

**(1989) 12 CAL CK 0002**

**Calcutta High Court**

**Case No:** C.R. No. 344 of 1988

Mst. Sahana Bibi @ Khatutn

APPELLANT

Vs

Islam Ali Khan and Another

RESPONDENT

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**Date of Decision:** Dec. 5, 1989

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 125, 126, 127, 127, 128
- Muslim Women (Protection of Rights on Divorce) Act, 1986 - Section 3, 3(1)(b), 3(2), 5, 7

**Citation:** 94 CWN 385

**Hon'ble Judges:** J.N. Hore, J; Ajit Kr. Sengupta, J

**Bench:** Division Bench

**Advocate:** Sk. Tebarak Ali, for the Appellant; Oil Mohammad, for the Respondent

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### **Judgement**

Ajit Kumar Sengupta, J.

This revisional application is directed against the order dated December 4, 1987, passed by the learned Judicial Magistrate, First Court, Tamluk. This application was moved before the learned single Judge who was of the view that there is a conflict of the judicial decision as to whether a child who is staying with his divorcee mother, is entitled to be maintained by the father and there is no Division Bench decision on this point and, accordingly, the matter was referred to the Division Bench. The facts leading to this application are that the petitioner was married to Islam Ali Khan, the opposite party no. 1, according to Mohammedan law and out of the wedlock one son and one daughter were born to them. As the husband allegedly neglected and failed to maintain, the petitioner moved an application u/s 125 of the Criminal Procedure Code for herself and for two minor children before the Sub-Divisional Judicial Magistrate, Tamluk. The said application was contested by her husband. The learned Judicial Magistrate passed an order dated December 3, 1979 allowing the application for maintenance and directing the opposite party to pay maintenance allowance of Rs. 60/- per month to the petitioner and Rs. 40/- each for her son and

daughter aggregating to Rs. 140/- per month.

2. The husband being aggrieved by the said order moved a revisional application before this Court, on May 5, 1980 praying for stay of operation of the said order. Rule was issued and interim stay was granted on condition that the husband, the opposite party, shall go on paying a consolidated sum of Rs. 70/- per month towards maintenance month by month. Ultimately on September 1, 1981, the said Rule was discharged and the opposite party no. 1 was directed to pay the entire amount of maintenance as ordered by the learned Magistrate. In execution of the said order the opposite party paid the maintenance to the petitioner and her two children upto September, 1985.

3. On August 12, 1985, the petitioner made an application for enhancement of the said maintenance as according to the petitioner when the original order of maintenance was made on December 3, 1979, the minor son was 2 1/2 years old and minor daughter was 1 1/2 years old but since then they have grown up and attained 8 years and 7 years respectively and they are reading in a Primary School, it has therefore become impossible to meet their expenses for food, clothing, education and medical treatment out of the meagre amount of maintenance allowance originally granted.

4. On July 23, 1986, the opposite party filed an application that the petitioner and her children are not entitled to maintenance allowance in view of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The learned Magistrate after hearing the parties by his order dated February 28, 1987 allowed the application of the petitioner and enhanced the maintenance allowance from- Rs. 60/- to Rs. 150/- for the wife and from Rs.40/- to Rs. 100/- for each of the children.

5. The opposite party being aggrieved, moved this court in revision and M.R. Mullick, J., disposed of the said revisional application on September 10, 1987, inter alia, by the following order:

At the hearing, it is disclosed that the learned Magistrate, has to consider the import of Muslim Woman (Protection on Divorce) Act on the application u/s 127 Cr. P.C. pending before him from the date on which the said Act has come into force.

The present petitioner also contended before the learned Magistrate, that in view of the provision of section 7 of the Act, he has got no liability to pay maintenance, not to speak of the maintenance being enhanced.

