(2002) 04 CAL CK 0030

Calcutta High Court

Case No: C.R.R. No. 608 of 2002

Saheda Khatoon		APPELLANT
	Vs	
Gholam Sarwar		RESPONDENT

Date of Decision: April 12, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Muslim Women (Protection of Rights on Divorce) Act, 1986 - Section 3

Citation: (2003) 2 ALD(Cri) 12 : (2002) CriLJ 4150

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: Pranati Goswami, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Malay Kumar Basu, J.
This Revision Application is directed against the order dated 21st March, 2001 passed by the learned Principal Judge, Family Court, Calcutta where under the learned Judge dismissed the Misc. Case filed by the petitioner-wife praying for maintenance against the O.P.-husband. It may be mentioned here that the Q.P. has not entered his appearance in spite of repeated calls even though he has received the notice of this Revisional Application in due time (vide order sheet dated 12th April, 2002).

2. The petitioner-wife filed this Misc. Case No, 136/99 u/s 125, Cr.PC-praying for an award of maintenance in her favour against her husband, the O.P. Her case was that she was married by the O.P. on 14th Oct. 1993 according to the Muslim rites and they lived as husband and wife for about two years after the marriage was consummated and during this period the petitioner conceived. But the husband

started torturing her both physically and mentally. One day, when she was in advanced stage of her pregnancy, the O.P. mercilessly assaulted her and kicked her on her abdomen. As a result she had to be admitted into a Nursing Home and operated upon and she gave birth to a dead child. Thereafter the O.P. drove her out from his house when she became compelled to take refuge in her father''s house. Since thereafter a good number of attempts were made through village panchayat to effect a settlement between them so that the husband might take her back but it failed due to the adamant attitude of the husband and in this way the petitioner has been compelled to live at the mercy of her parents and she has been finding it difficult to have her both ends met. Hence she has preferred the present petition for maintenance before the Court below, as she has no independent source of income, whereas her husband is a businessman and earns about Rs. 200/ - per day from such business.

3. The petition was contested by the O.P.-husband by filing a written objection where he denied the material allegations while admitting that the petitioner was his married wife. His further case was that he divorced the petitioner by giving Talak to her on her demand in his presence and in the presence of several witnesses of the local panchayat: As the petitioner refused to stay with him and her father told him to give Talak to her daughter, he divorced her by giving three Talaks, The petitioner thus being a divorced wife will not be entitled to get maintenance u/s 125, Cr.P.C. as claimed and the petition is not maintainable under the law.

4. In view of such contention of the husband O.P. the 14. Judge, Family Court, took up the issue of legal maintainability of the application and came to the finding that the petitioner being found to be the divorced wife of the O.P. was not entitled to any relief u/s 125, Cr.P.C. and her case was to be governed under the provisions of Section 3 of the Muslim Women (Protection of Right on Divorce) Act, 1986. In coming to such a conclusion what weighed with the Ld. Judge is the oral evidence of the O.P. Ws. 1 and 2 and the documentary evidence adduced by the O.P. viz./ the Exbt. A and A{1). The Ld. Judge has observed as follows. "The opposite party has categorically stated in his evidence that he gave the petitioner Talak in April about two years back and he has filed the affidavit and Talak nama (Exbt. A) and (A/1) O.P.W. 2 Mazboor Rahaman has also stated in his evidence that the opposite party gave Talak to the petitioner in a meeting of the panchayat. The petitioner''s father demanded Talak from the opposite party in the said Panchayt meeting.

...It transpires from Exbt. A and affidavit sworn before the Notary Public that on 11-6-1999 at about 10.00 a.m. the meeting of the local people was called by Saheda Khatoon where she and her parents demanded Talak from the opposite party and so he pronounced Tin Talak in presence of witness which they happily accepted. It further transpires from the said affidavit that to avoid any confusion and to confirm the said Talak he had sworn the Affidavit, It transpires from the Talak-nama Exbt. A/1 that the opposite party Md. Gholam Sarvyar gave Talak to the petitioner Saheda

Khatoon on 11th April, 1999 in presence of witnesses Abdullah Md. Mofid and Mazboor Rahman and the Talak-nama was signed by Sufi Nishat, Muslim Registrar Quazi. It therefore transpires from the evidence of the opposite party and his witness together with Exbt. A and A/1 that the opposite party gave Talak to the petitioner on 11-4-1999 in presence of witnesses....

