AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 198 of 2016

1 - Nilesh Kumar Shukla S/o Shri C.L.Shukla, Aged About 35 Years R/o Sector-4, Street-32, Quarter No.18G, Bhilai Nagar, Tah. And Dist. Durg, Presently Residing At Qtr. No.4B, Street 31, Sector-8, Bhilai, Civil And Revenue District Durg, Chhattisgarh,

---- Appellant

Versus

1 - Renuka Shukla W/o Shri Nilesh Kumar Shukla, Aged About 32 Years Present Resident of Through Smt. Geeta Tare, Kishore Kumar Bhandel, Tikrapara, Ramdas Nagar, Bilaspur, Tahsil and District Bilaspur, Chhattisgarh, **--- Respondent**

With

FAM No. 84 of 2017

Smt. Renuka Shukla W/o Shri Nelesh Shukla Aged About 33 Years R/o Tikrapara, Ramdas Nagar, District Bilaspur, Chhattisgarh.

---- Appellant

Versus

Nelesh Kumar Shukla S/o Shri C.L. Shukla Aged About 35 Years R/o Street No. 32, Sector No. 4, Q.No. 18 G, Bhilai Nagar, District Durg, Presently residing at Q.No. 4, B, Street No. 31, Sec 8, Bhilai, District Durg, Chhattisgarh. **--- Respondent**

Shri B.P. Sharma, Advocate along with Shri M.L. Sakat and Ms. Samiksha Gupta, appears for the appellant in FAM No. 198 of 2016 and the respondent in FAM No. 84 of 2017.

Shri Vivek Sharma, Advocate, appears for the appellant in FAM No. 84 of 2017 and respondent in FAM No.198 of 2016

Division Bench:Hon'ble Justice Shri Goutam Bhaduri and

Hon’ble Jusitce Shri Sanjay S. Agrawal

Judgment/Order on board

18.04.2024

The following judgment of the Court has been dictated by **Hon’ble Goutam Bhaduri, J**

Heard.

1. The present appeals are against the judgment and decree dated 26.07.2016 passed by the Additional Principal Family Court in Civil Suit No.266-A/2014. The appeal filed by the husband bearing FAM No.198/2016 is against the dismissal of application for grant of divorce and another appeal bearing No.84/2017 filed by the wife is against the dismissal of application under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. Since, both the petitions stood dismissed by the learned Family Court by common judgment. These instant two appeals are being heard analogously as the germane of issue is one and the same.

2. In earlier bout of litigation, two appeals bearing nos. bearing FAM No.54 of 2010 & FAM No. 119 of 2010 were filed by the wife against the initial judgment and decree dated 19.04.2010 passed by the Principal Judge, Family Court, Durg in Civil Suit Nos. 232-A/2008 & 233-A/2008 whereby the the application filed by the wife for restitution of conjugal rights was dismissed whereas the application filed by the husband for dissolution of marriage was allowed. This Court by order dated 18.09.2014 while disposing of those appeals remanded the case to the learned Family Court with certain observations as have been made in paras 8 and 9, which are reproduced below:-

> **"8.** On close scrutiny of evidence, we do not find any evidence upto the mark adduced on behalf of the respondent to prove such ground for dissolution of marriage by a decree of divorce. The appellant has also not adduced sufficient evidence to establish the fact that only the respondent has deserted her and

she was not responsible for such separate living. In these circumstances, finding of the Court below in both the cases is not sustainable, therefore, both the appeals deserve to be allowed.

9. In the result, the appeals filed on behalf of the appellant are allowed. Impugned judgment and decree is hereby set aside. The case is remitted to the Court below concerned to decide the case afresh after providing opportunity of hearing and adducing evidence to both the parties. It is also expected from the Family Court concerned to make further attempts for reconciliation of matrimonial dispute between the parties. The parties shall remain in attendance before the Court below on 17.11.2014."

Thereafter the learned Family Court passed the impugned judgment and decree dated 26.07.2016, both the petitions one by the husband seeking divorce and another by wife seeking restitution of conjugal rights, were dismissed. Hence these appeals.

3. The facts of this case are that on 09.01.1997, both the appellant and the Respondent got married and out of their wedlock, a baby girl was borne on 10.12.1997 namely, Nainy. The wife alleged that after the birth of the child, the behaviour of the husband became hostile and he started demanding money. Since, the father of the wife died earlier as such, the demand was being catered by her mother.

