

Calcutta High Court

Barik Seikh vs State Of West Bengal And Ors. on 24 December, 2003

Equivalent citations: 2004 (2) CHN 110, 2004 CriLJ 2152

Author: P K Biswas

Bench: P K Biswas

JUDGMENT Pradip Kumar Biswas, J.

1. This is an application under Section 401 read with Section 482 of the Code of Criminal Procedure filed at the instance of Barik Seikh seeking to set aside and/or quashing the impugned order dated 29.6.2001 passed by the learned Judicial Magistrate, 2nd Court, Jangipur in Case No. 113/1995 (T. R. No. 59/2000) in a proceeding under Section 125 of the Code of Criminal Procedure.

2. The short facts leading to the filing of this revisional application are as follows.

3. The present petitioner and the Opposite Party No. 2 were married on the 16th of Ashar of B.S. 1398 in accordance with Mohammedan rites and customs against an amount of Rs. 251/- agreed upon as dower payable by the petitioner to the Opposite Party No. 2.

4. On 31.5.1995 the Opposite Party No. 2 herein filed an application under Section 125 of the Cr. P. C. before the Court of the Id. SDJM., Jangipur Murshidabad, inter alia, praying for an order of maintenance amounting to Rs. 600/- per month for herself and Rs. 400/- p.m. for her minor daughter against the petitioner and the said application was registered as M. R. No. 113/1995 and the same was heard ex parte in absence of the petitioner and was disposed of by an ex parte order dated 20.1.1996 directing the petitioner herein to pay monthly maintenance of a sum of Rs. 500/- to the Opposite Party No. 2 and a sum of Rs. 250/- per month in favour of the minor daughter of the petitioner.

5. The petitioner having come to know about such ex parte order filed an application on 29.2.1996 under Section 126(2) praying for recalling the order dated 20.1.1996 contending therein that the Opposite Party No. 2 being a divorced wife under the provisions of Mohammedan Law precisely as per the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 was not entitled to receive any maintenance in the aforesaid proceeding and alleging further that he could not attend the proceedings of the aforesaid case as he did not receive any summons pertaining to the same.

6. The aforesaid ex parte order was, however, recalled and the petitioner was given an opportunity to contest the aforesaid application under Section 125 of Cr. P. C.

7. The petitioner thereafter, filed show cause contending, inter alia, that the application under Section 125 of Cr. P. C. was not maintainable at all and also reiterating the fact that since the O. P. No. 2 had been given divorce by the petitioner on 16.5.1996 by way of pronouncing 'Three Talakhs' in presence of the village Majlis (Assembly) and the next day i.e., on 17.5.1995, the petitioner had registered a 'Talak-E-Bayan' against the O. P. No. 2 before the Muslim Marriage Registrar and Kazi and subsequently on 31.8.1995, the petitioner had served a xerox copy of the aforesaid 'Talak-E-Bayan' on the O.P. No. 2 by registered post with A/D and the same had been received by

her and during the course of the proceedings in the aforesaid T.R. No. 59/2000, the petitioner also adduced proper evidence pertaining to the aforesaid facts.

8. The aforesaid case was, however, finally disposed of by the Id. Judicial Magistrate by his judgment and order dated 29.6.2001 directing the present petitioner to pay a monthly maintenance to the O.P. No. 2 at the rate of Rs. 600/- in favour of the O.P. No. 2 and Rs. 400/- in favour of the minor child born out of the wedlock between the petitioner and the Opposite Party No. 2, till she attains majority with effect from the date of filing of the aforesaid application under Section 125 of the Cr. P. C. by the O.P. No. 2.

9. It has also been alleged that the aforesaid judgment and order passed by the Id. Judicial Magistrate suffer from serious legal infirmities and procedural abnormalities and as such those are not tenable at all, and this is more so specially in view of the fact that since a prima fade case of 'Divorce' or Talak' had been made out by the petitioner in the aforesaid proceedings, the said proceedings should not have been allowed to be proceeded further under Section 125 of the Cr. P. C. in absence of an affidavit or declaration submitted before the Id. Magistrate by the O.P. No. 2 in accordance with Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and as such proceeding under Section 125 of Cr. P. C. is void ab initio and as such is liable to be quashed.

