Orissa High Court
Abdul Rauf Khan vs Halemon Bibi And Anr. on 23 December, 1988
Equivalent citations: I (1990) DMC 315
Author: K Mohapatra
Bench: K Mohapatra
JUDGMENT K.P. Mohapatra, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure ("Code" for short) praying for quashing the order dated 17-11-1986 passed by the learned Sub-divisional Judicial Magistrate, Nayagarh directing the petitioner to deposit arrear maintenance of Rs. 2400/- which was due to the opposite parties. A few relevant facts may be stated. Opposite party No. 1 Malemon Bibi and opposite party No. 2 Abdul Asak Khan are the wife and son respectively of petitioner Abdul Rauf Khan, an advocate of Nayagarh. The petitioner divorced opposite party No. 1 in 1970 after which opposite party No. 2 the minor son, lived with the mother. The opposite parties claimed maintenance under Section 488 of the old Code in Criminal Miscellaneous Case No. 13 of 1971. Maintenance at the rate of Rs. 50/- and Rs. 25/- was awarded in favour of the mother and the son respectively. Subsequently, on account of rise in the cost of living; the opposite parties in Criminal Misc. Case No. 14 of 1979 prayed for enhancement of maintenance under Section 127 of the Code and by order dated 2-12-1980 maintenance was enhanced and while opposite party No. 1 was awarded Rs. 150/- opposite party No. 2 was awarded Rs. 50/ per month. The aforesaid facts remain undisputed.

2. On 23-12-1985 the opposite parties filed Criminal Misc. Case No. 58 of 19S5 under Section 128 of the Code stating therein that the petitioner defaulted payment of the maintenance from 1-12-1984 to 30-11-1985 and was in arrears of a sum of Rs. 2400/-. Therefore, they prayed for recovery of the said amount by attachment and sale of moveable and immoveable property belonging to the petitioner. In his counter purported to be under Sections 4 and 7 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 'Act') the petitioner stated that the petition of the opposite parties under Section 125 of the Code was pending. The parties belong to Sunni Sect and are governed by Hanafi School of Mohammedan Law. The marriage between the petitioner and the opposite parties had taken place on 24-10-1969 and the divorce was effected according to the local and religious custom on 10-5-1970. The divorce was also communicated to opposite party No. I on 17-7-1971 and on different dates. After the divorce, opposite party No. 1 received Mahr and as such the divorce became complete and irrevocable. According to Sections 4 and 7 of the Act the petitioner is no more liable to pay maintenance to the opposite parties and the proceeding for recovery of arrear maintenance was liable to be dropped.

3. After hearing the learned counsel for both parties, the Court below passed the impugned order directing the petitioner to make deposit of the arrear maintenance of Rs. 2400/-. When the petitioner approached the Court and prayed for stay, order was passed on 9-12-1987 directing him to deposit the sum of Rs. 2400/- in two instalments and it appears from the records of the Court below that the amount had been deposited.

4. Mr. Deepak Misra, learned counsel appearing for the petitioner, relied upon the different provisions of the Act and urged that after coming into force thereof on 19-5-1986 the petitioner is no longer liable to pay maintenance to the opposite parties and the latter are free to seek their remedies according to the provisions of Sections 3 and 4 against the appropriate parties. Mr. K.C. Mohanty, learned counsel appearing for the opposite parties, on the other hand, contended that the Act has no retrospective operation either expressly or impliedly. Its provisions do not affect orders of maintenance passed either under Section 488 of the old Code or Section 125 of the Code before it came into force on 19-5-1986. The right of maintenance which had already accrued in favour of the opposite parties prior to the Act cannot be extinguished by any of the provisions thereof. In any event, the Act does not provide with regard to maintenance of a son. He specifically pointed out that Section 7 of the Act has no application to a proceeding under Section 128 of the Code and so in any view of the matter, the opposite patties being entitled to arrear maintenance, the recovery proceeding cannot be quashed. From the aforesaid contentions it is apparent that the point which falls for determination is whether the Act or any of the provisions thereof have retrospective operation expressly or by necessary implication so as to extinguish an order of maintenance under Section 125 of the Code already granted in favour of the opposite parties.

5. The Act came into force on 19-2-1986. A divorced Muslim woman claiming maintenance against her husband shall be entitled to relief under Sections 3 and 4 unless both the divorced woman and her former husband opt under Section 5 that they would prefer to be governed by the provisions of Sections 125 and 128 of the Code. Section 3, however, contains a non obstante clause, 'notwithstanding anything contained in any law for the time being in force'. In view of the non-obstante clause, Mr. Misra citing several decisions of the Supreme Court urged that despite there being already an order of maintenance under Section 125 of the Code. Section 3 of the Act shall prevail with the consequence that such order shall stand extinguished without having any legal force Mr. Mohanty, however, clarified contending that the non-obstante clause shall not affect an order under Section 125 of the Code already made effective. It would only supersede the provisions of Sections 125 and 127 if petitions thereunder are pending or filed after coming into force of the Act unless the parties have opted under Section 5 to be governed by Sections 125 to 128 of the Code. Supporting his argument Mr. Mohanty pointed out the provisions of Section 7 which are transitional in character. According to this section an application by a divorced woman under Sections 125 or 127 of the Code pending before a Magistrate on commencement of the Act shall be disposed of by such Magistrate in accordance with the provisions of the Act. A pending petition under Section 128 of the Code is not affected by Section 7 or any of the other provisions of the Act. As in this case the petition of the opposite parties under Section 128 of the Code is pending, as a result of the order of maintenance under Section 125 passed long before the Act came into force, it cannot be said that the right of the opposite parties has completely extinguished by virtue of the provisions of the Act.

6. It is also necessary in this connection to notice a few decisions in which divergence views have been expressed by different High Courts. In 1987 (2) KLT 528 Mohammed Haji v. Rukiva almost an identical case, it was held by a learned Single Judge as follows :

"As the petition has been filed under Section 128 Cr.P.C. for the enforcement of maintenance already ordered i.e. long prior to the commencement of the Act and as Section 7 of the Act does not

bar the relief sought under Section 128 it is futile to contend that the Magistrate has no jurisdiction to proceed to recover the amount. The transitional provision contained in Section 7 of the Act applies only to applications pending before Magistrate under Sections 125 or 127 Cr P.C. It has no application to any proceedings taken under Section 128 Cr.P.C. It is always open to a divorced Muslim wife who has obtained maintenance under Section 125 or enhanced maintenance under Section 127 to enforce it under Section 128. So long as Section 7 of the Act does not interdict proceedings under Section 128 Cr.P.C. it is not possible to hold that after the commencement of the Act the respondent cannot file the petition for enforcement of the order in her favour."

In II (1987) DMC 434, Akkutty v. Amina a Division Bench of the Kerala High Court held as follows:

"... A reading of the Section makes it explicitly clear that once a case has been decided by the Magistrate Section 7 cannot have any application Section 7 is a transitional provision. It makes the position abundantly clear that pending cases before a Magistrate on the commencement of the Act have to be decided under the Act and not cases already disposed of. As the Sessions Judge has passed the order on 31-7-1984 it is impossible to hold that the application was pending before a Magistrate on the commencement of the Act."

