

Gauhati High Court

Idris Ali And Etc. Etc. vs Ramesha Khatun And Etc. Etc. on 8 March, 1988

Equivalent citations: I (1990) DMC 107

Author: G Lodha

Bench: G Lodha, S Phukan

JUDGMENT G.M. Lodha, C.J.

1. In this bunch of revision petitions, an important question relating to interpretation of Section 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, for short 'Act of 1986', has been referred to this Bench by a single Bench. The order dt. 11-11-87 passed in one such Criminal Revision, viz., Criminal Revision No. 112/87 by the learned Judge runs as follows : --

"A question of great importance in so far as divorced Muslim Women are concerned has arisen in these cases. The point for consideration is whether the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, shall have application when a divorced woman approaches the Court of a Magistrate for execution of the final order already passed in her favour under Section 125 of the Cr.P.C. For this purpose, it would be required to be seen whether Section 7 of the aforesaid Act shall have application at the stage of execution of the final order passed, under Section 125 of the Cr.P.C. Many such cases are said to be pending in different Criminal Courts of this State, and indeed, some are pending before this Court itself. The point is important, and there is no decision of this Court on this point. It has therefore been deemed appropriate that these cases may be heard by a Division Bench. When these cases shall be heard by a Bench, all other cases pending in this Court relating to this aspect would also be placed before the Bench for hearing. As the point is of general importance, it is felt that the learned Advocates General of Assam, Nagaland, Meghalaya should assist this Court. Let the records be placed before the Hon'ble Chief Justice for his Lordship's necessary orders. As the cases are related to maintenance proceedings they shall be heard by a Division Bench without most expedition". Sd/- B. L. Hanasaria Judge".

2. In pursuance of the above order, we have heard the learned counsel for the petitioners and also learned counsel for the opposite parties on the point raised. None of the Advocates General has appeared to assist this Court in respect of interpretation of Section 7 of this new Act of 1986.

3. Since, we are not deciding the revision petitions on merit as it would depend on the facts of each case, it is not necessary for us to mention the facts given in these cases.

4. It would be sufficient to mention that these are cases where the divorced wives claimed maintenance against their husbands for themselves and in some cases for their children under Section 125 Cr.P.C. Invariably the maintenance has been granted. After the grant of maintenance when the proceedings under Section 125 Cr.P.C. were over, the question of payment and enforcement of the order of the learned Court below for payment under Section 128 arose.

5. During this period the Act of 1986 came into force and the husband i.e. the petitioner in Criminal Revision No. 112/87 applied to the Magistrate that he has divorced his wife and therefore, the maintenance should be stopped. The Magistrate did not accept this plea and distress warrant was

issued and the petitioner husband came before this Court.

6. We are giving facts only of one case in order to mention how the controversy arose. The husband made a prayer before the Magistrate to stop the maintenance which was not allowed and when a distress warrant was issued he came to this Court and during the pendency of the Criminal Revision, the above order dt. 11-11-87 has been passed by the learned single Judge for a decision by a Division Bench.

7. It may be incidentally mentioned that in this particular case earlier order dt. 4-4-87 under Section 125 Cr.P.C. passed by the learned Magistrate became final as the revision was rejected,

8. Now the question which has been canvassed before us by the learned counsel for the petitioner, Mr. A. Ahmed is that as soon as the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force, Sections 125, 127, 128 so far as divorced Muslim women are concerned became dead and unenforceable by virtue of Section 7 and also by virtue of the entire scheme of the new Act of 1986. It was pointed out that the said Act of 1986 is for the protection of the rights of divorced Muslim women and therefore, such divorced Muslim women, immediately on coming into force of this Act can only apply under this new Act and if any order had been passed by a Magistrate under Section 125 or 127 Cr.P.C. before coming into force of the Act, such orders would become nugatory and nonest in the eye of law as the rights of the parties for the purpose of maintenance of a divorced Muslim women have to be decided according to the provisions of the Sections 3 and 4 of this new Act by virtue of Section 7 of the Act of 1986.

9. It was pointed out that the proceeding for maintenance under Section 125 continues and never comes to an end by decision on an application under Section 125 or 127 because there is no penalty attached to them.

10. The learned counsel has supported this submission that the continuation of the proceeding under Section 125 or 27 is not pending because of the fact that Section 7 contemplated proceeding pending and the use of word 'pending' is significant.

