

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

**Criminal Writ Petition No. 917 of 2014**

Mirza Khudaratulla Baig s/o.  
Mirza Noorulla Baig,  
Age : 32 years,  
Occupation : Private Service,  
R/o. Shobha Nagar, Nanded,  
Taluka & District : Nanded.

.. Petitioner  
(Original respondent)

**versus**

1. Mahenaz w/o. Mirza Khudaratulla Baig,  
Age : 23 years,  
Occupation : Household,  
R/o. Mandhai Area, Old City, Nanded,  
Taluka & District : Nanded.

.. Respondents  
(No.1 - Original applicant)

2. The State of Maharashtra.

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*Mr. Hamzakhan I. Pathan, Advocate, for the petitioner.*

*Mr. S.A.G. Qureshi, Advocate, for respondent no.1.*

*Mr. S.G. Nandedkar, Additional Public Prosecutor,  
for respondent no.2 - State.*

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**CORAM : SMT. SADHANA S. JADHAV, J.**

**DATE : 25TH MARCH 2015**

**ORAL JUDGMENT :**

1. Heard Adv. Mr. H.I. Pathan for the petitioner, Adv. Mr. S.A.G. Qureshi for respondent no.1, and the learned APP Mr. S.G. Nandedkar for respondent no.2 - State.

2. Rule. Rule made returnable forthwith. By consent, heard finally.

3. The petitioner herein is original respondent in Misc. Criminal Application No. 142/2011 wherein the wife of the petitioner i.e. the present respondent had filed an application under Section 125(1) of the Code of Criminal Procedure, 1973, seeking maintenance at the rate of Rs. 5,000/- per month. In the said proceedings, notice was served upon the respondent. He appeared in the court, through an Advocate, on 29-7-2011. The learned court had granted time and opportunity to the present petitioner to file his say. However, the petitioner failed to file his say and, therefore, the learned court was constrained to proceed with the application without waiting for the say of the petitioner. The learned Magistrate, in the circumstances, was constrained to place implicit reliance upon the oral and documentary evidence produced by the applicant therein and had considered her contentions. Upon appreciating the evidence led by the applicant i.e. present respondent no.1, the learned 6th Judicial Magistrate (F.C.), Nanded, vide order dated 31st October 2012, allowed the application partly. The learned Magistrate directed the present petitioner to pay monthly maintenance to the respondent, at the rate of Rs. 3,000/- from the date of application. The petitioner was also directed to

pay costs of Rs. 1000/- to the applicant therein.

4. The petitioner herein filed an application under Section 397 of the Code of Criminal Procedure, 1973, before the Sessions Judge at Nanded. The petitioner had demonstrated that there was sufficient cause and reason for not filing his say before the Judicial Magistrate (F.C.). He had contended before the revisional court, that the contentions raised in the application seeking maintenance were unfounded. The learned Sessions Court had considered that on 30th August 2011, the petitioner herein had filed an application for filing say and time was again granted to him till 29th September 2011. On 29th September 2011, the petitioner had again sought an adjournment. The said application was rejected on the ground that sufficient time was already granted to the petitioner. The learned Magistrate had passed an order below Exhibit 1 on 21st April 2012, to proceed with the matter without say of the petitioner. No doubt, the applicant had also sought time for leading evidence and ultimately filed affidavit, in evidence, on 2-7-2012. The contents of the affidavit were verified by the learned Magistrate on the same day and the matter was adjourned for cross examination. However, the petitioner chose to remain absent and hence, the applicant was not cross examined. The petitioner had not filed any application seeking orders to set aside the order of 'no say' or to cross examine the applicant. The learned Sessions Judge has observed that during the period 29th September 2011 to 21st April 2012, the petitioner had not filed his say along with the application for permission to participate in the proceedings. The learned Sessions Judge had rightly observed that the petitioner has not made out satisfactory grounds to explain as to what had constrained him from participating in

the said proceedings. In view of this, the learned Sessions Judge had rejected the revision and held that the learned Magistrate, in the interest of justice, has rightly relied upon the evidence adduced by the applicant. Hence, the present petition.

5. The learned Counsel for the petitioner submits that during the pendency of the proceedings, respondent no.1 has re-married and hence, she would not be entitled for seeking maintenance under Section 125(1) of the Code of Criminal Procedure, 1973. The petitioner has placed on record, the copy of *Talaknama*. However, the learned Counsel for respondent no.1 submits that the factum of pronouncing *Talaknama* has been disputed by the present respondent. The learned Counsel for respondent no.1 has placed reliance upon the judgment of Hon'ble Division Bench of this Court, in the case of ***Mrs. Rehana Mushtaz Temrekar Vs. State of Maharashtra & another***, reported in **2008 ALL MR (Cri.) 1628**. The Hon'ble Division Bench of this Court has placed reliance on the judgment of this Court in the case of ***Dagdu s/o. Chotu Pathan Vs. Rahimbi Dagdu Pathan & others***, reported in **2002 ALL MR (Cri.) 1230**, and has observed that when the pronouncement of *Talak* is disputed, then the parties will have to lead evidence to that effect. The Hon'ble Division Bench was pleased to remand the matter to the Family Court for adducing evidence to that effect and had given fair opportunity to the respective parties to adduce evidence. It was held that the factum of divorce will have to be proved by leading evidence.

6. The learned Counsel for the petitioner submits that, in the interest of justice, it would be appropriate to remand the matter and give

opportunity to the petitioner to lead evidence in respect of two issues, *firstly*, the pronouncement of *Talak*, and *secondly*, that respondent no.1 has got re-married. The learned Counsel for respondent no.1 submits that, in fact, it is open for the petitioner to file an application under Section 127 of the Code of Criminal Procedure, in the changed circumstances. However, that would not meet the ends of justice as in the present case, there are disputed questions of fact as well as law.

7. This Court [*Coram : M.T. Joshi, J.*] vide order dated 12th September 2014, has stayed the execution of the impugned order after directing the petitioner to deposit an amount of Rs. 50,000/- in the court of concerned Judicial Magistrate (F.C.), on or before the returnable date. The learned Counsel for the petitioner submits that the petitioner has complied with the order dated 12th September 2014. Today, the learned Counsel for the petitioner, upon instructions, submits that the petitioner is willing and desirous to deposit the arrears before the Judicial Magistrate (F.C.), Nanded.

8. The petitioner shall pay the arrears of maintenance in two instalments. The first instalment of Rs. 35,000/- [Rupees thirty five thousand] shall be paid within four weeks from today. The rest of the arrears shall be paid in the next instalment within four weeks thereafter. The petitioner undertakes to pay the maintenance amount regularly from the month of April 2015, at the rate of Rs. 3,000/- per month. In view of this undertaking, the matter needs to be remanded to the learned Judicial Magistrate (F.C.) for decision afresh.

9. In the result, the petition is partly allowed.

(A) The judgment and order dated 12th May 2014, passed by the learned Sessions Judge, Nanded, in Criminal Revision No. 119/2012, is quashed and set aside.

(B) The matter is remanded to the court of Judicial Magistrate (F.C.), Nanded. The learned Magistrate shall permit the petitioner to file his written say. The said say shall be filed in accordance with law. Upon acceptance of the written say, the learned Judicial Magistrate (F.C.) shall permit the petitioner to cross examine the applicant in Misc. Criminal Application No. 142/2011 as per her convenience. The learned Judicial Magistrate (F.C.) shall decide the said Application afresh on its own merits. All contentions of the respective parties are kept open.

10. Rule is made absolute in the above terms.

**( SMT. SADHANA S. JADHAV )**  
**JUDGE**

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