

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 114 OF 2018
WITH
CIVIL APPLICATION NO.518 OF 2018**

Mr.Ali Abbas Daruwala	...Petitioner
V/s.	
Mrs.Shehnaz Daruwala	...Respondent

Mr.Anagha N. Nimbkar for the Petitioner/Applicant.

Mrs.Tanbon F. Irani for the Respondent.

CORAM : SMT.BHARATI H. DANGRE, J

RESERVED ON : 21st MARCH 2018

PRONCENED ON : 04th MAY 2018

JUDGMENT :-

1. The present petition is filed by the petitioner challenging the order dated 22.06.2017 passed by the Family Court at Bandra below Exh-7 in petition No.A-1097/2015, thereby allowing the application and directing the petitioner to pay an amount of Rs.25,000/- per month to the petitioner and Rs.20,000/- per month each for both the children towards interim maintenance from the date of the filing of the application including the house rent. The petitioner is aggrieved by the said order and prays for quashing and setting aside the said order on the ground that the

Family Court has exceeded its jurisdiction in passing the said order. A brief chronology of facts and events leading to the filing of present petition is culled out in the subsequent paragraphs.

2. The petitioner and the respondent belong to Islamic Alvi Bohra Community and were married on 16.10.1997. Out of the said marriage three children were born and one eldest son expired on 28.10.2014. The other two children are aged 14 and 13 years respectively.

The respondent-wife filed petition for divorce under the Dissolution of Muslim Marriage Act, 1939 seeking dissolution of the marriage, before the Family Court at Bandra on 15.04.2015 and invoked provisions of Section 2(viii)(a)(d) of the Dissolution of Muslim Marriage Act, 1939 and also prayed for custody of the children, maintenance and accommodation. The said prayer for divorce was opposed by the petitioner by filing written statement.

On the very same day when the proceedings were instituted for divorce, the respondent-wife moved an interim application seeking maintenance and accommodation and in the said application she reiterated the statements made in the petition and claimed an amount of maintenance for herself as well as two minor children, taking into consideration the earning capacity of the

petitioner-husband and her requirements. The amount of Rs.2 lakhs was claimed towards maintenance for herself and an amount of Rs.1,50,000/- was claimed towards the maintenance of the children along with the cost of litigation. The petitioner filed his response to the said application on 23.04.2016 opposing the said claim.

The husband raised an objection by filing application under Order 7 Rule 11(a) of the Civil Procedure Code which came to be rejected by the Family Court by observing that the petition for dissolution of marriage cannot be dismissed in such a fashion. On 20th May 2016 the wife again filed an application for monthly maintenance for herself and her minor children which was marked as Exh.-34.

3. It is a specific case of the petitioner that he gave Talaq to the respondent on 29.03.2017 and since the wife herself was claiming divorce, he was under an impression that she would not object to the same. The wife objected to the divorce granted by the petitioner and according to the petitioner she accepted the amount of Mehar and she returned the said amount only on 08.05.2017. According to the petitioner since, the wife herself had approached and filed the proceedings under the Dissolution of Muslim Marriage Act, she had no justification to oppose the said Talaknama dated

29.03.2017. The Family Court vide order dated 06.05.2017 passed a restrain order, restraining the petitioner for performing the second marriage. The petitioner moved an application for deciding the maintainability of the petition and also praying for framing preliminary issue of jurisdiction under Section 9A of the Civil Procedure Code. The learned Family Court by order dated 17.07.2017 ordered that the issues raised in the application would be added to other issues to be dealt by the Court.

On 09.06.2017 the respondent filed an application under Section 12, 18, 19, 20, 22 and 23 of the Domestic Violence Act, 2005 and prayed for the similar relief which she had prayed in the earlier application. On 22.06.2017 the Family Court passed an impugned order which is assailed in the present petition.

4. In support of the petition I have heard Ms. Angha Nimbkar appearing for the petitioner she would submit that the petitioner and respondents are governed by the Muslim Personal Laws and different enactments govern their personal relationship of including The Muslim Personal Law (Shariat) Application Act 1937, The Dissolution of Muslim Marriage Act, 1939 and The Muslim Women (Protection of Rights on Divorce) Act, 1986. The learned counsel would invite attention to the provisions contained in the

Muslim Women (Protection of Rights on Divorce) Act, 1986 and specifically to the provision contained in Section-3 of the said Act which contemplate a reasonable and fair provision of maintenance to be made and paid to a wife during iddat period. She would also invite attention to Section-3 of the said Act which reads thus :-

“(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that-

(a) her husband having sufficient means, has failed or neglected to make or pay her within the Iddat period a reasonable and fair provision and maintenance for her and the children; or

*(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause(d) of sub-section (1) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman: **Provided that if the Magistrate finds it impracticable to dispose of the application***

within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.”

5. She would also make reference to Section-2 of The Dissolution of Muslim Marriage Act, 1939 and would submit that the said Act permits a women to obtain a decree for dissolution of marriage on the grounds set out in the said section. The learned counsel for the petitioner would thus submit that the Family Court has erred is not considering the fact that divorce sought under the Act for all practical purposes is by way of “Khula” and that is a reason there is no provision for any other reliefs for maintenance, custody of children etc., provided in the Act. She would submit that “Khula” is a mode of dissolution of marriage by agreement between husband and wife and the divorce by “Khula” is divorce by consent at the instance of the wife in which she gives or aggrieves to give a consideration to the husband for release from marriage. She would submit that the husband after following the established procedure under the Muslim Law are has pronounced “Talaq” on 29.03.2017 thereby dissolving the marriage solemnized between the parties and amount of mehar/dower of Rs.60,000/- was send to the respondent on 30.03.2017, which came to be returned by her only on

06.05.2017. The learned counsel would submit that the respondent is a divorced wife and her rights are enumerated and limited under the Muslim Women (Protection of Rights on Divorce) Act, 1986. She would submit that the petition filed before the Court was exclusively under the Dissolution of Muslim Marriage Act, 1939 where there is no provision for any ancillary reliefs, as are available under the Domestic Violence Act, 2005. She would also submit that the learned Family Court did not consider that the complaint under Section-12 was filed as an after thought, after after filing of the application for maintenance. She would also emphasis that the respondent has not mentioned the provision of law under which the relief was claimed. She would also assail the order of the Family Court on the ground that the Court did not consider the qualifications of the wife and her potential to earn a livelihood for herself.

Per contra learned counsel Ms.Irani would support the impugned order. She would submit that in no contingency it is a case of 'Khulla'. She would submit that the provisions of Protection of Domestic Violence Act do no create any restriction on the wife to invoke the provisions of the said enactment on the ground that she is governed by Muslim Personal Law. Mr.Irani would submit that the wife had instituted proceedings under the Dissolution of Muslim

Marriage Act 1939 specifically invoking Section-2(viii)(a) and (d). She would submit that for the married Muslim women there was no provision available to obtain a decree from the Court seeking Dissolution of Marriage, in case the husband neglect to maintain her and make her life miserable by inflicting cruelty on her and in absence of such a provision being available, Muslim women were subjected to utmost misery. In order to provide a remedy to such oppressed women, the Dissolution of Muslim Marriage Act, 1939 came to be enacted enabling a women married under Muslim Law to obtain a decree for Dissolution of Marriage on the grounds enumerated under Section-2. According to the learned counsel the wife had invoked the provisions of the said enactment seeking divorce on ground of cruel treatment meted out to her.

Ms.Irani would submit that the in the said proceedings the wife moved an application seeking reliefs available under Section-12 of the D.V. Act including the monetary relief. She would submit that there is no legal embargo in her approaching the competent Court by invoking the said provision. She would pray for upholding of the impugned order and would submit that the proclamation of Talaq by the husband cannot nullify the benefits flowing to her unless the factum of Talaq is proved by sufficient evidence.

6. On consideration of the arguments advanced by the parties in support of their respective claim, the first point which arise for consideration is whether the Family Court was justified in entertaining the application filed by the respondent-wife in light of the fact that the parties belong to Islamic Alvi Bohra Community and specifically in the backdrop of Muslim Women (Protection of Rights on Divorce) Act, 1986. The issue is whether proceedings claiming relief under D.V. Act, can be entertained specifically when the main petition filed by the wife is under the Dissolution of the Muslim Marriage Act, 1939.

It is not in dispute that the wife has instituted proceedings for divorce praying for dissolution of marriage solemnized on 17.09.1997 under the provisions of Section 2(viii)(a) and (d) of Dissolution of Muslim Marriage Act. The said provision permits the woman married under the Muslim Law to obtain a decree for dissolution of marriage on the ground that the husband has treated her with cruelty or made her life miserable and that he has disposed of her property or prevent her from exercising her legal rights over it.

In the said proceedings the wife had moved an application at Exh.-7 by way of an interim application on 15.04.2015. The said application is titled as "Application for

maintenance and residential accommodation”, without specifying the section. Perusal of the application would however reveal that the wife has alleged that she has filed petition for divorce and custody of her children and she sought to place reliance on the said petitions. In the said application the wife has claimed an interim maintenance from the husband for meeting the expenses of her children as well as her own expenses. The said application no doubt do not mention the provision which is sought to be invoked. The learned counsel for the petitioner had advanced a submission that the parties being governed by the Muslim Women (Protection of Rights on Divorce) Act, 1986 which governs the entitlement for maintenance of Muslim women who have been divorced by and who have obtained divorce from husband. As per the petitioner-husband, pursuant to filing of the said proceeding he had given Talaq to the respondent-wife to 29.03.2017. The contention of the husband is that the wife was otherwise seeking divorce and he has granted divorce which would partake a form of “Khula”. He would submit that the wife had accepted the amount of Mehar in pursuant to the Talaq being pronounced on 30.03.2017. However, she turned back and returned the Mehar on 08.05.2017. It is the specific case of the petitioner-husband that on 28.04.2017, the husband re-married since the wife had accepted the Mehar thereby leading to a

conclusion that the Talaq pronounced by the husband was acceptable to her. However, it is a specific case of the wife that the said dissolution of marriage cannot be treated as Khula and in fact Mrs.Irani had invited attention to the pleadings and would submit that she has not accepted the said Talaknama and rather in light of the latest pronouncement of the judgment by the Apex Court in the case of *Shayara Bano V/s. Union of India & Ors. (2017-9-SCC-1)*, the Talaknama is not valid. Mrs.Irani would submit that under the Muslim Law, in certain circumstances the power to initiate divorce proceeding is given to the wife and she had instituted the proceedings for the said purpose. However, she would submit that her client has not accepted the Talaknama dated 29.03.2017 and in any contingency she would take appropriate steps to deal with the said issue separately.

7. In the present case the pronouncement of the Talaq is disputed by the wife and the husband will have to be prove the said factum of Talaq. As till the time the Talaq is not proved, the respondent continues to be legally weeded wife of the petitioner and in that contingency the question is whether the wife who is in domestic relationship with the petitioner is entitled to seek the relief under the provisions of the Domestic Violence Act. Though the

learned counsel for the petitioner had vehemently argued that the parties are governed by Muslim Personal Laws and therefore the provisions of the Domestic Violence Act cannot be invoked, per contra Mrs.Irani would submit that there is no intention of the legislature to restrict the provisions of Protection from Womens of Domestic Violence Act, 2005 to a particular category of women and to specifically exclude the women belonging to the Muslim religion.

