

MohinuddIn Middya Vs. State of West Bengal and anr.

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Court : Kolkata

Decided On : Jan-30-2004

Reported in : 2004(3)CHN417

Judge : P.N. Sinha, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125 to 128; ;Muslim Women (Protection of Rights on Divorce) Act, 1986 - Sections 3, 3(1), 3(2), 4 and 5; ;Code of Criminal Procedure (CrPC) (Amendment) Act, 2001

Appeal No. : C.R.R. No. 2199 of 2003

Appellant : MohinuddIn Middya

Respondent : State of West Bengal and anr.

Advocate for Def. : Sharmila Das, Adv. for the Opposite party No. 2

Advocate for Pet/Ap. : S.S. Roy and ;S.K. Laha, Advs.

Judgement :

P.N. Sinha, J.

1. This revisional application is directed against the order dated 11.7.1993 passed by the learned Judicial Magistrate, 5th Court, Howrah in Misc. Case No. 176/2000 and thereby dismissing the application filed by the present petitioner as husband

opposite party in the Court below alleging that the petition under Section 125 of Cr. PC is not maintainable.

2. Learned Advocate for the petitioner contended that the opposite party No. 2 was married with the petitioner in 1989 according to their Muslim rituals and customs and they are Muslim by faith. At the time of marriage of petitioner with opposite party No. 2, she was a divorcee. The opposite party No. 2 used to spend most of the time in her parent's house and finally taking away gold ornaments and other articles she went away to her father's house. The opposite party No. 2 tried to create pressure upon him in different ways to obtain property and money. Finding no other alternative to save his life and property, he divorced opposite party No. 2 wife on 28.3.95 under the provisions of Mahommedan law before Marriage Registrar and Kazi and factum of divorce i.e. talaq was duly communicated to the opposite party. On 26.7.2002 the petitioner received a notice along with copy of application under Section 125 of Cr. PC filed by opposite party No. 2 claiming maintenance for herself from him. Receiving the notice the petitioner appeared before the learned Judicial Magistrate, 5th Court, Howrah and on 31.5.03 he filed the petition alleging that application under Section 125 of Cr. PC is not maintainable. He also annexed the talaqnama as well as letter of communication of talaqnama to opposite party No. 2 with his application. But the learned Magistrate by the impugned order rejected the application.

3. Learned Advocate for the petitioner further contended that Section 125 of Cr. PC is not applicable in case of a divorced Muslim wife. She can claim maintenance in view of provisions of Muslim Women (Protection of Rights on Divorce) Act (hereinafter called the Act). In view of the provisions of the said Act, Sections 125 to 128 of Cr. PC are not applicable in the instant case unless the parties in terms of Section 5 of the Act exercises option for provisions of Section 125 of Cr. PC. He contended that the learned Magistrate erred in law by dismissing his application filed before the learned Magistrate contending that Section 125 Cr. PC application is not maintainable. Accordingly, the impugned order should be set aside and the instant proceeding should be dropped or quashed. In support of his contention he cited the decisions reported in 2002 C Cr LR (SC) 1 and 2002 C Cr LR (Cal) 39.

4. Learned Advocate for the opposite party No. 2 contended that even the divorced Muslim wife can claim maintenance under Section 125 of Cr. PC not only for herself but also for her minor child. Option under Section 5 of the Act is not always necessary in invoking provisions of section 125 of Cr. PC. Moreover, at the early stage of the proceeding such question of divorce or talaq and non-maintainability of the Section 125 Cr. PC application should not be considered and it can be considered only after parties adduce evidence. She contended that the opposite party No. 2 was not divorced by the petitioner and there was no communication of divorce earlier.

5. I have duly considered the submissions made by the learned Advocates of the parties and also perused the application and contents thereof. A learned Single Judge of this Court in Makiur Rahaman Kha and Anr. v. Mahila Bibi, reported in 2002 C Cr LR (Cal) 39, relying upon Supreme Court's judgment reported in : 2001 CriLJ4660 observed that, a Muslim divorced woman cannot invoke provisions of Section 125 of Cr. PC against her former husband if she does not exercise her option under Section 5 of the Act. The Supreme Court in Daniel Latifi and Anr. v. Union of India, reported in : 2001 CriLJ4660 , has observed that provisions of Sections 3 and 4 of the Act is not ultra vires. The Supreme Court has further observed in the said decision that, application of provisions of Sections 125 and 127 of Cr. PC are not barred under the provisions of the Act. But the Supreme Court also observed that:

'Section 5 of the Act provides for option to be governed by the provisions of Section 125 Cr. PC, 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 Section 125 Cr. PC and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly'.

