

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

CRIMINAL WRIT PETITION NO. 202 OF 2005

1. Masaratbee W/o Fakir Mohmad Shaikh,
Age. 38 years, Occ. Household,
R/o. Gulab, Tq. Ausa, Dist. Latur.
2. Nijamoddin S/o Fakir Mohmad Shaikh,
Age. 16 years, Occ. Education,
U/g. Of his natural mother,
Petitioner No. 1.

...PETITIONERS
(Orig. Applicant)

Versus

Fakir Mohmad S/o Faijoddin Shaikh,
Age. 40 years, Occ. Centering Contractor,
R/o. Miskinpoora, retnapur Chowk, Near
House of Advocate Badade, Latur

...RESPONDENT
(Orig. Opponent)

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Advocate for Petitioners : Smt Anuja Sarvade h/f Anjali
Dube

Advocate for Respondents : M L Dharashive

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CORAM : V.K. JADHAV, J.

Dated: November 28, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed
by the Judicial Magistrate First Class, Ausa dated
20.7.2004 in M.A. No.37/2003 to the extent of rejection

of her application for grant of maintenance and further common judgment and order passed by the Adhoc Additional Sessions Judge, Latur dated 20.1.2005 in Criminal Revision No.68/2004 preferred by the (present petitioner) and Criminal Revision No.76/2004 preferred by the (present respondent) approached to this court by filing present criminal writ petition.

2. Brief facts, giving rise to the present writ petition are as follows :-

a] Petitioner no.1 and respondent are husband and wife and petitioner no.2 is their son born to them out of their marital wedlock. Their marriage was solemnized 17 years prior to filing of the application before the trial court seeking maintenance. After marriage, respondent no.1 and his family members started causing ill-treatment to respondent on account of non-fulfillment of certain demands. Even, after birth of petitioner no.2 respondent had not come to see her and newly born baby. In spite of all these facts, petitioner no.1 stayed in the house of respondent. However, respondent alongwith his family members drove her out from the house in the

night time and since then she is residing with her parents. Respondent no.1 is not providing anything towards maintenance. Respondent-husband has sufficient means to pay maintenance. Thus, the petitioner no.1 alongwith her son petitioner no.2 has approached the court by filing M.A. No.37/2003 claiming maintenance @ Rs.1,500/- p.m. each as maintenance.

b] Respondent-husband has strongly resisted the application on various grounds. It has contended that, petitioner no.1 cohabited with respondent till the birth of petitioner no.2 and thereafter she started saying that marriage was performed against her wish. In the year 1989 the petitioner no.1 left house of the opponent on her own accord. At that time she took with her cash amount of Rs.1,000/-, gold ornaments and cloths. Respondent-husband has made many attempts to bring her back for further cohabitation. However, she did not return. In the year 1994-1995 petitioner had gone abroad in Gulf country. After her return, respondent-husband had made attempt to bring her back for

cohabitation, however, petitioner no.1 had denied for the same. Thus, on 17.4.2003 respondent no.1 gave her divorce in presence of Nayab Kazi and two witnesses and thus petitioner no.1 ceased to be his wife.

c] The petitioners as well as respondent led their oral and documentary evidence in support of their rival contentions. Learned Judicial Magistrate First Class, Ausa by its impugned judgment and order dated 20.7.2004 partly allowed the application and thereby directed the respondent-husband to pay maintenance @ Rs.5,00/- p.m. to petitioner no.2 alone and rejected the claim of maintenance of petitioner no.1. Being aggrieved by the same, petitioners have preferred criminal revision no.68/2004 and respondent-husband also preferred criminal revision no.76/2004. The learned Adhoc Additional Sessions Judge, Latur by its impugned judgment and order dated 20.1.2005 dismissed the revision petition by confirming the order passed by the learned Magistrate. Hence ,this writ petition.

3. The learned counsel for the petitioner submits that, respondent-husband has failed to prove that he had given divorce to the petitioner no.1. Learned counsel submits that, however, both the courts below have erroneously come to the conclusion that respondent-husband has not refused and neglected to maintain petitioners. Learned counsel submits that, petitioner no.1 wife has alleged and proved the unlawful demand of cash amount made by respondent-husband. Petitioner no.1 wife was subjected to ill-treatment on account of non fulfillment of the said demand. Even petitioner no.1 wife was driven out from the matrimonial house on account of non fulfillment of the said demand of the cash amount. Learned counsel submit that the trial court has given unnecessary weightage to the certain admissions given by the father of the petitioner no.1. Learned counsel submits that trial court has come to a wrong conclusion that petitioner no.1 had left her matrimonial house on her own accord and that respondent-husband has made several attempts to bring her back. Learned counsel submits that, even the respondent-husband has deposed that in the year 1992

