Orissa High Court
Alimuddin Khan vs Nasiran Bibi And Ors. on 17 November, 1997
Equivalent citations: 1998 CriLJ 1811
Author: P Tripathy
Bench: P Tripathy
ORDER P.K. Tripathy, J.

1. The petitioner has invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (in short 'the Code') with a prayer to quash the order of maintenance passed by the S.D.J.M., Cuttack against him Under Section 125 of the Code vide order dated 12-12-1989 in Criminal Misc. Case No. 94 of 1988 which was confirmed by the First Addl. Sessions Judge, Cuttack in Criminal Revision No. 7 of 1990 vide order dated; 19-3-1993.

2. Opposite party No. 1 herself and for her minor sons opposite parties 2 and 3 claimed maintenance from the petitioner who is her husband and father of opposite party Nos. 2 and 3 on the ground of negligence, cruelty and desertion. In his written statement petitioner admitted the relationship but denied the allegations of negligence, cruelty and desertion. At the stage of tendring evidence the petitioner made a statement that he had divorced the opposite party No. 1 learned S.D.J.M. recorded a finding that the plea of divorce was not proved and that opposite party No. 1 proved the factum of negligence, cruelty and desertion. Accordingly, he awarded monthly maintenance of Rs. 200/- to the opposite party No. 1 and Rs. 100/- to each of opposite parties 2 and 3 from the date of application i.e. 5-4-1988. In Criminal Revision No. 7 of 1990 learned First Addl. Sessions Judge, Cuttack on assessment of the evidence confirmed the findings of the S. D. J. M. and dismissed the revision.

3. In the petition under Section 482 of the Code though the orders of the lower Courts are challenged both in respect of the decision on the issue of divorce as well as on the issue of negligence, cruelty and desertion and the grant of maintenance thereof, yet at the time of arguments Mr. S. K. Aziz, learned Counsel for the petitioner confined his argument only with respect to the issue on divorce. Hence, the other grounds raised in the petition are treated as not pressed. Mr. Azizargued that the parties are Muslim and are governed by their personal law. In a proceeding under Section 125 of the Code the petitioner (opposite party herein) has to comply With mandatory' provisions under Muslim Women (Protection of Rights and Divorce) Act, 1986 (in short, the Act'). He further argued that keeping in view the settled legal position the courts below should Have accepted that the plea of divorce has been substantiated at least from' the date' of evidence if not from the date on which the divorce took place in 1988. He thus prayed to quash the order by exercise of inherent power under Section 482 of the Code.contention .regarding bar of

4. Mr. P. K. Sahu, learned counsel for the opposite parties, on the other hand, argued that the argument of the petitioner is hot tenable when in the written statement he has admitted the relationship. He further argued that petitioner has miserably failed to prove the factum of divorce and in that connection he supported the reasonings and the findings recorded by the courts below. Above all, he argued that, this proceeding under Section 482 of the Code is in disguise a second revision which is not permissible in view of the provisions under Section 397(2) of the Code and that there being no illegality committed by the courts below nor there being any abuse of process of court

this Court should not invoke inherent power so as to quash the impugned orders.

5. The question of lack of jurisdiction being of vital importance is being dealt with first.

6. A plain reading of Section 482 of the Code makes it clear that inherent power under that provision can be invoked by the High Court (i) to give effect to any order under the Code, (ii) to prevent abuse of the process of any Court, or (iii) to secure the ends of justice, notwithstanding anything contrary contained in the Code. This provision corresponds to Section 561A of the Criminal Procedure Code, 1898. By virtue of the said provision indeed a wide discretion has been vested with the High Court which is to be sparingly used only for the purpose of administration of justice. According to Mr. Sahu, learned Counsel for the opposite party, Section 397(3) of the Code poses a bar because of dismissal of the criminal revision filed by the petitioner. In that context, a prolong discussion is not necessary in view of the principles of law settled by this Court as well as by the Apex Court.

7. In the case of Basudev Ghai v. Bipadakhanjan Pushan 1997 Cri LJ 1933 this Court examined a similar contention regarding bar of jurisdiction under Section 482 because of Section 397(3) of the Code and referring to several leading cases of the Apex Court as well as of this Court, it has been held, that exercise of powers under Section 482 of the Code is not restricted by Section 397(3) of the Code if there is patent illegality or inherent lack of jurisdiction in the impugned order or if appropriate order is necessary for the ends of justice.

