

THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.28 of 2020

In the matter of an appeal under Section 19 of Family Courts Act 1984
read with Section 28 of the Hindu Marriage Act, 1955.

Arun Kumar Sahu,
S/o. Baburam Sahu,
Village- Baniagan, P.O.- Pedagodi,
P.S. Kaptipada, District- Mayurbhanj.

Appellant

-Versus-

Smt. Madhumita Puthal,
D/o- Chandra Puthal,
Village- Baniagan, P.O.- Pedagodi,
P.S. Kaptipada, District- Mayurbhanj.

Respondent

For Appellant : Mr. Samir Kumar Mishra, Advocate

For Respondent : Mr. T. K. Mishra, Advocate.

CORAM:

**THE HONOURABLE SHRI JUSTICE S. TALAPATRA
THE HONOURABLE SHRI JUSTICE B. P. ROUTRAY**

JUDGMENT
29th June, 2022

S. Talapatra, J. This appeal U/s.19(1) of the Family Court Act, 1984
arises from the Judgment dated 19.09.2019 delivered in Civil
Proceeding No.108 of 2018 by the Judge, Family Court, Baripada,
District- Mayurbhanj.

2. Be it noted at the outset that, the entire Judgment is not under challenge. Only the direction, by which the appellant has been asked to pay the permanent alimony of Rs. 4,00,000/- (Rupees four lakhs) has been challenged.

3. Briefly stated the facts those are relevant are that the appellant and the respondent failing to live a peaceful conjugal life, filed a petition under section 13(B) of the Hindu Marriage Act, 1955 for dissolution of their marriage, after they lived two years separately. During that period, it has been asserted, by the parties that there had been no cohabitation. To reconcile the differences, the efforts taken by the Court did not bring any settlement, hence the Court proceeded to decide the petition.

4. Finally, by the impugned Judgment, the marriage between the appellant and the respondent has been dissolved by a decree on mutual consent but with a direction on the appellant to pay a lump sum permanent alimony to the extent of Rs. 4,00,000/- to the respondent.

5. Being aggrieved by that direction, the appellant has filed this appeal contending *inter alia* that the Judge, Family Court has transcended the jurisdiction as conferred by Section 13 (B) of the Hindu Marriage Act by giving the said direction.

6. Mr. S. K. Mishra learned counsel appearing for the appellant has drawn our attention to a part of the petition that was filed

under Section 13 (B) Hindu Marriage Act with an object to show that the respondent had expressly waived any claim of alimony, any other claim from the appellant. For the purpose of reference, the relevant Clause dealing with the said aspect is reproduced here under :

“6. That the petitioner No. 1 undertakes not to claim any alimony from the petitioner No.2 in future and there shall have no other claim in any manner, against that petitioner No.2.”

7. Mr. Mishra, learned counsel has referred to the finding in the Judgment dated 19.09.2019, where it has been recorded that, the parties were examined and they supported the averments of the petition. They have admitted that they have filed the petition jointly and prayed for mutual divorce. Mr. Mishra, learned counsel has laid emphasis by stating that it therefore, clearly transpires that, the Court on due consideration found the clauses of the settlement in order, not unlawful. Hence, it was the duty of the Judge, Family Court to effectuate the understanding as reproduced in the said petition filed U/S. 13 (B) of the Hindu Marriage Act.

8. To buttress his contention, Mr. Mishra, learned counsel for the appellant has relied on a decision of the Apex Court in ***Ganesh vs. Sunil Kumar Srivastava and another*** reported in **(2020) 20 SCC 787**, where it has been enunciated that, when the spouses filed the petition by mutual consent -

“Appropriate course to be adopted in the matter is to effectuate the understanding”

It has been further observed in *Ganesh (supra)* that it was certainly open to the wife to give up any claim so far as maintenance or permanent alimony or Stridhan is concerned. According to Mr. Mishra, learned counsel, a direction for payment of permanent alimony to the extent of Rs. 4,00,000/- is unsustainable, in as much as such relief was not sought by the respondent and, hence, is required to be intervened by this Court for ends of justice.

