



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FA(MAT) No. 21 of 2022**

- Smt. Aparna Pandey W/o Jai Prakash Pandey, D/o Late Shri Ramdhan Shukla Aged About 50 Years Through Next Friend (Brother) Ramkishore Shukla , S/o Late Shri Ramdhan Shukla R/o D-17, Vidya Up Nagar , Near Shiv Mandir Bilaspur, Tahsil And District Bilaspur Chhattisgarh.

---- **Petitioner****Versus**

- Jai Prakash Pandey S/o Late Shri Churawan Prasad Pandey, Aged About 50 Years R/o Yamuna Vihar , NTPC Town Ship, Jamnipali, Korba West , Police Station And Tahsil Darria, District Korba Chhattisgarh.

---- **Respondent**

For Appellant
For Respondent /State

Mr. HV Sharma and Mr. Ravindra
Sharma, Advocates
Mr. Vineet Kumar Pandey, Advocate

DB.: **Hon'ble Mr. Justice Goutam Bhaduri &****Hon'ble Mr. Justice Deepak Kumar Tiwari****Judgment on Board by Goutam Bhaduri, J.****6/7/2022**

1. Heard.
2. The present appeal is against the judgment and decree dated 26.11.2021 passed by the Judge, Family Court, Camp Court, Katghora, District Korba (CG) passed in Civil Suit No.74-A/2021, whereby, the decree of divorce has been granted in favour of



the husband. The instant appeal is filed by the appellant-wife.

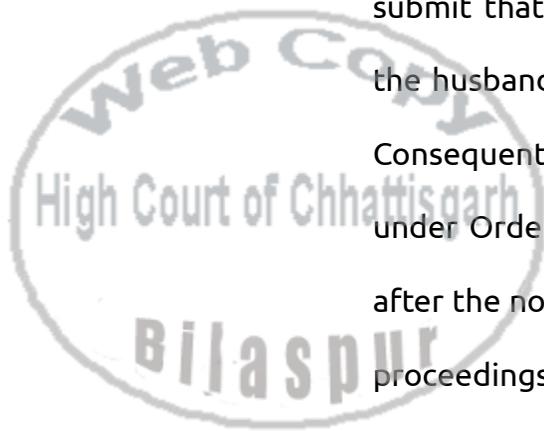
3. The brief facts of the case is that the marriage of the respondent-husband and the appellant-wife was solemnized on 9.5.2002 and thereafter, the wife moved to her matrimonial house at Korba. As per the pleadings of the husband, after the rituals of the marriage, the behaviour of the wife appeared to be non-cooperative and unnatural but since such behaviour was immediately after the marriage, it was ignored. However, the wife went back to her parental home and when the husband tried to bring her back, she refused for some or the other reasons. Thereafter, a child was born out of their wedlock. It was alleged that in May 2007, the wife again left for her parental house and subsequently, several rounds of social meetings were held. Lastly, it came out that the wife is mentally retarded, for which, she is being treated by Psychiatrists Dr. Prakash Narayan Shukla and Dr. Shailesh Verma at Raipur and Bilaspur respectively. It was further pleaded that the husband proposed to get the wife treated by the best Psychiatrist but for some or the other reasons, the same was avoided. It was also stated that when the husband got to know the mental condition of the wife, the sister of the wife came to the matrimonial house and took all her belongings and the wife never tried to come back. The husband has further made certain narrations of the incidents in his pleadings. Consequently, in a petition filed under Section 13(1) of the Hindu Marriage Act, 1955 before the Family Court, the respondent proceeded ex-parte and eventually, an ex-parte





decree was passed.

4. Learned counsel for the appellant-wife would submit that when it was pleaded that the husband knew the fact that the wife is mentally retarded, the Court below should have proceeded under Order 32 Rule 15 of the CPC to make an enquiry about the state of mind of the wife. He would submit that without having done so, the Court has proceeded ex-parte, therefore, the order itself would be bad in law.
5. Per contra, learned counsel for the respondent-husband, would submit that it was on the information of the family members, the husband got to know that the wife was mentally retarded. Consequently, there was no mandate to follow the procedure under Order 32 Rule 15 of CPC. He further submits that even after the notice, the wife did not turn up and thus, the ex-parte proceedings drawn by the Court is well merited, which do not call for any interference.
6. We have heard learned counsel for the parties at length, perused the pleadings and the order sheets of the Court below.
7. The order-sheets would show that after filing of the petition on 19.7.2021, the notice was ordered to be issued and the case was fixed for 20.9.2021 for appearance of the wife, reconciliation and reply. The acknowledgment shows that the above notice was stated to be served on the respondent-wife (appellant herein). The order sheet further shows that the date of hearing i.e. 20.9.2021 was pre-poned and the matter was taken up on





25.8.2021 and on the said date, the next date of hearing was given as '22.10.2021'. Thereafter, on 22.10.2021, the ex-parte proceedings were drawn and on the subsequent date, the evidence was recorded.

