

**IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,  
BONGAIGAON**

**PRESENT: SYEDA FARIDA AFZAL ZINNAT**

**CASE NO: 1(M)/2013**

**MSST. HASNUFA RAHMAN**

**FIRST PARTY**

***VERSUS***

**SAHEB ALI**

**SECOND PARTY**

***U/S 125 of the Code of Criminal Procedure***

**FOR THE FIRST PARTY: MR. K. CHAKRABARTY, ADVOCATE**

**FOR THE SECOND PARTY: MR.H.DAS, ADVOCATE**

**EVIDENCE RECORDED ON: 7/5/13, 14/5/13**

**ARGUMENTS HEARD ON: 21/5/13**

**JUDGMENT DELIVERED ON: 13/6/13**

## JUDGMENT

1. This proceeding has arisen out of a petition filed by the first party under section 125 of the Code of Criminal Procedure claiming maintenance allowance @ Rs. 8,000/- per month from the second party.
2. The case of the first party in brief is that she is the legally married wife of the second party. On 16/10/2002 the first party got married to the second party according to Muslim Shariat and the first party started her conjugal life at her matrimonial house at Chalantapara, Bongaigaon. After two years of the marriage the second party demanded an amount of Rs. 1, 00,000/- from the first party and used force on her to fulfil his demand. Upon refusing to give the money the second party and his family members started physical and mental torture on the first party. It is the case of the first party that she was not provided with food and cloth and when the tortures increased she informed her family members and they gave Rs. 50,000/- to the second party by selling cows to save her marriage in the year 2006. But after few months the second party and his family members again started to demand Rs. 50,000/- for his business and tortured the first party for not fulfilling his demand and on 16.12.2009 the second party and his family members tortured the first party physically and drove her out of her matrimonial house threatening her not to return without money. Finding no alternative the first party took shelter at her sister's house at Goalpara and thereafter she took shelter at her uncle's place at Dolaigaon, Ujanpara. After the first party left her husband's house the second party neither enquired about her nor provided her any maintenance. The first party has no source of income and she has become the burden of her aged uncle. It is alleged that the second party is financially sound having land, fisheries and cultivable land. Apart from this the second party is a

school teacher and his monthly income is more than Rs. 20,000/- Hence this case for maintenance.

3. The second party contested the case by filing written statement denying all the allegations made in the petition. It is submitted by the second party that he is an employee of grade IV at Chalantapara Girls' High School and the first party hails from a well to do family and as such she could not adjust with the second party in spite of his best of efforts. It has been alleged by the second party that the first party left him ceasing the marital tie on her own pronouncing three talaq in presence of the witnesses (ukil) of marriage Nur Alam and Rafiqul Islam and the second party has paid her a sum of Rs. 50,000/- for the purpose of her iddat maintenance and meher and the first party has wilfully received the sum. It is further alleged that the first party has sworn an affidavit on 15.12.2009 before the Notary, North Salmara which was witnessed by the two persons aforementioned and was duly identified by advocate Manik Ullah of Abhayapuri Court. So she is not entitled to get any maintenance. Hence prayed for dismissal of the case.
4. Upon perusal of the pleadings the following points are taken up for consideration:
  - 1) Whether the first party has got any just and reasonable ground for living separately from the second party?
  - 2) Whether the second party having sufficient means neglected or refused to maintain the first party?
  - 3) Whether the second party has got the ability to give maintenance to the first party?
  - 4) Whether the first party is entitled to get the maintenance as prayed for?

5. In support of her case the first party adduced the evidences of two witnesses and the second party examined himself as well as two other witnesses. I have gone through the arguments put forward by the learned counsels of both sides and gone through the Evidence on Record.
6. DISCUSSION ON EVIDENCE, DECISION AND REASONS THEREOF:

