

JURISDICTION OF FAMILY COURTS TO DEAL WITH THE MATTER OF MAINTENANCE OF DIVORCED MUSLIM WOMEN

By

Sri S.M. Deka

Director

North Eastern Judicial Officers'

Training Institute (NEJOTI)

1. PREFACE

Samina Yasmine filed an application under Section 125 of the Code of Criminal Procedure, 1973 before the Family Court at Guwahati seeking maintenance for herself and her child from her husband Ainul Haque. The Family Court while awarding maintenance for the child rejected her claim on the holding that she was a divorced woman and her remedy lay under Section 3(2) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Samina thereafter moved the High Court in revision and by the judgment SAMINA YASMIN VS STATE OF ASSAM, 2002(2) GLT 121 decided on 12.06.2002, the High Court directed the Family Court to treat her application as one under Section 3(2) of the Muslim Women Act and decide her claim for maintenance on merit. This judgment is referred hereinafter as SAMINA YASMINE-I. The Family Court on remand awarded maintenance to her. This time Ainul Haque the husband became the revision-petitioner before the High Court. By the Judgment dated 27.09.2004 AINUL HAQUE VS SAMINA YASMINE 2005(3) GLT 107 the High Court dismissed the revision petition. This judgment is referred hereinafter as SAMINA YASMINE-II. The implication of SAMINA YASMINE-I and SAMINA YASMINE-II is that the Family Court has jurisdiction to deal with the matter of maintenance for divorced Muslim Women under Section 3(2) of the Muslim Women Act. In between these two cases came the Judgment dated 07.03.2004 of the Gauhati High Court, MD SAZID HAZARIKA VS MST ALAM ARA BEGUM 2004 Cri.L.J 4092 whereby the High Court upheld the order of the Chief Judicial Magistrate, Guwahati awarding maintenance and Mahr or dower to Alam Ara Begum, a divorced Muslim Woman under Section 3 of the Muslim Women Act. The implication –contrary to that of SAMINA YASMINE I and II is that the magistrate and not the Family Court has jurisdiction in the matter. What follows is an attempt at understanding and exposing the correct law on the question of jurisdiction thrown up by the above decisions.

2. THE LAW

To promote conciliation in and to secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith the parliament enacted the Family Court Act, 1984 (1984 Act hereinafter). It came into force in Assam only on the 2nd October 1991 and thereafter one Family Court was established at Guwahati in exercise of the powers under Section 3 of the 1984 Act. Section 7 and 8 of the 1984 Act speak about jurisdiction of Family Courts. Sub-section (1) of Section 7 of the 1984 Act confers jurisdiction to deal with suits or proceedings enumerated in clauses (a) to (g) of the explanation to the sub-section on the Family Court to exercise the same jurisdiction exercisable by the District or subordinate Civil Courts in respect of suits or proceedings enumerated in the explanation. For the purpose of this essay sub-section (2) is the more important and it runs thus :-

“(2) Subject to other provisions of the Act, a Family Court shall also have and exercise –

- (a) *the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to Order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and*
- (b) *such other jurisdiction as may be conferred on it by any other enactment.”*

Section 8 of the 1984 Act by Clause (a) provides for exclusion of jurisdiction of the District Court or other subordinate Civil Courts in respect of Suits or proceedings of the nature referred to in the explanation to sub-section (1) of Section 7 after establishment of the Family Court for the area. Clause (b) Section 8 excludes the jurisdiction and power of the Magistrate under Chapter IX of the Code of Criminal Procedure, 1973. By Clause (c) Section 8 it is provided that all Suits or proceedings of the nature described in clauses (a) to (g) in Section 7(1) and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 pending immediately before the establishment of such Family Court and which would have been required to be instituted before such Family Court if a Family Court existed at the date of institution shall stand transferred to such Family Court.

In 1986, to overcome the ratio in MOHD AHMED KHAN Vs SHAH BANO BEGUM & OTHERS, AIR 1985 S.C. 945, a case dealing with maintenance to a divorced Muslim Woman under Section 125 Cr.P.C., the Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. This Act referred hereinafter as the Muslim Women

Act by Section 3 declares certain rights of the muslim divorced women and lays down the procedure for the remedy in case of infringement of those rights. The fourfold rights declared in Clauses (a) to (d) of sub-section 1 of Section 3 of the Muslim Women Act are right to a fair provision and maintenance for self and child, right to Mahr or dower and right to properties given to the wife at or before the marriage by the husband, friend or relatives of the spouses. Section 3(2) is the most important for the present purposes and is quoted in extenso as under :

“(2) where a reasonable and fair provision and maintenance or the amount of Mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or anyone duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, Mahr or dower or the delivery, of properties, as the case may be.”

The Family Courts Act, 1984 being of the 14th day of September, 1984 does not, as it could not have, make any mention of the Muslim Women Act of 1986. No conflict can also be read between provisions referred to above from the two Acts. Therefore Section 20 of the Family Courts Act 1984 cannot apply even considering the fact that the Family Courts Act 1984 came into force in Assam in 1991 after the coming into force of the Muslim Women Act.

