

(2022) 09 OHC CK 0203
In the Orissa High Court
Case No : MATA No.33 Of 2021

Smt. Chinmayee Mohapatra		APPELLANT
	Vs	
Sri Chinmaya Chetan Mishra		RESPONDENT

Date of Decision : 26-09-2022

Acts Referred:

Indian Penal Code, 1860 — Section 406
Family Court's Act, 1984 — Section 19, 19(1)
Hindu Marriage Act, 1955 — Section 13(1)(1a), 25(1), 25(2), 27, 28

Citation : (2022) 09 OHC CK 0203

Hon'ble Judges : S. Talapatra, J; M.S. Sahoo, J

Bench : Division Bench

Advocate : Samir Kumar Mishra, Deepali Mohapatra

Final Decision : Partly Allowed

Judgement

S. Talapatra,. J

1. This is an appeal under Section 19(1) of the Family Court's Act, 1984 directed against the part of the Judgment dated 01.03.2021 delivered in Civil Proceeding No.24 of 2019 by the Judge, Family Court, Phulbani.

2. The appellant instituted a suit being Civil Proceeding No.24 of 2019 for dissolution of marriage on the ground of cruelty within the meaning of Section-13 (1)(1-a) of Hindu Marriage Act, 1955 and also for return of the gold ornaments and household materials given to the appellant at the time of marriage including the cash of Rs.1,30,000/- along with permanent alimony to the extent of Rs.10,00,000/-.

3. It may be mentioned that by the Judgment dated 01.03.2021 delivered in Civil Proceeding No.24 of 2019, the marriage between the appellant and the respondent has been dissolved by a decree of divorce, but the prayer for return of the articles and the cash belonging to the appellant as well as the prayer for permanent alimony have been rejected by the Judge, Family Court, Phulbani.

4. From the records, it appears that for purpose of adjudication of the said matrimonial suit, the following issues amongst the other issues were framed by the Judge, Family Court, Phulbani on the basis of the rival pleadings:

".....(5) Whether the petitioner is entitled to get back cash of Rs.1,30,000/- (Rupees one lakh thirty thousand) only along with the house hold materials given to her at the time of marriage from the respondent ?

(6) Whether the petitioner is entitled to get monthly or permanent alimony from the respondent and if so, what would be the quantum ?"

5. While deciding those two issues relating to return of the articles and cash belonging to the appellant, as claimed and making provision of permanent alimony, the Judge, Family Court, Phulbani has observed that there is no document filed on behalf of the petitioner (the appellant herein) to the effect that in whose name two cheques were issued.

6. P.W.1 (the appellant) in her cross-examination at para-24 expressed her inability to say in whose name the entire amount of Rs.1,30,000/- had been debited. Likewise, P.W.2, the brother of the appellant, in his cross-examination (at para-7) expressed his inability to say to whose account the aforesaid amount had been credited. But, on the other hand, OPW-1 (the respondent) in his examination-in-chief deposed that the parents of the petitioner had given a cheque bearing No.935854 dated 17.06.2018 amounting to Rs.65,000/- (Rupees sixty five thousand) to purchase sarees and cloths for himself and his other relatives. Similarly, OPW-2 (the father of OPW-1) in his examination-in-chief deposed that the petitioner (the appellant) had given a cheque of Rs.65,000/- (Rupees sixty five thousand) only to purchase sarees and cloths for her relatives.

7. After having taken note of the above evidence, the Judge, Family Court has observed in the impugned judgment as follows:

"The provision laid down U/S. 27 of the Hindu Marriage Act says about disposal of property presented at or about the time of marriage which may belong jointly to both the husband and wife. So the cheque given by the petitioner amounting to Rs.65,000/- (Rupees sixty five thousand) to purchase the dress materials and clothes for relatives as per the custom of usage in Hindu Society is not coming under Section 27 of the Hindu Marriage Act, 1955".

8. The appellant had also claimed to get back her gold ornaments and other house hold materials given to her at the time of marriage.

