

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 12 of 2014**

Fulmaniya Yadav, W/o Khunwa Yadav, aged about 56 years, resident of Village Khudiya, P.S. Sanna, District Jashpur, present address- village Jori, P.S. Dhourpur Tahsil- Lundara, Revenue and Civil District Surguja (Chhattisgarh)

---- Appellant**Versus**

Balram Yadav s/o Prasad Yadav, aged about 58 years, Caste- Ahir, Resident of Village- Jori, P.S.Dhourpur, Tahsil Lundra, Revenue and Civil District Surguja (Chhattisgarh)

---- Respondent

For Appellant	:	Shri Sunil Tripathi, Advocate
For Respondent	:	Shri Rajesh Pandey, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Shri Justice Chandra Bhushan Bajpai
ORDER

Per Prashant Kumar Mishra, J**06/10/2016**

1. This is an appeal filed by the defendant/wife assailing the judgment and decree dated 28.12.2013 passed by Family Court, Ambikapur, District Surguja in Civil Suit No. 27A/2013, whereby, the Family Court has declared that the appellant is not the legally wedded wife of the respondent.

2. The present appeal was earlier allowed on 14.1.2015 on the ground that a suit seeking negative declaration concerning marriage is not maintainable. Against this order, the respondent/husband preferred Civil

Appeal No.4500/2016, which was allowed by the Supreme Court on 27.4.2016 vide judgment reported in **AIR 2016 SC 2161, Balram Yadav V. Fulamaniya Yadav**. The Supreme Court held that under Section 7 (1) Explanation (b) of the Family Courts Act, 1984, a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8 all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status.

3. The appellant claims to be the legally wedded wife of the respondent, whereas, the respondent is denying the fact that the parties have married according to Hindu rites and rituals. In an earlier proceeding under Section 125 Cr.P.C., the same Presiding Officer has recorded a finding in favour of the appellant in its order dated 7.12.2011 that she is a legally wedded wife of the respondent, whereas, in the present impugned order, a contrary finding has been recorded.

4. Be that as it may, learned counsel for the appellant has rightly pointed out an inherent defect in the procedure adopted by the trial Court while rendering the impugned judgment inasmuch as the trial Court was informed by one Panmeshwari, a friend of the appellant on 4.5.2013 that the appellant is mentally unfit, therefore, next friend be appointed on her behalf to protect her interest in the suit. The plaintiff/respondent did not

object to this application by the appellant, therefore, on 17.6.2013, the Family Court allowed this application with a condition that on being directed by the Court, the appellant shall present herself for recording evidence. Further, order sheets recorded by the trial Court would not indicate that on any future date of hearing, the issue was considered to examine appellant's unsoundness or mental unfitness. However, when she appeared for her examination on 17.10.2013, the trial Court did not ascertain about the appellant's mental state and straightway proceeded to examine her.

5. The larger issue falling for consideration is that when a next friend has been appointed for any party to the suit on the ground that the concerned party is mentally unfit, whether such appointment can be a conditional appointment without making enquiry as contemplated under Order 32 Rule 3 read with Rule 15 C.P.C.

6. Another important question is whether a party can be declared to be mentally unfit for sometime, and to be mentally sound on some other dates of hearing? In our considered opinion, it is not permissible in law. It is the duty of the trial Court to conduct an enquiry as contemplated under Rule 3 of Order 32 C.P.C. regarding appointment of a next friend in cases where the party claims to be mentally unfit which is a serious issue which cannot be concluded merely on no objection from the other side. The trial Court is not an expert to ascertain as to whether a person is of unsound mind or not. Neither the other party can consent for such appointment without any basis. There has to be an enquiry concluded with a finding regarding mental unfitness or unsoundness of mind of a party before proceeding to

appoint a next friend. If the procedure prescribed in law is not followed and a decree has been granted against such person who was once declared as a person of unsound mind or lunatic, such decree is void *ab initio* and *non est*. In taking this view we draw support from the judgment rendered by us in the matter of **Smt. Babita Gupta vs. Dinesh Gupta** (FAM No. 59/2014 order dated 08/09/2016), wherein after referring the judgments rendered in **AIR 1977 Punjab & Haryana 28, Asha Rani Vs. Amrat Lal, AIR 1978 Allahabad 551, Maikoo Vs. Umashankar Bajpai, AIR 1931 Calcutta 168, Samaresh Chakravarti & Anr. Vs. Jalpaiguri Banking And Trading Corporation Limited, AIR 1937 Allahabad 29, Bhondhu Mal Vs. Thomas Skinner & AIR 1968 SC 954, Ram Chandra Arya Vs. Man Singh & Anr**, it has been held that a decree passed against a person of unsound mind or a minor without following the procedure prescribed under Order 32 C.P.C. is a nullity.

7. For the foregoing reasons, the impugned judgment and decree deserves to be set aside as the same has been passed against the appellant who was once treated by the trial Court to be of unsound mind but, was later on examined as a witness without removing the next friend nor the next friend was summoned for examination to ascertain whether the appellant has ceased to be a person of unsound mind. The matter is remitted back to the trial Court for decision afresh after making an enquiry as contemplated under Order 32 C.P.C. to ascertain the mental condition of the appellant and thereafter, to appoint a next friend, if need so arises and after affording opportunity to both the parties to lead evidence and decide the matter in accordance with law. The parties shall appear before

the trial Court on **8th November, 2016**.

8. The record of the trial Court be sent back forthwith. The trial Court shall conclude the trial at the earliest preferably within a period of six months from 8th November, 2016.

Sd/

(Prashant Kumar Mishra)
Judge

Sd/

(Chandra Bhushan Bajpai)
Judge