AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.10 of 2022 and MATA No.30 of 2022

MATA No.10 of 2022

Smt. Geetabai Jain .... ***Appellant***

-Versus-

Kamal Kishore Agrawal .... ***Respondent***

For Appellant : Mr. Suryakanta Dash, Advocate

For Respondent : Mr. Upendra Ku. Samal, Advocate

MATA No.30 of 2022

Kamal Kishore Jain @ Agrawal .... ***Appellant***

-Versus-

Geetabai Jain .... ***Respondent***

For Appellant : Mr. Upendra Ku. Samal, Advocate

For Respondent : Mr. Suryakanta Dash, Advocate

CORAM:

JUSTICE ARINDAM SINHA
JUSTICE M.S. SAHOO

J U D G M E N T

Dates of hearing: 14th November, 2023 and 6th February, 2024
Date of judgment: 6th February, 2024

ARINDAM SINHA, J.

1. Mr. Dash, learned advocate appears on behalf of appellant-wife. He submits, by impugned common judgment his client's civil proceeding for divorce met with direction for judicial separation. Respondent-husband's counter claim for restitution of conjugal rights was accordingly not allowed. Mr. Samal, learned advocate appears on behalf of respondent, who has preferred independent appeal against the common judgment.

2. Mr. Dash submits, fact of cruelty was pleaded in paragraphs-7 to 10 of the petition. The paragraphs are reproduced below.

> *"7. That the petitioner, respondent and new born child again gone to Cuttack in the month of January 2010 and during their staying the respondent and the family members started torture both physically and mentally one year, but the petitioner was tolerate with a hope that the respondent will change his behaviour and everything will be normalized.*
>
> *8. That the respondent instead of changing his behaviour and attitude started brutally assault the petitioner for which the* ***petitioner lodged a complaint against the respondent at Boxi Bazar police station, but the police advised the***

> ***petitioner to resolve your matter amicably so with a hope the returned and stayed with the respondent till February 2011***.
>
> *9. That the respondent continued ill-treatment to the petitioner in a cruel and violent manner regularly and declined to provide basic amenities like food, medicine, clothes etc. to herself and infant baby.*
>
> *10. That the respondent started picking-up silly quarrels for each and every thing and started beating by abusing un-parliamentary words to the petitioner as such the petitioner without getting any alternative she returned to Bhawanipatna.* ***In the month of March 2011 and since then the petitioner is staying with her parents.***

(emphasis supplied)

3. He draws attention to paragraphs-6, 13 and 14 in the written statement filed by respondent-husband. He demonstrates therefrom firstly, false allegation of conditions put by his client for shifting to Sindhekela is continuation in corroboration of the cruelty. Secondly, respondent-husband himself said in paragraphs-13 and 14, sometime in year 2011, his client with her son had gone to her parents' house. Long thereafter in May, 2016 respondent-husband had gone to his father-in-law's house to bring back his client but allegedly his father-in-law refused. From all this it is clear that the record in

paragraph-25 of deposition dated 15th April, 2019 in cross-examination of his client saying she continued to stay in her matrimonial home till March, 2017, is clearly incorrect. He seeks reversal of impugned judgment.

4. Mr. Samal submits, there was finding in impugned judgment, of inability on part of appellant-wife to have established cruelty. In the circumstances, she had no reason to have left society of his client. On the top of that his client had filed counter claim for restitution and the family Court erred in not decreeing the claim. In the face of such finding on facts, appellant, if does not want to join society of his client, she may have divorce but cannot claim permanent alimony or maintenance. His client however, will provide for the son.

5. In paragraphs-7 to 10 of the petition allegations of cruelty were made. On query made we have ascertained from Mr. Dash, appellant-wife visited the police station at Buxi Bazar in January, 2010 and on being advised by the police to resolve her matter amicably, she returned and stayed with respondent-husband till February, 2011. It is pleading of

appellant-wife herself. The implication is that her allegation of physical violence was not considered to be serious enough by the police to act upon and thereafter she stayed with her husband for another year. It is no wonder that the family Court threw out her plea of cruelty, to reject her claim for dissolution of the marriage.

6. Section 10 in Hindu Marriage Act, 1955 provides for judicial separation while the previous section provides for restitution of conjugal rights. The provision for judicial separation is that a petition may be presented on any of the grounds specified in sub-section (1) of section 13 and in case of wife, also on any of the grounds specified in sub-section (2) thereof. Here, none of the parties had filed for judicial separation. Where the wife had filed for divorce invoking clause (i-a) under section 13(1) and the family Court having directed judicial separation, it could only be on that ground. The contradiction is, said Court itself rejected the ground. It follows there could not be direction for judicial separation.

7. So far as the husband's claim for restitution of conjugal rights is concerned, impugned judgment was made on 23rd March, 2021. The position is that the parties did not ever stay together, at least after March, 2017. It is not necessary for us to decide on fixing the point in time, when separation occurred, whether in February/March, 2011 as pleaded by the wife in her petition or March, 2017 as recorded in her deposition in cross-examination. Fact is, respondent-husband did not apply for divorce under clause (i) in section 13 (1-A). He being aggrieved had promptly preferred appeal on rejection of his claim for restitution. Hence, submission of Mr. Samal that appellant-wife having herself left society of his client, she can have divorce without claim for permanent alimony. Desertion is abandonment of the marriage and repudiation of the obligations. As such, submission that appellant-wife cannot claim permanent alimony or maintenance. In this context we ascertained from the parties that there was no maintenance proceeding.

8. Impugned judgment is modified to effect that the counter claim of respondent-husband is decreed under section 9, for restitution of conjugal rights.

9. Mr. Dash submits, this modification ought not to be made but there be direction for remand. He relies on impugned judgment regarding issue no.4. We do not accept the submission because there has been finding of absence of cruelty, which on perusal of the pleadings and evidence, is hereby confirmed.

10. Section 23-A, as applicable to the case, provides that in the proceeding for divorce, respondent-husband may not only oppose the relief sought by petitioner on ground of cruelty but also make a counter claim. The second part of the provision, on application to the case, is that on petitioner's desertion proved, the Court may give to the respondent any relief under the Act, to which he would have been entitled if he had presented a petition seeking such relief on the ground. Appellant-wife had alleged cruelty but could not prove it. Respondent-husband had counter alleged before the family Court, appellant-wife had

deserted him and he sought relief of restitution. Where appellant-wife could not prove cruelty, consequence is of her having left society of respondent-husband without justifiable cause. In the circumstances, there is proof of desertion on facts established. By the explanation in section 9 the burden of proving reasonable excuse for desertion was also cast upon respondent-wife. Hence, our relief granted to respondent-husband, of restitution of conjugal rights as counter claimed by him.

11. Impugned judgment is modified in confirming the finding on fact and decreeing the counter claim of respondent-husband for restitution of conjugal rights. The decree be drawn up expeditiously.

12. The appeals are disposed of.

(Arindam Sinha)
Judge

(M.S. Sahoo)
Judge

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