

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2690 OF 2014

Sarafraj Jailab Nadaf .. Petitioner
vs.
Faimida S. Nadaf & Ors. .. Respondents

Mr. Nitesh Zimur i/b. Ms A.R.S. Baxi for Petitioner.
Mr. S. R. Ganbawle i/b. Mr. S. Yadav for Respondents.

CORAM : M. S. SONAK, J.
DATE : 23 FEBRUARY 2016

P.C :

1] The challenge in this petition is to the order dated 5 May 2014, by which, the Family Court, at Kolhapur has dismissed the petitioner's application below Exhibit '11' in Petition No. E 49/2013 questioning the maintainability of proceedings under Section 125 of the Cr.P.C.

2] Mr. Nitesh Zimur, the learned counsel for the petitioner has submitted that in the present case, the petitioner and the respondent no. 1 have obtained divorce i.e. '*Khula*', which is evident from the deed of talaq by '*Khula*' method dated 28 January 2008, which is placed on record and marked as Exhibit 'E' to the memo of petition. He further submitted that in terms of talaqnama, the respondent no. 1, consequent upon divorce, has waived and relinquished her rights to obtain any future maintenance from the petitioner. Relying upon these circumstances, as also the provisions

of the Muslim Women (Payment of Rights on Divorce) Act, 1986 (1986 Act), the learned counsel for the petitioner submitted that the proceedings under Section 125 of the Cr.P.C. were not at all maintainable and the Family Court has purported to usurp jurisdiction, when, in fact, the Family Court has lacked jurisdiction.

3] Mr. Zimur, the learned counsel for the petitioner placed reliance upon the decision of the learned Single Judge of this Court in the case of *Syed Younus vs. Jabeen & Ors.*¹, to submit that a wife who had obtained divorce by *Khula* method against her husband, cannot claim maintenance under Section 125 of the Cr.P.C. without following the due procedure as contemplated under Section 5 of the 1986 Act.

4] Mr. Ganbawle, the learned counsel for the respondent no. 1 submitted that there is no bar either under 1986 Act upon which the petitioner has placed reliance or under Section 125 of the Cr.P.C. to a muslim divorced women applying for maintenance under Section 125 of the Cr.P.C. He submitted that this issue is no longer *res integra* in view of the decision of the Hon'ble Apex Court in the matter of *Shamima Farooqui vs. Shahid Khan*². Mr. Ganbawle further submitted that any agreement precluding the claim of future maintenance is void and therefore unenforceable in a Court of law.

1 2008 (5) AIR Bom R. 700

2 (2015) 5 SCC 705

He submitted that such a provision is contrary to public policy. Therefore, without accepting the charge of waiver, Mr. Ganbawle submitted that there is no question of enforcement of such alleged waiver. For all these reasons, Mr. Ganbawle submitted that there is no infirmity in the impugned order and this petition may be dismissed.

5] Having heard the learned counsel for the parties and perused the record, in my judgment, there is no case made out to interfere with the impugned order.

6] In the case of *Shamima Farooqui* (supra), the Family Court had rejected the preliminary objection as regards maintainability of proceedings under Section 125 of the Cr.P.C., even, though, the applicant was a muslim women who had been divorced. The Supreme Court approved the view taken by the Family Court by reference to earlier decisions applicable to the context. Relevant discussion on this aspect is contained in paragraph 9, which reads thus:

*“9. First of all, we intend to deal with the applicability of [Section 125 CrPC](#) to a Muslim woman who has been divorced. In *Shamim Bano vs. Asraf Khan* (2014) 12 SCC 636, this Court after referring to the Constitution Bench decisions in [Danial Latifi v. Union of India](#) (2001) 7 SCC 740 and *Khatoon Nisa v. State of U.P.* (2014) 2 SCC 646 had opined as follows: (*Shamim Bano* case, SCC p.644, paras 13-*

14):

"13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in [Section 125](#) of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under [Section 125](#) of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under [Section 125](#) of the Code and the effect of ultimate consequence.

14. Slightly recently, in [Shabana Bano v. Imran Khan](#)(2010) 1 SCC 666 a two-Judge Bench, placing reliance on [Danial Latifi](#) (*supra*), has ruled that: (*Shabana Bano case*, SCC p. 672, para 21) :

"21. The appellant's petition under [Section 125](#) CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under [Section 125](#) CrPC cannot be restricted for the iddat period only."

Though the aforesaid decision was rendered interpreting [Section 7](#) of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoon Nisa* (*supra*)."

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge.”

7] In the light of the authoritative pronouncement of the Hon'ble Apex Court, it is not possible to place reliance upon the decision of this Court in the case of *Syed Younus* (supra). At the stage when *Syed Younus* (supra) was decided, the learned Judge obviously, did not have the benefit of ruling of the Supreme Court in the case of *Shamima Farooqui* (supra).

8] The question as to whether the respondent has indeed waived her right to claim any maintenance in future is really a disputed question of fact. In any case, the Hon'ble Supreme Court in the case of *Nagendrappa Natikar vs. Neelamma*³ has ruled that any agreement for permanent alimony, precluding future maintenance would be an agreement which is opposed to public policy and therefore not enforceable in a Court of law. The Hon'ble Apex Court has held that such agreement is void since its object is unlawful.

9] Similarly, the Division Bench of this Court, in the case of *Geeta Satish Gokarna vs. Satish Shankarrao Gokarna*⁴ has held

³ (2014) 14 SCC 452

⁴ 2004 (3) Mh.L.J. 159

that even a clause in the consent terms filed by the parties for the purpose of obtaining divorce by mutual consent before a Court of law, to the effect that the wife will give up her claim to future maintenance is opposed to public policy, void and unenforceable. The relevant discussion is contained in paragraph 8, which reads thus:

“8. Having considered the judgment in the case of Hirabai Bharucha (supra) the question really would be whether under Section 25(1) a party who has been divorced is entitled to maintenance even if in the consent terms had agreed not to claim alimony/maintenance. The language of [Section 25](#) shows that it is a power conferred on the Court at the time of passing of the decree or at any time subsequent thereto on an application made to award alimony or maintenance. This is a jurisdiction to be exercised by the Court. The parties, therefore, cannot by an agreement between themselves, agree to oust the jurisdiction of the Court which otherwise Parliament has conferred. The second aspect of the matter is that permanent alimony and maintenance are a larger part of the right to life. These provisions have been included to enable a person unable to maintain herself to be protected. The learned single Judge of this Court in Hirabai Bharucha interpreting [Section 40](#) of the Parsi Marriage Act has taken a view following similar views taken by English Courts that such a section is based on public policy. That public policy is now reflected in our Constitutional philosophy. The power as conferred on the Court with the object of helping the weak. Therefore, any clause in a contract or consent terms providing to the contrary would be against public policy. (See [Delhi](#)

Transport Corporation v. D.T.C. Mazdoor Congress and Others, AIR 1991 S.C. 101). Clause 5 of the consent terms is clearly severable from the other terms of the consent terms. Clause 5 would be contrary to public policy and consequently that clause will have to be treated as non-est. The only question is whether Clause 4 would bar the appellant herein from so applying. The very fact that Clause 5 was placed differently from Clause 4 will indicate that it ought to cover situations other than those covered by Clause 5. Even otherwise Clause 4 to the extent that prohibits a party from claiming maintenance would also suffer similar consequences as Clause 5 of being against public policy. Considering the above discussion the appellant was not barred from applying under [Section 25\(1\)](#). The application, therefore, by the appellant was clearly maintainable. The learned trial Judge was right in so holding. The Cross Objections, therefore, filed by the respondent on that count must be rejected.

10] If, as observed by the Hon'ble Apex Court and the Division Bench of this Court even a clause in the consent terms filed and accepted in a Courts of law, whereby, the wife gives up her claim for future maintenance is opposed to public policy, void and unenforceable, surely, the talaqnama upon which the petitioner relies, cannot, stand on any different pedestal. The talaqnama is merely, an agreement between the parties, having neither any statutory nor judicial imprimatur. Based therefore, upon any clause in the talaqnama to the effect that the respondent has waived her right to claim maintenance in future, it cannot be said

that the proceedings instituted by the respondent under Section 125 of the Cr.P.C. are not maintainable.

11] There is no jurisdictional error in the making of the impugned order. This petition is therefore liable to be dismissed and the same is hereby dismissed. The interim order is vacated.

12] Considering that the proceedings were initiated by the respondent in the year 2013 and they were stayed by the orders of this Court, it is only appropriate that directions are issued to the Family Court to dispose of the petition E 49/2013 as expeditiously as possible and in any case within a period of six months from today.

13] The parties to appear before the Family Court on 1 March 2016 at 11.00 a.m. and produce authenticated copy of this order.

14] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)

Chandka