In II (1987) DMC 15, Kasam v. Jenabi maintenance was granted under Section 125 of the Code in favour of a divorced Muslim woman on 16-8-1984. It was held by a learned single Judge of the Madhya Pradesh High Court that the Act received the assent of the president on 19-5-1986 and so the case did not fall to be governed by its provisions. In AIR 1988 Gujarat 141, Arab Ahemadhia Abdulla and etc. v. Arab Bail Mohmuna Saiyadbhai and Ors., a learned Judge held as follows:

"Next it was contended that in view of the provisions of Muslim Women Act, the orders passed by the Magistrate under Section 125 of the Cr.P.C. are non-est. This submission is also without any substance. There is no section in the Act which nullifies the orders passed by the Magistrate under Section 125 of the Cr.P.C. Further, once the order under Section 125 of the Cr.P.C. granting maintenance to the divorced women is passed then her rights are crystalized and she gets vested right to recover maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provision in the Muslim Women Act. Under Section 5 an option is given to the parties to be governed by the provisions of Sections 125 to 128 of the Cr.P.C. This section also indicates that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystalized before the passing of the Act. Section 7 only provides that every application by divorced woman under Sections 125 or 127 of the Cr.P.C. which is pending before the Magistrate on the commencement of the act shall be disposed of (subject to the provisions of Section 5 of the act) by the Magistrate in accordance with the provisions of this act."

In 1988 Cri.L.J. 1421, Hazi Farzand Ali v. Mst. Noorjahan, a learned Judge of the Rajasthan High Court held that Section 7 of the Act is a transitional provision and it applies to the application by a divorced woman under Sections 125 and 127 of the Act. Section 7 does not apply to the application moved on behalf of the children who were minors and unable to maintain themselves. If the application by a divorced woman under Sections 125 and 127 of the Code is pending on the commencement of the Act, then such an application is required to be disposed of under the

provisions of the Act. Section 7 is an overriding provision. To such a pending application the provisions of Section 125 of the Code will not apply and that application has to be disposed of in accordance with the provisions of the Act subject to the provisions of Section 5 thereof. Section 4 does not at air deal with the children claiming maintenance. In II (1988) DMC 19, Ghulam Sabir v. Rayeesa Begum, a learned Judge of the Allahabad High Court observed that the Act came into force on 19-5-1986. Upto 18-5-1986 whether a woman was or was not divorced, was not a matter of any importance because in any case she was entitled to maintenance in accordance with the provisions of Section 125 of the Code. But if it is established that she had been divorced prior to the date, that is, 19-5-1986 then with effect from 19-5-1986 the case shall be covered by the provisions of the Act. If, however, it is not established that she was divorced prior to 19-5-1986 then upto the date of divorce she will be entitled to maintenance under Section 125 of the Code as the Act is not retrospective in effect. But from the date of divorce action will have to be taken in accordance with the provisions of the Act, The third contingency will arise if evidence shows that the story of divorce is bogus and actually no divorce has been pronounced. In that case the Act will have no application and the case will be covered by the provisions of Section 125 of the Code. In 1988 (2) KLT 446, Aliyar v. Pathu, it was held by a Division Bench that the Act does not take away the right of the children to make a claim under Section 125 of the Code either through the mother or otherwise. Section 7 requires only an application by a divorced woman under Section 125 or 127 of the Code to be disposed of under the Act. Section 7 does not contemplate an application under Section 125 or 127 of the Code filed on behalf of the children either by the mother or by any one to be disposed of under the Act. The right and the remedy available to the Children under Section 125 or 127 of the Code are unaffected by (he Act. I have made reference to this decision because it has dealt with another facet of the problem relating to the children of the divorced couple claiming maintenance from the former husband either through the divorced mother or otherwise. In the case under consideration, opposite party No. 2 is the son in whose favour maintenance was allowed and hence the necessity to refer to the decision. In 1987 (1) Crimes 241, Md. Unus v. Bibi Phenkani @ Tasrun Nisa and Anr., a learned Judge of the Patna High Court however took a contrary view. After analysing the different provisions of the Act it was held as follows :

"Striking feature would be that there is no saving clause provided under this Act by which any order passed in favour of a divorced Muslim woman, under Section 123 or 125 of the Code could be validated or liability created in the husband in this regard could be held valid or enforceable.

