

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

% Reserved on: 18th January, 2017
Decided on: 30th January, 2017

+ CRL.M.C. 93/2010 & Crl.M.As.2052/2010, 6786/2010, 13010/2015,
10375/2015 and 2411/2016

GAUHAR HUSSAIN

..... Petitioner

Represented by: Mr. Ravi Prakash Mehrotra
with Mr. Vibhu Tiwari, Advs.

versus

MUMTAZ ARA

..... Respondent

Represented by: Mr. Ashok Gurnani, Adv.
SI Vivek, PS Chandni Mahal.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. A petition under Section 125 Cr.P.C. was filed by the respondents Mumtaj Ara and Tania Gauhar, daughter of the petitioner and respondent. Vide order dated 27th October, 2007, learned Metropolitan Magistrate considering the rival contentions of the parties and the legal position on the issue directed the petitioner to pay interim maintenance of ₹2500/- per month to each of the two respondents from the date of filing of the petition till its disposal. Learned Trial Court came to the conclusion as under-

“..... Heard, the arguments on behalf of both the parties and perused the record. The main defence of the respondent is that as he had already pronounced ‘Talak’ on his wife, he is not liable to pay maintenance. In cse 2007 (1) JCC 365 titled as Riyaz Fatima vs. Md. Sharif, Hon’ble High Court has held certain requisites for grant of divorce by Muslim man to his wife. The judgment holds that there are four pre-requisites for grant of divorce which are:

- (1) *Divorce must be for reasonable cause mandatory in holy Quran, husband to give evidence showing cause which compelled him to divorce his wife;*
- (2) *Husband to prove proclamation of Talaq thrice in presence of witnesses.*
- (3) *Proof of payment of dowry amount or observance of period of Iddat;*
- (4) *Husband also to prove attempt for settlement/conciliation prior to divorce.*

In view of the said judgment, the first pre-requisite is that divorce must be for reasonable cause and the husband has to give evidence showing the cause which compelled him to divorce his wife.

The respondent has to prove the payment of Dower and observance of period of Iddat. The husband has to prove that settlement/conciliation was attempted before granting of divorce and the same failed. The respondent has not mentioned of any such steps taken on his behalf granting of divorce. Respondent has admitted that Mehar has not been paid to the petitioner as matter is stated to be subjudice. Thus, the respondent has been able to prove only one of the pre-requisites that is no.2 as held by the Hon'ble High Court in the aforesaid case and he has failed on three other aspects.

In view of the various pronouncements of the Hon'ble High Court and Hon'ble Supreme Court divorce cannot be granted by a Muslim man to his wife with sole intention of avoiding provision of maintenance u/s 125 Cr.P.C. In this case, it is apparent that the alleged divorce has been granted only with the intention of avoiding maintenance as maintenance petition was filed on 25.1.2003 and thereafter the respondent allegedly divorced his wife on 7.12.2003 without assigning any reason and without attempting to go for any conciliation, such a divorce as has been held by Hon'ble Supreme Court and Hon'ble High Court is against the diktat of holy quran.

Hon'ble Madras High Court in Salim Basha vs. Mumtaz Begam, 1991 (1) RCR (Criminal) 392, has held that where the husband has not given any evidence to the effect that there was a pre-divorce conference for settlement by two mediators, one chose by wife and the other by husband which was mandatory of Muslim Law, Talak was not valid.

Hon'ble Bombay High Court in Case no.(2004) Family Juris C.C. 209 (Bom) titled as Khannu Bi vs. Salim Rayaliwale has held that where a husband exercises his right to give Talak after grant of maintenance, it has to be presumed that divorce was given without any reason only to evade payment of maintenance and such a divorce is not valid divorce.

In view of the aforesaid judgments prima facie it appears that the alleged divorce having been granted by respondent to the petitioner without assigning any reason for the same and without undergoing any conciliation proceedings before granting of divorce is not as per Muslim Law and is therefore not a valid divorce.

Ld. Counsel for respondent/applicant has relied upon the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and judgment of Allahabad High Court in case no.1997 JIC 1080 (ALL) titled as Habid vs. 1sts Additional Civil Judge & Ors., wherein Hon'ble High Court has held that Muslim lady is entitled to receive maintenance till the date of divorce or till the date of communication of divorce whichever is later. These provisions and judgment is not of much help to the respondent as it would have applied to the case, only if respondent would be able to prove after evidence that he has granted valid divorce as per Muslim Law.

In view of the above findings and the judicial pronouncements the respondent has to prove that he has granted a valid divorce to his wife for a reasonable ground and had taken a conciliation proceeding before grant of divorce. The question of payment of Mehar is admittedly subjudice. Whether the divorce is

valid divorce or not has to be proved by way of cogent evidence and cannot be decided at this stage of deciding the interim maintenance. Hence the respondent is legally bound to maintain the petitioners. The respondent has also admitted the paternity of the petitioner no.2. Being the father of the petitioner no.2 the respondent has legal as well as moral duty to maintain the petitioner no.2 also. Respondent has not denied his legal and moral duty to maintain the petitioner no.2 who is the daughter of the respondent. The only defence taken by the respondent in his WS is that he is ready to take the custody of the petitioner no.2 but this is not the subject matter of present petition and at present the custody of the petitioner no.2 is with the petitioner no.1/natural mother of the petitioner no.2, if respondents wants to claim the custody of petitioner no.2 then he may initiate appropriate proceedings in the guardian ship court and the question of custody of petitioner no.2 is to be decided by the guardianship court.

It is also admitted by the respondent that he is a government servant and having income of ₹15,364/-. Moreover, the fact whether the petitioner no.1 has left the company of respondent without any reasonable cause or whether the respondent had divorced the petitioner or not the treated her with cruelty or not cannot be decided at this stage of deciding interim maintenance application as the same can be decided only after evidence. Thus, in the totality of the facts and circumstances of the case, it is directed that the petitioners shall be entitled to receive a sum of ₹2500/- per month for each petitioner from the respondent towards their maintenance. Accordingly, at this stage the respondent is directed to pay interim maintenance of ₹2500/- per month for each petitioner i.e. a total sum of ₹5,000/- receivable by petitioner no.1 on behalf of the petitioner no.2 from the date of filing of the present petition till the disposal of the present petition. Nothing stated herein above shall tantamount to have any expression of opinion on the merits of this case. Now to come up on 16.04.2008 for PE.”

2. The petitioner thereafter filed an application under Section 127 Cr.P.C. contending primarily that the finding of the learned Trial Court on

the form of divorce between the parties was misreading of the Muslim Personal Law and the divorce between the parties was valid in the eyes of law. Vide order dated 19th November, 2008, learned Metropolitan Magistrate directed him to deposit half the arrears of interim maintenance before his application under Section 127 Cr.P.C. was heard. Challenging the said order, the petitioner filed a revision petition which was dismissed vide impugned order dated 23rd March, 2009. The application filed by the petitioner under Section 127 Cr.P.C. was dismissed as not maintainable by the learned Metropolitan Magistrate on 22nd July, 2009 noting that the application under Section 127 Cr.P.C. was maintainable only if there are “change of circumstances” after passing of the judgment/interim order under Section 125 Cr.P.C., there being no change in the circumstances and the only ground mentioned that the Court was misled by the form of divorce and requisites of valid divorce, the same was not the scope of consideration under Section 127 Cr.P.C. The order dated 22nd July, 2009 passed in the application under Section 127 Cr.P.C. is also impugned in the present petition. Thus, the two orders impugned before this Court are order dated 23rd March, 2009 passed by learned Additional Sessions Judge dismissing the revision petition challenging the order dated 19th November, 2008 directing the petitioner to pay half the amount of the arrears of maintenance before his application under Section 127 Cr.P.C. was heard and the order dated 22nd July, 2009 passed by the learned Metropolitan Magistrate dismissing the application under Section 127 Cr.P.C. as not maintainable.

3. The order dated 27th October, 2007 granting interim maintenance to the respondent by the learned Metropolitan Magistrate has not been challenged by the petitioner before any higher forum and thus the said

interim order has attained finality. During the pendency of the revision petition before the learned Additional Sessions Judge, pre-deposit of half of the amount of arrears of maintenance had already been made, hence challenge to the order dated 23rd March, 2009 passed by the learned Additional Sessions Judge has become infructuous. Thus, the only issue required to be considered by this Court was that whether the application under Section 127 Cr.P.C. was maintainable before the learned Metropolitan Magistrate or not i.e. whether there was any change of circumstances warranting entertainment of the application under Section 127 Cr.P.C.

4. Section 127 Cr.P.C. reads as under:-

“127 Alteration in allowance.- (1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.

(2) where it appears to the magistrate that, in consequence of any decision of a competent civil court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the magistrate shall, if he is satisfied that-

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

- (b) *the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order-*
- (i) *in the case where such sum was paid before such order, from the date on which such order was made,*
- (ii) *in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;*
- (c) *the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be after her divorce, cancel the order from the date thereof.*
- (4) *at the time of making any decree for the recovery of any maintenance or dowry by any person, to whom monthly allowance for the maintenance and interim maintenance or any of them has been ordered to be paid under section 125, the civil court shall take into account that sum which has been paid to, or recovered by, such person as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of the said order."*

5. The contents of the application under Section 127 Cr.P.C. are that the learned Trial Court was misled by the form of divorce and misread the requisites of valid divorce. An application under Section 127 Cr.P.C. is not in the nature of review before the same Court but gives power to the learned Trial Court to pass orders from time to time with the change in circumstances. The contention of the petitioner that an erroneous interpretation was given by the Court to the form of divorce and the

requisites of valid divorce is not the scope of a petition under Section 127 Cr.P.C.

6. Learned counsel for the petitioner referring to sub-Section 3(b) of Section 127 Cr.P.C. contends that when a woman has been divorced by her husband and she has received whether before or after the date of the said order the whole of the sum which under any customary or personal law applicable to the parties was payable on such divorce she has no right to maintenance thus such an order should be cancelled. In the present case, the plea of the petitioner is not that divorce was granted after the order dated 27th October, 2007. The pleas taken in the application under Section 127 Cr.P.C. are in the nature of recalling/review of the order dated 27th October, 2007. Hence there is no illegality in the order dated 22nd July, 2009 of learned Metropolitan Magistrate dismissing the application under Section 127 Cr.P.C. as not maintainable.

7. Petition and Crl.MAs. 2052/2010 and 6786/2010 are dismissed. The other remaining applications are also dismissed as infructuous.

(MUKTA GUPTA)
JUDGE

JANUARY 30, 2017
‘vkm’