11. The learned counsel for the opposite party Mr. S. N. Bhuyan has vehemently opposed the above interpretation of law and has submitted that Section 7 of the new Act of 1986 sets all controversy at rest. It was pointed out that Section 7 in terms mentioned that if an application filed by a divorced woman under Section 125 or 127 is pending before a Magistrate on the commencement of the Act of 1986 then only it has to be disposed of in accordance with the provisions of this new Act of 1986. His submission is that the condition precedent for application of new Act is the continuance of proceedings under Sections 125 and 127 Cr.P.C. on the date of commencement of new Act of 1986 and once the proceeding is disposed of under Section 125 or 127 by the Magistrate then there is no pendency.

12. We have given our serious consideration on this point. Before we proceed further, we may like to mention that Sections 125, 126, 127 and 128 in Chap. IX of the Cr.P.C. provide elaborate procedure for the purpose of maintenance of wives, children and parents. Section 125 contemplates grant of

maintenance when the wife is unable to maintain herself and the husband neglects or refuses to maintain. We are not mentioning all the provisions of Section 125 because in the present bunch of cases we are all concerned with the rights of married Muslim women who have claimed maintenance from their husbands. Section 126 provides the procedure.

13. Section 127 provides for change of monthly allowance and it can be made on proof of the change of the circumstances of any person, but the rate of Rs. 500/- has been put as highest amount and this amount should not be exceeded. Sub-section (2) gives the power to the Magistrate to cancel or vary the order under Section 125 in consequence of any decision of a competent Civil Court.

14. Sub-section (3) of Section 127 is for the purpose of the present case. It provides that in case of divorce, the Magistrate can cancel the order of maintenance and so also on her remarriage under Clause (a) and further under Clause (b) if the divorce is proved and it is further proved that woman has received the sum, she is entitled to under the customary law payable to her on divorce, then the order of maintenance can be cancelled. The cancellation can be from either of two dates provided in Sub-clauses (i) and (ii).

15. Sub-clause (c) of Sub-section (3) of Section 127 further provides the power to obtain a divorce from her husband and that she had voluntarily surrendered her rights of maintenance after her divorce. In all these cases, the order of maintenance can be cancelled by the Magistrate.

16. Section 128 provides the procedure for enforcement of order of maintenance.

17. We are here concerned with the new Act of 1986. It is open for the Muslim divorced woman to obtain an order of maintenance against her husband and also who are alleged to have been divorced thereafter. Obviously in respect of the new Act of 1986, a Muslim husband can move an application under Sub-clause (b) of Sub-section (3) of Section 127 Cr.P.C. as it provides for divorce and further provides that the order of maintenance earlier awarded can be cancelled in case of such divorce.

18. The above position of law is so clear that it does not require any further elaboration. In fact the points raised by the learned counsel for the petitioner is that the woman was divorced and it was further proved that such amount 'Mahr' has been paid and accordingly the order directing the husband to pay the maintenance should have been cancelled:

19. Be that as it may, we are to take into account that the new Act of 1986, was framed for the purpose of protecting the rights of Muslim women. The controversy raised by the judgment of the Apex Court in *Md. Ahmed Khan v. Shah Bano Begum*, 1985 Cri LJ 875.: (AIR 1985 SC 945), by which it was declared, that Clause (b) of explanation to Section 125(1) Cr.P.C. contains no words of limitation to justify the exclusion of Muslim women from its scope. The Court cannot excluded, (b) of the said Section 125(1) Cr.P.C. for them. In *Zahara Khatun v. Md. Ibrahim*, AIR 1986 SC 587 : (1986 Cri LJ 556) the Supreme Court further held that on dissolution of marriage under Dissolution of Muslim Marriage Act, 1939 a Muslim woman is also entitled to claim maintenance under Section 125 of the Cr.P.C.

20. Shah Bano's case (AIR 1985 SC 945) evoked serious controversy and the result is the statute in the form of the new Act of 1986 passed in the Parliament.

21. The case of the learned counsel for the petitioner is that the Muslim women have got no right of maintenance on divorce. After above two judgments of the Hon'ble Supreme Court, this argument needs no further examination by, this Court as under Article 141 of the Constitution, we are all governed by principle laid down by the Apex Court in these judgments.

22. Of course by the statute the Parliament has tried to make certain changes and in the present case we are not concerned with any challenge to that authority of the Parliament because neither it has made nor we find it. We would, therefore, interpret Section 7 of the new Act of 1986. Section 7 reads as under :

"Every application by a divorced woman under Section 125 or under Section 127 of the Cr. P.C. 1973 (2 of 1974) pending before a Magistrate on the commencement of this Act, shall notwithstanding anything contained in that Code and subject to the provisions of Section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act".

23. We are of the opinion that the very fact that the legislature has used the word 'application by a divorced woman' as the first pre-requisite condition, it shows that the legislature was of the opinion that merely by moving an application under Section 127 or 125 Cr.P.C. the husband cannot take the benefit of Section 7 of the Act. The other salient feature of Section 7 is that the said application was pending on the commencement of this new Act of 1986 which means that on the date when the Act came into force, there must be a pending proceeding under Section 125 or 127. Subject to the interpretation of the word 'pending' and unless we agree with the learned counsel for the petitioner with his interpretation as staged earlier, we are of the view that the simple meaning of the word 'pending' is that the petition which was moved under Section 125 or 127 has not been disposed of. It is common ground that no application for increase or reduction of the maintenance under Section 127 was pending on the date of Act of 1986 came into force.

24. The application by the petitioner-husband in the present case was moved after the Act came into force and, therefore, it cannot be said that it was pending even after the Act came into force. We are well aware of the well established principle of interpretation of a statute that legislatures never use superfluous words. If the legislature would have simply said that all proceedings under Chap. IX of the Cr.P.C. would be governed by the new Act of 1986, then probably what the petitioner wants to argue before this Court would have been justified. The legislature did not use the words 'Chapter IX of the Cr.P.C.' and also excluded Section 128 Cr.P.C. which is for enforcement of order of maintenance, in Section 7 of the new Act of 1986. It is not insignificant, but in our opinion more significant. So far as maintenance is concerned even for the case of divorced Muslim women, they would get the benefit of the order passed in their favour before the commencement of the Act of 1986 and the enforcement of the order could be made. Non-inclusion of Section 128 in Section 7 of the Act of 1986 pointed out towards the intention of legislatures that they never wanted to stop the payment of maintenance of divorced Muslim women which became entitled on account of two earlier judgments mentioned above known as Shah Bano's case (AIR 1985 SC 945) and Zahara

Khatun's case (AIR 1986 SC 587).

25. The learned counsel for the petitioner has invited our attention to the two decisions of the Hon'ble Supreme Court for the purpose of interpreting the word pending. In Asgar AH Nazarali Singaporewalla v. State of Bombay, AIR 1957 SC 503, the question arose whether a particular proceeding was pending on the date of commencement of the Act. In that case also the matter was decided by the Presidency Magistrate after closure of the evidence and in such circumstances it was held that the case was not concluded and was pending before the Presidency Magistrate on the date of the commencement of the Act. In that case reference to the Special Judge, who could have tried those cases was necessary and since a Special Judge was yet to be appointed it was held that cases were pending. We fail to appreciate how this proposition of law can in any manner enhance or support the contentions regarding interpretation advanced by the learned counsel for the petitioner because it is obvious that the cases under Sections 125 and 127 Cr.P.C. were tried by the Magistrate, who had the power to, dispose of the matters, by giving judgments under Section 125 Cr.P.C. and even the revisions filed have been dismissed and the orders became final.

26. In Lt. Col. S. K. Kashyap v. State of Rajasthan, AIR 1971 SC 1120 : (1971 Cri LI 832) the word 'pending' used in Criminal Law Amendment Act, was interpreted in para 25 which runs as under :

"25. The word 'pending' came up for consideration before this Court in Asgarali Nazarali Singaporewalla v. State of Bombay, 1957 SCR 678 : AIR 1957 SC 503. Criminal Law Amendment Act, 1952 provided for the trial of all offences under Section 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 exclusively by Special Judges, and directed the transfer of all such trial pending on the date of the coming into force of the Act to Special Judges. The Presidency Magistrate continued the trial and acquitted the appellant. Upon appeal by the State Government the High Court held that from the date of the commencement of the Act the Presidency Magistrate lost all jurisdiction to continue the trial and ordered retrial by the Special Judge. It was contended that on the date of the coming into force of the Criminal Law Amendment Act, 1952 viz. 28 July, 1952, the case was not pending because no Special Judge was appointed until 26 Sept, 1952 and the trial also came to an end on 26 Sept. 1952. This court did not accept that contention because the accused was not called upon his defence on 28 July, 1952 and the examination of the accused under Section 342 of the Code of Criminal Procedure took place after that date and the accused filed his written statement on 14 Aug. 1952 and the addresses by the prosecution as well as the defence continued right up to 26 Sept. 1952. The word 'pending' will ordinarily mean that the matter is not concluded and the Court which has cognizance of it can make an order on the matter in issue. The test is whether any proceedings can be taken in the cause before the Court tribunal where it is said to be pending. The answer is that until the case is concluded it is pending. Judged by these tests it will appear that this present appeal relates to a case pending before 30 June, 1966."

27. It is nobody's case that in the present bunch of cases proceedings under Section 125 Cr.P.C. initiated by Muslim wives have not been concluded by final judgment granting maintenance. It is also nobody's case that proceedings under Section 127 Cr.P.C. for alteration of the amount on the basis of the conditions mentioned therein were pending.

28. So far as the facts mentioned above in the case of Idris Ali are concerned, it is common ground that not only the Magistrate granted maintenance but even the revision petition was dismissed. That being so by no stretch of imagination and by construction of interpretation of the statute it cannot be said that the proceedings under Section 125 or 127 were pending on the date when the new Act of 1986 came into force. In fact only an application informing the Magistrate that divorce was made after coming into force of the Act was filed and therefore, no proceedings under Section 125 or 127 were pending on the date on which new Act of 1986 came into force.

29. We are, therefore, of the opinion that the pre-requisite condition for application of Section 7 of the new Act of 1986 is that an application under Sections 125 and 127 of the Cr.P.C must be pending before the Magistrate on the commencement of the new Act of 1986 which is absent in respect of the present petitions.

30. It is also significant that legislature has used the word 'Magistrate' which means even if the revision is pending in a Sessions Court or a High Court, it would not come under Section 7. The legislature could have used the word 'Court' instead of 'Magistrate' if the intention would have been to include revision petition pending before a Sessions Court or a High Court on the date of commencement of the new Act of 1986.

31. We feel that legislature was very much concerned not to write off the maintenance of Muslim divorced wives, who had already been granted maintenance earlier by a competent Court under Section 125 or 127 of the Cr.P.C and therefore made it express that the new Act of 1986 and the provisions thereof would cover only the cases filed after the new Act came into force and those cases under Sections 125 and 127 which were pending. If any retrospective effect would be given to the Act of 1986, it would result in serious complications. The legislature in its wisdom never contemplated a situation where divorced Muslim women would not be given benefit which they had already acquired under the law which was in force earlier and which had been implemented under Sections 125 and 127 Cr.P.C. and became final. It must be noticed that in Section 7 of the new Act of 1986 word 'Magistrate' has been used twice and as such the Magistrate should act in accordance with the provisions of this Act which means that even the High Court in revision, if it is pending on the date of commencement of Act cannot deprive Muslim women of their rights of maintenance under Sections 125 and 127 which had been allowed by the Magistrate earlier and which had become final to that extent.

32. Consequently there is no hesitation to hold that answer to the question referred to by the learned single Judge is that if a divorced Muslim woman approaches the Court of a Magistrate for execution of final order already passed under Sections 125 and 127, Cr.P.C. earlier to the new Act of 1986 then she will have a right to get the order executed under Section 128 Cr.P.C. which section has been excluded from Section 7 of the Act of 1986, and Section 7 of the new Act of 1986 would not take away that right.

33. In other words Section 7 would apply only to those cases which are not finalised by the Magistrate under Section 125 or 127 Cr.P.C. on the date the new Act of 1986 came into force and are still pending and such application had been moved by a divorced woman, We want to make it clear

that a Muslim divorced woman or her husband cannot move before a Magistrate for cancellation of the order of maintenance already granted simply on the ground that the new Act of 1986 has come into force. We are trying to set all the controversies at rest and we further make it clear that under Section 127 Cr. P.C. there are various provisions where in case of divorce the husband or the wife may approach the Magistrate for cancellation of order of maintenance already passed on proving of certain conditions which are laid down therein.

34. Let these cases be listed before the learned single Judge who would now dispose of all the Criminal Revisions including Miscellaneous applications on merit according to the above law.

35. We want to make it clear that we have not set out the facts of other cases as in our opinion it is for the learned single Judge to decide the cases on merit on the basis of interpretation of Section 7 of the new Act of 1986 as stated above.

36. Since these are cases for maintenance the Registry should take necessary steps to list these cases before the learned single Judge for early disposal in accordance with the decision given above.