

(2005) 09 CAL CK 0018

Calcutta High Court

Case No: C.O. No. 3564 of 2004

Dhananjoy Majumder

APPELLANT

Vs

Mahuya Majumder alias Jaya
(nee Mukherjee)

RESPONDENT

Date of Decision: Sept. 7, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47
- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 97
- Hindu Marriage Act, 1955 - Section 9

Citation: (2006) 1 CHN 655

Hon'ble Judges: Narayan Chandra Sil, J

Bench: Single Bench

Advocate: Tapabrata Chakraborty, for the Appellant; Chapales Bandyopadhyay, Azizul Islam, Swagata Dutta and Gargy Basu, for the Respondent

Final Decision: Dismissed

Judgement

Narayan Chandra Sil, J.

This is to consider an application under Article 227 of the Constitution of India which is directed against the Order No. 32 dated 31.08.2004 passed by Sri J.G. Chatterjee, the learned Additional District Judge of Second Court , Barasat.

2. The learned Judge passed the impugned order in considering an application u/s 47 of the CPC (hereinafter referred to as "Code" only). It appears from the said order that the learned Judge was pleased to allow the application u/s 47 of the Code and in doing so set aside the Matrimonial Execution Case No. 2 of 2001.

3. It appears further that one Dhananjoy Majumder brought a suit being Suit No. 27 of 1994 for restitution of conjugal rights against his wife, Mahuya Majumder which

was decreed ex parte on 22.09.2000. In the said suit the learned Court allowed the application of the husband giving him the custody of his minor son, namely, Pritam Majumder alias Tubai. An execution case relating to that decree was filed by the husband wherein the husband prayed only the custody of the minor son from his wife. It was alleged that the husband obtained such decree by suppressing the material facts. It is stated that the husband himself filed a case under Act VIII for the appointment of guardian and custody of his minor son before the learned District Judge (vide Misc. Case No. 433/93) and the learned District Judge, Barasat after taking evidence of both sides was pleased to dismiss the said prayer of the husband by passing the order No. 20 dated 25.3.1996. The said fact was totally suppressed in the Mat. Suit No. 27 of 1994 which was decreed ex parte.

4. The husband contested the application before the learned Judge and it was contended there that the Executing Court cannot go behind the decree in considering an application u/s 47 of the Code. The husband admitted the existence of the order passed by the learned District Judge on 25.3.1996 appointing the guardian of the minor. It is also alleged that no step was taken by the wife for setting aside the ex parte decree and as such the wife was is not entitled to get any relief in the application u/s 47 of the Code.

5. Mr. Tapabrata Chakraborty, the learned Advocate for the petitioner/ husband tries to impress upon me that there was no suppression of fact before the learned Judge at the instance of the petitioner / husband in getting the ex parte decree and as such the impugned order must be set aside. It is further pointed out by Mr. Chakraborty that in paragraph 8 of the application dated 13.12.1993 the petitioner/husband had disclosed the fact of filing of the application under Act VIII. The said application was filed on 13.12.1993 which was contested by filing a written objection by the wife wherein the wife also categorically admitted the filing of such application.

6. Mr. Chakraborty has referred to the ratio reported in [Addison Paints and Chemicals Ltd. Vs. Santram Parmanand](#), in his written notes on arguments and it is claimed by him that it was held in that case that Section 47 of the Code is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. Mr. Chakraborty has also referred to the ratio decided in the case of [Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others](#), . It is claimed in that written notes on arguments that it was held in that case that where the objection of the jurisdiction of the Court does not appear on the face of the record and requires examination of the question raised and decided at the trial or which could have been but have not been raised, the Executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. It is also pointed out in the said written notes on arguments that the wife entered appearance in the matrimonial suit for restitution of conjugal rights

brought by the husband and filed written statement but subsequently she eschewed herself from contesting the same and as such she is estopped from urging any infirmity in the decree in terms of the provisions of the ratio decided by the Hon"ble Apex Court in the case reported in [Rafique Bibi \(D\) by Lrs. Vs. Sayed Waliuddin \(D\) by Lrs. and Others,](#).

7. Mr. Chakraborty has annexed the relevant documents along with his written notes on arguments and that apart the records of the learned Lower Courts are also before us. However, paragraphs 8 and 9 of the application filed by the husband read as under:

8. That an application for appointment of a guardian of minor said child has been filed before your Honour"s Court under Act VIII being Case No. 433 of 1993 and the respondent has also entered appearance in this case. And your petitioner as in duty bound, shall ever pray.

