

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2201 OF 2007

Shakil Ahmad Jalaluddin Shaikh .. Petitioner
vs.
Vahida Shakil Shaikh & Anr. .. Respondents

Mr. R. S. Khadapkar for Petitioner.
Ms Tejasweeta Bhosale h/f. Mr. R. S. Kate for Respondent No. 1

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 15 January 2016

Date of Pronouncing the Judgment : 20 January 2016

JUDGMENT :-

1] The challenge in this petition is to the judgment and order dated 31 August 2007 made by the Additional Sessions Judge, Karad (ASJ) in criminal revision no. 58 of 2006.

2] By the impugned judgment and order, the Sessions Judge has reversed the judgment and order dated 29 September 2006 made by the Judicial Magistrate First Class (JMFC) Karad, in misc. criminal application no. 506 of 2005. The JMFC had dismissed the respondent no. 1's application for maintenance under Section 125 of the Cr.P.C. By the impugned judgment and order, the Sessions Judge has allowed the respondent no. 1's application and directed the petitioner to pay maintenance of Rs.1,500/- per month to the respondent no. 1, apart from Rs.5,000/- towards costs of the proceedings. Hence, the present petition.

3] Mr. R. S. Khadapkar, the learned counsel for the petitioner has submitted that the Sessions Judge has exceeded the bounds of revisional jurisdiction, in as much as the Sessions Judge has reassessed the findings on record and reversed the finding of fact rendered by the JMFC. In any case, Mr. Khadapkar submitted that the material on record overwhelmingly makes it clear that the petitioner had validly divorced the respondent no. 1 and thereafter in terms of the provisions contained in Muslim Women (Protection of Rights of Divorce) Act, 1986, there was no obligation on the part of the petitioner to give any maintenance to the respondent no. 1 beyond the Iddat period. Mr. Khadapkar further submitted that in the present case there was documentary evidence in the form of talaqnama, acceptance of amounts and articles by the respondent, which establish without doubt the factum of divorce and acceptance thereof by the respondent no. 1. For all these reasons, Mr. Khadapkar submitted that the Sessions Judge, in making the impugned order has clearly exceeded jurisdiction.

4] Ms. Tejasweeta Bhosale, the learned counsel for the respondent no. 1 submitted that the documentary evidence has been rightly disbelieved by the Sessions Judge. She submitted that the JMFC was not right in himself making comparison of signatures and concluding that the documents contained the signature of the respondent no. 1. That apart, Ms Bhosale, relying upon a decision

of the Full Bench of this Court in the case of *Dagdu Chotu Pathan vs. Rahimbi Dagdu Pathan & Ors.*¹, submitted that the essential ingredients for proving and establishing 'Talaq' were non-existent in the present case and therefore the Sessions Judge has rightly upheld the respondent no. 1's claim for maintenance. She submitted that there is no jurisdictional error whatsoever in the making of the impugned judgment and order.

5] The rival contentions now fall for my determination.

6] There is no merit in the contention of Mr. Khadapkar that the Sessions Judge has reassessed material on record, thereby exceeding the bounds of revisional jurisdiction. The Sessions Judge, in this case, has merely applied the legal position clarified by the Full Bench of this Court in the case of *Dagdu Pathan* (supra), and on the said basis, held that there was no legal material on record to sustain the finding of Talaq.

7] In case of *Dagdu Pathan* (supra), the Full Bench of this Court, upon consideration of several precedents, commentaries and religious texts, at paragraphs 27, 28, 29, 30, 31 and 32 observed thus :

“27. Pleadings before the Court, though made on oath, either in writing or in oral form, when disputed by the wife, are

¹ 2002 (3) Mh.L.J. 602

required to be proved and when it comes to proving all these pleadings the process is governed by the common law viz. the Civil Procedure Code and Evidence Act etc. and mere statement on oath, either in writing or in oral form itself does not prove the factum of divorce as well as valid or effective divorce. If the Talaq pronounced is ineffective or invalid it is no divorce under the Mahomedan Personal Law. It is also required to be noted, at this stage, that though the husband has the right to divorce his wife, he also has the right to revoke the said pronouncement and take her back, as his wife, provided the divorce has not become irrevocable. This also shows the tolerance of Islam that after having uttered divorce once, the wife is provided an opportunity for reformation/ correction and to take steps accordingly so that the institution of marriage is saved. It is possible that sometimes the husband pronounces Talaq in haste and subsequently repents for it and, therefore, before the Talaq has reached its irrevocable stage, the husband has the right to retrieve himself from such an extreme step and reconciliation with the situation and correct himself.

