

## Md. Abu Taleb Ali Vs Mst. Hasina Bibi

**Court:** Gauhati High Court

**Date of Decision:** April 13, 2005

**Acts Referred:** Constitution of India, 1950 " Article 15, 39  
Criminal Procedure Code, 1973 (CrPC) " Section 125, 127, 310, 397, 401

**Citation:** (2007) 2 GLR 792 : (2005) 3 GLT 559

**Hon'ble Judges:** B.P. Katakey, J

**Bench:** Single Bench

### Judgement

B.P. Katakey, J.

Heard Mr. M.A. Sheikh, learned Counsel for the petitioner.

2. This application by the petitioner husband u/s 482 read with Section 401 of the Criminal Procedure Code is directed against the order dated

11.2.2005 passed by the learned Sessions Judge, Dhubri in CR Case No. 19(3)/04 dismissing the revision petition filed by the husband revision

petitioner challenging the order dated 30.7.2004 passed by the Judicial Magistrate, 1st Class, Dhubri in Misc. Case No. 148/2002 awarding

maintenance of Rs. 700 per month for the wife (present opposite party) and Rs. 450 per month for the minor son with effect from the date of filing

of the application u/s 125 Cr.P.C, i.e., 2.5.2002.

3. An application u/s 125 of the Criminal Procedure Code was filed by the present opposite party Musstt. Hasina Bibi against the present the

petitioner claiming maintenance at the rate of Rs. 500 per month for herself and at the rate of Rs. 400 per month for first son, Rs. 300 per month

for the daughter and Rs. 200 per month for the second son. The learned Judicial Magistrate 1st Class Dhubri on the basis of the evidence on

record came to the finding that the petitioner-husband having sufficient means neglected to maintain his wife (present opposite party) and his minor

son who are unable to maintain themselves. The learned Magistrate also came to the finding that the husband drove the wife out from his house and

has contacted a second marriage. It was further found by the learned Magistrate that out the wedlock between the present petitioner and present

opposite party 3 children were born, one of the son is with the present opposite party/wife, other children, namely one daughter and one son are

with the present petitioner/husband. Having recorded the said finding an amount of Rs. 700 and Rs. 450 per month were awarded as maintenance

by the learned Magistrate for the wife and the minor son living with her with effect from the date of filing of the application, i.e., 2.5.2002. Being

aggrieved, the present petitioner-husband moved the learned Sessions Judge in revision which was dismissed vide order dated 11.2.2005 by

upholding the order of maintenance passed by the learned Magistrate.

4. Since the second revision by the same party is barred u/s 397(3) of the Criminal Procedure Code, the present application has been filed by the

husband, who was the revision petitioner before the learned Sessions Judge, Dhubri, u/s 482 of the Criminal Procedure Code for invoking inherent

power of this Court.

5. It appears from the judgment passed by the learned courts below that the petitioner has taken the stand that the present Opposite Party is not

entitled to any maintenance as the marriage between them was dissolved by divorce as talaknama was executed on 7.3.2002 divorcing the

Opposite Party and as an amount of Rs. 5,000 being the mohorana and a further amount of Rs. 3000 as maintenance for the iddat period totaling

Rs. 8,000 was paid to the opposite party. Both the courts below has disbelieved the story of the husband, present petitioner as the said talaknama

could not be produced before the court and the petitioner also could not prove by adducing reliable evidences about execution of such talaknama.

6. Mr. Sheikh, learned Counsel for the petitioner challenged the judgment of the learned courts below on two counts-

(i) As the petitioner has divorced the Opposite Party by executing a talaknama, she is not entitled to any maintenance except the maintenance for

the iddat period, which has already been paid, in view of the provisions of The Muslim Women (Protection of Rights on Divorce) Act 1986;

(ii) No orders awarding any amount as maintenance can be passed which is more than the amount claimed by the applicant.

