

Patna High Court

Abdul Mannan vs Saira Khatoon on 20 January, 2000

Equivalent citations: I (2001) DMC 387

Author: N Rai

Bench: N Rai, A Verma

JUDGMENT Nagendra Rai, J.

1. The petitioner husband has filed the present application against the order dated 9.8.1995, passed by the Judicial Magistrate, 1st Class, Muzaffarpur, in Trial No. 4263 of 1995, by which he was allowed the application filed by with opposite party No. 1, Saira Khatoon and ordered for payment of maintenance of Rs. 400/- per month for her and Rs. 200/- each for two children, namely, Mohina Khatoon (opposite party No. 2) and Noor Alam (opposite party No. 3).

2. The opposite party No. 1 filed a petition stating therein that the petitioner was earlier married with the daughter of one Md. Wasi of village Katai. Later on, he married with opposite party No. 1 on 18.12.1975 and Rs. 3,000/- was fixed as the dower debt. After marriage, three children were born out of their wed-lock, out of whom one is also married. They were living peacefully for some time and, thereafter, the husband-petitioner started misbehaving with her and stopped giving food to her and her children and in the month of January, 1991, the husband-petitioner forcibly drove her out of his house and since then she is living with her parents along with her children. She is unable to maintain herself and her children. Her father approached the husband-petitioner several times for keeping them but he had not agreed. The husband-petitioner has an income of Rs. 3,000/- per month, but even then he is not maintaining her and her children. Hence, the application for maintenance.

3. The husband-petitioner appeared and filed a show-cause. He admitted his marriage with opposite party No. 1 on 18.12.1975 for a deferred dower of Rs. 785/-. Wife opposite party No. 1 was lady of questionable character and was indulging in a loose life and as there was no chance of any improvement so with her consent, he on 2.10.1976 divorced her and paid the deferred dower of Rs. 785/- and also paid the maintenance during that period, in regard to which she executed receipt and her mother also executed in Ekrarnama in respect of divorce and since 2.10.1976, she is not his wife, she is not entitled to maintenance under Section 125 of the Code of Criminal Procedure (hereinafter referred to as the Code').

4. The opposite parties examined five witnesses in this case, namely, A.W. 1 Md. Usman, A.W. 2 Mahendra Sah, A.W. 3 Md. Yunus, A.W. 4 Saira Khatoon (herself) and A.W. 6 Hamida Khatoon (daughter of the petitioner and opposite party No. 1).

5. The petitioner examined three witnesses, namely, O.P.W. 1 Md. Jahangir, O.P.W. 2 Md. Jubair and O.P.W. 3 Abdul Manan (herself). The petitioner also filed two documents, namely, receipt alleged to have been executed by opposite party No. 1 in token of having received the amount at the time of divorce and Ekrarnama of divorce executed by the mother of opposite party No. 1.

6. The learned Magistrate, after considering the materials on record, came to the conclusion that opposite party No. 1 was married with the petitioner in 1975 and the story of divorce as propounded by the husband has not been proved and his wife and children are being neglected and are not being maintained by the husband-petitioner inspite of his having sufficient means to maintain and has ordered for payment of maintenance as stated above.

7. So far as the maintenance of the children is concerned, the same has not been challenged and in our view rightly as the Magistrate has power to pass an order of maintenance of the children under Section 125 of the Code and this controversy has been settled at rest by the Supreme Court in the case of Noor Saba Khatoon v. Mohd. Quasim, reported AIR 1997Supreme Court 3280=11 (1997) DMC 356 (SC), wherein the Apex Court has held that the children are entitled to maintenance for period till they attain majority or are able to maintain themselves. The said right of children is not restricted, affected or controlled by Section 3(l)(b) of the Muslim Women (Protection of Rights on Divorce) Act (hereinafter referred to as 'the Act').

