

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD

CRIMINAL WRIT PETITION NO. 225 OF 2002

- 1] Ashiyabegum w/o Sk. Khayyum,
age 20 years, occ. Household,
R/o Syed Nagar, Beed,
- 2] Kum. Sirin d/o Sk. Khayyum,
age 2 years, occ. Minor,
U/g of legal mother Ashiyabegum ...Petitioners

VERSUS

- 1] Sk. Khayyum s/o Shaikh Jilani,
age 30 years, occ. Business,
R/o New Vegetable Market, Beed,
- 2] The State of Maharashtra ...Respondents

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Shri M.V.Salunke, advocate h/f
Shri V.D.Salunke, advocate for petitioners
Shri Mohit Deshmukh, advocate h/f
Shri S.G.Chapalgaonker, advocate for the respondent no.1
Shri V.H.Dighe, A.P.P. for respondent no.2
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CORAM : V.M.DESHPANDE, J.

DATED : 13th February, 2015

ORAL JUDGMENT : -

- 1] The petitioners preferred an application under Section 125 of the Code of Criminal Procedure in the court of Chief Judicial Magistrate, Beed. The said application was registered

as Miscellaneous Criminal Application No. 254 of 1996. The said application was presented on 11.7.1996.

In the said application, it was stated that the marriage between petitioner no.1 and respondent no.1 took place prior to five years of filing of the proceedings under Section 125 of the Criminal Procedure Code at Beed. From the wedlock, petitioner no.2 was born and relation between husband and wife is still subsisting.

It was further stated in the application that prior to 15 days of Ramzan of 1996, the petitioner no.1 was assaulted by the respondent and brought one Bayo alias Sultana in the house and drove away the petitioners from the matrimonial house. Resultantly, they are residing in the parental house of petitioner no.1.

It was further stated that no attempt was made by the respondent to provide any maintenance amount, on the contrary, he has kept one Bayo alias Sultana as his wife in the house. It was further pointed out in the application that the respondent is engaged in the wholesale business of various fruits and earns Rs.1½ Lacs yearly. He is having two big houses, one Hero Honda motor cycle and one Scooter.

On the above pleadings, a prayer was made that maintenance of Rs.500/- per month be granted in favour of petitioner no.1 and Rs.300/- per month be granted in favour of petitioner no.2.

2] On being summoned, the respondent filed his written statement on record. From the additional pleadings in the written statement, it is stated that petitioner no.1 used to disobey the orders of the husband, used to pick up quarrel with his parents and used to insist that he should reside separately from his parents. It is further stated that she on her own left the company of the husband requiring him to marry with Sultana. It is further stated in the written statement that on the day of filing of the written statement i.e. on 20.1.1997 in the presence of two witnesses, he gave divorce and thereby their relations as husband and wife ceased to exist. Therefore, the application under Section 125 of the Criminal Procedure Code is not maintainable.

3] Petitioner no.1 entered into witness box to substantiate her pleadings. She also examined Babamiya her father. Respondent Shaikh Kayyum also entered into witness box. He also examined his father Mohd. Jilani and one witness Mohd. Sadeq. According to the respondent and his witness, he gave Talaq.

4] The learned Chief Judicial Magistrate, Beed, on 30.6.1997 delivered his judgment. By the said judgment, the learned Magistrate recorded a finding that the respondent has proved that he has given divorce to petitioner no.1 and on the

basis of the income of the respondent, reached to the conclusion that petitioner no.1 is entitled to receive maintenance @ Rs.300/- per month from the date of the application i.e. 11.7.1996 till the date of divorce i.e. 20.1.1997. He also granted maintenance in favour of petitioner no.2 @ Rs.200/- per month from the date of the application.

5] The finding recorded by the learned Magistrate were not challenged by the respondent husband in respect of quantum.