5. But giving careful considerations to the evidence, I am of the view that the Ld. Judge of the Family Court has fallen into error by resorting to a reasoning which is fallacious. It should be remembered that here the story of divorce is asserted by the husband and denied by the wife. In such a Case, therefore, the onus falls heavily on the shoulder of the husband to furnish strict proof of his alleged divorce. But, as I have found on scrutiny of the evidence that far from furnishing strict proof the evidence suffers from short coming and inconsistencies. From the story which he avers it appears that the alleged divorce was not at his will but was promoted by a demand for such divorce made by the wife and her father. This gives the impression that the first category of divorce (Section 307 of Mahomedan Law) known as Talak (divorce given by the husband at his will), but is categorised as divorce on mutual consent which is known as Kulla. This is a form of divorce which is dealt with u/s 319 of the Mahomedan Law. In case of such a divorce the offer is to come from the end of the wife. If is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the married tie. It is to be noted that here also the case of the husband is that the father of the petitioner promised him the return of the dower debt, if he gave Talak to his daughter. Curiously enough, while giving the evidence the O.P. appears to have made a departure from this stand and has deposed so as to make out a case of divorce of the first category that is divorce at the will of the husband pronouncing the word Talak. This sets his case as averred in this pleadings at naught. In his oral evidence the O.P. has simply stated that he gave the petitioner Talak in April, about two years back and he filed the affidavit and Talak-nama in support of the statement. Nothing more has been stated by the O.P. in his evidence. His case as made out in the written objection thus does not get substantiated in his oral evidence. The Ld. Judge has relied upon the contents of the above-mentioned documents, namely, Talaknama and Affidavit, sworn before the Notary Public (marked as Exhibit. A series). This affidavit (Exbt. A) is to the effect that on 11th June, 1999 at about 10.00 a.m. a meeting of the local people was called by Saheda Khatoon where she and her parents demanded Talak from the opposite party and so he pronounced "Tin Talak" in presence of witnesses which they happily accepted. The Talak-nama Exbt A/1 provides that the O.P. gave Talak to the petitioner on 11th April, 1999 in presence of witnesses, namely, Abudullah Md. Mofi and Mazloor Rahaman and the Talak-nama was signed by Sufi Nishat, the Quazi: Ld. Judge below has jumped to the conclusion from this observing that it therefore transpires from the evidence of the O.P. and his witness together with Exbt. A and A/1 that the O.P. gave Talak to the petitioner on 11th April 1999 in presence of witnesses. I cannot but

hold that here the Ld. Judge misdirected himself into a wrong finding. The Talak-nama does not bear the signature either of the petitioner or her father. There is nothing to show that it was executed either in the presence of the petitioner wife or to her knowledge. Secondly, the execution of such an unilateral document is not also proved or testified to by any disinterested and trustworthy witness. The quazi, Sufi Nishat who allegedly assigned it is not coming to the witness box to support such a story of the O.P. or to prove that it was his signature. Nor the witness Abdullah Md. Mofi is examined in this behalf. The only witness who has come to corroborate the evidence of the O.P. is the O.R 2 Mazloor Rahaman. But this witness appears to be an interested witness. He has himself admitted in his examination-in-chief that the O.P. is his nephew (brother''s son) and he and the O.P. residence at the same place and premises and further that he along with his son is arranging the meals of the O.P. In his examination-in-chief he further says that the petitioner''s father demanded Talak from the O.P. in the Kamarhati Panchayat meeting and accordingly the O.P. gave Talak to the petitioner on the said meeting of the Panchayat and shortly thereafter the O.P. sent communication of such Talak to the petitioner. It is curious that such statements are not made by the O.P. himself and the O.P. 2 is the only witness who gives such deposition which remains totally uncorroborated. Secondly, he does not make it clear how the O.P. sent communication of such oral Talak to the petitioner. More curiously, how the question of communication arises, when it is the definite case of the husband that he pronounced Tin Talak in presence of the wife-petitioner. He admits that no paper was prepared in that panchayat meeting regarding such Talak as alleged. This also raises doubt and question as to why such an important matter having far-reaching consequences upon the lives of the parties were not reduced into writing when it was being taken up and dealt with by an official body like the village panchayat. In case of divorce by Talak it is required that the utterance of the word should be made by the husband in the presence of the wife to her hearing or it should be brought to her knowledge. But in the present case as we have seen above from the evidence on record no proof has been furnished as to the allegation that such alleged pronunciation of Talak was brought to the knowledge of the petitioner wife. The husband has miserably failed in this respect. The affidavit sworn before a Notary Public filed by the husband along with Talak-nama described above is of little value for obvious reasons. There is no explanation why such an affidavit concerning a vital matter was not sworn before a First Class Magistrate. Therefore, the findings of the Court below that the oral evidence of the O.P. Ws. 1 and 2 together with Exbts. A and A/1 have sufficiently proved the allegation of the husband that he gave Talak to the petitioner wife on the 11th April, 1999 in presence of witness are not at all correct. The evidence adduced in his regard by the husband is insufficient and unsatisfactory and miserably fall short of the standard of proof which is required in such a case, apart from the fact that the husband has led the Court to confusion by mixing up two kinds of divorce on mutual consent (khula).

