

Riswana Begum Vs A Mlv. Motiullah

Court: Orissa High Court

Date of Decision: Oct. 14, 1988

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 125, 126, 127, 128
Muslim Women (Protection of Rights on Divorce) Act, 1986 â€” Section 3(2), 5

Citation: (1989) 67 CLT 353

Hon'ble Judges: G.B. Patnaik, J

Bench: Single Bench

Advocate: Md. Y.A. Rahim, for the Appellant; R. Ch. Mohanty, R.K. Mohanty and Sk. Nijamuddin, for the Respondent

Final Decision: Dismissed

Judgement

G.B. Patnaik, J.

Revisional order of the Sessions Judge Cuttack setting aside the order of the Magistrate granting interim maintenance in

favour of the Petitioner while the application u/s 125 of the Code of Criminal Procedure is pending, is being assailed- in this revision.

2. The parties are muslims and the Petitioner is the wife of the opposite party. " She filed an application u/s 125 of the Code of Criminal Procedure

before the learned Magistrate and along with the said application she filed an application for interim maintenance. That application for inter-

maintenance, was registered as criminal. Miscellaneous case No. 34/81 The opposite party filed an objection to the effect that the Petitioner is not

entitled to interim maintenance. It was also stated in the objection that the Petitioner left the house of her husband of her free will by executing a

"Khulanama" and relinquished her dower dues and future maintenance from the husband and therefore, the husband has divorced her and

accordingly the wife is not entitled to any interim maintenance relying upon a decision of the Supreme Court in the case of Savitri Rawat Vs.

Govind Singh Rawat, , the Magistrate held that he has jurisdiction to award interim maintenance and taking into consideration the materials before

him he awarded interim maintenance at the rate of Rs. 200/- per month till the disposal of the application tiled u/s 125 of the Code of Criminal

Procedure. The husband carried a revision before the learned Sessions Judge. The learned Sessions Judge by the impugned order came to hold

that in view of the provisions of Muslim Women (Protection, of Rights on Divorce) Act, 1986, the order of the Magistrate granting maintenance is

not in conformity with law and therefore, be set aside the order granting maintenance. It is this order of the Sessions Judge, which is being

impugned in the present revision.

3. The provisions of Section 125 of the Code of Criminal Procedure are independent of the personal law or any custom governing the parties and

the said personal law or custom cannot be imported into Section 125 of the Code. The right to get maintenance u/s 125 of the Criminal Procedure

is a distinct statutory right which the Legislature has recognised irrespective of the nationality or the creed of the parties. The only condition

precedent is the existence of a conjugal relationship in the case of wife which will have to be ascertained with reference to the personal law of the

parties. The provisions of Section 125 of the Code of Criminal Procedure are not superseded by personal or special law of the parties. In fact in

the famous Shah Bano's case reported in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, , it was clearly stated by their Lordships that a

divorced muslim woman, so long as she has not remarried is a wife for the purpose of Section 125 of the Code of Criminal Procedure and the

statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her. The sole question for

consideration" is whether the Muslim Womens (Protection of Rights an Divorce) Act. 1986 (Act 25 of 86) (hereinafter refilled to as the ""Act"") can

be said to have made any change in law so as to exclude the jurisdiction of a Magistrate u/s 125 of the Code of Criminal Procedure or not. The.

Act came into force on 19-5-1989. In the present case the marriage itself was solemnised after the Act coming into force that is, on 25-6-1986.

The application u/s 125, Cr. P. C, was filed on 11-2-1987 and an application for interim maintenance was filed on 27-4-1987. The husband filed

his objection on 23-6-1987 and the Magistrate granted interim maintenance by order dated 10.8-1987. The Act seeks to restore the Muslims

personal law of husband's liability upto and for the period of Iddat and also retains the provisions of Section 125 of the Criminal Procedure. Code

by making it optional on the choice at both parties and, therefore, the old orthodox view as well as the liberalised view expressed in Mohd. Ahmed

Khan Vs. Shah Bano Begum and Others, have been retained but with the difference was would be seen u/s 5 of the Act. In the statement of

objects and reasons of the Act which was introduced in the Parliament on 19th February, 1986 it was stated ;

The Supreme Court, in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, , has held that although the Muslim Law limits the husband's

liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by

Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extent the above principle of

Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife

is able to maintain herself, the husband's liability ceases with the expiration of the period of Iddat but If she is unable to maintain herself after the

period of iddat, she is entitled to have recourse to Section 125 of, the Code of Criminal Procedure.

2. The decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has,

therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill

accordingly provides for the following among other things, namely:

(a) A Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former

husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be

extended to a period of two years from the date of birth of the children. She will also be entitled to mahr or dower and all the properties given to

her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to

apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of Mahr or dower or the delivery

of the properties;

(b) Where a Muslim divorced woman is unable to maintain herself after the of period of iddat the Magistrate is empowered to make an order for

the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions

in which they would inherit her property. If anyone of such relatives is unable to pay his or her share on the ground of his or her not having the

means to pay the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a

divorced woman has no relatives or such relatives or anyone of them has not enough means to pay the maintenance or the other relatives who have

been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives" the Magistrate

would order the State Wakf Board to pay the maintenance ordered by him or the states of the relatives who are unable to pay.

3. The Bill seeks to achieve the above objects.

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. Section 5 of the Act is important for the point in issue. Section 5 is quoted herein below

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 the first bearing 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 (2 of 1974), 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 bearing of the application ""means the date fixed in the summons for the attendance of

the Respondent to the application.

Thus by the aforesaid provision option has been given to the parties to choose the remedy of Section 125 of the Code of Criminal Procedure and

if that remedy is chosen in accordance with the manner prescribed and the time when such option has to be exercised as indicated in Section 5 of

the Act, then the proceeding for maintenance would continue under Sections 125 to 128 of the Criminal Procedure Code. The choice is to be

exercised in the manner and at the time prescribed in the section the manner prescribed being by affidavit or other declaration in writing in such

form as prescribed by rules under the Act by both parties either jointly or separately. The time prescribed is the date of first bearing of the

application under Sub-section (2) of Section 3 of the Act. It follows, therefore, that application for maintenance by a divorced muslim woman must

be initiated under Sub-section (2) of Section 3 of the Act and then only choice should be exercised in the manner and on the date stated above so

that the proceedings should continue under Sections 125 to 128 of. the Criminal Procedure Code. In this view of the matter so far as divorced

muslim woman is concerned Section 125 of the Code of Criminal Procedure would apply. Only, if both parties, exercise their option at the first

hearing of the application under Sub-section (2) of Section 3 of the Act as contemplated u/s 5 of the Act and not in any other manner.

Consequently the Magistrate cannot exercise his jurisdiction u/s 125 Code of Criminal Procedure in case of divorced muslim woman, unless an

application is filed u/s 3 (2) of the Muslim Womens (Protection of Rights on Divorce) Act, 1986 and parties exercise their option as required u/s 5

of the said Act. In view of my aforesaid conclusion in the present case the Magistrate had no jurisdiction to award interim maintenance and, the

order of the learned Sessions Judge is unassailable. The revision is accordingly dismissed.