

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL REVISION No.282 of 2017

Arising Out of PS. Case No.- Year-1111 Thana- District-

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Md. Quamruzzaman Son of Late Azimuddin Resident of Village-
Rangamatia, P.S.- Barsoi, District- Katihar.

... .. Petitioner/s

Versus

Begam Ara D/o Late Asiruddin, Resident of Village- Rangamatia, P.S.-
Barsoi, District- Katihar.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Amrendra Kumar, Adv. Md. Anisur Rahman, Adv. Md. Akram Naiyar, Adv.
For the Respondent/s	:	Mr. Anshuman, Adv. Mr. Kuber Pathak, Adv. Mr. Devesh Shankara, Adv.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
CAV JUDGMENT

Date : 05-08-2019

This revision application is filed against the order dated 2.2.2017 passed in maintenance Case No.316 of 2012 by the Addl. Principal Judge, Family Court, Katihar whereby and whereunder the learned court has directed the petitioner to pay a sum of Rs.7,000/- per month in the first week of every month from the date of order as maintenance to the Opposite Party -applicant and also directed to pay a sum of Rs.50,000/- as the cost of the litigation.

2. Facts giving rise to this revision application in short is that the Opposite Party-applicant filed a petition on 23.11.2015 under Section 125 Cr.P.C. in the court of the Principal Judge,



Family Court, Katihar stating therein *inter alia* that she is legally married wife of the petitioner as the marriage was solemnized 28 years ago and she has two sons and a daughter also born from that wedlock. It is also her case that after seven years of marriage, the petitioner came in contact with a lady Momina Khatoon and married with her, which Opposite Party came to know after three years and thereafter she was subjected to torture and cruelty also and the petitioner-husband stopped to pay the maintenance of the Opposite party and also stopped the expenses of the education of the children and further transferred the land in the name of his second wife. It is also a case that he tried to kill her and taken her thumb impression forcibly on two blank papers . Further case is that she is leading a miserable life having no source of income whereas the petitioner-husband has income of Rs.01 lac per month and he is a Homeopath Doctor and also he has further earning of Rs.60,000/- from the agriculture and from the house at the village. On the above the Opposite Party-applicant has prayed for maintenance of Rs.7,000/- per month to her and Rs.5,000/- for the education of the children and Rs.5 lac for the marriage of her daughter.

3. It appears that the petitioner-husband appeared in the above maintenance case and admitted that Opposite Party-



applicant is his wife and the children are from his wedlock with the applicant, however, denied the story of torture and cruelty. He has also come with a case that as he has married with one Momina Khatoon in the year, 2008 and on the instigation of her *Maike* people, she became violent and for that second wife Momina Khatoon has lodged a case i.e. Barsoi P.S.Case No.169 of 2012 but that case ended in a compromise. The husband-petitioner has also come with a case that the applicant had illicit relationship with one Niharul Haque, due to which he divorced her on 27.8.2012 and when there was no change in her behaviour again on 10.1.2013 and on 4.1.2013, he divorced her. It is also his case that the applicant is residing in his hosue along with her children .

4. Case of the petitioner- husband is that he has only 3-4 bighas of land and there is no other source of income, whereas the first son the applicant is Doctor and the second son is a Compounder and daughter is the Principal in a Madarsa, as such they have good income and she is living a peaceful life.

5. Before the learned Family Court, four witnesses were examined on behalf of the applicant and four witnesses were examined on behalf of the -husband, apart from that some documents have also been filed by the husband petitioner. They are



Ext.'A' certificate of *Mukhia* , Ext. 'B' order dated 15.4.2014 passed in Complaint Case No.248 of 2013 filed by the husband petitioner , Ext. 'B/1' is the order dated 26.5.2014, Ext. 'C' is the statement of the complainant in Complaint Case No.248 of 2013 and Ext.'D' is the cognizance taken in Barsoi P.S.Case No.169 of 2012, Ext. 'E' is the charge-sheet in Barsoi P.S.Case no.169 of 2012.

6. Learned court below by the impugned order allowed the maintenance application filed by the Opposite party and directed to pay Rs.7,000/- to her as maintenance and further directed Rs.50,000/- to pay as litigation cost.

7. Being aggrieved by the impugned order, the present application has been filed.

8. Grounds for assailing the impugned judgment is that the learned Family Court has failed to consider that the Opposite Party is a divorcee, as such she is not entitled for maintenance under Section 125 of the Code of Criminal Procedure (hereinafter to be referred as the 'Cr.P.C.'), at best she can claim maintenance during '*Iddat*' period as per the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 [hereinafter to be referred as 'the Muslim Women (Divorce Protection Act)']. In support of his contention he has relied upon the reported decision



of a Single Bench of this Court in the case of ***Muzaffar Alam – Vrs. Qamrus Nisa*** reported in ***1990 BBCJ 505***. It has also been contented by the learned counsel for the petitioner that Opposite Party has established illicit relation with one Niharul Haque and due to that he pronounced divorce on 27.8.2012 and again on 10.1.2013 and 4.1.2013 and it has also been contented that elder son of the petitioner is a Homeopath Doctor and has handsome earning but the learned court below has not considered the above grounds and allowed the maintenance. Further contention is that the learned Family Court without assessment of the annual income or monthly income of the petitioner has allowed maintenance of Rs.7,000/- per month and Rs.50,000/- as litigation cost and as such the impugned order is against the materials available on the record and without proper appreciation of law points raised by petitioner.

