

(1994) 05 RAJ CK 0007

In the Rajasthan High Court

Case No : .Civil Miscellaneous Appeal No. 80 of 1994

Soyab Mohammad

APPELLANT

Vs

Rashida Bano Munni

RESPONDENT

Date of Decision : 25-05-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125

Evidence Act, 1872 — Section 112

Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 3(1)

Citation : (1994) 2 DMC 611

Hon'ble Judges : Y.R. Meena, J;V.K. Singhal, J

Bench : Division Bench

Advocate : R.P. Garg, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Singhal, J.—This appeal has been filed by the appellant against the order of the Family Court, Ajmer dated January 5, 1994 by which the son Jibrao was granted maintenance at the rate of Rs. 300/- p.m. from May 28, 1988. The submission of the learned Counsel for the appellant is that in accordance with the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter called the Act) the maintenance of children cannot be claimed after expiry of two years.

2. For the purpose of appreciating the arguments made on behalf of the learned Counsel for the appellant the provisions of Section 3(1)(b) of the Act on which reliance has been placed are reproduced here which read as under :--

"Mahr or other properties of Muslim Women to be given to her at the time of divorce :

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to :

(a).....

(b) Where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c)

It is submitted that the marriage between the parties was performed on June 19, 1986 and divorce took place on June 11, 1987. A son was born on December 5, 1987. Rashida Bano, the respondent, left the house of her husband, the appellant, on February 15, 1987, the son cannot be said to have been born out of the wedlock with the appellant. It is submitted that vide order dated August 4, 1989 the maintenance of Rs. 150/- p.m. was granted, but when the matter was challenged in appeal, it was remanded and how the amount of maintenance has been increased.

3. So far as the contention of the learned Counsel for the appellant that the child was not born out of the wedlock and was an illegitimate child is concerned, the Family Court has taken into consideration the evidence and has come to the conclusion that the child was the legitimate child of the parties born out of their wedlock. The assistance of Section 112 of the Evidence Act was also taken into consideration in which it has been provided that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The finding given by the learned Family Court and the reasons therefore are in accordance with law and do not require any interference.

4. So far as the second question that the amount has been increased to Rs. 300/- p.m. when by the earlier order it was only Rs. 150/- p.m. we are of the view that if the order has once been set aside the learned Judge had to apply his mind afresh and the order for even enhanced amount could be passed.

5. The main contention of the learned Counsel for the appellant is with regard to the maintenance granted to the son after the expiry of two years. The provisions of Section 3(1)(b) of the Act mentions with regard to the maintenance of Muslim woman. Under Clause (a) it has been provided that a reasonable and fair provision for maintenance has to be made to her within the Iddat period by her former husband. Clause (b) says that where she herself maintains the children born to her before or after the divorce a reasonable and fair provision and maintenance has to be made and paid by her former husband for a period of two years from the respective dates of birth of such children. This refers to the Muslim woman and not to the children. The right claimed for maintenance by a Muslim woman is governed by Section 3 of the Act which has over-riding effect to any other provision. But so far as the right of maintenance of children is

concerned, since the Section does not contemplate the maintenance to the children it will not have over-riding effect on the provisions of other Acts. Section 125 of the Code of Criminal Procedure provides for maintenance of children and that provision cannot be said to be superseded by the provisions of the Act. This Court in the case of Jamaluddin v. Mst. Lalli, 1988 Raj. Cr. Cases 441 held as under :

"I see no prohibition under the provisions of Act of 1986 in case a divorced Muslim wife moves a petition for the maintenance of her children against the father u/s 125 Cr.P.C. The prohibition in the Act of 1986 is only against the divorced Muslim wife if she is claiming maintenance for herself subject of course to the period of Iddat, but she cannot be denied a right of maintenance claim on behalf of the children in the capacity of a lawful guardian..."

6. The decision of the Patna High Court in the case of Mohd. Yunus v. Bibi Phenkani atias Tasrun Nisa and Anr. 1987 (2) Cri 241 is with regard to the right of Muslim woman to get maintenance from her husband and is not an authority on the right of children which may be claimed through mother being the natural guardian (in case of divorcee). In view of the decision of this Court in the case of Jamaluddin (supra), we are of the opinion that the child is entitled to maintenance and the said view is also supported by the decision of the Andhra Pradesh High Court in the case of M.A. Hameed Vs. Arif Jan and Another, The amount which has been awarded cannot be said.

7. Consequently, this appeal has no force. It is hereby dismissed.