

Mohd. Abbas Vs. Mst. Ejazan and Others

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Court : Allahabad

Decided On : Jul-15-2011

Judge : Sudhir Agarwal

Appeal No. : WRIT- C No. 13058 of 1997

Appellant : Mohd. Abbas

Respondent : Mst. Ejazan and Others

Judgement :

SUDHIR AGARWAL, J.

1. Heard learned counsel for petitioner and perused the record.
2. It is stated that petitioner and respondent no. 1 were married on 7.6.1972 at village Aurangabad, District Meerut. The marriage was solemnized according to law of Shariyat. Respondent no. 1, however, was divorced by petitioner on 23.3.1979. Thereafter, she filed an application no. 46/11 of 1986 under Section 125 Cr.P.C. claiming that 12 years before she was given talaq by petitioner and thus she should be allowed maintenance at the rate of Rs. 500/- per month. The said application was later on transferred to Family Court and was dismissed on 4.9.1991 on the ground that respondent no. 1 being a divorced lady, the said application initially filed before Munsif Magistrate was not maintainable.

3. Respondent no. 1, thereafter, filed Original Suit No. 696 of 1980 claiming recovery of Nan Nafqa (maintenance) for the past eight months at the rate of Rs. 100/- per month, her Mehar Rs. 32.50 and price of her articles of Jahez valued at the rate of Rs. 6447/-. The suit was initially partly decreed on 8.1.1986 for Rs. 332.50 which included a sum of Rs. 32.50 towards mehar and 300/- towards maintenance of Iddat period of three months. Rest of suit was dismissed.

4. Respondent no. 1 preferred appeal no. 50 of 1987 which was decided on 2.9.1987 and matter was remanded to Trial Court who thereafter, decreed the suit on 7.1.1993 directing for payment of Rs. 5304/- as price of articles of Jehaz. It also observed that plaintiff's suit for mehar and maintenance has already been decreed and that shall form part of the judgment dated 7.1.1993.

5. It is said that petitioner paid the aforesaid amount to respondent no. 1 and the decree was satisfied on 28.10.1994. Thereafter respondent no. 1 filed an application no. 6048/9 of 1994 on 8.8.1994 under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "1986 Act") claiming that she was married to petitioner and after eight years of marriage, she was given divorce. Since financial condition of her family members (parents) is bad and she has no source of income, hence, she be awarded maintenance at the rate of Rs. 3000/- per month for four months and ten days after talaq and Rs. 50,000/- for maintenance of rest of her life.

6. Petitioner filed objection dated 27.10.1994 stating that all the maintenance amount etc. has already been paid to respondent no. 1 pursuant to Original Suit No. 696 of 1980 and, therefore, the claim made afresh in the petition under Section 3 of 1986 Act is not maintainable. He also raised a preliminary objection that 1986 Act is applicable to cases where divorce has taken place after enactment of 1986 Act and application under Section 3 of the said Act was not maintainable in the present case.

7. The Judicial Magistrate-III considered the question of maintainability of petition whether 1986 Act is retrospective or not. By order dated 9.8.1995, relying on a decision of Gujrat High Court in AIR 1988 Gujarat 141 Arab Ahmadiya Abdullah and others Vs. A.B. Mohmuna Saiyad Bhai he held that application is maintainable

and, accordingly, objection of petitioner to this aspect was rejected. Thereafter, petitioner preferred a revision which has been dismissed by the Court of VII Addl. Sessions Judge holding that the said revision is not maintainable.

8. Learned counsel for petitioner contended, since the Magistrate is a Judicial Officer under the provisions of Criminal Procedure Code, therefore, revision under Section 397 Cr.P.C. is maintainable.

9. This matter is pending before this Court for the last 14 years and the application filed under Section 3 of 1986 Act by respondent no. 1 is pending in the Court of Judicial Magistrate for the last 16 years. In the circumstances, the question whether revision before the District Judge was maintainable or not should not be and cannot be a ground to obstruct this Court from deciding the basis issue whether 1986 Act would apply to a Muslim women divorced before enactment of the said Act. This would answer petitioner's very basic question regarding maintainability of petition whereafter, in case, this issue is answered in favour of respondent no. 1, the proceedings under Section 3 pending before Judicial Magistrate would proceed and reach finality in one or the other way.

10. In order to consider the question whether 1986 Act is applicable only to the Muslim women who are divorced after enforcement of the Act, it would be appropriate to consider firstly that in the entire Act, there is nothing to show that the Act would be applicable only to those cases where Muslim woman is divorced after enforcement of the said Act. The word "divorced woman" have been defined in Section 2 (a) of the 1986 Act which reads as under:

"divorced woman" means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim law;"

11. The Act, admittedly, came into force on 19.5.1986. Section 7 provides for transitional provisions and reads as under:

"7. Transitional provisions. - Every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure, 1973 pending before

a Magistrate on the commencement of this Act, shall notwithstanding anything contained in that Code and subjected to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.”

12. A perusal of Section 7 makes clear that even those cases where an application under Section 125 or 127 Cr.P.C. was pending before a Magistrate on the date of commencement of 1986 Act, such application shall also be required to be disposed of by Magistrate in accordance with provisions of 1986 Act, meaning thereby, an application which relates to a divorced woman who has been divorced before commencement of 1986 Act would be covered by it. In fact, provisions of Section 125 Cr.P.C. have not been completely done away by enacting 1986 Act but an option has been given in case where the application is filed under Section 3 of 1986 Act. Section 5 thereof says that on the date of first hearing of application, the divorced woman and her former husband, if declare by an affidavit in writing, either jointly or separately, that they would prefer to be governed by the provisions of Section 125 to 128 of the Code of Criminal Procedure, 1973, the matter may be disposed of by Magistrate accordingly, meaning thereby Section 125 Cr.P.C. has been made optional and not completely done away.

13. Be that as it may, from a cumulative reading of various provisions of 1986 Act, I have no manner of doubt that it would apply to a Muslim woman who has been divorced even before enforcement of 1986 Act. The very basic objection raised by petitioner regarding maintainability of petition under Section 3 of 1986 Act before Judicial Magistrate stands negatived and, therefore, I have no manner of doubt that the Magistrate has rightly held that the application is maintainable.

14. So far as merits of issue are concerned, in my view, at the first instance, the same should be decided by the Magistrate and, therefore, I am refraining from making any observation in this regard.

15. In view of above, writ petition is finally disposed of holding that application under Section 3 of 1986 Act filed by respondent no. 1 before Judicial Magistrate is maintainable.

16. Magistrate is directed to proceed with the aforesaid matter, and, since it is already pending for the last almost 16 years, decide the same in accordance with law after hearing the parties expeditiously, but not later than six months from the date of production of a certified copy of this order.

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