

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

CRIMINAL WRIT PETITION NO.1398 OF 2014

Anjum Hashmi @ Nigar Sultan w/o
Sayed Javed Hashmi (Divorced wife)
age 36 yrs, Occ. Household,
R/o Gouse Colony, Dargah Road,
Parbhani, Tq. & Dist Parbhani Petitioner.
(orig applicant/respondent)

Versus

Syed Javed Hashmi s/o Syed Amir Hashmi,
age 47 yrs, Occ. Service,
R/o Gausiya Masjid, Kumbhar Galli,
Parbhani, Tq. & Dist. Parbhani,
Now R/o at Dargah Road,
Parbhani, Dist. Parbhani. Respondent.
(orig Non-applicant/Rev.Pet.)

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Mr. P.S. Agrawal, advocate for petitioner.
Mr. A.N. Sabnis h/f Ms. R.P. Gour advocate for respondent.

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CORAM : S.G. CHAPALGAONKAR, J.

**RESERVED ON : 27th SEPTEMBER, 2023
PRONOUNCED ON : 07th NOVEMBER, 2023.**

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ORDER :-

1. The petitioner/original applicant impugns the judgment and order dated 25.8.2014 passed by the Extra Joint Adhoc Additional Sessions Judge, Parbhani in Criminal Revision No.7 of 2023, by which the order granting maintenance in favour of the petitioner in Misc. Criminal (maintenance) Petition no.78 of 2007 dated 31.12.2012 came to be quashed and set aside. (For the purpose of brevity, the parties are hereinafter referred to as per their

original status in Misc. Criminal Case N.78 of 2007 before JMFC, at Parbhani).

2. In nutshell, the applicant contends that she is a legally wedded wife of the non-applicant (present respondent). Their marriage was solemnized on 22.9.2004 as per Muslim rites and customs. Marriage is still in subsistence. It is the case of the applicant that non-applicant was a married person. However, non-applicant had no issue out of his wedlock with first wife. Hence, he performed marriage with the applicant with consent of his first wife. After marriage, applicant resided with non-applicant. Although, initially he behaved properly with her, lateron, he started ill-treatment. When, applicant conceived pregnancy, first wife of non-applicant assaulted her and drove out of home. The non-applicant did not allow her to resume his company. Since, 2.7.2006 she is residing with her parents at maternal home. Non-applicant neglected her and failed to maintain although having sufficient means. As such, she raised claim for maintenance of Rs.15,000/- p.m. from the non-applicant invoking the provisions of section 125 of the Criminal Procedure Code before the JMFC, at Parbhani.

3. The non-applicant appeared in the aforesaid proceeding and filed his say/written statement. In first paragraph, he admits the marriage i.e. Nikah with the applicant. However, alleges that the applicant cheated him. The applicant was already married with Abdul Bashid before performing marriage with him. He has filed criminal case bearing SCC No.213 of 2007 against her for cheating. She is a lady of doubtful character. It is further contention of non-applicant that he divorced the applicant on 7.9.2005. Since then, she ceased to be his wife.

4. The parties led respective evidence in support of the pleadings. After hearing parties, learned JMFC was pleased to dismiss the application holding that the respondent divorced with applicant hence as per Muslim personnel law she would not be entitled for maintenance. The order passed by the learned JMFC dated 30.4.2010 was challenged by applicant before the Sessions Court in Criminal Revision No.40 of 2011. The Sessions Court remanded the matter for fresh consideration to the Court of the JMFC. In second round of litigation, learned JMFC allowed the application vide order dated 31.12.2012 and directed non-applicant to pay maintenance of Rs.1200/- p.m. to the applicant from the date of application. Said order was further subjected to challenge in the revision before the Sessions Judge at Parbhani in Criminal Revision Application No.7 of 2013. The learned Sessions Judge, after considering the rival submissions, pleased to allow the revision and quashed and set aside the order dated 31.12.2012 passed in Misc.Cri. Maintenance (petition) no.78 of 2007. Consequently, dismissed the claim of the applicant for grant of maintenance. The order passed by the Sessions Judge, Parbhani is impugned in the present criminal writ petition.