9. On perusal of the petition, which has been filed by the appellant, it appeared to the Judge, Family Court that the appellant had described about the properties to be disposed of U/S.27 of the Hindu Marriage Act viz. gold ornaments of 50 grams, i.e., Bracelet 15 grams, gold chain 16 grams, gold rings (4 nos.) 10 grams and ear rings (9 grams), wooden furniture like dressing table, sofa set, double bed cot, mattress, pillow, wardrobe, trolley suit case, brass utensils, silver utensils and steel utensils. It has been noted by the Judge, Family Court that the

respondent denied the aforesaid pleadings. As there was a total denial of those properties, the Judge, Family Court appreciated the evidence in that direction and thereafter he had observed as follows:

"Had it been true that the receipts are handed over to the respondent, the petitioner could have collected copy of the money receipt from her shop keepers from whom the costly materials are being purchased or can be examined. Any person transported such materials after solemnization of the marriage."

10. So, the evidence of P.W.1 regarding purchase of the above said materials is not believable even in the standard of preponderance of the probability. The Judge, Family Court also disbelieved the evidence as regards the gold ornaments as he found some serious discrepancy in the testimonies of P.Ws. 1 & 2. P.W.2 in particular, had introduced receipt of the gold ornaments, being Exhibits-B/1, B/2 & B/4 showing purchase of the gold ornaments weighing about 18.82 grams. So the evidence of both the witnesses regarding the gold ornaments to the extent of quantity was not believed. Thus, the Judge, Family Court rejected the prayer for return of those articles.

11. So far as the claim of permanent alimony is concerned, the Judge, Family Court, having noted the comparative income of the parties, has observed that the appellant has been earning a monthly remuneration of Rs.55,000/- as the Court Manager in the District Court, Boudh and she was recruited there prior to her marriage. But the appellant, according to the Judge, Family Court did not place any definite evidence as regards the income of the respondent.

12. During her cross-examination, she has stated that she does not know about the monthly income of the respondent (para-28). But she has testified that the respondent has been serving under a private company, namely SIMPLEX. However, the respondent (OPW-1) has admitted that she had been earning a sum of Rs.29,981/- and after deduction, he is to get a sum of Rs.28,712/- per month.

13. It may be noted at this juncture that the appellant filed a specific application U/S.25 (1) of the Hindu Marriage Act, 1955 seeking the alimony. Thereafter, it has been observed by the Judge, Family Court as follows :

"In the instant case, as the monthly income of the petitioner is near about double the monthly income of the respondent and she is living in better position than that of the respondent. Under the aforesaid scenario, it would not be just and proper to direct the respondent to provide any permanent alimony to the petitioner as claimed."

These findings are under challenge in this appeal by the appellant.

14. Mr. Mishra, learned counsel appearing for the appellant, has submitted that following the standard of preponderance of probability, the appellant has quite successfully proved that the properties as noted above are lying with the respondent and the respondent is under obligation to return the properties in as

much as Section-27 of the Hindu Marriage Act deals with disposal of the property presented, at or about the time of marriage, which may belong to jointly to both husband and wife.

15. For the purpose of reference, Section-27 of the Hindu Marriage Act, 1955 is reproduced hereunder:

27. Disposal of the property. –

In any proceeding under this Act, the Court may make such provision in the decrees as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

16. Mr. Mishra, learned counsel appearing for the appellant has further submitted that denial of permanent alimony is contrary to the very object of Section-25(1) of the Hindu Marriage Act. The said provision has been enacted so that either of the spouses may carry on a decent life. Section-25(1) of the Hindu Marriage Act postulates that any Court exercising jurisdiction under the Hindu Marriage Act may, at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose, either by the wife or the husband, as the case may be, order that respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant, as having regard to the respondent's own income and the other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the Court to be just, and any such payment may be secured, if necessary by a charge on the immovable property of the respondent.

