

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 27 of 2022
with
COT 15 of 2022

Sanjay Pareek & Ors.
versus
Smt. Madhushree Sharma (Pareek)

For the Appellants : *Mr. Sudipta Moitra, Ld. Sr. Adv.,*
Mr. Dipanjan Dey,
Mr. Vijay Verma,
Mr. Dwaipayan Biswas,
Ms. Shreyasi Manna.

For the Respondent : *Mr. Probal Kumar Mukherjee, Ld. Sr. Adv.,*
Mr. Sounak Bhattacharya,
Mr. Sounak Mondal,
Mr. Abhirup Halder,
Mr. Anirban Saha Ray.

Hearing is concluded on : *13th June, 2023.*

Judgment On : **11th August, 2023.**

Partha Sarathi Chatterjee, J.

1. The present appeal questions the legality and tenability of the judgment and decree dated 31st August, 2019 passed by the learned Judge,

City Civil Court, III Bench, Calcutta in Title Suit no. 1763 of 2001 whereby the suit was decreed in part directing the appellants to refund the ornaments described in the schedule (a) (i) & (iii), appended to the plaint but the prayer for refund of other articles and cash of Rs.3,41,000/- were turned down. The respondents also preferred a cross-objection under Order 41 Rule 22 of the Code being COT 15 of 2022. The said cross-objection is treated as on day's list and is taken up for hearing along with the appeal.

2. The necessitous facts required to be adumbrated for the purpose of effective adjudication of the appeal are that one Smt. Madhushree Sharma (in short, Madhu) filed Title Suit no. 1763 of 2001 for declaration and injunction contending, *inter alia*, that she was given in marriage with one Sanjay Pareek (in short, Sanjay), the appellant no.1 on 18.2.1999 and the rest appellants happen to be her parents-in-law.

3. She claimed that in the engagement ceremony held on 20.5.1997, gold ornaments and other items worth Rs.25,000/- were given to Sanjay by her father, and at the time of marriage, her father, namely, Mohanlal Pareek (in short, Mohanlal) gifted various gold ornaments and diamond jewelleryes and silver sets worth Rs.2,00,000/- along with other house hold articles and cloths which are her absolute properties and when she was leading her nuptial life, then Mohanlal gave gold ornaments and other articles worth Rs. 50,000/-.

4. In or about 1995, Sanjay's father came to Mohanlal with a proposal of Sanjay's marriage with Madhu. At that time, Sanjay was preparing for pursuing MBA in USA. Sanjay and members of both the families agreed to

that proposal but Sanjay had no healthy bank account to get Visa and hence, Mohanlal asked his friends and relatives, who were to make a gift to Madhu at the time of her marriage, to make a gift of money in the name of Sanjay so that substantial amount could be shown in the bank account of Sanjay. In furtherance of that proposal to enable Sanjay to obtain Visa, one account was opened in the name of Sanjay in American Express Bank Ltd., now known as Standard Chartered Private Bank and Mohanlal, his friends and relatives gifted Rs.3,41,000/- to Sanjay by issuing cheques in his name and that amount was deposited in that account. It was claimed that the amount was gifted to Sanjay under the impression that Sanjay would refund that amount to Madhu, who was original owner of that money. That amount, which reached to Rs.4,00,000/- being accumulated with interest, was ultimately deposited with one company, namely, M/s. Ranisati Niyat Limited, having its office at 33/1, N.S. Road, Kolkata-700 001. In or about July, 1999, Madhu hired a locker vide. no. 20 at Vijaya Bank located at no. 4, Clive Row, Kolkata- 700 001 and it was recited in the plaint that in or about 2000, Madhu and Sanjay went to London where Sanjay took a job and on 8th August, 2001 they came back to India. Sanjay directly went to Jaipur, Rajasthan where his parents were residing whereas Madhu came back to Kolkata. Sanjay went back to London on 17th August, 2001 without giving any intimation to her. On or about 10th September, 2001, she came to learn that Sanjay took out all her ornaments from the locker hired in the Vijaya Bank in 1999 and even key of that locker had been surrendered.

