

Firdaus Bano Vs. Mohammad Ashraf

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Court : Chhattisgarh

Decided On : Jan-15-2008

Reported in : 2008(2)MPHT111(CG)

Judge : Dhirendra Mishra, J.

Appellant : Firdaus Bano

Respondent : Mohammad Ashraf

Disposition : Petition allowed

Judgement :

ORDER

Dhirendra Mishra, J.

1. The petitioner by this petition under Section 482 of the Code of Criminal Procedure (for brevity 'the Code') has impugned the order dated 9th December, 2004 passed in Criminal Revision No. 28/04 arising out of the order dated 23-2-2004 passed by Additional Chief Judicial Magistrate, Khairagarh in Criminal Case No. 4/02 whereby the learned Additional Sessions Judge, Khairagarh has partly allowed the criminal revision and set aside the order of maintenance under Section 125 of the Code passed in favour of the petitioner.

2. The facts necessary for the purposes of this petition are that Nikah of the petitioner was solemnized with the respondent on 7th February, 2000 and Mohd. Hussain was born through their wedlock. The petitioner and Mohd. Hussain applied for maintenance under Section 125 of the Code with the allegations that she was harassed and tortured by the respondent and his family members for dowry while she was carrying pregnancy and she was left by them in her parental home at Korba. She lodged a report in Police Station, Korba against the respondent on 7-6-2000. She gave birth to Mohd. Hussain. The respondent did not attend the social functions organized on the eve of birth of Mohd. Hussain. When she went to her matrimonial home with her father, they did not allow her to enter in their house and reiterated the demand of dowry. Thereafter, she lodged a report and offence under Section 498A of IPC is pending in the Court against them. She is not able to maintain herself whereas the respondent is employed in railways and is drawing a salary of Rs. 10,000/- per month, accordingly she prayed for maintenance at the rate of Rs. 3,000/- p.m. for herself and Rs. 2,000/- p.m. for her son.

3. The respondent in his reply denied the allegations and stated that he has already divorced the petitioner through Talak- a-Hasan and she ceases to be his married wife, therefore, her application under Section 125 of the Code for maintenance is not maintainable. The other allegations in the petition including the demand of dowry were denied and it was stated that he is drawing a salary of Rs. 3,500/- p.m. It was further stated by the respondent on oath that he had sent written divorce through registered letter on 1 -8-2001 and one month thereafter he sent another divorce and ultimately he sent a third written divorce after one month, which was duly received by the petitioner.

4. The Trial Court allowed the petition and awarded maintenance to the petitioner and her son at the rate of Rs. 2,000/- p.m. and Rs. 1,000/- p.m. respectively, from the date of filing of the petition, i.e., 24-1-2002 with a finding that the respondent has failed to prove that he has divorced the petitioner in accordance with Mahomedan Law and it is held that the petitioner is a legally married wife of the respondent, she is residing separately for valid reasons and is not able to maintain herself and her son Mohd. Hussain. The respondent has neglected to maintain

them, he is drawing a salary of Rs. 10,000/- p.m. and as such, he is capable of maintaining the petitioner and her son.

6. Learned Additional Sessions Judge, by the impugned order, has partly allowed the criminal revision, set aside the order of the Trial Court to the extent it relates to grant of maintenance to the petitioner with a finding that the Trial Court was not justified in holding that the respondent has failed to prove the legal divorce of the petitioner as he has divorced the petitioner by addressing three written communications pronouncing divorce to the petitioner in the interval of one month and in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (in short 'the Act of 1986'), the petition under Section 125 of the Code is not maintainable. However, the Revisional Court confirmed order of the Trial Court granting maintenance of Rs. 1,000/- p.m. to son Mohd. Hussain with a modification that the maintenance shall be payable from the date of passing of the order of the Trial Court, i.e., 23 rd February, 2004 instead of 24-1-2002.

