Abdulla Vs. Subaida

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Court : Kerala

Decided On : Jul-13-2006

Reported in : I(2007)DMC853; 2006(3)KLT699

Judge : R. Basant, J.

Acts : Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3 and 3(1); Muslim Personal Law; Code of Criminal Procedure (CrPC) - Sections 125

Appeal No. : Crl. R.P. No. 2788 of 2004

Appellant : Abdulla

Respondent : Subaida

Advocate for Def. : P.B. Suresh Kumar and; S.M. Althaf, Advs.

Advocate for Pet/Ap. : T.H. Abdul Azeez and; K.A. Jaleel, Advs.

Judgement :
ORDER

R. Basant, J.

1. Should a divorced Muslim woman be unable to maintain herself to entitle her to amounts under Section 3 of the Muslim Women (Protection of Rights on Divorce)

Act Is she entitled for any amount under Section 3(1)(b) on the ground that she herself had maintained children who are aged more than 2 years on the date of divorce These interesting questions arise for consideration in this revision petition directed against an order passed under Section 3 of the Muslim Woman (Protection of Rights on Divorce) Act (hereinafter referred to as the 'Act'). The order directs the petitioner herein/divorced husband to pay a total amount of Rs. 2,73,000/- to the claimant, his divorced wife.

2. Marriage and divorce are admitted. Liability to pay maintenance during the period of Iddat is not disputed. Liability to make fair and reasonable provision and maintenance is also not disputed. There was a claim for deferred mahar payable at the time of divorce. There is dispute regarding the quantum of deferred mahar and also as to whether there is any deferred mahar. Amounts were claimed under Section 3(1)(b) of the Act. The children were aged 12 years, 12 years and 10 years at the time of divorce. It was claimed that under Section 3(1)(b) the mother of the children is entitled to maintenance for two years from the date of birth of the children - the petitioner having allegedly not paid any maintenance to them during such period. An amount of Rs. 72,000/-(Rs. 1000 p.m. x 3 children x 24 months) was claimed.

3. The claimant wife examined herself as PW1 and her uncle as PW2. Exts.P1 and P2 were marked. The petitioner herein examined himself as CPW2. The Secretary of the Mosque was examined as CPW1 to prove the marriage register.

4. The learned Magistrate came to the conclusion that the claimant wife is entitled for the following amounts.

1. Maintenance during the period

of iddat for three months - Rs. 5,000/- (total)

2. Fair and reasonable provision

and maintenance - Rs. 18,00,000/-

(Rs. 3000x 12x5 years)

3. Deferred mahar payable at the

time of divorce - Rs. 16,000/-

Rs. 4000 x 4 sovereigns)

4. Amounts payable as main to

the children under - Rs. 72,000/-

Section 3(1)(b)of the Act (Rs. 1000 x 3 x 2x 12 months)

5. There is no serious dispute about the quantum of amount payable towards maintenance during the period of iddat. The direction to that effect under Section 3(1) is not challenged. Coming to the amount of Rs. 1,80,000/- ordered as fair and reasonable provision and maintenance it is contended that the monthly quantum reckoned as Rs. 3,000/- is totally incorrect, unreasonable, irrational and perverse. The revisional jurisdiction deserves to be invoked to interfere with that direction, it is urged.

6. So far as the claim for deferred mahar is concerned, the claimant wife had contended that 10 sovereigns of gold was the mahar agreed upon. The entire mahar had not bean paid and was deferred, she contended. The husband/petitioner herein contended that only 3 sovereigns was the mahar agreed upon and the same had been paid at the time of marriage itself and there was no deferred mahar whatsoever.

7. Regarding the amounts claimed under Section 3(1)(b), the petitioner herein contended that all the children having attained 10 years (more than 2 years) and more at the time of divorce, no amount whatsoever is payable under Section 3(1)(b).

8. Before proceeding to consider the challenge raised, I must alertly remind myself of the nature, quality and contours of the jurisdiction of this Court sitting as a court of Revision exercising the correctional and supervisory jurisdiction. No Court of revision shall or can invoke its supervisory and correctional jurisdiction unless the finding/order is vitiated by illegality, impropriety-, incorrectness and irregularity and

such vice in turn leads to miscarriage of justice. The court below was called upon to collect acceptable inputs from the interested testimony tendered by PWs 1 and 2 on the one hand and the petitioner, RW1, on the other. Indications unmistakably show the degree of affluence enjoyed by the rival contestants. The petitioner herein is employed in the Merchant Navy and the indications suggest convincingly and unmistakably that his monthly income, at any rate, exceeds Rs. 50,000/-I am not embarking on a detailed discussion as to what exactly and precisely was the monthly income. The indications further suggest that the claimant wife was also earning an income of about Rs. 10,000/- p.m. Here again I am not embarking on a detailed consideration of the precise quantum of monthly income of the wife.

9. It is contended that the wife is entitled to maintain herself and that she is not a person unable to maintain herself. Counsel relies on the factors which prompted the Parliament to enact the Act and contends that the purpose was to do justice to a Muslim wife who is unable to maintain herself. In this context the learned Counsel relies on the decision in Kunhammed Haji v. Amina 1995 (1) KLT 765 (DB). I am unable to agree that the relevant observations in paragraph 7 of the decision of the Division Bench can be reckoned as laying down any binding precedent on the disputed question as to whether a divorced wife able to maintain herself is entitled to the amount due under Section 3(1)(a).

10. While discussing the factors which prompted the Parliament to come out with a special legislation particularly for the muslim woman certain observations have been made by the Division Bench. Those observations cannot be reckoned as introducing an insistence on an ingredient which is not there in Section 3 that the divorced wife must be unable to maintain herself before she can claim amounts from her husband. That conclusion does not flow from the language of Section 3 or the purported objectives of the Act - to ensure that a muslim woman is entitled to additional rights which are protected by the personal law and that the less advantageous secular law should not stand in the way of the benefits which a muslim woman is entitled to under the personal law. This appears to be atleast the purported objective of the Act.

11. The precise question was considered by this Court in the decision in 1990 (1) KLT 192. Jagannatha Raju (J) in that decision has clearly held that it is not the requirement of Section 3 of the Act that the divorced wife must be unable to maintain herself before she can claim amounts under Section 3.I am in total agreement with the law so laid down and the incidental observations made by the Division Bench in Kunhammed Haji's case (supra), cannot alter the said conclusion which flows directly from the language of Section 3. The Division Bench has not overruled the dictum in 1990 (1) KLT 192. The Legislature conscious of the rights of the wives professing other religions under Section 125 Cr.P.C, when it enacted Section 3 did not choose to weave into Section 3 the requirement that the divorced wife must be unable to maintain herself. It is not necessary to advert to certain precedents by other High Courts in as much as from the language of Section 3 and from the precedent which has remained from 1990 in Ahammed v. Aysha (supra), the position is well laid down and need not be doubted. I may clarify that even a millionaire wife will be entitled to claim amounts under Section 3 of the Act from her billionaire husband and the fact that she can maintain herself is no bar against any claim under Section 3. In these circumstances the fact that the claimant divorced Muslim wife is able to maintain herself and is not unable to maintain herself can have no bearing on her right under Section 3(1)(a) though it may have relevance while ascertaining the quantum.

12. A husband is expected to make reasonable and fair provision and maintenance under Section 3(1)(b). The relative affluence of the husband and wife will be relevant while considering the fairness and reasonableness of the provisions to be made. The husband was getting amounts exceeding Rs. 50,000/- p.m. The wife was getting only an amount of Rs. 10,000/- It is reasonable to assume that when they lived in harmony they must have been used to a standard of life in between. Therefore, while considering the quantum of reasonable and fair provision and maintenance to be made by the husband the relative, qualitatively higher degree of affluence enjoyed by the husband vis-a-vis his divorced wife must certainly be taken into account.

