

Mst. Zohara Khatoon

Vs

Mohd. Ibrahim

Criminal Appeal No. 761 of 1980

(D. P. Madon, G. L. Oza JJ)

26.11.1985

JUDGMENT

MADON, J. -

1. Both the parties are Muslims. On January 15, 1973, the appellant obtained under the Dissolution of Muslim Marriages Act, 1939, a decree of dissolution of her marriage with her husband, the respondent. There was one issue born of the marriage of the appellant with the respondent, namely, a son. On coming into force on April 1, 1974 of the Code of Criminal Procedure, 1973, the appellant filed on September 17, 1974, a petition under Section 125 of the said Code for maintenance for herself and the child of the marriage. The respondent contended that the appellant's marriage with the respondent having been dissolved by a decree of dissolution by a civil court, she was not entitled to any maintenance under the said Section 125. This defence was rejected and the Special Judicial Magistrate, Barabanki, U.P., allowed the said application by his order dated December 29, 1976, and directed the respondent to pay a sum of Rs 100 per month in all as maintenance both for the appellant and the child, holding that the appellant had been neglected by the respondent without reasonable or probable cause. The order of the learned Magistrate was upheld by the Sessions Judge in revision. Thereafter, the respondent approached the Lucknow Bench of the Allahabad High Court under Section 482 of the Code of Criminal Procedure. The High Court held that being a divorced wife, she was not entitled to maintenance for herself and directed the respondent to pay a sum of Rs 40 per month to the appellant for the maintenance of the child.

2. The appellant thereupon obtained special leave to appeal against the judgment and order of the High Court. The appeal reached hearing before a Division Bench of this Court consisting of S. Murtaza Fazal Ali, A.D. Koshal and A. Varadarajan, JJ. and was heard ex parte as the respondent did not appear. On February 18, 1981 ((1981) 2 SCC 509 : 1981 SCC (Cri) 517 : (1981) 2 SCR 910 : AIR 1981 SC 1243 : 1981 Cri LJ 754), S. Murtaza Fazal Ali, J., delivered judgment on behalf of himself and Varadarajan, J., while A.D. Koshal, J., delivered a separate but concurring judgment allowing the appeal. All the learned Judges held that the appellant was entitled to maintenance for herself and the child. This Court accordingly set aside the order passed by the High Court and restored the order of the learned Magistrate. Thereafter, the respondent made an application to set aside the judgment and order of this Court on the ground that the notice of lodgment of the appeal had not been served on him. This plea was accepted and the court by its order dated September 24, 1981, restored the appeal to the file and further pending the appeal directed the respondent to pay to the appellant maintenance in the sum of Rs 140 per month, made up of Rs 100 for the appellant and Rs 40 for the child, with effect from September 17, 1974. This Court further directed the respondent to deposit within three months with the Joint Registrar (Lucknow Bench) of the Allahabad High Court the entire amount of maintenance. The Joint Registrar (Lucknow Bench) of the High Court by

his report dated January 12, 1982, intimated to this Court that the respondent had failed to deposit the amount as directed.

3. This appeal has now reached hearing before us. In the judgments delivered on February 18, 1981, the learned Judges considered the entire law on the subject and held that Muslim wife whose marriage was dissolved by a decree of dissolution passed at her instance was entitled to maintenance under Section 125 of the Code of Criminal Procedure. The position in law so far as a divorced Muslim wife is concerned has now been settled by the judgment of a Constitution Bench of this Court in *Mohd. Ahmed Khan v. Shah Bano Begum* (AIR 1985 SC 945 : (1985) 2 SCC 556 : 1985 SCC (Cri) 245).

4. In view of these judgments there is no substance in the contention raised by the respondent and this appeal must succeed. We accordingly allow this appeal, reverse the judgment and set aside the order of the High Court and direct the respondent to pay to the appellant a sum of Rs 140 per month, namely, Rs 100 as maintenance for the appellant and Rs 40 as maintenance for the child, with effect from September 17, 1974. We further direct the respondent to pay to the appellant the arrears of maintenance at the above rate within three months from today.

5. On behalf of the appellant it was urged that in view of the passage of time and the increased cost of living, the amount of maintenance should be increased. No materials, however, have been placed before us to show what the income of the respondent is at present. If the appellant desires the amount of maintenance to be increased, it will be open to her to apply to the concerned Magistrate under Section 127(1) of the Code of Criminal Procedure, 1973, to increase the amount of maintenance.

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