

Bombay High Court

Zahid Ali Imdadali vs Fahmida Begum (Smt.) D/O Akbar Ali ... on 23 June, 1988

Equivalent citations: 1988 (4) BomCR 366, 1989 MhLJ 109

Author: G Loney

Bench: G Loney

JUDGMENT G.G. Loney, J.

1. An important point which falls for determination in this revision is whether a Muslim wife who accrued a vested right to recover the amount of maintenance determined by a Court under section 125 Criminal Procedure Code stands affected by virtue of section 7 of the Muslim Women, (Protection of Rights on Divorce) Act, 1986 hereinafter referred to as "the 1986 Act" if she is subsequently divorced ?. The facts and circumstances which are relevant for the just decision of this case are given in the following paras.

2. There are some admitted facts in this case. They are as under, Applicant Zahid Ali and Shrimati Fahmida Begum were married according to Mohammedan Law. Kumari Rizwana is their daughter born out of the wedlock. That on 14th July, 1986, the parties are divorced under the Mohammedan Law. The marriage was solemnised in the year 1973. The wife applied for maintenance under section 125 Criminal Procedure Code for herself and her minor daughter Rizwana. The proceedings were commenced before the Magistrate vide Criminal Case No. 12 of 1978 and by an order dated 3-11-1982, maintenance @ Rs. 75/- per month was granted to daughter Rizwana and the claim of the wife was rejected. The husband filed a revision being Criminal Revision No. 2 of 1983 for setting aside the amount of maintenance granted to daughter Rizwana whereas the wife filed Criminal Revision No. 5 of 1983 against the rejection of her claim for maintenance. Both the Criminal Revisions No. 2/83 and 5/83 were decided by the Sessions Court on 29th December, 1983. The Sessions Court dismissed the revision of the husband and allowed the revision of the wife thereby granting her maintenance @ Rs. 300/- per month. A petition filed by the husband against the grant of maintenance to the wife was rejected by this Court on 27th November, 1983. The husband approached the Supreme Court against the order of the High Court which confirmed the grant of maintenance to the wife. The Hon'ble Judges of the Supreme Court rejected the husband's petition for special leave to appeal (C. R. I. No. 968/83) and also the Criminal Miscellaneous Petition No. 1893/85 by an order dated 18th November, 1983. The order granting maintenance @ Rs. 300/- per month to the wife and Rs. 75/- per month to her daughter Rizwana stand concluded and became final. The wife was divorced on 14th July, 1986.

3. It is important to note that before the date of divorce, the wife had started execution proceedings claiming the arrears of maintenance for her and her daughter in Misc Criminal Case No. 8 of 1984 on 24th February, 1984. It appears that the husband was paying the amount of maintenance, but did not clear the entire arrears. In that execution proceedings on 11th December, 1987, the husband filed an application objecting its validity. He claimed discontinuance or cancellation of the maintenance amount granted to the wife and the daughter. It has been contended in the said application that since the wife has been divorced on 14th July, 1986, the relationship of husband and wife came to an end therefore, the husband was not legally bound to maintain the wife. It was therefore urged that as a divorced wife, Fahmida was not entitled for maintenance on the ground that the relationship of

husband and wife came to an end. There was no objection raised in the application as regards granting maintenance to the daughter Rizwana. However, at the stage of argument, additional contentions were raised by the husband. The first contention raised was that in view of section 5 of the 1986 Act, the option has to be exercised jointly by the parties to opt for the provisions of section 125 of Criminal Procedure Code. Having not opted for the provisions of section 125 of Criminal Procedure Code, the execution proceedings are not maintainable. The second contention was that under section 7 of the 1986 Act, the recovery proceedings cannot be proceeded further, Section 7 reads as under :---

"Every application by a divorced woman under section 125 or under section 127 of the Code of Criminal Procedure, 1973 (2 of 1974 pending before a Magistrate on the commencement of this Act, shall notwithstanding anything contained in that Code and subject to the provisions of section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act."

The learned trial Court did not agree with any of the submissions of the husband and dismissed that application by the impugned order.

4. Shri Shabbir Hussain, the learned Counsel appearing for the applicant-husband, contended that after the coming into force of the 1986 Act on 19 May, 1986, unless the husband and wife exercise the option under section 5 of the 1986 Act, the provisions of section 125 Criminal Procedure Code cannot be invoked. He further submitted that the order of maintenance has to be executed under subsection (3) of section 125 read with section 128, Criminal Procedure Code. The second contention raised is that under section 7 of the 1986 Act, the application made by the wife for execution of maintenance order requires to be treated as made by the divorced woman under the provisions of 1986 Act. It is therefore, submitted that the right accrued to the wife to claim maintenance stands affected by virtue of section 7 of the 1986 Act. In support of his submission on this point, Shri Shabbir Hussain relied on the decision of this Court in Criminal Application No. 413 of 1987, Mahaboob Khan v. Parveenbanu and State, in which the retrospectively of the 1986 Act is decided. It has been held by brother Mohta, J., that "the presence of non obstinate clause in section 7 of 1986 Act is a pointer. Sections 3 and 7 of the said Act operate upon the same field in which the Criminal Procedure Code operates." It is held that after coming into force of the 1986 Act the provisions of section 127, Criminal Procedure Code stand repealed from the language of section 7 of the 1986 Act. It is further observed in the aforesaid decision that the legislative intention is clear from section 7 that neither the order passed under section 125, Criminal Procedure Code nor the liability already incurred earlier has been served. But the facts in the case supra show that the wife was divorced on 5-1-1985 and as a divorced wife she applied for the grant of maintenance on 25-1-1985. It was essentially an application made by divorced wife and therefore in her case the provisions of 1986 Act were clearly applicable. The entire purpose of the 1986 Act is to protect the rights of Muslim women who have been divorced and the matters connected there with or incidental thereto. Therefore, the view taken in the case supra is the context of deciding the claim of already divorced Muslim women. But in the instant case the application was made by a neglected Muslim wife and not a divorced Muslim wife. Therefore, her claim for maintenance is not hit by the provisions of 1986 Act. Neither section 3 nor section 7 of the 1986 Act will be applicable. The 1986 Act is intended to protect the rights of Muslim women who have been divorced.

5. In order to appreciate the contention raised by the learned Counsel, it is necessary to look at the requirements of the 1986 Act. The preamble appearing in the 1986 Act reads as:

"An Act to protect the rights 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 essence, the 1986 Act is meant to protect the rights of Muslim women who have been divorced. This special enactment has embodied in its provisions the principles of Mohammedan Law. Section 3 of the 1986 Act provides for an option to be exercised by the husband and the wife jointly to opt for the provisions of section 125 to 128 of the Criminal Procedure Code in a proceeding in an application under sub-section (2) of section 3 of the 1986 Act. In other words, if the application is made by a divorced woman to claim the benefits of section 3 of the 1986 Act, then only under sub-section (2) of section 3 of that Act the option has to be exercised. The provisions of section 9 of the 1986 Act therefore, do not apply in a proceeding initiated by a Muslim wife claiming maintenance since she does not claim maintenance as a divorced wife. It is for the reason mentioned in section 3 that a reasonable and fair provision for maintenance has to be worked out within the sub-clauses of sub-section (1) of section 3. The divorced woman and her former husband are required to jointly apply for such an option. The contentions raised by the learned Counsel for the applicant therefore, are misplaced as regards the provisions of section 5 of the 1986 Act in relation to the proceedings in this case as it is not an application by a divorced wife. I will come to the nature of the proceedings in question later. However, suffice it to say that the application under section 3 of the 1986 Act is restricted to a proceeding under sub-section (2) of section 3 of the 1986 Act only.

6. The next contention raised by Shri Shabbir Hussain, the learned Counsel for the applicant, is that under section 7 of the 1986 Act, any pending application under section 125 or 127, Criminal Procedure Code is governed by the provisions of the 1986 Act relying the observations in Mahaboob khan's case. According to him, the application under section 125 Criminal Procedure Code pending on the date of commencement of the 1986 Act will have to be disposed of by the Magistrate in accordance with the provisions of 1986 Act. So far as the plain reading of section 7 is concerned, there is no quarrel about its retrospectively as held in Mahaboob khans case. It has been contended that the decision in the case of Mahaboob khan clearly lays down that the provisions of section 7 are retrospective in nature and therefore under this provision, the trial Court should have considered his objection and quashed the execution proceedings initiated by the wife. He further contended that since the wife has been divorced on 14th July, 1986, her application in Misc. Criminal Case No. 6/84 should be construed as an application under subsection (3) of section 125, Criminal Procedure Code and applying the principles of Mahaboob khan's case, it should have been dismissed. It is pertinent to note that the facts in the aforesaid judgment in Mahaboob khan's case, are different from the facts in the instant case. In Mahaboob khan's case the divorce had taken place on 8th January, 1983. The application under sub-section (3) of section 125 for maintenance was made on 28th January, 1985 and was decided on 31st January, 1986 granting maintenance to Parveenbanu. Before the commencement of 1986 Act on 19-5-1986, the wife had filed an application under subsection (3) of section 125 on 14-5-1986 as a divorced wife. It was thereof obvious that her application dated 14-5-1986 was filed by her as a divorced woman. On similar facts as in the instant case, the Madhya Pradesh High Court in the case of Mohd. Shafi v. Smt. Sadrunnissa and others,

1988(1) Crime 819 has taken a view that on the date of commencement of the 1986 Act the application pending, was by a wife within the meaning of section 125 Criminal Procedure Code. The wife was divorced in that case on 14th July, 1986, as in this case. On the basis of the above facts, the learned Judge of the Madhya Pradesh High Court has taken a view that the provisions of the 1986 Act will not govern the case of a wife who was not divorced when she filed the application. In the instant case, it is an admitted fact that the divorce had taken place on 14th July, 1986. Therefore, the application filed by the wife on 24th February, 1984 cannot be an application by a divorced woman and as such cannot attract the application under section 7 of the 1986 Act. In Mahaboob khan's case, Madhya Pradesh High Court case was referred, but as it was not concerned with the facts, it was not discussed.

7. Shri Shabbir Hussain also contended that the provisions under the Criminal Procedure Code as regards maintenance are different in nature than the Shariat Law which governs the Muslims. According to him, there is discrimination as regards the grant of maintenance to the Muslim woman under the provisions of the Criminal Procedure Code and the Shariat law and therefore are offending article 14 of the Constitution of India and hence require to be struck down.

8. Shri Shabbir Hussain has also raised other contentions regarding the vires of the provisions contained in Chapter IX of the Criminal Procedure Code. It is also urged that the petition be considered as the one under Articles 225 and 227 of the Constitution of India. This request cannot be accepted as it is not within the jurisdiction of the Single Judge to decide it. It is also not necessary looking to the facts and circumstances of this case, to go into that aspect of the matter.

9. From the facts of this case, it is clear that when the wife and the daughter applied on 24th February, 1984 for maintenance, the 1986 Act was not in force. Similarly, the wife was not a divorced woman. The application filed by the wife under subsection (3) of section 125 Criminal Procedure Code was for execution of the order of maintenance. The order of granting maintenance to wife by the Magistrate was upheld by the Sessions Court, High Court and the Supreme Court. Thus, the claim of wife stood finally decided and as such she accrued a substantial right. It has become a vested right in the wife. The amount claimed in the execution application in question was for the period prior to the date of divorce, i. e. 14th July, 1986. When such a valuable vested right to claim certain amount was accrued to the non-applicant in her capacity as a wife, the same cannot be taken away by the provisions of 1986 Act. The nature of the vested right accrued to the non-applicant is as regards a money claim. The right of a destitute wife or a minor claiming maintenance in Chapter IX of the Criminal Procedure Code is essentially a civil right. The remedies provided in the said Chapter are in the nature of civil rights. The proceedings under section 125 are essentially civil in nature. Thus when a vested right is accrued to a wife to claim her past maintenance, the provisions of the 1986 Act therefore cannot affect her right to institute the recovery proceedings. Even if a Muslim wife is divorced during the pendency of her application for execution within the meaning of sub-section (3) of section 125 Criminal Procedure Code, her previous claim of maintenance as vested right will not be taken away by the 1986 Act. The right which accrued to her as a vested right cannot be altered or abrogated by the 1986 Act. The law as regards the vested right of a party has been settled by the Supreme Court in the case of Garikanati Veerayya v. N. Subbiah Choudhary and others, . In the said case, the Supreme Court has taken the

following view:---

"In construing the articles of the Constitution we must bear in mind certain cardinal Rules of construction. It has been said in *Hough v. Windus*, (1984)12 C & B 224 at p. 237 (V) that "statutes should be interpreted , if possible, so as to respect wester right." The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

