

Madhya Pradesh High Court

Abdul Rashid (Dr.) vs Mst. Farida W/O Abdul Rashid on 9 October, 1993

Equivalent citations: 1994 (0) MPLJ 583

Author: S Chawla

Bench: S Chawla

ORDER S.K. Chawla, J.

1. The order under challenge in this revision is order dated 22-1-1990 by Additional Sessions Judge, Sheopurkalan, holding that application for maintenance under Section 125, Criminal Procedure Code by a Muslim divorced woman was prosecutable even after the enforcement of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

2. A Muslim woman named Farida (impleaded as non-applicant in this revision) filed an application under Section 125, Criminal Procedure Code against her husband Dr. Abdul Rashid (applicant in this revision) on 16-6-1980 before Judicial Magistrate First Class, Sheopur. That application was for maintenance of herself and her minor daughter Shabnam, aged then 8 years. During the pendency of that application, the husband Dr. Abdul Rashid gave Talak to his wife. That Talak became operative at least from 30-7-1985, when the husband filed an application in the Magistrate's Court informing his wife thereby that he had given Talak to her. This legal position under Mahomedan Law could not be contested and attempt to contest that position was given up by Farida's counsel in this Court. It was afterwards on May 19, 1986 that the Act called the Muslim Women (Protection of Rights on Divorce) Act, 1986 - hereinafter called the Muslim Women Act - came into force. On 22-11-1986, the husband Dr. Abdul Rashid made an application in the Magistrate's Court that after the enforcement of the Muslim Women Act, the application under Section 125, Criminal Procedure Code was not prosecutable. The learned Additional Chief Judicial Magistrate by order dated 23-2-1987 held that the application was not prosecutable so far as it was on behalf of the divorced woman, but it was prosecutable so far as it was on behalf of the minor daughter. So holding, the learned Additional Chief Judicial Magistrate dismissed that application so far as it was on behalf of the divorced woman, but decided to proceed ahead with that application so far as it was on behalf of minor daughter. Mst. Farida went in revision to the Court of Session and the learned Additional Sessions Judge, Sheopurkalan by the impugned order dated 22-1-1990 reversed the decision of the Additional Chief Judicial Magistrate, holding that the application even on behalf of the divorced woman was prosecutable after the enforcement of the Muslim Women Act, and further holding that in prosecution of that application the parties would be required to exercise their option under Section 5 of the Act to say whether they would prefer to be governed by the provisions of Sections 125 to 128, Criminal Procedure Code or by the provisions of the Muslim Women Act. It is this order, which is impugned in this revision by the husband.

3. The contention put forward by learned counsel for the applicant was that the present application for maintenance, so far as it was on behalf of Muslim divorced woman, which was admittedly the status of non-applicant Farida in this revision, became unprosecutable after the enforcement of the Muslim Women Act and there could be no question of parties being given any opportunity to exercise option referred to in his order by the learned Additional Sessions Judge. The application was, therefore, rightly dismissed by the learned Additional Chief Judicial Magistrate.

4. The law with respect to applications for maintenance under Section 125, Criminal Procedure Code vis-a-vis Mahomedan Law needs to be examined at this stage. To begin with, it must be said that Section 125, Criminal Procedure Code is a secular provision appearing in Code of Criminal Procedure. It provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties, *Nanak Chand v. Chandra Kishore* in AIR 1970 SC 446. The religion professed by the parties has no place in the scheme of Section 125. As was aptly observed by the Supreme Court in *Mohd. Ahmed Khan v. Shah Bano Begum* in AIR 1985 SC 945 : "Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in application of its provision. The reason for this is axiomatic, in the sense that Section 125 is a part of the Code of Criminal Procedure, not of the Civil Laws which define and govern the rights and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, and Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent ?"

5. It may further be noticed that Muslim Women Act deals exclusively with Muslim divorced women; it does not at all deal with Muslim wives. A Muslim wife, who is unable to maintain herself, can therefore invoke the provisions of Section 125, Criminal Procedure Code and there is nothing which comes in her way. Naturally, she can also prosecute any of her such applications which may be pending at the time of commencement of the Muslim Women Act. But the moment she is divorced or obtains a divorce, the provisions of the Muslim Women Act would come into play and her application would become governable by its provisions for the period after the date of divorce.

6. With respect to divorced Muslim woman, the law before the coming into force of Muslim Women Act was stated by the Supreme Court in *Shah Bano's case* (supra). It was observed : "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". Then came the Muslim Women Act. It is named "The Muslim Women (Protection of Rights on Divorce) Act, 1986". The title may be said to be a misnomer, for instead of protecting the rights of divorced Muslim women, it can very well be argued that it curtails their rights. Section 3 of the Act enacts an overriding provision (section 125 Criminal Procedure Code of course included) that a divorced woman shall be entitled to (i) a reasonable and fair provision and maintenance within the period of Iddat from her former husband, (ii) reasonable and fair provision and maintenance for her children being maintained by her up to their attaining the ages of 2 years from her former husband, (iii) amount of Mahr or dower and (iv) all properties given to her by her husband or by relatives and friends of either side. Section 4 enacts an overriding provision that if a divorced Muslim woman is not remarried and is unable to maintain herself after the period of Iddat, the Magistrate may make an order directing reasonable and fair maintenance to be paid to her by her children, parents, other relatives and Wakf Board, in that order. It will thus be seen that husband's liability to maintain his divorced wife ceases the moment the period of Iddat is over. The implication is obvious. If a divorced Muslim woman wants maintenance from her former husband, she has to confine her claim for maintenance to the period of Iddat. Even for enforcing such liability, she will have to make an application under Section 3(2) of

the Muslim Women Act. The application under Section 125, Criminal Procedure Code, if already made by her, may or may not do. It may be mentioned here that an application under Section 3(2) of the Muslim Women Act is of special character and may be made not only for the recovery of limited maintenance as already described, but for three more items already mentioned. Another point to be noticed is that it is only when divorced Muslim woman makes an application under Section 3(2) of the Act, that there can arise any question about exercise of option by the divorced woman and her former husband under Section 5 of the Act, to be governed by the provisions of Sections 125 to 128, Criminal Procedure Code. In other words, if no application has been made by a divorced Muslim woman under Section 3(2), there can arise no occasion for any kind of option being exercised by the parties to be governed by the provisions of Sections 125 to 128, Criminal Procedure Code. One more thing may be noticed. If an application under Section 125, Criminal Procedure Code by a divorced woman is pending on the date of the commencement of Muslim Women Act, that application will have to be disposed of by the Magistrate in accordance with the provisions of the Muslim Women Act, vide Section 7 of that Act. The fate of such an application can be easily visualised. She can recover maintenance from her former husband limited only to the period of Iddat. If she wants maintenance for post Iddat period, the liability would not be that of her former husband, but that of her children, her parents, other relatives and Wakf Board, in that order. Naturally, her application under Section 125, Criminal Procedure Code against her former husband, so far as pertaining to post Iddat period, will have to be disallowed.

7. A point was raised by learned counsel for Farida in this case. He contended that only those applications under Section 125, Criminal Procedure Code pending at the commencement of the Muslim Women Act and which when made, were by divorced Muslim women, would be governed by the provisions of Muslim Women Act vide Section 7. But those applications which when made were by Muslim wives but who came to be subsequently divorced, would not be governed by the provisions of the Muslim Women Act as falling outside the purview of Section 7. This argument seeks to make an irrational classification with regard to applications pending at the commencement of the Muslim Women Act by divorced Muslim women, between those which were made initially by Muslim wives but who came to be subsequently divorced and between those applications which were made even initially by divorced Muslim women. Such a classification has no meaning. Even if for arguments sake, it is supposed that applications for maintenance under Section 125, Criminal Procedure Code initially made by Muslim wives who came to be subsequently divorced do not come within the purview of Section 7 of the Act, their fate would not be any different. The substantive overriding law enacted in Sections 3 and 4 of the Muslim Women Act would apply even to such applications limiting the liability of the husband for the Iddat period only. With regard to post-Iddat period, the liability would be that of the children, parents, other relatives and Wakf Board, in that order; but not that of the husband. The classification suggested is therefore, irrational and meaningless. It is proper to hold that the expression "every application by a divorced woman" employed in Section 7 of the Muslim Women Act covers all applications by divorced women whether or not they were divorced when the applications were made. It is improper to add the words, "who was divorced at the time when the application was made" to expression "Every application by a divorced woman" appearing in Section 7.

8. My conclusions may be summed up :

(i) Section 125, Criminal Procedure Code is a secular provision appearing in the Code of Criminal Procedure.

(ii) A Muslim wife unable to maintain herself can make an application under Section 125, Criminal Procedure Code against her husband. She can also prosecute her any such application which may be pending at the commencement of the Muslim Women Act. Such application would not be governed by the provisions of the Muslim Women Act. It will be disposed of on the basis of the same principles on which an application under Section 125, Criminal Procedure Code is disposed of.

(iii) But the moment she is divorced or obtains a divorce, the provisions of Muslim Women Act would come into play and her application would become governable by the provisions of the Muslim Women Act with respect to the period soon after the divorce.

(iv) A divorced Muslim woman, irrespective of being able to maintain herself or not, desirous of obtaining maintenance from her former husband, can get maintenance from him, confined to Iddat period. Her proper remedy to recover this limited kind of maintenance and also to recover maintenance for her children being maintained by her up to their ages of 2 years, for Mahr or dower and for gifted properties, is to make an application under Section 3(2) of the Muslim Women Act.

(v) It is only when the divorced Muslim woman makes an application under Section 3(2) of the Muslim Women Act that the question of parties opting under Section 5 of the Act to be governed by the provisions of Sections 125 to 128, Criminal Procedure Code can arise.

(vi) If a divorced Muslim woman who has not remarried, is unable to maintain herself and is desirous of obtaining maintenance for post Iddat period, her remedy is that mentioned in Section 4 of the Muslim Women Act, to obtain an order from a Magistrate, who may direct payment to be made to her by her children, parents, other relatives or Wakf Board, in that order. The former husband does not figure in this scheme of things and cannot be directed to make payment.

(vii) All applications by divorced Muslim women under Section 125, Criminal Procedure Code pending at the commencement of the Muslim Women Act, would be governed by the provisions of Muslim Women Act.

9. Coming to the present case, the application under Section 125, Criminal Procedure Code was made on 16-6-1980. It was pending on 19-5-1986, when the Muslim Women Act came into force. Mst. Farida who had made that application was a divorced Muslim woman. It was thus an application by a divorced Muslim woman pending on the commencement of the Muslim Women Act and fell within the purview of Section 7 of that Act. Such an application has to be disposed of in accordance with the provisions of the Muslim Women Act, as mandated in that section. As already seen, Section 3 of the Muslim Women Act imposes a liability, confining ourselves to the subject of maintenance, on a Muslim husband to pay maintenance to his divorced wife within the period of Iddat. This is irrespective of the fact whether she is or is not able to maintain herself. In the present case, the application for maintenance covers also the claim for Iddat period, which a divorced Muslim woman is entitled to get, if not already paid to her. The application under consideration is,

therefore, prosecutable at least on this matter.

10. The application under consideration covers also the claim for maintenance commencing from the date of the application. Mst. Farida was a Muslim wife at the time when she had made the application. It is the case of Mst. Farida in the application that she was not able to maintain herself. As a Muslim wife, as wives of any other religion, she was entitled to claim maintenance from her husband in accordance with the provisions of Section 125, Criminal Procedure Code. If an order is made under Section 125, Criminal Procedure Code granting maintenance to Mst. Farida, for the period commencing from the date of the application until the moment of her divorce, such an order would not be contrary to the provisions of Muslim Women Act, because as already seen, the Muslim Women Act does not at all deal with Muslim wives or enact any provision governing their rights. It leaves that area absolutely untouched. Section 7 of the Muslim Women Act mandates that the application shall be disposed of in accordance with the provisions of Muslim Women Act. If Muslim Women Act leaves certain area untouched and decision with regard to that area is given in terms of general law enacted in Section 125, Criminal Procedure Code, it cannot be said that the disposal of the application was not done in accordance with the provisions of the Muslim Women Act. It will be a matter for consideration by the Magistrate in the event of his allowing the application under Section 125, Criminal Procedure Code to direct whether the maintenance allowance shall be payable from the date of the application or from the date of the order. The Magistrate should give reasons whether he directs payment of maintenance allowance from the date of the application or from the date of the order. In either case, he has to give reasons. See *Krishna v. Dharamraj* in 1991 MPLJ 451. The point which I am trying to endeavour is that claim for maintenance for the period from the date of the application till the moment of divorce, contained in the application under consideration, would also be a matter for consideration, and in that sense this application is prosecutable.

11. In conclusion, the present application was prosecutable even in so far as it was made by Mst. Farida on behalf of herself, so far as the claim for maintenance of Iddat period and claim for maintenance of previous period from the date of the present application till the date of divorce, was concerned. The learned Additional Sessions Judge gave a wrong reason that it was prosecutable to enable the parties to exercise option under Section 5 of the Muslim Women Act. There had been no application by Mst. Farida under Section 3(2) of the Muslim Women Act, and therefore, there was no question of applicability of Section 5, whereunder a divorced Muslim woman and a former husband are given option, to be governed by the provisions of Sections 125 to 128, Criminal Procedure Code. Be that as it may, the application under Section 125, Criminal Procedure Code, as already explained, was prosecutable, though for a different reason than that given by the learned Additional Sessions Judge. The order of the learned Chief Judicial Magistrate dismissing the present application in so far as it was on behalf of Mst. Farida, was wrong. It was properly set aside by the impugned order of the Additional Sessions Judge, though he gave a wrong reason.

12. In the result, the revision is partly allowed. The impugned order of the Additional Sessions Judge is maintained in so far as it directs the application under Section 125, Criminal Procedure Code, so far as made by Mst. Farida on her own behalf, to be prosecutable. His direction that the parties would be allowed to exercise option under Section 5 of the Muslim Women Act, is set aside. The application is held to be prosecutable on matters mentioned in paragraph 11 above.