HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

…

CRMC no.491/2018

Pronounced on: 04.07.2024

Fayaz Ahmad Wani aged 30 years S/o Ali Mohammad Wani R/o Gulzarpora Tokuna Awantipora A/P Chradipora Pakherpora District Budgam

…….Petitioner(s)

Through: Mr

Versus

Mst. Hameeda D/o Mohammad Ramzan Bhat W/o Fayaz Ahmad Wani R/o Wadoora, Pulwama

……Respondent(s)

Through: Mr

CORAM:
HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Setting-aside of the Order dated 24th October 2018, passed by the court of Additional Sessions Judge, Pulwama (for short "*Revisional Court*") in a Revision Petition titled as *Mst. Hameeda v. Fayaz Ahmad Wani*, is sought for by petitioner on the grounds mentioned in instant petition.
2. I have heard learned counsel for parties and considered the matter.
3. Respondent (Mst. Hameeda) filed an application under Section 488 of the Code of Criminal Procedure (J&K) for maintenance way back in the year 2009, before the court of Judicial Magistrate 1st Class (Munsiff) Pulwama (for short "*Trial Court*"). The said application was decided vide *ex parte* judgement dated 14th December 2009. Revision

against *ex parte* judgement was preferred, which was, however, dismissed on 9th August 2012. A petition under Section 561-A, Cr.P.C., bearing 561-A no.185/2012 was preferred before this Court, in which an order dated 3rd July 2013 was passed directing the Trial Court to decide the application under Section 488 Cr.P.C. on merits after providing opportunity of hearing as well as recording evidence of either side.

4. The Trial Court vide order/judgement dated 5th February 2018 dismissed respondent's application under Section 488 Cr.P.C. observing that relationship between parties did not exist as spouse.

5. Aggrieved of Trial Court order dated 5th February 2018, respondent filed a Revision. The Revisional Court vide judgement dated 24th October 2018 set-aside Trial Court order dated 5th February 2018, directing petitioner to pay Rs.3000/- per month to respondent as maintenance under Section 488 Cr.P.C. from the date of application, which is 25th August 2009, except the amount already paid as interim maintenance. Petitioner is aggrieved of this judgement. Hence this petition.

6. Learned counsel for petitioner would contend that the Revisional Court has not considered and appreciated facts and circumstances of the case in its right perspective. The Revisional Court has not taken note of the fact that the Trial Court has passed order 5th February 2018 after full dress trial and discussion of case projected by the parties and evidence adduced by them and after it found that respondent has already been divorced which has been proved by petitioner beyond any shadow of doubt inasmuch as intention of petitioner to divorce is very clear. It is

also stated by him that reconciliation efforts and reasonable cause for divorce has been proved and what is held by the Supreme Court in the case of ***Shayara Bano v. Union of India, AIR 2017 SC 4609***, is about instant divorce but the same is not the position in the present case as petitioner had not given triple talak.

7. Petitioner has placed on record copy of Talaknama as Annexure A. penultimate paragraph thereof reveals that petitioner in order to put an end to the wedlock has made three pronouncements of Talak, thereby declaring that he has divorced her and relieved her out of the wedlock. According to petitioner, he has conveyed Talaknama to respondent. It may be made clear here that such a practice in law is deprecated.

8. The issue that arises for consideration is whether the proceedings under Section 488 Cr.P.C. for maintenance before the Trial Court can be quashed because petitioner pleads that he has divorced his wife. Such a plea is not acceptable. In ***Mohammad Naseem Bhat v. Bilquees Akhter and another, (2012) 4 JKJ 318***, a lucid judgement has been given by a Bench of this Court. Paragraphs 08 to 28 are important to be reproduced hereunder as it also takes care of all the issues which have been raised by petitioner in the instant writ petition:

