**Ma Mi Vs. Kallander Ammal**

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**SooperKanoon Citation** : sooperkanoon.com/347635

**Court** : Mumbai

**Decided On :** Nov-20-1926

**Reported in** : (1927)29BOMLR800

**Judge** : Atkinson, Carson and John Wallis, JJ.

**Appellant** : Ma Mi

**Respondent** : Kallander Ammal

**Disposition** : Appeal dismissed

**Judgement** :

**John Wallis, J.**

1. This is an appeal from the decree of the High Court at Rangoon reversing the decree of the District Court of Pegu. The suit was brought by the respondent Kallander Ammal, to recover the whole, or in the alternative, a part of the estate of her deceased husband, Sheik Moideen, who died intestate on February 29, 1920.

2. In her plaint she claims to be the sole heir of her deceased husband, and alleges that the first defendant, Ma Mi, falsely claims to have been his lawful wife, and that the second defendant, Mohamed Eusoof, falsely claims to be the legitimate son of the deceased Sheik Moideen by one Ma Kin; and that neither of them have any claim to any portion of or interest in the estate of the deceased.

Notwithstanding which, as she alleges, the defendants have been withholding the property of the deceased from her. The defendants filed a joint written statement in which they denied that the plaintiff was heir to the estate, and pleaded that prior to his death the deceased divorced the plaintiff according to Mahomedan law, and that the said divorce was communicated to the plaintiff, and the plaintiff thereafter ceased to be the wife of the deceased if she was legally married to him at any time. They also pleaded that as widow and son of the deceased they were his only heirs and legal representatives.

3. The District Judge framed four issues of which the second, 'Was there a valid divorce between plaintiff and Moideen ?' alone was tried. On this issue the District Judge found that there was ample evidence to prove that the deceased executed a Talaknama or a divorce document about two years before his death in Burma, where he resided, and sent it to his wife in India where she was residing, and he accordingly dismissed the plaintiff's suit.

4. The plaintiff appealed to the High Court at Rangoon, who held that there was no legal evidence on record of the contents of the divorce document, as the evidence tendered in the absence of the document itself was not secondary evidence within the meaning of Section 63 of the Indian Evidence Act. They accordingly held that a divorce by Talaknama or writing was not proved; and being further of opinion that no oral divorce was proved by the evidence on record, they allowed the appeal and decreed the plaintiff's suit.

5. At the trial, several of the witnesses deposed to have heard the Talaknama read out, and to having seen it executed by the deceased, but the writer of the document was not called, and none of the witnesses had read it so as to be able to speak de visu to its contents. Their Lordships are of opinion that in this state of things the learned Judges of the High Court were right in holding that the statements of the witnesses were not secondary evidence within the meaning of Section 63 of the Act which, so far as material, is as follows:-

Secondary evidence means and includes-.oral accounts of the contents of a document given by some person who has himself seen it.

6. In their Lordships' opinion the learned Judges were right in holding that this means that the oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the document Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of Section 60 as to oral evidence generally:-

Oral evidence must, in all cases whatever, be direct; that is to say-if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it.

7. The question whether the document was a Talaknama or deed of divorce was a fact which could be seen by reading it, and, therefore, in accordance with the general principle embodied in the section could only be spoken to by a witness who had himself read it.

8. In this state of the evidence the learned Judges in their Lordships' opinion rightly held, in the absence of any legal evidence of the contents of the document in question, that a divorce by Talaknama or written document, as found by the District Judge, was not proved.

9. They then proceeded to consider whether there was any evidence on record sufficient to prove that the deceased, on the occasion when the document was drawn up and executed, used words which would, in themselves, be sufficient to constitute an oral divorce under Mahomedan law. According to that law, a husband can effect a divorce whenever he desires. He may do so by words without any Talaknama or written document, and no particular form of words is prescribed. If the words used are 'express' or well understood as implying divorce, such as talak, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. On an examination of the evidence the learned Judges came to the conclusion that there was no sufficient evidence of any such oral divorce, and they accordingly reversed the judgment of the lower Court and gave the plaintiff a decree.

10. There is no doubt the evidence of two witnesses on the record that the deceased on this occasion uttered three times the word 'talak,' which, if uttered once, would be sufficient to constitute an oral divorce, and that he also told the witnesses that the document was a Talaknama or divorce document. As to this, the learned Judges have held that the evidence as to the use of the word talak by the deceased was not reliable, and that it was not proved that the deceased told the witnesses that he had divorced his wife, or indeed that he had any intention of effecting a divorce otherwise than by the execution and transmission of the document which has not been proved.

11. Their Lordships see no sufficient reason for differing from these findings, which are sufficient to dispose of the ease.

12. It may be observed, in the first place, that the District Judge confined himself to holding that there had been a divorce by written document. Not only did he not find an oral divorce by the pronouncement of talak, but in his summary of the evidence of the two witnesses who spoke to the use of the word talak, he omitted this portion of their evidence nor did he anywhere refer to it in the course of his judgment. In these circumstances, it cannot be inferred that the District Judge would have been prepared to find an oral divorce upon the evidence of these two witnesses if he had considered it necessary to record a finding on this question.

13. As regards the pronouncement of talak, it is only spoken to by two witnesses out of several. As to the first witness, P.N. Manika Meera, the learned Judges were of opinion that the witness was silent on the point until a very leading question was put to him in examination in chief. Putting aside this objection to his evidence, which is not clearly established, it is worthy of observation that the next witness, Mahomed Ali, who went to the house with him and left at the same time, says nothing about an oral divorce by the pronouncement of talak, and was not even questioned about it. A formal pronouncement of a divorce by the use of the word talak would naturally take place in the presence of all the persons who had been summoned, and the witness must have heard it equally with Manika Meera. It is also significant that Abdul Rahim, otherwise known as Ko Po O, who is found to have been the most reliable of the defendants' witnesses, says nothing about it.

14. The only corroboration of Manika Meera's evidence is to be found in the evidence of Madar Sar, a petty bazaar keeper and a dependant of the defendants. Their Lordships agree with the High Court that the evidence of these two witnesses is not sufficient to support a finding of an oral divorce by the pronouncement of talak.

15. As regards the statements said to have been made by the deceased, their Lordships agree with the learned Judges, that the evidence does not sufficiently establish what the deceased actually said to enable them to say whether the words used amounted to a statement that the deceased had divorced his wife, or merely indicated his intention of divorcing her by the execution and transmission of the Talaknama.

16. For these reasons their Lordships are of opinion that the appeal fails and should be dismissed with costs, and will humbly advise His Majesty accordingly.