

Saman Ismail Vs Rafiq Ahmad and Another

Court: Allahabad High Court

Date of Decision: May 24, 2002

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 397, 398, 6
Muslim Women (Protection of Rights on Divorce) Act, 1986 â€” Section 3

Citation: (2002) CriLJ 3648 : (2002) 2 DMC 430

Hon'ble Judges: R.P. Misra, J; G.P. Mathur, J

Bench: Division Bench

Advocate: R.B. Sahai and Fareeduddin, for the Appellant; A.G.A., Vinod Prashad and S.A. Gilani, for the Respondent

Judgement

G.P. Mathur, J.

A learned Single Judge has referred the following question for decision by a Larger Bench :

Whether a revision u/s 397, Cr.P.C. is maintainable against the order passed by the Magistrate under Muslim Women (Protection of Rights on

Divorce) Act, 1986.

2. On the application moved by the applicant u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short, the Act) an

order was passed by a Magistrate in her favour. The opposite party, Rafiq Ahmad, preferred CrI. Revision No. 256 of 1999 against the order of

the learned Magistrate before the Sessions Judge, Fatehpur. At the time of the admission of the revision, an objection was raised by the applicant

that against an order passed by a Magistrate under the Act no revision was maintainable u/s 397, Cr.P.C. The learned IInd Addl. Sessions Judge,

Fatehpur. by his order dated 19.7.1999 repelled the objection of the applicant and admitted the criminal revision for hearing. Feeling aggrieved by

the aforesaid order, the applicant has filed the present revision in this Court. It was contended before the learned Single Judge, who heard the

revision for admission, that there is no provision under the Act under which a revision may be filed against an order passed by the Magistrate and,

consequently, the order dated 19.7.1999 passed by the IInd Additional Sessions Judge, admitting the revision for hearing, was illegal. In support

of this submission, reliance was placed on a decision by a learned Single Judge in Salim v. Judicial Magistrate, Haridwar, 1996 JIC 30, wherein it

was held that there was nothing to indicate that the provisions of Code of Criminal Procedure would apply to the applications given under the Act

and, therefore, Section 397, Cr. P.C. was not applicable. It was further held that there being no other provision under which an order of a

Magistrate may be challenged, the remedy of an aggrieved party lay in filing a writ petition against the said order. The learned Single Judge, who

heard the present criminal revision for admission, expressed doubt about the correctness of the law laid down in *Salim v. Judicial Magistrate*,

Haridwar (supra), and, accordingly, referred the matter for decision by a Larger Bench.

3. We have heard Mr. R.B. Sahai for the applicant who has contended that the Muslim Women (Protection of Rights on Divorce) Act, 1986, (in

short, the Act) is a complete Code and there being no provision in this Act for challenging the order of a Magistrate, a criminal revision u/s 397,

Cr. P.C. against the said order is not maintainable. Mr. S.A. Gilani, appearing for opposite party No. 1, has contended that the view taken in

Salim v. Judicial Magistrate, Haridwar (supra), is not correct and an order passed by the Magistrate under the Act is amenable to revisional

jurisdiction u/s 397, Cr.P.C. Mr. Vinod Prasad, who appeared as amicus curiae on the request of the Court, has submitted that the Act is a very

small one containing only 7 sections and it simply makes provision for maintenance of Muslim women who have been divorced by or have

obtained divorce from their husbands. He has further submitted that the Act does not make any provision as to how the proceedings have to be

conducted or the application is to be heard and the judgment is to be written. The Act makes reference to Code of Criminal Procedure, 1973, at

several places which showed the intention of the Legislature that where the Act was silent or did not make any specific provision, the matter would

be governed by the aforesaid Code. Mr. Vinod Prasad has thus submitted that since the Act did not make any provision for challenging an order

passed by a Magistrate nor made any provision to the effect that the order of the Magistrate would be final, a revision against the order of the

Magistrate would, therefore, be maintainable u/s 397, Cr.P.C. and the view taken in *Salim v. Judicial Magistrate, Haridwar* (supra), does not lay

down the correct law.

4. After the decision in the *Shah Bano*'s case by the Apex Court, wherein it was held that even the divorced Muslim woman was entitled to

maintenance from her former husband until she has remarried a protest was raised by some Muslim organisations that the declaration of law was

contrary to the Shariat. It was then thought proper to bring in a legislation which may make provision for providing maintenance to a divorced

Muslim woman, both during the period of Iddat and after the period of Iddat. The objects and reasons of the Bill leading to the passing of the Act

by the Parliament are as under :

(a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of Iddat, by her former

husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be

extended to a period of two years from the dates of birth of the children. She will also be entitled to Mahr or Dower and all the properties given to

her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to

apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of Mahr or Dower or the delivery

of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of Iddat, the Magistrate is empowered to make an order for the

payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in

which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means

to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced

woman has no relatives or such relatives any one of them has not enough means to pay the maintenance or the other relatives who have been

asked to pay the shares of the defaulting relatives also do not have means to pay the shares of the defaulting relatives the Magistrate would order

the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The preamble of the Act reads as follows :

"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."

5. The statement of objects and reasons and also the preamble clearly show that the Act had been passed for a limited purpose, namely, as to who

would provide maintenance to a divorce Muslim woman during and after the period of Iddat, the maintenance to children and also her entitlement

to Mehr or Dower and the properties given to her by her relatives, friends, husband and husband's relatives. The scheme of the Act which extends

only to 7 sections shows that the complete procedure for conducting the proceedings or for challenging the correctness of the order of the

Magistrate have not been provided. Therefore, it cannot be held that the Act is a complete self-contained Code.

