

In Re: Mohamed Rahimullah and anr.

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Court : Chennai

Decided On : Nov-15-1946

Reported in : AIR1947Mad461; (1947)1MLJ70

Appellant : In Re: Mohamed Rahimullah and anr.

Judgement :

ORDER

Yahya Ali, J.

1. This is a reference by the Chief Presidency Magistrate, under Section 432 of the Code of Criminal Procedure, made in the following circumstances. Kurshid Begum filed an application under Section 488 of the Code of Criminal Procedure against her husband Mohamed Rahimulla for maintenance in M.P. No. 221 of 1945. Maintenance was awarded. On 5th January, 1946, Mohamed Rahimulla filed M.P. No. 6 of 1946, alleging that he had divorced his wife and praying for the cancellation of the order of maintenance made in M.P. No. 221 of 1945, on the ground that she had ceased to be his wife. As it was admitted by Mohamed Rahimulla before the Court that he had not paid the amount of maintenance for the period of Iddat, his application for the cancellation of the order of maintenance was rejected. Against the order of rejection Mohamed Rahimullah filed Crl. R.P. No. 193 of 1946 (Crl. R.C. No. 199 of 1946) in this Court which was dismissed by Kuppuswami Ayyar, J. In dismissing the application the learned Judge followed the decision of this Court in Muhammad Anser Sahib v. Zubeida Bee (1933) M.W.N.

Cri. 121 where it was laid down that divorce effects not a change in circumstances but a change in the status. After dismissal of the Criminal Revision Petition here, Mohamed Rahimulla paid Kurshid Begum the amount of maintenance for the period of Iddat and communicated to her in writing the fact of his having divorced her irrevocably in conformity with the requirements of the Mahomedan law. Based upon these averments, he filed a fresh application M.P. No. 332 of 1946 in the Court of the Chief Presidency Magistrate, contending that the divorce had become irrevocable, that Kurshid Begum had ceased to be his wife and that therefore the order of maintenance passed in M.P. No. 221 of 1945 should be cancelled. The learned Chief Presidency Magistrate in dealing with this application felt confronted with a difficulty arising out of the order of this Court in the Criminal Revision Petition. Rahimullah had, according to his averments, absolutely divorced his wife, so that the relationship of husband and wife between them had ceased effectively. He had paid the maintenance for the period of Iddat and had conformed to all the requirements of the personal law applicable to the parties and had also duly communicated the fact of the divorce to his wife. But the order of this Court in Cri. R.C. No. 199 of 1946 decided by Kuppaswami Ayyar, J., had, according to the Magistrate, indicated that it was not a case in which the Magistrate could pass an order of cancellation under Section 488 of the Code of Criminal Procedure, since the divorce had not effected a change in the circumstances within the meaning of Section 489. The Chief Presidency Magistrate has therefore referred to this Court the question of law arising in the matter with particular reference to the ruling given in the Criminal Revision Petition. As Kurshid Begum was not represented, I appointed Mr. B. Pocker as *amicus curiae* and he has given me valuable assistance.

2. It is assumed for the purpose of this reference that there is a valid and irrevocable divorce in force between the parties which has been communicated to the wife in the manner required under the law and that the maintenance for the period of Iddat after the date of the divorce was duly paid. These are facts which the Magistrate will have to find upon the evidence before giving effect to the decision on the question of law raised by him.

3. The question that arises for consideration is whether when a valid and irrevocable divorce has been given by a Mahomedan husband to his wife in conformity with the Mahomedan law and he has also paid the Iddat maintenance, he is still bound to continue to pay the maintenance awarded to his wife under Section 488 of the Code of Criminal Procedure when the marriage is not subsisting between them ; in other words when the marital tie has been completely and effectively severed, whether the divorced wife can still claim maintenance on the ground that the divorce does not operate as a change in circumstances within the meaning of Section 489 but is in the nature of a change in status.

4. The answer to this question is straight and simple. The foundation upon which Section 488 and Section 489 of the Criminal Procedure Code rest, so far as granting of maintenance by the husband to the wife is concerned, is that the relationship of husband and wife subsists between them. When that relationship is lawfully dissolved and there is no marital tie whatsoever subsisting in fact or in law between them, it is hard to see either in reason or upon any canon of justice or even upon the language of Sections 488 and 489 how the husband can be directed to continue to maintain his divorced wife.

