

Jaheed Alli Vs. Mst. Charguda Feroz

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Court : Orissa

Decided On : Jun-19-1992

Reported in : 74(1992)CLT471; 1992(II)OLR234

Judge : D.M. Patnaik, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125; Muslim Women's (Protection of Divorce) Act, 1986 - Sections 7; Muslim Personal Law

Appeal No. : Criminal Misc. Case No. 673 of 1989

Appellant : Jaheed Alli

Respondent : Mst. Charguda Feroz

Advocate for Def. : None

Advocate for Pet/Ap. : P.K. Mishra, N.C. Pati, A.K. Panda, B.K. Nayak and S. Mukherjee

Disposition : Petition allowed

Judgement :

D.M. Patnaik, J.

1. In this Misc. Case, the petitioner-husband, a Mohammedan in religion invokes the inherent power of this Court Under Section 482 of the Code of Criminal

Procedure to set aside the order of maintenance. The opposite party-wife was awarded a monthly maintenance of Rs. 250/- for herself and Rs. 100/- for her minor daughter. The Magistrate's order was confirmed by the Additional Sessions Judge, Sambalpur

2. The opposite party-wife came forward with a case that both of them are Muslims and had married long since. The sons, and three daughters were born out of the wedlock. Sometime in the year 1980, while the petitioner-husband was staying at Btajaraj Nagar and working as a loader in the Orient Colliery at Budhijam, took a second wife and thereafter neglected and refused to maintain the opposite party-wife and so she filed a case before the Magistrate Under Section 125 of the Code.

The petitioner-husband filed a show-cause. His case was that, no doubt both of them were married and he begot children through opp. party. But while he was staying at Budhijam, the opp. party-wife was staying at Parsamir in U. P., his native place. 'Sometime in the year 1975-76, the petitioner suspected the illicit relationship of the opp. party-wife with somebody else at Parsamir. When he found the opp. party-wife to have been developed sexual relationship with a stranger and was carrying, he divorced her on 4-4-1976 in presence of the members of the Muslim committee at Parsamir and since then he kept no relationship with her as husband. He took the plea that the opp. party-wife after the above divorce married to one Zalim in the year 1930-81 and since then they are living as husband and wife.

3. None appears for the opposite party-wife. Heard Mr. A. K. Mishra on behalf of Mr. P. K. Mishra, learned counsel for the petitioner. Mr. Mishra strenuously urged that the Magistrate who tried the case Under Section 125 Cr. P. C. committed gross error in appreciating the case of the petitioner-husband inasmuch as the learned Magistrate, according to Mr. Mishra, solely based his reasoning by analysing the evidence of the witnesses of the opposite party-wife but did not effectively discuss the evidence of the witnesses of the petitioner-husband. According to Mr. Mishra, the petitioner having been able to prove satisfactorily the fact of divorce in the year 1976, the petition for maintenance should be disallowed.

Mr. Mishra referring to the decisions reported in 71(1991) CLT 547 : (1991) 4 OCR 267 Sirujur Raheman v. Nasim Banoo and Anr. and 67(1989) CLT 353 : (1988) 1 OCR 703 Riswana Begum v. Mly. Motiullah submits that the petition Under Section 125 Cr. P. C. is not maintainable.

4. I have gone through the orders of the Courts below and the evidence on record.

Mr. Mishra's contention that the 125, Cr. P. C. petition is not maintainable, is not correct.

The provisions of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 'Act') will be applicable only if the fact of divorce between the parties is admitted. But in the present case before us the fact of divorce is in dispute. That apart, the Act came into force in 19-5-1986 whereas the wife filed this present application for maintenance on 4-4-1984, that is, long before the Act coming into force.

5. The Act which came into force from '19-5-1986 no doubt restores the Muslim Personal Law of the husband's liability upto and for the period of Iddat but also at the same time retains the provisions of Section 125 of the Code by making it option for the parties to choose the 125 forum.

Section 7 of the Act provides for transitional provisions. It predicates as follows ;

'...Every application by a divorced woman Under Section 125 of or Under Section 127 of the Code of Criminal Procedure, 1973, pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.'

