

Prafulla Kumar Majhi and Another Vs Laxmi Majhi (dead) and after her State of Orissa

Court: Orissa High Court

Date of Decision: July 22, 1998

Acts Referred: Penal Code, 1860 (IPC) " Section 34, 406

Citation: (1998) 2 OLR 454

Hon'ble Judges: S.C. Datta, J

Bench: Single Bench

Advocate: Prabodh Ku. Patnaik, N. Senapati, A.K. Dwivedy, D.P. Dash and R.C. Singh, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

S.C. Datta, J.

This revision is directed against order dated 28.9.1994 passed by the learned Additional Sessions Judge, Jeypore,

dismissing Criminal Appeal No. 103 of 1992 and confirming the order of conviction and sentence recorded by the Sub-divisional Judicial

Magistrate, Nowrangpur.

2. Petitioner No. 1 is the son of petitioner No. 2. Both of them faced trial before the learned Magistrate u/s 406/34, IPC, for committing criminal

breach of trust in respect of gold and silver ornaments and other sundry articles said to have been given to opposite party No. 1 (since dead) at the

time of marriage as dowry. The opposite party No. 1 Laxmi Majhi died during the pendency of this proceeding. Since the revision has been filed

against the order of conviction and sentence which was confirmed in appeal, the State of Orissa has been impleaded as opposite party No. 2.

3. The fact of the case may shortly be stated as under :

The petitioner No. 1 and opposite party No. 1 one Laxmi Majhi were married in the year 1982 according to their caste custom prevailing in their

community. The marriage broke in the year 1985 when they started living separately. Petitioner No. 1 thereafter contracted a second marriage. The

opposite party No. 1 also married for the second time. Laxmi Majhi lodged this complaint before the Sub-divisional Judicial Magistrate,

Nowrangpur for recovery of dowry items given to the present petitioners at the time of her marriage. It has been alleged in the complaint petition

that ever since the date of marriage, petitioner No. 1 ill-treated her and finally drove her out of matrimonial house. So she was compelled to reside

with her parents since then. She demanded return of the dowry items from the petitioners but they turned a deaf ear to her request. A panchayat

was convened but it yielded no result. Opposite party No. 1 sent a Lawyer's notice to petitioner No. 1 demanding return of the dowry items but

no response came. Accordingly, this complaint has been lodged with the Magistrate. The learned Magistrate took cognizance and eventually the

present petitioners faced trial before the learned Magistrate on charges u/s 406/34, IPC.

4. The complainant examined as many as four witnesses including herself while the defence has examined five witnesses to support their plea. On

consideration of the materials on record, the learned Magistrate believed the case of the opposite party No. 1 and convicted the present petitioners

u/s 406/34, IPC and sentenced each of them to undergo R.I. for one year and imposed a fine of Rs. 2,000/- in default thereof, they are to under to

R.I. for three months each. The petitioner carried an appeal to the Sessions Court but became unsuccessful. The appellate Court by order dated

28.9.1994 dismissed the appeal and confirmed the order of conviction and sentence recorded by the learned Magistrate. Thereupon, the

petitioners have moved this Court in Revision.

5. It is contended on behalf of the petitioners that there has been a miscarriage of justice because the Courts below had failed to appreciate the

evidence properly. It is contended that evidence led by the complainant does not establish specific entrustment of properties with the accused

persons nor it has been shown that the accused persons have dominion over such properties. It is also contended that Ext. 1 makes it manifestly

clear that the accused persons had actually no dishonest intention to misappropriate the properties belonging to the complainant. According to the

petitioner, the Courts below ought to have held that the dispute between the parties is a civil dispute and the complainant is at liberty to approach

the appropriate Civil Court for ventilating her grievance.

6. Heard learned counsel for the petitioners as well as learned counsel for the State.

7. As noticed earlier, opposite party No. 1, the defact to complainant died during the pendency of this proceeding. Anyway, it is to be considered

whether in the facts and circumstances of the case, the Courts below were justified in convicting the present petitioners u/s 406/34, IPC.

