Supreme Court of India
Shamim Ara vs State Of U.P. & Anr on 1 October, 2002
Author: R Lahoti
Bench: R.C. Lahoti, P.Venkatarama Reddi.

CASE NO.:
Appeal (crl.) 465 of 1996

PETITIONER:
Shamim Ara

RESPONDENT:
State of U.P. & Anr.

DATE OF JUDGMENT: 01/10/2002

BENCH:
R.C. LAHOTI & P.VENKATARAMA REDDI.

JUDGMENT:

J U D G M E N T R.C. Lahoti, J.

Shamim Ara, the appellant and Abrar Ahmad, the respondent no.2 were married some time in 1968 according to Muslim Shariyat Law. Four sons were born out of the wedlock. On 12.4.1979, the appellant, on behalf of herself and for her two minor children, filed an application under Section 125 Cr.P.C. complaining of desertion and cruelty on the part of respondent no.2 with her. By order dated 3.4.1993 the learned Presiding Judge of the Family Court at Allahabad refused to grant any maintenance to the appellant on the ground that she was already divorced by the respondent and hence not entitled to any maintenance. However, maintenance at the rate of Rs.150/- per month was allowed for one son of the appellant for the period during which he remained a minor; the other one having become major during the pendency of the proceedings.

The respondent no.2 in his reply (written statement) dated 5.12.1990, to the application under Section 125 Cr.P.C., denied all the averments made in the application. One of the pleas taken by way of additional pleas is that he had divorced the appellant on 11.7.1987 and since then the parties had ceased to be spouses. He also claimed protection behind the Muslim Women (Protection of Rights on Divorce) Act, 1986 and submitted that the respondent no.2 had purchased a house and delivered the same to the appellant in lieu of Mehar (Dower), and therefore, the appellant was not entitled to any maintenance. No particulars of divorce were pleaded excepting making a bald statement as already stated hereinabove. The appellant emphatically denied having been divorced at any time. The respondent no.2, when he appeared in the witness-box, stated having divorced the appellant on 11.7.1987 at 11 a.m. in the presence of Mehboob and other 4-5 persons of the neighbourhood. He further stated that since 1988 he had not paid anything either to the appellant or to any of the four sons for their maintenance. The divorce said to have been given by him to the appellant was a triple talaq though such a fact was not stated in the written statement. The Family Court in its order dated 3.4.1993 dealt with and upheld a strange story of divorce totally beyond the case set up by the respondent no.2. The learned Presiding Judge referred to some affidavit dated 31.8.1988 said to

have been filed by the respondent No.2 in some civil suit details whereof are not available from the record of the present case but certainly to which litigation the appellant was not a party. In that affidavit it was stated by the respondent no.2 that he had divorced the appellant 15 months before. The learned Judge held that from such affidavit the plea of the respondent no.2 found corroboration of his having divorced the appellant. The learned Judge concluded that the appellant was not entitled to any maintenance in view of her having been divorced. The appellant preferred a revision before the High Court. The High Court held that the divorce which is alleged to have been given by the respondent no.2 to the appellant was not given in the presence of the appellant and it is not the case of the respondent that the same was communicated to her. But the communication would stand completed on 5.12.1990 with the filing of the written statement by the respondent no.2 in the present case. Therefore, the High Court concluded that the appellant was entitled to claim maintenance from 1.1.1988 to 5.12.1990 (the later date being the one on which reply to application under Section 125 Cr.P.C. was filed by the respondent No.2 in the Court) whereafter her entitlement to have maintenance from respondent no.2 shall cease. The figure of maintenance was appointed by the High Court at Rs.200/-.

The appellant has filed this appeal by special leave. The singular issue arising for decision is whether the appellant can be said to have been divorced and the said divorce communicated to the appellant so as to become effective from 5.12.1990, the date of filing of the written statement by the respondent no.2 in these proceedings. None of the ancient holy books or scriptures of muslims mentions in its text such a form of divorce as has been accepted by the High Court and the Family Court. No such text has been brought to our notice which provides that a recital in any document, whether a pleading or an affidavit, incorporating a statement by the husband that he has already divorced his wife on an unspecified or specified date even if not communicated to the wife would become an effective divorce on the date on which the wife happens to learn of such statement contained in the copy of the affidavit or pleading served on her. Mulla on Principles of Mahomedan Law (Nineteenth Edition, 1990) states vide para 310:-

"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 Talak. __ No particular form of words is prescribed for effecting a talak. If the words are express (saheeh)or well understood as implying divorce no proof of intention is required. If the words are ambiguous (kinayat), the intention must be proved (e). It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her (f). In a Calcutta case the husband merely pronounced the word "talak" before a family council and this was held to be invalid as the wife was not named (g). This case was cited with approval by the Judicial Committee in a case where the talak was valid though pronounced in the wife's absence, as the wife was named (h). The Madras High Court has also held that the words should refer to the wife (i). The talak pronounced in the absence of the wife takes effect though not communicated to her, but for purposes of dower it is not necessary that it should come to her knowledge (j); and her alimony may continue till she is informed of the divorce

(k). As the divorce becomes effective for purposes of dower only when communicated to the wife, limitation under Art. 104 for the wife's suit for deferred dower ran from the time when the divorce comes to her notice (l), under the Act of 1908. See also the Limitation Act, 1963.