he had contracted/performed second marriage. Learned counsel submits that, though parties are Mohammedan, it is well settled that if the husband performed second marriage then the same would be a just ground for a wife to reside separately and claim maintenance. Learned counsel submits that, only on the basis of the suggestions given by respondent, courts below held that petitioner no.1 wife was guilty of desertion and further merely on the basis of certified copy of the report in crime no.3028/2003 vide Exh.38, held that since petitioner no.1 was found in possession of unauthorized stock of petrol she is not a woman who is unable to maintain herself. Learned counsel submits that, respondent no.1 husband has failed in his duties to maintain his wife and taken a false plea of Talaq and in case, if the petitioner no.1 wife find it difficult to maintain herself and indulged in some activities, which are not warranted her application for maintenance cannot be thrown out on the ground that she is able to maintain herself. Learned counsel submits that orders passed by the courts below are thus liable to be quashed and set aside to the extent so far as rejection of

application for maintenance filed by petitioner no.1.

4. Learned counsel for petitioners in order to substantiate her contentions placed her reliance on the following cases :-

1. Begum Subanu alias Saira Banu and Another Vs. A.M. Abdul Gafoor reported in AIR 1987 SC 1103.

2. Shaikh Babbu Shaikh Suleman Vs. Rashida Shaikh Babbu and Another reported in 2002 (2) Mh.L.J. 495.

3. Saygo Bai Vs. Chueeru Bajrangi reported in (2010) 13 SCC 762.

5. Learned counsel for respondent husband submits that, respondent husband has proved the factum of talaq by examining certain witnesses. Respondent husband has examined witness no.2-Mukhtar Pathan in whose presence the respondent husband has given Talaq to petitioner no.1. Furthermore, respondent husband has placed on record office copy of the notice Exh.21 to show that on the same day of divorce a notice was issued to the petitioner and intimation of divorce was accordingly given to her. Learned counsel submits that, fact of divorce is thus communicated to petitioner

no.1 and respondent-husband has therefore duly proved talaq given to petitioner no.1. Learned counsel submits that therefore application u/s 125 of Cr.P.C. seeking maintenance is not maintainable.

6. Learned counsel submits that, petitioner no.1 wife left the company of respondent-husband without any just cause. As per the admissions given by the witnesses of petitioner no.1, respondent-husband treated well the petitioner no.1 till birth of petitioner no.2 and as per their own admissions she never cohabited with respondent-husband thereafter. Learned counsel submits that, the courts below have therefore rightly come to the conclusion that it is the wife who is guilty for desertion and she is not entitled for separate maintenance since living separately without any just cause. Learned counsel submits that, under the Mohammedan law, second marriage is permissible and therefore, same is not a ground available to the petitioner-wife to reside separately and claim maintenance. Learned counsel submits that, petitioner no.1-wife is indulged in various activities and on one

occasion she had gone abroad. Furthermore, crime was also registered against her under the provisions of Essential Commodities Act for selling Petrol unauthorizedly. Both the courts below have therefore rightly come to the conclusion that petitioner no.1-wife in the instant case is able to maintain herself. Learned counsel submits that, both the courts below have recorded concurrent findings and accordingly rejected the application claiming maintenance filed by petitioner no.1. No interference is required.

7. Learned counsel submits that, so far as petitioner no.2 is concerned, he had attained majority long back and his application seeking maintenance is now liable to be rejected.

8. Learned counsel in order to substantiate his contention places his reliance on a case Sangita Arun Mhasvade Vs. Arun Aba Mhasvade and another reported in 1984 Cri L. J page 1524.

9. On careful perusal of the impugned judgment and order passed by the courts below and evidence adduced by the parties, it appears that respondent-husband in support of his claim of divorce has examined himself and witness no.2 Mukhtar Pathan and also examined two more witnesses and further produced copy of Talaqnama Exh.25 and its translated copy at Exh.28. Respondent-husband has also further places his reliance on the notice giving intimation of divorce to the petitioner no.1 at Exh.21. Both the courts below have recorded concurrent findings that respondent-husband has failed to prove the factum of divorce. By giving reference to the observations made in a case of Dagadu Chotu Pathan Vs Rahimbi Dagdu Pathan reported in 2002(3) Mh.L.J.602, the learned Magistrate has observed that, an attempt at reconciliation between the husband and 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. Respondent No.1 has examined witness no.3 Khajakhan

Pathan to show that respondent-husband made an attempt for pre-divorce conciliation. Said witness is friend of respondent- husband and he could not answer most of the questions put to him during the course of cross examination. Even, respondent-husband has failed to state in his pleadings that, a pre-divorce conciliation was failed and therefore, he left with no other remedy but to give talaq to petitioner no.1. Both the courts below have disbelieved the evidence of respondent-husband on the point of pre-divorce conciliation. Respondent-husband has failed to discharge burden to prove pre-divorce conciliation and thus the courts below have rightly recorded findings in the negative and thereby held that respondent-husband failed to prove talaq.

