

Mat Suit 56/2017
(R. No. 1216/2017)
(CNR no. WBSP01-006693-2017)

Order No. 78
Dated 20.03.2024

Today is fixed for evidence of DW and hearing of recall petition.

Parties file their separate haziras through their respective Ld. Advocates.

The respondent on 16.06.2023 filed an application u/s 151 of the CPC praying for an order to recall the order dt. 30.05.2023 fixing a date for hearing the application dt. 26.04.2023 without proceeding the trial further till the disposal of the same, which is supported by an affidavit. Copy of which has been served upon the Ld. Advocate for the petitioner in advance.

The Ld. Advocate for the respondent contended that on 30.05.2023 the petitioner was present personally and informed the Ld. Court that the Ld. Advocate would not participate due to full court resolution of the local Bar Association. But in spite of the same an order was passed by the court to proceed with the suit. It is stated further that the application has been filed on behalf of the respondent praying for an opportunity to cross-examine the petitioner/husband, but without providing any opportunity to contest the suit, the Ld. Court proceeded to go on with the trial. It is further contended on behalf of the respondent that the respondent did not get opportunity to identify her husband through virtual method, as if the Ld. Commissioner appointed by the court is competent enough to identify the petitioner. It is contended further on behalf of the respondent that for the just decision of the suit, the respondent be given an opportunity to identify the petitioner and the petitioner/husband be directed to face the cross-examination before permitting to proceed further. It is further contended by the Ld. Advocate for the respondent that the confusion arose when an order was passed by the court to provide two links at the same time, since there should be one platform to be entered through the link by all the parties at the same time.

Ld. Advocate for the respondent relied on a decision of the Hon'ble Supreme Court reported in AIR 981 (SC) 1400, wherein the Hon'ble Supreme Court has been pleased to hold that party should not suffer for misdemeanour or inaction of his counsel. The Ld. Advocate for the respondent also relied on a decision of the Hon'ble Madras High Court passed in CRP (NPD) no.2974 of 2018 and CNP no. 1437 of 2018 on which the Ld. Court has been pleased to observe that the right to cross-examine is a very valuable right and the court must always endeavour to protect the said right. If a party fails to cross-examine the witness and that failure results in closing the evidence and if that party applies within a reasonable time for reopening and recalling of the witness,

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the court has to exercise its discretion in favour of such party and only in cases where there is total negligence or callous in adverse on the part of the parties in conducting trial, the court rejects such requisition. The trial court had exercised its discretion in favour of the petitioner and allowed the application and I do not think such exercise of jurisdiction can be interfered with, particularly exercising of power under Article 227 of the Constitution of India.

Ld. Advocate for the petitioner on the other hand contended that the respondent challenged the order no. 61 dt. 04.01.2023 passed by the court, which was affirmed by the Hon'ble Court. Moreover, the respondent on previous occasion also has filed an application on 26.04.2023 for necessary direction upon the Advocate Commissioner to record the evidence of PW-1, after proper identification and for passing necessary order in view of the pendency of the matter before the Hon'ble High Court and the same was rejected by the court and as such the application filed by the respondent is barred by constructive res judicata. It is contended further that the Hon'ble Court has been pleased to direct this court to dispose of the matter within stipulated period and in order to defer the disposal and to enjoy the maintenance towards alimony pendente lite, the respondent has filed the application, which should be rejected in limine.

The Hon'ble Calcutta High Court in C.O. No. 4353 of 2023 by an order dt. 29.02.2024 has been pleased to direct this court to dispose of the suit, within a period of four months from the next date fixed, independently and strictly in accordance with law upon allowing the parties to contest the proceeding, provided the husband is paying maintenance pendente lite regularly. It appears that by an order dt. 04.01.2023 this court passed an order to the effect that Ld. Advocate, namely Sriprakash Thakur is appointed as Advocate Commissioner for the purpose of recording of evidence of petitioner/husband Sri Sukesh Ranjan Kolley through video conference in presence of Ld. Advocate for both the parties and the petitioner/husband is directed to pay some of Rs.10,000/- to the Ld. Advocate Commissioner as cost of commission immediately. The Hon'ble Court by an order dt. 25.04.2023 has been pleased to affirm the order dt.04.01.2023 observing "Considering all facts and circumstances, I do not find any reason to interfere with the order passed on 04.01.2023 with a view to stand in the way of proceeding of the suit".

It is true that in the application dt. 26.04.2023, the respondent has made two fold prayers for allowing the respondent to identify her husband before the Ld. Advocate Commissioner and give an opportunity to cross-examine the petitioner/husband. Although in order dt. 30.05.2023 the petition dt. 26.04.2023 has been rejected, but in the

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order nothing has been discussed as to why the respondent will not be allowed to cross-examine the petitioner.

Considering the aforesaid aspect of the matter and keeping in mind that the Hon'ble Court by order dt. 29.02.2024 had been pleased to observe to dispose of the matter independently and strictly in accordance with law, upon allowing the parties to contest the proceeding, I am of the view that since the respondent/wife is contesting the instant Mat Suit, the respondent/wife has the right to cross-examine the petitioner/husband. It may be the reason that due to confusion as to providing the link of both parties the respondent could not take step on the first date, but the respondent ought to have more vigilant to remain present with her authorized advocate for cross-examination of the petitioner. However, this court cannot ignore the fact that the respondent is contesting the suit all along and PW-3 has been cross-examined in full by the respondent and therefore, it would be miscarriage of justice if in a contested suit the respondent be denied to cross-examine the petitioner, who has brought the instant Matrimonial Suit against her. PW-2, the Ld. Advocate Commissioner, was also could not be cross-examined as the Ld. Advocate appearing on behalf of the respondent did not present when the matter was taken up, although the respondent herself was present. It is submitted that on the date fixed there was full court resolution of the Bar Association and as such the Ld. Advocate did not appear. There may be latches on the part of the Ld. Advocate for the respondent but in view of the decision of the Hon'ble Supreme Court reported in AIR 1981 (SC) 1400, the parties should not suffer for misdemeanour or inaction of his counsel, I am of the opinion that the respondent should get an opportunity to cross-examine the Ld. Advocate Commissioner also.

However, the respondent is to bear the cost of the Ld. Advocate Commissioner for his commission work to be rendered during cross-examination of the petitioner.

Accordingly, the petition filed by the respondent u/s 151 of the CPC on 16.06.2023 is considered and allowed.

Ld. Advocate Sriprakash Thakur would record the cross-examination of the petitioner/husband Sri Sukesh Ranjan Koley through video conferencing to be made by the Ld. Advocate for the respondent in presence of the Ld. Advocate for the petitioner. Ld. Advocate Commissioner Sriprakash Thakur is to issue notice to the Ld. Advocates for both the parties fixing a schedule of commission, which shall not be exceeded more than two days keeping in mind that the Hon'ble Court has been pleased to give direction to dispose of the matter within four months.

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A video link be provided to the Ld. Advocate Commissioner and the Ld. Advocate for the petitioner by the Ld. Advocate for the respondent as per schedule fixed by the Ld. Advocate Commissioner.

Fix **16.04.2024** for filing report by the Ld. Advocate Commissioner after completion of the cross-examination of the PW-1 on recall on commission.

Respondent/wife is directed to bear the cost of Rs.5,000/- to the Ld. Advocate Commissioner as cost of commission immediately.

Dictated & corrected by me,

Sd/-
Additional District Judge (I/C)
6th Court, Alipore
J.O. Code WB00795

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