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Mujeeb Rahiman vs Thasleena

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Court : Kerala

Decided On : Apr-04-2022

Judge : Honourable Dr. Justice Kauser Edappagath

Appeal No. : RPFC/212/2020

Appellant : Mujeeb Rahiman

Respondent : Thasleena

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 4TH DAY OF APRIL 2022 / 14TH CHAITHRA, 1944 CRL.REV.PET NO. 667 OF 2020 AGAINST THE JUDGMENT IN CRA 83/2019 OF ADDITIONAL DISTRICT AND SESSIONS COURT-III KOZHIKODE MC 223/2017 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I,KOZHIKODE REVISION PETITIONER/APPELLANT: MUJEEB RAHIMAN AGED 46 YEARS S/O. ALIKOYA, ARIPPURATHUPOYIL HOUSE, KURUVATTOOR P.O, KAKKODI, KOZHIKODE-673 611 BY ADVS. NIRMAL. S SMT.VEENA HARI SMT.RIA ELIZABETH JOSEPH SMT.IRENE ELZA SOJI RESPONDENTS/RESPONDENTS & STATE: 1 THASLEENA, AGED 40 YEARS D/O. ABDURAHIMAN,

ARIPURATHUPOYILIL HOUSE, KURUVATTOOR P.O, KAKKODI, KOZHIKODE-673 611 2 STATE OF KERALA, REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM 682031. R1 BY ADV N.V.P.RAFEEQUE SRI.SANGEETHA RAJ, PUBLIC PROSECUTOR THIS REV.PETITION(FAMILY COURT) HAVING COME UP FOR ADMISSION ON 04.04.2022, ALONG WITH RPFC.212/2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 4TH DAY OF APRIL 2022 / 14TH CHAITHRA, 1944 RPFC NO. 212 OF 2020 AGAINST THE ORDER IN MC 101/2018 OF FAMILY COURT,KOZHIKODE REVISION PETITIONER/RESPONDENT: MUJEEB RAHIMAN,AGED 45 YEARS S/O. ALIKOYA, ARIPPURATHUPOYIL HOUSE, KURUVATTOOR P.O, KAKKODI, CHEVAYOOR POLICE STATION LIMIT, KOZHIKODE-673 611 BY ADVS. NIRMAL. S SMT.VEENA HARI RESPONDENTS/PETITIONERS:

1 THASLEENA AGED 39 YEARS D/O. ABDURAHIMAN, ARIPURATHUPOYILIL HOUSE, KURUVATTOOR P.O, KAKKODI, KOZHIKODE-673 611 2 MINA FATHIMA, AGED 17 YEARS D/O. MUJEEB RAHIMAN, (2ND MINOR PETITIONER REP. BY MOTHER 1ST PETITIONER M.C.),CHEVAYOOR POLICE STATION LIMIT. BY ADV SRI.N.V.P.RAFEEQUE THIS REV.PETITION(FAMILY COURT) HAVING COME UP FOR ADMISSION ON 04.04.2022, ALONG WITH Crl.Rev.Pet.667/2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -:3:- C.R.

O R D E R

Dated this the 4th day of April, 2022 The husband, who is the petitioner in both the above revision petitions, challenges two orders passed by two courts in two

different proceedings initiated by the wife.

2. MC No.223/2017 has been filed by the wife against

her husband, mother-in-law and sister-in-law under Section 12 of the Protection of Women from Domestic Violence Act, 2005. The learned Magistrate as per the order dated 15/01/2019 allowed the said MC against the husband/the respondent No.1 therein and the following reliefs were granted.

> (1) First respondent is hereby directed to pay Rs.6,000/- per month to the first petitioner towards her monthly maintenance from the date of petition i.e, on 15.11.2017 to the date of pronouncement of third talaq i.e, on 08.02.2018. He is further directed to pay Rs.3,000/- per month for the maintenance of the second petitioner and Rs.3,000/- per month for the educational expenses of the second petitioner from the date of -:4:- the petition till her marriage.

(2) The first respondent is hereby directed to

> provide alternative accommodation suitable for the status of the second petitioner at Calicut city where she is studying within one month from the date of this order failing which the second petitioner can take suitable house or flat on rent and claim the rent of the accommodation periodically from the first respondent against the valid receipt issued by the landlord.

(3) First respondent is directed to pay Rs.6,000/- per month towards the rent from the date of petition till the date of this order.

