

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 6TH DAY OF OCTOBER 2023 / 14TH ASWINA, 1945

RPFC NO. 98 OF 2020

AGAINST THE ORDER IN MC 106/2019 OF FAMILY COURT, THALASSERY

DATED 31.12.2019

PETITIONER/RESPONDENT:

NOUSHAD FLOURISH, AGED 43 YEARS
S/O. MOHIYUDHEEN, FLOURISH, NEAR MEPPAYUR HIGHER
SECONDARY SCHOOL, KOZHIKODE DISTRICT, PIN-673 524.

BY ADVS.

SHAIJAN JOSEPH JOSEPH
VARGHESE MUNDACKAL(K/000106/1970)
SURUMI SHAKEEL(K/276/2012)

RESPONDENTS/PETITIONERS:

- 1 AKHILA NOUSHAD, AGED 32 YEARS,
D/O. RAZIK E.V., KALIMA, PERINGADI, NEW MAHE,
THALASSERY TALUK, KANNUR DISTRICT, PIN-673 312.
- 2 LAMAR MOIDEEN, AGED 8 YEARS,
S/O. NOUSHAD, KALIMA, PERINGADI, NEW MAHE,
THALASSERY TALUK, KANNUR DISTRICT, PIN-673 312
REPRESENTED BY MOTHER AKHILA NOUSHAD.

BY ADVS.

SRI.T.ASAFALI
SMT.LALIZA.T.Y.

THIS REV.PETITION (FAMILY COURT) HAVING BEEN FINALLY
HEARD ON 19.09.2023, THE COURT ON 06.10.2023 DELIVERED THE
FOLLOWING:

"C.R"

A. BADHARUDEEN, J.

=====
R.P(F.C).No.98 of 2020
=====

Dated this the 6th day of October, 2023

O R D E R

This Revision Petition has been filed under Section 19(4) of the Family Courts Act, 1984 and revision petitioner is the respondent in M.C.No.106/2019 on the files of the Family Court, Thalassery. The respondents herein are the original petitioners in the above M.C.

2. Heard Dr.Varghese Mundackal, the learned counsel appearing for the revision petitioner as well as Advocate T.Asaf Ali, the learned counsel appearing for the respondents.

3. I shall refer the parties in this Revision Petition as to their status before the Family Court as 'petitioners' and

`respondent`.

4. The petitioners, who are the wife and child of the respondent, had approached the Family Court and claimed maintenance @ Rs.15,000/- per month for the 1st petitioner and Rs.12,000/- per month for the 2nd petitioner. According to the petitioners, the respondent married the 1st petitioner and they were residing together as husband and wife at the house of the 1st petitioner. The 2nd petitioner was born during this period. Thereafter, the respondent took the petitioner and the minor to Qatar, where he had been doing business. However, the respondent failed to pay maintenance to the petitioners, though he had an income of Rs.2 lakh per month from his business in Qatar. According to the petitioners, they did not have any means of maintenance and, therefore, the respondent was liable to pay allowance of maintenance for them.

5. The respondent filed objection and resisted the claim for

maintenance. It is admitted that the respondent was abroad from 2003 onwards and the respondent had given all his hard earned money to the 1st petitioner. Further the respondent came back from Qatar on 04.06.2018. Thereafter, the petitioner also came from Qatar around 20.06.2018. Later, the petitioner went to Qatar many times without permission of the respondent. Thereafter, the respondent lost his job abroad and he had no contact with the petitioner due to her illegal dealings and in the month of March, 2019, the petitioner went to Qatar along with the minor child. The educational qualification of the 1st petitioner as an MBA degree holder also was pointed out. It was alleged that the respondent incurred loss in the business and thereafter the respondent voluntarily left his company and made relationship with one Kamarudeen.

6. Now the 1st petitioner is in relationship with one Kamarudeen and the said relationship led to marital collapse.

7. The Family Court considered O.P.No.292/2019 and M.C.No.106/2019 together. The 1st petitioner examined as PW1 and Exts.A1 to A7 were marked on the side of the petitioner. The respondent got examined as RW1 and Exts.B1 to B7 were marked on his side.

8. On appreciation of evidence, the Family Court granted maintenance @ Rs.10,000/- each to the petitioners w.e.f 02.04.2019. The said order is under challenge in this Revision Petition.

9. At the time of argument, the learned counsel for the respondent submitted that the 1st petitioner has been living in adultery and, therefore, the respondent is not bound to pay maintenance to the 1st petitioner. In order to ascertain this contention, when the learned counsel was asked to justify the evidence to support adulterous life of the 1st petitioner, he submitted that CrI.M.Appl.No.2/2023 has been filed along with 3

documents as Annexures A1 to A3.

10. It is not in dispute that, in order to prove the adulterous life of the 1st petitioner, convincing evidence to be adduced. In fact, no convincing evidence adduced to prove the adulterous life of the 1st petitioner before the Family Court, rather than the oral version of the respondent, who got examined as RW1. But the specific case put up by the 1st petitioner is that she lived along with RW1 till December, 2018 (this fact is admitted by RW1, the respondent also) and she left the company of the respondent thereafter since the respondent treated her cruelly on alleging extra-marital relationship. In the said circumstances the Family Court found that the 1st petitioner was justified in living separately and the petitioners had no means of sustenance. Accordingly maintenance allowance @ Rs.10,000/- each was granted.

