

Kerala High Court

Kunhammed Haji vs Amina on 31 March, 1995

Equivalent citations: II (1995) DMC 260

Author: T Ramakrishnan

Bench: M P Pillay, T Ramakrishnan

JUDGMENT T.V. Ramakrishnan, J.

1. This Criminal Miscellaneous Case filed under Section 482 of the Criminal Procedure Code (for short 'the Code') was posted before us along with Criminal Miscellaneous Case No. 1861/1993 on the basis of a common reference order. The specific question referred to the Division Bench has been answered by us in Criminal Miscellaneous Case 1861/1993 by a separate judgment and need not be considered again in this case. As per the judgment in Criminal Miscellaneous Case 1861/1993, we have held that the provisions contained in Section 397(3) of the Code will not be a bar of invoking the jurisdiction of this Court under Section 482 of the Code. In the light of the said judgment, it has to be held that this Criminal Miscellaneous Case is maintainable in law.

2. Facts, necessary to deal with the contentions of merit raised in the case, can be summarised thus: The 1st respondent is the divorced wife of the petitioner. She filed Maintenance Case No. 118 of 1989 in the Court of the Additional Chief Judicial Magistrate, Thalassery, under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short 'the Act'). In the petition, 1st respondent claimed, (i) an amount equal to the sum of mahr according to Muslim Law; (ii) amount towards maintenance during the period of iddat; and (iii) a reasonable and fair provision for future maintenance. The learned Magistrate rejected the claim towards mahr. Rs. 5,000/- was allowed as maintenance payable during the period of iddat. The learned Magistrate also awarded Rs. 30,000/- as reasonable and fair provision for her future livelihood. Aggrieved by the order, the petitioner preferred Criminal Revision Petition 143/1992 before the Court of Sessions, Thalassery. The learned Sessions Judge dismissed the revision confirming the order passed by the learned Magistrate. The Criminal Miscellaneous Case has been filed invoking the jurisdiction of this Court under Section 482 of the Code.

3. On the above facts, learned Senior Counsel for the petitioner Shri T.P.K. Nambiar has mainly advanced two contentions. Firstly, it was submitted that grant of Rs. 30,000/- as future maintenance under Section 3 of the Act is illegal and unsustainable in law. Secondly, it was contended that the quantum of maintenance fixed is totally arbitrary and illegal. Learned Counsel submitted that both the Courts below have failed to take note of the fact that there is no reliable evidence on record to show the income of the petitioner and the finding regarding the means of the petitioner is based solely on surmises and conjectures.

4. Point No. (1):--Relying upon the provisions contained in Sections 3, 4, and 5 of the Act, it was submitted that the petitioner is liable to make only a reasonable and fair provision and to pay maintenance to the 1st respondent during the iddat period and not for any period subsequent thereto. In support of the above submission, it was pointed out that Section 3(1)(a) in terms restricts the right of the divorced woman to a claim for the benefits conferred by that clause and that too only for the iddat period and not for any period beyond that. To buttress the above submission, it was

submitted that under the pristine Muslims Law, the liability of a husband to pay maintenance to a divorced wife ceases on the expiry of iddat period and thereafter there is no liability for the husband to pay maintenance to her. It was vehemently argued that the Legislature having taken note of the above peculiarity of the personal law and the need to ensure a source of livelihood for the needy divorced Muslim woman has made a special provision in Section 4 of the Act for payment of maintenance to divorced woman in certain cases by her relatives indicated therein or by the Wakf Board, As per Section 5, applicability of the provisions in Sections 125 to 128 of the Criminal Procedure Code is also specifically excluded except in cases where both the husband and wife opt to be governed by those provisions. Relying upon the above provisions it was argued that the scheme of the Act is to make the former husband of a divorced woman liable to make a reasonable provision and pay maintenance only during the iddat period and not for any period subsequent thereto. Submitting so, the learned Counsel argued that the decisions reported in 1988 (2) KLT 94 (Ali. v. Sufaira) and in 1988 (2) KLT 446 (Aliyar v. Pathu) wherein a contrary view has been taken by a learned Single Judge and a Division Bench of this Court requires reconsideration, especially in view of the decisions of the Madras and Andhra Pradesh High Courts reported in Raja Mohammed v. Moimoon [1992 (2) KLT (SN) 1 and All India Muslim Advocate Forum v. Osman Khan 1990 (1) KLT 560] = II (1990) DMC 541.

