

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal (M) No. 177 of 2019

- Smt. Durga Sahu, W/o Shri Suresh Kumar Sahu, aged about 33 years, R/o Village – Mohara, Tahsil – Masturi, Civil & Revenue District – Bilaspur, Chhattisgarh.

--- Appellant

Versus

- Suresh Kumar Sahu, S/o Shri Mahesh Kumar Sahu, aged about – 36 years, R/o Chandaniyapara, Janjgir, Tahsil – Janjgir, Civil & Revenue, District – Janjgir – Champa, Chhattisgarh

--- Respondent

For Appellant	:-	Mr. Parasmani Shriwas, Advocate.
For Respondent	:-	None appears for the respondent though Served.

Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board by Justice Manindra Mohan Shrivastava J.

23.08.2021

1. Considering the nature of dispute raised before us and the order required to be passed which will essentially result in remand of the case, we are inclined to dispose off the matter finally.
2. Appellant/wife filed an application for grant of decree of divorce against respondent/husband on the ground of cruelty. She also made prayer under Section 25 of the Hindu Marriage Act that as she resides separately from husband since 2017, she has no other source of income

and she mostly keeps ill and requires some means for her treatment, husband being a person of good financial capacity and possessed of ten acres of agricultural land from which he is earning, she may be awarded Rs. 10 lakhs as permanent alimony.

Prayer under Section 27 of the Hindu Marriage Act was also made for return of *Streedhan*, as per the schedule appended thereto and listing the articles of gifts at the time of marriage.

3. In the proceeding before the Court below, though respondent/husband was served, he did not appear and was therefore proceeded ex-parte.
4. After collecting the evidence led by the appellant/wife, the learned Family Court returned finding that the appellant/wife succeeded in proving that she was subjected to cruelty and therefore on this ground she was entitled to grant of decree of divorce.
5. However, as far as her claim under Section 27 of the Hindu Marriage Act was concerned, the same was rejected and the learned trial Court did not find any material evidence led by the wife in support of her application, not even the receipts of said purchase of the items enlisted with the application.
6. As far as application under Section 25 for grant of permanent alimony is concerned, that prayer was already rejected by the learned Family Court without any inquiry on

the ground that the appellant/wife was being awarded maintenance under Section 125 proceedings and therefore, there was no need to pass any order for grant of permanent alimony under Section 25 of the Hindu Marriage Act.

7. Aggrieved by the judgment and decree to the extent appellant applications under Section 25 and 27 of the Hindu Marriage Act has been rejected, this appeal has been filed.
8. Learned counsel for the appellant would argue that the appellant led oral evidence in support of her pleading with regard to the *Streedhan*/gift articles enlisted along with the application which were gifted to the appellant/wife at the time of marriage, but even then the learned trial Court below has rejected the same, though, evidence in this regard has remained uncontroverted. It is next submitted that the application for grant of permanent alimony under Section 25 of the Hindu Marriage Act, ought to be duly inquired into but the Court below refused to consider the same, swayed by grant of maintenance under Section 125 Cr.P.C., which was an outcome of summary proceeding, whereas the remedy for maintenance under Section 25 is of permanent nature granted upon full fledged trial, upon the adjudication of the rights of the parties. At the most, the Court below could have adjusted the amount of maintenance awarded under Section 125 Cr.P.C. proceedings. He, therefore, has prayed for grant of appropriate relief both with regard to return of the *Streedhan* as also permanent alimony.

9. We have heard counsel for the appellant and perused the records.
10. On factual score it remains undisputed that the appellant/wife, even before decision of application under Section 25 of the Hindu Marriage Act, had earlier approached the Magistrate by instituting application under Section 125 Cr.P.C. and in those proceedings she was initially awarded maintenance of Rs.1800/- per month vide order dated 10.07.2017, which was later on modified enhancing the amount of maintenance from Rs.1800/- to Rs.2000/-. The occasion arose for the Family Court to decide application for grant of permanent alimony while passing the decree of divorce on 10.05.2019 i.e. much after passing of the order of maintenance under Section 125 Cr.P.C.
11. Upon perusal of the modified order passed by the learned Court below we find that the learned Court below has rejected claim of permanent alimony under Section 25 of the Hindu Marriage Act on a complete misconception of law that once maintenance is awarded under Section 125 Cr.P.C., the subsequent application for grant of maintenance under other enactment, in the present case, Section 25 of the Hindu Marriage Act, is not maintainable.
12. In this regard, series of authoritative pronouncement of the Supreme Court have settled the issue which shall referred to herein below.