**POINT NO.1:**

7. PW1 Hasnufa Rahman stated that for about 2 years after marriage she stayed at her husband's residence in Chalantapara peacefully but after that her husband started torturing her physically and mentally in demand of Rs. 1 lakh. Her mother-in-law, sister –in- law and brother-in-law also misbehaved her all the time. She stated that due to the brutal assaults of her husband the hearing of her right ear has been impaired. In the year 2005 he drove her out of his house in demand of dowry and her married sisters gave her Rs. 50,000/- to fulfil the demand of her husband. After paying the money she again started to live with her husband but after six months he again demanded Rs. 50,000/- and threatened her that if she did not fulfil his demand he would marry another woman. On 16<sup>th</sup> December 2009 he drove her out of the matrimonial house and she had to take shelter at her maternal uncle's house. First party stated in her evidence that after driving her out of his house her husband married another woman named Naliya Khatun.
8. PW2 Jenifa Rahman, sister of the first party supported the evidence of the PW1. She stated that her sister Hasnufa used to show injury marks on her body and she cried in front of her sisters for the tortures inflicted on her by her husband. She further

stated that she and her sisters gave Rs. 50,000/- to the second party but even after that he tortured the first party and drove her out of his house.

9. DW1 took the plea that the first party is a mental patient and he divorced the first party by way of swearing an affidavit in Abhayapuri and paid her a lump sum amount of Rs. 50,000/-. He further stated that he has married another woman and he will not take the first party back and that because of the divorce the first party is not entitled to any maintenance. Whether the divorce is a valid one or not and whether the first party is entitled to maintenance will be decided at a later stage of this judgment but from the evidence discussed above it is seen that the allegation of the second party that the first party is a mental patient and that she was treated by her brothers for mental illness is not supported by any medical or documentary evidence to that effect. The allegation of the second party, in the absence of any just and cogent evidence, cannot be believed. On the contrary, it is seen that the second party has married another woman and has refused to take back the first party. In such a situation it cannot be said that the first party left the matrimonial house without any reasonable and justifiable ground. So it is held that the first party has got just and reasonable ground for living separately from the second party. Accordingly this point is decided in favour of the first party.

**POINT NO.2:**

10. According to the first party (PW1) since she left the house of the second party he neither enquired about her nor provided her any maintenance. Her evidence is fully supported by PW2. According to the PW1 the second party is a fourth grade employee at Chalantapara Girls' High School and has cultivable land and

fisheries. DW1 denied that he has any cultivable land and stated that he does not get any salary and that he works as a caretaker of his friend's fishery. But DW3 stated that the income of the fishery is equally distributed between him and the second party which means he is a partner in the fishery business. Also second party has not given any document to prove that he is working without salary. It is but natural that an employee will get remuneration. Therefore the plea of the second party that he does not get any salary cannot be believed. Moreover it is an admitted fact that the second party has married another woman and he has a son too. This means that the second party has sufficient means to look after and provide for a family. So it comes out that the second party has sufficient means to maintain the first party. Thus the failure of the second party to provide maintenance to the first party clearly establishes that he having sufficient means neglected to maintain the first party. This point is decided in favour of the first party.

**POINT NO. 3:**

The first party admittedly has no income of her own. The second party is an able bodied person and is of sound health. He is providing for his second wife and son. Hence he has the ability to maintain his first wife. This point is also decided in favour of the first party.

**POINT NO. 4:**

11. Before deciding whether the first party is entitled to get the maintenance as claimed for in view of the plea of divorce by the husband let us discuss some of the provisions of Muslim Personal Law.

Section 2 of the 1937 Act reads as under:

2. Application of Personal Law to Muslims.-- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law ( Shariat ).

12. Under Muslim personal law, dissolution of marriage can be brought about by various means, only one of which is talaq. Khula, for example, is the mode of dissolution when the wife does not want to continue with the marital tie. She proposes to her husband for dissolution of the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to Mahr (dower). Khula is a divorce which proceeds from the wife which the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return<sup>14</sup>.