4. On the contrary, the husband stated that the wife in turn used to demand money and the demand was beyond the reach of fulfillment. Further more, the wife used to misbehave with the in-laws as also the husband, therefore, difference of opinions started between them. The husband,

who was working in Bhilai Steel Plant stated that on 31.05.2002, when he came back from his office he saw that his daughter Naini was lying dead and the wife was lying in the pool of blood and was in an unconscious stage. He tried to call the relatives but the phone lines were found to be separated from the source. He went out and called his relatives thereafter with the help of the other neighbors and the family members, the wife was admitted in I.C.U., Bhilai hospital, Sector-9. When she regained consciousness, her dying declaration was recorded. Subsequently, she was charged under Section 302 of I.P.C. for killing her daughter and under Section 309 for attempting to commit suicide. The husband also denied the allegation that he ever demanded the money from the mother of the wife. The wife was eventually acquitted both for offences under Section 302 and under Section 309 of the I.P.C. The husband further states that the wife had lodged report against him under Section 498-A for demand of dowry and after trial, the criminal case ended with acquittal order. Thereafter, on difference occasions, the parties have made aspersions and dispersions with personal abuse against each other. Therefore, on the ground of cruelty, the divorce was sought for by the husband, whereas the wife under Section 9 of the Hindu Marriage Act, 1955 sought for the restitution of conjugal right. Both the parties have adduced the evidence before the learned Family Court in both the cases. The cases filed by the wife, seeking restitution of conjugal rights and the application of the husband seeking divorce, were dismissed. Hence these appeals.

5. Learned counsel for the appellant husband would submit that the behaviour of the wife was so extremely terrific that he could not cope up

with her, as she killed their own child and tried to commit suicide. He would further submit that though the acquittal of the wife was made in the sessions trial, but, the circumstances of this case would lead to show that she committed cruelty toward the husband, for which, the husband cannot be compelled to continue the matrimonial ties. He would further would submit that the statement of the wife recorded under the dying declaration is a corroborative piece of evidence, which cannot be ignored at all to evaluate the quantum of cruelty. He further submits that pursuant to the report of the wife, criminal case was registered wherein, the husband was also acquitted under Section 498-A, therefore, it would amount to cruelty as he he had to undergo the trauma of trial. In these circumstances, after the terrific act committed by the wife on 31.05.2002 both have practically parted their ways and it would not be possible to reunite and the learned Family Court failed to understand and appreciate the evidence in proper perspective. Consequently, the dismissal of the application seeking divorce is bad in law. Accordingly, he prayed that the decree of divorce may be passed.

6. Per contra, learned counsel for the Respondent-wife would submit that according to the wife, she was assaulted by unidentified people, which caused the death of her child and this fact was in knowledge of the husband, as after the incident of 31.05.2002, the husband supported the wife to get her released which would amount to condoning the cruelty, if any. He further submits that the cruelty has not been proved, as would be evident from the statement of the husband, which was marked as Ex.P-4 in Appeal No.84 of 2017 wherein the husband made categorical statement that he wanted to keep the wife, which would lead to show that

there is no cruelty. He further submit that after the incident of 31.05.2002, the application under Section 9 was filed by the wife on 16.03.2004, and in between 31.05.2002 to 16.03.2004 no application for divorce was preferred and only on 26.10.2004, the application for divorce was filed, which would lead to show that no cruelty was ever committed by the wife. He would further submit Ex.D-2 filed in appeal No.84/2017 would further show that the wife has not filed any complaint as the documents do not bear any signature or any complaint of like nature and the statements are not on record. Therefore, if the acquittal was not on merit, the husband cannot get benefit to say that he was subjected to cruelty and had undergone the trauma of trial, therefore, the judgment of the Court below in dismissing the application seeking divorce is well merited whereas the statement of the wife would show that she wanted to join back the company of the husband, which remains unrebutted. Accordingly the appeal filed by wife against dismissal order of the application under Section 9 be allowed.

7. We have heard learned counsel for the parties at length and perused the statements and the documents on record.

8. After the marriage took place on 09.01.1997, a child was borne on 10.12.1997. The husband alleged that the wife used to misbehave with the family members of the husband and even after certain major operation which his father underwent and stay of the father in law in the house, was objected by her, whereas, the wife denied the same allegation. Further narrating an incident, according to the evidence of husband, he states that on 31.05.2002 when he came home from duty at 3.00 pm, he saw that his wife was lying in the pool of blood on the floor in

front room. There were many cut marks on her wrist and blood was spread on the floors. In the inner room, his daughter Naini was lying on the bed and many knots by scarf were tightly tied around her neck, then he got scared and informed his brother in law about the incident on phone and went to Police Station to inform the police and lodged the complaint. He further deposes that his wife was admitted in Sector-9 Hospital in Bhilai and she was charge sheeted under Section 302 of I.P.C for committing murder of child and under Section 309 of I.P.C. for committing suicide.

