Madras High Court
Kathiyumma vs Urathel Marakkar on 26 February, 1931
Equivalent citations: AIR 1931 Mad 647
Author: V Rao
JUDGMENT Venkatasubba Rao, J.

1. The parties are Sunni Mahomedana belonging to the Hanafi subject. The question I have to decide is whether the claim of the wife (the plaintiff) for deferred dower is barred by limitation under Article 104, Lim. Act. That article reads thus:

By a Mahomodan for deferred dower.	Three years.	When the marriage is dissolved by death or divorce.

2. The husband (the defendant) pleads that the talak was validly effected more than three years before the suit and that it is therefore barred. The Munsif overruled this contention and gave judgment for plaintiff. The Subordinate Judge, finding that the claim was barred by limitation, dismissed the suit.

3. The Subordinate Judge finds that the defendant pronounced a valid talak on 21st July 1919 and requested the Kazi to communicate the fact to the plaintiff who was informed of it by that official on 24th August. On these findings he has held that there was a valid divorce on 21st July 1919 and that the suit filed on 25th July 1922 was barred. The District Munsif has, on the other hand, found that the talak was pronounced on 21st August and held that the suit was within time.

4. The Kazi communicated the fact of the divorce by Ex. A dated 24th August, written by him to the plaintiff's father. It is common ground that so far as that letter goes, the divorce is stated to have been effected on 21st August and not on 21st July. The Kazi explains that he was informed by the defendant that the talak was effected on 21st July, but that it was due to a slip" on his own part that the date was wrongly given as 21st August. The District Munsif has refused to act upon this statement and, as I have said, found that the talak was actually effected only on 21st August. The lower appellate Court has accepted the Kazi's explanation. Dr. John, for the appellant, contends that the finding of the Subordinate Judge is perverse and that it is open to me in second appeal to set it aside, although the question is one of fact. In the view I take it is unnecessary to decide whether the finding is perverse or not, for I proceed upon the footing that the Subordinate Judge's conclusions of fact are correct, namely that the talak was pronounced in the absence of the wife on 21st July and that fact was communicated to her on 24th August. On these findings, in my opinion, the suit is not barred by limitation. It is now settled law that the absence of the wife does not make the pronouncement of talak void and inefficacious, for the husband may pronounce a valid talak in her absence. Sarabai v. Rabibai [1906] 30 Bom. 537, Fulchand v. Nawab Ali Choudhary [19091 36 Cal. 184, Ashabibi v. Kadir Ibrahim Rowther [1910] 33 Mad. 22, Rajasaheb Rasul Saheb In Re [1920] 44 Bom. 44 and Ma Mi v. Kallander Ammal A.I.R. 1927 P.C. 15. But on the question whether the talak

takes effect only after it comes to the notice of the wife, there seems to be some uncertainty. Ameer Ali in his Mahomedan Law states the law thus:

It is not necessary for the husband himself to pronounce the talak in the presence of the wife, but it is necessary that it should come to her knowledge. If a talak is given by letter, it will take effect on the receipt of the letter by the wife. If the letter reaches her father and he tears it to pieces there will be no talak unless the father transacts all her business, is, in fact, her agent, and resides in the same house with her. If the father should inform the wife of the' receipt of the letter and deliver to her the torn pieces thereof, the talak will take effect only if the letter can be read and understood: 4th Edn, Vol. II, p. 514.

5. In Sarabai v Rabibai [1906] 30 Bom. 537 Batchelor, J., makes the following observations:

On the contrary, the authorities show that a bain talak, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing; see e. g., Baillie, p. 233; Moulvi Mahomed Yusoof, Vol. III, p. 95. The divorce being absolute, it is effected as soon as the words are written, " even without the wife receiving the writing .

6. This is clearly opposed to the extract from Mr. Ameer Ali's book. But I must point out that the actual point decided in Sarabai v. Rabibai [1906] 30 Bom. 537 is somewhat different. It was argued in that case that the divorce could not be considered final, because it was never communicated to the plaintiff. The learned Judge meets this contention by observing that the evidence was quite clear that every practical stop was taken to communicate the divorce and make over the iddat money to the plaintiff, and that these measures, if they were frustrated, were frustrated solely by her own obstinate refusal to accept the paper or the money.

7. In these circumstances, the learned Judge went on to say, it would be a strange result if the plaintiff were allowed to take advantage of her own inaccessibility. He added that he found nothing in the Mahomedan law to countenance such a conclusion.

8. In Ashabibi v. Kadir Ibrahim Rowther, to which Abdur Rahim, J., was a party the question arose whether for a talak to be effective, the words of repudiation must be addressed to the wife. The learned Judges dealt in that case elaborately with the incidents of marriage and divorce under the Mahomedan law. They held that it was unnecessary that the words of repudiation should be addressed to, or uttered in the presence of, the wife. In that case, they were not called on to consider whether the talak takes effect only when it comes to her knowledge. There are some passages, no doubt, in the judgment, from which it may be inferred that the talak becomes effective the moment it is pronounced, but the decision can hardly be said to be an authority on the question. As Mr. Ameer Ali points out, many of the observations in that judgment are obiter: see p. 548 of Ameer Ali's Mahomedan Law, Vol. 2, But there is a passage in the judgment which is relevant to the present inquiry. The learned Judges suggest that without communication a. talak may cease to be effective at least for certain purposes. I quote their words:

All that the law requires is that the words should refer to the wife though if they be not communicated to her at the time, a question may possibly arise as to whether she is not entitled until she comes to know of the divorce, to bind her husband by certain acts, such as-pledging his credit for obtaining the means of subsistence.