8. In the case of Krishnan v. Krishnaveni 1998 Cri LJ 1519 : AIR 1997 SC 987 the Apex Court examined all the leading judgments relating to the scope and extent of exercise of inherent power under Section 482 of the Code and held thus :

In view of the above discussion, we hold that though the revision before the High Court under Sub-section (1) of Section 397 is prohibited by Sub-section (3) thereof, inherent power of the High Court is still available under Section 482 of the Code and as it is paramount power of continuous superintendence of the High Court under Section 483, the High Court is justified in interfering with the order leading to miscarriage of justice and in setting aside the order of the Courts below. It remitted the case to the Magistrate for decision on merits after consideration of the evidence. We make it clear that we have not gone into the merits of the case. Since the High Court has left the matter to be considered by the Magistrate, it would be inappropriate at this stage to go into that question. We have only considered the issue of power and jurisdiction of the High Court in the contest of the revisional power under Section 397(1) read with Section 397(3) and the inherent powers. We do not find any justification warranting interference in the appeal.

9. In the case of Ashim K. Roy v. Bipinbhai Vadilal Mehta 1997 (8) Supreme Today, 490 : 1997 Cri LJ 4651 while approving quashing of criminal proceeding in spite of dismissal of criminal revision by the Sessions Court, the Apex Court accepted with approval the ratio in the case of R.P. Kapur v. State of Punjab AIR 1980 SC 866 : 1960 cri LJ 1239 and also in the case of State of U.P. v. C.P. Sharma (1996) 7 SCC 795 : 1996 Cri LJ 1878 besides the case of State of Bihar v. Rajendra Agarwala, (1996) 8 SCC 104 : 1996 AIR SCW 591 and have quoted with approval the following passage from

that decision .

It has held by this Court in several cases that the inherent power of the Court under Section 482 of the Code of Criminal Procedure should be very sparingy and cautiously used only when the Court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the Court, if such power is not exercised. So far as the order of cognizance by a Magistrate is concerned, the inherent power can be exercised when the allegations in the first information report or the complaint together with the other materials collected during investigation taken at their face value, do not constitute the offence alleged. At that stage it is not open for the Court either to sit the evidence or appropriate the evidence and come to the conclusion that no prima facie case is made out.

10. It is thus clear that no strait-jacket formula is available to exercise or not to exercise the inherent power. The power under Section 482 of the Code is not restricted or controlled by any provisions of the Code so as to restrict its application. However, where alternative remedy is available High Court should not be inclined to invoke inherent power rather allow the parties to work out their remedies in the appropriate forum.

11. The next question that requires determination is as to whether under the given circumstance, as existing in the lower Court record, the factum of divorce was proved. For that we should take into aid the facts and circumstances existing in the LCR. It appears therefrom that in the written statement filed on 21-7-1988 the petitioner has admitted the relationship. The opposite party examined herself as P.W. 1 on 18-1-1989 and P.W. 2, a witness, was examined on 25-1-1989. On 22-9-1989 the petitioner was examined as O. P. W. 1 besides two witnesses viz. O.P. PWs. 2 and 3. On 25-10-1989 the last witness from his side, i.e. O.P. W. 4 was examined. Regarding the factum of divorce the petitioner has tendered his evidence and the evidence of O.P.W. 4. In his evidence the petitioner stated that on 1 -8-1988 he divorced his wife. O. P. W. 4 deposed that on 8-1-1988 the petitioner divorsed his wife. Besides that contradiction, the trial Court has taken note of all other contradictions regarding the time and place of giving Talak (divorce) and has disbelieved the petitioner's evidence. In other words, the evidence from the side of the petitioner has been found to be contradictory and unreliable to prove the factum of divorce. Apart from that, when opposite party No. 1 was examined or her witness was examined no suggestion was given to them that the petitioner has divorced opposite party No. 1. The petitioner did not amend his written statement to insert the plea of divorce. The whole scenerio made his case of divorce unbelieable. For the reasons stated above, the trial Court as well as the revisional Court did not accept the contention of the petitioner relating to the plea of divorce.

