

Rahimunnissa and ors. Vs. Mohd. Ismail

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Court : Andhra Pradesh

Decided On : Sep-06-1955

Reported in : 1956CriLJ47

Judge : Bilgrami, J.

Appellant : Rahimunnissa and ors.

Respondent : Mohd. Ismail

Judgement :
ORDER

Bilgrami, J.

1. This is a petition to revise an order of the Magistrate, Division No. 1 of Hyderabad City, ordering maintenance of Rs. 15/- against the revision petitioner, in favour of respondents Mohd. Riazuddin and Mohd. Giasuddin and rejecting the application of the respondent Rahimunnissa, the wife, on the ground that she has refused to live with her husband for insufficient reasons and that the neglect or refusal to maintain of the husband was not proved. A petition in revision has also been filed by the wife Rahmunnissa against this order.

Both of these revision petitions, it will be convenient to decide together as they arise out of the same order. The learned advocate of the revision petitioner (Mohd. Ismail) argues that a previous application of the wife having been rejected,

because she refused to live with her husband, and because the husband's neglect to maintain her was not proved, any maintenance to the children in her custody cannot be awarded. The father is prepared to maintain them if they are given in his custody. In support of this proposition he has relied upon - *Sita Devi v. Har Narain*' AIR 1930 Lah 886 (A); and - *Ralia v. Mt. Atti*' AIR 1914 Lah 417 (1) (B).

The view taken in the former case was that the requirements of neglect to maintain under Section 488 must be fulfilled before any order is made under this section. In the second case, it was held that the father cannot be made liable for the maintenance of his minor child, when he is willing to maintain the child if it is given in his custody. No reasons are given in the judgment, which is a short one.

There are however other clear rulings to the contrary. See in this regard - '*Kuppala Krishtappa y, Prema Lilamani*' AIR 1942 Mad 705 (C), in which it has been held that it would be improper for the Court to refuse maintenance for the child, merely because it was of opinion that the mother has no right to the custody of the child. The view is based on the ground that the child stays away not by his own choice, but because he is in the power of his mother.

The Lahore High Court in - '*Mt. Aktari Begum v. Abdul Rashid*' AIR 1937 Lah 236 (D) has held that father's readiness to maintain the child provided he is given into his custody, does not disentitle the child to maintenance if the mother refuses to give him in the custody of his father. See also in this regard - '*Maung San Pe v. Ma Lal Mai*' AIR 1932 Rang 183 (E), in which it has been held that a father is bound to maintain the child even though it is living with its mother against the wishes of its father. If the father wants the custody of the child, the proper procedure for him is to apply for it before the civil Court.

The Bombay High Court in - '*Dinsab Kasim Sab v. Mahamad Hussen*' AIR 1945 Bom 890 (F), has held that the right to custody can be a full defence against a claim for separate maintenance in a civil suit, provided the father has expressed his bona fide willingness to keep and maintain the child, but it is not a defence in proceedings under Section 488. because the father irrespective of his right to custody is responsible for maintaining his minor son, and that the residence of his father is not a condition precedent to his obligation to maintain.

A reference may also be made here to - 'Allah Rakhi v. Karan Ilahi' AIR 1933 Lah 969 (G). I entirely agree with the view that has been expressed in the above cited decisions. Section 488 (4), Criminal P.C. has no application to a case or a child's claim for maintenance. It is the duty of the wife to live with her husband, if she fails in this duty without sufficient and reasonable cause, she forfeits the right to maintenance.

The case of a child is different. A child does not stay away by his own choice; he cannot be deprived of his right of maintenance because his mother refuses to give him in his father's custody. The father cannot, under Section 488 insist that the children should be given in his custody as a condition precedent for maintaining them. No other point is pressed in this revision on behalf of Mohd. Ismail. Passing any order regarding the custody of the child is out of question in a proceeding like this.

2. I shall now proceed to consider the revision petition of Rahimunissa. The learned advocate of the revision petitioner, Shri Jehangiri Ali, contends that the wife has been denied maintenance because she has refused to live with her husband without sufficient cause, and because neglect, cruelty and ill-treatment were not proved. All these grounds can be sufficient or valid for refusal of maintenance to a wife with whom the tie of marriage subsists, but when this tie is dissolved, all these defences cannot be set up and the right of the wife to maintenance during the 'Iddat' period is absolute under the Mahometan law; the only obligation which binds a wife during this period is that she should not remarry.

Legally no other act or omission is required. Hamilton's Hedayas, page 133 and - 'Usman Bhai Sanad Bhai v. Bai Sakina' AIR 1927 Bom 176 (PI) are relied upon in support of this proposition and it is argued that the criminal Court cannot insist on fulfilment of an obligation not enjoined by the personal law. Granting that this is the position under the personal law, I am not prepared to concede that requirement of Section 488, Criminal P.C. can be ignored

I shall now proceed to discuss the cases cited by the learned advocate of the revision petitioner in which according to him a different view has been taken. In - 'Gulam Yusuf Khan v. Azam Bi', 33 Deccan LR 241 (I), the question that was

referred to the Division Bench was whether under Section 488, the Court is competent to grant maintenance for the period of Iddat. This question was answered in the affirmative and all the authorities on the matter were fully discussed. In - 'Mahomed Shamshuddm v. Noor Jehan Begum' AIR 1955 Hyd 144 (J), it was held that the criminal Court in a proceeding under Section 488 is competent to grant maintenance during the period of Iddat, because, the factum of marriage is left for determination in accordance with the personal law, and this incident of that law should also be taken into consideration.

The question that was decided in these rulings is entirely different from what arises for determination in the present case. Here the proceedings were commenced on 28-7-1954. On 16-1-1955, the husband pronounced a revocable divorce against the wife, and produced the divorce deed in the Court which was verified on 28-1-1955. The Court below has refused maintenance to the wife, I think on sufficient grounds. She has by her conduct disentitled herself to maintenance during the period when the tie of marriage subsisted, and I think that she cannot merely because she has been divorced, claim maintenance on the ground that the obligation to live with the husband no longer subsists.

It is only the wife, who could have laid claim under Section 488 of maintenance before the dissolution of marriage took place, who can claim maintenance during the period of Iddat in a proceeding under Section 488. In none of the cases cited by the learned advocate, Mr. Jehangir Ali, this question was under consideration. In all of them it was held that the wife was entitled to maintenance before she was divorced. I was unable to find any authority on the point, nor any which was directly to the point was cited on behalf of the revision petitioner. I think the matter is quite clear, and admits of no doubt, that for making an order under Section 488, Criminal P.C. all the conditions that are necessary under it must be fulfilled, and if these are not fulfilled, no order can be passed thereunder even though the person claiming maintenance may be entitled to it under the personal law. If, however, the wife has proved herself entitled to maintenance under this section, then the subsequent dissolution of marriage will not disentitle her for maintenance for the period of Iddat, because under the Muhammadan Law, the tie is not completely severed till the expiry of that period. In my opinion, the rulings cited by Mt,

Rahimunnissa's learned pleader do not apply to the present case and what has been laid down therein, is not inconsistent with the view I have taken.

3. I may mention here that Mr. Abdul Khair Siddiqi for the respondent tells me that according to his instructions the divorce was reasonable and has been revoked, but in the view I have taken of the matter this is of no importance and it will make no difference for the decision of the case.

4. In the result, both these revision petitions are dismissed.

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