

Noor Saba Khatoon

Vs

Mohd. Quasim

(Dr. A.S. Anand, K.Venkataswami JJ)

29.07.1997

JUDGMENT

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DR. ANAND, J.

1. A short but interesting question involved in this appeal, by Special Leave, is whether the children of muslim parents are entitled, to grant of maintenance under Section 125, Cr.P.C. for the period till they attain majority or are able to maintain themselves whichever date is earlier or in the case of female children till they get married or is their right restricted to the grant of maintenance only for a period of two years prescribed under Section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 notwithstanding Section 125 Cr.P C.

2. The appellant married the respondent according to Muslim rites on 27.10.1980. During the wedlock, three children were born - two daughters and a son. On certain disputes arising between the parties, the respondent allegedly turned the appellant out of the matrimonial home alongwith the three children then aged 6 years, 3 years and 1 1/2 years and also refused and neglected to maintain her and the children thereafter. After turning the appellant out of the matrimonial home, the respondent took a second wife, Shahnawaz Begum. Claiming that the appellant has no means to maintain herself and the children and that the respondent had both agricultural land and was carrying on business in electrical appliances as well and had sufficient income and means to maintain them, she filed an application under, Section 125 Cr.P.C. in the Court of Shri A.K.Jha, Judicial Magistrate, First Class, Gopalganj, on 13.2.1992. She claimed a sum of Rs.400/- per month for herself and Rs.300/- per month as maintenance for each of the three children. The application was contested, though it was only the appellant, who adduced evidence at the trial and the respondent/husband did not lead any evidence. The Trial Court found that the respondent had failed and neglected to maintain his wife and children and that they had no source of income or means to maintain themselves and accordingly held that they were entitled to the grant of maintenance from the respondent. By its order dated 19.1.1993, the Trial Court directed the respondent to pay maintenance to the appellant at the rate of Rs.200/- per month for herself and at the rate of Rs.150/- per month for each of the three minor children, till they attain the age of majority. While the matter rested thus, the respondent divorced the appellant and thereafter filed an application in the Trial Court seeking modification of the order dated 19.1.1993, in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 1986 Act). By an order dated 27.7.1993, the Trial Court modified the order dated 19.1.1993, insofar as the grant of maintenance to the appellant is concerned while maintaining the order granting maintenance to each of the three minor children. Insofar as the appellant is concerned, the Trial Court held that in view of the Provisions of the 1986 Act the appellant-wife after her divorce was entitled to maintenance only for a period of three months i.e., for the period of Iddat. The Trial Court further found that the

right to maintenance under Section 125 Cr.P.C. insofar as the children are concerned was not affected by the 1986 Act in any manner. The order dated 27.7.1993 was challenged by the respondent through a Revision Petition in the Court of 2nd Additional Judge, Gopalganj. On 16.7.1994, the revisional court dismissed the revision petition holding that the 1986 Act does not over-ride the provisions of Section 125 Cr.P.C. for grant of maintenance to the minor children and that Section 3(1)(b) of the 1986 Act also entitles a divorced woman to claim reasonable and fair maintenance from her husband for maintaining the children born to her before or after her divorce from her former husband for a period of two years from the respective dates of birth of the children and that the said provision did not affect the right to maintenance of the minor children granted by Section 125 Cr.P.C. The respondent, thereupon, filed a Criminal Misc. Petition under Section 482 Cr.P.C. in the High Court challenging the correctness of that part of the order of the revisional court which upheld the right to maintenance of the three minor children under Section 125 Cr.P.C. at the rate of Rs.150/- per month per child. A learned Single Judge of the High Court accepted the plea of the respondent that vide Section 3(1)(b) of the 1986 Act, a divorced muslim woman is entitled to claim maintenance from her previous husband for her minor, children only. for a period of two years from the date of birth of the concerned child and that the minor children were not entitled to claim maintenance under Section 125 Cr.P.C. after the coming into force of the 1986 Act. The High Court noticed that the two older children were aged 6 years and 3 years when the application for maintenance was filed on their behalf by their mother, and thus "had completed two year's prior to filing of the petition for grant of maintenance", and as such those two children were held not entitled to the grant of any maintenance under Section 125 Cr.P.C. and that the third child, who was only 1 1/2 years of age on 19.1.1993, was entitled to receive maintenance till she attained the age of two years i.e. till 19.7.1993 from the date of filing of the application i.e. 13.2.1992. With the said modification, the miscellaneous application of the respondent-husband was partly, allowed. By special leave to appeal the appellant has come up to this Court.

