

Bibi Asiran Vs. Mobarak Ansari

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Court : Patna

Decided On : Aug-23-1993

Judge : Dharmpal Sinha, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125 and 397; Muslim Law

Appeal No. : Crl. Revn. No. 84 of 1992 (R)

Appellant : Bibi Asiran

Respondent : Mobarak Ansari

Advocate for Def. : S.N. Pal, M. Prasad and B.K. Dubey

Advocate for Pet/Ap. : M.N. Sinha, Adv.

Judgement :

Dharmpal Sinha, J.

1. This Criminal Revision is directed against a part of the impugned judgment and order dated 27.11.1991 passed by the Sub-divisional Judicial Magistrate, Lohardaga, in Case No. 4(M) of 1979, whereby the learned Sub-divisional Judicial Magistrate has made a declaration that the applicant is entitled to realise arrears of maintenance allowance at the rate of Rs. 150/- per month from 23.6.1983 to 23.7.1988 and thereafter she will get the amount of Rs. 4,250/- which is said to

have been deposited on account of Mehar and the amount of maintenance during Iddat period before the Anjuman.

2. The relevant facts for the disposal of this revision petition may briefly be stated. The applicant filed a petition under Section 125 of the Code of Criminal Procedure (to be hereinafter referred to as 'the Code') claiming maintenance and the application had been allowed on 23.6.1983 and the opposite party (the husband) was asked to pay a sum of Rs. 150/-per month to the applicant. A revision petition was filed against that order bearing Cr. Revision No. 160 of 1983 which was dismissed. Thereafter the applicant filed a petition for realisation of the arrears of maintenance from 23.6.1983 to 18.12.1986 and Distress warrant was issued for realisation of the said amount. Thereupon the opposite party filed a petition on 14.6.1988 under Section 127 of the Code stating therein that due to intervention of certain relations and well wishers the parties had entered into compromise under which the opposite party was to pay Rs. 1000/- only in satisfaction of all the arrears of maintenance and the applicant was to live with the opposite party. He further alleged that the circumstances have changed because of coming into force of the Muslim Women's (Protection of Rights on Divorce) Act, 1986. To that application of the opposite party a rejoinder was filed by the applicant asserting that the alleged story of compromise was totally false and concocted and that she had never made any compromise with the opposite party. The learned Sub-divisional Judicial Magistrate after considering the petition dated 14.6.1988 filed by the opposite party and the rejoinder filed by the applicant passed an order in favour of the applicant. Against that order another revision petition was tiled bearing Criminal Revision No. 23 of 1989. The Re visional Court in that revision passed an order, operative portion of which reads as follows :

'The revision is, therefore, allowed and the case is remanded back to the Court below with the direction to give chance to the parties to adduce evidence in support of their respective assertions aforesaid and then give a finding whether or not the O.P. did forgo her claim for the maintenance of 6300/- and accepted Rs. 1000/- in token thereof and whether she has entered into compromise as alleged by the petitioner, after the evidence of both sides the Court below must make it a point to decide these issues and then dispose of the matter whether or not the

O.P. can realise any amount as maintenance and if so, to what extent and for what period and also in what manner.'

3. In pursuance of that direction the learned Sub-divisional Judicial Magistrate, after allowing the parties to examine their witnesses, has passed the impugned judgment.

4. Learned Counsel for the petitioner has contended that that part of the impugned order of the learned Court below which has limited the maintenance only upto 23.7.1988 is improper. This finding that the applicant will not be entitled to maintenance after 23.7.1988 seems to have been given on the basis of the alleged declaration made before the Anjuman and a document (Ext. A) which has been brought on the record wherein Rs. 4,250/- is said to have been deposited with the Secretary of the Anjuman, Lohardaga as the amount of Dainmohar and costs of Dinar and articles of Jahez. The learned Counsel for the petitioner has strongly contended that the issue of divorce was never raised before, and even in the petition filed on 14.6.1988 under Section 127 of the Code, there was no mention about divorce or the time when the divorce had been given although it was generally stated that due to coming into force of the aforesaid Act the circumstances have changed. The learned Counsel for the applicant further argued that in the remand order also there were certain specific direction as to what points are to be decided by the lower Court after giving opportunity to the parties and the direction was limited to the question as to whether the compromise which had been alleged by the opposite party had or had not taken place. Although the learned Court below has given a finding that the alleged compromise was not true and the two issues framed in this regard by the learned Court below have been decided in favour of the applicant, it had gone beyond the pleadings of the parties and the direction of the Revisional Court in giving a finding of divorce with effect from 23.7.1988 which finding according to the applicant's Counsel could not have been given in view of the pleadings of the parties and the remand order.

