

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO.229 OF 2005

Mukhtar Shaikh S/o Aref Shaikh
Age : 28 years, Occu. Nil,
R/o H.No.4-12-57, Old Bajjipura,
Aurangabad.

...Applicant

VERSUS

1. Dr. Sameena Shahin d/o Salim Shaikh
Age : 26 years, Occ. Household,
R/o. Ariba Clinic, Plot No.5,
Arsh Masjid Road, Yunus Colony,
Aurangabad.

2. Shaikh Nabiha d/o Mukhtar Shaikh,
Age : 1 year,
Under the guardianship and through
Respondent No.1.

...Respondents

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Ms. Madhaveswari S. Mhase, Advocate for the applicant.
Ms. C.E. Gaikwad, Advocate for the respondents.

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CORAM : S.G. MEHARE, J.

DATED : MARCH 15, 2023

ORAL JUDGMENT :-

1. Heard respective counsels at length.
2. The husband has impugned the order of the Principal Judge, Family Court, Aurangabad, in Petition No.E-427/2004 dated 04.07.2005, granting maintenance under section 125 of Cr.P.C.
3. The learned counsel for the husband has raised the sole question that the Family Court has no jurisdiction to entertain a Muslim divorcee women's application under Section 125 of the

Criminal Procedure Code, after the Muslim Women (Protection of Right on Divorce) Act, 1986 (for short 'Muslim Women Act, 1986') came into force.

4. Learned counsel for the applicant/husband vehemently argued that the divorce was sent to her by registered post. The jurisdiction of the Family Court was impugned in the trial on the above legal issue. However, the learned Judge, Family Court, misinterpreted the law and granted her maintenance under Section 125 of the Cr.P.C. The talaqnama was legal and valid. The conditions for divorce by written talaqnama were also followed. The Family Court has exceeded its jurisdiction. Therefore the impugned Judgment and order is illegal, improper and incorrect. To bolster her arguments, she relied on the case of Karim Abdul Rehman Shaikh Vs. Shehnaz Karim Shaikh and others, 2000 (3) Mh.L.J. 555.

5. Per contra, learned counsel for the respondent/wife has vehemently argued that the learned Principal Judge, Family Court, Aurangabad, has scrutinized the facts of the case and correctly held that the written talaqnama was not legal and valid. A Muslim woman who has not legally divorced can see the maintenance under Section 125 of the Criminal Procedure Code. Therefore, the Family Court has jurisdiction. She would also argue that the learned Judge has discussed the facts and the relevant provisions of the law in proper

perspective and passed the impugned order. Hence, the petition is liable to be dismissed.

6. The parties did not dispute the service of written talaqnama by Registered Post A.D. The Hon'ble Supreme Court, in the case of Karim Abdul (supra), has pronounced that after the commencement of the Muslim Women Act 1986, a Muslim divorced wife cannot apply for maintenance under the provisions of Chapter IX of the Criminal Procedure Code. However, the question before the Family Court was about the legality and validity of the talaqnama. The learned Judge, Family Court, held that the talaqnama was not legal and valid. Therefore, her application under Section 125 of Cr.P.C. was maintainable before it. The Family Court followed the ratio in the case of Dagadu Chhotu Pathan V Rahimbi Dagadu Pathan 2002 (3) Mh.L.J. 602 of the Bombay High Court. Paragraph No. 22 of the said Judgment is relevant as regards the valid and legal divorce by a husband orally or by written talaqnama, that reads thus;

“22. A divorce by the husband is Talaq and it has its oral as well as written forms. The oral form of Talaq can be effected in three modes viz. Talaq-e-Ahsan, Talaq-e-Hasan, Talaq-ul-Biddat or Talaq-e-Badai. The first two forms are conditioned and they are accepted to be more civilized but while resorting to any of these two forms there are conditions precedent and it is not that the husband is at his free will to resort to any of these modes at any time and without assigning any reasons. If the husband feels that his wife does not care for him, she is incompatible,

she does not listen to him, she does not love him, she refuses to cohabit with him, she engages in cruel behaviour, she is unfaithful or for any other reason, he has the right to give Talaq to his wife but by following certain procedure. Firstly, he has to make it known to his wife about any of these reasons and she must be given time to change her behaviour. If by his direct conversation/persuasions she does not change her behaviour, the husband has to resort to the process of conciliation by informing to her father or any other parental relations. Two arbitrators, one from wife and one from the husband, are required to be appointed and it shall be the duty of the Arbiters to bring in a settlement between the parties so that they live together happily and in spite of these efforts having been made if the discord still persists to an irreparable level there is no alternative but to separate and it is at this stage that the husband has the right to give Talaq to his wife. The stage of conciliation with the intervention of the arbiters is a condition precedent for effecting Talaq either in Ahsan form or Hasan form. It will be seen that in all disputes between the husband and the wife the judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other failing which divorce is to be effected. Therefore, though it is the husband, who pronounces the divorce, he is as much bound by the decision of the judges as is the wife. This shows that the husband cannot repudiate the marriage at his will. The case must be first referred to two judges and their decision is binding. Talaq must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by the arbitrators, one from the wife's family and the other from the husband's. If

the attempts failed, Talaq may be effected. In other words, an attempt at reconciliation by two relations; one each of the parties, is an essential condition precedent to Talaq.”

7. The full bench of this Court, in the above case, has laid down the procedure for a valid divorce by a Muslim husband. The husband claimed that he had served his wife a written talaqnama, which is legal and valid. Testing his evidence on the anvil of the requirement of a valid divorce, the Court is of the view that he failed to prove that he gave a valid talaq to his wife. The validity of talaq was raised before the Family Court. It goes to the root of the jurisdiction of the family. Provisions of Section 125 Cr.P.C. is a social justice legislation. A distinct approach has to be adopted while dealing with such applications. The said section has imposed certain conditions to get the maintenance. If the wife claims maintenance under the said section, she must be a legally wedded wife or a wife on the date of filing the application. Unless she is disqualified, she is entitled to maintenance. Hence, the learned Judge, Family Court, appears to have correctly examined the validity of the alleged talaqnama and correctly concluded that it was not legal and valid. The reasons for invoking or having jurisdiction to entertain such an application also appear correct and legally acceptable. The Court agreed with the view taken by the Family Court.

8. In the facts of the case and considering the evidence with the provisions of law, this Court is of the view that the order impugned before this Court was well-reasoned, legal, proper and correct. Hence, it does not require interference. Therefore, the following order :

ORDER

- (i) The revision application stands dismissed.
- (iii) Record and proceedings be returned to the Family Court at Aurangabad.
- (iii) The respondent/wife is allowed to withdraw the amount of Rs.50,000/- deposited in this Court, and the office is directed to pay the amount to the respondents.
- (iv) Rule is discharged.

(S.G. MEHARE, J.)