11. Although the respondent failed to adduce evidence to prove the extra marital relationship, Annexures A1 to A3

documents have been produced before this Court, along with CrI.M.P.No.2/2023 to prove the extra-marital relationship and also to prove that the 1st petitioner became pregnant during the period of separate living. Annexure A1 is order in O.P.No.368/2019 dated 19.03.2022. On perusal of Annexure-A1, it is discernible that O.P.No.368/2019 was a petition filed by the 1st petitioner herein for dissolving the marriage under the Dissolution of Muslim Marriages Act, 1939. When the petition was considered by the Family Court, the petitioner submitted that the marriage was dissolved by pronouncement of Khula on 27.05.2021 and accordingly the Family Court dismissed the petition as the 1st petitioner was not inclined to continue with the same. In Annexure-A1 order, the liberty of the respondent to challenge the Khula in appropriate forum was reserved.

12. It is argued by the learned counsel for the respondent that even though the respondent challenged the Khula before the

Family Court, the said challenge was dismissed as withdrawn. He also pointed out that 2 separate Division Benches of this Court considered the case in between the parties in O.P(F.C).No.641/2022 and O.P(F.C).No.322/2023 filed by the respondent herein and both those petitions were dismissed. Copies of the said orders also were placed by the learned counsel for the respondent.

13. In this matter, the petitioner effected 'Khula' with effect from 27.05.2021. In Islamic jurisprudence, 'Khula' is generally recognised as a valid form of divorce if the wife has a legitimate reason for seeking divorce. No doubt, in order to effect 'Khula' the procedure for the same shall be followed. The point involved in this matter is whether a wife, who affirms that the marriage was dissolved by Khula can claim maintenance after effecting Khula?

14. Para.319 of Mulla's Principles of Mahomedan Law provides that *a divorce by khoola 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 marriage tie. In such a case, the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mahr (dower) and other rights, or make any other agreement for the benefit of the husband. Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce, though the husband may sue the wife for it.

A khula divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (talak-i-bain) (311(3), 312), and its operation is not postponed until execution of the khulanama (deed of khula).

15. Para.320 deals with 'Effect of khula and mubara'at

divorce' which provides that *unless it is otherwise provided by the contract, a divorce effected by khula or mubara`at operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her iddat, or to maintain his children by her.*

16. Reverting to the legal position, in the decision of the Apex Court in [(1985) 2 SCC 556 : AIR 1985 SC 945], ***Mohd. Ahmed Khan v. Shah Bano Begum & Ors.*** the Apex Court decided in favour of a divorced Muslim woman and held that under Section 125 of the Code of Criminal Procedure, a divorced Muslim woman also is entitled to get maintenance from her former husband. It was thereafter Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted to dilute the judgment of the Supreme Court and restricted the right of Muslim divorced women to get alimony from her former husband (the period of iddat in Islamic law). But in a later judgment of the Apex Court reported in

[(2001) 7 SCC 740], **Danial Latifi & anr. v. Union of India**, the Apex Court held while dealing with the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 as under:

“31. Even under the Act, the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

*33. In **Sha Bano** case the Supreme Court has clearly explained the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman.”*

17. Finally it was concluded as under:

“(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.

(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as

provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law, from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

(4). The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.”

18. Again in the decision reported in [(2015) 5 SCC 705], ***Shamima Farooqui v. Shahid Khan*** the Supreme Court held in para.9 as under:

*“9. First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In ***Shamima Bano v. Asraf Khan*** (supra) this Court after referring to the Constitution Bench decisions in ***Danial Latifi v. Union of India*** and ***Khatoon Nisa v. State of U.P*** had opined as follows: (***Shamim Bano Case***, SCC p.644, paras 13-14)*

“13. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a

divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.

14. *Slightly recently, in **Shabana Bano v. Imran Khan**, a two-Judge Bench, placing reliance on **Danial Latifi**, has ruled that: (**Shabana Bano case**, SCC p.672, para 21)*

'21. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the iddat period only.'--

*Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in **Khaton Nisa**."*

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge."

Thus the law is clear on the point that a Muslim divorced wife can claim maintenance under Section 125 of Cr.P.C till she remarries, unless a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period or thereafter in terms of Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

19. It is true that Section 125 provides maintenance to wives, children and parents who are unable to maintain themselves. The term `wife` includes a divorced wife, and the term `children` includes legitimate or illegitimate children. The section also provides for maintenance to parents who are unable to maintain themselves. However, as per Section 125(4) of Cr.P.C that *no wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent.* Thus when the wife refuses to live with her husband, she could not claim maintenance from the husband. When the wife effects divorce by Khula for getting her released from the husband, the same, in fact, is akin to refusal of the wife to live with her husband, as provided under Section 125(4) of Cr.P.C. If so, the wife, who effected

divorce by Khula at her volition and thereby refuses to live with her husband voluntarily, is not entitled to get maintenance from the date of *Khula* in view of the restriction provided under Section 125(4) of Cr.P.C. It is because of this legal restraint the learned counsel for the petitioners fairly submitted that the maintenance claim of the 1st petitioner to be limited till 27.05.2021 by modifying the order.

