

**HIGH COURT OF TRIPURA
AGARTALA
F.A. 05 of 2023**

Mr. Kutub Ali,
S/o. Late Ali Mohammad,
Village Noagaon, P.O. Ichabpur,
P.S. & Sub-Division Kailashahar,
District Unakoti, Tripura.

----Appellant(s)

Versus

Mst. Rousanara Begam,
W/o. Mr. Kutub Ali
D/o. Afruj Ali,
Resident of village Fulbarikandi,
P.O. Ichabpur, P.S. & Sub-Division-Kailashahar,
District-Unakoti, Tripura.

----Respondent(s)

For Appellant(s)	:	Mr. J. Islam, Advocate Mr. R. Debnath, Advocate
For Respondent(s)	:	Ms. M. Chakraborty, Legal aid counsel
Date of hearing & delivery of judgment & order	:	25.07.2024
Whether fit for reporting	:	Yes

**HON'BLE MR. JUSTICE ARINDAM LODH
HON'BLE MR. JUSTICE S.D. PURKAYASTHA**

JUDGMENT & ORDER (ORAL)

This appeal filed under Section 19 of the Family Courts Act, 1984 is directed against the judgment dated 10.08.2023 passed by the learned Judge, Family Court, Kailashahar, Unakoti District, Tripura in Title Suit No.01 of 2020 whereby and whereunder the suit instituted by the appellant herein, praying for dissolution of marriage has been dismissed.

2. Heard Mr. J. Islam, learned counsel appearing for the appellant-husband. Also heard Ms. M. Chakraborty, learned legal aid counsel appearing for the respondent-wife.

3. For convenience, we may reproduce the facts hereunder as projected by learned Judge, Family Court:

“a. That, the appellant, as plaintiff instituted Title Suit No.01 of 2020 against the respondent in the learned Family Court, Kailashahar, Unakoti District for declaration under Section 34 of the Specific Relief Act declaring that the marriage between the parties are not in existence.

b. That, the appellant as plaintiff instituted the said suit stating *inter alia* that the marriage between the parties was solemnized as per Muslim Rites and Customs on 10.01.2012 and *Moharana* was fixed at Rs.1,00,000/- from which the appellant has reimbursed Rs.60,000/- only as cost of golden ornaments of the respondent and that the parties started to live together as husband and wife but after six months it was seen that the respondent is not a fair lady and very often started to quarrel with the appellant and his mother and family members and that the respondent started mental torture upon the appellant and that she assaulted the appellant and his mother physically and mentally and that village meetings were arranged but no amicable settlement could be done and therefore, the appellant started to live in separate mess but the respondent was not rectified though a male child was born in the meantime and that the male child is now 6(six) years old and that the appellant thought that the respondent shall be rectified but she was not rectified and that on 20.11.2017 on false plea the respondent raised hue and cry and assaulted the appellant and his aged mother and that due to attitude of the respondent, the marriage of the parties needs to be resolved by a decree of declaration and that the appellant had given Talak to the

respondent as per Islamic Rules on 30.10.2019, 29.11.2019 and 29.12.2019 and communicated to the respondent by post and said Talak was made in presence of witnesses and therefore, the appellant instituted the suit for declaration as stated herein above.

c. That, the respondent has contested the suit by filing written statement challenging maintainability of the suit and denying the averments of the plaint and stated that no Talak was given by the appellant and also denied the communication of Talak by post and also denied the averments of meeting etc. The respondent further stated that she was tortured and assaulted by the appellant and was driven out from her matrimonial home and also stated that she filed Crl. Misc.(125) 12 of 2017 which was amicably settled between the parties. The respondent also stated further that after amicable settlement due to similar problem she filed Crl. Misc. (125) 105 of 2017 and got order in her favour and also stated further that her brother Mr. Achab Ali has lodged a complaint case before the learned Chief Judicial Magistrate, Unakoti District, Kailashahar under Sections 326/307/34 of I.P.C. and the case was registered as C.R. 211 of 2017 which was subsequently amicably settled between the parties and prayed for dismissal of the suit.”

