

Thilothama Vs. Kunjappan

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Court : Kerala

Decided On : Jan-06-1983

Reported in : 1983CriLJ273

Judge : U.L. Bhat, J.

Appellant : Thilothama

Respondent : Kunjappan

Judgement :

ORDER

U.L. Bhat, J.

1. In Crl. M. C. 46 of 1972, the petitioner obtained an order under Section 125 of the Code of Criminal Procedure (for short 'the Code') directing the respondent, her husband, to pay maintenance to her and her child at the rate of Rs. 25/- and Rs. 10 per month respectively. The maintenance amounts were increased to Rs. 50 and Rs. 25 per month, respectively in M.C. 61 of 1975 filed by the petitioner. The respondent filed G.P. 21 of 1975 under Section 14 of the Cochin Marumakkathayam Thiyya Act, 1115 for dissolution of the marriage. The trial Court passed an order on 28-7-1975 dissolving the marriage and directing the respondent to pay compensation of Rupees 1,000 to the petitioner under Sections 14 and 15 of that Act, In appeal, as seen in Ext. P1 judgment, the first Appellate Court increased the quantum of compensation to Rs. 2,000 on 9-6-1978 It

appears, the amount due was paid on 14-3-1979. Thereafter, the respondent filed M.C. 14 of 1980 under Section 127(3)(b)(ii) of the Code seeking cancellation of the prior maintenance order in favour of the petitioner. The learned Magistrate dismissed the petition but in revision. the Court of Session reversed the decision and allowing M.C. 14 of 1980, cancelled the earlier maintenance order in favour of the petitioner, the result is divorced wife is no longer entitled to claim maintenance though this does not affect her son.

2. Sections 13 to 15 of the Cochin Marumakkathayam Thiyya Act on which reliance is placed by the respondent read thus:

13, Marriage is dissolved only in one of the following ways:

(i) by the death of either party,

(ii) by mutual consent evidenced by a registered instrument attested by not less than two witnesses, and

(iii) by a formal order of dissolution as hereinafter provided.

14. A husband or wife, but not any person as the next friend of a minor wife, may present a petition for dissolution of the marriage under Section 13. Clause (iii) in the Court of the District Munsiff, within the local limits of whose jurisdiction the respondent resides, carries on business, or personally works for gain or if the respondent resides, carries on business Or personally works for gain in any place outside Cochin, the Court of the District Munsiff within whose jurisdiction the petitioner resides or the marriage was solemnised; and where the petitioner is the husband, he shall be liable to pay reasonable compensation to the respondent.

15. What is reasonable compensation shall, in case of dispute, be determined by the Court after an enquiry into the position, means and circumstances of the parties, but without going into the ground of the proposed dissolution, and it shall in no case exceed Rs. 2,000.

3. A person governed by the Act is entitled to secure an order of dissolution of marriage between himself or herself and the spouse. Where the person who seeks

divorce is the husband, he has a statutory liability to pay reasonable compensation to the wife on divorce. What is reasonable compensation is a matter for decision for the appropriate Court after an enquiry into the position, means and circumstances of the parties. There is a statutory upper limit of Rupees 2,000 for the quantum of compensation. It is thus seen that the amount which may be ordered to be paid by the matrimonial Court and the amount actually paid in this case is compensation for the order of dissolution to be passed. Sections 13 to 15 of the Cochin Act do not indicate that considerations regarding the future maintenance of the divorced wife is a matter to be taken into consideration in fixing the compensation payable,

4. Section 127(3)(b)(ii) of the Code reads thus:

127. Alteration in allowance,

(1) & (2) xx xx xx

(3) Where any order has been made under 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-

(a) xx xx xx

(b) 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 on such divorce, cancel such order.-

(i) XX XX XX

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman.

5. In order that a prior order of maintenance could be successfully challenged under the above provision, the husband has to prove the factum of divorce and further show the whole of the sum which under the customary or personal law applicable to the parties was payable at the time of divorce, has been actually

paid.