10. Petitioner no.1 has examined herself and given all the details of the demands of the cash and ill-treatment she was subjected to on account of the non-fulfillment of the said demands. Petitioner no.1 has pleaded that despite ill-treatment she resided at the house of respondent-husband for a span of four months after

birth of petitioner no.2. It is difficult to accept that after birth of petitioner no.2 without any reason petitioner no.1 wife started making a statement that she do not want to stay with respondent-husband. It has come in the evidence of the petitioner no.1 and also in the evidence of her father that respondent-husband and his family members drove her out from the matrimonial home and since then she is residing with her parents. It is not disputed that, respondent- husband had performed second marriage. Both the courts below have observed that, petitioner no.1 left the house on her own accord and started residing with her parents without any just cause. However, the fact that respondent-husband had performed second marriage is sufficient for a wife to reside separately and to claim maintenance even though the parties are Mohammedan

11. In a case Begam Subanu (supra) relied upon by learned counsel for the petitioners, the Supreme Court has observed that, in case of Mohammedan though husband can marry again under personal law, first wife is entitled to claim maintenance and separate residence

on that ground.

12. In a case *Sk Babbu (supra)* relied upon by learned counsel for the petitioner, it is held that “the second legally married wife if refused to live with her husband on the ground that the husband is living with the first wife, despite the offer from the husband to maintain her, is enough to prove neglect and is entitled for maintenance within the meaning of the second proviso to sub-section (3) of Section 125 read with explanation thereunder.”

13. Learned counsel for respondent husband placed his reliance in a case *Sangita Mhasvade (supra)* wherein, in the facts of the said case, it is observed that, wife on her own leaving matrimonial house and therefore, she is not entitled to maintenance as husband could not be said to have neglected or refused to maintain her.

14. In the instant case, petitioner no.1-wife has adduced satisfactory evidence before the Magistrate that

after marriage she was subjected to ill-treatment on account of non-fulfillment of certain demands and that she has every right to claim maintenance by residing separately since respondent-husband had performed second marriage.

15. On careful perusal of the impugned judgment and order passed by the courts below, it appears that, undue weightage is given to registration of one crime in the year 2003 against petitioner-wife for dealing unauthorizedly in the business of petrol and kerosene. It is observed by the courts below that, it cannot be said that, petitioner-wife is unable to maintain herself. In the instant case, respondent-husband has failed to provide any maintenance to the petitioner no.1-wife. Further, he had taken a plea of divorce which he could not substantiate. Thereafter, admittedly, he had performed second marriage. In such a situation, if, the petitioner no.1-wife even though said crime in which charges of the Essential Commodities Act has been levelled against her are yet to be proved, it can not be said that, petitioner no.1-wife is able to maintain herself

as she indulged in the activities including some illegal activities. Respondent-husband has failed to prove that he has not refused and neglected to maintain petitioner-wife even though she started residing with her parents. It appears that, both the courts below have erroneously rejected the application of the petitioner no.1-wife for grant of maintenance.

16. Thus, considering the income of the respondent-husband and the standard of living of the parties to the proceeding and considering the prices of the Essential Commodities in the year 2003, it would be just and proper if the respondent-husband is directed to pay the maintenance to the petitioner no.1-wife @ Rs.500/- (Rs. Five Hundred) p.m. Hence, following order.

O R D E R

- I. Criminal Writ Petition is hereby partly allowed.
- II. The judgment and order passed by the Judicial Magistrate First Class, Ausa dated 20.7.2004 in M.A. No.37/2003 and the judgment and order passed by the Adhoc

Additional Sessions Judge, Latur dated 20.1.2005 in Criminal Revision Petition No.**68/2004 & 76/2004** are hereby quashed and set aside to the extent of rejection of application for grant of maintenance filed by the petitioner no.1-wife.

- III. Criminal Application No.37/2003 is hereby partly allowed and respondent-husband is directed to pay maintenance @ Rs.500/- (Rs. Five Hundred) each to both the petitioners from the date of application.
- IV. Needless to say that respondent- husband is at liberty to file an application under the provisions of Section 127 of the Code of Criminal Procedure for cancellation of the maintenance order passed in favour of the petitioner no.2 on the ground that he has attained majority during the pendency of this criminal application.
- V. Criminal Application accordingly disposed off. Rule is made absolute in above terms.

(**V.K. JADHAV, J.)**

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