

IN THE COURT OF THE JUDGE, FAMILY COURT,
BHUBANESWAR.

Present : Shri Pravakar Mishra, OSJS (SB),
Judge, Family Court, Bhubaneswar.

Civil Proceeding No. 186 of 2011
U/s.13 of the Hindu Marriage Act, 1955

Danyal Sahu, aged about 32 years
S/o-Deven Sahu,
of N.C.-98, P.O.-Jayadev Bihar, P.S.-Nayapalli,
Bhubaneswar, Dist-Khurda,
At present working at Kolkata,
Tech Mahindra Ltd., Salt Lake, Sector-V,
Kolkata-91.

....Petitioner

... Versus ...

Smt. Sujata Sahoo, aged about 28 years
W/o-Danyal Sahu,
At present residing at Officer's Quarter No.-C/1,
Indian Oil Colony (Near Fire Station), Baramunda,
Bhubaneswar, Khurda.

.... Respondent

Civil Proceeding No. 320 of 2011
U/s. 9 of Hindu Marriage Act, 1955

Smt. Sujata Sahoo, aged about 32 years,
W/o-Sri Danyal Sahoo,
D/o-Sri Pitambar Sahoo,
At present residing at Ganga Nagar, Sweet Complex,
Phase-3, Plot No.-7, Bhubaneswar-751020,
Dist-Khurda.

... Petitioner

... Versus...

Sri Danyal Sahu, aged about 35 years,
S/o-Sri Deven Sahu,
Plot No. N.C.-98, P.O.-Jayadev Bihar,
P.S.-Nayapalli, Bhubaneswar,
Dist-Khurda.
At present working at Kolkata Tech Mahindra Ltd.,
At-3rd & 4th Floor, Building 'C',
Bengal Intelligent Park, Sector-5, Salt Lake,
Kolkata, PIN-700091.
At-6th Floor, Tech. India Building,
Phase-II, EM-4/1, Sector-V, Salt Lake,
Electronic Complex, Kolkata,

PIN-700091.

... Respondent

Date of Argument: 07.04.2015

Date of Judgment : 27.04.2015

J U D G M E N T

The petitioner, husband-Danyal Sahu has filed C.P. No. 186 of 2011 against the respondent, wife-Sujata Sahoo U/s. 13 of Hindu Marriage Act, 1955 (in short, the Act 1955) for dissolution of marriage by passing a decree of divorce, whereas the respondent has filed C.P. No. 320 of 2011 U/s. 9 of the Act, 1955 against the petitioner-husband-Danyal Sahu praying for a decree of restitution of conjugal rights. Both the case are taken up together for a common Judgment as both the parties are same in both the proceedings.

2. The facts of the petitioner in C.P. No. 186/2011 are his defence in C.P. No. 320 of 2011. Similarly, the facts of the case of the wife-respondent in C.P. No. 320/2011 are her defence in C.P. No. 186/2011 filed by the husband-petitioner. Therefore, for sake of brevity and in order to preserve the unit of expression, I picked up the facts of the case of the parties in C.P. No. 186/2011.

3. Admitted facts of the parties are that their marriage was solemnized in Hotel Presidency, Bhubaneswar on 23.11.2005 and the parties have been living separately since 23.06.2006.

4. The fact of the case of the petitioner Danyal Sahu in C.P. No. 186 of 2011 are as follows:-

After marriage, they resided for few days in the father's house of the petitioner. Some days thereafter, the respondent expressed her unwillingness to accompany with him to his service place initially to Pune and thereafter to Kolkata and left his house for her parental home without the consent of his family members leaving his retired ailing parents and undertook training for Postal service on 10.02.2006 for a period of two months and fifteen days and returned his house on 25.04.2006 as she was posted at Bhubaneswar. According to the petitioner, there has been no happy conjugal relation between them. A few days after their marriage, he