The transitional provisions under the section mentioned above make amply clear that a petition must be pending by a divorce woman. In the present case, the Magistrate passed the judgment on 12-11-1987. Therefore, admittedly this matter was pending before him when the Act came into force. But admittedly the opposite party-wife's case was that she was not a divorced woman though the petitioner-husband claims that she was divorced, since 1976. Therefore, it was incumbent on

the part of the Magistrate to find out as to whether as on 19-5-1986, when the Act came into force, the opposite party-wife was a divorced or not. This aspect of the case has never been dealt with neither by the lower Court nor by the revisional Court, in that case, consequently on a finding either way, the case at hand would have accordingly been disposed of either under the provisions Under Section 125 Cr. P. C. or under the provisions of the 1986 Act.

6. Coming to the evidence with regard to the fact of divorce, the learned Magistrate no doubt at page 5 of his judgment discussed the matter, but what is found is that the Magistrate only discussed certain documents filed by the opposite party-wife and the evidence from her aide. At one stage while discussing about this fact of divorce in para 6 of his judgment he observed as follows :

'If the Ext. 5 is accepted, then the evidence of O. P. Ws. 1 to 3 is worthless to the point that the petitioner was divorced in the year 1976, inasmuch as, it shows that by virtue of it the said is samia committee appealed to the General Manager of Orient Colliery to pay maintenance to the petitioner out of the pay of the O. P. '

Ext. 5 is found to be a document not signed by either of the parties to the proceeding and hence is not a document of admission with regard to the fact of divorce or otherwise. This is only a letter addressed to the General Manager, Orient Colliery, Brajarajnagar, requesting him to pay certain amount to the petitioner since the petitioner-husband had taken a second wife and had not given Talak to the opposite party-wife. Thus it is evident from this observation that the Magistrate has not discussed the evidence of the O. P. Ws. 1 to 3 and, particularly, when O. P. W. 2 stated in para 5 of his cross-examination that the present petitioner divorced the opposite party. The Magistrate has committed the error in not discussing the evidence of the O. P. Ws. with regard to the divorce.

7. The Magistrate in para 8 of his judgment observed that the marriage of the petitioner-husband with another girl Zumanbi has been proved and therefore the petitioner neglected to maintain the opp. party-wife and her children. There is no evidence as to when the petitioner married Zumanbi and even at least the year. That apart in para 8 at page 8 of the judgment, the Magistrate is found to have wrongly read the show-cause filed by the petitioner-husband, when he has

observed that the petitioner-husband in his show-cause also admitted the fact of the second marriage but nowhere in the show-cause he has so admitted. Rather, in para 6 of the show-cause he denied the allegation made in para 5 of the petition. This is a wrong reading of the case of parties in the show-cause.

For the reasons stated above, this petition has to be allowed since it is found that the judgment suffers from infirmity which has caused miscarriage of justice. There has been wrong appreciation on both facts as well as on the point of law.

8. In the result, the petition is allowed. The judgments of the Courts below are set aside. the case is remitted back to the Court of the Judicial Magistrate, First Class, Jharsuguda, for fresh disposal according to law as per the observations of this Court mentioned above.

Mr. Mishra, learned counsel for the petitioner submitted that since the opposite party-wife married to another person, she is no more interested in prosecuting the case and, therefore, she has not appeared before this Court and contested the case. Be that as it may, since the orders suffer from infirmity as mentioned above, in any case, the parties should be given a chance to put forth their case properly. With a view to facilitate the lower Court to dispose of the case at an early date, the following directions are hereby given.

(i) The trying Magistrate should give a finding as to whether there was a divorce between the parties as on 19-5-1986 when the 1986 Act came into force and after arriving at the finding either way, shall dispose of the case one way or the other.

(ii) The Court shall discuss the evidence of witnesses for the opposite party (husband) with regard to the fact of divorce and the mode of divorce prescribed under the Mohammedan Law, that is, as to how Talak is given.

(iii) Parties may be given chance to adduce further evidence if they like.