

(2010) 04 GUJ CK 0033

In the Gujarat High Court

Case No : Special Criminal Application No. 1416 of 1997

Mohmad Hanif Abdulla Kadar

APPELLANT

Vs

Mehrunisha Hapumiya Shaikh and Another

RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:

Constitution of India, 1950 — Article 227

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

Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 3(1), 3(1)A, 5

Citation : (2011) 52 GLR 134 : (2011) 2 RCR(Civil) 462 : (2011) 2 RCR(Civil) 462 : (2011) 2 RCR(Criminal) 409 : (2011) 2 RCR(Criminal) 18

Hon'ble Judges : A.L. Dave, J

Bench : Single Bench

Advocate : M.A. Kharadi, for the Appellant; H. H. Parikh, Addl. P.P. for Respondent No. 2 and S.K. Bukhari, for the Respondent

Final Decision : Dismissed

Judgement

A.L. Dave, J.—By this petition under Article 227 of the Constitution of India, the Petitioner-husband challenges the order passed by the learned J.M.F.C, Bharuch, on 29-12-1994 in Misc. Criminal Application No. 395 of 1992 filed under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, by which the Magistrate awarded an amount of Rs. 2 lacs u/s 3(1) of the said Act, with an amount of Rs. 127-50 ps. being the amount of Mahr, from the Petitioner-husband of Respondent No. 1, Mehrunisha.

1.1. The said order was challenged by the present Petitioner before the Sessions Court, Bharuch by way of Criminal Revision Application No. 13 of 1995, which came to be dismissed and the order of the Magisterial Court came to be confirmed, by judgment and order dated 7-1-1997. By this petition, these two orders are challenged.

2. The background of the case of the Petitioner needs special mention here. The Petitioner was married to Respondent No. 1 in the year 1987 according to Muslim

rites. Daughter Roshanbanu was born from the said wedlock in the year 1989 and the Petitioner divorced Respondent No. 1 in the year 1989 and contracted marriage with one Mumtazbanu. Respondent No. 1 preferred Misc. Criminal Application No. 227 of 1989 claiming maintenance u/s 125 of the Code of Criminal Procedure and Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 ("Act of 1986" for short). However, the prayer was for the amount under the Act of 1986. In that petition, the parties agreed as contemplated u/s 5 of the Act of 1986 to resort to the provisions contained in Section 125 Code of Criminal Procedure and the amount of maintenance for both, Respondent No. 1 and minor daughter Roshanbanu, was fixed at Rs. 175/- and Rs. 75/- per month respectively.

2.1. It appears that in the year 1992, Respondent No. 1 preferred Misc. Criminal Application No. 395 of 1992 before the Judicial Magistrate First Class, Bharuch claiming an amount of Rs. 2 lacs u/s 3(1)(A) of the Act of 1986 and Rs. 127-50 ps. by way of Mahr. The learned Magistrate granted that application by judgment and order dated 29-12-1994. The said order was challenged by way of revision, which also came to be dismissed. Hence, this petition.

3. Learned Advocate Mr. Kharadi for the Petitioner submitted that when Respondent No. 1 preferred application u/s 3 of the Act of 1986, and thereafter, by mutual agreement as contemplated u/s 5 of the said Act, agreed to be bound by the provisions contained in Sections 125 - 128 of Code of Criminal Procedure, Respondent No. 1 could not have then preferred another application u/s 3 of the Act of 1986. The trial Court ought not to have entertained this application being barred and the Sessions Court also ought not to have confirmed the order. According to Mr. Kharadi, Act of 1986, particularly Section 5, gives an option to the parties to resort to the provisions contained in the Code of Criminal Procedure. But, once that is resorted to, it does not give the party again to fall back on the provisions of the Act of 1986. These aspects are not considered by the trial Court nor by the Sessions Court, and amount is awarded, and thereby, injustice is caused to the Petitioner. The second fold argument of Mr. Kharadi was that Section 3 would apply only where husband fails to make a reasonable and fair provision and maintenance. Here, the husband has agreed to pay maintenance of Rs. 500/- per month to Respondent No. 1 and Rs. 175/- per month for minor daughter. Therefore also, the application u/s 3 of the Act of 1986 ought not to have been entertained.

4. The application is opposed by learned Advocate Mr. Bukhari.

5. Before proceeding to deal with the arguments of learned Advocate for the Petitioner, it would be proper to refer to the provisions of law. Section 3 and Section 5 of the Act of 1986 run as under:

3. Mahr or other properties of Muslim woman to be given to her at the lime of divorce:

(1) 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 and 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 of 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 the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in Clause (d) of Sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under Sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that -

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in Clause (d) of Sub-section (1) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to 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 the 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:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) 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 fines under the Code of Criminal Procedure, 1973, 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.

5. Option to be governed by the provisions of Sections 125 - 128 of Act 2 of 1974. 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 - 128 of the Code of Criminal Procedure, 1973, and file 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.

6. The provisions of Section 3 of the Act of 1986 make it clear that a divorced Muslim woman would be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. Therefore, a divorced muslim woman gets a right to apply for a reasonable and fair provision and maintenance u/s 3 of the Act. The scheme of the Act, if seen, a Magisterial Court will have jurisdiction to entertain and decide such applications.

6.1. A look at Section 5 of the said Act makes it clear 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 - 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

7. A plain reading of the said provisions makes it clear that when the application is filed u/s 3 of the said Act, parties have to exercise their option as contemplated u/s 5 of the Act to decide whether they would like to be governed by the provisions of Sections 125 - 128 Code of Criminal Procedure, and if such an option is exercised and affidavit is filed before the Court, the Magistrate shall dispose of such application i.e. application filed u/s 3 of the Act of 1986 accordingly, meaning thereby, resorting to Sections 125 - 128 Code of Criminal Procedure This provision cannot be interpreted to mean that once such an option is exercised by party of deciding to be governed by the provisions of Sections 125 - 128 Code of Criminal Procedure, they shall be so optioned perennially or perpetually. The language of the Section is very clear that if the parties exercise such an option, the Court shall decide that application, meaning thereby, once

the application, which is made u/s 3 of the Act of 1986 as if it is an application u/s 125 Code of Criminal Procedure, the option available to the parties and the exercise by the parties is in respect of the application which is filed and pending before the Magistrate under the provisions of the new Act and the application of such option, if exercised, would be limited to that application only. Perennial application of the agreement between the parties while exercising option u/s 5 of the Act of 1986 is not contemplated by the said provision. The contention of Mr. Kharadi, therefore, cannot be accepted.

8. The next contention is that the Petitioner is already directed by Court u/s 125 Code of Criminal Procedure to pay compensation to Respondent No. 1 and minor daughter Roshanbanu in earlier application, and therefore, maintenance is receivable by them. They, therefore, could not have preferred second application u/s 3 of the Act of 1986 and the learned Magistrate could not have entertained the same. In this regard, it may be observed that the maintenance awarded by the Magisterial Court in the earlier application and revised from time to time to be Rs. 500/- per month for Respondent No. 1 and Rs. 175/- per month for minor daughter Roshanbanu, can by no stretch of imagination be considered as a reasonable and fair provision and/or maintenance. That apart, the Courts below have awarded Rs. 2,00,000/- by way of provision and Rs. 127-50 ps. by way of Mahr and no order for maintenance is passed. Therefore, this contention also cannot be accepted.

9. Last but not the least, none of the contentions raised by the learned Advocate Mr. Kharadi for the Petitioner appears to have been raised by the Petitioner, either before the Magisterial Court or before the Revisional Court.

10. In the result, there appears no substance in the petition. The petition must fail and stand dismissed. Rule discharged. Interim relief, if any, shall stand vacated. R. & P., if called for, shall be sent back to the Court below.