Restoring to the golden rule of construction, I find that there is no specific provision in 1986 Act to show that there is retrospective effect to construe the application of wife if she is subsequently divorced to be of a divorced woman so as to effect her vested right already accrued to her. The retrospectivity in *Mahaboob khan's* case is only applicable to a divorced wife and not to a wife who only applied earlier. Thus, in view of the facts and circumstances of this case, in my view, the answer to the point involved in this case has to be in the negative. Section 3 of 1986 Act is not available to a Muslim woman, who is not divorced in view of the fact that the present non-applicant No. 1 Fahmida was not a divorced Muslim woman when she made the application in 1984 and also when the 1986 Act came into force. She can at the most be considered as a divorced woman after 14th July, 1986 and if she makes any application thereafter claiming maintenance as a divorced Muslims woman, then the provisions of 1986 Act will be attracted. Simply because she was divorced during the pendency of the proceedings will not automatically convert her application which was filed as a Muslim wife into an application by a divorced muslim wife. If such an interpretation is allowed to be put, looking to the facts of this case, it will destroy the vested right which accrued to the non applicant No. 1 Fahmida. On the basis of the golden rule, while deciding the question of vested right, it will have to be held that the right which accrued to Fahmida to claim the past maintenance amount prior to the divorce period and including the period of iddat will not be taken away by any of the provisions of the 1986 Act.

10. Shri Choudhary, the learned Counsel appearing for the non-applicants 1 and 2, has also placed before us certain observations of the Supreme Court as regards the claim of maintenance by a wife. In the case of *Bai Tahira v. Ali Hussain Fidaalli Chothia* and another, 1979(2) Supreme Court cases 316, it has been laid down by Krishna 1yer, J, as a preparatory statement :

"In this appeal, by special leave, we are called upon to interpret a benign provision enacted to ameliorate the economic condition of neglected wives and discarded divorcees, namely, section 125 Criminal Procedure Code. Welfare laws must be so read as to be effective delivery systems of the statutory objects sought to be served by the legislature and when the beneficiaries are the weaker sections, like destitute woman, the spirit of Article 15(3) of the Constitution must belight the meaning of the section. The Constitution is a pervasive omni presence brooding over the means and transforming the values of every measure. So, section 125 and sister clauses must receive a compassionate expansion of sense that the words used permit."

In another case of *Bhupinder Singh v. Daljit Kaur* , the said Judges of the Supreme Court while refusing the leave has observed:

"-----any defence against an order passed under section 125, Criminal Procedure Code must be founded on a provision in the Code. Section 125 is a provision to protect the weaker of the two parties, namely, the neglected wife. If an order for maintenance has been made against the deserter it will operate until vacated or altered in terms of the provisions of the Code itself. If the husband has a case under section 125(4), (5) or section 127 of the Code it is open to him to initiate appropriate proceedings. But until the original order for maintenance is modified or cancelled by a higher Court or is varied or vacated in terms of section 125(4) or (5) or section 127, its validity survives---"

In the instant case, the vested right accrued in favour of wife cannot be allowed to be frustrated by a defence raised by the husband to defeat that claim on the basis of the provisions of 1986 Act.

In the result having answered the point involved in the negative, I find that the order of the trial Court is correct. The claim of wife for maintenance upto 14th October, 1986 is maintainable. She has a vested right to executive the order of maintenance for the amount upon 14th October, 1986. However, if she claims maintenance for the period after 14th October, 1986, after iddat period, then she will be governed by the provisions of 1986 Act as a divorced Muslim woman. The revision application is therefore dismissed. The rule is discharged in the above said terms.