3. The facts are not in dispute. The appellant had filed a petition for grant of maintenance under Section 125 Cr.P.C. for herself as well as on behalf of the three children born during the wedlock, who were living with her, since the respondent had refused and neglected to maintain them. On the date of the application filed under Section 125 Cr.P.C. i.e., 13.2.1992, the children were aged 6 years, 3 years and 1 1/2 years. After the Trial Court granted the petition under Section 125 Cr.P.C. in favour of the appellant and the three minor children, the respondent divorced the appellant and filed an application seeking modification of the order of maintenance in view of the provisions of the 1986 Act. The trial court modified its order qua the appellant, restricting the grant of maintenance to the period of Iddat but maintained its earlier order, insofar as the children are concerned. While the revisional court declined to interfere with the order of the Trial Court, the High Court based itself on Section 3(1)(b) of the 1986 Act to hold that the grant of maintenance to the children of divorced muslim parents, living with their mother, was restricted to the period prescribed under the said section notwithstanding the provisions of Section 125 Cr.P.C..

4. Does Section 3 (1)(b) of the 1986 Act in any way affect the rights of the minor children of divorced muslim parents to the grant of maintenance under Section 125 Cr.P.C. is thus the moot question?

The preamble to the 1986 Act reads:

"An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto."

5. The Act, thus, aims to protect the rights of Muslim Women who have been divorced. The 1986 Act was enacted as a sequel to the judgment in Mohd. Ahmed Khan Vs. Shah Bano Begum, AIR 1985 SC 945. The question of maintenance of children was involved in the controversy arising out of the judgment in the case of Shah Bano Begum (supra). The Act was not enacted to regulate the obligations of a muslim father to maintain his minor children unable to maintain themselves which continued to be governed with Section 125 Cr.P.C. This position clearly emerges from a perusal of the relevant provisions of the 1986 Act.

6. Section 3 of the 1986 Act to the extent relevant for this case reads:

"Sec.3. Mahr or other properties of Muslim woman 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) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband:

(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) an amount equal to the sum of mahr or dower agreed to be paid to her at her time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends." From a plain reading of the above Section it is manifest that it deals with "Mahr" or other properties of a muslim woman to be given to her at the time of divorce. It lays down that a reasonable and fair provision has to be made for payment of maintenance to her during the period of Iddat by her former husband. Clause (b) of Section 3(1) (supra) provides for grant of additional maintenance to her for the fosterage period of two years from the date of birth of the child of marriage for maintaining that child during the fosterage. Maintenance for the prescribed period referred to in Clause (b) of Section 3(1) is granted on the claim, of the divorced mother on her own behalf for maintaining the infant/infants for a period of two years from the date of the birth of the child concerned who is/are living with her and presumably is aimed at providing some extra amount to the mother for her nourishment for nursing or taking care of the infant/infants upto a period of two years. It has nothing to do with the right of the child/children to claim maintenance under Section 125 Cr.P.C. So long as the conditions for the grant of maintenance under Section 125 Cr.P.C. are satisfied, the rights of the minor, children, unable to maintain themselves, are not affected by Section 3(1)(b) of the 1986 Act. Under Section 125 Cr.P.C. the maintenance of the children is obligatory on the father (irrespective of his religion) and as long as he is in a position to do so and the children have no independent means of their own, it remains his absolute obligation to provide for them. Insofar as children born of muslim parents are concerned there is nothing in Section 125 Cr.P.C. which exempts a muslim father from his obligation

to maintain the children. These provisions are not affected by clause (b) of Section 3(i) of the 1986 Act and indeed it would be unreasonable, unfair, inequitable and even preposterous to deny the benefit of Section 125 Cr.P.C. to the children only on the ground that they are born of Muslim parents. The affect of a beneficial legislation like Section 125 Cr.P.C., cannot be allowed to be defeated except through clear provisions of a statute. We do not find manifestation of any such intention in the 1986 Act to take away the independent rights of the children to claim maintenance under Section 125 Cr.P.C. Where they are minor and are unable to maintain themselves. Muslim father's obligation, like that of a Hindu father, to maintain his minor children as contained in Section 125 Cr.P.C. is absolute and is not at all affected by Section 3(1)(b) of the 1986 Act. Indeed a Muslim father can claim custody of the children born through the divorced wife to fulfil his obligation to maintain them and if he succeeds, he need not suffer an order or direction under Section 125 Cr.P.C. but where such custody has not been claimed by him, he cannot refuse and neglect to maintain his minor children on the ground that he has divorced their mother. The right of the children to claim maintenance under Section 125 Cr.P.C. is separate, distinct and independent of the right of their divorcee mother to claim maintenance for herself for maintaining the infant children upto the age of 2 years from the date of birth of the concerned child under Section 3(1) of the Act. There is nothing in the 1986 Act which in any manner affects the application of the provisions of Sections 125-128 of the Cr.P.C. relating to grant of maintenance insofar as minor children of Muslim Parents, unable to maintain themselves, are concerned.