10. Accordingly, by filing this application, the petitioner has come up before this forum seeking to quash or set aside the impugned order and to quash the present proceeding.

11. I have heard the learned Counsel appearing for the petitioner-husband, but none, however, appeared on behalf of the O.P. No. 2.

12. The Id. Counsel appearing for the petitioner, drawing my attention to the provisions of Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 'Act 1986'), has submitted before me that the provisions of Section 5 of the Act, 1986 has provided option to the parties to be governed either under Sections 125 to 128 of the Code of Criminal Procedure or under the provisions of special statute, the Act, 1986 and as such the application filed by a divorced Muslim woman under Section 3(2) of the Act, 1986 could be disposed of by the Court by following the provisions of Sections 125 to 128 of the Cr. P. C. when option has been exercised by them either jointly or singly for being governed by the provisions under Sections 125 to 128 of the Criminal Procedure Code.

13. He has further submitted that after coming into force of the Act, 1986, no proceedings can be initiated on an application under Section 125 of the Code of Criminal Procedure by the divorced woman except as provided under Section 5 of the Act, 1986.

14. He has, therefore, clearly submitted that in the instant case when Talak has been validly granted and the grant of Talk has been communicated to the wife/O.P. No. 2 by registered post with A/D and the same has been received by her, in such a situation, the present proceeding should not have been allowed to be proceeded with under Section 125 of the Code of Criminal Procedure in absence of an affidavit or a declaration submitted before the Id. Magistrate by the wife/O.P. No. 2 in

accordance of Section 5 of the Act, 1986 and in the absence of that a proceeding under Section 125 of Cr. P. C. should be regarded as void ab initio and should be quashed.

15. To appreciate the aforesaid contention of the Id. Counsel appearing for the petitioner, relevant portion of Section 5 of the Act, 1986 may be quoted as under:

"Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974.--If, on the date of the first hearing of the application under Sub-section (2) of Section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose such application accordingly.

Explanation.--For purposes of this section 'date of the first hearing of the application' means the date fixed in the summons for the Attendance of the respondent to the application".

16. Now, before I deal with the question involved in this revisional application, it would be necessary to have a brief history for the enactment of Act, 1986 by the Parliament. In the case of Md. Ahmed Khan v. Shah Bano Begum and Ors., a principal question which came up for consideration before the Apex Court was the interpretation of Section 127(3)(b) of Cr. P. C. that where a Muslim woman has been divorced by her husband and paid her Mahr, whether it would indemnify the husband from his obligation under the provisions of Section 125 of Cr. P. C.

17. In the aforesaid judgment, Apex Court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. It was further held that if there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail and ultimately it was held by the Apex Court that it is a sum payable on divorce within the meaning of Section 127(3)(b) of Cr. P. C. and further held that Mahr is such a sum which cannot ipso facto absolve the husband's liability under the Act.

18. In the aforesaid case, it was also considered whether the amount of Mahr constitute a reasonable alternative to the maintenance order and ultimately it was concluded that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125 of Cr. P.C. and such applications were not barred by Section 127(3)(b) of Cr. P.C.

19. After the aforesaid judgment, there was a big uproar and Parliament enacted the Act of 1986 presumably with the intention of making the decision in Shah Bano's case (supra) as ineffective as it would be apparent from the object of enacting of Act, 1986, The object of enacting the Act, as stated in the Objects and Reasons to the Act, is that the Supreme Court in Shah Bano's case held that Muslim law limits, the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. It was held in the aforesaid Shah Bano's case that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with

the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 of Cr. P. C. It has further been held in the aforesaid judgment that there is no conflict between the provisions of Section 125 of Cr. P. C. and those of the Muslim personal law on the question of the Muslim husband's obligation to provide maintenance to his divorced wife who is unable to maintain herself.

20. The Constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the Act, 1986) was taken up for consideration but the Apex Court and in the case of *Denial Latifi v. Union of India*, as . In the aforesaid judgment of *Danial Latifi's* case (supra), it was further held that "Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128 of Cr. P. C. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 Cr. P.C., and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly".

