IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 29.08.2022
Pronounced on:02.09.2022

CRM(M) No.79/2020

MOHAMMAD ALI BHAT ... PETITIONER(S)

Through: - Mr. M. S. Latief, Sr. Advocate,
Mr. Zahid Khan, Advocate.

Vs.

SHAFEEQA BANO & ANR …RESPONDENT(S)

Through: - Ms. Sami Shah, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has filed the instant petition under Section 482 of the Cr. P. C challenging order dated 15.04.2019 passed by learned Chief Judicial Magistrate, Budgam, whereby, in a proceeding under Section 488 of the J&K Cr. P. C, the learned Magistrate has granted a monthly interim maintenance to the tune of Rs.2000/ to respondent No.1 and Rs.1500/ to respondent No.2. Challenge has also been thrown to order dated 11.12.2019 passed by learned Sessions Judge, Budgam, whereby, while dismissing the revision petition against the impugned order passed by the learned Magistrate, the learned Sessions Judge has upheld its validity.

2) Respondent No.1 claims herself to be the wife and respondent No.2, claims to be the daughter of the petitioner. They filed a petition under Section 488 of the J&K Cr. P. C before the learned trial Magistrate alleging therein that the petitioner has neglected and refused to maintain them. The petitioner herein filed his objections to the application and besides urging other grounds, he has submitted that in terms of document dated 10.01.2019 issued by Anjuman Sharie Shiaan, Jammu and Kashmir, responded No.1 herein has been divorced. The learned trial Magistrate while passing the impugned order granting interim maintenance in favour of the respondents, observed that the question whether the petitioner has pronounced Talaq upon respondent No.1 is a factual issue and the same can be determined only after evidence is led. Till such time, the learned trial Magistrate, granted interim maintenance in favour of both the respondents.

3) The impugned order passed by the learned trial Magistrate was challenged by the petitioner by way of a revision petition before Principal Sessions Judge, Budgam, on the ground that a divorced Muslim wife is not entitled to maintenance and, as such, respondent No.1 herein could not have been granted interim maintenance by the learned trial Magistrate. The Revisional Court while passing the impugned order upheld the validity of the order passed by the learned Magistrate and it was observed that validity of the communication dated 10.01.2019 can be decided only after the trial of the case and till that time, respondent No.1 cannot be left in the state of vagrancy.

4) The petitioner has challenged the impugned orders passed by the courts below through the medium of instant petition primarily on the ground that a divorced Muslim wife is not entitled to maintenance in terms of the provisions contained in Section 488 of the J&K Cr. P. C and, as such, even interim maintenance cannot be granted in her favour.

5) I have heard learned counsel for the parties and perused the impugned orders and the material on record.

6) learned Senior counsel appearing for the petitioner while arguing that respondent No.1, having been divorced by the petitioner in terms of communication dated 10.01.2019 issued by Anjuman Sharie Shiaan J&K, is not entitled to any maintenance from the petitioner, has relied upon the ratio laid down by this Court in the judgments delivered in the case of **Bashir Ahmad vs. Mst. Roshni and others,** 1995 SriLJ 255, **Riaz Ahmad vs. Suriya Begum,** 2017(1) JKJ 85, and **Sheikh Mohammad Shafi vs. Mehmooda,** 2018(1) SLJ 496.

7) So far as the facts of the case at hand are concerned, it is not in dispute that the petitioner had entered into a wedlock with respondent No.1 and out of this wedlock, respondent No.2 was born. So far as respondent No.1 is concerned, she claims that the marriage between her and the petitioner is still subsisting whereas the petitioner claims that the marriage stands dissolved in terms of communication dated 10.01.2019 of Anjuman Sharie Shiaan, J&K. Both the courts below have held that the question whether the petitioner had divorced

respondent No.1 can be determined only after recording of evidence to be led by both the parties during the trial of the case.

