
(1998) 12 BOM CK 0002

In the Bombay High Court

Case No : Criminal Writ Petition No. 205 of 1998

Mahamadrafik Akbar Bagwan

APPELLANT

Vs

Nurbegam Mahamadrafik Bagwan and Others

RESPONDENT

Date of Decision : 15-12-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127, 128, 482
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 5, 7

Citation : (1999) 101 BOMLR 812

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Judgement

F.I. Rebello, J.—The petitioner by the present petition has challenged the order dated 5th November, 1990 passed by the IInd Additional Sessions Judge, Kolhapur in Criminal Revision Application No. 204 of 1989. By the said judgment the learned Additional Sessions Judge reversed the order of the Judicial Magistrate, First Class, Kagal, dated 6th October, 1989 below Exh. 6 in Miscellaneous Criminal Application No. 5 of 1989.

2. The petitioner and respondent No. 1 were married. The respondent No. 2 is the child from the said marriage. Divorce has been effected between the petitioner and respondent No. 1 on 8th January, 1985. The respondent No. 1 on behalf of herself and her minor daughter had applied u/s 125 of the Cr.P.C. for maintenance by application dated 25th September, 1986. The said application came to be allowed by order dated 2nd June, 1986. Revision Application preferred by the petitioner was dismissed on 30th November, 1989.

As the petitioner herein failed to comply with the terms of the order the respondents moved for recovery in terms of Section 128 of the Cr.P.C. It was the contention of the petitioners herein that on coming into force of the Muslim Women Act, 1986 (hereinafter referred to as Muslim Women Protection Act) the respondents had no locus standi to move the said application without the consent of the petitioner considering the provisions of Sections 5 and 7 of the Muslim

Women Protection Act. The learned Magistrate held that in view of Section 7 of the aforesaid Act the order was not enforceable and consequently rejected the application moved by the respondents Nos. 1 and 2 herein. Aggrieved by the said order the Respondents Nos. 1 and 2 herein preferred Criminal Revision Application No. 204 of 1989 which came to be allowed whereby the order of the Magistrate was set aside. The learned Additional Sessions Judge upheld the right of respondents Nos. 1 and 2 to get the order enforced and hence the present petition.

3. At the hearing of the petition, learned Counsel for the petitioner contends that the order came to be passed on 2nd June, 1986 whereas the Muslim Women's Protection Act came into force with effect from 19.5.1986. In that view of the matter the learned Counsel contends that Section 7 of the said Act was applicable and as such the order dated 2nd June, 1986 is without jurisdiction and consequently cannot be enforced. Learned Counsel relies on a judgment of the Single Judge of this Court in the case of Mahaboobkhan " Babu Vs. Parveenbanu and Another, .

4. The Muslim Women (Protection of Rights on Divorce) Act, 1986 hereinafter referred to as the Muslim Women Act came into force with effect from 19th May, 1986. Section 7 of the Act reads as under:

7. Transitional provisions. - 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.

In view of Section 7 of the Act it is clear that if any application by a divorced woman u/s 125 or u/s 127 of the Code of Criminal Procedure, 1973 was pending before a Magistrate on the commencement of the said Act, the application shall, notwithstanding anything contained in the Criminal Procedure Code and subject to the provisions of Section 5 of the Act, be disposed of by such Magistrate in accordance with the provisions of the Act. In other words the Magistrate was bound to apply the provisions of the Muslim Women Protection Act to all pending applications. In the present case admittedly the application which was pending was u/s 125 of Cr.P.C. and hence would have been normally covered by the provisions of Section 7 of the said Act. The order, however, came to be passed on 2nd June, 1986 under the provisions of Section 125 of Cr.P.C. and in disregard of the provisions of the Muslim Women Protection Act. A Revision came to be preferred against the said order which was rejected. There was no further challenge to the said order which consequently became final until the objection by the petitioner herein to its enforcement on an application being made by the respondent Nos. 1 and 2 u/s 128 of the Cr.P.C. Admittedly Section 128 of Cr.P.C. is not covered by Section 7 of the Muslim Women's Act.

