



IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.12 of 2023

Sandeep Kumar Senapati

....

Appellant

-versus-

Jyotirmayee Sahoo

....

Respondent

Advocate(s) appeared in this case:-

For Appellant : Mr. G. N. Parida, Advocate

For Respondent : Mr. A. P. Bose, Advocate

**CORAM: JUSTICE B.P. ROUTRAY
JUSTICE CHITTARANJAN DASH**

**JUDGMENT
26th March, 2025**

By The Bench.

1. Heard learned counsel for the Parties.
2. Present Appeal is directed against the judgment and order dated 21st December, 2022 of the learned Judge, Family Court, Khurda passed in C.P. No.147 of 2017, wherein the learned Court refused to grant decree of divorce to the husband.
3. The husband being the Petitioner before the Family Court, filed aforesaid Civil Proceeding praying for dissolution of marriage and grant of decree of divorce on the ground of cruelty and desertion. His allegation against the wife is that, the marriage which took place on 17th February 2016, could not be consummated due to non-cooperation of the wife. Both parties stayed together in the matrimonial house till 6th March 2016.



4. Conversely, the wife filed her Written Statement alleging that the marriage between her and the Appellant was well consummated on several occasions during their joint stay after the marriage in the matrimonial house till 6th March 2016. It is further alleged by the wife that the husband tried to have unnatural sex with her, which she protested. As a result of this, the husband has brought all such false allegation against her regarding non-consummation of the marriage. It is further stated by the wife that she filed an application for restitution of conjugal rights and is interested for reunion. However, in the meantime, the husband has re-married to another girl.

5. The allegations of re-marriage against the husband with another woman, is left uncontroverted as it is not specifically denied by the husband.

6. So far as the ground of cruelty and desertion is concerned, the term cruelty in a matrimonial proceeding includes mental cruelty also. Law is no more res integra on this aspect. The Hon'ble Supreme Court, in cases such as in **V. Bhagat Vs. D. Bhagat**, reported in (1994) 1 SCC 337, has observed that –

“15. If so, the question arises what kind of cruel treatment does clause (i-a) contemplate? In particular, what is the kind of mental cruelty that is required to be established? While answering these questions, it must be kept in mind that the cruelty mentioned in clause (i-a) is a ground now for divorce as well as for judicial separation under Section 10. Another circumstance to be kept in mind is that even where the marriage has



irretrievably broken down, the Act, even after the 1976 (Amendment) Act, does not permit dissolution of marriage on that ground. This circumstance may have to be kept in mind while ascertaining the type of cruelty contemplated by Section 13(1)(i-a).

16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be Determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

7. In the case at hand, admittedly the parties resided together till 6th March 2016 from the date of their marriage. It is the specific statement of the wife that the marriage was consummated for the first time on 20th February 2016 and thereafter regularly. The Appellant-husband denies consummation of marriage in his



pleadings. Therefore, according to the principles, the burden rests on the husband to prove the fact of non-consummation of marriage. It is well settled in ***Dr. N. G. Dastane Vs. Mrs. S. Dastane*** reported in **AIR 1975 SC 1534** that the burden of proof rests on the applicant in matrimonial proceeding to establish his/her case. The burden lies on the party who affirms the fact.

8. Upon examining the evidence on record regarding consummation of marriage, it is essential to consider the statements made by the husband (PW-1) during his cross-examination. He admitted the following: -

“...from the night of our marriage till the date of our separation, we both stayed in our bed room at our Nayapali residence...”; “... there was no whisper of disturbance between myself and my wife in those fifteen days, to be specific her behaviour towards me as well as to the parents was warm and cordial ...”; “... and she performed her part as an ideal daughter-in-law ...”.

