1979 SCC OnLine Gau 41

In the High Court of Gauhati
(BEFORE BAHARUL ISLAM, C.J. AND D. PATHAK, J.)

Rukia Khatun
Versus
Abdul Khalique Laskar

Criminal Revision No. 86 of 1975
Decided on July 9, 1979

The Judgment of the Court was delivered by

BAHARUL ISLAM, C.J.:— This is an application under Section 401 of the Code of Criminal Procedure and is directed against an order passed by the Sub-Divisional Judicial Magistrate, Hailakandi, selecting an application for maintenance filed by the petitioner (wife) under Section 125 of the Criminal Procedure Code, 1973 (hereinafter 'the new Code'). The material facts are these:

2. The petitioner's case is that she was married by the opposite party (husband) about 3 (three) years ago. They lived as husband and wife for about three months where after the husband abandoned and neglected her. She was not provided with any maintenance and was passing her days in penury. She prayed for maintenance of Rs. 150/- per month from the husband.

3. The opposite party filed a written statement and contested the petitioner's application. He admitted the marriage, but his plea was that he divorced the petitioner on 12.4.1972 by executing a talaqnama. He further pleaded that he paid the dower money to the petitioner.

4. The Magistrate found that petitioner had been divorced by the opposite party. He held that as the petitioner had been divorced before the coming into operation of the new Code, she was not entitled to maintenance and he rejected the application. Hence this application in revision.

5. This application came up for hearing before a learned Single Judge of this Court before whom it was contended by the petitioner, relying on a decision of this Court in Criminal Revision No. 199 of 1977, disposed of on 31.3.78, that there has been no valid talaq, and, as such the petitioner was entitled to maintenance. The opposite party submitted before the Single Judge that the decision of the Single Judge in Criminal Revision No. 199/77 required re-consideration. Although the learned Single Judge concurred with the view expressed in Criminal Revision 199/77, he referred the matter to a Division Bench as substantial questions of law were involved in the case.

6. Section 125 of the new Code provides:

> "125.(1) If any person having sufficient means neglects or refuses to maintain-
> (a) * *
> (b) * *
> (c) * *
> (d) * *
>
> a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of the wife……at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct;
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> *** *** * * *

(relevant provisions only)

"Wife" has been defined in Explanation (b). The definition is in the following words:

"For the proposes of this Chapter (Chapter IX)

(b) 'Wife' includes a woman who has been divorced, by, or has obtained a divorce from her husband and has not remarried."

7. In the instant case the petitioner filed the application for maintenance on the footing that the marriage was subsisting and that she was the neglected wife of the opposite party, the opposite party having pleaded that she had been divorced.

8. The first point to be decided, therefore, is whether the opposite party divorced the petitioner. The equivalent of the word 'divorce' is 'talaq' in Muslim Law. What is valid 'talaq' in Muslim law was considered by one of us (Baharul Islam. J. as he then was) sitting singly in Criminal Revision No. 199/77 (supra). The word 'talaq' carries the literal significance of 'freeing' or 'the undoing of knot'. 'Talaq' means divorce of a woman by her husband. Under the Muslim law marriage is a civil contract. Yet the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriagetic, Islam recognises the necessity in exceptional circumstances of keeping the way open for its dissolution.

9. There has been a good deal of misconception of the institution of 'talaq' under the Muslim law. From the Holy Quran and the Hadis, it appears that though divorce, was permitted, yet the right could be exercised only under exceptional circumstances. The Holy Prophet is reported to have said:"Never did Allah allow anything more hateful to him than divorce." According to a report of Ibn Umar, the Prophet said:"With Allah the most detestable of all things permitted is divorce". (See the Religion of Islam by Maulana Muhammed Ali at page 671).

10. In the case of *Ahmad Kasim Molla* v. *Khatun Bibi*, reported in ILR 59 Cal 833, which has so long been regarded as a leading case on the law of divorce, Justice Costello held:

"Upon that point (divorce), there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the mere recent decisions of the Courts. I regret that I have to come to the conclusion that at the law stands at present, any Mohamedan may divorce his wife at his mere whim and caprice."

(emphasis added).

11. Following Macnaghten, J. who held:"there is no occasion for any particular cause for divorce, and mere whim is sufficient," and Batchelor, J. in case of *Sarabai* v. *Babiabai* (ILR 30 Bom 537), Costello, J. held:

"It is good in law, though bad in theology."

12. Ameer Ali, in his Treatise on Mahomedan Law hat observed:

"The Prophet pronounced talaq to be a most destable thing before the Almighty God of all permitted things. If 'talaq' is given without any reason it is stupidity and ingratitude to God"

13. The learned Author in the same book has also observed

"The author of the Multeka (Ibrohim Halebi) is more concise. He says-'The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, readers the married life unhappy; but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws, upon himself the divine anger, for 'the curse of God', said the Prophet, 'rests on him who repudiates his wife capriciously."

14. In ILR 33 Mad 22, a Division Bench of the Madras High Court, consisting of Munro and Abdur Rahim, JJ., held:

> "No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband."
>
> (emphasis mine)

What. Munro and Abdur Rahmim, JJ, in ILR 30 Mad 22 precisely held was that impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband. The emphasis was that a talaq would be valid only if it is effected in accordance with the Muslim Law.

15. In ILR 3 Rang 18, their Lordships of the Privy Council observed:

> "According to that law (the Muslim Law), a husband can effect a divorce whenever he desires." But the Privy Council has not said that the divorce need not be duly effected or that procedure enjoined by the Quran need not be followed.

16. It is needless to say that Holy Quran is the primary source and is the weightiest authority on any subject under the Muslim Law. The Single Judge in Criminal Revision No. 199/77 in his judgment quoted the relevant verses of the Quran, to deal with divorce. We need not refer to all the Verses. It will be sufficient if we refer to only one of them, which is Sura IV verse 35. It reads:

> "If ye fear a breach. Between them twain, Appoint two arbiters, One from his family, And the other from hers; If they wish for peace, God will cause. Their reconciliation : For God bath full knowledge, And is acquainted. With all things"

From the verse quoted above, it appears that there is a condition precedent which must be complied with before the talaq is effected. The condition precedent is when the relationship between the husband and the wife is strained and the husband intends to give 'talaq' to his wife he must chose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may call down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give 'talaq'. The 'talaq' must be for good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret. Maulana Mohammad Ali, an eminent Muslim jurist, in his Religion of Islam, after referring to, and considering, the relevant verses on the subject has observed:

> From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."

17. The learned Jurist also has observed:

> "Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off"

18. Costello, J. in ILR 59 Cal 833 (supra) considered the judgments of Munro ana Abdur Rahim, JJ. in ILR 33 Mad 22 (supra) end of the *Privy Council* in ILR 5 Rang 18, (supra) but he preferred the opinions of Machaghten and Bachelor, JJ in ILR 30 Bom 537 (supra). The reason perhaps is, as observed by Krishna Ayer, J. (now of the Supreme Court) in the case of *A. Yusuf Rowther* v. *Sowramma*, reported in AIR 1971 Ker 261:

> "Marginal distortions are inevitable when the Judicial Committee in Downing

Street has to interpret Manu and Muhammad of India and Arabia. The soul of a Culture law is largely the formalised and enforceable expression of a community's culture norms-cannot be fully understood by alien minds."

19. Krishna Ayer, J, in AIR 1971 Ker 261 (supra) has further observed:

"The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions..... Indeed, a deeper study of the subject disclosed a surprisingly rational, realistic and modern law of divorce....."

20. The learned Judge has further observed:

"It is a popular fallacy that a Muslim male enjoys, under the Quranic law, Unbridled Authority to liquidate the marriage. The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them' (Quran IV : 34)"

21. In our opinion the correct law of 'talaq' as ordained by Holy Quran is : (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and 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. In our opinion the Single Judge has correctly laid down the law in Criminal Revision No. 199/77 (supra), and, with respect the Calcutta High Court in ILR 59 Cal 833 and the Bombay High Court in ILR 30 Bom 537 have not laid down the correct law.

22. Mr. Mazumdar has fairly conceded to the correctness of the view taken by us but he submits that in the instant case the 'talaq' has been effected in accordance with law. The husband's case was that he effected the 'talaq' by executing a deed at the residence of the wife's father. But the husband has not mentioned the ground of the divorce or that his life was unbearable or that there was an attempt at reconciliation. We, therefore, hold that the husband has failed to prove that there was a valid 'talaq' in this case.

