

Orissa High Court

Sayad Newaj Alli @ Nati vs Rasida Begum on 26 October, 1990

Equivalent citations: I (1991) DMC 319

Author: V Gopalaswamy

Bench: V Gopalaswamy

JUDGMENT V. Gopalaswamy, J.

1. This revision is preferred against the order dated 6-12-1986 of the S.P.J.M., Sadar, Cuttack, in Criminal Misc. Case No. 127 of 1986, a proceeding under Section 125, Cr.P.C., directing the present petitioner to pay Rs. 200/- per month to the present opposite party as interim maintenance from the date of the order. The parties are Muslims.

2. The only point that arises for consideration and decision is whether the learned S.D.J.M. had jurisdiction to pass the impugned order.

3. The present opposite party Rasida Begum originally filed a petition under Section 125(1), Cr.P.C. in Criminal Misc. Case No. 127 of 1986 claiming monthly maintenance at the rate of Rs. 600/- per month to which the present petitioner filed his counter on 25-8-1986 alleging that on 27-2-1986 he divorced the opposite party according to Muslim Law and for confirmation of that divorce he filed Title Suit No. 123 of 1986 in the Court of the Subordinate Judge, First Court, Cuttack. While filing his objection dated 25-8-1986 to the present opposite party's application dated 15-7-1986 for interim maintenance, the petitioner had reiterated that as he had divorced her long back, she is not entitled to any interim maintenance. On hearing the parties, the learned S.D.J.M. passed the impugned order awarding interim maintenance in favour of the present opposite party.

4. The present petitioner has asserted in the 125, Cr.P.C. proceeding that he had divorced his wife on 27-2-1986. The learned counsel for the opposite party disputes this fact and contends that as Title Suit No. 123 of 1986 seeking for divorce is pending in the Court of the Subordinate Judge, it should be held that by the date of impugned order there was no divorce between the parties. On the other hand, the learned counsel for the present petitioner contended that the petitioner had divorced his wife on 27-2-1986 and he had filed the suit merely for a declaration to that effect. Once a Muslim woman is divorced, her rights are governed by the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as 'the Act'). So whether at all the present opposite party was divorced by the petitioner and if so on what date, becomes very much material in the present case.

5. As earlier stated, the petitioner has asserted that he divorced his wife on 27-2-1987 and he filed the Title Suit for a declaration to that effect. In the counter to the main petition as well as in the counter to the petition for interim maintenance, the petitioner has asserted that he had divorced his wife on 27-2-1986.

6. In *Sk. Mohiuddin v. Hasina*, 1988 (II) OLR 163, while considering the aspect of divorce under the Mahommedan Law, relying on the decision *Mohammed Ali v. Feroodunnisa Begum*, AIR 1970 Andhra Pradesh 298, this Court observed as follows :

"While considering an aspect of the Mahommedan Law one should not be influenced by one's sense of justice or principles, of discrimination or the wholesome principles relating to marriage and divorce applicable to Hindu or Christians. Under the Mahommedan Law the husband is in an advantageous position. It confers a special right on the husband not only to divorce the wife orally in the manner provided under the Mahommedan Law but also by issuing a notice of filing a written statement in defence to maintenance claim and where such a statement in writing is made that he had divorced his Wife in the past long prior to the suit filed notwithstanding the denial of the wife, the statement of divorce made either by notice or in a written statement itself amounted to a declaration of divorce as on that day on which the said statement was made..."

In the above decision this Court referred with approval to the following passage from Mulla in Principles of Mahommedan Law, 18th Edition, Page 327 :

"If a man says to his wife that she had been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier."

7. Relying on the above referred decision of this Court I hold that in the present case, even if it is held that the petitioner had not divorced his wife on 27-2-1986 as alleged by him, yet from the undisputed facts that he had earlier filed a suit alleging that he had divorced his wife and that he had repeatedly asserted in the counters filed by him in the 125, Cr.P.C. proceeding that he had divorced his wife on 27-2-1986, it necessarily follows from Sk. Mohiuddin's case (supra) that under the Mahommedan Law the same amounted to a declaration of divorce on the respective dates, which are prior to the date of passing of the impugned order. So by the date of the impugned order the present opposite party stands in the position of a divorced Muslim woman.

8. Section 3(2) of the Act enables a divorced Muslim woman where a reasonable and fair provision and maintenance or the account of mahr or dower due has not been made or paid, to file an application before a Magistrate for an order for payment of such provision and maintenance, mahr or dower, or the delivery of properties, as the case may be. (See Riswana Begum v. Mlv. Motiullah, 62 (1989) CLT 353.

9. Section 5 of the Act is important for the point in issue. Section 5 is quoted hereinbelow in extenso :

"Section 5 Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974. If, on the date of first hearing of the application under Sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation :--For the purpose of this Section 'date of the first hearing of the application' means the date fixed in the summons for the attendance of the respondent to the application."

10. As observed by this Court in Riswana Begum's case (*supra*), so far as the divorced Muslim woman is concerned Section 125 of the Code of Criminal Procedure would apply only if both parties exercise their options at the first hearing of the application under Section 3(2) of the Act as contemplated under Section 5 of the Act and not in any other manner. Consequently the Magistrate cannot exercise his jurisdiction under Section 125, Cr.P.C. in case of a divorced Muslim woman unless an application is filed under Section 3(2) of the Act and parties exercise their options as required under Section 5 of the Act.

11. From the facts of the case it is seen that, by the date of passing the impugned order the present opposite party was already a divorced Muslim woman and therefore, the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are attracted in the present case. Hence the Magistrate had no jurisdiction to pass the impugned order awarding interim maintenance in favour of the present opposite party and therefore, the same is liable to be set aside.

12. In the result, I hereby set aside the impugned order passed by the S.D.J.M., awarding interim maintenance in favour of the present opposite party and accordingly allow the revision.