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(2001) 2 DMC 401

Gauhati High Court

Case No: Writ Petition (C) No. 262 of 2000

Tripura Board of Wakf and Another	APPELLANT
Vs	
Tahera Khatoon	RESPONDENT

Date of Decision: Feb. 2, 2001

Acts Referred:
Muslim Women (Protection of Rights on Divorce) Act, 1986 â€" Section 4(2)

Citation: (2001) 2 DMC 401

Hon'ble Judges: A.K. Patnaik, J

Bench: Single Bench

Advocate: U.B. Saha and A. Bhattacharjee, for the Appellant; S. Saha, for the Respondent

Judgement

A.K. Patnaik, J.
This is an application under Articles 226/227 of the Constitution of India praying for quashing the order dated

23.12.1997 passed by the learned Judicial Magistrate, 1st Class, Sonamura, in Misc. Case No. 15/97, and for quashing the order dated

28.1.2001 in Misc. Case No. 10/98, and the distress warrant dated 28.1.2000 issued by the Sub-Divisional Judicial Magistrate, Sonamura.

2. The facts briefly are that the respondent is a Muslim divorced woman. She filed an application for maintenance against her husband u/s 125,

Cr.P.C. which was registered as Misc. Case No. 5/96 and was ultimately disposed of with the observation that the respondent being a Muslim

divorced woman can file a petition under the Muslim Women (Protection of Rights on Divorce) Act, 1986, (for short, ""the Act, 1986"").

Thereafter, the respondent filed such a petition which was numbered as Misc. Case No. 15/97. In the said petition, the husband of the respondent

was impleaded as opposite party No. 1, the Assistant Commissioner, Sub-Divisional Wakf Committee, (Wakf Board), Sonapur (hereinafter

referred to as ""the Assistant Commissioner, Wakf Committee"") as opposite party No. 2, and the mother of the respondent was impleaded as

opposite party No. 3. By order dated 23.12.1997, the learned Magistrate disposed of the said Misc. Case with, inter alia, the following

observations :

...In consideration of all aspects the prayer of the petitioner is partially allowed. The opposite party No. 1 shall pay Rs. 7,000/- as Mahrana to the

petitioner and further the opposite party No. 1 shall pay Rs. 4,000/- for the period of Iddat Kal. The opposite party No. 1 shall pay in total Rs.

11,000/- to the petitioner. The opposite party No. 2 is also bound by this order and he will act as per Acts laid down in the Muslim Women

(Protection of Rights on Divorce) Act. The opposite party No. 3 is discharged from any liability.

It is thus clear that by the said order dated 23.12.1997, the Magistrate directed the opposite party No. 1, husband of the respondent to pay a total

of Rs. 11,000/- and discharged the opposite party No. 2, mother of the respondent, from any liability, but observed that the opposite party No. 2,

Assistant Commissioner, Wakf Committee would be bound by the order and would act as per the provisions of the Act, 1986. Thereafter, the

respondent filed an application before the Magistrate which was numbered as Misc. Case No. 10/98 stating, inter alia, that although the Magistrate

had passed an order on 23.12.1997 for payment of maintenance allowance under the Act, 1986, the Assistant Commissioner, Wakf Committee,

had not paid the arrear maintenance allowance of Rs. 5,000/- for the period from 23.12.1997 to 23.10.1998. In the said application, the

respondent prayed for an order for immediate realisation of the dues from the Assistant Commissioner, Wakf Committee. Pursuant to the said

application registered as Misc. Case No. 10/98, the Magistrate passed an order on 18.11.1999 giving the Assistant Commissioner, Wakf

Committee, some adjournment as a last chance. The Assistant Commissioner, Wakf Committee then filed an application praying for review of the

said order dated 18.11.1999, but the Magistrate rejected the said prayer for review by order dated 28.1.2000. In the meanwhile, distress warrant

had been issued pursuant to orders passed on 7.12.1999. Aggrieved by the said orders dated 23.12.1997 and 28.1.2000 as well as the distress

warrant, the petitioner had filed this writ petition for appropriate relief.

3. Mr. U.B. Saha, learned Senior Counsel appearing for the petitioners, submitted that it will be clear from Sub-section (2) of Section 4 of the Act,

1986, that only where a divorced woman is unable to maintain herself and she has no relative as mentioned in Sub-section (1) of Section 4 or such

relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to

pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to Sub-

section (1) of Section 4, the Magistrate may, by order direct the State Wakf Board to pay such maintenance as determined by him under Sub-

section (1) of Section 4 or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as may be

specified in the order. In the present case, no finding has been recorded by the Magistrate as to whether the relatives of the respondent have not

enough means to pay the maintenance nor any maintenance amount determined by the Magistrate. Mr. Saha further submitted that all that the

Magistrate recorded in the impugned order dated 23.12.1997 was that the Assistant Commissioner, Wakf Committee, was bound by the said

order; and would act as per Act, 1986. According to Mr. Saha, the Assistant Commissioner, Wakf Committee or the Wakf Board would be

bound by the provisions of Act, 1986 and in particular under Sub-section (2) of Section 4 thereof if the Magistrate recorded a clear finding that the

respondent could not be maintained by her relatives, and until the Magistrate fixes the amount of maintenance, the Wakf Committee or Board

should not be held liable to pay the maintenance to the respondents. Mr. Saha further submitted that it would be clear from the said order that one

of the witnesses, namely, P.W. 3, who was examined by the Magistrate was the brother of the respondent and, therefore, the Magistrate should

have considered as to whether the said P.W. 3 was in a position to maintain the respondent. He further argued that in the subsequent order dated

28.1.2000 in Misc. Case No. 10/98 by which the Magistrate rejected the prayer of the petitioner for review of the order dated 18.11.1999, the

Magistrate has made mention that the respondent had filed a petition u/s 127, Cr.P.C. for enforcement of the order dated 23.12.1997. According

to Mr. Saha, since the proceeding under Sections 125 and 127, Cr.P.C. were not applicable to a Muslim divorced woman, the order of the

Magistrate was without jurisdiction and are nullities.

4. Mr. S. Shah, learned Counsel appearing for the respondent, on other hand, submitted that it has been held by the Supreme Court in Secretary,

Tamil Nadu Wakf Board and another Vs. Syed Fatima Nachi, that the proceedings under Sub-sections (1) and (2) of Section 4 of the Act, 1986,

are not mutually exclusive but are to be taken up simultaneously by the Magistrate. In the instant case, the Assistant Commissioner, Wakf

Committee has been impleaded as opposite party No. 2 in the very first application filed by the respondent before the Magistrate numbered as

Misc. Case No. 15/97, and if the contention of the State Wakf Board was that the respondent has other relatives who could provide maintenance

for the respondent, the State Wakf Board should have taken a plea in that regared before the Magistrate. Mr. Saha submitted that no such plea

was taken by the Assistant Commissioner, Wakf Committee and in the circumstances the Magistrate was right in recording a finding that the

Assistant Commissioner, Wakf Committee was bound by the provisions of the Act, 1986. He further submitted that a reading of the impugned

order dated 23.12.1997 would show that the Magistrate has considered all aspects of the matter including the fact that the respondent was

dependable on her widow mother who was a poor woman and had discharged the widow mother impleaded in the said procedure as opposite

party No. 3 from all liabilities. According to Mr. Saha, this would go to- show that as per the said order dated 23.12.1997, the Assistant

Commissioner, Wakf Committee was required to pay the maintenance to the respondent. He further submitted that if the Wakf Committee was

aggrieved by the said order dated 23.12.1997, it was open for the said Wakf Committee to have moved higher Courts against the said order, but

no such steps were taken by the Wakf Board. When no maintenance was paid by the Wakf Committee, the respondent had no option but to

move the Magistrate for realisation of maintenance allowance from the Wakf Committee, and it was at that very belated stage that the Wakf

Committee filed an application for reviewing the order dated 18.11.1999, and the Magistrate rejected the said application after observing that the

earlier order dated 23.12.1997 passed in Misc. Case No. 15/97 for payment of maintenance to the respondent had not been challenged by the

Wakf, Board. Mr. Saha, therefore, submitted that this writ petition should be dismissed by this Court with cost particularly when the respondent is

a poor Muslim divorced woman and has been suffering since her divorce.

5. The contention of Mr. U.B. Saha, learned Counsel for the petitioners that the impugned orders dated 23.12.1997 and 28.1.2000 are without

jurisdiction and are nullities inasmuch as these are purported to have been passed u/s 127, Cr.P.C. and not under the Act, 1986 has no merit at all.

It is true that the Magistrate has stated in the impugned order dated 28.1.2000 that Misc. Case No. 10/98 had been filed by the respondent u/s

127, Cr.P.C. But it is not disputed that the Magistrate who passed the impugned orders had the jurisdiction under the Act, 1986, to pass the

impugned orders. If that be so, the mere fact that in his impugned order dated 28.1.2000 he has made a reference to Section 127, Cr.P.C. would

not divest the Magistrate of the jurisdiction vested in him for passing orders under the Act, 1986. The question really is whether by the impugned

orders dated 23.12.1997 passed in Misc. Case No. 15/97, the State Wakf Board was liable for making payment of maintenance to the

respondent under Sub-section (2) of Section 4 of the Act, 1986.

6. Sub-section (2) of Section 4 of the Act, 1986, is quoted hereinbelow :

(2) Where a divorced woman is unable to maintain herself and she has no relative as mentioned in Sub-section (1) or such relatives or any one of

them have not enough means to pay the maintenance ordered by the Magistrate or other relatives have not the means to pay the shares of those

relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to Sub-section (1), the Magistrate

may, by order direct the State Wakf Board established u/s 9 of the Wakf Act (29 of 1954), or under any other law for the time being in force in a

State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under Sub-section (1) or, as the case

may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

It is clear from the bare reading of Sub-section (2) of Section 4 of the Act, 1986, quoted above, that the Magistrate can order the State Wakf

Board to pay maintenance if the divorced woman is unable to maintain herself and she has no relative as mentioned in Sub-section (1) or such

relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to

pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to Sub-

section (1) of Section 4 of the Act. In the present case, it appears from the order dated 23.12.1997 that the Magistrate has come to a conclusion

that the respondent is unable to maintain herself and has also recorded a finding that the mother of the respondent is poor and is, therefore, not in a

position to maintain the respondent. But the Magistrate has not considered as to whether there were other relatives referred to in Sub-section (2)

of Section 4 of the Act who had the means to pay the maintenance to the respondent. It is true as has been submitted by Mr. S. Saha that the

Assistant Commissioner, Wakf Committee who had been impleaded as opposite party No. 2 in Misc. Case No. 15/97 did not take any plea that

there were other relatives who could provide the maintenance to the respondent. But in my considered opinion, even where no such plea is taken

by the Wakf Board before the Magistrate, some finding has to be recorded by the Magistrate that the relatives as mentioned in Subsection (2) of

Section 4 of the Act do not have enough means to pay maintenance to the divorced woman. This is because, as has been rightly contended by Mr.

U.B. Saha, the resources available with the State Wakf Board are not unlimited but limited and as the language of Sub-section (2) of Section 4

makes it clear that such limited resources available with the Wakf Board are meant for divorced Muslim women who are unable to maintain

themselves or who have no relatives as mentioned in the said Sub-section (2) having enough means to pay maintenance to the divorced woman.

Further, it will also be clear from Sub-section (2) of Section 4 of the Act, 1986, quoted above, that the order passed by the Magistrate must also

indicate the maintenance determined by him which is to be paid by the State Wakf Board. But in the order 23.12.1997 in Misc. Case No. 15/97

although it was held that the Assistant Commissioner, Wakf Committee would be bound by the provisions of Act, 1986, no amount of

maintenance was determined by the Magistrate which the State Wakf Board was required to pay under the Act, 1986.