5. This Court has exhaustively considered the scope and effect of Section 3(1)(a) of the Act in the two decisions, the correctness of which has been challenged by the learned Counsel for the petitioner in this case. The Division Bench of this Court to which one of us (Chief Justice) was a party has specifically found that as per Section 3(1)(a), the former husband of a divorced woman is liable to make a reasonable and fair provision for her livelihood even for post iddat period apart from his liability to pay maintenance during the iddat period. We may usefully extract the following passages quoted from paras 9, 10 and 11 of the judgment which would indicate the reasoning of the Division Bench:

"Under Clause (a) of Sub-section 3(1) of the Act, divorced wife is entitled to reasonable and fair provision to be made and maintenance to be paid within the iddat period. The Clause emphasises that provision is to be made and maintenance is to be paid. Of course provision is to be made to secure livelihood of the wife. That need not be in the shape of money; it could be in the shape of provision by grant of immovable property or other valuable assets or other income yielding property. Provision has to be made within the Iddat period; it has to be fair and reasonable. Provision must certainly be capable of being realised or secured by her. Besides the provision to be made, she is also entitled to be paid maintenance during the period of Iddat. The expressions reasonable and fair provision and maintenance to be made and paid cannot be understood to have been used disjunctively. In the context 'and' cannot mean 'or'. The two expressions convey different ideas and give rise to two different connotations. Relevant part of Clause (a) cannot be read as "reasonable and fair provision or maintenance". If there is no difference between the two ideas and they mean the same thing, one of the expressions is redundant; there is no justification to take a view that the introduction of the words reasonable and fair provision by the Parliament was intended to be a meaningless exercise. It must necessarily have a different connotation. Since the main purpose of the statute is to protect the interests of the divorced Muslim woman, even if there is any ambiguity in the language of the statute, or even if two interpretations are equally possible, that

interpretation which is reasonable and would protect the interests of divorced Muslim women has to be adopted by the Court. In the present case there is no ambiguity or uncertainty in Section 3(1)(a). The words used are plain, clear, certain and unambiguous; they clearly involve declaration of two separate and distinct rights, that is, to obtain maintenance for the period of iddat and to have a reasonable and fair provision made. Provision is the amount set aside to provide for known liability which cannot be quantified accurately; it is a provision for future use. Besides paying maintenance to the divorced wife for the Iddat period, former husband has to provide reasonably and fairly for the future needs of the divorced wife, i.e., use of the divorced wife after the period of iddat period and till her marriage or death." (Head Note 2)

6. The learned Single Judge who rendered the decision reported in 1988 (2) KLT 94 (Ali. v. Sufaira) earlier to the decision of the Division Bench has also interpreted Section 3(1)(a) in the same manner as the Division Bench has interpreted it. The reasoning of the learned Single Judge was also more or less similar to that of the Division Bench. We may note here itself that Bhaskar Rao, J., of the Andhra Pradesh High Court who wrote a dissenting judgment in the Full Bench case (All India Muslim Advocate Forum's case) has expressed full agreement with the view taken in Ali's case after referring to it.

7. In an attempt to persuade us to reconsider the decisions against him, the learned Counsel for the petitioner has referred to relevant passages from Mulla & Tayabji for the proposition that on divorce, a Muslim husband's liability is only to pay maintenance to the divorced wife for the iddat period and not to any subsequent period. The learned Counsel has further submitted that it was when, in Shah Bano's case (AIR 1985 SC 945) Supreme Court has declared that the Muslim husband's liability to pay maintenance will not cease by the expiry of iddat period and will continue till death or remarriage of the divorced wife under Section 125 of the Criminal Procedure Code in cases where the divorced wife has no means of livelihood that the Legislature has passed the Act to restore that legal position to its pristine condition. As per Section 5 of the Act, the Legislature has specifically excluded even the application of the provision contained in Sections 125 to 128 of the Code except in cases where both parties concerned opt to be governed by those provisions. As such, it would be quite contrary to the intention of the Legislature to interpret and understand Section 3(1)(a) of the Act in such a manner as imposing a liability on the husband to pay not only maintenance during the iddat period, but also a provision for her livelihood during the rest of her life time. It will also be clearly opposed to the scheme of the Act whereby the legislature has made a specific provision, namely, Section 4 casting the liability for payment of maintenance to the divorced women after iddat period on certain of her relatives and in appropriate cases on the Wakf Board.