5. Madhu claimed that M/s. Ranisati Niryat Private Ltd. (in short, the company) awarded interest amounting to Rs.3 lacks against the amount being Rs.3,41,000/- to Sanjay and the interest was deposited in the American Express Bank Ltd., now known as Standard Chartered Pvt. Bank. Sanjay had withdrawn the entire amount being Rs.3 lacks which belonged to her. She further claimed that Sanjay wrote a letter to the said company to refund the said sum of Rs.4 lacks which actually belonged to her and which was given to Sanjay by her father, family friends and relatives. She alleged that Sanjay withdrew ornaments worth Rs.2.5 lacks and money amounting to Rs.3 lacks from the Bank and the Company respectively and kept the money and the ornaments in the custody of the appellant nos. 2 and 3.

6. The plaint was amended at the instance of Madhu where she claimed that being subjected to mental cruelty and being victim of various types of emotional abuse, Madhu filed one suit for divorce vide. Matrimonial Suit no. 119 of 2004 which was decreed on 14.10.2004. She remarried thereafter in 2005.

7. The defendants/appellants (hereinafter referred to as the appellants) resisted the suit by filing joint written statements. Crux of defence taken in written statement is that Madhu made a complaint under Section 156(3) of the Code of Criminal Procedure, 1973 on 12.10.2001 before the learned Chief Metropolitan Magistrate, Calcutta and treating the said complaint as an F.I.R., one case was started under Sections 406/120B IPC and subsequent thereto, she filed another complaint basing upon which another case under Sections 498A/34 IPC was also started. However, as

per direction of the Hon'ble High Court at Calcutta, both the cases were tried together and the appellants were acquitted of all the charges by a judgment dated 31.7.2009.

8. The appellants claimed that Rs.4 lacks were given as interest-bearing loan to the said company in August, 1997 and the company paid interest from time to time till 30.9.2000 and on 29.6.2001, he made a demand for refund of that amount along with interest and he gave a reminder to that company on 11.9.2001. Rs.3.41 lacks were gifted to him during the period from October, 1995 to March, 1996 i.e. three years before the marriage and there was no connection of that gift with the marriage and that amount actually belonged to him which would be explicit from the declarations of gift executed by the donors and from the judgment dated 31.7.2009. The appellants claimed that the company is required to refund that amount along with interest @ 18% p.a. accrued thereon since 18.1.2001.

9. Records reveal that the learned court below framed as many as five issues. In corroboration of the facts depicted in the plaint, Madhu and Mohanlal adduced their oral accounts and she tendered certified copy of the order passed in C.R. Case no. 1071 of 2002, a letter dated 16.7.2004 received by her from Barclays Bank along with statements of account, two letters dated 10.9.2001 and 11.9.2001 written by her and the Chief Manager of the Vijaya Bank, 11 nos. of declarations of gift, 3(three) pay in slips of American Express Bank, 4 nos. of statement of accounts and one income tax return of Sanjay (taken as evidence on admission) which were admitted

in evidence. Madhu also filed one list of articles allegedly given to Sanjay which was marked as 'X' for identification.

10. Whereas to embolden the defence taken in written statement, the appellants adduced oral testimony of Giridharilal Pareek (in short, Giridharilal), appellant no.2 and the appellants produced some family photographs (Ext.-A), statement of accounts issued by that company, a letter of Asian Development Bank confirming scholarship of Sanjay, the judgment passed in the criminal cases, certified copy of the order dated 6.2.2001 passed in connection with G.R. case no. 2939 of 2001 etc.

11. Upon contested hearing, the learned Court below decreed the suit in part. Grieved thereby, the appellants have preferred this appeal whereas challenging the portion of the judgment impugned whereby the prayer for direction upon the appellants to pay that amount being Rs.3,41,000/- along with interest accrued thereon was turned down, Madhu has filed a cross-objection which has been heard along with the appeal.

