

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

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

Criminal Proceeding No. 75 of 2013

Susmitra Mishra, aged about 37 years,
D/o-Sri Manamohan Mishra
W/o- Dr. Pradeep Kumar Rath,
Plot No. 39, Lane No.2, Road No.1,
Jagannath Vihar, Baramunda,
Bhubaneswr-751003.

... Petitioner

...Versus...

Dr. Pradeep Kumar Rath, aged about 48 years,
S/o-Sri Gobinda Chandra Rath,
Plot No. 2078, Sovaniwas, Sabar Sahi,
Bhubaneswar -751014.

... Opp. Party

Date of Argument : 09.04.2015

Date of Judgment: 30.04.2015

J U D G M E N T

The petitioner Susmita Mishra filed a petition u/s. 125 of the Code of Criminal procedure 1973 (in short, Cr.P.C) for self and for her minor children namely Pratik and Lagna being the mother guardian claiming a monthly maintenance of Rs. 50,000/- for them from the Opp. Party.

2. Admitted facts of the case of the parties are that their marriage was solemnized in Diploma Engineers Association Premises, Bhubaneswar on 27.11.1997 and out of their wedlock one male child namely Pratik Rath and female child namely Lagna were born in Sunflower Nursing Home, Bhubaneswar and Shatabadi Gyanic Clinic, Unit-IV, Bhubaneswar on 27.02.2000 and on 20.09.2006 respectively and the petitioner along with the children are living separately from the Opp. Party in the parental home of the petitioner since September, 2010. At the time of marriage, the Opp. Party was working as Medical Officer in

Harianka and the petitioner is a Post Graduate in Political Science from Utkal University, Vanivihar, Bhubaneswar.

3. The facts of the case of the petitioner are as follows:-

According to the petitioner her father had given cash of Rs. 3,00,000/-, gold ornaments of twenty five tolas and other household articles including dress of the Opp. Party at the time of marriage as per demand of the Opp. Party and his family members. According to the petitioner, both the children were born under the care of her parents and the Opp. Party did not meet the expenses at the medical centers. The Opp. Party during his posting as medical officer at Raisunguda PHC, Salepur developed illicit relationship with many ladies especially with one Samima. After birth of the female child when she went to her in-laws house in the month of December, 2007, she found her husband has not only avoided for consummation but also avoided her presence in the house. During her stay in her matrimonial home she found there was continuous inflow of messages from a lady and they were expressing their love to each other through messages. The Opp. Party also did not take care of her children. It is the further case of the petitioner that she could mark a difference in the Opp. Party's conduct and character after birth of 2nd child. Noticing the aforesaid abnormal behavior of the Opp. Party, the petitioner reported it to her parents-in-law and when the Opp. Party was confronted with the above facts he replied that he had not time to spare with the petitioner as he was undertaking Super Specialization course in S.C.B. Medical College and Hospital, Cuttack. To obviate this obstinate problem, the petitioner was taken four to five times to the house of the sister of the Opp. Party at Cuttack but the same could not be proficient as the Opp. Party avoided marital cohabitation with the petitioner. The Opp. Party also continued to avoid her when he was receiving phone and making phone calls in his cell phone and also never allowed her to take the cell phone. She has also found suspicious messages coming to his cell phone and one night she could transfer all the available messages coming from one cell phone No. 9439485796 to her husband's cell phone No. 9437240888 to her cell phone No. 9437441700. On enquiry by her parents, it came to the light of the day

