

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

WPST 5 of 2021

**Mamlun Nesha alias Mamlun Nisha alias Mamlun Nessa
Vs.
The State of West Bengal & Ors.**

Appearance:

For the Petitioner	:	Mr. Partha Sarathi Bhattacharyya, Adv. Mr. Debasish Banerjee, Adv. Mr. Raju Bhattacharyya, Adv. Mr. Rakesh Jana, Adv.
For the State	:	Ms. Chaitali Bhattacharya, Adv. Mr. Subhendu Roy Choudhury, Adv.
For the Respondent no. 7	:	Mr. Sardar Amjad Ali, Adv. Mr. Malay Kumar Das, Adv. Mr. M. A. Sardar, Adv. Mr. S. Haque, Adv. Ms. Rubina Akthar, Adv.
Judgment On	:	14.09.2023

Harish Tandon, J.:

A digression from an issue involved in the instant writ petition becomes inevitable on the stand of both the parties raising an issue striking at the root of the rights of the parties in relation to their matrimonial status consequently impacting the entitlement to share the retiral benefits including family pension under the DCRB Rules, 1971. Though the stand of the party in a proceeding initiated before the State Administrative Tribunal which becomes necessary because of the disbursement of such retiral benefits but the shifting of the core issue is manifest on the stand of the parties on a point being raised on the marital status of the private respondent claiming to be the legally wedded wife of the deceased government employee.

The facts emanates from the record, as unfurled, are that one Manirul Islam was holding the post of Sub-Inspector of Police at Uttar Dinajpur and died at the age of 48 while in service. Both the petitioners and the private respondent claimed as legally wedded wife of the said deceased Government employee and approached the State Authorities for disbursement of the retiral benefit as well as entitlement to a family pension under the aforesaid Rules. The litigation reached to the Tribunal as the writ representations of the respective alleged wives were not attained to by the competent authority and a direction was passed upon the Superintendent of Police, Uttar Dinajpur to dispose of the said representations by recording proper reasons in accordance with law. The Superintendent of Police, Uttar Dinajpur passed a reasoned order on the premise that both the petitioner and the private respondents being the wife of the deceased Government employee are entitled to get equal share of family pension in terms of the Rule 104 of DCRB Rules, 1971 read with

Notification no. 54-F (PEN) dated 13.1.1997 issued by the West Bengal Finance Department, Audit Branch, Pension Cell. The said authority further held that the leave salary of the deceased Government employee will be received by both the wives in equal share in terms of the Rule 168 B read with Finance Department Order no. 4625-F dated 26.5.1999. The said authority further came to conclusion that since the nomination for death gratuity before the demise of the Government employee stands in the name of the petitioner being the first wife, she is entitled to receive the same in terms of the Rule 98 and 100 of the said Rules. So far as the payment of the Provident Fund is concerned, the authority held that in terms of the Rule 7 (ii) of the General Provident Fund (West Bengal Services) Rules all the family members of the deceased employee are entitled to receive the same in equal share but it shall not be paid to the son who has attained the age of maturity and the married daughter whose husband is alive. The amount pertaining to the group insurance was directed to be given to the heirs of the deceased Government employee in equal share in terms of Rule 11 (iii) of West Bengal State Government Employees Group Insurance-cum-Savings Scheme, 1987, upon obtaining an indemnity bond for claims as no nomination was done by the said Government employee.

The said order is assailed by the private respondent before the Tribunal which gave rise to registration of Case no. OA 350 of 2020. By the impugned order dated 12th October, 2020, the Tribunal passed an interim order staying the operation of the reasoned order passed by the Superintendent of Police, Uttar Dinajpur until further order. The petitioner of the Tribunal Application

filed the instant writ petition assailing the said interim order on various grounds including that the Tribunal ought not have stayed the operation of the order solely on the ground that the suit filed by the petitioner for declaration that the private respondent is not legally wedded wife of the deceased Government employee but proceeded to stay aside the order of the Superintendent of Police, Uttar Dinajpur who directed the disbursement of the entire retiral benefit including the family pension to the petitioner.

At the time when the matter is listed before us, initially we decided to dispose of the writ petition on the doctrine of person aggrieved but it appears that the earlier Division Bench admitted the writ petition and invited the parties to argue on merit with an intent to decide the main issue involved in the said Tribunal Application. Since the earlier Division Bench directed the matter to be decided on merit and even granted liberty to party to file supplementary affidavit, the point was raised before us on 10th February, 2023 as to whether a muslim woman is entitled to divorce her husband under “Khula” recognised under the Shariat Act *vis-a-vis* the provision contained under dissolution of Muslim Marriage Act, 1939. Precisely for such reason the first paragraph hereinabove is recorded by us and the Counsel for the respective parties addressed the issue thereupon.