felt sick at Kolkata and was unable to do all the household works for which he had undergone Hernia and Gall Bladder operations during the second week of October, 2006 at Bhubaneswar. The respondent during that period of operation did not attend her for which he was looked after by his old ailing parents. At that critical stage of his life he and his parents made several attempts to bring her back but the respondent bluntly refused to join with his company. In the month of May, he had taken the respondent to Kolkata after much persuasion to lead a happy conjugal life. The respondent stayed 13 days with him and during that short period of stay in his house treated him with utmost cruelty and again she left his house without prior intimation to him. The respondent after returning from Kolkata on 16.05.2006 joined as Postal Assistant at Bhubaneswar on 26.05.2006. The respondent during her stay at Kolkata compared his private organs with that of one of her boy friend's and redeemed him as not being a man in the real sense throwing false, defamatory, scandalous, baseless and unproved allegations against him of not being above to satisfy her sexual urge. She has also threatened to commit suicide if he would insist her to stay with him at Kolkata and to implicate him in false cases of dowry torture. The respondent has also refused to keep sexual relationship with him during that short period of stay at Kolkata. After the respondent returned from Kolkata started residing with her father and brother at Bhubaneswar instead of staying in her matrimonial home. He has further stated that when he made an enquiry about the respondent from her parents, they did not disclose her whereabouts and told him not to worry, as she will only reappear after "Ta Munda Thanda Hela Se Gharaku Pheriba". On 23.07.2006 he again after much persuasion took the respondent to Kolkata but the respondent returned to Bhubaneswar with her belongings after staying a period of 12 days with him. She also humiliated him and his family members and also told before him she cannot live with his parents at Bhubaneswar. Further in the first week of the September again he took her but she stayed for six to seven days and left his house with her personal belonging from Kolkata which she had brought with her at the time of marriage from her parental home including clothing and jewellery. Since then the respondent refused to join with his company at his service place at Kolkata. The petitioner further averred that the respondent declaring to be pregnant conducted pathological test in the

month of August, 2006 but the result was negative. He has further averred that the respondent used to return home at late hours of the night as pillion rider of scooter with whom she has an affair. Since, it is not possible for him to continue marital tie with the respondent as her behaviour caused him pain, injury, physically and mental torture, getting no other way, he sought for a decree of divorce from the respondent on the ground of cruelty.

5. The respondent-wife contested the proceeding by filing W.S. and denied all the allegations made by the petitioner-husband against her. She has stated that the suit is not maintainable due to lack of cause of action and due to non fulfillment of basic ingredient as required U/s. 13 of the Act, 1955 which envisages that the marriage can be dissolved if desertion is for a continuous period of not less than two years preceeding the presentation of the petition. In the instant case, the suit for divorce was presented on 25.03.2007 and the petitioner has asserted in paragraph-29 of the plaint by submitting that finally on 10.09.2006 the respondent had left the matrimonial home without any information to him, for which as per averments and contentions made by the petitioner in the plaint the desertion was only for six months 15 days on the date of presentation of this case for which the suit is pre-matured and lack of cause of action and accordingly the same may be dismissed due to barred by law of limitation. It is the further case of the wife that her husband along with his family members are cruel in nature, self centered in mind having egoist and adamant mentality for which they have tortured her in an irrational and inhuman manner. Being the disciplined Hindu house wife she had tolerated the torture caused to her by in laws with a mentality and high hope that they might amend their character but all her hopes were shattered. According to her the present case is filed as a shield against initiation of any future criminal case under Dowry Torture and Domestic Violence Act. She has further averred that although her father had fulfilled all the demand of the respondent and his family members by paying Rs. 5,00,000/-, gold ornaments weighing 180 grams, colour T.V. and costly furnished furniture along with other household articles yet she was tortured by the petitioner and his family members for non-fulfillment of additional demand of cash of Rs. 1,00,000/- and a four wheeler, even she was told that she will not be accepted as the bride of the house if their