6. Learned Counsel for the petitioner submits that as per procedure prescribed as 'Hasan Talak' three successive pronouncements of talak are required to be made by the husband at the time when the wife is in menstruation in three successive months and there is no intercourse between them during this period. However, in the instant case the three pronouncements were made on 1-8-2001 (Exh. NA/2), 2-9-2001 (Exh. NA/5) and on 15-1-2002 (Exh. NA/6). The above pronouncements were made in the presence of witnesses Aziz and Farukh. The respondent has admitted in his deposition in Paragraph 13 that original copy of the first pronouncement has been filed by him and he is possessing carbon copy of the above pronouncement. He also deposed in Paragraph 14 that he was unable to explain as to what matter was written in Exh. NA/2. The second pronouncement of Talak was never communicated to the petitioner as the respondent has admitted that the letter sent to the petitioner was received unserved and he did not send the same to the petitioner thereafter. The witnesses Aziz and Farukh have not been examined and there is no evidence available on record that all the three pronouncements were made by the husband at the time when the petitioner was in the menstruation period (Tuhar Kal) and thus, the Trial Court has rightly held that the pronouncement of Talak is null and void and the same has no legal effect and

the petitioner continues to be the legally married wife of the respondent. Reliance is placed on the judgments in the matters of Shamim Ara v. State of U.P. and Ors. 2002 AIR SCW 4162 and Zahirunnisa v. Wahae Mohammed 2005(2) CGLJ 223.

7. Further, placing reliance on the judgments in the matters of Iqbal Bano v. State of U.P. and Anr. (2007) 3 SCC (Cri.) 258, Sabra Shamim v. Maqsood Ansari (2007) 3 SCC (Cri.) 265 and Danial Latifi and Anr. v. Union of India (2007) 3 SCC (Cri.) 266, it was argued that finding of the Revisional Court that the application under Section 125 of the Code is not maintainable is also erroneous.

8. On the other hand, learned Counsel for the respondent contended that the instant petition under Section 482 of the Code is not maintainable as order of the Revisional Court was revisable under Section 397 of the Code. The petitioner was divorced by the respondent under Talak-a-Hasan. According to this form of Talak three pronouncements are required to be made during menstruation period and no intercourse takes during all the three Tuhars. The written Talak has already been proved by filing three documents of NA/2, NA/5 and NA/6. The above documents bear the signatures of two witnesses and the same were duly sent to the petitioner. The amount of maintenance for the period of Iddat at the rate of Rs. 1,500/- p.m. was also sent through draft of Rs. 4,500/-. The petitioner was also informed that she can take back all the ornaments, which were given to her at the time of marriage. The second Talaknama could not be served upon the petitioner and the same was sent back with a tip that 'addressee is not available' and the third Talaknama was received back with an endorsement that 'refused to acknowledge'. Thus, from the evidence available on record the respondent has been able to prove the valid divorce of the petitioner. The divorced Muslim woman is entitled for maintenance only under the Act of 1986 and Section 5 of the Act of 1986 gives option to the parties to the proceedings to be governed by the provisions of Section 125 or 128 of the Code. However, such option has not been exercised by the parties to the proceedings and therefore, in the absence thereof, the parties are governed by the Act of 1986 and the petition under Section 125 is not maintainable.

9. I have heard learned Counsel for the parties.

10. The only question to be decided in this petition is--whether the respondent has been able to prove by leading evidence that he has validly divorced the petitioner? If yes, whether application for maintenance under Section 125 of the Code by a divorced Muslim woman is maintainable in view of the Act of 1986?

11. In the instant case, the respondent claims that he divorced the petitioner by resorting to the mode of Talak-a- Hasan. Mullah's principles of Mahomedan Law, 19th Edition, vide Paragraph 310 says as under:

310. Talak may be oral or in writing.--A talak may be effected (1) orally (by spoken words) or (2) by a written document called a talaknama (d).

