(2005) 11 CAL CK 0021

Calcutta High Court

Case No: C.O. No. 3983 of 2005

Sm. Soma Dey		APPELLANT
	Vs	
Swapan Kumar Dey		RESPONDENT

Date of Decision: Nov. 28, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, 115
- Constitution of India, 1950 - Article 227
- Hindu Marriage Act, 1955 - Section 24

Citation: (2006) 2 CALLT 53

Hon'ble Judges: Pratap Kumar Ray, J

Bench: Single Bench

Advocate: Gurudas Mitra and Sumita Shaw, for the Appellant;M.P. Gupta, for the Respondent

Final Decision: Allowed

Judgement

P.K. Ray, J.
Heard learned Advocates appearing for the parties.

2. In this application under Article 227 of the Constitution of India the petitioner has assailed the order dated 11.8.2005 passed in Matrimonial Suit No. 215 of 1995 by the learned Additional District Judge, 5th Court at Howrah (Sadar) District-Howrah, whereby and whereunder the application of the husband/opposite party praying for withdrawal of the suit with liberty to file a fresh suit was allowed holding, inter alia, that all alimony as directed to be paid pending litigation has already been paid to the wife. Learned Advocate for the petitioner has submitted that alimony was not paid and only by an interim order some amounts were paid but there was no final determination of the application filed u/s 24 of the Hindu Marriage Act, 1955. It has been further contended that the application u/s 24 of the Hindu Marriage Act, 1955 was finally adjudicated upon by the Trial Court allowing maintenance at the rate of Rs. 4000/- per month for the wife and the children and Rs.2,000/- as litigation cost. This order was assailed in the application u/s 115 of the CPC

before the High Court by being the order dated 26.8.2003 passed by the learned Additional District Judge, 4th Court, Howrah in Misc. Case No. 3 of 2001 which was registered as C.O. 2068 of 2003. As an ad interim measure, Girish Chandra Gupta, J. reduced the monthly maintenance allowance to some extent as appears in the order passed by this Court. Thereafter, the matter was finally, adjudicated upon by Amitava Lala, J. (as His Lordship then was) on quashing and setting aside the order under challenge in the said application u/s 115 of the CPC by directing to consider the matter afresh on hearing the parties and on consideration of the submissions as made by the learned Advocates with a rider that till the decision reached payments as directed to be made by the earlier order dated 29.9.2003 by Girish Chandra Gupta, J. would continue. The petitioner in this application is aggrieved by the impugned order for the reason that maintenance issue during pendency of the litigation and the cost of litigation since as yet has not reached its finality by a judicial order, there was no scope before the learned Court below to permit the husband to withdraw the suit with liberty to file a fresh suit.

3. Learned Advocate for the opposite party has contested this matter by contending, inter alia, that already all payments regarding alimony pendente lite and the litigation cost has been paid which is reflected from the order impugned in this application.

4. On a bare reading of the order impugned it appears that there was no whisper that the application u/s 24 of the Hindu Marriage Act as filed by the wife praying maintenance pendente lite and litigation cost now stands finally disposed of in terms of the order passed by Amitava Lala, J. in C.O. No. 2068 of 2003. That application is still pending for adjudication as, there is no further order passed on hearing the parties on that issue as per direction of Amitava Lala, J. In this application, the only legal question involved for adjudication is now as to whether a party of a matrimonial suit can withdraw a suit during pendency of the application filed u/s 24 of the Hindu marriage Act. The application tender Section 24 of the Hindu Marriage Act was introduced by the legislature to safeguard the interest of the party concerned who due to economic condition is not in a position to maintain the family and also to provide litigation cost. Enactment of Section 24 of the said Act was in the nature of welfare legislation. In the instant case, the wife is the applicant of the application u/s 24 of the said Act. It appears from the records that the wife in the suit along with the children were not in a position to maintain the family during pendency of the suit and, as such, filed an application u/s 24 of the said Act. The applicability of Section 24 of the said Act starts at the very moment with the litigation is filed by any spouse on matrimonial issue either praying for divorce and/or judicial separation as the case may be. Hence, cause of action started long back when the litigation started. The wife filed an application for that purpose to mitigate her suffering and the two children. It is true that right to withdraw a suit of a party who has initiated the suit is a available right to him, but so far as matrimonial suit is concerned where an application u/s 24 of the said Act is pending, this Court is of the view that until and unless that application u/s 24 of the said Act is decided and disposed of directing payment of litigation cost as well as payment of maintenance for the period from the date of institution of the suit till

