

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.676 of 2014

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Rukhsar Ahmad Khan, Son of Late Samiullah R/O Vill – Morwara no -2, P.s.
Biraul, Distt. Darbhanga

... .. Appellant/s

Versus

Farzana Khanam, D/O Shafiur Rahman, R/O Vill Bastawara, P.S. Simri, distt
- Darbhanga

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Manoj Kumar, Advocate

For the Respondent/s : Mr. Iqbal Asif Niazi, Advocazte

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

and

HONOURABLE MR. JUSTICE PRAKASH CHANDRA

JAISWAL

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 05-03-2018

We have heard parties and have perused the records of this case.

This appeal is directed against the judgment dated 12.11.2013 pronounced in Matrimonial Case No. 59/2010 by the Principal Judge, Family Court, Darbhanga, by which the aforesaid matrimonial case for grant of divorce was dismissed on contest by the court below on the ground that the applicant had failed to establish the pronouncement of Talaq and the communication to the same to the opposite party.

The factual matrix of the case stands narrated as under:



Admittedly the marriage of the applicant–appellant Rokhsar Ahmad Khan with the opposite party – respondent Farzana Khanam was solemnised on 29.4.2006. The applicant – appellant has alleged in his application that right from the beginning, he found the behaviour of the opposite party – respondent to be unnatural and against the ethics and untrustworthy. She refused to accompany him at his working place at Jhumaritilaya and went away to her '*Naihar*'. It is alleged that she did not allow the applicant to cohabit and openly said that she did not like him. Even after much persuasion, she never respected him and refused to permit marital relationship. She allegedly pressed for divorce and flatly said that if the husband would not divorce her then she will file a case for demand of dowry. She ultimately filed a case, which was registered at Simaraha P.S. Case No. 115 of 2009 on 13.8.2009 under section 498A of the Indian Penal Code.

It is further alleged that when the applicant failed in his attempts to persuade the opposite party to live with him and lead a happy marital life, first of all, he pronounced Talaq on 30.12.2009 then he pronounced second Talaq on 31.1.2010 and lastly, he pronounced third Talaq on 3.3.2010 after which the divorce became operative and relationship of husband and wife



came to an end. Since then it is said that there is no relationship between the applicant- husband and the opposite party-wife. The husband also claims that he had returned the amount of 'MEHAR' and amount of 'IDDAT' and has also returned all the articles of presentation to the opposite party. Thus, he sought relief from the court to pass a decree of divorce in favour of the applicant.

The opposite party appeared on notice and filed her written statement. Her stand in the written statement is that everything has been framed by the husband and the case against her is not maintainable either in law or on facts as the allegations made in the plaint are totally false and incorrect. In fact, he had ousted the opposite party from the matrimonial house as a result of which, she had filed Simaraha P.S. Case No. 115 of 2009 against the applicant and his family members under section 498A of the Indian Penal Code read with section 3/4 of the Dowry Prohibition Act and had also filed maintenance case in the Family Court. Infuriated by the aforesaid case to put pressure upon her and harass her, the husband has filed the case on un-imaginary allegations. She has stated that she never refused to co-habitat with the applicant and has also refuted the allegation that she



had desired divorce. The applicant - appellant had never returned her 'Dahej' articles then 'MEHAR' and 'IDDAT' amount.

In the aforesaid background of the matter, the trial court after consideration of various provisions of pronouncement of Talaq under Islamic Law has come to the conclusion, after noticing the legal position that the consent of wife is not required for Talaq, that the so-called three Talaq pronounced on different dates was never communicated to the wife. It has been held by the court below that, in such a situation, the communication of Talaq to the wife became *sine qua non* and in the absence of that pronouncement of Talaq cannot be accepted as legal and valid. Hence the case has been dismissed on contest by the court below.

The trial court has noticed Article 311 from Mulla Principles of Mahomedan Law that there are three different modes of pronouncement of Talaq under Islamic Law. For better appreciation the three different modes as envisaged in Article 311 of the aforesaid Principles of Mahomedan Law, 20th Edition is extracted as under:-

“311. Different Modes of talak A talak may be effected in any of the following ways :-

(1) Talak ahsan- This consists of a single pronouncement of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of Iddat.



(2) *Talak hasan*- This consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs.

(3) *Talak-ul-biddat* or *talak-i-badai*- This consists of-

(i) three pronouncements made during a single tuhr either in one sentence, e.g., "I divorce thee thrice,- or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee or,

(ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage, e.g., "I divorce thee irrevocably".