12. Mr. Moitra, learned advocate appearing argues the matter elaborately on behalf of the appellants. Arguments advanced by Mr. Moitra, as crystalized, are that the marriage in between the couple took place on 18.02.1999 and the subject suit was filed in 2001. Madhu also filed a suit seeking decree of divorce and in that suit for divorce Madhu could have prayed for return of her stridhan articles but she has not done so and hence, in consequence of such omission, subject suit and the reliefs sought for therein would be barred by the provisions of Order 2 Rule 2 of the Code.

13. He submits that in the schedule (b) and (c) to the plaint, reference of one locker number, names of two banks and one account number have been made but no prayer has been made in respect of schedule (b) and (c) and no specification has been given in respect of such schedules and he submits that in respect of prayer (b), no schedule has been annexed to the plaint yet the learned court below has based on such incomplete and vague pleading of the plaintiff.

14. He strenuously argues that Madhu filed two criminal cases against the appellants, one under Section 498A/406/120B IPC and the other U/s. 498A/34 IPC and as per direction of this court, both the cases were heard together. He contends that during investigation, no seizure was made and even the investigating officer could not collect any document or bill relating to the ornaments and ultimately, those cases ended in acquittal. The judgment passed in the criminal case was carried in a revision before this Hon'ble Court as also in the Hon'ble Supreme Court but both the Hon'ble Courts had dismissed the revision and Special Leave Petition.

15. According to Mr. Moitra, the judgement passed by the criminal court is relevant as per the provisions of Section 40- 43 of the Evidence Act and effect of the judgment of criminal court is to be taken into account and in support of such contention, he places reliance upon a judgment delivered in case of *K.G. Premshanker vs. Inspector of Police and Anr. reported in (2002) 8 SCC 87*.

16. He argues that the evidence of Madhu did not find support from the evidence of PW-2 and even, PW-2 in his entire evidence, did not make

any whisper regarding ornaments. According to Mr. Moitra, admittedly, in civil cases, fact in issue is to be proved on the principle of preponderance of probability but such principle does not empower the trial court to base its judgment upon uncorroborated oral testimony of plaintiff without making further enquiry as to whether such testimony has ring of truth or not.

17. He contends that the locker was opened in July, 1999 and the locker was surrendered in March, 2000 and the same was last operated on 21.08.1999 & 28.8.99. The couple went to London in August, 2000 and no evidence has been let in to show that the ornaments belonging to Madhu were initially kept in the locker, Sanjay took out the ornaments and kept in the custody of his parents. He asserts that from the photographs (Ext.-A), it would be explicit that Madhu took her ornaments to London and her ornaments were all along in her possession.

18. He further submits that the locker was surrendered in March, 2000 and till August, 2000 there was no matrimonial dispute in between the couple and Madhu has never made any demand for any ornament or any other articles as mentioned in the schedule from the appellants. He submits that locker was opened in joint names of Madhu and Sanjay. Taking us to the evidence of Madhu he submits that on 10th September, 2001, Madhu came to learn that the ornaments were taken away by Sanjay from that locker. He submits that no question was put to the DW1 to the effect that the ornaments were ever entrusted with the appellants and no evidence has been adduced to prove that the ornaments were retained by the appellants. He submits that the plaintiff claims that at the time of marriage various

valuable articles were gifted to her but no specification of those valuables were ever disclosed by Madhu.

19. Mr. Moitra further argues that the amount being Rs.3,41,000/- was gifted to Sanjay by 11 persons by executing declarations of gift and all the donors by executing declarations of gift declared on oath that they had gifted the amount to Sanjay for the absolute use and benefit of Sanjay and nowhere, it was declared that the gift was made in connection of the marriage. He further submits that the gift was made in 1996 whereas the marriage took place in 1999. He submits that the oral evidence given by some of the donors in criminal trial cannot be accepted to nullify the effect of his declaration of gift in view of the provisions of Sections 91 and 92 of Evidence Act.

