ORISSA HIGH COURT: CUTTACK.

MATA NOS. 90, 91 AND 92 OF 2011

From a common judgment dated 31.10.2011 passed by Shri Arun Kumar Mishra, Judge, Family Court, Jajpur in C. P. Nos. 283, 445 and 446 of 2011.

(In all cases)

Abinash Samal ..... Appellant

-Versus-

Gitipuspa Samal ..... Respondent.

For appellant : M/s. A.P.Bose, R.K.Mahanta, N. Hota & M.Pradhan.

For Respondent: M/s. Dibakar Bhuyan, B.N. Das, A.K.Rout & C.R.Swain.

Date of judgment 17.05.2013

PRESENT :

THE HONOURABLE SHRI JUSTICE M.M. DAS
AND
THE HONOURABLE SHRI JUSTICE B.K.MISRA

M. M. DAS, J. The aforesaid three appeals have been filed by the appellant-husband against a common judgment dated 31.10.2011 passed by the learned Judge, Family Court, Jajpur in three Civil Proceeding Nos. 283, 445 and 446 of 2011. The appellant-husband filed C.P. No. 283 of 2011 (previously numbered as C.P. No. 10 of 2009 in the court of the Judge, Family Court, Cuttack) under section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') seeking

dissolution of his marriage with the respondent – wife on the grounds stated in the said petition which will be discussed in this common judgment later. C.P. No. 445 of 2011 (previously numbered as C.P. No. 97 of 2009 in the court of Judge, Family Court, Cuttack) and C.P. No. 446 of 2011 (previously numbered as C.P. No. 679 of 2009 in the court of the Judge, Family Court, Cuttack) are filed by the respondent –wife under section 7(1) of the Family Courts Act and under section 18 of the Hindu Adoption and Maintenance Act, 1955 respectively seeking a decree for permanent injunction restraining the appellant-husband from getting married for the second time during her lifetime and subsistence of their marriage and for a direction to the appellant-husband to pay Rs. 15,000/- per month through the process of court as maintenance.

2. It appears from the impugned judgment that the learned Judge, Family Court recorded one set of evidence in all the three civil proceedings and appreciating such evidence passed the common impugned judgment.

In the application under section 13 of the Act, appellant-husband sought for dissolution of the marriage and for a decree of divorce, inter alia, pleading that the parties are Hindus governed by Mitakshyara School of Law, who got married on 7.7.2007 as per Hindu rites and customs at Binjharpur in the district of Jajpur. The appellant-husband is

the only son of his parents, who belongs to a respectable family and the marriage ceremony was performed with pump and gaiety at their house at Bidanasi and the parties led their marital life in the matrimonial house at Bidanasi. The father of the appellant-husband is a retired Bank Official and the appellant-husband has some private business dealing with Paints and Hardware. The substance in the grounds taken by the appellant-husband for passing a decree of divorce upon dissolution of the marriage are that the respondent-wife due to mental disorder behaves like a child of about 10 to 12 years old, the respondent-wife refuses and restricts consummation of the marriage even from the fourth night itself, she is unable to read and write though it was claimed at the time of marriage that she was qualified. At the time of marriage, there was fraudulent suppression of the fact that the respondent – wife is mentally under developed and was suffering from epilepsy. The above allegations were refuted by the respondent – wife in her written statement and counter allegations were made by her that there was demand of dowry by the appellant-husband and his family members, non-co-operation by the appellant-husband to lead happy family life, false plea of dowry-free marriage has been taken. But it was pleaded that she developed such disorder due to torture after marriage.

3. The learned Judge, Family Court took up the application for dissolution of marriage, i.e., C.P. No. 283 of 2011 as the main petition in which evidence was lead and in the common judgment has dealt with the said pleadings and evidence first. Upon dealing with the same, the learned Judge, Family Court came to the conclusion that from the pleadings, the marriage between the parties is admitted and the respondent-wife staying in her matrimonial house for certain period is also admitted. After analyzing the evidence adduced by the parties and hearing them, the learned Judge, Family Court came to the following findings:-

(a) The petitioner (husband) has not come up with clean hands; and

(b) there is no cogent ground established by the petitioner for passing a decree of divorce.