3. The husband challenged the above order at the

appellate court as Crl.Appeal No.83/2019. The appellate court dismissed the appeal as per the order dated 7 th July 2020. Crl.R.P.No.667/2020 has been filed by the husband challenging the above two orders.

4. The wife and one child filed another petition as MC

No.101/2018 against the husband at the Family Court, Kozhikode u/s 125(1) of the Code of Criminal Procedure, 1973 (for short, Cr.P.C) claiming maintenance. The Family Court after trial allowed the said MC also and the husband was directed to pay Rs.6,000/- -:5:- per month to the wife and Rs.3,000/- per month to the child as maintenance from the date of the petition. It was further ordered that the husband shall be entitled to set off the amount of maintenance paid for the same period in MC No.223/2017. Challenging the said order, the husband preferred RP(FC) No.212/2020.

5. I have heard Smt.Veena Hari, the learned counsel for the husband and Sri.N.V.P.Rafeeque, the learned counsel for the wife and child.

6. The parties are Muslims. The marriage between the

husband and the wife was solemnized as per Muslim religious rites on 25/12/1997. Two children were born in wedlock (one son and one daughter). At the time of filing the MC, the son had attained the majority. The maintenance was claimed for the daughter. It is submitted that now the daughter has also attained majority. There is some dispute with regard to the present marital status of the husband and the wife. The husband claims that he has validly divorced the wife by the pronouncement of talaq in accordance with Muslim Personal Law. The wife disputes

-:6:- the same. MC No.223/2017 has been filed at a time when the husband pronounced the first talaq. During the pendency of the said MC, the husband pronounced the remaining two talaqs. In paragraph 7 of the order in MC No.223/2017 dated 15 th January 2019, there is a clear finding that the marriage between the husband and the wife was validly dissolved by the pronouncement of talaq and that the status of the wife is that of

the divorced wife. It is pertinent to note that the wife did not challenge the said order. On the other hand, in the appeal filed by the husband challenging the said order, the appellate court confirmed, among other things, the finding of the learned

Magistrate that there was a valid dissolution of marriage by the pronouncement of talaq. Thus, the finding that the marital relationship between the husband and wife was severed by the pronouncement of talaq in accordance with Muslim Personal Law

has attained finality. However, the Family Court in MC No.101/2018 entered into a finding that the pronouncement of talaq was not in accordance with law and hence the marriage was not dissolved. The Family Court passed the order on 27/1/2020 -:7:-

much after the order in MC No.223/2017 was pronounced. In as much as the wife did not challenge the finding of the learned Magistrate in MC No.223/2017 that the marriage was dissolved by the pronouncement of talaq, the said finding is binding on her. Hence, I am of the view that the finding in MC No.101/2018 that the talaq was not valid is liable to be interfered with and I do so.

7. The learned Magistrate awarded maintenance

@Rs.6,000/- per month to the wife from the date of the petition till the date of pronouncement of talaq. However, the Family Court in MC No.101/2018 awarded maintenance to the wife @Rs.6,000/- per month from the date of the petition onwards. The learned counsel for the petitioner Smt.Veena Hari argued that since the marriage between the wife and the husband has been dissolved, the Family Court went wrong in awarding maintenance u/s 125 Cr.P.C beyond the date of dissolution of marriage. The learned counsel further invited my attention to the findings in the order in MC No.223/2017 that even though the

husband sent Rs.1,00,000/- as DD towards the fair and reasonable provision for future maintenance entitled by the wife -:8:-

u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short, 'the Muslim Women Protection Act'), the wife refused the same. The learned counsel further submitted that since the wife has failed to invoke Section 3 of the Muslim Women Protection Act, the husband is unnecessarily fastened with liability to continue to pay the maintenance u/s 125 of Cr.P.C. The counsel added that

there is no provision in the Muslim Women Protection Act for the husband to move before the Magistrate to determine the fair and reasonable provision for maintenance of his former wife.

8. Sections 125 to 128 of Cr.P.C contains an anti-

vagrancy provision, empowering Magistrates to order payment of maintenance to destitute wives, children and parents. Under Section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. It was claimed by the husbands that once dissolution takes place, a woman ceases to be a wife and hence is no longer entitled to maintenance. Looking at this loophole, an amendment was made in 1973, and clause (b) of the Explanation to Section 125(1) was

-:9:-

incorporated which provided that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Thus, after the amendment, a divorcee is entitled to maintenance till the time she remarries subject to Section 127(3)(b) which provides that the Magistrate shall cancel the order of maintenance, if the wife is divorced by the husband and, she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce. Being secular in nature, these provisions (Sections 125 to 128) apply to all women, including Muslim women.