aforesaid demand would not be fulfilled. As per demand of the respondent and his family members. It is further averred that she had been tortured from the date of marriage till her husband left for his working place at Pune. When she insisted to go with the petitioner to his working place at Pune the petitioner turned down her request telling she will be allowed to accompany him if she would fulfill the aforesaid demand. Thereafter her husband was transferred to Kolkata. The petitioner and his parents forced her to pay her entire salary to them or else to resign from her service. The family of her husband had a full time domestic worker to do all domestic work but after "Asta Mangala" they terminated the service of the said domestic servant and compelled and pressurized her to do all the domestic works for which she faced much difficulties to manage the household work and her office work. The intention behind imposing such physical and mental torture was aimed at compelling her to leave her in laws house. When she failed to do all kinds of domestic works, she was subjected to physical assault by her husband thrice on different dates under the instructions of the parents-in-law. They all started accusing her passing adverse comments against her character and conduct without having any truth. They did not hesitate to pronounce that the child whom she was bearing was an illegitimate one. They tried and forced her to terminate her pregnancy during the 1st month. When she did not succumb to their pressure, they did not give her proper food and medicine. On the other hand, she was sent to her brother's house at Bhubaneswar for medical checkup. She with the help of her brother and father got her medical examined in Kar Clinic, Bhubaneswar on 23.06.2006 and on that day when she returned to her matrimonial home with her father after medical checkup she found the house was locked from outside and none was present in the house and accordingly, she returned to her brother's resident at Bhubaneswar and since then she has been residing with her brother. Thus, the petitioner and his parents had succeeded in driving her out when she was in dire need of their care, love and affection. She has also further averred that she has suspected that her father-in-law and mother-in-law have been living with her husband in Kolkata since then at some place which unknown to her. She had also gone to her matrimonial house for many times, but the house was remained under lock and key. During November, 2006 and 2007, her father and brother visited Kolkata

and met her husband at his working place and requested him to take her back. But each time, he refused by saying that his parents were opposing to her return. On 07.02.2007, when she was pregnant by six months she along with her father and her uncle Sri Surendra Kumar Sahoo of Mirkamalpatna, Mangalabag, Cuttack went to her husband at Kolkata with a hope of staying with her husband but her husband did not allow her to stay with him. Finding no alternative they returned to Bhubaneswar on the same day. It is the further case of the respondent that due to willful negligence, cruel, inhuman and uncivilized behavior and attitude of her husband and his parents, her physical and mental condition deteriorated and became miserable day by day. When it became unbearable she filed a complaint before Mahila Police Station, Bhubaneswar on 19.03.2007 vide BBS-39/2007. Thereafter she filed an application U/s. 12 of the Protection of Women from Domestic Violence Act, 2005 before learned S.D.J.M, Bhubaneswar vide Criminal Misc. Case No. 570/2007 but due to avoidance of the petitioner and his parents the summons could not be served on them. Thereafter she has made complaint before Women Commissioner, Orissa, Bhubaneswar at the time of her pregnancy for negligent act of her husband and his parents and the petitioner appeared before Mahila Commission where he agreed not to torture and neglect the respondent further but surprisingly during pendency of the complaint he has filed the present case for divorce. However, she gave birth a male child in Kar Clinic, Unit-IV, Bhubaneswar on 07.05.2007. She is always ever ready and willing ready to join with the petitioner and accordingly, the relief claimed by the petitioner in C.P. No. 186 of 2011 may be dismissed and her relief claimed in C.P. No. 320 of 2011 be allowed.

6. The question that requires to be adjudicated:-

- (i) Whether, there exists any desertion and cruelty on the part of the respondent to allow the petition for divorce?
- (ii) Whether the respondent-wife had voluntarily withdrawn herself from the society of the respondent-wife without any reasonable cause and whether the petitioner-husband is entitled for a decree of restitution of conjugal rights?

7. The petitioner-husband in C.P. No. 186 of 2011 in order to prove his case he, himself, has been examined as P.W. 1 and his father as P.W. 2 and relied some medical documents in support of his illness which are marked

under Ext. 1 series. In order to negate the claim of the petitioner-husband, the respondent-wife, has been examined as R.W. 1, her father as R.W. 2 and one Khageswar Sahoo, the mediator of the marriage as R.W.3 and relied on ten numbers of documents. They are:- Ext. A is the Appointment letter, Ext. B is the letter received from Postal Authority, Ext. C is the application for extension of date of joining date, Ext. D is the pregnancy check up report, Ext. E is the discharge certificate, Ext. F is the Xerox copy of Birth Certificate of son namely Prince Dibyajyoti Sahoo, Ext. G is the certified copy of State Women Commission, Ext. G is the certified copy of report of Protection Officer, Ext. J is the Xerox copy of the fee statement of son, Ext. K is the annual tax statement of the petitioner for the financial year 2012-13 and the assessment year 2013-14.

