

Andhra High Court

Shaik Dada Saheb vs Shaik Mastan Bee And Anr. on 26 August, 1994

Equivalent citations: 1994 (2) ALT Cri 554, II (1995) DMC 473

Bench: R M Bapat

ORDER

1. The 1st respondent herein had filed Maintenance Case No. 8 of 1987 against the petitioner herein on 19-4-1987 claiming maintenance for herself and for her children in the Court of the II Addl. Munsiff Magistrate, Gurazala. The said case was decided by the learned Magistrate on merits and awarded maintenance to the first respondent herein and her children. The 1st respondent herein was granted Rs. 200/- per month by way of maintenance and two children were granted Rs. 100/- each by way of maintenance. The said order was passed on 11-9-1989.

2. Being aggrieved by the said order, the petitioner herein filed a revision case No. 141/90 before the learned Sessions Judge, Guntur. The order of the Magistrate was confirmed by the learned Sessions Judge on 12-7-1990. Thereafter the petitioner herein filed the proceedings u/S. 482 Cr. PC before this Court. This Court also dismissed the said petition with a direction that he may approach the Court of the Magistrate by filing the petition u/S. 127 Cr. PC. Accordingly the petitioner herein filed Criminal Petition No. 1143/90 u/S. 127 Cr. PC read with section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The said application filed by the petitioner herein was allowed on 26-4-91. Being aggrieved by the said order, the 1st respondent herein filed a Revision Petition No. 55/91 in the Court of Sessions Judge, Guntur, which was allowed. Against the said order, the present petition has been filed under section 482 Cr. PC for quashing the said order.

3. It appears from the record that during the pendency of M.C. No. 8 of 1987, the petitioner herein had divorced the first respondent herein on 2-4-1988 by pronouncing 'Talak'. Parties to this petition are Muslims by Caste. The petitioner herein has no grievance regarding the orders granting maintenance to his children. The main grievance was made by the petitioner herein that the wife i.e., the 1st respondent herein, is not entitled for maintenance after pronouncing 'Talak'. She is entitled for maintenance only up to the expiry 'Iddat' period. The contention raised by the petitioner herein before the Court of the Magistrate was accepted by the learned Magistrate but it was reversed by the learned Sessions Judge in Crl. Petition No. 55/91 filed by the wife i.e., the first respondent herein.

4. All the aforesaid facts are admitted facts. There is no dispute regarding the facts narrated above. Only legal question raised before me as to whether the wife is entitled for maintenance only up to the expiry of 'Iddat' period or she is also entitled for maintenance even after the expiry of 'Iddat' period ?

5. The learned counsel Mr. K. F. Baba appearing on behalf of the petitioner herein invited my attention to the decision of this Court delivered by the Full Bench reported in Azmath Ali Khan v. Qamar Bano . In that case, the questions to be considered by the Full Bench are on the following three issues. (at P. 228 of AIR, Para 1)

1) Whether a divorced Muslim woman can claim maintenance under Section 125 of the Code from her former husband even after passing of the Act of 1986 ?

2) Whether the maintenance contemplated under section 3(1)(a) of the Act of 1986 is restricted only for the period of 'Iddat' or whether a fair and reasonable provision has to be made for future also within the period of Iddat ?

3) How far Sections 125 to 128 of the Code can be held to be applicable after coming into force of the Act of 1986 and what should be the mode of disposal of the cases pending before the Courts under these Sections ?

6. While answering the aforesaid issues, the learned Judges of this High Court observed in para 11 of the Judgment as follows :

"The primary question arises out of Section 4 for consideration is that the liability of the relatives or the Wakf Board, as the case may be, to pay maintenance to the divorced woman arises only if the divorced woman is not remarried or is unable to maintain herself after the Iddat period. This clearly shows that the husband is not liable to pay any maintenance beyond the period of Iddat. If the divorced woman is unable to maintain herself even after the period of Iddat then the liability devolves on her relatives who would inherit her property, as stated in Section 4. Under Section 5 it is provided that if on the date of the 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 it 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 and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly. The form in which the affidavit has to be filed in pursuance of Section 5 is given in Form 'B' under Rule 8 of the Muslim Women (Protection of Rights on Divorce) Rules 1986. It is clear from a reading of Section 5 that it is only if a declaration is made by a divorced woman and her former husband exercising their option to be governed by the provisions Sections 125 to 128 of the Code, then their case will be governed by the provisions of Section 125 to 128 of the Code and not otherwise. But, in case, no such option exercised and the affidavit is not filed as required under Rule 8 referred to supra, Sections 125 to 128 of the Code will have no application to the case of maintenance claimed by the divorced woman. Under Section 7, transitional provisions are made to the effect that every application by a divorced woman under section 125 or under section 127 of the Code, pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of the Act of 1986, be disposed of by the Magistrate in accordance with the provisions of Act of 1986."

