Bombay High Court
Mrs Sabah Adnan Sami Khan vs Adnan Sami Khan on 23 March, 2010
Bench: D.B.Bhosale, R.Y. Ganoo
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.179 OF 2009

Mrs Sabah Adnan Sami Khan, .. Appellant
aged 34 yrs, Occupation-
Business, residing at No.1301, A
& C and Flat No.1401, A,B and

C Oberoi Sky Garden, 3rd X
Lane, Lokhandwala, Andheri,
Mumbai-400053.

ig Vs

Adnan Sami Khan, .. Respondent
aged 39 years, Occupation-

business, residing at No.1301, A
& C and Flat No.1401, A, B and
C Oberoi Sky Garden, 3rd X
Lane, Lokhandwala , Andheri,
Mumbai-400053.

Mr Mahesh Jethmalani, Senior Counsel, with Mrs Mrunalini Deshmukh, Mrs Edith Dey, for the Appellant.

Mr Vaibhav Krishna a/w Mrs Mridula Kadam, Mr Aashish Sah,

Tejas Sha, Vishal Nahar, Laxmi Mardekan, Anvisubade i/b M/s Juris Consillis, for the respondent.

CORAM : D.B.BHOSALE AND R.Y.GANOO,JJ.

DATE : 23/03/2010.

JUDGMENT : (Per D.B.BHOSALE,J.)

1. In this appeal under section 19 of the Family Courts Act, 1984, the following questions are raised for our consideration:

(i) Whether a divorce between the appellant and the respondent under the Divorce Agreement dated 18th April, 2004 was a Talak in the `Ahsan mode', as the appellant-wife claims, or was it a divorce by `Khula', as claimed by the respondent-husband?

(ii)Whether, the appellant was obliged to undergo Halala prior to her remarriage with the respondent on 5th April, 2007?

(iii)If the divorce under the Divorce Agreement dated 18th April, 2004 is held to be a Talak by Khula, whether the appellant-wife was obliged to undergo Halala before the remarriage on 5.4.2007 ?

(iv)Whether the petition filed by the appellant-wife for divorce and her Miscellaneous Application under the provisions of the Protection of Women from Domestic Violence Act, 2005 (for short, "the Domestic Violence Act") were tenable before the Family Court?

2. This appeal was admitted on 14.12.2009 and, on 1.2.2010, liberty was granted to the appellant to submit private paper book within a period of six weeks and to apply for fixed date of hearing of the appeal. The appellant, along with the appeal, had filed a Civil Application, being Civil Application No.53 of 2010, for interim reliefs prayed for therein. This civil application was placed on board on 10.3.2010 for hearing. On this date, we heard learned counsel for the parties for some time and, in the course of hearing, they jointly requested to take up the appeal itself for final disposal.

3. Learned counsel for the parties addressed the court only on the aforesaid questions, and all the questions being the questions of law they fairly stated that evidence for addressing the questions is not necessary and they would address the court on the basis of admitted facts and the material placed before us and that they would not seek remand of the matter for allowing the parties to lead evidence. In view thereof, we have heard learned counsel for the parties at considerable length.

4. The facts, which are relevant to dispose of this appeal, are fairly simple. The appellant and the respondent are Mahomedans and they belong to the Sunni Sect. The appellant is a citizen of UAE and the respondent is a citizen of Pakistan.

They got married on 15.9.2001 according to Islamic rites. At the time of their marriage, it was the appellant's third marriage and the respondent's second. Their marriage was dissolved under the Divorce Agreement dated 18.4.2004 singed by them and the witnesses. The parties remarried on 5.4.2007 at Jama Masjid, Bandra, Mumbai, (for short, "the second marriage"). The second marriage was registered with the Sub Registrar of Marriages, Bandra, Mumbai on 2.2.2008. Sometime in June-

July,2008, disputes and differences arose between the appellant and the respondent, which resulted in execution of the Reconciliation Agreement dated 22.1.2009.

