

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Akhtaruzzaman

Civil Revision No. 619 of 2019

Md. Sohel Kazi petitioner

-Versus-

Mosammat Anjona Begumopposite party

Mr. Biswojit Roy, Advocate

.....for the petitioner

Mr. Md. Shah Alam, Advocate

.....for the opposite party

Judgment on 12.02.2024

Bhishmadev Chakrabortty, J.

In this Rule, issued at the instance of the husband, opposite party wife was called upon to show cause as to why the judgment and decree of the District Judge, Madaripur passed on 22.01.2019 in Family Appeal No.04 of 2018 allowing the appeal in part with modification of the judgment and decree of the Family Court, Madaripur passed on 09.08.2018 in Family Suit No.16 of 2015 decreeing the suit for maintenance and dower money should not be set aside and or such other or further order or orders passed by this Court may seem fit and proper.

At the time of issuing the Rule, operation of the judgments of the Courts below was stayed for a limited period which was subsequently extended till disposal of the Rule.

Facts relevant for disposal of the Rule, in brief, are that Mst. Anjona Begum and the child represented by her as plaintiffs instituted

the aforesaid family suit praying for dower money and maintenance. The plaintiffs stated facts therein that plaintiff 1 and the defendant sworn an affidavit of marriage before the Notary Public of Bangladesh on 02.08.2012. Thereafter, they entered into marriage tie on 22.08.2012 through a registered *kabinnama*. They had been living as husband and wife from that very day. During subsisting of their marriage, plaintiff 1 was conceived. But at the brutal behavior of the husband she left his house and started living in her parents' house where she gave birth to a child on 05.01.2014. After leaving her husband's house he did not look after and maintain plaintiff 1 and the child. The local elites arranged a *salish* between them but it failed. She claimed unpaid dower money of Taka 9,90,000.00 and maintenance of Taka 5,000.00 per month for her and the child each but the defendant refused to pay it. Hence the suit claiming dower money and maintenance.

Defendant-husband contested the suit by filing written statement denying the allegation made in the plaint. He mainly contended that no marriage was solemnized between them as per muslim law and no *kabinnama* was registered. They did not live together as husband and wife. The child was not his son. Plaintiff 1 was the grandmother of the defendant. He went to Faridpur with plaintiff 1 to buy some goods and returned in the evening. But in his absence plaintiff 1 created an affidavit of marriage on 02.08.2012. On

that day plaintiff 1 was the wife one Najir Fakir. The *kabinnama* registered on 22.08.2012 was also created collusively and fraudulently. The defendant did not put any signature in the *kabinnama*. He came to learn about the said forged *kabinnama* and affidavit of marriage on 28.08.2012 and then and there sent a notice of divorce to plaintiff 1. The affidavit in support of the marriage and the *kabinnama* are not binding upon him. Since the defendant did not marry plaintiff 1 and the child is not his son and as such they are not entitled to get dower money and maintenance as prayed for. The suit, therefore, would be dismissed.

The family Court framed the following issues to adjudicate the matter in dispute-

- i. Whether the suit is maintainable in its present form and manner?
- ii. Whether the marriage between plaintiff 1 and defendant was solemnized and subsists?
- iii. Whether plaintiff 2 is the legitimate child of the defendant?
- iv. Whether the plaintiff is entitled to get dower and maintenance as prayed for?
- v. Whether the plaintiffs are entitled get relief as prayed for?

In the trial, the plaintiffs examined 4 witnesses while the defendant examined 1. The plaintiffs produced documents exhibits '1-4' and the documents of defendant was exhibit-'Ka'. However, the Family Court on the documents and other materials on record decreed the suit directing the defendant to pay dower money of Taka 9,90,000.00, maintenance of plaintiff 1 of Taka 2,56,000.00 and the son plaintiff 2 of Taka 1,62,000.00, *i.e.*, in total of Taka 14,08,000.00 within 60 days of passing the judgment and decree. Being aggrieved by the defendant preferred family appeal before the District Judge, Madaripur. The District Judge allowed the appeal in part by reducing maintenance of plaintiff 1. Thus the judgment and decree passed by the trial Court was affirmed in the modified form decreeing the suit for total Taka 11,83,000.00. The appellant husband then approached this Court and obtained this Rule with an *interim* order of stay.

Mr. Biswojit Roy, learned Advocate for the petitioner takes us through the judgments of the Courts below and other materials on record and submits that the burden of proof of certain fact lies upon the plaintiff. Here, the plaintiffs' documents are found to be forged. Admittedly, plaintiff 1 was the wife of one Najir Fakir at the time of the alleged marriage with the petitioner. The notice of divorce which was allegedly sent to her previous husband is not a notice under the provisions section 7 of the Muslim Family Laws Ordinance, 1961 and as such, no divorce took place between she and Najir Fakir. He refers

to the case of Abdul Aziz Vs. Rezia Khatun, 21 DLR 733 and relied on the *ratio* laid therein that non service of notice of divorce renders the *talak* ineffective. Therefore, the marriage with plaintiff 1, if admitted, is a void marriage and, therefore, the opposite party wife cannot claim any dower money and maintenance. At the fag end of hearing of this Rule, the petitioner has submitted an application under Order 41 Rule 23 of the Code of Civil Procedure (the Code) for sending back the suit on remand. Mr. Roy relied on the statements made in the application and submits that the case was poorly conducted by the learned Advocate appointed in the trial Court. To disprove the marriage between the husband and wife and to prove the *talak* to her previous husband, the volumes ought to have been called for which was not done. The suit, therefore, be sent on remand to the family Court setting aside the judgments passed by the Courts below giving a chance to the petitioner to prove the aforesaid facts as per law. Mr. Roy finally submits for making the Rule absolute and sending back the suit on remand for trial afresh.

