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IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No. 117 of 2019

Akshaya Kumar Sahoo *Appellant*

-versus-

Madhusmita Sahoo @ Anusuya *Respondent*

Advocates appear in the case:

For appellant: Mr. Suryakanta Dash, Advocate
Mr. Gajendranath Rout, Advocate

For respondent: Mr. Jeetendra Sahu, Advocate

CORAM:

THE HON'BLE MR. JUSTICE ARINDAM SINHA

AND

THE HON'BLE MR. JUSTICE M.S. SAHOO

J U D G M E N T

Date of Hearing: 10th September, 2024
Date of Judgment: 25th September, 2024

ARINDAM SINHA, J.

1. Mr. Dash, learned advocate appears on behalf of appellant-husband and submits, his client instituted the civil case by petition for dissolution of the marriage on ground of cruelty and desertion. He submits, impugned judgment dated 27th June, 2019 of the Family Court was made dismissing the petition on erroneous appreciation of the law.



2. He draws attention to the issues. He submits, issue nos. 2 and 3 were respectively on grounds taken, of cruelty and desertion. Issue no.1 was on maintainability. His client's petition was dismissed on the ground of maintainability inspite of issue nos. 2 and 3 answered in his favour.

3. He demonstrates from finding on issue no.1 that because his client had earlier filed for divorce by C.P. no.211 of 2013 and not complied with direction for interim maintenance, it was dismissed for default. That fact was purported basis for the Family Court to dismiss the subsequent civil proceeding invoking provision in rule-9 of order-IX, Code of Civil Procedure, 1908. He draws attention to order dated 15th December, 2014, by which the earlier civil proceeding was dismissed. Reproduced below is text of the order.

“15.12.14. Both parties are present through their respective counsels. The learned counsel for the petitioner submitted that petitioner is unable to pay the interim maintenance and litigation expenses granted by this Court in I.A. 201/13. So the learned counsel for the respondent submitted that in accordance with the order passed on dated 14.11.2014 the case may be dismissed for non-payment of interim alimony and litigation expenses. There is no objection to such submission. Hence it is ordered.”



Order

The case is dismissed for non-payment of interim maintenance and litigation expenses.”

(emphasis supplied)

He submits, there be interference in appeal to reverse impugned judgment and dissolve the marriage.

4. Mr. Sahu, learned advocate appears on behalf of respondent-wife. He submits, there is no error in impugned judgment. The earlier civil proceeding having been filed by appellant, he was deemed plaintiff. As such, the dismissal was under rule-8 in order-IX. Appellant cannot maintain the present civil proceeding, as in the appeal, to seek reversal of impugned judgment. He ought to have applied to the Family Court for setting aside dismissal of his earlier civil proceeding.

5. We made query of Mr. Sahu to show us a provision in law either from Family Court's Act, 1984 or Hindu Marriage Act, 1955 or Code of Civil Procedure, 1908 or any other law, empowering a Court to dismiss a civil proceeding for non-compliance of an interim direction. Remedy in execution is always available under section 28-A in Hindu Marriage Act, 1955. Mr. Dash submits, there was view taken



by a learned single Judge of this Court in **Binayak Chandra Padhy v. Kamala Padhy @ Padhiani** reported in 1986(II) OLR 63 that pleading of defaulting spouse can be struck off.

6. Rules 8 and 9 in order IX are reproduced below.

“8. Procedure where defendant only appears.-Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit.- (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”



(emphasis supplied)

7. Facts in this case do not make applicable the rules simply because the civil proceeding was not dismissed for default, on non-appearance of plaintiff (appellant), when defendant (respondent) had appeared. Said order dated 15th December, 2014 by first sentence records that both parties were present through their respective counsels. Order-XXXIX in the Code provides for temporary injunction and interlocutory orders. Though direction for interim maintenance stands separately provided for in the special statute but there is nothing regarding enforcement. We can discuss the principles emanating from order-XXXIX. Inserted by amendment rule-2-A provides for consequence of breach of injunction. It does not empower dismissal of the suit.

8. That there was non-compliance by appellant of direction to pay interim maintenance in his earlier civil proceeding, cannot be disputed. Appellant succeeding in the appeal to obtain dissolution of the marriage will then require us to consider what should be permanent alimony granted to respondent. On invitation submissions were made in this regard.

9. In view of aforesaid impugned judgment is reversed. The marriage solemnized on 10th July, 2005 is dissolved by decree of



divorce on the ground of cruelty and desertion. In exercising our jurisdiction of passing the decree we direct maintenance for respondent by way of permanent alimony at ₹2,00,000/- The amount is to be deposited in the Family Court for payment to respondent, within three weeks from date.

10. On the judgment delivered, Mr. Dash hands up demand draft no.602777 dated 21st September, 2024 issued by State Bank of India in favour of respondent for ₹2,00,000/-. The draft is handed over to Mr. Sahu on his submission, he has instruction to receive it on behalf of his client. He puts his signature on copy of the draft to acknowledge receipt, execution, discharge and satisfaction of the direction for permanent alimony, hereby made. Mr. Sahu submits, his client will take all steps to cause withdrawal/dropping of the pending execution and criminal cases.

11. The appeal is allowed and disposed of.

(Arindam Sinha)
Judge

(M.S. Sahoo)
Judge

Jyoti