Mr. Bhattacharyya, learned Advocate appearing for the petitioner submits that the Private Respondent no. 7 was already married to Misrul Haque in the year 2008 and in absence of any document concerning divorce before contracting marriage with the deceased Government employee, she cannot be regarded as a legally wedded wife. It is further submitted in view of

an embargo created in West Bengal Services (Duties, Rights and Obligations of Government Employees) Rules, 1980, no second marriage can be contracted during the service and, therefore, the claim of the private respondent no. 7 is not tenable. It is further submitted that the said private respondent no. 7 did not produce any document that she was divorced before the alleged marriage with the deceased Government employee was contracted and, therefore, the authority cannot presume that the Private respondent no. 7 is a legally second wedded wife of the deceased employee. It is further submitted that though the Personal Muslim Law is recognised and applicable because of the Shariat Act, 1937 but the Dissolution of Muslim Marriages Act, 1939, which is a later legislation, supersedes Section 2 of the Shariat Act, 1937 and, therefore, the dissolution of marriage at the behest of the muslim women can only be valid on a decree passed by the Civil Court. It is further submitted that no decree for dissolution of marriage at the instance of the Private respondent no. 7 is produced before the authority nor before the Court, she cannot be regarded as a second wife for the purpose of the retiral benefits and the family pension under DCRB Rules, 1971. It is ardently submitted that the grounds for seeking dissolution of marriage by a muslim woman has been elaborately incorporated in the Act of 1939 and, therefore, it is imperative that the decree of dissolution is required to be passed by the Civil Court before a muslim woman claimed a valid divorce under the Muslim Law.

On the other hand, Mr. Amzad Ali, learned Senior Advocate appearing for the Private Respondent no. 7 submits that by virtue of the Act of 1937 the personal law relating to the certain aspects indicated in Section 2 thereof has a

statutory recognition and its applicability which includes Talaq (Dissolution of Marriage) without making any distinction between a muslim man and muslim woman. It is vociferously submitted that one of the forms of Talaq under the Personal Law is Talaq-ul-Tafweez available to a muslim woman and, therefore, the moment the muslim woman has exercised the right conferred by the husband to seek dissolution of marriage, Act of 1939 has no manner of application. It is further submitted that the provisions contained in Act of 1939 is the additional right conferred upon the muslim woman to seek dissolution of marriage (Talaq) and cannot be regarded as a overriding effect on the personal law. Mr. Ali, the learned Senior Advocate arduously submits that Section 5 of the Act of 1937 was repealed on promulgation of dissolution of Muslim Marriage Act of 1939 which indicates that the aforesaid Act is supplemental to the personal law and does not put any impunity on the muslim woman to take recourse under the Act of 1939 for dissolution of marriage having a overriding effect on the Act of 1937.

Both the parties have relied upon certain judgments which we will deal hereinafter touching upon the aforesaid issue. The State took a neutral stand and concededly submitted that they have all intention to the disbursement of the retiral benefit of the deceased Government employee and any direction or order passed by this Court would be implemented without any demur.

The Muslim Personal Law (Shariat) Application Act, 1937 was enacted to make provision for application of Muslim Personal Law (Shariat) to the muslim. Section 2 of the Act of 1937 starting with the non-obstante Clause

imbibed within itself several incidences of the rights recognised under the Personal Law in the following:

“2. Application of Personal Law to Muslims. – Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. Marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

It is manifest from the aforesaid Section that the rights relating to the agricultural land is excluded from the purview of aforesaid Act but its applicability to the incidence recorded therein has been recognised. It admits no ambiguity that the provisions of Personal Law relating to the dissolution of marriage including Talaq, Ila, Zihar, Khula, Mubarat and Lian shall be governed by the Muslim Personal Law. The Act of 1937 does not create any distinction on its applicability to the muslim man and muslim woman so far as it relates to a marriage or a dissolution of marriage indicated therein. However, Section 5 of the Act of 1937 as it stood before it is repealed by an Act of 1939 contained the provision relating to the dissolution of marriage by Court in certain circumstances in relation to a muslim married woman in the following:

“Dissolution of Marriage by Court in certain circumstances – The District Judge may, on petition made by a muslim married woman, dissolved a marriage on any ground recognised by Muslim Personal Law (Shariat).”