6. The question which arises for consideration is whether the payment of compensation awarded by the court under Section 14 of the Cochin Marumakkathayam Thiyya Act could be treated as payment of whole of a sum which under the customary or personal law applicable to the parties was payable at such divorce. In *Kunhi Moyin v. Pathumma* 1976 Ker LT 87, a Division Bench of this Court upheld the validity of Section 125(1)(a) of the code. Incidentally, the court considered the scope and effect of Section 127(3)(b) of the code, and observed as follows:

This section may be pressed into service by some ingenious husbands to defeat the provisions contained in Section 125. We would like to make it clear that Section 127(3)(b) refers not to maintenance during the period of iddat or payment of dower. Unfortunately, place of dower is now occupied by dowry, payable by the girls' parents, which till 1-6-1061 was paid in public and thereafter in private; thanks to Dowry Prohibition Act, 1951. It is therefore not a sum of money which under the personal law is payable on divorce as expressed in Section 127(3)(b), On the other hand, what is impliedly covered by this clause is such sums of money as alimony or compensation made payable on dissolution of marriage under customary or personal law codified or uncodified, or such amount agreed upon at the time of marriage; to be paid at the time of divorce; the wife agreeing not to claim maintenance or any other amount. We thought it necessary to clarify this position lest there be any doubt regarding the scope of Section 127(3)(b), for, at the first blush, it might appear that, it takes away by one hand what is given under Section 125 by the other hand. This is not so.

(Emphasis supplied)

7. A Full Bench of this Court in *Kamalakshi Vasantha Kumari v. Sankaran Sadasivan* : AIR1979 Ker116 had occasion to consider the import of Section 127(3)(b) of the Code. In that case, in accordance with the provisions of the Travancore Ezhava Act, at the time of passing a decree for dissolution of marriage, the maximum compensation payable namely Rs. 2,000/- was ordered to be paid. The question arose whether the payment of this sum would attract the

operation of Section 127(3)(b) of the Code. On behalf of the divorced wife, reliance was placed on the observations of the Division Bench in Kunhi Moyin's case (1976) Ker LT 87. Referring to these observations, the Full Bench observed as follows:

The observations of the Division Bench were really unnecessary for the purpose of that case and were meant, as the Division Bench itself had stated, only to clarify the position and resolve any doubt that might arise in regard to the applicability of the Section. Again, after giving the matter our careful consideration, We find no warrant to interpose in the Section 127(3)(b) words to the effect that the wife must have agreed not to claim maintenance or any other amount; and we think the Division Bench was wrong in making this a necessary pre-condition to the applicability of the Sub-section (3) (b) of Section 127.' The Full Bench also placed reliance on a decision of a Division Bench of the Bombay High Court in Rukhsana Parvin v. Sk. Mohd. Hussain 1977 Cri LJ 1041. Dealing with the argument that the amount paid on orders of court under Section 8 of the Travancore Ezhava Act was not really an amount of future maintenance but only compensation and therefore Section 127(3)(b) would not be attracted, the Full Bench observed as follows: We are unable to accept this argument. Section 8 of the Travancore Ezhava Act refers only to an application to offer 'reasonable compensation' and no more. It does not either expressly or impliedly designate the amount of compensation as maintenance. Turning now to Section 127(3)(b), that Section only speaks of 'a sum, which under the customary or personal law applicable to the parties, was payable' on divorce'. This appears to us to be a clumsy and circuitous way of referring to the well-known expression 'maintenance' which could certainly have been done if such was the legislative intent, in plainer and simpler, and more direct language. We are therefore, of the opinion that sum referred to by Section 127(3)(b) need not be restricted to maintenance in the well understood sense of the term, but may cover any sum or amount payable on divorce under the customary or personal law of the parties. Such was the amount in the instant case, and Section 127(3)(b) is attracted.