20. He submits that although there was no plausible evidence to lend support to the plaintiff's case yet the learned Court below directed the appellants to return the ornaments to Madhu which cannot be sustained. To bolster his argument, he placed reliance upon the judgments delivered in cases of *Jhatu Mondal and Ors. Vs. Surendra Nath Mondal & Ors. reported in (2002) 3 CHN 596*, *M.C. Chockalinga Thever vs. K.A Sankarappa Naikar and Anr. Reported in AIR 1942 Madras 421*, *State of Uttar Pradesh vs. Nawab Hussain reported in AIR 1977 SC 1680* and *Satish Chander Ahuja vs. Sneha Ahuja reported (2021) 1 SCC 414*.

21. Mr. Mukherjee, learned senior advocate argues on behalf of the respondents and the contentions canvassed by Mr. Mukherjee are that the subject suit for recovery of stridhan articles was filed by Madhu in 2001

whereas the suit seeking decree of divorce was filed in 2004 and hence, the present suit is a prior suit and consequently, the provision of Order 2 Rule 2 of the Code will not apply in the present case.

22. He contends that since the appellants have been acquitted of the charges levelled against them under Section 406 of the code, it cannot be held that the prayer for recovery of stridhan articles made by Madhu is barred by the principle of constructive *res judicata*. He claims that the degree of proof in civil suit is preponderance of probability whereas in criminal trial, the degree of proof is beyond reasonable doubt and it cannot be claimed that since a fact in issue has not been proved beyond reasonable doubt, the same cannot be proved basing upon the principle of preponderance of probability.

23. He submits that in the case at hand, the allegation was that the stridhan articles were entrusted with Sanjay but Sanjay did not come up to depose and hence, adverse inference is to be taken against Sanjay. Drawing our attention to the deposition of the bank manager of Vijaya Bank and the letter of the manager of that bank [Ext.- 3(a)], he submits that it has been proved that the locker was last operated on 21.08.1999 and also on 28.08.1999 by Sanjay and the locker was surrendered on 25.03.2000 by Sanjay. He contends that the locker was opened to keep ornaments and other valuables belonging to Madhu. He claims that no evidence has come up to show that the locker was ever operated by her and the gold ornaments were ever handed over to her. He submits that in compliance with the direction of this Court given in connection with aforesaid criminal case, the

appellants took some ornaments to Hare Street P.S. but those ornaments did not belong to Madhu and consequently, she refused to identify those ornaments. He asserts that considering these aspect the learned judge by passing reasoned order has rightly decreed the suit in respect of the ornaments.

24. He contends that the talk of marriage started in October, 1995 which would be explicit from Paragraph- 4 of the plaint and in respect of the contents made in para 4 of the plaint, the appellants have made only evasive denial in paragraph- 11 of their written statement and in consequence thereof, the facts unfurled in Paragraph-4 of the plaint are to be treated as admission from the end of the appellants. He submits that the money amounting to Rs.3,41,000/- was deposited in the account of Sanjay to inflate the amount in his account to enable Sanjay to obtain a visa for pursuing MBA in USA and such amount was gifted to Sanjay by the friends and relatives of Mohanlal and from the evidence it has come out, neither of them was related to Sanjay or his father in any way.

25. He argues that the some of those donors by giving deposition have stated on oath that they gifted the amount to Madhu in relation to her marriage and in 1997, there was an engagement and the marriage took place in 1999. He further submits that after obtaining visa the aforesaid amount was kept in the company which itself indicates that the money was gifted to Madhu in relation to her marriage and the learned Court below erred in refusing to pass in any decree in respect of that amount being Rs.3,41,000/- and interest accrued thereon. To invigorate his submission

he laid emphasis upon judgments delivered in case of *Krishna Bhattacharjee vs. Sarathi Choudhury & Anr. Reported in (2016) 2 SCC 705* and *Anil Rishi vs. Gurbaksh Singh reported in (2006) 5 SCC 558*.