5. The proposition that an allowance ordered to be paid by a man to his wife for the sole reason that she is his wife ceased to be payable when she ceases to be his wife whether by death or divorce is, as remarked by the Nagpur High Court in a decision that I shall presently refer to, not even open to discussion. In regard to that position all the High Courts in India are agreed, the only dissentient being Knox, J., who was in a minority in the Full Bench ruling of the Allahabad High Court in *Shah Abu Ilyas v. Ulfat Bibi* I.L.R. (1896) All.

50. The further proposition that the allowance given to a wife should continue to be paid until the termination of Iddat is included in the proposition that it ceases on her divorce. It is no more than saying that it ceases when the divorce is complete and not before. The only doubt that was raised at one time in the Allahabad High Court was whether the allowance having been one granted under Section 488 of the Criminal Procedure Code by the Magistrate, he could make any change in it either by way of increasing or decreasing it or discontinuing it except under the

condition mentioned either in Sub-sections

(4) and

(5) of Section 488 or in Section

489. In Sub-section

(4) a wife is not entitled to receive an allowance from her husband if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. Under Sub-section

(5) if it is proved by the husband after such an order has been passed that she is living in adultery or that without sufficient reason she refuses to live with him or that they are living separately by mutual consent, the Magistrate shall cancel the order. None of these provisions applies to the present case. Section 489 provides that on proof of a change in the circumstances of any person receiving under Section 488 a monthly allowance or of any person ordered to pay the allowance to his wife the Magistrate may make such alteration in it as he thinks fit subject to the provision that if he increases the allowance it should not exceed the maximum of Rs. 100 a month. We are not concerned with Sub-section

(2) of that section. Section 490 is the provision for the enforcement of the order of maintenance. In the matter of the Petition of Din Muhammad I.L.R. (1882) All. 226 Mahmood, J., while construing the provisions in the then Code corresponding to the present Section 489 held that the alteration in the allowance contemplated therein only refers to a power to alter the amount and not to a total discontinuance thereof. In taking this view, the learned Judge was following the ruling in *Abdur Raheman v. Sakhina* I.L.R. (1879) Cal. 558 which was a decision under the Presidency Magistrate's Act of Bengal. The learned Judge, however, for other reasons that I shall presently describe held that in the case of a divorce by a Mahomedan husband of his wife, the Magistrate may refuse to enforce the order under Section

490. The view of Mahmood, J., was followed by a Full Bench of the same High Court in *Shah Abu Ilyas v. Ulfat Bibi* I.L.R. (1896) All. 50 where Aikman, J., who

delivered the leading judgment, adopted the reasoning of Mahmood, J., and said:

The 'change in circumstances' referred to in Section 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail the stoppage of the allowance.

These dicta would appear to be the basis of the two decisions of Burn, J., in *Muhammad Anser Sahib v. Zubeida Bee* (1933) M.W.N. Cri. 121 and of Kuppaswami Ayyar, J., in *Mohamed Rahimulla v. Khurshid Begum* Crl. R.C. No. 199 of 1946. It might however be noted that this restricted view of the interpretation of the expression 'change in the circumstances' in Section 489 has not been adopted in any other Court. The entire position has been exhaustively reviewed by Halifax, A.J.C., in *Emperor v. Shaikh Daud* A.I.R. 1921 Nag. 7 where the learned Judge after referring to the decision of the High Court of Calcutta in *Nepoor Aurut v. Jurai* (1873) 19 W.R. 73 and of the Chief Court of the Punjab in *Mt. Baji v. Nawab Khan* (1894) 21 P.R. Cri. 1894 pointed out that there was no valid ground whatever for excluding legal or personal status from the circumstances in which a change would make Section 489 applicable and for including in them practically nothing but pecuniary circumstances as was done by the Allahabad High Court. The only reason advanced by Mahmood, J., in *In the matter of the Petition of Din Muhammad* I.L.R. (1882) All. 226 was that the expression 'change in the circumstances' was preceded by the word 'wife' and followed by a limitation as to the amount of the monthly allowance and hence it indicated that it excluded the idea of total discontinuance of the allowance. The learned Judge of the Nagpur High Court commented on that reasoning in the following terms:

I am unable in the first place to see what the position of the words, 'wife or child' has to do with the question. They are merely a part of the description of one of the two classes of persons in whose circumstances a change would empower the Magistrate to make an alteration in the allowance. They are indeed otiose and might easily have been omitted. As to the limitation of the amount, that is merely a

maximum, and to say that because of that limitation the alteration could not be to nothing would be to say that because of the same limitation in Section 488 the Magistrate could not refuse to give an allowance on proof that the applicant was not the wife or child of the non-applicant.

He observed that a valid divorce is such a change in the circumstances as is contemplated by Section 489, and that the alteration in the amount of the order could be a reduction of it to nothing and that is a necessary consequence of the view taken that a wife ceases entirely to be entitled to an allowance previously ordered when she is completely and validly divorced. The judgment concludes with this observation:

I hold therefore that when a wife, whose husband has been ordered to pay her an allowance under Section 488, Criminal Procedure Code, is proved to have been completely and validly divorced a Magistrate is not only bound to refuse to enforce the order under Section 490 but is also empowered to alter the amount payable under it to nothing under Section 489, that is to say, he can set aside the order.

With this conclusion and with the reasoning of the learned Judge I am, with respect, in entire agreement.

6. Apart however from the interpretation of the expression ' change in the circumstances ' in Section 489, all Courts including the Allahabad High Court have taken uniformly the view that if the conjugal tie is proved to have been severed, barring the liability to pay maintenance during the period of Iddat, the wife ceases to have any right to enforce against the husband any order for maintenance made in her favour under Section 482. In the case already cited, In the matter of the Petition of Din Muhammad I.L.R. (1882) All. 226 Mahmood, J., quoted the observations in *Abdur Rahman v. Sakhina* I.L.R. (1879) Cal. 558 to the following effect:

It is as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed.

If the plea of divorce is raised before him by the husband, the Magistrate must determine on such evidence as may be before him whether there has or has not been a legally valid divorce.

If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution.

The ratio decidendi will be found in the following passage:

The whole of Chapter XLI of the Criminal Procedure Code so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. ' When and in what manner a cessation of the conjugal relation takes place is a question which, ex necessitate rei, must be determined according to the personal law to which the parties concerned are subject....

All that the Magistrate has to determine in a case of this kind is, whether the woman claiming maintenance is still the wife of the person against whom she advances such a claim. If the question is determined in the affirmative, the order of maintenance must continue to be operative. On the other hand, if it is found that by the effect of some rule of the personal law of the parties concerned, the conjugal relation has absolutely ceased to exist, the order of maintenance, ipso facto become functus officio and can no longer be enforced.

Knox, J., in *Mahaburan v. Fakir Baksh* I.L.R. (1893) All. 143 had dissented from this view. But it is unnecessary to discuss that ruling because of its having been overruled by a Full Bench of that Court in *Shah Abu Ilyas v. Ulfat Bibi* I.L.R. (1896) All. 50 to which Knox, J., who dissented from the majority view, was a party. The majority decision was in conformity with the dicta of Mahmood, J., just referred to. The judgment of the majority was that when a plea of divorce is put forward the Magistrate is not only competent, but it is his imperative duty, to inquire into the plea, and determine on such evidence as may be adduced before him whether the

relation of husband and wife subsists between the person against whom an order is asked for and the person making the application. All the previous cases bearing upon the question were fully reviewed and overruling *Mahaburan v. Fakir Baksh* I.L.R. (1893) All. 143 Aikman, J., pointed out that the view of Knox, J., was opposed not only to the decision of the Allahabad High Court, but to the decisions of the Calcutta, Bombay and Madras High Courts and the Chief Court of the Punjab and had not been adopted by any authority save Knox, J., himself. Aikman, J., said:

It has been repeatedly held that the Legislature in enacting Section 488 of the Criminal Procedure Code did not intend to interfere with the right of divorce.