9. The wife on the other hand stated that while she was in the house on 31.05.2002 her mouth was gagged from behind and in her cross-examination, she states that she got injury on her head and thereafter she lost her consciousness and got back the same in the hospital. She states in the cross-examination that she has not seen the faces of the assailant and admitted another fact that she was also charged under Section u/s 309 of I.P.C. for attempting to commit suicide. The husband in his examination, has placed on document (Ex.P-3) which is copy of dying declaration recorded by the Executive Magistrate Durg on 31.05.2002 at 7:45 PM i.e., the date of incident wherein, a question was asked by the Magistrate as to why she tried to commit suicide, to which, she replied that she was mentally disturbed for long and the incident happened at around 11.00 to 11.,30 pm, on that day and she strangled her daughter and thereafter, after taking acid, she stabbed herself to commit suicide. She further replied that she and her daughter were at home at the time of incident and her husband had gone on duty; there were often domestic disputes with her husband, and she was fed up with

her life, hence she waned to commit suicide. In order to appreciate the gravity of the allegations, for brevity the relevant portion of dying declaration is reproduced hereunder:-

> "प्र० तुमने आत्महत्या की कोशिश क्यों की, क्या किये पूरा विवरण बताइये
>
> उ० मैं बहुत दिनों से मानसिक रूप से परेशान थी, आज लगभग 11, 11.30 बजे की घटना है मैं अपने बच्ची का गला दबा दी इसके बाद मैंने एसिड की दवाई खाने के बाद स्वयं को आत्महत्या करने की नियत से चाकू मार ली। घटना समय घर में मैं एवं मेरी बच्ची थी। मेरे पति उस समय ड्यूटी गये थे, पति के साथ अक्सर घरेलू विवाद होता था मैं अपने जीवन से तंग आ गई थी इस कारण आत्म हत्या करना चाहती थी।" ।

10. The wife, when was confronted with such dying declaration, she completely denies the same and further denies in cross-examination that she does not know, as to whether such dying declaration was filed in criminal trial which she faced and maintained her stand that she had not given any such statement. She was further asked in cross-examination, as to whether the said statement of dying declaration (Ex.P-3) was recorded in her own hand writing and she signed it, she denied the same. She also denies the suggestion that the State Examiner has given affirmative report of such signature and handwriting of her in the dying declaration. She repeated the fact that she had not given such statement and states that she has been acquitted in both the sessions trials.

11. We have examined the said dying declaration (Ex.P-3) and the statements of both husband and the wife. Though, the wife had survived and subsequently was acquitted of the charges, her statement, which is the dying declaration, may not be a dying declaration perse under Section 32 of Indian Evidence Act, 1872 vide Ex.P-3, but would remain

as a corroborative piece of evidence of facts narrated therein. Section 32 of the Evidence Act read with Sections 155 & 157 which would entitle this Court that in order to corroborate the testimony of a witness any former statement made by such witness relating to same fact or about the time when the fact took place or before any authority legally competent to investigate the fact may be proved which would result into the fact that the dying declaration Ex.P-3 though may not be treated as dying declaration under Section 32 of the Indian Evidence Act but would have a corroborative value under Sections 155 & 157 read with Section 162 of the Cr.P.C. The similar proposition had been laid down in ***Ramprasad vs. State of Maharashtra*** reported in ***AIR 1999 SC 1969*** and subsequently in ***Ranjit Singh Versus State of Madhya Pradesh AIR 2011 SC 255***, wherein the Supreme Court had held by following the law laid down in ***Maqsoodan and others V. State of U.P.AIR 1983 SC 126*** that when a person who had made a statement in execution of death did not die, it cannot be treated as dying declaration as his/her statement was not admissible under Section 32 of the Indian Evidence Act, 1872, but it was to be dealt with under Section 157 of the Act of 1872, which provides that the formal statement of a witness may be proved to corroborate later testimony as to the same fact. Paras 24 & 25 of the said judgment in Ranjit Singh Versus State of M.P. AIR 2011 SCC 255 (supra) is reproduced here under:-

> 24. In *Maqsoodan and ors. v. State of U.P. AIR 1983 SC 126*, **this Court dealt with a similar issue wherein a person who had made a statement in expectation of death did not die. The Court held that it cannot be treated as a dying declaration as his statement was not admissible under Section 32 of the Indian Evidence act, 1872 (hereinafter**

called the Act 1872), but it was to be dealt with under Section 157 of the Act 1872, which provides that the former statement of a witness may be proved to corroborate later testimony as to the same fact.

