

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

CRIMINAL APPLICATION NO. 615 OF 2004

Sk. Nawab s/o Sk. Biban Patel,
Age: 55 years, Occ: Agri.,
R/o. Ghodegaon (Shillegaon
Police Station), Tq. Gangapur,
Dist. Aurangabad.

...APPLICANT

VERSUS

1. Hasinabegum d/o Nemdar Patel,
Age: 50 years, Occ: Household,
R/o. Jalka, Tq. Newasa,
Dist. Ahmednagar.

2. State of Maharashtra.

...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.1852 OF 2005

IN

CRIMINAL APPLICATION NO. 615 OF 2004

WITH

CRIMINAL APPLICATION NO.2228 OF 2016

IN

CRIMINAL APPLICATION NO. 1852 OF 2005

IN

CRIMINAL APPLICATION NO. 615 OF 2004

Hasinabegum d/o Namdar Patel,
Age: 50 years, Occ: Household,
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VERSUS

Sk. Nawab s/o Sk. Biban Patel,
Age: 55 years, Occ: Agri.,
R/o. Ghodegaon (Shillegaon
Police Station), Tq. Gangapur,
Dist. Aurangabad & anr.

...RESPONDENTS

...

Mr. P.P. Dawalkar, Advocate h/f Mrs. C.S. Deshmukh, Advocate for
applicant in Cri. Application No. 615/2004 and for respondent No.1 in
Cri. Application Nos. 1852/2005 & 2228/2016

Mr. Amit R. Vaidya, Advocate for respondent No.1 in Cri. Application
No. 605/2004 and for applicant in Cri. Application Nos.1852/2005
and 2228/2016

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CORAM : N.W. SAMBRE, J.

DATE : 5th MAY, 2016

ORAL JUDGMENT :

This application is filed under Section 482 of the Code of Criminal Procedure by the husband questioning the legality and validity of the judgment and order dated 07/01/2004 passed by learned Additional Sessions Judge, Aurangabad in Criminal Revision No. 100 of 2003, whereby the applicant-husband was directed to pay lump sum maintenance amount of Rs.1,50,000/- towards future maintenance to the respondent-wife in five equal yearly installments of Rs.30,000/-.

2. The facts as are necessary for deciding the present criminal application are as under :-

Parties to the proceedings claimed that they are legally married couple. The claim under Section 3(1)(a) of the Muslim Women (Protection of the rights on Divorce) Act, 1986 came to be moved by the respondent-wife. It was the case of respondent-wife that having spent almost more than two decades with the applicant-husband and having a married daughter, was subsequently neglected by the applicant, resulting into filing of the application under Section 125 of the Code of Criminal Procedure by the wife and also on behalf of minor daughter Taslim. The said application came to be resisted by the applicant-husband on the ground that there was a divorce and as such, ceased to be a wife. According to respondent-wife, total assets of the applicant-husband are worth around of Rs.25,00,000/- in 2000, which includes house and agricultural land and as such, he is duty bound to make appropriate provisions of maintenance and as such, claimed amount of Rs.5,00,000/- for future maintenance.

3. Though the applicant-husband admitted the relationship of husband and wife, however claimed that in view of divorce, he being former husband, is not liable to pay maintenance but only *Meher* which is already paid. He would submit that the maintenance for the *iddat* period was also paid.

4. Considering the rival claims of the parties and evidence as was brought on record, learned Magistrate answered the plea as regards neglect to maintain her and ordered payment of Rs.3,00,000/- for future maintenance. The said order was questioned by present applicant-husband before learned Sessions Judge, Aurangabad under Section 397 of the Code of Criminal Procedure in a revision. By the judgment and order dated 07/01/2004 revisional Court partly allowed the revision preferred by the husband and reduced the amount of future maintenance from Rs.3,00,000/- to Rs.1,50,000/- to be paid in five equal yearly installments.

5. A revision preferred by the wife for enhancement being Revision No. 119 of 2003 was dismissed. As such, present application by the applicant-husband.

6. Heard Mr. D.P. Dawalkar, learned Counsel holding for Mrs. C.S. Deshmukh, learned Counsel for the applicant-husband, Mr. Vaidya, learned Counsel for respondent No.1-wife and learned A.P.P. for respondent No. 2.

7. Learned Counsel for the applicant would submit that once the plea of divorce is raised and could established, right to claim future maintenance from ex-husband is not identified under the Divorce Act. He would invited attention of this Court to the Sections 3 and 4 of the Divorce Act so as to submit that the maintenance is required to be paid only for *iddat* period preceding three months of the date of marriage. Learned Counsel submits that *Meher* as was agreed was already paid, so also maintenance for three months and in view thereof, both the Courts below have committed an error of awarding future maintenance. It is then claimed that the amount of maintenance as is ordered is disproportionate to the source of income, as the applicant is labour and earning only Rs.1000/- per month at the relevant time.