6. There is still another aspect of the matter . The learned Judge of the Family Court has held that since the O.P. in his written show cause in reply to the averments made in the petition by the wife has taken the specific plea that he divorced the petitioner on 1lth April, 1999, the Talak Will be effective w.e.f. the date of filing of the written show cause, even if it is assumed that the O.P. has failed to prove his alleged divorce by pronouncing the word Talak thrice in presence of the petitioner as well as the witnesses. Ld. Judge has relied upon a decision K. Srinivasulu Vs. Deputy Commercial Tax Officer, . It was held in the former ruling that statement by husband in pleadings filed in answer to the petition for maintenance by the wife that he had already divorced the petitioner wife long ago will operate as divorce w.e.f. the date on which this pleading comes to the knowledge of the wife. In the latter it has been held that the wife shall be treated to have been divorced on the date on which statement to that effect was made by husband in his plaint. But after careful consideration of the point and the above observations I do not feel inclined to subscribe to such a view. The question which is in issue in the concerned application u/s 125, Cr.P.C. filed by the wife is whether she was divorced by the husband O.P. w.e.f. 1lth April 1999 as alleged and whether w.e.f. that date she was to be regarded as a divorced wife. The petitioner-wife did not receive any communication of such alleged divorce effected unilaterally by the husband at his will till she filed the present petition for maintenance u/s 125, Cr.P.C. The husband after receiving the notice of such a case has averred in his written objection that he divorced the wife on being demanded by her and her father. In her evidence, as it has been shown above, he has totally failed to establish such a story and it has not been proved that any such divorce was actually given by the husband. That being so, the story of divorce appearing to be a myth, it cannot be held by the Court in the same breath that the mere statement of the husband in the written objection to the effect that he divorced the wife on 1lth April, 1999 should now be taken to show that the fact of such alleged divorce is thus communicated to the wife through the averments in his pleadings. That will be inconsistent and self-contradictory when a thing is proved to be non-existent or not happening at all cannot be said to be communicated. It will be a dangerous proposition to say that now that the O.P. has given a statement in his written objection to the effect that he divorced the wife on any particular date, that statement should be taken to indicate that the alleged fact of divorce is thereby being communicated to the wife. The question of such communication through the averments in the pleadings could arise only if it was held that the alleged giving of divorce has been proved by the husband. But since in this case it has been held by him that the story of divorce has not been substantiated by trustworthy evidence, the question of its communication loses significance. Again, it is argued that this statement of the O.P. in his written objection that he divorced the wife should be taken as his declaration of Talak originating on that date than also it will be unacceptable since that will be inconsistent with the case of the C.P. as made out in his pleadings that he divorced the wife on 1lth April, 1999 and that too on her demand and in her presence. When the O.P. has failed to prove such allegation the

Court cannot help him overcome the drawback by giving recognition to such a third case which was never his original stand or pleaded by him never.

7. The husband having failed to successfully bring home his story of divorce of the legal maintainability of the application u/s 125, Cr.P.C. is not affected in any way and it remains intact. There is no question of referring the petitioner wife to the provisions of Section 3 of the Muslim Women (Protection of Rights on Divorce) Act 1986 and she is entitled to file such a petition under the provision of Section 125 of Cr.P.C.

