

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.395 of 2015

=====

Kamlesh Kumar Son of Late Baijnath Sah Resident of Village - Gangoi, P.S.
- Paroo, District - Muzaffarpur.

... .. Appellant/s

Versus

Puja Devi Wife of Kamlesh Kumar, Daughter of Prabhu Sah Resident of
Village - Saraiya, P.O. - Saraiya, P.S. - Deoriya, District - Muzaffarpur.

... .. Respondent/s

=====

Appearance :

For the Appellant/s	:	Mr. Pramod Rajpati, Advocate
For the Respondent/s	:	M/s Gajanan Arun Dharmendra Nath Mishra, Advocates

=====

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
and
HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT
(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 09-08-2017

We have heard parties for the purpose of final disposal of
this matter with their consent.

This appeal is directed against the order dated 22.08.2015 by
which the Principal Judge, Family Court, Muzaffarpur has dismissed
the suit on the ground that same suffers from the vice of
multifariousness as two different reliefs have been sought under
Section 10 of the Guardians and Wards Act, 1890, first for the custody
of the child and second for the annulment of marriage. Such type of
mixed plaint cannot be allowed.



Prima facie, this proposition appears to be attractive but on deeper scrutiny and reading of the relief portion of the plaint which has been appended as Annexure 1, it appears that the case could not have been dismissed on such ground. The appellant-petitioner has sought following reliefs:-

- (i) The marriage of the petitioner with the respondent be dissolved through a decree of divorce
- (ii) That while granting decree of divorce the provision should be made to the custody of the minor son of the petitioner namely Prince Gupta & Piyush Gupta with the right of maintenance and education.

First relief which the petitioner has sought is that marriage should be dissolved by pronouncing decree of divorce. Second relief is that while granting decree of divorce, the provision should be made to the custody of the minor son of the petitioner, namely, Prince Gupta & Piyush Gupta. However, in the cause title, the relevant provision has been stated under Section 10 of the Guardians and Wards Act, 1890 read with Section 13(i-k) of Hindu Marriage Act, 1955 and perhaps this has led the court in passing of the impugned order dismissing the case.

However, in our considered view the decision with respect to custody of children can be taken during the pendency of such case and the same can also be reflected in the decree which would be finally



pronounced in judgment and decree. For better appreciation Section 26 of the Hindu Marriage Act, 1955 is extracted as under:-

“26. Custody of children.- In any proceeding under this Act, the Court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, alter the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent. ”

In such a situation, in our opinion, even without application of Section 10 of the Guardians and Wards Act, 1890, a decision can also be taken with respect to the custody of the children under Section 26 of the Hindu Marriage Act, 1955 in a case filed for annulment of marriage. Even a final decision in this regard can also be reflected in the decree to be passed.



Labeling of Section 10 of Guardians and Wards Act, 1890 in the petition / plaint does not make it a case filed under such provision as main relief sought is annulment of marriage by passing a decree of divorce. Thus, the Principal Judge should have proceeded to take a decision regarding custody of child under Section 26 of the Hindu Marriage Act, 1955 in place of dismissing the suit.

Accordingly, this appeal is allowed and the order impugned is set aside.

However, the matter is remitted back to the court concerned to proceed with the matrimonial case in accordance with law.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

Spd/-/Sanjay

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	07.09.2017
Transmission Date	NA