Words of divorce.__ The words of divorce must indicate an intention to dissolve the marriage. If they are express (saheeh), e.g., "Thou art divorced," "I have divorced thee," or "I divorce my wife for ever and render her haram from me" [Rashid Ahmad v. Anisa Khatun (1932) 59 I.A. 21], they clearly indicate an intention to dissolve the marriage and no proof of intention is necessary. But if they are ambiguous (kinayat), e.g., "Thou art my cousin, the daughter of my uncle, if thou goest" [Hamid Ali v. Imtiazan (1878) 2 All.71] or "I give up all relations and would have no connection of any sort with you" [Wajid Ali v. Jafar Husain (1932) 7 Luck, 430, 136 I.C. 209, ('32) A.O.34], the intention must be proved.

Pronouncement of the word talak in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is inconsequential. Ghansi Bibi v. Ghulam Dastagir (1968) 1 Mys. L.J. 566.

If a man says to his wife that she has been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier."

[(f) Ma Mi v. Kallander Ammal, supra;

Ahmad Kasim v. Khatoon Bibi (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27;

Fulchand v. Nazib Ali (1909) 36 Cal.

184, 1 I.C. 740; Sarabai v. Rabiabai (1905) 30 Bom. 536 (obiter).

(g) Furzund Hussein v. Janu Bibee (1878) 4 Cal. 588.

(h) Rashid Ahmad v. Anisa Khatoon (1932) 59 I.A. 21, 54 All.46, 135 I.C. 762, ('32) A.P.C. 25.

(i) Asha Bibi v. Kadir, supra.

(j) Fulchand v. Nazib Ali, supra.

(k) Ma Mi v. Kallandar Ammal, supra;

Abdul Khader v. Azeeza Bee (1944) 1 M.L.J. 17, 214 I.C. 38, ('44) A.M. 227.

(l) Kathiyumma v. Urathel Marakkar (1931) 133 I.C. 375, ('31) A.M. 647.] The statement of law by Mulla as contained in para 310 and footnotes thereunder is based on certain rulings of Privy Council and the High Courts. The decision of A.P. High Court in (1975) 1 APLJ 20 has also been cited by Mulla in support of the proposition that the statement by husband in pleadings filed in answer to

petition for maintenance by wife that he had already divorced the petitioner (wife) long ago operates as divorce.

We will offer our comments on this a little later. Immediately we proceed to notice a few other authorities. In Dr. Tahir Mahmood's 'The Muslim Law of India' (Second Edition, at pp.113119), the basic rule stated is that a Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the Court. This power is known as the power to pronounce a talaq. A few decided cases are noticed by the learned author wherein it has been held that a statement made by the husband during the course of any judicial proceedings such as in wife's suit for maintenance or restitution of conjugal rights, or the husband's plea of divorce raised in the pleadings did effect a talaq. Such liberal view of talaq bringing to an end the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands has met with criticism and strong disapproval at the hands of eminent jurists.

V. Khalid, J., as His Lordship then was, observed in Mohammed Haneefa Vs. Pathummal Beevi, 1972 K.L.T. 512 __ "I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A Division Bench of this court, the highest court for this State, has clearly indicated the extent of the unbridled power of a muslim husband to divorce his wife. I am extracting below what Their Lordships have said in Pathayi v. Moideen (1968 KLT 763). "The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law .. The husband can effect if by conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge."

Should muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."(p.514) In an illuminating judgment, virtually a research document, the eminent judge and jurist V.R. Krishna Iyer, J., as His Lordship then was, has made extensive observations. The judgment is reported as A. Yousuf Rawther Vs. Sowramma, AIR 1971 Kerala 261. It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship:-

"The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute. (para 6) "Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture __ law is largely the

formalized and enforceable expression of a community's cultural norms __ cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions." (para 7) "It is a popular fallacy that a Muslim male enjoys, under the Quaranic Law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, 'if they (namely, women) obey you, then do not seek a way against them'." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." (para 7) "Commentators on the Quoran have rightly observed __ and this tallies with the law now administered in some Muslim countries like Iraq __ that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce." (para 7) "After quoting from the Quoran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. . . . . Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation." (para 7) 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 Vs. Mrs. Anwara Begum, (1981) 1 GLR 358 and later speaking for the Division Bench in Must. Rukia Khatun Vs. Abdul Khalique 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 inspite 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 be 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, talaq 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 fail, '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.

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 Vs. Ali Hussain AIR 1979 SC 362 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 S.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 is easy. Surely, Parliament, in keeping with Art. 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 Art.39 is part of social and economic justice, specificated in Art.38, fulfillment of which is fundamental to the governance of the country (Art.37). From this coign 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) The plea taken by the husband-respondent no.2 in his written statement may be re-noticed. The respondent No.2 vaguely makes certain generalized accusations against the wife-appellant and states that ever since the marriage he found his wife to be sharp, shrewd and mischievous. Accusing the wife of having brought disgrace to the family, the respondent No.2 proceeds to state, vide para 12 (translated into English) __ "The answering respondent, feeling fade up with all such activities unbecoming of the wife-petitioner, has divorced her on 11.7.87." The particulars of the alleged talaq are not pleaded nor the circumstances under which and the persons, if any, in whose presence talaq was pronounced have been stated. Such deficiency continued to prevail even during the trial and the respondent No.2, except examining himself, adduced no evidence in proof of talaq said to have been given by him on 11.7.1987. There are no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq.

We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p.1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. The respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end the

marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter parte, containing a self-serving statement of respondent no.2, could not have been read in evidence as relevant and of any value.

For the foregoing reasons, the appeal is allowed. Neither the marriage between the parties stands dissolved on 5.12.1990 nor does the liability of the respondent No.2 to pay maintenance comes to an end on that day. The respondent No.2 shall continue to remain liable for payment of maintenance until the obligation comes to an end in accordance with law. The costs in this appeal shall be borne by the respondent No.2.