8. Per contra, learned Counsel for the respondent-wife

would urge that neither factum of *Talaq* nor the denial of right under the Divorce Act is identified in law. He would submit that there is hardly any material on record to infer that there was divorce, however sufficient material is placed on record as regards the applicant-husband has neglected to maintain the respondent-wife.

9. With the assistance of learned Counsel, I have scanned the record, orders impugned and evidence as is brought on record. What is required to be noted in the present application is that the applicant-husband has admitted his marriage with respondent-wife but has claimed that there was divorce. If the applicant-husband has come with a plea that there was divorce, the burden rest on him to prove the same. Appropriate support as regards whether there was valid divorce or not could be drawn from the full bench judgment of this Court in the matter of **Dadgu Chotu Pathan vs. Rahimbi Dagdu Pathan and others** reported in **2002(3) Mh.L.J. 602**, particularly paragraphs-22 and 26, which 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 inspite 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 wives family and the other from the husbands. 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.

26. The above discussion does indicate that mere pronouncement of Talaq by the husband or merely declaring his intentions or his acts of having pronounced the Talaq is not sufficient and does not meet the requirements of law. In every such exercise of right to Talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for Talaq. Conveying his intentions to divorce the wife are not adequate to meet the requirements of Talaq in the eyes of

law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as condition precedent for the husbands right to give Talaq to his wife. It is, thus, not merely the factum of Talaq but the conditions preceding to this stage of giving Talaq are also required to be proved when the wife disputes the factum of Talaq or the effectiveness of Talaq or the legality of Talaq before a Court of law. Mere statement made in writing before the Court, in any form, or in oral depositions regarding the Talaq having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.

It is a fallacious argument that in case of a minor or a woman past menopause, the oral Talaq in the form of Ahsan or Hasan could be pronounced by the husband at any time or at his sweet will as in such cases there is no Iddat. However, the period of Iddat has been specifically defined and even in such cases there is a waiting period of three lunar months even though there is no occurrence of menstruation. The view taken by this Court in the case of Chandbi Ex W/o Bandeshah Mujawar (supra) cannot be accepted as a good law.”

10. In view of above mandate of law, if the material as is placed on record is analyzed, same in my view is not sufficient to prove that there was a divorce between the applicant and respondent. Rather the burden on the present applicant to prove the same has not been discharged.

It is brought on record that the respondent herein claiming maintenance as *Pardanishi* women and married with the present applicant was not in dispute. So far as the source of income of the present applicant is concerned, same is duly dwelt upon by both the Courts below. The order of payment of one time maintenance amount is based on sufficient evidence brought on record and the fact remains that the applicant has not proved the issue of lawful divorce to the respondent.

11. Be that as it may, even if presuming that the respondent-wife has moved the application that future maintenance pursuant to the provisions of Sections 3 and 4 of the Divorce Act as referred supra, still in my opinion, the applicant is liable for payment of maintenance under the provisions of Divorce Act. Constitution

Bench of the Apex Court in the matter of **Danial Latifi and another vs. Union of India** reported in **(2001) 7 SCC 740** while dealing with the plea as regards entitlement of the maintenance of a divorced muslim woman, in paragraph-36 has observed thus :

“36. While upholding the validity of the Act, we may sum up our conclusions:

1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to

pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.”

12. In this background, in my opinion, the law laid down by the Apex Court in the matter of ***Danial Latifi and another*** (supra) governs the case in hand.

13. It was expected of the applicant to bring law laid down by this Court in the matter of Dagdu Chotu Pathan (supra) and Apex Court in the matter of ***Danial Latifi and another*** (supra) to the notice of this Court while he claimed interim relief from this Court. What is noted is, on the date of filing of the proceedings and claiming interim relief contrary to the law laid down by this Court and Apex Court in above referred two judgments was not brought to the notice of this Court in the matters cited supra.

14. As such, in my opinion, no case for interference is made out. As such, criminal application fails and stands dismissed.

15. Amount of Rs.50,000/- (Rs. Fifty thousand only) as are deposited in this Court are permitted to be withdrawn by the respondent-wife along with interest, if any accrued thereon.

16. The respondent-wife will be entitled to recover the balance amount of Rs.1,00,000/- (Rs. One lac only) from the applicant-husband, which shall carry interest @ 6% per annum from the date of the application i.e. 27/11/2000, if the said amount of maintenance is not paid by present applicant-husband.

17. Criminal Application No. 615 of 2004 stands disposed of in above terms.

18. In view of above, Criminal Application Nos. 2228 of 2016 and 1852 of 2005 stand disposed of.

[N.W. SAMBRE, J.]