9. Per contra, Mr. T. K. Mishra learned counsel appearing for the respondent has submitted that, it is the duty of the Judge, who is passing decree of divorce under the provisions of Hindu Marriage Act, 1955 to pass the appropriate direction for alimony or maintenance. Mr. Mishra, learned counsel for the respondent has extensively referred to Section 25 (1) of the Hindu Marriage Act. Hence, the said provision may be reproduced.

“25. Permanent alimony and maintenance-(1) Any Court exercising jurisdiction under this Act may at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the 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 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." (Emphasis added)

10. Mr. Mishra learned counsel for the respondent has robustly contended that, it is the duty of the Court at the time of exercising the jurisdiction under the said Act to pass the order as regards permanent alimony or maintenance. Therefore, the direction to pay the permanent alimony as made by the Judge, Family Court by the impugned Judgment is in conformity to the provision of Section 25 (1) of the Hindu Marriage Act and, as such, no interference is called for.

11. Mr. Mishra, learned counsel for the respondent has relied on a decision of Bombay High Court in ***Geeta Satish Gokarna v. Satish Shankarrao Gokarna*** reported in **AIR 2004 Bombay 345**. In that case, the marriage between the parties was dissolved by a decree of divorce by mutual consent. In the consent terms, the wife agreed not to claim alimony or maintenance. Later on, the wife had moved an application seeking alimony or maintenance U/S. 25 (1) of the Hindu Marriage Act. In that circumstance in ***Geeta Satish Gokarna***, the question that fell for consideration before the Bombay High Court is that, whether having

considered the consent terms, the wife can be allowed maintenance. There was no dispute that the clause or term waiving the claim of permanent alimony or maintenance was embodied in the consent terms. In order to answer the said question, the Bombay High Court in ***Geeta Satish Gokarna*** (*supra*) has observed that, the question really would be whether under Section 25(1), a party who has been divorced, is entitled to maintenance even if in the consent terms she had agreed not to claim alimony/maintenance. Thereafter, it has been observed as under:

“The language of Section 25 shows that it is a power conferred on the Court at the time of passing of a decree or at any time subsequent thereto on an application made to aware alimony or maintenance. This is a jurisdiction to be exercised by the Court. The parties, therefore, cannot by an agreement between themselves as to oust jurisdiction of the Court which otherwise the Parliament has conferred.”

In *Geeta Satish Gokarna* (*supra*), it has been further observed that permanent alimony or maintenance is inalienable component of Right to Life. Section-25(1) has been enacted to protect a person, unable to maintain herself or himself.

12. It has been held in the said report that in *Hirabai Bharucha*, interpreting Section 40 of the Parsi Marriage Act, a view has been taken following view taken by the English Courts that such a provision is based on public policy. That Public Policy has found

accommodation in our Constitutional philosophy. The power is conferred on the Court with object of helping the weak. Therefore, any clause in a contract or consent terms providing to the contrary would be against the said public policy [See Delhi Transport Corporation V. D.T.C. Mazdoor Congress: AIR 1991 SC 101]. Clause 5 of the consent terms is clearly severable from the other terms. Clause 5 is contrary to the public policy and consequently that clause will have to be treated as non est [in the case of Geeta Satish Gokarna (*supra*)]. In the case in hand, the only question, is whether Clause 4 would bar the court from giving a direction of permanent alimony suo motu. The very fact that Clause 5 was placed differently from Clause 4 will indicate that it ought to cover situations other than those covered by Clause 5. Even otherwise, Clause 4 would prohibit a party ex facie from claiming maintenance and that requires consideration [in the case of Geeta Satish Gokarna (*supra*)]. It would also suffer similar consequence as Clause 5 is held being against the public policy. On consideration, it has been held in Geeta Satish Gokarna (*supra*) that the appellant was not barred from applying U/S. 25 (1). The application, therefore, by the appellant was clearly maintainable. It has been further observed that, the learned trial Judge was right in so holding. The cross objections as filed by the respondent on the said finding is bound to fall flat.