4. On consideration of the facts narrated here-in-above, the learned trial court had framed the following issues:

“1. Whether the petition is maintainable?

2. Whether the marriage between the Petitioner Kutub Ali and the wife-defendant Mst. Rousonara Begam was dissolved by their social rites and custom?

3. Whether the Petitioner is entitled to the decree, as prayed for and to what other relief/reliefs?”

5. During the course of trial, the appellant/plaintiff produced the following witnesses:

- (i) Mr. Kutub Ali (Plaintiff himself) as PW1,
- (ii) Mr. Abdul Chabur as PW2,
- (iii) Smt. Chinu Rani Shil as PW3,
- (iv) Mr. Raich Ali as PW4.

Similarly, the respondent as defendant produced the following witnesses:

- (i) Mst. Rousonara Begam (Defendant herself) as DW1.
- (ii) Moura Mia as DW3.
- (iii) Asadur Rahaman as DW4.

DW2 Shamsul Islam did not turn up to face cross-examination. None of the parties to the *lis* has produced any documentary evidence.

6. After completion of recording evidence and having heard the arguments advanced by learned counsel appearing for the parties, the learned Court below dismissed the suit by judgment dated 10.08.2023.

7. Being aggrieved by and dissatisfied with the said judgment, the appellant has preferred the present appeal before this Court.

8. This Court vide order dated 16.11.2023 admitted the appeal. During the pendency of the appeal, the appellant has filed an application under Order XLI Rule 27 of the CPC, 1908 for producing/adducing additional evidence which has been registered as IA No.01 of 2024.

8.1. After perusal of the said application and having heard the learned counsel appearing for the parties, we are of the opinion that the plea taken by the appellant to adduce additional evidence is not acceptable. It is stated in the

application that during cross-examination, the respondent-wife admitted that she received an envelope containing white paper, but as per the appellant, the *Talaknama* which was sent by him was witnessed by one 'Abdul Sabur'. Since said Abdul Sabur was out of station, he could not be produced as witness in the original suit.

8.2. On the above issue, Ms. Chakraborty, learned legal aid counsel for the respondent-wife has submitted that the spelling of 'Abdul Sabur' has wrongly been reflected in the application filed under Order XLI Rule 27 of the CPC only to mislead the Court. The name should be spelled as 'Abdul Chabur' instead of 'Abdul Sabur'. He was produced by the appellant himself and was also examined and cross-examined before the learned trial Court as PW2.

8.3. On perusal of the record, we have noticed that the submission advanced by Ms. Chakraborty, learned counsel for the respondent-wife is correct that one 'Abdul Chabur' appeared in the witness box, submitted examination-in-chief and he was duly cross-examined.

8.4. In furtherance thereof, the appellant neither produced '*Talaknama*' during the course of trial nor adduced any evidence or proof in support of the fact that the *Talaknama* was sent by post to the respondent-wife. That apart, the appellant during his cross-examination has specifically stated that "*he was not having any document to prove his case*". Curious enough, even before this Court, the appellant has failed to enclose any proof that he has sent *Talaknama* by post to the respondent-wife. In view of this, we do not find any merit in the application filed by the appellant to adduce additional evidence.

9. Order XLI Rule 27 reads as under:

“27. Production of additional evidence in Appellate Court. – (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –

- (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or**
[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]¹
- (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.**
- (2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”**

10. The Hon’ble Supreme Court in the case of **Union of India vs. Ibrahim Uddin & Anr.**, reported in **(2012) 8 SCC 148: 2012 SCC OnLine SC 528**, elaborately discussed the scope of allowing a petition filed under Order XLI Rule 27 of CPC. The relevant observation may be reproduced hereunder, for convenience:

“Order 41 Rule 27 CPC

36. *The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself. (Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526] , Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008] , Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698 : AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553] .)*

37. *The appellate court should not ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly,*