21. It was further held by the Apex Court that "even under the Act, the parties agreed that the provisions of Section 125 of Cr. P. C. would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 of Cr. P. C. would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional" and ultimately, the Apex Court held as follows :

"While upholding the validity of the Act, we may sum up our conclusions :

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India".

22. True it is that in Danial Latifi's case (supra), the Apex Court has not dealt with the question of maintainability of the application under Section 125 of Cr. P.C. by a divorced woman against her former husband in the absence of filing declarations or affidavits by the divorced woman or her former husband either jointly or separately, yet, there was a broad hint in the judgment itself, when it is held by the Apex Court that even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and therefore, what could be earlier granted by a Magistrate under Section 125 of Cr. P. C. would now be granted by the very Act itself.

23. In a decision in the case of Arab Ahemadhia Abdulla & etc. v. Arab Bail Mohmuna Saiyadbhai and Ors., it was held that as per provisions of Section 5 the application filed under Section 3(2) of the Muslim Women Act by a divorced woman can be disposed of by following the provisions of Sections 125 to 128 of the Criminal Procedure Code, if the divorced woman and her former husband file affidavits to that effect.

24. In a decision, reported in 2003(1) Cal LT 422 (HC) in the case of Makiur Rahaman Khan and Anr. v. Mahila Bibi, it was held by Justice N. C. Sil that "it is clear that a Muslim divorced woman cannot invoke the provisions of Section 125 of Cr. P. C. against her former husband if she does not exercise her option under the provisions of Section 5 of the Act. Section 4(1) of the Act contains the provision for maintenance to the divorced woman from her children but this does in fact not debar the divorced Muslim woman from invoking the provision of Section 125 of Cr. P. C. against her children. Even under the Act the application of the provisions of Section 125 of Cr. P. C. has been contemplated and the Act has not specifically made any ouster of the application of Section 125 Cr. P. C. Section 5 of the Act has imposed one condition for the application of Sections 125 to 128 of Cr. P. C. against former husband of the divorced Muslim woman but it is conspicuously silent as regards their application against others. The framework of the Act itself and the ratio decided in the case of Danial Latifi (supra) which we have discussed above will show that the Act itself is not a substituted measure of Section 125 of Cr. P. C. but in addition thereto. This suggests that the proceeding under Section 125 of Cr. P. C. against children of the respondent mother is quite maintainable despite the pendency of the proceeding under Sections 3, 4 of the Act against her husband."

25. So, from the ratio of the decisions in the aforesaid cases, it has now become quite well settled position of law that a divorced woman cannot invoke the provisions of Section 125 of Cr. P. C. against her former husband, if she does not exercise her option under the provisions of Section 5 of the Act.

26. But, coming to this particular case in hand, I am rather constrained to observe that in this case the entire argument was advanced by the learned advocate appearing for the petitioner/husband taking it to be an accepted position that there was a valid divorce granted by his client to the opposite party-wife. But, upon perusal of the impugned judgment and the materials available on record, I am rather constrained to observe that in the instant case, there is nothing on record to suggest that really divorce was granted to the petitioner by pronouncement of effective "Talak". No cogent materials could also be made available before this Court by the petitioner to hold that finding of the Trial Judge on this count was erroneous and faulty requiring interference by this Court.

27. That being the position, the case in hand goes out of the purview of the Act of 1986 and the allied provisions made therein and in consequence thereof, I hold with certainty that although, it is now quite settled position that the Muslim divorced woman cannot invoke the provisions of Section 125 of Criminal Procedure Code against her former husband without exercising option under Section 5 of Act of 1986 for being governed by the Section 125 to 128 of Cr. P. C., yet, in the instant case upon the materials available, the petitioner having failed to establish that there has been valid pronouncement of "Talak" in favour of his wife, no relief could be obtained by him in the instant proceeding inasmuch as there is no reason for interference by this Court in relation to the impugned order passed by the Id. Magistrate under Section 125 of the Cr. P. C.

28. Consequently, the revisional application fails.

29. Interim order, if there be any, stands vacated. Send a copy of this order to the Court below for information and necessary compliance.

30. Urgent xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible.