

(1999) 07 PAT CK 0040

In the Patna High Court

Case No : Criminal Miscellaneous No. 2044 of 1993

Ibrar Alam

APPELLANT

Vs

The State of Bihar and Nooraisha Khatoon

RESPONDENT

Date of Decision : 02-07-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 127, 128, 2, 7
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 4, 5, 7
Waqf Act, 1995 — Section 9

Citation : (1999) 2 BLJR 1547 : (1999) 3 PLJR 1

Hon'ble Judges : Nagendra Rai, J; Ashish N. Trivedi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Nagendra Rai, J.—The petitioner has challenged the order for payment of maintenance passed u/s 125 of the Code of Criminal Procedure (hereinafter referred to as the Code) in favour of his wife opposite party.

2. The petitioner is aggrieved by the order dated 19.6.92 passed by the Judicial Magistrate 1st Class, Gaya in Misc. Case No. 95/89 (Tr. No. 353/92) whereby the petitioner of the said case has been directed to pay maintenance of Rs. 400/- per month to the wife opposite party Nooraisha Khatoon from 27.9.89, the date of filing of the application and the order dated 16th January, 1993 passed in Cr. Rev. No. 180/92 dismissing the revision application against the said order.

3. The facts giving rise to the present application are that opposite party Nooraisha Khatoon was married with the petitioner on 6.1.83. At the time of marriage Rs. 25,000/- was spent to fulfil the demand of dowry made by the petitioner. After marriage she went to her husband's house. Thereafter, she went to Calcutta where her husband was employed. She became pregnant and gave birth to a female child at her mother's place. Thereafter, her husband and in law demanded Rs. 25,000/- and when her mother showed inability to pay the amount she was being neglected and tortured in different ways and her husband

threatened to marry with another girl as a result of which she filed a petitioner u/s 125 of the Code claiming Rs. 400/- as maintenance as her husband has sufficient means to pay the same.

4. The petitioner appeared in the Court below and filed show cause wherein he did not deny the factum of marriage but deny the other assertions and allegations made in the petition.

5. Opposite party Nooraisha Khatoon examined three witnesses including herself in support of her case. Her husband (petitioner) also examined two witnesses but did not examine himself as a witness. At the fag end of the case a petition was filed on his behalf by his brother that he has divorced his wife and as such she is not entitled to maintenance in view of the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the Act). The learned Magistrate rejected the aforesaid petition by order dated 20.4.92. The ground for rejection of the said prayer was that during the examination of the witnesses no whisper was made on behalf of the husband petitioner that he has given divorce. This apart the petition filed in the Court was neither signed by the husband petitioner nor by any authorised advocate. The petitioner preferred a Cr. Rev. No. 180/92 against the said order which was heard and dismissed by the Sessions Judge on 19.5.92 and thereafter the impugned order has been passed by the learned Magistrate which has been upheld in revision. Both the original Court as well as the revisional Court did not accept the case of the petitioner that he has divorced his wife opposite party and ordered for payment of maintenance, as stated above.

6. Learned Counsel appearing on behalf of the husband petitioner submitted that as the petitioner has divorced his wife the proceeding u/s 125 of the Code is not maintainable and according the direction issued for payment of the maintenance under the said section is vitiated in law. The case should have been considered in terms of the provisions of the Act and the opposite party is only entitled to the maintenance for the period of Iddat from her husband in terms of the provisions contained u/s 3 of the Act.

7. The Counsel for the opposite party submitted that the proceeding u/s 125 of the Code was maintainable for maintenance even by the divorced wife of a muslim in case of refusal or neglected by the husband and. her right to claim maintenance u/s 125 of the Code is not taken away on curtailed by the provision of the Act.

8. Thus, the question for determination is as to whether an application u/s 125 of the Code by a divorced wife for maintenance in case of refusal or neglect by her husband governed by muslim law is maintainable after enactment of the Act or not.