17. Sub-section-(2) of Section-25 provides for variance, rescission and modification of the order in respect of maintenance. Even in the event of re-marriage by either of the spouse or if the party is husband, he had sexual intercourse with any woman outside, the order of maintenance may be varied, modified or rescinded in such a manner as the Court may deem just. The appellant herein did ask for the lump-sum as permanent alimony to the extent of Rs.10,00,000/- and return of the articles, which were given about or during the time of marriage.

18. Mr. Mishra, learned counsel appearing for the appellant, has submitted that despite adequate evidence laid by the appellant, her prayer for permanent alimony and return of the properties have been rejected. Mr. Mishra, learned counsel has further contended that Section-27 of the Hindu Marriage Act authorises the Court while deciding matrimonial dispute to pass a decree in respect of the property which may jointly belong to both the husband and the wife. This Section at best provides a civil remedy to an aggrieved wife and does not in any way take away her right to file a criminal complaint against property belonging to her, if criminally misappropriated by her husband. Mr. Mishra, learned counsel has placed his reliance on an apex Court decision in Pratibha

Rani vs. Suraj Kumar and another, reported in AIR 1985 Supreme Court 628, where the apex Court has summed up the position of law in the following words:

"27. To sum up, the position seems to be that a pure and simple entrustment of stridhan without creating any rights in the husband excepting putting the articles in his possession does not entitle him to use the same to the detriment of his wife without her consent. The husband has no justification for not returning the same articles as and when demanded by the wife nor can be burden her with losses of business by using the said property which was never intended by her while entrusting possession of stridhan. On the allegations in the complaint, the husband is no more and no less than a pure and simple custodian acting on behalf of his wife and if he diverts the entrusted property elsewhere or for different purposes he takes a clear risk of prosecution under S. 406 of the IPC. On a parity of reasoning, it is manifest that the husband, being only custodian of the stridhan of his wife, cannot be said to be in joint possession thereof and thus acquire a joint interest in the property."

19. It is a well-known principle as, however, referred by Mr. Mishra, learned counsel for the appellant that a Hindu wife can own property in her own right. That apart, it is purely a question of fact whether the dowry or the traditional presents given to her, were to be individually owned by her or had been gifted to the husband alone or jointly to the couple. For instance, the jewellery meant for a person for wearing of the bride, wearing apparel made to her, the cash amounts put into the Fixed Deposit in the bank exclusively in her name (the wife) are examples of dowry, raising the strongest, if not conclusive presumption. Once it is found that it is a fact that these articles of dowry were so given to her individually and to her own right, then we are unable to see how the mere factum of marriage would alter any such property and divest her ownership either totally or partially. Therefore, what surfaces from those proposition is that properties, gifted or transferred (a) for exclusive use of the bride e.g. her personal jewellery, wearing apparel etc., (b) articles of dowry which may be for common use and enjoyment in the matrimonial home and (c) articles given as presents to the husband or the parents-in-law and other members of the family are to be brought for consideration for determining a claim under Section-27 of the Hindu Marriage Act.

The properties at (a) which are put to the exclusive use of the bride falls within her pristine ownership irrespective of their custody in the matrimonial home.

20. There cannot be any amount of doubt that the bride is entitled to return of her ownership irrespective of her entry and presence in the matrimonial home. The perception that the moment, a married woman enters her matrimonial home, all her properties, including her exclusive properties become a joint property by affection of being placed in the custody of her husband or his relation. These two views are definitely in contrast to each other. Thus, on the basis of the detailed analysis as made in Pratibha Rani (supra), it may safely be held that the perception upon entering the matrimonial home, the ownership of

stridhan property becomes joint with her husband or his relation, cannot be accepted. Stridhan property of a married woman, even if it is placed in the custody of her husband or in-laws, they will be deemed to be trustees and bound to return the same, if and when demanded by her.

