

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CFA No. 41/2016

Reserved on: **07.12.2023**

Pronounced on: **28.12.2023**

**Ghulam Mohammad Pandit
S/O Mohd Ramzan Pandit
R/O Duru Sopore**

...Appellant(s)

Through: Mr. Imtiyaz Sofi, Advocate.

Vs.

- 1. Mehbooba Akhter
D/O Sonaullah Sofi
R/O Malabagh Srinagar**
- 2. Adnan Pandit
S/O Gh. Mohd. Pandit
R/O at present Malabagh Srinagar**
- 3. Mehvish
D/O Gh. Mohd. Pandit
R/O at present Malabagh Srinagar**
- 4. Masarat alias Lodly
D/O Gh. Rasool Bisati
R/O Malabagh Srinagar**
- 5. Principal Galaxy Public School Soura.**

...Respondent(s)

Through: Mr. G.N.Shaheen, Advocate.

CORAM:

HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

1. This Civil 1st Appeal has been preferred against the judgment and decree dated 16.03.2016, (for short 'the impugned judgment) passed by the court of learned 3rd Additional District Judge Srinagar in Civil Original Suit No.18/N titled *Mehbooba Akhter & Ors. Vs. Ghulam Mohammad Pandit & Ors.*, in terms whereof the appellant has been directed to make the payment of

monthly maintenance @ Rs.4500/-, Rs.6000/- and Rs.4500/- in favour of respondents 1, 2 and 3 respectively, with effect from 19.05.2003, and setting off the monthly interim maintenance paid @ Rs.2000/- per month in favour of respondents 2 and 3.

2. The impugned judgment has been challenged through the medium of the instant appeal, *inter alia* on the following grounds:-

- a) That the trial court has not at all discussed the evidence produced by the appellant in support of the issues framed by the trial court, which rendered the impugned judgment and decree perverse and unsustainable under law;
- b) That the appellant had led the evidence wherein he proved that he has divorced respondent No.1 on 15.02.2005 in presence of two witnesses who also proved the said fact and the trial court has not discussed their evidence while deciding the issues framed by the trial court;
- c) That the trial court has by passing the impugned judgment tried to interfere with the 'shariat' and has failed to appreciate that the parties are governed by 'shariat law' so far as marriage, divorce etc. is concerned, particularly when the parties belong to 'Hanafi' sect;
- d) That the parties are living separately since 2003 and the plaintiff herself has set out the case that she is living separately from the appellant since 19.05.2003;

- e) That the appellant divorced the respondent No.1 on 15.02.2005 not only by pronouncing the 'talaq' but also by reducing the same into writing, in presence of the witnesses who also were examined by the appellant as witnesses in the case;
- f) That the respondent No.1 has filed the suit on 19.03.2005, pleading therein that she has not accepted the divorce and that the divorcee is entitled to maintenance till she remarries;
- g) That the trial court has not considered the oral evidence of the appellant and the evidence of the witnesses in whose presence the 'talaq' was pronounced and without recording any reason the trial court has brushed aside the said evidence which has caused great miscarriage of justice;
- h) That the trial court has simply held that the appellant has not duly divorced the respondent No.1, which amounts to interference in the religious matters of the parties, moreso, when the trial court has not recorded any reason in this behalf;
- i) That the trial court has not touched the evidence produced by the appellant while deciding the issues framed in the suit;
- j) That there is no evidence on record that the salary of the appellant is more than Rs.20,000/-, while as he had expressly stated that his salary is Rs.7000/- and that he has to maintain the other dependents also;

- k) That the trial court has fixed the maintenance amount at the rates mentioned in the impugned judgment from 2003 which is patently illegal;
- l) That the trial court has also not considered the entitlement of respondents 2 and 3 for maintenance as the respondent no.2 has attained the majority one year back and is able to earn his livelihood himself and cannot be said to be the dependent as on date, similarly respondent no.3 is about to cross 18 years within next few months and how long the appellant has to pay the maintenance to her is not mentioned which also renders the impugned judgment illegal.

3. The factual matrix of the case is:

- 3.1.** that the appellant and respondent No.1 entered into a marital wedlock on 18.09.1995 and out of which, respondent No.1 gave birth to respondents 2 and 3, who are of the age of 19 years and 17 years respectively; that the attitude and behavior of respondent No.1 with the appellant did not remain cordial and she did not behave like a Muslim prudent wife, with the result the relationship between the appellant and respondent No.1 got strained and the respondent No.1 left the appellant's house; that the appellant made all efforts to bring back the respondent no.1 to resume the marital life but of no use; that the appellant also sought the intervention of his relations, friends and well wishers but all in vain; that the respondent no.1 did not leave any stone unturned to

defame the appellant and leveled baseless libels and character assassinations against the appellant; that the appellant was constrained to divorce the respondent No.1 on 15.02.2005 in presence of the witnesses and sent the same to respondent no.1 through registered post on 16.02.2005 against proper receipt; that before the divorce was pronounced, the appellant and respondent no.1 were living separately for about two years; that the appellant had filed an application under Section 25 of Guardian and Wards Act in respect of his minor children i.e. respondents 2 and 3 before the court of competent jurisdiction, seeking their custody.

