

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No. 75 of 2016

Debasish Pattnaik **Appellant**

Mr. Bibekananda Bhuyan, Advocate

-versus-

Bani Bandana Das **Respondent**

Mr. R.N. Prusty, Advocate

MATA NO.76 OF 2016

Debasish Pattnaik **Appellant**

Mr. Bibekananda Bhuyan, Advocate

-versus-

Bani Bandana Das ... **Respondent**

Mr. R.N. Prusty, Advocate

CORAM:
JUSTICE S. TALAPATRA
JUSTICE M. S. SAHOO

ORDER
24.08.2022

Order No.

- 19.**
- 1.** This matter is taken up through hybrid mode.
 - 2.** The aforementioned appeals are combined for disposal by a common judgment.
 - 3.** In the appeal being MATA No.75 of 2016, the judgment dated 25.04.2016 delivered in C.P. No.08 of 2011 by the Judge, Family Court, Cuttack has been challenged and in the appeal being MATA No.76 of 2016, the judgment dated 25.04.2016 delivered in C.P. No.557 of 2014 has been challenged by the appellant.

4. At the outset, it may be noted that the matrimonial suit being C.P. No.08 of 2011 was instituted by the appellant for dissolution of marriage on the ground of cruelty, whereas the other C.P. No.557 of 2014 was instituted by the Respondent (wife) U/s.9 of the Hindu Marriage Act, 1955 for decree of restitution of conjugal rights. In the suit filed by the appellant, the ground that has been resorted to, is U/s.13(1) (i-a) of the Hindu Marriage Act, 1955, owing of non-consummation of marriage. In the other suit as instituted by the Respondent, the fundamental ground that has been taken is that without any reasonable cause, the appellant has been living separately by denying the respondent [in the appeal] her right to enjoy the conjugal right. Both the suits were for obvious reasons tried together. By the said judgment, the suit instituted by the appellant was dismissed on the ground that the suit was instituted before completion of one year of marriage and without leave in consonance with the provisions of Section 14(1) of the Hindu Marriage Act, 1955. As such, it has been held by the Judge, Family Court, Cuttack that the suit cannot be maintained and

it has to be dismissed as the suit was filed prematurely. However on appreciation of the facts as brought on records by the rival parties, the Judge, Family Court allowed the suit, instituted by the Respondent for restitution of conjugal rights directing the appellant herein to join the company of the respondent and resume conjugal life with her within a period of two months. Both the judgments as noted above have been challenged by the appellant by filing two different appeals, as noted above.

5. Mr. B. Bhuyan, learned counsel appearing for the appellant has submitted that the Judge, Family Court has failed to understand the purport and intent of Section 14 (1) of the Hindu Marriage Act, 1955. According to him, a suit can be instituted prior to completion of one year of marriage as the very provision is directory in nature. That apart, Mr. Bhuyan, learned counsel has submitted that the appellant had, subsequently, filed one application in terms of the proviso below Section 14(1) of the Hindu Marriage Act, seeking leave for institution of the suit

before expiration of one year of marriage. The Judge, Family Court ought to have allowed the prayer for leave for filing the matrimonial suit before expiration of one year, post ex facto and would have cured the irregularity on taking into consideration that Section 14(1) is in spirit directory. In support of his contentions, Mr. Bhuyan, learned counsel has referred two decisions. One is of the Madras High Court in the case of **Indumathi vrs. Krishnamurthy: [1999(1) CTC210]**. In that report, the Madras High Court had occasion to observe that Section 14(1) of the said Act is only directory and any irregularity in the procedure, in presentation of the petition for divorce, even in contravention of Section 14(1) of the Act is not fatal to the proceeding, unless manifest injustice is shown to have been caused to the respondent. Almost in the similar line a Division Bench of the Calcutta High Court in **Rabindranath Mukherjee vrs. Itee Mukherjee: III(1991)DMC 227(DB)** gave their opinion.

