

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on:10.03.2014.*  
*Judgment delivered on:14.03.2014*

+ CRL.A.202/2006

SALIM @BHAJJU ..... Appellant

Through None.

Versus

STATE .... Respondent

Through Ms. Kusum Dhalla, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

**INDERMEET KAUR, J.**

1 Present appeal has impugned the judgment and order of sentence dated 08.03.2006 and 10.03.2006 respectively whereby the appellant Salim has been convicted for the offence under Sections 306/498-A of the IPC and has been sentenced to undergo RI for 5 years and to pay a fine of Rs.3,000/- and in default of payment of fine, to undergo RI for one year for the offence under Section 306 of the IPC; for the offence under Section 498-A of the IPC, he has been sentenced to undergo RI for three years and to pay a fine of Rs.3,000/- and in default of payment of fine, to undergo RI for one year.

2 Nominal roll of the appellant had been summoned. As on  
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05.09.2007, he had undergone a sentence of about 2 years and about 4 months; he had been granted bail vide order dated 01.04.2008 on which date, he had completed incarceration of about 2 years and about 11 months including the period of remission earned in that period.

3      Record shows that the present FIR has been registered on the complaint of Smt. Shakila (PW-2), the mother of the victim Shabana who had succumbed to her burn injuries. PW-2 had got her statement recorded before the Investigating Officer (Ex.PW-2/A). She had stated that Shabana who was her daughter married Salim about 10 years ago; they have three children; Shabana used to work in kothis to earn livelihood; Salim was a tailor by profession; Shabana told her that her husband used to consume liquor and used to beat her. A complaint had been lodged in the CAW cell, Seelampur; thereafter the parties who were earlier living at Durga Puri shifted to Janta Colony, Welcome; Najo, the sister of Salim and his mother were also living with them. Shabana had disclosed that she had been beaten by Salim and he was not giving her any money for the children. On 06.08.2005, she was informed that her daughter had received burn injuries; she went to the hospital where she was allowed to meet Shabana. Her daughter Shabana

was burnt and her face was swollen. Shabana informed her that she had received these injuries as a lamp of kerosene oil had fallen upon her; on re-questioning, Shabana told her the same fact but further added that she should perceive what had happened. This version in Ex.PW-2/A was reaffirmed by PW-2 on oath in Court.

4 In her cross-examination, PW-2 stuck to her stand; she admitted that the children are living with Salim and Salim had also sustained burn injuries; she reiterated that her daughter was conscious when she met her.

5 The father of the victim Mohd. Rasid (PW-7) has deposed that his daughter married to Salim according to Muslim rites about 10-12 years ago; on 07.08.2005, he received information that his daughter received burn injuries; she died on 11.08.2005; he stated that his daughter had not told him anything about her life with Salim but she used to tell her mother that she was harassed by her husband.

6 In his cross-examination, PW-7 had stated that a sum of Rs.25,000/- had been demanded by Salim; his daughter was threatened that if this money was not paid, Salim would divorce her; he stated that during the stay of his daughter and son-in-law at their house, they

appeared to be happy; no complaint regarding any dispute or altercation between the husband and wife had been made to the police either by PW-7 or by his wife (PW-2). He admitted that after the stay of his daughter and son-in-law, he did not visit his daughter's house nor she did visit their house; his daughter and son-in-law had visited their house at Nasbandi Colony about 5 years ago i.e. 2006 meaning that they had come to their house sometime in February, 2001.

7 Nanhi (PW-1) is the sister of PW-7. She was living close to Shabana and Salim; she admitted that Shabana and Salim had got married 10-12 years back; she had deposed that Shabana used to visit her house and complained about the behavior of Salim; 2-3 days prior to her death, Shabana had visited her house at noon time and had stated that Salim had given beatings to her and had left the house 7-8 days ago; thereafter she came to know about the incident of Shabana having got burnt. In her cross-examination, she admitted that on the date of the incident, she was not present at her house; she had gone to Bhajanpura where she has another house and since then she is living there. She denied the suggestion that she is deposing falsely at the behest of other family members.

8       A neighbor of the parties Subhash was been examined as PW-4. He stated that on 05.08.2005 at about 11:30 pm, a fire had broken out in the house of Salim and in the morning he came to know that Shabana had been removed to the hospital and she had set herself on fire. This witness had turned hostile. He was permitted to be cross-examined by the learned public prosecutor. He admitted that Shabana and Salim had been married 9-10 years ago; he denied the suggestion that on that day, Shabana had shouted for help; he denied the suggestion that he has been won over by the accused.