Mr. Md. Shah Alam, learned Advocate for the opposite party on the other hand, opposes the Rule and submits that the marriage between plaintiff 1 and the defendant has been admitted by the defendant in his evidence as DW1. The plaintiffs proved the marriage by oral evidence and documents exhibited. The opposite party wife has been residing in her parents' house for long ago and as such the

petitioner is to pay the dower money as stipulated in the *kabinnama* and maintenance of the wife and the child. The trial Court passed judgment for payment of unpaid dower money and directed to pay maintenance to the plaintiff 1 from the date of leaving her husband's house and the son from his birth. In the appeal, the District Judge modified the order of maintenance passed by the trial Court, so far it relates to wife and allowed her maintenance for 03(three) months. The above decision of the appellate Court is beyond the materials on record. Although the plaintiffs did not file any revision against the appellate judgment and decree but this Court can pass judgment setting aside the judgment and decree passed by the Appellate Court and affirm those of the family Court. The Rule, therefore, should be discharged and the judgment passed by the family Court be affirmed.

We have considered the submissions of the learned Advocates for both the sides and gone through the materials on record.

In the written statement the defendant alleged that he did not marry plaintiff 1. The documents of marriage are created and forged. He did not put signature on any affidavit of marriage or on *kabinnama*. Those were created by plaintiff 1 only to trap him. Moreover, at the time of alleged marriage with the defendant plaintiff 1 was the wife of one Najir Fakir and therefore the present marriage, if any, is void. It is admitted fact that plaintiff 1's first husband was one Najir Fakir. Plaintiff 1 denied that at the time of solemnizing the

marriage with the defendant she was the wife of Najir Fakir. On recall as PW1 she produced the registration of divorce with Najir Fakir exhibit-4. The aforesaid exhibit proves that divorce was effected on 02.08.2011 and she divorced Najir Fakir long before solemnizing the instant marriage with the defendant. This is a public document and we can rely upon it. So the submissions of the learned Advocate for the petitioner that during subsisting of the previous marriage with Najir Fakir, plaintiff 1 got married with the defendant bears no substance. It is found from exhibit-1 *Kabinnama* that marriage between plaintiff 1 and defendant was solemnized on 22.08.2012 in presence of the witnesses. This is also a public document and its presumption goes in favour of plaintiff 1 wife unless it's contrary is proved. The facts as stated in the plaint that before registration of marriage in the office Nikah Registrar both of them sworn an affidavit of marriage has been proved by exhibit-3. The evidence of PWs 2 and 3 supporting it is corroborative.

It is pertinent to mention here that after leaving the husband's house the wife gave birth to a child in her parents' house on 05.01.2014. During trial she filed an application for holding DNA test of the child with the defendant. Accordingly, sample was collected, DNA test was held and a report was furnished. PW4, *Serestader* of the family Court stated in evidence that he came to Dhaka Medical College Hospital with the plaintiffs and defendant to hold DNA test

and in his presence the sample was collected. The report of DNA test is exhibit-2. The report proves that defendant Sohail Kazi is the biological father of the child plaintiff 2. From the aforesaid oral evidence of the parties and documents exhibit-1 the *kabinnama* between plaintiff and defendant, exhibit-2 the DNA test report of the child, exhibit-3 the affidavit of marriage and exhibit-4 the registration of divorce proves that the marriage was solemnized between plaintiff 1 and the defendant on 22.08.2012 and they were living as husband and wife and subsequently she gave birth to child plaintiff 2 and defendant is the biological father of the child. The defendant contested the suit denying all those facts and claimed that he did not marry plaintiff 1 and the documents were created. It was his duty to prove the aforesaid fact as per the provisions of Evidence Act but he hopelessly failed to do so.

Exhibit-‘Ka,’ alleged notice of divorce dated 02.08.2012 sent by plaintiff 1 to her previous husband is a certified copy of declaration before the notary public which was attested on 18.07.2018. The aforesaid affidavit do not come within the meaning ‘divorce notice’ under the Ordinance, 1961. There is no endorsement that a copy of it was sent to the chairman of the concerned union parishad as required by law. Therefore, the defendant failed to prove that plaintiff divorced Nazir Fakir on 02.08.2012. Since the divorce as claimed by the defendant to plaintiff 1 has not been proved the plaintiff is entitled to

the maintenance from the day she left the defendant's house till today. The finding of the appellate Court, so far it relates to the divorce and reducing the maintenance of the wife appears perverse and beyond the materials on record. But we are undone here and cannot give any relief to the opposite party wife who did not file any revision challenging the judgment and decree passed by the lower appellate Court. Since every documents of the plaintiffs have been proved according to law, we find no ground to send the case on remand to the family Court. It should not be sent on remand to fill up lacuna of the defendant, if any. The prayer for remand seems a device of the petitioner for delaying the payment of dower money and maintenance to the opposite party.

In view of the discussion made hereinabove, we find no merit in this Rule. Accordingly, the Rule is discharged. However, there will be no order as to costs. The judgment and decree passed by the appellate Court by modifying those of the trial Court is hereby affirmed.

Communicate the judgment and send down the lower Court records.

Md. Akhtaruzzaman, J.

I agree.