

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRREV No. 306 of 2002

From the judgment and order dated 08.07.1998 of Civil Judge (Sr. Division) -cum- J.M.F.C., Bonai in G.R. Case No.246 of 1994 (Trial No.403 of 1995) and the judgment and order dated 13.02.2002 of Adhoc Addl. Sessions Judge, Sundargarh in Criminal Appeal No.33/235 of 1998.

1. *Malay Sarkar*
2. *Nibaran Sarkar(dead)*
3. *Nirmal Sarkar*
4. *Smt. Dukhi Dei*

.....
Petitioners

Versus

State of Orissa

.....
Opp. Party

Advocates appeared in this case through Hybrid Mode :

For Petitioners : Mr. B.K. Sharma, Advocate

For Opp. Party : Mr. Sibani Shankar Pradhan,
Addl. Govt. Advocate

CORAM:

JUSTICE SAVITRI RATHO

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Date of Judgment :19.09.2022
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Savitri Ratho, J.

This Criminal Revision has been filed by the petitioners challenging the judgment and order dated 08.07.1998 passed by learned J.M.F.C., Bonai in G.R. Case No.246 of 1994 (Trial No.403 of 1995), convicting them under Section – 498-A IPC and sentencing them to undergo R.I. for a period of one year each and further sentencing Petitioner no.1 Malay Sarkar to pay a fine of Rs.3000/, in default to

undergo imprisonment for a period of six months more with a direction that the amount would be remitted to the victim, P.W.2 as compensation under Section 357 of Cr.P.C. Their conviction and sentence has been confirmed by the learned Adhoc Addl. Sessions Judge, Sundargarh in Criminal Appeal No.33/235 of 1998 vide judgment dated 13.02.2002.

2. Petitioner No.1 Malay Sarkar is the husband of the victim Purnima Sarkar P.W.2, Petitioner No.2 Nibaran Sarkar is her father-in-law, Petitioner No.3 Nirmal Sarkar is her brother-in-law and Petitioner No.4 Smt. Dukhi Dei is her mother-in-law.

3. Mr. B.K. Sharma, learned counsel for the petitioners has submitted that the Petitioner No.2, Nibaran Sarkar has expired on 10.02.2005, during pendency of this revision. Accepting his statement, this revision is confined to Petitioner No.1 Malay Sarkar, Petitioner No.3 Nirmal Sarkar and Petitioner No.4 Smt. Dukhi Dei.

4. The prosecution case in brief is that Purnima P.W.2 was married to Petitioner no.1 Malaya Sarkar on 21st June, 1991 at Panposh, Rourkela. After the marriage they happily lived as husband and wife at Chandrapur for some time. Malay Sarkar was working as Compounder at Chandiposh and was staying there in a rented house and he would come to Chandrapur frequently. Purnima was staying with his parents at Chandrapur. After one year of the marriage the petitioners and sister of

Malay started ill treating Purnima. They assaulted her and deprived her of adequate food and clothing. She informed her parents, brother and other relatives about this ill-treatment orally and in her letters. On 10.08.1993 she was driven away from her matrimonial home. This fact was reported at Chandiposh Out-Post but the matter was amicably settled. For some days Purnima Sarkar came and stayed with her parents. Thereafter, the husband of Purnima and his parents refused to take her back to their house. The matter was taken to the Family Court, Rourkela. On 24.04.1994 the case was compromised in the Lok-Adalat. After the compromise in the case, Purnima was taken to the house of her parents-in-law. But the ill treatment was repeated. She was not allowed to go to her parent's house on the occasion of the marriage of her younger sister. On 10.07.1994 the father-in-law and brother-in-law of Purnima assaulted her. On 07.08.1994 when the brother and other relatives of Purnima went to bring her back to their house, they found Purnima alone. The store room was locked and Purnima was found with only dried wheat to eat. No other provisions were given to her for her sustenance on that day. Thereafter, on 08.08.1994 P.W.1 Biswanath Das her brother submitted a written report at Banki Police Station and a case under Section 498-A of the I.P.C. was instituted against the husband, his parents and brother in law.

In course of investigation, the I.O. seized four letters written by P.W.2 to her parents, the Station Diary of Chandiposh Out-Post containing S.D.E. No. 166 and No.170 dated 11.08.1993. He also seized the joint photograph of Malaya Sarkar and P.W.2, certified copy of the order passed by the learned Family Judge, Rourkela in M.C. No.87 of 1993 along with the certified copy of the compromise petition filed by both the parties. He submitted chargesheet against the petitioners for commission of offence under Section – 498 –A IPC.

