

**(1988) 04 BOM CK 0012**

**In the Bombay High Court**

**Case No :** Criminal Application No. 413 of 1987

Mahaboobkhan " Babu

APPELLANT

Vs

Parveenbanu and Another

RESPONDENT

**Date of Decision :** 29-04-1988

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1), 125(3), 127  
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 7

**Citation :** (1988) 3 BomCR 379 : (1988) MhLj 781

**Hon'ble Judges :** V.A. Mohta, J

**Bench :** Single Bench

**Advocate :** V.S. and K.V. Sirpurkar, for the Appellant; A.J. Khan, B.T. Patil, Assistant Public Prosecutor, for the Respondent

**Final Decision :** Allowed

## Judgement

V.A. Mohta, J.—Is the Muslim Women (Protection of Rights on Divorce) Act, 1986 (the Act) retrospective in operation is the point that arises in this application. Following is the factual back-ground :

2. The applicant Mahaboobkhan married the non-applicant Parveenbanu on 25th April, 1984. Both are Muslims and were married according to Muslim law. There was a divorce between the two on 8th January, 1985. Parveenbanu applied for maintenance u/s 125, Cri.P.C. on 25th January, 1985 in the Court of Judicial Magistrate, First Class, Luxettipet (A.P.), where the marriage was solemnised. By order dated 31st January, 1985 she was granted maintenance at the rate of Rs. 250/- p.m. from the date of the application till the circumstances vary. She filed an application in the Court of judicial Magistrate, First Class, Wani (M.S) (where Mahaboob Khan resides) under sub-section (3) of section 125 read with section 120. Cri.P.C. for issuance of a distress warrant for recovery of maintenance for the period 25th January, 1985 till 21st April, 1986 along with the costs amounting to Rs. 100/-. The said application was resisted by Mahaboobkhan vide reply dated 16th July, 1986 on the ground that the Act which brought into force

w.e.f. 19th May, 1986 has obliterated the proceedings u/s 125, Cri.P.C. and the only permissible relief for maintenance to a Muslim divorced woman thereafter was in terms of the provisions of the Act. The learned Judicial Magistrate, Wani overruled the objection on the ground that the order of maintenance u/s 125, Cri.P.C. was passed prior to the commencement of the Act, which does not have retrospective effect and, therefore, the husband Mahaboobkhan was obliged to comply with the order of maintenance dated 31st January, 1986. The said order overruling the objection was challenged before the Additional Sessions Judge, Yavatmal, who was pleased to maintain the order impugned. The present application challenges the maintainability of the application u/s 125(3), Cri.P.C. dated 14th May, 1986 on the ground that its continuation is an abuse of the process of the courts.

3. In deciding the question of retrospectivity and the applicability of the Act to pending proceedings u/s 125(3), Cri.P.C. on the date of the commencement of the Act, it will be necessary to examine not only the general scheme and the intent but also the legislative back-ground. I will first deal with the back-ground.

In two decisions, Bai Tahira Vs. Ali Hussain Fidaalli Chothia and Another, and Fuzlunbi Vs. K. Khader Vali and Another, the Supreme Court held that section 125, Cri.P.C. applied to every divorcee-woman and no exception could be carved out for a divorced Muslim wife, despite provisions of sections 127(3)(b), Cri.P.C. and Muslim Personal Law. Soundness of this view was doubted by a Division Bench when the famous matter of Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, came up for hearing before the said Bench. The matter was referred to a larger Bench by making the following order :

"As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in Bai Tahira v. Ali Hussian Fidaali Chothia and Fuzlunbi v. V.K. Khader Vali, require consideration because, in our opinion, they are not only in direct contravention of the plain and unambiguous language of section 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the periods of iddat has been observed. The decision also appears to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three Judges."

In view of the public importance of the point raised, a larger Bench of five learned Judges heard the matter and held that (i) even according to his personal Law, a Muslim husband is under an obligation to provide a maintenance beyond the period of iddat to his divorced wife who is unable to maintain herself and that there was no conflict between the two laws on the subject and (ii) even if there is

any conflict section 125, Cri.P.C. will have over-riding effect. (See Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, ).

4. This decision generated great controversy as to the obligation of a Muslim husband to maintain his divorced wife who is unable to maintain herself beyond iddat period. A section of Muslim population strongly felt that the Supreme Court has not correctly interpreted the Muslim Personal Law. The Act has been made to specify the rights to which Muslim divorced woman is entitled to at the time of divorce and to protect her interests. Here are the subjects and reasons attached to the relevant bill introduced in the Parliament.

The Supreme Court, in Mohd Ahmed Khan v. Shah Bano Begum and others has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance in the situation envisaged by section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself the husband's liability ceases with the expiration of the period of iddat, but she is unable to maintain herself after the period of iddat, she is entitled to have recourse to section 125 of the Code of Criminal Procedure.

This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely :-

(a) a Muslim divorced 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. She will also be entitled to mahr or dowar and all the properties given to her by her relative, friends husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the delivery of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives

also. But where a divorced woman has no relatives or such relatives any one of them has not enough means to pay the maintenance of the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay."