From the aforesaid, it is apparent that there is provision of *Talaq ahsan* by the single pronouncement of divorce made between Tuhrs followed by abstinence from sexual intercourse for the period of 'IDDAT'. Second is *Talaq hasan*. Under this provision, three pronouncement are to be made during successive Tuhrs while no intercourse taking place during any of the three Tuhrs. The first pronouncement should be made during Tuhrs, the second during the next Tuhrs and the third during the succeeding Tuhrs. Similarly in *Talaq-ul- biddat* or *Talaq-i-badai*, three pronouncements are made during a single Tuhr. So far the third provision, i.e., *Talaq-ul- biddat* or *Talaq-i-badai* is concerned, the Constitution Bench of the Hon'ble Supreme Court in **Shayara Bano v. Union of India [(2017) 9 Supreme Court Cases 1]** has



held that the same was not protected by Article 25 of the Constitution of India as it is not an essential religious practice as a consequence of which the Talaq-e- Biddat or a triple Talaq has been declared illegal.

Surprisingly, the applicant in the plaint has not disclosed anywhere that he has proceeded to proclaim Talaq under which mode out of the aforesaid three. However, since he has stated in the plaint that he first proclaimed Talaq on 30.12.2009 then again on 31.1.2010 i.e., after about a month and lastly on 3.3.2010 i.e., after about two months, there can be a case on behalf of the appellant that the same would be covered by the mode, namely, *Talaq hasan*. It has been urged on behalf of the appellant that under Mahomedan Law, the husband has ample right to give Talaq to the wife because Muslim marriage is a contractual marriage and marriage under Muslim Law, the proposal and acceptance is necessary but in Talaq acceptance of the wife is not essential at all.

Be that as it may, we, after careful consideration of the materials on record and the legal position, are of the view that the case of the appellant of pronouncing Talaqu on three different dates even assumed to be *Talaq Hasan* mode, suffers from several fatal flaws.



The first and the foremost requirement of pronouncement of Talaq under the aforesaid provision is that three pronouncements should be made during successive Tuhr, whereas in the plaint, it is nowhere stated that Talaq on the three different dates were pronounced during successive Tuhr. No relevant dates in this regard has been disclosed in the plaint. Another mandatory requirement is that there should be no intercourse taking place between the husband and the wife during any of the aforesaid Tuhrs. This statement is absolutely lacking in the plaint. That apart, there may be a case that the acceptance of Talaq of the wife is not essential or required under the Islamic Law but, in our view, communication of Talaq would be essential. So far this aspect of the matter is concerned the plaint is again silent as there is no averment at all. Even there is no whisper that, after such pronouncement of Talaq on three occasions, the same was communicated to the wife in any manner. During the course of examination, neither the P.W. 1 nor P.W. 2 and even the P.W. 3 in their examination-in-chief have stated anywhere that such pronouncement of Talaq was communicated to the wife. So far as P.W. 1 is concerned, he has stated in his cross examination that he does not know regarding the day and date or even the month when the Talaq was pronounced by the husband. Similarly P.W. 2



has also stated that Talaq was pronounced in the month of March 2010 but he could not say about day or the date thereof. He has further stated in paragraph 8 of his cross examination that Talaq was not pronounced in his presence. Of course, the husband, who has been examined as P.W. 3 had tried to fill up the lacuna by saying in his cross examination that he has sent the communication through ordinary post. However, that is not being his case in the pleading, such statement is to be ignored as having been made to fill up the lacuna in view of the fact that P.Ws. 1 and 2 could not support his claim and nothing in that regard was stated in the plaint. Another question would be why by ordinary post and not by registered post or any other mode so that service of notice could have been verified? The applicant does not have any answer to that and its evidence to that extent has to be rejected in view of it being beyond pleading.

The Hon'ble Supreme Court in **Shamim Ara v. State of U.P. and another [AIR 2002 Supreme Court 3551]**, after noticing two decisions rendered by the Gauhati High Court, has agreed that the correct law of Talaq as ordained by Holy Quran is that the Talaq must be for a reasonable cause and be preceded by an attempt of reconciliation between the husband and the wife by



two arbiters – one from the wife’s family and other from the husband. If the attempts fail Talaq may be effected.

The Constitution Bench of the Apex Court in **Shayara Bano (supra)** has observed that it cannot be said that there is no *ratio decidendi* in **Shamim Ara (supra)**.

On anxious consideration having been made to the various materials available on record and the various legal pronouncements as discussed above, we are of the opinion that the appellant husband has completely failed to establish his case.

In the result, this appeal fails and, is accordingly, dismissed.

However, parties will bear their own costs.

(Dr. Ravi Ranjan, J)

(Prakash Chandra Jaiswal, J)

Spd/-

AFR/NAFR	AFR
CAV DATE	NA
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