

(2003) 05 MP CK 0054

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No's. 1527 and 1733/88, 153/89, 2001/90, 1326/92 and 2141/93 and Reference (Criminal) No. 1 of 2000

Wali Mohammed

APPELLANT

Vs

Batulbai

RESPONDENT

Date of Decision : 06-05-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 125(1), 127, 127(3)
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3, 3(1), 4

Citation : (2003) CriLJ 2755 : (2004) ILR (MP) 37 : (2003) 4 JCR 625 : (2003) 3 MPHT 113 : (2003) 1 MPJR 513 : (2003) 2 MPLJ 513 : (2003) 3 RCR(Criminal) 408

Hon'ble Judges : S.L. Kochar, J;N.K. Jain, J;A.M. Sapre, J

Bench : Full Bench

Advocate : Girish Desai, Dy. Advocate General, H.S. Uberoi, B.L. Pavecha and Jaisingh, as Amicus Curiae, for the Appellant;

Judgement

N.K. Jain, J.

All these matters arising out of the proceedings initiated by Muslim wives against their (former) husbands for grant of maintenance allowance or recovery of the amount already awarded, u/s 125 of the Code of Criminal Procedure (for short, "the Cr.PC"), by the order of Hon"ble the Chief Justice, have been placed before us for resolution of following questions :--

(i) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, (for short, "the Act of 1986"), can be given retrospective effect so as to cover the claim for maintenance instituted by a divorced Muslim woman u/s 125 of Cr.,PC, prior to coming into of the Act of 1986?

(ii) Whether a Muslim divorced woman is entitled to institute the proceeding for recovery of arrears of allowance for maintenance u/s 125(3) or 127 of Cr.PC in respect of the order of maintenance passed u/s 125(1)(a), Cr.PC prior to the

enforcement of the Muslim Women (Protection of Rights on Divorce) Act, 1986?

(iii) Whether a non-divorced Muslim Woman is entitled to continue the proceedings u/s 125(1)(a), Cr.PC instituted after the enforcement of the Muslim Women (Protection of Rights on Divorce) Act, 1986, if during the pendency of the said proceedings, she is divorced by her husband simply to avoid the liability of maintenance under the Code of Criminal Procedure ? and,

(iv) What decision has to be followed by the Subordinate Courts in case of conflicting decisions of the Benches consisting of same number of Judges on the same point of Law?

The first question is referred by a Single Bench of this Court in M.Cr.C. No. 1527/1988, while the remaining questions are referred under a Reference (No. 1/2000) made by the Judicial Magistrate First Class, Manawar. Other matters (M.Cr.C. Nos. 1733/1988, 153/1989, 2001/1990, 1326/1992 and 2141/1993), have been referred by the Division Bench of this Court. Although no specific question as such is formulated by the Division Bench while referring these five matters, however, decision of these cases would also depend on the answers to the questions already extracted hereinabove.

We have heard learned Counsel for parties; Shri Girish Desai, learned Dy. Advocate General; as also learned Senior Counsel Shri H.S. Uberoi, Shri B.L. Pavecha and Shri Jaisingh, who addressed the Court at our request.

Taking the last question (No. iv) first, at the outset it may be stated that the answer to this question is contained in a recent Full Bench decision of this Court in the case of Jabalpur Bus Operators Association and Others Vs. State of M.P. and Another, wherein it is held :--

"With regard to High Court, a Single Bench is bound by the decision of another Single Bench. In case it does not agree with the view of other Single Bench, it should refer the matter to Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case it does not agree with the view of the earlier Division Bench, it should refer the matter to Larger Bench. In case of conflict between the judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of latter Division Bench shall be binding. The decision of Larger Bench is binding on Smaller Benches."

Needless to say that what is said about the decisions of Division Bench shall also apply in case of conflict between judgments of two Single Benches. So in case of conflict between two decisions of the High Court rendered by the Benches of equal strength (be it a Full Bench, Division Bench or Single Bench), the decision earlier in time shall hold the field unless it is referred and explained in the latter decision in which case the latter one shall be binding. The question No. (iv), thus stands answered accordingly.