20. Coming back to the documents placed before this Court by the learned counsel for the respondent, even though as per Annexure-A1 pronouncement of Khula by the 1st petitioner can be gathered, nothing gathered therefrom to hold that the 1st petitioner had been leading an adulterous life. Apart from Annexure-A1, Annexure-A2 is the copy of a medical document and the same would suggest that Akhila (the 1st petitioner) was consulted by Dr.Supriya, Sonologist, and found single intrauterine pregnancy of about 5-6 weeks of gestation as on 24.08.2018.

21. In fact, Annexure-A2 has been pressed into by the learned counsel for the respondent to contend that the 1st petitioner had been living in adultery and she became pregnant in the said relationship. In fact, Khula was pronounced only w.e.f 27.05.2021. The litigation between the parties started during 2019. Before the said period, exactly upto 31.12.2018, as admitted by the 1st petitioner and the respondent, while deposing as PW1 and RW1, both of them were living together. Therefore, it has to be held that the pregnancy, as noted in Annexure-A2 dated 24.08.2018 is of the period covered as dealt in Section 112 of the Evidence Act. Section 112 of the Evidence Act provides that *the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no*

access to each other at any time when he could have been begotten. Since the pregnancy, noted in Annexure-A2, in fact, would require proof by examining the doctor, is accepted, for argument sake, the same also is of no significance to hold that the 1st petitioner had been living in adultery, as contended by the respondent since during the period of pregnancy, the 1st petitioner and the respondent lived together as husband and wife. Coming to Annexures A2 and A3, the same are tuition fee receipts to the tune of Rs.9,400/- and Rs.3,450/- in relation to Lamar Moideen, the 2nd petitioner, paid to Mount Guide International School, on 07.03.2023.

22. In the case at hand, it has to be held that at the time when evidence was recorded by the Family Court, no evidence let in to prove the adulterous life of the 1st petitioner, as alleged by the respondent. Before this Court, Annexure-A2 is the trump card on which the respondent would allege that the 1st petitioner had been

living in adultery. However, if at all this document is accepted, as I have already pointed out, the same does not suggest adulterous life of the 1st petitioner, as contended. Coming to the evidence given by RW1, the respondent, during cross examination, he admitted that he was drawing Rs.1,50,000/- as salary since he was working as Accounts Manager in Rotala Run way Car. He also admitted that he had independently run a concern by name 'Store Mount' and he had an income of Rs.2 lakh therefrom. He also stated that he did not return to Gulf after January, 2019 and the period of his passport expired on 21.07.2019. But at the same time, he conceded that he had obtained new passport and the same is in his possession. He also stated that there was valid visa even in the old passport. He also admitted that the second respondent is studying in Mount Guide International School and Rs.7000/8000 is the monthly fee. He also conceded that he had an accusation that the 1st petitioner had maintained relationship with Kamarudeen and

also she had relationship with other persons.

23. Thus RW1 admitted the case put up by the petitioners regarding his employment as well as his income, though he has a contention that at present he is not doing any job. In this matter, no employment or income established in so far as the 1st petitioner is concerned and as per Annexures-A3 and A4, it has come out in evidence that the 2nd petitioner has been studying at Birla Public School.

24. As far as the entitlement of the petitioners in the matter of maintenance, the same is established by the evidence of PW1 and supported by the evidence of RW1. Nothing substantiated to hold that the 1st petitioner is having any permanent employment or income to survive herself. To the contrary, RW1 admitted his income as herein above mentioned. Taking into consideration of all these, the Family Court granted Rs.10,000/- each as maintenance to the petitioners.

25. The finding of the Family Court that the petitioners are entitled to get maintenance, is justified as per the available evidence. Regarding the quantum, I am inclined to hold that the amount of maintenance in relation to the 1st petitioner can be reduced to Rs.7,000/- per month from Rs.10,000/-, while maintaining the maintenance granted in favour of the 2nd petitioner @ Rs.10,000/- per month.

Holding so, this Revision Petition stands allowed in part and the order impugned stands modified. Accordingly, the respondent is directed to pay Rs.7,000/- (Rupees seven thousand only) to the 1st petitioner from 24.07.2019 to 27.05.2021 and to pay maintenance @ Rs.10,000/- (Rupees ten thousand only) per month to the 2nd petitioner from 02.04.2019 onwards.

Sd/-

(A.BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF RPFC 98/2020

PETITIONER'S ANNEXURES

- | | |
|-------------|--|
| Annexure A1 | TRUE COPY OF THE STATEMENT IN JUDGMENT
DATED 19/03/2022 IN O.P 368/2019. |
| Annexure A2 | TRUE COPY OF THE SCAN REPORT OF THE
ILLEGITIMATE PREGNANCY OF THE 1ST
RESPONDENT HEREIN DATED 24.8.2018. |
| Annexure A3 | TRUE COPY OF THE SCHOOL FEE RECEIPTS
DATED 7.3.2023. |