INEQUALITY IN MUSLIM LAW

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CASE ANALYSIS ON NAZIR AHMAD v. STATE

INTRODUCTION

Under Mohammedan law it is open to the husband to divorce his wife without intervention of court and without assigning any reason for his action. This is a unique feature of the Mohammedan law. This arbitrary power of the husband is in practice controlled by certain safeguards.

There are three modes in which the husband can exercise his power of divorcing his wife:

- Talak Ahasan
- Talak Hasan
- Talak-ul-biddat

Husband and wife divorcing by mutual consent:

- Khula
- Mubara'at divorce

There are various other types of Talaq's as well.

In the following case of **Nazir Ahmad v. State** which is a very rare case of non-communication of talaq to the wife which later amounted to marital rape charges by the wife on the husband. The author has tried dealing with all the aspects of talaq and even analyzed them.

FACTS OF THE CASE

- The appellant and his wife (Respondent) were married for about 16-17 years back before the registration of the case.
- A daughter was also born out of this wedlock.
- The Respondent and her daughter were turned out by the appellant and they started staying in the house of father of the respondent.
- In January, 1985 the prosecutrix filed a maintenance petition under Section 488, Cr. P. C, before the concerned Court
- To which the appellant appeared in April, 1985 and disclosed that he had already divorced the prosecutrix since 10-2-1978.
- The allegation was that on 30-9-1978 he had also executed a power of attorney in favour of his wife authorizing her to dispose of certain property describing and admitting that she was his legally wedded wife.

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- Consequently, a Criminal case was registered against him on the allegations that in spite of executing and registration of Talaq-Nama against the prosecutrix he had been using her as his wife and cohabitating with her knowingly screening the factum of divorce deed and, as such, he has committed an offence punishable under Section 376, R.P. C. After the completion of the investigation, the challan was filed against him and consequently he was charged under Section 376, R. P. C.

ISSUES

1. Whether non-communication of "talaq" to wife forms the basis of divorce?
2. Whether having sexual intercourse with wife without informing her about talaq-e-nama amounts to marital rape?

CASE ANALYSIS

1. **Whether non-communication of "talaq" to wife forms the basis of divorce?**
   - **Case Perspective**:
     In the present case, it was argued that the divorce deed was prepared by the appellant back in 10-02-1978 but this was not communicated to the respondent. Therefore, according to Muslim Law, a talaq cannot said to be completed without the communication to the wife. To which the respondent argued that Talaq-Nama of February 1978 was used by the petitioners to avoid maintenance.

   - **Author's Analysis:**
     The Supreme Court, in ***Mohd. Ahmed Khan v. Shah Bano Begum***[1] has held that although the Muslim Law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation enraged by **Section 125 of the Code of Criminal Procedure, 1973.** The court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which the divorced wife is unable to maintain herself. The court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourses **to Section 125 of the CPC, 1973**.
     This landmark judgment raised many controversy thus, leading to the formation of **The Muslim (Protection of Rights on Divorce) Act, 1986** which forms the basis of the author's analysis. According to this act- A Muslim divorced women shall be entitled to a reasonable and fair provision and maintenance within the period of iddat, and in case she maintains the children this maintenance extends up to 2 years.
     The appellant in the present case used this law, in order to get away from maintenance claiming that he has already divorced her in 1978 and also that the iddat period is over and time of two years has also lapsed. Therefore, no

[1] AIR 1985 SC 945

maintenance could be demanded for the same. The Act further says that if the wife is not able to maintain herself the husband has to give her maintenance. But this act doesn't have a direct effect on this case due to the place being **Jammu and Kashmir**. So, the law could only be applied retrospectively. The appellant used the same as a tool. One of the point which stays is that the "talaq" was not communicated.

In ***Shamim Ara's*** case, which runs on the similar grounds of non-communication of talaq, the Hon'ble Supreme Court held that- *"We are of the opinion that the talaq to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate."* (**Chambers 20th Century Dictionary, New Edition, p. 1030**) and therefore, did not termed as talaq in **Shamim Ara's** case. This also, made it very clear after this judgment that a plea of previous divorce taken in the written statement cannot at all be treated as talaq by the husband to the wife on the date of filling of the written statement in the court followed by delivery of a copy thereof to the wife.

Similarly, in the present case the respondent (wife) was turned out of her matrimonial home and even the divorce deed (Talaq Nama) was not communicated to her. In fact it is her own case that the Talaq Nama came to her notice only when the appellant took the plea of divorce deed prepared in February 1978 in order to avoid paying maintenance.

Thus, no divorce took place. Therefore, under Muslim Law, a husband is liable to maintain all his wives and children. Therefore, the wife is rightly to get maintenance from her husband because non-communication of talaq does not amount to talaq.

2. **Where having sexual intercourse with wife without informing her about talaq-nama amounts to marital rape?**

- **Case Perspective:**

In the case it was argued by the respondent that the applicant had concealed a very material fact of execution of divorce deed (Talaq-Nama) from his own wife and had been cohabiting with her for 7-8 years.

The appellate argued that talaq-nama was prepared way back on 10-2-1978, but this was not communicated to wife (Respondent) and therefore, legally in Muslim Law it cannot be said to be as effectuating Talaq between the parties. Therefore, for all intents and purposes the appellant was cohabiting with the prosecutrix as his legally wedded wife. Thus, no offence under Section 376, RPC is made out against him.

- **Own Analysis:**

The most material fact for consideration in this case is that the appellant went on cohabiting his own wife for 7-8 years despite the fact that divorce deed got prepared

by him in February 1978. Undisputedly the fact remains that it was not communicated or not pronounced to the wife.

Though the definition of rape also reads that if a woman consents to a sexual intercourse with a man thinking he is her husband and the man knows, he's not the husband this amounts to rape.

In the present case, wife content to sexual intercourse because she was unaware of talaq-nama prepared by her husband but this also stands true that the talaq was not completed as it was not pronounced. Thus, marital rape is not committed because she was still his wife when she was consenting to it.

In case of ***Mansoor Ahmad v State*** [2] which works on similar grounds as this respective case the court held that the husband is not liable because the talaq was not communicated.

CONCLUSION

Following principles laid down in Shamim Ara's case, the appellant was acquitted of Section 376 RPC.

Though in the personal opinions of authors-

Talaq is one of the major factors that results in women's unequal status in marriage. Although Muslim marriage is seen as a contractual relationship that must be entered into by two consenting parties; talaq gives the power to unilaterally terminate this contract to only one of the parties, the husband.

The husbands are given right to pronounce talaq, unilaterally, the power to revoke the talaq is likewise seen as his alone. The wife then has no say in whether or not she wants to remain married to a man who has gone as far as to begin the process of discarding her . When in such a position, a woman's powerlessness and vulnerability are exacerbated by laws that fail to recognise marital rape. Even if the so- called 'right of talaq' is never exercised, a husband can use such a power as a tool of control throughout marriage.

In this case also, if we go by the laws the husband is not liable, which is also proven by analysis done by the authors themselves but the major question remains

'Is the law fair? Is it equal for all?'

[2] 2006