



## **JUDGMENT**

1. This appeal has been filed by appellant accused Ayjul Haque being highly aggrieved and dissatisfied with the impugned Judgment and order dated 17-08-16 of conviction passed by Panchali Shyam, Ld. SDJM (M), Bilasipara in GR case no-193/12 (Bilasipara PS Case no. 193/12) convicting appellant accused Ayjul Hoque u/s 498(A)/34 IPC and sentencing him to undergo S.I for 3 months and fine of ₹. 5,000/- i/d to undergo further S.I for two months.

2. The prosecution case out of which this appeal has been filed in brief is that on 20-03-12 informant Anowar Hussain lodged an ejahar before Bilasipara PS inter alia citing that his sister Amina Bibi who was married to accused Ayjul Hoque 3 ½ years ago was subjected torture by accused Ayjul Hoque and he demanded money and many things from them as dowry from the days of marriage. After marriage, accused Ayjul Hoque and his parents, accused Nojrul Hoque and Amela Bibi started to torture Amena Bibi physically and mentally in demand of money and things. Amena Bibi tolerated all quietly only to carry her married life with Ayjul Hoque, but he in connivance with other accused persons torture Amena Bibi even more in demand of money and things as dowry. On 19-03-12 at around 09.00 pm the accused persons tied a piece of cloth around the neck of Amena Bibi and severely assaulted her in unconscious state. On receiving information, the informant and his family members went and brought Amena Bibi to their house. Thereafter Informant lodged the ejahar.

3. After completion of investigation I.O of the case submitted C.S against the accused person Ayjul Haque, Nojrul Hoque and Amela Bibi, u/s 498(A)/34 of the IPC. During trial cognizance has been taken and after furnishing copies to the accused persons then Ld. SDJM(M) Bilasipara framed charges U/s 498(A)/34 IPC against the accused persons. When said charges read over and explained to the accused persons they pleaded not guilty and claimed to be tried.

4. During trial, to prove the charges against the accused persons, prosecution examined as many as 8 no of witnesses including M.O and I.O and exhibited ejahar, medical report of victim and chargesheet. After closer of prosecution's evidence accused persons were examined U/s 313 Cr.P.C. Their plea is total denial however, not adduced defence evidence in support of their denial and after hearing the Ld. Counsel for both sides Ld. SDJM(M) Bilasipara

delivered judgement convicting appellant/accused Ayjul Hoque and other two accused persons u/s 498(A)/34 IPC and sentenced **accused** Ayjul Hoque to undergo S.I for 3 months and fine of ₹. 5,000/- , i/d to undergo further S.I for two months. Ld. Trial Court after hearing accused person on the point of sentenced released other two accused Nojrul Hoque and Amela Bibi u/s 4 of the Probation of Offender Act. Hence accused Ayjul Haque filed this appeal against the judgment of conviction and order of sentencing of Ld. Trial court passed against him.

5. I have heard Ld. counsel for both sides. It has been argued by the Ld. appellant counsel that after filing of the case, matter was amicably settled in between the parties and to that victim filed an affidavit before the Ld. trial court for grant of bail of accused Ayjul Haque and ld. trial court granted bail to the accused appellant on the fact mentioned by the victim in her affidavit. He submitted that during trial also both the accused, victim and complainant filed a petition which was number as petition no. 3382/15 and signed by Ld. Addl. P.P and identified by Ld. Addl. P.P but same was rejected holding that offence u/s 498(A) IPC is non compoundable. He contended considering the fact that this is matrimonial matter, court could have taken lenient view to save the marriage between the parties. In support of his submission he relied the decision "Manohar Singh and State of Madhya Pradesh, 2014 CRI. L.J.4326"

6. Ld. Addl. PP appearing for the state and for the respondent no. 2 and 3 supported the submission made by the Ld. Appellant counsel. His submission is that as parties are amicably settled their dispute, court can considered the same in view of the petition filed by accused appellant Ayjul Hoque and informant and victim jointly before this appellant court vide no. 2318/17.

7. I have perused the impugned judgment passed by the Ld. Trial court also perused the decision relied by the Ld. Appellant counsel. In para 6 Hon'ble Apex court held " Section 498-A of the IPC is non compoundable. Section 4 of the Dowry Act is also non compoundable. It is not necessary to state that non compoundable offences cannot be compounded by a court. While considering the request for compounding of offences the court has to strictly follow the mandate of section 320 of the Code. It is, therefore, not possible to permit compounding of offences under section 498-A of the IPC and section 4 of the Dowry Act. However, if there is a genuine compromise between husband and

wife, criminal complaints arising out of matrimonial discord can be quashed, even if the offences alleged therein are non-compoundable, because such offences are personal in nature and do not have repercussions on the society unlike heinous offences like murder, rape etc. ( See Gian Singh v. State of Punjab). If the High court forms an opinion that it is necessary to quash the proceedings to prevent abuse of the process of any court or to secure ends of justice, the High Court can do so. The inherent power of the High Court under section 482 of the Code is not inhibited by section 320 of the Code. Needless to say that this court can also follow such a course.”