> "8. Whether a Muslim husband has an absolute and unqualified power to pronounce divorce on his wife and wriggle out of his obligations under the marriage contract? The fate of the present revision petition hinges on answer to this question. It needs to be pointed out at the outset that a Muslim in the matters of marriage, divorce, adoption, maintenance and inheritance etc. is in terms of Jammu and Kashmir Shariat, Act, 2007, governed by the Shariat Law. The primary sources of Shariat Law are Quran, and Sunna-practice and sayings of Prophet. Ijma, Qiyas and Ijtihaad supplement the primary sources. To find out the answer to the question, and manner in which the marriage may be dissolved or the marriage contract may come to an end, we have to go to the fundamental sources of Shariat Law and to understand the concept of marriage in Islam, the rights of the parties to the marriage contract i.e. husband and wife, and the mode and manner the marriage contract is dissolved.

9. The marriage is a social institution that forms bedrock of family and Society. The Supreme Court in G.V.Rwao Vs. L. H. V. Prasad and others
2000) 3 SCC 693 called marriage sacred ceremony, the main purpose of which is to enable the young people to settle down in life and live peacefully. In Smeda Nagpal Vs. State of Delhi and others (2000) 9 SCC 745, the Supreme Court holding that basic unit of Society is a family, observed that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. The concept of marriage in Islam is no different. Marriage in Islam is a solemn covenant. It is union of love, affection, mutual respect, loyalty and obedience. The Institution of marriage in Quran is described as sign of mercy of Almighty Allah with the object to bring peace and tranquillity to the husband and the wife. QuranChapter 30 verse 21 ordains. And amongst His signs is that he created for you spouses from among yourselves, that you may find peace in them, and he put between you affection and mercy. Verily in that there are signs for those who reflect.
10. In Islam marriage, is not only means to achieve emotional and biological gratification but also Ibadah as by contracting marriage, the parties to the marriage display obedience to Allah and to the Sunnah. There is no celibacy in Islam. The marriage is a religious duty, a moral safeguard and a social necessity as it enables the marrying couple to establish a family as a fundamental unit of the society. The Prophet is reported to have said marriage is my tradition whosoever keeps away there from is not from amongst me.
11. Since the marriage is based on mutual love, affection and loyalty, Islam does not give preference to either of the parties to a marriage. The message in Chapter 30 Verse 21 is not gender specific. It does not address a Muslim man or Muslim woman. It does not say that Almighty Allah created for a man, woman as his spouse or vice-versa. It, on the other hand, addresses both men and women saying that He created spouses and it is a sign of His mercy. This clearly indicates that a man and woman are equal partners in a marriage. Again Quran uses expression Zawj for both husband and wife. It means either of the pair. Wherever Quran makes mention of ideal partners in a marriage, it refers to them as Zawj and not husband or wife. This again makes it clear that husband and wife in Islam are equal partners and have equal status.
12. With the above baseline, Islam does not prefer or encourage a particular pattern of life for a married couple. It gives them complete freedom to decide on life pattern and assign roles as long as such patterns or roles are not in conflict with fundamental principles of Islam. The husband and wife, at the time the marriage is contracted, must be competent to enter into a contract. The contract is to be based on mutual consent i.e. offer and acceptance. This further reinforces the proposition that a man and women have equal rights, equal role and equal power while contracting marriage. The parties after they contract marriage retain their personal rights as against each other and as against others. Having regard to the object of the marriage and its basis, it does not require any emphasis, that marriage in Islam is not temporary feature. It is meant to continue and remain intact for the entire span of life.
13. In Islam husband and wife protect each other. Quran calls them garments for each other. The verse is to indicate the level of proximity or intimacy between the spouses. Here again Quran does not make any difference between wife and husband. A garment does not only protect a person from heat and cold or bodily injury but also is something close to the body of a person. The expression garments for each other therefore, means that no other person can be as protective and close to husband or wife as his or her spouse. The love, affection, care and protection that marriage creates between spouses have positive spill

over for the family, the society, the world and the universe. The marriage in Islam therefore forms building block for the universal love and peace.