In the case of **Sudeep Chaudhary vs. Radha Chaudhary (1997 (11) SCC 286)**, the Supreme Court held though maintenance awarded under Section 125 Cr.P.C. was granted, if subsequently in matrimonial proceedings, the maintenance pendente-lite under Section 24 of the Hindu Marriage Act is claimed, the same could be awarded after due adjustment of the amount already being paid to the wife towards maintenance under Section 125 Cr.P.C. proceedings.

13. The issue arising for consideration before the Supreme Court in a recent case of **Rajesh Malhotra Vs. Krishna Malhotra**¹ was whether, after grant of permanent alimony under Section 25 of the Hindu Marriage Act, a prayer can be made before the Magistrate under Section 125 of Cr.P.C. for maintenance over and above what has been granted by the Court below while exercising powers under Section 25 of the Hindu Marriage Act. Examining the interplay of provisions contained under Section 25 of the Hindu Marriage Act and Section 125 of the Cr.P.C. their Lordships in the Supreme Court held that provisions contained under Section 25 sub-section (1) of the Hindu Marriage Act empowers the Court, while passing any decree, to consider the status of the parties and whether any arrangements needs to be made in favour of the wife or the husband; and by way of permanent alimony, an order of alimony could also be passed by the Court. It proceeded to hold that at the stage of passing a decree of dissolution of

¹ 2020 Vol 14 SCC 150

marriage, the Court should consider not only the earning capacity of the respective parties, the status of the parties as well and various other issues. Taking into consideration the provision contained under sub-section (2) and sub-section (3) of Section 25, it was held that the aforesaid provisions permitted the Court to modify the order of maintenance, in case there is any change in the circumstances. The distinction between two factual situations, one where initially an application under Section 125 Cr.P.C. was filed maintenance granted and then prayer for grant of permanent alimony was made under Section 25 of the Hindu Marriage Act and a situation where an order of permanent alimony under Section 25 of the Hindu Marriage Act was passed first in point of time and thereafter, application for grant of maintenance U/s 125 Cr.P.C. was filed, and was explained as below :-

“10. Ms. Shakil, amicus curiae invited our attention to some decisions including the decision of this Court in [Sudeep Chaudhary vs. Radha Chaudhary](#). This decision was relied upon by the High Court while passing the order under appeal. In [Sudeep Chaudhary](#), the initial order was passed by the Magistrate under [Section 125](#) of the Code and subsequently in proceedings under the Act, interim maintenance was granted while exercising power under [Section 24](#). It was in the context of these facts, this Court observed that despite the award of maintenance under [Section 125](#) of the Code, the wife was competent to maintain the proceedings under [Section 24](#) of the Act. But the present case is completely to the contrary.

11. Since the Parliament has empowered the Court under [Section 25\(2\)](#) of the Act and kept a remedy intact and made available to the concerned party seeking modification, the logical sequittor would be that the remedy so prescribed ought to be exercised rather than creating multiple channels of remedy seeking maintenance. One can understand the situation where considering the exigencies of the situation and urgency in the matter, a wife initially prefers an application under [Section 125](#) of the Code to secure maintenance in order to sustain herself. In such matters the wife would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a Competent Court either under the Act or similar such enactments. But the reverse cannot be the accepted norm.”

14. The Supreme Court in the case of **Nagendrappa Natikar Vs.**

Neelamma (2014 Vol (14) SCC 452) considered the interplay of provision with regard to grant of maintenance as provided under Section 18 of the Hindu Adoption and Maintenance Act and provision relating to maintenance as contained under Section 125 Cr.P.C. and it was held that the proceedings under Section 125 Cr.P.C. were summary in nature and were intended to provide speedy remedy and so any order passed under Section 125 Cr.P.C. by compromise or otherwise would not foreclose the remedy under Section 18 of Hindu Adoption and Maintenance Act.