7. Mr. Sheikh, the learned Counsel in support of his contention in Point No. (i) has submitted that the marriage between the petitioner and the

opposite party was dissolved by executing a Talaknama on 7.3.2002, which was proved by the petitioner by adducing evidence and the petitioner

having paid the maintenance for the iddat period, the opposite party is not entitled to any maintenance. The learned Counsel submits that even

assuming that the petitioner could not prove the "talak" as he has failed to produce the talaknama executed, he having pleaded in the objection filed

against the application filed by the opposite party claiming maintenance that he divorced her by giving talak, it amounts to pronouncement of

divorce and hence from the date of filing of the objection the talak would be effective, consequently the opposite party is not entitled to

maintenance at least from the date when such objection was filed by the petitioner before the learned Magistrate. Mr. Sheikh, the learned Counsel

in support of his contention has placed reliance on Section 310 of "Mulla on Principles of Mohamedan Law" (19th Edn.) and also a decision of a

Single Judge of this Court in Md. Abdul Aziz v. Rehana Begum reported in 1993 (1) GLJ 523.

8. In Mohamedan Law "talak" may either be oral or in writing, i.e., "talak" may be effected orally (by spoken words) or by written document

called a talaknama. Such "talak" has to be pronounced, though it is not necessary that such pronouncement must be in presence of the wife or even

addressed to her but the intention must be proved. The talak pronounced in the absence of the wife takes effect though not communicated to her,

but for purposes of dower it is necessary that it should come to her knowledge and her alimony may continue till she is informed of the divorce.

The words of divorce must indicate an intention to dissolve the marriage. Pronouncement of the word "talak" in presence of the wife or when the

knowledge such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is

inconsequential. (Mulla on Principles of Mohamedan Law - Section 310 - 19th Edn.).

9. The Apex Court in Shamim Ara Vs. State of U.P. and Another, upon consideration of Section 310 of "Mulla on Principle of Mohamedan Law"

and " Muslim Law of India" by Dr. Tahir Mahmood and also the various pronouncements of the Apex Court and also decisions of this Court has

held that "talak" to be effective has to be pronounced and mere plea taken in the written statement of a divorce having been pronounced sometime

in the past cannot by itself be treated as effectuating "talak" on the delivery of copy of the written statement to the wife. A plea of divorce taken in

such written statement cannot at all be treated as pronouncement of talak by the husband on the wife on the date of filing of the written statement in

the court followed by delivery of a copy thereof to the wife. By holding so, the judgment passed by the High Court refusing to grant maintenance

by holding that the wife shall not be entitled to maintenance from the date of filing of the written statement pleading therein that he has divorced his

wife on a particular day in the past and hence the parties had ceased to be spouses, was set aside.

10. In the present it is the case of the petitioner that the talaknama was executed on 7.3.2002, which he has failed to produce before the court,

The further plea of the petitioner is that as he has pleaded in the objection against the petition for maintenance u/s 125 Cr.P.C. that he has divorced

his wife by executing "talaknama", the divorce is complete at least from the date when such objection was filed and served on the opposite party

wife. The said plea of the petitioner cannot be accepted on the ground that the petitioner claimed to have divorced his wife by written document

i.e. talaknama which he has failed to produce before the court to prove the divorce. Further to constitute a valid talak it has to be pronounced. As

held by the Apex Court in Shamim Ara's case, a plea of previous divorce taken in the written statement cannot at all be treated as pronouncement

of "talak" by the husband on the wife on the date of filing of the written statement in the court followed by delivery of a copy thereof to the wife.

Hence, the contention of the husband that the talak is complete at least on the date when he filed written statement with the pleading that he

executed a talaknama previously, cannot be accepted. In view of the judgment by the Apex Court in Swamim Ara (supra) the decision of this

Court in Md. Abdul Aziz (supra) cannot be taken as the law on that point.

