

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.353 of 2023

AFR

.... *Appellant*

-Versus-

.... *Respondent*

Advocates appeared in this case:

For Appellant : Mr. Lalitendu Mishra, Advocate
Mrs. Chandana Mishra, Advocate
Mr. S. Acharya, Advocate
Mr. S.K. Singh, Advocate
Ms. J. Sahoo, Advocate
Ms. S. Patnaik, Advocate

For Respondent : Mrs. Sujata Jena, Advocate
Mrs. B. Sahu, Advocate
Mrs. S. Panda, Advocate

**CORAM: JUSTICE ARINDAM SINHA
JUSTICE SIBO SANKAR MISHRA**

J U D G M E N T

**Dates of hearing: 23rd November, 2023, 6th December, 2023
and 21st December, 2023**

Date of Judgment: 21st December, 2023

ARINDAM SINHA, J.

1. Appellant-husband being aggrieved with judgment dated 22nd September, 2023 of the family Court is before us in appeal.

Mr. Mishra, learned advocate appears on behalf of appellant and submits, by the judgment his client's civil proceeding for dissolution of the marriage was dismissed. The dismissal was in face of also dismissed counter claim of respondent-wife for restitution of conjugal rights. The contradiction is apparent.

2. He submits, several grounds were taken in the petition. In appeal his client is urging only ground of non-consummation of the marriage and denial of physical intimacy as mental cruelty. He relies on judgment of the Supreme Court in **Samar Ghosh v. Jaya Ghosh**, reported in (2007) 4 SCC 511, paragraph 101, illustration-(xii).

3. We had heard this appeal on 23rd November, 2023 and 6th December, 2023. Text of orders made on those days, for notice to parties, are reproduced below.

23rd November, 2023

“1. Mr. Mishra, learned advocate appears on behalf of appellant-husband and Ms. Jena, learned advocate for respondent-wife.

2. We have heard opening submissions of Mr. Mishra. We have perused parts of the petition, written statement and paragraph 80 from deposition of cross-

examination of respondent-wife held on 11th April, 2023.

3. By consent list on 6th December, 2023.”

6th December, 2023

“1. Mr. Mishra, learned advocate appears on behalf of appellant-husband, who is aggrieved because the family Court did not grant divorce. Ms. Jena, learned advocate appears on behalf of respondent-wife. We have heard them.

2. We have perused, inter alia, paragraphs-5(g) and 5(h) in the petition. The allegation therein has been dealt with in paragraph-14(g) of the written statement. It appears therefrom respondent-wife alleged consummation on 9th February, 2014 but thereafter she was afraid of intimacy.

3. We have also seen deposition in cross-examination of respondent-wife, inter alia, paragraph-60, questions 69 and 70, paragraph-71 and 79 to 81.

*4. Mr. Mishra relies on judgment of the Supreme Court in **Samar Ghosh vs. Jaya Ghosh**, reported in **(2007) 4 SCC 511**, paragraph-101 illustration-(xii).*

5. List on 20th December, 2023.”

4. Mrs. Jena, learned advocate appears on behalf of

respondent-wife and submits, she has several points. Firstly, case of non-consummation of the marriage required petitioner to apply for annulment under section 12 in Hindu Marriage Act, 1955. If it was a case of non-consummation, petitioner would have applied within prescribed period. He not having had applied in the period is first presumption against him that his allegation is incorrect. Secondly, no amount of evidence contrary to pleading can be looked into. It is a well-settled position. When her client had stated the marriage was consummated and thereafter appellant had his way with her, evidence to the contrary cannot be looked into. She relies on **Janak Dulari Devi v. Kapildeo Rai**, reported in (2011) 6 SCC 555, paragraph 9. Thirdly, she reiterates, there are clear statements in her client's written statement that the marriage was consummated and, appellant always had his way with her client without caring for her feelings. The family Court correctly appreciated the situation that allegation of unsatisfactory physical intimacy must lead to presumption that there was physical intimacy but may not have been satisfactory from point of view of appellant. That does not make his allegation of non-

consummation of marriage to be proved as a fact. Furthermore, her client tendered prints of conversations between appellant and herself on social media platform WhatsApp. It was tendered as ext.B. She relies on section 14 in Family Courts Act, 1984 and submits, the documents were duly exhibited. Perusal of the kind of messages appellant had sent to her client will clearly show that there was consummation and physical intimacy.

5. She relies on another judgment of the Supreme Court in **Nirmal Singh Panesar v. Paramjit Kaur Panesar**, reported in **AIR 2023 SC 4920**, inter alia, paragraph 19. We reproduce the paragraph below.

