

(1989) 09 AHC CK 0003
In the Allahabad High Court
Case No : Criminal Revision No. 256 of 1989

Shafaat Ahmad

APPELLANT

Vs

Smt. Fahmida Sardar

RESPONDENT

Date of Decision : 20-09-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 108, 109, 111, 125(3)
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 3(1), 3(2), 3(3), 3(4)
Muslim Women (Protection of Rights on Divorce) Rules, 1986 — Rule 4

Citation : (1990) 1 AWC 635

Hon'ble Judges : Rajeshwar Singh, J

Bench : Single Bench

Advocate : Z. Zilani and Mohd. Sayeed, for the Appellant; Mohd. Wasim, Mohd. Shamim, Mohd. Nadim and R. Srivastava, for the Respondent

Judgement

Rajeshwar Singh, J.—This is a revision against the order of the Magistrate passed in proceedings under the Act (The Muslim Women (Protection of Rights on Divorce) Act, 1986). The parties are Muslims. The husband divorced his wife. The wife filed an application u/s 3 of the Act. The Magistrate issued notice to the husband. The husband was serving in Navy in Goa. There notice was served on him on 19th October 1987 by registered post. The case was fixed for 9th November 1987. The Commanding Officer of the husband sent a telegram and a letter on 30th October 1987 to the Magistrate requesting him to fix some other date in February, 88 as the husband could not be relieved to attend the Court. The husband instructed his brother, who was resident of another district, to make enquiry regarding the case in the Court of the Magistrate. The husband alleges that his brother could not get any information as the case had been transferred to another Court and this is not controverted. Then on 18th November, 1987 the case was ordered to proceed exparte. Ultimately on 6-1-88 an exparte order u/s 3(3) of the Act. Was passed. On 7-1-88 the brother of the husband gave an application to recall the exparte order. On 8-1-88 the learned Magistrate passed

an order calling upon the husband to comply with the order of the Court or to show cause. This order was served on the husband in Goa on 27-1-88. The husband could not get leave prior to 31st January, 88 to come to attend the Court as alleged by him. On 2-2-88 the husband came to the Court of the Magistrate and got the file inspected and he says that it was on that date that the order of the Magistrate dated 6-1-88 passed u/s 3(3) of the Act became known to him. On 3-2-88 the husband gave an application for recalling the order. This application to recall the order and the application given by the brother of the husband on 7-1-88 to recall the same order were rejected by order dated 26-4-1988. In this order the Magistrate held regarding application given by the brother that he had no right to move the application because he was never instructed by the husband to move such application. Regarding husband's application, the learned Magistrate said that it was barred by limitation. It is against this order of 26-4-88 that the present revision has been filed by the husband and it is being opposed by the divorced wife.

2. A preliminary objection has been raised on behalf of the wife that the revision is not maintainable and the learned Counsel for the wife has referred to the case of A.A. Abdullah AIR 1988 Gujarat 141. In this case some other point was under consideration and casually to support the argument that the matter should be disposed of expeditiously the Single Judge of Gujarat High Court observed that it would be worthwhile to note that no appeal or revision is provided against the order passed by the Magistrate u/s 3 or 4 of the Act. The learned Judge was not deciding the point whether revision is maintainable or not. This stray observation was made casually while considering other point. Hence, it appears that this point was not properly debated and this stray observation cannot be of much help. The simple thing is that under the Act this order is passed and was passed by the Magistrate. Section 397 of the Code of Criminal Procedure provides that the High Court may call and examine the record of any proceeding before any inferior criminal Court and the Court of the Magistrate is an inferior criminal Court. Hence, there is no reason why the order should not be revisable by the High Court. The fact that it has not been said in the Act that the order is revisable, is of no consequence. A provision need not be made in every Act and it is sufficient if it is provided in one Act. The Act provides that the order is to be passed by the Magistrate and the Code of Criminal Procedure provides that the order of the Magistrate can be revised by the High Court. The Act does not exclude the application of the Code of Criminal Procedure. So, Code of Criminal Procedure has to be given effect and the order passed by the Magistrate u/s 3 of the Act becomes revisable in view of the provisions in the Code of Criminal Procedure. Therefore, the preliminary objection is rejected.

3. Then it was argued that this order is only an interlocutory order and in view of Sub-section (2) of Section 397 of the Code of Criminal Procedure, there can be no revision against an interlocutory order. The Magistrate passed the exparte order under Sub-section (3) of Section 3. Under this provision, rights and liability of wife and husband are finally decided by the Magistrate. Then comes Sub-

section (4), but it relates to execution of the order. If the Magistrate finds that the husband is not complying with the order without sufficient cause, he executes the order passed under Sub-section (3) through issuing a warrant for levying the amount of maintenance or passing an order for imprisonment of the husband. Thus, rights of the parties regarding relief to be given to the wife are finally decided under Sub-section (3). When the rights are finally decided under Sub-section (3), the order will not be an interlocutory order and revision is maintainable.

4. It has further been argued by the learned Counsel for the wife that at the time of passing an order under Sub-section (3) no notice is required to the husband and he would get notice only when proceedings are taken under Sub-section (4), so, there is no point in setting-aside the order that has been passed by the Magistrate under Sub-section (3) of the Act and the husband can show cause against the order, when that order has been served upon him under Sub-section (4) of the Act. To appreciate this argument, provisions of the Act will have to be seen:

(1) Section 3 over-rides provisions of other law. Sub-section (1) says that the divorced muslim wife is entitled to certain facilities such as a fair provision and maintenance to be paid during the period of "Iddat", payment of dower and return of properties given to the woman at the time of marriage.

(2) Then Sub-section (2) provides that divorced wife can make an application to the Magistrate for an order for granting her aforesaid reliefs.

(3) Sub-section (3) says that when an application is made by a divorced wife under Sub-section (2) and the Magistrate is satisfied that the husband has not given those reliefs to the woman; the Magistrate may make an order directing the husband to give such reliefs to the woman.

(4) Lastly comes Sub-section (4). It says that if a husband 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 dower and may sentence such person to imprisonment.

5. To repeat, the argument of the learned Counsel for the wife is that Sub-section (3) merely says that if a Magistrate is satisfied, he can order the husband to give those facilities to the wife and at this satisfaction, the Magistrate can arrive without giving notice to the husband and in his absence. After this order the Magistrate will issue notice to the husband and if he finds that husband has failed to comply with the order without sufficient cause, then he would issue warrant for levying the amount or send the husband to jail. The argument of the husband is that even at the stage of Sub-section (3) he is entitled to get notice.

6. Even in administrative matters where a statute does not make any specific provision for issuing notice, it has been held that where exercise of that

administrative power results in civil consequences to citizens, unless the statute specifically rules out the application of rules of natural justice, such rules would apply that is notice would have to be issued to the parties and he will have to be heard. For this we may refer to the case of Baldev Singh and Others Vs. State of Himachal Pradesh and Others, followed in State of Haryana Vs. Ram Kishan and Others, . The principles of natural justice must be read into the unoccupied interstices of the statute unless there is clear mandate to the contrary. Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, . In the case before us the matter is to be decided by a Court judicially having civil consequences on the rights of the parties. So, it appears necessary that husband should be given notice and opportunity of being heard.

7. No doubt Sub-section (4) further provides that if the husband, against whom an order has been made under Sub-section (3), fails without sufficient cause to comply with the order, the Court may levy the amount or order imprisonment. But this does not appear to me that since notice is to be given under Sub-section (4), it should not be given under Sub-section (3). The provision regarding maintenance is to be found u/s 125 Code of Criminal Procedure. Its Sub-section (1) says that upon proof of such neglect or refusal to maintain the Magistrate may direct a monthly allowance to be given to the wife. It is after hearing the husband and giving notice to him that action is taken under this provision and the Magistrate on proof of the fact may make an order. Still under Sub-section (3) of Section 125 Code of Criminal Procedure, it has again been provided virtually in the words of Sub-section (4) of the Act that if the husband fails without sufficient cause to comply with the order, the Magistrate may order imprisonment. Thus, again opportunity is given to the husband. This latter opportunity is in fact provided not to determine liability of the husband to maintain or to give the amount of maintenance fixed by the Court but to determine the question whether there is any sufficient cause on account of which he could not comply with the order. Here the husband is not allowed to go back and start questioning the order of maintenance, rather he has only to show as to why he could not comply with it. Similar appears to be the position under the Act. Under Sub-section (3) the Magistrate has to determine after hearing the parties whether reliefs provided in that section should be given to the wife. Then comes the stage of Sub-section (4). Here the husband cannot be allowed to question the order passed under Sub-section (3) giving reliefs to the wife: rather he can only show as to why he could not comply with the order passed under Sub-section (3). Thus, under Sub-section (3) and Sub-section (4) different points are to be determined and the opportunity is given to the husband on both the occasions for determining the relevant point.

8. The learned Counsel for the wife argued that in proceedings Under Sections 107, 108, 109, 111 and 145 Code of Criminal Procedure the Magistrate proceeds to pass initial orders without hearing the effected parties. One basic difference is that u/s 3 of the Act, the Court has to proceed judicially and under the aforesaid sections of Code of Criminal Procedure referred to by the learned Counsel for the

wife an administrative authority has to proceed immediately to prevent certain consequences. u/s 107 Code of Criminal Procedure it has been said that if the Magistrate is of the opinion that there is sufficient ground for proceeding then he may issue a show cause. All that has to be seen in this section is whether there is ground for proceeding. At that time no order of consequence affecting rights of the parties is passed. Similarly, in Section 108, the Magistrate has only to see and form an opinion whether there is ground for proceeding. u/s 109, the Magistrate can proceed when there is reason to believe and hence he just proceeds to require the person to show cause and then to determine the matter. u/s 109, the Magistrate does not proceed straightway to decide the matter. According to Section 111, only notice to show cause is issued when it is deemed necessary. Similarly, in proceedings u/s 145 Code of Criminal Procedure if the Magistrate is satisfied from certain materials or information received by him that a dispute, likely to cause a breach of the peace, exists, he proceeds requiring the parties to show cause. Thus, all these sections are where rights of the parties are not decided. Initially, only a show cause notice is issued if the Magistrate is of the opinion or is satisfied about certain facts. In the case before us, under Sub-section (3) of the Act rights of the parties are to be decided. So, it cannot be said that at that stage the husband has no right to be heard. So, the analogy, given by the learned Counsel for the wife, will not work and this argument of his that husband may show cause when notice goes to him under Sub-section (4), fails.

9. Then we come to the question whether the ex-parte order should be set-aside in this case. The husband gets notice but his Commander sends a letter that he could not be spared and another date be fixed. Against this, it has not been said that the husband manipulated it. So, the husband was not in a position and a free person, being employed in defence force, to come to the Court. He instructs his brother but he could not find the position of the case because it was transferred to another Court. The brother moves an application for setting aside the ex parte order within time but it is rejected on the ground that he had no right to move that application in the absence of husband's instructions to move that application. No order of the Magistrate is produced before me showing as to what view he took regarding letters of the Commander and there is nothing to show that the Magistrate informed the Commander to send him immediately or to relieve the husband to come on an early date. The matter was at Lucknow and the husband was posted in Goa, from where ordinarily it could not be possible to send a lawyer with the instruction to conduct the case here. The brother, who resides at Saharanpur, could hardly be instructed through letters immediately to contest the case. And when the husband was not informed that the request to his Commander was not being given weight, the husband could not realize the necessity of following some other course immediately. Thus, the husband was making efforts to come to the Court and he was not wilfully avoiding to come.

10. Here we may refer to Rule 4 made under the Act. It provides that all evidence shall be recorded in the presence of the husband. Then there is a proviso which says that if the Magistrate is satisfied that the husband is wilfully

avoiding service or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the matter ex parte. Here the use of word "wilfully" is important. The Magistrate gets jurisdiction to proceed ex parte only when the husband avoids service wilfully or neglects to come to Court wilfully. Here the husband was not doing it wilfully. He was unable to come because the defence authorities were not relieving him. When he was not doing wilfully it is doubtful that the Magistrate had any jurisdiction to proceed ex parte. Therefore, the action of the Magistrate in proceeding ex parte was basically wrong. As soon as the husband was allowed to come to Lucknow, he moved an application. It was rejected on the ground that it was not within seven days from the date of the ex parte order. Here the term "from the date of the order" would rather mean the date of the order which the husband could humanly comply. The husband was in a position to comply the order only when he was spared by the defence authorities. So, the period of limitation will have to be taken from the date when the husband became in a position to comply with the order. Taking in this light the application of the husband would be within time. Of course, it seems that the defence authorities were not really applying their mind and probably were issuing letters that he could not be relieved in a routine manner and thus adding to the difficulties of wife and husband both, though a short leave would have served the purpose. In the letter dated 30th October, 1987 the Commodore says that the husband could not be spared on account of urgent deployment and exigencies of service and a fresh date may be given in the month of February 1988 when the officer would be granted annual leave. There is not the slightest indication as to what was the exigencies of the service. The man was not participating in a war. No specific assignment of the urgent nature has been mentioned. During all this period he was not on sea. For some time he was only sent on duty to staff college. But there was insistence that he should attend the Court during annual leave. He was even at Head-quarters. Again on the next occasion we find that Commanding Officer writes that husband could not be spared and he could be available at the time of annual leave in July, 89. This gives an impression as if the Commander was merely insisting that husband should go during annual leave and mechanically leave was refused for attending the case without realizing as to what will be the fate of the woman whose case the Parliament expects to be decided within a month under Sub-section (3). Probably such insistence was unjustified, but I would not comment on it further and in a decessive manner, because I have not heard the view point of the Commander. All the same this Court does expect that such letters should come from defence authorities after they have applied their mind to the entire circumstances and facts of the case and it is better if they give slight indication showing as to why it is not possible to spare an officer when a destitute woman, whose case the Parliament wants to be decided in a month, is suffering.

11. Any way, the position remains, in view of what has been said above, that the exparte order in this case is not justified and it should be set-aside. However, the matter should now be disposed of at the earliest and the learned Counsel for the

husband told me during arguments that the husband is here and he would appear before the Court on the date fixed by this Court.

12. Therefore, exparte order dated 26-4-88 and the order rejecting application dated 6-1-88 are set-aside and the learned trial Court is directed to proceed under Sub-section (3) of the Act according to law. Both the parties shall appear before the Magistrate on 27th September, 1989 to enable the Magistrate to give priority to the case and to proceed immediately.

13. Office of this Court is also directed to send the entire record to the Court concerned before 27th September 1989.