

Sk. Safique Vs Papia Bibi

Court: Calcutta High Court

Date of Decision: Nov. 17, 2000

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 125

Citation: (2001) 2 DMC 336

Hon'ble Judges: Debi Prasad Sengupta, J

Bench: Single Bench

Advocate: Tapash Kumar Ghosh, for the Appellant; Somnath Banerjee and Ganesh Srivastab, for the Respondent

Final Decision: Dismissed

Judgement

Debi Prasad Sengupta, J.

This revisional application is directed against an order dated 23.2.2000 passed by the learned Sessions Judge,

Birbhum thereby dismissing the revisional application and affirming the order dated 12.7.1999 passed by the learned Judicial Magistrate, First

Class, Dubrajpur, Birbhum in Misc. Case No. 146 of 1997 u/s 125, Cr.P.C.

2. It appears that the present opposite party/wife filed an application before the learned Magistrate praying for maintenance for herself. The learned

Judicial Magistrate after recording evidence and considering the facts and circumstances of the case directed the present petitioner/husband to pay

an amount of Rs. 800/- p.m. from the date of filing of the case. It appears that the present petitioner being the husband contested the proceeding

u/s 125, Cr.P.C. by filing written objection denying all material allegations levelled against him. In the written statement it was stated by him that he

had already divorced the opposite party/wife on 6.6.1998 and since she is a divorced Muslim woman, she is not entitled to get any maintenance

under the provision of Section 125, Cr.P.C. The learned Magistrate after recording evidence and considering the facts and circumstances directed

the present petitioner to pay an amount of Rs. 800/- p.m. towards maintenance of the opposite party /wife from the date of filing of the case.

Challenging the said order of maintenance the petitioner preferred a revisional application before the learned Sessions Judge which was also

dismissed by the learned Judge by his order dated 23.2.2000. Against such order of dismissal the petitioner came up before this Court in revision.

3. Mr. Tapash Kr. Ghosh, the learned Advocate appearing for the petitioner submits that the present opposite party /wife is not entitled to get any

maintenance in her favour since she is divorced Muslim woman. Mr. Ghosh further contended that the Talaknama marked as Ext. A in the

proceeding u/s 125, Cr.P.C was a certified copy of the original document and the same was not considered by the learned Magistrate and no

evidentiary value was given to this particular document. Therefore, both the Courts below according to Mr. Ghosh committed wrong in allowing

maintenance of Rs. 800/- p.m.

4. On a perusal of the order passed by the learned Sessions Judge it appears that relying on some decisions of this Court he was of the view that

the Talak was not a valid Talak. A Mohammedan husband cannot pronounce Talak to his wife at his own whim without any pre-divorce

conference to arrive at a settlement. For the purpose of tendering Talak the husband has to show reasonable cause which is to be discussed to his

wife before tendering such Talak. The learned Judge also relied upon a judgment of Saleem Basha Vs. Mrs. Mumtaz Begam, wherein it was laid

down that divorce must be preceded among Muslims by an attempt of reconciliation between the husband and wife and two mediators. The

learned Judge also relied upon a judgment reported in 1994 (3) Crimes 236 241, wherein it was held by this Court that there must be reasonable

cause for divorce which should be preceded by a pre-divorce conference so as to make an endeavour for reconciliation between the parties if

possible.

5. Mr. Ghosh, the learned Advocate of the petitioner relies on a judgment reported in 1994 C Cri L R (Cal) 48. Wherein it was held that where

the Court passed an order of maintenance u/s 125, Cr.P.C. in favour of wife not being a divorced wife and if after such order the wife is divorced

by the husband in accordance with the Muslim Women (Protection of Rights on Divorce) Act, 1986, the order imposing liability to maintain the

wife u/s 125, Cr.P.C. will also cease. It was further held that in such a case the Court would be entitled to entertain an application u/s 127,

Cr.P.C. and passed appropriate order of proof of factum of divorce as contemplated by Section 2(a) of the Act. Relying on the said judgment Mr.

Ghosh submits that since the present opposite party/wife is a divorced woman, she is not entitled to get any maintenance from her husband. The

next judgment relied upon by Mr. Ghosh reported in 2000 C Cri L R (Cal.) 195. Relying on a Division Bench judgment of this Court reported in

1989 C L R (Cal.) 197 the learned Single Judge of this Court held in the said judgment that where maintenance order is passed in favour of a

Muslim wife and after such order was passed subsequent divorce takes place in accordance with law, such divorced wife is not entitled to get any

maintenance after divorce and proceeding for vacating the maintenance order u/s 127 is maintainable. I have carefully gone through the said

judgment and it appears from the said judgment that Talak was duly proved in the said case and Talak was duly communicated to the

wife/opposite party and further that reasons for such Talak were also duly assigned in the Talaknama. In such circumstances the learned Judge was

of the view that the learned Judicial Magistrate concerned was justified in passing an order u/s 127, Cr.P.C. Mr. Ghosh next relies on a judgment

reported in 1989 C Cri L R (Cal.) 197. On a perusal of the said judgment it appears that it was held in the said judgment that the provision of

Section 125, Cr.P.C. will have no force in respect of a divorced woman. It was further held that in respect of a divorced woman if an order was

passed prior to the commencement of the Act of 1986 that will cease to have any effect after the commencement of the Act of 1986. It was also

held that if any order u/s 125, Cr.P.C. is passed in favour of any Muslim woman not being a divorced wife, and after such an order is passed the

wife is divorced by her husband either of the party to the proceeding may file an application u/s 127, Cr.P.C. for variation/vacation of such order.

In the said judgment of the Division Bench there is no indication as to what should be the manner or procedure for tendering Talak. From a reading

of the judgment reported in 1994 C Cri L R (Cal.) 48, it becomes clear that it was held by this Court that there must be reasonable cause for

tendering. Talak, which should be preceded by a pre-divorced conference so as to make an endeavour for reconciliation between the parties if

possible. While delivering the said judgment the learned Single Judge of this Court also took into consideration the Division Bench judgment of this

Court reported in 1989 C Cri L R (Cal.) 197, Abdul Sattar v. Sahanibibi and Anr. The judgment reported in 2000 C Cri L R (Cal) 195, is not

also applicable in the present case. In the said judgment it appears that order of maintenance was awarded in favour of the wife and after such

order was passed the husband divorced the wife by Talaknama. Thereafter the husband filed an application u/s 127, Cr.P.C. claiming that the wife

is not entitled to get any maintenance after the date of divorce. It was held by the learned Magistrate that the opposite party/wife was entitled to

maintenance upto the date of divorce. Such order was set aside by the Additional Sessions Judge and against such order revisional application was

moved in this Court. This Court set aside the order passed by the Additional Sessions Judge and affirmed the order passed by the learned

Magistrate. In the said case it appears that Talaknama was duly proved. The reasons for giving Talak was also recorded in the document. In the

proceeding u/s 127, Cr.P.C. several witnesses were examined and on the basis of such evidence the learned Magistrate was satisfied that the

factum of divorce had been proved according to law. In the present case it appears that in the proceeding u/s 125, Cr.P.C. the Talaknama (Ext.

A) was not proved.

6. The original Talaknama was not produced before the Court. Marriage Registrar did not turn up before the Court for proof of the Talak and as

such it was held by the learned Magistrate that Ext. A is a fake document and no reliance should be placed on it. However, the learned Sessions

Judge was of the view that since such Talak was not in accordance with law, the same cannot be acted upon. Relying on the judgment of this

Court the learned Sessions Judge rightly held that for the purpose of tendering Talak the husband has to show reasonable cause which need be

discussed to his wife before tendering Talak. The Mohammedan husband cannot divorce his wife at his own whim and caprice. Divorce must be

for a reasonable cause and it must be preceded by a pre divorce conference to arrive at a settlement. Since there was no attempt for settlement

prior to divorce, there cannot be a valid divorce under the Mohammedan law.

7. I have heard the learned Advocates of both the parties. In my considered opinion the impugned order passed by the learned Additional

Sessions Judge dismissing the revisional application and affirming the order passed by the learned Judicial Magistrate in Misc. Case No. 146/97

u/s 125, Cr.P.C. does not suffer from any illegality. The learned Judge passed the said order on proper application of mind and on perusal of

relevant documents/Exhibits. Since the present application is a second revision and since the factum of divorce could not be proved before the

Courts below, I do not find any reason to interfere with the order passed by the learned Sessions Judge. However, petitioner is always at liberty to

make an application u/s 127 of the Code of Criminal Procedure before the learned Magistrate for variation of the order passed u/s 125, Cr.P.C.,

where he can prove the Talaknama, which could not be proved in the Trial Court, by adducing evidence. The present revisional application

accordingly fails and the same is dismissed. The interim stay earlier granted by this Court stands vacated.