8) The question that falls for determination is as to whether production of document dated 10.01.2019 issued by Anjuman Sharie Shiaan, J&K, would conclusively and/or even prima facie show that respondent No.1 has been divorced by the petitioner. Dependent upon determination of the said issue would be the answer to the question whether respondent No1. herein is entitled to claim maintenance from the petitioner.

9) The issue touching the subject of divorce under Muslim Law has been a matter of discussion in a large number of judgments rendered by the different High Courts of the Country and the Supreme Court. In order to determine the controversy at hand, it will be apt to notice the observations made by different Courts in some of the celebrated judgments rendered on the issue.

10) In **Yousuf Rawther v. Sowramma, AIR 1971 Ker 261,** the eminent Judge and jurist V. R. Krishna Iyer-J, as His Lordship then was, has, while discussing the concept of divorce under Muslim Law, observed as under:-

> *"6. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before*

locating the precise connotation of the words used in the statute.

7……. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic lawof divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture ─ law is largely the formalized and enforceable expression of a community's cultural norms ─ cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions……. It is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage. "The Holy Quoran expresslyforbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them'." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife,by her indocility or her bad character, renders the marriedlife unhappy; but in the absence of serious reasons, noman can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simplecaprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously."…… "Commentators on the Quoran have rightly observed ─ and this tallies with the law now administered in some Muslim countries like Iraq ─ that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce…… After quoting from the Quoran and theProphet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by

> *'Talaq' or by 'Khola'……. Consistently with the secular concept of marriage and divorce, the law insists that at thetime of Talaq the husband must pay off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation."*

11) The aforesaid observations of the High Court of Kerala were noticed by the Supreme Court in the case of **Shamim Ara v. State of U.P. and another, (2002) 7 SCC 518**. While doing so, the Supreme Court explained the mode of pronouncement of divorce in the following words:-

> *"We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p.1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by deliveringa copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So*

> *also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter parte, containing a self-serving statement of respondent no.2, could not have been read in evidence as relevant and ofany value."*

12) In **Masroor Ahmed v. State (NCT of Delhi) & another, ILR (2007) II DELHI 1329**, Badar Durrez Ahmed-J, as his Lordship then was, while holding that communication of *talaq* to wife is a vital ingredient of pronouncement, made the following observations: -

> *"36. The Supreme Court made it clear in Shamim Ara (supra) that a talaq, to be effective, has to be pronounced. The manner of pronouncement of oral talaq also brings in differences in hanafi and ithna ashari schools. For one, the latter requires the presence of two competent witnesses, while the former does not. Then there is the issue of communication. A talaq may be pronounced in the absence of the wife. But, does it not need to be communicated to her? As discussed above, pronouncement of talaq materially alters the status of the wife. Her rights and liabilities flow from the nature of the talaq. Is it a revocable talaq or is it an irrevocable talaq? Then there is the question of iddat. Her right to residence. Her right to maintenance. Her right to mahr (if deferred). Custody of children, if any. Her right of pledging her husband's credit for obtaining the means of subsistence. How would she know that it is time for her to exercise these rights (or time for her not to exercise them, as in the case of pledging her husband's credit) if she does not even know that her husband has pronounced talaq? So, linked with the question of her rights is the issue of communication of the talaq to her? Furthermore, as pointed out above, the iddat period, in the case of a revocable talaq, is also a period during which the husband and wife have a re-think and attempt reconciliation. How would this be possible if the husband pronounces talaq secretly and does not at allinform the wife about it? Consequently, while it may not beessential that the talaq has to be pronounced in the presence of the wife, it is essential that suchpronouncement, to be effective, is made know to her, communicated to her, at the*

earliest. Otherwise she would be deprived of her rights post talaq and pre-dissolution. What is the earliest will depend on the facts andcircumstances of each case and would necessarily be a function of the access to communication that the husband and wife have. In the modern day, where every nook and cranny has landline or cellular coverage, in almost every case it would mean the same day. To my mind, communication is an essential element of pronouncement. Where the pronouncement of talaq is made in the presence of the wife, the acts of pronouncement and communication take place simultaneously. The act of pronouncement includes the act of communication. Where the wife is not present, pronouncement and communication are separated by time. The pronouncement would be valid provided it is communicated to the wife. The talaq would be effective from the date the pronouncement is communicated to the wife. In case it is not communicated at all, even after a reasonable length of time, a vital ingredient of pronouncement would be missing and such a talaq would not take effect."