9. The question as to whether Section 125 of the Cr.P.C

applies to Muslims was concluded by two decisions of the Apex Court in Bai Tahira v. Ali Hussain Fidaalli Chothia (AIR 1979 SC 362) and Fuzlunbi v. K. Khader Vali (AIR 1980 SC 1730). Those decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under Section 125. In 1981, a two-Judge Bench of the Apex Court was inclined to view that those cases were not correctly decided and made a reference of

-:10:-

the question to a larger Bench and the larger Bench consisting of five judges took up that question for consideration in Mohd. Ahmed Khan v. Shah Bano Begum (AIR 1985 SC 945), known popularly as the Shah Bano's case. The precise question posed was - Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? The contention of the husband and of the interveners who supported him was that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the period of iddat despite the fact that she is unable to maintain herself. (Iddat is the period when co-habitation of the parties end, on the expiry of iddat the spouses will stand divorced. The period of iddat consists of three menstrual cycles or three lunar months, in the case of pregnant women, the iddat period would extend upto the time of delivery). Rejecting the said argument, the Apex Court held that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat, but, if she is unable to maintain herself, she is entitled to take recourse to

-:11:-

Section 125 of Cr.P.C.. The second plank of the husbands contention was that the wife's application under Section 125 was liable to be dismissed because of the provision contained in Section 127(3)(b). It was urged that the Mehr being the amount payable by the husband to the wife on divorce, constitutes a reasonable alternative to the maintenance order. It was held that Mehr is not a sum which, under the Muslim Personal Law, is payable on divorce and thus does not fall within the meaning of the provision Section 127(3)(b). Thus, the Apex Court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 of Cr.P.C. and such applications were not barred under Section 127(3)(b) of Cr.P.C. Later, in Zohara Khatoon v. Mohd. Ibrahim (1986 KHC 605), the Apex Court held that the expression "wife" in Section 125 and Section 127 of Cr.PC incorporates Muslim ladies who get separated by method of talaq or under the Dissolution of Muslim Marriage Act,1939.

10. After Shah Bano's case (supra), the Muslim Women Protection Act was enacted with effect from 19.05.1986 as per -:12:-

which a divorced Muslim woman is not only entitled to maintenance for the iddat period from her former husband but also to a reasonable and fair provision for the future. Holy Quran, the foremost source of Muslim law, imposes obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The verse (Ayat) 241 of Holy Quran reads:

And for the divorced woman (also) a provision (should be made) with fairness (in addition to dower): (this is) a duty (incumbent) on the reverent. The Muslim Women Protection Act is, thus, a declaratory law codifying and recognizing pre-existing rules of Muslim law regarding rights and obligations of divorced persons.

11. The important Section in the Muslim Women

Protection Act is Section 3 which provides that a divorced woman is entitled to obtain from her former husband 'maintenance', 'provision' and 'Mehr, and to recover from his possession her

wedding presents and authorizes the Magistrate to order

payment or restoration of these sums or properties. The provision of this enactment provides remedies beneficial to the Muslim women divorcee by making the former husband liable to -:13:-

provide the divorced woman with reasonable and fair provision in addition to providing maintenance and where the husband fails to comply with the order without sufficient cause, the Magistrate may issue warrant for levying the amount of maintenance and may sentence him to imprisonment for a term which may extend to one year. The near relatives of the woman are also made liable under Section 4 of the Act. In case, the relatives are not in a position to pay her, the State Wakf Board is also made liable to

provide maintenance. While the Criminal Procedure Code provides the relief of maintenance only, the Muslim Women Protection Act furnishes a divorced woman, additionally, 'a reasonable and fair provision', the relief of recovery of dower and return of marital gifts. Section 5 of the Act enables the parties at the stage of the first hearing, to withdraw from the applicability of the Muslim Women Protection

Act and be governed by the provisions of Cr.P.C (Sections 125 to 128) and then the

Magistrate has to dispose of the application accordingly. Otherwise, the Magistrate has to deal with the application as per the provisions of the Muslim Women Protection Act. Section 7 -:14:- deals with Transitional Provisions. As per Section 7, an application by a divorced woman under Section 125 or under Section 127 of Cr.P.C pending before a Magistrate on the commencement of Muslim Women Protection Act, shall, notwithstanding anything contained in that Code, subject to the provisions of Section 5 of the Act, be disposed of by such Magistrate in accordance with the provisions of the Muslim Women Protection Act.