11. Mr. Sheikh advancing his argument on point No. (ii) has submitted that the opposite party has claimed an amount of Rs. 500 and Rs. 400 for

herself and for her minor son respectively per month as maintenance and hence the court cannot award an amount more than what was claimed by

the opposite party as maintenance. According to learned Counsel, the Magistrate has awarded a sum of Rs. 700 and Rs. 450 per month to the

opposite party and her minor son, respectively, as maintenance though they claimed Rs. 500 and Rs. 400 per month respectively. According to

learned Counsel, the amount should be reduced at least to the amount which was claimed by the opposite party. The learned Counsel in support of

his contention has placed reliance in State of Gujarat Vs. Sardarabegum and Others,

12. In State of Gujrat v. Sarderbegum (supra) the Constitutional Bench of the hon"ble Supreme Court while dealing with an application challenging

discontinuation of political pension and order directing payment of such compensation to the heirs of deceased pensioner after his death, has held

that, as the writ petitioner in the said case has given up the claim to get the pension "in perpetuity" and got these words deleted from the prayer

clause of the writ application, the inevitable implication of such deletion was that the claim of the writ applicant had become limited to pension

payable for the life time of the writ applicant, the High Court erred in directing to pay more than what was prayed for. The said decision, in my

view, is not applicable to the fact situation of the present case.

13. The object of maintenance proceeding u/s 125 is not to punish a person but to prevent vagrancy by compelling those who can do so to

support those who are unable to support themselves and who have a moral claim to support. Section 125 has been enacted with the object of

enabling discarded wives, helpless and deserted children and destitute parents to secure much needed relief. It serves a special purpose.

14. Prior to Act 50 of 2001, the maximum amount of monthly maintenance awardable u/s 125 Cr.P.C. was Rs. 500. The code of Criminal

Procedure (Amendment) Act 2001 (Act 50 of 2001) the maximum ceiling of maintenance has been done away with. After the said amendment the

Magistrate of 1st Class may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife

or such child, father or mother, at such monthly rate, as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from

time to time direct. Section 127 of the Criminal Procedure Code empowers a Magistrate to alter such allowance for the maintenance which

includes the power to enhance the allowance granted for maintenance. The Magistrate for the purpose of determining the quantum of maintenance

has to take into consideration the earning of the husband and also the income and means of the wife. The said provisions of maintenance u/s 125

being a social beneficial legislation and having enacted to prevent vagrancy the Magistrate has to see the requirement of the wife and the child who

were neglected by the husband to maintain though having sufficient means and also the cost of living in the present day.

15. Section 125 empowers a Magistrate to award maintenance on such monthly rate as it thinks fit by taking into account the totality of the

circumstances and also the materials available on record. In a case where a wife filed an application u/s 125 CrPC by claiming maintenance from

the husband without mentioning any amount claimed by her, is it that the Magistrate will have no power to award maintenance as no amount has

been claimed? If it is so, the object and purpose of 125 CrPC would be lost. Under the said provision, as already discussed above, the Magistrate

has to make an enquiry and award monthly maintenance as he thinks fit so that the claimant can somehow pull on with that maintenance amount

awarded by the learned Magistrate. Even if in an application u/s 125 CrPC a particular amount is claimed as monthly maintenance, the Magistrate

may refuse to grant the said amount as claimed and also may upon taking into consideration the evidence on record, the status of the parties

including the financial position and also totality of the circumstance award monthly maintenance more than what has been claimed in such

application.

16. The Apex Court in Captain Ramesh Chander Kaushal Vs. Mrs. Veena Kaushal and Others, has held as under:

9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of

Article 15(3) reinforced by Article 39. We have no doubt that sections of status calling for construction by courts are not petrified print but vibrant

words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must

inform interpretation if it has to have social relevance. So viewed, it impossible to be selective in picking out that interpretation out of two

alternatives which advances the cause the cause of the derelicts.

17. In the instant case, the learned Magistrate has passed the order directing payment of maintenance at the rate of Rs. 700 and Rs. 450 to the

wife and minor son by recording the findings that the petitioner being a Grade-IV employee of a Public Health Centre is getting Rs. 3,400 per

month as salary. The learned courts below passed the said order of maintenance by marshalling the evidences on record and keeping in view of the

totality of the circumstances. This Court in exercise of its inherent power conferred by Section 482 of the Criminal Procedure Code cannot re-

appreciate the evidence on record nor can it sit on appeal over the order passed by the learned courts below. The said power can be exercised to

give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any court or otherwise to secure the ends of

justice.

18. This being the position, I do not find any merit in the petition filed by the petitioner seeking to invoke the jurisdiction of this Court u/s 482 of the

Code of Criminal Procedure Code and hence the petition is dismissed in limine.