that the name of the cell phone holder is Mr. Mir Sirajual Ali, a Muslim person of Machhuati village Salepur who is staying at Dubai and his wife is namely Samima is using the cell phone who sent SMS and talked hours together with her husband. The call duration details will speak itself the talks between her husband and Samima which are grave circumstances of suspicion and also such messages speak of extramarital relationship of the Opp. Party. The Opp. Party also admitted about the extramarital relationship with Samima who is aged about 35 years before her brother and father which was recorded during discussion between her father, brother and Opp. Party. It is the further case of the petitioner that during private practice at Jagannth Medicine shop the Opp. Party developed the extra marital relationship with Samima who has also shifted to Salepur Town from Machhuati village. The Opp. Party through Samima has also linked with other lady at Jagatpur and the Opp. Party now a days goes to Jagatapur. It is the further case of the petitioner that after marriage from November, 1997 till September, 2010 when she left her in-laws house to her parental home with her father, the Opp. Party had not given a piece of saree and other dress material to her. It is her parents who had regularly provided the same to her. Her husband had not given her any money during these periods to meet her personal expenses. She met it from the money given to her either by her father or brother. According to the petitioner, the Opp. Party is a Class-I Super Specialist Officer and is getting salary of Rs. 49,978/- per month besides, he gets Rs. 40,000/-, Rs. 25,000/- and Rs. 15, 000/- per month from his private practice at Vivekananda Hospital, KIMS Hospital and M/s. Aditya Care Hospital respectively. Apart from that he is getting huge amount of money from private practice in Jagannath Medicine shop at Salepur Town. He has also substantial deposit in HDFC Bank and at Budheswari Post Office in his name and in the name of his parents. The Opp. Party has no liability. The father of the Opp. Party is retired Superintendent of Post Offices and he is getting pension. The Opp. Party has two sisters who are given in marriage. The Opp. Party is the only son of his parents. The Opp. Party is also getting Rs. 8,000/- per month by letting out his ground floor of his house. The

petitioner is merely a house wife having no source of income to maintain herself as well as the medical, study and other expenses of her children and is depending upon her father who is unable to maintain them. Since the Opp. Party having sufficient means willfully neglected and refused to maintain the petitioner and her children, who have no sufficient means, the present petition is filed claiming monthly maintenance of Rs. 30,000/- for their food, clothing, living accommodation and Rs. 20,000/- per month for education of their children.

4. The Opp. Party entered contest the proceeding by filing written objection denying all the allegations made against him by the petitioner. He has averred that he did his Post Graduation in Medicine from MKCG Medical College and Hospital, Berhampur in the year 2002 and posted as Medical Officer in Raisunguda PHC, Salepur from 2002 to 2008 till he was selected for Super Specialization in Cardiology and completed his D.M in Cardiology at SCB Medical College in the year 2011 and at present posted as Assistant Surgeon in Capital Hospital, Bhubaneswar. According to him the 1st and 2nd delivery of the petitioner were made in Nursing Home as per desire of the parents of the petitioner and the entire expenses were borne by him. After each delivery the petitioner stayed in her parental home and was reluctant to come back to his house. At the time of delivery of the second child he was posted at Raisunguda PHC and was staying in his Govt. Quarters on the plea of the education of the elder child and unwilling to come and stay with him at Raisunguda and preferred to stay at Bhubaneswar where the 1st child of the petitioner was admitted in BJEM School. Whenever he got chance and time out of his busy schedule, he used to take the petitioner and children to his in-laws place, parks, restaurants and nearby places. When he got his admission into D.M. (Cardiology) at SCB Medical College, Cuttack in the month of August, 2008 he has to work 12 to 14 hours in a day and also to look after the Cardiology OPD, Emergency, OT and also attended the round. At that same time, he has also prepared the study and seminar scheduled in every week. Considering the pressure of work he has to stay in the hostel at Cuttack. Caring the sentiment of the petitioner, he had also suggested her to come to Cuttack, so that he can take a house on

rent during this period for having a happy conjugal life but the petitioner denied his suggestion on the plea of disturbance of the education of the son and whenever the petitioner comes to the house of his sister, they have had happy time and the petitioner had not grumbled at any time during that period. During the period from 2008 to 2010 in spite of strain/stress he could manage to take the petitioner and the children to Kochi and Mannar for four days and they stayed in a Hotel and had a nice time. In the year 2010 also they had gone to Berhampur to attend the old students meet at Medical College where they stayed for a couple of days and during that time they had physical relationship and after 2010 for she left his house went to her parental home they had no relationship. It is further stated by the Opp. Party that during his tenure at Harianka and Raisunguda he was a very popular doctor having a large patient base in Kendrapara and Salepur. Due to his sympathetic approach and cordial behavior towards the patients, each patient wants to be nearer to him and wanted to remain in touch with him. Most of them had kept his telephone number to get support at the time of any emergency. Very often they send message even shyaree and jokes, lest he could see or read them as he had hardly any time to reciprocate with messages coming from telephone No. 919439485796 to which he attended and talked for hours together. According to him, the said telephone number belongs to a lady, whose grandson is a heart patient and also an industrialist and a lady of high dignity. She and her entire family are personally known to him as all the family members are his patients. It is further averred by him that if the petitioner being a wife of doctor that too a Cardiology Specialist will entertain doubt about, then he has got nothing to do, but is to curse his own fate. He has further averred that his father did not want any monetary help from him and used to manage the expenses of the house including the educational expenses of his son till the petitioner left his house with the children. His father has been depositing Rs. 1000/- each month in the name of his second child in a Recurring Deposit in a Post Office. If he had any intention he would not have mentioned the name of the petitioner as the nominee in his pensionary benefit and also in the GPF, PPF and in all his