9       Apart from the testimonies of the aforementioned witnesses, testimony of SI Mohan Singh (PW-8) is relevant. He had recorded (Ex.PW-8/F), the statement of the victim on 07.08.2005; PW-8 has admitted that at the time of recording of this statement, the victim (Shabana) was not fit for statement; he did not make any application seeking opinion as to whether she was fit for statement. He admitted that doctor was present at that time but there is no endorsement of the doctor on this statement (Ex.PW-8/F) endorsing this fact that Shabana was in fact fit to make statement. He admitted that no doctor had attested Ex.PW-8/F; he admitted that he spent 30 minutes in recording the statement of Shabana.

In fact in a part of the deposition, PW-8 has admitted that on 07.08.2005, Shakila, the mother of Shabana met him and at that time Shabana was unconscious.

10 It is this document Ex.PW-8/F which has been heavily relied upon by the trial Judge to convict the appellant. The Court had noted that this was a credible dying declaration and although there was no endorsement of the doctor and no fitness certificate was obtained for recording of statement declaring the victim fit for statement but nevertheless the Court had noted that this version of the victim recorded by PW-8 reveals the true story and had thereafter gone on to base conviction on this document.

11 Learned public prosecutor has placed reliance upon (2004) 9 SCC 257 Kulwant Singh & Others Vs. State of Punjab to support his submission that a dying declaration does not require to be made in any particular form; it is not necessary that it should be recorded in the presence of a Magistrate; submission being that in a case where the deceased had died even seven days after making the statement, it was still held to be a 'dying declaration'. The dying declaration in the instant case is also fully credible.

12 Ex.PW-8/F as noted supra was recorded by the Investigating Officer. This is a statement under Section 161 of the Cr.PC. It is signed by the Investigating Officer himself. This statement which has been treated as a dying declaration has to be rejected for various reasons. Apart from the fact that the Investigating Officer has blatantly and candidly admitted that at the time when he recorded the statement Ex.PW-8/F, the doctor was present and it was recorded in his presence yet he did not take any endorsement of the doctor on this statement to corroborate his presence; PW-8 has also admitted that he did not make any application to the doctor to get her declared fit for statement before he recorded this so called version of the victim.

13 The MLC of the victim Ex.PA shows that the patient had been brought in for examination on 06.08.2005 at 12:50 AM with alleged history of burns; she was conscious and oriented at that time; she has suffered 70-80% burns which were almost on all parts including her arms; her front face was also burnt; her entire back including the back of her arms, her left thigh were also burnt. This is depicted from the pictures drawn on the MLC. There is another endorsement on the left side of the document showing that the patient was fit for statement on

06.08.2005. This fitness is admittedly dated 06.08.2005. Investigating Officer has recorded the statement of the victim on 07.08.2005. The victim had died on 10.08.2005. It is not the case of the prosecution that the victim was slowly on the road of improvement; her condition was in fact deteriorating; even presuming that she was fit for statement on 06.08.2005, why her statement had been recorded on 07.08.2005 without a fitness and especially when the patient had been admitted in the hospital in the earlier morning hours (12:50 am) of 06.08.2005 with 70-80% burns and her condition slowly deteriorating and not improving, it would be difficult to imagine that the patient was in fact fit, conscious and oriented to give a statement which could then be treated as a dying declaration.

14 The law on dying declaration is clear. It can be oral; it is also not necessary that it has to be in writing; it may not even be signed by the victim. However the circumstances of each case have been seen in the background in which they have occurred before credence can be given to such a document. This statement is even otherwise liable to be discarded for earlier reason; reason being that the statement of the mother of the victim was recorded on 07.08.2005; PW-8 has admitted

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that at the time when he recorded this statement of the mother; it was in the presence of the victim but the victim (Shabana) was unconscious at that time. This was on 07.08.2005. When Shabana regained consciousness has not been answered by the prosecution. This is relevant for the reason that the mother of the victim had stated that she had reached the hospital on 06.08.2005 and had spoken to Shabana at which point of time, she was conscious; they had intermittent talks; Shabana had disclosed that the incident was an accident with kerosene oil falling upon her from the table lamp; even on repeated query, Shabana gave the same reason for the accident but volunteered that her mother could perceive the situation.

15 Thus what emanates from this evidence is that Shabana was conscious on 06.08.2005 and had spoken to her mother and her mother giving a version different from Ex.PW-8/F which is to the effect that it was Salim who had goaded her to pour kerosene oil upon herself. These are two versions i.e. version given by PW-2 in Court and the version appearing in Ex.PW-8/F, the trial Court relying upon these conflicting versions, for convicting the accused for an offence under Section 306 of the IPC has committed a grave illegality.