21. Mr. Mishra, learned counsel for the appellant has placed his reliance on a decision of the Delhi High Court in Smt. Sangeeta vs. Sanjay Bansal as reported in AIR 2001 Delhi 267. In that decision, the claim of the spouse for return of her properties were rejected holding that those properties since were presented at the time of marriage fell outside Section-27 of the Hindu Marriage Act, 1955. The Delhi High Court has rejected the proposition by holding that the property, as contemplated by Section-27 is not the property which is given to the wife at the time of marriage only. It includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage and also the property given before or after marriage to the parties to become their joint property. Implying thereby, the property can be treated to have connection with the marriage. All such properties fall within the ambit of Section-27 of the said Act.

22. To repel the submissions made by Mr. Mishra, learned counsel for the appellant, Ms. Deepali Mohapatra, learned counsel has submitted that, there is no difference of opinion so far as the exposition of law relating to Sections- 25 & 27 of the Act are concerned. So far as return of the property under Section-27 of the Hindu Marriage Act is concerned, Ms. Deepali Mohapatra, learned counsel has quite robustly submitted that the right over the properties, meaning as stridhan, has to be established by evidence. The appellant has miserably failed to prove her ownership to prove the existence of the property or the right of the appellant to hold such property and her right to get the property returned. The Judge, Family Court has appreciated the evidence and every part of it and thereafter by advancing his analogy has observed that the appellant is not entitled to get the properties. Even the reason those are provided for denying the permanent alimony do not ex facie suffer from any infirmity. Ms. Mohapatra, learned counsel further contended that no interference in respect of the impugned judgment is called for.

23. So far as the alimony is concerned, Mr. Mishra, learned counsel has reiterated that the alimony as claimed is very little in as much as the said alimony has been claimed to retain the standard of life. The appellant is supposed to have and she cannot be pushed for dissolution of marriage, to disadvantageous financial condition. He has urged for interference in the impugned judgment.

24. For purpose of appreciation of findings as returned by the Judge, Family Court, Phulbani, it would be appropriate to make a meaningful survey of the evidence as recorded so far as related to the property covered by Section 27 and to the claim of alimony under Section 25(1) of the Hindu Marriage Act are concerned.

25. Before we appreciate the evidence, let us refer to the pleadings made in paragraph-8 of the petition as the appellant has pleaded as follows:

"8. That my parents have given costly bed, bed materials, pillows, wardrobe, dress materials as per their choice and also given other house hold articles and a sum of Rs.1,30,000/- in shape of Cheque bearing No.935854, dated 07.06.2018 & 935855, dated 16.06.2019 on SBI even though they have not demanded anything."

26. Beyond this, there is no pleading so far as return of the properties is concerned. Without giving any particulars regarding the income of the respondent, the appellant herein prayed for a decree of permanent alimony to the extent of Rs.10,00,000/- for sustenance of the appellant in future.

27. In support of the pleadings, as it appears from the records, the appellant adduced two witnesses including herself (P.W.2). The other witness is his brother Deepak Mohapatra (P.W.2). The documents as considered relevant for the purpose of determining the claim for returning the properties under Section 27 of the Hindu Marriage Act, have been admitted as Ext.B series (Ext.B/1 to Ext.B/4), as regards the purchase of the gold ornaments in the years 2013 & 2014.

28. In the written statement filed by the respondent, it has been stated that the pleading at para-8 of the petition (the matrimonial suit) is not fully correct. But the respondent has admitted that the parents of the petitioner (the appellant) had given a Cheque No.935854, dated 17.06.2018 amounting to Rs.65,000/- towards purchase of sarees and cloths for the relatives of the bride but no other cheque had been given by the parents of the petitioner as alleged.

29. Therefore, it is a total denial, as the said money according to the respondent was spent for purchasing sarees and cloths for the relatives of the bride. But there is no definite denial in respect of the furnitures, golden ornaments, utensils etc. Since it is a case of denial, burden was on the appellant. For that purpose, let us now survey what P.W.1 (the appellant) has stated in her testimony. She has testified as follows:

"9. That my parents have given costly Bed, Bed materials, pillows, wardrobe, dress materials as per their choice, and also given other house hold articles and a sum of Rs.1,30,000/- in shape of Cheque bearing No.935854, dated 07.06.2018 & 935855, dated 16.06.2018 of SBI along with gold ornaments about 80 grams of different items."