savings. It is further averred by the Opp. Party that time and again whenever her children are sick he had made arrangement for specialized consultation at High Tech Hospital and Zenith Clinic and SCB Medical College, Cuttack as the Specialists happened to be his friends. Further he has averred that his both sisters are well educated and they have got less time to interfere with his family matters. His elder sister is a Reader in Botany and her husband is a Professor in SCB Medical College and the 2nd sister is also quite educated though not in service and her husband is a Senior Class-I officer in Central Govt. He being the only brother is liked by them and whenever they came to his house they comes with plenty of gifts and presentations for the children and for him also. It is further averred that after marriage, she has also not expressed her desire to take a job for herself and for the said period his mother used to do all the household works till the petitioner accustomed herself with the new scenario. There was a part time maid servant who was working in the house since last twenty years. According to him he belongs to a middle class family. He including his family members were accustomed to do their own work. As he was not staying in the house his father used to bring the household articles and also used to leave and bring the son from the School as the petitioner was to cook for herself, her children and for his parents as per custom in the middle class family. On 19.09.2010 i.e. on his birth day, the petitioner left his house with children without informing his family members with her father and brother on the plea that she has some pending bank work and believing the same his parents allowed her to go. While they were eagerly waiting for her return in one fine morning her parents came to his house and intimated his parents that the petitioner will not come to her in-laws house and they have got sufficient ability to take care of her and her children. They also told his parents that the petitioner will be provided with home and sufficient money to lead rest of her life without the Opp. Party. All the attempts to convince the father of the petitioner turned down by the former and they left his house without listening his parents. Further, he has averred that the monetary claim/assistance made by the petitioner seems to be with a motive to extra money for leading her life

lavishly. Thereafter several attempts have been made from his side but all were in vain. Finding no other alternative, he has been waiting for an occasion of for settlement of his family. The Opp. Party further averred that the petitioner without any rhyme or reason suspects him and also suspicion has been fueled by her parents and the petitioner is thoroughly guided and swayed by her parents for which all his attempts have been frustrated and he is depriving of former to maintain happy conjugal life. According to him, he is ready and willing to maintain the petitioner and his children. He wants to give the best education possible to his children and the possible comfort which he can afford to his wife. It is further averred by him that as a Cardiologist he is getting Rs. 45,000/- per month through which he is to maintain his ailing parents and other expenses and feels if his family members will stay with him he will be encouraged to do more work and to earn more to give his family all possible comfort to which they deserve. According to him, as the petitioner has left his house without just and sufficient cause, she should not be allowed to get any maintenance and hence the petition be dismissed with cost.

5. From the aforesaid rival contentions of the parties, the following points are formulated for determination of the case:-

- (1) Whether petitioner has voluntarily deserted the Opp. Party?
- (2) Whether the Petitioner is unable to maintain herself and her children?
- (3) Whether the Opp. Party having sufficient means neglected and refused to maintain the petitioners?
- (4) What would be the quantum of maintenance to be allowed to the petitioners, if point No. 1 and 2 are answered in their favour.

6. The petitioner in order to buttress her case she, herself, has been examined as P.W. 1 and placed reliance on seven documents. They are:- Ext. 1 to 1/w are the money receipt towards payment of tuition fees of Prateek Rath, Ext. 2 and 2/a are the money receipt showing purchase of text books of Prateek Rath, Ext. 3 to 3/w are the money receipts towards payment of tuition fee of Lagna Rath, Ext. 4 to 4/c are the money receipts showing purchase of text book of Lagna Rath, Ext. 5 to 5/e are

the conveyance charges towards auto rickshaw of Prateek Rath and Lagna Rath, Ext. 6 and 6/a are the prescriptions and Ext. 7 and 7/a are the money receipts. The Opp. Party in order to negate the claim of the petitioner he, himself examined as O.P.W. 1 and relied on four documents. They are:- Ext. A is the money receipt towards payment of coaching fee of Prateek Rath for the year 2010, Ext. B is the Bank Folio regarding School fee of Prateek Rath, Ext. C is the School fees payment card of Prateek Rath and Ext. D is the R.D. Pass Book in favour of Lagna Rath.