It is also elicited from the mouth of the husband (PW-1) during his cross-examination that, *“... After ten days of my marriage, myself and my wife had been to Kendrapada to the residence of my father and stayed for four days. Myself and my wife had been to INOX, BBSR to watch a movie.... My wife used to cook food during her stay in our residence”*

9. In addition to the above, the wife’s allegation regarding the husband’s demand for unnatural sex was not challenged during her cross-examination as RW-1. Upon a thorough analysis



of the material evidences brought in this regard and based on the principles of preponderance of probability, the statement of the wife holds greater weight. She is found to have established through her statements regarding consummation of marriage by both the parties as well as demand for unnatural sex by the husband. It is needless to mention that in a matrimonial proceeding, the principle of preponderance of probability is the guiding factor. The test has to be applied on the relevant facts brought on record. It is the normal standard of proof to be applied for finding discharge of burden of proof. Upon scrutiny of the evidence of both the parties thoroughly, it is ascertained that the wife has successfully established her statement through relevant facts proved on the basis of principles of preponderance of probability. Hence, we find it proper to conclude that the marriage was consummated between the parties, and the allegations made by the husband against the wife in this regard are found untrustworthy.

10. As seen from the record, the husband (PW-1) and his father (PW-2) have admitted that the wife fulfilled her matrimonial duties in a normal manner. Not only was her behaviour normal, but she was also cordial towards her husband and in-laws. Furthermore, the husband's own evidence indicates that he has no interest in continuing the matrimonial relationship with the respondent-wife. He has explicitly stated that even if the wife were to behave and act like an ideal spouse, he would still refuse to accept her. Similarly, PW-2 has stated in his evidence



that he would not accept the respondent-wife as his daughter-in-law should she be willing to resume conjugal life.

When both the appellant-husband and his father admit that the respondent-wife was cordial towards her husband and in-laws, and there was no indication of any disturbance between them and that no specific instance of cruelty has been described against her, the entire allegation of cruelty made by the husband remains unsubstantiated. In other words, the allegations of cruelty made by the husband are found to be false.

11. With regard to the allegation of desertion by the wife, it reveals from record that she left for her parental home on 6th March 2016 as per custom and informed the appellant-husband, requesting him to take her back to the matrimonial home. However, the husband never made any effort to bring her back. While he does not dispute that the wife left her matrimonial home, it remains unrebutted that she had requested him to take her back. The conduct of both the husband and his father suggests that they were not interested in reinstating the wife in the matrimonial home or resuming marital life.

Moreover, the fact that the husband has since remarried, is also undisputed. We find no fault on the part of the wife to substantiate the husband's claim of desertion. On the contrary, the husband made no attempt to reconcile with her but instead proceeded to file for divorce, whereas the wife sought restitution of conjugal rights under Section 9 of the Hindu Marriage Act,



1955. In view of these facts, we find no merit in the husband's allegation of desertion by the wife.

12. The husband has further sought a decree of divorce on the ground of irretrievable breakdown of marriage. While the principles concerning this issue have been well established in various decisions of the Hon'ble Supreme Court, in ***Bishnu Dutta Sharma Vs. Manju Sharma*** reported in **2009 SCC 940**, the Court has held that, irretrievable breakdown of marriage is not provided by the legislature as ground for granting divorce and the Court cannot add such a ground under Section 13 of the Divorce Act as that would be amending the Act, which is the function of the legislature.

In the case at hand, keeping in view the conduct of the husband and the facts discussed above where he has deliberately refused to restore marital life despite the wife's willingness to reconcile, we find no justification for granting a decree of divorce on this ground. The wife has consistently expressed her interest in reunion, yet the husband and his family members have deliberately denied her the opportunity for the same. Furthermore, the husband's remarriage to another woman underscores his lack of genuine effort towards reconciliation. In such circumstances, he cannot claim a decree of divorce on the ground of irretrievable breakdown of marriage, as such conduct by one spouse cannot be used to their advantage in order to get a divorce.

13. In view of the discussion made above, we find no infirmity in the findings recorded by the learned Judge, Family



Court, Khurda and concur with the same. The Appeal is hence dismissed on merit.

(B.P. Routray)
Judge

(Chittaranjan Dash)
Judge

AKPradhan/Bijay

Signature Not Verified

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