ORISSA HIGH COURT,
CUTTACK

CIVIL APPEAL NO.58 OF 2000

From the judgment dated 30.08.2000 passed by Shri M.R. Behera, Judge, Family Court, Rourkela in Civil Proceeding No.155 of 1999.

Dilip Kumar Barik ..... Appellant

Versus

Smt. Usharani Barik ..... Respondent

For Appellant - M/s A.R. Dash, N.Lenka, N. Das and R.N. Behera

For Respondent - M/s S. Hota, D.N. Subudhi, A.K. Mohanty and B.Mohanty

---

PRESENT:-

THE HON'BLE MR. JUSTICE P.K.TRIPATHY

AND

THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing and judgement : 31.10.2006

Heard both the parties, perused the evidence on record and considered the argument advanced. The judgment is as follows:

2. Appellant is the husband and respondent is the wife. That relationship is not disputed. Their marriage was solemnized in May, 1996 and a son was born out of the wedlock on 14.12.1997. As per the order of the court in an earlier proceeding in C.P. No.142 of 1997, that child is getting maintenance at the rate of Rs.300/- per month.

3. The respondent wife had filed C.P.No.142 of 1997 claiming maintenance for herself and the minor child in accordance with the provisions of Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (in short 'the Act 1956'). The appellant-husband had also filed C.P.No.115 of 1998 seeking the relief for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 (in short 'the Act 1955'). In the case filed by the wife, her allegation was of ill-treatment and cruelty by the husband as well as the in-laws on account of dowry and allied matters. While denying to such allegations, the husband inter alia alleged that the wife voluntarily deserted him after going away from the matrimonial home on the pretext of illness of her mother. Both the proceedings were heard analogously and a common judgment was delivered on 6th September, 1999. That judgment was tendered as Ext.B in the present proceeding. Learned Judge, Family Court, Rourkela in that judgment, Ext.B, rejected the wife's claim for maintenance. However, the court below granted a decree for maintenance at the rate of Rs.300/- per month in favour of the child, who is in the custody of the wife, and also passed a decree for restitution of conjugal rights in favour of the husband.

4. On 01.11.1999, the wife filed the present proceeding, i.e., C.P. No.155 of 1999 in the court of the Judge, Family Court, Rourkela claiming for maintenance under Section 18 of the Act 1956. In that application, while reiterating the selfsame ground of ill-treatment and cruelty, she also stated that the husband has not respected and implemented the decree for restitution of conjugal rights so far and because of her destitute condition she may be provided with maintenance in accordance with law. In that respect, her further contention was that in spite of approach through letters, the husband did not respond to implement the decree for restitution of conjugal rights. In his written statement the appellant-husband inter alia stated that his attempt to restore the conjugal rights was avoided by the wife and that the suit for maintenance was hit by the principle of res

judicata because of the judgment, Ext.B. Both the parties being at issue, the trial court settled the issues and took up the case for hearing. The respondent and the appellant examined themselves. Besides that, the appellant examined one more witness and relied on his pay particulars, Ext.A and the aforesaid judgment, Ext.B. Both the parties reiterated their contentions while claiming or opposing to the prayer for maintenance.

5. Learned Judge, Family Court, Rourkela, on appreciation of the aforesaid facts and the evidence on record, found that the conduct of the husband in not implementing the decree for restitution of conjugal rights has circumstantially proved that he is the negligent party to maintain the wife or to keep her association. The appellant-husband did not prove that the wife-respondent has source of living and under such circumstances learned Judge, Family Court, Rourkela granted a decree for maintenance at the rate of Rs.400/- per month with effect from 30.08.2000, i.e., the date of the impugned judgment. While passing such an order, the learned Judge, Family Court, Rourkela stated that the findings recorded in Ext.B, under the aforesaid circumstances, do not operate as res judicata.

6. Mr. A.R. Dash, learned counsel for the appellant, criticizes the aforesaid judgment and order on the selfsame ground of enforceability of the plea of res judicata and also conduct of the wife in declining to join the husband and her non-cooperation in the conciliation proceedings. Learned counsel for the respondent, however, supports the impugned judgment and the order for maintenance.

7. So far as the plea of res judicata is concerned, we do not find any merit in the argument of the appellant inasmuch as no factual finding recorded by the Family Court in Ext.B was tried to be upset or overreached by the impugned judgment. In fact, the Family Court has not interfered with the judgment of dismissal of the earlier application for maintenance. The Family Court has also not granted the maintenance on the ground of any ill-treatment or cruelty on

account of dowry, etc., as alleged in the past. Claim for maintenance under Section 18 of the Act 1956 can be renewed on fresh cause of action and, therefore, the judgment, Ext.B in this case does not operate as res judicata.

8. Relying on the ratio in the case of ***Laxmi Sahuani v. Maheswar Sahu***, AIR 1985 Orissa 11, learned counsel for the appellant argues that if the facts of that case are applied to the present case, then it is the respondent who is the guilty party in not respecting the decree for restitution of conjugal rights and, therefore, she is not entitled to any maintenance inasmuch as none of the clauses in sub-section (2) of Section 18 is enforceable in her favour in the context of grant of maintenance under Section 18(1). After careful perusal of the citation, we find that the ratio therein rather helps the respondent than the appellant. It has been stated in that judgment that in the Hindu Society and according to the practice and custom prevalent a wife never volunteers to join husband for enforcement of a decree of conjugal rights and in that respect the husband should take appropriate steps. In the present case, learned Judge, Family Court, has also made a similar observation and taking note of the conduct of the appellant that he did not execute the decree for restitution of conjugal rights maintenance was provided to the wife.

9. Mr. Dash argues that according to the provisions in the Limitation Act, such a decree (Ext.B) is enforceable within a period of twelve years. Even if the law is so, then also a wife cannot wait for twelve years in destitute condition with a hope for execution of the decree for restitution of conjugal rights by the husband. In such a case, conduct of the husband coming within ambit of Section 18(2)(g) of the Act 1956 is relevant to determine as to whether the wife should get maintenance and in that case the aforesaid conduct of inaction by the husband to execute the decree (Ext.B) is sufficient to approve the order of maintenance granted in her favour by the learned Judge, Family Court, Rourkela. The amount so granted is Rs.400/- and, therefore,

below the 1/5th of the monthly income of the husband. Under such circumstance, we also do not want to interfere with the order of maintenance or quantum thereof.

10. We may note here that attempt made by us for a conciliation failed because the respondent did not appear to participate in the conciliation. That circumstance alone cannot be a ground to refuse her the relief for maintenance if she is legally entitled to the same. We find that the husband is resorting to technicalities to defend himself rather than discharging his legal as well as moral duties towards the wife and the son. No step was ever taken by him voluntarily to provide maintenance to the son until there was an order by the court in Ext.B. He has also not volunteered to execute the decree for restitution of conjugal rights and now he takes the plea of limitation. He did not provide any maintenance to the wife though he is an earning member and there is nothing on record to prove that the wife is self-sufficient. Under such circumstances, not only the law but also equity supports the claim of the wife.

11. For the reasons indicated above, we do not find any merit in this appeal and the same is accordingly dismissed with a consolidated cost of Rs.500/- to be paid by the appellant to the respondent within a period of two months, failing which, the respondent is allowed to realize the same by due process of law.

.....
P.K.Tripathy,J.

.....
Pradip Mohanty,J.

Orissa High Court, Cuttack
October 31, 2006 / *Samal*