It was further observed by their Lordships in paras 12, 13 and 14 of the judgment as follows :

"12. It is thus clear that even if an application is pending under Section 125 or under section 127 of the Code, on the commencement of the Act (of 1986), notwithstanding anything contained in that Code and Subject to the provisions of Section 5 of the Act, the application has to be disposed of in accordance with the provisions of Act of 1986. This indicates that the operation of the provisions of

Section 125 or Section 127 of Code are excluded on the commencement of the Act of 1986 and such applications (filed under section 125 or under section 127 of the Code) pending before the Magistrate, shall have to be disposed of in accordance with the provisions of Act of 1986.

13. It is also significant to note that there is no saving clause in the Act of 1986 under which it may be said that the provisions of Sections 125 to 128 of the Code of Criminal Procedure are not applicable to the case of the divorced Muslim woman claiming maintenance from her former husband, after passing of the Act of 1986. In the absence of a saving clause, the intention of the Parliament is clear that the claim of maintenance by the divorced Muslim woman is to be governed by the provisions of the Act of 1986 unless option is exercised by the parties as provided under Section 5 of the Act.

14. Let us now analyse the situation arising out of the provision of the Act itself to answer the question whether the Section 125 of the Code could be applicable to the case of a divorced Muslim wife claiming maintenance from her former husband. It is seen that Section 3 starts with a non-obstante clause as it provides that 'notwithstanding anything contained in any other law for the time being in force', a divorced woman shall be entitled to the rights which are enumerated therein. Under Section 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of Iddat, is devolved upon the relatives and if the relatives are not available, on the Wakf Board. The very concept of liability of the husband is limited for and during the period of Iddat. The liability, if any, arising for payment of maintenance after the Iddat period to divorced woman if she is unable to maintain herself is cast upon the relatives or the Wakf Board, under section 4 of the Act. Under Section 5 it is provided that the husband and wife would be governed by sections 125 to 128 of the Code, if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provisions of Sections 125 to 128 of the Code. It would be too much to say that the claim of maintenance by the divorced Muslim would still be governed by the provisions of when such an application is expressly dependent upon the provisions of Section 5 of the Act and on the exercise of the option by the parties concerned. Further more, under section 7 of the Act, the intention of the Legislature is clear when it provides that every application by a divorced woman under section 125 or under section 127 of the Code pending before the Magistrate on the commencement of the Act of 1986, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of the Act, be disposed of in accordance with the provisions of Act of 1986."

Lastly in para 22 of the Judgment, it was observed by their Lordships as follows :

"Therefore, in view of the foregoing, it is held that a divorced Muslim woman cannot claim maintenance under section 125 of the Code from her former husband after passing of the Act of 1986."

7. The learned counsel for the first respondent drew may attention to the ruling reported in Ali v. Sufaira (1988) 3 Crimes 147. This case was decided by the single Judge of Kerala High Court and held that the Muslim woman is entitled for maintenance beyond Iddat period.

8. While delivering the judgment in Azmath Ali Khan v. Qamar Bano (supra), the Full Bench of this High Court also considered the judgment delivered by the Kerala High Court and held that the High Court has no power to interpret 'Quran' and they did not agree with the ruling laid down by the Kerala High Court. Lastly this Court observed in Paras 39, 40, 41 and 42 of the judgment as follows :

"39. Regarding the third question, how far sections 125 to 128 of Code can be held to be applicable after coming into force of the Act of 1986, we hold that under section 7 of the Act of 1986, it is specifically stated that every application by a divorced woman under Section 125 or Under Section 127 of the Code pending before a Magistrate on the commencement of the Act shall be disposed of by the Magistrate in accordance with the provisions of the Act of 1986, having due regard to Section 5 of the Act and the rules framed thereunder with regard to the option to be exercised by the parties. Any order of maintenance which is sought to be enforced under section 128 of the Code imposing a liability on the husband which is not warranted by the provisions of the Act of 1986, cannot be executed against the husband. This is based on the principle that when a Muslim husband is not liable to make any provision or pay maintenance after the period of Iddat, then there is no question of any order being enforced against such a husband under section 128 of the Code after passing of the Act of 1986. A similar view by a learned single Judge in Crl. Petition 849/87 dt. 20-11-1987.

40. In the light of the foregoing discussion, in answer to the first question, we are of the opinion that the divorced woman cannot claim maintenance under section 125 of the Code after passing of the Act of 1986.

41. In regard to second question, we hold that the fair and reasonable provision and maintenance contemplated under Section 3(1)(a) payable by the husband is restricted only for the period of Iddat and the liability of the husband to provide any provision or maintenance after the period of Iddat does not arise.

42. In regard to third question, we hold that Sections 125 to 128 of the Code are not applicable after coming into force of the Act of 1986, save in so far as the parties exercise their option under Section 5 of the Act, to be governed by the provisions of Sections 125 to 128 of the Code."

9. Considering the Full Bench decision of this High Court, I hold that the divorced Muslim woman is not entitled for any maintenance beyond Iddat period. She has to claim maintenance from her close relatives, who are likely to succeed to her property, if not from the Wakf Board.

10. Under such circumstances, the Criminal Revision Case stands allowed and the order passed by the learned Sessions Judge directing the petitioner herein to pay maintenance beyond Iddat period is hereby set aside holding that the 1st respondent herein is not entitled for maintenance after Iddat period.

11. Petition allowed.