

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.386 of 2022

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Raju Sah, aged about- 35 years, (Male) Son of Pyare Sah, Resident of Village
- Kothi Pachpatia, Police Station - Jamo Bazar, District - Siwan.

... .. Appellant/s

Versus

Rinku Devi, Wife of Raju Sah, Daughter of Lal Babu Sah, Resident of
Village - Kagzi Mohalla, Police Station - Siwan Muffasil, At Present Village -
Bishunpur, Post and P.S. - Siwan, District - Gopalganj.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Vijay Bardhan Pandey, Advocate
For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA)

Date : 19-01-2024

Heard learned counsel for the appellant.

None for the Respondent.

2. Learned counsel for the Appellant
stated that the appellant-husband is a labourer and
Respondent-Wife is a home maker and marriage
was solemnized on 02.06.2005 according to Hindu
customs in village- Vishunpur, Dist- Gopalganj and
after marriage the Respondent-Wife came to her
matrimonial home. Daughter was born out of their
wedlock. The respondent-wife and her parents
wanted the appellant-husband to stay at her



mother's house and not with appellant-husband's parents house. That the appellant-husband refused to do so and as alleged by the learned counsel for the appellant-husband respondent-wife left her in-laws house on 15.10.2010 with all her belongings alongwith appellant-husband's mother's jewelry and since then, Respondent has been living at her parental house. It is further submitted that there has been several attempts made by the appellant to bring the respondent-wife back to the matrimonial home but the respondent-wife refused to join him.

3. The appellant-husband filed a R.C.R. case No. 103 of 2012 against the respondent-wife in the Court of Principal Judge Family Court, Siwan for restitution of conjugal rights under section 9 of The Hindu Marriage Act, 1955.

4. The Court of Principal Judge Family Court, Siwan passed an order in favour of respondent-wife granting an amount of Rs. 70,000/- along with Rs. 10,000/- per year towards



respondent-wife after considering the matter at hand and dismissed the case.

5. Before going into the merits of the case, we have to consider as to whether judgment and decree passed on 10.12.2019 and 23.12.2019 in R.C.R. case No. 103 of 2012 is maintainable or not.

6. The Appellant filed R.C.R. case No. 103 of 2012 on 14.06.2012 and on 25.06.2013. Respondent-Wife filed Written Statement. Both parties were directed for reconciliation on 22.03.2017 which has failed and the issues were framed on 25.06.2018. The appellant-Husband and Opposite Party-Respondent-Wife thereafter were last present together on 11.06.2019, after that the Appellant-Husband did not appear on any subsequent dates. The learned Family Court in the absence of the Appellant-Husband in the court, proceeded to examine three witnesses of Respondent-wife on 25.10.2019, 08.11.2019 and 15.11.2019. The Ld. Family Court, thereafter passed Judgment and decree on 10.12.2019 and



23.12.2019 without hearing the Appellant-Husband.

7. The provisions under the Code of Civil Procedure, 1908 laid down in Order 9 states that:-

“Order IX- Appearance of parties and consequence of non-appearance.

Rule- 1 Parties to appear on day fixed in summons for defendant to appear and answer.....

Rule- 2 Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.....

Rule- 3 Where neither party appears suit to be dismissed.....

Rule- 4 Plaintiff may bring fresh suit or Court may restore suit to file.....

Rule- 5 Dismissal of suit where plaintiff after summons returned unserved, fails for seven days to apply



for fresh summons.....

Rule- 6 Procedure when only plaintiff appears.....

Rule- 7 Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.....

Rule-8 Procedure where defendant only appears.—Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.



Rule- 9 Decree against plaintiff by
default bars fresh
suit.....”

8. Order IX Rule 8 of Code of Civil Procedure, 1908 clearly mentions that when the defendant only appears and the plaintiff does not appear, the procedure laid down in Rule 8 shall be followed and the defendant is only entitled to have plaintiff’s suit dismissed. The defendant is also not entitled to call any evidence.

9. On perusal of written statement submitted by the respondent-wife, no facts were admitted from the plaint by the respondent-wife, thus it attracts the provisions laid down above.

10. The **Purabii Dasgupta (Sarkar) vs. Arun Kumar Dey AIR 2010 Gau 66 : 2010 (2) Gau LT 613**, The **Gauhati High Court** held that an order disposing of suit deciding the question of maintainability hearing only the defendant in absence of plaintiff, can be treated as dismissed for default. It is not a ‘decree’ inasmuch as such a decision does not decide the matter



involved in the suit. An order of this nature contravenes the provisions of Order IX Rule 8 of the Code, which lays down the procedure to be followed in absence of the plaintiff. The order is not appealable but advisable, and it can also be interfered with by the High Court under 227 of the Constitution of India.

11. The Learned Judge of Family Court, Siwan has not dismissed the R.C.R. Case No.103 of 2012 under Order 9 Rule 8 of CPC but has passed judgment on merit in this case, which is not in accordance with law. Thus, considering the provisions laid down in the Code of Civil Procedure, 1908, and considering above facts and circumstances of the case, the judgment and decree passed on 10.12.2019 and 23.12.2019 in R.C.R. case No. 103 of 2012 is not in accordance with law as laid down above.

12. After considering the facts and circumstances of this case and materials available on record along with the provisions of the laws laid down which has not been adhered as it is crystal



clear that hearing the defendant only in absence of plaintiff, shall be treated as dismissed for default and we are fully satisfied that the order proceeding against the Appellant-Husband was not in accordance with law, therefore, the judgment and decree passed by the Family Court is hereby set-aside. Accordingly, this appeal is allowed.

13. In view of the facts and circumstances of the case, we direct the parties to appear before the Family Court on 06.03.2024. It is also directed that both the parties shall appear before the learned Family Court on 06.03.2024 and thereafter the trial shall be commenced and concluded within a period of six months from 06.03.2024. Parties shall co-operate in the proceedings.

(Ramesh Chand Malviya, J)

(P. B. Bajanthri, J)

Brajesh Kumar/-

AFR/NAFR	
CAV DATE	08.01.2024
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