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**Ummer Farooque Vs. Naseema**

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**Court** : Kerala

**Decided On :** Oct-05-2005

**Reported in** : 2005(4)KLT565

**Judge** : R. Bhaskaran and; K.P. Balachandran, JJ.

**Acts** : Code of Criminal Procedure (CrPC) - Sections 125; ;Indian Penal Code (IPC) - Sections 498A; ;Mohammedan Law; ;Hanafi Law; Quaranic Law

**Appeal No.** : Mat. Appeal No. 76 of 2005/R.P. (FC) No. 49 of 2005

**Appellant** : Ummer Farooque

**Respondent** : Naseema

**Advocate for Def.** : M.P. Prakash, Adv.

**Advocate for Pet/Ap.** : K. Shibili Naha, Adv.

**Disposition** : Petition allowed

**Judgement** :

**R. Bhaskaran, J.**

1. R.P.(FC).No. 49 of 2005 arises out of M.C.No. 561 of 2003 filed by the respondent herein under Section 125 of the Code of Criminal Procedure for maintenance and Mat. A.No. 76 of 2005 arises out of O.P.No. 191 of 2004. for

arrears of maintenance filed by the respondent wife. In the claim for maintenance under Section 125 of the Code of Criminal Procedure, the appellant contended that there was already a divorce effected by the pronouncement of talaq on 23-7-1999 and the divorced wife was not entitled for claiming maintenance. Arrears of maintenance was claimed for the period from 29-10-2000 to 28-10-2003. The claim was opposed on the ground that there was already a divorce in 1999 and the respondent is not entitled to claim any maintenance. At the time of argument of the O.P. before the Family Court, a contention was also raised that the respondent was not entitled to claim arrears of maintenance unless she pleaded and proved that she belonged to Shafi sect. This contention was negatived by the Family Court and arrears of maintenance was ordered as prayed for. The Family Court also ordered for payment of maintenance at the rate of Rs. 1,500/- p.m. from the date of petition and arrears of maintenance for three years at the rate of Rs. 1,000/- p.m.

2. In the appeal and revision, the learned Counsel appearing for the appellant and revision petitioner mainly contended that the parties are presumed to be Hanafis and the wife is not entitled to claim arrears of maintenance. He also contended that when there is a pronouncement of talaq and divorce is effected, a divorced Muslim wife cannot claim maintenance and therefore the Family Court has gone wrong in allowing the application filled by the respondent wife. In the light of the above contentions, the points for consideration are (1) whether the Family Court was justified in law in awarding arrears of maintenance to the respondent wife, and (2) whether there was a divorce as contended by the appellant and whether the respondent is disentitled to file an application under Section 125 of the Code of Criminal Procedure before the Family Court.

Point No. 1

3. The learned Counsel for the appellant strongly relied on the decision of Madhavan Nair, J., in Naha Haji v. Karikutty , 1966 KLT 445. In that case, there is an observation that the generality of Mappilas in South Malabar are Shafis; but, it cannot be said that every Mappila in South Malabar is a Shafi. The presumption can only he that an Indian Muslim is a Sunni of the Hanafi sect. Whenever

deviation from the Hanafi law is sought to be relied on in a case, it has to be pleaded and proved as a fact. These observations are in the nature of obiter dictum as the learned Judge has himself observed that it was unnecessary in that case to decide whether the parties concerned are Shafts or Hanafis; for, even if they were Shafis, there would not have been any difference in the result of the case. The learned Judge was deciding the question whether a gift by the father to a daughter had come into effect and could be revoked by the father. It was observed that even if parties are Shafis the gift in the circumstances of the case had become operative. No doubt, Justice Madhavan Nair has noted that in Katheesa Umma v. Narayanath Kunhamu, : [1964]4SCR549 , a case from North Malabar, the parties are seen treated as Hanafis by the Supreme Court. But on going through the decision of the Supreme Court, there was no question raised as to which sect the parties belonged to and there was no decision on that aspect at all. Though there was a passing observation that the parties are Hanafis, the Supreme Court has not laid down any law about the general presumption and the necessity for pleading and proving in all cases if a claim is made for past maintenance that the parties belonged to Shafi sect.