28. *Even in case of irrevocable Talaq in the presence of a Qazi or the wife's father or two witnesses the factum of this form of Talaq is required to be proved, if challenged before a competent court in appropriate proceedings. This may involve examining either the Qazi or the father or the witnesses. If there are two witnesses, both of them must be professing Islam. If there is only one male witness and remaining two are women all of them must be professing Islam. Their presence, when the husband pronounced Talaq and his so pronouncing Talaq, are required to be proved if the factum of valid Talaq is questioned by the wife. Mere assertion by the*

husband, in any form, is not sufficient to hold that he has exercised the right to give Talaq legally and validly. If any of the witnesses does not profess Islam, the Talaq given in his/her presence shall be invalid and inoperative.

29. If the husband has not been able to prove his statement regarding divorce given earlier to making such a statement before the Court, there does not exist a Talaq in the eyes of law and such a statement cannot be taken as a fresh declaration of divorce; as mere declaration of divorce is not sufficient, by itself, for a valid divorce. Even if such statement in writing or made orally before the Court is supported by a Talaknama, which may be a record of the fact of an oral Talaq or may be the deed by which the divorce is effected but that supportive document by itself does not lead to a conclusion that the Talaq was valid, effective and legal. Under the Wakf Act there is also a provision of registration of Talaq and a certificate to that effect is issued by the Qazi. In most of these cases, the Talaknamas are customary and unless the factum of Talaq is proved, these documents in isolation have no sanctity in support of a valid Talaq. Mere existence of this document does not make the Talaq valid or legal and, therefore, it is necessary that the factum of Talaq and the stages it is preceded by, are required to be proved before the Court, if disputed by the wife and mere intentions of the husband while making such a statement before the Court cannot be accepted to be a valid Talaq from the date such a statement was made before the Court and in any form.

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.

31. *On the proceedings initiated by the wife before a*

competent Court the divorce allegedly given by the husband in the first three forms (a) to (c), if disputed about its factum, cannot be valid and operative. Such a divorce will be fictitious and inoperative unless the husband proves his plea of any of these forms of Talaq before the Court by leading evidence. Mere taking such plea, even in a statement on oath, does not by itself operate as a divorce from the date it is so made because there are conditions precedent to such a form of Talaq and it is required to be exercised during a particular period. The husband is required to discharge his burden of proving that he had no physical relationship with the wife during the waiting period and the reasons for exercising such a right are required to be putforth. The factum of conciliation or arbitration is also one of the conditions preceding the process of Talaq in any of these forms namely "Ahsan" and "Hasan".

In the (d) form even if the factum of divorce is proved it cannot be held to be a valid divorce as one of the witnesses does not belong to the Mahomedan religion and as per the Holy Quran it is a condition precedent that both witnesses (men) must profess Islam and in case one witness is a man the other witnesses must be two women and all of them must profess Islam. Any breach in this regard results into an invalid Talaq as being contrary to the command of the Holy Quran, even though the factum of divorce may be established before the Court.

In the fifth form i.e. (e) it would not be enough for the husband to invoke his right of giving Talaq under the "Ahsan" or "Hasan" form before the Court by way of written statement or while in the witness box and under oath. It is not in each

case that the husband and wife (the two litigating parties before the Court) are staying under different roofs and similarly the wife may take a plea that the husband did not observe the condition precedent in that regard. The burden then falls on the husband to prove these conditions of abstinence from sexual intercourse. In addition, he has to set out before the Court the reasons for such a divorce and whether he had sought the help of arbitrators for reconciliation at any time before the wife approached the Court before he filed his written statement or before he appeared in the witness box to take such a plea of Talaq.

