

Mst. Salma Vs. Mohammed Iqbal

Mst. Salma Vs. Mohammed Iqbal

SooperKanoon Citation : sooperkanoon.com/770224

Court : Rajasthan

Decided On : Apr-08-1986

Reported in : 1986WLN(UC)711

Judge : Kishore Singh Lodha, J.

Appeal No. : S.B. Criminal Misc. Application No. 15 of 1986

Appellant : Mst. Salma

Respondent : Mohammed Iqbal

Disposition : Application allowed

Judgement :

Kishore Singh Lodha, J.

1. This is a wife's application under Section 482, Cr. PC against the order of the learned Addl. Sessions Judge, Bikaner, dated 9-10-1985 by which he upheld the order of the Munsif and Judicial Magistrate, Bikaner, refusing maintenance to her although by the same order the learned Addl. Sessions Judge had partly allowed the revision and granted a maintenance of Rs. 80/- p.m. to the son.

2. The petitioner Smt. Salma was married to the non-petitioner Mohammed Iqbal in May, 1978 and a son was born out of this wedlock in July, 1979. The non-petitioner had gone to South Arabia in June, 1979 and in his absence his parents

did not look after the petitioner and therefore, she went away to her parent's house. Even after the return of the non-petitioner from South Arabia, he did not care to call her back and he did not provide for her maintenance and thus neglected her. An application under Section 125 Cr. PC was earlier filed in November, 1980 where upon the parties compromised and the non-petitioner took back the petitioner for sometime. Even there after the parents of the non-petitioner again in his absence turned her out in September, 1982. The non-petitioner who was at Riyadh came back to Bikaner but did not call the petitioner nor provided for her maintenance and thus again neglected her. The petitioner was thereupon compelled to file the present application for maintenance for herself and her child. She alleged that the non-petitioner was working at Riyadh and was earning about Rs. 3,000/- p.m. She further alleged that she herself was not earning and had no source of livelihood. She claimed Rs. 500/- for maintenance of herself and her child. The non petitioner denied the allegation of neglect although he admitted the marriage and the birth of the son. He further alleged that he had already divorced the petitioner and that she was free to go in a second marriage. He contended that the petitioner was capable of earning by tailoring and was not entitled to any maintenance. After framing the necessary issues and taking the evidence of the parties, the learned Magistrate rejected the application mainly on the ground that as the petitioner did not come in the witness box, it did not stand proved that she was unable to maintain herself. Aggrieved of this, the petitioner filed a revision before the learned Addl. Sessions Judge, who partly allowed the same and awarded a maintenance of Rs. 80/- p.m. so far as the child was concerned but refused to award any maintenance to the wife solely on the ground that she did not come in the witness box to establish that she was unable to maintain herself. Aggrieved of the refusal of maintenance to herself, the petitioner has come up before this Court.

3. I have heard the learned Counsel for the parties and have gone through the record.

4. It is urged by the learned Counsel for the petitioner that the learned Addl. Sessions Judge has most arbitrarily refused to award any maintenance to the petitioner, solely on the ground that she did not enter the witness box and has

brushed aside the other relevant evidence only on the ground that when the petitioner herself has not entered the witness box, the other evidence cannot be relied upon. He urges that this decision of the learned Addl. Sessions Judge should be set aside and either the case should be remanded for the evidence of the petitioner herself if deemed necessary otherwise on the material on record itself, she may be awarded reasonable maintenance. On the other hand, the learned Counsel for the non-petitioner has urged that the order of the learned Addl. Sessions Judge is correct and no interference can be made with it in exercise of the powers under Section 482,Cr.PC.

5. As already stated above, both the courts below had refused maintenance to the wife solely on the ground that she has not entered the witness box. Therefore, the main question, which fell for determination was whether on that account alone, she should have been disentitled to any maintenance. In this connection, it would be relevant to mention that as early as 11-4-1983 while the petitioner's evidence was to begin, the petitioner had moved an application for issuing a commission to examine her on the ground that she was a Pardanashin lady and was not in position to appear before the Court as in the community, this was looked down upon. This application was rejected by the learned Magistrate. He was of the view that the petitioner was not such a Pardanashin lady as could not have come to the court. It is true that despite the rejection of this application, the petitioner did not enter the witness box. However, she produced her father AW 1 Abdul Salam and her uncle Mohammed Yasin. AW 1 Abdul Salam clearly stated that Salma had no means of livelihood and had no earnings. He also denied that Salma knew tailorings. In rebuttal, the non-petitioner Mohd. Iqbal examined himself and also produced two other witness NAW 2 Nek Mohd, and NAW 3 Abdul Hakim. Both the courts below as already stated above, refused to rely on the statements of the petitioner's father merely on the ground that the petitioner herself had not entered the witness box and they did not at all apply their mind to the credibility of the witness AW 1. They drew an inference against the petitioner, as she did not enter the witness box, that she was capable of earning and, therefore, she was not entitled to any maintenance. Now to my mind this approach to the case is wholly erroneous and the reasons put forward by the two courts below for not relying on the evidence of AW 1 Abdul Salam are wholly fanciful. No doubt the Court was