“19. So far as the facts of the present case are concerned, as stated earlier, the appellant-husband is aged about 89 years and respondent-wife is aged about 82 years. The respondent all throughout her life has maintained the sacred relationship since 1963 and has taken care of her three children all these years, despite the fact that the appellant-husband had exhibited total hostility towards them. The respondent is still ready and willing to take care of her husband and does not wish to leave him alone at this stage of life. She has also expressed her sentiments that she

does not want to die with the stigma of being a "divorcee" woman. In contemporary society, it may not constitute to be stigma but here we are concerned with the respondent's own sentiment. Under the circumstances, considering and respecting the sentiments of the respondent wife, the Court is of the opinion that exercising the discretion in favour of the appellant under Article 142 by dissolving the marriage between parties on the ground that the marriage has irretrievably broken down, would not be doing "complete justice" to the parties, would rather be doing injustice to the respondent. In that view of the matter, we are not inclined to accept the submission of the appellant to dissolve the marriage on the ground of irretrievable break down of marriage."

6. The Supreme Court in **Samar Ghosh** (supra) gave several illustrations enumerated from instances of human behaviour, which may be relevant in dealing with cases of mental cruelty. Some illustrations were given in paragraph 101, as was said to be not exhaustive. On behalf of appellant reliance has been on illustration-(xii). The illustration is reproduced below.

“(xii) Unilateral decision of refusal to have intercourse for considerable period without there

being any physical incapacity or valid reason may amount to mental cruelty.”

We understand that refusal to have intercourse for considerable period without any physical incapacity or valid reason, on unilateral decision, may amount to mental cruelty. Therefore, we must satisfy ourselves one way or other on the issue of whether respondent-wife took unilateral decision to refuse intercourse for considerable period without suffering any physical incapacity nor having a valid reason.

7. On going through the exhibits tendered in the Court below, as available from the lower Court record produced before us, including ext.B (WhatsApp messages), it emerges that appellant was always seeking intimacy. The WhatsApp messages are at best expressions of appellant wanting physical intimacy. They are not and cannot be proof of actual physical intimacy. We have not been shown anything in them to be an account of what already happened. It is unfortunate that such private messages were brought on record. Be that as it may, paragraphs 5 (g), (h) and (i) in the petition and paragraph 14(g) in the written statement are

respectively reproduced below.

Petition

*“5(g) That the Respondent always said to the petitioner that she fears about the pain while thinking about having sexual intercourse as such **she never allowed the petitioner to consummate their marriage. Whenever the petitioner tried to have physical touch or make relation with the respondent, she never allowed for the same. This kind of behavior of the respondent made the petitioner uncomfortable, unhappy and the petitioner never felt that he is married as the respondent never gave him the pleasure of being married.***

*(h) That the Respondent did not allow the petitioner to establish physical relationship on their first night after marriage and clearly told the petitioner that she is going to take 3-4 months to get comfortable and would allow him to make physical relations with her. **The petitioner appreciated the feelings of Respondent and gave time to the respondent for being comfortable in her matrimonial house as well as in her married life. But by the time, the Petitioner felt that how can a woman stop herself to intimate with her husband living together and sleeping together as a husband and wife.***

(i) *That on June 2014, the petitioner got elected as a Member of Parliament uncontested from Rajya Sabha in the age of 32 only. After becoming the Member of Parliament, the petitioner started residing at Delhi along with the respondent. The Petitioner again tried to get comfortable with the respondent for consummating their marriage but she refused it clearly being uncomfortable in making any kind of physical relationship with the petitioner.”*

Written Statement

14(g) *That the averments made in sub para (g) of para-5 of the petition regarding physical relationship between the parties and subsequent events are not only false but also baseless. The petitioner belongs to karan by caste. As per the tradition and culture and custom of karan caste in Odisha the marriage is supposed to be consummated just after return of groom and bride to the in-law's house of bride. **But here in the case in hand the couple returned to the house of the petitioner after marriage on 9th morning February, 2014. On the same night the marriage of both the parties were consummated. Considering the petitioner definitely the Respondent was in fear at the time of consummation everyday***

thereafter. But the Respondent never complained anywhere regarding consummation either in the in-law's family or to her mother or married sisters in any manner at any point of time. In the mean time from the date of marriage till filling of divorce application more than 6 years has passed. The presumption is very clear under such circumstances the marriage between petitioner and Respondent have consummated. The petitioner has taken such a false plea on the divorce application regarding consummation considering the mentality of Respondent and after studying the mind of Respondent. The idea of petitioner is the Respondent can never face such type of allegations. Even if the Respondent fearing herself without carrying her the petitioner was proceeded in consummating his marriage on the next day of marriage. The question of allow by the Respondent for consummation does not arise. The process of consummation by the petitioner was continued and whenever the petitioner wanted to have sex with the Respondent became successful by any manner. The petitioner never care for listening anything from the Respondent in any matter as he was not in a mood due to heavy drinking. The Respondent never objected at any point of time in any

manner to the petitioner because the petitioner was not in a mood to hear anything, hence the question of allow to touch and make relationship does not arise. The petitioner is an habituated drunker who was drinking wine in his bedroom everyday over night with the help of his assistants who is a male person, overnight the Respondent was in a fearing mood and was thrumbling initially which was became habit subsequently. The Respondent never slept a night in her stay in in-laws house. Still the Respondent never expressed her difficulties in her bedroom any where considering her social prestige and keeping the prestige of both the families. Besides it, both the parties are eminent cine artist in Odisha and very popular among the young stars of Odisha. The petitioner is put to strict proof of the same.”