3. THE LAW AS INTERPRETED BY THE HIGH COURTS

- (A) A Division Bench of the Allahabad High Court in AMJUM HASAN SIDDIQUI Vs SALMA B, AIR 1992 All 322 decided on 18.01.1992 dealt with the question of jurisdiction of the Family Court to entertain an application under Section 3 of the Muslim Women Act by a divorced muslim woman. The Division Bench considered the provisions of Section 7 of the Family Courts Act 1984 and Section 3 of the Muslim Women Act then answered the question unequivocally that only the Magistrate and not the Family Court has jurisdiction to entertain and decide an application under Section 3(2) of the Muslim Women Act.**
- (B) A Division Bench of the Kerala High Court in EDAVALATH AVARAN KOYA Vs KUNNOTH MARIYAM 1993 CRL.L.J 1118 decided on 15.12.1992 dealing with the same question respectfully agreed with the holding in AMJUM SIDDIQUI (Supra)**

of the Allahabad High Court. The DIVISION bench even read the non-obstante clause with which Section 3(1) of the Muslim Women Act begins as covering not merely the substantive part of the provision but also the procedural part in sub-section (2) (3) and (4) of Section 3 of the Muslim Women Act.

- (C) A Single Judge of the Orissa High Court by a Judgment dated 26.04.1994 reported in SK. ALAUDDIN Vs SHAMIMA AKHTARI 1995 CriL.J. 228 dealt with an application under Section 3 of the Muslim Women Act by a divorced Muslim Woman seeking maintenance, dower and gifts filed before the Sub-Divisional Judicial Magistrate, The application was transferred to the Family Court. The jurisdiction of the Family Court to entertain the application was challenged by the former husband. The proceedings ended in an exparte Order against the former husband. The legality of the proceeding before the Family Court was challenged before the High Court. He High Court answered the question of jurisdiction in these words :-

“The Family Court, therefore, has no jurisdiction to deal with the matter, and the proceeding before it is misconceived. The orders passed in the proceeding are without jurisdiction. The matter shall be dealt with by the learned SDJM.”

3.1 THE CONTRARY VIEW

Contrary to what has been held by the High Courts of Allahabad, Kerala and Orissa the Bombay High Court in ALLABUKSH KARIM SHAIKH Vs NOOR JAHAN 1994 Cri.L.J 2826 decided on 22.06.1994 seems to hold that family Courts have jurisdiction to decide the matter of maintenance for divorced Muslim Women even after coming into force of the Muslim Women Act. In that case the application for maintenance was initially filed before the Metropolitan Magistrate at Bandra but got transferred to the Family Court at Bandra in purported exercise of power under Section 8(c) of the Family Courts Act. Since the application was filed jointly by the divorced Muslim Woman and her minor daughter the Family Court only like in the case of YASMINE –I granted maintenance to the child but rejected that of the divorced muslim woman. Unlike YASMINE-I the divorcee did not file revision but the former husband did challenging the payment of maintenance to the child. The only question before the High court was the correctness of the grant to the child. Having answered the question in favour of the grant the Division Bench also considered the question whether the Family Court has jurisdiction to entertain and decide an application for

maintenance filed by a divorced Muslim Woman. As the divorced woman herself did not move the High Court the conclusion and reasons therefore that such an application is entertainable by the Family Court is purely obiter. Reasons for the conclusion have been reached by perusal of only the provisions of the Family Courts Act. In the Judgment the Nonobstante clause in Section 3(1) and the entire procedural part of Section 3 of the Muslim Women Act have not been noticed. The provisions of Section 8(c) (ii) of the Family Courts Act and the statutory indication in Section 7 of the Muslim Women Act, that application by divorced Muslim Woman under Section 125 Cr.P.C. or 127 Cr.P.C. pending before Magistrate at the date of commencement of the Muslim Women Act shall be disposed of by the Magistrate under the provisions of the Muslim Women Act, seem to have been mis-appreciated. The holding in the judgment that “a proceeding under chapter IX of the Code is still available to a Muslim divorced woman in and before a Family Court, while the remedy under the Muslim Woman Act, of 1986 is an additional remedy” is difficult to appreciate and digest in view of the categorical provisions of Section 3(1) and the procedural provisions in Section 3(2), 3(3), 3(4) besides the statutory indication to the contrary contained in Section 7 of the Muslim Woman Act.

3.2 THE IMPLIED VIEW

The third view in between the two considered above is contained in SAMINA YASMINE –I and II (Supra) from the Gauhati High Court. In these two Judgments the question of jurisdiction of the Family Court though involved was not argued, debated and the law touching the question that is the relevant provisions of the Family Court Act like Section 7 and 8 and of Muslim Women Act like Section 3 and 7 were not considered. In the first case the learned Counsel submitted that the petition filed by Samina Yasmine under Section 125 Cr.P.C. should have been treated as a petition under Section 3(2) of the Muslim Women Act. The High Court quoted para 31 and 36 of DANIAL LATIFI Vs UNION OF INDIA, (2001)7 SCC 740 without considering the context of the extracts and accepted the submission of the learned Counsel for the petitioner and impliedly assumed that the Family Court has jurisdiction to decide the matter of maintenance for a divorced Muslim woman under Section 3(2) of the Muslim Women Act.

