

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.41 of 2022

Subrat Das

....

Appellant

Mr. R.K.Sahoo, Advocate

-versus-

Sugyani Prabha Panigrahy

....

Respondent

Mr.S.K.Dash,Advocate

CORAM:

SHRI JUSTICE S. TALAPATRA

SHRI JUSTICE B. P. ROUTRAY

ORDER

23.6.2022

Order No.

- 04.
1. The matter is taken up through Hybrid mode.
 2. This appeal arises from the judgment dated 1st December, 2021 delivered in Civil Proceeding No.72 of 2021, which has been renumbered as Mat Case No.22 of 2019 before the Family Court, Parlakhemundi, Gagapati. The Respondent filed a petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of the conjugal rights. There is no dispute regarding the facts relating to marriage and that the Appellant is living separately from the husband. The matrimonial discord was, on earlier occasions, settled by intervention of the family elders, but again the Respondent has been subjected to harassment. But all these allegations have been denied by the Appellant. On the face of the rival pleadings, following issues were framed for adjudication of the said petition:

- i) Whether the case is maintainable?
- ii) Whether the petitioner is cause of action?
- iii) Whether the petitioner is entitled to restitution for conjugal rights with respondent?
- iv) To what (any other) relief may be granted?

3. It appears from the record that the Respondent, the Petitioner in the original proceeding, has adduced two witnesses (Respondent himself and his mother, PW2). Certain serious allegations have been made by the Appellant including the allegations of violating her body by the father in law and physical assault on 23rd April, 2017, in her written statement, it has been also stated that finally she was driven out from the matrimonial home. It appears further from the records that 1st December, 2021 was fixed for appearance of the Appellant, but on that date as is evident from the order dated 1st December, 2021, neither of the parties was present when the matter was taken up. In the said order dated 1st December, 2021, it has been noted that on 18th November, 2021, the evidence of the petitioner (Respondent herein) was closed. On 25th November, 2021, the evidence of the Appellant was also declared closed “without any witness examined on behalf of the respondent”. On 1st December, 2022, the case was fixed for argument. As there was no representation from the parties, the suit has been disposed of, taking recourse to the provision of Order 17 Rule 3 of the CPC.

4. Mr.R.K.Sahu, learned counsel appearing for the Appellant has quite succinctly submitted that the Judge, Family Court has taken the recourse under Order 17 Rule 3 of the CPC wrongly, inasmuch as

Order 17 Rule 3 provides that the Court may proceed notwithstanding either party fails to produce evidence, etc. It has been provided that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary for to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default (a) if the parties are present, proceed to decide the suit forthwith, or (b) if the parties are, or any of them is, absent, proceed under rule 2.

5. Mr. Sahu, learned counsel has further pointed out that both the parties were absent on the date when the impugned judgment was passed. In that circumstances, Order 17 Rule 2 CPC may not apply inasmuch as Rule 2 provides that where, any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or pass such other order as it thinks fit. In the present case, by the impugned judgment, recourse to Order 9 has not been taken. As such the procedure as adopted has been vitiated in law.

6. Mr.S.K.Das, learned counsel appearing for the Respondent contended that when the impugned judgment was passed, the Court had no other alternative recourse.

7. We have perused the records and also examined the judgment carefully and are of the opinion that the judgment passed under Order 17 Rule 3 cannot be sustained as the parties were absent and there would have been no recourse to the provisions of Order 9 CPC. In view of that, the impugned judgment stands set aside. The petition being Civil Proceeding No.72 of 2021, renumbered as Mat Case

No.22 of 2019, is remanded for commencement of adjudication from the stage of recording of the evidence of the Respondent [the Appellant herein). Since the matter requires early disposal, we would request the Judge, Family Court, Paralakhemundi to take all initiatives to complete the proceeding within six months from the date when a copy of this order will be available before that court.

8. In the result, the appeal stands allowed. Registry is directed to draw the decree and send the LCRs thereafter.

(S. Talapatra)
Judge

(B.P. Routray)
Judge

C.R. Biswal / M.K.Panda