5. The Act has barely 7 sections. Section 2 defines inter alia the terms "divorced woman"" iddat period "Magistrate". Section 3(1), which is substantive in character states that 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 or 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 or mahr or dower agreed to be paid to her at the 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 her marriage by her relatives or friends or the husband or any relatives of the husband or his friends."

Sub-sections (2) & (3) of section 3 are procedural. An application can be made to a Magistrate for an order of payment of dues under sub-section (1) of section (3). Sub-section (4) deals with the subject of execution of the order of payment. It is *pari materia* with section 125(3) Cri.P.C. and reads as under :

If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance, or mahr or dower due in the manner provided for levying fine under the Code of Criminal Procedure, 1973, (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code."

Section 4(1) deals with the order for payment of maintenance to a divorced woman who has not remarried and who is not able to maintain herself after the iddat period, against her relatives who would be entitled to inherit her property on her death according to Muslim law. Similar provision is made also for maintenance allowance for the children of such divorced woman. Sub-section (2) of section 4 provides that if a divorced woman has no relatives as mentioned in sub-section (1) or such relatives do not have sufficient means to pay the

maintenance, the Magistrate may by order direct the State Wakf Board established u/s 9 of the Wakf Act, 1954 to pay such maintenance as determined by him or to pay. Section 5 deals with the option to a former husband to be Governed by the provisions of section 125 to 128 of Cri.P.C. Section 6 is rule making power. Section 7 which contains transitional provisions reads thus :

"7. Every application by a divorced woman u/s 125 or u/s 127 of the Code of Criminal Procedure, 1973 (2 of 1974), pending before a Magistrate on the commencement of this Act, shall notwithstanding anything contained 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,"

It will be seen that the Act does not fix outer limit of Rs. 500/- as contained in section 125, Cri.P.C. A divorced Muslim woman who has not remarried is entitled to maintenance from the husband only upto the iddat period-the maximum limit being the amount of mehr.

6. Now, from the Legislative history and the back-ground, it seems that in a sense, the Act is declaratory in character. When is the Act declaratory ? According to Blackstone (1 Comm, 86) "where the old custom of the realm is almost fallen into disuse or become disputable, in which case Parliament has thought proper, in perpetuum rei testimonium, and for avoiding all doubts and difficulties, to declare what the law is, and every hath been." Craries on Statute Law, Seventh Edition at page 58 states "the usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes." It is well settled that where the Act has declaratory character, the usual presumption against retrospectivity does not arise. Indeed such Acts are generally retrospective. No doubt the word "declared" is not mentioned in the Act but the presence or the absence of the said word is not conclusive of the matter.

7. That on coming into force of the Act provisions of sections 125 or 127 of the Cri.P.C. stand repealed is clear from the language of section 7. No longer the right of getting maintenance from the husband after the iddat period is available to a muslim divorced woman. It is pertinent to notice that no exception about sub-section (3) of section 125 Cri.P.C. has been made in section 7 of the Act, which means that even such applications were intended to be brought into the net of section 7. Under the circumstances, to make exception about sub-section (3) and to restrict the operation only to sub-section (1) of section 125 would be doing violence to the plain language of section 7. The Legislative intention seems to be quite clear. It is of extreme relevance to notice that the neither order passed u/s 125 Cri.P.C. nor liability already incurred earlier to the Act has been saved. The inevitable consequence is that not only right u/s 125(1) but also remedy u/s 125(3) are lost. Section 7 thus envisages complete effacement of the right and remedy u/s 125 Cri.P.C. and therefore, there can be no question of enforcing the same under sub-section (3) of section 125 Cri.P.C.

8. Presence of non obstante clause in section 7 of the Act is also a pointer. Section 3 and section 7 of the Act (which is later to the Cr. Procedure Code) operate upon the same field in which the Cri.P.C. operates. The only way by which the conflict between the two provisions can be resolved is to hold in favour of whole repeal in the absence of a saving clause. In this connection, useful reference may be made to the following observations in the case of Gopi Chand Vs. The Delhi Administration, :

"Since the impugned Act does not contain an appropriate saving section the appellant would be entitled to contend that after the expiration of the Act, the procedure laid down in it could be no longer be invoked in the cases then pending."

What applies to remedy also applies to the right.

9. My attention was drawn to two decisions-one of Madhya Pradesh High Court in the case of Mohd. Shafi v. Smt. Badrunnisa & others 1988(1) Crimes 819 and another of Patna High Court in the case of Md. Yunus v. Bibi Phenkani " Tasrun Nisa and another 1987(11) Crimes 241. In the present matter, we are not concerned with situation as was obtained in the Madhya Pradesh case viz. of a divorce have been taken place after the commencement of the Act, during pendency of an application for maintenance by the wife u/s 125 Cri.P.C. Patna High Court case has taken a view that the Act is retrospective in operation. With the said view, I have my respectful concurrence.

10. To conclude, the revision is allowed. The order passed by the Judicial Magistrate First Class, Wani and the learned Additional Sessions Judge, Yavatmal are quashed and set aside. The Judicial Magistrate, First Class, Wani is directed to dispose of the application in accordance with the provisions of the Act.