"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

TUESDAY, THE 7TH DAY OF FEBRUARY 2023 / 18TH MAGHA, 1944

MAT.APPEAL NO. 13 OF 2016

AGAINST THE ORDER DATED 26.08.2015 IN O.P.NO.405 OF 2010

ON THE FILE OF THE FAMILY COURT, KOLLAM

APPELLANT/PETITIONER:

,

BY ADVS.
SRI.C.RAJENDRAN
SRI.K.R.RANJITH

RESPONDENT/RESPONDENT:

,

BY ADVS.
SMT.B.BINDU
SRI.C.S.DIAS
SMT.P.K.DHANYA
SRI.N.K.SUBRAMANIAN
SRI.T.V.SREEJITH

THIS MATRIMONIAL APPEAL HAVING COME UP FOR FINAL HEARING ON 19.01.2023, THE COURT ON 07.02.2023 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

P.G. Ajithkumar, J.

The petitioner in O.P.No.405 of 2010 before the Family Court, Kollam is the appellant. She filed O.P.No.405 of 2010 seeking recovery of money and return of gold ornaments and movables. The Family Court as per the common judgment in O.P.Nos.404 and 405 of 2010 dated 26.08.2015 allowed O.P.No.405 of 2010 only in part. The appellant was allowed to recover a few movables included in the petition schedule. Her claim for recovery of money and return of gold ornaments was declined. Aggrieved by the said part of the decree, this appeal has been filed under Section 19(1) of the Family Courts Act, 1984.

2. Notice was directed to be served on the respondent as per order dated 08.01.2016. The respondent entered appearance through his learned counsel. The appeal was admitted on 29.03.2017.

3. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

4. The marriage of the appellant and the respondent was solemnised on 18.08.2002. Betrothal of the marriage was held on 09.06.2002. On that day, Rs.5 lakhs was entrusted by the father of the appellant to the respondent. On the occasion of the marriage, the appellant was given 100 sovereigns of gold ornaments. After the marriage, respondent was given Rs.1 lakh by the father of the appellant to avail a locker facility. The gold ornaments of the appellant were kept in the locker availed in her name. The entire gold ornaments were eventually appropriated by the respondent. Later, an amount of Rs.2 lakhs was given by the father of the appellant to the respondent for purchasing a property in the name of the appellant.

5. The relationship between the appellant and the respondent eventually became estranged. O.P.No.404 of 2010 was filed by the respondent for a decree of dissolution of marriage. O.P.No.405 of 2010 was filed by the appellant for recovery of gold ornaments, movables and realisation of money. O.P.No.404 of 2010 was decreed and the marriage

was dissolved. O.P.No.405 of 2010 was not decreed as prayed. The appellant would contend that the Family Court without appreciating the evidence in a proper perspective, rejected her claim for return of gold ornaments and realisation of money.

6. The appellant would urge that her oral testimony along with the evidence of PWs.2 to 4 and Exts.A5 photographs sufficiently proved the fact that the appellant had 100 sovereigns of gold at the time of marriage. PW1 deposed before the court that the gold ornaments kept in the locker availed in the name of the appellant were taken away and misappropriated by the respondent. Regarding payment of Rs. 5 lakhs, evidence of PW1 and PW4, who is a family friend, was let in. The appellant claims that the evidence amply proved payment of Rs.5 lakhs. But the Family Court did not accept that evidence stating flimsy reasons. The learned counsel appearing for the appellant would submit that oral testimonies of PWs.1 and 4 with respect to the practice prevailing in the area of making payment of money at the time of betrothal is

convincing. Mere denial by RW1 in the box was given overemphasis by the Family Court. It is further submitted that trivial inconsistencies in the evidence of PWs 1 and 4 was highlighted by the Family Court in order to disbelieve them, which is wrong. It is also submitted that even the admission of the respondent that 50 sovereigns of gold ornaments were given to the appellant at the time of marriage was not acted upon by the Family Court. Accordingly, the learned counsel contended that findings of the Family Court regarding misappropriation of gold ornaments and Rs.5 lakhs paid at the time of betrothal are liable to be reversed.