26. Order 2 Rule 2 of the Code mandates that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished and if a person being entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted.

27. Settled proposition of law is that since Order 2 Rule 2 of the Code bars the remedy, the provisions thereof should be construed strictly. Order 2 Rule 2 of the Code bars the second suit. It would apply where the previous and subsequent suits have arisen out of the same cause of action. Suit for dissolution of marriage was filed in 2004 whereas the suit for recovery of stridhan articles was filed in 2001 and hence, there is no scope to apply the provisions of Order 2 Rule 2 of the Code in the suit for recovery of stridhan articles.

28. In the case of *K.G. Premshanker (supra)*, the following proposition of law was expounded:

“ What emerges from the aforesaid discussion is : (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of

res judicata may apply; (3) in a criminal case, Section 300, Cr.P.C. makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil Court would be relevant if conditions of any of the Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.”

In the judgment of K.G. Premshanker (supra), it was also ruled that no inflexible guidelines can be laid down on the issue and the possibility of conflicting decision in civil and criminal Courts is not a relevant consideration. In each and every case, ‘first question which would require consideration is - whether judgment, order or decree is relevant? if relevant - its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon facts of each case’.

So, no thumb rule can be framed that as and when there would be civil and criminal proceeding based on same facts and/or cause of action, principle of constructive res judicata will apply and recording of finding of acquittal in criminal case shall be binding effect upon the civil court. It is noteworthy that standard of proof required in two proceedings are different. Civil cases are decided on the basis of preponderance of evidence while in criminal cases burden lies on the prosecution and proof beyond reasonable doubt has to be given. Suffice it to note further that civil suit has to be determined on the basis of evidence brought before it not in terms of the

evidence brought in criminal trial. In case of *Visnu Dutta Sharma –vs- Daya Sarpa* reported in (2009) 13 SCC 729, considering the ratiocination of the judgment of *K.G. Premshanker (supra)*, it was held that if a judgment of civil court is not binding on a criminal court, it is incomprehensible that a judgment of a criminal court would be binding on a civil court.

29. In the case at hand, the learned court below has found the findings of criminal court to be relevant and evidence recorded in criminal trial and findings returned by criminal court have been admitted in evidence. Now, taking stock of factual situation and chronological resume, it would be apposite to ascertain as to whether Madhu could be able to prove her case on the basis of preponderance of evidence.

30. The definition of the word ‘proved’ incorporated in Section 3 of the Indian Evidence Act, 1872 has been worded as follows:

“Proved” .- A fact is said to be proved when, after considering the matters before it , the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

It is axiomatic that tests of probabilities are i) how consistent the story is with itself, ii) how far the witness stands the test of cross-examination and iii) how the evidence fits in with the rest of evidence and circumstances.

In plaint and in affidavit-in-chief, regarding gold ornaments Madhu claimed as follows:

- i) In her engagement ceremony held on 20.5.1997, Mohanlal gave gold ornaments worth Rs.25,000/- to Sanjay;
- ii) At the time of marriage held on 18.2.1999, Mohanlal gave gold ornaments, diamond and silver sets worth Rs.2,00,000/- and Mohanlal gave other valuable articles also.
- iii) After marriage, when she was in her marital home, Mohanlal gave gold and other items of Rs.50,000/-

In July, 1999, one locker was opened in the joint names of the couple in the Vijaya Bank and those ornaments and valuables were kept therein. Sanjay last operated the locker on 21.8.1999 and 28.8.1999 and the locker was surrendered on 25.3.2000 and on 10.9.2001, she came to learn that Sanjay took out all the ornaments from the locker and kept those ornaments in the custody of his parents.

In schedule- (a) (i) details of some ornaments were given claiming that those were gifted to her by her family, relatives and friends and in schedule- (a) (iii), specification of some ornaments were given claiming that Giridhari gifted those ornaments to Madhu.