6. Mr. Bhuyan, learned counsel has submitted that non-consummation of a marriage for resistance or

inhibition or for any other factor which disrupts the cohabitation constitutes cruelty. It has been asserted by him that the appellant has successfully proved the cruelty that he had pleaded in the petition filed U/s.13(1)(i-a) of the Hindu Marriage Act, 1955. According to Mr. Bhuyan, learned counsel, for the serious defect in the sexual organ of the respondent, the appellant could not consummate the marriage and according to the appellant, the said fact was never told by the respondent to him before or after marriage. Mr. Bhuyan, learned counsel, having taken us to the opinion of the expert, has submitted that the respondent is unfit to consummate the marriage. Mr. Bhuyan, learned counsel, has contended that even the respondent disobeyed the medical advice given by the expert, Dr. S. Kanungo, who had examined the respondent on 10.08.2015. Therefore, according to Mr. Bhuyan, learned counsel for the appellant, not only the physical defects that the respondent has, but there was resistance from the respondent to cohabit. Dr. Kanungo is holding the senior position in the Department of Obstetrics and Gynaecology in SCB

Medical College and Hospitals, Cuttack. In the judgment, as pointed out by Mr. Bhuyan, learned counsel for the appellant, the opinion of Dr. Kanungo, Professor and H.O.D. in the Department of Obstetrics and Gynaecology, SCB Medical College & Hospital, Cuttack has been discussed exhaustively. Dr. Kanungo (P.W.6) appeared in the trial and testified in respect of her report (Ext. A & B). From the evidence of P.W.6, it surfaced that the respondent-wife has retroverted uterus, Grade-I. But she has definitively opined that retroverted uterus Grade-I cannot be an obstacle to maintain smooth sexual relationship between the couple and the wife, having retroverted uterus, is quite capable of normal sexual life. It cannot be said that that the respondent is unfit to have the sexual intercourse. While giving her evidence, P.W.6 has referred to the factors which may contribute to a phenomenon called retroversion of uterus. Those parts of the opinion are very relevant and as such, we will not go into further details about the expert opinion in respect of the matter.

7. Mr. Bhuyan, learned counsel for the appellant has submitted that since 2011, precisely from 10.08.2011, the spouses were living separately from each other and they were having no conjugal life. Thus, the marriage has become dead to such extent that, it cannot be retrieved and hence the parties do deserve relief from the misery of carrying on the lifeless marriage. The decree of divorce is an essential remedy in the circumstances. Mr. Bhuyan, learned counsel did not forget to mention that, not living together for such a long time makes the couple strangers. Even, the ground of desertion has been taken by the appellant, but the said ground could not be proved, inasmuch as the essential feature of desertion is *animus* in the relation and obligation to prove lies on the respondent, the petitioner in the proceeding below.

8. Mr. R.N. Prusty, learned counsel for the respondent has quite robustly submitted that when the matrimonial suit for divorce is itself not tenable in the eye of law, in terms of the provisions of Section 14(1) of the Hindu Marriage Act, 1955, the suit ought not have

been tried as the Court lacked jurisdiction in view of the expressed statutory bar in entertaining any suit before expiration of one year of marriage or without leave from the Court as provided by the proviso below Section 14(1) of the Hindu Marriage Act, 1955. The Judge, Family Court, Cuttack could not have entertained the suit at all. Finally, such order has been passed, but the similar order was to be passed at the threshold. The suit has dismissed for having filed prematurely. Mr. Prusty, learned counsel has extensively referred to Sections 14(1) and 14(2) of the Hindu Marriage Act, 1955 for the purpose of reference. Both the sub-sections of Section 14 are reproduced hereunder:-

“14. No petition for divorce to be presented within one year of marriage- (1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner

or of exceptional depravity on the part of the respondent, but, if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the Court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year.”

[Emphasis added]

It is apparent from Section 14 that “No petition for divorce to be presented within one year of marriage”, while Section 14(1) postulates further that notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed, since the date of marriage.

9. According to Mr. Prusty, there is no ambiguity in the provisions. The alternative that is available for presenting the matrimonial suit for divorce before expiration of one year has been provided under proviso to Section 14 of the said Act. The said proviso, *inter alia* postulates that application under this Section may be made for leave to present a petition for divorce before expiration of one year from the date of marriage, on the ground of severe hardship and in a situation where no probability emerges for reconciliation between the parties. In this regard, the rules as framed by the High Court of Orissa called "The Hindu Marriage & Divorce (Orissa High Court) Rules, 1956 has been referred by Mr. Prusty, learned counsel for the respondent. It has been provided under Rule-6 of the said Rules that *"where any party to a marriage desires to present a petition for divorce within one year of such marriage , he or she shall obtain leave of the Court U/s. 14 of the Act on ex parte application made to the Court in which the petition for divorce is intended to be filed."*