13. Having appreciated the rival contentions, as raised by the counsel for the parties in this appeal, we need to refer more elaborately to the provision of Section 25 (1) of the Hindu Marriage Act. A bare reading of that Section would show that, the Court which is exercising the jurisdiction under the Hindu Marriage Act, 1955 has the power or jurisdiction at the time of passing any decree or at any time subsequent thereto to order the maintenance or alimony. But such power or jurisdiction can only be exercised on application made to that Court for that purpose either by the wife or the husband, as the case may be. On such application, the Court will inquire into the respondent's income or property for determining the quantum of alimony or maintenance to be paid periodically or at a time. What has been noticed by us is that, the respondents in this appeal, did not file any application at least no reflection of such fact is available in the Judgment or in the records, for permanent alimony or maintenance. The Judge, Family Court in the purported exercise of jurisdiction as conferred by Section 25 (1) of the Hindu Marriage Act has suo moto issued the said direction for permanent alimony to the extent of Rs.4,00,000/- to the respondent herein. It is noticed by us that there had been no inquiry at all.

14. In Ganesh (*supra*), as referred by Mr. S. K. Mishra learned counsel for the appellant, the Apex Court has laid down that, either of the parties, the wife or the husband, may give up any claim so far as the

maintenance or permanent alimony is concerned. It has been also observed by the Apex Court that, the duty of the Court which has been exercising the jurisdiction under the Hindu Marriage Act, 1955 is to effectuate the understanding as placed before it in order to pass a decree of divorce by mutual consent. In this regard, we have persuaded to observe that, the Court while adjudicating the petition U/S. 13 (B) of the Hindu Marriage Act is permitted to examine whether the consent terms is hit by Section 23 of the Indian Contract Act, 1872, in as much as the considerations and objects in the said consent terms have to be lawful. It has been provided by Section 23 of the Indian Contract Act that the considerations or objects of an agreement is lawful unless it is forbidden by law or it is of such a nature that, if permitted, it would defeat the provisions of any law. We may again refer to Rule (3) of Order 23 of the CPC, which provides for compromise or adjustment of the suit. It has been clearly provided that, such decree on compromise can only be passed, when it is found by the Court to its satisfaction that, the suit has been adjusted fully or in part by any lawful agreement or compromise. The explanation which has been placed below the proviso under Rule (3) of Order 23 of the CPC as embodied by the Code of Civil Procedure (Amendment) Act, 1976 and come into effect from 01.02.1977, is relevant for consideration in the context, as the said explanation provides that an agreement or compromise, which is void or voidable

under the Indian Contract Act, 1872 shall not be deemed lawful within the meaning of that rule. The same principle shall apply while appreciating the consent terms embodied in a petition filed U/S. 13 (B) of the Hindu Marriage Act. Now, the question that finally falls for our consideration in this appeal is that, whether the Clause regarding waiver or relinquishment of permanent alimony or maintenance is void or voidable.

15. In *Ganesh (supra)*, what the Apex Court has observed is equally important. It may transpire that the waiver/relinquishment Clause relating to permanent alimony or maintenance is voidable in view of the provision of Section 25 (1) of the Hindu Marriage Act. But, if those provisions are appreciated cumulatively, it would be apparent that maintenance or permanent alimony cannot be granted by any Court by exercising its power under the provisions of the Hindu Marriage Act, unless that is sought by the person who needs permanent alimony or maintenance periodically. No jurisdiction for granting the permanent alimony or maintenance periodically can be exercised by the Court unless such alimony and maintenance is sought by either of the parties. It may further be noted that in **Ganesh**, the Apex Court has observed that the wife or the husband may give up any claim so far as the maintenance or permanent alimony or stridhan is concerned. Therefore, unless it is proved that consent terms in respect of the permanent

alimony or maintenance periodically is the outcome of fraud, duress or any other undue influence, the duty of the Court will be to effectuate the said terms and not to pass an order contrary to the consent terms.

