

Bombay High Court

Rukhsana Parvin vs Shaikh Mohomed Hussein Mohomed ... on 1 September, 1976

Equivalent citations: (1977) 79 BOMLR 123

Author: Chandurkar

Bench: Chandurkar, Shah

JUDGMENT Chandurkar, J.

1. This petition involves a question relating to the construction of Section 127(3)(b) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "new Code").

2. The facts on which this question arises are not in dispute. The petitioner-wife was married to respondent No. 1-husband on February 5, 1968 and she was divorced by the husband on April 7, 1974. The husband treating Rs. 50 per month as proper amount of maintenance sent a sum of Rs. 150 by insured letter, being the total amount of maintenance due from him under the personal Muslim law to the wife. He also sent a sum of Rs. 500 which, was the mahr amount according to him, by money order. The wife, however, declined to accept this amount. She filed an application under Section 125 of the new Code on July 15, 1974. This application was contested by the husband, according to whom, the petitioner had quarreled on April 7, 1974 and she left the house voluntarily and took talak which was given by him on April 8, 1974. A talaknama was produced by him. He claimed that in view of the provisions of Section 127(3)(b) of the new Code he was not liable to pay any maintenance to the petitioner. The trying Magistrate took the view that the provision in Section 127(3)(b) of the new Code was specifically made for Muslim women and that under that provision, the right of the Muslim women to claim maintenance came to an end as soon as mahr amount and iddat amount are paid by the husband to the talaki. On facts the learned Magistrate found on opening the insured letter that it contained Rs. 650 that is Rs. 500 as mahr amount and Rs. 150 as payment towards maintenance during iddat. It was further found that the petitioner had shown unwillingness to accept the said amount of Rs. 650 even in Court. The amount was deposited in Court. The learned Magistrate, therefore, took the view that the husband had satisfactorily proved that he had been offering the amount of mahr and maintenance during iddat, but the applicant had been refusing it and in such a case, she was not entitled to claim separate maintenance. In doing so, the learned Magistrate had in view the provisions of Section 127(3)(b) of the new Code.

3. The petitioner then filed a revision application in the City Sessions Court at Bombay. The Additional Sessions Judge who decided the revision application also confirmed the order of the trying Magistrate that the case was covered by Section 127 of the new Code. It was contended before the Additional Sessions Judge that at any rate, the wife was entitled to receive maintenance until the amount of Rs. 650 was tendered to the wife on July 5, 1975. The learned Judge, however, took the view that the wife had a grievance about the quantum of maintenance and that it was for the Court to decide the quantum of maintenance during the period of iddat. The learned Judge seems to have declined to take the view that Rs. 50 per month was adequate by way of maintenance and he, therefore, remanded the case to the trying Magistrate for fixing the amount of maintenance after having earlier observed that the right to receive the maintenance continues until an unmarried divorced wife receives the amount due to her under the personal law or she remarries.

4. The wife has now filed this petition under Article 227 of the Constitution of India substantially challenging the view taken by the two Courts that having declined to accept the mahr amount and the amount of maintenance sent by the husband, she should be deprived of her right of maintenance expressly granted to her under Section 125 of the new Code in view of the provisions of Section 127(3)(b) of the said Code.

5. It is vehemently contended by Mr. Jafarbhoy appearing on behalf of the petitioner-wife that she was entitled to maintenance till she remarries in view of the express provisions Section 125 of the new Code read with the definition of 'wife' in the Explanation in that provision. The learned Counsel has relied on two decisions of this Court in support of the proposition that the petitioner was entitled to maintenance till her remarriage, if at all she remarries, and that Section 127(3)(b) did not deprive her of her right which was expressly created by the provisions of Section 125 of the new Code.

6. Before we refer to the relevant provisions in Sections 125 and 127(3)(6) of the new Code, it is necessary to point out that we are dealing expressly with a case of a divorced wife who is governed by her own personal law, namely the Mahomedan Law. Since the Mahomedan law dealing with the right of maintenance of a divorced Muslim woman has some relevance in the matter of construction of the provisions of Section 127(3) of the new Code, we shall first refer to that part of the personal law. The position with regard to the maintenance of a divorced wife is explained in Mulla's Principles of Mahomedan Law, seventeenth edition, paragraph 279. This paragraph reads as follows (p. 272):

Maintenance on divorce.-(1) After divorce, the wife is entitled to maintenance during the period of iddat. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce.

7. This statement of the law by Mulla positively states the position of law relating to the right of maintenance of a divorced Muslim wife to be that after the divorce, the wife is entitled to maintenance during the period of iddat. The present is not a case where the divorce was not communicated to the petitioner and if personal law was relevant in any way for determining either the nature or the extent of the right of the petitioner for maintenance, then under the personal law, she could not have claimed maintenance except for the period of iddat. This position was well settled even by decisions by Courts and was given effect to even in proceedings under Section 488 of the old Code of Criminal Procedure. These cases are catalogued by Mulla at p. 273 where with reference to the provisions of Section 488 of the Code of Criminal Procedure, 1898, there is a passage which reads as follows:

Where an order is made for the maintenance of a wife under Section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of iddat. The result is that a Mahomedan may defeat an order made against him under Section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her iddat.

8. Let us now refer to the provisions of Section 125 of the new Code. Section 125 so far as is material for the purposes of the present case reads as follows:

125. (1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or....

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided....

Explanation.-For the purposes of this Chapter,-

(a) ...

(b) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried....

9. Section 127 then provides for an alteration in the amount of maintenance which has been granted by the order under Section 125 of the new Code. Under Sub-section (1) the Magistrate is entitled to alter the allowance if there is some change in the circumstances of the person against whom the order has been made. Sub-section (2) requires the Magistrate to take cognizance of any decision of a competent civil Court in consequence of which a cancellation or variation of the order made by him under Section 125 becomes necessary and it enables him to pass the appropriate consequential order. Sub-section (3) then reads as follows:

Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband the Magistrate shall, if he is satisfied that-

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

10. Now, the contention of Mr. Jafarbhoy on behalf of the petitioner is that there is no ambiguity whatsoever when in the Explanation to Section 125(1) a wife has been defined to include a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. The contention is that when Section 125 enables a wife, who has been divorced, to apply, she will be entitled to maintenance under that provision as long as she has not remarried and that an order for maintenance in case of which a wife would only come to an end if the divorced wife remarries.

11. Now, there is no doubt that the submission, if considered merely in the light of the provisions of Section 125 of the new Code, must be clearly accepted, but while considering the jurisdiction of a Magistrate to make an order for maintenance under Section 125 of the new Code, it will not be proper to restrict our attention merely to the provisions of Section 125. There is no doubt that a divorced wife who has not remarried is entitled to apply for maintenance under Section 125 of the new Code, but it is only one part of Chapter IX of the new Code which contains the whole scheme contemplated by the new Code regulating the right of maintenance. Therefore the provisions of Sections 125 to 128, which are contained in Chapter IX, and which together constitute the entire scheme regarding the right of maintenance contemplated by the Parliament while enacting the new Code, will, therefore, have to be considered as a whole and if there is any apparent conflict between any of the provisions in that Chapter, these provisions will have to be harmoniously construed. In fact in our view, there is no conflict whatsoever between the provisions of Sections 125 and 127(3)(b) of the new Code. Section 125 provides; for a right of maintenance in favour of the person specified in Section 125(1), which includes certain categories of persons who did not have such a right under the old Code. Section 125(1) is, however, a provision of general application. Section 125 does not make any reference to the personal law of a person in whose favour a right is created by that section. Sub-section (1) of Section 125 confers a legal right on persons referred to in Clauses (a) to (d) thereof to apply for maintenance and on the terms of that section, that right appears to be uncontrolled or unrestricted by any personal law. Section 126 then merely provides for the procedure regulating the place where proceedings should be taken and how the evidence should be recorded and the Court has also been given the power to make an order with regard to costs. Sub-sections (1) and (2) of Section 127 have no impact on the controversy raised before us.

12. If we now go to Section 127(3) of the new Code, the effect of Clause (a) is that the order of maintenance in the case of a divorced woman remains in operation only up to the date of the remarriage of the divorced woman if she remarries and it gives power to the Court to cancel the order of maintenance from the date of the remarriage. This is again a provision of general application irrespective of to what community or religion the divorced wife may belong. The provision of Clause (b) of Sub-section (3) of Section 127 is the only provision in which a clear reference is found to the customary or the personal law of the divorced wife who is making a claim for maintenance. At this stage, it may be made clear that there is no dispute that under the Mahomedan personal law, the amount which is payable to a divorced wife is the mahr amount and the amount of maintenance during the iddat period. Now, Clause (b) deals with a case where the wife has been divorced by her husband and she has received, whether before or after the order under

Section 125, the whole of the sum which under any customary or personal law applicable to the parties was payable on such divorce. What is to happen in such contingency is then provided in Sub-clause (i) and (ii) of Clause (b) of Sub-section (3). Under Sub-clause (i) it is clearly provided that where the sum due under the customary or the personal law applicable to the parties is received before the date of the order under Section 125, then it is obligatory on the Magistrate to cancel the order and this cancellation takes effect from the date on which the order under Section 125 was made. No discretion is left to the Magistrate either in the matter as to whether the order should be cancelled or not or in the matter of the date with reference to which the order should be cancelled once he is satisfied that what was due under the customary law or the personal law was paid to the divorced wife. Sub-clause (ii) provides for a residuary case where what is due under the customary or personal law to the divorced wife is not paid to her before the order but is paid after the order and in such a case again, no discretion is left to the Magistrate in the matter of cancellation of the order; the Magistrate has to cancel the order. This cancellation, however, takes place from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman. In our view, the provisions in Clause (b) of Sub-section (5) of Section 127 have a very serious impact on the right of a Muslim divorced woman to claim maintenance under Section 125. If we may so say, with respect, these provisions seem to recognise the legal position, as settled by several Courts, under the Mahomedan Law dealing with the duration of an order for maintenance made in favour of a Muslim wife. We have already referred to this catalogue of cases earlier when we referred to paragraph 279 from Mulla's Principles of Mahomedan Law.

13. The question involved in the present petition, therefore, turns on what are the consequences which flow from the provisions of Section 127(3)(b) of the new Code. In our view, there is hardly any ambiguity about the consequences, once we appreciate that this provision reflects the settled position under Mahomedan Law in respect of the right of a Muslim divorced woman in regard to the right of maintenance. It is clear from Clause (i) that where it is proved to the satisfaction of the Magistrate that what was due under the personal law was paid even before the order, the Magistrate has to cancel the order with effect from the date from which he made the earlier order under Section 125. This obviously means that in spite of the fact that originally an order under Section 125 was made, that order has to be revoked because what was due under the personal law has already been paid to the divorced woman. The natural consequence of the cancellation of the order, which must then follow is that the entitlement which was claimed by the divorced wife was statutorily denied to her and the divorced wife, who has already received, before the order, what was due to her under the personal law, is under law treated as not entitled at all to have any order for maintenance against the husband. The provision in Sub-clause (ii) does not change the basic position contemplated by the main part of Clause (b) that a divorced woman who has under the personal law received what is due to her is not entitled to any further maintenance from the husband. What is, however, provided is that in a case which is not covered by Sub-clause (i), that is where payment is not made before the order under Section 125, the cancellation of the order takes effect from the date of the expiry of the period from which maintenance has been actually paid by the husband to the woman. This provision provides for the date with effect from which the liability of the husband to comply with the order under Section 125 is put an end to. The date will be, for example, in the case of a monthly maintenance, end of the period of one month for which maintenance has been paid by the husband. The object for such a provision appears to us to be obvious. It appears that the Legislature intended

that where a cancellation of the order of maintenance takes place in a case covered by Sub-Clause (ii), the wife will not be subjected to a demand for refund of any amount which she may have received in consequence of an order under Section 25. Here again, though from the point of time prescribed in Sub-clause (ii) of Clause (b) the entitlement of the wife is taken away, the basic postulate is that she must have received what was due to her from the husband under the customary or personal law. Now, it is difficult to countenance an argument that where the law itself provides for a want of entitlement in a divorced wife to claim maintenance, if what was due under the personal law has been paid to the divorced wife, in a case where the requirements of Sub-section (3) are satisfied, that is to say where the husband has paid to the divorced wife what he was required to pay under the personal law, the Magistrate could still proceed to make an order under Section 125. It is true that there are no words of restriction of a right to claim maintenance to be found in Section 125 itself. But then, in our view, Sections 125 and 127(3) have to be harmoniously construed, and we must read Section 127(3)(b) as a proviso which will restrict the power of the Magistrate in the matter of entertaining an application for maintenance at the instance of a divorced wife in whose case the provisions in Clause (b) have been complied with.

14. It was contended by Mr. Jafarbhoy that Sub-section (3) of Section 127 opens with the words "Where any order has been made under Section 125" and, therefore, these provisions will only apply in a case where the original order under Section 125 has been made and consequently a Magistrate will not be entitled to refuse to entertain or to proceed with the application and make order for maintenance even though it is proved to his satisfaction that what was required to be paid under the personal law has already been received by the divorced wife.

15. Now, it is no doubt true that Sub-section (3) of Section 127 of the new Code refers to an order under Section 125. But if as we have already pointed out, the section deals with an entitlement to have an order under Section 125, especially having regard to the provisions of Sub-clause (i) in Sub-section (3)(b) of Section 127, it is difficult for us to hold that the Magistrate can proceed to make an order even though the husband has satisfied the Magistrate that he had complied with the provisions of Sub-section (3) of Section 127. It is difficult for us to imagine that the Legislature contemplated that even in such a case the Magistrate must proceed first to make an order and then proceed further at the instance of the husband to go through the formality of making an enquiry in the exercise of his powers under Section 127(3)(b) to hold that what was due to the divorced wife under the personal law has been already paid and then cancel the order. There is nothing in Section 125 of the new Code which prevents the husband from adducing evidence in the enquiry. Under Section 125 that he has already paid to the divorced wife what was due to her under the personal law. Harmoniously construing Sections 125 and 127(3)(b) we are, therefore, inclined to take the view that in a case where the husband satisfies the Magistrate in a proceeding under Section 125 of the new Code that he has complied with the requirements of Section 127(3)(b), the divorced wife does not have any subsisting right of maintenance having regard to the provisions of Section 127(3)(b) and the Magistrate will have no jurisdiction in such a case to make an order under Section 125 of the new Code.

16. According to the learned Counsel for the petitioner-wife the view which he has been canvassing is supported by at least two decisions of this Court. It, therefore, becomes necessary to make a

reference to these two decisions.

17. In the first decision relied upon in *Khurshid Khan v. Husnabanu Mahimood*, the contention of the husband was that a divorced wife under the Muslim Law was entitled to maintenance only during the period of iddat and this Court took the view that the principles of Muslim law relating to iddat were not relevant when considering the provisions of Section 125 of the Code of Criminal Procedure and that there was nothing in Muslim law or culture to prevent Parliament from making a law conferring a right on the divorced Muslim wife to claim maintenance against her quondam husband, so long as she remained unmarried, even after the iddat period. The only reference to the provisions of Section 127(3) is to be found in the context of the contention raised by the counsel for the husband in that case that the personal law was not excluded by Chapter XXI of the new Code but that it has to be borne in mind while making an order under Section 125. This contention was negated by the learned Judges in the following words (p. 242):

It is difficult to understand how this argument of Mr. Hussein can help him in the present application under Article 227 of the Constitution of India, because both the Courts below have concurrently found as a fact that though the husband is a teacher, he has not cared to pay anything or provide any maintenance to the wife and the child after he divorced her and married a second wife.

These observations cannot be read as laying down the scope and content of the provisions in Section 127(3) of the new Code. On the other hand, it was held in that case that the husband was not entitled to invoke the provisions of Section 127(3) because he had not paid anything to either the wife or the child. The question which is canvassed in this case on behalf of the respondent-husband cannot be said to have been concluded by this decision.

18. The other decision of this Court relied upon by the learned Counsel for the petitioner is in *Smt. Mehabubabi Nasir v. Nasir Farid*. In that case, an application by a divorced Muslim wife for maintenance made under Section 125 of the new Code was contested by the husband on the ground that the wife had run away from the matrimonial home taking with her ornaments from the house and that there was an agreement between the husband and the wife that they should stay separately, that she was quarrelsome and that she had an affair with another person with whom she used to go to pictures and, therefore, she was not interested in staying with the husband. On these grounds, therefore, according to the husband, he had given a notice giving talak. On facts it was held that the lower Courts had "acted without jurisdiction and contrary to ordinary canons of justice in holding that, from what they regarded as the behaviour of the wife, there appeared to be some truth in the allegation made by the husband, without any evidence on record to support any such inference." It was observed that as none of the grounds mentioned in Section 125(4) was established by the husband the Courts were bound to award maintenance to the wife and two children for whom she had claimed maintenance. The division Bench in the course of the judgment further observed as follows (p. 261):

After the coming into force of Section 125, even a Muslim husband cannot divorce his first wife and marry a second wife with impunity and without paying anything to the first wife and children from

her. He has an obligation to Maintain his former wife till she remarries, under Section 125. Section 127(3) cannot be invoked where nothing has been paid by the husband as in this case....

(Italics ours).

The observations underlined by us above will again indicate that the learned Judges have ruled out the application of Section 127(3) on the ground that the husband has not paid anything to the wife. These observations cannot, therefore, be said to have concluded the question which we have been called upon to decide in this petition.

19. The learned Counsel for the petitioner has also placed reliance on a decision of the Karnataka High Court reported in U.H. Khan v. Mahabeobunnisa [1976] Cri. L.R. 395. There the divorced wife had applied for maintenance and was granted maintenance by the Magistrate at the rate of Rs. 250 per month. It was contended in the High Court on behalf of the husband who challenged the order of maintenance that the wife had no right under the personal law to be, maintained by her divorced husband beyond the period of iddat, she cannot be permitted to claim the same under Section 125 of the new Code and that the ambit of Section 125 of the new Code cannot in law extend to cover rights which are not available to parties under their personal law. The only relevant paragraph relied upon by the learned Counsel for the petitioner is para. 6 of the judgment in which the learned Judge, after referring to the plain meaning of the word 'wife' in the Explanation to Section 125, held that that definition showed that a divorced Mahomedan woman can bring action under Section 125 of the new Code claiming maintenance, from her ex-husband so long as she does not remarry even if the period falls beyond the period of iddat. The learned Judge further observed (p. 396):

...That shows that maintenance to some additional period beyond the period of iddat becomes available to a divorced Muhammeden woman in an action under Section 125 of the new Code. This additional benefit does not at all conflict with the right she has under the Muhammeden Law. By proceeding under Section 125 of the new Code, she gets something more than what she is entitled to get under her personal law. A Statute can confer rights and benefits on persons even though these rights and benefits happen to be more than what these persons are entitled to, under their personal law.

It is difficult for us to see how these observations can be of any assistance to the learned Counsel for the petitioner. There is nothing in the judgment of the learned Judge of the Karnataka High Court which shows that the aspect of the matter which has been pressed upon us was canvassed in that form because the judgment does not make any reference to either the scope or the nature of the provisions of Section 127 of the new Code.

20. It was vehemently pressed upon us by the learned Counsel for the petitioner that the construction which we were placing on Section 127(3) of the new Code will take away the benefit which is in terms given under Section 125 as by way of a progressive and ameliorative measure to create a right of maintenance in favour of a divorced woman.

21. Now, while we are conscious of the fact that in a case which expressly falls under Section 127(3)(6) such a result is bound to occur, in view of the express provisions in Section 127(3)(b), it is not possible for us to obviate this result. It is not as if benefit to a divorced Muslim woman is denied in all possible cases. Section 125 read with Section 127(3)(b) still contemplates a case where the conditions in Section 127(3)(b) are not satisfied and it will be competent for the Magistrate to make an order for maintenance. In a case where the husband comes to the Court for cancellation of such an order, the cancellation will become operative only in future, but, as we have already pointed out, Section 127(3)(b) clearly indicates an intention on the part of the Legislature at least in a case where the parties are governed by the Muslim personal Law that the right 'must be of a restricted nature.

22. It is contended on behalf of the petitioner that the determination of the amount of maintenance should not be left to the sweet will of the husband who will arbitrarily fix it at a meagre amount. It is obvious that the maintenance which the husband is liable to pay to the divorced wife under the personal law must be a reasonable amount of maintenance. If the wife is not satisfied with the amount of maintenance paid by the husband or if he has not paid any maintenance at all, in our view, there is nothing in Section 127 of the new Code which prevents her from making an application for determination of the amount of maintenance, the payment of which will have to be taken account of for the purposes of deciding to what amount the divorced wife is entitled.

23. It appears to us on the facts of this case that when the learned Magistrate passed an order rejecting the application, he was inclined to take the view that on facts the proper amount of maintenance was Rs. 50 which he had offered at all material times to the wife. It is true that the learned Additional Sessions Judge has set aside the order of the trying Magistrate to the limited extent of determination of the quantum of maintenance. "We do not think, in the view which we have taken, the wife should be further subjected to any protracted litigation. Parties have, therefore, agreed in this case that in addition to the amount which was originally deposited in the Court and has now been withdrawn by the wife, the husband shall pay to the wife a further sum of Rs. 350. The learned Counsel for respondent No. 1 undertakes to deposit the said amount of Rs. 350 in this Court within a period of two months. The petitioner-wife shall be entitled to withdraw that amount after the amount is deposited in this Court. In view of this position, it will not now become necessary to have the amount of maintenance determined by the trying Magistrate as directed in the remand order by the Additional Sessions Judge.

24. In the result, we quash the direction in the order of the Additional Sessions Judge remanding the matter to the trying Magistrate and the order of the trying Magistrate shall stand restored subject to the modification that the husband undertakes to pay an additional amount of Rs. 350 within a period of two months, as stated above.