

Ahammed Vs. Aysha

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Court : Kerala

Decided On : Dec-21-1989

Reported in : II(1990)DMC110

Judge : Jagannadha Raju, J.

Acts : Muslim Women (Protection of Rights) on Divorce Act, 1986 - Sections 3 and 3(3)

Appeal No. : Crl. R.P. No. 246 of 1988

Appellant : Ahammed

Respondent : Aysha

Advocate for Def. : P.A. Mohammed and; A.T. Ramesh, Advs.

Advocate for Pet/Ap. : M.A. Manhu and; V.V. Narayanan, Advs.

Judgement :

Jagannadha Raju, J.

1. This is a revision filed by the former husband of the petitioner in M.C. No. 75 of 1987 on the file of the First Class Judicial Magistrate, Taliparamba. In this revision the husband complain that the order of the Magistrate directing him to pay Rs. 12,000/-towards reasonable and fair provision and maintenance during the iddat

period and also a sum of Rs. 101/- towards mahar is illegal and not maintainable. The petitioner's counsel contends that in these proceedings which emanated on a petition under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act 25 of 1986) (hereinafter referred to as 'the Act'), it is the bounden duty of the court to go into the question of means of the husband and then pass the orders as contemplated under the various sub-sections of Section 3. If the wife is in affluent circumstances when compared to the husband, there is no need to pass an order. In the present case the court passed a composite order without specifying what amounts are payable under different heads mentioned in Section 3(1) of the Act. He contends that while the petitioner, the former husband, is only a salesman getting Rs. 440/- per month, the wife is in more affluent circumstances. She owns property, gets income from the property and she is also in receipt of remittances from her sons through the earlier marriage who are now employed in gulf countries. It is contended that the composite or the consolidated order is passed by the Magistrate without going into the question of the capacity of the husband to pay the amount and the relative financial position of the spouses. The petitioner's counsel places strong reliance upon *Ali v. Sufaia*, 1988 (2) KLT 94, a single Judge decision of this court, which dealt with the scope and ambit of Section 3 of the Act. The petitioner's counsel also places reliance upon various decisions of the different High Courts and the Supreme Court which deal with petitions for maintenance under the Hindu Marriage Act, under Section 125 of the Cr. P.C., and Section 488 of the old Cr. P.C. and claims that the husband can be directed to pay maintenance only where the wife is unable to maintain herself. As there is no finding to the effect that the petitioner's divorced wife is unable to maintain herself, the order under Section 3 should not have been passed.

2. On behalf of Shri P.A. Mohammed, Shri A.T. Ramesh argues that proceedings under Section 3 of the Act will have to be dealt with without reference to the principles applicable for granting maintenance under the Cr. P.C., Hindu Marriage Act, etc. This Act does not contemplate the inability of the wife to maintain herself. He also contends that the Revision Petitioner is a partner in a business and hence he is certainly having the means to pay the amounts ordered to be paid by the Magistrate.

3. The point for consideration is whether the order passed by the Magistrate is in conformity with the provisions of Section 3 of the Act.

4. The point : It should be remembered that this Act 25 of 1986 came into the statute book as a result of the epochmaking decision of the Supreme Court in Shah Bano's case, (1985) 2 SCC 556. The Act is meant to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands. Section 3 is the most important section. The language of Section 3(1) clearly indicates that notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to the four items mentioned in Clauses (a), (b), (c) and (d) of Sub-section (1). Sub-section (2) 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 the properties referred to in Clause (d) of Sub-section (1) have not been delivered to a divorced woman on her divorce, she or anyone 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. Sub-section (3) is very important. It reads as follows :

'(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.'