8. The wife in C.P. No. 320 of 2011 in order to prove her case she, herself, has been examined as P.W. 1 and her father as P.W. 2 but did not choose to file any document on her behalf. In order to negate the claim of the wife, the husband, himself has been examined as R.W.1 and relied on nine numbers of documents. They are:- Ext. A is the certified copy of the complaint petition in Domestic Violence Case, Ext. B is the copy of the petitioner of Mahila Commission dated 20.03.2007, Ext. C is the Xerox copy of written report before Mahila Police Station, Ext. D is the Xerox copy of Railway Ticket, Ext. E is the Xerox copy of Pathology test report dated 21.08.2006, Ext. F is the Xerox copy of doctor report dated 13.09.2006, Ext. G is the Xerox copy of the doctor report dated 20.09.2006, Ext. H is the Xerox copy of the SMS dated 07.10.2006, Ext. J is the certified copy of the C.M.C. No. 570 of 2007 passed by J.M.F.C, Bhubaneswar on 18.03.2014.

9. The petitioner sought divorce on the ground of cruelty. It deems appropriate to examine the concept of cruelty both in English and Indian Law, in order to evaluate whether petitioner's petition based on the ground of cruelty deserves to be allowed or not.

10. Now it is well settled that the expression 'cruelty' includes both (i) physical cruelty; and (ii) mental cruelty. In this connection, I bestow my attention to English as well as Indian authorities. I will refer to some of them.

11. The concept of cruelty has been dealt with in Halsbury's Law of England (Vol.13. 4th Edition Para1269) as under:-

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of

special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complaint's capacity for endurance and the extent to which that capacity is known to the other spouse."

12. In *Gollins V. Gollins*, 1964 (AC 644: (1963) 2 All EF 955, Lord Reid Stated:-

"No one has ever attempted to give comprehensive definition of cruelty and I do not intend to try to do so. Much must depend on the knowledge and intention of the respondent., on the nature of his (or her) conduct, and on the character and physical or mental weakness of the spouse, and probably no general statement is equally applicable in all cases except the requirement that the party seeking relief must show actual or probably injury to life, limb or health."

13. Lord Pearce also made similar observation:-

"It is impossible to give a comprehensive definition of cruelty, but when the reprehensibly conduct or departure from normal standards of conjugal kindness causes injury to health or an apprehension of it, it, I think, cruelty is a reasonable person, after taking due account of the temperament and all

the other particular circumstances would be considered that the conduct complained of is such that this spouse should not be called on to endure it”

(See also Russel V. Russell, (1897) AC 395: (1895-99) All ER Rep 1)

14. The test of cruelty has been laid down by the Apex court in the leading case of N.G. Dastane V S. Dastane, reported in AIR 1975 2 SCC 326, thus:- *“The enquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent....”*

15. In Sirajmohmedkhan Janmohamadkhan V. Haizunnisa Yasinkhan & Anr. Reported in AIR 1981 4 SCC 250, by the Apex Court stated that the concept of the legal cruelty changes according to the changes and advancement of social concept and standards of living. It was further stated that to establish legal cruelty, it is not necessary that physical violence should be used. Continuous cessation of marital intercourse or total indifference on the part of the husband towards marital obligations would lead to legal cruelty.

16. In Shobha Rani V. Madhukar Reddi reported in AIR 1988 1 SCC 105, this Court examined the concept of cruelty. It was observed that the term “cruelty” has not been defined in the Hindu Marriage Act. It has been used in Section 13 (1) (i-a) of the Act in the context of human conduct and behavior in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of the one spouse which adversely affects the other spouse. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of degree which is relevant. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the other spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases bad enough and per se unlawful or illegal. Then the impact or the

injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Mens rea is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment.