8. It is not disputed that petitioner No. 1 and opposite party No. 1 since deceased, were married in the year 1982, according to their caste custom

prevailing in their community. The marriage did not last long but it broke some time in the year 1985 and the parties started living separately. It has

been alleged by the complainant ever since the date of marriage petitioner No. 1 started ill-treating her and finally he drove her out of the

matrimonial home in 1985. It is claimed that at the time of marriage some gold and silver ornaments, a now, a calf and other sundry articles were

given as dowry. The opposite party No. 1 alleged that for about a month, she had worn the ornaments given to her by her parents at the time of

marriage. Thereafter, her parents-in-law took away those ornaments from her custody and did not return to her in spite of demands. During trial, it

has been sought to be established that a list of dowry item given at the time of marriage was prepared in duplicate; one copy was given to the

accused party and the other was retained. It has been alleged that one Nilakantha Pujari was the scribe of that list. The said Nilakantha Pujari

though alive has not been examined nor the duplicate copy of purported list has been produced in Court. There is no explanation as to why this

valuable document showing list of items given to petitioner No. 1 as dowry has not been produced, nor any explanation has been offered as to why

the said Nilakantha Pujari has not been examined. It may be stated that in order to bring" a case u/s 406, IPC the prosecution must prove - (a)

that the accused was entrusted with the property or dominion over it; (b) that he misappropriated it or converted it to his own use or used it; (c)

that it was in violation of the direction touching the discharge of the trust.

9. Dishonest intention is the gist of the offence under this section. More in this case, there is no cogent evidence to show when those properties

were specifically entrusted with the accused persons. The complainant states that she had worn those ornaments for about a month and thereafter

those ornaments were taken away by her parents-in-law. We do not get specific proof of what the ornaments were because the list said to have

been prepared showing the items of dowry has been withheld. A vague statement that all ornaments have been taken away by her parents-in-law

and later by her husband, viz., petitioner No. 1 is not considered sufficient to sustain a charge u/s 406, IPC. During trial, the complainant (P.W. 1)

had however given a description of the ornaments which is, however, denied by the defence. As noticed earlier, there is no paper to establish the

fact of entrustment of the valuable ornaments with the accused persons. The prosecution has pressed into service Ext. 1 said to be a letter written

by petitioner No. 1 to his father-in-law, wherein petitioner No. 1 is said to have told his father-in-law to take back whatever articles were there.

This discloses that the petitioner No. 1 had no dishonest intention to misappropriate the articles said to have been given during marriage. From the

description of some of the items as given by the complainant during her evidence, it appears some of them might have been lost or destroyed or

worn out by wear and tear with the passage of time. It cannot be disputed that some ornaments might have been given by the parents of the

complainant during marriage but there is want of cogent evidence to establish that those ornaments were entrusted with the petitioners by the

complainant and the latter had misappropriated it for their own use. As noticed earlier, dishonest intention is the gist of the offence u/s 406, IPC.

Here the dishonest intention is absent in view of the letter (Ext. 1) purported to have been written by petitioner No. 1 to his father-in-law asking

him to take back whatever the items were given to them during marriage. Therefore, having regard to the facts and circumstances of the case and

regard being to the nature of relationship between the parties as it existed, I think the prosecution has signally failed to establish the charges u/s

406/34, IPC against the accused persons. It will be hazardous to base conviction solely on the basis of oral evidence. It appears that the Courts

below have not properly appreciated the evidence and there has been a manifest miscarriage of justice. Accordingly, I am inclined to allow the

revision petition which I hereby do.

10. Consequently, the order of conviction and sentence recorded by the learned Magistrate which was affirmed in appeal by the Additional

Sessions Judge, Jeypore are hereby set aside and the accused persons are acquitted of the charge. They are discharged from their respective bail

bonds.

11. The revision application is disposed of accordingly.