13) In **Mohd. Naseem Bhat v. Bilquees Akhter and another, 2013 KLJ 466,** this Court observed that for a husband to wriggle out of his obligations under marriage including one to maintain his wife, claiming to have divorced her has not merely to prove that he has pronounced *Talaak* or executed divorce deed to divorce his wife but has to compulsorily plead and prove the following:-

I) *that effort was made by the representatives of husband and wife to intervene, settle disputes and disagreements between the parties and that such effort for reasons not attributable to the husband did not bear any fruit.*

II) *that he had a valid reason and genuine cause to pronounce divorce on his wife.*

III) *that Talaak was pronounced in presence of two witnesses endued with justice.*

IV) *that Talaak was pronounced during the period*

> *of tuhr (between two menstrual cycles) without indulging in sexual intercourse with the divorcee during said tuhr.*

14) In **Ali Abbas Daruwala v. Mrs. Shehnaz Daruwala** (WP No.114 of 2018 decided on 04.05.2018), the Bombay High Court while dealing with the plea of divorce raised by husband in the said case, in lightof the provisions of the Domestic Violence Act, observed as under:-

> *"10. The purpose of any provision of law which is beneficial to a woman is to provide some solace to a woman during the subsistence of the marriage or even after she is divorced out of the said marriage and since the Domestic Violence Act is an enactment to provide effective protection of rights of woman, who are victims of violence, the respondent-wife cannot be denied theumbrella of the said legislation. The respondent-wife has staked her claim by filing proceedings under the Domestic Violence Act, 2005 claiming monthly maintenance for herself and her children vide Exh-34. On the said application, the respondent-husband has been directed to produce all or any of the documents which arein existence or his possession and which are not produced by him so as to reflect his earnings. Though itis a specific case of the petitioner-husband that he has divorced to his wife, it cannot be expressed as a gospel truth specifically in light of the latest pronouncement of the Hon'ble Apex Court in case of Shayara Bano v. Union of India & others as to what would be the effect of such Talaknama. In any contingency this Court is not concerned with the validity of the said Talaknama at this stage and in this proceeding. This Court will have to restrict itself to the impugned order dated 22.06.2017passed by the Family Court at Bandra directing the husband to pay monthly amount for maintenance of the wife*

and the children and also to pay for the rent of the house where the wife is residing."

15) From the analysis of the law laid down in the foregoing judgments, it is clear that for a Muslim husband to avoid his liability to maintain his wife on the ground that he has divorced his wife, has not only to show that the divorce is validly pronounced in accordance with Muslim law but he has also to show that the said divorce has been communicated to the wife.

16) In the instant case, a perusal of the document dated 10.01.2019 allegedly issued by Anjuman Sharie Shiaan reveals that the petitioner is stated to have deposited the Talaq Nama as well as an amount of Mehar (Rs.75,000) and amount of maintenance (Rs.10,000) with the office of Anjuman Sharie Shiaan, Jammu and Kashmir Budgam. It nowhere provides that Talaq Nama has either been brought to the knowledge of respondent No.1 or that the amount of Mehar and maintenance has been received by her. Although, learned Senior counsel appearing for the petitioner has submitted that respondent No.1 appeared before the Anjuman and she has the knowledge about Talaq Nama, yet the learned counsel for the respondents has strongly disputed this fact and has submitted that the document in question is a unilateral document issued without the knowledge of respondent No.1.

