

(1987) 08 OHC CK 0003
In the Orissa High Court
Case No : First Appeal No. 179 of 1975

P. Maharajan alias Nadarajan

APPELLANT

Vs

Chakalayil Kunju Sarojini

RESPONDENT

Date of Decision : 11-08-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7, 151
Hindu Marriage Act, 1955 — Section 27

Citation : AIR 1988 Ori 175

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : S.N. Satpathy, for the Appellant; Y. Mohanty, for the Respondent

Judgement

L. Rath, J.—This is an appeal by the husband against the decree granting judicial separation to the respondent wife as also custody of the minor son to her with further direction that the appellant is to return back some movables including ornaments as per list to the respondent. During the hearing, Mr. Satapathy, the learned counsel appearing for the appellant, did not press the appeal regarding the order of judicial separation or custody of the child and has confined his submissions only to the direction for return of the movables.

2. The respondent in her petition, furnished a list of movables claimed by her, in para. 14(iii) as being gold ornaments consisting of gold bangles, gold necklaces, earwears, gold rings, gold necklace containing Mangalsutra presented by the appellant, one gold chain presented to the minor son by the respondent's brother, besides one Phillips Radio purchased by the respondent. Apart from such articles, some other articles not specified were also claimed Mr. Satpathy assails the order for return of the articles contending that Section 27 of the Hindu Marriage Act, 1955 (Act 25 of 1955) does not authorise the Court to pass an order for return of ornaments or property belonging to the wife and further neither the existence of such ornaments or articles nor the fact of their being in custody of the appellant has been satisfactorily proved There was no issue on the

point and hence the direction is not sustainable.

3. Developing his submissions, Mr. Satapathy has argued that Section 27 of the Act only vests jurisdiction in the Court to pass orders which it deems just and proper in respect of property which had been presented at or about the time of marriage and belong jointly to the husband and the wife. Since the ornaments claimed to be presented to the respondent at the time of the marriage do not constitute joint property of both the husband and the wife and are the exclusive property of the wife, a direction in that respect is beyond the purview of the powers of the Court u/s 27 of the Act. Besides, the Phillips radio and the gold chain stated to be presented to the minor son by his uncle are neither joint properties of the husband and the wife nor are they presents given at or about the time of marriage and no direction can be issued in respect of those articles. Besides, the respondent also could not press his claim against the appellant regarding "other articles" without specifying them and the order of the learned Subordinate Judge is, on that account, vitiated.

4. The submissions made by Mr. Satapathy seem to have substantial force. There is no dispute and it is now well settled by the decision of the Supreme Court in Pratibha Rani Vs. Suraj Kumar and Another, that ornaments presented to the wife at the time of marriage are her separate Stridhan properties and always continue to be absolutely so without taking any hue of jointness only because of her entering the matrimonial home. Such property even if it remains in custody of either the husband or the in-laws, yet they merely hold the property as trustees on her behalf and can at no point of time lay any claim to the property. By the decision of the Supreme Court, some other conflicting decision of different High Courts including that of a Full Bench of the Punjab and Haryana High Court in Vinod Kumar Sethi and Others Vs. State of Punjab and Another, regarding joint ownership of such property was set at rest. Since the property is the Stridhan of the respondent. Section 27 of the Act in terms would not apply and the Court exercising jurisdiction on a petition for divorce or judicial separation would have no authority to pass any orders in respect of the property. There is a lone decision. Kamta Prasad Vs. Smt. Om Wati, relied upon by Mr. Y. Mohanty, appearing for the respondent, enabling him to urge that Section 27 does not exclude the power of the Court to pass a decree relating to property exclusively belonging to either of the contesting parties since the power is inherent in the proceedings under the Act. It has been held that powers u/s 27 are merely enabling powers of the Court to deal with jointly owned properties, but do not restrict the Court's power to deal with separate properties of either the husband or the wife which powers the Court possesses u/s 151 or Order 7, Rule 7, C.P.C. inasmuch as the powers of a Civil court are available to be resorted to u/s 21 while dealing with the proceedings under the Act.

5. With great respect to the learned Judge, I find considerable difficulty in agreeing with the view taken even though I am conscious of the fact that if power under S, 27 of the Act is not available to the Court to deal with such

property, then apart from criminal prosecution which may be resorted to against the custodian of the property for breach of trust, the only other remedy that may be available to the wife would be the dilatory process of a civil suit. Order 7, Rule 7, C.P.C. does not clothe the Court with an additional power to grant relief unless such relief is otherwise within its powers to allow. The provision is itself an enabling power authorising the Court to grant a relief to the plaintiff or the defendant even if such relief has not been specifically asked for but the Court thinks it as just. The rule pre-supposes that the Court has basically the power to grant the relief if it finds that the relief in the facts of the case is just and proper but has not been specifically stated by the parties in their pleadings. If a relief is not within the power of the Court, then it would be inconceivable that the same can be granted resorting to the provisions of Order 7, Rule 7 C.P.C.

6. Section 27 of the Act makes a specific provision regarding the power of the Court to deal with joint properties of the parties presented to them at or about the time of the marriage. If it would have been merely an enabling power of the Court to deal with that specific category of property, leaving unaffected the otherwise unlimited and unrestricted power of the Court to deal with other properties of the parties, then there does not appear to be any cogent reason as to why only such joint property has been taken out for a separate treatment. The inherent power of the Court, if conceded to, would also take within its ambit the category of property referred to u/s 27 of the Act. On the contrary, vesting power in the Court specifically only to deal with joint property of the parties seems to be indicative of the fact that save and except the specific jurisdiction conferred on the matrimonial court u/s 27, there is no general power available, in the proceeding, to deal with property as such. As far as Section 151, C.P.C. is concerned, the law is well settled that the powers under it are not available to be invoked when there are specific provisions in the statute dealing with the same. Thus, neither Section 151 nor Order 7, Rule 7, C.P.C. would enable the Court to pass any order regarding the individual property of the wife. There is a decision of the Delhi High Court in AIR 1982 Delhi 223 (Smt. Shukla v. Brij Bhushan Makkar) taking the same view as mine while differing from Kamta Prasad Vs. Smt. Om Wati, . In that view of the matter, the arguments of Mr. Satapathy is unassailable and the direction of the learned Subordinate Judge in that respect is to be quashed.

7. Even though such is the legal position, yet it cannot but be felt that the position is highly unfavourable and unjust to harassed wife, whose only remedy to get back the property which is justly her own is, as the law stands, only to move the civil court which is a time-consuming process and itself may be a dissuading factor to be taken recourse to. There does not seem to be any justification as to why the Court, though has the power to deal with the joint property of the husband and the wife presented at or about the time of the marriage, yet would not have the power to deal with such property presented only to one party at that time. In our society ornaments are mostly presented to women at the time of the marriage and it is often the case that such ornaments

or other presents remain in the custody of the husband or other in-laws. It is a travesty of justice that while the wife is compelled to seek a divorce or a judicial separation because of situations in which continuance of a marital life is no longer possible, yet in addition to her humiliation and anxiety, she would have the further harassment of running to the civil court to get back her property which has been unlawfully retained by the husband. No doubt a criminal case instituted against the husband may act as a lever to bend him for agreeing to deliver the articles, but, however, it is not a necessary consequence of the criminal prosecution. The Supreme Court itself expressed its anxiety in *Pratibha Rani Vs. Suraj Kumar and Another*, by stating :

"..... .It is an extreme travesty of justice for a court to say that whenever a married woman demands her Stridhan property from her husband she should be driven to the dilatory process of a civil court and her husband would be debarred from being prosecuted by a criminal court.".

In the same decision, however, the scope of Section 27 of the Act, as analysed above, has been affirmed by observing and agreeing with a decision in *Bhai Sher Jang Singh and Another Vs. Virinder Kaur*, of the Punjab & Haryana High Court that the Section merely provides an alternate remedy to the wife to bring a properly constituted suit in respect of the Stridhan property which the husband refuses to return.

8. The consequence is not an enviable one, particularly in view of the weaker status of women in our society and thus there is urgent need of a remedial measure through appropriate legislation.

9. In view of the conclusion reached regarding lack of jurisdiction of the Court to pass orders, it is not necessary to examine the further submission raised by Mr. Satapathy as regards the effect of not framing an issue on the question and also whether there is sufficient evidence on record to justify the order.

10. In the result, the appeal succeeds to the limited extent of quashing of the order as regards the direction for return of the articles by the appellant to the respondent. The decree may be modified accordingly. In the circumstances, there shall be no order as to costs.