Admittedly, such claim of Madhu has not been proved in criminal court on the standard of '*beyond reasonable doubt*'. Before any court, Madhu could not produce any bill or voucher in respect of any of the ornaments. PW-2, Madhu's father in her entire evidence did not make any whisper regarding ornaments and other valuables though she claimed that a major portion of ornaments were gifted to her by her family, friends and

relatives. So, it is clear as day that evidence of PW-1 did not find support from the evidence of PW-2 nor was it corroborated by any documentary evidence.

31. Witnesses are of three types, namely, i) wholly reliable, ii) wholly unreliable and iii) neither wholly reliable nor wholly reliable. In the first two, conclusion may be arrived at by accepting or rejecting evidence but in case of third, court has to be circumspect and to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

In cross-examination, Madhu could not recollect whether any list regarding ornaments and jewellery was kept in the locker and she admitted that she had not made any demand for any ornaments from Sanjay and she has no document to show that her ornaments and other valuables were kept in the locker.

32. The bank manager concerned has proved that Sanjay operated the locker on 21.8.1999 and 28.9.1999. DW-1 has deposed as per direction of the Hon'ble Court, the appellants produced some ornaments before Hare Street P.S. but Madhu could not identify any ornament. DW-1 claimed that from order dated 6.2.2002 passed in G.R. Case no. 2939 of 2001, it would be explicit that ornaments were returned to her. In the order dated 6.2.2002, it was observed that '*stridhan properties were given but she failed to identify all as she herself didn't see (illegible)*'.

33. It is quite vivid and luminescent that the evidence of PW-1 is not consistent to the full extent. Her evidence relating to ornaments has not

found support in evidence of PW-2 and there is no documentary evidence to corroborate the evidence of PW-1 and in cross-examination, her evidence has been shaken to some extent.

34. To find out how her evidence fits in with the rest of evidence and circumstances, we find that oral and documentary evidence of the bank manager suggests that Sanjay operated the locker on 21.8.1999 and 28.8.1999 but no evidence has come what were kept in the locker and what were taken out from the locker. Though from the evidence of the bank manager it was proved that Sanjay operated the locker for the last time but it has not been proved to be probable that Madhu's ornaments were kept in the locker and Sanjay took out the ornaments from the locker.

35. The only circumstance which may be of some substance is that as per the order of the Hon'ble Court, the appellants took some ornaments to Hare Street P.S. but Madhu failed to identify any of them. Now, question may come in the mind of even a prudent man that had the appellants not retained her ornaments, how they took some ornaments to the police station but at the same time, a question would also come in the mind of any reasonable man that considering entire evidence and facts and circumstances, whether only for this cause, it can be held that Madhu has proved her claim to be probable!

36. The learned court below has passed the decree in part basing upon the evidence of the bank manager, the circumstance discussed above and on the basis of presumption that in India, gold ornaments are given to bridegroom at the time of marriage and such ornaments would be her

stridhan properties. It is worthwhile to note that the order of the Hon'ble Court passed in interlocutory stage was tentative view and was passed only to shorten the arena of litigation. Rule of appreciation of evidence mandates that the effect of entire evidence is to be taken into account. When evidence has not been proved to be consistent and does not find support from any other oral and documentary evidence and when evidence of PW-1 has been shaken in cross-examination, then only basing upon evidence of bank and act of appellants done in deference to an interlocutory order of this court, it would be iniquitous to pass any decree in respect of gold ornaments as was prayed for by Madhu. Suffice it to observe that there is no evidence that the ornaments detailed in schedule a (i) and (iii) were gifted to Madhu and such ornaments valued at Rs.2,75,000/- during the years 1997- 1999. Taking stock of factual situation and evidence brought on record, we are of the view that the learned court below erred in law in not considering these aspects and in passing the decree in part.

37. Now, regarding the money amounting to Rs.3,41,000/- (which has reached to Rs.4,00,000/- along with interest accrued thereon), Madhu claimed that Sanjay wanted to pursue MBA course from USA and to obtain a Visa, a substantial amount was required to be shown in his account and as such Mohanlal asked his friends and relatives to gift money in the name of Sanjay under the impression that those money being her stridhan property would be returned to her.

