

Sainulabdheen Vs. Beena

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Court : Kerala

Decided On : Oct-03-2003

Reported in : 2004CriLJ2351; 2004(1)KLT859

Judge : J.B. Koshy, J.

Acts : Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3, 5 and 6; Code of Criminal Procedure (CrPC) - Sections 125, 127 and 482; Muslim Women (Protection of Rights on Divorce) Rules, 1986 - Rule 4

Appeal No. : Crl. M.C. No. 8406 of 2001

Appellant : Sainulabdheen

Respondent : Beena

Advocate for Def. : S. Sankaran Thampi and; Biji Mathew, Advs. and; P. Deept

Advocate for Pet/Ap. : V.V. Surendran and; P.A. Harish, Advs.

Disposition : Criminal M.C. dismissed

Judgement :

ORDER

J.B. Koshy, J.

1. Whether this Court in the absence of any miscarriage of justice, is bound to interfere in the order of a Magistrate allowing amendment of a petition filed under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (in short 'the Act') in the absence of specific provision for amendment of pleadings in the Code of Criminal Procedure is the question considered in this case.

2. First respondent herein filed a petition under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act. According to her claim, the counter petitioner in the M.C. has promised a mahar of 28 grams of gold ornaments and it was given. At the time of evidence, the counter petitioner (husband) deposed that out of the mahar promised, only 14 grams of gold was given. Contention of the husband was that since the marriage was not consummated, he has obligation only to give 50% of the mahar promised. According to the wife, the marriage was already consummated. She filed a petition to amend the petition stating that out of the 28 grams of gold promised as mahar, only 14 grams were received and averment in the petition that the entire mahar promised was paid was made under a bona fide mistake. The above amendment application was allowed by the Magistrate. That is questioned in this case.

3. Main contention taken up is that under the Code of Criminal Procedure, there is no provision for amendment of pleading and, essentially, the proceedings under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act is a criminal proceedings. Learned counsel relied on the decision of the Full Bench of the court in *Satyabhama v. Ramachandran* (1997 (2) KLT 503 FB). The court held that when Family Court is hearing a petition under Section 125 of the Code of Criminal Procedure in exercise of its jurisdiction under Section 12A, it is a criminal court and the proceedings is a criminal proceedings. The respondent, on the other hand, relied the decision of another Full Bench of this Court in *Balan Nair v. Valsalama* (1986 (1) KLT 1378) where in it was held that the provision of Section 125 is a measure of social legislation and specially enacted to protect women and children. The brooding presence of the constitutional empathy for the weaker sections like women and children must perform interpretation if it has to have a social relevance. The Full Bench held that the court has got power to set aside ex parte order under Section 125 of the Code of Criminal Procedure. The Full Bench in

Balan Nair's case (supra) also held that proceedings under Chapter IX of the Code of Criminal Procedure are essentially of civil nature. The court further held that the fact that provisions occur in the Code of Criminal Procedure and not in the Code of Civil Procedure and the fact that the recalcitrant opposite party who suffers the order of maintenance and does not obey the order may have to go to prison will not change the nature of proceedings from civil to criminal. In Nanda Lal v. Krishna Lal (AIR 1960 SC 882), the Supreme Court held that the provisions under Chapter IX of the Code of Criminal Procedure are essentially civil in nature. The judgment in Balan Nair's case was considered but not followed by the subsequent Full Bench in Sathyabhama's case (supra) in view of the Apex Court decision in S.A.L. Narayanan Row and Anr. v. Ishwarlal Bhagwandas and Anr. (AIR 1965 SC 1818). In that case, the Supreme Court observed as follows:

'..... ..The expression 'civil proceeding' is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed

After considering the above observations of the Supreme Court, the Full Bench observed as follows:

'The law of precedents would compel us to follow Narayan Row's case (supra) in preference to Nanda Lal's case (supra) while deciding the nature of the proceedings exercised by the Family Court under Section 7(2)(a) of the Act. The Supreme Court has clearly stated in Union of India v. K.S. Subramanian (AIR 1976 SC 2433) that when different Benches of the Supreme Court have expressed differing opinions on a point, the proper course for the High Court is to try to find out and follow the opinions expressed by Larger Benches in preference to those

expressed by smaller Benches. As such We would be justified in holding that as regards the nature of the proceedings under Chapter IX Cr. P.C. we are bound by the decision in Narayan Row's case (supra)'.

There, the Full Bench was considering the question whether revision application filed from Family Court is to be considered as a Criminal Revision Petition or Civil Revision Petition. The court held that it should be considered as a Criminal Revision Petition. Even in the first Full Bench decision though observed that it is essentially a civil proceedings, it was held that it was a quasi criminal proceedings. The court only held that the remedy of the person who suffers an ex parte order is not only confined to file an application to set aside the ex parte order before the Magistrate court. It is open to him to challenge it by way of revision application under Section 397 of the Code of Criminal Procedure. The question considered by the earlier Full Bench was that whether a petition to set aside the ex parte order will lie and it is held that it will lie despite absence of specific provisions in the Code of Criminal Procedure.

4. The learned counsel for the respondent-husband submitted that the criminal court has illegally allowed the petition invoking inherent powers. Section 482 gives power to the High Courts only to pass orders using inherent powers and it is settled law that there is no inherent powers for the criminal courts subordinate to the High Court. But, in *Madhavi v. Thupran* (1987 (1) KLT 488 = 1987 KLJ 737), this Court held that even though inherent powers under Section 482 of the Code of Criminal Procedure is only available to the High Court, subordinate Criminal Courts are not powerless to do what is absolutely necessary for dispensation of justice in the absence of enabling provision provided there is no prohibition or no illegality or miscarriage of justice is involved. Both Full Bench decisions cited were concerned with Section 125 of the Code of Criminal Procedure as courts were considering the revision applications filed from that. We are considering a petition arising from the Muslim Women (Protection of Rights on Divorce) Act, 1986. It is a self-contained Code. The Central Government has also framed Muslim Women (Protection of Rights on Divorce) Act, 1986. Rule 4 proviso made specifically for proceeding with the case ex pane and for setting aside the ex pane order. In both the Act and Rules wherever the procedure as per the Code of Criminal Procedure

is to be taken, that is specifically mentioned. Effect of Section 5 of the Act is that operations of Section 125 or 127 of the Act are excluded on the commencement of the Act. Even pending applications under Section 125 or 127 of the Code have to be disposed of in accordance with the provisions of the Act unless separate affidavit or declaration is made as provided under Section 5 as can be seen from the decision reported in All India Muslim Advocates' Forum v. Osman Khan (1990 (1) KLT SN 72). A reading of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 would show that it is a proceeding in quasi civil and quasi criminal matter even though the Magistrate is made as the adjudicating authority. Since impugned order in this case is passed by a Magistrate, in view of the judgment of the Apex Court in Narayan Row's case, such orders can be challenged using provisions of the Code of Criminal Procedure. Even assuming that the proceedings are purely criminal proceedings and the Magistrate has no specific power to amend the pleadings as in the Code of Civil Procedure, I am of opinion that an interference under Section 482 is not warranted to quash the order on the facts of this case. There is no specific prohibition in the Code of Criminal Procedure in allowing amendment of a petition filed under Chapter IX of the Code of Criminal Procedure. In the absence of express prohibition in the Code of Criminal Procedure, being quasi criminal or quasi civil, no interference is needed by using the powers under Section 482 of the Code of Criminal Procedure by this Court, if Magistrate court allows amendment of a petition filed under Section 6 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. This petition is filed under Section 482 of the Code. The High Court need interfere under Section 482 using inherent power only if it is satisfied that there is abuse of the process of the court or to secure the ends of justice. Powers under Section 482 of the Code of Criminal Procedure is sparingly used by this Court. I am of opinion that by allowing the amendment application, no injustice is caused. It cannot be stated that there is abuse of the process of the court or miscarriage of justice. Of course, the Magistrate can decide the matter only on the basis of evidence adduced. There is no necessity to quash the order.

5. Petitioner is free to file counter to the amended application and parties shall be allowed to adduce evidence. For the reasons stated above, I decline to quash the impugned order by using powers under Section 482 of the Code of Criminal

Procedure.

The Crl. M.C. is dismissed.

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