9. Section 536 of the oldest Code contained a provision for maintenance of wife and children in case of neglect or refusal by the husband and father respectively, This provision was made to compel the husband and father to maintain with a

view to prevent vagrancy and destitution. Section 488 of 1998 Code also contained the same provision. Under the said section also in case of refusal or neglect by the husband his wife or his legitimate or illegitimate child who are unable to maintain them selves, could claim maintenance. There was no provision under the old Code for payment of maintenance to the divorced wife or parents. The Code of 1973 for the first time contained a provision for maintenance of parents and divorced wife. The orders passed under the Code are subject to final adjudication that may be made by a competent Civil Court determining the rights of the party with regard to the payment of maintenance.

10. The provision of maintenance under the Code was independent of personal law of the parties. The only requirement that is to be proved in case of payment of maintenance to the wife or the divorced, wife is existence of conjugal relationship which has to be determined with reference to the personal law of the parties beyond this the personal law has no role to play so far the question of payment of maintenance is concerned.

11. The question as to whether the divorced wife of a muslim husband is entitled to maintenance u/s 125 of the Code or not till she is remarried or her claim of maintenance is governed by personal law came for consideration before the Apex Court in the case of Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, , wherein the Apex Court held that in view of Clause (b) of the Explanation to Section 125(1) which defines "wife" as including a divorced wife, divorced wife of the muslim is also include in the said definition. The case of divorced muslim women is covered by Section 125 of the Code so long as she has not remarried. She is a wife for the purpose of Section 125 of the Code and the statutory right available to her under that section is unaffected by the personal law applicable to her. It was further held that if the divorced wife is able to maintain herself the husband's liability to provide maintenance for her ceases with the expiration of the period of Iddat. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Code. In other words, there is no conflict between the provisions of Section 125 of the Code and those of the Muslim Personal Law on the question of the Muslim Husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

12. The aforesaid judgment was received with protest by the Muslim Community as according to them the said judgment interfered with their Personal Law. Thereafter, the Parliament enacted the Act which came into force on 18th May, 1986. The Preamble of the Act provides that the Act has been 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. Section 2(a) of the said Act defines that "divorced Woman" means a muslim woman who was married according to muslim law and has been divorced by, or has obtained divorce from, her husband in accordance with law. Section 3 provides that notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to a reasonable and

fair provision and maintenance to be made and paid to her within iddat period by her former husband, a reasonable and fair maintenance to the children for a period of two years from the respective date of birth of such children, an amount equal to the sum of mahr and dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law and all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relative of the husband or his friends.

13. Section 4 provides that in case when the divorce woman has not remarried and is not able to maintain herself after the Iddat period, the Magistrate may issue a direction to such of her relatives as would be entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her. In case relatives are not in a position to pay the maintenance a direction may be issued to the Wakf Board established u/s 9 of the Wakf Act, 1954 or under any other law to pay maintenance. Section 5 provides that after filing an application u/s 3 of the Act for maintenance etc. as mentioned above the divorced wife and her former husband by filing an affidavit or any other declaration as provided therein may declare that their case should be disposed of in terms of provision of Sections 125 to 128 of the Code and thereafter the Magistrate will dispose of the proceeding accordingly. Section 7 provides that every application by a divorced woman u/s 125 pending before a Magistrate on the commencement of this Act, shall notwithstanding anything contain in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

14. Thus, the Preamble of the Act shows that the Act has been brought into existence with a view to protect the rights of the divorced muslim women. It is a beneficial legislation and it has to be interpreted in such a manner as to fulfil the object for which it has been enacted.

15. The provision of Section 7 clearly shows that an application filed by a divorced Woman of Muslim husband after coming into force of the Act has to be disposed of in terms of the Act. The conjoint reading of the aforesaid provision and the non-obstante clause makes it clear that Section 125 of the Code has been excluded or made inoperative in case of claim of maintenance by a divorced muslim wife from her husband. The Code of Criminal Procedure is a general one whereas the Act in question is a special one and it will prevail over the general provision contained under the Code. Thus, from bare reading of the provision it is clear that after coming into force of the Act the claim of maintenance u/s 125 of the Code by a divorced muslim woman is not maintainable unless the case is covered by Section 5 of the Act, according to which both the parties (husband and divorced wife) may agree for disposal of their case in terms of the provisions of Sections 125 to 128 of the Code by complying with the requirement as mentioned in the said Section.

