

(2001) 02 BOM CK 0073

In the Bombay High Court

Case No : Criminal Writ Petition No. 1359 of 1994

Shahanazbegum Kadarbasha Shaikh and Another

APPELLANT

Vs

Kadarbasha Usman Shaikh and Another

RESPONDENT

Date of Decision : 05-02-2001

Acts Referred:

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

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

Citation : (2001) 5 BomCR 401 : (2001) CriLJ 1215 : (2002) 1 DMC 375 :
(2001) 2 MhLj 198

Hon'ble Judges : N.V. Dabholkar, J

Bench : Single Bench

Advocate : B.A. Vora, for the Appellant; S.C. Halli and Kejariwal, Assistant Public Prosecutor, for the respondent State., for the Respondent

Final Decision : Dismissed

Judgement

N.V. Dabholkar, J.—This writ petition arises out of the maintenance proceedings under Chapter IX of the Code of Criminal Procedure, 1973 on the file of the Judicial Magistrate First Class, Solapur. Petitioner No. 2 is the son of the petitioner No. 1 and respondent No. 1. Petitioner No. 1 and respondent No. 1 were married on 29-5-1997.

The petition prays to set aside the order passed by the Assistant Sessions Judge, Solapur on 4-4-1994 in Criminal Revision No. 137 of 1992 and award maintenance in favour of the wife.

2. The admitted facts in this contest for the maintenance are as follows :-

First legal battle for the maintenance took place in the form of application by wife u/s 125 of the Code of Criminal Procedure, 1973 being Application No. 115 of 1980. (Henceforth, the parties are referred to as the wife, husband and child for the sake of brevity). The application concluded in favour of the petitioners and maintenance at the rate of Rs. 75 and Rs. 25 per month was awarded in favour

of the wife and child respectively. This was sometime in the year 1981. Admittedly this decision was not challenged by the husband.

The Application No. 142 of 1984 was filed u/s 127 of the Code of Criminal Procedure for enhancement and maintenance was enhanced to Rs. 125 and Rs. 50 in favour of the wife and child respectively. This was in the year 1984.

Lastly, Criminal Misc. Application No. 15 of 1988 was filed on 13-1-1988 and it was decided on 25-9-1989 by which maintenance was enhanced to Rs. 300/- and Rs. 150/- respectively.

3. On 3-11-1990, husband filed Criminal Misc. Application No. 242 of 1990 u/s 127 of the Criminal Procedure Code, 1973, (for easy reference, hereinafter, referred to as "the said Code"). He claimed that he had divorced wife on 5-2-1990. The talaknama was reduced into writing. Therefore, after commencement of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for the sake of brevity, hereinafter, referred to as the "Act of 1986") he was not liable to pay the maintenance to the wife and the son. Therefore, he had prayed for cancellation of the order of maintenance passed in favour of the wife and the child on 25-9-1989 upon conclusion of Criminal Misc. Application No. 15 of 1988.

This application was decided by the Judicial Magistrate, First Class, Solapur on 2-5-1992, who was pleased to quash the maintenance order in toto. The wife had opposed the petition, inter alia, contending that talak was not pronounced thrice and hence according to Muslim Law and custom, the same was not legal and valid. It was also not communicated to wife and therefore, the talak being bad in law, the husband; it was claimed; cannot be exonerated from his liability to pay the maintenance as ordered in Criminal Misc. Application No. 15 of 1988.

The learned Magistrate observed that in view of the provisions of Mohammedan Law, talak pronounced in absence of wife is also valid though not communicated to her. However, for the purposes of dower, the communication was necessary failing which, she was entitled to alimony till she was informed of the divorce. Since the talaknama was reduced into writing, which was produced before the Magistrate at Exhibit 21, the learned Magistrate held that the husband had divorced the wife, but she would be entitled to maintenance during the period of Idat, but if the talak was not communicated she was entitled to maintenance even beyond the period of Idat till she was informed of divorce.

Relying upon the judicial pronouncement of this High Court reported at 1989 Cri.L.J. 133, Maheboob Khan v. Parveen Bano, the learned Magistrate observed that neither the order passed u/s 125 of the Code of Criminal Procedure nor the liability already incurred earlier to the Act of 1986 was saved. Inevitable consequence, therefore, was that the rights u/s 125(1) of the Code as also section 125(3) were lost and therefore, there was no question of enforcing the order of maintenance. While concluding the judgment, the learned Magistrate also observed that it was open for the wife and the child to apply u/s 3(1) of the

Act of 1986 for reasonable and fair provisions and maintenance to be made and paid to the wife within the Idat period, so also Meher, etc. Thus, the learned Magistrate totally quashed and set aside the order of maintenance in favour of both i.e. wife as well as the child.

Present petitioners preferred Criminal Revision No. 137 of 1992 before the Sessions Judge, Solapur, against this decision of the Magistrate. By his order dated 4-4-1994, Additional Sessions Judge, Solapur was pleased to restore the maintenance allowance to the child at the rate of Rs. 150/- per month, although restricting the same till the child attains the majority. As far as wife is concerned, the husband was ordered to pay the maintenance at the rate of Rs. 300./- per month upto 1-2-1991 and further three months, treating the said period to be Idat period. Taking cognizance of the fact that copy of talaknama produced at Exhibit 21 before the Magistrate was sent to wife by registered post A.D. but the same was returned unserved, the learned Sessions Judge observed that the wife learnt about talak on 1-2-1991, the day on which she appeared before the Magistrate and applied for time to file say through her Advocate. In view of these observations, the learned Sessions Judge set aside the order of Magistrate totally cancelling the maintenance and restored the same to limited extent as described above.

4. In this petition the wife expects this Court to invoke its jurisdiction under Article 227 of the Constitution of India, as also inherent powers u/s 482 of the Code of Criminal Procedure. It is contended that the courts below erred in holding that the husband has divorced the wife and that provisions of the Act of 1986 are not properly appreciated. In fact, it is also contended that the Court below ought not to have ignored the provisions of section 125 of the Code, by considering the application as if the same was under the Act of 1986.

5. As the record of the writ petition shows, the Advocate Shri Vora for petitioner, by his letter dated 11-8-2000 (marked Exhibit "X" for identification) had enquired his client whether she is remarried and whether the son has attained the majority. This was because Shri Halli, Advocate representing the respondent No. 1 made a statement before the Court on 9-8-2000 that wife had remarried and son had completed 18 years of age. This communication is replied by wife on 19-8-2000 (marked Exhibit "Y") denying the remarriage and claiming that she is still the wife of the respondent No. 1 and prepared to file an affidavit to that effect. An affidavit appears to have been filed by wife Shahanaj on 8-9-2000 wherein it is stated that opponent Quadar Basha was her husband. Applicant No. 2 was born out of the wedlock and has completed 18 years on 9-1-1997. It is added that pending the maintenance application, in order to avoid maintenance the husband has given talak to her by post but she has not contracted the second marriage after talak. (Affidavit is marked as Exhibit "Z" for ready reference). This affidavit confirms present status of wife to be "divorced wife".

6. In view of the changed status of Shahanaz, Shri Vora, learned Advocate has placed reliance on the Full Bench decision of this High Court, reported in Karim

Abdul Rehman Shaikh Vs. Shehnaz Karim Shaikh and others, . He has mainly placed reliance on answer to question No. 2 as incorporated in para No. 63 of the judgment and also to some extent on directions (a) and (c) as contained in para No. 64. The portion relied upon by the learned Counsel is reproduced hereinbelow for ready reference :---

Q. " (ii) Whether the Muslim Women Act has the effect of invalidating the orders/ judgments passed u/s 125 of the Code i.e. whether the Muslim Women Act operates retrospectively so as to divest parties to vested rights ?

Ans. The orders passed u/s 125 of the Code prior to the enactment of the Muslim Women Act are not nullified by reason of the coming into force of the Muslim Women Act. Such orders are binding on both sides and can be executed u/s 128 of the Code. The Muslim Women Act does not divest the divorced women of the right to get maintenance u/s 125 of the Code vested in her by reason of orders of a competent Court passed prior to its coming into force."

(a) All pending applications u/s 125 of the Code filed by divorced Muslim Women pending after the commencement of the Muslim Women Act will be treated as applications under the Muslim Women Act and will be disposed of as per the provisions of the said Act.

(c) All applications u/s 125 of the Code filed by divorced Muslim Women, which have been decided finally pursuant to the decision of the Division Bench of this Court in Allabuksh's case (supra) will not be reopened due to the present judgment.

It is contended by the petitioner (henceforth wife shall be referred as the petitioner, that the maintenance order, so far as it relates to the child having come to an end on his attaining majority and which order is not prayed to be modified by the present petitioner) the subsequent orders of enhancement are mere extensions of the said order. The maintenance order was thus obtained before coming into force of the Act of 1986 (on 19-5-1986) and the same is protected by virtue of reply to question No. 2 as also direction (c) in para No. 64 of the Full Bench judgment. As a second limb of argument, it is also contended that since the writ petition challenging the revision is pending, it should be held that the application u/s 125 of the Code is still pending and the same will have to be treated as an application under the Act of 1986.

While replying on behalf of the husband, Advocate Shri Halli submitted that section 125 of Code and section 3 of the Act of 1986 are distinct in their ambit and scope, inasmuch as section 3 is available only to divorced wife. According to him, the orders protected by answer to second question are the orders obtained u/s 125 of the Code by the wife in the capacity as a "divorced wife". Since the petitioner has obtained all the orders in the capacity of wife, whose marriage is still subsisting the said order cannot enjoy protection by virtue of the reply to question No. 2 or direction (c). "divorced woman" contemplated by these is the one who has obtained maintenance u/s 125 of the Code in her capacity as

"divorced woman". According to him, after the divorce, wife has never claimed failure on the part of husband to make a reasonable and fair provisions and maintenance to be made and paid to her within the Idat period as contemplated by section 3(1)(a) of the Act of 1986 and therefore, direction (a) in para 64 of the Full Bench judgment does not render any help to her cause.

7. The only question that is required to be determined for the decision of writ petition is whether the order of maintenance in favour of the petitioner wife that was passed in the year 1981 and which was modified by enhancement in the year 1984 and thereafter in the year 1988 is an order covered and protected by answer to question No. 2 and direction at Serial No. (c).

The answer to question No. 2 is reproduced above with emphasis upon later half. Although the words "divorced women" does not appear in the first half of the answer, on considering the later half which incorporated this term, it can be seen that the answer as a whole is regarding the orders of maintenance obtained u/s 125 of the Code by "divorced women".

As far as present petitioner is concerned, there can be no denial that she applied for maintenance under Chapter IX of the Code and obtained orders in her favour, in her capacity as a wife of subsisting matrimonial tie. In fact, till the time affidavit (Exhibit "Z") was filed in this writ petition on 8-9-2000, she claimed to be the legally wedded wife of the respondent No. 1, either contending that she was not divorced or pleading that the divorce was illegal and invalid. If the orders of maintenance u/s 125 of the Code contemplated to be saved by answer to question No. 2, are the orders obtained in the capacity of "divorced woman" the petitioner cannot be protected.

If directions (c) in para No. 64 is to provide any clue, since the said direction is also relied upon, it must be said that the interpretation attributed to answer No. 2 by Shri Halli, learned Advocate for the respondent husband will have to be accepted. Direction (c) specifically says "All applications u/s 125 of the Act filed by divorced Muslim Women, which have been decided finally". The application u/s 125 of the Code is required to be filed by a divorced woman as can be seen from the plain reading of direction (c). Even pending applications u/s 125 of the Code, which are ordered to be proceeded by treating those as if applications under the Act of 1986 by direction (a), are also applications filed by divorced Muslim Women, prior to coming into force of the Act of 1986 and still pending either in the Court of Judicial Magistrate or Family Court, on the day of commencement of the Act or thereafter.

On going through the judgment of the Full Bench, it can be seen that for the reasons discussed in para Nos. 45 to 50, the Court has recorded answer to question No. 2 as in para No. 63 of that judgment. Following contents of para No. 47 provide unambiguous key to the question i.e. required to be decided.

"..... In our opinion vested rights of parties cannot be taken away by implication. Significantly while u/s 5 of the Muslim Women Act there is a specific

reference to section 125 to section 128 of the Code in the transitional provision contained in section 7, section 128 of the Code which speaks of enforcement of order of maintenance is absent which clearly indicates the intention of the legislature to protect the crystallised or vested rights of a divorced Muslim Women.In our opinion the rights of divorced women which have been finally determined and taken the shape of judgments or orders of Courts of law prior to the coming into force of the Muslims Women Act will have to remain untouched and protected."

The portion underlined for the purpose of emphasis provides clear answer. The crystallised vested rights those are protected are the rights of divorced Muslim women. The petitioner would have been justified in seeking shelter of answer to question No. 2 had she obtained an order of maintenance prior to coming into force of the Act of 1986 in the capacity as a "divorced woman".

Such an interpretation is fully justified also in view of the fact that the Act of 1986 enables only divorced woman to seek maintenance by an application before the appropriate forum, as against the provisions contained in Chapter IX of the Code which entertain the applications by both; a wife who is or is not divorced.

8. Taking into consideration three events i.e. the order of maintenance under Chapter IX in favour of the wife, divorce and coming into force the Act of 1986, there can be six permutations and combinations possible of the chain of these three events as under :---

Combinations at Serials Nos. 4, 5 and 6 stand eliminated from the protection of answer to question No. 2 because the orders of maintenance in all these three categories have come after the Act of 1986 coming into force. In fact in all these three cases, the divorced wife will be required to approach the Court only under the new enactment and order under Chapter IX of the Code would not practically be available obviously because the husband may not consent to be governed by the provisions of sections 125 to 128 of the Code. Moreover, by virtue of section 7 regarding transitional provisions, the applications pending on the date of coming into force of the Act were to be disposed of as if the applications under the Act of 1986. Consequently the orders contemplated by last three categories would be the orders under the Act of 1986 and not under Chapter IX of the Code.

In the combination at Serial No. 3, the wife has to obtain order of maintenance in her capacity as a divorced woman and the legislation has come into force thereafter. This is the category fully protected by the answer to question No. 2.

In the second category, the divorce has followed the order. This order obtained is in the capacity of wife of a subsisting marriage. The Act of 1986 has come into force after the divorce. This category is not protected, but wife may continue to draw benefit till the time husband does not seek its modification or cancellation, in view of the fact that section 7 regarding the transitional provisions of the Act of 1986 does not incorporate section 128 of the Code (regarding enforcement of order of maintenance), within its scope.

However, as far as the remaining category to which the petitioner belongs, there can be no ambiguity. The wife in this category has obtained order of maintenance in the capacity of wife while marriage is subsisting. The Act of 1986 has come into force thereafter. The divorce having followed coming into existence of the Act of 1986 and the husband having applied u/s 127 of the Code by Criminal Application No. 242 of 1990, the changed status of wife as "divorced woman" was available as a ground to the husband to seek closure of the order of maintenance u/s 125 of the Code, in view of the personal law of the parties.

9. Relying upon the answer to question No. 1 Shri Vora desired that this Court should remand the matter and direct the Magistrate to consider the application of the wife as contemplated u/s 3(1)(a) of the Act of 1986. Such a course cannot be adopted in the present case, because the litigation as it stands was prosecuted by the petitioner in her capacity as a "wife" and not in the capacity of "divorced wife". Consequently, all her previous pleadings are unlikely to embrace the requirements of section 3(1)(a) of the Act of 1986. On going through section 3, it was open for the wife to file such an application immediately after she learnt about the divorce. There does not appear any limitation to file an application u/s 3(1)(a) either in the Act of 1986 or in the rules framed by the Central Government thereunder, and it will be open for the petitioner to prefer such an application, irrespective of the decision of this writ petition.

10. For the reasons discussed above, it is not possible to interfere with the impugned order in this writ petition and the petition is therefore, dismissed.