12. The dual expressions provision and maintenance

used in Section 3 of the Muslim Women Protection Act, led to conflicting rulings on their import by various High Courts. Some of the High Courts held that the two expressions meant the maintenance of the iddat period only, while some others took the view that provision was different from maintenance and both would be payable under the Act. Finally, the Constitution Bench of the Apex Court in Danial Latifi v. Union of India {(2001) 7 SCC 740} settled the issue holding that a former husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well.

-:15:-

Interpreting the meaning of the term within used under section 3(1)(a) of the Act read with the terms fair and reasonable, the court arrived at the conclusion that the maintenance, being fair and reasonable, should exceed the iddat period but must be made within the iddat period. Such maintenance made during the iddat period should be for her entire future, that is the time after the expiration of the iddat period as well. It was observed that the emphasis of section 3(1) (a) is not on the nature of duration of any such 'provision' or 'maintenance', but on the time by which an arrangement for payment of provision and maintenance

should be concluded, namely, 'within the iddat period'. Accordingly, the Constitution Bench of the Apex court concluded that the former husbands liability under the Act to provide maintenance to his divorced wife is not confined to the iddat period. The Constitution Bench also upheld the constitutional validity of the Act. Daniel Latifi (supra) judgment basically revived the principles settled in the Shah Bano case (supra) that, the husbands liability to maintain his wife doesnt end with the iddat period. However, it explained this principle, not as -:16:-

contravening the Act which was enacted as a result of the Shah Bano case (supra), as a commentary on that Act. However, the specific question whether the rights of the divorced Muslim woman to claim maintenance under Section 125 of Cr.P.C has been extinguished by the enactment of the Muslim Women Protection Act did not specifically arise for consideration in Danial Latifi (supra) and was not actually considered by the Apex Court.

13. The main thrust of the argument of the learned

Counsel for the husband is that after the enactment of the Muslim Women Protection Act, a petition by a divorced Muslim woman under Section 125 Cr.P.C. is not maintainable. Such a woman can claim maintenance under the Muslim Women Protection Act and not under the Cr.P.C, submitted the counsel. I cannot subscribe to the said submission. There is nothing in the Muslim Women Protection Act which indicates that the right of the Muslim divorced wife which they had under section 125 of Cr.P.C prior to the enactment of the Muslim Women Protection Act will stand superseded or extinguished by the enactment of

-:17:-

the Muslim Women Protection Act. Section 127(3)(b) of Cr.P.C clearly shows that an order passed under Section 125 will continue to remain in force even after divorce until the amount payable under the customary or personal law applicable to the parties is paid either before or after the order. That clearly shows that an order under Section 125 can be passed even in respect of a divorced Muslim wife. A two-Judge Bench of the Apex Court in Shabana Bano v. Imran Khan (AIR 2010 SC 305) has considered this question and has taken the view that a petition under

Section 125 of Cr.P.C by a divorced Muslim wife will be maintainable notwithstanding the enactment of the Muslim Women Protection Act. In para - 30 of the judgment it was specifically held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of the period of iddat also, as long as she does not remarry. The principle has

been seconded by the Division Bench of this Court in Kunhimohammed v. Ayishakutty (2010 (2) KHC 63). It was

held that the divorced Muslim wife's right to claim maintenance

-:18:-

under Section 125 Cr.PC does not stand extinguished by the enactment of the Muslim Women Protection Act. Her right under Section 125 Cr.PC shall stand extinguished only when the payment under Section 3 is actually made and absolution is granted by the Court under Section 127(3)(b) of the Code. Till then, or till she remains a divorced Muslim wife, she will be entitled to claim maintenance from her divorced husband. Death, remarriage or actual payment of the amount payable under Section 3 of the Act alone shall extinguish her right under Section 125 Cr.PC to claim maintenance. This was once again reiterated in the recent judgment of the Division Bench of this Court in Sajani A v. Dr. B. Kalam Pasha and Another (2021 (5) KHC 582) holding that the rights of the divorced woman under Section 125 of the Cr.PC do not get extinguished on account of the larger rights conferred under Section 3 of the Act. It was observed that if the divorced Muslim woman chooses to claim amounts under Section 3 of the Act, only on such payments being actually made either voluntarily or in response to an order of the Court does Section 127(3)(b) of the Cr.PC get attracted to extinguish the

-:19:-

liability of the husband under the Cr.PC. Thus, the law is settled that a divorced Muslim woman can seek maintenance under section 125 of Cr.P.C until she

obtains reliefs under Section 3 of the Muslim Women Protection Act. An order passed under Section 125 of Cr.P.C shall continue to remain in force until the amount payable under Section 3 of the Muslim Women Protection Act is paid.

