Supreme Court of India
Shamim Bano vs Asraf Khan on 16 April, 1947
Author: D Misra
Bench: Dipak Misra, Vikramajit Sen

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.820 OF 2014
(Arising out of S.L.P. (Criminal) No. 4377 of 2012)

Shamim Bano … Appellant

Versus

Asraf Khan …Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The appellant, Shamim Bano, and the respondent, Asraf Khan, were married on 17.11.1993 according to the Muslim Shariyat law. As the appellant was meted with cruelty and torture by the husband and his family members regarding demand of dowry, she was compelled to lodge a report at the Mahila Thana, Durg, on 6.9.1994, on the basis of which a criminal case under Section 498-A read with Section 34 IPC was initiated and, eventually, it was tried by the learned Magistrate at Rajnandgaon who acquitted the accused persons of the said charges.

3. Be it noted, during the pendency of the criminal case under Section 498-A/34 IPC before the trial court, the appellant filed an application under Section 125 of the Code of Criminal Procedure (for

short "the Code") in the Court of Judicial Magistrate First Class, Durg for grant of maintenance on the ground of desertion and cruelty. While the application for grant of maintenance was pending, divorce between the appellant and the respondent took place on 5.5.1997. At that juncture, the appellant filed Criminal Case No. 56 of 1997 under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for brevity "the Act") before the learned Judicial Magistrate First Class, Durg. The learned Magistrate, who was hearing the application preferred under Section 125 of the Code, dismissed the same on 14.7.1999 on the ground that the appellant had not been able to prove cruelty and had been living separately and hence, she was not entitled to get the benefit of maintenance. The learned Magistrate, while dealing with the application preferred under Section 3 of the Act, allowed the application directing the husband and others to pay a sum of Rs.11,786/- towards mahr, return of goods and ornaments and a sum of Rs.1,750/- towards maintenance during the Iddat period.

4. Being grieved by the order not granting maintenance, the appellant filed Criminal Revision No. 275 of 1999 and the revisional court concurred with the view expressed by the learned Magistrate and upheld the order of dismissal. The aforesaid situation constrained the appellant to invoke the jurisdiction of the High Court under Section 482 of the code in Misc. Crl. Case No. 188 of 2005. Before the High Court a preliminary objection was raised on behalf of the respondent-husband that the petition under Section 125 of the Code was not maintainable by a divorced woman without complying with the provisions contained in Section 5 of the Act. It was further put forth that initial action under Section 125 of the Code by the appellant-wife was tenable but the same deserved to be thrown overboard after she had filed an application under Section 3 of the Act for return of gifts and properties, for payment of mahr and also for grant of maintenance during the 'Iddat' period. It was also urged that the wife was only entitled to maintenance during the Iddat period and the same having been granted in the application, which was filed after the divorce, grant of any maintenance did not arise in exercise of power under Section 125 of the Code. Quite apart from the above, both the parties also had advanced certain contentions with regard to obtaining factual score.

5. The High Court, after referring to certain authorities, came to hold that a Muslim woman is entitled to claim maintenance under Section 125 of the Code even beyond the period of Iddat if she was unable to maintain herself; that where an application under Section 3 of the Act had already been moved, the applicability of the provisions contained in Sections 125 to 128 of the Code in the matter of claim of maintenance would depend upon exercise of statutory option by the divorced woman and her former husband by way of declaration either in the form of affidavit or in any other declaration in writing in such format as has been provided either jointly or separately that they would be preferred to be governed by the provisions of the Code; that the applicability of Sections 125 to 128 of the Code would depend upon exercise of statutory option available to parties under Section 5 of the Act and as the appellant-wife had taken recourse to the provisions contained in the Act, it was to be concluded that she was to be governed by the provisions of the Act; that the claim of the appellant under Section 125 of the Code until she was divorced would be maintainable but after the divorce on filing of an application under Section 3 of the Act, the claim of maintenance, in the absence of exercise of option under Section 5 of the Act to be governed by Section 125 of the Code, was to be governed by the provisions contained in the Act; that as the application under Section 3 of the Act having already been dealt with by the learned Magistrate and allowed and affirmed by the

High Court under Section 482 of the Code, the claim of the appellant for grant of maintenance had to be confined only to the period before her divorce; and that the courts below had rightly concluded that the wife was not entitled to maintenance as she had not been able to make out a case for grant of maintenance under Section 125 of the Code; and further that the said orders deserved affirmation as interim maintenance was granted during the pendency of the proceeding upto the date of divorce. Being of this view, the High Court declined to interfere with the orders of the courts below in exercise of inherent jurisdiction.

6. We have heard Mr. Fakhruddin, learned senior counsel appearing for the appellant, and Mr. Kaustubh Anshuraj, learned counsel appearing for the respondent.

7. The two seminal issues that emanate for consideration are, first, whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the appellant to sustain the application under Section 125 of the Code; and second, whether regard being had to the present fact situation, as observed by the High Court, the consent under Section 5 of the Act was an imperative to maintain the application.

8. To appreciate the central controversy, it is necessary to sit in a time machine for apt recapitulation. In Mohd. Ahmed Khan v. Shah Bano Begum and others[1], entertaining an application under Section 125 of the Code, the learned Magistrate had granted monthly maintenance for a particular sum which was enhanced by the High Court in exercise of revisional jurisdiction. The core issue before the Constitution Bench was whether a Muslim divorced woman was entitled to grant of maintenance under Section 125 of the Code. Answering the said issue, after referring to number of texts and principles of Mohammedan Law, the larger Bench opined that taking the language of the statute, as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 of the Code and that mahr is not such a quantum which can ipso facto absolve the husband of the liability under the Code, and would not bring him under Section 127(3)(b) of the Code.

9. After the aforesaid decision was rendered, the Parliament enacted the Act. The constitutional validity of the said Act was assailed in Danial Latifi and another v. Union of India[2] wherein the Constitution bench referred to the Statement of Objects and Reasons of the Act, took note of the true position of the ratio laid down in Shah Bano's case and after adverting to many a facet upheld the constitutional validity of the Act. While interpreting Sections 3 and 4 of the Act, the Court came to hold that the intention of the Parliament is that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. Thereafter, the Court proceeded to state thus: -

"In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words

cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."

10. In the said case the Constitution Bench observed that in actuality the Act has codified the rationale contained in Shah Bano's case. While interpreting Section 3 of the Act, it was observed that the said provision provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties and further indicates that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The Court further observed that the emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period", and if the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act. Thereafter the larger Bench opined thus:-

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agree that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional."

11. Eventually the larger Bench concluded that 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 and 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 of the Act; that liability of a Muslim husband to his divorced wife arising under Section 3 of the Act to pay maintenance is not confined to the iddat period; and that a divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 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 and 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.

12. At this Juncture, it is profitable to refer to another Constitution Bench decision in Khatoon Nisa v. State of U.P. and Ors.,[3] wherein question arose whether a Magistrate is entitled to invoke his jurisdiction under Section 125 of the Code to grant maintenance in favour of a divorced Muslim woman. Dealing with the said issue the Court ruled that subsequent to the enactment of the Act as it was considered that the jurisdiction of the Magistrate under Section 125 of the Code can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with. The Court noticed that in the said case the Magistrate had returned a finding that there having been no divorce in the eye of law, he had the jurisdiction to grant maintenance under Section 125 of the Code. The said finding of the magistrate had been upheld by the High Court. The Constitution Bench, in that context, ruled thus:

"The validity of the provisions of the Act was for consideration before the constitution bench in the case of Danial Latifi and Anr. v. Union of India. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr.P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr.P.C.. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the magistrate has exercised his jurisdiction under Section 125 Cr.P.C. But, since the magistrate retains the power of granting maintenance in view of the constitution bench decision in Danial Latifi's case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr.P.C., we see no ground to interfere with the orders of the magistrate granting maintenance in favour of a divorced Muslim woman."

13. The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

14. Slightly recently, in Shabana Bano v. Imran Khan[4], a two-Judge Bench, placing reliance on Danial Latifi (supra), has ruled that: -

"The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only." Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in Khatoon Nisa (supra).

15. Coming to the case at hand, it is found that the High Court has held that as the appellant had already taken recourse to Section 3 of the Act after divorce took place and obtained relief which has been upheld by the High Court, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced. It may be noted here that during the pendency of her application under Section 125 of the Code the divorce took place. The wife preferred an application under Section 3 of the Act for grant of mahr and return of articles. The learned Magistrate, as is seen, directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the Iddat period. Thus, in effect, no maintenance had been granted to the wife beyond the Iddat period by the learned Magistrate as the petition was different. We are disposed to think so as the said application, which has been brought on record, was not filed for grant of maintenance. That apart, the authoritative interpretation in Danial Latifi (supra) was not available. In any case, it would be travesty of justice if the appellant would be made remediless. Her application under Section 125 of the Code was continuing. The husband contested the same on merits without raising the plea of absence of consent. Even if an application under Section 3 of the Act for grant of maintenance was filed, the parameters of Section 125 of the Code would have been made applicable. Quite apart from that, the application for grant of maintenance was filed prior to the date of divorce and hearing of the application continued.

16. Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband. Needless to emphasise, the entitlement and the necessitous provisions have to be made in accordance with the parameters of law.

17. Under these circumstances, regard being had to the dictum in Khatoon Nisa's case, seeking of option would not make any difference. The High Court is not correct in opining that when the appellant-wife filed application under Section 3 of the Act, she exercised her option. As the Magistrate still retains the power of granting maintenance under Section 125 of the Code to a divorced Muslim woman and the proceeding was continuing without any objection and the ultimate result would be the same, there was no justification on the part of the High Court to hold that the proceeding after the divorce took place was not maintainable.

18. It is noticed that the High Court has been principally guided by the issue of maintainability and affirmed the findings. Ordinarily, we would have thought of remanding the matter to the High Court for reconsideration from all spectrums but we think it appropriate that the matter should be heard and dealt with by the Magistrate so that parties can lead further evidence. Be it clarified, if, in the meantime, the appellant has remarried, the same has to be taken into consideration, as has been stated in the aforestated authorities for grant of maintenance. It would be open to the appellant-wife to file a fresh application for grant of interim maintenance, if so advised. Be it clarified, we have not expressed anything on the merits of the case.

19. In the result, the appeal is allowed and the impugned orders are set aside and the matter is remitted to the learned Magistrate for re-adjudication of the controversy in question keeping in view the principles stated hereinabove.

.....J.

[Dipak Misra] .....J.

[Vikramajit Sen] New Delhi;

April 16, 2014.

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[1] (1985) 2 SCC 556
[2] (2001) 7 SCC 740
[3] 2002 (6) SCALE 165
[4] (2010) 1 SCC 666