14. Though Islam does not treat marriage as a temporary relation and expects it to create an eternal bond between the spouses based on love, affection, fidelity, and mutual respect, yet it does not rule out a situation where because of reasons beyond control of the parties marriage may break down. Islam recognises three modes of dissolution of marriage. It may be dissolved by (i) mutual consent of the spouses Khula, (ii) divorce by the husband Talaak or (iii) by intervention of the Courtjudicial divorce. Ila, zeher, mubara at are other modes of dissolution of marriage. In the present case we are concerned with divorce by husbandTalaak. It may take three forms:

(i) Talaak ahsan single pronouncements of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat.

(ii) Talaak hasan three pronouncements of divorce made during successive tuhrs, without any intercourse during any of the three tuhrs,

(iii) Talaak bidi three pronouncements of divorce made during a single tuhr either in one sentence or in three sentences or any other form like in writing, indicating intention of the husband to irrevocably dissolve the marriage.

15. It is important to note that Talaak ahsan, whereby a husband pronouncing divorce during tuhr i.e. period of purity, before having any sexual relations with his wife, is only form of divorce that finds approval of Quran. This is the approved form of divorce, as it leaves room for reconciliation. Talaak ahsan, in a way, is a mechanism of experimental temporary separation, where spouses falling apart have adequate opportunity to proceed on an onward journey and understand negative spill over of separation on them and those around them. Talaak hasan is next to Talaak ahsan in the degree of acceptability. However after divorce is pronounced twice i.e. in two consecutive period of tuhr, the parties thereafter have a choice to either live together as husband and wife forever or to separate forever never thinking of reunion. Once the two consecutive experiments of reconciliation fail, third divorce operates as Talaaki bain. Quran in Chapter 2 verse 229 commands a divorce is only pronounced twice; after that the parties either to hold together on equitable terms or separate with kindness. Talaaki bidi is a later innovation and does not find approval of Shariat Law. It is a medicine that was conceived to cure the menace of multiple divorces at one time, but turned out to be more lethal than the disease it was to cure. It nonetheless, operates immediately, dissolves marriages, leaving the divorcee with rights, like right to claim maintenance and right to shelter during the period of iddat. Most despised and discouraged of all forms of talaak, the talaak bidi is frequently used device to dissolve marriage.

16. In case of irrevocable divorce where husband pronounces divorce twice i.e. two consecutive tuhrs and thereafter decides not to live with his wife or pronounces a third divorce, the husband pronounces triple divorce or uses any other form of divorce to make it clear that it is to operate irrevocably, he cannot remarry the divorcee. Quran in Chapter 2 verse 2230 ordains so if a husband divorces his wife irrevocably, he cannot after that remarry her until after she is married to another person and he has divorced her. There is no such bar in case of Talaak ahsan. Chapter 2 verse 232 provides when ye divorce women, and they fulfill the term of their (iddat), do not prevent them from marrying their (former husbands) if they mutually agree on equitable terms. However, as the Talaak bidi is the most frequently used method of divorce, the discussion is to remain focused on the said form of Talaak.

17. Though Islam visualises a situation where a marriage may run into rough weather, for reasons beyond control of the parties to the marriage

and provides for a mechanism to end or dissolve the relationship in such case, yet emphasis remains on making every effort to help the marriage work, and to require the parties to marriage realize, that the weft and warp of marriage is love, affection, loyalty, care, accommodation and understanding and differences are to be resolved on the basis of said principle. The device of divorce is to be used as a last option when the marital relations have irretrievably broken down and only way in the interest of both the parties and the society is to help them separate, to make a new beginning and start a new life, so that they are in a position to play the roles for their well being and betterment of other members of the Society. In other words, Islam is strongly against the divorce and wants it to be avoided unless there is no alternative, except separation.