¹ Ins. by Act 104 of 1976, S. 87 (w.e.f. 1-2-1977)

where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co. [(1978) 2 SCC 493 : AIR 1978 SC 798])

38. *Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. (Vide Lala Pancham [AIR 1965 SC 1008] .)*

39. *It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912] and S. Rajagopal v. C.M. Armugam [AIR 1969 SC 101])*

40. *The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a “substantial cause” within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.*

41. *The words “for any other substantial cause” must be read with the word “requires” in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment.*

42. *Whenever the appellate court admits additional evidence it should record its reasons for doing so (sub-rule (2)). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the court of further appeal to see, if the discretion under this Rule has been properly exercised by the court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision*

is only directory and not mandatory, if the reception of such evidence can be justified under the Rule.

43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough compliance with the requirement as to recording of reasons.”

11. Having regard to the principle laid down in the case of ***Ibrahim Uddin(supra)***, it can be summed up that seeking of adducing additional evidence is not a matter of right upon the party who insists for it. It is a judicial discretion which must be applied assigning sufficient reasons. Additional evidence cannot be produced/adduced to fill up the lacunae. The inadvertence of a party or his inability to understand the importance of production of such evidence during the course of trial does not constitute the “substantial cause” to adduce additional evidence. The words “for any other substantial cause” must be read with the word “requires” in the beginning of the sentence. The Court must reach a finding that production or adducing additional evidence is required to grant equitable relief to the parties vis-à-vis to pronounce a satisfactory judgment.

(emphasis supplied)

12. Coming to the facts of the instant case, as we said earlier, during the course of examination, the appellant has categorically stated that “*I have no document to prove in connection with this case*”. That means that the appellant has no document to substantiate his plea that he has sent “*Three Written Talaknamas*” through post to the respondent-wife.

13. Learned counsel appearing for the appellant has tried to persuade this Court that it was due to the negligence of the learned counsel conducting the case on behalf of the appellant before the learned trial Court that the

documents could not be produced. Keeping in view the principle laid down in the case of *Ibrahim Uddin(supra)*, we may unhesitantly hold that this submission has no legs to stand. Added to it, on perusal of the averments made in the application for adducing additional evidence, we do not find any statement made by the appellant that it was due to the negligence of his learned counsel that he could not produce any evidence.

14. Another aspect is that one ‘Abdul Sabur’ adduced evidence as PW2. As we discussed in the preceding paragraphs that it was ‘Abdul Chabur’ and not ‘Abdul Sabur’ who was produced as the witness by the appellant himself.

15. The appellant has not even enclosed any photocopy of the said “*Three Written Talaknamas*” which were sent to the respondent in his application for adducing additional evidence to satisfy this Court that out of negligence or incapability he could not produce the documents in course of the proceeding before the learned trial Court.

16. So, in the considered view of this Court, the appellant has miserably failed to make out a case to pass an order permitting him to adduce additional evidence. According to us, the grounds taken by him for adducing additional evidence do not fulfill the conditionalities embodied in Order XLI Rule 27 of the CPC.

17. Another important aspect is that when it is the plea of the appellant that the original copies of “*Three Written Talaknamas*” were in possession of the respondent-wife, in that case, the appellant could have filed an application before the learned trial Court in course of the proceeding for production of the original copy of those “*Three Written Talaknamas*” under

Order XI Rule 14 of CPC read with Section 67 of the Evidence Act, but, he did not avail this opportunity also.

So, under Section 114(g) of the Evidence Act, it is presumed that the plea taken by the appellant-husband has no substance and presumption goes against him.

Resultantly, the application for adducing additional evidence stands rejected.

18. Now coming to the challenge of the impugned judgment passed by the learned Judge, Family Court, we find that Section 310 of Mulla's Principles of Mahomedan Law, 23rd edition stipulates that a *Talak* may be effected (1) orally (by spoken words) or (2) by a written document called a *Talaknama*. In *Shayara Bano v. Union of India and Ors.*, reported in (2017) **9 SCC 1** a five-judge bench of Supreme Court by a 3:2 majority, set aside the principles of *Talak-e-biddat* (instantaneous triple *talak*). The Supreme Court by 3:2 verdict held that the triple *talak* is against the basic tenets of *Quran*.