However, in the last contingency the divorce becomes effective and irrevocable forthwith and the wife becomes "Haram" for the husband. If the husband claims to have exercised his right of divorce in the form of Biddat/ Bidai or Rajai, in the written statement on an earlier occasion the divorce is complete and irrevocable provided the factum of due Talaq given in this form, on an earlier occasion, is duly proved before the Court. The words uttered for giving Talaq in these two forms or in any of them are required to be proved before the Court and mere statement of the husband or the proof in support thereof by way of Talaqnama or deed of divorce or certificate of divorce will not be sufficient to prove the factum of having exercised this power sometimes in the past. This view is inconsonance with the law laid down by the Privy Council in Anisa Khatun's case (supra).

32. *We accordingly hold, with profound respect, that the view taken in Jaitunbi's case (supra) does not meet the requirements of the Mahomedan Personal Law for a valid and irrevocable divorce. The plea taken by the husband in his*

written statement that he had given Talaq at an earlier date shall not amount to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made unless such a Talaq is duly proved and it is further proved that it was given by following the conditions precedent viz. that of arbitration/ reconciliation and for valid reasons and more so when the mode of divorce alleged to have been given in the "Ahsan" or "Hasan" form. The factum of divorce is required to be proved, including the conditions precedent therefor, by evidence both oral and documentary, when the same is disputed by the wife before a competent Court of law. We agree with the view taken subsequently by a Division Bench of this Court in the case of "Saira Banu" (supra) and further lay down the clarifications, as set out herein above. We hold that the view taken by the Gauhati High Court in the case of Mast. Rukia Khatun (supra) and Zeenat Fatima Rashid (supra) is more in tune with the ethos of Islamic Personal Law. However, if the husband relies upon the Biddat or Rajai form of Talaq given at an earlier occasion either in his written statement or in his oral depositions, he is required to prove the factum of the same by leading evidence before the Court, if disputed by the wife."

[Emphasis supplied]

8] Even if the material on record, as it stands, is accepted as correct, the view taken by the Sessions Judge that Talaq has not been proved, cannot be faulted or taken to be an exercise in excess of jurisdiction. Amongst other matters, the pre-condition with regard to the arbitration and reconciliation have not at all been established.

There are neither any pleadings nor is there any material to establish that any arbiters or conciliators were at all appointed and that such arbiters or conciliators attempted any reconciliation, with a view to explore the possibility of the continuance of marriage. The mere existence of a document like talaqnama, is by no means sufficient to render a valid Talaq. For a valid Talaq, it is not sufficient that the prescribed expressions are pronounced thrice but the stages it is preceded by, are required to be pleaded and proved before the Court, if disputed by the wife.

9] In the present case, it cannot be said that the JMFC was not right, in relying upon his own comparison of the disputed signatures, particularly, in view of the discrepancies noted by the Sessions Judge. Considering that the proceedings under Section 125 of the Cr.P.C. are summary in nature and the same are not intended to affect the civil rights of the parties, it cannot be said that the exercise undertaken by the Sessions Judge was either an impermissible one or that the same exceeded jurisdiction vested in the Sessions Judge.

10] At the insistence of Mr. Khadapkar, I did peruse the depositions of the parties and their witnesses. Upon such perusal, it cannot be said that the view taken by the Sessions Judge suffers from any error of jurisdiction. Significantly, neither the petitioner nor

the witnesses examined on his behalf, deposed to the fulfillment of pre-conditions necessary for a valid talaq. The JMFC, it appears, had not adverted to these aspects and therefore the Sessions Judge was right in reversing the JMFC.

11] For all the reasons, there is no case made out to interfere with the impugned judgment and order. This writ petition is therefore dismissed. There shall be no order as to costs. Rule is discharged.

(M. S. SONAK, J.)

Chandka