8. Some time after the decision of the Full Bench, the Supreme Court had occasion to consider the import of Section 127(3)(b) in Bai Tahira v. Ali Hussain

Fissali Chothia : 1979 CriLJ151 . This was a case where after the divorce effected by a Muslim husband of his wife, there was a suit which resulted in a consent decree settling all disputes and recited that the husband had transferred the suit premises namely, a flat in Bombay to the divorced wife as also the shares of the society which built the flat. There was also a reference to payment of Rs. 5,000/- as mehar money and Rs. 180 as iddat money. The compromise decree further declared that the divorced wife has now no claim or right whatsoever against the defendant or against his estate or his properties. It was argued before the Supreme Court that payment of mehar money as a customary discharge is within the cognizance of Section 127. In considering this question, the three member Bench observed as follows (Paras 11, 12)

Rs. 5.000/-, interest from which could not keep the woman's body and soul together for a day, even in that city where 40% of the population are reported to live on pavements, unless she was ready to sell her body and give up her soul. The point must be clearly understood that the scheme of the complex of provisions in Chap. IX has a social purpose. Ill-used wives and desparate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section 127. Where the husband, by customary, payment at the time of divorce, has adequately provided for the divorcee, a subsequent series of recurrent doles is contra-indicated and the husband liberated. This is the telcological interpretation, the sociological decoding of of the text of Section 127. The key-note thought is adequacy of payment which will take reasonable care of her maintenance.

The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the court is to pay true homage to the Constitution. The only just construction of the section is that Parliament intended divorcees should not derive a double benefit. If the first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for

the order under Section 125 not mathematically but fairly then Section 127(3)(b) subserves the goal and relieves the obligor, not pro tanto but wholly. The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of Section 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the parties. There must, be a rational relation between the sum so paid and its potential as provision for maintenance; to interpret otherwise is to stultify the project,... The proposition, therefore, is that no husband can claim under Section 127(3)(b) absolution from his obligation under Section 125) towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance. allowance.

(Emphasis supplied)

9. The question once again came up for consideration before a three member Bench of the Supreme Court in *Fuzlunbi v. K. Khader Vali* : 1980 CriLJ1249 . In that case, on pronouncing talaq the husband tendered Rs, 500/- by way of the custom and Rs. 750/-, towards maintenance for the period of iddat and on that ground the earlier order of maintenance passed in her favour of Rs. 250/- per month under Section 125 of the Code was vacated by the Magistrate and the same was confirmed by the Court of Session and the High Court. The Supreme Court once again reiterated the law as declared by it in *Bai Tahira's case* 1979 Cri LJ 151 and stated as follows (at pp. 1731, 32 of AIR) : (at pp. 1250, 51 of Cri LJ):

The matter is no longer *res integra*. No one in his senses can contend that the mehar of Rs. 500 will yield income sufficient to maintain a woman even if she were to live on city pavements! What is the intendment of Section 127(3)(b)? What is the scheme of relief for driftwood and destitute wives and divorcees discarded by heartless husbands? What is the purpose of providing absolution from the obligation to pay continued maintenance by lump sum liquidation?....

The Court observed further:

We need not labour the point because this Court has already interpreted Section 127(3)(b) in Bai Tahira AIR 1979 SC 382 : 1079 Cri LJ 151 and no Judge in India, except a larger Bench of the Supreme Court without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof. The language used is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law as expounded there is an easy task. And yet, the Division Bench if we may with respect say so, has, by the fine art of skirting the real reasoning laid down 'Unlaw' in the face of the law in Bai Tahira which is hardly a service and surely a mischief, unintended by the Court may be, but embarrassing to the subordinate judiciary.

The Court went on to consider the reasoning in the D. B. judgment appealed against and met the same with quotations from Bai Tahira's case and referred to the decision of the Division Bench of this Court in Kunhi Moyin's case 1976 Ker LT 87 and also the Full Bench decision in Kamalakshi Vasantha Kumari's case 1979 Cri LJ (NOC) 113 and observed as follows:

While, in our view, the Full Bench decision in Kamalakshi v. Sankaran : AIR1979 Ker113 in so far as it does not insist on an adequate sum which will yield a recurring income to maintain the divorcee in future, is bad law and the Division Bench, in so far as it excuses the husband if he pays a sum which the ignorant wife at the time of marriage has agreed upon to relinquish maintenance after divorce does not go far enough.