Answers to other questions (Nos. i to iii) depend on the interpretation of various

provisions of the Act of 1986 vis-a-vis the provisions of 125 to 128 of Cr.PC. Before coming into force the Act of 1986 (on 19th May, 1986), provisions of Sections 125 to 128 of Cr.PC governed grant of maintenance to a married Muslim Woman before and after her divorce till she contracted second marriage after divorce. In *Mohd. Ahmed Khan Vs. Shah Bano Begum and Others*, , the Apex Court held that if a Muslim divorced woman is able to maintain herself, the husband's liability to maintain his former wife ceases with the expiration of period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of Cr.PC. It was, thus, held that there is no conflict between the provisions of Section 125, Cr.PC and those of Muslim Personal Law on this question. This decision led to some controversy as to the obligation of a Muslim husband to pay maintenance to the divorced wife. The Parliament, therefore, enacted the Act of 1986 to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interest during and after the period of iddat. However, the questions have arisen as to whether the Act of 1986 is retrospective in operation, that is to say whether it would have the effect of nullifying the order for maintenance already made u/s 125(3) of Cr.PC before coming into force of the Act of 1986 and what would be the effect if during the pendency of proceeding u/s 125, a declaration is made by the husband in writing or otherwise of his having given divorce to his wife. Learned Counsel who addressed the Court were unanimous in their submissions that the Act has no retrospective effect, that it would not nullify the orders for maintenance already made u/s 125, Cr.PC and that mere declaration by the husband during the pendency of any such proceeding that he has divorced his petitioner - wife, would not automatically arrest the continuance of the proceedings u/s 125 of Cr.PC. Any such defence regarding divorce set up by the husband has to be proved like any other fact. As regards the orders already made prior to the coming into force of the Act of 1986, the remedy of the husband lies in making application under Clause (b) of Sub-section (3) of Section 127 of Cr.PC for cancellation of such an order on showing that he has made reasonable and fair provision for the future of the divorced wife not only during the iddat period but also beyond thereof in terms of Section 3(1)(a) of the Act of 1986. It was submitted that answers to all these questions are in fact, contained in two Supreme Court decisions in *Danial Latifi and Another Vs. Union of India*, and *Shamim Ara Vs. State of U.P. and Another*, .

In order to appreciate the arguments as advanced as also the import of the decisions of the Apex Court in the cases of *Danial Latifi and Shamim Ara* (supra), it will be useful here to refer to the relevant provisions of the Act of 1986. Sub-section (1) of Section 3 which is the most important provision of this Act and which deals with reasonable and fair provision and maintenance to be made and paid to a divorced Muslim woman by her former husband as also payment of amount of Mahr and giving of other properties to her, thus, reads as follows :--

(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.

Sub-sections (2), (3) and (4) of Section 3 and Section 4 of the Act provide for remedy and procedure to enforce the right given under Sub-section (1). Section 5 gives option to the parties (the divorced woman and her former husband) to take recourse to Section 125 of Cr.PC, while Section 7 provides for the procedure to deal with the applications made u/s 125 or 127 of Cr.PC pending before a Magistrate on the date of commencement of the Act and mandates that any such application subject to the option as provided u/s 5, shall be disposed of by the Magistrate in accordance with the provisions of the Act.

In the backdrop of the aforesaid provisions when we take up the question of the Act being or not retrospective in its operation and its effect on the orders already passed u/s 125 or 127 of Cr.PC before coming into force of the Act, it may be stated at the outset that no provision is contained in the Act so as to give even slightest indication of it being retrospective in operation. There is also no provision in the Act which may have the effect of nullifying the orders already passed by the Magistrate u/s 125 or 127 of Cr.PC against the former husband of a divorced Muslim woman or even the orders passed during subsistence of the marriage the same having been dissolved subsequent to the coming into force of the Act. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. It is more so when the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. So unless there are words in the statute sufficient to show intention of the legislature to affect existing rights, it is "deemed to be prospective" only, (See : Principles of Statutory Interpretation by Justice G.P. Singh, VIth Edition Page 315). Right to get maintenance from her husband is a vested right of a woman of any religion and as already pointed out, there is absolutely nothing in the Act of 1986 which tends to take away this right. On the contrary, the Act recognises the said right available to a Muslim woman even under the Personal Law. Needless to say that the Act of 1986 is a substantive law relating to-vested rights and such laws are normally treated as prospective.

High Courts of Gujarat and Bombay in Arab Ahemadhia Abdulla and etc. Vs. Arab

Bail Mohmuna Saiyadbhai and Others etc.,) and Karim Abdul Rehman Shaikh Vs. Shehnaz Karim Shaikh and others, (Bom) (FB)] have held that the Act of 1986 is not retrospective in operation and that by the enactment of this Law, the order passed by Magistrate u/s 125, Cr.PC ordering Muslim husband to pay maintenance to his divorced wife, would not be non-est. Both these decisions are referred with approval by the Supreme Court in Danial Latifi (supra).

Interestingly the Act of 1986 was enacted with a view to nullify the effect of Supreme Court decision in Shah Bano case (supra). However, the Court in the case of Danial Latifi (supra) reiterated the law as declared in the case of Shah Bano (supra), in following terms:--

"We have very carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano case (supra). The learned Solicitor General contended that what has been stated in the objects and reasons in the Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano (supra) case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the legislature took note of certain facts in enacting the law will not be of much materiality."

Their Lordships of the Apex Court while upholding the validity of the Act summed up their 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 the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided u/s 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced woman 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.

The Supreme Court in yet another decision in the case of Khatoon Nisa Vs. State of U.P. and Others, has held that even after passing of the Act of 1986, the Magistrate retains jurisdiction to grant maintenance to a divorced Muslim woman u/s 125 of Cr.PC.

It will be thus, seen that the Muslim Women (Protection of Rights and Divorce) Act, 1986 is neither retrospective in operation nor it will have effect of nullifying the orders already made u/s 125 or 127 of Cr.PC ordering a Muslim husband to

pay maintenance to his divorced wife prior to the coming into force of the Act of 1986. We may, however, clarify that any such husband may seek cancellation of such an order by taking recourse to Sub-section (3) of Section 127 of Cr.PC, on his showing that he within the iddat period, has made reasonable and fair provision for the future of his divorced wife in terms of Section 3(1)(a) of the Act and has also paid the amount of Mahr and returned the properties as contemplated in Clauses (c) and (d) of Section 3(1) and as interpreted by the Apex Court in Danial Latifi (supra). The question Nos. (i) and (ii) are answered accordingly.

Coming to question No. (iii), the answer to the question is contained in the Supreme Court decision in the case of Shamim Ara (supra), wherein it was held that Talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rhetorically, to declare, to utter and to articulate. Their Lordships further cautioned "that mere plea taken in the written statement of a divorce having been pronounced sometime in the past, cannot be treated as effectuating Talaq on the date of delivery of the copy of the written statement to the wife, A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of Talaq by the husband on the wife on the date of filing of written statement in the Court followed by delivery of a copy thereof to the wife". It was, thus, held that the respondent/husband shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law.

Single Bench of this Court in recent two decisions in Khatunbai @ Mehraj Bi Vs. Gani Khan, and Mohammad Idris v. Smt. Nigar Sultana and Anr., Criminal Revision No. 200/2000, has the same view and it is held that mere setting up of plea in the written statement is no proof of divorce and the husband is required to prove that he has given divorce to his wife in accordance with Mohammadan Law. We respectfully agree with the view taken by the learned Single Judge. We must say with respect that Single Bench decision of this Court in Farida Begum v. Nisar Ali Kadri 1998 (1) MPWN 173, does not lay down the correct position of law. Question No. (in), thus, stands answered accordingly.

All the questions referred to us thus, stand answered as aforesaid. These matters be now listed before the appropriate Bench for further orders. We also record our appreciation for the valuable assistance rendered by Shri H.S. Uberoi, Shri B.L. Pavecha and Shri Jaisingh who addressed the Court at our request as Amicus Curiae.