17. In *V. Bhagat V. D. Bhagat (Mrs)* reported in AIR 1994 1 SCC 337, the court observed:- “Mental Cruelty in Section 13 (1) (i-a) can broadly be defined as that the conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must be as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment or conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational

level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.”

18. The Apex Court in *Chetan Das V. Kamala Devi* reported in AIR 2001 4 SCC 250 stated:- Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to pay in the society, in general. Therefore, it would not be appropriate to apply any submission of “irretrievable broken marriage” as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case”.

19. Mental cruelty has also been examined by the Apex Court in *Parveen Mehta Vrs. Inderjit Mehta* reported in AIR 2002 5 SCC 706:- “Cruelty for the purpose of Section 13 (1) (i-a) is to be taken as a behavior by one spouse towards the other, which causes reasonable apprehension in the mind of the later that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavior or behavioral pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish,

disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavior in isolation and then pose the question whether such behavior is sufficient by itself to cause mental cruelty. The approach should be take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

20. In *A. Jayachandra Vrs. Aneel Kaur* reported in AIR (2005) 2 SCC 22, the Apex Court observed that:- “The expression ‘cruelty has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to the cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept poof beyond the shadow of doubt, it is to be applied to criminal tries and not to civil matters and certainly not to the matters of such delicate personal relationship as those of husband and wife. Therefore, one has to be what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complaint spouse because of the acts or omission of the other.

Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may be not at the same time be direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial dispute.”

21. In *Vinita Saxena Vrs. Pankaj Pandit* reported in AIR (2006) 3 SCC 778, the Apex Court said:- It is settled by the catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such willful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case. The word “cruelty” has not been defined and it has been used in relation to human conduct or human behavior. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. There may be causes where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.”

It was further stated:- ‘Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole acts and the matrimonial relations between the parties. In this connection, the culture, temperament

and status in life and many other things are the factors which have be considered.

The legal concept of the cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, that rule is of a special value when the cruelty consists not of violent act but of the injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in a case of apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellants, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable/ The Court has then to decide whether the cumulative conduct was sufficiently serious to say that from a reasonable persons point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

22. In *Samar Ghos Vrs. Jaya Ghos* (2007) 4 SCC 511, this Apex Court held:- "No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the case of "mental cruelty". The instances indicted in the succeeding paragraphs are only illustrative and not exhaustive.

- (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not

make possible for the parties to live with each other could come within the board parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental Cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

23. Bearing the above parameters of law, in my mind, I proceed to analyse the evidence adduced by the parties to determine whether there is existence of any cruelty either physical or mental, so that the Court can pass a decree of dissolution of marriage. Herein the instant case, there is no physical violence or physical cruelty. The petitioner attributed mental cruelty on ten aspects. They are as follows:-

- (a) The wife has joined in postal service without the knowledge and consent of the petitioner and his family members.
- (b) Did not attend during hernia and Gull Bladder operations of the petitioner.
- (c) Did not look after the ailing parents of the petitioner.

- (d) Left Kolkata without the consent of the petitioner.
- (e) The respondent threatening to commit suicide and book him in false criminal cases if the petitioner would insist her to stay with him in Kolkata.
- (f) The respondent refused to keep sexual relation with the petitioner.
- (g) Refused to reside with the parents of the petitioner.
- (h) The respondent humiliated him and his family members.
- (i) Declared to be pregnant but the pathological report proved negative.
- (j) Used to return home late night with a boy with whom she has an affair.

24. On the contrary, the wife-respondent made the following allegations against the husband-petitioner. They are as follows:-

- (i) The petitioner and his family members are selfish, egoist, adamant, irrational.
- (ii) Tortured her for non fulfillment of the additional demand of Rs. 1,00,000/- and a four wheeler vehicle.
- (iii) The petitioner and his parents insisted the respondent to give them her entire salary or else to quit the job.
- (iv) Forced to do the manual work in the house.
- (v) Petitioner assaulted the respondent at the pep-talk of his parents when she refused to do all the household work simultaneously with office work.
- (vi) Criticized her unjustly castigating her character.
- (vii) The petitioner refused to accept the child as his own legitimate son.
- (viii) Forced to terminate the pregnancy and when she refused she was driven out by the mother of the petitioner.