9. On the other hand the learned Opposite Party has countered submission of the learned counsel for the petitioner and submitted that the petitioner has failed to prove that he has given divorce to the Opposite Party , as nothing has been brought on record in support of the same and furthermore only because the petitioner has divorced the Opposite Party, on that ground the maintenance can not be disallowed. It has also been submitted that the Hon'ble Apex court in the case of ***Danial Latifi and Anr. Vrs.***



Union of India reported in **2001 AIR SC 3958** while considering the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986, though upheld enactment of the Act and further held in Para 36 of the judgment as follows :

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

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after 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.”

10. But there is nothing on the record to show compliance of the above directions of the Hon’ble Apex Court, was complied by petitioner. Further contention is that in this case Opposite Party has brought evidence on record to show that the petitioner is working as a Homeopath practitioner and has good income from that and he has purchased a land as well as he has married with



another lady that is the good ground for the Opposite Party to refuse to live with the petitioner, as such the amount of maintenance allowed by the petitioner is just and proper for her maintenance and for maintenance of her daughter and she is residing in the house of the petitioner.

11. In the above background of submissions of both the parties and on perusal of the record, it appears that Opposite Party has come with a case that after marriage with Momina Khatoon assaulted her and forced her to leave the house and the petitioner has filed a complaint case. She is living in miserable condition along with his two sons and one daughter, whereas the case of the petitioner -husband is that due to ill behaviour of the Opposite Party after his marriage with Momina Khatoon, she lodged a complaint case. Further case is that later on she had relationship with one Niharul Haque as such he divorced her. In support of rival contention both the parties have brought oral evidence and the petitioner has also brought some documentary evidence. Evidence was also adduced on behalf of the Opposite Party -applicant in support of her case of desertion and ousting her from the house. It further appears that the petitioner has been examined as O.P.W.3 and he has admitted the factum of the marriage with the Opposite Party-applicant and sons and daughter from her and



in his chief he has stated that as the applicant used to misbehave with him, as such he has married with Momina Khatoon. His evidence also disclosed that the applicant has developed illicit relationship with Niharul Haque and due to which he divorced her. The impugned judgment further disclosed that no suggestion has been given to the applicant while her examination as P.W.2 about the illicit relation with Niharul Haque. O.P.W.2 examined on behalf of the petitioner has also stated in his evidence that the petitioner has married and his second wife who was 18 years old and the daughter of the applicant was also aged about 18 years. From perusal of the judgment, it appears that except his evidence that he has divorced her, no details of the divorce has been brought on record as to whether any reconciliation was held prior to that and except coming with pleading there is no evidence on record as to when the petitioner divorced Opposite Party and before whom he divorced and as to whether he has paid '**Den Mehar**' and maintenance for '**Iddat**' period, even in the revision petition, the petitioner has not stated anything as to what evidence he has brought in support of his plea of the divorce. No doubt after enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the muslim women after divorce are entitled for maintenance during '**Iddat**' period. However, as discussed



above, while upholding the validity of the above act, the Hon'ble Apex court has held that Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife obviously including her maintenance as well such reasonable and fair provision extending beyond "Iddat" period in terms of Section 3(1)(a) of the above Act, as such the Muslim Women (Protection of Rights on Divorce) Act, 1986 also provides the husband liable for her maintenance.

12. In the facts of this case, the question arise whether merely coming with a pleading that the petitioner has divorced Opposite Party without proving the same with sufficient and reliable evidence in support of his case, Opposite Party No.2 can be denied maintenance. Learned counsel for the petitioner has relied on the decision of the Single Bench of this Court in the case of *Muzaffar Alam Vrs. Qamrun Nisa*, at para nos. 13 and 14 held as follows: -

13. From bare reference to the transitional provisions of The Muslim Women (Protection of Rights on Divorce) Act, 1986 it is clear that every application filed under section 125 of the Code of Criminal Procedure by a divorced woman, pending before the Magistrate on the day of the commencement of The Muslim Women (Protection of Rights on Divorce) Act, 1986, shall be disposed of by such Magistrate in accordance with the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and the Magistrate will have no jurisdiction to dispose of the proceeding pending under the provisions of section



125 of the Code of Criminal Procedure. There appears to be no conflict to be resolved between these two Acts, i.e., the Criminal Procedure Code as also The Muslim Women (Protection of Rights on Divorce) Act, 1986. More or less these two laws are operating in the same field. However, when two or more laws operate in the same field and each contains a non obstante clause, stating that its provision will override those of any other laws, cases of such conflict have to be decided by reference to the object and purpose of the laws under consideration. For resolving even there is inter se conflict, a reference can be made to the ratio decided in the case of Shrawan Singh and another- Vrs- Kasturi Lal (A.I.R. 1977 S.C. 265). It has been held that in such a situation the later enactment must prevail over the earlier one.