ig Thereafter, the appellant on account of matrimonial discord, filed a complaint in the Metropolitan Magistrate Court at Andheri, (Railway Court), in February, 2009 under the provisions of the Domestic Violence Act. On 24.2.2009, the respondent filed a reply to her application under the Domestic Violence Act. On 16.3.2009, the appellant filed a petition, being Petition No. A-673 of 2009, under section 2(viii) of the Dissolution of Muslim Marriages Act of 1939, seeking dissolution of the second marriage. Along with the said petition, the appellant also filed Misc. Application seeking reliefs under the Domestic Violence Act. The respondent filed reply to the said application under the Domestic Violence Act so also her Written Statement in which, for the first time, he brought out an issue that the appellant did not perform Halala formalities before the second marriage and hence it is nullity. It was also contended that the petition for divorce and the application for interim reliefs are not tenable before the Family Court.

5. The Family Court, after having considered the diverse contentions urged by learned counsel for both sides, held that the dissolution of marriage in the present case was by mutual consent and it was a divorce by "Mubara'at" and not by Talak "Ahsan". It was further observed that Talak Ahsan is oral divorce and since in the present case the divorce was executed under the Agreement/Deed of Divorce dated 18.4.2004, the contention of the appellant that it was a Talak Ahsan, must be rejected.

After making these observations in respect of the mode of Talak and in view of the admitted position that the appellant had not observed the Halala, it was further held that the second marriage of the parties is not legal and valid and consequently the petition filed by the wife for dissolution of her marriage under section 7 of the Family Courts Act, being Petition No.A-673 of 2009 is liable to be dismissed as not tenable. Thus, the impugned order in the present appeal disposes off the matrimonial petition instituted by the appellant by rendering it unsustainable on the sole ground

that the marriage of the parties of which she seeks dissolution is void inasmuch as the appellant had not undergone the mandatory requirement of Halala, after the dissolution of her first marriage with the respondent on 18.4.2004, as recorded in the Deed of Divorce executed on the very same day.

6. We have heard learned counsel for the parties at considerable length and, with their assistance, perused the principles of Mahomedan Law from the books of different authors, to which our attention was invited by learned counsel for the parties, so also the Judgments relied upon by the learned counsel in support of their contentions.

Mr Jethmalani, learned senior counsel for the appellant, at the outset, submitted that having regard to the Divorce Agreement dated 18.4.2004 and subsequent conduct of the parties, it is clear that the divorce agreement between the appellant and the respondent was a Talak in the Ahsan mode. He submitted that all forms of Talak, including the Talak in the Ahsan mode, are revocable up to a certain period and thereafter it becomes irrevocable. He then submitted that when Talak becomes irrevocable, it is not that a fresh marriage can be contracted between the parties only on the wife performing Halala. According to Mr Jethmalani, performance of Halala is necessary only in case of triple Talak. In other words, he submitted that it is not correct to assume that the concept of irrevocability entails that a wife must perform Halala on any form of Talak becoming irrevocable. After inviting our attention to Verses (Sura) in the Holy Quran, he submitted that Halala is mandatory on the part of wife only in case of a talak in Talak Hasan mode and Talk-i-badai by three pronouncements and expiry of Iddat. Khula and Mubaraat, he submitted, though operate as Talak-i-bain, that is, irrevocable divorce, does not mean that for re-marriage between them, the wife has to undergo "Halala". It only means that re-marriage between them is valid only under a fresh Nikah and fresh Mehr. In support of this contention, he also placed reliance upon Section 42 (Page 141 of Faiz B.Tyabji's Mahomedan Law). He also relied upon certain other sections of Faiz B Tyabji's Mahomedan Law including section 171 therein. Lastly, Mr. Jethmalani submitted that even if Talak Ahasan became irrevocable, parties to a divorce can re-marry without the wife performing Halala.

On the other hand, Mr Krishna, learned counsel for the respondent, after inviting our attention to various provisions/sections in the Mulla's Principles of Mahomedan Law and to the Divorce Agreement and more particularly the preamble and clause (3) thereof, submitted that the divorce under the divorce agreement between the appellant and the respondent was by Khula and it became irrevocable from the moment the respondent repudiated the appellant as his wife.