5. Mr. Pawankumar Agrawal, learned advocate appearing for the petitioner would submit that the learned Sessions Judge dismissed the claim of the applicant for grant of maintenance under erroneous finding that the applicant's earlier marriage with Khaja Abdul Basid was subsisting when she performed marriage with non-applicant. The sessions court assumes subsistence of earlier marriage of applicant for the reason that she sought recovery of maintenance amount from her earlier husband based on order passed in Misc. Application No.68 of 2023 decided on 6.8.2004 between the applicant and her first husband Khaja Basid. He would submit that such an

inference drawn by the learned Sessions Judge is perverse and unsustainable in law. He would further submit that although non-applicant pleaded that he has divorced the applicant, it has not been proved by leading cogent evidence.

6. Per contra, Mr. Sabnis, learned advocate appearing for the respondent-husband would submit that marriage between the applicant and her husband Khaja Basid was in existence when she contracted marriage with the respondent. Therefore, such a second marriage which is outcome of fraud exercised by the applicant would not entitle her to claim maintenance as per the provisions of Muslim Law. Such marriage is void ab-initio. He would, therefore, support the impugned order passed by the Sessions Court.

7. Having considered the submissions advanced by the respective parties, it can be observed that there is no dispute as to the fact that the applicant had contracted a marriage with non-applicant on 22.9.2004 as per Muslim rites and customs. It is also undisputed that non-applicant had a wife namely Rehana, but she could not begotten child. Therefore, with her consent, non-applicant performed marriage with the applicant. The non-applicant seeks to defend applicants claim for grant of maintenance on two grounds.

i. Firstly, he claims that the applicant suppressed her first marriage with Khaja Basid and without obtaining divorce from him, she contracted second marriage with non-applicant, which is void abinitio.

ii. Secondly, he has divorced the applicant on 7.9.2005. Since then, matrimonial ties have been discorded.

8. So far as first defence of non-applicant is concerned, the learned Sessions Judge accepted the contentions of the non-applicant

giving reason that the applicant could not place satisfactory evidence regarding her divorce with her first husband Khaja Basid. Secondly, the document at exhibit 15 i.e. MA No.57 of 2005 shows that the applicant sought recovery of maintenance amount from Khaja Basid for the period from 22.9.2003 to 22.7.2005 (total amount of Rs.20,050/-) in pursuance of the order dated 6.8.2004 passed by the JMFC, Pathri in Misc. Application No.68 of 2003. As such, applicant continued to be the wife of Khaja Basid till 2.8.2005 i.e. the date of filing Misc. Application No.57 of 2005 seeking recovery of maintenance under section 125(3) of the Cr.P.C. The learned Sessions Judge also accepted the contention of non-applicant that as per Muslim Law, utterance of the word "Talaq" itself is sufficient. Further in the reply filed to this application, the non-applicant has made declaration of such Talaq, which is sufficient to comply with the requirement of communication of Talaq to the applicant-wife.

9. Pertinently, once the non-applicant has accepted that there was a marriage between him and the applicant dated 22.9.2004 as per Muslim Rites and Customs, the burden to prove defence that such marriage is vitiated by fraud or operation of law shall rest upon the non-applicant. The learned Sessions Judge has simply relied upon the Misc. Application No.57 of 2005 dated 2.8.2005 filed by the applicant by which she sought recovery of maintenance from her earlier husband i.e. Khaja Bashid. Perusal of said application would show that it was moved on behalf of the applicant and her son Khaja Mukshid s/o Bashid. I find that seeking recovery of maintenance from earlier husband itself cannot be considered as evidence regarding subsistence of marriage between the applicant and Khaja Basid. The non-applicant has not examined any witness to show that the marriage between the applicant and her first husband Khaja Basid

is still in subsistence. Pertinently, perusal of the reply filed by the applicant would show that there is no pleading in the reply that the applicant continues to be the wife of her first husband. The respondent has not initiated any proceeding seeking declaration that his marriage with applicant is invalid or void abinitio. On the other hand, he contends that, he divorced the applicant on 7.9.2005. Therefore, first contention of the applicant that the applicant continues to be the wife of Basid Ali or his marriage with the applicant is invalid cannot be accepted. Finding recorded by the Sessions Judge relying upon her claim for recovery of maintenance based on maintenance order passed on 6.8.2004 against Khaja Makshid appears to be untenable.