4. In Abdul Karim v. Nabeesa, 1987 (2) KLT 887, Pareed Pillay, J., as His Lordship then was, noticed that in the plaint in that case it was not stated that the parties belong to Shafi sect. But it was asserted in the replication filed by the plaintiff that they and defendant follow Shafi School. It was observed that majority of Muslims in Kerala follow Shafi School. So far as this State is concerned Hanafis are only in the minority. Judicial notice of the above position was taken by the learned Judge and it was found that there was ample evidence in the case that the parties followed Shafi School. When judicial notice is taken of the fact that majority of the Muslims in Kerala follow Shafi School, we do not understand as to why there should be a presumption so far as the Muslims in Kerala are concerned that they are Hanafis; and the necessity to plead and prove that the parties belonged to Shafi sect, when alone a decree for arrears of maintenance can be granted. In this case, it is important to note that when the plaintiff claimed arrears of maintenance there was no contention in the written statement filed that the parties belonged to Hanafi sect and therefore the plaintiff cannot claim arrears of maintenance. It was only in the proof affidavit of the power of attorney holder of the appellant that it was

stated that the parties belonged to Hanafi sect. When Rw.1 was examined, no attempt was made to bring out as to which sect the parties belonged to. The appellant was not examined in court. The question still arises as to how far the evidence of the power of attorney can be relied on and can be treated as a substitute for the evidence of the appellant himself. As held by the Supreme Court in M.P. Rural Agrl .KO. Assn. v. State of M.P. , 2004 (2) KLT 265 (SC), the power of attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge. In the absence of sufficient pleadings to raise an issue on the particular sect to which the parties belonged to and an issue raised in that respect, it may not be proper to defeat the claim for maintenance on such technical contentions. It is to be noticed that the appellant is claiming a special exemption from the general law of the land. It is, no doubt, true that though generally a neglected wife is entitled to maintenance if the personal law of the parties is otherwise the husband may be entitled to resort to the personal law. But such claims must be beyond doubt. If as noted in this case the majority of Muslims in Kerala especially in South Malabar are Shafis, we are of opinion that it will be most unjust, to start with a presumption that they are Hanafis and in the absence of pleading and proof, to hold that neglected wife is not entitled for arrears of maintenance. We are of opinion that Justice Pareed Pillay was fully justified in taking judicial notice of the fact that Hanafis in the State are only in the minority and majority of the Muslims in Kerala follow Shafi School. This is supported by the observation in the Madras District Gazetteers (Malabar), Volume 1, page 188 wherein it is stated that the Mappilas belong to the Shafi School of the Sunni Sect of Mohammadans, As early as in 1937, the Madras High Court in Kutti Umma v. Nedungadi Bank Ltd., Calicut, AIR 1937 Madras 734 also found that the doctrines of Shafi School are found among the Mappilas of South Malabar generally. In Mulla's Principles of Mohammadan Law, in paragraph 28, it is stated as follows:

'The Sunnis are divided into four sub sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis.... Considerable groups of Mahommedans in the south of India, such as Kerala and Malabar, are Shafeis'.

In view of the above weighty authorities, the counsel for the appellant is not right in contending that in the absence of pleading and proving to the effect that the parties are to be presumed to be Hanafis and therefore the plaintiff is not entitled for past maintenance. This point is therefore found in favour of the respondent and against the appellant.

Point No. 2

5. The question whether the respondent is entitled for maintenance will depend upon the question whether there was a valid divorce effected between the parties. The learned Counsel for the appellant mainly relied on Ext.B2 deposition in C.C.No. 49 of 2001 produced in O.P.No. 191 of 2004. C.C.No. 49 of 2001 was filed by the respondent against the appellant before the Judicial First Class Magistrate under Section 498-A of the Indian Penal Code. In the evidence of the respondent, she had stated that the appellant had pronounced talaq three times on 14-2-2000. According to the counsel for the appellant, that is sufficient admission to the effect that there is a valid divorce between the parties. The appellant has no case that he has divorced the respondent on 14-2-2000. On the other hand, according to him, she was divorced on 23-7-1999. The question to be considered is whether in this case there is any evidence of a valid divorce by pronouncement of talaq under Mohammadan Law. The general impression as reflected in the decision Of a Division Bench of this Court in Pathayi v. Moideen , 1968 KLT 763 was that the only condition necessary for a valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at the that time and he can effect divorce whenever he desires and no witnesses are necessary for dissolution of the marriage and the moment when talaq is pronounced, dissolution of marriage is effected; it can be conveyed by the husband to the wife and it need not be even addressed to her and it takes effect the moment it conies to her knowledge etc. But this can no longer be accepted in view of the authoritative pronouncement of the Supreme Court in Shamim Ara v. State of U.P. , 2002 (3) KLT 537 (SC). In that decision the Apex Court accepted the view of the Division Bench decision of the Gauhati High Court in Must. Rukia Khatun v. Abdul Khalique Lasker, (1981) 1 GLR 375. Baharul Islam, J., as His Lordship then was, speaking for the Bench, and of the same learned Judge in

Jiauddin Ahmed v. Mrs. Anwara Begum, 1981) 1 GLR 358 that to be a valid talaq it should be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's side and if the attempts fail talaq may be effected. The Supreme Court has also approved the view of the learned Judge and jurist, V.R. Krisha Iyer, J., of this Court in Yousuf Rawther v. Sowramma, 1970 KLT 477 holding that it is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage. The Holy Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. Justice Krishna Iyer has referred to various authorities to come to the conclusion that divorce was permissible in Islam only in case of extreme cases and where reconciliation has failed. In Shamin Ara 's case (2002 (3) KLT 537 (SC), the Supreme Court disapproved the action of the presiding Judge in relying on the affidavit of the husband in some civil suit wherein he had stated that he had divorced the wife and the Family Court had accepted the affidavit in corroboration of the contention of the husband that he had divorced the wife.

6. The only thing to be further considered in this case is whether the divorce alleged to have been effected by the husband by pronouncement of talaq on 23-7-1999 is proved or not. The mere pronouncement of talaq three times even in the presence of the wife is not sufficient to effect a divorce under Mohammadan Law. As held by the Supreme Court in Shamim Ara's case (2002 (3) KLT 537 (SC), there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife. The marriage between the appellant and the respondent was on 20-9-1998. After two months of joint living the appellant went abroad. According to the wife, she was compelled to leave the marital house on account of the ill-treatment and demand for additional gold ornaments and mental cruelty. To prove talaq the appellant-husband was not examined. As already observed earlier, the father who is the power of attorney holder is not competent to give evidence as to the circumstance and the manner in which talaq was pronounced. Though it is stated by Pw.1 that talaq was pronounced in the presence of Aboobakcer, Alavikunju and Basheer, none of them

was examined in court. The husband was admittedly working in Jiddah on 23-7-1999. Though it was argued that the information regarding talaq was conveyed through post, no document was produced in support of the same.

7. Even assuming that the evidence of power of attorney holder can be looked into as evidence on behalf of the appellant, we have to consider as to what he has stated in evidence. In M.C.No. 561 of 2003 even the chief examination was in court and not by affidavit. All that he has deposed is that since there is no marriage relationship between his son and the appellant there is no liability for his son to pay maintenance. He has not given any of the details of talaq. In O.P.No. 191 of 2004 which was for arrears of maintenance, the chief examination is by affidavit. Though it is stated in paragraph 8 of the affidavit that one Abdulrahiman Haji and Valappil Mohamed were the mediators and that the wife did not agree for further continuing the marriage, none of them was examined in court. There is no case that there were two mediators; one on the side of the wife and the other on the side of the husband, to settle the disputes which was a failure. 'Even assuming that the wife has stated that the husband had pronounced talaq thrice on 14-2-2000 if by that mere pronouncement of talaq there was no valid dissolution of marriage, that admission by itself will not stand in the way of her claiming maintenance or arrears of maintenance. She has never admitted that she has been validly divorced by the appellant. Rw.1 has admitted that on 14-2-2000 the appellant has not dissolved the marriage between him and his wife. In the absence of any evidence, whatsoever to substantiate the case of a valid talaq, we are of opinion that the appellant is not entitled to resist the claim for maintenance on the ground that there was already a divorce of the marriage between the parties. In view of the decision of the Supreme Court quoted earlier, we find that the appellant has not succeeded in establishing a valid talaq and the finding of the Family Court is only to be upheld and we do so.

In the result, there is no merit in the appeal and the revision and they are dismissed with costs.

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