On the above findings, the learned Judge, Family Court dismissed C.P. No. 283 of 2011. Thereupon, he proceeded to decide C.P. No. 446 of 2011 which is filed by the respondent – wife under section 18 of the Hindu Adoption and Maintenance Act praying for a monthly maintenance of Rs. 15,000/-. Depending on the finding of non-sustainability of the grounds for passing a decree of divorce, the learned court below held that since the main civil proceeding for divorce goes against the appellant-husband, the only point to be determined in the proceeding for maintenance is as to whether the respondent-wife is entitled to get maintenance from the appellant-husband

as she is having no sufficient income. The learned court below came to the conclusion that the respondent-wife is dependant on her father, who is not a service holder and having no business, but, on the contrary, the father of the appellant-husband is a retired Bank Manager having their house at Cuttack and appellant-husband is the only son, who is having a Hardware shop along with Paints business and during marriage, he was given sumptuous dowry. Considering the above aspects, the learned court below directed payment of monthly maintenance of Rs. 2,000/- per month from the date of application to the respondent-wife. With regard to the application of the respondent-wife under section 7 (1) of the Family Courts Act, i.e., C.P. No. 445 of 2011, the learned court below again relying upon the non-sustainability of the claim of the appellant-husband for a decree of divorce came to the finding that in view of the said findings, the inference would be that the appellant-husband is to take back his wife or to pay maintenance and not to marry for the second time. Thus, holding, the learned court below allowed the said Civil Proceeding filed by the wife passing the following order:-

> "The Civil Proceeding No.283/2011 (C.P. 10/2009) filed by the husband petitioner U/s 13 of H.M. Act is dismissed on contest without cost.
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> Civil Proceeding No.446/2011 (C.P No.679/2009) filed U/s 18 of H.A & M. Act by wife petitioner against husband opposite party is allowed on contest without cast. Husband-O.P is directed to pay monthly maintenance of Rs.2000/- (two thousand) to the wife petitioner from the date of

application i.e. 12.08.2009 subject to adjustment of interim maintenance if paid.

Civil Proceeding no.445/2011(C.P No.97/09) filed by petitioner wife U/s 7 of Family court Act against the husband O.P is allowed on contest without cost. The husband-O.P is directed to take back his wife and he is restrained to marry for the second time".

4. During the course of hearing of these appeals, it was brought to the notice of this Court that around 21 cases have been filed by the respondent-wife against the appellant-husband out of which some are criminal cases initiated by the respondent – wife against the appellant-husband and his parents in which the parents of the appellant-husband were also taken to custody. Even some cases have been filed, i.e., civil suits, by the respondent-wife claiming right over the property of the appellant-husband. The particulars of those cases are C.S. No. 687 of 2008, filed before the learned Civil Judge (Senior Division) Ist Court, Cuttack and Misc. Case filed in the said Civil Suit, the two civil proceedings filed before the learned Judge, Family Court, Cuttack which were ultimately transferred to the Judge, Family Court, Jajpur and Misc. Cases filed in the said Civil Proceedings, G.R. Case No. 134 of 2009 before the learned S.D.J.M., Sadar, Cuttack, Criminal Misc. Case No. 866 of 2009 also filed before the learned S.D.J.M., Sadar, Cuttack under the Domestic Violence Act as well as Criminal Misc. Case No. 618 of 2010 before the said court under sections 9 and 12 of the said Act, another Civil Suit, being T.S. No. 241 of 2010 filed before the learned Civil Judge (Senior Division), Jajpur and

Misc. Cases filed therein, J.J.P. No. 94 of 2009 filed before the State Commission for Women, Case No. 1009 of 2009 filed before the State Human Rights Commission, I.C.C. No. 178 of 2010 converted to G.R. Case No. 342 of 2010 before the learned S.D.J.M., Jajpur as well as some writ petitions filed earlier before this Court.

5. Considering such nature of disputes between the appellant-husband and the respondent–wife, bereft of consideration of the evidence adduced in the Civil Proceedings in which the common impugned judgment has been passed, we are of the considered view that the marriage between the parties has become irretrievable and has broken down beyond repair.