16. A learned Single Judge of this Court in the case of Md. Yunus v. Bibi Phenkani

alias Tasrun Nisa 1987 (2) Crimes 241, held that the divorced woman is no longer entitled to claim of maintenance u/s 125 of the Code and her claim for maintenance is to be determined in terms of the provision of the Act, according to which she is entitled to the claim of maintenance for the Iddat period.

17. The said question was considered by a Full Bench of the Andhra Pradesh High Court in the case of Usman Khan Bahamani Vs. Fathimunnisa Begum and others, , and held that a divorced muslim woman cannot claim maintenance u/s 125 of the Code after coming into force of the Act. The provision of Sections 125 to 128 of the Code has no application after coming into force of the Act except in case of option exercised by the parties in terms of Section 5 of the Act. It was held in paragraph-14 of the said judgment which runs as follows:

Let us now analyse the situation arising out of the provisions of the Act itself to answer the question whether Section 125 of the Code would be applicable to the case of a divorced muslim wife claiming maintenance from her former husband. It is seen that Section 3 states with a non-obstante clause as it provides that notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to the rights which are enumerated therein. u/s 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of Iddat, is devolved upon the relatives and if the relatives are not available, on the Wakf Board. The very concept of liability is limited for and during the period of Iddat. The liability, if any, arising for payment of maintenance after the Iddat period to the divorced woman if she is unable to maintain herself is cast upon the relatives or the Wakf Board, u/s 4 of the Act. u/s 5 it is provided that the husband and wife would be governed by Sections 125 to 128 of the Code, if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provisions of Section 125 of the Code when such an application is expressly dependent upon the provisions of Section 5 of the Act and on the exercise of the option by the parties concerned. Further more, u/s 7 of the Act, the intention of the Legislative is clear when it provides that every application by a divorced woman u/s 125 or u/s 127 of the Code pending before the Magistrate on the commencement of the Act of 1986, shall notwithstanding anything contained in that Code and subject to the provision of Section 5 of the Act, be disposed of in accordance with the provisions of Act of 1986.

18. I am in full agreement with the view taken by the leaned Single Judge of this Court as well as the Full Bench of Andhra Pradesh High Court. Any contrary view will frustrate the every object of the enactment of the Act, which has been enacted with a view to make the provision for payment of maintenance to the muslim divorced wife.

19. Thus, once it is proved that a muslim woman has been divorced in accordance with law her right to claim maintenance u/s 125 of the Code ceases and her case is to be governed by the provision of the Act. But prior to divorce her claim for maintenance in case of refusal or neglect by the husband is

governed by Section 125 of the Code for the simple reason that before the divorce she is wife of the muslim husband and he is liable to pay maintenance to his wife in case of fulfilments of the conditions as mentioned u/s 125 of the Code.

20. A show cause was filed by the husband wherein he has not stated that he has divorced his wife. He did not cross-examine the witnesses examined on behalf of his wife on the point of divorce and on the other hand he has specifically stated in the show cause that he is ready to keep his wife. At the fag end of the case an application was filed by the brother of the petitioner, which was not even signed by the Advocate engaged by the petitioner, that he has divorced his wife. The Magistrate rejected the said petition on the ground that no suggestion was made during the cross-examination by the witnesses that the petitioner has divorced his wife and the said application was neither signed by the petitioner nor he had authorised his Advocate to sign on his behalf.

21. Both the Courts having come to the conclusion that the petitioner has not been able to prove that he has divorced his wife, rejected the belated statement made in the petition filed by the brother of the petitioner as not being petition filed by the petitioner stating that he had divorced his wife. There is no record to show that he authorised his brother to pronounce talak by filing a petition which was even not signed by the Advocate of the petitioner. The petitioner in his show cause himself stated that he was ready to keep his wife. In that view of the matter, both the Courts have rightly rejected the claim of Divorce set up by the petitioner.

22. Taking into consideration the aforesaid facts I am of the view that no case for interference with the finding of the Magistrate that the husband has failed to prove the divorce, is made out. The said finding has been upheld in Revision. No other point has been urged on behalf of the petitioner.

23. In the result, the application is dismissed.

Ashish N. Trivedi J.

I agree.