8. Learned Counsel for the petitioner has submitted that as the husband already divorced his wife-opposite party much before filing of the application under Section 125 of the Code and a statement to that effect was made in the written statement, the wife opposite party being a divorced wife was not entitled to maintenance under Section 125 of Code in view of the specific provision contained in the Act. In the alternative, he submitted that even if the story of divorce as propounded and asserted by the petitioner before the Court below from an earlier date was not accepted, the divorce will be treated to have become effective from the date of assertion of the said fact in the written statement or in the show cause filed before the Magistrate.

9. Learned Counsel appearing for the opposite parties, on the other hand, submitted that the case of divorce as set up by the husband-petitioner was negatived by the learned Magistrate and in that view of the matter, the claim for maintenance was maintainable under Section 125 of the Code and the provisions of the Act are not applicable in such a situation.

10. The Act was enacted to protect the right of Muslim women, who have been divorced by or have obtained divorce from their husbands, and to provide for matters connected therewith or incidental thereto. In other words, the Act has been enacted to protect the rights of divorced Muslim women. Section 3 of the Act provides that the divorced Muslim women could be entitled to maintenance within the period of Iddat apart from the amount of Mahr/dower as provided therein in case of non-payment of the amount of maintenance etc., a divorced wife is entitled to make an application to a Magistrate for an order for payment of maintenance etc. and thereafter, the Magistrate has to pass an order as provided under Sub-section (3) of Section 3 of the Act. Section 4 of the Act provides that in case the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the Iddat period, then he may issue a direction to such of her relatives as being entitled to inherit her property on her death according to Muslim Law to pay such reasonable and fair maintenance to her as he may determine fit and proper. In case, she has no relative, then a direction may be issued to the Wakf Board, as provided under Sub-section (2) of Section 4 of the Wakf Act, 1954. Section 7 of the Act provides that if any application by a divorced woman under Section 125 or under Section 127 of the Code is pending before a Magistrate on the commencement

of the Act, then such application shall be disposed of in accordance with the provisions of the Code. Section 5 of the Act provides that if the parties, namely, the former husband and the divorced woman, by an affidavit or any other declaration in writing, would agree that their cases, are to be considered under the provisions of Sections 125 to 128 of the Code and not under the provisions of the Act, then the Magistrate will dispose of the application under the provisions of the Code.

11. Reading of the aforesaid provisions shows that the said Act has been enacted with a view to provide maintenance to the divorced wife during the Iddat period by her former husband and after the Iddat period by her relatives as would be entitled to inherit her property on her death and in case of absence of such relatives, then a direction has to be issued to the Wakf Board to pay maintenance to such divorced women.

12. The oldest Code in Section 536 contained a provision for maintenance of wife and children in case of neglect or refusal by the husband or father. Section 488 of 1898 Code also contained the same provision. There was no provision for maintenance to the parents and the divorced women. The 1973 Code contained a provision under Section 125 for maintenance to the divorced woman and parents also, apart from the wife and children as provided under the earlier Codes.

13. The question as to whether a divorced Muslim woman is entitled to maintenance or not under the provisions of the Code came up for consideration before the Apex Court in the case of Mohd. Ahmad Khan v. Shah Bano Begum (popularly known as Shah Bano case), reported in AIR 1985 Supreme Court 945 and the Apex Court held that if the divorced Muslim woman is unable to maintain herself, she is entitled to take recourse to the provisions of Section 125 of the Code and there was no conflict between the aforesaid provisions and the Personal Law of the Muslims. The Apex Court held that till the Muslim divorced woman is remarried, she is a wife for the purpose of Section 125 of the Code and the statutory right available to her under the Section is unaffected by the Personal Law applicable to her, The said judgment was received by protest from the Muslim community, as a result of which the Parliament enacted the aforesaid Act, which came into force on the 18th of May, 1986.

