Patna High Court
Musarat Jahan And Anr. vs State Of Bihar And Anr. on 7 January, 2008
Equivalent citations: AIR 2008 Pat 69
Author: S P Singh
Bench: S P Singh
ORDER Samarendra Pratap Singh, J.

1. The petitioners who are wife and daughter of O.P. No. 2 has moved against order dated 20-1-2007 in M.R. No. 42 of 2004 whereby the learned principal Judge, Family Court, Madhubani, has directed O.P. No. 2 to pay maintenance to petitioner No. 1, the wife, for period commencing from 3-11-2004 to 13-5-2005, i.e. from the date of filing of the petition of maintenance till the date of filing of show-cause in which opposite party claimed that he has already divorced her. The petitioners are also aggrieved by the order by which maintenance was allowed only till petitioner No. 2, daughter of petitioner No. 1 attains majority.

2. The main issue involved in this case are (i) whether the divorce is to be conclusively accepted from the date of filing written statement/show cause by husband wherein claim of divorce has been made as has been held by a Division Bench of this Court in the case of Abdul Mannan v. Saira Khatoon reported in 2000 (2) PLJR 320. (ii) whether under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter to be referred to as 'the Act, 1986') a divorced woman, is entitled to maintenance only till the Iddat period (three months and ten days) from her husband.

3. The fact of this case is that the petitioners filed an application under Section 125 of Cr. P.C. against O.P. No. 2, Sarfaraz Ahmad, for payment of maintenance of Rs. 3000/- to each of petitioners. It was asserted that the petitioner No. 1 was expelled from her matrimonial house by opposite party No.2 as the demand of dowry could not be fulfilled by her parents. A case under Section 498 A of I.P.C. was filed bearing C.R. No. 386/04. It was further stated that she does not have means to maintain herself and her minor child who was born in 1992, two years after her marriage in 1990. It was claimed that the husband is a truck owner and he earns Rs. 10,000/- per month and apart from that he has landed property. Petitioner No. 1 stated that the marriage is still subsisting and as such she is entitled to maintenance for herself and her minor child.

4. The opposite party No.2 filed his show cause denying the allegations made against him and refuting the claim of maintenance. He has stated that he has divorced petitioner No. 1 on 13-4-2004 and as such she is not entitled to any maintenance beyond the Iddat period. He has further stated that she is only entitled to Mahr and maintenance up to Iddat period and not beyond that. He, however, expressed his readiness to maintain the daughter, petitioner No.2.

5. The Family Court found from the pleading of both the parties two facts admitted, namely, the marriage and secondly petitioner No. 2 is daughter of O.P. 2.

6. Both the parties adduced evidence in support of their claim. However, no document was produced by O.P. No. 2 in proof of divorce. The opposite party No.2 in his evidence-in-chief admitted that he is a truck driver and earns Rs. 3000/- per month.

7. The learned principal Judge held that both petitioners Nos. 1 and 2 are entitled to maintenance of Rs. 1000/- per month. He further held that petitioner No.2 is entitled to maintenance till the time she attains her majority. He further held that petitioner No. 1 is entitled to maintenance only from 3-1-2004 to 13-5-2005, i.e. from the date of filing of the petition to the date of filing of show-cause filed by the O.P. wherein he claimed that he has already divorced his wife petitioner No. 1. For coming to the above conclusion the Family Court relied upon a Division Bench Judgment of this Court reported in 2000 (2) PLJR 320 : Abdul Man-nan v. Saira Khatoon.

8. So far as the quantum of maintenance @ Rs. 1000/- per month to each of the petitioners is concerned this Court does not find any material to alter the same and as such the amount so fixed stands affirmed.

9. The learned trial Court in holding that the petitioner No. 1 is entitled to maintenance from 3-11-2004 to 13-5-2005, relied upon a Division Bench Judgment reported in 2000 (2) PLJR 320: Abdul Mannan v. Saira Khatoon.

9A. In this view of the matter first issue as referred in para 2 is being taken up for consideration:

(i) Whether the divorce is to be conclusively accepted from the date of filing written statement/show-cause by husband wherein claim of divorce has been made as has been held by a Division Bench of this Court in Similar Matter in the case of Abdul Mannan v. Saira Khatoon reported in 2000 (2) PUR 320.

9B. In Abdul Mannan's case also the estranged wife filed a petition for her maintenance as well as her minor children. She claimed that the marriage was still subsisting. The opposite party (husband) entered his appearance and claimed that he had already divorced the petitioner therein. Thus in above case the issue of factum of divorce and the date of its effectiveness cropped up before their Lordships. This Court relying upon the judgments rendered in Wahav Ali v. Camro Bai reported in AIR (8) 1951 Haidrabad 117, Chand Bai v. Bandesha , Muzaffar Alam v. Qamrun Nisha reported in 1990 BBCJ 505 and others held as follows:

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 Cr. P.C. 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 Cr. P.C.

The word 'Act' mentioned in the quoted passage refers to the Act, 1986.

10. The learned Counsel contended that the Hon'ble Apex Court in its subsequent decisions have held that the date of filing of show-cause claiming divorce by the husband cannot be accepted as a date of valid conclusive divorce.

