

Rukiya and Another Vs. Mohammed

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Court : Karnataka

Decided On : Jul-18-1996

Reported in : 1997CriLJ723; I(1997)DMC251; ILR1996KAR3254;
1996(7)KarLJ97

Judge : B.N. Mallikarjuna, J.

Acts : [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 125 and 127

Appeal No. : Crl. R.P. No. 188 of 1993

Appellant : Rukiya and Another

Respondent : Mohammed

Advocate for Def. : G.S. Visweshwara and ;G. Venkatachala, Adv.

Advocate for Pet/Ap. : Sanath Kumar Shetty, Adv.

Judgement :

ORDER

1. First petitioner is the divorced Muslim woman, respondent is her former husband, the second petitioner is their son and he lives with the first petitioner.

Petitioners filed application under S. 125, Cr.P.C. in the Court of J.M.F.C., Puttur, District of Dakshina Kannada claiming maintenance.

The learned Magistrate by the order impugned dated February 11, 1993 dismissed the application by the first petitioner for want of declaration in the prescribed form under S. 5 of the Act called 'The Muslim Women (Protection of Rights on Divorce) Act, 1986'. However allowed the application of the second petitioner granting Rs. 400/- a month for his maintenance.

The learned counsel submits that he has challenged that portion of the order granting maintenance to the second petitioner in the Court of District and Sessions at Mangalore.

2. The relationship is not in dispute. It is also admitted that the respondent divorced the first petitioner on March 13, 1991 by sending the 'Talaknama' to her by Registered Post.

The petitioners contended that the respondent having sufficient means neglected to maintain both of them.

The respondent contended that after the coming into force of the Act, 1986 (25 of 1986), an application under S. 125, Cr.P.C. by the divorced woman is not maintainable.

3. Heard the learned counsel for both the parties.

In view of the rival contentions the short and interesting question that arises for consideration is whether an application under S. 125, Cr.P.C. by a divorced woman against her former husband would lie after the Act 1986 (25 of 1986) came into force.

The Act came into force on May 19, 1986. Divorce in the case on hand is on March 13, 1991 and the application under S. 125, Cr.P.C. is filed on April 2, 1991.

4. Section 1 describes the Title of the Act and its applicability to the whole of India except the State of Jammu and Kashmir, S. 2 defines certain words and phrases, S. 3 stipulates what a divorced woman, her children living with her would be entitled to and for what period and how and when an application could be made before the Magistrate, S. 4 deals as to who should pay the maintenance to them

till she continues to be unmarried, S. 5 provides for filing a declaration in the prescribed form jointly or separately expressing willingness to prefer to be governed by the provisions of S. 125, Cr.P.C. in a proceeding initiated on an application under S. 3(2) of the Act, S. 6 speaks of powers to make Rules and S. 7 provides for transitional provisions, it states that all applications under S. 125 or under S. 127, Cr.P.C. pending before Magistrate on the commencement of the Act, 1986 (25 of 1986) shall, notwithstanding anything contained in the code and subject to the provisions of S. 5 of the Act be disposed of in accordance with the provisions of the Act, 1986.

A close and careful examination of Ss. 3, 4 and 7 and the non obstante clauses occurring in these sections, in my considered view make it clear that after the commencement of the Act, 1986 application under S. 125, Cr.P.C. by the divorced woman is not maintainable; she can only approach the Court for maintenance under the Act either under S. 3 or under S. 4 as the case may be. However an exception is made under S. 5 of the Act for conversion of the proceedings initiated on an application under sub-sec. (2) of S. 3 to one under S. 125 of the Code of Criminal Procedure provided the divorced woman and her former husband declare by affidavit or any other declaration in writing in the prescribed form either jointly or separately. Rule 7 of the Rules framed under the Act called 'the Muslim Women (Protection of Rights on Divorce) Rules, 1986' states that an affidavit under S. 5 shall be in form 'A' and Rule 8 save that the declaration shall be in Form 'B'.

5. I am therefore of the considered view that after coming into force of the Act, 1986, no proceedings can be initiated on an application under S. 125, Cr.P.C. by the divorced woman except as provided under S. 5 of the Act, 1986 (25 of 1986).

In the case on hand, there was no application by the first petitioner either under S. 3 or S. 4 of the Act and therefore the proceedings on the application under S. 125, Cr.P.C. independently is bad in law and not sustainable. Therefore the order impugned has to be maintained if not for the reason assigned by the learned Magistrate but for the reasons mentioned hereinabove.

6. The learned counsel invited my attention to the decisions of this Court in Abdul Khader v. Razia Begum reported in : ILR 1990 KAR3109 , Syed Kareem v. Zarina

Bi reported in : ILR 1992 KAR822 , and Mohammed Jahir v. Nazrat Fatima reported in : ILR 1995 KAR2259 and also the Full Bench decision of the Andhra Pradesh Court in Usman Khan Bahamani v. Fathimunnisa Begum reported in : AIR 1990 AP225 .

In Abdul Khader's case (1991 Cri LJ 247) (Kant), the learned single Judge held that the Act is prospective in nature and the statutory right availed of by the divorced woman before the Act came into force stood crystalized into a vested right and therefore, that right is not affected or impaired. The Court was considering the scope and purport of an application under Sec. 127, Cr.P.C. where on an application under Sec. 125, Cr.P.C. by the wife, the Court on March 3, 1985 had ordered payment of maintenance at Rs. 150/- a month. Act, 1986 came into force on May 19, 1986.

In Syed Kareem's case : ILR 1992 KAR822 , the learned single Judge holds that the right to claim maintenance under S. 125, Cr.P.C. is not taken away by the amending Act 25 of 1986, but in such proceedings, the Court owes a duty to bring it to the notice of the Muslim divorced women that they have got option to be governed by the provisions of Ss. 125 to 128, Cr.P.C. and after ascertaining their option in the matter, the Court should proceed in accordance with law that is opted by either of the parties in the case.

In Mohammed Jahir's case (1995 Cri LJ 3822), the latest judgment of this Court on the point, the learned single Judge agreeing with the reasoning adopted by the Full Bench of the Andhra Pradesh High Court in Usman Khan Bahamani's case (1990 Cri LJ 1364) holds that proceedings under S. 125, Cr.P.C. by a divorced Muslim women after the amending Act 25 of 1986 is not maintainable.

The provisions in the Act, 1986 (Act 25 of 1986) came up for consideration before the Full Bench of Andhra Pradesh High Court in Usman Khan Bahamani v. Fathimunnisa Begum's case (1990 Cri LJ 1364). The Full Bench after considering in detail each of the provisions of the Act held that a divorced woman cannot claim maintenance under S. 125 of the Code after coming into force of the Act of 1986. I am in respectful agreement with the decision for the reasons stated by me hereinabove.

In the result, this relevant petition is dismissed. However, it is made clear that the first petitioner is at liberty to approach the Court under the Act, 1986 (Act 25 of 1986) for appropriate relief if available and if she is so advised.

7. Petition dismissed.

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