14. The provisions of the Act, as stated above, clearly show that after coming into force of the said Act, the application of Section 125 of the Code has been excluded unless both the parties to the dispute, namely, the former husband and the divorced woman agree that their cases are to be disposed of under the provisions of Section 125 of the Code. This question has been considered by this Court as well as by other High Courts and the consistent view is that the divorced Muslim woman is not entitled to claim maintenance under Section 125 of the Code and her claim of maintenance has to be determined under the provisions of the Act. Reference in this connection may be made to a learned Single Judge judgment of this Court in the case of Md. Yunus v. Bibi Phenkani @ Tasrun Nisa, reported in 1987 (2) Crimes 241, and an unreported Division Bench judgment of this Court in the case of Md. Sajjad Ahmad v. State of Bihar & Ors., Criminal Revision No. 64 of 1994, disposed of on 14.5.1999, in which one of us (Nagendra Rai, J.) was a party. The same view has been taken by a Full Bench of the Andhra Pradesh High Court in the case of Usman Khan Bahamni v. Fathimunnisa Begum and Ors., reported in AIR 1990 AP 225, and by a Division Bench of the Bombay High Court in the case of Smt. Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh,

reported in 1999 Criminal Law Journal 3846.

15. Thus, it is held that after coming into force of the Act, a divorced Muslim woman is not entitled to claim maintenance under the provisions of Section 125 of the Code as her right has to be determined in terms of the provisions of the Act.

16. The next question, for consideration is as to whether in view of the said finding, the application filed by the opposite parties is maintainable or not? The story of divorce as set up by the husband-petitioner has not been accepted by the learned Magistrate. According to the learned Counsel for the petitioner, even if the story of divorce has not been accepted, the divorce will become effective from the date of assertion of such fact in the written statement or in the show cause. In support of the assertion he relied upon the judgments rendered in *Wahab Ali v. Qamro Bi and Ors.*, reported in AIR (38) 1951 Hyderabad 117; *Chandbi v. Badasha*, reported in AIR 1961 Bombay 121; *Sheikh Jalil v. Bibi Sarfunisw*, reported in 1976 PLJR365; *Muzaffar Alam v. Qamrun Nissa*, reported in 1990 BBCJ 505; *Mohammad Ali v. Fareedunnisa Begum*, reported in AIR 1970 AP 298; and *Smt. Jaitunbi Mubarak Shaikh case (supra)*. In these cases, it has been held that even if the plea of divorce as propounded/asserted by the husband in the show-cause or written statement from a date earlier to the filing of the written statement or show-cause is not proved, the assertion in the written statement or in the show-cause itself operates as an expression of divorce by the husband and operates as from that moment.

17. We are in agreement with the view taken in the aforesaid cases and, accordingly, hold that even if the story of divorce as propounded or asserted in the show-cause or in the written statement is not proved, the same will operate from the date of filing of such written statement or show-cause. In such a case, the claim for maintenance under Section 125 of the Code would be maintainable prior to the filing of the written statement or show-cause asserting divorce and, thereafter, the case has to be disposed of in terms of the provisions of the Act as for a period after that date, no order of maintenance can be passed against the former husband at the instance of the divorced Muslim woman under Section 125 of the Code.

18. Coming to the facts of the present case, it is clear that the husband has set up divorce from 1976. The learned Magistrate has rejected the documents and evidence filed by the husband-petitioner and came to a different finding that there was no divorce from 1976 as asserted by the husband-petitioner.

19. In that view of the matter, the application filed by opposite party No. 1 for maintenance under Section 125 of the Code was maintainable and she is entitled to maintenance under Section 125 of the Code till the filing of the show-cause, wherein the husband-petitioner has asserted the divorce, which, inter alia, would be treated as a declaration of divorce. The learned Magistrate has not considered the matter in a right perspective and has ordered for payment of maintenance under Section 125 of the Code. In our view in the background of the discussions made above, it is clear that the order passed by the learned Magistrate is not according to law and, accordingly, the same is quashed and the matter is remitted to the learned Magistrate to consider the matter afresh in the light of the observation made above.

20. In the result, this application is allowed and the impugned order is quashed.