13. The learned Magistrate only held that an amount of Rs. 3,000/- p.m. is due to the wife to bridge the gap between the actual income and the fair and reasonable provision which the husband has to make. The court has awarded only maintenance for a period of five years. The same had been quantified and the amount of Rs. 1,80,000/- has been fixed. The course adopted by the court below in reckoning Rs. 3,000/- as the monthly maintenance and five years as the probable period, she would continue as a divorced wife - both the multiplier and the multiplicand do appear to me to be correct. The quantum fixed as Rs. 1,80,000/- does not warrant interference. With three children between 10 and 12 years at the time of divorce, the chances of probable remarriage will also show that the acceptance of multiplier as five is not unreasonable.

14. We now come to the quantum of deferred mahar. Both sides have not chosen to place before court the complete truth. Husband claimed that the entire mahar fixed of 3 sovereign has been paid. This is found to be incorrect and false when DW1 was examined and relevant documents were produced. It is seen that the mahar was 4 sovereigns and not three as contended by the husband nor 10 sovereigns as contended by the wife. The court reckoned 4 sovereigns as the deferred mahar. I am unable to find anything wrong in the approach made by the court below or its conclusion on the question of deferred mahar - direction to pay Rs. 16,000/- was issued. It does not suffer from any vice warranting revisional interference.

15. The learned Counsel for the petitioner then contends that at any rate the learned Magistrate has misdirected himself in law in assuming that the amount under Section 3(1)(b) of the Act is an amount payable to the children born in the wedlock. The court has erred in directing payment of an amount of Rs. 72,000/- on the basis that the 3 children for a period of 2 years are entitled to amounts @ Rs. 1,000/- per mensem. It is on this calculation that the learned Magistrate has directed payment of an amount of Rs. 72000/- (Rs. 1,000/- x 3 x 2 x l2), though the payment was directed to be made to the wife. I find considerable force in this contention. Section 3(1)(b). of the Act reads as follows:

S.3. Mahr or other properties of Muslim woman to be given to her at the time of divorce:

(1) (a)...

(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.

The learned Counsel for the petitioner contends and I agree that the court below erred grossly in assuming that the amount under Section 3(1)(b) is one payable to the children. It is not so. That is only the amount payable to the divorced wife and the rationale or philosophy underlying such a payment is not the entitlement of the children, but only the entitlement of the wife who is saddled with the responsibility of fosterage of the infant children who are born before or after the divorce - for a period of 2 years from the date of birth of such children.

16. One has to primarily look at the language of Section 3(1)(b). The amount is payable to the wife undoubtedly. The payment is not the quantum of the maintenance due to the children. An additional amount or payment for an additional period is made available to the wife under Section 3(1)(b), because she has the responsibility of fostering infant children even after divorce. Whether such children be born before or after the marriage, the liability of the husband to maintain such divorced wife who has infant children to be fostered is fixed for the period till the children attain the age of 2 years.

17. According to me, there can be no subsisting confusion on the legal question any more. The Supreme Court in Noor Saba Khatoonv. Mohd. Quasim AIR 1997 SC 3280 in para.8 has removed the last trace of doubt if any on this question. I extract para.8 below.