(1) Oral Talk.-*** ***(2) Talak in writing.--A talaknama may only be the record of the fact of an oral talak See Rashid Ahmed v. Anisa Khatun (1932) 59 I.A. 21, 54 All. 46, ('32) A.P.C. 25; or it may be the deed by which the divorce is effected. The deed may be executed in the presence of the kazi Sarabai v. Rabiabai (1905) 30 Bom. 537 or of the wife's father Waj Bibee v. Azmut Ali (1868) 8 W.R. 23 or of other witnesses Rajasaheb, In re: (1920) 44 Bom. 44, 54 I.C. 573; Ahmad Kasim v. Khatoon Bibi (1932) 59 Cal. 833. The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so superscribed and addressed it is said to be in unusual form. If it is in customary form it is called 'manifest' provided that it can be easily read and comprehended. If the deed is in customary form and manifest the intention to divorce is presumed. Otherwise the intention to divorce must be proved. In the undernoted case Sarabai v. Rabiabai 30 Bom. 537, Mahomed Ishaq v. Mt. Sairan (1936) 163 I.C. 953 ('36) A.L. 611 the talaknamas were held to be customary and manifest and so operative without proof of intention. On the other hand if the deed is in the form of a declaration not addressed to the wife or any other person, it is not in customary form and is not effective if there was no intention to divorce Rasul Bakhsh v. Mt. Bholan (1932) 13 Lah. 780, 138 I.C. 134, ('32) A.L. 498. If the talaknama is customary and manifest it takes effect immediately (Section 313) even though it has not been brought to the knowledge of the wife Ahmad Kasim v. Khatoon Bibi (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27 Rajasaheb, In re: (1920) 44 Bom. 44, 541, I.C. 573;

Mahomed Ishaq v. Mt. Sairan (1936) 163 I.C. 953, ('36) A.L. 611. In a Bombay case the talaknama was communicated to the wife within a reasonable time and the Court observed that this was sufficient *Rajasaheb, In re:* (1920) 44 Bom. 44, 54 I.C. 573. This, however, was not a finding that communication within a reasonable time is necessary and the talaknama operated from the date of execution. But as in the case of an oral talak, communication may be necessary for certain purposes connected with dower, maintenance and her right to pledge her husband's credit for means of subsistence *Ahmed Kasim v. Khatoon Bibi* (1932) 59 Cal. 833, 141 I.C. 869, ('33) A.C. 27, See also : *Chandbi v. Bandesha* ('61) A.B. 121. If an acknowledgment of divorce is made by the husband, the divorce will be held to take effect at least from the date upon which the acknowledgment is made *Asmat Ullah v. Khatun-un-nisa* (1939) All. 763, (1939) A.L.J. 804, 184 I.C. 517, ('39) A.A. 592.

12. Paragraph 311 mentions different modes of talak, i.e., (1) Talak ahsan, (2) Talak hasan and (3) Talak-ul-bldaat or talak-i-badai. Talak hasan consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs. The first pronouncement should be made during a tuhr, the second during the next tuhr, and the third during the succeeding tuhr.

13. In the matter of *Shamim Ara* (supra), Their Lordships elaborately discussing the statement of law by Mullah, as mentioned hereinabove, and also referring to Dr. Tahir Mahmood's *the Muslim Law of India* (Second Edition) have held in Paragraphs 13 and 14 thus:

13. There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in *Sri Jiauddin Ahmed v. Mrs. Anwara Begum* (1981) 1 GLR 358 and later speaking for the Division Bench in *Must. Rukia Khatun v. Abdul Khaliq Laskar* (1981) 1 GLR 375. In *Jiauddin Ahmed's* case, a plea of previous divorce, i.e., the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim Law? The learned

Judge observed that though marriage under the Muslim Law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (Para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that 'the whimsical and capricious divorce by the husband is good in law, though bad in theology' and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters-one from the wife's family and the other from the husband's; if the attempts fail, talak may be effected (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq, as ordained by Holy Quran, is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fails, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the abovesaid observations made by the learned Judges of High Courts. We must note that the observations were made 20-30 years before and our country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive trends. What this Court observed in Bai Tahira v. Aii Hussain : 1979 CriLJ151 , dealing with right to maintenance of a Muslim divorcee is noteworthy. To quote: The meaning of meanings is derived from values in a given society and its legal system. Article 15(3) has compelling compassionate relevance in the context of Section 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcee. This social perspective granted the resolution of all the disputes

projected in easy. Surely, Parliament in keeping with Article 15(3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Article 39 is part of social and economic justice specified in Article 38, fulfillment of which is fundamental to the governance of the country (Article 37). From this coin of vantage we must view the printed text of the particular Code.' (Para 7) 'Law is dynamic and its meaning cannot be pedantic but purposeful.' (Para 12).

