
(1993) 03 RAJ CK 0037
In the Rajasthan High Court
Case No : Criminal Appeal No. 104 of 1990

Mst. Jameela

APPELLANT

Vs

Alimuddin

RESPONDENT

Date of Decision : 22-03-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127, 128
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 5, 7

Citation : (1993) CriLJ 2815 : (1993) 2 DMC 353 : (1993) 3 RCR(Criminal)
538 : (1993) 1 RLW 248 : (1993) 2 WLC 517

Hon'ble Judges : Y.R. Meena, J;Milap Chandra, J

Bench : Division Bench

Advocate : Nemo, for the Appellant; M.L. Kala, for the Respondent

Judgement

Milap Chandra, J.—This appeal is directed against the judgment of the learned Judge, Family Court, Jodhpur, whereby, he has rejected the applications for recovery of maintenance allowance and only allowed the amount payable for "Iddat" period.

2. Facts stated in short are that Mst. Jameela had filed an application Section 125. Cr. P.C. against the respondent Alimuddin, which was finally decided on 6.6.1983 by awarding Rs. 125/- per month as maintenance allowance to the appellant.

3. When no amount was paid by the respondent, the appellant moved applications for recovery of the arrears of maintenance allowance u/s 125(3), Cr. P.C. In consequence of these applications, the arrest-warrants were issued against the respondent and thereafter he made some payment towards the arrears to the appellant.

4. The respondent, thereafter filed a revision petition against the order dated 6.6.1983, which was also dismissed by the learned Sessions Judge.

5. In the meantime, the Muslim Women (Protection of Rights on Divorce) Act,

1986 (hereinafter referred to as "the Act of 1986") came into force, the respondent moved an application under Act of 1986 before the Trial Court, in the recovery proceedings. The Trial Court has rejected that application of the respondent. Against that, he filed a Criminal Misc. Petition in the High Court, which dismissed as withdrawn on 22-7-1986.

6. After sometime, the appellant moved three fresh applications Section 125(3). Cr. P.C. recovery of the arrears. The respondent Alimuddin raised an objection that after coming into force of the Act of 1986 the appellant is not entitled for recovery of arrears in pursuance of the order passed u/s 125. Cr. P.C. The objections of respondent were allowed and the learned judge Family Court came to the conclusion that the appellant Mst. Jameela is entitled for recovery of the amount to the extent due for "Iddat" period only.

7. Being aggrieved with the judgments of the Court-below, the appellant preferred this appeal against the order of the learned Judge Family Court.

8. Heard Mr. M.L. Kala, learned Counsel for the appellant and perused the material on record. The respondent Alimuddin appeared in person.

9. The facts are not in dispute that the appellant moved an application for maintenance u/s 125, Cr.PC which was decided on 6.6.83 and amount of Rs. 125/- per month was allowed to her as maintenance allowance. That order was maintained even upto the High Court. The appellant moved various applications for recovery of the arrears. Some amount was recovered but in the meantime, the Act of 1986 came into force. Thereafter, appellant moved three applications; first on 17-2-86 asking for recovery of Rs. 2,500/-, second application was moved on 24-3-87 for recovery of Rs. 1,625/- and third application was moved on 3.1.89 for recovery of Rs. 3,625/-. The learned judge of the Family Court has rejected these applications on the basis of the provisions of the Act of 1986 and only allowed Rs. 125/- per month payable for "Iddat" period. Mr. Kala, learned Counsel for the appellant submitted that the provisions of the Act of 1986 are not applicable on the matter, which was concluded before commencement of the Act of 1986, therefore, the arrears payable before the commencement of the Act of 1986 should be paid to the appellant. For that, he relied upon the following decisions :

1. 1988 (2) DMC 19. 4. 1990 (1) DMC 315.

2. Arab Ahemadhia Abdulla and etc. Vs. Arab Bail Mohmuna Saiyadbhai and Others etc.,

3. 1989 (2) DMC 204. 6. 1987 (1) RLR 156.

10. On the other hand, the respondent Alimuddin appeared in person and he also placed reliance on the decision of this Court in Abid Ali v. Mst. Raisa Begum, 1988 RLW 104.

