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Court : Gujarat

Decided On : Jul-29-1983

Reported in : (1984)1GLR203

Judge : S.L. Talati, J.

Appellant : Ganchi Umar Mohmad

Respondent : Haluben @ Jivu Abraham and ors.

Judgement :

S.L. Talati, J.

1. This petition is directed against the order passed by the Additional Sessions Judge, Junagadh, in Criminal Revision Application No. 74 of 1980 on 16-6-1981. The facts which gave rise to this Criminal Revision Application may be briefly stated as under.

2. Opponent No. 1 Haluben alias Jivu Abraham residing at Dhoraji had filed Miscellaneous Criminal Application No. 85 of 1975 in the Court of Judicial Magistrate, First Class, Junagadh in September, 1975 for obtaining maintenance for herself and her daughter against the present petitioner under Section 125 of the Criminal Procedure Code. Now the learned Judicial Magistrate, First Class, Junagadh did not grant maintenance to opponent No. 1-wife and her petition was dismissed. However, the maintenance was granted to the daughter and the

amount fixed was Rs. 60/- per month. Both the parties were not satisfied with judgment rendered by the J.M.F.C. and opponent No. 1-wife of the petitioner filed Criminal Revision Application No. 19 of 1977 in the Sessions Court at Junagadh. The applicant-husband also filed Criminal Revision Application No. 26 of 1977 in the Sessions Court at Junagadh. Both the petitions came to be dismissed on 7-9-1978. The result was that the decision rendered by the learned Magistrate in Misc. Criminal Application No. 85 of 1975 became final between the parties as the parties did not thereafter choose to carry the litigation to the High Court. Here it is required to be stated that the learned Magistrate was guided by the fact that opponent No. 1-wife of the petitioner was a Mohmadan lady and she had received Iddat and Mehar amounts, she was not entitled to maintenance. Now what happened thereafter was that the Supreme Court in the case of Tahira Bai v. Ali Hussain Fissalli Chothia and Anr. reported in : 1979 CriLJ151

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.

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 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.

3. In this particular case it appears that the wife in her deposition in the first petition which she had filed admitted that she was given ornaments as per the custom of the community at the time of marriage. Nowhere it is stated as to what those ornaments were or what was their value. She further admitted that at the

time of the marriage Mehar amount was paid to her and that amount was Rs. 450/- . Now that was given at the time of the marriage. Thereafter when there was divorce, for the period of Iddat an amount of Rs. 125/- was sent which was accepted. It is nobody's case that Rs. 450/- which were given at the time of marriage were not spent by her during the period while she remained married and gave birth to a daughter. The value of the ornaments is not known and there is no evidence on record and it was nobody's case that the value of the ornaments was so big and sufficient that that amount could be sufficient for future maintenance. Now thereafter the maintenance amount for a period of Iddat was calculated at the rate of Rs. 30/- per month and ad hoc amount of Rs. 125/- was sent for that period. Thereafter nothing was paid. This was the state of affairs and the whole case was not based on the allegation that the amount which was paid at the time of marriage being Rs. 450/- plus ornaments was sufficient for future maintenance or that the amount of Rs. 125/- paid for Iddat was sufficient for her maintenance for all time to come. But the whole case was that once Mehar and Iddat amounts were paid, according to the personal law of the parties, the petition by a Mohmadan lady was not maintainable. That plea was accepted and, therefore, the wife-opponent No. 2 herein could not get maintenance either in the Court of Judicial Magistrate, First Class, Junagadh or in the Sessions Court at Junagadh and her petition came to be dismissed as well as her revision application. Thereafter the Supreme Court came to the conclusion as stated by me in the above judgment.

4. Another petition was filed in the Court of Judicial Magistrate, First Class, Junagadh being Application No. 66 of 1979. That petition came to be dismissed on 17-5-1980. The matter was carried to the Sessions Court by filing Criminal Revision Application No. 74 of 1980. The learned Sessions Judge considering the judgment of the Supreme Court in A.I.R. 1979 Supreme Court page 362 (supra) came to the conclusion that originally the petitioner-wife was entitled to the maintenance and for the purpose of deciding as to what the quantum should be, he made an order of remand. The husband original opponent challenged that order of remand by filing this petition in this Court.

5. The learned advocate Shri B.C. Patel vehemently urged that the judgments rendered by the Sessions Court in Criminal Revision Applications Nos. 19 of 1977

and 26 of 1977 would be binding to the parties and as those judgments were not challenged by filing any petition in the High Court, those judgments became final and binding between the parties and if any other proposition is laid down by the Supreme Court thereafter, might help the other parties but so far as these parties are concerned they are bound by the judgments originally rendered by the Sessions Court and on this proposition of law he relied upon the case of State of West Bengal v. Hemuni Kumar Bhattacharjee and Ors. reported in : 1966 CriLJ805 . The ratio of that ruling is based on Section 11 of the Civil Procedure Code and it is held as under:

A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or ether procedure like review which the law provides.

Now that was a case where the jurisdiction of the Courts came to be challenged by West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949). The interpretation of Sections 4 and 12 was required to be done in those matters and the real question was as to whether the Chief Presidency Magistrate had jurisdiction to try certain cases or the Special Courts created by West Bengal Criminal Law Amendment Act 1949 had jurisdiction and different orders were passed by the Chief Presidency Magistrate and the Special Judge and also by the High Court on different dates which are not relevant for the purpose of deciding this matter but in paragraph 14 of that judgment the Supreme Court held as under:

(14) Before proceeding with these argument in detail, we can dispose of second contention very shortly. This argument proceeds on a fundamental misconception as it seeks to equate an incorrect decision with a decision rendered without jurisdiction. A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeal to higher tribunals or other procedure like review which the law provides. The learned Judges of the High Court who rendered the decision on 4-4-1952 had ample jurisdiction to decide the case and the fact that their decision was on the merits erroneous as seen from the later judgment of this Court does not render it any the less final and binding between the parties before the Court. There is, thus no

substance in this contention. The decision of the High Court dated 4-4-1952 bound the parties and its legal effect remained the same whether the reasons for the decision be sound or not.

Now therefore, the argument is that the decisions rendered by the Sessions Judge in Criminal Revision Application Nos. 19 of 1977 and 26 of 1977 are final and binding between the parties and now they cannot be challenged. The question, therefore, before me is whether the petitioner by filing a petition in the Court of Judicial Magistrate, First Class, Junagadh being Criminal Revision Application No. 66 of 1979 can challenge the decisions rendered by the Sessions Court which became final and binding between the parties. It is true that in this petition also she has claimed maintenance for herself and she had claimed maintenance in the previous application as well and that petition came to be dismissed. Now for that purpose one has to examine the scheme of the Criminal Procedure Code in particular in regard to giving of maintenance to the persons entitled for that purpose. One has to look to Section 125 of the Criminal Procedure Code which runs as under:

125. Order for maintenance of wives, children and parents: (1) If any person having sufficient means neglects or refuses to maintain - (a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself. a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

The other part of the section is not important for the purpose of this case. Section 126 only lays down the procedure which the Magistrate is required to follow. Thereafter comes Section 127 which also requires to be considered. It deals with alteration in allowance. It runs as under:

127. Alteration in allowance (1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court any order made under Section 125 should be cancelled or varied, he shall cancel the order, or as the case may be, vary the same accordingly.

(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) the woman has after the date of such divorce, re-married, cancel such order as from the date of her remarriage;

(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) in the case where such sum was paid before such order, from the date on which such order was made,

(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;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person to whom a monthly allowance has been ordered to be paid under Section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

8. Now it may here be stated so far as Section 127(3)(b) is concerned, it is already interpreted by the Supreme Court in the judgment reported in A.I.R. 1979 Supreme Court at page 362 (supra). Now, therefore, the real question which is required to be considered is, what is the scope of Section 125 (read with Section 127 of the Criminal Procedure Code) in regard to this particular lady who approached the Court for maintenance. To my mind also there is no doubt that the judgments rendered by the learned Magistrate and the learned Sessions Judge previously were binding between the parties. But the question is what would be the meaning of the word 'binding' and for how much period they would be bound by that decision. If Section 127 was not thereafter all it would mean that that would be binding for all time to come. Section 127 contemplates eventualities where the amount could be increased, where the amount could be decreased, where the amount could be made even to zero if she re-marries. Therefore, that amount is variable as the exigencies change. Now, therefore, the maintenance of any individual does not depend on himself. It can never be so. Nothing can be measured in terms of money. The money is only a means of exchange. When money is only the means of exchange it could never bring the maintenance fully by any particular amount. What a human being requires is food grains, clothes, shelter, medicine etc. For providing these essentials for the existence of a human being the money is only made a media of necessity for the purpose of getting them in the market. There were days when there was no money and yet all these existed for human beings and by barter these things were got. Now things are available in exchange of money only. But as these things are essential and necessities of life, the requirements change in terms of money because prices

fluctuate, they might increase or decrease. The other circumstances with which we are not concerned are that a woman might re-marry. The other circumstance would be that the husband may become rich, a wealthy person and a woman is required to stay according to their status. The other circumstance would be that the husband may become poor. Now that, therefore, the judgment could be binding only for a particular period for which it was rendered. It could never bind the parties for all time to come. Section 11 of the Civil Procedure Code binds the parties in an entirely different way. That is for the purpose of civil litigation. They are for the purpose of different rights and different issues which are substantially tried and determined in a suit. They relate to certain transactions. The maintenance is not a transaction. Section 11 can never be equal or brought into question, in maintenance proceedings no one even can argue that the res-judicata as contemplated in Section 11 would apply to the criminal proceedings. What is argued is that the principles of res-judicata would apply. Now when the principles of res-judicata are required to be applied they are required to be applied with discretion, caution and taking into consideration various factors and circumstances on record. So far as Criminal Procedure Code is concerned, there is Section 300 where the principles of res-judicata are brought into picture and Section 300 reads as under:

300. Person once convicted or acquitted not to be tried for same offence: (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Sub-section (1) of Section 221, or for which he might have been convicted under Sub-section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under Sub-section (1) of Section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under Section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or any other Court to which the first-mentioned Court is subordinate.

(6) Nothing in this section shall effect the provisions of Section 26 of the General Clauses Act, 1897 (10 of 1897) or of Section 188 of this Code.

Explanation.- The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

9. Now, therefore, it cannot be suggested for a moment that Section 300 would apply to the proceedings under Section 125. In a proceeding under Section 125 of the Criminal Procedure Code the person who is a petitioner is not the complainant. The person who is an opponent is not an accused person. He has not committed any offence. He is not being tried by any offence. He is neither being charged nor convicted nor acquitted of any offence. Now that, therefore, the proceedings under Section 125 though they appear to be in Criminal Procedure Code the opponent in that matter is never treated as an accused person. He is the opponent. He is entitled to file a written statement. He may give evidence on oath as an ordinary person as if he were a defendant in a civil matter. Therefore, it is semi-civil matter which is tried by the criminal Court. The purpose is that before the parties go to a civil court and get an appropriate amount which may be even more than Rs. 500/- they do not starve and in the meantime they get some amount, that amount being

not more than Rs. 500/- The persons may be entitled to more than Rs. 500/- They, therefore, may have to approach the civil court. But as the civil court might require more time to dispose of the matter a speedy remedy is provided by the Criminal Procedure Code. Also the power is vested in the Magistrate that during the period the civil court decides the matter he awards a sum which is not above Rs. 500/- so that during that period the person does not starve. That is the purpose of Section 125 of the Criminal Procedure Code. If this provision which is embodied in the Criminal Procedure Code is equated with the Criminal trial the whole purpose would be frustrated and, therefore, Section 300 would not apply in any case to the proceedings under Section 125. Now, therefore, when Section 300 of the Criminal Procedure Code does not apply and when Section 11 of the Civil Procedure Code does not apply and only principles of res-judicala are required to be applied, then what is required to be observed is that the judgment rendered in Criminal Revision Application Nos. 19 of 1977 and 26 of 1977 would be binding between the parties during the period that litigation was continued and the petitioner who filed the petition in the year 1979 would never get maintenance prior to the date of presenting that application because for the period that she did not apply thereafter that period has gone and the judgment became binding between the parties. To hold it otherwise would mean that the cause of action for maintenance does not arise every month or that Section 127 of the Criminal Procedure Code did not exist in the Criminal Procedure Code. Such a view is not possible and it can never be taken by this Court as it would nullify the object for which the whole provision is made. Under these circumstances I feel that the order passed by the learned Additional Sessions Judge is absolutely correct.

In the result this petition is dismissed and now the learned Judicial Magistrate First Class shall proceed with the petition which is pending before him from 1979 and he would try to dispose it of as expeditiously as possible.