The Court also summed up and declared the law as follows:

We may sum up and declare the law foolproof fashion.

(1) Section 127(3)(b) has a setting scheme and a purpose and no talaq of the purpose different from the sense is permissible in statutory construction.

(2) The payment of an amount, customary or other, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of. the monthly maintenance allowances the divorcee may need until death or remarriage overtake her. The policy of the law abhors

neglected wives and destitute divorcees and Section 127(3)(b) takes care to avoid double payment, one under custom at the time of divorce and another under Section 125.

(3) Whatever the facts of a particular case, the Code, by enacting Sections 125 - 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill-used wives and cast away ex-wives, only if the woman has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties.

(4) Neither personal law nor other, salvatory plea will hold against the policy of public law pervading Section 127(3)(b) as much as it does Section 125. So a farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance.

(5) Here the mehar paid is Rs. 500 and the income therefrom may well be Rupees 5 a month, too ludicrous to mention as maintenance. The amount earlier awarded is the minimum.

10. The Supreme Court has expressly declared that the view taken in Kamalakshi Vasantha Kumari's case 1979 Cri LJ (NOC) 113 (Ker) (FB) is not good law. The Supreme Court has also laid down the correct principles of law underlying Section 127(3)(b) of the Code. Whether the sum paid should have nexus with future maintenance, if so, whether it must be a reasonable sum directly arose : for consideration in both the cases decided by the Supreme Court and have been answered in the affirmative. It is therefore futile for respondent to contend that the observation of the Supreme Court in Bai Tahira's case 1979 Cri LJ 151 and Fuzlunbi's case 1980 Cri LJ 1249 were obiter dicta. They were not obiter dicta, but were made in the context of controversies which arose for consideration in those cases and which required determination for the disposal of the cases. All the Courts in the country, are bound to follow the law as laid down by the Supreme Court.

11. 'The sum which, under any customary or personal law applicable to the parties, was payable on such divorce' referred to in Section 127(3)(b) of the Code

will not take payments of meagre amounts by way of customary or personal law requirement. The provisions will apply so as to enable cancellation of an order passed under Section 125 only if the sum paid is a reasonable substitute for provision for future maintenance. Such payment may be required by custom or personal law to be paid on divorce; but it will terminate the liability to pay future maintenance only if it is a capitalised substitute for payment of maintenance periodically. Therefore, payment of compensation on divorce as per orders of court under the Cochin Marumakkathayam Thiyya Act and other similar statutes can attract the provisions of Section 127(3)(b) only if the sum paid is a reasonable one and can be treated as a fair substitute for maintenance payable periodically.

12. The sum paid in this case is Rupees 2,000. Maintenance payable to the divorced wife has been fixed as Rs. 50 per month or Rs. 600 per year. Lump sum payment of Rs. 2,000 is not a reasonable substitute for payment of Rupees 600 annually or Rs. 50 monthly; Rs. 2,000 cannot be regarded as the capitalised substitute for continued payment of maintenance at the rate of Rupees 50 per month. The order parsed by the Court of Session is illegal and has to be set aside.

13. Learned Counsel for the respondent pointed out that in any view of the case the quantum of maintenance awarded to the divorced wife must be suitably revised taking into consideration the quantum of compensation paid to her and this matter could be decided in the same proceeding. Of course, it is open to the respondent to urge such a contention, I do not think for that purpose the matter should be remanded. It is open to the respondent to move the competent court for an appropriate relief in this behalf under Section 127 of the Code and if he so moves, the competent Court will dispose of the claim in accordance with law.

In the result, the order of the Court of Session in Crl. R.P. 17 of 1981 is set aside. The order of the Judicial Magistrate of the First Class in Crl. M.C. 14 of 1980 is restored. The revision petition is allowed in this manner.