(emphasis supplied)

8. Our appreciation of the pleadings is that there was assertion of non-consummation and denial of physical intimacy as also appears from, inter alia, paragraph 5(n) in the petition. On the other hand, respondent-wife categorically asserted consummation of marriage and subsequent intimacy at instance of appellant,

without him waiting for her 'allow' him. The pleadings being at variance, issue arises on whether there was consummation of the marriage and thereafter physical intimacy.

9. Proceeding to the evidence adduced by the parties, it would be appropriate for us to reproduce below paragraphs 60, questions 69 and 70, paragraphs 71 and 79 to 81 from deposition dated 11th April, 2023 in cross-examination of respondent-wife.

“60. It is not a fact that I had promised my husband that I would consummate our marriage for the first time on his birthday after marriage, i.e. 24.12.2014, but I did not do so. The witness volunteers that my marriage had already been consummated on the first night of my marriage as per the tradition of ‘karan caste’.

69 Q. Are you ready to get a fitness test done from a gynecologist and psychiatrists to show your fitness for consummation of marriage both physically and/or psychologically?

Ans: I am not ready to get a fitness test done from a gynecologist and psychiatrists, as there was/is no need to do so.

70Q. When did Dr. Sidharth Das and Dr. Sujata Mishra, who were our doctors advised you for

consummation of marriage and counseling for that purpose on 5-6 occasions and then Dr. Sujata Mishra met you separately also for making the marriage get consummated from soon after your marriage time till 2019 when you separated?

Ans: Dr. Sidharth Das and Dr. Sujata Mishra have never advised me for consummation of our marriage and they have never counseled me. Dr. Sujata Mishra has never met me separately for making our marriage get consummated.

71. *It is a fact that Dr. Sujata Mishra is a gynecologist and it is not a fact that she was counseling me with regard to consummation of marriage, as she has also got her separate clinic because my husband was speaking to them about the solution to the non-consummation of marriage.*

79. *It is a fact that I never consulted any IVF (in vitro fertilization) or IUI (intra uterine insemination) for infertility (with objection as not pleaded). The witness volunteers that there was no requirement.*

80. *It is a fact that I did not consult IUI or IVF experts or clinics because there was no need as I never allowed my husband to consummate the marriage or have sexual intimacy with me.*

81. *It is not a fact that the question of conceiving*

any child did not arise as I never allowed my husband to have sexual intimacy or intercourse with me.”

(emphasis supplied)

10. Respondent-wife alleged appellant having his way with her and long period must lead to presumption of consummation and physical intimacy. In cross examination she denied suggestion that there was non-consummation of the marriage on assertion that it had been consummated on the first night as per tradition of them in “Karan caste”. It also appears from her cross-examination that she was not ready to get the fitness test done from a Gynecologist or Psychiatric as there was or is no need to do so. She denied that Dr. Sidharth Das or Dr. Sujata Mishra had advised her for consummation of the marriage, or they had ever counseled her. She went on to say Dr. Sujata Mishra had never met her separately to make the marriage consummated. She admitted knowledge of Dr. Sujata Mishra being a Gynecologist and admitted that her husband was seeing the doctors about the solution to the non-consummation of the marriage. She also admitted that she never consulted any IVF or IUI for infertility

(question 69, paragraphs 79 and 80). She volunteered, there was no requirement. On having thus volunteered she asserted by paragraph-80 that she did not consult such experts nor visited such clinics because there was no need, as she never allowed her husband to consummate the marriage or have sexual intimacy with her. At this point Mrs. Jena submits, there is a typographical error in record of evidence under paragraph-80 in the deposition of her client's cross-examination. It should be read as she had said, 'It is 'not' a fact...'. We must consider this submission in light of preceding answers to question 69 and paragraph 79 in the cross-examination, which were answers to similar questions, on seeing doctors. Furthermore, procedure in the Court below is for the deposition to be signed by the witness on transcription of it. Oral examination of a witness at trial is for the Court to find on fact. In this case there could not have been a third party witness to testify on either consummation of the marriage or physical intimacy of the parties. It follows that utmost importance attaches to what the parties themselves deposed. An admission in deposition of cross-examination cannot be explained by