In SAMINA YASMINE –II (Supra) also the question of jurisdiction of the Family Court passed sub-silentio. Both these cases therefore cannot be treated as precedents on the question. In SAMINA YASMINE –II, DANIAL LATIFI (Supra) was relied on to hold that the divorced Muslim women is entitled to maintenance from her former husband beyond the period of iddat till she remarries. There is also the

categorical holding that a divorcee Muslim woman is not entitled to claim maintenance under Section 125 Cr.P.C.

Only other distinguishing feature of these two cases is that while cases from the High Courts of Allahabad, Kerala, Orissa and Bombay are cases pre DANIAL LATIFI (Supra) cases from the Gauhati High Court are post DANIAL LATIFI (Supra). Some features of this Supreme Court case are considered below.

4. DANIAL LATIFI (Supra)

The Constitution Bench of the Supreme Court by the Judgment in DANIAL LATIFI (Supra) decided on the 28th of September, 2001 disposed of a batch of Writ Petitions challenging the constitutional validity of the Muslim Women Act. The Supreme Court upheld the constitutional validity of the Muslim Women Act.

The Supreme Court further held :

- (1) A Muslim husband is liable to make reasonable and fair provision including payment of maintenance for the future of the divorced wife. Such provision extending beyond the period of iddat must be made within the period in terms of Section 3(1) (a) of the Muslim Women Act.**
- (2) Liability of a Muslim husband to his divorced wife arising under Section 3(1) (a) of the Muslim Women Act is not confined to the iddat period.**
- (3) A divorced Muslim Woman who has not remarried and is unable to maintain herself can proceed against her relatives and on their failure to provide maintenance against the State Wakf Board to obtain maintenance.**

It is necessary to note that in para 18 of the Judgment the Supreme Court listed the incidental questions arising in the Writ Petitions. These questions were ;

- (1) Whether the Muslim Women Act is retrospective in effect ?*
- (2) Whether Family Courts have jurisdiction to decide the issues under the Muslim Women Act ?*

(3) *What is the extent to which the Wakf Board is liable under the Muslim Women Act ?*

In para 19 of the Judgment the Supreme Court spoke thus :-

“We will decide only the question of constitutional validity of the Act and relegate the matters where other issues arise to be dealt with by the respective Benches of this Court either in appeal or special leave petition or Writ Petition.”

Indeed the Supreme Court (see para 22 and 23 of the Judgment) was concerned with interpretation of only the substantive part of Section 3 of the Muslim Women Act and not the procedural part enacted in sub-sections (2), (3) and (4) of Section 3. The Supreme Court also observed that “it may look ironical that the enactment intended to reverse the decision in SHAH BANO CASE actually codifies the very rationale contained therein.” It was observed that what could earlier be granted by the Magistrate under Section 125 Cr.P.C. would now be granted under the Muslim Women Act.

Thus the question of jurisdiction which is the theme of this writing though argued before the Constitution Bench in DANIAL LATIFI (Supra) was left to be decided by the respective Benches. Despite search within the resources available to the writer no direct decision of the Supreme Court on the question could be discovered.

However, in K.A. ABDUL JALEEL Vs T.A. SHAHIDA, (2003) 4 SCC 166 decided on the 10th April 2003 a Three Judge Bench of the Supreme Court considered the provision of Section 7 of the Family Courts Act 1984 and Section 3 of the Muslim Women Act in relation to a Suit by a divorced muslim woman against her former husband covered by the explanation to Section 7 of the Family Courts Act. AMJUM HASAN SIDDIQUI (Supra) was cited to contend that as held therein the Family Court has no jurisdiction. The Supreme Court held that the proceedings under Section 3 of the Muslim Women Act and that under section 7(1) of the Family Courts Act are absolutely distinct and separate.

5. CONCLUSION

The law as interpreted by the High Courts of Allahabad, Kerala and Orissa considered in para 3 of this writing appears to be the correct law on the question of jurisdiction of Family Courts to entertain and decide an application under Section 3 of the Muslim Women Act

which vests such jurisdiction only on the Magistrate and not the Family Court. In view of this the implication of YASMINE –I and II to the extent that an application of a Muslim divorced woman under Section 3 can be decided by the Family Court where such court exists does not have the support of law. Sooner the High Court dispels the uncertainty in this regard implicit in the three judgments from the Gauhati High Court by a definitive pronouncement from a Larger Bench the better.

6. POSTSCRIPT

The discovery of substantial portion of the case law considered in this writing has been the result of search by Sri Yusuf Azaz, a trainee Judicial Officer of the 2006 Batch of recruits to Assam Judicial Service. His efforts deserve thankful recognition. The Postscript has been added to record this recognition.