15. In a recent judicial pronouncement of the Hon'ble Supreme

Court in the case of **Rajnish Vs. Neha and Another**² examining legal position with regard to difficulties arising due to overlapping jurisdiction with reference to conflicting judgments, taking into consideration the view held by the Supreme Court in the case of **Rakesh Malhotra Vs. Krishnakant Malhotra** (supra), conclusions were drawn and directions were issued, as below :-

“60. It is well settled that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the [D.V. Act](#) and [Section 125](#) of the Cr. P.C., or under H.M.A. It would, however, be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. If maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of maintenance in the subsequent proceeding, the civil court/family court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant.

61. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, we direct

that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that the Court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount. If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the concerned court in the previous proceeding.”

16. The legal position, therefore, now has become vividly clear

and there remains no doubt that even though the wife has been awarded maintenance under Section 125 Cr.P.C., her remedy to obtain maintenance under other enactment is not foreclosed, though, while considering the application for grant of maintenance in proceedings other than one, in which, maintenance has already been awarded, the Court while dealing with a subsequent application under different enactments is required to take into consideration the order passed in previously instituting proceedings.

17. Consequently, we have no hesitation to hold that the

learned Family Court refused to exercise its jurisdiction decide claim for award of permanent alimony under Section 25 of the Hindu Marriage Act, proceeding on a misconception of law that once maintenance is awarded under Section 125 Cr.P.C., no amount could be awarded under Section 25 of the Hindu Marriage Act. Indeed, the learned Family Court proceeded on an erroneous assumption of law that application for maintenance under one proceeding foreclose claim of maintenance in subsequently instituted proceedings under different enactments which also provide for award of maintenance. The common thread which runs through the decisions

referred to above is that while considering the application for maintenance in subsequently instituted proceedings, the Court is required to take into consideration the order of maintenance granted in previously instituted proceedings and make necessary adjustment/set-off while passing an order of maintenance. To what extent, adjustment should be made, would essentially depend upon facts, circumstances, pleadings and evidence, oral and documentary, led by the parties in the proceedings. But it is well settled that order of maintenance granted in one proceeding under one enactment do not by itself foreclose all remedy of maintenance under other enactments. This principle is however subject to an exception, as has been set out in the case of **Rakesh Malhotra Vs. Krishna Malhotra** (supra) that where an order of permanent alimony has already been passed in proceedings under the Hindu Marriage Act, subsequent application under Section 125 Cr.P.C. would not be maintainable but it would be open for the party seeking additional enhanced amount to prefer application for modification of order of permanent alimony granted under Section 25 sub-section (1) of the Hindu Marriage Act by moving appropriate applications before the concerned Court, seeking variation under sub Section (2) or sub Section (3) of Section 25 of the Hindu Marriage Act.

It would also be pertinent to further restate the legal position adumbrated by the Supreme Court and relevant considerations in the matter of award of permanent

alimony. In this regard, we may usefully revert to the observations made in Para 12 in the case of **Vinny Parmvir Vs. Parmvir Parmar**³ where in it was held :-

“12. As per [Section 25](#), while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony.”

18. In the recent judicial pronouncement in the case of **Rajnish Vs. Neha Malhotra** (supra) also the Supreme Court reiterated the aforesaid principles of law applicable in the matter of award of permanent alimony as below :-

“Permanent alimony

73. Parties may lead oral and documentary evidence with respect to income, expenditure, standard of living, etc. before the concerned Court, for fixing the permanent alimony payable to the spouse.

74. In contemporary society, where several marriages do not last for a reasonable length of time, it may be inequitable to direct the contesting spouse to pay permanent alimony to the applicant for the rest of her life. The duration of the marriage would be a relevant factor to be taken into consideration for determining the permanent alimony to be paid.

75. Provision for grant of reasonable expenses for the marriage of children must be made at the time of determining permanent alimony, where the custody is with the wife. The expenses would be determined by taking into account the financial position of the husband and the customs of the family.