16 For the offence under Section 306 of the IPC, abetment is an essential ingredient. Abetment has been defined in Section 107 of the IPC. The explanation contained therein is also relevant.

17 In AIR 1994 1 SCC 73 State of West Bengal vs Orilal Jaiswal the Supreme Court had cautioned that the courts should be extremely careful in assessing the facts and circumstances of each case for the purpose of finding out whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. Merely allegation of harassment without there being any positive action proximate to the time of occurrence i.e. to the act of suicide, conviction under Section 306 of the IPC is not sustainable.

18 In the facts and circumstances of the instant case, what has really weighed in the mind of the trial Court is document Ex.PW-8/F. It is this document which has been relied upon by the trial Judge to hold that Shabana had been goaded by her husband to commit suicide. This document is wholly unreliable. The statement of the victim has been treated as dying declaration but none of the parameters for recording of a dying declaration were adhered to; in fact the Investigating Officer had admitted that although the doctor was present at the time when he

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recorded this statement yet he chose not to obtain his signatures or his endorsement on this document.

19 There is every reason to discard Ex.PW-8/F. Moreover Ex.PW-8/F is wholly contrary to the statement of the mother of the victim (PW-2) on the basis of which the FIR had been registered. PW-2 had stated that her daughter had hold her that it was because of an accidental fall of the table lamp containing kerosene oil that she had sustained burn injuries. This was reiterated on a re-questioning. It appears that the imagination of the Judge had carried him a bit far and he chose to build up a story and toe the version set up by the Investigating Officer who appears to have recorded an alleged statement of the victim but there appears to be no evidence to show that she was either conscious or oriented to make such a statement; admittedly this version was recorded on 07.08.2005 i.e. after the recording of the statement of PW-2 and PW-8 admitting that at that time i.e. at the time when he recorded the statement of PW-2, victim was unconscious. At the cost of repetition, it is also not the version of the prosecution that the victim was improving after 06.8.2005. Her condition was worsening every day till she finally succumbed to her injuries on 10.08.2005. The judgment of Kulwant

Singh (supra) relied upon by the learned public prosecutor does not come to his aid.

20 PW-7 was only a witness of hearsay; he has admitted that his daughter had never disclosed about any cruelty meted out to her by Salim; he and his wife had also not made any complaint about this harassment meted out to their daughter; this is again in contrast with the version of PW-2 who had stated that her daughter had made a complaint in the CAW Cell. Nanhi (PW-1) the neighbor did not support the version of the prosecution.

21 The fundamental rule of criminal jurisprudence is that the prosecution must stand on its own legs. There is no doubt that for an offence of abetment of suicide under Section 306 of the IPC; once the initial threshold i.e. essential ingredients of the offence as contained in Section 306 of the IPC have been established, the presumption contained in Section 113-A of the Indian Evidence Act gets attracted which is for the benefit of the prosecution. However, to avail of this benefit, the initial threshold has to be crossed which has not been done in the instant case. The conviction of the appellant under Section 306 is illegal; it is accordingly set aside.

22     However the conviction of the appellant under Section 498-A of the IPC does not call for any interference. As far as the ingredients of Section 498-A are concerned, the cruelty to the woman by the husband during substance of their marriage; and in this regard the testimony of PW-2 has remained un-assailed. PW-1 has also corroborated the version of PW-2 of Shabana deposing about the harassment which was meted out by her husband; her husband used to take liquor and also not providing her money for daily expenses. PW-7 was a hearsay witness, his testimony may be ignored. Testimony of PW-4 is also liable to be discarded.

23     In this background, conviction of the appellant under Section 498-A of the IPC is maintained.

24     For the offence under Section 498-A of the IPC, the trial Judge has sentenced the appellant to undergo RI for a period of 3 years and to pay a fine of Rs.3,000/- and in default of payment of fine to undergo RI for 1 year. As noted supra, the nominal roll of the appellant shows that as on date, the appellant has undergone incarceration of 2 years and 11 months. Keeping in view the aforementioned background, while maintaining the conviction of the appellant under Section 498-A of the IPC, the

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sentence of imprisonment already undergone by the appellant shall be the sentence imposed upon him for the offence under Section 498-A of the IPC. Bail bonds of the appellant are cancelled. Surety discharged.

25      Appeal disposed off in the above terms.

**INDERMEET KAUR, J**

**MARCH 14, 2014**

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