

Nasiruddin Vs. Dulari Bibi and ors.

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Court : Orissa

Decided On : Oct-29-1990

Reported in : 1991CriLJ2039; I(1992)DMC228

Judge : D.P. Mohapatra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125, 127 and 127(3);
[Muslim Women \(Protection of Rights on Divorce\) 1986](#) - Sections 3(2), 3(5), 5 and 7

Appeal No. : Crl. Rev. No. 642 of 1989

Appellant : Nasiruddin

Respondent : Dulari Bibi and ors.

Advocate for Def. : B. Pujari, Adv.

Advocate for Pet/Ap. : S.P. Mishra and ;A.R. Dash, Adv.

Disposition : Revision dismissed

Judgement :

D.P. Mohapatra, J.

1. The core question which falls for decision in this case is whether the proceeding under Section 125, Criminal Procedure Code (Cr.P.C.) is liable to be re-opened in

view of the provisions in the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986) ?

2. The factual background of the case leading to the present proceeding may be shortly stated thus. The petitioner is the husband of opposite party No. 1 and father of opposite parties 2 and 3. On the application filed by the opposite party No. 1, under Section 125 Cr.P.C. Misc. Case No. 86 of 1985 was initiated in the Court of the learned Sub divisional Judicial Magistrate, Bhadrak. In the said application the opposite party No. 1 for herself and on behalf of her two minor sons claimed maintenance from the petitioner alleging, inter alia, that she is the legally married wife of the petitioner, opposite parties 2 and 3 are their children. The parents-in-laws being dissatisfied with the dowry she brought with her at the time of her marriage used to assault and ill-treat and finally drove her out from matrimonial home. Having no other alternative she was forced to take shelter in her father's house. Since she has no independent source of income and is unable to maintain herself and her minor children, she claimed maintenance from the petitioner at the rate of Rs. 300/- per month.

3. The petitioner contested the case. While admitting his marriage with the opposite party No. 1 and that he was the father of opposite parties 2 and 3, he denied other allegations in the petition. It is his case that the opposite party No. 1 left his house with the children on her own volition and without any reasonable cause.

4. The learned S.D.J.M. considered the case of the parties, assessed the evidence on record and passed the order dated 19-12-1987 allowing the application filed under Section 125, Cr.P.C. and directed the petitioner to pay to the opposite party No. 1 Rs. 250/- per month towards maintenance. Thereafter, the petitioner filed an application under Section 127 Cr.P.C., before the learned S.D.J. M. (Misc Case No. 19 of 1988) for reconsideration of the order granting maintenance alleging, inter alia, that he had divorced the opposite party No. 1 and had executed a Talaknama on 8.12.1987 and intimated the latter about it. Since he fell ill after execution of the Talaknama, he could neither inform his Counsel about the material development in the case nor could produce the Talaknama in the Court

before disposal of the proceeding. On 1.9.1989 when Misc. Case No. 19 of 1988 was taken up for hearing the petitioner was absent and therefore the case was dismissed for default. He filed another application on 28.9.1989 purportedly under Order 9, Rule 9 read with Order 41 Rule 5(2), Cr.P.C. for setting aside the order passed on 1-9-1989 which was dismissed by the learned Magistrate by order dated 28-9-1989. The said order is under challenge in this revision petition.

5. The main thrust of the argument of Shri A.R. Das appearing for the petitioners that the order passed by the learned Magistrate directing the petitioner to pay maintenance to the opposite parties needs reconsideration and modification in view of the provisions of the Act Muslim Women (Protection of Rights on Divorce) Act, 1986 and the petitioner will be seriously prejudiced, if this important and vital aspect of the case is not taken into consideration. It is the further submission of Sri Das that the learned Magistrate should not have gone by mere technicalities and should have appreciated the substantial question raised in the application filed under Section 127 Cr.P.C. and should have restored the matter.

6. On the facts of the case and the contentions discussed above the question formulated earlier arises for determination.