7. As regards payment of Rs.1 lakh for availing locker facility in the name of the appellant and another Rs.1 lakhs for the purchase of the property, the Family Court took the view that the evidence goes contrary to the pleadings of the appellant. The contention of the appellant is that Rs.1 lakh was paid for availing a locker in the name of the appellant. Admittedly a locker facility was availed in the name the appellant. PW1 admitted that her gold ornaments were kept in

the locker availed in her name. The further evidence is to the effect that Rs.1 lakh deposited for availing the locker facility was later withdrawn and the same along with another Rs. 1 lakh paid by the father of the appellant was utilised by the respondent to purchase a property.

8. The respondent produced Ext.B1, a sale deed in the name of the appellant, in order to prove that Rs.2 lakhs paid by the father of the appellant was towards sale consideration of that property. As per Ext.B1, a property belonging to the sister of the respondent was conveyed in favour of the appellant. The same is the sale transaction made mention of by the appellant also, for which consideration of Rs.2 lakhs was paid. The sale is in favour of the appellant. Therefore, the said amount cannot be claimed by the appellant saying that the payment was made to the respondent and it was misappropriated by him. Rejection of that claim by the Family Court cannot be said to be incorrect.

9. The appellant relies on the oral testimonies of PWs.1 and 4 to substantiate that Rs.5 lakhs was paid to the

respondent at the time of betrothal. The betrothal was on 09.06.2002. What was averred in the petition is that on the occasion of betrothal Rs.5 lakhs was paid to the respondent. It may say that further details need not have been pleaded, since pleadings need contain only material facts. But when the evidence tendered in respect of such facts pleaded, contain inconsistencies, lack of detailed pleadings impel the court to doubt the evidence.

10. PW1 gave evidence that Rs.5 lakhs was paid by his father reaching the house of the respondent along with her brother, uncle and PW4. It follows that PW1 did not witness handing over of the money. PW4 deposed that on a Thursday the betrothal took place and on that day he accompanied the father of the petitioner to the house of the respondent for handing over the money. PW4 explained that he was working with Kerala State Financial Enterprises and by availing leave only he attended the betrothal function. 09.06.2002, the day of betrothal, is a Sunday as per the Gregorian calendar. If so, the oral testimony of PW4 becomes suspicious. No other direct

evidence with respect to the payment of Rs.5 lakhs to the respondent is available on record. It was in the said circumstances the Family Court held that the evidence was insufficient to prove payment of Rs.5 lakhs to the respondent in connection with the marriage.

11. The learned counsel for the appellant would submit that Rs. 5 lakhs was paid in connection with the marriage and therefore it is dowry. The practice prevalent in the area was not to make such payments in public and therefore the father of the bride and others went to the house of the bridegroom and handed over the money. Since payment of dowry is prohibited by law it was done so and hence the evidence naturally would be scanty.

12. The ancillary question arises is as to, can there be a decree as sought by the appellant in respect of money and gold ornaments allegedly given in consideration of the marriage, which is dowry. As giving and taking dowry is an offence under Section 7 of the Dowry Prohibition Act, 1961, is it possible to seek recovery of the dowry amount and gold ornaments ?

13. After considering the scope and ambit of Section 6 of the Dowry Prohibition Act, a Three-Judge Bench of the Apex Court in **Bobbili Ramakrishna Raju Yadav and others v. State of Andhra Pradesh and another [(2016) 3 SCC 309]** held that if the dowry amount or articles of married woman was placed in the custody of his husband or in-laws, they would be deemed to be trustees of the same. The person receiving dowry articles or the person who has dominion over the same, as per Section 6 of the Dowry Prohibition Act, is bound to return the same within three months after the date of marriage to the woman in connection with whose marriage it is given. If he does not do so, he will be guilty of a dowry offence under this Section. The section further lays down that even after his conviction he must return the dowry to the woman within the time stipulated in the order.

14. The Dowry Prohibition Act contemplates two aspects; the first, prohibition of taking or giving or abetting of giving or taking of dowry and making such acts punishable. The second is, creation of obligation under Section 6 of the

Dowry Prohibition Act on those who receives dowry to transfer of the same to the beneficiary, and till then the person holds it in trust for the benefit of the woman. When taking or giving or abetting of giving or taking of dowry is punishable, any such transaction tantamount to a void transaction. As per Section 23 of the Contract Act, 1872 if the object or consideration of an agreement is forbidden by law, that agreement is void. The question then is, can there be a valid claim for recovery of the money and the gold thus given. The Legislature itself has provided in Section 6 of the Dowry Prohibition Act that the person who took the dowry shall give it to the woman, and in the interregnum to hold it in trust for the benefit of the woman. Therefore, it is the right of a woman to file a suit to recover the amount and gold from the person who held the dowry in trust, if that person has not transferred the trust property in favour of the woman. It follows that the claim in the original petition is permissible in law.

15. Provisions of the Indian Evidence Act, 1872 have no strict application to the proceedings before the Family

Courts owing to Section 14 of the Family Courts Act. That does not however dispel the application of the basic principle that in a civil case, facts are to be proved at least by preponderance of probabilities, if to get a decree. In **Dr.N.G.Dastane v. Mrs.S.Dastane [AIR 1975 SC 1534],** a Three-Judge Bench of the Apex Court explained when can it be said that the fact is proved by preponderance of probabilities as follows:-

> "The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he links that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second."

16. In **Bexy Michael v. A. J. Michael [2010 (4) KHC 376]** the matter in issue was a claim for return of gold and money. The Court held that absolute certainty is not the requirement under Section 3 of the Evidence Act. In a civil case rival contentions and rival evidence will have to be considered, assessed, evaluated, and weighed to come to a conclusion about whether the burden on the claimant has been discharged. The standard of proof, therefore, is by a preponderance of probabilities.

17. The evidence brought on record by the appellant should be appreciated in the light of the aforesaid principle of law. Having considered the entire evidence concerning the above aspects we find no infirmity to the findings of the Family Court that the evidence is insufficient to substantiate the claim for recovery of Rs.2 lakhs as well as Rs.5 lakhs from the respondent. Hence, the said findings are not liable to be interfered with.

18. When the petitioner contended that she was given 100 sovereigns of gold ornaments and got 13 more

sovereigns of gold ornaments from her relatives, the case of the respondent is that she had only 50 sovereigns of gold ornaments. Ext.A5 is the photographs of the marriage function. From Ext.A5 photographs, it can be seen that the petitioner wore a good amount of ornaments at the time of marriage. Whether it was 100 sovereigns or 50 sovereigns is not able to be decided on a mere perusal of Ext.A5. PW1 asserted that she had 100 sovereigns. PW2 is the proprietor of Panikkassery Jewellers. He deposed that the gold ornaments for the marriage function of the appellant were purchased from his shop. But he did not say that the appellant bought 100 sovereigns from him.

19. PW3 is a teacher and social worker. She deposed that she intervened in the dispute between the appellant and the respondent, but she was unsuccessful in resolving the difference of opinion between them. Evidence of PW3 is not helpful to prove the case of the appellant that she had 100 sovereigns of gold at the time of marriage. RW1 the respondent would depose that the appellant had only 50

sovereigns of gold ornaments. On a comparative analysis of oral evidence let in by either side, the preponderant view is that the appellant had 100 sovereigns of gold when her marriage was solemnised. The success of the claim of the appellant, however, depends on the question of whether the ornaments were entrusted to the respondent and misappropriated by him.