7. Indeed Section 3(1) of 1986 Act begins with a non obstante clause "notwithstanding any thing contained in any other law for the time being in force" and clause (b) thereof provides that a divorced woman shall be entitled to a reasonable and fair provision for maintenance by her former husband to maintain the children born out of the wedlock for a period of two years from the date of birth of such children, but the non obstante clause in our opinion only restricts and confines the right of a divorcee muslim woman to claim or receive maintenance for herself and for maintenance of the child/children till they attain the age of two years, notwithstanding anything contained in any other law for the time being in force in that behalf. It has nothing to do with the independent right or entitlement of the minor children to be maintained by their muslim father. A careful reading of the provisions of Section 125 Cr.P.C. and Section 3(1)(b) of the 1986 Act makes it clear that the two provisions apply and cover different situations and there is no conflict, much less a real one, between the two. Whereas the 1986 Act deals with the obligation of a muslim husband vis-a-vis his divorced wife including the payment of maintenance to her for a period of two years of fosterage for maintaining the infant/infants, where they are in the custody of the mother, the obligation of a muslim father to maintain the minor children is governed by Section 125 Cr.P.C. and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In the case of female children this obligation extends till their marriage. Apart from the statutory provisions referred to above, even under the Muslim Personal Law, the right of minor children to receive maintenance from their father, till they are able to maintain themselves, is absolute.

8. Prof. Tahir Mahamood, in his book "Statute-Law relating to Muslims in India" (1995 Edn.) while dealing with the effect of the provisions of Section 125 Cr.P.C. on the 1986 Act, and the Muslim personal law observes at page 198:

"These provisions of the Code remain fully applicable to the Muslims,

notwithstanding the controversy resulting from the Shah Bano case and the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. There is nothing in that Act in any way affecting the application of these provisions to the children and parents governed by Muslim law.....As regards children the Code adopts the age of minority from the Majority Act, 1875 by saying: "Minor means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority" - [Explanation to Section 125 (1), clause (a)]. Ordinarily, thus, every Muslim child below 18 can invoke the Cr.P.C law to obtain maintenance from its parents if they "neglect or refuse" to maintain it despite "having sufficient means"..... By Muslim law maintenance (nafaqa) is a birth of children and an absolute liability of the father. Daughters are entitled to maintenance till they get married if they are bakira (maiden), or till they get remarried if they are thayiba (divorcee/widow). Sons are entitled to it till they attain bulugh if they are normal; and as long as necessary if they are handicapped or indigent. Providing maintenance to daughters is a great religious virtue. The Prophet had said:

"Whoever has daughters and spends all that he has on their upbringing well, on the Day of Judgment, be as close to me as two fingers of a hand." If a father is a poverty-stricken and cannot therefore provide maintenance to his children, while their mother is affluent, the mother must, provide them maintenance subject to reimbursement by the father when his financial condition improves."

(Emphasis supplied)

9. Thus, both under the personal law and the statutory law (Sec.125 Cr.P.C.) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife.

10. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125, Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females, till they get married, and this right is not restricted, affected or controlled by divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. In other, words Section 3(1)(b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under Section 125 Cr.P.C. till they attain majority or are able to maintain themselves, or in the case of females, till they are married.

11. It, therefore, follows that the learned Trial Court was perfectly right in directing the payment of amount of maintenance to each of the three children as per the order dated 19.1.1993 and the learned 2nd Additional Sessions Judge also committed no error in dismissing the revision petition filed by the respondent. The High Court, on the other hand, fell in complete error in holding that the right to claim maintenance of the children under Section 125 Cr.P.C was taken away and superseded by Section 3(1)(b) of the 1986 Act and that maintenance was payable to the minor children of Muslim Parents only for a, period of two years from the date of the birth of the child concerned notwithstanding the provisions of Section 125 Cr.P.C. The order of the High Court cannot, therefore, be sustained. It is accordingly set aside. The order of the Trial Court and the

Revisional Court is restored. This appeal succeeds and is allowed but without any orders as to cost.

12. The arrears of maintenance in respect of the children shall be paid by the respondent to the appellant-mother, who filed the petition on their behalf, within one year from the date of this order in four equal installments, payable quarterly. The first installment shall be paid on or before August 15, 1997 and thereafter every three months. Any single default in the payment of the arrears will entitle the appellant to recover the entire balance amount at once with 12% interest through the Trial Court in the manner prescribed by the Code. The respondent shall continue to pay maintenance as directed by the trial court, till the children attain majority or are able to maintain themselves and in the case of the daughters, till they get married.