

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 19.07.2016

+ **MAT. APP.(FC) 93/2016**

SHABANA ALI AND ANR.

..... Appellants

Through : Sh. M.D. Azam Ansari, Advocate with
the appellant in person.

Versus

FARMAN ALI @ SHAHIL

..... Respondent

Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The appellant is aggrieved by an order of the Family Court whereby her application for recall of the summoning order (issued on 16.12.2014) in ML No.7/2014 was rejected.

2. The brief facts necessary for the decision in this appeal are that the respondent (Farman Ali) sought – in proceedings in ML 7/2014 – a decree for restitution of conjugal rights and a further declaration that the marriage between the appellant and the second appellant, Mohd. Aadil was a nullity. In brief, it was contended by Farman Ali *alias* Shahil in the proceeding before the trial judge that he had solemnized marriage with the present appellant Shabana Ali on 26.03.2006 at Hazrat Nizamuddin Dargah, New Delhi. According to Farman Ali, that marriage was his second marriage. The respondent also alleged to have lived with the first appellant in Sewak Park, Uttam Nagar, New Delhi and that she left him on 23.10.2014. Farman Ali

alleged that he was informed by the first appellant's brother that she was later married to the second appellant.

3. Based upon the allegations in the petition, the Family Court issued summons which were received by the appellant. She was supplied with a copy of the petition on 27.02.2015. She contested the proceedings and filed an application on 23.03.2015, requesting the Court to recall the order summoning her. According to the allegations in the application, she had never contracted the marriage. Since the Family Court did not decide the application, the appellant had preferred the Mat.Appeal (FC) No.90/2015. That appeal was disposed of on 21.07.2015 with the following directions:

"In the above circumstances, we are of the view that interest of justice would be best met if the learned Family Court first decide the application moved by the appellant No.1 seeking dismissal/rejection of the petition preferred by the respondent instead of insisting upon the appellant No.1 to file written statement. Sufficient material has been placed by the appellant No.2 to show that he lawfully married appellant No.1 on 23rd October, 2014 and in the light of the material placed on record, we find that the pleas raised by the appellant No.1 on the application filed, deserves consideration.

We accordingly, direct the learned Family Court to decide the said application filed by the appellant No.1 after completing the pleadings in the same.

The appeal is disposed of in the above terms.

(Underlining by us) "

4. The appellant argues that the impugned order is untenable because the respondent had never pleaded any material fact disclosing as to who had witnessed the marriage. Furthermore, he did not produce the *nikaahnama*

and made frivolous allegations. In these circumstances, the Family Court should have addressed itself primarily to the existing record rather than proceed on surmises. Learned counsel emphasized that the very pendency of the proceedings can be a source of great hardship because she would be forced to defend a plainly false claim and, therefore, undergo harassment, besides hardship.

5. The trial Court considered the effect of Section 20 of the Family Courts Act which states that the Act would have an overriding effect over all other provisions of law. The Court thereafter noticed the salient allegations made by Farman Ali in his petition. Thereafter it discussed, what *prima facie* are the essentials of a Muslim marriage, by citing the judgment in *Rahima Khatoon v. Saburjanessa and Ors.* AIR 1996 (Gau) 333 as well as *Mulla's Principles of Muslim Law, 20th Edition*. The Court then reasoned as follows:

“12. In the present case the petitioner is claiming solemnization of his marriage with the respondent no.1 on 26.03.2006 at Hajarat Nizamuddin Dargah, New Delhi and it was the second marriage for the petitioner but it was the first marriage of respondent no.1 and that after their marriage they lastly lived together and cohabited as husband and wife at B-2/2324, Sewak Park, Uttam Nagar, New Delhi and they were enjoying their married life when the respondent no.1 went to Kuwait after her marriage. It is further claimed by the petitioner that written Nikahnaama was also prepared and the respondent no.1 has written letter to the petitioner confirming her marriage with him. According to the petitioner the brother of the respondent no.1 took the respondent no.1 away on 23.10.2014 on the pretext of going to Muzaffar Nagar, U.P. and subsequently he was informed by his father-in-law, Sh. Haneef Ansari that they have got the respondent no.1 married with Sh. Mohd. Adil, respondent no.2 and now the respondents are living at Meerut, U.P. According to the petitioner, the petitioner was