But she has denied any gift to have been received from the parents of the respondent. However, in the cross-examination, she failed to take any definite stand regarding the cheques. She testified as follows:

"24. A sum of Rupees one lakhs thirty thousand was given to the respondent in shape of two cheques each amounting to Rs.65,000/-. There was no demand from the side of the respondent so far my marriage with the respondent is concerned. The two cheques were blank, save and except the amount is

concerned. The amount has been debited from my account but without verification of the Pass Book, I cannot say in whose name the entire amount of rupees one lakh thirty thousand has been credited.”

30. However, she had confirmed that from her father’s house, bed materials, pillows, wardrobe, dress materials were given to the respondent. But the money receipts of those materials were handed over to the respondent. But no such claim was raised in the pleading. The appellant has stated that she has been receiving the monthly sum of Rs.55,000/- serving as the Court Manager in the Civil Courts, Boudh. She has also stated that the respondent has been working in a private company, namely SIMPLEX at Cuttack. Her brother, namely Deepak Mohapatra (P.W.2) in his examination-in-chief has testified as under:

“2. That my sister informed about the torture by the respondent and her parental in-laws. That at the time of marriage we have given house hold articles and furniture along with gold ornaments to the respondent, i.e. brasslet-15 gms, gold chain-16 gms, gold rings four in numbers 10 gms. each. And we have also given Ear rings to the sister of the respondent – 9 gms and money Rs.1,30,000/- (Rupees one lakh thirty thousand) in shape of two Cheques.”

31. P.W.2 has stated of no other materials. But in the cross-examination regarding issuance of the cheque, P.W.2 has stated as follows:

“7. To my knowledge, the parents of the respondent asked the petitioner to provide two number of cheques of Rs.1,30,000/- and for which the petitioner issued two cheques but I do not know for what purpose the two cheques were issued by the petitioner. One cheque was issued on 06.07.2018 and the subsequent cheque was issued on 16th or 17th July, 2018. To my knowledge both the cheques were issued without mentioning the name of the drawer. I do not know whose account the aforesaid cheques amount has been credited.”

32. But he has stated in the cross-examination that the respondent has not given anything to his sister. He has further corroborated that the appellant (P.W.1) has been serving as a Court Manager in the Civil Courts at Boudh. But he has denied to have any knowledge about the appellant’s monthly remuneration.

33. The respondent has categorically denied to have received a sum of Rs.1,30,000/-, sofa set, brass and silver utensils etc. But he has admitted that he received one cheque amounting to Rs.65,000/- for the purpose of purchasing sarees and cloths for the relatives of the appellant. He has claimed that his parents gave the appellant some gold ornaments, the relevant part of his testimony is extracted hereunder:

“10. That my parents had given necklace with ear ring totaling 50 grams, ring 2 nos. measuring 8 grams, bangles set of 30 grams, patta set with gold 20 grams, Mangal sutra 10 grams and guest gifts of 4 rings of 10 grams, 4 ear rings of 15 grams and set of palla 10 grams. The petitioner had brought some golden ornaments for her use. All these golden ornaments were with the petitioner, but

she concealed such facts for ill-motive.”

34. So far as the income of the appellant and the respondent is concerned, the respondent has stated that the appellant is drawing a sum of Rs.55,000/- per month, as her salary, whereas, he has been receiving a sum of Rs.28,712/-. In support thereof, he has produced the salary statement in the evidence. He has denied that the appellant is entitled to get any alimony.

35. The respondent as OPW-1 has testified that some gold ornaments were given to the appellant by him and the purchase vouchers (Ext.B series) were produced in support thereof.

36. In para-38, the respondent (OPW-1) has stated that the gold ornaments like necklace, ring, bangle set, Mangal sutra etc. weighing about 80 grams, as stated by him at para-10 of the examination-in-chief, were given to the appellant.