8. This brings up to the question whether all the ingredients of Section 125, Cr.P.C. have been fulfilled. It is the case of the petitioner that she used to be inhumanly tortured by the O.P. who one day kicked on her abdomen when she was in an advanced stage of pregnancy with the result that she gave birth to a dead child after being operated upon. It is also her further case that she was driven out by her husband and took refuge in her father''s house and in spite of repeated requests being made by her father for taking her to his house he did not take her to his house. The petitioner has stated of this in her deposition and as many as 3 PWs have corroborated her testimony. Those witnesses have further stated that there was an attempt at effecting a settlement between the parties by the village panchayat but the husband ultimately did not pay any heed to the decision of that panchayat. It do not find anything in the cross examination of this PWs which has any effect of destroying the reliability of such statements. This shows that the petitioner cannot be said to have left the house of the husband voluntarily or of her own accord.

9. The second question is whether the petitioner has any independent source of income. It is admitted position that she has no employment or no independent source of income and has to live in the family of his father being dependent on him.

10. The next question is whether the husband is employed and if so, how much he earned in a month. It is in the evidence of the petitioner that her husband has a business wherefrom he earns about Rs. 8000/- per month while the father of the petitioners has stated that the G.P. earns Rs. 200/- per day from his Pan biri shop. Consequently, such statements of these PWs. have not been challenged, far less shaken, in their cross-examination. In the cross-examination of the PW 1 it has been suggested that the O.P. gets a sum of Rs. 25/- every day as his remuneration from his employer, owner a beaf shop and such suggestion has been denied. What is more the statement of the petitioner''s father that the O.P. earns Rs. 200/- every day from his business of Pan biri remains also totally unchallenged. In this context the evidence of the O.P. himself is worthy of notice. He has said that he is not an owner of any beaf shop but as a matter of fact, he is employee in such a beaf shop, but at present, that is, at the time when he was deposing he was no more an employee in such a concern have been discharged by the employer. It is curious that such statement of the O.P. 1 remains totally uncorroborated either by any oral evidence or by means of a document. Not a single scrap of paper from such a concern has

been forthcoming to prove that he has been discharged from his employment there, nor any person attached to such a concern in coming to corroborate the O.P.s said testimony . That he is deposing untruth with regard to this aspects of the matter is manifest from the evidence. In his examination- in -chief in order to prove himself to be an employed, idle person dependent on others help he states that he is maintained by his uncle, namely, Mazloor Rahman (O.P. 2) from whom he took loan of Rs. 325/-, but curiously enough his statement is falsified straightway by the said Mazloor Rahman (O.P. 2) when he says in his examination-in-chief that the O.P, has not borrowed any amount from him and it would not be correct to say that the O.P. borrowed a sum of Rs. 325/- from him. Thus it becomes clear that the O.P.s case that he has no income and he lives on others gifts is totally false. As I have shown above, the statement of the PW 1 or PW 2 giving monthly income of O.P. as Rs. 8000/- approximately has not been subjected to challenge. Therefore, it can safely be concluded that this amount should be taken as the approximate monthly income of the O.P. for the purpose of determining the amount of maintenance payable to the petitioner who is admittedly the married wife of the OP. and is found entitled to get maintenance from him every month, all the conditions of Section 125, Cr.P.C. having been satisfied. The general and reasonable rule is to charge l/5th of the income of the husband for the purpose of awarding maintenance to the wife-petitioner. Therefore, the amount of maintenance in this case which is found awardable is fixed by a method of approximation at Rs. 1500/- per month which appear to be the minimum reasonable amount for the purpose of enabling an adult person to maintain herself by meeting the bare necessities of life, regard being had to the post of living index of the present day.

11. Accordingly, the Revisional Application be allowed and the impugned order of the Court below be set aside. The husband -O.P. be directed to pay to the petitioner-wife a sum of Rs. 1500/- every month. This order shall take effect from the date of application filed by the wife u/s 125, Cr.P.C. filed before the Court below. The O.P.-husband is further directed to pay such monthly amount of maintenance by postal Money Order to the present address of the petitioner after deducting the M.O. costs therefrom. As regards the arrears of maintenance the O.P. shall make payment of the same in five consecutive monthly installment commissioning from the month of June 2002.

Xerox Certificate copy of this order, if applied for may be supplied as early as possible.