9. That the hearing of the instant case be considered together with the case under Act VIII being Misc. Case No. 433 of 1993 for the ends of natural justice and the same should be tagged with this case for balance of convenience with your Honour"s Court.

8. The petitioner/husband has also annexed the copy of the written objection filed by the o.p/wife and the first paragraph of that objection appears as under:

1. That the petitioner has no any cause in filing the present petition as where the misc. case being No. 433/93 under Act VIII of the Guardians Act is pending before the Id. D.J. at Barasat.

9. A list of dates has been filed by the learned Advocate for the petitioner/ husband and it appears therefrom that the application for restitution of conjugal rights being Mat. Suit No. 535 of 1993 subsequently renumbered as 27 of 1994 was filed in the year 1993 whereas a petition for custody of the child was filed on 5.6.1993 by the husband himself before the learned District Judge.

10. It appears from the records of the learned Lower Court that the learned District Judge passed the order in Misc. Case No. 433 of 1993 on 25.03.1996. On perusal of the said order it appears that the learned District Judge had considered the suit being Mat. Suit No. 535 of 1993 for restitution of conjugal rights filed by the husband. In fact, the learned District Judge got surprised for filing such suit particularly after the custody of the minor son being given in favour of the wife in pursuance to hearing of a petition u/s 97 of the Criminal Procedure Code. The learned District Judge appears to have considered the evidence adduced by the husband and also the evidence of the minor son Pritam Majumder (O.P. W.2) along with other materials placed before him. I like to quote the observation of the learned District Judge in his order particularly as regards the evidence of the minor son which reads as under:

Nextly, it is evident from the evidence of O.P. W.2 Pritam Majumder that he read well in Class 1 in Pranabananda Vidyapith at Nabadwip. He is not willing to go to his father. It is found from his evidence that once his father tried to press his throat. So, he likes to stay with his mother. In that sequence of event, it is clearly stated by him that he loves his mother and his mother also loves him.

11. Thus, after having considered the welfare of the child the learned District Judge had dismissed the misc. case and maintained the custody of the minor son in favour of the O.P.

12. It appears that the copy of the ex parte order passed in Mat. Suit No. 27 of 1994 has not been annexed by either of the parties. However, I find the certified copy of the decree drawn in respect of ex parte order and it appears therefrom that the said order passed on 22.9.2000 long after the Order No. 20 dated 25.3.1996 passed by learned District Judge in Misc. Case No. 433 of 1993 (Act VIII) dismissing the said application filed by the husband for the custody of the child. It appears from paragraphs 8 and 9 of the petition filed by the husband and paragraph 1 of the written objection filed by the wife have quoted above that at the time of filing those petitions and objections the matter was pending before the learned District Judge it was not disposed of. From the decree drawn in connection with Mat. Suit No. 27/94 there appears nothing that this aspect was either brought to the notice of the learned Additional District Judge or the learned Additional District Judge in passing the ex parte decree had considered the said fact. It is definitely an illegality and not irregularity and the same cannot be cured subsequently. This aspect had been properly considered by the learned Additional District Judge in passing the order impugned u/s 47 of the Code.

13. It is established principle of law that the Executing Court cannot go behind the decree but the Executing Court can go behind the decree particularly when the same is a nullity in the eye of law. Apparently, there is no suppression of fact that a case claiming the custody of the child filed by the husband was pending before the learned District Judge but at the time of passing the ex parte decree against the wife the fact that the pending application before the learned District Judge for the custody of the child had been disposed of in favour of the wife was not either brought to the notice of the learned Additional District Judge nor it appears to have been considered by him. It is also a pointer to note that after filing the suit u/s 9 of the Hindu Marriage Act for restitution of conjugal rights the wily husband/petitioner had cleverly shunned his desire to live with his wife which is actually the real meaning of restitution of conjugal rights. Instead he had only pressed for the custody of the child.

14. The question for the custody of a child always stands on a special footing in the eye of law before a Court of equity even if there is order on the custody of a child such order can be reviewed at any point of time if it is found by the Court that the welfare of the child is not being properly done. In fact time without number there

are instances galore that the paramount consideration of the Court in such case is the welfare of the child at all times and at all stages.

15. Thus, I do not find any irregularity in the order passed by the learned Additional District Judge in considering the application u/s 47 of the Code and as such I shall refrain myself from interfering with the same and accordingly the order passed by the learned Additional District Judge is hereby affirmed.

16. The application under Article 227 of the Constitution of India is thus dismissed with costs.