

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.378 of 2015

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Guddi Kumari, W/O Vijay Shankar Murari, D/O Sri Dayanand Ram, resident of Govindpur, Fatwha, Bypass Road, (near Hanuman Mandir) P.S. Fatwha, Dist.- Patna.

... .. Appellant/s

Versus

Vijay Shankar Murari, S/O Hare Krishna Murari, resident of Dudhaila, P.S. Nagarnausa, Dist- Nalanda.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Rajesh Mohan
For the Respondent/s : Mr. Harish Kumar

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 20-04-2018

Heard Mr. Rajesh Mohan for the appellant and Mr. Harish Kumar for the respondent.

The appellant is aggrieved by the judgment and order dated 10.08.2015 of the learned Additional Principal Judge, Family Court, Patna, whereby the review application filed by the appellant under Section 114 of the Code of Civil Procedure (hereinafter referred to as 'the Code') together with the petition under Section 151 of the Code, has been dismissed.

According to Mr. Rajesh Mohan, the respondent herein, filed a petition under Section 9 of the Hindu Marriage



Act, 1955 (hereinafter referred to as 'the Act') for restitution of conjugal right. The appellant herein appeared and filed her written statement on 02.09.2009, opposing the prayer on the ground of cruelty, a copy of which is at Annexure-I which was followed by a petition under Section 24 of 'the Act' praying for interim maintenance which was filed on 07.01.2010. He submits that while the matter was pending that an application for withdrawal of the matrimonial case was filed by the respondent on 04.09.2014. It is submitted that the withdrawal application prompted the appellant to file a counter claim by way of additional written statement which was filed on 15.11.2014, vide Annexure-IV whereunder the appellant claimed return of her **Stridhan** described in Schedules-A,B,C,D,E,F,G,H of the additional written statement. It is the grievance of the appellant that although the court below had taken note of the withdrawal application filed by the respondent as well as the petition for interim maintenance filed by the appellant but without paying attention to the counter claim so raised by the appellant through her additional written statement, has disposed of the Matrimonial Case No. 403 of 2009 on 03.07.2015.

It is argued that it is feeling aggrieved, the appellant



filed a review application under Section 114 of 'the Code' for review of the order of maintenance and also filed an application under Section 151 of 'the Code' to remind the court below that the counter claim had not been disposed of and both of which have been dismissed by the impugned order.

According to Mr. Rajesh Mohan, in view of the law laid down by the Supreme Court in the case of **Jaiminiben Hirenbai Vyas & Anr. vs. Hirenbai Rameshchandra Vyas & anr.**, reported in **2015 (1) PLJR SC 201**, the appellant is not only entitled to the maintenance from the date of application which is 07.01.2010, but is also entitled to a higher rate of maintenance considering the economic status of the respondent. It is further argued that the counter claim raised by the appellant by way of additional written statement, has yet not been disposed of by the court below and has remained pending. Learned counsel relies upon the provision of Section 23(1)(a) read with section 27 of 'the Act' to support his contention.

The argument has been resisted by Mr. Harish Kumar, who submits that the award of maintenance by the court below is after assessment of the entire position and



insofar as the counter claim is concerned, the same was not admissible

We have heard learned counsel for the parties and have perused the record and we are persuaded to uphold the grievance of the appellant inasmuch as even though the counter claim was raised by the appellant by way of additional written statement, as is manifest from paragraph 1 and 2 thereof, which are reproduced hereinunder, it was not disposed of:

“1. That due to inadvertent mistake some important facts is not mentioned in the W.S. of the Respondent dated 2.9.09. When the Respondent wants to take the relief under counter claim in this case in the spirit of section 23(A), 27 of the Hindu Marriage Act to which the Respondent has got her statutory right. Hence this Add. W. S. is being filed.

2. That the Respondent by the way of counter claim as per section 23(A) 27 of the Hindu Marriage Act seeks to get her stridhan restored which details are given in schedules no A,B,C,D,E,F,G,H of this Add. W.S. of the Respondent which are illegally withheld with the Applicant and he is not returning the same.”

Even if, not happily worded yet a claim is raised.

The court below has not dealt with the same while



disposing of the Matrimonial Case No. 403 of 2009 on 03.07.2015 and even if, it could not be raised by way of Section 151 petition, yet once a review application is filed by the petitioner alongwith, the matter was thrown open and since admittedly the counter claim was yet to be disposed of, the counter claim could well have been disposed.

Another infirmity in the order that we notice is that though while passing the order dated 10.08.2015 impugned herein, the court below has noticed the review application but while passing the order, he has simply dismissed the review application while rejecting the petition under section 151 of the Code without assigning any reason. In our opinion, not only the court below was under a duty to pass order on the counter claim raised by the appellant through her additional written statement while disposing of the Matrimonial Case on 03.07.2015, rather the issue raised by the appellant by way of the review application also required application of mind which is missing in the order impugned.

For the reasons discussed, the judgment and decree passed by the Additional Principal Judge, Family Court, Patna, in Matrimonial Case No. 403 of 2009 on 03.07.2015, together with the order dated 10.08.2015, can not be upheld



and is accordingly set aside.

The Matrimonial Case No. 403 of 2009 is restored to its file for the limited purpose of disposal of the counter claim of the appellant as well as for the purpose of consideration of her plea for review of the maintenance order. The court below will consider the issues raised by the appellant as taken note hereinabove and dispose of the same in accordance with law after giving opportunity of hearing to the parties, who are directed to appear before the Family Court on 7th of May, 2018, when the Family Court will proceed to dispose of the matter as stipulated above.

The appeal is allowed but without any order as to cost.

(Jyoti Saran, J)

(Chakradhari Sharan Singh, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	01.05.2018
Transmission Date	