18. A closer look at the Quranic verses dealing with the subject of divorce, as also Sunna relevant to the subject, makes it abundantly clear that the divorce is discouraged and an effort is made to make it difficult and inconvenient for a husband to pronounce Talaak. On the other hand every effort is made to facilitate reconciliation, where the relationship is marred by disputes and disagreements. Chapter 65 verse 1 and 2, reference to which would be made during course of this judgment, place restrictions on divorce and at the same time ensure that conditions are created for reconciliation. The wife even after Talaak is pronounced is to stay in the house of the husband. The husband is under command not turn out the divorcee from his house. The object is to make the couple live under same roof, during the waiting period and help them realize their importance for each other and what they mean to each other, so that the husband is prompted to give a second look to his decision and take back his wife in marital fold.

19. The Prophet is reported to have said Jabrail (Gabriel) so much commended the cause of the women, and so counselled me as to give me the impression that, except in the case of adultery, the wife does not deserve to be divorced. Imam Jafar Sadiq quotes the Prophet as saying: To God no house is dearer than the house where there is the union of marriage, and no house exists which deserves His wrath more than that in which the union of marriage is broken by divorce. According to Imam as-Sadiq: The word Talaq (divorce) occurs repeatedly in the Quran, and that the details of the matter of divorce have been honoured with the attention of the Holy Quran. The reason for this is that God is an enemy of separation. Tabarasi in Makarimu l-akhlaq quotes the Hadith Get married, but do not divorce because the throne of Allah shudders when there is divorce. Imam as-Sadiq says: No lawful thing is the object of so much wrath and hate in the eyes of Allah as divorce is. Allah considers the man who repeatedly divorces as His enemy. Abu Dawud in Kitab Sunnah quotes Hadith Allah declared lawful nothing so abominable to Him as divorce. Jalalu-Din-Rumi refers to the tradition of Prophet, as far as possible do not step into separation, for the most detestable thing to me is divorce.

20. The Prophet was once informed that Abu Ayyub Al-Ansari was determined to divorce Umm Ayyubhis wife. The Prophet knowing that the divorce of Umm Ayyub was not grounded in a genuine cause said Verily the divorce of Umm Ayyub is the great sin. It follows that husband must have a genuine and valid reason to divorce his wife. The power or right to pronounce divorce is not to be used arbitrarily, at whim and caprice and in absence of a valid and genuine reason.

21. From the above brief overview of Quran and Sunna relevant to the subjectthe fundamental sources of Shariat Law governing the Muslims in the matter of marriage, divorce and other family matters, it emerges that though husband under Shariat law has power to divorce his wife yet this power is not absolute, unqualified and unbridled. The proposition is further reinforced by Q?ran Chapter 4 Verse 35 of Surah Nisa. It reads:

If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they seek to set things alright, Allah will cause their reconciliation: for Allah loveth not the arrogant, the vainglorious; -

22. The Quran ordains that wherever and whenever there appear fissures in the marital relationship and there is disagreement between the spouses, the husband does not have an absolute and unqualified power to divorce his wife so as to get out of relationship, bruised by discontent. As the first step, two arbiters are to be appointed one from the husbands family and one from the wifes family and the two arbiters so appointed are to be given an adequate opportunity to resolve the dispute and give their verdict. The verdict whatever given by the two arbiters is expected to be followed by the spouses. It is pertinent to mention that Quran uses the word Hakm or arbiter and not mediator. The arbiters therefore, have not to simply mediate but to give their verdict so as to redress the grievances, and such verdict is expected to be followed by the spouses. It is important to note that after insisting on appointment of arbiters, Quran reminds us that Allah loveth not the arrogant, the vainglorious. It is to exhort the parties to a marriage plagued by disputes, to abide by the verdict given or course suggested by the arbiters and not to be rude, obstinate or recalcitrant.

