

Surendra Mallik Vs. D. Dei

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Court : Orissa

Decided On : Jan-20-1993

Reported in : I(1994)DMC213

Judge : S.C. Mohapatra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 17

Appeal No. : F.A. No. 333 of 1977

Appellant : Surendra Mallik

Respondent : D. Dei

Advocate for Def. : Devandra Misra and ;R.N. Mohanty, Adv.

Advocate for Pet/Ap. : K.C. Mohanty, Adv.

Disposition : Appeal dismissed

Judgement :

S.C. Mohapatra, J.

Defendant is appellant against a decree for maintenance.

1. Case of plaintiff is that she is legally married wife of defendant since 1964. They continued as husband and wife till July, 1970, during which period a daughter was

born to them who died. In July, 1970, plaintiff went to her father's house to nourish her ailing father. On 15-8-1970 she wanted to come back to the house of the defendant to attend Sudhi ceremony but she was not allowed by the defendant. Plaintiff is all along ready and willing to go to the house of the defendant and to live with him but the defendant refuses and does not maintain her. Her ornaments which are with her husband were not allowed to be taken back. On times allegations, she claimed arrear maintenance for two years @ Rs. 70/- per month amounting to Rs. 1,580/- and future maintenance at that rate. Added to it she claims a sum of Rs. 4,000/- towards cost of ornaments and articles.

2. Defendant contented the suit. While admitting the marriage, he took the plea that plaintiff had illicit connection with one Lingaraj Malia and illegitimate child was born to plaintiff for which defendant is not willing to entertain the plaintiff in his house and plaintiff is also not willing to come to his house. Plaintiff claims that he has no means to pay maintenance as his income is very meagre.

3. Plaintiff examined three witnesses including herself and defendant examined three witnesses appreciating the materials on record, Trial Court has decreed maintenance @ Rs. 30/- per month, both towards arrear and future. However, claim of Rs. 4,000/- towards ornaments and articles was refused. This is grievance of the appellant. No independent appeal or cross-objections has been filed by the plaintiff.

4. Then this appeal was called for hearing, there was no appearance for the appellant although respondent is present, Learned Counsel engaged for the plaintiff is since dead during pendency of appeal and appellant has not engaged any other Counsel. This would lead to conclusion that plaintiff desired to make his submission personally which is not prohibited by law.

5. When plaintiff does not appear in a suit, the same may either be adjourned or dismissed for default. This is because plaintiff is required to support his case by evidence and it is difficult for the Court to decide the issues without materials. Some would not have been the position in case of appeal since all materials are available on record and Court can consider the materials itself where it not got the assistance of any party. But Order 41, Rule 17 C.P.C. provides that Court make an

order that the appeal be dismissed if the appellant does not appear when the appeal is called for hearing. Since Court may construe that there is no prohibition to decide the appeal on merits, explanation was inserted to Order 41 Rule 17(1) C.P.C. which reads as follows :

'Explanation : Nothing in this Sub-rule shall be construed as empowering the Court to dismiss the appeal on merits.'

In view of clear language of explanation, under Order 41, Rule 17(1) C.P.C., there is no scope to enter into merits and consider the appeal on merits.

6. In view of the aforesaid, the suit being of the year 1974 filed for maintenance by a destitute lady and by order dated 24-8-1978 execution proceeding having been stayed subject to conditions which have been complied with and such execution proceeding is pending since 15 years, the appeal is dismissed so that decree-holder can execute the decree.

7. In result, appeal is dismissed. No costs.

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