8. From the trial court record it has been seen that during trial victim filed a petition citing that they have settled their matrimonial dispute amicable outside the court and are living together. Earlier victim at the time of investigation of the case by filing an affidavit stated before the court that she is living with accused leading her matrimonial life and compromised their dispute and due to some domestic quarrel her brother lodged an ejahar and Ld. Trial court granted bail to the accused appellant Ayjul Haque on said affidavit.

9. I have scrutinized the impugned judgment. The charge against the accused appellant is u/s 498-A IPC. Maximum punishment prescribed u/s 498-A IPC is three years and shall also be liable to fine. Sec 2 (x) defined what is warrant case. “warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Offence u/s 498(A) IPC falls in the category of warrant cases as defined in section 2 (x) of code of criminal procedure. And therefore, trial of the appellant accused will proceeded as per chapter XIX of Code of criminal procedure under trial of warrant cases by magistrate. Under Part C in heading ‘*conclusion of trial*’ of chapter XIX, “Trial of Warrant Procedure Cases by Magistrate” u/s 248 (2) “where in any case under this chapter, the magistrate finds the accused guilty, but does not proceed in accordance with the provision of section 325 or section 360, he shall after hearing the accused on the question of sentence, pass sentence upon him according to law.

10. Thus, reading of section 248 (2) Cr.P.C, it is abundantly clear that before imposing sentence on the convicted accused, it is the duty of the Magistrate to hear him on the question of (point of) sentence and this is a mandatory provision of law.

**11.** On perusal of the impugned judgment in para 24 Ld. Trial court hold accused person Ayjul Hoque, Najrul Haque and Amela Bibi guilty of committing offence u/s 498(A)/34 IPC and convicted them and thereafter, straightway heard the convicted accused persons on question of sentence before applying the provision of section 360 Cr.P.C or Probation of Offenders Act as mandate by the statue, and then hold that convicted accused Ayjul Haque not entitle benefit of Probation of Offender Act and sec 360 Cr.P.c and passed sentenced of 3 years SI and to pay fine of Rs. 5000/- i/d to undergo 2 month SI. It is the rule of law, provision of Probation of Offender Act and/or section 360 Cr.P.C has to be applied first and then if these two provision are not applied, after giving reason, Magistrate will heard accused on the point of sentence. The reading of paragraph 24 of the Ld. Trial court shown that Ld. Trial court has not applied statutory provision of law in case of the appellant accused in accordance with the statutory provision of law as per section 248 (2) Cr.P.C. On meticulous scrutiny of the impugned judgment and case record it is revealed, sentence hearing u/s 248 (2) Cr.P.C statement of accused not present on record and that shows that accused persons is not heard on the sentence as required under the law.

12. Now, let me look into the other aspect, the evidence and material on record to find out whether impugned judgment and order of conviction passed by the Ld. Trial court is sustainable under the law and is based on evidence and material on record.

13. PW1 Amina Bibi, wife of the accused Ayjul Hoque deposed accused Ayjul Hoque is her husband, their marriage solemnized 6 years back and accused person demanded Rs. 50,000/- from her and she unable to fulfil the demand her husband assaulted her 3/4 times and her husband demanded Rs. 50000/- after birth of their son to purchase a piece of land and on the last day of incident at about 09.00 - 9.30 pm, there was altercation between her and her husband and he demanded of ₹50,000/- and assaulted her with an iron rod and driven out her as she was unable to fulfil his demand. Her cross reveal on the day of incident she went to the house of Azad but Azad did not give her shelter and she returned to her matrimonial home and stayed there and on next day her brother Anowar came with two/three other person and seeing her condition her brother take her to his house and at that time her husband was not present

at home. Her further cross is that when she was leading conjugal life with her husband Ayjul they stayed in the rented house of one Nazir Hussain and at that time her husband fell ill and her husband Ayjul came to his parent's house for treatment and at that time she did not want to come at her in-laws house however subsequently she also came. This part of the cross revealed that house of her in-laws is separate.

