

Musaffar Hussaln Vs. Anjun Afsha

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Court : Rajasthan

Decided On : Jan-25-1991

Reported in : 1991WLN(UC)30

Judge : N.L. Tibrewal, J.

Appeal No. : S.B. Criminal Misc. Petition No. 107 of 1989

Appellant : Musaffar Hussain

Respondent : Anjun Afsha

Disposition : Petition dismissed

Judgement :

N.L. Tibrewal, J.

1. This petition has been filed by the husband, being aggrieved against the order dated 4.12.87 of Additional Munsif and Judicial Magistrate No. 2 (South), Kota and the judgment of Additional Sessions Judge No. 1 Kota dated 4.2.89 passed in criminal revision No. 3/88 in a proceeding under Section 125 Cr.P.C. as well as Section 3 of the Muslim Women (Protection of Rights on Divorce) Act.

2. In brief, the facts are that the non-petitioner (wife) filed an application under Section 125 Cr.P.C. for grant of maintenance allowance in the court of Additional Munsif and Judicial Magistrate No. 2 (South) Kota alleging therein that she was

married to the petitioner in accordance to Muslim Law on 3.5.83 at Kota, but she was deserted by her husband (petitioner) on 10.10.83 i.e. just after five months of the marriage. She claimed maintenance allowance at the rate of Rs. 500/- per month.

The husband filed a reply to the aforesaid application on 11.7.86. In the said reply he pleaded, inter alia that he was unemployed while the non-petitioner-wife was employed in a private school. In the said reply he made a declaration thrice about the divorce.

In view of the aforesaid declaration of divorce, the non-petitioner-wife moved an application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In that application she denied that she was gainfully employed as a teacher in a private school. She further pleaded that after divorce on 11.7.86 the husband (petitioner) has not paid the amount of 'Meher' and he also did not return the ornaments and other article of dowry which is in his possession as trustee. The non-petitioner has estimated the cost of these ornaments and articles as Rs. 70,000/-. The wife further claimed 'Meher' which is amounting Rs. 10,000/- in cash and eight 'Asharfies' of gold. In reply to the said application the husband (petitioner) had taken the plea that 'Meher' was abandoned by the wife. He denied that he was in possession of ornaments or other articles of dowry.

The learned Magistrate recorded the statements of the wife Anjun Afsha as PW 1, as well as of five witnesses examined by her as PW 2 to PW 6. The petitioner also appeared in the Witness Box as DW 1 and examined the witnesses as DW 2 and DW 3.

The learned Trial Magistrate, after recording the evidence and hearing the arguments of the learned Counsel for the parties, held that the wife (non-petitioner) was entitled Rs. 6,00/- as maintenance allowance for the period of iddat at the rate of Rs. 2,00/- per month and also Rs. 10,000 and the market value of eight 'asharfies' as settled in Mehar at the time of marriage. The learned Magistrate further directed the petitioner to make the payment within a month from the date of order i.e. 4.12.87.

Aggrieved against the aforesaid order, the petitioner filed a revision petition which was heard and disposed of by the Additional District and Sessions Judge No. 1, Kota. The revision was also dismissed by the learned Additional Sessions Judge vide judgment dated 4.2.89. Hence this petition under Section 482 Cr.P.C. has been filed by the petitioner challenging the aforesaid orders/judgments of the learned courts below.

3. I have heard the learned Counsel for the parties and perused the entire record as well as the orders/judgments of the courts below.

The learned Counsel for the petitioner has raised only one point that the contract of 'Mehtar' at the time of marriage is illegal, as gold ashrafy could not be possessed at the time of contract in view of the Gold Control Act, and the said contract is also not enforceable in law because its performance cannot be made, inasmuch as 'ashrafy' was neither available at the time when the settlement of Mehtar was made nor the same is available now.

