

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

First Appeal No. 25 of 2010

Smt. Nafeesa
W/o Shamim Ahmad
D/o Abdul Khalik
R/o Village Bijholi
Paragna and Tehsil Roorkee
District Hardwar

..... Appellant

Versus

Shamim Ahmad
S/o sharafat
R/o Village Bhaisarheri Paragna
Chapar, District
Muzaffarnagar (U.P)

.....Respondent

Shri Mohd. Safdar, Advocate, present for the appellant
Shri Kuldeep Singh Rawal, Advocate, present for the
respondent

Coram: Hon'ble Prafulla C. Pant, J.
Hon'ble Sudhanshu Dhulia, J.

Oral: Hon'ble Prafulla C.Pant, J.

This appeal, preferred under section 19 of Family Courts Act, 1984, is directed against the Judgment and order dated 06.02.2010, passed by Additional Judge Family Court, Roorkee, in Suit No. 58 of 2004, whereby said court has dismissed the suit filed by the wife (appellant) for a decree of divorce.

(2) Heard learned counsel for the parties, and perused the lower court record.

(3) Brief facts of the case, are that, the appellant Nafeesa got married to respondent Shamim Ahmad in the year 1998, following the muslim rites in village Bijholi. It is pleaded on behalf of the appellant before the trial court that after her marriage she discharged her matrimonial obligations and two children were born out of the wedlock. It is alleged by the wife in her petition for divorce moved under section 2 of Dissolution of Muslim Marriage Act, 1939, that after two years of marriage respondent (husband) started treating the appellant with cruelty. It is also pleaded by her that respondent is a thief, who runs business of selling meat/beaf of the stolen animals. It is also alleged that the appellant was subjected to mental and physical cruelty, and she was forced to leave her husband's house in July 2003. It is also mentioned in the petition that the respondent used to harassment the appellant for non fulfilment of demand of dowry. It is also mentioned that appellant filed a criminal case in connection with the demand of dowry and harassment. With these allegations the appellant sought decree of divorce in the trial court.

(4) Respondent Shamim Ahmad contested the suit

before the trial court and filed the written statement. However, he admitted that he got married to appellant and two female children were born out of the wedlock. As to the rest of the allegations he denied the same. He has pleaded in the written statement that the appellant had implicated the respondent in false criminal cases including one, which relates to maintenance claimed under section 125 of Cr.P.C. It is alleged by the husband that his wife left him, on a false pretext that her sister in law (BHABHI) was unwell. Lastly, it is pleaded that the respondent is ready to keep his wife and children with him. On the basis of pleaded of the parties, the trial court framed following issues :-

- (i) Whether, the petitioner got married to respondent in village Bijholi about five years before filing of the petition and Mehar was fixed at ₹ 525/-.
- (ii) Whether two female children were born out of the wedlock who are living with the petitioner, if so its effect?
- (iii) Whether the respondent is a man of bad character and beats his wife, if so its effect?
- (iv) Whether the respondent made any demand of dowry and harassed his

wife for non fulfillment there of.

- (v) Whether the respondent has neglected to maintain his wife for last two years, if so its effect?
- (vi) Whether suit filed by the petitioner is without any cause of action, if so its effect?
- (vii) Whether the respondent has filed a suit for restitution of conjugal rights and the present petition is filed by the petitioner to save herself ?

After recording the evidence, of the parties, and after hearing them, the trial court decided issue no.1,2 and 3 in favour of the petitioner. However, the rest of the issues were decided against her, and suit was dismissed. Hence this appeal.

(5) Learned counsel for the appellant argued before this court that the trial court has erred in law in dismissing the suit for divorce even though the grounds taken in the petition were proved on the record. On the other hand, learned counsel for the respondent submitted that the allegations made by the appellant were false and the petition was rightly dismissed by the trial court.