5. The learned Counsel for the opposite party has submitted that the fact of divorce even if not initially raised in the pleadings has been brought to the notice of the other side when it had been submitted in the Revisional Court which passed

the remand order, because there an argument had been advanced that the opposite party had divorced her. He further submitted that even at the time of evidence the opposite party clearly stated when he was examined as OPW No. 7 on 19.8.1991 that he had divorced the applicant 13 or 14 years back and he was also cross-examined on this point. The submission of the learned Counsel for the opposite party is that even though in the earlier pleadings the question of divorce was not stated and the plea of divorce which several witnesses of the opposite party during the evidence stated to have taken about 13 or 14 years back may not be consistent with the earlier pleadings and even the alleged compromise wherein there was term that the applicant will start living with the opposite Party which term could not possibly be incorporated in the compromise if there could have been divorced, none-the-less when assertion was made about divorce, the divorce would be operative. The learned Counsel for the opposite party also submitted that the applicant had also virtually admitted the fact of divorce as would appear from two petitions which she had filed before the lower Court, one on 1.4.1991 wherein she made a prayer for delivery of articles of Jahez and the other on 15.1.1992 wherein she had stated that the amount of Dainmohar is very inadequate and value is much less

6. On careful perusal of the contentions raised, the contents of the petitions and the initial pleadings and the remand order, I am of the considered opinion that the issue regarding divorce had not been raised by the petition or rejoinder filed and only belatedly some attempts were made by the opposite party to show that the applicant had been divorced long back (13 or 14 years back) which fact cannot be considered to be true and acceptable in the context of the pleadings of the parties and in the context of the order of the Revisional Court by which the learned Sub-divisional Judicial Magistrate was called upon to take a decision. Even though as it appears from the order of the Revisional Court that a submission was made about divorcing by the opposite party of the applicant, the Revisional Court did not give any direction in this regard to frame any point or any issue (regarding divorce or when it became operative). So parameters under which the learned Court below was to proceed and give its finding had already been fixed by the Revisional Court. It appears that the learned Court below in the impugned order has committed an error of record wherein he has observed that 'However, during the

course of passing order in Cr. Revision No. 23 of 1989 the learned First Additional Judicial Commissioner, Ranchi, remanding the proceeding has directed to make it a point to decide as to whether the opposite party has divorced the applicant.' So in this regard the learned Court below appears to have gone beyond the direction of the Revisional Court. True it is that the petitioner by her petition on 1.4.1991 wanted to get back her Jahez articles and in the petition dated 15.1.1992 she asserted that the amount fixed about maintenance for Iddat period is not adequate. These petitions hardly affect the scope and limit which had been fixed by the Revisional Court and the point which had to be decided by the Sub-divisional Judicial Magistrate after the remand.

7. Learned Counsel for the opposite party has submitted on the basis of the decision reported in 1990 BBCJ 505 (Muzaffar Alam v. Qamrunnisa) that even if the story of divorce from many years back may not be true, but when the applicant stated before the Court about the fact of divorce and the other side became aware of this stand of his and cross-examination was also done on her behalf on this point, the divorce will be operative with effect from the date on which the opposite party stated so before the learned Court below on 19.8.1991. I think the submission is correct and the divorce, as a matter of fact, will be operative from 19.8.1991 on which date definitely the 'applicant became aware of this stand of the opposite party. Learned Counsel for the opposite party has fairly conceded that the divorce may be treated with effect from 19.8 1991 and the operation of the order which had been attacked on behalf of the petitioner may be modified only to the extent that the maintenance would be payable at the rate of Rs. 150/- per month till 19.8.91 and thereafter the applicant will not be entitled to maintenance, but reasonable and fair amount of maintenance for the period of Iddat and the cost of articles (commonly known as Jahez article) given before and at the time of marriage and after marriage from her relations and friends as mentioned in Clauses (a) and (d) of Section 3 of the Muslim Women's (Protection of Rights on Divorce) Act, 1986.

8. In the result, I allow this revision petition in part and the applicant will be entitled to get maintenance till 19.8.1991 instead of 23.7.1988 as fixed by the impugned judgment. Thereafter she will be entitled to get the amount of articles of Jahez and

the amount of maintenance for the Iddat period which has already been fixed by the Court below.

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