

(2007) 07 CAL CK 0035
In the Calcutta High Court
Case No : C.R.R. No. 2288 of 2005

Manchura Bibi @ Baby Begum

APPELLANT

Vs

Abdul Majid Mondal and Another

RESPONDENT

Date of Decision : 02-07-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 21

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127, 128, 482

Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 3(1), 3(1)(2), 3(2), 3(3)

Citation : (2008) 1 CHN 1043

Hon'ble Judges : Tapan Mukherjee, J

Bench : Single Bench

Advocate : Kazi Safiuddin Ahmed and Md. Riazuddin, for the Appellant; Prabir Majumdar, for Opposite Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Tapan Mukherjee, J.—This application u/s 482, Criminal Procedure Code is directed against the order dated 20.9.03 passed by learned Chief Judicial Magistrate, Nadia in Misc. Case No. 277(iv) of 2002 u/s 125, Cr.PC.

2. The petitioner is a divorced wife of the O.P. No. 1, She filed an application u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and on 30.9.99 the same was disposed of by the Judicial Magistrate, 3rd Court, Krishnanagar granting Rs. 101/- as dower, Rs. 500/- per month for maintenance for iddat period. Then the petitioner filed an application u/s 125, Cr.PC for monthly maintenance at the rate of Rs. 1,500/- per month from the O.P. No. 1 from the date of application. The said application was rejected by the learned Magistrate on 20.9.03 holding that the petitioner has reaped benefit u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act and law does not permit her to maintenance u/s 125, Cr.PC and she can avail of Section 4 of the said Muslim Women (Protection of Rights on Divorce) Act.

3. Being aggrieved by the said order of the learned Magistrate the wife-petitioner has filed the instant petition for setting aside the impugned order and for hearing the misc. case on merit.

4. It has been contended by the learned Lawyer for the petitioner that the divorced Muslim woman can claim maintenance u/s 125 of the Cr.PC and the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 are made available to the divorce Muslim woman really in addition to the claim available to them u/s 125 of the Cr.PC. The said Act of 1986 does not indicate that the divorced woman cannot file any application u/s 125, Cr.PC independently of said Act of 1986 and it has been laid down in the ruling reported in Abdul Latif Mondal Vs. Anuwara Khatun and Another, that the provisions of maintenance under Muslim Women (Protection of Rights on Divorce) Act made available to the divorce Muslim women are in addition to the claims available to them u/s 125 of the Cr.PC.

5. Learned Lawyer has further contended that u/s 3(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband. In the case of Danial Latifi v. Union of India reported in 2002 C Cr. LR (SC) 1, it has been held that the wordings of the Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations i) to make a reasonable and fair provisions for his divorced wife; ii) to provide maintenance for her. The emphasis of this Section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded namely within the iddat period.

6. Learned Lawyer for the petitioner further contends that in that decision it was further observed that a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance and at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangement in advance for meeting those needs. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to the meaning as the word "within" would mean on or before, "not beyond" and therefore it was held that the act would mean that on or before the expiration of the iddat period the husband is bound to make and pay maintenance to the wife and if he fails to do so the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for the second time.

7. Learned Lawyer for the petitioner has further contended that this view of the Apex Court was reiterated by this Court in the case of Makiur Rahaman Kha and Another Vs. Mahila Bibi, . He has further contended that in the Mohd. Ahmed

Khan Vs. Shah Bano Begum and Others, , a divorced Muslim woman was given the right to claim maintenance u/s 125 Cr.PC against her former husband. The Muslim Women (Protection of Rights on Divorce) Act does not take away the effect of law laid down by the Apex Court in the case of Shah Bano. The Act nowhere provides that a divorced Muslim woman is not entitled to file an application u/s 125 Cr.PC independently of the Muslim Women (Protection of Rights on Divorce) Act.

8. In the case of Danial Latifi v. Union of India it was held by the Apex Court that the enactment of the Muslim Women (Protection of Rights on Divorce) Act though intended to reverse the decision in Shah Bano case actually codifies the very rationale contained therein.

9. Learned Lawyer for the petitioner has further contended that the provision of Section 4 of the Muslim Women (Protection of Rights on Divorce) Act does not apply to the former husband. It applies where the Muslim husband is incapable of maintaining his divorced wife who is incapable of maintaining herself and not remarried. So the learned Lawyer for the petitioner has contended that mere fact that there is an order of maintenance for the iddat period in a proceeding under Muslim Women (Protection of Rights on Divorce) Act does not debar her to maintenance from her husband by filing a petition u/s 125, Cr.PC and so the instant petitioner should be allowed and the impugned order should set aside for rehearing the matter afresh.

10. Ld. Lawyer for the opposite party contended that in the Danial Latifi's case the Apex Court considered the constitutional validity of the provisions of Sections 3 and 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Supreme Court made certain conclusions while upholding the validity of the Act in para 36 of the judgment. The petitioner sought for reliefs under Muslim Women (Protection of Rights on Divorce) Act and obtained an order and if she was aggrieved by the said order she could have moved the superior Court against that order in revision and she cannot come to claim relief u/s 125, Cr.PC independently. The provision of Section 5 of the Act gives her the right of election whether she would be governed by the provisions of Muslim Women (Protection of Rights on Divorce) Act or by the provisions of Section 125, Cr.PC. When she chose the relief u/s 3, Muslim Women (Protection of Rights on Divorce) Act she cannot switch over to the relief u/s 125, Cr.PC. Under the provisions of Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, the husband is to make a reasonable and fare provision including the maintenance of divorced wife extending beyond the iddat period within the iddat period and when the learned Magistrate did not give her the relief of reasonable and fair provision including the maintenance extending beyond iddat period she should have moved the Superior Court in revision against that order and for not getting such relief of maintenance beyond iddat period, she cannot claim relief u/s 125, Cr.PC.

11. It is admitted that the petitioner is a divorced wife of the O.P. No. 1. It is

further admitted that the petitioner filed a petition u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act before the learned Chief Judicial Magistrate, Nadia against her husband O.P. No. 1, for maintenance for the period of iddat, dower amount and other articles given to her at the time of her marriage. In the petition u/s 3 of the Act the petitioner did not pray for reasonable and fair provision including maintenance beyond the period of iddat. Ld. Magistrate allowed Rs. 101/- for dower and Rs. 1,500/- for maintenance during iddat period. It further appears that after the said order in the case under Muslim Women (Protection of Rights on Divorce) Act passed on 30.9.99 by the learned Magistrate the petitioner again filed the petition u/s 125, Cr.PC on 8.4.2002 registered as Misc. Case No. 277(iv) of 2002 claiming maintenance at the rate of Rs. 1,500/- per month from her husband.

12. It further appears that on 20.9.2003 by the impugned order learned Magistrate dismissed the case observing that the petitioner has reaped legal benefit u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act and law does not permit her to maintenance u/s 125, Cr.PC and she can avail herself of Section 4 of the said Muslim Women (Protection of Rights on Divorce) Act.

13. It has been laid down in the ruling reported in Abdul Latif Mondal Vs. Anuwara Khatun and Another, by this Court that there is no Section in the Act which nullifies the order passed by the Magistrate u/s 125 of the Cr.PC. Further, once the order u/s 125, Cr.PC granting maintenance to the divorced woman is passed, then her rights are crystallised and she gets vested right to recover the maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provisions in the Act and that there was no inconsistency between the provisions of the said Act and provisions of Sections 125 to 128 of the Code of Criminal Procedure.

The conclusion is that the provisions of M.W. Act as made available to the divorce Muslim woman are in addition to the claims available to them u/s 125 of the Code of Criminal Procedure.

14. In the case of Danial Latifi and Anr. v. Union of India reported in 2002 Cal Cr. LR (SC) 1, the Apex Court upheld the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act with the following conclusions:

(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 a Muslim husband to his divorced wife arising u/s 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

(3) A divorced Muslim woman who had not remarried and who is not able to maintain herself after iddat period can proceed as provided u/s 4 of the Act

against her relative who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced women 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.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

Thus it was held that Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well and that provision extending beyond the iddat period must be made within the iddat period and liability of the Muslim husband to his divorced wife arising u/s 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

15. In the case between Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, , it was held by the Apex Court that Section 125, Cr.PC deal with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it cannot be said that the Muslim husband, according to his Personal Law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The true position is 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. Therefore it cannot be said that there is conflict between the provisions of Section 125 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.

16. The said decision in the Shah Bano case created a furore amongst the Muslim community in India who agitated strongly against the decision on the ground that it sought to abrogate the principles of Muslim Law with regard to maintenance payable to a divorced Muslim wife. In the wake of the protests made against the said decision the Muslim Women (Protection of Rights on Divorce) Act, 1986 was passed. In the statement of object and reasons to the bill which resulted in the Act the decision in the Shah Bano case was reiterated and it was stated that the 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 right which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. To quote the words of the Apex Court in the case of Danial Latifi "there was a big uproar thereafter and Parliament enacted the Act perhaps with the intention of making the decision in Shah Bano case ineffective." In the said case the Apex Court has observed

that the Act actually and in reality codifies what was stated in Shah Bano case. It is further observed by the Apex Court in the said case that a comparison of the provisions of Section 3 read with Section 125 of the Cr.PC will make it clear that requirement provided in Section 125 and the purpose and object thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have normal and legitimate claim to support are satisfied.

17. Reference may be made to a decision reported in Secretary, Tamil Nadu Wakf Board and another Vs. Syed Fatima Nachi, where it has been held that the Parliament enacted the Act, Muslim Women (Protection of Rights on Divorce) Act to undo the effect to a Constitution Bench decision of the Court in Md. Ahmed Khan v. Shah Bano Begum because the said decision was strongly opposed to by the sizable Section of Muslim community. The Act, as the preamble suggests, came to protect the rights of the Muslim women who have been divorced by or obtained divorce from their husbands or and to provide for matters connected therewith or incidental thereto.

18. Reference may also be made in a case 2004(9) SCC 616 where it has been held that a divorced wife is entitled to maintenance not merely till iddat period but for entire life until she remarries, under the Act.

19. The object of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been provided in the Act itself to protect the rights of Muslim woman who have been divorced by, or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto.

20. Thus it is clear from the said Act that by filing an application u/s 3(2) of the Act the divorced Muslim woman who was married according to Muslim Law is entitled to an order directing her former husband to pay such reasonable and fair provision and maintenance beyond the period of iddat till her remarriage. When the special Act provides relief of maintenance to the divorced Muslim woman who was married according to Muslim Law such divorced Muslim woman cannot claim maintenance u/s 125 of the Code from her former husband after passing of the Act except under the provision of Section 5 of the said Act. u/s 5 of the Act the parties may exercise option to be governed by the provisions of Sections 125 to 128 of Cr.PC on the date of the first hearing of the application under Sub-section (2) of Section 3. The provision of Section 5 is reproduced below:

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 (2 of 1974) and files such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation.-For the purposes of this section, "date of the first hearing of the

application" means "the date fixed in the summons for the attendance of the respondent to the application." So, such divorced Muslim woman can resort to the provisions of Section 125, Cr.PC for her maintenance till her remarriage against the former husband if she exercised her option under Sections of the Act.

21. If the Muslim divorced woman married according to Mohammadan Law has the right to pray for maintenance allowance for herself from her husband invoking jurisdiction of Magistrate u/s 125, Cr.PC after the Act came in force then the provision of Section 5 of the Act would be nugatory and purpose for introducing the Act in the matter of making provision for maintenance allowance to the divorced Muslim wife by the former husband would be frustrated. After the Act such Muslim woman cannot resort to the provisions of Section 125, Cr.PC for her maintenance allowance from her former husband according to her sweet-will. She can invoke relief u/s 125, Cr.PC only under the provisions of Section 5 of the Act. She cannot claim maintenance allowance for herself u/s 125, Cr.PC independently of the Act. In view of the availability of relief of maintenance allowance by the wife u/s 3(2) of the Act, sufficiency of such relief, it can be said that after enforcement of the Act such Muslim woman is to obtain relief of maintenance allowance for herself under the said Act only subject to provision of Section 5 of the Act and she can get complete relief of maintenance allowance for herself from her former husband u/s 3(2) of the Act.

22. In this regard reference may be made to a decision of this Court reported in 2004 Calcutta Criminal Law Reporter (Calcutta) at page 199 where it has been held that it has now become a well-settled position of law that a divorced woman cannot invoke the provision of Section 125, Cr.PC against her former husband if she does not exercise her option under the provisions of Section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

23. Reference may be made to a decision reported in JT 2002 Supp. (1) SC at page 115 in the case of Mst. Bilkis Begum @ Jahanara v. Majid Ali Gazi and Anr. Where the appellant-wife filed a petition u/s 125, Cr.PC claiming maintenance for herself and for her two minor daughters and during the pendency of proceedings respondent divorced the appellant and thereafter the appellant filed an application u/s 5 of the M.W. Act and preferred to be governed by the provisions of Sections 125 to 128 of the Cr.PC instead of the provisions of the Act and the said application was rejected by learned Magistrate as the application was filed by the petitioner without the consent of her former husband and the High Court in revision affirmed the order of the Id. Magistrate, the Apex Court held applying the principles laid down in the case of Noor Saba Khatoon v. Md. Quasim reported in JT 1997(7) SC 144 : 1997 C Cr. LR (SC) 400, that the position is clear that the application filed u/s 125, of the Cr.PC, claiming maintenance for the two children is to be proceeded with by the Id. Magistrate and disposed of applying the provisions of the Code of Criminal Procedure. So far as the claim of maintenance for the divorced wife is concerned the proceedings u/s 125 cannot be proceeded with. She is entitled to receive her dues according to the 1986 Act,

and if she has not received the same she has to take recourse of the proceedings under that Act and realise the amount in accordance with law.

24. Following the decisions laid down in the aforesaid rulings it can be said that a divorced Muslim woman married according to Muslim Law cannot claim maintenance for herself u/s 125, Cr.PC independently of the Act of 1986. After passing of the Act such woman is to claim maintenance for herself till her remarriage beyond period of iddat by filing application u/s 3(1)(2) of the Act 1986 subject to the provision that she can switch over to the provision of Sections 125 to 128 of the Criminal Procedure Code by exercising option according to law u/s 5 of the Act. In view of the said Act she cannot straightaway file an application u/s 125, Cr.PC for her maintenance. The claim for maintenance allowance for such divorced Muslim wife herself under the Act cannot be made available to such woman in addition to claim available u/s 125, Cr.PC. The decision reported in Abdul Latif Mondal Vs. Anuwara Khatun and Another, relied by the learned Lawyer for the petitioner does not come to his aid.

25. In the instant case as already observed in the petition u/s 3(2) of the Act the petitioner claimed maintenance for the period of iddat, dower amount and other articles given to her at the time of her marriage. She could have prayed for reasonable and fair provision including maintenance beyond the period of iddat in the said period. There was no application u/s 5 of the Act for being governed under the provisions of Section 125, Cr.PC.

26. The petitioner submitted to the jurisdiction of the learned Magistrate to be exercised under the Act. During the pendency of the proceedings there was no application for adding prayer for reasonable and fair provision including maintenance beyond the period of iddat. She was satisfied with what she got by the order of the learned Magistrate in view of her such petition under the Act. The order was passed on 30.9.99 and in 2002 she filed a petition for maintenance allowance for herself u/s 125, Cr.PC. Her petition u/s 125, Cr.PC is not maintainable in law and the same was liable to be rejected and the misc. case arising out of such petition was liable to be dismissed and learned Magistrate rightly dismissed the misc. case and order of dismissal of misc. case should be maintained.

27. Before parting with the judgment it must be placed on record that the learned Magistrate rightly dismissed the misc. case but his order is very much cryptic. He should have taken pains to go through the matter more elaborately and to give detailed reasons. A divorced Muslim woman married according to Mohammadan Law is at liberty to claim maintenance allowance for herself till her remarriage by filing application u/s 3(2) of the Act and she is not bound to resort to the provisions of Section 4 of the Act. Learned Magistrate was not justified in advising her to avail herself of the provision of Section 4 of the Act. As the decision is of dismissal misc. case passed by the learned Magistrate is right so I am not inclined to interfere with the ultimate decision of the learned Magistrate. The instant application is therefore dismissed on contest. I make no order as to

costs.