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IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No. 36 of 2023

.... *Appellant*

-versus-

.... *Respondent*

Advocates appear in the case:

For appellant: Mr. Subash Chandra Acharya, Advocate

For respondent: Mr. A.K. Swain, Advocate

CORAM:

**JUSTICE ARINDAM SINHA
JUSTICE M.S. SAHOO**

JUDGMENT

Dates of Hearing: 6th December, 2023 and 3rd January, 2024

Date of Judgment: 3rd January, 2024

ARINDAM SINHA, J.

1. Mr. Acharya, learned advocate appears on behalf of appellant-husband. He submits, his client is aggrieved by judgment dated 13th January, 2023 made by the family Court. His client had filed for divorce on the

ground of cruelty. Though impugned judgment was made ex-parte against respondent-wife, divorce was not granted.

2. He demonstrates from impugned judgment, the Court below appreciated that his client's ground for claiming divorce was cruelty. The Court went on to hold cruelty was established but dismissed the civil proceeding on technicality of non-joinder of party. The Court below had erred in failing to appreciate that his client had not taken the ground of adultery but pleaded the fact to establish cruelty.

3. Mr. Swain, learned advocate appears on behalf of respondent-wife and submits, his client was precluded from filing written statement in the family Court. His client has good contentions in defence against appellant's claim for dissolution of the marriage.

4. Allegation of appellant-husband was accepted to be true because respondent-wife had not contested at trial, to test appellant-husband's evidence by cross-examination. The Court cannot be faulted for concluding as such.

5. Claim of appellant-husband for dissolution of the marriage was rejected, as aforesaid, on technicality of not having added the paramour as a necessary party, required by rule 5 in Hindu Marriage and Divorce (Orissa High Court) Rules, 1956. It is apparent the rules were made in exercise of

power under section 21 in Hindu Marriage Act, 1955. The provision is reproduced below.

“21. Application of Act 5 of 1908- Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (5 of 1908)”

6. Code of Civil Procedure, 1908 by order I rule 3 provides for who may be added as defendants in a suit. The provision is reproduced below.

“3. Who may be joined as defendants.- All persons may be joined in one suit as defendants where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and सत्यमेव जयते

(b) if separate suits were brought against such persons, any common question of law or fact would arise.”

Where a husband alleges adultery and dissolution of the marriage under clause (i) in section 13(1) of Hindu Marriage Act, 1955, he cannot be said to have a right of relief against the paramour. In the circumstances, the paramour is not a necessary party-defendant in a suit filed, to be tried on application of the Code. However, by the rules a paramour has been made a

necessary party. We reproduce below clause (a) under rule 5 as is relevant for our purpose.

“5. Necessary parties- (a) In every petition for divorce or judicial separation on the ground that the respondent is living a adultery or has committed adultery with any person, the petitioner shall make such person a co-respondent. The petitioner, may however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds-

- (i) That the name of such person is unknown to the petitioner although he has made due efforts for discovery;*
- (ii) That such person is dead;*
- (iii) That the respondent being the wife is leading the life of a prostitute and that the petitioner knows of no person with whom adultery has been committed;*
- (iv) For any other sufficient reason the Court may deem fit to consider.”*

7. Though the rule mandates making of the paramour as a necessary party but exceptions have been provided where such person may not be made a party. Therefore, the mandate of the paramour ‘shall’ be made a party is to be interpreted as to be made party where possible. On query from Court Mr. Acharya submits, no question was put by the family Court to his client in the box requiring information regarding address of the paramour.

He submits, all his client knows is that the paramour does business in Sector-15, Noida in State of Uttar Pradesh. We made this query because section 165 in Evidence Act, 1872 empowers the Judge to, inter alia, ask questions.

8. On noticing allegations made by appellant-husband of abortion and documents exhibited as obtained by him under Right to Information Act, 2005 to demonstrate that respondent-wife suffered inter uterine death of the foetus thereafter expelled, we think fit to direct remand for the case to be tried on contest. This direction has nothing to do with the family Court having proceeded ex-parte against the wife but a combination of factors regarding the technicality of adherence to the rule held as fatal to appellant-husband's case and respondent-wife being before us to contest the appeal.

9. For reasons aforesaid, impugned judgment is set aside with direction for remand under rule 23-A in order-XLI of the Code for trial on all issues. The family Court need not be detained by non-joinder of the paramour as on query from Court Mr. Swain submits, his client does not know alleged paramour. We have not expressed any opinion on the merits. In further exercise of our appellate power, we direct that respondent-wife may file written statement by 16th January, 2024. We make it clear our direction is mandatory as filing of written statement stood earlier precluded by the family Court. On perusal of the petition it appears that appellant-husband

had sought dissolution of the marriage on grounds under clause (i) and (i-a) under section 13(1). On remand, the case will be accordingly tried. We are confident the family Court will expeditiously deal with the case on remand.

10. The appeal is accordingly disposed of. Registry will communicate this order to the Court below.

(Arindam Sinha)
Judge

(M.S. Sahoo)
Judge

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