23. The Quran in chapter 65 Verses 1 and 2 ordains:

1. O Prophet when ye do divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.

2. Thus when they fulfil their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you, endued with justice, and establish the evidence for the sake of Allah. Such is the admonition given to him who believes in Allah and the Last Day.

And for those who fear Allah, He (ever) prepares a way out. The above quoted verses, obviously place, certain restrictions on the power of husband to pronounce divorce. The restrictions are that the husband, even where he has a valid reason to divorce his wife, has to divorce her at the prescribed period. The divorce is to be pronounced after end of menstrual cycle but before the husband indulges in sexual intercourse with his wife. In case after menstrual cycle the husband and wife copulate during the period of purity or tuhr, the husband cannot pronounce Talaak during that tuhr and has to wait till tuhr comes to an end, and the second menstrual discharge ends and thereafter pronounce Talaak in next tuhr. Again divorce is to be pronounced in presence of two witnesses who are endued with justice. There is no scope for disagreement with the legal proposition that as Quran and Sunna refer to Talaak ahsan, restrictions placed on use of said device, as laid down in Chapter 65 verse 1 and 2 and elsewhere in Quran and Sunna have reference to Talaak ahsan. However, there is no reason to conclude that the said restrictions applicable to the most approved form of divorce, should not be applicable to the most despised and discouraged form of Talaak i.e. Talaak bidi. On the other hand restrictions warrant strict enforcement in case of Talaak bidi.

24. The divorce, (Talaak) to be valid and in accordance with Quran and Sunnah, must be pronounced during tuhr. Furthermore, in case husband after the menstrual cycle comes to an end and the period of purity or tuhr commences, has sexual intercourse with his wife, he is forbidden to divorce his wife in that tuhr and if he persists with his resolve to pronounce Talaak, he has to wait till next menstruation and pronounce

Talaak in tuhr thereafter. The legal position is made clear by the case of Abdullah- bin Umar reported by all the treatise on Hadith. Abdullah-bin Umar divorced his wife Amina-binti Gaffar when she was in middle of menstrual cycle. Umer-bin Khatabfather of Abdullah-bin Umer reported the matter to the Prophet. The Prophet disapproved the divorce pronounced by Abdullah- bin Umar, asked him to restore relations with his wife making it clear that in case Umer bin Abdullah was adamant in his resolve to divorce his wife, he may do so during next tuhr. It follows that the pronouncement of divorce during menstrual cycle is strictly prohibited and any violation or disregard renders divorce (talaak) non-est and inconsequential. Why does Quran ordain that Talaak to be valid must be pronounced during tuhr and Sunna insist on its compliance, as is evident from verdict rendered in Abdullah-bin-Umars case, is not difficult to understand. The husband as per the dictates of Quran is to stay away from his wife during the period of menstruation. In such circumstances the husband, when he has no access to his wife, may not be in a position to appreciate in right perspective the fallout of divorce on his life and that of his family. He would be in a better position to realize the importance of his wife if he has access to her and they are in a position to relish their marital relations and perform marital obligations. The husband in such situation may feel dissuaded from pronouncing Talaak on his wife. The restrictions on pronouncement of Talaak after the husband and wife copulate, in that tuhr, is to serve the same purpose. The object is to, as far as possible delay the divorce, so that husband has sufficient time to give a fresh look to his decision. Once period of tuhr in which husband has sexual intercourse with his wife comes to an end, and the wife does not have the menstrual discharge indicating thereby that she has conceived, the husband realizing that he has fathered a child may no more be interested in pronouncing Talaak and may very well abandon the idea. The end game is to facilitate and ensure continuation of marriage and to avoid the family breakdown.

25. To make divorce (Talaak) valid, it is not enough that it is pronounced in presence of two witnesses. The Quran prescribes qualifications of such witnesses. It emphasises that the witnesses must be endued with justice. The purpose is to ensure that the witnesses, prompted by their sense of justice, may request, implore and persuade the spouses on the verge of separation, to calm down, resolve their disputes and lead a peaceful marital life.