7. Nonetheless, I find great force in the submission of Mr. S. Saha, learned Counsel for the respondent that the Assistant Commissioner, Wakf

Committee who was impleaded as opposite party No. 2 in Misc. Case No. 15/97 before the Magistrate had not contested the said Misc. case at

all resisting the claim of the respondent against the Wakf Board. Further, by order dated 23.12.1997 the Magistrate observed that the Assistant

Commissioner, Wakf Committee, opposite party No. 2 in the said Misc. case was bound by the Act and yet the said order was not challenged in

higher Courts. Mr. U.B. Saha, learned Counsel for the petitioner, of course contended that by the said order the Wakf Board was not required to

pay any maintenance to the respondent and all that was stated was the Assistant Commissioner, Wakf Committee was bound by the provisions of

the Act. He also submitted that in the petition filed by the respondent registered as Misc. Case No. 15/97, no claim as such was made against the

Wakf Board. In my considered opinion, so long as some orders were not passed by the Magistrate making the Wakf Committee/Board liable for

payment of maintenance to the respondent, the Wakf Committee/Board was not required to move the higher Courts, but once an observation was

made by the Magistrate in the order dated 23.12.1997 that the Assistant Commissioner, Wakf Committee was bound by the provisions of the Act

and at the same time the Magistrate discharged the mother of the liability for maintenance of the respondent, the Wakf Committee had been held

liable to pay maintenance under Sub-section (2) of Section 4 of the Act, 1986. The said order of the Magistrate dated 23.12.1997 should have

been challenged by the Wakf Committee/Board on the same ground as it is now challenged before this Court in this writ petition that unless a

finding is recorded by the Magistrate that the respondent does not have other relatives who have the means to provide maintenance to her, the

State Wakf Board is not liable for such maintenance for the respondent. There is however no limitation for filing a writ petition challenging the said

order dated 23.12.1997 on the ground that the State Wakf Board is not liable unless a finding to that effect is recorded by the Magistrate. It is

only in the year 2000 that the State Wakf Board has filed this writ petition before this Court challenging the said order dated 23.12.1997 with,

inter alia, the ground that the State Wakf Board is not liable until a finding is recorded by the Magistrate that no other relative having means to pay

maintenance to the respondent is available.

8. In Secretary, Tamil Nadu Wakf Board v. Syed Fatitna Nachi (supra), cited by Mr. S. Saha, learned Counsel for the respondent, the Supreme

Court has held that Section 4 of the Act, 1986 does not contemplate multiplicity of proceedings, first a proceeding under Sub-section (1) and

thereafter a proceeding under Sub-section (2) for payment of maintenance by the Wakf Board. The proceeding before the Magistrate against the

relatives and the State Wakf Board may be simultaneous and " in such proceeding the State Wakf Board can take such defences as are open to

them on the merit of the matter and Within the framework of the legislative scheme embodied in Section 4 of the Act, 1986. In my considered

opinion, therefore, in Misc. Case No. 15/97, the State Wakf Board ought to have taken its defences on merit within the framework of the

legislative scheme embodied in Section 4 of the Act, 1986, and had such defences been taken by the State Wakf Board, the Magistrate would

have considered the said defences and passed appropriate orders in the said Misc. Case No. 15/97. But since no such defence has been taken in

the said Misc. case and since the order passed on 23.12.1997 in the said Misc. case has been challenged by the State Wakf Board before this

Court only in the year 2000. I am of the opinion that the petitioners should be saddled with a reasonable cost to take care of the hardship that the

respondent has suffered and to enable the respondent to contest the case again before the Magistrate against the petitioners. In the aforesaid case

of the Supreme Court in Secretary, Tamil Nadu Wakf Board v. Syed Fatima Nachi, the Supreme Court had directed the Tamil Nadu Wakf Board

to deposit a sum of Rs. 10,000/- before issuing notice to the divorced woman in that case and at the time of disposal of the case directed that Rs.

3,000/- out of the said amount be paid to the Counsel appearing for the divorced woman in that case and the remaining Rs. 7,000/- be paid to the

divorced woman for her succour. In my considered opinion, therefore, a cost of Rs. 10,000/- in favour of the respondent in the present case will

meet the ends of justice.