13. In 2008(103) DRJ137 Masroor Ahmed versus State it was observed by the High Court of Delhi as follows: "At this juncture it would be relevant to mention the Dissolution of Muslim Marriages Act, 1939 which enabled Muslim women of all sects to seek dissolution of marriage by a decree of the court under the various grounds enumerated in Section 2 thereof which included the husband's cruelty, impotency, failure to maintain, leprosy, virulent venereal disease, etc. Section 2(ix) of the 1939 Act contained the residuary clause entitling a Muslim woman to seek dissolution of her marriage through a court on any other ground which is recognised as valid for the dissolution of marriages under Muslim law. So, the position after the 1937 and 1939 Acts is that

dissolution of a Muslim marriage is permissible by the modes of talaq, ila, zihar, lian, khula and mubaraat (as mentioned in the 1937 Act) as also on a wife's suit under the 1939 Act, on any of the grounds mentioned therein or on any other ground which is recognised as valid for the dissolution of marriages under Muslim law which would include lian. Divorce through talaq, ila, zihar, khula and mubaraat takes place without the intervention of the court. Divorce under the 1939 Act (which would also include lian) is through a wife's suit and by a decree of the court. The Muslim wife, therefore, can seek divorce either outside the court (through khula) or through court (under the 1939 Act or lian). She can also put an end to the marital tie by pronouncing talaq upon herself in the case of talaq-e-tafwiz where the husband delegates the power of pronouncing talaq to his wife. On the other hand, the Muslim husband can dissolve the marriage only outside court through talaq (ila and zihar being virtually non-existent in India). Both the husband and wife can mutually decide to dissolve the marriage, again without the intervention of court, through mubaraat.”

14. It has been alleged by the second party that the first party left him ceasing the marital tie on her own pronouncing three talaq in presence of the witnesses (ukil) of marriage Nur Alam and Rafiqul Islam and the second party has paid her a sum of Rs. 50,000/- for the purpose of her iddat maintenance and meher and the first party has wilfully received the sum. It is further alleged that the first party has sworn an affidavit on 15.12.2009 before the Notary, North Salmara which was witnessed by the two persons aforementioned and was duly identified by advocate Manik Ullah of Abhayapuri Court. So she is not entitled to get any maintenance. But in his evidence DW1 stated that he divorced the first party by way of swearing an affidavit and exhibited the affidavit as Exhibit A. Again DW2 stated that both the first party and second party divorced each other by swearing the affidavit. Learned counsel for the second party argued that this is a case of

talaq e tafwiz where the husband delegated the power of talaq to the wife and she exercised it by way of swearing an affidavit. I respectfully disagree with the learned counsel for the second party for two reasons. Firstly there is discrepancy in the written statement of the second party and the evidence of the DWs. In the written statement it has been stated that the first party divorced the second party on her own whereas the second party as DW1 has stated in his evidence that he divorced his wife by way of swearing an affidavit. Nowhere in his evidence or in the written statement has it been stated that the second party delegated his power of talaq to the first party. Second party could not adduce the evidence of any witness to substantiate the argument of the learned counsel of the second party that he had delegated his power of talaq to his wife. Secondly during a question put to the DW1 by the court he stated that he divorced the first party on 15/10/12 in presence of Nur Alam and Rafikul Islam. If he delegated his power of talaq to his wife and she had exercised it outside court by way of swearing an affidavit and pronouncing talaq on her herself way back on 15<sup>th</sup> December 2009 what necessitated the pronouncement of talaq again on 15/10/12 is not understood. Therefore in my considered opinion this is not a case of khula or talaq e tafwiz. In *Sri Jiauddin v. Mrs Anwara Begum* (1981) 1 GLR 358, it was held by the hon'ble Gauhati High Court that " 'talaq' must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected." Attempts of reconciliation between the husband and wife in the case at hand have not been established by adducing just and cogent evidence. Hence the prayer of the second party that the first party is not entitled to any maintenance because of the divorce is not maintainable and it is hereby held that the first party is entitled

to maintenance from her husband as no valid divorce took place between them.

15. In view of the discussions and decisions made hereinbefore it is held that the first party is entitled to get maintenance from the second party. As regards the quantum of maintenance allowance it is to be noted that the first party has no children and the second party has married another woman and has a baby from her. The first party is staying alone. Hence in my considered opinion a monthly allowance of Rs. 2,000/- would be sufficient to meet the necessities of the first party.

### **Order**

In the result, maintenance allowance is granted to the first party at the rate of Rs. 2,000/- per month from the date of passing of this order.

This petition is disposed off accordingly.

Given under the hand and seal of this court on this the 13th day of June, 2013.

Syeda Farida Afzal Zinnat, AJS

J.M (1<sup>st</sup> CLASS) BONGAIGAON