It cannot, in my opinion, be disputed that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under Section 488 be ordered to provide for the woman's support and I hold that it is only on the supposition of the continued existence of that relationship that the allowance can continue.

7. In another place it was pointed out that under Section 490 of the Code of Criminal Procedure the question for the Magistrate to consider is not merely whether he has jurisdiction over the person affected by the order, and whether he is satisfied as to the identity of the parties. It was observed:

A most material question which in my opinion it is incumbent on him to consider is whether the order to which it is sought to give effect is still in force, or whether it has become 'functus officio'.

This view has been taken in a long line of cases *Abdur Raheman v. Sakhina* I.L.R. (1879) Cal. 558. In the matter of the Petition of Din Muhammad I.L.R. (1882) All. 226. In *re Kasam Pirbhai* (1871) 8 Bom. H.C.R. 95 In *re Abdul Ali Ismailji* I.L.R. (1882) Bom. 180 *Mahomed Abid Ali Kumar Kadar v. Luddan Sahiba* I.L.R. (1886) Cal. 276 and a number of cases of the Punjab High Court as also in the latest decision of the Calcutta High Court in *Ahmad Kasim Molla v. Khatun Bibi* I.L.R. (1931) Cal. 833.

8. That this principle is of still wider application and the doctrine, that when the basic relationship of husband and wife terminates in any lawful manner the Magistrate has not only the power under the Code of Criminal Procedure to alter the amount but to cancel the order of maintenance made by him is also applicable to the case of Hindus has been held by Krishnan, J., in *Meenatchi Ammal v. Karuppanna Pillai* (1924) 48 M.L.J. 183 : I.L.R. 48 Mad. 503. The learned Judge said:

It was contended that under Section 489, the Magistrate could not altogether cancel the order of maintenance but could only alter it or reduce it. I do not think the word 'alter' is used in any such restricted meaning. The reduction of the maintenance to nothing would also come within the meaning of the word 'alteration'.

It only remains now to examine the two decisions of Burn, J., and Kuppaswami Ayyar, J., adverted to in the reference by the Chief Presidency Magistrate. With regard to the ruling of Burn, J., it will have to be remembered that the question that arose in that case was whether during the period of Iddat the maintenance could be enhanced as was done by the Magistrate, and since for the purpose of such enhancement a divorce cannot be deemed to be a change in the circumstances, the learned Judge held that the order of the Presidency Magistrate was without jurisdiction and set it aside. The point to be noted is that the order granting enhancement of the maintenance was set aside and the wife's petition was rejected. With reference to the second decision again, the circumstances were at that stage somewhat different. Divorce had not been satisfactorily proved and admittedly maintenance for the period of Iddat had not been paid. The particular question whether by reason of any irrevocable divorce the order made under Section 488 should stand vacated on account of cessation of the marital tie was not in question in the petition as it has been directly raised in this proceeding.

9. I may incidentally refer to a recent ruling of Kuppaswami Aiyar, J., in *Abdul Khader v. Azeza Bee* (1944.) 1 M.L.J. 17 where under identical circumstances the learned Judge held that the wife will not be entitled to maintenance after the date when the factum of her having been divorced was duly communicated to her.

He said:

Whatever it be, there is the definite admission of P.W. 1 that she (the wife) came to know of the thalaknama from the Sub-Inspector before she was examined, which was on 5th May, 1943. So at any rate from the date on which the Sub-Inspector informed her the divorce had come into effect. The wife will therefore not be entitled to maintenance at any rate after 5th May, 1943, as she came to know of the thalak before that date.

I hold, therefore, in agreement with the view expressed by the Nagpur High Court in the case cited above, which is the view consistently obtaining in all the Courts, that in circumstances such as those which are assumed to exist in the present case the Magistrate is not only bound to refuse to enforce the order under Section 490 of the Code of Criminal Procedure but is also empowered under Section 489 of the Code of Criminal Procedure to alter the amount payable under it to nothing, that is to say, by a combined effect of both these provisions he is competent to set aside the order. The records in the case will be returned to the Magistrate with a copy of this order.

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