Let me dilate each circumstance and back ground of cruelty alleged by the parties against each other in seriatim.

Point No.1

25. The petitioner while being examined as P.W. 1 has stated that the respondent left her matrimonial home without their consent and joined in Postal Department as Postal Assistant. His aforesaid statement is a demur, when we look into his cross-examination evidence. P.W. 1 during his cross-examination has stated at paragraph-13 that he had gone to Saharanpur, the training centre of his wife to bring her and during that

period they had visited Mousorie and Dehradun and had taken joint photograph. His aforesaid statement is clearly suggestive and indicative of the fact that he has consent for joining in service of the respondent. He neither has mentioned in his petition nor has tendered evidence suggesting the respondent to quit the job at any point of time. On the other hand, the respondent has stated that she was forced to give all her salary to the petitioner and his parents or else to resign. From this it is apparent that when the respondent wanted to maintain separate account of her income, dispute erupted in the family but not for joining in service. In the present day society, many couples need to have separate accounts to maintain financial and emotional harmony in their relationship. Marriage, is joining two lives and for-shaking all others, but it is not the for-shaking of one's separate identity and it is certainly is not for-shaking pre-marital money habits and mind sets. That is why even if a couple, has joint account from which household bills are paid, each spouse needs a certain amount of money over which they have complete control. This gives each partner a sense of autonomy and financial independence, potentially saving them from endless hours of petty money fights. Separate accounts allow the saver to scrimp and penny-pinch without resentment from the spender who also will feel less guilt or anxiety about splurges. This is not a sign of marital problems to come. It is simply an acknowledgement of a fundamental difference in money attitude, much like couples have different religious views yet find a way to make it work for them. If person has a clearly defined idea of how his or her saving or spending will aid in the achievement of the family's goals, both people feel more empowered and responsible for their choices. One of the biggest reasons, I advocate separate accounts is the fact that at some point more than half of married people will become financial independent again not only because of divorce but also due unexpected death. Losing a partner can be devastating enough without having to relearn how to manage daily finances. Having separate accounts helps ensure that both the spouse remain financially literate and able to manage money on their own if need be. That is why the father of the petitioner (P.W. 2) has stated that the petitioner married the respondent because is literate with the advancement of civilization the development of the society depends upon the participation of women in

political, social, economic and religion and is the rule in the Indian Society of today. Therefore, the respondent joining in service and maintaining separate account without disrespecting the petitioner is not a conduct of cruelty of the respondent on the petitioner.

Point No.2, 9 and 10

26. P.W. 1 has stated that he had undergone operation for Hernia and Gull Bladder in Kalinga Hospital, Bhubaneswar in the month of October, 2006 and the respondent did not attend him despite intimation to her by him and his father. His aforesaid statement appears perfidious when we look into his examination part of the affidavit part. It has been demonstrated in paragraph-8 that several intimations have given by his father. P.W. 2, the father of the petitioner has acquiesced it. Contrary, the respondent in her W.S. as well in her affidavit evidence has stated that during the 3rd week of September, 2006 when she and her mother-in-law were present in the matrimonial house and was suffering from sickness, and was badly in need of medical help. Her father-in-law-in-law secretly instructed her mother-in-law from Kolkata over phone to send her to her brother to help her get medical checkup and avail of medicine. Since she was in badly need of immediate medical checkup, according to the advice of her mother-in-law, she went to her brother who was staying at Bhubaneswar on 23.09.2006 and with the help of her father and brother, she was medically checkup at Kar Clinic, Bhubaneswar and safety of medicines were given to her for restoration of health and safety of pregnancy. She has further stated in her examination in chief paragraph-7 that doctor has advised her to take rest for one month after medical check up on 23.09.2006. She has further stated during her cross-examination at para-27 that as the petitioner did not intimate her about his operation in Kalinga Hospital on 10.10.2006 she could not go to Kalinga Hospital. The petitioner at paragraph-31 of his cross-examination has admitted that the respondent stayed with him at Kolkata till 14.09.2006 and on 15.09.2006 he brought the respondent to Bhubaneswar from Kolkata and left her in his house. He has also admitted that he did not know the pregnancy of the respondent. Be that as it may, the medical reports of the respondent which has been marked as Ext. D, E and birth certificate marked Ext. F she have birth male child on 07.05.2007. That means that the respondent was pregnant by the

