Supreme Court of India
Iqbal Bano vs State Of U.P. And Anr on 5 June, 2007
Author: . A Pasayat
Bench: Dr. Arijit Pasayat, D.K. Jain

CASE NO.:
Appeal (crl.) 795 of 2001

PETITIONER:
Iqbal Bano

RESPONDENT:
State of U.P. and Anr

DATE OF JUDGMENT: 05/06/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:

J U D G M E N T Dr. ARIJIT PASAYAT, J.

1. In the present appeal the appellant questions correctness of the order passed by a learned Single Judge of the Allahabad High Court dismissing her revision petition (Criminal Revision No.1161 of 1995). The appellant had questioned correctness of the order passed by learned Additional Sessions Judge, Aligarh, setting aside the order dated 7.7.1994 passed by the learned Judicial Magistrate, Aligarh. By the said order dated 7.7.1994 learned Judicial Magistrate had accepted the prayer for grant of maintenance filed by the appellant in terms of Section 125 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.'). She directed respondent no.2 to pay a monthly maintenance of Rs.450/- to the appellant.

2. Background facts in a nutshell are as follows:

The appellant had married respondent no.2 in the year 1959 and a child was born to them in 1966. Unfortunately the son died in the year 1991. Respondent no.2 who was living separately from the appellant stopped coming to the house of the appellant where she was staying and also did not pay anything for her subsistence. Therefore, an application under Section 125 Cr.P.C. was filed on 21.2.1992. Before that she had sent notice demanding payment of maintenance. Respondent no.2 replied to the notice and denied his liability to pay maintenance. As noted above, on 21.2.1992 application was filed claiming maintenance of Rs.500/- p.m. It was stated that that the income of the respondent no.2 was Rs.4,000/- per month. On 28.5.1992 written statement was filed wherein it was stated that long back he had divorced his wife by utterance the word "Talaq" "Talaq" "Talaq". It was further stated that there was severance of marital ties between them for years as the divorce was over by the utterance of the word "Talaq" thrice and he had also paid Mehr and the Iddat period was over the claim was not acceptable. He also stated he had contacted the second marriage.

3. The learned Magistrate held that there was no material to substantiate the plea of divorce and accordingly maintenance was granted. Order was challenged by filing a revision before the learned Additional Sessions Judge. Stand of the respondent was that after enactment of the Muslim Woman (Protection of Rights on Divorce) Act, 1986 (in short the 'Act'), petition under Section 125 Cr.P.C. was not maintainable. It was also stated that not only in the reply to the notice, there was mention about the utterance of the word "Talaq" "Talaq" "Talaq", there was mention in the written statement also, amounting to divorce. Learned Additional District and Sessions Judge accepted the plea. He held that after the enactment of the Act, petition by any married muslim woman under Section 125 Cr.P.C. is not maintainable. Such woman can claim maintenance under the Act and not under the Cr.P.C. It was further held that mention was made in the written statement about the divorce purportedly 30 years back and the mentioning about this fact in law amounted to divorce. Accordingly, order of the learned Magistrate was set aside. High Court dismissed the writ petition summarily observed as follows:

"Heard learned counsel for the revisionist.

The learned Additional District and Sessions Judge has committed no illegality in modifying the order passed by the Magistrate in declining the maintenance after the date of divorce.

The revision has got no force. It is dismissed accordingly."

4. Learned counsel for the appellant submitted that the approach of the First Revisional Court was clearly erroneous. There is no bar on Muslim woman filing petition in terms of Section 125 Cr.P.C. The Act only applies to divorced woman and not the Muslim married women who are not divorced. Further, mere statement in the written statement about some divorce long back does not meet the requirement of law. The finding of the First Revisional Court about payment of Mehr has no relevance.

5. Mr. S.W.A. Qadri, learned counsel for the State of Uttar Pradesh brought to our notice several decision of this Court to support the stand of the appellant. Learned counsel for the respondent no.2 on the other hand supported the order of the High Court. It was submitted that no interference is called for. The dismissal of the revision petition by the High Court in the manner done is clearly unsustainable. The absence of these reasons has rendered the High Court's order unsustainable.

6. The view expressed by the First Revisional Court that no Muslim woman can maintain petition under Section 125 Cr.P.C. is clearly unsustainable. The Act only applies to divorced women and not to a woman who is not divorced. The conclusions that in view of the statement in the written statement about alleged divorce 30 years by utterance of the words "Talaq" "Talaq" "Talaq" three times is sufficient in law is not sustainable. This Court in Shamim Ara v. State of U.P. and Anr. (2002 (7) SCC 518) observed:

"16. 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 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 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 the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of Respondent 2, could not have been read in evidence as relevant and of any value."

7. The conclusions about the Mehr having been paid and the Iddat period is over has no relevance. A Constitution Bench of this Court in Danial Latifi and Anr. V. Union of India (2001 (7) SCC 746) observed as follows:

"28. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

29. The important section in the Act is Section 3 which provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for

his divorced wife; and (2) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely. "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(l)(d) of the Act. Precisely, the point that arose for consideration in Shah Bano case1 was that the husband had not made a "reasonable and fair provision" for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are "a reasonable and fair provision and maintenance to be made and paid" as provided under Section 3(l)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs - "to be made and paid to her within the iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance"; thirdly, the words of The Holy Quran, as translated by Yusuf Ali of "mata" as "maintenance" though may be incorrect and that other translations employed the word "provision", this Court in Shah Bano case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could be no pretence that the husband in Shah Bano case had provided anything at all by way of "mata" to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to "mata" is only a single or onetime transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word "provision" in Section 3(1)(a) of the Act incorporates "mata" as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables "a reasonable and fair provision" and "a reasonable and fair provision" as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Bano case actually codifies the very rationale contained therein.

36 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 (i) (a) of the Act.

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

(3) A divorced Muslim woman who is 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 relative who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law for such divorced woman including her children and parents. If any of her relative being unable to pay maintenance, the Magistrate may direct the State Waqf Board established under the Act to pay maintenance.

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

8. The position was followed in Sabra Shamim v. Maqsood Ansari (2004 (9) SCC 616).

9. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court notices that there was a divorced woman in the case in question, it was open to him to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same Court. In Vijay Kumar Prasad v. State of Bihar and Ors. (2004 (5) SCC 196), it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows:

"14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126(1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

10. Accordingly, we set aside the order impugned of the High Court and remit the matter for fresh consideration.

11. The High Court while deciding the matter shall keep in view the principles indicated above. Since the matter is pending since long, the High Court shall dispose of the matter within six months from the date of receipt of this order to avoid unnecessary delay. We direct the parties to appear before the High Court on 23rd July 2007. We request the Chief Justice of the High Court to list the matter before the appropriate Bench.

The appeal is disposed of accordingly.