It is thus manifest that prior to promulgation of Act of 1939 the right of the Muslim married woman to seek divorce through Court was conferred provided such dissolution of marriage is sought for on the grounds recognised under the Personal Law. The said Section was subsequently repealed on promulgation of Act of 1939 with an aim to consolidate and clarify the provision of Muslim Law relating to suits for dissolution of marriage by woman married under Muslim Law and to remove doubts as to the effect of renunciation of Islam by a married muslim woman on her marriage tie. Section 2 of Act of 1939 enumerated the grounds on which the muslim married woman can obtain a decree for dissolution of marriage in the following:

“2. Grounds for decree for dissolution of marriage. – A woman married under Muslim law shall be entitle to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely; -

- (i) That the whereabouts of the husband have not been known for a period of four years.***
- (ii) That the husband has neglected or has failed to provide for her maintenance for a period of two years;***
- (iii) That the husband has been sentenced to imprisonment for a period of seven years or upwards;***
- (iv) That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;***
- (v) That the husband was impotent at the time of the marriage and continues to be so;***
- (vi) That the husband has been insane for a period of two years or is suffering from *** a virulent venereal disease;***

(vii) That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(viii) That the husband treats her with cruelty, that is to say, -

(a) Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) Associates with women of evil repute or leads an infamous life, or

(c) Attempts to force her to lead an immoral life, or

(d) Disposes of her property or prevents her exercising her legal rights over it, or

(e) Obstructs her in the observance of her religious profession or practice, or

(f) If he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(ix) On any other ground which is recognised as valid for the dissolution of marriages under muslim law :

Provided that –

(a) No decree shall be passed on ground (iii) until the sentence has become final;

(b) A decree passed on ground (f) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) Before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.”

It is apparent from the aforesaid provisions that muslim married woman can seek a decree for dissolution for marriage on any of the grounds mentioned in Section 2 of the Act of 1939 from the competent authority.

A point arose before the Lahore High Court in case of ***Muhammad Baksh vs. The Crown through Khuda Baksh & Ors.***, reported in ***AIR 1950 Lah 133*** as to whether a decree passed by a Judge in relation to a proceeding initiated by the muslim married woman seeking decree for dissolution of marriage under Clause 7 of Section 2 of the Act of 1939 is essential or not. The view was expressed by the Civil Judge in the said case that mere exercise of option of puberty does not operate as dissolution of marriage unless such repudiation is confirmed by the order of the Court. In the said case one Mt. Amiran was married to Md. Baksh, the petitioner therein when she was minor by an authority of her father as guardian. Faced with such question, it is held that the Act of 1939 is merely a consolidating Act and does not profess to add to the provisions of Muslim Law. It is further held that the Section 2 of the Act of 1937 merely recognised the existing view of the Mahomedan Law and the Act of 1939 cannot be construed to create a new right or remedy into a muslim woman and, therefore, it is not essential that the exercise of right under the Personal Law seeking dissolution on an option of puberty is subject to the confirmation by the Court in the following:

“8. On Principle, I can see no valid reason why the option of puberty, if once exercised under the conditions laid down by Muslim law, should be subject to confirmation by an order of the Court. It is after all the right of an individual, dependant entirely on personal choice and is not conditioned by any consideration as to whether the guardian for the marriage acted wisely or not, in selecting the

spouse. I have been unable to find any authority to the effect that a Court can refuse to confirm the valid exercise of such option. There is nothing in the Holy Quran or in any authentic collection of Ahadis to support the view adopted by some jurisconsults of Islam that an order of a Qazi is necessary to confirm an exercise of the option of puberty.”

Ultimately the Court held:

“22. On a review of the original authorities therefore, and having regard to the opinion of the well-known savant, the late Sayyed Ameer Ali, I have reached the conclusion that a Court’s order is not essential for conferring validity on the exercise of the option of puberty. The Qazi must be replaced in the modern context by the civil Court. The Court’s order would seem to be only necessary to invest it with the judicial imprimatur in order to avoid any possible disputes, as Mr. Ameer Ali has explained.”

In case of ***Pirmohammad Kukaji vs. The State of Madhya Pradesh***, reported in ***AIR 1960 MP 24*** though related to a criminal offence allegedly committed by appellant therein under Sections 366 and 542 of the Indian Penal Code and having sentenced by the Additional Session Judge of Indore, certain observations may be relevant in the present context. An argument was advanced that since Mst. Fatma appellant therein given in marriage during her minority, she had an option to repudiate the marriage on attaining puberty and her marriage to an another person would imply the exercise of such option. The Bench did not accept the aforesaid contention and held that mere exercise of an option of repudiation does not automatically operate as a dissolution of marriage as the same is required to be confirmed by the Court in the following:

“12. I am unable to accept the contention. Before the Dissolution of Muslim Marriage Act, 1939 was enacted the option of repudiating a marriage on attaining puberty was available to a girl only when the marriage had been contracted for her during her minority by any guardian other than the father or the grand-father. Here, Mst. Fatma’s marriage with the appellant was contracted by her father and not by any guardian other than the father. That being so, she had no right of repudiating the marriage on attaining puberty. Again the mere exercise or the option of repudiation does not operate as a dissolution of the marriage. The repudiation is required to be confirmed by the court.”