37. As stated earlier, the father of the appellant, namely Santosh Kumar Mishra testified in the trial as OPW-2. He had stated that no dowry was ever demanded nor any amount or any articles as dowry was received by their family. He has also stated that a sum of Rs.65,000/- was received for purchase of sarees and cloths for the relatives of their own choice.

38. Further, OPW-2 has categorically stated in the trial as under:

“11. That I had given golden ornaments to the petitioner such as necklace with ear ring totally 50 grams, ring 2 nos. measuring 8 grams, bangles set 30 grams, patta set with gold 20 grams, Mangal sutra 10 grams and guest gifts of 4 rings about 10 grams, 4 earrings of 15 grams and set of palla 10 grams, but such facts have been concealed by the petitioner. All the golden ornaments are with the petitioner including her own golden ornaments.”

His statement could not be denied by way of cross-examination.

39. Thus, it is apparent from appreciation of the evidence as recorded in the trial of the matrimonial suit that except payment of Rs.65,000/- to the respondent, no amount was paid to him. So far as the claim of paying Rs.1,30,000/- is concerned, cannot be believed at the best evidence that could have been placed in the trial, has not been placed. If the cheques were issued either from any account and encashed, from the ledger of the bank it could have been proved who issued the cheque in whose favour and who had drawn the said amount from the bank. But the said evidence has not been advanced. Hence, the adverse inference is bound to follow. There is no pleading that the gold ornaments, as claimed to have been owned by the appellant were ever put to the custody of the respondent or any of his relative. Thus, we are also unable to accept that gold ornaments were/are ever in the custody of the respondent. The respondent has denied the fact of accepting any furniture, utensils or the bed materials. However, it is customary that during the marriage, if socially arranged, such gifts are given to the bride for her comfort and ownership of the materials in the matrimonial home. Even the respondent's denial is evasive in nature, as he has

not categorically stated that no such materials were brought by the appellant.

40. A presumption could have been drawn based on the testimony of the appellant, such as bed sheet, some utensils etc. were given at the time of marriage. But strangely enough, the appellant did not plead that she had left those materials in her matrimonial home. As such, it is very difficult to hold that those properties (furniture, bed sheet and utensils) were left in her matrimonial home, as we are bound to determine the fundamental fact as regards the possession or custody.

41. Now, we are to decide whether the appellant is entitled to return of any properties U/S. 27 of the Hindu Marriage Act, 1955 or the appellant is entitled to get alimony as claimed U/S. 25(1) of the Hindu Marriage Act. Let us take up first the issue of granting permanent alimony to the appellant.

42. It is an admitted fact that the appellant is earning almost twice the income of the respondent. Therefore, even for maintaining the standard of life, the respondent cannot be directed to give any amount as alimony. In this regard, the findings of the Judge, Family Court stands affirmed. Nowhere, the Judge, Family Court has observed that the properties as claimed by the appellant cannot be returned under Section

27 of the Hindu Marriage Act. What he has precisely observed is that the ownership of that property as claimed by the appellant could not be proved. On the contrary, the claim of proprietorship on a sum of Rs.1,30,000/- has not been proved, as the best evidence that could have been produced, has been withheld. Hence, the ground of objection in this regard is unsustainable. However, what we find that a sum of Rs.65,000/- was paid to the respondent. Even though the respondent's claim is that, that amount was given to him for purchase of the cloths for the relatives of the appellant. This explanation is difficult to believe. Hence, in our considered view, the said amount is liable to be returned. On the basis of a general presumption, this Court would further direct that the respondent shall pay another sum of Rs.60,000/- for miscellaneous properties or accrual of interest etc.

43. Hence, this appeal stands partly allowed with direction on the respondent to pay a total sum of Rs.1,25,000/- (Rupees one lakh twenty five thousand) to the appellant. After such payment, the appellant will have no further claim whatsoever. The said amount shall be paid within a period of two months from the date of decree, failure of which, it is needless to say, that the appellant will be at liberty to recover the said amount through the process of Court. For that purpose, the decree shall be treated as the money decree.

44. Draw the decree accordingly.

45. LCRs, if lying with the Registry, be sent down thereafter.

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