7. In so far as the minor children Prateek and Lagna are concerned, the Opp. Party who is their father has the responsibility to maintain them. The responsibility of the Opp. Party to maintain them which is cast on him not only by the laws of the land, but also by the natural laws of the humanity continues to be in force. From the pleadings of the Opp. Party nay, from his evidence it has been clearly established that the minor children are residing with the mother-petitioner. The further fact from the pleadings as well as from the evidence of the parties established that the children are not in starving condition. It has also been established that the father-Opp. Party has not sought the custody of the minor children and has not been providing for their maintenance. Minor children have no will or volition of their own and, therefore, they cannot be held responsible as to where they stay. The Opp. Party cannot avoid his responsibility by saying that children are with mother and that mother who is highly qualified having a master's degrees can earn money to maintain the children is if no avail. Ability of mother to maintain the children cannot be a ground for refusing maintenance to the minor children even the mother has separate income though not contrary is not relevant though the children are living with mother-petitioner. Argument has been advanced that the petitioner claiming maintenance for her minor children, did not join them as petitioners, this being an irregularity does not come in the petitioner's way for claiming maintenance for her minor children. Thus, from the proved fact that the minor children were not living with the Opp. Party and the Opp. Party was not providing for their maintenance is sufficient to satisfy the requirement of neglect or

refusal within the meaning of Section 125(1). Speaking differently the minor children are entitled to get maintenance from the father-Opp. Party.

8. In so far as the claim of the maintenance by the wife-petitioner is concerned, it contextualizes for judicial evaluation whether the petitioner has sufficient cause to live separately from the Opp. Party and that the Opp. Party has refused or neglected to maintain her. The wife-petitioner alleged the ill-treats and cruelty of non-sex of Opp. Party which compelled her to leave his house. The Opp. Party refuted it by pleading as well as leading evidence that they had marital cohabitation during their attending old student meet at Berhampur in the year 2010 and no ill-treats to the petitioner and that the petitioner left his house voluntarily. In *Deb Narayan Vrs. Anushree* (2003) II SC 303 it has been held that where the wife left the matrimonial house without any justifiable ground, she was not entitled to the grant of maintenance. Now, the elementary question that first it required to be decided is whether the alleged cruelty of non-sex is proved and if so, justify the wife to leave apart from the Opp. Party. P.W. 1 has stated that from December, 2006 till 19.09.2010 the Opp. Party refused to have sexual intercourse with her and denied sex, even though she persuaded him. She has further stated that when the Opp. Party stopped his frequency of coming to his house and stopped marital cohabitation during prosecuting his D.M. Course in SCB Medical College and Hospital Cuttack, she told it to her parents-in-law and when her parents-in-law confronted it to the Opp. Party, the later replied that he had no time to spare as he was busy in his studies. She has further stated that her parents-in-law had taken her four to five times to the house of the Opp. Party's sister at Cuttack for resumption of marital cohabitation but in none of the occasions they have had any sexual relationship and therefore, she used to return her matrimonial home with all humiliation and embarrassment. The Opp. Party during his examination in chief stated that to avoid the abstinent problem he had given a suggestion to the petitioner to come to Cuttack to join with him for happy conjugal life so that he can take a house on rent but the petitioner declined up her in the garb of disturbance of the

higher education of the son. He has further stated that the petitioner used to visit his sister's house during these periods and they have had physical relationship. The petitioner who is none else than the wife of the Opp. Party is the best person who could thrust light on sexual relationship between them. When categorically denied the same there is no escape to conclude that the petitioner was non-sexed. Had it not been so, the petitioner who is a highly educated lady having married to a doctor of repute would not have left her matrimonial home with her two minor children with the knowledge that it would be difficult on her part to rear and bring the children up without the assistance of the Opp. Party.