He submitted that Khula operates as a single irrevocable divorce, that is, talak-i-bain, the moment the wife's offer to compensate the husband for her release from marital rights is accepted, and when it becomes irrevocable, remarriage between the parties is unlawful unless Halala is observed by the wife. In support, he invited our attention to the Divorce Agreement dated 18.4.2004 and submitted that the divorce was obtained at the instance of the appellant and effected by acceptance of an offer from the appellant to compensate the respondent by giving up her right over mehr and, therefore, it was a divorce by Khula.

He submitted that all the conditions of Khula stand satisfied, if a close look at the divorce agreement dated 18.4.2004 is taken. In other words, he submitted that the Divorce Agreement dated 18.4.2004

has been acted upon by both the parties for three years and had become final and irrevocable and, therefore, compliance of Halala formality was mandatory. The purpose of challenge raised by the appellant in the proceeding is not to continue marriage but to claim the property of the respondent.

The divorce agreement is at the initiative of the wife and is full and final and, therefore, Halala, in accordance with Shariat law applicable.He submitted the marriage is permitted provided it is in accordance with Shariat law, which provides compliance of Halala formalities.

Mr Krishna further submitted that since Khula/Mubara'at are Talak-i-bain, the rigors of irrevocable divorce by triple pronouncements are applicable and Halala is mandatory. In support of this contention, he invited our attention to Sections 311, 312, 313, 319, 320 and 336 in Mulla's Principles of Mohammaden Law and submitted that Khula divorce is effected by offer from the wife to compensate the husband and once the offer is accepted it operates as single irrevocable divorce (Talak-

i-bain) (sections 311(3), 312) and its operation is not postponed until execution of the Deed of Khula. He submitted that section 311(3) is completely applicable to Talak-i-bain including section 311(3)(i) and if any formality is applicable to section 311(3)(i), then it has to apply to section 311(3). He further submitted that section 312(3) and Talak-i-badai mode becomes irrevocable immediately it is pronounced irrespective of iddat as Talak becomes irrevocable at once it is called Talak-i-bain. Mr Krishna submitted that where talak has become irrevocable through any mode between the parties, re-marriage between the parties is unlawful unless an intermediary marriage with another person takes place with proved consummation. Lastly, he submitted that the co-habitation of the appellant and the respondent as husband and wife, after the so-called second marriage, would not confer legitimacy to void marriage and would not create any rights in favour of the appellant.

7. The Holy Quran is the primary source of Mohammedan Law and represents the God's Will communicated to the Prophet through the Angel Gabriel. (See: Masroor Ahmed Vs State (NCT of Delhi) and Anr, MANU/DE/9441/2007 and the Full Bench Judgment of this Court in Dagdu Pathan Vs Rahimbi Dagdu Pathan, 2003 (1) HLR 689). Section 34, Chapter IV in Mulla's Principles of Mahomedan Law by Hidayatullah, Nineteenth Edition, (for short, "Mulla's Mahomedan Law") deals with Interpretation of the Quran. It states that the Courts, in administering Mahomedan law, should not, as a rule, attempt to put their own construction on the Quran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.

8. The Holy Quran recites on the issue of Halala, with which we are concerned in the present appeal, as under :

> Sura 230 (i e. Verse 230).
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> "And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband. Then if he (the other husband) divorces her, it is no sin for both of them that they come together again if they consider that they are able to observe the limits of Allah. These are the limits of Allah.

He manifesteth them for people who have knowledge".

What it means is that if the Talak was "the third time", such a Talak was pronounced, then they cannot re-marry unless the wife were to have, in the intervening period, married someone else and her marriage had been dissolved either through divorce or death of that person and the iddat of divorce or death has expired. This is considered as "Halala".

9. Marriage, according to Muslim Law, is a civil contract, the object of which is to legalize sexual intercourse and the procreation of children. (See: Smt Joygun Nessa Bibi Vs Muhammad Ali Biswas, AIR 1938 Calcutta 71). Divorce is another name of dissolution of marriage under three distinct modes in which a Muslim marriage can be dissolved and the relationship of the husband and the wife terminated. The existence of conjugal relations in the case of Mahomedans has to be determined by reference to the provisions of the Mahomedan Law and not by considerations of equity and good conscience as understood in any other system of law (See: Zohara Khatoon Vs Mohd Ibrahim, AIR 1981 SC 1243).