20. This Court considered the question as to upon whom is the burden of proof in a petition claiming the return of gold ornaments given to the bride at the time of the marriage in **Pankajakshan Nair v. Shylaja and another [2017 (1) KHC 620].** The Court observed as follows: it is quite natural that once the marriage is over and the bride has come to the house of the in-laws, there is the possibility of the ornaments being entrusted to the elders as trustees for keeping the articles during the subsistence of marriage. There is a duty cast on the defendants to disprove this fact and also to prove the fact it was taken by the plaintiff at the time she left the house. What the Court held is about the possibility of

things being happened, and not of any presumption available in law.

21. This Court considered the question as to when it can be said that there is entrustment in a suit for recovery of money and gold said to have been given at the time of marriage in **Abubakkker Labba and another v. Shameena K. B. and another [2018 (3) KLT 196].** In that, the claim was to return money and gold ornaments that were allegedly given to the wife in connection with the marriage. Claim against the parents of the husband was the question posed before the Court. It was held that there cannot be a constructive or presumptive entrustment, without actual physical delivery of the same to the parents of the husband and it must be specifically pleaded and proved by sufficient evidence, by the claimant wife. Merely on the evidence that the bride had worn gold ornaments, at the time of marriage, it cannot be held that the ornaments, which were worn at the time of marriage, were entrusted to the father and mother of the bridegroom.

22. In **Binod v. Sophy [2019 (4) KLJ 128]** this Court took the view that the wife while making a claim for gold ornaments will have to prove the entrustment of gold ornaments.

23. In **Rajesh P. P. and another v. Deepthi P. R. [2021 (4) KHC 242]** it was held, it is a customary practice in our country, particularly in our state, among all the communities, that parents would gift gold ornaments to their daughters at the time of marriage as a token of love. Indian parents start making jewellery for their daughters from their birth to make sure that they have enough golden jewellery for their marriage. Thus, it would be unrealistic for a Court to insist on documentary evidence regarding ornaments that had changed hands at the time of marriage. The Court can, certainly, act upon oral evidence if it is found credible and trustworthy. It is also quite common that when the bride moves to the house of the groom after the marriage, she takes all her ornaments and entrusts the

same, except a few required for daily wear, to her husband or in-laws for safe custody. Such entrustment also could be established by the sole testimony of the wife since, normally, no independent witness would be available to witness the same. Once such entrustment is made, a trust gets created. Being a trustee, the husband or his parents, as the case may be, is liable to return the same.

24. In **Leelamma N.P v. M.A.Moni [2017 (3) KHC 340]** a Division Bench of this Court held that once it is proved that gold ornaments were entrusted by the wife to the husband, the burden is on the husband to prove, what happened to the gold ornaments. It is further held that if it was taken by the wife when she left the matrimonial home, the same has to be proved by the husband.

25. Indisputedly, a locker was availed in the name of the appellant. PW1 deposed that her gold ornaments, except a few ones for her daily use, were kept in the said locker. The allegation of the appellant is that on some

subsequent occasions, the respondent obtained the gold ornaments and he misappropriated the same. From the oral evidence of PW1, it cannot be seen that the respondent ever operated the locker. There is no other evidence in that respect. She deposed that some ornaments were taken from the locker and many were kept in it. Keeping the ornaments of the appellant in a locker in her own name cannot amount to the entrustment of the same to the respondent. In the nature of the said evidence, it is not possible to find that the ornaments; whole or any part, were entrusted to the respondent. Only if the fact of entrustment of the gold ornaments to the respondent is proved, the appellant can claim return of such ornaments. The finding of the Family Court that there is lack of evidence to prove the entrustment of gold ornaments to the respondent is therefore not liable to be interfered with. Accordingly, we hold that the decision of the Family Court to reject the claim of the appellant for the return of gold

ornaments and money does not suffer from any infirmity.

Hence, this appeal fails and the same is dismissed.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

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