14. From scrutiny of evidence of P.W.1 it is revealed that she did not narrate the incident to her brother. Her evidence does not show that other accused persons namely Nojrul and Amela Bibi assaulted her or demanded any money from her. She stated her husband assaulted her with an iron rod and driven out her. Her cross shows that on the day of incident she went to the house of one Azad but Azad did not give her shelter and she returned to her matrimonial home. Therefore, her statement that accused person driven out her on the date of incident i.e. on 19-03-12 and she took shelter in the house of one Azad does not derive confidence. Her cross further reveals that she left her matrimonial home in absence of her husband and when her husband came to his parent's house for the stay she objected.

15. PW-2 informant deposed at the time of marriage they gave some ornaments to their sister and they are to give one bangle and gold earrings to her but as bangle was not given to her accused assaulted her and one day he got information from the uncle's son of Ayjul that accused Ayjul beaten his sister and he has to rescue her so he with his mother, sister, brother Monowar, uncle Hydar, went to the house of his sister PW-1 and found her in unconscious state and they took her to the Bilasipara PS in an auto wherefrom she was taken to the Bilasipara hospital and his sister sustained injury on her leg. In cross he stated after lodging of the case Amina lived together with accused Ayjul in a rented house of Nazir for 3 months thereafter they again live together for 6 months and three months. He admitted in cross that he did not state before the police that accused person beaten his sister Amina as they are to give her gold bangle and gold earrings.

16. On meticulous scrutiny of the evidence of PW-1 and PW-2 it is revealed that PW-1 victim does not state that she was unconscious and accused persons beaten her for not giving gold bangle and gold earrings to her by her family. PW-1, victim's evidence shows that her brother Anowar Hussain alone came but

PW-2 stated he along with his brother, mother, Monowar and uncle Hydar went to the house of accused Ayjul. Victim did not stated that other accused person assaulted her but PW-2 informant of the case stated accused persons assaulted his sister Amina. Thus, shown that his evidence is exaggerated and he deposed what has not been the statements of victim and therefore, his evidence is not acceptable beyond all reasonable doubt and his evidence is not trustiness. According to PW-1 and PW-2, one Azad, the uncle of the accused Ayjul and his son knows the incident but neither I/O nor prosecution made them as witness and adduced their evidence. Evidence of Azad and his son could have able to unfurl the actual story of the incident dated 19-03-12 whether victim went to the house of Azad or not and whether son of Azad informed the incident and whether he seen the incident and all these questioned were unanswered by the prosecution.

17. PW-3 Monowar stated he did not visit the house of his sister either on the day of incident or next day of incident and he came to his home after two days of incident from Rangia. Thus, make evidence of PW-2 more doubtful. He deposed that at the time of marriage they give one BSA cycle to Ayjul as demanded but his mother says they did not give BSA cycle and torture his sister. In cross PW-3 stated before the police he did not made statement that accused Ayjul demanded BSA cycle. Thus, shown that this statement is made by the Pw-1 for the first time before the court after 2 years of passing incident and therefore, evidence of PW-3 that accused demanded BSA cycle does not derived confidence. His other piece of evidence is that on the day of incident his brother, mother, another sister and uncle Hydar went to the house of victim but other Pws stated they visit victim's house on next days of incident. So there is no corroboration on this fact. It is revealed from his evidence that he did not visit the house of accused after 19-3-12.

18. Statement of the PW-2, PW-4 that they found PW-1 at her matrimonial house in an unconscious state is not at all believable because PW 1 herself not stated this fact. Other PWs also not stated that they found Amina (PW-1) in an unconscious state. Victim evidence shown that on the day of incident she went to the house of one Azad and from the house she returned back to her house of accused and stayed in the house of accused. Victim statement alone shown that she was not unconscious and she was in a position to move. Victim evidence

does not bring on record that on 19-3-12 accused persons driven out her from their house. On that night she stayed in the house of accused persons.

19. PW-4 evidence is that she heard that Ayjul assaulted Amena and she went to her matrimonial home. Her cross is that Amena's in laws restrained them to bring Amena. It is also evident from her cross examination that after incident both Amena and Ayjul mutually settled their dispute and resided in a rented house. Thereafter, no incident dispute took place in between them. Her evidence also shown that other accused persons i.e in laws of Amena not assaulted her.

20. PW-5 deposed accused Ayjul demanded Rs. 50,000/- and gold ornaments and assaulted her daughter and Ayjul left his house after beating her daughter. Her cross is she frequently visited her daughter Amena's house. It is further appear from her evidence that after the incident they have mutually settled their dispute and as per the wish of her daughter, her daughter and accused Ayjul lived separately from his parents and during their stay in a rented house Ayjul fall sick.