10. In Mullas Mahomedan Law, section 311 provides, three modes of Talak, with which we are concerned in the present appeal, namely Talak Ahsan; Talak Hasan; and Talak-i-badai.

Talak "Ahsan" consists of a single pronouncement of divorce (Talak) made during a tuhr, period between two menstrual course, followed by abstinence from sexual intercourse for the period of Iddat. (See. Section 311(1)).

Talak "Hasan" consists of three pronouncements made during successive tuhrs without sexual intercourse during any of the three tuhrs. The Talak becomes irrevocable on pronouncement of divorce during all the three tuhrs. In other words, before the third pronouncement, Talak Hasan is revocable by conduct of the parties. However, once the third pronouncement of divorce is made without sexual intercourse during all the three tuhrs, the divorce becomes irrevocable and in that case after Iddat, the former husband and wife cannot enter into a Nikah unless the wife undergoes the process of Halala. (See. S.311(2).

The third mode of Talak, namely, "Talak-i-badai" consists of two modes. Firstly, it consists of three pronouncements made during a single tuhr. For instance, three pronouncements in one go (Triple Talak) either in one sentence, e.g, "I divorce you three times or in separate sentences, e.g., Talak, Talak, Talak.

(See : S. 311(3)(i)). The second mode of Talak-i-badai consists of a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage. For instance, "I divorce you irrevocably". (See: S.311(3)(ii)).

11. A Talak in the "Ahsan" mode becomes irrevocable and complete on the expiration of the period of iddat. (See: S.312(1) in Mulla's Mahomedan Law) Similarly, a Talak in the "Hasan"

mode becomes irrevocable and complete on the third pronouncement, irrespective of the iddat, (See: S.312(2)) and a Talak in the "badai" mode becomes irrevocable immediately it is pronounced, irrespective of the iddat. As the Talak becomes irrevocable at once, it is called talak-i-bain, that is, irrevocable Talak (See: S.312(3)). Thus, in case of a Talak in the Ahsan mode and in the "Hasan" mode do not become absolute until a certain period has elapsed. In case of these two modes of Talak the husband has an opportunity of reconsidering his decision and he has the option to revoke it before the certain period is elapsed. The essential feature of a talak-ul-bidaat or talak-i-

badai is its irrevocability. One of tests of irrevocability is the repetition three times of the formula of divorce within one tuhr.

But the triple repetition is not a necessary condition of talak-ul-

bidaat, and the intention to render a talak-irrevocable may be expressed even by a single declaration. Thus if a man says : "I have divorced you by a talaka-ul-bain (irrevocable divorce)", the talak is talak-ul-bidaat or talak-i-badai and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "bain" (irrevocable) manifests of itself the intention to effect an irrevocable divorce.

12. "Iddat" has been described in Mulla's Mahomedan Law, as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by divorce, the duration of the iddat, if woman is subject to menstruation, is three course; if she is not so subject, it is three Lunar months.

If the woman is pregnant at the time, the period terminates upon delivery. When the marriage is dissolved by death, the duration of the iddat is four months and ten days. If the woman is pregnant at the time, the iddat lasts for four months and ten days or until delivery, whichever period is longer (See: Section 257, Chapter XIV in Mulla's Mahomedan Law). The period of iddat prescribed by Muslim Law is 90 days.

13. As the Talak becomes irrevocable at once, it is called Talak-i-bain, that is, irrevocable Talak. (See: S.312, Mulla's Mahomedan Law). Thus it is clear that a Talak can be revoked by conduct before it becomes irrevocable. The Talak is, however, complete on the expiration of the period of iddat. Until the talak becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or implied as by resuming sexual intercourse. Every mode of Talak, when is complete, it becomes irrevocable. The question that we have to consider is whether in case of every irrevocable talak, irrespective of its mode, for remarriage with the same husband the wife requires to observe the "Halala".