It is the petitioners, who preferred Revision before the learned Sessions Judge, Beed. The Revision came to be registered as Criminal Revision Application No. 89 of 1997. Before the learned Revisional Court, it was the contention of the wife that the trial court erred in granting maintenance from the date of the application till the date of divorce. According to her, there was no divorce between the couple. The learned Revisional Court, on 30.7.1998 dismissed the Revision.

6] Against this two judgments, holding that the respondent husband has given divorce on 20.1.1997 to petitioner no.1, and therefore, she is entitled for the maintenance only from the date of application till the date of divorce, present Writ Petition is filed.

7] I have heard Shri M.V.Salunke advocate holding for Shri V.D.Salunke, learned counsel for the petitioners, Shri Mohit Deshmukh, advocate holding for Shri S.G.Chapalgaonkar, learned counsel for respondent no.1 and Shri V.H.Dighe, learned Additional Public Prosecutor for respondent no.2/State. With their able assistance I have gone through the record and proceedings.

8] Both the learned counsel relied upon the authoritative pronouncement of Full Bench of this court in the case of **Dagdu Chotu Pathan vs Rahimbi Dagdu Pathan and others**, reported in **2002 (3) Mh.L.J. 602**.

9] Before advertng to the facts, it will be useful to refer to paragraphs 22, 26 and 30 of the judgment in the case of **Dagdu Chotu Pathan**, which are reproduced here under :-

“ 22. A divorce by the husband is Talaq and it has its oral as well as written forms. The oral form of Talaq can be effected in three modes viz. Talaq-e-Ahsan, Talaq-e-Hasan, Talaq-ul-Biddat or Talaq-e-Badai. The first two forms are conditioned and they are accepted to be more civilized but while resorting to any of these two forms there are conditions precedent and it is not that the husband is at his free will to resort to any of these modes at any time and without assigning any reasons. If the husband feels that his wife does not care for him, she is incompatible, she does not listen to him, she does not love him, she refuses to cohabit with him,

she engages in cruel behaviour, she is unfaithful or for any other reason, he has the right to give Talaq to his wife but by following certain procedure. Firstly, he has to make it known to his wife about any of these reasons and she must be given time to change her behaviour. If by his direct conversation/persuasions she does not change her behaviour, the husband has to resort to the process of conciliation by informing to her father or any other parental relations. Two arbitrators, one from wife and one from the husband, are required to be appointed and it shall be the duty of the Arbiters to bring in a settlement between the parties so that they live together happily and in spite of these efforts having been made if the discord still persists to an irreparable level there is no alternative but to separate and it is at this stage that the husband has the right to give Talaq to his wife. The stage of conciliation with the intervention of the arbiters is a condition precedent for effecting Talaq either in Ahsan form or Hasan form.

It will be seen that in all disputes between the husband and the wife the judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other failing which divorce is to be effected. Therefore, though it is the husband, who pronounces the divorce, he is as much bound by the decision of the judges as is the wife. This shows that the husband cannot repudiate the marriage at his will.

The case must be first referred to two judges and their decision is binding. Talaq must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by the arbitrators, one from the wife's family and the other from the husband's. If the attempts failed, Talaq may be effected. In other words, an attempt at reconciliation by two relations, one each of the

parties, is an essential condition precedent to Talaq.

26. The above discussion does indicate that mere pronouncement of Talaq by the husband or merely declaring his intentions or his acts of having pronounced the Talaq is not sufficient and does not meet the requirements of law. In every such exercise of right to Talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for Talaq. Conveying his intentions to divorce the wife are not adequate to meet the requirements of Talaq in the eyes of law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as condition precedent for the husband's right to give Talaq to his wife. It is, thus, not merely the factum of Talaq but the conditions preceding to this stage of giving Talaq are also required to be proved when the wife disputes the factum of Talaq or the effectiveness of Talaq or the legality of Talaq before a Court of law. Mere statement made in writing before the Court, in any form, or in oral depositions regarding the Talaq having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.