11. In Ali Mohammed v. Smt. Zaida 1987 (1) RLR 156, the Single Bench of this

Court has taken the view that when the learned Magistrate passed the order on the application u/s 125, Cr. P.C. was not pending before him and the matter is in revision before the learned Sessions Judge, therefore, the provisions of the Act of 1986 are not applicable in that case.

12. In *Abdul Rauf Khan v. Halemon Bibi and Anr.* 1990 (1) DMC 315, the Single Bench of Orissa High Court has taken the view that if an order of maintenance has been passed by a Magistrate u/s 125, Cr.P.C. in favour of the divorced Muslim Woman before the Act of 1986 came into force and a petition is filed or is pending u/s 128, Cr. P.C. thereof for its enforcement after the Act came into force, the enforcement proceedings cannot be barred. To such a petition, Section 7 shall have no application.

13. In *Mohammed Tajuddin v. Quomurunnisa Begum and Ors.* (1989 (2) DCM 204), the Single Bench of Andhra Pradesh High Court has taken the view that after coming into force of the Act of 1986, it cannot be said that the provisions of that Act abrogate the scope and ambit of Section 125 to 128, Cr. P.C. on the other hand, Section 3 of the Act contemplates fair & reasonable provisions to be made end maintenance paid to the divorced wife that too with the "Iddat" period, while Section 125, Cr. P.C. limits the maximum amount of maintenance to Rs. 500/- per month but under the Act of 1986, there is no such limit.

14. In that case, the gross salary of the husband was Rs. 1300/- to 1400/- and after deduction, he was receiving a net amount of Rs. 950/-. The A.P. High Court has allowed Rs. 10,000/- to the divorced woman towards fair and reasonable provisions u/s 3 of the Act of 1986.

15. In *Arab Ahemadhia Abdulla and etc. Vs. Arab Bail Mohmuna Saiyadbhai and Others etc.*, the matter is concluded in holding that under the Muslim Women Act, a divorced woman is entitled to have a reasonable and fair provision from her former husband. The reasonable and fair provision would include provision for her future residence, clothes, food and other articles for her livelihood. She is also entitled to have reasonable and fair future maintenance. This is to be contemplated and visualized within the "Iddat" period. After contemplating or visualizing it the reasonable and fair provision and maintenance is to be made and paid to her on or before the expiration of the "Iddat" period.

16. The respondent Alimuddin placed reliance on the decision of this Court in *Abid Ali v. Raisa Begum* 1988 (1) RLR 104, this Court has considered this aspect that whether the order passed u/s 125 Cr. P.C. remains effective after commencement of the Act of 1986. The view has been taken that the order u/s 125, Cr. P.C. does not remain in force as there is no saving clause provided under the Act of 1986, which enables the respondent to enforce her right u/s 125(3), Cr. P.C.

17. The facts are not in dispute that in the case in hand, the order u/s 125(1), Cr. P.C. was passed in the year 1983. The matter went upto the High Court and there, the respondent has withdrawn his petition and his petition has been

dismissed as withdrawn. That has happened before commencement of the Act of 1986. Now, the question arises for our consideration is that when the order u/s 125(1), Cr. P.C. is concluded, can that order be enforced after commencement of the Act ?

18. There is no saving Clause as such in the Act of 1986 but Section 7 provides that every application u/s 125 or 127, Cr. P.C. pending before the Magistrate on commencement of the Act of 1986 subject to the provisions of Section 5 be disposed of by the Magistrate in accordance with the provisions of this Act of 1986. Section 5 provides that if both the parties declare in writing either jointly or separately, that they would prefer to be governed by the provisions of Section 125 to 128, Cr. P.C. and file such affidavit or declaration in Court, the Magistrate shall dispose of such application accordingly. There is no joint request by the parties to be governed by the provisions of Section 125 to 128, Cr. P.C., therefore, there is no question of disposing of the application u/s 125 to 128, Cr. P.C. but the pertinent question arose that when the order u/s 125(1), Cr. P.C. is concluded can it be enforced after commencement of the Act of 1986.