6. After going through the application and annexures, I am of opinion that both the aforesaid decisions namely Daniel Latifi (supra) and Makiur Rahaman Kha (supra) are not applicable in the instant matter. The petitioner husband annexed copy of

the registered talaqnama dated 28.3.95 as annexure 'P-1'. He has also annexed the copy of the letter by which he communicated the fact of talaq to his wife Rousan Ara Begam, i.e. opposite party No. 2 of the revisional application. This letter communicating fact of divorce addressed to opposite party Rousan Ara is dated 28th September, 2001 and it appears that it was posted for registration on 1.10.01. The certified copy of the order of the learned Magistrate makes it clear that the application filed by opposite party No. 2 under Section 125 of Cr. PC has been registered as Misc. Case No. 176 of 2000. It is manifestly clear that the opposite party No. 2 wife filed the application under Section 125 of Cr. PC long before the husband petitioner made the alleged communication of giving her talaq on 28.9.01. In the instant case, therefore, no question of exercising option under Section 5 of the Act to invoke provisions of Section 125 of Cr. PC arises. It is clear and transparent that when the opposite party No. 2 wife filed the application under Section 125 of Cr. PC in 2000 the husband petitioner did not communicate to her the fact of giving her talaq. The husband petitioner communicated it to her only by letter dated 28.9.2001 and it is not clear on which date the petitioner received the same in the month of October, 2001. Though in paragraph 9 of the revisional application it was contended that after talaq dated 28.3.95 fact of talaq was duly communicated to opposite party, no paper or document was produced in Court to establish such contention. The alleged communication letter dated 28.9.2001 goes against the contention of petitioner. In the instant case the decision of the Supreme Court reported in 2002 AIR SCW 4162 is applicable.

7. The Supreme Court in Shamim Ara v. State of U. P. and Anr., reported in 2002 AIR SCW 4162, has observed that:

'We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, 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 pronounced sometime in the past cannot by itself be

treated as effecting talaq on the date of delivery of the copy of the written statement to the wife. The 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. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed for delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter parte, containing a self-serving statement of respondent No. 2, could not have been read in evidence as relevant and of any value'.

8. A Muslim marriage is no doubt a contract but it does not empower the Muslim husband to divorce his wife whenever he likes and the wife cannot be treated like a chattel. In this connection the Hon'ble Supreme Court relied upon and agreed with the view in Jiauddin Ahmed v. Anwara Begum, reported in 1981(1) Gauhati LR 358 and Rukia Khatun v. Abdul Khalique Laskar, 1981(1) Gauhati LR 375. In Jiauddin Ahmed's case (supra) it was observed that:

'The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13)'.

The Supreme Court quoted from Rukia Khatun's case in the following manner :

'The Division Bench stated that 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 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 view which, in their opinion, did not lay down the correct law, and the Supreme Court observed that it is in respectful agreement with the aforesaid observation'.

9. In paragraph 11 of the revisional application the husband petitioner has mentioned that after appearance in the Court of the learned Chief Judicial Magistrate, Howrah he has filed his show-cause petition before the learned Judicial Magistrate, 5th Court wherein the case has been transferred. It clearly indicates that the husband petitioner appeared before the learned Magistrate and filed his show-cause or written objection and has taken plea of talaq there for the first time. He also filed an application on 31.5.2003 and at this stage it is not clear to this Court whether the said application was filed after his submission of written objection or before filing the written objection. But, the position is clear that, the Section 125 Cr. PC application was filed by the wife in 2000 when she was not aware of the alleged talaq and the alleged talaq was not communicated to her at that relevant time. It was communicated to her by letter dated 28.9.2001 much after the filing of the Section 125 application by the wife. Order of learned Magistrate shows that the case is now lying at the stage of recording evidence. Therefore, no question of option under Section 5 of the Act arises in the present case. In the present case the decision of Shamim Ara (supra) is quite appropriate.

10. The principle of law made clear by the Supreme Court regarding talaq, its pronouncement and communication makes it clear that the plea of previous divorce taken by the husband for the first time in written statement or by an application after appearance in Court in a proceeding initiated by wife for claiming maintenance under Section 125 of Cr. PC cannot at all be treated as pronouncement of talaq by the husband on wife on date of filing written statement in Court followed by delivery of copy thereof to wife after the institution of the Section 125 application by the wife much ahead of such communication. In such a case neither the marriage between the parties stands dissolved nor does liability of husband to claim maintenance comes to an end on such day. In the instant cases opposite party No. 2 filed the Section 125 Cr. PC application in 2000 and the husband petitioner entered appearance before the learned Magistrate only in 2002 as he stated in this revisional application and filed application regarding non-

maintainability of Section 125 application on 31.5.03. This is the very early stage of the case and at this stage the learned Magistrate rightly rejected the petition filed by the wife. Both the parties have to adduce evidence in Court to establish their respective cases and at the time of leading evidence the husband petitioner as opposite party before the learned Magistrate would have liberty to adduce sufficient evidence before the Court in respect of talaq, its date, its communication etc. For the present, there is no ground at all to drop or quash the Section 125 application filed by the wife. There is no ground at all to interfere with the impugned order passed by the learned Magistrate.

11. In view of the aforesaid discussion the revisional application fails and is disposed of accordingly in the light of the observations made above in the body of the order.

12. However, I make it clear that whatever I have stated above or observed should not be considered as opinion regarding merit of the case and the concerned Court at appropriate stage would act in accordance with law and the learned Magistrate would arrive at his own conclusion and would not be guided by the observations made by this Court in this revisional application.

13. Learned Judicial Magistrate, 5th Court, Howrah is directed to proceed with the Misc. Case No. 176 of 2000 as expeditiously as possible and to dispose of the same at a reasonable time without allowing undue adjournment to either of the parties.

14. Send a copy of this order to the learned Judicial Magistrate, 5th Court, Howrah for information and necessary action.

15. Urgent xerox certified copy be given to the parties, if applied for, expeditiously.