In the instant case, it is the specific plea of the appellant-husband that he divorced the respondent-wife by way of signing "*Three Written Talaknama*" through registered post. The Allahabad High Court in *Rahmtullah v. State of U.P. and Ors.*, reported in **1994 SCC OnLine All 74** has given a new meaning and new direction to the law of *talak*. It held that *talak-ul-biddat* or *talak-i-badai* i.e. giving an irrevocable divorce at once or at one sitting or by pronouncing it in a *tuhr* once in an irrevocable form, without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about reunion, by removing difference or cause of differences and helping the two in solving their differences, runs counter to

the mandate of the Holy Quran and has been regarded as by all under *Islam-Sunnat*, to be sinful.

The Court further observed that the mode of *talak* giving unbridled power to the husband, cannot be deemed operative, and creating as same has the effect of perpetuating discrimination on the ground of sex and male authoritarianism. The need of the time is that codified law of Muslim marriage and divorce should be enacted keeping pace with the aspiration of the Constitution.

The above observation of the Court might be the '*obiter dicta*' of the judgment but it helped in mobilizing public opinion.

The editor of Mulla's principles of Mahomedan Law, 23rd edition is also in agreement with the view that the divorce must be preceded among Muslims by an attempt of reconciliation between the husband and the wife by two mediators, one chosen by the wife from her family and the other by the husband from his side. A Mahomedan husband cannot divorce his wife at his whim or caprice i.e., divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement. Even if there is any reasonable cause for the divorce, yet there must be evidence to show that there was an attempt for a settlement prior to the divorce and when there was no such attempt prior to divorce to arrive at a settlement by mediators, then there cannot be a valid divorce under Mahomedan Law.[ref: ***Zulekha Begum alias Rahmathunnisa Begum v. Abdul Raheem*, 2000 SCC OnLine Kar. 20**]

19. The Hon'ble Supreme Court of India after going through various authorities on Muslim Law and cases decided by various High Courts reiterated the following statement of Justice Iyer [ref:***A. Yousuf Rawther v. Sowramma***, reported in ***1970 SCC OnLine Ker 49:AIR 1971 Ker. 261***]

“It is a popular fallacy that a Muslim male enjoys under the Quranic Law an unbridled authority to liquidate the marriage. The whole Quran 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 (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.”

The Apex Court further observed that the *talak* 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...

The revising editor of the 20th edition of Mulla’s principles of Mahomedan Law is also in agreement with the Supreme Court findings that the correct law of divorce as ordained by Holy Quran is that *talak* must be for reasonable cause; and it must be preceded by an attempt of reconciliation between the husband and the wife by two arbitrators. Thus, factum of divorce is required to be proved by the husband, including the conditions precedent there.

20. In the instant case, the appellant-husband in his deposition has stated that after 5 to 6 months of marriage, the respondent started ill behavior with him and his old-aged mother. Several amicable settlements were arranged to rectify such activities and immoral lifestyle of the respondent-wife, but, did not find any fruitful result. Thereafter, about three years ago (from the date of deposition), on 06.01.2022, the respondent left the house of the appellant without his consent and started to reside at her parental house. The appellant had pronounced first *talak* in writing on 03.10.2019 and communicated it through India post on 1.11.2019, which she had received

duly. The appellant pronounced second *talak* on 29.11.2019 in writing and sent it through India post on 02.12.2019 which also was received duly by the respondent. The appellant pronounced third *talak* on 29.12.2019 in writing which was communicated to the respondent through India post on 31.12.2019. The appellant has stated that it was presumed that the respondent had duly acquainted about the fact that the *talak* had been completed between the parties. One Abdul Chabur (PW2) and another Smt. Chinu Rani Shil (PW3) and Raich Ali (PW4), deposed in favour of the appellant and their evidences are the reiteration of the statements made by the appellant in his examination-in-chief.

