

Mohamed Usman Vs. Sainaba Umma

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Court : Kerala

Decided On : Feb-24-1987

Reported in : AIR1988Ker138

Judge : Varghese Kalliath, J.

Acts : [Dissolution of Muslim Marriages Act, 1939](#) - Sections 2; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100

Appeal No. : Second Appeal No. 136 of 1987

Appellant : Mohamed Usman

Respondent : Sainaba Umma

Advocate for Pet/Ap. : P.N.K. Achan, Adv.

Disposition : Appeal dismissed

Judgement :

Varghese Kalliath, J.

1. This is a matrimonial cause, The wife complained of cruelty and not providing maintenance to her by husband. She also contended that the marriage has broken irretrievably. On these grounds, she prayed for a dissolution of marriage under the [Dissolution of Muslim Marriages Act, 1939](#), hereinafter referred to as 'the Act.' The

husband resisted the suit. The trial court dismissed the suit. Plaintiff-wife filed an appeal. The appellate court found that the plaintiff has made out a valid ground under Section 2(ix) of the Act. Now, the defendant husband appeals.

2. The sequence of the relevant facts is this: The marriage of the parties took place on 10-10-1971. The 'Nikkah' ceremonies were in the home of the husband. The husband and wife began to live together in the husband's home from Nov. 1972. After some months husband took it as a habit to come home after consuming liquor. He began to indulge in horse play in the home. When the wife questioned, the usual answer was an assault on her. Later, the husband made his home itself the venue for his drinking spree. He used to become boisterous and violent on such occasions. A drunken carouse followed every day in the company of his friends. Any resentment by the wife resulted in severe assault on her. In 1978, she left her home for her parents' house. Mediation followed. She returned to her husband's home, but the husband continued his habits with added vigour. In January 1981, wife sought permission to go to her parents' house, since her life with her husband became a perpetual torture and mental agony for her. She was taken to her house in January 1981. The husband never cared to maintain her and showed any concern for her. The wife says that there is a complete break down of marriage which is irretrievable. The husband stoutly denied the allegations. The legal proceedings commenced in 1983. The facts of the case reveal that from 1981 onwards, the parties are not living together as husband and wife.

3. The learned counsel for the appellant-husband submits that the finding of the appellate court that there is irretrievable break-down of marriage is incorrect and requires a re-consideration by this court.

4. 'Section 2(ix) of the Act is really in the form of a residuary ground where the courts have an area of discretion and freedom. The reality in this case is that the husband and wife are living separately from 1981 onwards and the wife has expressed in clear and plain terms her great hatred and aversion towards the defendant-husband. Though the case of cruelty has not been sustained on proof the wife has said in unequivocal terms that she is unwilling to continue as the wife of the appellant. She has even said that she is not prepared to receive any amount

as maintenance from her husband She says that to compel her to live as the wife of the defendant is an infliction of a penal servitude on her.

5. The question is in such a situation, whether this court can interfere with a finding recorded by the appellate court that the marriage has broken irretrievably and that the marriage has to be dissolved under Sub-section (ix) of Section 2 of the Act. Certainly, in matrimonial causes, the court should strive as far as possible, to have a rapprochement between the parties so as to restore the conjugal harmony. We believe that family is the grass-root unit of the nation and that the strength of the nation largely depends on the unity and strength of this primary integer of the nation -- the family. A benign and kind rapprochement process is absolutely necessary on the part of matrimonial courts when approaching a matrimonial cause. This is done in fact not in the interests of the parties alone, but in the interests of the general public and also in the interests of the off-springs if any, of the fighting husband and wife. But, the other facet of the problem is that it is not always in the interests of the parties or in the interests of the public that a man and a woman should be by compulsion, bound to live together as husband and wife, however unwilling they are to live in union as husband and wife. When an intolerable situation has been reached and partners are living with hostility for a considerable number of years, it is legitimate to draw an inference that the marriage has broken down in reality and the law should recognise it and try to end the relationship. I feel that this is the modern trend of decisions in matrimonial causes. The solemnity of marriage is certainly to be preserved. It has to be preserved as a high principle of morality. But, we should not forget about the reality that there is no morality of compelling partners who are living separately for years together and a possibility of a rapprochement has failed.

6. Islam certainly takes a very liberal attitude in the matter of divorce particularly the right of divorce granted to husbands. It is significant to note that independently of the Dissolution of Muslim Marriage Act, Islam concedes grounds for dissolution of marriage at the instance of the wife, and the statute itself recognises it and preserves it as a saving provision in Section 2(ix) of the Act when it enacted 'any other ground which is recognised as valid for the dissolution of marriages under Muslim Law.'

7. When the wife verily detests the husband and he reciprocates it in the same measure and the spouses keep rigidly a fixed and morbid aversion and abhorrence to each other, life becomes a hell upon earth and a harrowing torture for both. In such circumstances, Islam concedes the right to the wife to seek dissolution of marriage on the ground of 'Khul'. Take the case of Thabit ibn Quais. It is said that this is the first instance of Khul recorded in Islam. Wife of Thabit ibn Quais requested the Holy Prophet to get her husband to divorce her on her giving him her garden. Thabit was very ugly and his wife is reported to have said 'if I had had no fear of God, I should have struck him on the face whenever he approached, me.'

8. In 1986 (I) Cur CC 240 (I) (Pak) (SC), a Pakistan case is reported, where it is seen stated thus : --

'In cases of dislike by the wife of her husband, islam concedes the right to the wife in circumstances of extreme discord and where life becomes torture for both, on account of the fixed aversion on the part of the spouses, to seek dissolution of marriage on the ground of Khula. This right however, is not an absolute right by which the wife can herself dissolve the marriage but is a controlled right. The success of the right depends upon the quazi's reaching the conclusion that the spouses cannot live within the limits of God.'

The learned District Judge has referred to this quote in his judgment.

9. Now, the appellate court has held that there is clear and clinching evidence to hold that the marriage between the parties has broken irretrievably. I do not think that this is a fit case where I should interfere with the judgment of the appellate court, exercising my power under Section 100 of the Civil P.C. I see no substantial question of law that arises for my consideration on the facts of this case in second appeal. The appeal is only to be dismissed. I do so.