

# HIGH COURT OF ORISSA ; CUTTACK

## **RPFAM NO.105 OF 2011**

From the order dated 5.8.2011 passed by learned Judge, Family Court, Bhubaneswar in C.R.P.No.36 2011.

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Gyasuddin Khan @ Gayasuddin Khan      ...      Petitioner

Versus

Kahkashan Khan & another      ...      Opposite Parties  
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For Petitioner      :      M/s. S.P.Mishra, S.Nanda,  
S.K.Mohanty,A.K.Dash,  
S.K.Sahoo & J.K.Mohapatra.

For Opp.Parties      :      M/s.Ashok Ku.Mohapatra,  
A.K.Mohapatra & N.C.Rout.

M/s.S.K.Padhi (Amicus curie)

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**P R E S E N T :**

***THE HONOURABLE MR. JUSTICE S.K.MISHRA***

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***Date of judgment: 25.02.2015***

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**S.K.Mishra,J.**      In this revision application, against the order of the Judge, Family Court, Bhubaneswar, the petitioner (husband), who was the opposite party in C.R.P. No.36/2011(Crl. Misc. Case No.141/2009) has assailed the order dated 5.8.2011 passed by the learned Judge enhancing the maintenance of opposite party no.1-wife and opposite party no.2-child from Rs.1500/- to Rs.3000/- each per month.

2. The facts are not in dispute. Both parties belong to Muslim community. Opposite party no.-1 is the petitioner's divorced wife. Opposite party no.2 is their son. The petitioner is working as a Administrative Officer with Oriental Insurance Company Ltd. After divorcing opposite party no.1 he has remarried. It is not disputed that the marriage between the petitioner and opposite party no.1 took place on 11.4.1993. At the time of marriage some dowry articles were given. Later on the petitioner demanded more. There are tussle between the parties. It is further alleged that the petitioner developed illicit relationship with another woman and demanded Rs.2.5 lakhs from opposite party no.1's father. Thereafter the petitioner tortured opposite party no.1 both physically and mentally. On 27.10.2003 the petitioner drove opposite party no.1 out. At that time opposite party no.2 was studying in D.A.V. School, Chandrasekharapur. Thereafter the opposite parties filed an application under Section 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the "Act" for brevity) which was registered as C.M.C. No.61/2004. After hearing both the parties, the learned S.D.J.M., Bhubaneswar allowed the application and directed the petitioner to pay maintenance to the present opposite parties @ Rs.1500/- each per month.

3. The petitioner carried the matter to this Court. The matter came up for disposal before a Single Judge in CrI. Revision No.751/2006. As per judgment dated 3.2.2009 the CrI. Revision was dismissed and the order passed by the learned S.D.J.M., Bhubaneswar was upheld.

4. While matter stood thus, the opposite parties filed an application before the learned S.D.J.M., Bhubaneswar, which was registered as CrI. Misc. Case No.141/2009 for enhancement of maintenance. However, after establishment of the Family Court,

as per the general order passed by the learned District Judge, Khurda at Bhubaneswar the case was transferred from the court of learned S.D.J.M., Bhubaneswar to the court of learned Judge, Family Court, Bhubaneswar. On 4.1.2011 the petitioner was noticed, but he did not appear on the date fixed i.e. on 7.2.2011. Hence he was set *exparte* and the case was adjourned to 24.2.2011 for *exparte* hearing. On that date *exparte* hearing was taken up. On 25.2.2011 final order was passed on the said petition whereby the learned Judge, Family Court allowed the petition filed by opposite party nos.1 and 2(who were petitioners before the trial court) and directed the present petitioner (who was opposite party before the trial court) to pay maintenance @ Rs.3,000/- per month to each of the opposite parties w.e.f. 9.4.2009.

5. The petitioner thereafter filed an application to set aside the order. However, in a detailed and speaking order dated 5.8.2011 the said application to set aside the order was rejected by the learned Judge, Family Court, Bhubaneswar on the ground that the petitioner, who had received notice well before 7.2.2011, could not show any sufficient cause for his non-appearance on date the case was taken up for hearing.

6. In this case in essence two legal questions arise for determination. The first contention (as per the submission of the petitioner's counsel) is that since this is a proceeding under the Act, the Judge, Family Court is not competent to decide the matter. The second contention is that there being no provision of enhancement of maintenance in the Act, the impugned order is illegal.

7. As far as the first contention is concerned, the learned counsel for the petitioner relying upon the case of **Sk.Allauddin**

**V. Shamima Akhtari and another**, 1995 CRL.L.J. 228 contends that an application 3 of the Act cannot be said to be covered by Section 7 as Sub-section (1) of the provision has application only when a suit or proceeding is of the nature envisaged in clauses (a) to (g) of the Explanation, and the matter was adjudicable by the District Court or any sub-ordinate civil court. In the said decision, this Court has held that an application under Section 3 of the Act is neither a suit nor a proceeding, nor is a matter adjudicable by the civil court. This Court has further held that there is no provision in the Act which was enacted subsequent to Family Courts Act which would lend support to the plea that jurisdiction can be deemed to have been conferred by Section 3. It was, therefore, held by this Court that application under Section 3 of the Act cannot be transferred to and proceeded with by Family Court and the order passed by Family Court would be without jurisdiction.

