

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.217 of 2022

Satyajit Padhi and another *Appellants*

-Versus-

Jogamaya Pati *Respondent*

Advocates appeared in this case :

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

For Respondent : Mr. Amitav Das, Advocate

CORAM:

**JUSTICE ARINDAM SINHA
JUSTICE M.S. SAHOO**

J U D G M E N T

Dates of hearing: 2nd November, 2023 and 3rd January, 2024

Date of Judgment: 3rd January, 2024

ARINDAM SINHA, J.

1. Two appeals are before us for adjudication. They have been filed by the husband. First is MATA no.89 of 2022 preferred against order dated 5th April, 2022 of the family Court allowing, on contest, the petition of respondent-wife for restitution of conjugal rights. The

other appeal is MATA no.217 of 2022 preferred against order dated 16th September, 2022 by said Court on the application filed by respondent-wife under section 12 of Protection of Women from Domestic Violence Act, 2005. On query from Court Mr. Parida, learned advocate appearing on behalf of appellant-husband submits, the application under the Act of 2005 was presented before the Magistrate on 22nd June, 2018. On further query from Court he submits, the petition under section 9 in Hindu Marriage Act, 1955 was presented by respondent-wife on or before 27th November, 2017, date on which first order was made by the family Court on it.

2. It appears appellant-husband applied for transfer of the domestic violence case to the family Court, already in seisin of the civil proceeding filed by respondent-wife under section 9. By **order dated 7th March, 2022 in TRP (Crl. no.09 of 2022) (Satyajit Padhi v. Jogamaya Pati)** a learned single Judge of this Court transferred the criminal case to the family Court. We reproduce below paragraph 5 from said order.

*“Considering the facts and the submissions made and the law laid down by the apex Court in the case **Rajnish vrs. Neha** (Criminal Appeal No.730 of 2020 arising out of SLP (Crl. No.9503 of 2018 disposed of on 4th November, 2020), this Court is of the view that if CMC (DV) Case No.131 of 2018 is*

transferred from the file of learned J.M.F.C. (2), Keonjhar to the file of learned Judge, Family Court, Keonjhar, the same will not cause any inconvenience to the Opposite Party-wife since both the courts are located in one place. Therefore, without issuing notice to the Opposite Party-wife, this Court directs that CMC (DV) Case No.131 of 2018 pending on the file of learned J.M.F.C.(2), Keonjhar be transferred to the court of Judge, Family Court, Keonjhar. Both the courts shall do the needful on production of the certified copy of this order and intimate the same to the Opposite Party. Learned Judge, Family Court, Keonjhar is directed to dispose of both the cases as expeditiously as possible, preferably within six months.”

The case of **Rajnesh v. Neha**, reported in **AIR 2021 SC 569** was relied upon by the learned single Judge to make the order of transfer. We reproduce below two passages from paragraph 17 in the judgment.

“Directions on overlapping jurisdictions

It is well settled that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the D.V. Act and Section 125 of the Cr.P.C., or under H.M.A. It would, however, be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. If maintenance is awarded to the wife in a

previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of maintenance in the subsequent proceeding, the civil court/family court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant.

To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, we direct that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that the Court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount. If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the concerned court in the previous proceeding.”

3. Code of Criminal Procedure, 1973 by section 407 provides for power of High Court to transfer cases and appeals. Inter alia, there is provision for a particular case to be transferred from a criminal Court subordinate to its authority, to any other such criminal Court of equal or superior jurisdiction. We mention this provision because by the

transfer order the criminal case was not transferred to the High Court itself but to the family Court. Said Court not being a criminal Court was recipient of the domestic violence case, obviously on reliance of above passages in **Rajnish v. Neha** (supra). Family Courts Act, 1984 by section 7 provides for its jurisdiction with explanation by several clauses thereunder. None of them include within their scope a criminal case initiated before the Magistrate under the Act of 2005. We address this complication because the Act of 2005 by section 29 provides for appeal from an order passed by the Magistrate under section 12, to the Court of Sessions. MATA no.217 of 2022 being appeal from a domestic violence case is before us since the family Court passed impugned therein order and under section 19 of the Family Courts Act, 1984, appeal lies to this Court.

4. By impugned order in the domestic violence case the family Court made several directions. Among them were directions for respondents (appellant and his father) to provide share hold house or in the alternative, ₹5,000/- per month for house rent from September, 2022, ₹6,000/- per month was directed to be paid as maintenance along with return of dowry articles as well as gifted articles and in addition to ₹1,00,000/- as compensation. Effect of the directions point to separation. Appellant-husband is before us in appeal while

respondent-wife accepted the order. Yet she filed for restitution of conjugal rights and got decree. The contradictory position taken by respondent-wife leaves a clear impression in our minds.

5. We have perused both the orders impugned before us in the appeals. In impugned order decreeing restitution of conjugal rights there has been finding that 'Bismozyme' is a homeopathic medicine, not poisonous. In the order made regarding domestic violence, the family Court has relied upon respondent-wife having had consumed 200 ml of Bismozyme as an attempt of suicide due to cruelty meted out to her. Yet, in that order there is also clear finding that alleged physical assault to cause bleeding injury in the head could not be substantiated by documentary evidence. There is nothing in the lower Court record to show respondent-wife had been treated for the injury. A discharge certificate exhibited by appellant-husband himself was relied upon by the family Court for above finding.

6. Fact is that the appeal arising out of the domestic violence case is before us. Rule 33 in order XLI, Code of Civil Procedure, 1908 provides for power of Court of appeal. Thereby, we have power to, inter alia, make any order which ought to have been passed or made. In exercising the power we set aside impugned order dated 16th September, 2022 made in the domestic violence case and restore

the case to the Magistrate's Court being Judicial Magistrate First Class (JMFC Court-II), Keonjhar. Registry will communicate this order to said Court and the family Court. The latter will send the record in the domestic violence case to the JMFC Court-II, Keonjhar.

7. MATA no.217 of 2022 is disposed of as above. Mr. Parida's submission stands recorded regarding payment already made to be dealt with by the Magistrate upon adjudication of the domestic violence case.

8. We adjourn MATA no.89 of 2022 for Mr. Das, learned advocate appearing on behalf of respondent-wife being heard on how his client can maintain contradictory positions of allegation of domestic violence and restitution of conjugal rights, for joining society of the perpetrator of the alleged violence.

9. List MATA no.89 of 2022 on 6th February, 2024 as prayed by Mr. Das.

(Arindam Sinha)
Judge

(M.S. Sahoo)
Judge

Jyoti/ Jyotsna

Signature Not Verified

Digitally Signed
Signed by: JYOTIPRAVA BHOL
Designation: Junior Stenographer
Reason: Authentication
Location: HIGH COURT OF ORISSA
Date: 04-Jan-2024 10:31:36