8. As regards the above contention, we find that the Division Bench has repelled the said contention also after a detailed consideration of the provisions contained in Section 4 of the Act for the following reasons :

"Under Section 3, former husband is liable for the payment of maintenance for the Iddat period and to make reasonable and fair provision for the post-iddat period. Quantification has to be made, under Sub-section 3(b) of Section 3, having regard to the needs of the divorced woman, standard of living enjoyed by her during her marriage and the means of her former husband. Former husband

may die; his means may be slender and the reasonable and fair provision made for the future may not be adequate. The provision might not for some reason or the other, be enforced. In all these contingencies, (the narrative is not exhaustive but only illustrative) the constitutional directive in the directive principles of state policy (specifically Articles 38, 39) would require measures to avoid destitution of the woman. Parliament has devised a strategy for providing additional safeguards to protect the interests of the divorced woman. If inspite of reasonable and fair provision made for the post-iddat period, she faces destitution, Section 4 comes to her rescue. We do not agree that the scheme of Section 4 casting on relatives of the divorced woman liability for maintenance should lead to a narrow and technical interpretation of Section 3."

We do not find any compelling reason to depart from the above reasoning and conclusion of the Division Bench. On the other hand, we are in complete agreement with the said reasoning and conclusion. We are clearly of the view that the Legislature has deliberately used the two expressions 'provision' and 'maintenance' with the intention of expressing two different things or ideas departing from the view expressed by the Supreme Court in Shah Bano's case that the distinction between the above two expressions 'provision' and 'maintenance' is a distinction without difference. Parliament, in our view, has while enacting Section 3(1)(a) of the Act, accepted the traditional view that right to maintenance ceases after the expiration of the iddat following talaq only after declaring and protecting the right of divorced women to get a fair and reasonable provision being made for her livelihood during the post iddat period also from her husband and that too within the period of iddat. In Shah Bano's case, the Supreme Court has already declared that there is a continuing liability on the part of the Muslim husband to pay maintenance to his divorced wife till her remarriage or death under Section 125 of the Code in case the wife is not having means for her livelihood. The revolt from a section of the Muslims was only against the continued liability declared by the Supreme Court. There was absolutely no dispute regarding the liability of the husband to pay maintenance during iddat period. From the statement of objects and reasons, it is evident that the Parliament has enacted the new legislation in the background of Shah Bano's case partly to contain the revolt against the continued liability imposed by the said decision on Muslim husbands and also to protect the rights of the divorced Muslim women who may not be having the necessary means of livelihood after the period of iddat. We think that the Parliament has justifiably attempted to strike a balance between the competing claims of Muslim husbands and wives who are parties to a divorce. As the revolt was solely against the continued liability under Section 125 of the Code declared by the Supreme Court, the applicability of the provisions in the Code was specifically excluded except in cases where the parties opted to be governed by them and the Muslim husband was freed from such continued liability conditionally on the husband making a fair and reasonable provision for the livelihood of the divorced wife who is not having sufficient means for her livelihood within the iddat period itself. In other words, the Parliament has only substituted in the place of the continued liability declared by the Supreme Court, the liability to make a fair and reasonable provision for the livelihood of the divorced wife in case she is not having sufficient means of livelihood, within the period of iddat itself as a condition to free the husband from all his liabilities to the divorced wife on the expiry of the iddat period. This seems to be the scheme envisaged by the Parliament while enacting the Act. It is difficult to think that Parliament has by enacting the Act has completely taken away the right of Muslim divorced women under Section 125 of the Code declared by the Supreme Court without making any provision as a compensatory measure. On making a fair and reasonable