8. Perusal of the order sheets would show that the notices were issued for appearance of the wife on 20.9.2021 and thus, it is not expected that on a prior date, the case would be taken up i.e. on 25.8.2021 and a different date of 22.10.2021 would be given. The acknowledgment notice shows that the date of appearance was given as '20.9.2021' and the order sheets of the trial Court would show that on the said date, the case was not taken up for hearing and on this ground alone, the ex-parte proceeding was bad in law. Apart from this, the pleadings of the husband would show that at para 17 and 20, categorical statements were made that the wife is of unsound mind. The pleadings further elaborate that the husband was sanguine of the fact that the wife is not mentally fit. Para 17 and 20 of the pleadings are reproduced hereunder :

“17. यह कि कालांतर में आवेदक को, अनावेदिका के मायके वालों द्वारा इस आशय की जानकारी दी कि अनावेदिका का मानसिक स्वास्थ्य विवाह के पूर्व से ही सही नहीं है जिसके लिए उसका स्वास्थ्य परीक्षण, अपोलो अस्पताल, बिलासपुर के मनोचिकित्सक, डॉ. प्रकाश नारायण शुक्ला, मनोचिकित्सक, रायपुर व डॉ. शैलेश वर्मा, मनोचिकित्सक, सेक्टर-9, भिलाई के मनोरोग विशेषज्ञों के पास चल रहा है।

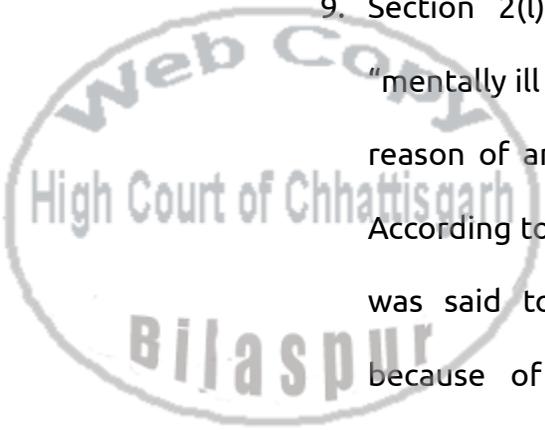


20. यह कि आवेदक नें अनावेदिका के मायके वालों के समक्ष यह प्रस्ताव भी दिया कि यदि वे यह नहीं चाहते कि उनकी अनुपस्थिति में अनावेदिका का चिकित्सकीय परीक्षण हो, तो उनकी ओर से कोई भी साथ आ सकता है। किन्तु अनावेदिका के मायके वालों नें, न तो अनावेदिका के चिकित्सा से संबन्धित कोई कागजात आवेदक को सौंपे और न ही आवेदक के इस प्रस्ताव पर अपनी सकारात्मक प्रतिक्रिया प्रदर्शित की, कि आवेदक, अनावेदिका का चिकित्सकीय परीक्षण अपने स्तर पर भारत के श्रेष्ठ मनोचिकित्सकों से कराएगा।”

9. Section 2(l) of the Mental Health Act, 1987 defines the “mentally ill person” as a person, who is in need of treatment by reason of any mental disorder other than mental retardation. According to the pleadings of the husband, the respondent-wife was said to be mentally ill person, who needs treatment because of mental disorder. Even if the pleadings are considered in a liberal view or it is considered that she was suffering from low intellectual quotient, there would no gainsaying to infer that she would be capable to defend herself.

10. After going through the pleadings of the husband that the wife is mentally retarded, it appears that in view of Section 10 of the Family Courts Act, 1984 (in short “the Act, 1984”), the husband-respondent should have taken recourse to the provisions contained in Order 32 Rule 15 of CPC as Section 10 necessarily refers to the procedure, which reads as under :

“10. Procedure generally – (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil





Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

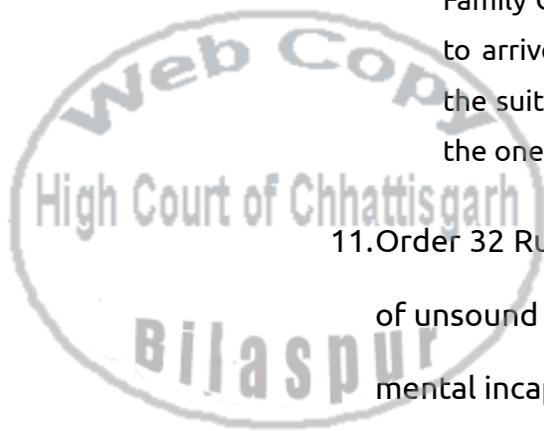
(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

11. Order 32 Rule 15 of the CPC (except rule 2A) applies to persons of unsound mind. It governs the suit by or against a person with mental incapacity and the same reads as under :

“15. **Rules 1 to 14 (except rule 2A) to apply to persons of unsound mind** - Rules 1 to 14 (except rule 2A) shall, so far as may be, apply to persons adjudged before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.”