23. The next question for decision is whether the divorced wife is entitled to maintenance under section 125 of the code. We have already quoted above the definition of wife. The learned Magistrate has held; "the word 'divorced wife' meant, the wives divorced after the Act came into operation". What he meant, as conceded to by learned counsel of both the parties, is that as the divorce had taken place before the coming into operation of the new Code, the petitioner would not be entitled to maintenance. It may be mentioned that in the Old Criminal Procedure Code, 1898, under Section 488, which provided for orders for maintenance of wife and children, 'wife' was not defined to include a divorced women. Therefore, under the Old Code wife means the married woman of a man between whom the marriage was subsisting and did not include a divorced woman. The definition has been included in the Criminal Procedure Code of 1973. The definition has not stated that the women must have been divorced after the coming into operation of the new Code. The purpose of the definition, in our opinion, is to give protection to distressed women who had been divorced both after and before the coming into force of the Criminal Procedure Code of 1973.

24. Interpreting Section 125 of the Code, their Lordships of the Supreme Court in the case of *Bai Tahira* v. *All Hussain Fissalli Chothia*, reported, in (1979) 2 SCC 316 : AIR 1979 SC 362, observed:

"Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Art. 15(3) of the Constitution must be-light the meaning of the Section.....so, S. 125 and sister clauses must

receive a compassionate expansion of sense that the words used permit."

25. Considering Explanation (b), which defines 'wife', their Lordships accepted the submission of the learned counsel for the petitioner in that case that a divorcee was alio entitled to maintenance. In the case of *Bai Tahira* v. *Ali Hussain Fissalli*, reported in (1979) 2 SCC 316 : AIR 1979 SC 362 (supra) the divorce took place in 1962, which was before the coming into force of the Criminal Procedure Code, 1973. We, therefore, hold that a woman divorced before the coming into force of the Criminal Procedure Code, 1973 will be entitled to maintenance after the enforcement of the said Code.

26. Mr. A.M. Mazumdar, next submits that the payment of the dower absolved the husband from payment of maintenance in view of sub-section (3)(b) of Section 127 of the Code. Clause (b) of sub-section (3) of Section 127 reads thus:

"(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that-

(a) * * *

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,- (i) in the case where such sum was paid before such order, from the date on which such order was made, (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman:

(c) * * *

In (1979) 2 SCC 316 : AIR 1979 SC 362 (Supra), their Lordships considered Section 127(3)(b) of the Code.

Their Lordships observed:

"If the first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under Sec. 125- not mathematically but fairly-then S. 127(3)(b) sub-serves the gold and relieves the obligor, not protanto but wholly. The purpose of the payment under any customary or personal law must be to obviate destitution of the divorce and to provide her with wherewithal to maintain herself. The whole scheme of Section 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the Parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance : to interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic but purposeful. The proposition, therefore, is that no husband can claim under Section 127(3)(b) absolution from his obligation under S. 125 towards a divorced wife except on proof of payment of a sum stipulated customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance."

27. Mr. Mazumdar submits that the stipulated 'mehar' of Rs. 800/- had been paid. He submits that the amount must have been invested for some productive purpose and she is getting maintenance therefrom. Even if this submission be accepted, in our opinion the monthly income from the investment would be nominal, and would not absolve the husband to pay maintenance to the petitioner.

28. The next question is what should be the quantum of maintenance that may be ordered in favour of the petitioner. Mr. Mazumdar submits, in our opinion correctly that the case should be remanded to the trial court for determination of the amount as there is no adequate evidence on record. We, therefore, remand the case to the Magistrate for determination of the amount of a maintenance. Parties shall be allowed

to adduce evidence on the 'means' of the husband and the wife's independent income, if any. Thereafter the Magistrate shall pass an order for maintenance in accordance with law.

29. Meanwhile as the petitioner is in penury, the husband shall pay maintenance at the rate of Rs. 50.00 (Rupees fifty) per month with effect from July 1, 1979.

30. In the result the application is allowed, the Rule is made absolute.