17) As already noted, a Muslim husband, in order to avoid his liability to maintain his wife on the ground that he has divorced his wife, has to show that the divorce has been validly pronounced and that

the divorce has been communicated to the wife. In the instant case, this aspect of the matter has been strongly disputed by respondent No.1. Therefore, the matter regarding validity of the divorce and its communication to the wife becomes a triable issue.

18) Learned Senior counsel appearing for the petitioner has submitted that once the husband raises a plea of divorce before a Magistrate, unless it is proved that this plea of divorce is false, interim maintenance cannot be granted in faovur of the wife. In this regard, the learned counsel has relied upon the judgments of this Court in **Sheikh Mohammad Shafi vs. Mehmooda (supra)** as also the judgment of this Court in **Masarat Begum vs. Ab. Rashid Khan and another**, 2014 (3) JKJ 1(HC).

19) In **Masarat Begum's** case,(supra) the deed of divorce had been executed in presence of witnesses and it was duly notarized and the execution of the divorce deed had taken placed prior to the filing of the petition under Section 488 of the J&K Cr. P. C. It is in these circumstances, that this Court observed that it cannot be stated that the husband had raised the plea of divorce as a device to wriggle out of his liability to pay maintenance to his wife. Relying upon the said ratio, this Court rendered its judgment in **Sheikh Mohammad Shafi's** case (supra).

20) In the instant case, the document dated 10.01.2019, has come into existence only after the filing of petition by respondent No.1 before the learned trial Magistrate. The petition was filed by respondent No.1 on

11.12.2018 whereas the document, on the basis of which the petitioner claims to have divorced respondent No.1, has come into existence only on 10.01.2019 i.e., well after the institution of the petition. Besides this, the very communication of the divorce to respondent No.1 is in dispute in the instant case and there is nothing on record to even prima facie show that the Talaq Nama has been conveyed to respondent No.1. Therefore, the ratio laid down in the aforesaid cases is not applicable to the facts of the instant case.

21) The legal position propounded by petitioner that there has to be prima facie evidence to show that there was a relationship of husband and wife between the petitioner and respondent No.1 before granting of interim maintenance, cannot be disputed but then in the instant case it is admitted by the parties that the petitioner had entered into wedlock with respondent No.1. The petitioner has come up with a plea that he has divorced respondent No.1 on 10.01.2019. The burden is upon the petitioner to show that his act of divorcing respondent No.1 was valid as per the Islamic law and that the divorce was communicated to respondent No.1. It is a settled principle of evidence that one who alleges a fact, the burden lies upon him prove the said fact. It is the petitioner herein who has alleged that he has divorced respondent No.1. Therefore, burden is upon him to establish the said fact and unless he discharges the said burden, it cannot be stated that the marriage between him and respondent No.1 stands dissolved. In my aforesaid view I am supported by the judgments of this Court in the case of **Mushtaq Ahmad**

Badyari vs. Ruquya Akhter (CRMC No.412/2018 decideed on 12.11.2020) and **Jamurad Begum vs. Nazar Hussain and another** (CRM(M) No.357/2020 decided on 30.12.2020). It is pertinent to mention here that the ratio laid down by this Court in **Jamurad Begum's** case has been upheld by the Supreme Court and the Special Leave Petition against the said judgment has been dismissed by the Supreme Court in terms of order dated 02.02.2022 passed in petition for Special Leave to Appeal (Cri.) No.252/2022.

22) In view of the foregoing discussion, it is clear that unless the petitioner discharges his burden of showing that his relationship with respondent No.1 has ceased to exist, he cannot wriggle out of his liability to maintain the said respondent. The petitioner can do so only after trial of the case and till such time, he is obliged to pay interim maintenance to respondent No.1.

23) For the foregoing reasons, this Court does not find any ground to interfere with the impugned orders passed by the learned trial Magistrate and the Revisional Court whereby interim maintenance has been granted in favour of the respondents. The petition is, accordingly, dismissed being devoid of merit.

24) A copy of the order be sent to the learned trial Magistrate for information.

(SANJAY DHAR)
JUDGE

Srinagar,
02.09.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***