It is a fallacious argument that in case of a minor or a woman past menopause, the oral Talaq in the form of Ahsan or Hasan could be pronounced by the husband at any time or at his sweet will as in such cases there is no Iddat. However, the period of Iddat has been specifically defined and even in such cases there is a waiting period of three lunar months even though there is

no occurrence of menstruation. The view taken by this Court in the case of Chandbi Ex W/o Bandeshah Mujawar (supra) cannot be accepted as a good law.

30. Let us consider now specific cases of husband taking the plea of having divorced his wife:

(a) In the written statement filed before the Court the husband takes a plea of divorce given on some date in the past and files a copy of the Talaqnama and/ or divorce certificate with such a written statement.

(b) The husband does not say anything about the divorce in the written statement and while in the witness box takes a plea of divorce given on some earlier date and produces in support a copy of the Talaqnama and/ or divorce certificate as issued by the Qazi.

(c) In the written statement the husband takes a plea that he has given divorce to the claimant on any date earlier in the presence of a Qazi or in the presence of the father or in the presence of two or three witnesses professing Islam.

(d) In his written statement the husband takes a plea of divorce given on an earlier date in the presence of two or three witnesses and one of them does not profess Islam.

(e) In the written statement or while in the witness box the husband invokes his right of Talaq under the Ahsan or Hasan form.

(f) In the written statement the husband takes a plea that on a given date he had pronounced the triple Talaq of divorce in the presence of witnesses, though in the absence of the wife, and the words addressed to the wife were repeated three times as

follows :

" I divorce my wife "Smt." forever and render her Haram for me."

And, in support thereof, copy of the Talaqnama or deed of divorce or certificate of divorce is produced. "

10] The burden is on the respondent to prove that he has given divorce (Talaq) to his wife. The primary burden rests on him. He must discharge the said burden. In the written statement, he has specifically stated that the wife was not obeying his words, used to pick up quarrel with his parents, used to insist that he should reside separately. It is further pleaded in the written statement that she on her own left his company and when he had been to her parents house, that time she insisted that if he is ready to reside separately, then only she will join his company. According to the written statement, that was the reason as to why he was required to marry with Sultana.

From the written statement, therefore, it appears that it was the reason for giving Talaq by him. He has pleaded that in presence of two witnesses he has uttered word 'Talaq' thrice and has put the relation of husband and wife to an end.

11] The statements made by the husband in his written statement are his pleadings. The party is obliged to prove the pleadings by adducing the evidence. Though in the written

statement, respondent has pleaded that he has uttered word 'Talaq' thrice, from the witness box he has not stated that at the time of giving Talaq he has used the word 'Talaq' thrice.

12] The learned counsel for the husband submitted that though he has not stated from the witness box that he has used word 'Talaq' thrice, his witness no.2 Mohd. Sadeq Mohd. Jafar has stated so.

13] It is for the husband to prove that he has given Talaq by using word 'Talaq' thrice. The evidence of the witness will always be a corroborative in nature. This is important in the present case. As per the learned counsel for the husband, the Talaq given by him is 'Talaq-e-Badai'. However, if the pleadings in the written statement and the evidence of the husband is read conjointly, then it is clear that form of Talaq will be in the name of either Talaq-e-Ashan or Talaq-e-Hasan. What shall be the procedure for effecting these two types of Talaqs is set down by **Dagdu Chhotu's** case (supra).

14] In the present case, clearly the requirements as set out by the Full Bench of this court in the case, cited supra, are not fulfilled, therefore, in my view, both the courts below committed serious mistake in recording a finding that on

20.1.1997 the husband gave Talaq to his wife.

15] Resultantly, Writ Petition is allowed. The judgment and order passed by both the courts below holding that petitioner no.1 is entitled for the maintenance from the date of application till the date of divorce is hereby quashed and set aside. The respondent is directed to pay maintenance @ of Rs.300/- per month to petitioner no.1 as directed by the learned Magistrate from the date of the application till this date and shall also continue to pay. Since the husband did not challenge the grant of maintenance to petitioner no.2 needless to mention he shall continue to pay the same as directed by learned trial court.

[V.M.DESHPANDE, J.]

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