even threatened by the family members of the respondent no.2. According to the petitioner the respondent no.1 could not remarry as per the Muslim Personal Law unless she was divorced by the petitioner and the original Nikahnaama of his marriage with the respondent no.1 has been taken out by the respondent no.1 with connivance of her family members and respondent no.2 to destroy of the evidence of petitioner's marriage with respondent no.1. The petitioner has claimed restitution of conjugal rights with the respondent no.1 on the basis of his marriage/Nikah on 26.03.2006 at Hajarat Nizamuddin Dargah, New Delhi.

13. The Hon'ble Gauhati High Court in case titled *Rahima Khatoon vs. Saburjaness and others* 1996 AIR (Gau) 333 has held that:-

"To constitute a valid marriage in Mahomedan Law it does not require to insist on any type of writing or any religious ceremony is essential. Even Mullah is not needed. The presence of Kazi at the time of contract between the parties can be dispensed with. The valid marriage may be contracted even though no ceremony is proved to have been taken place between the parties. The presence of rituals of ceremony is immaterial and no way affected the validity of the marriage."

14. The petitioner herein is claiming marriage with the respondent no.1 on 26.03.2006 in accordance with Muslim rights and ceremonies and seeks to prove the same by leading evidence by examining witnesses of marriage/Nikah and proving the joint photographs of the petitioner with the respondent no.1 although the same are being disputed by the respondents. The respondents, in para 4H of their application have also admitted that petitioner and respondent no.1 were friends for a long time and they did get photographs so many occasions which petitioner is portraying as marriage photographs and that some of the photographs especially at page 12 and 13 are fabricated. Thus, there are allegations and counter allegations being made by both sides and the parties are required to lead evidence and prove their claim for which trial is necessary. There are important and personal rights of

the parties which are involved in the present case and same are required to be proved/established in accordance with law by the respective parties. The validity of the marriage of petitioner with the respondent no.1 can be established/proved by the petitioner only by adducing evidence and petition cannot be dismissed summarily without affording him an opportunity to prove his case. The legality and validity of the matrimonial relationship of the respondent no.1 and 2 is also a matter of trial and parties are required to adduce evidence for the complete adjudication of the matter in issue.”

6. This Court is of the opinion that at this stage, the tenability or otherwise of Farman Ali's claim with respect to his marriage with the present Appellant No.1 cannot be gone into. Undoubtedly, the appellant is disputing the very fact of marriage alleged by the respondent. To some extent, the Court is cognizant of the hardship which would be caused to her if the proceedings continued. On the other hand, the mere circumstance that such hardship would be caused cannot be the basis for the Court to conclude, without a proper trial in accordance with law, that the claim put forward by Farman Ali is utterly untenable or false. In this, the Family Court's observations that important and personal rights of the parties are involved which required to be proved or established in accordance with law, is a sound one; a summary disposal of the case in the manner convenient to the appellants, however, would not be appropriate because the controversy is whether the marriage existed or not – which alone can be the basis for Farman Ali's claim for restitution of conjugal rights, and is a matter that still requires findings based on evidence led. The appellant's argument that no witness was cited in Farman Ali's pleading or claim, in the opinion of the Court, is not important or decisive, given that essential facts but not evidence is to be stated in the pleadings.

7. Though this Court is not inclined to entertain this appeal, at the same time, it is conscious of the likely embarrassment to the appellant. In the circumstances, the Family Court is directed to frame the issues at its earliest expedience – preferably within two months and thereafter consider the evidence and complete submission of the parties and render its final judgment before 31.12.2016. Order to be communicated to the Family Court directly by the Registry.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JULY 19, 2016