21. On the other hand, it is the case of the respondent-wife that she was tortured by the appellant and once the appellant tried to burn the lower abdomen of their child. She denied any attempt of amicable settlement as regards the disputes between her and the appellant. The respondent-wife also denied that she has not received any *talaknama*, however, she received an envelope with blank paper.

22. We have considered the evidence and materials on record.

23. The question, in the instant case, is that whether the appellant has been able to prove that if he pronounced three *talaks*, and the same was duly communicated to the respondent-wife.

24. According to us, burden of proof lies upon the appellant to prove that he sent “*Three Written Talaknamas*” to the respondent-wife by India post, which he miserably failed to discharge.

25. The appellant has stated that he has sent “*Three written Talaknamas*” on 30.10.2019, 29.11.2019 and 29.12.2019. The appellant has categorically stated and deposed that he has sent “*Three Written Talaknamas*”

through post. Learned Judge, Family Court came to a finding that the appellant has failed to produce proof of sending *Talaknamas* by post.

26. According to us, this finding of learned Judge, Family Court cannot be said to be incorrect or erroneous for the reason that this Court also, finds that the appellant has failed to produce any document to substantiate that he has sent “*Three Written Talaknamas*” through post. No postal receipt has been produced before this Court also.

27. Furthermore, on overall consideration of the evidence and materials on record, according to us, the factum of divorce has not been proved by the appellant-husband including the conditions precedent as discussed here-in-above. The appellant has failed to show or disclose the name of any person who acted as mediators or arbitrators to settle the disputes between him and the respondent-wife. Mere statement that the wife used to misbehave with him and his mother without any concrete evidence cannot be said to be a good ground for divorce.

28. In the opinion of this Court, these statements are mere stereotype statements in a divorce proceeding, which cannot in any way be relied upon to pass a decree of dissolution of marriage. The appellant has miserably failed to adduce any cogent evidence necessary for a decree of divorce. In the instant case, we do not find any convincing reason for divorce.

29. Another important aspect is that with the pronouncement of *Talaknama* it is the bounded duty of the husband to return ‘*Mahr*’ or dower to the wife. The appellant has admitted that the total ‘*Mahr*’ amount was fixed at Rs.1,00,000/- and he received Rs.60,000/- during the solemnization of ‘*Nikah*’. But admittedly, the said ‘*Mahr*’ has not been repaid/returned to the

respondent-wife. No such plea even has been taken by the appellant. Thus, the essentialities of '*Talak*' have not been fulfilled.

30. In the aforesaid facts and circumstances, we are unable to find any reason or grounds to interfere with the judgment passed by learned Judge, Family Court, dismissing the suit instituted by the appellant seeking a declaration for dissolution of marriage by decree of divorce.

Accordingly, the instant appeal preferred by the appellant-husband stands dismissed. However, there shall be no order as to costs.

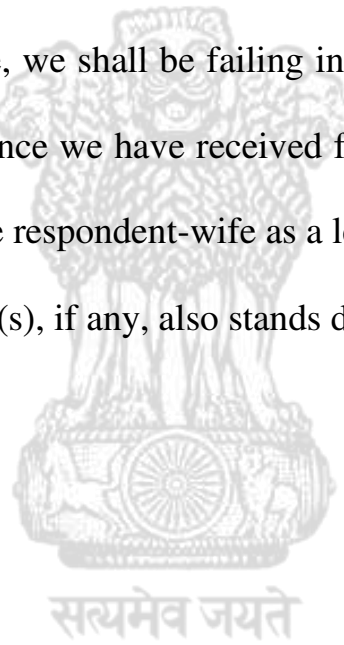
Decree shall be executed.

Before we conclude, we shall be failing in our duty if we do not appreciate the substantial assistance we have received from Ms. Chakraborty, learned counsel appearing for the respondent-wife as a legal aid counsel.

Pending application(s), if any, also stands disposed.

JUDGE

JUDGE



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