It was ultimately held that in the absence of any decree of the Court dissolving the marriage it cannot be presumed that the marriage was dissolved on mere exercise of an option of repudiation in the following:

“13. In AIR 1934 All 589, Young J. no doubt observed that the fact of second marriage was itself an evidence of repudiation of the first marriage by the girl on attaining puberty. Those observations seem to be biter as the learned Judge had held earlier that the first marriage of the girl in that case was invalid. The observation does not seem to be in consonance with the principles of Mohammeden Law. The Dissolution of Muslim Marriage Act in no way helps the prosecutions as even if that Act was in force in the territory of the former Madhya Bharat on 17th February, 1957 there was no decree of the court dissolving the marriage of Mst. Fatma with the appellant.”

A judgment of the Calcutta High Court delivered prior to coming in force of the Act of 1937 or an Act of 1939 may also throw light on the right of a muslim woman on an exercise of repudiation on attaining puberty in case of ***Badal Aurat & Ors. vs. Queen-Empress***, reported in ***(1891) ILR 19 CAL 79*** wherein the girl was given in marriage at the age of 5 by her mother with the complainant but before she attained the puberty the complainant was

sentenced to imprisonment for a term of 4 years and 6 months and while in jail the girl attained puberty and married another man. In such perspective the point arose whether any judicial order is necessary to effectuate the cancellation of the marriage, it is held:

“6. In the present case the man to whom the girl is said to have been married was in jail when she attained puberty. It was not necessary for her, therefore, to signify her assent or dissent. After attaining puberty she entered into a contract of marriage with the second accused. This is sufficient indication in my opinion that she never ratified the unauthorised marriage, which was never consummated.

7. The only question that remains to be considered is whether a judicial order was necessary to effectuate the cancellation. The Fatawa -i- Alamgiri says such an order is necessary, but the Raddul - muhtar (Vol. II, p. 502) explains it by saying that a judicial declaration is not needed for imparting validity to an act which the parties have the power to do, but to provide judicial evidence in order to prevent disputes. No time, however, is limited for seeking the assistance of the Kazi - - Fatawa-i- Alamhiri, I, p. 267 (Egypt edition). Besides it has been held by Mahomedan lawyers that in a claim for restitution of conjugal rights the defendant may plead the exercise of “the right of option”, and if it is established the Kazi may grant the declaration in that proceeding. It seems to me that this principle would apply equally to a proceeding like the present, where a conviction can take place only if it is found conclusively that the former marriage was still binding and effective.”

It takes us to the recent judgment of the Supreme Court in **Juverua Abdul Majid Patni vs. Atif Iqbal Mansoori & Anr.**, reported in **(2014) 10 SCC 736**, the said case relates to the provisions contained under the Protection of Woman from Domestic Violence Act, 2005 and the plea was taken

whether a divorced muslim woman can seek for relief against her husband under Section 18 to 23 of the said Act. Incidentally another question that felt for consideration as to whether the divorce took place between the muslim woman and her husband on 09.05.2008. A plea was taken by the appellant therein that a muslim married woman obtained an *ex parte* khula from Mufti under the Muslim Personal Law and the said order was challenged before the Family Court along with an application for restitution of conjugal rights. The Apex Court find that the Khula being one of the modes of dissolution of marriage when the muslim married woman does not intend to continue with the marital tie which cannot be refused by her husband except on some reasonable grounds relatable to the offer of the wife in return in the following:

“13. From the discussion aforesaid, what we find is that ‘khula’ is a mode of dissolution of marriage when the wife does not want to continue with the marital tie. To settle the matter privately, the wife need only to consult a Mufti (juris consult) of her school. The Mufti gives his fatwa or advisory decision based on the Shariat of his school. Further, if the wife does not want to continue with marital tie and takes mode of ‘khula’ for dissolution of marriage, she is required to propose her husband for dissolution of marriage. This may or may not accompany her offer to give something in return. The wife may offer to give up her claim to Mahr (dower). The ‘khula’ is a mode of divorce which proceeds from the wife, the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return. The Mufti gives his fatwa of advisory decision based on the Shariat of his school. However, if the matter is carried to the point of litigation and cannot be settled privately then the Qazy (Judge) is required to deliver a qaza (judgment) based upon the Shariat.”

