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Court : Madhya Pradesh

Decided On : Jun-21-1993

Reported in : 1994CriLJ361; 1994(0)MPLJ159

Judge : P.N.S. Chauhan, J.

Acts : Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3, 3(2), 5 and 7; Code of Criminal Procedure (CrPC) , 1974 - Sections 125 and 128

Appeal No. : Misc. Cri. Case No. 75 of 1992

Appellant : Bashir Khan

Respondent : Jamila Bee

Advocate for Def. : H.B. Agarwal, Adv.

Advocate for Pet/Ap. : S.L. Kochar, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

P.N.S. Chauhan, J.

1. Judicial Magistrate, First Class, Kawardha vide order dated 13-8-1986 awarded the non-applicant maintenance of Rs. 100/- per month under Section 125 of the

Code of Criminal Procedure. Proceedings for recovery of the aforesaid amount of maintenance under Section 128 of the Code of Criminal Procedure pending before the said Court are sought to be quashed in this petition under Section 482 of the Code of Criminal Procedure.

2. In the proceedings for recovery of maintenance amount the applicant/husband filed an objection on the ground that since he has divorced the non-applicant/wife on 15-8-1988 vide Annexures A and B she was not entitled to maintenance in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act No. 25 of 1986) (hereinafter 'the said Act' for short). The prayer was disallowed. The revision presented by the applicant also failed. Then the prayer was re-submitted before the learned Magistrate but the same was dismissed vide order dated 4-12 -1991 (Annexure-D) necessitating the present petition.

3. Petitioner's learned counsel has argued that in view of Mohd. Umar Khan v. Gulshan Begam, 1991 MPLJ 586, the non-applicant has no option to challenge the factum of Talak. In view of the divorce since none of the parties has given in writing supported by affidavit any option to proceed in the matter under Section 125 read with Section 128 of the Code of Criminal Procedure the pending proceedings for recovery of the amount of maintenance has lapsed under Section 5 of the said Act. Its continuance amounts to abuse of the process of law and, therefore, deserves to be quashed.

4. There appears to be no difficulty in accepting the submission that the non-applicant/wife has no option left to question the factum of Talak in view of the ratio of Mohd. Umar Khan's case (supra). However, the other submission by petitioner's learned counsel that proceedings of recovery of the amount of maintenance should be deemed as not maintainable cannot be accepted being misconceived. Section 3 of the said Act runs thus:

'3. Mahr or other properties of Muslim woman to be given to her at the time of divorce. - (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman' shall be entitled to -

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law, and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that -

(a) her husband having sufficient means has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her; make an order, within one month of the date of the filing of the application directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be,

for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973, and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.'

The option referred to under Section 5 of the said Act is exercisable in a proceeding under sub-section (2) of Section 3 of the said Act. Admittedly, till passing of the final order of maintenance in favour of the non-applicant she was not divorced by the applicant. That being the case there was no occasion for her to have instituted the proceedings under Section 3 of the said Act.

There being no such proceeding the question of exercising option under Section 5 of the said Act did not arise. The impugned proceeding is one for recovery of the amount of maintenance allowance under Section 128 of the Code of Criminal Procedure which is not covered by the transitional provision under Section 7 of the said Act. As such the argument that the said proceeding for recovery stands lapsed for non-exercise of the option under Section 5 of the said Act appears to be wholly misconceived. .

5. The scheme of the said Act clearly indicates that the Legislature intended that provision for maintenance of a divorced Muslim woman should be made. As things stand, the applicant after the divorce has not paid the amount of mahr. His assertion that the amount of mahr was already paid when Talak was announced

cannot be accepted as the petitioner would certainly have obtained a receipt from the lady if the amount was so paid in view of his subsisting liability under the order passed under Section 125, Criminal Procedure Code. In view of the foregoing discussion, there appears to be no justification to invoke the inherent jurisdiction of this Court to quash the ongoing proceedings for recovery of amount of maintenance against the petitioner.

6. In result the petition fails and is hereby dismissed.

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