Contrary to this, the learned Counsel for the non-petitioner submitted that the aforesaid pleas raised by the learned Counsel for the petitioner were not raised either in the reply before the learned Trial Magistrate or when the evidence was recorded and even at the time of argument before the learned Trial Magistrate. He further submits that no such plea was raised even before the learned Additional Sessions Judge. According to the learned Counsel for the non-petitioner, the only plea taken by the petitioner was that the amount of 'Mehtar' was abandoned orally by the non-petitioner and this plea was not accepted by the courts below.

4. I have given my thoughtful consideration on the aforesaid submission made by the learned Counsel for the parties. It may be stated at the outset that the plea has been raised by the learned Counsel for the petitioner first time before this Court in the present petition which has been filed under Section 482 Cr.P.C. and no such plea was taken before the courts below. The learned Counsel for the petitioner could not point out any illegality or irregularity in the findings arrived at by the learned courts below. In my view such plea cannot be allowed to be raised by the petitioner at this stage. The powers under Section 482 Cr.P.C. are limited and the court is to see whether there is any abuse in the process of the court in

deciding the matter by the courts below.

Otherwise also, I am of the view that none of the contentions raised by the learned Counsel for the petitioner is sustainable. The learned Counsel failed to show as to how the settlement of 'Mehtar' is illegal and simply because the petitioner had agreed to Rs. 10,000/-and eight 'asharfies' it cannot be said that the said contract becomes illegal because Gold Control Act was applicable at that time. It may be, however, mentioned that the Gold Control Act stood repealed and it is no more in force now. It is our common experience that at the time of settlement of the 'Mehtar', besides cash amount, some 'asharfies' are also settled as 'Mehtar'. This practice is prevalent inspite of the fact that 'asharfies' are no more any article available in the market. Generally an 'asharf' is taken to be a gold coin of one Tola i.e. of 10 grms. or 12 grms and whenever 'Mehtar' is fixed and 'asharfies' are mentioned as 'Mehtar', then the intention of the parties is to pay the market value of 10 grms. of gold which is found prevalent at the time of making payment of 'Mehtar'. After the Muslim Women (Protection of Rights on Divorce) Act came into force and a muslim woman is divorced, then the only source of her livelihood, if she is not having any other independent source of livelihood, is 'Mehtar' and as such a divorced woman should not be deprived of her 'Mehtar' by declaring the settlement of 'Mehtar' to be unenforceable. The attitude of the court, while deciding such matter, should be towards the wife and she should not be deprived of her 'Mehtar' on putting unrequired restrictions.

The learned Counsel for the non-petitioner has also drawn my attention that 'Mehtar' is an effect of the marriage and it is imposed on the husband by the law as a mark of respect for the wife, it is also taken as an exchange for the usufruct of the wife and its payment is necessary. It is also taken to be as a provision of support to the wife after divorce. 'Mehtar' is taken to be the incumbent on the husband and even the amount of 'Mehtar' (dower) is not settled, then too the wife can demand the same. In such a special situation the amount of dower will be to the extent of the dowers of the women of her rank and of the ladies of her fathers family. There is no limit to the amount of dower and it may be to a very large amount considering the position and circumstances of the bridegroom. As per Muslim Law, the amount of dower is never less than ten dirhans and if it is lesser

then this then the law augments it to be ten dirhams. It is further noteworthy that dower need not invariably be in currency, or even in metal and everything, except carrion, blood, wine and hog.

Therefore, the husband is bound to pay the dower (Mehar) even it was not mentioned in the marriage contract. If no dower is fixed then the wife can claim the same and in that situation the court grants the amount of dower considering the position and circumstances of the bridegroom. Therefore, by no stretch of imagination, the petitioner cannot claim that the cannot make the payment of 'Dower'(Mehar) of the ground that 'asharfies' are not available in the market and the said contract is not enforceable. It may be further stated that in the various dictionaries asharfy' has been defined as 'gold coin', 'a guines' or a gold coin having weight of 10 Masha which was in circulation at the time of Mughal period. Therefore, whenever the word 'Asharfi' is used as 'Mehar' the intention of the parties is to give the gold at the rate of 10 Mashas per Asharfi or its market value.

Thus, judged from any angle, this petition is wholly without any merit and the same is dismissed.