provision for livelihood of the needy divorced wife and paying her maintenance for the iddat period the husband was enabled to put an end to all his liabilities resulting from the divorce by the provision of the Act and to that extent it was certainly a benefit or advantage conferred by the Act on the Muslim husbands who wanted to divorce their wives. The fact that provision has been made to make a fair and reasonable provision for the future livelihood alone can be a justification for denying the right of a needy divorced Muslim women to have the benefit of the provisions contained in Section 125 of the Code. This, in our view, seems to be the real intention of the Legislature in making the provision in Section 3(1)(a) of the Act. If the intention of the Legislature was to restore the liability of the husband to its pristine form unconditionally, there was no necessity to incorporate the words 'reasonable and fair provision' in addition to the word 'maintenance' in Section 3(1)(a) of the Act, As held by the learned Single Judge and the Division Bench, we do not find any reason to interpret the provisions in such a way as to make the words and phrases 'reasonable and fair provision' and 'made and' used in the Clause altogether redundant and surplusage. Taking note of the fact that it is an enactment intended to protect the rights of divorced Muslim women, an interpretation which would advance the objects and reasons viz., protecting the rights of divorced women alone viz., can be justifiably accepted in preference to the interpretation canvassed for by the learned Counsel for the petitioner which will substantially restrict the then rights of divorced women.

9. It is also not possible to accept the argument of the learned Counsel for the petitioner that even if 'provision' and 'maintenance' are different, still they need only be made and paid to the divorced woman 'for the iddat period' and not for post-iddat period. Though in the decisions of the Madras and Andhra Pradesh High Courts, the learned Judges have taken the view that under Section 3(1)(a) the husband is liable only to pay maintenance during the iddat period accepting a similar contention advanced before them, we are inclined to agree with the view consistently taken by this Court in Ali's and Aliyar's cases, the correctness of which has been canvassed before us by the learned Counsel. In our view, the only reasonable way in which the provision can be understood is that the husband is made liable to make a reasonable and fair provision apart from paying maintenance to her for the iddat period, both within the period of iddat. The words 'within the period of iddat' seems to have been used to indicate the time within which the provision and maintenance have to be made and paid and not to indicate the duration for which they have to be made and paid. The words 'within the period of iddat' cannot also be taken as having the meaning of 'for the period of iddat'.

10. We would thus hold that under Section 3(1)(a), a divorced Muslim woman is entitled to get a fair and reasonable provision made for her livelihood after the period of iddat apart from her right to get maintenance during the period of iddat. The liability of Muslim husband to maintain his divorced wife during her life time or till her remarriage as declared in Shah Bano's case has only been substituted by a liability to make a fair and reasonable provision within the period of iddat as a condition for freeing the husband from all his liability to the divorced wife after the period of iddat as per Section 3(1)(a) of the Act.

11. Turning to the contention that the quantum of maintenance ordered to be paid during the iddat period and the amount directed to be paid as fair and reasonable provision for the post iddat period are arbitrary and illegal, it has to be pointed out that the Courts below have concurred in fixing Rs.

5,000/- and Rs. 30,000/- as reasonable and proper taking note of the facts and circumstances of the case. Though it may be true that the respondent wife has not succeeded in adducing evidence sufficient to determine the income of the husband with precision, the broad fact that husband is employed in a Gulf country and has not produced sufficient materials before Court to establish the exact income derived by him itself may be sufficient justification for the Courts to proceed to fix the maintenance amount payable under Section 3(1)(a) on the basis of a reasonable estimate. The factual details of the income of the petitioner are matters primarily within the knowledge of the petitioner and in this case to a great extent exclusively because the petitioner is admittedly employed in a Gulf country. As such, we find that the Courts below were justified in fixing Rs. 5,000/-and Rs. 30,000/- as the amounts payable under Section 3(1)(a) of the Act especially in view of the fact that we are exercising a very restricted jurisdiction conferred under Section 482 of the Code. We find any interference with the findings in this regard at this stage would result in failure of justice instead of doing justice for which alone the jurisdiction under Section 482 of the Code can be exercised.

We would accordingly dismiss the Criminal Miscellaneous Case as without any merit.