

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.516 of 2018

Arising Out of PS. Case No.- Year-1111 Thana- District-

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Bibi Mukbari Khatoon W/o Md. Asfan Alam D/o Md. Jakiruddin, R/o Vill.-
Gaura, P.S.- Kharagpur, District- Munger.

... .. Petitioner/s

Versus

1. State of Bihar
2. Md. Asfan Alam S/o Md. Makbul, Resident of Vill.- Khaira, P.S.- Shahkund,
District- Bhagalpur.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Binay Kumar and Mr. Md. Najmul Hodda, Advocate
For the Opposite Party/s	:	Mr. Diwakar Upadhyay, Advocate
For the State	:	Ms. Asha Kumari, APP

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN
AMANULLAH

ORAL JUDGMENT

Date : 19-07-2019

Heard learned counsel for the petitioner; learned APP
for the State and learned counsel for the opposite party no. 2.

2. The petitioner, who is the divorced wife of opposite
party no. 2, has moved the Court under Section 19(4) of the
Family Courts Act, 1984 against the order dated 31.03.2018
passed by the Principal Judge, Family Court, Munger in
Maintenance Case No. 60 of 2017, by which her application
under Section 125 of the Code of Criminal Procedure, 1973
(hereinafter referred to as the 'Code') seeking maintenance has



been disposed off holding that as a divorcee, she is not entitled to maintenance under the Mohammedan Law.

3. Learned counsel for the petitioner submitted that the order is absolutely perverse and unsustainable in the eyes of law. It was submitted that even if the petitioner being a Muslim woman, is a divorcee, but still she would be entitled to maintenance under Section 125 of the Code independently of her status as Muslim woman. It was submitted that the fact of divorce is contested, inasmuch as, neither anything was brought on record to substantiate that she was divorcee nor the Court has held any enquiry to record a finding that she was divorced by the opposite party no. 2. It was submitted that the entire order sheet, even of the reconciliation proceeding, does not disclose the fact that the petitioner had admitted that she had been divorced by the opposite party no. 2. Learned counsel categorically took the stand that the Principal Judge, Family Court, Munger has given an erroneous finding on fact that in the course of hearing in the reconciliation proceeding, the petitioner had admitted that she is a divorcee. Learned counsel relied upon a decision of the Hon'ble Supreme Court in **Shabana Bano v. Imran Khan** reported as **AIR 2010 SC 305**, at paragraphs no. 29 and 30, where it has been held that even a divorced Muslim woman would be entitled to claim



maintenance from her divorced husband, as long as she does not remarry, under Section 125 of the Code and the same would continue after expiry of even the *iddat* period.

4. Learned APP fairly submitted that the order of the Court below cannot be sustained.

5. Learned counsel for the opposite party no. 2 submitted that the petitioner had accepted the divorce and thus, she would be guided by the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 'Act') and petition under Section 125 of the Code is not maintainable. Learned counsel relied upon a decision of the Hon'ble Supreme Court in **Khatoun Nisa vs. State of UP and Ors.** reported as **2002 Supreme (SC) 2064**, for the proposition that the petitioner had the option for seeking maintenance under the Act itself and further that the Court below has granted her maintenance of Rs. 2,000/- from the date of filing of the case for the period 19.05.2017 till the date of filing of written statement i.e., 16.12.2017. It was submitted that the Court has also directed for payment of any due *Mehar*. However, on a direct query of the Court as to how the order of the Court below can be sustained in view of the judgment of the Hon'ble Supreme Court in **Shabana Bano** (supra), learned counsel fairly submitted that the law stands



settled holding a petition under Section 125 of the Code maintainable by a divorced Muslim woman.

6. Having considered the facts and circumstances of the case and submissions of learned counsel for the parties, the Court finds that the order dated 31.03.2018 passed in Maintenance Case No. 60 of 2017, by the Principal Judge, Family Court, Munger is wholly unsustainable in the eyes of law.

7. The petitioner has the option either to seek maintenance under the Act or the Code. She having chosen to move under the Code cannot be said to be debarred under law on the ground that she is a divorced Muslim lady. This is in the teeth of and contrary to the law laid down by the Hon'ble Supreme Court in a catena of decisions, including that of **Shabana Bano** (supra), in which also there is reference to earlier decisions as well as the Constitutional Bench decision in **Danial Latifi v. Union of India** reported as **(2001) 7 SCC 740**.

8. As far as the judgment of the Hon'ble Supreme Court relied upon by learned counsel for the opposite party no. 2 in **Khatoon Nisa** (supra) is concerned, the Court would only observe that the said decision in fact supports the petitioner's contention that the Court should have exercised its jurisdiction under Section 125 of the Code. Paragraph no. 10 of the judgment reads as under:



“10. Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short “the Act”) as it was considered that the jurisdiction of the Magistrate under Section 125 Cr.P.C. can be invoked only when the conditions precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the Magistrate came to a finding that there has been no divorce in the eye of law and as such, the Magistrate has the jurisdiction to grant maintenance under Section 125 Cr.P.C. This finding of the Magistrate has been upheld by the High Court. The validity of the provisions of the Act was for consideration before the Constitution Bench in the case of Danial Latifi v. Union of India, (2001) 7 SCC 740. In the said case by reading down the provisions of the Act, the validity of the Act has been upheld and it has been observed that under the Act itself when parties agree, the provisions of Section 125 Cr.P.C. could be invoked as contained in Section 5 of the Act and even otherwise, the Magistrate under the Act has the power to grant maintenance in favour of a divorced woman, and the parameters and considerations are the same as those in Section 125 Cr.P.C. It is undoubtedly true that in the case in hand, Section 5 of the Act has not been invoked. Necessarily, therefore, the Magistrate has exercised his jurisdiction under Section 125 Cr.P.C. But, since the Magistrate retains the power of granting maintenance in view of the Constitution Bench decision in Danial Latifi’s case (supra) under the Act and since the parameters for exercise of that power are the same as those contained in Section 125 Cr.P.C, we see no ground to interfere with the orders of the Magistrate granting maintenance in favour of a divorced Muslim woman. In fact, Mr Qamaruddin, learned counsel appearing for the appellants, never objected to pay maintenance as ordered by the Magistrate. But, he seriously disputes the findings of the Magistrate on the status of the parties and contends that the Magistrate was wholly in error in coming to the conclusion that there has been no divorce between the parties in the eye of law.”



9. On the other hand, the decision of the Hon'ble Supreme Court in **Shabana Bano** (supra), the following has been held at paragraphs no. 27, 28 and 29:

“27. The appellant's petition under Section 125 of the Cr.P.C. 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 of the Cr.P.C. cannot be restricted for the iddat period only.

28. The learned Single Judge appeared to be little confused with regard to different provisions of the Muslim Act, the Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.

29. Cumulative reading of the relevant portions of the judgments of this Court in Danial Latifi, (2001 AIR SCW 3932) (supra) and Iqbal Bano, (2007 AIR SCW 3880) (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.”

10. The Court below holding that she is entitled to *Dain Mehar* and maintenance of Rs. 2,000/- for the period 19.05.2017 till the date of filing of written statement i.e., 16.12.2017, when the husband filed his written statement disclosing divorce, after which she would not be entitled, is totally erroneous and misconceived.

11. Accordingly, the application is allowed. The order impugned dated 31.03.2018 passed by the Principal Judge, Family



Court, Munger in Maintenance Case No. 60 of 2017 is set aside.

The matter is remanded to the Court below for fresh consideration on merits, in accordance with law.

(Ahsanuddin Amanullah, J.)

P. Kumar

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