14. In the matter of Zahirunnisa (supra), this Court placing reliance on the judgment in Shamim Ara 's case (supra), has held in Paragraph 8 as under:

8. As enunciated by Hon'ble the Supreme Court of India, now it becomes necessary for Talak that, the Talak must be for reasonable cause and it must be preceded by reconciliation and if these two conditions are not fulfilled, then the Talak, either given orally or by a written document, has no effect to dissolve the marriage.

15. In the instant case, the Trial Court after elaborately discussing the evidence available on record has observed that though the respondent claimed to have dispatched original document of Talak through registered post to the petitioner thrice, however, he has submitted the original documents being NA/1 and NA/2 in the Court and thus, his stand is contradictory. The Talaknama is in English and the petitioner is not conversant with English, signature in the talaknamas do not tally with each other and the respondent has not explained the reasons for the same. It has been further observed that the witnesses of talaknama namely Aziz and Farukh have not been examined, there is no evidence that the declarations of talak were made in the successive menstruation period and they did not have husband and wife relationship in this period. The respondent has not been able to establish that talak was for the reasonable cause or that it was preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and another by the husband from his family, and their attempts failed.

16. Learned Additional Sessions Judge, ignoring the glaring discrepancy in the stand of the respondent, has held that the respondent has legally divorced the

petitioner in accordance with Muslim Law. It has been observed that since the applicant/respondent has not amended his application and incorporated the pleadings denying the talak by talak hasan mode, as claimed by the respondent, the inconsistency in the evidence of the respondent notwithstanding he has established legal talak in accordance with Muslim Law.

17. The next question involved in this petition is whether the petitioners' application for maintenance under Section 125 of the Code was maintainable in view of the provisions of the Act of 1986? The Constitution Bench in the matters of Danial Latifi (*supra*), while upholding the constitutional validity of the Act of 1986, have interpreted Section 3 of the Act of 1986, in Paragraph 28 as under:

28. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression 'within' should be read as 'during' or 'for' and this cannot be done because words cannot be construed contrary to their meaning as the word 'within' would mean 'on or before', 'not beyond' and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

18. In the matter of Iqbal Bano (*supra*), referring to the Constitution Bench judgment in the matter of Danial Latifi (*supra*), with approval, it has been held that the Muslim women are not barred from filing petition under Section 125 of the

Code. Even where the Court notices that a divorced Muslim woman has made an application under Section 125 of the Code, it is open to the Court to treat the same as a petition under the Act of 1986 considering the beneficial nature of the legislation especially since the proceedings under Section 125 of the Code and claims made under the Act of 1986 are tried by the same Court. It has been further held that the utterance of words 'talak, talak, talak' thrice, 30 years back, is sufficient in law to prove divorce, cannot be sustained. The respondent/husband is required to prove the pronouncements of talak at the claimed earlier date by adducing evidence and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. It has been further held that the law of Muslim husband to divorce the wife under Section 3(1)(a) of the Act of 1986 is not confined to the iddat period, he 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 of 1986.

19. In the present case, as already observed in the foregoing paragraphs, the respondent has failed to prove by leading reliable evidence that he had given talak to the petitioner by addressing written talaknama in three successive months in the period of tuhrs. He has also failed to prove that he did not have intercourse with his wife - the petitioner during this period and thus, he has failed to prove valid talak as per Muslim Law. The finding of the Revisional Court that the application for maintenance by a divorced Muslim woman under Section 125 of the Code is not maintainable in view of provisions of the Act of 1986, can also not be sustained in view of the principles of law laid down by the Hon'ble Apex Court in the above cited judgment. On the basis of aforesaid observations, the instant petition is allowed. The impugned order of learned Additional Sessions Judge, Khairagarh, Distt. Rajnandgaon is set aside and the order passed by the Additional Chief Judicial Magistrate, Khairagarh, Distt. Rajnandgaon dated 23rd February, 2004 is restored.