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Before A. P. Chowdhri, J.

HAZRAN,—Petitioner.

versus

ABDUL REHMAN,—Respondent.

Criminal Misc. No. 1366/M of 1988

October 7, 1988.

*Code of Criminal Procedure (II of 1974)—Ss. 125, 127 and 128—Muslim Women (Protection of Rights on Divorce) Act (XXV of 1986)—Ss. 3 and 7—Order of maintenance becoming final prior to the passing of the Act—Application for realisation of maintenance moved under S. 128 after coming into force of the Act—Order of maintenance and application for realisation—Whether maintainable in view of the Act.*

*Held*, that the *non obstante* clause in sections 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is in general terms. Sections 125 to 128 of the Code of Criminal Procedure, 1973 as such do not stand superseded. There is no provision in the Act to the effect "notwithstanding anything contained in sections 125 to 128 of the Code maintenance of Muslim Women shall be governed by the provisions of the Act or to the effect that sections 125 to 128 of the Code shall stand repealed in so far as maintenance of Muslim Women is concerned. It follows that the provisions of Sections 125 to 128 have been superseded only to the extent that there is a provision in the Act on matters covered under Chapter IX of the Code. It further follows that if no contrary provision has been made either expressly or by necessary implication in the Act, the provisions of the Code in Chapter IX shall hold the field. Sub-section (2) of section 3 as well as section 4 of the Act contains a provision regarding enforcement of order of maintenance granted under the said Act as distinguished from enforcement of an order passed under the Code where order had acquired finality before the commencing into force of the said Act. A careful consideration of the Act shows that there is no provision whatsoever with regard to enforcement of an order of maintenance which has already become final under the Code before coming into force of the Act. This only implies that the provisions with regard to enforcement of such orders contained in the Code hold good even after coming into force of the Act. Therefore, it has to be held that the order of maintenance under section 128 of the Code has not been affected by coming into force of the Act and the applications made before the Magistrate under section 128 of the Code have to be disposed of in accordance with the provisions of the Code.

(Paras 7, 8 and 10).

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*Petition under section 482 Cr.P.C. praying that the petition be allowed and the order of the learned Magistrate dated 21st January, 1987 (Annexure P. 4) be set aside and the application filed by the petitioner for recovery of maintenance be allowed.*

A. S. Nehra, Advocate, for the Petitioner.

Amarjit Markan, Advocate, for the Respondent.

JUDGMENT

A. P. Chowdhri, J.

(1) This petition under section 482 of the Code of Criminal Procedure (for short, 'the Code') raises an important question of law, namely, whether an order of maintenance passed under section 125 of the Code which had become final between the parties before coming into force of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act No. 25 of 1983) (for short, the 'Muslim Women Act') survives after coming into force of that Act.

(2) In order to appreciate the question, the facts of the case may be briefly stated. Mst. Hazran petitioner was married to Abdul Rehman respondent. From the wedlock, the petitioner has a daughter Shehnaz. The petitioner was divorced by the respondent. On an application under section 125 of the Code, learned Magistrate Ist Class, Malerkotla, fixed maintenance at the rate of Rs. 75 per month for the wife and Rs. 60 per month for the minor daughter by order Annexure P. 1, dated 15th December, 1981. This has become final between the parties.

(3) In October, 1984 the petitioner made an application under section 127 of the Code for enhancement of the maintenance. The application was allowed by the learned Magistrate and the amount of maintenance was enhanced from Rs. 75 to Rs. 100 per month regarding the petitioner and from Rs. 60 to Rs. 100 per month regarding the minor daughter,—*vide* order dated 15th October, 1985 Annexure p. 2. The husband filed a revision petition against the said order dated 15th October, 1985. The learned Additional Sessions Judge, Sangrur by order dated 6th November, 1986, allowed the revision petition and held that the application under section 127 of the Code was not maintainable in view of the provisions of the Muslim Women Act. A copy of the order is Annexure P. 3.

(4) Thereafter, the petitioner made an application on 19th December, 1986 under section 128 of the Code for realisation of the maintenance allowance as originally fixed with effect from 14th September, 1985 to 13th December, 1986 at the rate of Rs. 75 and Rs. 60 per month for herself and the minor. The application was, however, dismissed by the learned Judicial Magistrate Ist Class, by order dated 21st January, 1987 Annexure P. 4, with the finding that the application was not maintainable in so far as the petitioner was concerned in view of the provisions of the Muslim Women Act. It is this order which is sought to be quashed through the present petition.

(5) Chapter IX of the Code deals with order for maintenance of wife, children and parents. It contains sections 125 to 128. Section 125 confers a right on wife, children and parents to receive maintenance. Sub-section (3) of the said section empowers a Magistrate to realise the amount of maintenance. Section 126 lays down the procedure to be followed by the Magistrate in maintenance proceedings. Section 127 makes a provision for alternation in the amount of maintenance allowance on proof of a change in the circumstances of the person receiving the maintenance allowance. Section 128 empowers a Magistrate to realise the amount of maintenance at any place where the person against whom it is made, may for the time being be.

(6) With effect from May 19, 1986 the Parliament enacted. The Muslim Women (Protection of Rights on Divorce) Act, 1986. The Act seeks to cover some of the grounds dealt with in Chapter IX of the Code. The Muslim Women Act overrides Chapter IX of the Code in the following three ways :—

- (i) Sections 3 and 4 of the Muslim Women Act contained a *non obstante* clause in general terms.
- (ii) Where both the parties agree, they can opt to be governed by the provisions of sections 125 to 128 of the Code in regard to maintenance,—*vide* section 5.
- (iii) Proceedings under sections 125 and 127 of the Code which were pending at the commencement of the Muslim Women Act have to be dealt with in accordance with the provisions of the said Act in supersession of the provision of the Code,—(*vide* section 7 of the Muslim Women Act).