Section 125 of the Code entitled a divorced woman to get maintenance from her husband until she is re-married. Section 3(1)(a) of the Act curtailed her said right to get maintenance till the period of iddat only. In this view of the matter Section 125 of the Code so far as it had created a right to a Muslim divorced woman to get maintenance from her husband, until she is re-married, has been impliedly repealed; so far as the right to get maintenance after the period of iddat is concerned -by this Act. This being so, a Muslim divorced woman is no longer entitled to get maintenance from her former husband after the period of iddat as there is no saving clause in this Act. Having lost her right to get maintenance from her former husband after the period of iddat she has lost her remedy also as provided under Section 125(3) of the Code (sic) enforce her said right in case her former husband fails without sufficient cause, to comply with the order of maintenance. Thus if a divorced Muslim woman files a petition under Section 125(3) of the Code, which in substance, is a penal

provisions, it will be an action without remedy. The Act, as indicated above, does not contain any saving any (sic) right created or orders passed in favour of a Divorced Muslim woman. Thus the Act of 1986 has completely obliterated the right of such woman to get maintenance. The repeal without saving such right means that such woman had never such right and in this view of the matter the said right now can not be enforced under Section 125(3) of the Code. Thus, if a divorced Muslim woman divorced prior coming into force of the Act, in whose favour order of maintenance has been passed and has become final or is pending in revision or other court being challenged by the husband is allowed to get maintenance, it will be in complete contravention of the intention of the legislature and will amount to frustrate the very object of the Act for which it has been passed.

In the decision of this Court reported in 1988 O.C.R. 702, Riswana Begum v. Mlv. Mutiullah, there was discussion of some of the provisions of the Act so as to govern cases of maintenance by divorced Muslim woman after it came into force. There was however, no discussion as to whether the Act has retrospective operation or not.

7. I am in respectful agreement with the views expressed by the Kerala, Madhya Pradesh, Gujarat, Rajasthan High Courts and partially with the Allahabad High Court. The non obstante clause in Section 3 of the Act refers to any other law for the time being in force. It has no reference to a legal order of maintenance passed in accordance with any other law before the Act came into force. Only after the Act came into force and by operation of the non obstante clause in Section 3, maintenance in respect of divorced Muslim woman can only be claimed in accordance with the provisions thereof as well as under Section 4 subject to the provisions of Section 5 as has been held by this Court in the case of Riswana Begum v. Mlv. Mutiullah (supra). It cannot, therefore, be said that the non obstante clause occurring in Section 3 makes the Act retrospective in operation. There is also no specific provision in the Act making any of its provisions or whole of it retrospective. The transitional provision contained in Section 7 makes the intention of the legislature more explicit. According to it, pending applications under Sections 125 or 127 of the Code after the Act came into force with effect from 19-5-1986 shall be disposed of by the Magistrate according to the provisions of the Act, but not according to the provisions of the Code. It is pertinent to point out that there is no mention of Section 128 of the Code in Section 7 of the Act, which means, if a petition under Section 128 for enforcement of an order of maintenance which has been passed prior to coming into force of the Act is pending, Section 7 will not embrace it. In other words, if an order of maintenance has been passed by a Magistrate under Section 125 of the Code in favour of the divorced Muslim woman before the Act came into force and a petition is filed or is pending under Section 128 thereof for its enforcement after the Act came into force, the enforcement proceeding cannot be barred. To such a petition, Section 7 shall have no application. I would accordingly arrive at the conclusion that orders passed under Section 125 of the Code, prior to coming into force of the Act, in favour of a divorced Muslim woman and her minor children cannot be extinguished either expressly or impliedly. The impugned order, therefore cannot be quashed.

8. Before parting with the case, I would like to draw the attention of the learned Judicial Magistrate to the case of opposite party No. 2 as to whether he has attained majority or still be is a minor so as to be entitled to maintenance in view of the specific provisions of Section 125(1) (b) and (c) of the Code.

9. For the aforesaid reasons, there is no merit in this case which is accordingly dismissed.