10. It is an admitted fact that at the time of presentation, no leave was available to the appellant as he did not apply for such leave under proviso of Section 14(1) of the Hindu Marriage Act, 1955. Mr. Prusty, learned counsel for the respondent has emphatically submitted that there is no infirmity in the finding as returned by the Judge, Family Court, which is under challenge in this appeal. Apart that Mr. Prusty, learned counsel has referred a decision of this Court in ***Saudamini Lenka @ Mohapatra vrs. Khageswar Lenka: 2001 (I) OLR 51.*** It has been observed in the said report having referred to Section 14(1) of the Hindu Marriage Act that leave can only be granted in the cases of “exceptional hardship” or “exceptional depravity”. In absence of leave, no suit can be entertained or maintained.

11. Having appreciated the rival contentions, what comes to the foreground is that the suit as instituted by the respondent for restitution of conjugal rights, was decreed, as sequel to dismissal of the suit for divorce. It further appears that the decree of

restitution of conjugal rights has been passed, having adopted a welfare attitude for reconstruction of the marriage that subsists between the appellant and the respondent. We are totally in agreement with Mr. Prusty, learned counsel for the respondent that the court did not have any duty to enter into the merit of the suit as there was no leave under proviso to Section 14(1) of the Hindu Marriage Act, 1955, as the suit was filed before efflux of one year from the date of marriage, which was solemnized on 16.05.2010. The suit was instituted on 03.01.2011. The other suit was filed on 27/25.10.2014 by the respondent.

Mr. Bhuyan, learned counsel for the appellant has strenuously argued that the provision of Section 14(1) of the Hindu Marriage Act, 1955 is to be considered directory in nature and any competent court at his discretion can allow one of the spouses to institute a matrimonial suit for divorce before expiration of one year. If such analogy is accepted, the specific provision for taking leave under Section 14(1) of the Hindu Marriage Act, 1955 will turn otiose. Under the rules of interpretation, a statutory provision

cannot be made otiose by way of interpretation, as it is the golden principle that what has been provided in the statute, has to be understood by its words and phrases, not otherwise. Interpretation may require when there is ambiguity or gap leading to the legal difficulty in implementing the statutory provision. No interpretation can substitute the statutory provision. The decision of two High Courts as aforementioned could not persuade us, as according to our considered opinion, those decisions are *per incuriam* vis-à-vis the provisions laid under Section 14(1) of the Hindu Marriage Act, 1955. As such, we are of the view that the suit instituted by the appellant was hit by the provision of Section 14(1) of the Hindu Marriage Act, 1955 and the findings as returned by the learned Judge, Family Court by the impugned judgment, therefore, cannot be faulted with. Hence, the appeal being MATA No.75 of 2016 stands dismissed.

12. Before parting with the records, we would like to note that P.W.6 has categorically stated that for the retroverted uterus, the consummation of marriage

cannot be affected adversely. To fortify, in this regard, we would like to go back to the report of the expert, where she has categorically stated that *“retroverted uterus Grade-I cannot be an obstacle to maintain smooth sexual relationship between the couple”*. Therefore, even the plea of cruelty would not sustain and the desertion as pleaded cannot be attributed to the respondent inasmuch as, we have noticed from the evidence of the respondent (D.W.1) that she had tried to re-unite with the appellant.

As far as the decision in the matrimonial suit being C.P. No.557 of 2014 is concerned, we find the finding returned by the Judge, Family Court is only natural. When the substantial ground of cruelty found no basis, it was the duty of the Judge, Family Court to make all attempts to re-unite the estranged couple and reconstruct their marriage. As such, we are reluctant to interfere with the finding, and the direction as passed in the said suit. Accordingly, the judgment dated 25.04.2016 as passed in C.P. No.557 of 2014 which has been challenged in the appeal being MATA No.76 of 2016 stands affirmed by us. As

consequence, the appeal being MATA No.76 of 2016 stands dismissed.

Decree be drawn accordingly.

Sent down the LCRs, if received, thereafter.

(S. Talapatra)
Judge

(M.S. Sahoo)
Judge



RRJena/GS