11. The condition precedent for effectiveness of divorce so as to disentitle a Muslim woman to claim maintenance has to be proved on evidence. Mere taking a plea in written statement by the husband before the trial Court in reply to an application for maintenance that he had divorced the applicant sometime in past would not have the effect of effectuating a divorce on the date of delivery of the copy of the written statement to the applicant nor a similar affidavit filed in some other case by the husband to which the wife was not a party can be of any evidentiary value.

12. The Hon'ble Supreme Court in the case of Shamim Ara v. State of Bihar and another considering a similar issue as in the present case approved the observation of a Division Bench presided by the Hon'ble Mr. Justice Bahrul Islam in the case of Rukia Khatun v. Abdul Khalique Laskar Reported in (1981)1 Gau LR 375 which is quoted herein:

that the correct law of talaq, as ordained by the Holy Quran, is (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, "talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

The Hon'ble Supreme Court while dealing with the matter in respect of the effectiveness of the date of a valid divorce so as to disentitle a Muslim woman to claim maintenance held that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife.

13. It may be useful to quote para 16 of the Judgment of the Apex Court in the aforesaid Shamim Ara's case AIR 2002 SC 3551 (supra) We are also of the opinion that the talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter rhetorically, to declare, to utter, to articulate (see Chambers 20th Century Dictionary, New Edition, P. 1030). There is no proof of talaq having taken place on 11-7-1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed." This particular issue was also the centre point in the case of Rashid Naafi v. Shahin Gulab reported in 2005 (3) PLJR 743. In this case also the wife filing a petition before the Family Court claimed maintenance under Section 125 of Cr. P.C. and refuted the claim of her husband. This Court held that a mere divorce would not be enough to prove a genuine and valid divorce which particularly in absence of evidence as required to be proved as held in the case of Shamim Ara.

14. A single Bench of this Court in the case of Md. Asfar Hussain @ Azafar Sheikh v. State of Bihar and ors. reported in 2007 (2) PLJR 629 has held that the marriage under Mohammedan Law is not sacrosanct. It is pure and simple contract for certain purpose and object and hence it attracts all the incidents of a civil contract as in Contract Act. Therefore, unilateral repudiation of marriage should dso confirm the basic requirement of prov sions of Contract Act apart from Mohammedan Law. The learned single Judge observed that mere bald statement of Talaq unaccompanied by a cogent reason and other legsl details is not acceptable in the eye of law.

15. Thus, in view of the latest pronouncements of the Hon'ble Apex Court it is well settled that a mere plea taken in the written statement of a divorced woman having been pronounced earlier cannot by itself be treated as effectuating Talaq from the date of delivery of a copy of the written statement to the wife and as such the issue No. 1 as referred to in para 2 of this judgment is answered accordingly. Thus, the Principal Judge erred in law in holding that the plea of divorce would be accepted from the date of filing of show cause wherein such claim has been asserted.

16. There is no dispuute to the other submission of the learned Counsel for the petitioners that a divorced Muslim woman after enactment of the 1986 Act would be entitled to maintenance in accordance with the provision mentioned therein. The 1986 Act would come into play only when divorce is admitted by the parties or where it has been found that the same has been pronounced validly and effectively.

17. This Court now takes up issue No. (ii) of para 2 of this Judgment that (ii) whether under the Muslim Woman (Protection of Rights on Divorce) Act, 1986 (herein after to be referred to as 'the Act, 1986') a divorced woman is entitled to maintenance only till the iddat period (three months and ten days) from her husband.

18. The learned Counsel of O. Ps. submits that the petitioners would be entitled to maintenance till iddat period i.e. only for three months and ten days). This Court finds it expedient to quote Section 3 of the 1986 Act wherein the period of which a divorced Muslim woman is entitled to maintenance is legislated:

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

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at her time of her marriage or at any time thereafter according to Muslim law; and

(d) 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 friend.

19. It would appear from Section 3(a) of 1986 Act that it does not restrict the payment of maintenance only till the iddat period it rather mandates that fair provision and maintenance is to be made and arranged within the iddat period so that the same may take care of a maintenance till she remarries or is able to maintain herself.

20. This, very issue came for consideration in a case of Danial Latifi and another v. Union of India . In the above case while considering the challenge to constitutional validity of the 1986 Act, the interpretation of Section 3(1) (a) also came for consideration. The Hon'ble Supreme Court did not accept the contention of All India Muslim Personal Law Board and other side that a divorced Muslim woman is not entitled to payment of continuous maintenance.

21. The Hon'ble Supreme Court observed that as provided under Section 3(3) of the Act there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman. After considering different views of the Holy Quran and other Muslim Texts of eminent writers it further held that:

(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 the 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 to the (sic) 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. Earlier the Hon'ble Supreme Court in the case of Mohd. Ahmed Khan v. Shah Bano Begum and Ors. while interpreting scope of Sections 125 and 127 of Cr. P.C. in respect of a divorced Muslim woman has held that latter is entitled to maintenance even beyond the iddat period and entitled to maintenance continuously till she remarries and become unable to maintain herself. The enactment of 1986 Act does not do away with the entitlement of a Muslim woman beyond the iddat period but

it provides hence forth the application for claim of such maintenance is to be made under the provisions of the 1986 Act.

23. Thus, this Court concludes in view of the discussions made above that a divorced Muslim woman would be entitled to maintenance continuously and beyond the iddat period till she remarries or she is able to maintain herself.

24. This application is allowed to the extent is observed above.