14. I have already held that the status of the opposite party is of a divorced woman with effect from 28.2.86. Therefore, the learned Magistrate can decide the case and quantum of maintenance as per the provision of section 125 of the Code of Criminal Procedure, only for the period lying between 13.11.85, the date of filing of the petition to 28.2.86, the date on which the declaration for divorce was made in the written statement.”

13. And the above judgment also discloses that the Single Judge after considering the materials on the record held that the status of the Opposite Party as divorce woman was held and in that background of the above, judgment was passed. This Court has also noticed the judgment of the Hon’ble Apex Court in the case of *Shamim Ara Vrs. State of U.P. and Anr.* reported in (2002) 7 SCC 518, in which also the husband has come with a plea that he had



already divorced his wife and as such she was not entitled to any maintenance under Section 125 of the Cr.P.C. and the maintenance was disallowed by the Family Court and the same was also affirmed by the High Court against which the wife moved before the Hon'ble Apex Court and the Hon'ble Apex Court considering the views of several scholars and the different judgments passed by the Hon'ble Apex Court as well as High Courts has held in Para Nos. 15 and 16 as follows : -

“15. The plea taken by the husband-respondent no.2 in his written statement may be re-noticed. The respondent No.2 vaguely makes certain generalized accusations against the wife-appellant and states that ever since the marriage he found his wife to be sharp, shrewd and mischievous. Accusing the wife of having brought disgrace to the family, the respondent No.2 proceeds to state, vide para 12 (translated into English) — "The answering respondent, feeling fade up with all such activities unbecoming of the wife-petitioner, has divorced her on 11.7.87." The particulars of the alleged talaq are not pleaded nor the circumstances under which and the persons, if any, in whose presence talaq was pronounced have been stated. Such deficiency continued to prevail even during the trial and the respondent No.2, except examining himself, adduced no evidence in proof of talaq said to have been given by him on 11.7.1987. There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq.

16. We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate (See Chambers 20th Century Dictionary, New Edition,



p.1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter parte, containing a self-serving statement of respondent no.2, could not have been read in evidence as relevant and of any value.”

14. Considering the same, the Hon'ble Apex Court in para

17 has held as follows : -

“17. For the foregoing reasons, the appeal is allowed. Neither the marriage between the parties stands dissolved on 5.12.1990 nor does the liability of the respondent No.2 to pay maintenance comes to an end on that day. The respondent No.2 shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law.



The costs in this appeal shall be borne by the respondent No.2.

15. On perusal of the above judgment, it appears that merely coming with a pleading by the husband that he has divorced her is not enough when no particulars of the alleged '*Talaq*' are brought on the record either in the pleading or in the evidence to show in whose presence the '*talaq*' was pronounced and to prove any effort of reconciliation proceeded '*talaq*' and even no suggestion has been given to Opposite Party-applicant about such '*talaq*' or manner of '*talaq*'.

16. In view of the matter, the learned Family court has rightly not accepted the plea of the petitioner that he has already divorced Opposite Party and as such she is not entitled for maintenance .

17. Above fact clearly discloses reasons for the Opposite Party, not to reside with the petitioner. There is no evidence available on the record to show that the Opposite Party has any source of income and the evidence has been brought on record by the petitioner to show that the son of the Opposite Party is a Homeopath Doctor and he is earning a handsome amount and the daughter of the petitioner is Principal of Madarsa and the second son is working as Compounder with the first son, however, in the evidence brought by the petitioner-husband except that elder son



of the petitioner is working as Doctor no other evidence has been brought that the daughter of the Opposite Party is working as the Principal of a Madarsa and the second son of the Opposite Party is working as Compounder with his elder son. On the other hand the petitioner has admitted that he is a Government Teacher in a Madarsa and plea was also taken that he is a Homeopath practitioner also though there is nothing available on the record to show as a Homeopath Doctor he has good income as well as from the agriculture also he has income but the evidence of P.W.2 discloses that petitioner is practising as a Doctor.

18. Considering the above facts, even if it is presumed that the first son of the Opposite Party has handsome earning , still petitioner being husband legally bound to maintain her as wife and her daughter and one son .

19. Considering the above fact, the learned Family Court has allowed the maintenance of Rs.7,000/- per month and also Rs.50,000/- as the litigation cost. No doubt the litigation cost appears to be excessive.

20. In view of the discussions made above, so far impugned order, allowing the maintenance application of the Opposite Party and granting maintenance of Rs.7,000/- per month to her, I find nothing illegal or improper in that, however, so far litigation cost is



concerned, it is modified to the extent of Rs.30,000/- (Thirty Thousand) .

21. With the above modification in litigation cost, this revision application is dismissed.

(Vinod Kumar Sinha, J)

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AFR/NAFR	A.F.R.
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