- 3.2.** The respondent no.1 filed the suit, wherein, among other things, it was projected that she has not been divorced and that she has not accepted the divorce and that the appellant cannot divorce the respondent no.1 unilaterally and claimed maintenance from the appellant; that the appellant resisted the suit and took a firm stand that he had divorced the respondent no.1 on 15.02.2005; that the trial court after considering the facts and circumstances of the case, framed issues for determination; that the parties have led evidence and the appellant proved that he has divorced respondent no.1 on 15.02.2005, still the trial court decided issue Nos. 1 and 9 against the appellant, simply stated that mere placing of Photostat copies of divorce-deed and notices sent to respondent no.1, cannot

be taken as a proof. Finally, appellant has prayed for setting aside the impugned judgment.

4. The trial court, after consideration of the matter, framed the following issues for determination:-

1. *Whether divorce pronounced by the defendant No.1 against the plaintiff No.1 is non-est, non-existent and having no legal or Quranic sanctity? OPP 1*
2. *Whether the plaintiff No.1 is unable to maintain herself having no earnings of her own? OPP 1*
3. *Whether the plaintiffs were turned out by force by the defendant from his family quarter allotted to him in SKIMS Soura and since 19 of May 2003, the plaintiffs are living separately in a rented house ? OPP 1*
4. *Whether the defendant No.1 earns more than Rs. 20,000/- besides his monthly salary of Rs.30,000/- OPP 1*
5. *Whether the plaintiff No.1 requires Rs. 7000/- for her monthly maintenance and Rs.6000/- and Rs.5000/- respectively for the maintenance of her children i.e., plaintiffs 2 and 3 ? OPP*
6. *Whether the plaintiff No.1 is entitled to past maintenance as claimed in para 10 of the plaint? OPP*
7. *Whether the plaintiff No.1 is entitled to arrears of rent incurred by her for dwelling purposes from the defendant No.1 ? OPP*
8. *Whether the plaintiff No.1 is entitled to the cost of ornaments and other electronics and allied articles*

from the defendant No.1 to the tune of Rs. 1,75,000/-?

OPP 1

9. *Whether the plaintiff No.1 has been divorced on 15.02.2005 in accordance with mandate of Shariah and is free to marry any person of her choice ? OPD 1*
10. *Whether the plaintiff No.1 is only entitled to claim maintenance for the period of Iddat and the unpaid Mehar to the tune of Rs. 20,000/- ? OPD 1*
11. *Whether defendant No.1 earns a monthly salary of Rs.7000/- only on which he has to maintain himself, his old aged parents and unmarried sister ? OPD 1*
12. *Whether the plaintiff No.1 is working as teacher in a private school drawing Rs.2000/- p.m and is not entitled to claim maintenance as prayed for ? OPD 1*
13. *Whether the plaintiff No.1 has taken all the ornaments with her at the time of her departure and has never brought the other items/articles as shown in the plaint with her to the house of the defendant No.1 ? OPD 1*
14. *Whether the plaintiff No.1 has stigmatized the character of defendant No.1 by leveling frivolous allegations against him in the plaint ? OPD 2*
15. *Relief?*

5. Learned trial court, after leading evidence by the parties and keeping in view the arguments advanced by their counsel, allowed the suit of the plaintiff with the following directions:-

“....Defendant No.1 is directed to make the payment of maintenance @ Rs.4500/- in favour of

plaintiff No.1, Rs.6000/- in favour of plaintiff No.2 and Rs. 4500/- in favour of plaintiff No.3 respectively. This order shall operate from the 19.05.2003. However, maintenance paid @ Rs.2000/- p.m in favour of plaintiff No.2 and 3 be set off.”