10. So far as second contention of the respondent that he has divorced the applicant on 7.9.2005, the learned JMFC has recorded finding that there is material contradiction in the statement of the witnesses so also contents of alleged Talaqnama placed at Exhibit 51-A relied upon by the non-applicant. The Learned JMFC also recorded a finding that there was no communication of Talaq to the applicant, consequently matrimonial tie between the applicant and non-applicant continue to exist. Therefore case of Talaq dated 7.9.2005 put forth on behalf of the non-applicant is discarded. Conversely, the learned Sessions Judge made observation in the impugned order in paragraph no. 6, that reads thus :-

“Even if, for the sake of case of the present respondent, some sort of act was required on behalf of the revision petitioner to nullify the same, his pronouncing Talaq thrice was sufficient for treating the Talaq had taken place on that moment himself, practically for all the purposes, except for observation of Iddat period by the wife and her claiming maintenance as a divorcee. This communication, if it is held that was not there through documents marked Exhibit Nos.51-51/A in the file of the trial court, the claim to that effect in writing through his say/written statement was sufficient to hold that there was proper communication once that say was brought to the notice of the

respondent.”

11. Apparently, such observations are contrary to the well settled legal principles, which requires certain procedure before constituting valid Talaq. The Supreme Court of India in the case of **Shamim Ara Vs. State of U.P. reported in 2003 ALL MR (Cri) 344 SC** held that ‘Talaq’ must be for reasonable cause and it must be preceded by attempts of re-conciliation between husband and wife by two arbiters. The pleading in written statement or it’s communication to wife by delivering copy cannot be by itself treated as effecting Talaq. It will be also applicable when the husband in his application for cancellation of maintenance order taken such plea. Merely taking of plea of divorce is not sufficient. The fact of divorce has to be proved by leading cogent evidence as per law.

12. If the aforesaid observations are applied in the facts of the present case, it can be observed that the pleadings in W.S./reply merely state that the non-applicant has divorced on 7.9.2005. No further details of divorce are pleaded. There is no reference regarding Meher amount. There is no reference regarding execution or preparation of Talaqnama. There is no reference regarding witnesses before whom such Talaq was declared. The Trial Court, on analysis of oral evidence relied upon by the non-applicant categorically recorded finding that Talaqnama at Exhibit 51-A was prepared first and then Talaq was pronounced, which is not permissible. Therefore, the Trial Court rightly rejected plea of Talaq dated 7.9.2005. Finding recorded by the learned Magistrate is well founded, hence requires to be restored.

13. Even for the sake of arguments, it is accepted that, the non-applicant divorced with the applicant, his obligation in terms of section 125 of Cr.P.C. would continue till the applicant remarries. The Supreme Court of India in the matter of **Shabana Bano Vs. Imran Khan reported in 2010 ALL MR (Cri) 278 (SC)** considered the aforesaid aspect. In light of earlier judgment of the Supreme Court of India in the matter of **Danial Latifi and another Vs. Union of India reported in (2001) 7 SCC 8 740**, wherein it is observed that even a divorced Muslim Woman would be entitled to claim maintenance from her divorced husband as long as she does not remarry. This being a beneficial piece of legislation, benefit must accrued to the divorced Muslim woman.

14. At this stage, Mr. Sabnis, learned counsel appearing for the respondent would contend that when the applicant was having living spouse, her marriage with non-applicant is invalid or complete nullity. Hence, she is not entitled for benefit under section 125 of the Cr.P.C. In support of his contentions, he relies upon the judgment of the Supreme Court of India in case of **Yamuna Anant Adhav Vs. Anant Shivram Adhav reported in (1988) 1 SCC 530**. However, in view of the aforesaid observations, there is nothing on record to depict that the marriage of applicant with her first husband was in existence. Further, such contentions of non-applicant are without specific pleadings in the reply. In view of this factual backdrop, the ratio in the Judgment of Yamunabai (supra) would not yield benefit in favour of the non-applicant. Resultantly, the criminal writ petition deserves to be allowed. Hence, following order.

ORDER

- i. Criminal Writ Petition is allowed.

- ii. The judgment and order dated 25.8.2014 passed by the learned Additional Sessions Judge, Parbhani in Criminal Revision No.7 of 2013 is hereby quashed and set aside.
- iii. The judgment and order dated 31.12.2012 passed by the learned Judicial Magistrate First Class, Parbhani in Misc. Criminal (Maintenance) Petition No.78 of 2007 is restored.
- iv. Writ Petition is accordingly disposed off.

(S.G. CHAPALGAONKAR)
JUDGE

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