time of operation of the petitioner. When she was a sick lady she has also required attention of the family member but to her dismay when she returned to her matrimonial home after the medical checkup, the house was kept under lock and key. Besides, that the petitioner did not attend the respondent at the time of her delivery and surprisingly also denied that the son is not of his own. The respondent begotten his son on 07.05.2007 when the marriage between the parties was subsisting. It is an irrebutable presumption of law in civilized nation that a child born during the continuance of a valid marriage between his mother and a man is the legitimate child of that man. It is a marriage of prudence and is also in accordance with the rule of Natural Justice that a child born of a marriage must be deemed to legitimate and throws on any person who is interested in making out the illegitimacy the whole burden of proving it. The presumption contemplated U/s. 112 of Evidence Act, is conclusive presumption of law; the only thing which can displace it is proof of a particular fact mentioned in it, that is non-access between the parties to the marriage and the time the child could have been begotten. The person alleging illegitimacy must conclusively establish that the husband had no opportunity of intercourse with the wife at a time when according to ordinary course of nature, the child must have been begotten. Non access may be proved by means of such legal evidence as is admissible to prove a physical fact, but every presumption has to be made in favour of legitimacy of the child who is found to have been born in lawful wedlock. The law requires positive proof of a negative fact i.e. non access between the parties to the marriage. The mere fact that they were living apart in different house is insufficient to establish non-access. The presumption of legitimacy is one of the strongest presumptions of which law is cognizant. There can be no precise calculation of the period of gestation as cannot be rigidly fixed. The usual period of gestation from the first day of coitus is between 265 to 270 days and delivery is expected in about 280 days from the first day of menstruation period prior to the women conceiving a child. Here in the instant case, the LMP date was 06.08.2006 and the child was born on 07.05.2007, although the EDD was fixed on 13.05.2007. The respondent resided with the petitioner at Kolkata till 14.09.2006. Therefore, the child was born after the usual period of gestation and that too when the marriage was subsisting

between the parties. He can disprove it by DNA test but he has not done so. Therefore, the petitioner is the father of the child.

27. The petitioner instead of proving the negative about the paternity of the child alleged that he is not the father of the child in as much as alleged that the wife has illicit relationship with a boy who used to give lift to her in his scooter which the petitioner baffled to establish by letting into cogent evidence. Thus, when the petitioner has made such baseless allegations against the respondent with respect to her character then no amount of other evidence of the petitioner about the behavior of the respondent would be sufficient to grant a decree for dissolution of marriage to the petitioner.

Point No. 4 to 8

28. In the instant case, the petitioner has admitted for third term the respondent has stayed with him at Kolkata till 14.09.2006 and on 15.09.2006 he brought the respondent from Kolkata and left her in his house at Bhubaneswar. The respondent has stated that while she was residing in her matrimonial home with her mother-in-law, she was cunningly sent to her parental home by her mother-in-law for her pregnancy test on being instructed by her father-in-law over phone and on 25.09.2006 she was medically checked-up in Kar Clinic. Medical report filed by the respondent supports it. There was no cross-examination or rebuttal allegation and evidence to disprove it. Therefore, petitioner's allegations stand not established. Additionally, from the admission of the petitioner that the respondent stayed with him 14.09.2006 for the third term would show that both were living together and thus it is apparent that the husband has condoned the cruelty, if any, alleged by him against the respondent. The petitioner has not gone to see his first child, who is a son since his birth and despite all such odd situation, the wife is interested to join with the petitioner but the petitioner has stated that he would not accept his wife and child under any circumstances on the allegation that the respondent had sexual intercourse with a person other than him, which is unproved and a serious allegation against the wife. The position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegation of extramarital relationship is a grave assault on the character, honor, reputation, status

as well as health of wife. Such aspirations of perfidiousness attributed to the respondent-wife viewed in the context of an educated Hindu Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself a cruelty on the wife warranting the claim of the husband being dismissed and in fact I did the same.