A similar view has been reiterated by this Court in *Ramprasad v. State of Maharashtra AIR 1999 SC 1969*, as the Court held :

> Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before *"any authority legally competent to investigate the fact"* but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. Statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof.

25. This has also been reiterated in *Gentela Vijayavardhan Rao and anr. v. State of Andhra Pradesh AIR 1996 SC 2791;* and *State of U.P. v. Veer Singh and others AIR 2004 SC 4614*.

Thus, in view of the above, it can safely be held that in such an eventuality the statement so recorded has to be treated as of a superior

quality/high degree than that of a statement recorded under Section 161 Cr.P.C., and can be used as provided under section 157 of the Act, 1872.

(Emphasis supplied)

12. In the light of the above principle laid down by the Supreme Court, when Ex.P-3, the dying declaration was tested in the back drop of the statement given by the wife and the husband, the fact which emerges out that the death of the child on 31.05.2002 is not in dispute and at the same time, the wife attempted to commit suicide and she was admitted in hospital and was treated and after her recovery, she faced trial under Section 309 of I.P.C. Therefore, the preponderance of probability and the corroborative fact would hold the sway in favour of the appellant husband who makes a statement that on 31.05.2002, he saw that his child was lying dead and the wife was lying in a pool of blood. The wife though tried to explain that she was assaulted on her head but in cross-examination, injury to her wrist was pointed out. We are conscious of the fact that we are not sitting over the judgment of the Sessions Court but in such inter-se relations between the parties when such narrative comes to fore, the Court while evaluating such evidentiary value cannot shelve the statements of parties to test its veracity and had to bring the lens back to read in between the lines.

13. Having held that the statement of the husband was admissible narration of fact if certain acts have been done by the wife in a spur of movement, she may not be held responsible for offence under Section 302 of I.P.C. but the fear in the mind of the husband to continue the matrimonial life after such incident would always prevail which cannot be given a go-by. In a relation between husband and wife, it mainly floats over the

reciprocal belief of each other and if certain extreme act takes place in the house whereby they lose their child not because of any accident but for a deliberate act then idea of reform dies. There cannot be more inglorious incident in a matrimonial family ties, when one of the spouse is charged with murder of her own child. The statements of facts suggest that the wife herself has contributed to the gloomy environment and continuance of marital ties would only be buffeted with accusation. This would certainly amount to cruelty towards the husband by the wife.

14. Another aspect was highlighted by the respondent-wife that the husband has condoned. Such conduct of the husband would not amount to condoning the cruelty, when the husband tried to help out wife for bail during trial. The statement of the husband and wife would show that after the acquittal, the husband rushed to the High Court against the acquittal. In this given facts this would not amount to condone the cruelty and the state of mind would be reflected that even after the acquittal, the husband believed the die is cast and pitched his voice with accusation to the wife.

15. These facts would lead to show that the trust in between them has completely shaken. With respect to Section 498-A, the husband states that false report was made and he was acquitted. The statement of wife at para 20 would show that she admitted the suggestion that there was no compromise in trial under Section 498-A of I.P.C. Therefore, the presumption would be that when the report was made by the wife and she having been acquitted it would also lead to show that the wife lodged the report against the husband, which was found to be incorrect.

16. In the instant case, the prosecution is launched by the wife against the

husband under Section 498-A IPC making serious allegations in which the appellant had to undergo trial which culminated in his acquittal. The Supreme Court in the like nature of case i.e., ***Rani Narasimha Sastry Versus Rani Suneela Rani (2020) 18 SCC 247*** held that mere lodging of complaint or FIR cannot *ipso facto* be treated as cruelty, but when a person undergoes a trial in which he is acquitted of allegation of offence under Section 498-A IPC, levelled by the wife against the husband it cannot be accepted that no cruelty has been mated out on husband, particularly when serious allegations were made. Para 13 of the said decision is relevant and quoted hereinbelow :

> "13. In the present case, the prosecution is launched by the respondent against the appellant u/s 498-A IPC making serious allegations in which the appellant had to undergo trial which ultimately resulted in his acquittal. In the prosecution under Section 498-A IPC not only acquittal has been recorded but observations have been made that the allegations of serious nature are levelled against each other. The case set up by the appellant seeking decree of divorce on the ground of cruelty has been established. With regard to proceeding initiated by the respondent under section 498-A IPC, the High Court made the following observation in para 15 : (Rani Narisimha Sastry v. Suneela Rani, 2017 SCC OnLine Hyd.714 :
>
> > "15. … Merely because the respondent has sought for maintenance or has filed a complaint against the petitioner for the offence punishable under Section 498-A IPC, they cannot be said to be valid grounds for holding that such a recourse adopted by the respondent amounts to cruelty."
>
> The above observation of the High Court cannot be approved. It is true that it is open for anyone to file

> complaint or lodge prosecution for redressal of his or her grievance and lodge a first information report for an offence also and mere lodging of complaint or FIR cannot *ipso facto* be treated as cruelty. But when a person under-goes a trial in which he is acquitted of the allegation of offence under Section 498-A IPC, levelled by the wife against the husband it cannot be accepted that no cruelty has been meted out on the husband. ……..”

17. In view of the above discussion , we are of the view that the appeal filed by the husband bearing FAM no.198/2016 seeking decree of divorce deserves to be allowed.

18. Coming to the question of quantum of alimony, the concept of Supreme Court is that the wife and children should not be left in a hapless state of distress, destitution and starvation. The Supreme Court has consistently held that in order to ameliorate the financial position of a woman who had left her matrimonial home or even after the divorce petition of husband is allowed, grant of maintenance is a means to secure the woman’s sustenance, along with that of the children, if any. The statutory provision entails that if the husband has sufficient means, he is obligated to maintain his wife and children and he cannot escape from his moral and familial responsibilities. It appears that the wife has no source of income. As stated by the husband, he is working in Bhilai Steel Plant and is presently drawing a gross salary of Rs.1,20,000/- per month. It has further been stated that Rs.2000/- was granted by the Family Court under Section 125 Cr.P.C. Since we are passing a decree of divorce in favour of the husband and taking into consideration the fact that wife has no source of income and quantum of maintenance granted by the family Court is meagre, we are inclined to direct the husband to pay Rs.25,000/-

per month (twenty five thousand) towards maintenance of wife which would be deducted at source from the salary of appellant. It is further observed that as and when the source of income is reciprocally increased, the amount of maintenance shall also be increased proportionally to the extent of increase in source of income in percentage. It is made clear that if the wife is getting maintenance in any other case, the same shall be set off/adjusted.

19. In a result, FAM No. 198/2016 is allowed and FAM No. 84 of 2017 filed by wife u/s 9 of the HMA is dismissed. Accordingly, a decree be drawn.

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(Sanjay S. Agrawal)
Judge

Vivek/
Rao

FAM No. 198 of 2016

(Nilesh Kumar Versus Renuka Shukla)

FAM No. 84 of 2017

(Renuka Shukla Versus Nilesh Kumar)

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(1) If a person, who made a statement in expectation of death, did not die, the statement cannot be treated as dying declaration u/s 32 of the Evidence Act, but the same may be treated as a former statement of a witness to corroborate later testimony of same fact under Section 157 of the Evidence Act.

यदि व्यक्ति, जो मृत्यु की प्रत्याशा में कथन करता है, उसकी मृत्यु नहीं होती है, तो कथन को साक्ष्य अधिनियम की धारा–32 के तहत मृत्युकालिक कथन के रूप में नहीं माना जा सकता है, किन्तु साक्ष्य अधिनियम की धारा 157 के तहत उसी तथ्य को पश्चातवर्ती अभिसाक्ष्य की संपुष्टि करने के लिए उसे साक्षी के पूर्वतन कथन के रूप में माना जा सकता है।

(2) In a relation between husband and wife mainly floats on reciprocal belief and if extreme act took place in house whereby couple lose their child due to deliberate act of one spouse idea of reforms dies.

पति और पत्नी के बीच का संबंध मुख्य रूप से पारस्परिक विश्वास पर निर्भर करता है और यदि घर में अत्यधिक विवाद होता है, जिससे पति–पत्नी में से किसी एक द्वारा जानबूझकर किए गए कृत्य के कारण दंपत्ति अपने बच्चे को खो देते है, तब सुधार का विचार समाप्त हो जाता है।