5. It is significant to remember that under this sub-section there is no requirement of the inability of the wife to maintain herself as in the other enactment. The Act has the over-riding effect, notwithstanding anything contained in any other law for the time being in force. If we compare Section 3 of the Act with similar provisions for maintenance in the other enactments, we find that in Section 125 of the Cr. P.C. the person has to pay maintenance when he has sufficient means and neglected or refused to maintain his wife and children. He is called upon to pay maintenance to his wife or children who are unable to maintain themselves. Section 24 of the Hindu Marriage Act which deals with maintenance pendente lite and expenses of proceedings contemplates the respondent being paid the expenses of the proceedings and monthly maintenance which shall be determined having regard to the petitioner's own income and the income of the respondent and which the court finds reasonable. Section 25 deals with permanent alimony and maintenance. It introduces the standard of 'having regard to the respondent's own income and other property, if any, the income and other property, of the applicant', the court shall order payment of alimony. This strict standard whereby the inability of the wife is taken into account is not there in Section 3 of the Act. Under the Indian Divorce Act, Sections 36 and 37 deal with alimony pendente lite and permanent alimony. Under Section 36 a wife is entitled to file a petition for alimony pending the suit and the only limitation is that the alimony pending the case shall not exceed one-fifth of the husband's average net income for the three years next preceeding the date of the order. That section does not contemplate negating the right of the wife for alimony pendente lite in case she is in affluent circumstances or that she has income of her own. Under Section 37 which provides for permanent alimony, it is the duty of the court to see that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, it thinks reasonable. It is significant to remember that Sections 36 and 37 do not disentitle a wife with property and separate income from receiving either alimony pendente lite or the permanent alimony. If we compare and contrast the

provisions of Section 3 of the Act with similar provisions in the other enactments, we find that even a millionaire wife who lives in luxury and affluence is certainly entitled to claim maintenance and other reliefs from her former husband under Section 3. There is no requirement of the wife being unable to maintain herself for granting maintenance or for payment of fair and reasonable provision as contemplated under Section 3.

6. In the present case the petitioner's divorced wife claimed the mahr amount of Rs. 101/- which she claims has not been paid to her. She also claims Rs. 5000/- as maintenance for the iddat period and a sum of Rs. 25,000/- as reasonable and fair provision. The court found that the petitioner is liable to pay maintenance during the iddat period and that he is liable to make reasonable and fair provision and that he is liable to pay the mahr amount. But in the order, there is no discussion as to the means of the former husband and what exactly are the incomes he is getting. There is only a reference to the fact that he is getting Rs. 440/- per month as salary for his work as a salesman in General Hardwares, at Taliparamba. Without going into the question of his having 'sufficient means' or going into the question of 'the means of the former husband's a consolidated order is passed directing the former husband to pay Rs. 12,000/- towards reasonable and fair provision and maintenance for the iddat period. A direction was also given directing the revision petitioner to pay Rs. 101/-, the mahr amount fixed at the time of marriage.

7. The record reveals that except the salary of Rs. 440/- which is admitted by the former husband, there is no other evidence to show that he is possessed of any other properties or that he has any other income. The evidence in this case reveals that the house jointly constructed by the revision petitioner and the divorced wife has been conveyed to the wife for a price. In these circumstances the means of the husband should only be determined as Rs. 440/- per month. In this view of the matter directing him to pay Rs. 12,000/- towards reasonable and fair provision and maintenance during the iddat period appears to be most improper. Under the Act Section 2(b) prescribes the iddat period as 3 lunar months. So for three months the husband should be made to pay a reasonable maintenance. Considering his income at Rs. 440/- per month and considering the

fact that the revision petitioner and the divorced wife alone are the members of the family, it would be just and proper to fix the maintenance at Rs. 150/- per month. So for the period of iddat he is liable to pay Rs. 450/- for three lunar months. As regards the reasonable and fair provision which the husband is bound to make considering his income at Rs. 440/- per month, I feel if a lumpsum amount of Rs. 9,000/- is provided which covers the five years maintenance at the rate of Rs. 150/- per month the ends of justice would be satisfied. So I hold that the revision petitioner is liable to pay to the divorced wife Rs. 9,000/- towards reason able and fair provision. The husband is certainly bound to pay a sum of Rs. 101/- which is the mahr amount.

8. In the result, I modify the order of the trial court as follows :

- (1) The revision petitioner shall pay to the wife the mahr amount of Rs. 101/-.
- (2) The revision petitioner shall pay the divorced wife Rs. 450/- towards maintenance during the iddat period.
- (3) The revision petitioner shall pay Rs. 9,000/- towards reason able and fair provision.

The revision petitioner will have three months time to pay all these amounts giving credit for the amount already deposited as per the interim orders of this Court.

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