6. Aggrieved of the said judgment and decree, the appellant has filed the instant appeal, praying for setting aside the said judgment and decree dated 16.03.2016, impugned in the instant appeal, and also prayed that the suit be dismissed.
7. On consideration of the matter, this Court vide order dated 07.04.2016 as an interim measure, had stayed the impugned judgment and decree to the extent of respondent no.1. The Court further provided that in case appellant deposits an amount of Rs.2.00 lacs within three weeks with the Registry of this Court, then execution decree in respect of respondents 2 and 3, to the extent of arrears of the maintenance, shall stay, however, appellant shall continuously pay the decretal amount from the date of decree to the respondents 2 and 3. Thereafter, vide another order of this Court dated 24.07.2017, a direction was issued that out of balance arrears, an amount of Rs.50,000/- shall be paid to the respondent-children by the appellant, so as to enable them to pursue their studies, however, same shall be without prejudice to the rights of the appellant.
8. Mr. Imtiyaz Sofi, learned counsel for the appellant, while reiterating the grounds projected in the Appeal, vehemently argued that the respondent No.1 has failed to produce any evidence before the trial court that she is not validly divorced;

that since respondent No.1 has already been divorced and is not his wife now, there is no question of maintaining her financially. Furthermore, learned counsel argued that respondent No.2 has already attained majority and is able to earn his livelihood himself and cannot be said to be dependant as on date. So far as respondent No.3 is concerned, learned counsel argued that respondent No.3 was about to cross 18 years of age on the date of filing of the appeal and further wondered that how long the appellant has to pay maintenance to her. His further argument is that the learned trial court has wrongly decided the issues framed by it against the appellant, that too without appreciating the record, evidence and law laid down on the subject.

9. Mr. G.N.Shaheen, learned counsel for the respondents, ex-adversus, contended that there is no conclusive evidence to prove the divorce between the appellant and respondent No.1. He further contended that the learned trial court has recorded correct findings on all the issues including the maintenance in favour of the respondents. His further contention is that the respondent No. 2 and 3 are unemployed and are undergoing professional courses, as such, the maintenance in favour of the said respondents has been correctly decided. Learned counsel further contended that the respondent No.1 was a part-time teacher in a private school, however, is not working now.
10. Mr. Shaheen has further argued that even after giving 'Talaq', the husband is expected to make provision for maintenance of the wife and this provision needs to be made during 'Iddat'

period. To buttress his submission, learned counsel has relied upon the judgment of Supreme Court rendered in **Shabana Bano Vs. Imran Khan reported as AIR 2010 SC 305**, and **Shahana Vs. State of U.P & Anr.** reported as **2011 (1) Crimes(HC) 464**.

11. Heard, perused the record and considered.

12. The Supreme Court has held that the amount of maintenance to be awarded in such a case cannot be restricted for 'Iddat' period and the maintenance to be fixed during 'Iddat' period should be such that it is sufficient for livelihood of the wife even after the 'Iddat' period or for the period till the applicant does not remarry. Hon'ble Allahabad High Court in a case '**Shahana Vs. State of U.P & Anr.**' reported as **2011 (1) Crimes(HC) 464**, has held that the plea of husband in written statement that he had divorced wife and had communicated divorce by registered post as well by telegram to wife, is to be proved, if the same is challenged by the wife.

13. 'Talaq', in order to be effective has to be pronounced. In case there is no proof of 'talaq' having taken place, 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. These observations have been made in a case titled '**Shamim Ara Vs. State of U.P. & Anr.**' reported as **(2002) 7 SCC 518**. The Supreme Court in the said judgment has further observed that the husband ought to have adduced evidence and proved the pronouncement of 'talaq' and if he

failed in proving the plea raised in the written statement, the plea ought to have been treated as failed.

14. The Supreme Court has dealt with a similar case in ‘**Danial Latifi & Anr. Vs. Union of India reported**’ as AIR 2001 SC 3958, wherein it has observed and held that :-‘

“...The important section in the Act is [Section 3](#) which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of [Section 3](#) of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her. The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a

lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act..."

15. In Manzoor Ahmad Khan v Saja reported as **2010 (4) JKJ 380**, the High Court of Jammu & Kashmir, noted that in Shamim Ara (supra), the Apex Court relied upon the passages from judgments of various High Courts "which are eye openers for those who think that a Muslim man can divorce his wife merely at whim or on caprice" and finally held that the marriage between the parties did not stand dissolved.

16. In Masroor Ahmed v State (NCT of Delhi, ILR (2007)2 Del. 1329), it was held as follows:

"Thus, after Shamim Ara (supra), the position of the law relating to talaq, where it is contested by either spouse, is that, if it has to take effect, first of all the pronouncement of talaq must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that talaq was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place...."

17. In 'Shayara Bano Vs. Union of India' reported as **(2017) 9 SCC 1**, the Supreme Court observed:

"Marriage in Islam is a contract, and like other contracts, may under certain circumstances, be terminated. (But) In the absence of good reason, no man can justify a divorce..... Divorce breaks

the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage."