8. In this case Mr. S.K.Padhi, learned Senior Advocate who was appointed as amicus curie to help the Court, brought to the notice of the Court to the reported case of **SHABANA BANO V. IMRAN KHAN**; (2010) 1 Supreme Court Cases 666. In the reported case the question arose whether the Judge, Family Court can entertain the application under Section 125 of the Code and award maintenance in view of the provisions of the Act. The Hon'ble Supreme Court has taken note of various provisions of the Family Courts Act and has held as follows:

“The Family Act was enacted w.e.f. 14.9.1984 with a view to “promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith”. The purpose of enactment was essentially to set up Family Courts for the settlement of family disputes, emphasizing on

conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes. The Act, inter alia, seeks to exclusively provide within jurisdiction of the Family Courts the matters relating to maintenance including proceedings under Chapter IX CrPC.

Section 7 appearing in Chapter III of the Family Act deals with a jurisdiction. The relevant provisions thereof read as under:

“7. Jurisdiction – (1) Subject to the other provisions of this Act, a Family Court shall –

(a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be such subordinate civil court for the area to which the jurisdiction of Family Court extends.

Explanation.- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely –

(a)-(e) \* \* \*

(f) a suit or proceeding for maintenance;

(g) \* \* \*

Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under:-

“20. Act to have overriding effect.-  
The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any law other than this Act.”

A bare perusal of Section of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

Thus, from the above mentioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the application filed under Section 125 CrPC.

In the light of the aforesaid contentions and in view of the pronouncement of judgments detailing the said issue, learned counsel for the appellant submits that the matter stands finally settled but the learned Single Judge wholly misconstrued the various provisions of the different Acts as mentioned hereinabove, thus, committed a grave error in rejecting the appellant’s prayer.”

9. Thus, as per Clause (f) Explanation to Sub-Section (1) of Section 7 of the Family Courts Act any suit or proceeding for maintenance can be taken up and disposed of by the Family Court. Since in essence an application to seek enhancement of maintenance, is a proceeding for maintenance and hence this Court is of the opinion that as per the ruling given in the case of **SHABANA BANO V. IMRAN KHAN** (*supra*) the Judge, Family Court has jurisdiction to decide cases under Section 3 of the Act.

10. As far as the second contention is concerned, it is seen that a constitutional validity of this Act was challenged in the case

of ***Danial Latifi and another V. Union of India***; AIR 2001 SUPREME COURT 3958, which was disposed of Five Judge Bench of the Supreme Court. The Supreme Court after taking of various aspects of the case held as follows:-

“(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

(2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.”

11. Thus, the constitution bench of the Supreme Court has held that it is the duty of the husband to make reasonable and fair provision for the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. The Supreme Court further held that Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

12. Giving purposive interpretation to the provision, the Supreme Court in the case of ***IQBAL BANO V. STATE OF U.P. AND ANOTHER***; (2007) 6 Supreme Court Cases 785 held that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1) (a) of the Act. Now, the question, therefore, remains whether the Court has also jurisdiction to enhance the said amount of maintenance.

13. The Act was enacted to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husband and to provide for matters connected therewith or incidental thereto. Thus, it can be said that this is a progressive legislation aimed at protecting the rights of divorced Muslim women. It is apparent from the statement of objects and reasons of the Act that a divorced Muslim woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. Thus, from the expression “such reasonable provision and maintenance” should be fixed taking into consideration the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman.

14. Thus, it is clear that while awarding maintenance, the needs of the divorced woman, the standard of life enjoyed by her



during her marriage and the means of her former husband is to be taken into consideration. Now the time changes and in the mean time the need of the divorced woman becomes more because of rise in prices and other related factors as well as the education of her children and to maintain the standard of life she was enjoying before her marriage and the growth in the income of her former husband. This Court is of the opinion that a purposive interpretation of the Act would also include the power of the Magistrate or Judge, Family Court to enhance the maintenance granted to a divorced Muslim woman after lapse of some time of passing of the final order under Section 3 of the Act. Accordingly, this issue is answered.

15. As far as the child is concerned there is no specific provision for maintenance of child under this Act. Hence Section 125 of the Code shall apply and in that Section a child is entitled to maintenance till he attained the age of majority i.e. eighteen years.

16. In that view of the matter, if it is shown by opposite party no.1 before the executing court that opposite party no.2 has become major in the mean time, then the executing court shall pass appropriate orders excluding opposite party no.2 from receipt of maintenance from the date of his attending the majority.

With the aforesaid observations, the RPFAM is disposed of. L.C.R. be sent back.

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**S.K.Mishra, J**

**Orissa High Court, Cuttack**  
**Dated 25<sup>th</sup> February, 2015/A.K. Behera**

Orissa High Court, Cuttack  
Dated June, 2010/A.K.Behera.

Sd/-

**A.S.Naidu,J.**

**S.C.Parija,J.** I agree.

Sd/-  
**S.C.Parija,J**

True Copy

Orissa High Court, Cuttack  
Dated June,2010/A.K.Behera.

P.A.