6. We, therefore, propose to proceed in the above back-ground to analyze the law as to whether in such circumstances, the court should pass an order dissolving the marriage between the parties and passing a decree of divorce.

7. Learned counsel for the respective parties relied upon various judgments of the Hon'ble Supreme Court on the above question. Mr. Bhuyan, learned counsel for the respondent – wife contended that even if, it is held that the marriage has become irretrievable that cannot be a ground for passing a decree of divorce. On the contrary, Mr. Bose, learned counsel for the appellant-husband urged that in view of large number of cases filed by the respondent – wife against the appellant-husband

and in view of the fact that in one of such cases, the parents of the appellant-husband were arrested and taken to custody and they were ultimately released on bail by this Court, such conduct on the part of the respondent – wife amounts to mental torture and, hence, even if, the marriage cannot be dissolved on the ground of irretrievability, but the conduct of the respondent-wife clearly proves mental torture on the husband, which can be considered by this Court and on that ground, the marriage should be dissolved culminating in a decree of divorce.

8. Instead of referring to the various case laws and judgments of the Hon'ble Supreme Court on the above questions, we propose to rely upon the recent judgment of the Hon'ble Supreme Court in the case of ***K.Srinivas Rao v. D.A.Deepa,*** (2013) 40 SCD 84**,** the Hon'ble Supreme Court has dealt with several previous judgments of the said Court.

It appears that in the said case, the appeal was filed before the Hon'ble Supreme Court by the husband against a judgment of the Andhra Pradesh High Court by which the High Court set aside the decree of divorce granted in favour of the husband. The Hon'ble Supreme Court upon discussing the facts of the said case dealt with the conclusion of the family court, which found that the respondent-wife stayed in the husband's place only for a day and the story of demand of dowry of Rs. 10.00 lakhs is false basing upon which a petition was

filed by the wife against the husband and that by filing such false complaint against the appellant-husband and his family alleging offence under section 498-A IPC and by filing complaints against the appellant-husband, in the High Court, where he is working, the respondent –wife caused mental cruelty to the appellant-husband and that re-union is not possible. The Hon'ble Supreme Court took note of this direction of the family court directing the husband to return Rs. 80,000/- given by respondent-wife with interest at the rate of 8% per annum from the date of the marriage till payment. It appears from the facts of the said case that the judgment of the family court where a decree of divorce was passed was appealed against before the Andhra Pradesh High Court by the wife. The High Court, inter alia, observed that the finding of the family court with regard to lodging a complaint with the police against the appellant – husband amounts to cruelty is perverse because it is not a ground for divorce under the Hindu Marriage Act. The High Court further held that the appellant-husband and the respondent – wife did not live together for a long time and, therefore**,** the question of their treating each other with cruelty does not arise. The High Court came to the conclusion that the respondent – wife caused mental cruelty to the appellant-husband is based on presumption and assumption. In the result, the High Court set aside the decree of divorce granted by

the family court.

9. The Hon'ble Supreme Court tracing out the history of the matrimonial dispute and referring to its earlier judgment in the case of ***Samar Ghosh v. Jaya Ghosh*** (2007)4 SCC 511, where illustrative cases have been stated in which inference of mental cruelty can be drawn, quoted such circumstances, which are as follows:-

> "101-No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:
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> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
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> (iii) xxx xxx xxx
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> (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.
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> (v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.
>
> (vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) xx xx xx

(viii) xx xx xx

(ix) xx xx xx

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) xx xx xx

(xii) xx xx xx

(xiii) xx xx xx

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to severe that tie, the law in such cases, does not serve the sanctity of marriage, on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

It is pertinent to note that in this case the husband and wife had lived separately for more than sixteen and half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli"

10. In the case of Samar Ghosh (supra), the Hon'ble Supreme Court took note of the fact of the said cased that the husband and wife had lived separately for sixteen and half years. Taking the said fact along with other facts into consideration, it was held that the matrimonial bond has been

ruptured beyond repair because of the mental cruelty caused by the wife. A similar view was taken by the Hon'ble Supreme Court in the case of ***Naveen Kohli v. Neelu Kohli***, (2006)4 SCC 558.