6. A bare perusal of the Act would show that it makes reference to a "Magistrate" and to Code of Criminal Procedure, 1973, at several places.

Section 2(c) of the Act provides that the "Magistrate" means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal

Procedure, 1973, in the area where the divorced woman resides. Section 3(2) lays down that where a reasonable and fair provision and

maintenance or the amount of Mehr or Dower due has not been made or paid or the properties referred in Clause (d) of Sub-section (1) have not

been delivered to a divorced woman on her divorce, she may make an application to a Magistrate for an order to payment of such provision and

maintenance, Mehr or Dower or the delivery of the properties, as the case may be. Sub-section (3) of Section 3 lays down that the Magistrate on

being satisfied about the facts stated in the application may make an order directing her former husband to pay the amount determined by him.

Sub-section (4) of Section 3 lays down that if any person against whom an order has been made under Sub-section (3) fails without sufficient

cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or Mehr or Dower due in the manner

provided for levying fines in the Code of Criminal Procedure, 1973, and may sentence the person for the whole or any part of the amount

remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one year. Sub-section (4) empowers the

Magistrate to make an order directing certain categories of relatives of the divorced woman who has not re-married and is not able to maintain

herself to pay her such fair and reasonable maintenance as he may determine fit and order.

7. Exercising power conferred by Section 6 of the Act, the Muslim Women (Protection of Rights on Divorce) Rules, 1986 have been made. Rule

2(b) provides that the Code means the Code of Criminal Procedure, 1973. Sub-section (4) of Section 3 of the Act expressly provides for issuing

a warrant for levying the amount of maintenance of Mehr or Dower due in the manner provided for levying the fines under the Code of Criminal

Procedure, 1973, and confers power upon the Magistrate to sentence such person for the whole or part of any amount remaining unpaid after the

execution of the warrant to imprisonment for a term which may extend to one year or until payment, if made, subject to such person being heard in

defence and the said sentence being imposed according to the provisions of the said Code. Section 5 gives option to a divorced woman and her

former husband whether they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure. Rule 4 lays

down that evidence in the proceedings under the Act shall be recorded in the manner specified for summary trials under the Code of Criminal

Procedure.

8. Section 2(c) of the Act clearly lays down that a Magistrate means a Magistrate of the First Class exercising jurisdiction under the Code of

Criminal Procedure, 1973, in the area where the divorced woman resides.

9. Section 6 of the Code of Criminal Procedure enumerates the classes of Criminal Courts and they include Judicial Magistrate of the First Class,

Metropolitan Magistrate and the Judicial Magistrate of the Second Class. Section 12(3)(b), Cr.P.C. shows that a Chief Judicial Magistrate

exercises general control over all Magistrates. Section 10(1) Cr.P.C. provides that all Assistant Sessions Judges shall be subordinate to the

Sessions Judge in whose Court they exercise jurisdiction. Sub-section (1) of Section 397, Cr.P.C. lays down that the High Court or any Sessions

Judge may call for and examine the record of any proceedings before any. inferior Criminal Court constituted within its or his local jurisdiction for

the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to

regularity of proceedings of any such inferior Court. The explanation to this sub-section provides that all Magistrates, whether Executive or

Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purpose of this sub-

section and of Section 398. In view of Section 6 of Cr.P.C. all Judicial Magistrates (First Class or Second Class), Metropolitan Magistrates and

Executive Magistrates are Criminal Courts. By virtue of the explanation of Sub-section (1) of Section 397, Cr.P.C, all Magistrates shall be

deemed to be inferior to the Sessions judge. It, therefore, follows that all Magistrates are inferior Criminal Courts and, consequently, the

correctness, legality or propriety of any finding, sentence or order passed by them or the regularity of any proceedings of such Magistrates can be

examined by the High Court or the Sessions Judge under Sub-section (1) of Section 397. The power conferred by Sub-section (1) of Section

397, Cr.P.C. is in very wide terms. There is nothing to indicate that any order passed by a Magistrate under the Muslim Women (Protection of

Rights on Divorce) Act, 1986, would not fall within the purview of Sub-section (1) of Section 397, Cr.P.C. As mentioned earlier, the Legislature

has not made any such provision in the Act which may indicate that any finality is attached to the orders passed by the Magistrate. Therefore, the

correctness, legality or propriety of any order passed or proceedings conducted by a Magistrate under the Act can be examined by the High Court

or the Sessions Judge under Sub-section (1) of Section 397, Cr.P.C. We are, therefore, of the opinion that the view taken in *Salim v. Judicial*

Magistrate, Haridwr 1996 JIC 30, that a revision does not lie against an order passed by a Magistrate under the Act does not lay down correct

law.

10. Our answer to the question referred by the learned Single Judge is, therefore, as follows :

"Against an order passed by a Magistrate under the Muslim Women (Protection of Rights on Divorce) Act, 1986, a revision is maintainable before

the Sessions Judge u/s 397, Cr.P.C."

11. Before parting with the case, we would like to place on record that Sri Vinod Prasad who appeared as amicus curiae at the request of the

Court rendered valuable assistance.

The revision may now be listed before the appropriate Court at an early date.