29. Mr. Sarangi, the learned counsel for the petitioner submitted that the allegation of the respondent both in her W.S. and evidence as regards to demand of dowry torture thereof being contradictory but not proved itself a sufficient ground to allow the divorce petition of the petitioner. I am not gullible to sustain such submission because in all matrimonial causes particularly in case cruelty, it is for the petitioner to prove the element of legal cruelty and the burden cannot be thrown on the respondent because the respondent has not come to the Court for seeking any relief. Mr. Sarangi relying on *Satish Sitole Vrs. Smt. Ganga* reported in 2008 (3) Civil Court cases 808 (S.C) Supreme Court of India submitted that when a marriage is dead emotionally and practically and there is no chance of its being retrieved, the continuance of such marriage would amount to cruelty and relying on *Smt. Mayadevi Vrs. Jagdish Prasad* reported in 2007(2) Civil Court Cases 144 (S.C) Supreme Court of India submitted that mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. Again relying on *Smt. Nita @ Nathi Hitendrakumar Sakariya Vrs. Hitendrakumar Kaluram Sakariya* reported in 2010 (3) Civil Court cases 033 (Bombay) (DB) Bombay High Court submitted that false, baseless wanton and scandalous allegations in written statement also amounts mental cruelty. No one can quarrel upon such proposition of law but there is always peril in treating the words of judgment as though they are words in a legislature enactment. It is to be remembered that judicial utterance are made in the setting of the facts of a particular case. Circumstantial flexibility one additional or different fact may make world of difference between conclusions in two cases. The case laws relied by the petitioner being delivered fundamentally on different facts and circumstances, the principle of law declared therein, therefore, is not applicable to the facts and circumstances of the present case.

C.P. No. 320 of 2011

30. In view of the forgoing discussion, it is held that the respondent has been residing separately from the petitioner due to matrimonial cruelty of the petitioner on the respondent. The respondent despite the infidelity charge of the petitioner against her still willing to join with her husband even though such charge of the husband can expose her to a greater peril which shows she has faith on her husband. This is nothing but a gentle disposition of the wife. The wife has bona-fide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation. The wife who is sincere is entitled to a decree even though the parties may not envice any affection for each other. The wife in her evidence has stated that when she returned to her matrimonial home after medical checkup, she found that the matrimonial house remained under lock and key and that position continued till date as reported to the Court at the time of hearing argument. Since, I have noticed sincerity with the wife to return to her matrimonial home, her claim is allowed. Hence, it is ordered.

ORDER

The C.P. No. 186/2011 filed by the petitioner-husband against the respondent-wife praying for dissolution of marriage is dismissed on contest and C.P. No. 320/2011 filed by wife, against the husband is allowed on contest. A decree of restitution of conjugal rights is hereby passed in favour of the wife. The husband is hereby directed to join with the company of the wife in her matrimonial home within fifteen days from the date of this order. Any deviation to comply the order of the Court, the wife is at liberty to take further action through due process of law. The petitioner-husband is directed to go on paying the maintenance amount of Rs. 6,000/- to the son as per the order of the Hon'ble Court passed in Misc. Case No. 12341 of 2011 arising out of W.P. (C) No. 21629/2011 dated 25.08.2011.

JUDGE, FAMILY COURT,
BHUBANESWAR.

Dictated, corrected by me and is pronounced on this the 27th day of April, 2015.

- Ext. C Xerox copy of written report before Mahila Police Station
Ext. D Xerox copy of Railway Ticket
Ext. E Xerox copy of Pathology test report dated 21.08.2006
Ext. F Xerox copy of doctor report dated 13.09.2006
Ext. G Xerox copy of the doctor report dated 20.09.2006
Ext. H Xerox copy of the SMS dated 07.10.2006
Ext. J Certified copy of the C.M.C. No. 570 of 2007 passed by
J.M.F.C, Bhubaneswar on 18.03.2014.

JUDGE, FAMILY COURT,
BHUBANESWAR.