8. Perusal of the provisions of the Protection of Women from Domestic Violence Act, 2005 would reveal that it is an enactment to provide for more effective protection for rights of women guaranteed under the Indian Constitution who are the victims of the violence. The enactment no way intends to restrict its application to any particular category of women but it intends to protect the women aggrieved, who are victims of Domestic Violence. The definition and connotation of “Domestic Violence” under Section-3 of the enactment do not indicate any intention either express or implied to exclude Muslim women. Section-36 of the said enactment provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time any force. Thus, the scheme of the enactment do not restrict the applicability of the provisions of the Act to a particular

category of women, nevertheless to a woman belonging to a particular religion. No doubt the Muslim women are also governed by several other enactments in the form of Muslim Women (Protection of Rights on Divorce) Act, 1986, Dissolution of Muslim Marriage Act, 1939 etc., however, the rights conferred under the said enactments can in no way curtail the operation or Protection granted under The Protection of Women from Domestic Violence Act. In these circumstances the contention advanced by the learned counsel for the petitioner that the respondent-wife could not avail the provisions of the Domestic Violence Act is not sustainable. Further, the submission of the learned counsel for the petitioner that the wife had moved an application namely Exh.-7 in a proceeding which she had instituted under the Dissolution of Muslim Marriage Act, 1939 and therefore they are not tenable, needs to be cursorily dealt with. The Section-26 of the Act of 2005 permits the relief to be availed under Sections-18, 19, 20, 21 and 22 to be sought in any legal proceedings before a Civil Court, Family Court or Criminal Court affecting the aggrieved person whether, such proceedings were initiated before or after the commencement of this Act. Sub-Section 2 of Section-26 makes it amply clear that in such relief may be sought for in addition to and alongwith any other relief that the aggrieved person may seek in such suit or legal proceeding before

Civil or Criminal Court.

9. In the present case wife had instituted the proceedings by taking aid of Section-2(viii) and has specifically filed the proceedings on the ground of the cruel treatment meted out to her and her children by making her life miserable by subjecting her to cruelty and by preventing her to exercise her legal right over the property. On perusal of the proceedings filed by the wife it revealed that she had taken out proceedings for dissolution of the marriage on the ground of cruelty, which is a form of Domestic Violence. The term Domestic Violence is assigned a specific meaning in the Act of 2005 which include an act of harming, injuring, and endangering the health, safety, life or well being, whether physical or mental of the aggrieved person including the physical, sexual, verbal and emotional abuse and also economical abuse. Thus, the ground on which the wife has sought dissolution of marriage is cruelty and the proceedings initiated though under the provisions of Dissolution of Muslim Marriage Act, 1939 stand on the same platform as proceeding instituted by wife under the provisions of Domestic Violence seeking relief under Section-12 of the Act, she being an aggrieved women.

In any contingency by taking recourse to Section-26 of

the Domestic Violence, it is permissible for the respondent-wife to file proceedings seeking the relief under Sections-18, 19, 20, 21 and 22 of the Domestic Violence Act, in addition to and along with the relief that she has otherwise sought in the pending proceedings. Thus, the claim for interim maintenance filed by the wife cannot be said to be completely alien to the provisions under which she has approached the Court by way of main petition seeking Dissolution of Marriage on the ground of cruelty. By way of an interim relief she has sought maintenance from the husband and since there is no bar for her to invoke the provisions of The Protection of Domestic Violence Act, 2005, such an application is duly entertained by the Judge Family Court, such an application cannot be thrown away only on the ground that it is not mentioned as to under what provision of law, the said application has been preferred. The Court has entertained the said application considering the factum of destitution being put forth by the wife and has treated her as an aggrieved person and has entertained the said application for interim maintenance and directed payment of amount of Rs.25,000/- to the wife and Rs.20,000/- for the children along with rent of the house at rate of Rs.40,000/-. The Court has considered that the wife has been subjected to vagrancy and is unable to maintain herself and her children whereas the husband owed a

moral responsibility to maintain his wife and the children specifically in case of subsisting marriage and therefore has passed the impugned order dated 22.06.2017.

9. The case of the husband is that he has pronounced Talaq on 29.03.2017 and in light of this development such an order is not justified, is also liable to be ignored since the factum of Talaq has not been proved by the husband and merely because Talaknama is tendered in the Court, the marriage cannot be said to have been dissolved. Even assuming for the sake of it the marriage stands dissolved by Khula taking it to be divorce by consent at the instance of the wife, the husband cannot be completely absolved of his liability to maintain his wife and children, in the specific background, that he has remarried and he is maintaining two children of the wife whom he had re-married. The learned counsel for the petitioner has also invited attention of the Court on a subsequent application filed by the wife under Sections-12, 18, 19, 20, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005 on 09.06.2017 and she would submit that if this application is filed under the provisions of the Domestic Violence Act, under what provision of law did the Family Court entertained the earlier application and passed an order below Exh-7. As this Court has

already observed that the said application was filed in Petition No.A-1097/2015 instituted by the wife for Dissolution of Marriage under the Dissolution of Muslim Marriage Act, 1939 and she would submit that this Act contains no provision for any interim maintenance or provision for custody of children. However, perusal of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 would reveal that certain rights are conferred even on a woman who has been divorced by who have obtained divorced from her husband and make such a woman entitled to a reasonable and fair provision and maintenance to be paid to her within the period of Iddat. Not only this such a woman is also entitled to an amount equal to some of Mehar or dower agreed to be paid to her at the time of the marriage according to the Muslim Law and also entitled for all the properties given to her before and at the time of the marriage and after the marriage by her relative, friends or her husband.

10. The purpose of any provision of law which is beneficial to a woman is to provide some solace to a woman during the subsistence of the marriage or even after she is divorced out of the said marriage and since the Domestic Violence Act is an enactment to provide effective protection of rights of woman, who are victims

of violence, the respondent-wife cannot be denied the umbrella of the said legislation. The respondent-wife has staked her claim by filing proceedings under the Domestic Violence Act 2005 claiming monthly maintenance for herself and her children vide Exh-34. On the said application, the respondent-husband has been directed to produce all or any of the documents which are in existence or his possession and which are not produced by him so as to reflect his earnings. Though it is a specific case of the petitioner-husband that he has divorced to his wife, it cannot be expressed as a gospel truth specifically in light of the latest pronouncement of the Hon'ble Apex Court in case of ***Shayara Bano V/s. Union of India & Others*** as to what would be the effect of such Talaknama. In any contingency this Court is not concerned with the validity of the said Talaknama at this stage and in this proceedings. This Court will have to restrict itself to the impugned order dated 22.06.2017 passed by the Family Court at Bandra directing the husband to pay monthly amount for maintenance of the wife and the children and also to pay for the rent of the house where the wife is residing.

The objection raised by the learned counsel for the petitioner Ms.Anagha Nimbkar to the maintainability of the application on which the impugned order came to be passed is not sustainable for the reasons stated above and since this Court at arrived at a conclusion that the parties being governed by the Muslim Personal Law is not an impediment in the wife invoking the

jurisdiction of the Court under the provisions of the Domestic Violence Act and there is no embargo of the said Court to confer the relief on the women who is an “aggrieved person” within the scope and meaning of the Act merely because she belongs to Muslim religion. The contention of the learned counsel for the petitioner therefore deserves to be rejected.

The impugned order has taken into consideration the earning capacity of the husband and the needs of the wife. In the application filed by the wife a statement was made that the husband was depositing an amount of Rs.10,000/- to Rs.15,000/- per month in her account, which was not found to be sufficient to maintain herself. The Court taken in to consideration the said aspect of the matter and also the statement that the husband is regularly paying certain amount to the wife from which she is withdrawing some regular amount. The Court has also noted that the wife has no shelter and in such circumstances the impugned order cannot be faulted with and there appears to be no illegality or perversity in the said order which would warrant and inference at the instance of this order. In the result the impugned order is upheld. The present petition being devoid of any merit and substance, is liable to be dismissed.

(SMT.BHARATI H. DANGRE, J.)