Admittedly, in 1996, 11 persons gifted a sum of Rs. 3,41,000/- in total by executing 11 numbers of declarations of gift. Mr. Mukherjee claimed

that the money was gifted in relation to marriage and in paragraph -4 of the plaint, Madhu claimed that talk of marriage was started in 1995 and the appellants in their written statement has just made evasive denial and hence, taking adverse inference, court ought to have held that talk of marriage was held in 1995 and basing upon the evidence of four donors adduced in the criminal trial where they specifically deposed that they had gifted the money to her in connection with her marriage, the court should have held that the money was actually gifted to her in relation to her marriage. Mr. Moitra contradicted such contention saying that evidence of donors cannot be accepted in view of provisions of sections 91 and 92 of Evidence Act.

It is cardinal rule that not in every case, wherever the court shall find that any statement made in the plaint has not been traversed, it shall take adverse inference and jump to the conclusion. Non-denial of or non-response to a plea that is not supported by evidence cannot be deemed to be admitted by applying the doctrine of non-traverse. Pleadings are not substitute for proof. (See, the case of *Manager, RBI -vs- S.S. Mani*, reported in *AIR 2005 SC 2179*). Madhu could not produce any evidence to show that in 1995, talk of marriage was started or in 1995, Giridharilal came to Mohanlal with a proposal for her marriage with Sanjay.

In 11 numbers of declarations of gift, all the donors made written declaration on oath that they gifted the amount to Sanjay for his absolute use and benefit and all these gifts and declarations of gift were made in

1996 whereas engagement ceremony was held in 1997 and marriage took place in 1999.

Section 92 of Evidence Act, 1872 lays down that when the terms of any contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, has been proved as per section 91 of the Act, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representative-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. Proviso 2 and 3 thereto permits to prove separate oral agreement on which a document is silent, and which is not inconsistent with its terms and which constitute a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.

Here, 4(four) out of 11(eleven) donors came to dispose in criminal trial and stated that they intended to make some gift to Madhu in her marriage. Those donors did not speak about existing of any separate oral agreement and they did not depose for the purpose of contradicting, varying, adding to, or subtracting from, its terms. They just wanted to express their intention lying behind their gift i.e. purpose of gift. They wanted to contradict that declaration that they gifted the money to Sanjay for his absolute use and benefit. We are of the view that such sort of oral evidence to contradict their own written declaration cannot be accepted. The learned court below has not misguided itself in refusing to accept the prayer of Madhu regarding her claim of Rs.3,41,000/-.

38. It is trite law that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even in slight distinction on fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. In the case of Krishna Bhattacharjee (supra), the main issue involved in the case was whether or not after passing decree of judicial separation, the woman shall be ceased to be an 'aggrieved person' within the meaning of Section 2(a) of Protection of Women from Domestic Violence Act, 2005 and whether she can take action under 2005 Act to get back her stridhan articles. In case of Anil Rishi (supra), the plaintiff claimed that he had not executed the deed and the deed was forged. Then question was raised burden lies upon whom, is it upon the plaintiff or upon the defendant ! The plaintiff took the plea that she cannot be asked to prove negative fact and as such burden rests with the defendant. The Court held that since plaintiff could not prove that there was fiduciary relationship in between them and since the plaintiff alleged fraud, burden lies on the plaintiff.

There is no scintilla of doubt regarding binding effect of the proposition laid down in the judgment relied upon by Mr. Mukherjee but those are distinguishable on facts.

39. For the reasons discussed hereinabove, the appeal is allowed and part of the decree whereby the learned Court below directed the appellants to return the ornaments detailed in schedule- a (i) and (iii) to the plaintiff is

set aside and the cross-objection is also dismissed. Parties shall bear their own costs.

40. Let a decree be drawn up, accordingly.

41. Let a copy of this judgment along with LCR be sent down to the learned Court below forthwith.

42. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)