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(7) It will be seen that the *non obstante* clause is in general terms. Sections 125 to 128 of the Code as such do not stand superseded. There is no provision in the Muslim Women Act to the effect, "notwithstanding anything contained in sections 125 to 128 of the Code maintenance of Muslim Women shall be governed by the provisions of the Muslim Women Act or to the effect that sections 125 of 128 of the Code shall stand repealed in so far as maintenance of Muslim Women is concerned. It follows that the provisions of sections 125 to 128 have been superseded only to the extent that there is a provision in the Muslim Women Act on matters covered under Chapter IX of the Code. It further follows that if no contrary provision has been made either expressly or by necessary implication in the Muslim Women Act, the provisions of the Code in Chapter IX shall hold the field. Sub-section (2) of section 3 as well as section 4 of the Muslim Women Act contains provisions regarding enforcement of order of maintenance granted under the said Act as distinguished from enforcement of an order passed under the Code where order had acquired finality before the commencing into force of the said Act.

(8) A careful consideration of the Muslim Women Act shows that there is no provision whatsoever with regard to enforcement of an order of maintenance which has already become final under the Code before coming into force of the Muslim Women Act. This only implies that the provisions with regard to enforcement of such orders contained in the Code hold good even after coming into force of the Muslim Women Act.

(9) It will be further seen that the Muslim Women Act is confined to only divorced women. The scope of section 125 of the Code, on the other hand, is much wider and maintenance can be fixed even in respect of wife who has not been divorced. It may further be pointed out that the transitional provision while expressly referring to sections 125 and 127 of the Code does not make a reference to section 128 of the Code relating to enforcement of the order.

(10) The result of the above discussion is that the provision with regard to enforcement of the order of maintenance under section 128 of the Code has not been affected by coming into force of the Muslim Women Act and the applications made before the Magistrate under section 128 of the Code have to be disposed of in accordance with the provisions of the Code.

(11) In support of the conclusion which I have reached, I may refer to *Mohd. Haji v. Rukiya* (1) and *Arab Ahemadhia Abdulla etc. v. Arab Bali Mohmuna Saiyadbhai and others* (2), where a similar view was taken.

(12) The learned counsel for the respondent contended that the proper course for the petitioner was to have filed a revision against the order of the learned Magistrate before the Sessions Judge and that course having not been adopted, the present petition was not maintainable. He placed reliance on *Amar Nath v. State of Haryana*, (3) and *Madhu Limaye v. State of Maharashtra* (4). The principles laid down by their Lordships in relation to the exercise of inherent powers of the High Court are (i) that the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party; (ii) that it should be exercised very sparingly to prevent abuse of process of the Court or otherwise to secure the ends of justice; and (iii) that it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

(13) At the same time in *Madhu Limaye's* case (supra) it was observed as under : "but in case the impugned order clearly brings above a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in section 397(2) can limit or affect the exercise of the inherent powers of the High Court",—(*vide* para 10 at page 51 of the report). I find that the facts and the circumstances of the present case justifies interference by this Court for securing the ends of justice.

(14) The learned counsel for the respondent next contended that the order in question was passed on 21st January, 1987 and the present petition was filed in February 1988. He argued that the present petition should be dismissed as highly belated. From the facts of the case it is quite apparent that the petitioner unsuccessfully made an application under section 127 of the Code for enhancement of the maintenance allowance. Unsuccessfully because the order of enhancement was set aside by the learned Additional Sessions Judge in revision, the petitioner was thus obliged to fall

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(1) 1987 P.A.P. 472 Kerala.

(2) A.I.R. 1988 Guj. 141.

(3) A.I.R. 1977 S.C. 2185.

(4) AIR 1975 S.C. 47.

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back on the original order of maintenance dated 15th December, 1981 which had become final between the parties. These facts have been mentioned to highlight the hardship being suffered by the applicant. Apart from the above the petitioner is a poor illiterate woman and I find it an eminently suitable case to condone the delay to advance the cause of justice.

(15) For the reasons mentioned above, the petition is allowed and the order of the learned Magistrate, Annexure P.4, dated 21st January, 1987, to the extent that the application of Mst. Hazran was dismissed is set aside. The learned Magistrate Ist Class, Malerkotla, is directed to revive the petitioner and take further action for the realisation of the maintenance allowance in favour of Mst. Hazran according to law. The respondent shall be liable to pay costs of the proceedings. Counsel's fee Rs. 500.

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R.N.R.

Before : D. V. Sehgal, J.

SHANTI DEVI,—Petitioner.

*versus*

KARTA RAM AND OTHERS,—Respondents.

*Civil Revision No. 1099 of 1987*

October 11, 1988.

*Code of Civil Procedure (V of 1908)—Order 22, Rule 2—Suit for Permanent injunction against trespasser by four co-owners—One co-owner dying during pendency of suit—Factum of death not brought to the notice of Court—Court passed decree—Validity of such decree—Right to sue survived to remaining co-owners—Decree upheld.*

*Held*, that since the suit was filed by four co-owners of the suit property, on the death of one of them, the right to sue survived to the remaining plaintiffs and they could continue with the same. It is a different matter that the suit was continued without the knowledge of the death of Smt. Parkash Devi and the decree was also