7. To my query which of the provisions of the Act No. 25 of 1986 are material and relevant for the purpose of the present case, Sri Das submitted that Sections 3(2), 5 and 7 are material for the present purpose. Section 3 of the Act makes provision regarding mahr or other properties of Muslim Woman to be given to her at the time of divorce. Sub-section (2) of Section 3 provides that 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. Sub-section (3) of the Section 3 empowers the Magistrate, on being satisfied that her husband having sufficient means, has failed or neglected to make or pay her within that period a reasonable and fair provision and maintenance for her and the children, or 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 to 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 women, the standard of life enjoyed by her during her marriage and the means of her former husband etc. Sub-section (4) makes provision for enforcement of the order passed under Sub-section (1). Section 5 of the Act provides that if on the date of the first hearing of the application under Sub-section 2 of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed either jointly or separately that they would prefer to be governed by the provisions of Section 125 to 128 of the Code of Criminal Procedure 1973 and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly. Under the explanation to the Section it is laid down that 'date of the first hearing of the application' means the date fixed in the summons for the attendance of the respondent to the application. Section 7 deals with the transitional provisions. It is laid down therein that every application by a divorced woman under Section 125 to under Section 127 of the Code of Criminal Procedure, 1973 pending before a Magistrate on the commencement of the Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of the Act, be disposed of by such Magistrate in accordance with the provision of the Act.

8. It is the specific contention of Sri Das that in view of the provisions of Section 7 noted above, the proceeding ought to have been disposed of in accordance with the provisions of the Act No. 25 of 1986 not according to Sees. 125 to 128, Cr.P.C. The contention, in my view, is devoid of substance. On a bare perusal of the provision in Section 7, the position is manifest that the Section applies only to application by a divorced woman under Section 125 or Section 127, Cr.P.C. which was pending before a Magistrate on the commencement of the Act No. 25 of 1986 Act 25 of 1985 came into force from 19-5-1986. The application under Section 125 in the present case was filed by the opposite party in 1985 when on the petitioner's own showing he had not divorced the wife. Therefore, the requirement that the

application under Section 125 or Section 127 must have been filed by a divorced woman is not satisfied in the case. Therefore Section 7 is not applicable to the proceeding under Section 125 in the present case.

9. Coming to Section 5 of the Act, all that is laid down therein is that if in an application filed under Section 3(2) of the Act the divorced woman and her former husband jointly or separately request the Magistrate on the date of first hearing of the application that they would prefer to be governed by the provisions of Sections 125 to 128 Cr.P.C., then the Magistrate will disposed of the application accordingly. In the present case no application under Section 3(2) was filed and therefore, Section 5 is not attracted at all. Further, it is not the case of the petitioner that any such request was made before the Magistrate by the parties or even by the petitioner at the relevant stage of the petitioner.

10. Section 3(2), on which relaince was placed by Sri Das, lays down that where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or all the properties given to the divorced woman 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 have not been delivered to her on her divorce, she may file an application before the Magistrate for an order for payment of the same. It is apparent that this Section has no application to the present case.

11. The other point raised by Sri Das is that the order for maintenance needs reconsideration under Section 127(3)(b), Cr.P.C. Sub-section (3) of Section 127 provides that where any order has been made uider Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall if he is satisfied that the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable of such divorce, cancel such order. This provision will no doubt help the petitioner in case he has pleaded in the application filed by him under Section 127, Cr.P.C. that either prior to or subsequent to the order passed under Section 125, Cr.P.C. the opposite party No. 1 received the

whole sum which under the customary or personal law, particularly Act 25 of 1986 was payable to her on her divorce. Sri Das has not been able to bring to my notice any such averment in the application filed by his client under Section 127, Cr.P.C. noticed earlier, all that is stated in the application is that the petitioner in some unavoidable circumstances had not been able to bring to the notice of the Court, the subsequent development in the case that the petitioner had divorced his wife on 8-12-1987 and had executed a Talaknama to that effect. There is no averment regarding payment of any sum by the petitioner to the opposite parties at the time of the alleged divorce.

12. From the analysis and the discussion in the foregoing paragraphs, it is clear that on the grounds stated in the application filed by the petitioner under Section 127 Cr.P.C., no case for review or reconsideration of the maintenance order is made out. Therefore, in my view, allowing the present revision petition and directing the learned Magistrate to re-open the proceeding will only mean delay in payment of the maintenance amount to the deserted wife and children. I am, therefore, not inclined to interfere with impugned order in exercise of revisional power- The revision petition is accordingly dismissed. It will be open to the opposite party No. 1 to withdraw the amount, if any, deposited by the petitioner in the Court below in pursuance of the order passed by this Court on 21-2-1990 in Misc. Case No. 86 of 1990 arising from this case.