21. Evidence of PW-6 is that during the conjugal life of her sister Amena with accused Ayjul, quarrel took place and one night Ayjul beaten his wife Amena, hearing this she went to her house and found her sister inside the house but not found others family members. PW-6 is the sister of did not supported the statement of the other PWs that accused Ayjul demanded Rs. 50,000/- from Amena. He also stated that after this incident Amena and Ayjul amicably settled their dispute and lived separately. PW-7 is the MO. According to him on 20-03-12 he examined the Amena Bibi in connection of Bilasipara PS GD entry 607 and found multiple bruises over her both thighs and legs, multiple soft tissue swelling on her both arms and over her back and in his opinion the injuries sustained by the PW-1 is simple in nature but dangerous.

22. PW-8, I/O stated he had investigated the case, recorded the statement of victim, and witness, sent victim for medical examination and in cross he stated that in CD he has wrongly written that he recorded the statement of victim on and actually he recorded her statement on and he confirm that victim i.e PW-1, PW-2 informant Anowar Hussain and victim's mother PW- 5 Ajbhanu Bewa did not made statement that accused persons demanded Rs. 50,000/-

from the Amena. He also confirmed that victim did not stated before him that accused person driven out her.

23. I have perused the case diary. I have carefully examined the evidence of I/O. On scrutiny of the C.D. I have seen that victim has not stated before the police that accused person demanded Rs. 50,000/- from her and even before police she did not stated what amount her husband accused Ayjul demanded and when accused Ayjul made said demand. I/O proved this contradiction. From the scrutiny of the statement of the witness more specifically from the witness of the victim it is seen that her evidence does not disclose that her in laws made any demand to her and beaten her either on the day of incident or prior to the day of incident. The evidence on record is totally insufficient to hold accused person Nojrul Hoque and Amela Bibi guilty us 498 A IPC and they are not guilty u/s 498-A IPC and are acquitted.

24. Victim in her evidence though stated her husband Ayjul demanded Rs 50000 but she again stated that he needs the same to purchase land and before police she did not state that her husband Ayjul demanded Rs. 50,000/- on the date of incident or prior to the date of incident. Her statement made before the police u/s 161 Cr.P.C pointed that on the date of incident quarrel took place for using a bath shop for washing the cloth for her baby and I/O also corroborated that victim did not made any statement before him that on the date of incident her accused husband demanded ₹ 50,000/- from her. Thus, shown that she made said statement before the court for the first time and therefore, her evidence is not acceptable beyond all reasonable doubt. Her evidence does not shown that she narrated incident to the other PWs and other PWs not whispered that they heard incident of demand of ₹ 50000/- from PW-1 victim. Therefore their evidence to the fact that accused Ayjul demanded Rs. 50,000/- from victim amounted to hearsay evidence. Her evidence in chief pointed her husband needs the amount money for purchase of the land. This piece of evidence conflicted her allegation against her husband accused Ayjul that he made demand of dowry. Cross examination of the other PWs pointed that both victim and accused amicably settled their dispute and are living together.

25. Evidence of other PWs shown that victim with her accused husband Ayjul living separately in a rented house. Cross examination of PW-1 reveal that

when Ayjul fell sick and wanted to come to his parent's house she objected but later on she came. All this piece of evidence shaken the prosecution allegation against the accused Ayjul that he made any dowry demand from his wife. The petition filed by the victim before the Ld. Trial court and before this court also shown that after the incident both are living together in the same house. All this fact together taken into account goes to that the statement made in the ejahar of illegal demand is not the actual facts and the dispute may be the result of husband and wife's quarrel and the evidence on record on scrutiny does not bring home charge u/s 498 A IPC against the accused persons Ayjul Hoque, beyond all reasonable doubt. I hold that accused Ayjul Haque is not guilty of commission of offence u/s 498-A IPC and he is acquitted.

26. In view of the discussion made above, Appeal is allowed, impugned judgment and order passed by the learned trial court in GR case no-193/12 dated 17-08-16 is set aside, and accused person are acquitted and set at liberty forthwith. Surety stands discharged.

27. Send the LCR to the learned trial court with a copy of judgment immediately.

28. Judgement delivered under hand and seal of this court on this 11<sup>th</sup> day of September, 2017.

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara

Dictated and corrected by me.

(S. Bhuyan)

Addl. Sessions Judge, Bilasipara

Typed by,

Swmkhwr Brahma, Stenographer Gr. III