termination of the suit by the order of Court granting leave to withdraw a suit either with leave or without leave to file a suit, no order of termination suit could be passed. The purpose of granting maintenance allowance during pendency of the suit cannot be wiped out only by withdrawal of the suit by any party as during the period for which the suit was pending there was full effect of the said provision u/s 24 of the said Act and the applicant thereof got the right to get the relief accordingly prior to termination of the suit by any order of the Court. Having regard to such state of affairs, this Court is of the view that the learned Court below did not consider this aspect and thereby allowed to withdraw the suit with liberty to file a fresh suit. The order is suffering from inherent jurisdictional issue touching the root of the matter and this is also otherwise contrary to and in violation of the order of High Court passed in the revisional jurisdiction by Amitava Lala, J., as aforesaid. Considering all the aspects of the matter, the impugned order accordingly is set aside and quashed by exercising the supervisory jurisdiction of this Court under Article 227 of the Constitution of India by directing the learned Court below to dispose of the application u/s 24 of the said Act as pending on adjudicating the issue about payment of maintenance amount during the pendency of the suit and considering the litigation cost issue. The Court below would be at liberty to pass any order allowing withdrawal of the suit with liberty to file a fresh suit, but the Court will pass a conditional order that subject to payment of those amounts the husband would be entitled to get the order regarding withdrawal of the suit.

5. This Court is fortified by the Judgment passed by a Division Bench of this Court in the case of R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, . In the said case, the Apex Court considered the issue about Order 23, Rule 1 of CPC vis-a-vis non-consideration of any vested right prior to withdrawal of the suit and accordingly held : "If any vested right comes into existence before the prayer for withdrawal is made under Order 23, Rule 1 of the Code of Civil Procedure, the Court is not bound to allow the withdrawal." Similar issue was considered by the Karnataka High Court while same issue cropped up with reference to a suit for restitution of conjugal rights filed by the husband. The husband intended not to place the application praying restoration of the suit to frustrate the pending application filed by the wife u/s 24 of the Hindu Marriage Act. Karnataka High Court by the Judgment passed in the case of C. Sannalah v. Padma reported in AIR 1983 Kar 114 accordingly held that the husband should not be permitted to withdraw his application for restoration to affect the wife''s right adversely denying the remedy of the wife u/s 24 of the said Act. Even with reference to a lis when centered round about custody of a child during pendency of the application in such matrimonial suit, this Court in the case of Aloke Sarkar v. Anindita Sarkar reported in 1995(2) CLJ 441. held that the husband plaintiff was not entitled to withdraw the suit unless and until the application regarding custody of the child was decided upon by the Court. Considering all these aspects of the matter and considering the philosophical aspect of incorporation of Section 24 of Hindu Marriage Act by the legislature at their wisdom in the Hindu Marriage Act, this Court is accordingly of the view that the wife got a vested right for adjudication of her application u/s 24 of the said Act and without disposing of the same and passing necessary relief to that effect the

Court accordingly had no jurisdiction to pass the order of withdrawal of the suit by the husband to frustrate the pending application filed u/s 24 of the said Act. Learned Advocates for the parties, however, have disputed the fact on quantum of payment of alimony pendente lite and litigation cost. Learned Advocate for the petitioner has submitted that full payment has not been made and the application is still undecided, whereas learned Advocate for the opposite party has contended that all payments have been made. Since from the records it appears that the application u/s 24 of the said Act as yet has not been finally adjudicated upon in view of the order passed by Amitava Lala, J., parties will be at liberty to urge this point and the learned Court below is directed to dispose of that application first by passing an appropriate order of payment and on securing such payment from the husband, if any order is passed against him directing payment of maintenance and litigation cost, the Court will take up the matter for consideration of the application praying withdrawal of the suit with liberty to file a fresh suit.

The application is accordingly allowed.