9. The question more directly arose in Fulchand v. Namal Ali Choudhury. That was a suit by a Mahomedan widow against the heirs of her deceased husband for the deferred portion of her dower.. The defence was that she was divorced in 1697 and that the suit (brought in. 1905) was statute barred under Article 104, Limitation Act. It was argued that the-absence of the wife made the pronouncement of the talak void and inefficacious. In holding that it did not, the learned Judges refer to the following passage in Mr. Ameer Ali's book:

It is not necessary for the husband himself to pronounce talak in the presence of the wife, but that it is necessary that it should come to her knowledge.

10. The law is thus stated in the judgment:

We therefore hold that it is not necessary for the wife to be present when the talak is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of talak should come to her notice. That it came to the notice of the woman there can be no doubt, for before her husband's death she saw him and claimed the dower.

11. There was no distinct finding when the wife got knowledge of the talak, but the learned Judges held that the suit was barred stating their reasons thus:

If we count the period of limitation from the time of divorce or from a little later, it is obvious that the suit is statute barred * * * * But on the findings such as they are before us, we have no doubt at all that the woman had notice of the talak anterior to the period of limitation.

12. The judgment clearly seems to proceed on the ground, that time began to run more than three years before the suit, whether the starting point was the pronouncing of the talak or the wife receiving notice of it. This case, to a large extent, supports the appellant's contention.

13. The last case cited is In Re: Raja Saheb Rasul Saheb, on which also the appellant relies. It was there argued for the wife that the talaknama was not valid, as it was not duly communicated to her. Shaw, J., points out that no authority was cited to show that this proposition was correct. But the learned Judge goes on to say (and this is important):

All that appears necessary is that the fact of the talak having been effected must come to the notice of the wife.

14. The talaknama came to the wife's knowledge within a reasonable time from the date of its execution and that (says the judgment) seems to be sufficient to satisfy the requirements of the Mahomedan law.

15. On the authorities cited, there is a clear preponderance of view in favour of the plaintiff; but I am not prepared in the absence of fuller investigation to decide, whether a talak pronounced in the absence of the wife does or does not take effect till it comes to her knowledge It is unnecessary to decide that general [question. I am content to follow the authority of Fulchand v. Nawab Ali which holds:

it is necessary certainly for the purpose of dower that the fact of the pronouncement of talak should come to her notice.

16. This case is referred to by Munro and Abdur Rahim, JJ., in Ashabibi v. Kadir Ibrahim Rowther, and in their elaborate judgment its correctness has not been doubted. Moreover, that very judgment on which Mr. K. P. M. Menon for the respondent so strongly relies, suggests, as I have said, that the doctrine, that the divorce becomes efficacious immediately on its being pronounced, may be subject to some kind of reservation. I therefore hold that the plaintiff's right to claim the deferred dower accrued only on 24th August 1919 and that the suit is within time.

17. Article 104, Limitation Act, must be read in the light of the rule of the Mahomadan law to which I have just adverted. It provides (to quote only the material part), that for a suit for deferred dower, the period of limitation is three years from the date when the marriage is dissolved by divorce. It is a part of the Mahomedan law that, so far as a claim for dower is concerned, the marriage is dissolved by divorce only when it cornea to the wife's notice. Construed in this way, there is nothing in Article 104 which stands in the plaintiff's way. I am per-pared on this ground to allow the appeal.

18. There is another ground which is equally fatal to the defendant's case. The rule of estoppel applies to the facts as found. The defendant could himself have communicated to his wife that she had been divorced; but he constituted the Kazi his messenger. He alleges that ha specifically mentioned to the Kazi that the talak had bean effected on 21st July; but the latter, in words which are unequivocal, informs the plaintiff that it was effected on 21st August. Not till she came to Court was she told that August was a mistake for July. As I have said, the suit was filed on 25th July that is, before the expiry of the three years period, computing it from 21st August. Why should the plaintiff be deprived of her right she having acted upon the statement which was made to her? What was there to make her suspect that the statement might be wrong? To say that it was an innocent mistake of the Kazi is no answer; nor can it be doubted that the Kazi was the defendant's agent. A representation made by an agent is as effectual for the purpose of estoppel as if it had been made by a principal. I am satisfied that even on this ground the plaintiff is bound to succeed.

19. I accept the finding of the lower Courts that on the evidence the plaintiff is entitled to Rs. 105 and not Rs. 150 as her dower. In the result the second appeal is allowed to that extent. There will be judgment for the plaintiff for Rs. 105 with interest at 6 per cent per annum from the date of plaint, with costs throughout on the full amount claimed.