12. Order 32, Rule 3 contemplates filing of an application for the appointment of guardian where the respondent is alleged to be a person of unsound mind. Order 32 Rule 15 of the Code of Civil Procedure extends the application of Order 32, Rules 1 to 14, except Rule 2A, to the persons adjudged before or during





the pendency of the suit, to be of unsound mind and shall also apply to persons, who, though not so adjudged, are found by the Court on enquiry to be incapable by reasons of any mental infirmity, of protecting their interest when suing or being sued.

13. In a like nature of case, the High Court of Madras, in the matter of **L. Hemalatha Vs. N.P. Jayakumar** reported in **AIR 2008 MADRAS 98**, has held thus in para 21.3 to 21.6 :

“21.3 The expression, “persons who, though not so adjudged, are found by the Court on enquiry to be incapable by reason of any mental infirmity of protecting their interest when suing or being sued” found in Order 32, Rule 15 of the Code of Civil Procedure makes it clear that a duty is cast on the Court to arrive at the finding whether on the pleadings or even in the absence of any pleading, when it is brought to the notice of the Court by the evidence on record whether any person is found by the Court, on enquiry to be incapable of protecting his or her interest, when suing or being sued and such duty, in our considered opinion, is mandatory and not discretionary. Any deviation from the above rule would render Order 32, Rule 1 to 14 of the Code of Civil Procedure redundant, inasmuch as the Court is expected to be a guardian of interest of the minors and persons of unsound mind who are incapable of protecting their interest. Therefore, the duty cast on the Court is to consider whether the respondent is in a position to act independently or not and whether the appointment of a guardian is necessary or not, and render necessary finding.

22.4 In the instant case, the petitioner husband, having alleged that the respondent-wife is a person of unsound mind, ought to have filed an application for appointment of guardian, because even on his own pleadings, the respondent-wife, being a person of unsound mind, could not defend herself.

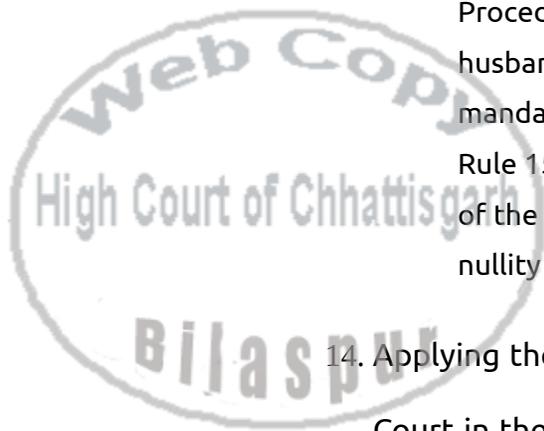




22.5 The trial Court ought to have satisfied itself whether the respondent-wife is a person of unsound mind or not. If the trial Court on the basis of materials placed before it, finds that the allegations of the petitioner-husband are not sustainable, there is no need to appoint a guardian to defend the respondent-wife. On the other hand, if it is satisfied that the respondent-wife is a person of unsound mind, it should appoint a guardian to defend her. Such duty has not been discharged by the trial Court in the instant case.

21.6 The primary duty of a Court is to see that truth is arrived at. But, the trial Court has simply accepted the case of the petitioner-husband without insisting on an application under Order 32, Rule 15 of the Code of Civil Procedure. The failure on the part of the petitioner-husband and the lapse on the trial Court to discharge the mandatory obligation as contemplated under Order 32, Rule 15 of the Code of Civil Procedure read with Section 10 of the Family Courts Act would render the order as a whole nullity in the eye of law.”

14. Applying the aforesaid principles and the law laid down by this Court in the matter of **Abhishek Lal vs. Smt. Minakshi Filomin** vide **judgment dated 1.7.2022** passed in **FAM No.224 of 2018**, in the case at hand, we are of the opinion that when the specific pleadings existed that the wife of the respondent is of unsound mind and it was well within the knowledge of the husband-respondent, she ought to have been represented before the Court below by the 'next friend' by invoking the provisions contained in Section 32 Rule 15 of the CPC or the Court below should have made an enquiry in due regard. Apart from the aforesaid facts, the dates and events would show that the exparte proceeding itself was not justified.





15. Accordingly, the appeal is allowed and the impugned judgment and decree is set-aside.

16. However, it is observed that the respondent-husband would be at liberty to file a fresh suit, if so advised, in accordance with law. Further, the findings recorded by this Court shall not be considered as *res judicata* in further proceedings, if any.

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(Deepak Kumar Tiwari)
Judge





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HEAD-NOTE

The decree of divorce against wife showing her mentally retarded would be nullity, if not represented through next friend.

पत्नी को मानसिक रूप से विकृष्ट दर्शाते हुए उसके विरुद्ध जारी विवाह विच्छेद की डिक्री शून्य होगी, यदि प्रकरण में पत्नी का प्रतिनिधित्व, किसी वाद मित्र द्वारा न किया गया हो।