What emerged from the aforesaid decision that a muslim married woman can seek divorce on any of the grounds recognised under the Personal Law provided it comes within the purview of “Talaq”. There are different forms and modes of “Talaq” and one of the recognised forms is Talaq-ul-Tafweez to be exercised by the mahomedan wife. The Islamic scholars have explained the said mode of Talaq by the muslim married woman to her husband provided such authority is given or in other words, the power to give Talaq reserved to the husband is delegated to the wife. It is propounded by the scholars that a muslim married woman can divorce her husband exercising the authority delegated by him pursuant to the agreement entered into between the parties either before or even after the marriage and the said power is not revocable, subject to the two conditions that the condition relating to delegation of power is of reasonable nature and is not opposed to the policy of Mahomedan Law.

It evolves an another question on the construction of Section 2 of the Act of 1939 engulfing within itself various grounds when the muslim married woman can seek a decree for dissolution of marriage. Clause (ix) of Section 2 of the Act of 1939 postulates that muslim married woman can seek a decree for dissolution of marriage on any other ground which is recognised as valid for dissolution of marriage under Muslim Law. It propels a notion that the decree of the dissolution of marriage is imperative and/or essential even the muslim married woman exercises her right to divorce recognised under the Personal Law as we do not find any reason for incorporating such ground within the aforesaid Section. The Court while interpreting the provision of statute shall go firstly on a literal interpretation thereof and in case of any difficulty in

adopting the aforesaid approach may take aid of a purposive construction in juxtaposition with the aim and object for which the Act is enacted. The possible reason which we find from the insertion of the aforesaid ground within Section 2 of the act of 1939 is that in the event there is a dissent by the husband in not accepting the mode of dissolution of marriage (Talaq) by the wife, such exercise of right under the personal law has to be confirmed and/or ratified by a decree of dissolution of marriage by the Court.

We cannot overlook the fact that by virtue of Act of 1937 the Personal Law is applicable to the various forms of dissolution of marriage and, therefore, Talaq-ul-Tafweez being one of the modes of dissolution of marriage cannot be taken out of the ambit thereof. Even if Section 5 of the Act of 1937 was repealed by an Act of 1939 it can at best be regarded as an additional right conferred upon the muslim married woman to seek dissolution and, therefore, the latter Act cannot override or supplant the Act of 1937. The Act of 1939 is mere a consolidating and clarificatory Act relating to the provision of Muslim Law in relation to suits for dissolution of marriage by woman married under the Muslim Law and, therefore, has to be interpreted in such manner.

The matter can be viewed from another angle. A muslim man has a right to dissolve the marriage under any of the forms or mode of the dissolution of marriage as recognised by law whereas the muslim woman shall be dragged to the Court seeking a decree for dissolution despite exercising the right under the Personal Law, more particularly, when the husband has accepted the decision of the wife. The disparity has to be avoided and the

parity in relation to the exercise of right in relation to a dissolution of marriage is required to be upheld.

In the instant case, the Private Respondent no. 7 produced the marriage certificate wherefrom it appears that at the time of solemnisation of the marriage the husband has delegated his power to divorce to the wife and, therefore, if the wife exercises such power delegated upon her by her husband and there is no dissent from the husband in this regard, we do not find that it is imperative for the said respondent to approach the Court seeking decree for dissolution of marriage on such ground.

The instant writ petition confined to interim order staying the operation of the reasoned order passed by the Superintendent of Police, Uttar Dinajpur is a subject matter of challenge in the instant writ petition. The matter is pending before the Tribunal for final adjudication and the point whether the prohibition contained under the West Bengal Services (Duties, Rights and Obligations of the Government Employees) Rules, 1980 has an overriding effect of the DCRB Rules, 1971 or in other words both the Acts are complementary to each other and operate in a respective sphere are involved therein and as such we do not intend to make any observations thereupon at the Tribunal Application is at the nebulous stage.

We are of the opinion that pending adjudication by the Tribunal, the interim order granted by the Tribunal does not require interference at this stage.

We, however, express our concern that the Tribunal would decide the said application on the above point and it is expected that the said application is disposed of within two months from the date of the communication of this order after affording an opportunity of hearing to the respective parties in accordance with law.

The writ petition is thus disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Prasenjit Biswas, J.)

(Harish Tandon, J.)