16. What has been observed by the Bombay High Court has been so observed in the different context. In that case, no order or direction was issued to pay the permanent alimony without being asked. The dispute in ***Geeta Satish Gokarna*** (*supra*) arose when the wife proceeded to secure permanent alimony and maintenance periodically. It was objected that since the claim of permanent alimony or maintenance periodically has been waived by the wife, she cannot be allowed to claim it in future. Here lies the difference between the factual matrices of the case in hand and the case of ***Geeta Satish Gokarna*** (*supra*). Unless the permanent alimony or the maintenance is sought for by the wife or the husband, the Court may not ordinarily pass any order in that regard. In the case in hand, there was no such claim for permanent alimony or maintenance periodically under Section 25 (1) of the Hindu Marriage Act. Hence, the direction/order for permanent alimony to the extent of Rs.4,00,000/- is totally uncalled for and unsustainable. The impugned direction, in our considered view, is not tenable and accordingly, the same is set aside.

17. Before parting with the records, if we do not observe that even if, the waiver clause is available in the consent terms, the wife-

respondent may approach the Court for permanent alimony or the maintenance periodically in the changed circumstances, when she or he becomes unable to maintain herself or himself, in as much as the public policy, embedded in our Constitution is that no woman should be pushed to vagrancy or destitution. Moreover, Section 25(1) of the Hindu Marriage Act has been structured in such a manner that, even after passing of the decree, such application for alimony or maintenance can be moved. Therefore, in one hand, when a spouse can give up the claim, on the other hand, with the change of circumstances, the same spouse can approach the Court for maintenance under Section 25(1). The waiver clause in the consent terms cannot oust the jurisdiction of the Court which has been expressly conferred by Section 25(1) of the Hindu Marriage Act.

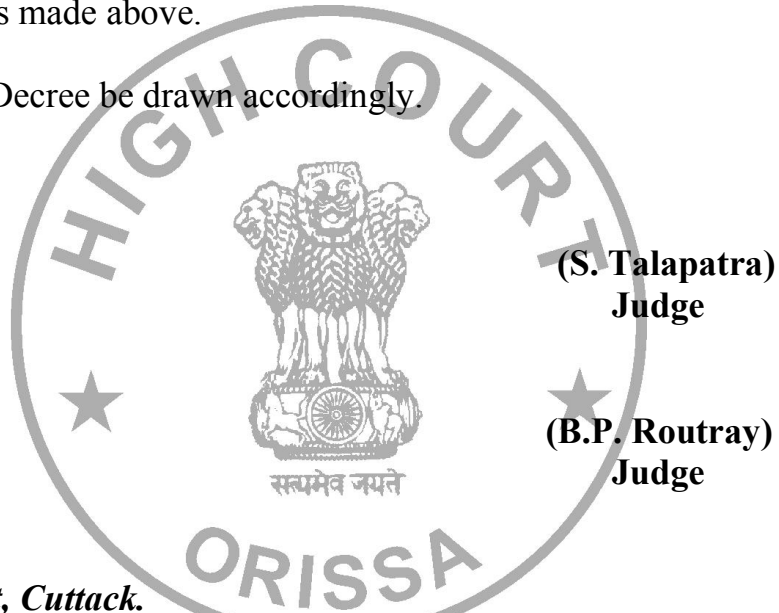
18. In this regard, we may recall what Justice Lord Atkin once remarked. It was spoken by Lord Atkin that, “the wife’s right to future maintenance is a matter of public concern which she cannot barter away.”

19. As it has been postulated in Section 23 of the Indian Contract Act that the considerations and objects are lawful, unless it is forbidden by law or is of such a nature that, if it is permitted to operate, it would defeat the provisions of any law. Therefore, any clause of the consent terms in a proceeding under Section 13(B) of the Hindu

Marriage Act is subject to the test of Section 23 of the Indian Contract Act. If it is observed that for the said waiver clause, the respondent has been completely debarred from approaching the court seeking alimony or maintenance, it would defeat the provisions of law as provided by Section 25(1) of the Hindu Marriage Act and that would, in that event, stand contrary to the public policy against vagrancy or destitution.

20. In the result, the appeal stands allowed, but subject to observation as made above.

21. Decree be drawn accordingly.



*Orissa High Court, Cuttack.
The 29th June, 2022/Subhasis Mohanty, P.A./
R.R. Nayak, Jr. Steno.*