5. Charge was framed against the petitioners under Section – 498- A IPC. Their plea was one of denial.

6. In order to prove its case, the prosecution examined fourteen witnesses. P.W.1 Biswanath Das is the brother of the victim and the informant. P.W.2 Purnimarani Sarkar is the victim. P.W.3, Subal Chandra Das is the father of the victim. P.W.4 Geetarani Das is the cousin of the victim. P.W.5 is Chinta Das and P.W.7 Jyotinarayan Sahu are neighbors of the parents of P.W.2. P.W.6, Rekharani Das is the mother of the victim, P.W.8 Smt. Basanti Dei and P.W.9 Brajamohan Dutiachand are neighbours of the accused persons and did not support the prosecution case. P.W.10 Duryodhan Pradhan and P.W.11 Parameswar

Samanta are neighbours of the accused persons. P.W.12 Harekrishna Kalo is a constable of Banki Police Station. P.W.13 Sudharani Pradhan is the Medical Officer, R.G.H., Rourkela and P.W.14 Nihar Ranjan Das was the IIC of Banki Police Station.

The defence has examined one witness Rabinaryan Sahu (D.W.1).

The prosecution exhibited nine documents. Ext.1 is the F.I.R., Exts.2, 3 and 4 are the letters of P.W.2, Exts.5, 7 and 9 are the seizure lists, Ext.6 is the injury report and Ext.8 is the Zimanama.

7. The learned Trial Court found the petitioners guilty under Section 498-A of the Indian Penal Code and sentenced them to undergo R.I. for a period of one year each. Petitioner no.1 Malay Sarkar was sentenced to pay a fine of Rs.3000/, in default to undergo for a period of six months more with a direction that the amount if realized would be remitted to the victim, P.W.2 as compensation under Section 357 of Cr.P.C. Taking into account the financial condition of the other convicts no separate sentence of fine was imposed. The learned trial court refused to release the petitioners under the Probation of Offenders Act taking into account the nature of the offence which was one against the victim as well as the society. The period if any undergone during trial was directed to be set off.

8. Criminal Appeal No.33/235 of 1998 filed by the petitioners was heard and dismissed by the learned Adhoc Addl. Sessions Judge, Sundargarh by judgment dated 13.02.2002.

9. Mr. B.K.Sharma, learned counsel for the petitioners referring to the evidence on record submits that the evidence is lacking so as to attract the offence for the commission of which the accused persons have been convicted. He has forcefully argued that P.W.2 the victim has not made any specific allegation against Petitioner No.1 her husband so as to make out an offence under Section 498- A IPC, but both the Courts below have committed manifest error in convicting him. The impugned judgments are therefore liable for interference and his conviction is liable to be set aside. He has also submitted that Petitioner No.2 Nibaran Sarkar has died on 10.02.2005. Petitioner No.4 Smt Dukhi Dei is now aged about 80 years old. He has urged that twenty eight years having elapsed since the FIR was lodged on 08/08/1994 and the petitioners having been granted bail during the trial, Appeal and during pendency of the Revisions, it would be a travesty of justice to send the three surviving petitioners to prison, in case their conviction is confirmed and they may be extended the benefit of the Probation of Offenders Act. He relies on the decisions of the Supreme Court in the case of *Surendran vs. Sub-Inspector of Police* reported in *SCC Online SC 445*

and *A.P. Raju vs. State of Orissa* reported in *1995 Supp (2) SCC 385* and the judgment of the Allahabad High Court in *Munna Lal @ Munna Babu vs. State* reported in *2006 SCC Online All 1828* in support of his submissions that petitioners should not be sent to jail when so many years have elapsed since the incident.

10. Mr. Sibani Shankar Pradhan, learned Addl. Govt. Advocate submits that the impugned judgments do not call for any interference, for which the Criminal Revision should be dismissed. He has also submitted that no indulgence should be shown to Petitioner No.1 Malaya Sarcas as he is the husband and should have taken care of his wife and having an extra marital affair also amounts to cruelty.

11. Although scope of interference by the High Court in a conviction which has been confirmed by the Appellate Court is not very wide, on perusal of the judgments of both the Courts below, I find that the trial court has not discussed the evidence of the witnesses in detail. Therefore, in order to be satisfied that the learned Courts below have correctly assessed the evidence, I find it necessary to peruse the evidence of the witnesses.

P.W.1 Biswanath Das, brother of the victim and the informant in this case. He has stated that the marriage took place on 10.08.1991. While his sister stayed at her marital house at Chandrapur,

her husband was staying at Chandiposh where he was serving at Chandiposh Hospital and came often to his house. They lived happily for one year. He has stated that P.W.2 had written a letter to his father narrating the torture meted out against her by her in-laws. She had written that her father-in-law, mother-in-law and brother-in-law were not giving her food and were harassing her in many ways. He along with his mother had been to the house of accused at Chandrapur where P.W.2 told that the accused persons were assaulting her without providing food and requested them to take her to their house. When asked, her father in law denied the allegation. P.W.2 had lodged a complaint before the Judge, Family Court, Rourkela and his father had lodged a report at Chandiposh Out Post. In the Family Court, the accused agreed to keep his sister with him but did not take her to the place of his service but forced her to stay in his house. He also stated that accused Malay had illicit affairs with another lady and his sister had detected a letter to such lady in his pocket which he snatched away. He proved the FIR, Ext. 1 and his signature Ext. 1/1. In cross examination, he has stated that he used to visit his sister often and the accused behaved properly with him. He has admitted there is no quarter facility in Chandiposh. Her husband used to visit his sister once a week and a son was born to them. He has denied that false allegations have been made against the accused persons after coming to

know mother in law of his sister was adivasi and that accused Malay wanted to take back his wife and child but they were not allowing.

P.W.2 Purnimarani Sarkar is the victim. She has stated that in the month of August 1993 all the accused persons except her husband and her sister-in-law assaulted her and they have assaulted her on many occasions and her in-laws used to tell her faults to her husband and were assaulting. The assault and torture was reported at the Police Station and she had filed case in the family Court at Rourkela. As per order of the Family Court, she went and stayed with her husband for five to six days. He did not keep marital relations with her and her in laws tortured her. They assaulted and tortured her when they found fault with her. Her husband was staying at the place of his service i.e. Chandiposh and to visit her once in ten days or two weeks and he had no illicit connection with any girl. She has stated that she has not gone to the house of the in-laws as they are not coming to take in a gap. She has stated that she had written to her father describing the ill treatment meted out to her and proved the three letters Ext 2 to 4. Her mother, aunt and elder sister had come to their house after that. In cross-examination at paragraph 2, she has stated that she had stayed with her husband for one month at Chandiposh, when assaulted and abused her after which she was taken to her matrimonial home. After that she filed the case in the Family Court

and compromise was effected, after which he took her to his house. She has denied the suggestion that as her mother in law is a adivasi, she did not want to stay in their house and has made false allegations.

P.W.3 Subal Ch. Das is the father of the victim. He has stated about the marriage in 1991 and about P.Ws pregnancy and birth of a son at his house after which he took them and left them in her in laws house and that P.W 2 came back after 15 days stating that her parents in law had driven her out and snatched the child. He had gone to his son in law at Chandiposh with other relatives and P.W.2 but he misbehaved with them. He asked the school master and the doctor to advise him, but to no avail. So he lodged FIR at Chandiposh Out Post and then approached the Family Court and there was a compromise and his son in law took his daughter to his house. After four to five days she was again assaulted. They did not attend the marriage of his daughter in spite of invitation. After ten to fifteen days he sent his wife, brother's wife, son, daughter Kalpana, Miss Smita to the house of accused where they found P.W.2 in a state of mental imbalance and seeing them she started crying and requested to take her to his house. His son went to Banki P.S. to lodge report but as the Inspector was not there, he lodged the report the next day. His daughter had sent him letters describing the assault on her,

marked as Exts. 2 to 4 and she was staying in his house being assaulted by her in laws in her matrimonial house.

P.W.4 Geetarani Das is cousin of the P.W.2. She has stated that when she went with other relations to house of P.W.2, they found that she was preparing her food of dried wheat and started crying on seeing them and said that her parents in law and brother in law were assaulting her. She told them that her husband was keeping relationship with another girl and her parents wanted her to marry her brother in law Nirmal Sarkar. Then they went to the Police Station.

P.W.5 Chinta Das has stated about the accused persons not coming for the wedding of her sister and when they went to her house, they found alone and eating dry wheat. She started crying and told them that the accused persons were assaulting her and not giving her food. Her husband had extra marital affair with another lady and was threatening to kill her if she disclosed about the torture and ill treatment to her family members.

P.W.6 Rekharani Das is the mother of the victim. She has stated that victim was staying in their house as the accused persons assaulted her and did not give her food. She has stated that they had gone to her house as they did not come for the wedding of her younger daughter. When asked, P.W.2 said that she was assaulted when she had

asked to go for the marriage. They lodged FIR. Purnima had written letters telling them about the assault and not being given food.

P.W.7 Jyotinarayan Sahu has spoken about Purnima (P.W.2) residing in her parents house as she was assaulted by her husband. In cross examination he has stated that he came to know about the incident from P.W.2.

P.W.8 Smt. Basanti Dei and P.W.9 Bhibhisani Dutiachand who are neighbours of the accused persons did not support the prosecution case for which they were declared hostile.

P.W.10 Duryodhan Pradhan and P.W.11 Parameswar Samanta neighbours of the accused persons presents have stated that Purnima is staying in her father's house at Panposh though married to accused Malay.

P.W.12 Harekrishna Kalo is a constable of Banki O.I.C. and witness to seizure regarding the papers of family Court under Ext.5 from the house of P.W.1.

P.W.13 Sudharani Pradhan is the Medical Officer, R.G.H., Rourkela and she medically examined P.W.2 and found no external injury on her person and submitted her report Ext.6.

P.W.14 Nihar Ranjan Das was the Inspector in Charge of Banki Police Station. He has stated that on the report of one Biswanath

Das, he registered this case and took up investigation. Ext.1 is the report. During investigation, he examined the witnesses, visited the spot, examined the victim lay and on 09.08.1994, he arrested the accused persons forwarded them to Court on the next day and he sent the victim lady for her examination to RGH, Rourkela. He has also stated about seizing the SDE No. 166 and SDE No. 170 dated 11.08.1993 under Ext.7 seizure list. The gist of SDE 166 was that the victim had gone to her father's house on account of misbehavior by her parents in law and brother in law and the next SDE was about compromise between them. He has stated about seizure of the three letters written by her to her father and seizure of the joint photograph with her husband Malaya, marriage invitation card, petition in misc case No 87 of 1993 filed by Malaya in Family Court vide seizure list Ext.9 from Subal P.W.3 and order passed by the Family Judge from P.W.1 Biswanath vide seizure list Ext.5.

D.W.1 Rabinarayan Sahu has stated that after marriage Purnima was staying in the house of accused persons. Then for one year she stayed with her husband at Chandiposh as her husband was working as Pharmacist there. He did not know anything about the ill-treatment caused to her by the accused persons. There was no discussion in the village concerning the torture on her by the accused persons. He further stated that he has no knowledge about any specific ill-treatment by

mother of Malaya who is Kisan by caste. He has also stated that Purnima is blessed with a son and after the birth of that son she did not return to the house of accused persons and he had heard that the accused persons had gone twice to invite her to their house.

12. After a careful perusal of the evidence of the witnesses which has been narrated above, it is apparent that neither the victim P.W.2, nor her parents or even her brother have made any allegations of assault or torture by Petitioner No.1 Malaya. Many of the witnesses have stated that Petitioner No.1 was having an extra marital affair with another woman. But the victim P.W.2 has specifically denied the same. So it is not necessary to deal with the submission of the learned Additional Government if having an extra marital affair will constitute an offence under Section 498- A IPC. In her cross examination P.W.2 has stated about being tortured when she spent a few days with her husband him, but she has stated that after that there was a compromise in the Court of the Judge, Family Court, Rourkela. But P.W.2, her brother P.W.1, her parents P.W.3 and P.W.6 respectively, have consistently stated about the torture and assault by the parents in law and brother in law which has not been shaken in cross examination .

13. I am therefore satisfied that a case under Section – 498 A IPC is made out against Petitioner Nos. 2, 3 and 4. But as regards

Petitioner No.1 Malaya Sarkar, except a stray statement during cross examination by P.W.2, she has not stated that he had assaulted or tortured her. It is true that P.W.5, P.W.6 have made omnibus allegations that the accused persons were assaulting and torturing P.W.2 but when P.W.2 has specifically stated about assault and torture by her parents in law and brother in law but left out her husband - Petitioner No.1 Malay Sarkar, his conviction under Section 498- A IPC cannot be sustained merely because he is her husband . His conviction is under Section – 498 A IPC is therefore vulnerable and I accordingly set aside the same.

14. In **Surendran** (supra), the accused had been convicted for commission of offences under Section – 379, 338 IPC. The Supreme Court held as follows:

.....“10. The incident took place on 16.02.1995 i.e. more than 26 years ago. It appears that appellant was throughout on the bail. The Trial Court after marshalling the evidence has recorded the conviction under Section 279, 338 and awarded sentence of imprisonment of six months and further sentenced to pay a fine of Rs.500/- under Section 337.

11. We do not find any error in conviction recorded by the Trial Court. The conviction of appellant is affirmed, however, looking to the facts and circumstances of the present case specially the fact that 26 years have elapsed from the incident, we are inclined to substitute the sentence of six months imprisonment under Section

279 and 338 into fine. Six months sentence under Section 279 and 338 IPC are substituted by fine of Rs.1000/- each whereas sentence of fine under Section 337 IPC is maintained.”

In the case of **A.P Raju** (supra), the Supreme Court held as follows:

“6. Coming now to the question of sentence – the occurrence took place almost 15 years ago on 20-05-1979. The appellant was acquitted by the trial court on 13-3-1981. After he was convicted by the High Court he filed the special leave petition and on 18-11-1985, leave was granted and while staying the operation of the judgment, bail was also granted to the appellant by an order of this Court dated 18-11-1985. For the last more than 8 years the appellant has therefore been on bail granted by this Court. Taking in view all these factors, in our opinion, the interest of justice would be met if instead of now sentencing the appellant to serve a term of imprisonment and sending him to prison again, we order his release under Section 360 Criminal Procedure Code on the appellant’s entering into a bond with one surety to keep good conduct and be of good behavior and keep peace for a period of one year from the date of execution of the bond. We make an order accordingly. The bond shall be executed by the appellant within one month from today the trial court. With the above modification of sentence, the appeal is disposed of.”

In the case of **Munna Lal** (supra), the Allahabad High court held as follows:

...“9. This has left the revisionist with convictions under 337, 338 and 304A IPC with sentences for a maximum punishment of 3

years on the whole. To send the revisionist to jail for such a short period after two decades of interval will not serve any useful purpose. It will not be in the interest of justice to send him to jail for some offences committed by him more than twenty-four years before. At present the revisionist is aged about 55 years of age and has settled down in his life. There had been no other complaints of any other kind against him during this interval. In this view of the matter, I consider it appropriate to convert the sentences of imprisonment awarded to the revisionist Under Section 337, 338 and 304A IPC into one of fine on various counts. Looking to the job of the revisionist and his status in society his sentence of six months RI Under Section 337 IPC substituted for a fine of Rs. 2,000/- (Two thousand) only, his sentence Under Section 338 IPC for one year RI substituted with a fine of Rs 4,000/- (Four thousand) only and his sentence Under Section 304A IPC for 2 years RI and a fine of Rs. 1000/- substituted with a fine of Rs. 15,000/- (Fifteen thousand) with further direction that out of the said total amount of fine of Rs. 20,000/-; Rs. 9,000/- (Rs. Nine thousand), each be paid as compensation to each of the legal heirs of the two known deceased persons will meet the ends of justice.”

15. In view of the fact that twenty eight years have elapsed since the date of occurrence and as Petitioner No. 4 Smt Dukhi Dei is a woman and will be around eighty years now, I am of the considered view that it would be proper to grant her the benefit of the Probation of Offenders Act. As regards Petitioner No.3. Nirmal Sarkar, I find that he was arrested during investigation on 10.08.1994 and was released on bail on

24.08.1994 by the learned trial Court. Twenty eight years have elapsed in the meanwhile. He has been granted bail during pendency of the appeal as well as during pendency of the Criminal Revision. He was aged about 30 years when judgment was pronounced by the trial Court in 1998. So he will be aged about 54 years now. After lapse of almost three decades since he was enlarged on bail, I do not think it would be in the interest of justice to send him to jail to serve out the remaining period of his sentence. Therefore, while confirming his conviction under Section 498-A, I modify the sentence to the period undergone and direct him to pay a fine of Rs.5,000/-, (Rupees Five Thousand only) which if realized shall be paid to the victim Purnima Sarkar. In case of failure to deposit the fine, he shall be taken to custody to serve the remaining part of the sentence imposed on him by the Courts below. As petitioner No.2 Nibaran Sarcar is reportedly dead no order is required to be passed regarding his sentence. As the three petitioners are on bail, their bail bonds be cancelled.

16. The Criminal Revision is accordingly disposed of.

17. Lower Court records be sent back forthwith.

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(Savitri Ratho)
Judge

Orissa High Court, Cuttack
Dated 19th September, 2022 / Sukanta