In my view, the learned Magistrate did not consider that aspect of the matter and it is fit and proper for the learned Magistrate to consider the import of the protection of the said Muslim Women (Protection on Divorce) Act and then to consider as to whether the order u/s 127 Cr. P.C. can be passed or not. In the circumstances, I set aside the impugned order passed by the learned Magistrate and direct the learned Magistrate to rehear matter in the light of the observations made by me on giving

opportunity of hearing to both the parties and to make their respective contentions as well as to tender additional evidence if they so deem fit and proper.

I direct the learned Magistrate to dispose of the pending application u/s 127 Cr. P.C. within two months from the date of communication of this order.

6. Pursuant to the said direction, on December 4, 1987, the learned Judicial Magistrate passed an order which is impugned in this proceeding. The said order, *inter alia*, is to the following effect:

Now admittedly the petitioner is a divorced woman and it appears from the record that both the petitioners and the O.P. have not filed affidavits to the effect that they prefer to be governed by the provisions of section 125 to 128 of the Cr. P.C. In the circumstances, considering the section 7 of the Muslim Woman (Protection of Rights on Divorce) Act, 1986. I am of the opinion that the petition filed by the petitioner u/s 127 Cr. P.C. is not maintainable.

The learned Judge also rejected the application of the petitioner for withdrawal of Rs. 400/- deposited in the Court, in view of the foregoing order.

7. At the hearing it has been contended by the learned counsel for the petitioner that the Judicial Magistrate was not right in holding that the petition filed by the petitioner u/s 127 was not maintainable under the Muslim Woman (Protection of Rights on Divorce) Act, 1987. He further submitted that the Act does not bar the grant of allowance to the defendant children under the provisions of the Code of Criminal Procedure. The learned counsel for the opposite party has, however, contended that the petitioner is not entitled to any further benefit in view of the provisions of the said Act and maintenance of the children must also be restricted to what has been provided u/s 3(2) of the said Act. Our attention has been drawn to the Division Bench decision of this Court in the case of *Abdul Sattar v. Sahani Bibi & Anr.* reported in 1987(2) CHN 203 in support of the respective contentions.

8. We have given our anxious consideration to the rival contentions.

9. Muslim Women (Protection of Rights on Divorce) Act, 1987 will only apply to the Muslim divorced Woman shall be entitled to reasonable and fair provision and maintenance. The learned Judicial Magistrate has considered section 5 of the Act which provides for exercising option to be governed by section 125 to 128 of the Code of Criminal Procedure. This option has to be exercised by both the divorced woman and her former husband to opt out of the said Act. In this case no such option was exercised by the parties.

10. The question is what is the effect of the Act on the application made by the petitioner for enhancement of the maintenance u/s 127 Cr. P.C. for herself and her children. So long as the wife is not legally divorced by the husband, the provision of the said Act would not apply to such a case and the Judicial Magistrate has to decide the claims and contentions of the parties in the light of the provision of section 125

and section 127 of the Code of Criminal Procedure. Section 7 contains the transitional provisions. It provides that every application by a divorced woman u/s 125 or u/s 127 of the Code of Criminal Procedure, 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. Section 7 contemplates an application made by a Muslim Divorced woman prior to the coming into force of the Act and which was pending on the commencement of the Act. But where an application was made by a wife u/s 125 or u/s 127 before her divorce she will be entitled to get the benefit of the orders made thereon until she is legally divorced, when the provision of the said Act will govern the case of her maintenance as a divorced woman. In other words, until the date of dissolution of marriage she will be entitled to the benefit extended to her u/s 125 or 127 of the benefit extended to her u/s 125 or 127 of the Code of Criminal Procedure.

11. The only question which remains to be considered is with regard to the maintenance of the children. Where an application was made by the wife for her maintenance as well as maintenance of her children u/s 125 the order passed thereon will be operative with regard to the children notwithstanding the fact that the wife has been legally divorced before or after the commencement of this Act. The children are not governed by the provisions of the Act. This will be evident from the statement of object and reasons of the Act. The Supreme Court in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat it does not contemplate of countenance the situation envisaged by section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The court therefore, came to the conclusion that if the divorcee is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to section 125 of the Code of Criminal Procedure. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. The Act was enacted to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and the protect her interest. The Act, accordingly, provided for the following amongst other things, namely:

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.

b) Where a Muslim divorce 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.

12. The Act is therefore concerned with the maintenance of a divorced Muslim Woman.

13. Section 3 provides for the entitlement of maintenance of the divorced woman and not of her children as such. It has nothing to do with the maintenance payable by a father to his children even after the divorce so long as the children are minor and are not taken into custody by the father. Section 3 provides that Mohar or properties of Muslim woman to be given to her at the time of divorce. Section 3(1)(b) provides that a divorced woman shall be entitled to:

Where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.

Therefore, this entitlement is of a divorced woman and not the entitlement of the children and, accordingly, even if the order of maintenance passed in favour of the wife ceases to be effective after the wife is legally divorced, that will not in any way affect the provision for maintenance for the children which is an independent obligation of the father.

14. Where a consolidated application has been made u/s 127 before commencement of this Act for enhancement of maintenance of the wife as well as of the children and during the pendency of such application the wife has been legally divorced and the Act has come into force, such application u/s 127 has to be considered by the Magistrate in so far as it relates to the children. It cannot be dismissed in limine on the ground that such application u/s 127 by the legally divorced woman will not be maintainable at all. It is not in dispute that the petitioner has already been divorced. Accordingly, her application for maintenance or enhancement of maintenance as a divorced woman will be governed by the Act. An application for maintenance for the children has to be made by the mother who has been divorced so long as the minor children would remain in her custody. The learned Judicial Magistrate fell in error in holding that the application u/s 127 is not maintainable at all. Such, application is maintainable so far as the maintenance of the minor children is concerned and the application must proceed in respect of the claim of the claim of maintenance of the children.

15. The next question is with regard to the quantum of the maintenance. Opposite Party No. 1 did not dispute the quantum of maintenance allowance determined by the Id. judicial Magistrate payable to the children. His only objection was that the

said application for enhancement was not maintainable because of the provisions contained in the said Act. The Order was set aside by this Court on revision only on the ground that the learned Magistrate did not consider the effect of the Muslim Woman (Protection of Rights on Divorce) Act. As we have held that the application which was made by the petitioner u/s 127 of the Code of Criminal Procedure is maintainable in so far as the children are concerned, there is no reason to send the matter back for quantification of the maintenance payable to the children. The learned Magistrate by his Order dated February 28, 1987 enhanced the maintenance from Rs. 40/- to Rs. 100/- for each to the children being one son and one daughter. The children have grown up, the son has attained the age of 12 and the daughter has attained the age of 11. Having regard to the expenses for providing food, clothing, education, medical treatment etc. in the context of ever increasing price of essential commodities, there is no reason to interfere with the quantum fixed by the learned Magistrate on February 28, 1987. We, therefore, direct that on and from September 1985 each of the children will be entitled "to maintenance at the rate of Rs. 100/- per month. All arrears shall be paid after adjustment of the payment stated to have been made in the meanwhile by the opposite party no. 1 on or before April 30, 1990. However, the current maintenance shall be payable on and from the month of December 1989. The payment for the month of December shall be made by the Opposite Party no. 1 by 15th December, 1989 and thereafter month by month on or before the 15th day of each succeeding month until the children are taken into custody by the Opposite Party No. 1 in accordance with law. If the sum of Rs. 400/- is still lying deposited in the Court of Judicial Magistrate, the same shall be withdrawn by the petitioner to be adjusted against the arrears of maintenance payable to the children.

16. The petitioner, however, will be at liberty to make appropriate application for her own maintenance and other reliefs as admissible to her under the provision of the aforesaid Act after her divorce and such application, if made, shall be disposed of by the Judicial Magistrate on merits.

17. This revisional application is thus disposed of. Certified copy, if applied for, shall be supplied within three days from the date of such application.

J.N. Hore, J.

I agree.