free to raise a presumption against the petitioner for her not entering the witness box but before doing that the Court was bound to apply its mind to the fact as to in what circumstances, she did not enter the witness box. Not only this while raising the presumption against the petitioner, the courts were bound to examine the other evidence on its face value and could not have discarded the whole evidence merely on the ground that the petitioner did not enter the witness box. If in the absence of the petitioner's own evidence, the other evidence produced by the petitioner by itself was reliable and capable of establishing the required facts, the courts could not have thrown out the evidence merely on the ground that the petitioner herself did not enter the witness box. The learned Addl. Sessions Judge does not at all refer to the fact that the petitioner did apply for commission to examine her and thus she had shown her willingness to give her own evidence. It is true that the commission had been refused by the trial court and perhaps this is also true that the refusal of the commission was not made a ground of attack before the learned Addl. Sessions Judge but that does not absolve the learned Addl. Sessions Judge from his duty to examine the record properly and to find out in what circumstances, the petitioner did not enter the witness box. I am of the opinion that when the petitioner had applied for commission and the prayer was refused, it would have certainly been better if she had entered the witness box in the circumstances if she did not enter the witness box on account of the feeling still prevalent in some sections of the society, it was not such matter as would have given rise to such a strong presumption against her so that the other evidence could have been discarded merely on this ground.

6. This brings me to the evidence of AW 1 Abdul Salam. As already stated above this witness has clearly stated that the petitioner has no source of income or means of livelihood He is the father of the petitioner. The petitioner is admittedly living with him. He is, therefore, expected to be fully conversant with the circumstances of the petitioner and when he has stated on oath that the petitioner has no source of earning or means of livelihood, there was no reason to discard his evidence or dis-believe him. Nothing has been brought out in the cross examination of this witness to discredit him and, therefore, when in these circumstances, the two courts below threw out his evidence, it can only be said that the courts discarded this evidence on a most flimsy and fanciful ground. I am

not oblivious of the fact that the powers of this Court under Section 482 Cr. PC are circumscribed but all the same, these powers are meant for the purpose of undoing the wrong, which has been done by the courts below causing hardship to the parties or resulting into mis-carriage of justice. The learned Addl. Sessions Judge himself awarded maintenance to the child and in doing so, he has observed in para 10 of the order that the petitioner has no means of livelihood and still while considering the case of the petitioner herself, he has discarded the evidence merely on the ground that she has not entered the witness box. In these circumstances, I feel called upon to exercise my powers under Section 482 Cr.PC in the interest of justice.

7. The evidence of AW 1 Abdul Salam, therefore, in my opinion, clearly establishes that the petitioner has no means of livelihood. Now the question is whether this evidence has been rebutted by the non-petitioner and I am clearly of the opinion that the petitioner's evidence in this respect is not at all sufficient to rebut this evidence. On the other hand, it may be said that there is no evidence what so ever in rebuttal inasmuch as what ever evidence has been given by the non-petitioner and his witnesses NAW 2 Nek Mohammed and NAW 3 Abdul Hakim, is no evidence in the eye of law. These witnesses have no personal knowledge and they only give hearsay evidence as would be clear from the statements of these three witnesses themselves. NAW 1 the non-petitioner Mohammed Iqbal in the last line of his examination-in-chief merely states lyek flykbZ dlhnkdjh dk dke djrh gS He, however, does not say that by doing this, she earns. In the crossexamination, he has failed to give the details of Salma's carrying on tailoring etc. and he says--dlhnk fudkydj fdls fn;k mldk uke irk ugh gS A Therefore, his mere statement that she knows tailoring, does not show that she earning out of tailoring. N.A.W. 2 Nek Mohammed in examination-in-chief, of course, states that Salma used to do tailoring work at his house (at the witness's house) but in the cross-examination, he states

lyek viuh bPNk ls gh djrh Fkh FkSfy;ks dks csprh ugh Fkh vius ikl j[krh Fkh A gekjs ?kj nks pkj FkSyh cukbZ Fkh A

This clearly goes to show that she used to do some tailoring work merely out of courtsey and not for earning and she did not use to sell any tailored articles. His evidence does not at all show that she earned by tailoring. In so far as N.A.W. 3 is concerned, he clearly admitted in the cross-examination that he had only heard from the women of the locality that Salma used to do tailoring work and he had no personal knowledge in this respect. In these circumstances, this evidence is wholly inadequate to rebut the evidence of Abdul Salam A.W. 1 and the conclusion is inevitable that Salma has no source of income or means of livelihood.

8. The learned Addl. Sessions Judge has awarded maintenance to the son @ Rs. 80/- p.m. It is true that he has not definitely pointed out what the income of the petitioner is but the fact remains that the non-petitioner is a young boy and he admits that he had been working as a labourer. He had also admitted that earlier he had gone to South Arabia and Riyad for earning. Thus he is capable of earning and the minimum wages payable these days can certainly be taken judicial note of. At this place, it can be assumed that he has a monthly income of about Rs. 300/-. Taking into consideration the amount awarded to the child, I am of the opinion that the maintenance of Rs. 80/- p.m. to the petitioner also would be proper.

9. I, therefore, allow this application, set aside order of the two Courts below and direct that the petitioner shall be entitled to maintenance @Rs. 80/- p.m. from the date of the application.