11. Before referring to the aforesaid judgment, it was held by the Hon'ble Supreme Court in the case of K. Srinivas Rao (supra) in paragraph-10 thereof as follows:-

> "10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnization of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and outlined the scope of the term 'cruelty'. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental."

Different instances of mental cruelty involved in various decisions of the Hon'ble Supreme Court have been referred in the above judgment. The instance of mental cruelty given in the case of Samar Ghosh (supra) in paragraph-14, the Hon'ble apex Court has held as follows:-

> "14. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse."

Thereupon, the Hon'ble apex Court proceeded to apply the said order to the facts of the case before it and noted the various legal proceedings initiated by both sides against each other. Further, taking into note some statements made by the parties before the family court along with the cases filed by the wife, considered the effect of such events coupled with the fact that the parties are living separately for more than ten years, took note of the fact that pursuant to the complaint filed by the wife before the police, which was registered as a case under section 498-A IPC, the appellant-husband and his parents had to apply for anticipatory bail and noted their satisfaction that the marriage has irretrievably broken down while holding as follows:-

> "26. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.
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> 27. In V. Bhagat this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down.

While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind. In Naveen Kohli, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

28. In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the appellant-husband, there are hardly any chances of the respondent-wife leading a happy life with the appellant-husband because a lot of bitterness is created by the conduct of the respondent-wife.

29.In Vijay Kumar, it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This court observed that judged in the background of all surrounding circumstances, the claim appeared to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same".

Thus holding, the Hon'ble apex Court proceeded to assess a just amount to be paid by the husband as permanent alimony and granted a decree of divorce.

12. Applying the ratio of the aforesaid judgment to the facts of the present case, as discussed above, we also find that the parties are remaining separately for about more than six years by now and number of cases filed by the respondent – wife are grounds for drawing an inference of mental torture caused upon the appellant – husband by the respondent-wife and the matrimonial bond between the parties has been ruptured beyond repair because of mental cruelty caused by the respondent-wife. We, therefore, find that no fruitful purpose will be served by refusing a decree of divorce by dissolving the marriage between the parties. We, accordingly, set aside the common impugned judgment of the learned Judge, Family Court, Jajpur passed so far as C.P. No. 283 of 2011 filed under section 13 of the Act is concerned and direct that the marriage between the parties stands dissolved and a decree of divorce be passed.

13. In view of the above findings, the question of restraining the appellant-husband to re-marry does not arise and, therefore, the order passing permanent injunction against the appellant-husband injuncting him from getting married for

a second time in C.P. No. 445 of 2011 is set aside and the said C.P. No. 445 of 2011 stands dismissed.

14. With regard to the impugned judgment in relation to C.P. No. 446 of 2001 filed by the respondent – wife claiming monthly maintenance, in which the learned court below has directed payment of Rs. 2000/- as monthly maintenance from 12.8.2009, in view of an earlier order passed by this Court in a connected matter i.e., W.P.(C) No. 9982 of 2011 determining the monthly income of the appellant-husband as Rs. 4000/- per month, we feel it appropriate that the monthly maintenance as awarded @ Rs. 2000/- per month by the learned court below should be reduced to Rs. 1000/- per month payable from 12..8.2009 till the month of April, 2013 and direct accordingly.

15. Considering the above aspects, with regard to the earning capacity of the appellant-husband and his nature of occupation, we hold that upon passing the decree of divorce as directed above, the appellant-husband shall pay a permanent alimony of Rs. 3,00,000/- (Rupees three lakhs), which shall be paid by him in shape of drafts in four equal installments by the end of December, 2013 before the learned court below, drawn in the name of the respondent-wife. The arrear monthly maintenance payable from 12.8.2009 till the month of April, 2013, less the monthly maintenance already paid by the appellant-husband, shall be deposited by the appellant-husband before the court below by the end of August, 2013.

16. In the result, MATA Nos. 90 and 91 of 2011 stand allowed and MATA No. 92 of 2011 stands disposed of with the modification in the impugned order as indicated above;

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M.M. Das, J.

B.K. MISRA, J. I agree**.**

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B.K.Misra, J.

Orissa High Court, Cuttack.
May 17th , 2013/Biswal.