12. So that as it may, the point raised by the petitioner is. that the issue of divorce was not properly considered. Mr. Aziz argued that the findings recorded by the learned Magistrate is absolutely incorrect being under a misconception of law and improper assessment of evidence on record. It is the admitted position that petitioner filed the written statement admitting the relationship, but in his evidence took the plea of divorce and stated that he divorced opposite party No. 1 on 1-8-1988. O.P.W. 4, who is said to fee a witness to that Talak, has stated in court that divorce was made on 8-1-1988. Petitioner has admitted in his evidence that after the alleged 'Talak' he did not take any

step to amend the Written statement. Even the petitioner did not give a suggestion relating to 'Talak' while cross-examining opposite party No. 1 P.W. 1. The petitioner is not forthcoming with any explanation regarding this deficiency. The evidence of O.P. Ws. 1 and 4 are quite insufficient to prove the quantum of Talak even in accordance with their personal law. The S.D.J.M. has thus committed ho illegality in recording the finding that the alleged divorce was not proved.

13. Petitioner has relied on the case of Sk. Mohiuddin v. Hasina Bibi 1988 (2) OLR 163, where this Court has held that a factum of divorce pleaded in the written statement is sufficient to Convey the intention of the Muslim husband regarding the divorce and if not earlier it will be effective at least from the date when the written statement is filed containing such statement. The aforesaid ratio cannot be extended to this case because of the fact that petitioner has failed to prove that he has divorced his wife in accordance with the customs and their personal law. There is always a distinction between pleading of a fact and mere assertion without having the intention to divorce. At least from the evidence in record and the finding recorded by the S.D.J.M., it is not clear that the petitioner intended to divorce the opposite party No. 1 and in furtherance thereof did all that is required as per the law and custom.

14. The petitioner has relied on the case of Sayed Sawaj Alli alias Nati v. Rasida Begum (1991) 71 CLT 257 and Rashida Khanum v. Sk. Salim (1995) 9 OCR 410 wherein it has been laid down that a divorced Muslim wife is not entitled to the relief under Section 125 of the Code unles the provisions in Muslim Women (Protection of Rights on Divorce) Act, 1986 are duly complied with. There cannot be any quarrel on that principle. In fact there is a catena of decision in support of that contention not only of this Court but also of various High Courts. But the fact remains that in this case by the date of application under Section 125 of the Code, the opposite party No. 1 was not a divorced wife. Therefore, she was not required to comply with the provisions in Sections 3, 5 and 7 of the Act. In the case of Sk. Masiruddi v. Dulari Bibi (1991) 72 CLT 151, the question examined by this Court was as to whether a declaration of divorce after the order of maintenance is reviewable under Section 127. This Court held that the provision under Section 127(3)(b) may help a Muslim husband to challenge the order of maintenance on the ground of divorce, but in the absence of any averment in the application to satisfy the requirement of law, mere verbal assertion is not sufficient.

15. The aforesaid discussion and ratio in the. citations vis-a-vis the facts and evidence available in the case record show that a plea of divorce was neither raised in the pleading nor proved in record. Under such circumstances, the provisions of the Act are of no help to the petitioner so as to defeat the application for maintenance filed by the opposite parties. It may further be noted that opposite party Nos. 2 and 3 are the two minor sons born out of the wed-lock. Provision of the Act does not grant immunity to the petitioner from maintaining such minor children and in that connection, law is also well settled that the provisions is the Act does not restrict the power under Section 125 of the Code for grant of maintenance in favour of minor children. See the case of Begum Bibi v. Abdul Rajak Khan (1995) 79 CLT 69 besides the case of Rashida Khanum (supra).

16. The preceding discussion shows that the S.D.J.M. has not committed any illegality or abuse of process of court. Similarly, the finding on the issue of divorce as recorded by the S.D.J.M. if allowed to remain, it Will not defeat the ends of justice. Above all, petitioner has legal remedy available

under Section 127 of the Code. For such reasons, there is no justification to invoke the inherent power under Section 482 of the Code. Hence, the Misc. case is dismissed.