9. The next allegation of the petitioner against the Opp. Party that he has extramarital relationship with many ladies especially with one Samima of Salepur. The petitioner stated the same in her affidavit evidence and also has taken a ground justifying herself to stay away from her husband with minor children. The petitioner during her examination has stated that from the SMS and long duration telephonic conversations she compounded her suspicion of extra marital relation of the Opp. Party with Samima even, she has not hesitated to state that in one of the occasions her son overheard the telephonic conversation of the Opp. Party with Samima to whom the Opp. Party addressed "I Love You". The Opp. Party explained during his examination in chief that many of his patients due to his popularity had taken his telephone number and talked with him for taking medical advice at the time of emergency. But to our dismay, the Opp. Party has singularly failed to produce any other SMS than Samima and that too from a particular cell phone number which belongs to husband of Samima who is staying in Dubai. Therefore, receiving frequent calls from a lady whose husband is staying abroad and that lady being aged about 35 years old as has been established from the record, the irresistible conclusion would be that the Opp. Party has some kind of affairs with that lady. As we know a married lady can tolerate all taunts or ill-treatment of her husband save and expect any affair of her husband with any lady and that is the sheet-anchor of marital discord between the spouses and for that reason the petitioner in order to have a

peaceful living though it wise to leave apart from her husband. Once the petitioner could justify her living apart from her husband and the husband has not provided any farthing till date from the date of her living separately, there is no escape to conclude the Opp. Party has refused and neglected the petitioner.

10. As regards to the income of the Opp. Party, the Opp. Party himself has admitted that he has been working as Super Specialist Class-I of Cardiology in Capital Hospital, Bhubaneswar and his net salary is Rs. 57,606/- after all statutory deduction of gross pay of Rs. 70, 306/-. Besides from Ext. 6/a, 7 and 7/a it has been established that the Opp. Party is doing private practice in Vivekananda Hospital and Sunflower Nursing Home at Bhubaneswar. It is further reveal from these two documents that the Opp. Party used to receive Rs. 1,000/- for each visit to in Vivekananda Hospital and Rs. 300/- to each visit to a patient Sunflower Nursing Home. Concatenating to the aforesaid evidence, there has been no cavil of doubt that the Opp. Party is man of means. Since the Opp. Party has willfully neglected and refused to maintain the petitioner and the minor children having sufficient means, he is legally bound to provide maintenance to the petitioner and the minor children since the petitioner has no independent source of income and she is depending upon the mercy of her parents and brother.

11. Now the next question for consideration is about the quantum of maintenance. While deciding this question, I am reminiscent and redolent that the quantum of maintenance should be fixed in such a manner which shall be commensurate to the status of the parties. The Opp. Party is a doctor of repute in Cardiology and a class-I officer of State Govt. of Odisha. Keeping that in view in my mind besides, spiraling rise of essential commodities and education and health, it would be just and proper to allow a monthly maintenance of Rs. 5,000/- to each of the children and Rs. 15,000/- to the petitioner. Hence, it is ordered;

ORDER

The petition is allowed on contest in favour of the petitioner. The Opp. Party is directed to pay a monthly maintenance of Rs. 15,000/- to the petitioner and Rs. 5,000/- to each of the children from the date of

filing of application i.e. from 04.05.2013. The Opp. Party is directed to clear up maintenance within two months hereinafter. He is also directed to pay the monthly maintenance within the 1st week of the succeeding month. He is also directed to pay litigation expenses of Rs. 10,000/- to the petitioner. Failure to carry out the order by the Opp. Party, the petitioner is at liberty to levy execution through due process of law.

Judge, Family Court,
Bhubaneswar.

Dictated, corrected by me and is pronounced on this the 30th day of April, 2015.

Judge, Family Court,
Bhubaneswar.

List of witness on behalf of petitioners

P.W. 1 Susmita Mishra

List of witness on behalf of Opp. Party

O.P.W.1 Dr. Pradeep Kumar Rath

List of exhibits on behalf petitioners

Ext. 1 to 1/w Money receipt towards payment of tuition fees of Prateek Rath

Ext. 2 and 2/a Money receipt showing purchase of text books of Prateek Rath

Ext. 3 to 3/w Money receipts towards payment of tuition fee of Lagna Rath

Ext. 4 to 4/c Money receipts showing purchase of text book of Lagna Rath

Ext. 5 to 5/e Conveyance charges towards auto rickshaw of Prateek Rath and Lagna Rath

Ext. 6 and 6/a Prescriptions

Ext. 7 and 7/a Money receipts

List of exhibits on behalf of O.P.W. 1

Ext. A Money receipt towards payment of coaching fee of Prateek Rath for the year 2010

Ext. B Bank Folio regarding School fee of Prateek Rath

Ext. C School fees payment card of Prateek Rath

Ext. D R.D. Pass Book in favour of Lagna Rath

Judge, Family Court,
Bhubaneswar.