26. From the above discussion, it emerges that a husband to wriggle out of his obligations under marriage including one to maintain his wife, claiming to have divorced her has not merely to prove that he has pronounced Talaak or executed divorce deed to divorce his wife but has to compulsorily plead and prove:

(i) that effort was made by the representatives of husband and wife to intervene, settle disputes and disagreements between the parties and that such effort for reasons not attributable to the husband did not bear any fruit.

(ii) that he had a valid reason and genuine cause to pronounce divorce on his wife.

(iii) that Talaak was pronounced in presence of two witnesses endued with justice.

(iv) that Talaak was pronounced during the period of tuhr (between two menstrual cycles) without indulging in sexual intercourse with the divorcee during said tuhr.

27. It is only after the husband pleads and proves all the above ingredients that divorce Talaak, would operate and marriage between the parties would stand dissolved so as to enable husband to escape obligations under the marriage contract, including one to maintain his

> wife. The Court in all such cases would give a hard look to the case projected by the husband and insist on strict proof.
> 28. In the present case the petitioner failed to prove the above ingredients to make the Talaak claimed to have been pronounced by him operational and result in dissolution of marriage. Though a feeble attempt appears to have been made to prove that there was some kind of intervention by the elders before Talaak was pronounced by the petitioner, yet this is of no avail to him, as all the above requirements or ingredients of a valid divorce (talaak) are not proved."

9. As is gatherable from above, for making divorce (Talaak) valid, it is not enough that it is pronounced in presence of two witnesses. The witnesses must be endued with justice as the purpose is to ensure that the witnesses, prompted by their sense of justice, may request and persuade the spouses on the verge of separation, to calm down, resolve their disputes and lead a peaceful marital life. It also appears that a husband to wriggle out of his obligation under marriage including one to maintain his wife, claiming to have divorced her has not merely to prove that he has pronounced Talaak or executed divorce deed to divorce his wife but has to compulsorily plead and prove that effort was made by the representatives of husband and wife to intervene, settle disputes and disagreements between the parties and that such effort for reasons not attributable to the husband did not bear any fruit; that he had a valid reason and genuine cause to pronounce divorce on his wife; that Talaak was pronounced in presence of two witnesses endued with justice; that Talaak was pronounced during the period of tuhr (between two menstrual cycles) without indulging in sexual intercourse with the divorcee during said tuhr. It is only after the husband pleads and proves all the above ingredients that divorce-Talaak, would operate and marriage between the parties would stand dissolved so as to enable husband to escape obligations under the marriage contract, including

one to maintain his wife. The Court in all such cases would give a hard look to the case projected by the husband and insist on strict proof.

10. In the case in hand, petitioner has placed on record copy of Talakname, which on its perusal reveals that petitioner has mentioned therein that he puts an end to the wedlock by *three* pronouncements of "Talak". The Revisional Court has taken into account the statements of two persons, namely, Nazir Ahmad Bhat and Ghulam Mohammad Rather, which would show that they had gone to the house of respondent intimating here that appellant wanted to divorce her but she did not accept the said proposal and as such, conversation was not successful. It has also been found that efforts for reconciliation were not coming to fore inasmuch as the decision of divorcing respondent was conveyed to respondent and there had been no sufficient evidence to establish reconciliation from the side of petitioner. The Revisional Court has also rightly considered the rival contentions of the parties and come up with impugned judgement, setting-aside the Trial Court order dated 5th February 2018 and directing petitioner to pay an amount of Rs.3000/- per month to respondent as maintenance.

11. The net result is that impugned order/judgement dated 24th October 2018 does not call for any interference and as a consequence of which, instant petition is **dismissed**.

(Vinod Chatterji Koul)
Judge

Srinagar
04.07.2024
Ajaz Ahmad, Secy.

Whether approved for reporting? Yes/No.