It may be mentioned that a Single Judge of this Court in the case of

Mahaboobkhan Faizullakhan (supra) was considering a case before him where a divorced Muslim wife applied for maintenance u/s 125 of Cr.P.C. on 25th January, 1985. She was granted maintenance by order dated 31.1.1985. As the amount was not paid she applied for a distress warrant. The said application was resisted by the husband therein on the ground that in the meantime the Muslim Women's Act had come into force in 1986. The objection was overruled by the Magistrate on the ground that the maintenance order was passed prior to commencement of the Act and the Act did not have retrospective effect. The said order rejecting the objection came to be challenged before the Additional Sessions Judge, Yeotmal, who maintained the said order. Thereafter the proceedings were invoked before this Court u/s 482 of Cr.P.C. A perusal of the said judgment shows that the learned Single Judge proceeded on the footing that a reading of Section 7 of the Muslim Women's Act, 1986 envisaged complete effacement of the right and remedy u/s 125 and, therefore, there can be no question of enforcing the same under Sub-section (3) of Section 125 of Cr.P.C.

Provisions of Section 125 of Cr.P.C. cease to apply to an applicant covered by the Muslim Women Protection Act with effect from the date it came into force subject to the rider as contained in Section 5 of the Muslim Women Protection Act. Section 5 of the Act provides that if on the date of the first hearing of the application under Sub-section (2) of Section 3 a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973 and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose such application accordingly. In other words by consent, the parties can agree that the Magistrate can have jurisdiction to dispose of the application under Sections 125 to 128 of the Act. Reference to Section 128 can be explained in as much as if an order is made u/s 125 then enforcement will be u/s 128 of Cr.P.C. There is a distinction in so far as Section 7 is concerned. Section 7 refers only to Section 125 or 127 of Cr.P.C. There is no reference to Section 128. Only the applications pending on the date when the Muslim Women's Protection Act came into force u/s 125 or 127 subject to Section 5 of the Act were to be disposed of by such Magistrate in accordance with the provisions of this Act. It is, therefore, clear that orders passed before the Act came into force were not covered by Section 7 or any other provisions of the Act. Reference to Section 5 of the Act would, therefore, be only in respect of applications made after the Act came into force. Therefore, the mere fact that Section 128 of Cr.P.C. has been referred to in Section 5 of Muslim Women's Protection Act would not mean that in so far as the enforcement of an order passed before the Act came into force the same would be governed by Section 5 of the Muslim Women's Protection Act. That will refer to the order passed u/s 5, after the Act came into force. I say so because there is no provision in the Act to hold or declare that orders passed before the Muslim Women Protection Act came into force were null and void or subject to Section 3 of the Act. In the light of the

matter, the judgment in Mahaboobkhan Faizullakhan (supra) normally ought to have been referred for consideration of a Division Bench of this Court. However, the said judgment can be distinguished in as much as Section 5 of the Act had not been taken into consideration. Further in the instant case the order of maintenance was challenged and the challenge was rejected and attained finality.

5. As pointed out earlier even under the Muslim Women's Act by virtue of Section 5 the parties can opt out of the provisions of the Act. It is true that Section 5 requires an affidavit or any other declaration in writing. In the instant case factually the order of the Magistrate is dated 2nd June, 1986 whereas the Act came into force on 19th May, 1986. There is nothing on record to show whether the arguments had been completed and the matter was only posted for judgment or for that matter the parties has agreed in writing to proceed with the matter. Even otherwise the application when filed was not by a divorced muslim wife. Even otherwise considering the fact that the petitioner herein did not challenge the final order and Section 5 of the Act permitted the parties to opt under the provisions of the Act it cannot be said that the order is a nullity. In that light of the matter the order dated 2nd June, 1986 is clearly enforceable. It can, therefore, be enforced u/s 128 of the Cr.P.C. In the light of that no interference is called for with the order of the Revisional Court and consequently, the order of the 2nd Additional Sessions Court is upheld. The Magistrate is directed to proceed with the enforcement of the order u/s 128 of the Criminal Procedure Code.