argument. There is nothing on record to show that on behalf of respondent-wife, the learned Judge was made aware there was a mistake of omission in record of the deposition. Mrs. Jena submits further, on 10th May, 2023 appellant had filed petition under section 340 read with section 195 in Code of Criminal Procedure, 1973 and other sections of Indian Penal Code, 1860. In it appellant had alleged that paragraphs 80 and 81 in deposition dated 11th April, 2023 on cross-examination of her client, the statements were contradictory. This goes to confirm her submission that there was error in recording paragraph 80, on omission of word 'not' for the statement to be, 'It is not a fact...'. We have perused the order sheet. The Court below had recorded that the petition was not served. On query from Court Mrs. Jena submits, copy of it was transmitted by WhatsApp and therefore her client's engaged learned advocate had got it. It appears from order dated 2nd August, 2023 of the Court below that appellant had not pressed the application. Significant however is that respondent-wife thus had her attention drawn to paragraphs 80 and 81 in her deposition dated 11th April, 2023 but still she did

not take any step to urge error therein before the learned Judge, who had recorded it. All this appears to be an attempt at explanation of clear admission of respondent-wife on non-consummation of the marriage, leading to inevitable conclusion that there could not have been physical intimacy.

11. We are clear in our minds that pleading of facts regarding non-consummation and denial of physical intimacy were there in the petition. Respondent-wife had notice of petitioner's case. She dealt with the case on categorical assertion of consummation and thereafter physical intimacy against her will. There was no surprise as can be contended on behalf of respondent-wife. **Janak Dulari Devi** (supra) has no application because the declaration of law is that evidence contrary to pleading cannot be relied upon. In that case, plaintiff had pleaded later payment of part consideration but had adduced evidence by the instrument that the consideration had been paid. However, admission to the contrary in cross-examination cannot be said to be reliance on evidence contrary to pleading. Moving on, even if the categorical admission by paragraph 80 in her cross-examination is not taken in isolation and allowing

for her expression of 'consummation' to also mean physical intimacy, the answers given to the questions reproduced above leave no doubt in our mind that there was no physical intimacy between the parties. Appellant cannot be faulted for waiting in hope of consummation, causing expiry of the prescribed period for annulment. The private messages exhibited demonstrate his eagerness to get physical with respondent-wife. Hence, his contention of mental cruelty.

12. In view of our finding in preceding paragraphs 10 and 11 and omission of respondent-wife to bring on record physical incapacity, as she had refused or said it was not required for her to visit any doctor or valid reason for withdrawing herself, leads us to conclude that it was unilateral decision on her part to deny her husband. Mrs. Jena submits, there was no pleading in terms of illustration-(xii) in **Samar Ghosh** (supra) and as such the declaration of law by the illustration cannot come to aid of petitioner. We have already stated the facts pleaded and evidence laid. Law need not be pleaded.

13. In view of the aforesaid we are unable to accept the finding

of the Court below on consummation of the marriage or physical intimacy. The Court has interpreted appellant's statement of the relation being not satisfying or unsatisfactory to mean that there must have been some contact, which was not to the satisfaction of appellant. This interpretation was used to deal with or rather overlook respondent's clear admissions regarding her awareness of Gynecologist consulted by her husband, particularly regarding non-consummation of the marriage and no physical contact. The finding cannot also otherwise be sustained simply because if respondent-wife is to be believed on her pleading, of continued physical relations without her consent as in there having been no situation of 'allowing' it, dissatisfaction would have to be taken as her grievance, for which she had refused to consult the doctors.

14. Nirmal Singh Panesar (supra) has no application to the case in aid of respondent-wife. The Supreme Court refused to exercise discretion in favour of therein appellant-husband under article 142 in the Constitution, to dissolve the marriage between parties on the ground that the marriage had irretrievably broken down as it would not to be doing 'complete justice'. This was

because the respondent-wife had expressed her sentiment of not wanting to die with stigma of being a ‘divorcee woman’. She was 82 years of age while appellant-husband, 89 years. In the case before us only ground urged in the appeal has been mental cruelty based on illustration-(xii) under paragraph 101 in **Samar Ghosh** (supra). Our finding on analysis of relevant pleadings and evidence has been as aforesaid. The finding is of ground under clause (i-a) under section 13(1) made out by appellant-husband. As such the law provides for us to dissolve the marriage.

15. Impugned judgment is reversed in appeal. We hold ground under clause (i-a) under sub-section (1) in section 13 of the Act proved by appellant-husband. In the premises, the marriage solemnized on 8th February, 2014 is dissolved by the decree of divorce hereby granted. The decree be drawn up expeditiously.

16. The appeal is disposed of.

(Arindam Sinha)
Judge

(S. S. Mishra)
Judge