18. Therefore, following the legal principles emerge from above discussion for judging the validity of ‘talaq’:

- a) ‘Talaq’, whether oral or writing, must be pronounced in presence of two witnesses;
- b) If wife is not present at the time of pronouncing talaq, it should be communicated to her;
- c) There should be reasonable cause for divorce;
- d) Effort of reconciliation made by two persons appointed by parties - one from husband side and other from wife side;
- e) Mere averment of divorce in written statement/application in a case before a court will not be effected as valid divorce.

19. It is a settled principle of law that the pronouncement of ‘talaq’ has to be proved on evidence. Merely taking a plea in the written statement before the trial court for maintenance, that the husband had divorced the wife sometime in the past, would not have the effect of effectuating a divorce on the date of delivery of the copy of the written statement to the wife.

20. The issue relevant for the disposal of this Appeal is to determine that the appellant divorced the respondent No.1 on 15.02.2005 and the divorce was validly given and effected in view of relevant judicial pronouncements in the country. In **Shamim Ara’s** case (supra), the Hon'ble Supreme Court held

that Talaq, in order to be effective has to be pronounced. The Court said that plea of talaq taken in unsubstantiated written statement submitted before a court should not be accepted as proof of talaq. Elaborating the meaning of word 'pronouncement', the Supreme Court said that the term 'pronounce' means to proclaim or to utter formally which is essential to effect divorce. The Court said that divorce must be for reasonable cause and it must be preceded after attempt of reconciliation between husband and wife before two persons, one from the side of the husband and other from the side of wife who should make effort for reconciliation.

21. In the instant Appeal, it has to be seen as to whether on the alleged date i.e., 15.02.2005, the appellant validly effected divorce by pronouncing 'talaq'? Whether it was duly communicated? Whether there was reasonable cause for divorce? It is also to be established that prior to pronouncement of 'talaq' whether the effort was made by appointing two persons- one from the side of appellant and other from the side of respondent No.1, who could initiate reconciliation, and only after failure of reconciliation process, divorce was effected.

22. Admittedly, the 'talaq' was not pronounced before the respondent No.1-wife, as the appellant himself has said that they were living separately since 2003 when infact the 'talaq' was pronounced on 15.02.2005. There is also not any reasonable cause projected for 'talaq'. The only allegation in the appeal is that the behavior of respondent No.1-wife with the appellant-husband was not cordial and she did not behave like a

Muslim prudent wife. There is no evidence given from the side of the appellant that any effort was made for reconciliation by appointing two arbiters, one from the side of husband's family and other from the side of wife's family. Thus, the essential condition mentioned above is also not satisfied.

23. On the touchstone of the law laid down in the above referred judgments, the appellant's case of divorce being given on 15.02.2005 was not established in the court below and the conclusion reached by the court below is factually and legally correct.

24. The trial court, while deciding the case determined the quantum of compensation on the touchstone of guesswork. The suit had been filed in the year 2005, whereas the same was granted and decreed in the year 2016. The trial court while deciding the relevant issue No.5, has not decided the case on any parameters of expenses, on the basis of evidence but on general principles. It was incumbent upon the trial court to return finding on monthly maintenance based on available evidence and also as to how long the same has to continue. The trial court has not conditioned the decree as to how long wife and children shall be entitled to maintenance. The wife is entitled to receive maintenance till the subsistence of her marriage and till the 'iddat' period, whileas the children are entitled, in case of son, till he attains the age of majority and in case of daughter, till her marriage.

25. On a keen consideration of the finding returned on issue No.5, whose onus to prove had been placed on the plaintiff, it is found

that the parties have not led sufficient evidence to effectively adjudicate the issue and the trial court returned the finding on this issue not exclusively based on evidence but on some guess-work with regard to expenses required by the wife and the children to maintain themselves and, as such, the liability was fixed on the appellant herein to pay them the amount, which has been decreed. The finding on issue No.5 is, thus, not sustainable and, is, liable to be set aside.

26. Viewed thus, the Appeal is partly allowed and the finding recorded on issue No. 5 by the trial court is, hereby, set aside. As a result, the case is remanded to the trial court to record finding on the issue No.5, after hearing parties afresh. The parties, if so desire, shall also be given an opportunity to lead evidence for and against, before returning such finding. Parties, through their counsel, are directed to cause their appearance before the trial court for further orders of proceedings on **22.01.2024.**

27. Lower court record (LCR) be sent down along-with a copy of this judgment, for information and compliance.

(M. A. CHOWDHARY)
JUDGE

Srinagar
28.12.2023
Muzammil. Q

<i>Whether the Judgment / Order is Reportable:</i>	<i>Yes / No</i>
<i>Whether the Judgment / Order is Speaking:</i>	<i>Yes / No</i>