There is no saving clause as stated above. Section 7 of the Act of 1986 provides that the application pending Under Sections 125, 127, Cr.P.C. on the commencement of the Act of 1986, can be disposed of under the Act of 1986. After order u/s 125, a person in whose favour the order has been made under Sections 128, Cr. P.C., can approach the Court for its enforcement u/s 125(3) or u/s 128, Cr. P.C. Section 7 provides for disposal of the application pending under Sections 125 or 128, Cr. P.C. that does not talk about Section 128, Cr. P.C. When the application is pending for maintenance and its enforcement, can be disposed of as per the provisions of Section 7 of the Act of 1986, which includes the application pending u/s 125(3), Cr. P.C. On record, the impugned three applications were made u/s 125(3), Cr. P.C. they were pending on commencement of the Act of 1986, therefore, they can only be dealt with as per provisions of this Act. When no joint declaration by the parties to prefer to be governed by the provisions of Sections 125 to 128, Cr. P.C., these applications will be disposed of as per the provisions of the Act of 1986.

Section 3(1)(a) of the Act of 1986 provides fair and reasonable provision for maintenance to a divorced woman, payable within the "Iddat" period by her former husband. In that provided, there is no limit of amount as provided u/s 125, Cr. P.C.

In Arab Ahemadhia Abdulla's case (supra), it has been observed that while allowing the maintenance payable within the "Iddat" period, we have to keep in mind legislature's intention that the divorced woman gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the streets without a roof over her head and without any means of sustaining herself and her children. The word "provision", itself indicates that something is provided in advance for meeting some needs.

In Mohammed Tajuddin's case (supra), the A.P. High Court has considered the question of maintenance, which can be allowed within the "Iddat" period. In that case, the petitioner's net income was Rs. 950/- even then, the Single Bench of A.P. High Court has allowed Rs. 10,000/- lump sum to the divorced woman. Thus, even we take this view of A.P. High Court, the maintenance is to be allowed as per the provisions of Section 3 (1)(a) of the Act of 1986 within "Iddat" period.

Mr. M.L. Kala, learned Counsel for the appellant further, submitted that the maintenance allowance allowed and finally concluded by the Trial Court before commencement of the Act of 1986, it can be enforced by invoking the provisions of Section 128(1) Cr. P.C.

It is true that Section 7 of the Act of 1986 provides only in respect of disposal of the application under Sections 125 or 127, Cr. P.C. pending at the time of commencement of this Act, but that is silent in respect of the applications filed u/s 128, Cr. P.C. and pending at the time of commencement of the Act of 1986. The maintenance allowance allowed and concluded, whether it can be enforced on an application u/s 128, Cr. P.C. That question was considered in the case of Abdul Rauf Khan (supra) and Orissa High Court has taken the view that application u/s 128, Cr.P.C., if pending at the time of commencement of the Act of 1986, that can be enforced even after commencement of the Act of 1986. In the case in hand, there is no application u/s 128, Cr. P.C. pending at the time of commencement of the Act of 1986, therefore, we would not like to comment on the merit of the application u/s 128, Cr. P.C. It will be considered in an appropriate case.

Now, the only question remains for our consideration is, that what should be the maintenance allowance payable to the appellant within "Iddat" period as per the provisions of Section 3(1)(a) of the Act of 1986. In the case of Mohammed Tajuddin (supra), Andhra Pradesh High Court has allowed Rs. 10,000/- payable within the "Iddat" period and the petitioner's net income was Rs. 950/- per month. Considering over-all circumstances of the case, in our view, Rs. 5,000/- will be just and reasonable to be paid to the appellant, which is payable within the "Iddat" period as per the provisions of Section 3(1)(a) of the Act of 1986.

In the result, the appeal is partly allowed. The respondent is directed to pay Rs. 5,000/- to the appellant within two months from the date of this order, failing which, the respondent will have to pay interest @ 18% on the amount outstanding after 2 months. Necessary steps will also be taken in case the respondent fails to pay the aforesaid amount payable within the "Iddat" period to the appellant.