14. Here is a case where the amount under Section 3 of the Muslim Women Protection Act offered by the husband was turned down by the wife. There is a clear finding in the order in

MC No. 223/2017 that even though the husband sent Rs.1,00.000/- as DD towards the fair and reasonable provision for future maintenance under Section 3, the wife refused the same. The wife has not come forward seeking a claim under Section 3 of the Act either. The learned Counsel for the husband Smt. Veena Hari points out that there is no provision in the Muslim Women Protection Act by which a husband on his own can get the amount payable under Section 3 determined by a Court. Sub-clause (2) of Section 3 permits the wife or anyone

-:20:- duly authorised by her only to make an application to the

Magistrate for an order of payment of such provisional maintenance. As such, if the wife does not seek to claim under Section 3 of the Act, the husband will continue to be liable under Section 125 of the Cr.P.C for all time to come. The evidence on record discloses that the husband is ready and willing to pay the amount payable by him under Section 3.

15. The wife cannot be allowed to circumvent the

provisions of the Muslim Women Protection Act by refusing the offer made by the husband to make the payment under Section 3 without any valid reason. The husband cannot be fastened with liability to continue to pay the maintenance under Section 125 of Cr.P.C till the wife invokes Section 3 of the Muslim Women Protection Act if he is prepared to discharge his liability under Section 3. The husband is free to pay amounts under Section 3 voluntarily out of court notwithstanding the fact that the wife did not choose to file a petition claiming reliefs under Section 3. Such payment would certainly absolve the husband from the liability under the Cr.P.C. If the wife is dissatisfied with the amount, she

can claim further amount if any payable under Section 3 by resorting to the provisions of the Muslim Women Protection Act. So also, in a case where the husband expresses his willingness to discharge his liability under Section 3 and actually tenders the amount payable by him under the said provision, but the wife without any valid reason refuses to receive the same, the liability of the husband under Section 125 of Cr. P.C would stand extinguished. However, such payment or offer should be made during the period of iddat.

16. The third and final talaq was pronounced on 8/2/2018.

The amount towards fair provision and maintenance was sent by the husband only on 5/11/2018 as evident from Ext R9. Thus, the amount was tendered much after the expiry of the period of iddat. The learned counsel for the wife Sri. N.V.P. Rafeeque has fairly submitted that the wife is prepared to file an application u/s 3 of the Muslim Women Protection Act before the Jurisdictional Magistrate within a period of one month.

17. So far as the relief of maintenance and alternative accommodation granted by the Magistrate as well as the Family -:22:-

Court to the child is concerned, I am of the view that no interference is required. The learned counsel for the husband submitted that the daughter has already attained the majority. Hence, she is no more entitled to maintenance u/s 125 of Cr.P.C. In the light of the above findings, RPFC No.212/2020 is

disposed of granting liberty to the wife to prefer an application under Section 3 of the Muslim Women Protection Act before the jurisdictional Magistrate within a period of one month from the date of the receipt of the copy of this order. The jurisdictional Magistrate shall dispose of the said application within a period of six months. Since the husband has expressed his willingness to pay the amount entitled by the wife under Section 3 of the Muslim Women Protection Act, the maintenance amount paid by the husband to the wife from the date of order in MC No.101/2018 shall be taken into consideration by the learned Magistrate while

deciding the quantum of fair provision and maintenance. The husband shall continue to pay the maintenance @Rs.6,000/- per month to the wife till the application under Section 3 of the Muslim Women Protection Act is finally disposed

-:23:- of. If the wife fails to file the application under Section 3 of the Act as aforesaid, the liability of the husband to pay maintenance pursuant to the order passed in MC No.101/2018 shall stand extinguished. Crl.R.P.No.667/2020 is dismissed. Sd/- DR.KAUSER EDAPPAGATH, JUDGE ded/04.04.2022

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