76.If there are any trust funds / investments created by any spouse / grandparents in favour of the children, this would also be taken into consideration while deciding the final child support.

III Criteria for determining quantum of maintenance

77.The objective of granting interim / permanent alimony is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

78.The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife and dependant children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.

79. In Manish Jain v Akanksha Jain 34 this Court held that the financial position of the parents of the applicant-wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the Court should mould the claim for maintenance based on various factors brought before it.

80. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiraling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications.

81. A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home.³⁶ The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor

should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

82. *Section 23 of HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of HAMA provides the following factors which may be taken into consideration : (i) position and status of the parties, (ii) reasonable wants of the claimant, (iii) if the petitioner/claimant is living separately, the justification for the same, (iv) value of the claimant's property and any income derived from such property, (v) income from claimant's own earning or from any other source.*

83. *[Section 20\(2\)](#) of the D.V. Act provides that the monetary relief granted to the aggrieved woman and / or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.*

84. *The Delhi High Court in [Bharat Hedge v Smt. Saroj Hegde](#)³⁷ laid down the following factors to be considered for determining maintenance :*

- “1. Status of the parties.*
- 2. Reasonable wants of the claimant.*
- 3. The independent income and property of the claimant.*
- 4. The number of persons, the non-applicant has to maintain.*
- 5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.*
- 6. Non-applicant's liabilities, if any.*
- 7. Provisions for food, clothing, shelter, education, medical attendance and treatment etc. of the applicant.*
- 8. Payment capacity of the non-applicant.*
- 9. Some guess work is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.*
- 10. The non-applicant to defray the cost of litigation.*
- 11. The amount awarded u/s 125 [Cr.PC](#) is adjustable against the amount awarded u/ 24 of the Act. 17.”*

85. *Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable.*

(a) Age and employment of parties

86. *In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children, and the elder members of the family, this factor would be required to be given due importance. This is of particular relevance in contemporary society, given the*

highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and re-train herself to secure a job in the paid workforce to rehabilitate herself. With advancement of age, it would be difficult for a dependent wife to get an easy entry into the work-force after a break of several years.”

19. This Court has noticed that generally in many cases, if not all, the Family Courts are passing orders under Section 25 of the Hindu Marriage Act while finally deciding matrimonial disputes more or less in mechanical manner without making proper inquiry. This does not serve the end of justice. Passing any order of lumpsum maintenance without disclosing the basis on which the Court has arrived at the sum, is bound to be unjust and unfair to the parties. In a given case, upon inquiry, the applicant may be entitled to more amount than what has actually been awarded as permanent alimony and yet, in another case, awarding an amount to which the applicant is not entitled under the law but has been awarded far more than what is intended to be provided under the law, the other party would suffer injustice, burden with more than what is intended to be fastened under the law towards payment of permanent alimony. Therefore, we hold that all the Family Courts while finally disposing of matrimonial dispute and considering prayer for grant of permanent alimony under Section 25 of the Hindu Marriage Act are obligated under the law to collect necessary evidence to enable them to reach to a just and fair conclusion as to the amount payable to the party applying for permanent alimony.

20. As far as prayer for grant of return of *Streedhan* is concerned we find that the appellant/wife claimed return of *Streedhan* on vague pleadings and evidence. Learned Family Court has rightly held that no sale receipts have been produced before the Court that the articles enlisted with the application were purchased and given in gifts. The reason assigned by learned Family Court and the conclusion based therefore, does not warrant any interference.

21. In the result the appeal is partly allowed. The order passed by the Court below to the extent it rejects, appellant's prayer for grant of permanent alimony is set aside. The matter is remitted to the Family Court to hold proper inquiry allowing the parties to lead oral and documentary evidence and then decide appellants' claim for permanent alimony under Section 25 of the Hindu Marriage Act, taking into consideration the amount which she has already been receiving as maintenance under an order passed under Section 125 Cr.P.C. Considering that we have issued number of directions in this case, we consider it proper to direct the Registrar Judicial to cause a copy of this order circulated to all the Family Courts in the State.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge