

Kerala High Court

Shihabudheen @ Mahin vs Shybi on 26 August, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Crl.MC.No. 967 of 2009()

1. SHIHABUDHEEN @ MAHIN, AGED 32 YEARS,
... Petitioner

Vs

1. SHYBI, AGED 28 YEARS, D/O. SHAMSUDHEEN,
... Respondent

2. STATE OF KERALA, REPRESENTED BY THE

For Petitioner : SRI. PMM. NAJEEB KHAN

For Respondent : PUBLIC PROSECUTOR

The Hon'ble MR. Justice M. SASIDHARAN NAMBIAR

Dated : 26/08/2009

O R D E R

M. SASIDHARAN NAMBIAR, J.

CRL.M.C.NO. 967 OF 2009

Dated 26th August 2009

O R D E R

If there was a dissolution of marriage under mubara'at whether a divorced wife is entitled to claim Mahr, maintenance during the Iddat period and fair and reasonable provision. This is the question to be settled in this petition.

2. There is no dispute on the factual matrix of the case. Petitioner and first respondent are Muslims

and admittedly were husband and wife. Their marriage was on 30/5/2002. A child was born in that wed lock on 12/2/2003. The marriage was dissolved on 14/3/2004. First respondent filed M.C.21/2004 under Section 3(1) of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as 'the Act') claiming maintenance for the Iddat period, fair and reasonable provision, maintenance for a period of two years for the child, return of Mahr of 36 grams of gold and return of 20 sovereigns of gold ornaments.

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3. Petitioner resisted the claim contending that Rs.50,000/- which was received at the time of marriage and 36 grams of gold received as Mahr, were returned at the time of dissolution of the marriage. It was also contended that gold ornaments of the first respondent were with her at the time of dissolution of the marriage and therefore, she is not entitled to claim it back. It is contended that petitioner is only a porter and is getting only very limited income and therefore, he cannot pay the amount claimed. It was also contended that dissolution was by talak and petitioner is not liable to pay any amount as claimed.

4. Learned Magistrate on the evidence of first respondent and her two witnesses, petitioner and his witness, Secretary of the Mosque Committee and Exts.P1 to P5 found that as a divorced wife petitioner is liable to pay Rs.6,000/- as maintenance for the Iddat period, Rs.1,20,000/- as fair and reasonable provision and Rs.12,000/- towards maintenance of the child for a period of two years from the date of birth, Rs.19,800/- being the value of 36 grams of gold ornaments received by the CRMC 967/09 petitioner as Mahr and Rs.88,000/- being the value of 15 sovereigns of gold ornaments belonging to first respondent and entrusted with the petitioner.

5. Petitioner challenged the order before Sessions court, Kottayam in Crl.R.P.28/2007. Learned Sessions Judge on re-appreciation of the evidence found that first respondent is entitled to fair and reasonable provision and upheld the direction to pay Rs.1,20,000/-. It was also found that first respondent is entitled to Rs.12,000/- being the maintenance expense of the child for a period of two years from the date of birth. It was also found that first respondent is entitled to Rs.19,800/-, being the value of the gold ornaments paid as Mahr and in addition she is entitled to get Rs.88,000/- being the value of 15 sovereigns of gold. Direction to pay maintenance during the Iddat period was set aside holding that when reasonable and fair provision is made, separate maintenance for the period of Iddat need not be paid. Though that finding is unsustainable and in addition to fair and reasonable provision, a divorced wife is entitled to get maintenance for the Iddat period, as first CRMC 967/09 respondent did not challenge the order, that portion of the order of the revisional court cannot be interfered.

6. This petition is filed under Section 482 of Code of Criminal Procedure to quash the orders passed by the learned Magistrate and the learned Sessions Judge contending that courts below should have found that the entire liability of the petitioner was settled between the parties and the amount payable was fixed in writing in the presence of mediators and there is no further liability to be discharged as provided under the Act and therefore, no further amount is payable. It is also contended that as first respondent has received Rs.75,000/- from the petitioner, consequent to the

settlement of the disputes at the time of divorce, she is not entitled to approach the court for any further amount and therefore the orders are to be quashed.

7. Arguments of the learned counsel appearing for the petitioner is that as is clear from Annexures-A1 to A3 agreements, which are not disputed by the first respondent, whatever is legally payable CRMC 967/09 was paid or relinquished and therefore, in addition to the amount fixed under Annexure-A1 and paid under Annexures-A2 and A3, first respondent is not entitled to claim any further amount and for that sole reason the orders are to be quashed. Learned counsel also argued that Annexures-A1 to A3 establish that marriage of the petitioner with first respondent was dissolved by mubara'at and mubara'at is dissolution of marriage by mutual consent and Annexures-A1 to A3 establish that Rs.75,000/- was fixed as the entire liability payable by the petitioner to first respondent and Annexures-A2 and A3 establish discharge of that liability and so petitioner is not liable to pay any further amount and therefore, the orders are not sustainable. Learned counsel also submitted that Annexures-A1 to A3 were not produced before the courts below due to the fault of the counsel of the petitioner and as Annexures-A1 to A3 are admitted by the first respondent, based on Annexures-A1 to A3, the orders are to be set aside. Reliance was placed on the decision of this court in *Mytheen v. Saphiya* (1993 (2) KLT 322) as well as on Section 319 of Mahomedan Law, in support of CRMC 967/09 the submission.

8. Learned counsel appearing for first respondent submitted that when in the counter statement filed before the Magistrate, petitioner specifically contended that dissolution was by talak, he is not entitled to contend otherwise before this court and therefore, submission that dissolution was by mubara'at cannot be allowed to be raised before this court. It is also contended that even if dissolution was by mubara'at, Section 320 of Mahomedan Law provides that even in a case of dissolution by khula or mubara'at, husband is liable to pay maintenance during the Iddat period as well as to maintain the children and therefore, even if dissolution was by mubara'at, liability to pay maintenance for the period of Iddat, the fair and reasonable provision or the liability to return the property are not effected and as provided under Section 320 of the Mahomedan Law, unless it is otherwise provided by the contract a divorce effected by mubara'at only operates as release by the wife, of her dower. Therefore, in law petitioner is liable to pay the amount as found by the CRMC 967/09 revisional court. Learned counsel also relied on the decision of the Apex court in *Danial Latifi v. Union of India* (2001 (3) KLT 651 (SC)) and argued that Constitution Bench has approved earlier law laid down in *Mohd.Ahmed Khan v. Shah Bano Begum & Ors.*(1985 (2) SCC 556) and the decision in *Mytheen's case* (supra) does not apply to the facts of the present case. It was pointed out that Annexures-A1 to A3 do not contain any provision for payment of maintenance for the Iddat period or return of Mahr or return of gold ornaments or fair and reasonable provision or any relinquishment by the wife of her right legally payable and therefore, the petition is only to be dismissed.

9. Though learned counsel appearing for the petitioner vehemently argued that dissolution in this case was by mubara'at, that was not the case taken up either before the trial Magistrate or before the revisional court. On the other hand, it was the specific case in the statement filed by the petitioner before the Magistrate that dissolution of marriage was by talak. As against that case, petitioner is not entitled to take a different stand CRMC 967/09 before this court for the first time. Whatever it

be, question is even if the dissolution of marriage was by mubara'at, whether a divorced wife is not entitled to claim the benefits available to her under Section 3 of the Act.

10. A divorced woman is defined under clause (a) of Section 2 of the Act "as Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim law." Therefore, whatever be the form of dissolution, a Muslim woman whose marriage was dissolved in accordance with the Muslim Law, if her marriage was according to Muslim Law, is a divorced woman as defined under the Act. Section 3 provides that Mahr or other properties of the Muslim woman received shall be given to her at the time of divorce. Under Sub Section 1 notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period by her former husband. Under clause (b) she is entitled to maintenance of the children from her CRMC 967/09 former husband for a period of two years from the respective dates of birth of such children. Under clause(c) she is entitled to an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law. Under clause (d) she is also entitled to get all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends. Sub Section 2 provides that where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) have not been delivered to the divorced woman on her divorce, she or anybody duly authorised by her, is entitled to make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties as the case may be. Therefore, a divorced woman is entitled to the benefits under Section 3(1) as provided under the Act, if it was not paid before the expiry of the Iddat period as provided under the Act. CRMC 967/09

11. Mulla' Principles of Mahomedan Law, Nineteenth Edition Chapter XVI deals with the dissolution of marriage as well as the effect of the dissolution. The dissolution of marriage could either by talak or by khula or by mubara'at or with the intervention of the court. Section 307 deals with the different forms of divorce. It reads "307. Different forms of divorce.-- The contract of marriage under the Mahomedan law may be dissolved in any one of the following ways: (1)by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention if a Court; (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage [S.314], but she may, in some cases, obtain a divorce by judicial decree [Ss.328-334].

When the divorce
proceeds from the husband, it is

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called talak (Ss.308-315); when it is effected by mutual consent, it is called Khula (S.319) or mubara'at (S.320) according to the terms of the contract between the parties."

Dissolution by talak is unilateral act on the part of the husband. As per the statement filed by the petitioner before the learned Magistrate the dissolution of marriage was an arbitrary act on the part of the petitioner and not the product of a mutual agreement.

12. Section 319 of Mahomedan Law deals with khula and mubara'at. Under Sub section (1) a marriage may be dissolved not only by talak, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of khula or mubara'at. Sub Section 2 deals with divorce by khula which is a divorce at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case, the terms of the bargain are matters of arrangement between the husband and the wife, as the consideration, may release her dyn-mahr (dower) and other rights, or make any other agreement for the benefit of the husband. Khula is effected by an offer from the wife to compensate the husband, if he releases her from her marital ties, and acceptance by the husband of the offer. Once the offer is accepted it operates as a single irrevocable divorce (talak-i-bain) and its operation is not postponed until execution of the khulanama (deed of khula).

13. Sub section 3 deals with divorce by mubara'at. Sub section 3 reads.

"(3) A mubara'at divorce like khula, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called khula. When the aversion is mutual, and both the sides desire a separation, the transaction is called mubara'at. The offer in a mubara'at divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is complete, and it operates as a talak-i-bain as in the case of khula."

Sub section 4 provides that as in talak, both in khula and mubara'at wife is bound to observe the Iddat as provided under Section 257. Under Section 257 Iddat may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion and to abstain from marrying another husband. When the wife is bound to observe Iddat and Iddat is observed irrespective of a dissolution by mubara'at or khula the husband is liable to pay maintenance for the Iddat period. It is clear from Section 320 also. Section 320 reads.

"320.Effect of khula and mubara'at divorce.-- Unless it is otherwise provided by the contract, a divorce effected by khula or mubara'at operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her iddat, or to maintain his children by her."

Therefore, irrespective of the position whether the dissolution of marriage was by talak or khula or mubara'at a divorced wife is entitled to maintenance during her Iddat period. Section 323 provides for dissolution of Muslim marriage under the Dissolution of Muslim Marriages Act. Hence whether the dissolution is under Talak or khula or Mubara'at or under the Dissolution of Muslim Marriage Act, if the divorce is in accordance with the Muslim law, she is a divorced wife. This court in Mytheen's case supra held "7. Under Muhammadan Law, a woman can be divorced through 'Talak-al-sunna', or through 'Talak-al-bida' or 'Talak-

e-tafwiz' or by a bilateral

divorce (either Mubara'at or

khula) or through the provisions of Dissolution of Muslim Marriage Act, 1939. The definition "divorced woman" in the Act is of wife import as to CRMC 967/09 embrace within its fold a woman divorced boy or through any of the modes recognised by Muhammadan law."

If so, she is also entitled to get all the benefits which are available to her, unless a reasonable and fair provision and maintenance has been made and paid or mahr or dower was paid or the properties as provided under Sub Section 3(1)(d) were delivered to her on the divorce as provided under Sub Section 2 of Section 3. Sub Section 2 of Section 3 reads.

"3.Mahr or other properties of Muslim woman to be given to her at the time of divorce.--

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, CRMC 967/09 mahr or dower or the delivery of properties, as the case may be."

When a husband is liable to make reasonable and fair provision and pay the same to the wife when there is a divorce, when the divorce is by mutual agreement between the parties the wife is entitled to relinquish the same. If it is relinquished, in view of Sub section 2 the divorced wife is not entitled to claim the same. That is all, what is provided under Section 3 of the Act. If a fair and reasonable provision and maintenance during the Iddat period was not made or paid, the divorced wife is definitely entitled to file a petition under Sub Section 3 of Section 3 of the Act for the benefits and the court is competent to grant the same. Whether the dissolution was by talak or by khula or by mubara'at the right is available to the wife. It would be lost only if a fair and reasonable provision is made and paid or properties were delivered. The only exception is of dower or mahr. Section 285 defines dower as "Mahr or dower is a sum of momey or other property which the wife is entitled to receive from CRMC 967/09 the husband in consideration of the marriage." In view of Section 320 of Mahomedan Law which provides that in the case of Khula and Mubara'at, unless otherwise provided by the contract, the divorce would operate as release by the wife of her dower, if the contract by which the marriage was dissolved does not provide that the dower due to the wife is not released, the divorced wife cannot claim the benefit provided under clause (c) of Section 3(1) of the Act for the Mahr. But she is definitely entitled to all the other benefits provided under Section 3(1) of the Act,

unless there is a contract to the contrary or an express relinquishment of the claim, on the failure of the husband to make and pay the fair and reasonable provision and also return the properties.

14. Though learned counsel strongly relied on the decision in Mytheen's case, I do not find anything contrary to this principle in the said decision. As is clear from paragraph 2 of the said decision, under Ext.D1 agreement marked therein, Saphiya, the divorced wife had acknowledged receipt of Rs.11,000/- from Mytheen her husband and CRMC 967/09 relinquished her right to get future maintenance and there is a recital in the agreement that Rs.11,000/- was received from Mytheen in full and final settlement of all the claim against him and that she shall not make any further claim against Mytheen, either towards maintenance or any other claim. It is because of the said recitals in the agreement and agreeing with the decision of the High Court Madras in *Muniammal v. Raja* (AIR 1978 Madras 103) where right of the woman who is entitled to claim maintenance under Hindu Adoptions and Maintenance Act was held not available to her when she, who is entitled to the benefit, has given up the right or relinquished it in consideration of a lump sum or consolidated sum unless the contract is vitiated by fraud or undue influence. His Lordship on the facts therefore held that Saphiya, the divorced wife is not entitled to get the benefit under Section 3 of the Act. The relevant portion of the decision reads "11. A perusal of the relevant passages in Muhammadan Law would thus show that under Mubara'at or khula form of CRMC 967/09 dissolution of marriage, personal law allows the parties to come to terms either about the maintenance or about the dower. That may, perhaps, be the reason why S.3 of the Act never intended to transgress into the terms of any agreement entered by parties and hence the non-obstante clause has advisedly refrained from huddling with contracts or agreement between the parties. In the general scheme of the Act, the right of parties to come to agreements has not been anathamatised."

That does not mean that in no case if the dissolution of marriage is by mubara'at, the divorced wife is not entitled to claim either maintenance for the Iddath period or for reasonable and fair provision or return of the Mahr or the gold ornaments or delivery of the properties as provided under Section 3(1) of the Act. Therefore, based on the CRMC 967/09 decision in Mytheen's case it cannot be said that if divorce was by mubara'at, as now canvassed by the petitioner, the benefits under Section 3(1) cannot be granted.

15. As far as this case is concerned, Annexures-A1 to A3 agreements relied on by the learned counsel appearing for petitioner, do not show any provision for maintenance for the Iddat period or that a fair and reasonable provision was either made or paid or the properties received returned. They do not disclose that these aspects were not even considered by the parties or settled at the time of the agreement for dissolution. Annexure-A1 only shows that they have agreed to separate. The husband agreed to return Rs.50,000/- which he received at the time of marriage from the side of the wife. In addition he agreed to pay Rs.25,000/- towards maintenance of the child. Annexure-A2 shows that out of Rs.75,000/- fixed under Annexure-A1, Rs.50,000/- was paid. Annexure-A3 shows that balance of Rs.25,000/- was also paid on 14/3/2004 and it is agreed by the parties that with regard to the settlement arrived at, under CRMC 967/09 Annexures-A1 and A2, there will not be any future dispute or claim. Though learned counsel vehemently argued that the said recitals are to be read or understood as a relinquishment of all future claims and a bar against approaching the court, I cannot agree with the submission. A proper reading of Annexure-A3 only shows that parties have

agreed to receive the amount provided under Annexure-A1 and further agreed that with regard to those matters, there will not be any future dispute. It does not show that maintenance for the iddath period was made or paid. So also fair and reasonable provision was neither made nor paid. Therefore, based on Annexure-A3 also petitioner is not entitled to contend that he is not liable to pay the amount as found by the courts below.

16. Then the only question is regarding the quantum fixed by the courts below. Learned Sessions Judge after considering each of the claims upheld the quantum fixed by the Magistrate, except maintenance for the Iddat period. Though learned counsel wanted me to re-appreciate the evidence and interfere with the quantum, exercising the powers under Section 482 CRMC 967/09 of Code of Criminal Procedure, it is not for this court to re-appreciate the evidence and substitute the factual findings of the learned Magistrate or the revisional court. Even the revisional court can re-appreciate the evidence, only if appreciation of evidence by the Magistrate was perverse or any material evidence was omitted or over looked. It is not the case. In such circumstances, on re-appreciation of evidence, the quantum cannot be modified, as sought for by the learned counsel. The petition is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE.

uj.