(6) Before further discussions, we think it just and proper to mention the relevant provision of law applicable to the present case. A Muslim woman, under Muslim Law can seek a decree of dissolution of her marriage on one or more of the grounds mentioned in section 2 of Dissolution of Muslim Marriage Act, 1939. Section 2 of said Act reads as under :-

Grounds for decree for dissolution of marriage:- *A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:*

- (i) *that the whereabouts of the husband have not been known for a period of four years ;*
- (ii) *that the husband has neglected or has failed to provide for her maintenance for a period of two years ;*
- (iii) *that the husband has been sentenced to imprisonment for a period of seven years or upwards ;*
- (iv) *that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;*
- (v) *that the husband was impotent at the*

time of the marriage and continues to be so;

- (vi) *that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease ;*
- (vii) *that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:*
- (viii) *that the husband treats her with cruelty, that is to say,--*
 - (a) *habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment ; or*
 - (b) *associates with women of evil repute or leads an infamous life; or*
 - (c) *attempts to force her to lead an immoral life; or*
 - (d) *disposes of her property or prevents her exercising her legal rights over it; or*
 - (e) *obstructs her in the observance of her religious profession or practice ; or*

- (f) *if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quoran ;*
- (ix) *on any other ground which is recognised as valid for the dissolution of marriage under Mulim law:*

Provided that ---

- (a) *no decree shall be passed on ground (iii) until the sentence has become final ;*
- (b) *a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and*
- (c) *before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.*

The plaint filed before the trial court shows that the divorce has been sought on two of the grounds mentioned in section 2 of dissolution of Muslim Marriage Act, 1939 :-

- (i) That the husband has neglected or failed to provide the wife maintenance for a period of two years.*
- (ii) He habitually assaulted her and her life has been made miserable.*

(7) To prove the fact that the appellant was subjected to cruelty and the husband neglected to maintain her, petitioner got herself examined as PW1 Nafeesa. She has stated on oath, that Shamim Ahmad (respondent) used to bring stolen animals and he had business of selling meat of such animals. She has specifically pleaded that the respondent used to beat her and assaulted her physically. PW1 Nafeesa has further stated that the respondent Shamim neglected to maintain her, and her children. It has also been stated that she was ousted from her matrimonial house. PW1 Nafeesa further stated that after compromise she again

joined company of her husband but again physically assaulted by him. Finally she had to leave her husband's house in a pregnant condition and her second daughter was born in her parental house. PW1 Nafeesa has lastly stated that it is her parents who are maintaining her as the respondent did not care for her.

(8) The above statement of PW1 Nafeesa gets corroboration from the statement of PW2 Noor Mohammad maternal uncle of the appellant. Though DW1 Shamim Ahmad has denied the allegation of cruelty and the fact that he neglected his wife to maintain, but as against the statement of his wife, the statement of DW1 can not be believed for the reason that he has nowhere stated as to what amount and when maintenance was paid by him to his wife or the children, who are admittedly living in parental house of their mother. DW1 Shamim Ahmad admitted that criminal cases are pending against him. However, he states that the same are false. DW2 Ikbal has been got examined on behalf of the respondent who is known to the parties but his statement is of little help to the respondent in the present case for an outsider can not be said to have knowledge of what the wife was undergoing within her matrimonial house.

(9) For the reasons as discussed above we find that

the findings of the trial court, that it is not proved on the record that the husband committed cruelty or that he did not neglect her to maintain, is erroneous in law. After carefully going through the evidence on record, we find that it is amply proved that respondent Shamim has treated his wife with cruelty and also neglected to maintain his wife who is living with her two little daughters in her parental house.

(10) Therefore, the appeal is allowed. The impugned judgment and order dated 06.02.2010, passed by Additional Judge Family Court, Roorkee, in Suit No. 58 of 2004, is set aside. The petition for dissolution of marriage moved by the appellant before the trial court is allowed, and marriage between the parties is hereby dissolved. There is no order as to costs.

(Sudhanshu Dhulia, J.) (Prafulla C. Pant, J.)

30.06.2011

Nahid