

1990 GAULR 2 328 . 1991 CRLJ 1843 . 1990 SCC ONLINE GAU 36 . 1990 GAU LR 2 328 .
1991 CRI LJ 1843 .

Hazi Abdul Khaleque v. Mustt. Samsun Nehar Opposite-Party.

Gauhati High Court (Aug 20, 1990)

CASE NO.

Criminal Revision no. 444 of 1989

ADVOCATES

Mr. A.B Choudhury, for the Petitioner.

Mr. J. Mollah, for the Opposite party.

JUDGES

J.M Srivastava, J.

IMPORTANT PARAS

1. 14. For the aforesaid reasons, this petition is partly allowed and the impugned order dated 1.9.89 passed by the learned Chief Judicial Magistrate, Goalpara in Misc. Case No. 14/83 is set aside.

JUDGMENT

This revision petition is directed against the order dated 14.8.89 and 1.9.89 passed by the learned Chief Judicial Magistrate, Goalpara in a maintenance matter.

2. Briefly, the opposite party wife of the petitioner had claimed maintenance from the petitioner which was allowed by order dated 23.8.1989 After the Muslim Women (Protection of Rights on Divorce) Act, 1986 hereinafter referred as the 'Act', had come into force the petitioner moved an application dated 1.8.87 with the prayer that after the Act had come into force he was no longer liable to pay maintenance. It appears that the learned Chief Judicial Magistrate on the said application, by order dated 3.9.87 held that the petitioner was no longer liable to pay maintenance. The present opposite party went in revision and the learned Sessions Judge by order 23.4.88 remanded the learned Magistrate for enquiry into certain matters like payment of dower money, return of presents and payment of maintenance during the period of 'iddat'.

3. The learned Chief Judicial Magistrate thereafter in order dated 14.8.89 took the view on the authority of Division bench decision of this court Idris Ali v. Ramisha Khatun, AIR 89 (GAU) 24* that the petitioner was liable to pay maintenance even after the Act had come

in to force because the order for payment of maintenance had been made earlier to the enforcement of the Act. On 1.9.89, the learned Chief Judicial Magistrate further ordered issue of non-bailable warrant of arrest against the petitioner, for detention in civil prison until he paid the maintenance.

4. Aggrieved, with both the aforesaid orders dated 14.8.89 and 1.9.89 the petitioner has come in revision and Shri A.B Choudhury, learned counsel appearing on his behalf has submitted that learned Chief Judicial Magistrate by order dated 14.8.89 could not reopen the matter of payment of maintenance, the same having been considered and decided by the learned Chief Judicial Magistrate, by order dated 13.9.87 which had not been set aside by the learned Sessions Judge but who had remanded for consideration of certain other matters. Shri A.B Choudhury learned counsel for the petitioner has also submitted that the order dated 1.9.89 for arrest of the petitioner was also erroneous and should be set aside.

5. I have heard learned counsel for the opposite party as well.

6. In so far as the first submission of Shri A.B Choudhury, learned counsel for the petitioners is concerned while it does appear that the learned Sessions Judge his order dated 23.4.84 had not said anything to set - aside the order dated 13.9.89 passed by the learned Chief Judicial Magistrate, yet the matter had been remanded may be for some other matter and the view taken by the learned Chief Judicial Magistrate by order dated 14.8.89 on the authority of the decision of this court was sound and correct and accordingly I am not inclined in exercise of revisional jurisdiction to interfere with the order dated 14.8.89

7. In so far as the order dated 1.9.89 is concerned, the order for payment of maintenance was to be enforced because the petitioner had not paid the maintenance allowed.

8. Chapter IX of the Code of Criminal Procedure hereinafter referred as the 'Code' in its Section 128 provides for enforcement of order of maintenance, but how was the order to be enforced has not been provided.

9. Section 128 reads:—

“28. Enforcement of order of maintenance.— A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any or to the person, to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, of such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due”.

10. It only provides for furnishing of copy of the order. It also provides that such order could be enforced by any magistrate at any place where the person against whom it was made may be, which only means that any magistrate of the place where the person may be they enforce the order on being satisfied about the identity of the parties and also that the dues had not been paid. As said before, how was the due to be recovered i.e the procedure, was not provided.

11. Under Chapter XXXII, Section 401 of the Code provides that. “Any money (other than

a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine.” The proviso to section 431 is not relevant here. The order for payment of maintenance was an order under the code for payment of money, for the recovery of which no method had been expressly provided. Accordingly, under section 431 of the code, I think the maintenance; money could be recovered, as if it were fine.

12. Section 421 of the Code provides for recovery of fine and the procedure laid down for the purpose was by issue of warrant for attachment and sale of any movable property belonging to offender in this case the present petitioner (opposite party in the maintenance proceeding) or issue of warrant to the Collector of the District, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter: The provision to Section 421 clearly stipulates that “no such warrant shall be executed by the arrest or detention in prison of the offender.”

13. On consideration of the above provisions, there should be no doubt that for recovery of money as maintenance which has to be in accordance with the procedure for recovery of fine no warrant of arrest or detention of the petitioner could have been ordered. I, therefore think that the impugned order dated 1.9.89 was clearly erroneous and has to be set aside.

14. For the aforesaid reasons, this petition is partly allowed and the impugned order dated 1.9.89 passed by the learned Chief Judicial Magistrate, Goalpara in Misc. Case No. 14/83 is set aside.