Para.8: Indeed Section 3(1) of 1986 Act begins with a non obstante clause 'notwithstanding anything contained in any other law for the time being in force' and Clause (b) thereof provides that a divorced woman shall be entitled to a

reasonable and fair provision for maintenance by her former husband to maintain the children born out of the wedlock for a period of two years from the date of birth of such children, but the non obstante clause in our opinion only restricts and confines the right of a divorcee Muslim woman to claim or receive maintenance for herself and for maintenance of the child/children till they attain the age of two years, notwithstanding anything contained in any other law for the time being in force in that behalf. It has nothing to do with the independent right or entitlement of the minor children to be maintained by their Muslim father. A careful reading of the provisions of Section 125 Cr. P.C and Section 3(1)(b) of the 1986 Act makes it clear that the two provisions apply and cover different situations and there is no conflict, much less a real one, between the two. Whereas the 1986 Act deals with the obligation of a Muslim husband vis-a-vis his divorced wife including the payment of maintenance to her for a period of two years of fosterage for maintaining the infant/infants, where they are in the custody of the mother, the obligation of a Muslim father to maintain the minor children is governed by Section 125 Cr. P.C and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In the case of female children this obligation extends till their marriage. Apart from the statutory provisions referred to above, even under the Muslim Personal Law, the right of minor children to receive maintenance from their father, till they are able to maintain themselves, is absolute.

18. Thus it is evident that the amount under Section 3(1)(b) is not a payment to the children, but it is a payment to the wife and that payment stipulated is only considering the responsibility of fosterage of the young children who have not attained the age of 2 years. The liability of the husband to maintain his wife would extend to the date on which such children who are born before or after the marriage attain the age of 2 years. To further substantiate his contention on this aspect, the learned Counsel for the petitioner has relied on the translation of the Holy Quran by A.Yusuf Ali. Ch.II verse 233 is translated thus:

The mothers shall give suck

To their offspring

For two wholeyears,

If the father desires

To complete the term.

But he shall bear thecost

Of their food and clothing

On equitable terms.

19. Tahir Mahmood The Muslim Law of India, short edition at page 117 refers to this liability in the following passage:

(a) nafga-e-raza at;fosterage-period maintenance

This is to be paid to her by her former husband as long she has in her custody a child of the couple under the age of weaning - which is ordinarily two years but may be extended upto a reasonable limit. It is not necessary that she must be breast-feeding the child.And it is her own maintenance - different from and in addition to themaintenance of the child in her custody which in any case the former husbandas its father must pay - that she can claim from her former husband.(emphasis supplied)

Thus it is evident that the amount under Section 3(1)(b) is intended to be paid to the wife after divorce because she has the responsibility of fosterage of the children who have not attained the age of 2 years.

20. The learned Counsel for the respondent contends that such payment will be available to the wife if she herself maintains her children for a period of about 2 years from their birth, whether such birth be before or after the divorce. He therefore contends that the impugned direction to pay an amount of Rs. 72,000/- to the claimant wife is justified. In as much as she had maintained the children born in the wedlock for a period of 2 years from the respective dates of birth of such children, she is entitled for such amount it is urged.

21. I am unable to agree that Section 3(1)(b) contemplates any payment in respect of children who were maintained by the divorced wife prior to the divorce during their infancy for a period of 2 years from the date of their birth. The expression 'maintains' in Section 3(1)(b) is eloquent and it clearly shows that it does not refer to a predivorce period. The use of the simple present tense is crucial. After divorce, if the divorced wife 'maintains' the children, then and then alone, she will be entitled to payment under Section 3(1)(b) of the Act. Such claim is on the ground that she has responsibility of fosterage of such infant children after the divorce. The fact that she 'had maintained the children in the past prior to divorce' cannot entitle her to any amount under Section 3(l)(b) of the Act.

22. Needless to say, in this case no one has a case that the children were aged less than 2 years on or after the divorce. Therefore the conclusion appears to be inevitable that the wife is not entitled for any amount under Section 3(1)(b) on the plea that children were maintained upto 2 years by her prior to the divorce.

23. The direction to pay an amount of Rs. 72000/- under Section 3(1)(b) must in these circumstances be set aside. No attempt is made by the learned Counsel for the respondent to support the said direction on any other ground.

24. In the result:

(a) This revision petition is allowed in part:

(b) The impugned order is upheld in all other respects. But the direction to pay amount of Rs. 72000/- under Section 3(1)(b) is set aside.