

IN THE HIGH COURT OF ORISSA AT CUTTACK

WP(C) No.31644 of 2021
(Through Hybrid mode)

Debasish Mishra

....

Petitioner

Mr. Jagannath Senapati, Advocate

-versus-

Soumyashree Nanda

....

Opposite Party

Mr. Nirmal Rath, Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
29.07.2022

Order No.

07. 1. The writ petition has been specially assigned to this Bench.
2. Mr. Senapati, learned advocate appears on behalf of petitioner (husband). He submits, his client filed petition under rule 1 in order XXIII, Code of Civil Procedure, to abandon the civil proceeding (C.P.no.306 of 2016). The Family Court instead of allowing the petition, by order dated 11th January, 2019 directed it to be put up on next date, fixed for objection and hearing. He refers to order sheet of the Family Court and demonstrates that thereafter several dates were fixed, lastly on 17th August, 2021 but the petition remained not dealt with.
3. Mr. Rath, learned advocate appears on behalf of opposite party (wife) and submits, by section 23-A in Hindu

Marriage Act, 1955 relief of respondent, in divorce and other proceedings have been provided for. Such proceedings include, inter alia, proceeding for judicial separation. His client, therefore, was entitled to and duly made the counter claim. Petitioner had merely put in a piece of paper stating abandonment. It was neither a memo nor a petition. Even then the Court took cognizance and posted a date for objection. Before the date of objection, his client filed counter claim for divorce. The proceeding thereafter continued on the counter claim, where his client filed evidence on affidavit and was cross-examined by petitioner. On query from Court he submits, section 21 provides for application of the Code of Civil Procedure to proceedings under the Act. Mr. Rath submits, his client also applied for maintenance pendente lite under section 24 and orders made for payment have not been complied with by petitioner. It is, inter alia, to avoid compliance this purported plea of abandonment. On query from Court, Mr. Rath submits, his client has made counter claim on ground of cruelty and desertion.

4. On query from Court regarding rule 1A in order XXIII, Mr. Senapati submits, same is not applicable since there is no other defendant, against whom opposite party can have cause of action on transposition.

5. Section 23-A gives right to a respondent in a proceeding, inter alia, for judicial separation to not only oppose the relief sought on ground of adultery, cruelty or desertion but also make a counter claim for any relief under the Act, on that ground for Court to grant on proof of the

same. This provision in enabling respondent to make a counter claim cannot be seen as a bar to petitioner abandoning the claim made in the proceeding.

6. Section 24 provides for maintenance pendente lite and expenses of proceedings. This provision also cannot be said to be a bar to petitioner abandoning his claim. Orders or directions already made during pendency of the proceeding, for payment of maintenance pendente lite and/or expenses of proceedings can be enforced against petitioner in execution.

7. Sub-rule (1) in rule 1, order XXIII provides for abandonment, in this case of claim made by petitioner for judicial separation. Sub-rule (4) provides by clause (a) thereunder that where the plaintiff abandons a suit or part of claim under sub-rule (1), he shall be liable for such cost as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. It is clear therefore, on petitioner obtaining order on his application for abandoning the proceeding, he, in future will not be able to file for judicial separation. The question remains as to what will happen to opposite party's counter claim for divorce on petitioner being allowed to abandon the proceeding and transposition not possible because there is no other party.

8. The parties are before Court on petitioner having invoked jurisdiction of this Court under article 227 in the Constitution of India. The power of superintendence thereby conferred in High Courts is extraordinary. It is accordingly directed that the Court below will forthwith determine cost to

be paid by petitioner for abandoning the proceeding. On the cost being paid as directed, the proceeding shall stand abandoned by petitioner. It shall be renumbered and registered as a divorce suit filed by opposite party (wife) against petitioner, as respondent. Issuance of further notice on the renumbered and registered divorce petition is dispensed with as this order is being made in petitioner's presence. Above directions be complied with within three weeks from date and thereupon, the renumbered and registered divorce petition be proceeded with on resumption, as expeditiously as possible.

9. The writ petition is disposed of.

(Arindam Sinha)
Judge

RKS