14. The Delhi High Court in Masroor Ahmed's case, after considering different forms of Talak, so also the provisions of Sections 311 and 312 in Mulla's Mohamedan Law, in paragraphs 26 and 27 of the judgment held thus:

> "26. ... . There are views even amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation.
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> It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.
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> 27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc."

15. The Full Bench in Dagdu Versus Rahimbi Dagdu Pathan (supra) had an occasion to consider the provisions in Chapter II and III of Part-I of a Compendium of Islamic Laws published by the All India Muslim Personal Law Board, dealing with the conditions of effectiveness of Talak so also Chapter XVI in Mulla's Mahomedan Law dealing with the subject Divorce.

The Full Bench, after considering section 310, Chapter XVI in Mulla's Mahomedan Law in respect of Talak in writing, made the following observations:

> "Talak in writing is a written mode of Talak reduced in a Talaknama which may only be the record of the fact of an oral Talak or it may be the deed by which the divorce is effected. The deed may be effected in the presence of a Qazi or the wife's father or of two witnesses. In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (Talak-i-bain) and takes effect immediately on its execution. Talak by a delegation is permissible and it is called as a Talak by Tafweez.
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> Written Talaq may have several forms and some of them are (a) Kitabat-e-mustabinath (legible writing). It is of two kinds - Mustabinah Marsumah (formal legible writing and Mustabinah Ghair Marsumah (informal legible writing) Kitabat-e- mustabinath Marsumah which is a formal divorce-
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> deed or letter which is written with a title and the addressee's name."

16. A Talak may be effected orally (by spoken words) or by a written document called a Talaknama. A Talaknama may only be the record of the fact of an oral Talak; or it may be the deed by which the

divorce is effected. Section 313 in Mulla's Mahomedan Law provides that in the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce that is, talak-i-bain, and takes effect immediately on its execution. Deed of Divorce in writing constitutes a valid divorce (Rasul Bakhst Vs Bholon and others, AIR 1932 (Lah.498). Under Hanafi Law, divorce of wife by a written document is irrevocable (Hayat Khatun Vs Abdullah Khan, AIR 1937 Lah.270). As most Sunni's are Hanafis the presumption is that a Sunni is governed by Hanafi Law. It is thus clear Talaknama may be only the record of the fact of an oral Talak or it may be the deed by which the divorce is effected.

(See: S.310(2)).

17. At this stage, it is also necessary to refer to the rules of revocable and irrevocable Talak and they are in sections 17,18,19 and 20 in Chapter III of Part-I of a Compendium of Islamic Laws, published by the All India Muslim Personal Law Board, dealing with the conditions of effectiveness of Talak, (See: Dagdu Vs Rahimbi Dagdu Pathan) which read thus :

> "Section 17 :
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> In a revocable Talaq the husband can take back the wife during "Iddat" without her consent and without a remarriage; but after the expiry of "Iddat" she will become irrevocable divorced and can be lawfully taken back only by a fresh marriage.
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> Section 18 :
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> Revocable may be either by conduct - e.g., if the husband had had coitus, kissing and caresses with the wife - or by spoken words, e.g. If the husband says that he has taken back his wife and informs her of the same. Revocation by words is preferable in the presence of witnesses (two men or a man and two women).
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> Section 19:
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> An irrevocable Talaq, whether express or implied, (words of complication are explained hereinafter) is of two kinds; bainunat-e-khafifah (minor separation) and bainunat-e-ghalizah (major separation). Less than three Talaqs effect bainunat-e-khafifah, otherwise there will be bainunat-e-ghalizah.
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> Section 20 :
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> In bainunat-e-khafifah though the wife goes out of the marital bond but the parties may by mutual consent remarry during or after the "Iddat". In bainunat-e-ghalizah remarriage is possible only where after the expiry of "Iddat" the woman has married another man who has either died or divorced her and the "Iddat" of death or divorce has expired."

From perusal of these sections, it is clear that once Talak becomes irrevocable, the wife can be lawfully taken back only by a fresh marriage. Revocation during iddat may be either by conduct or by spoken words. An irrevocable Talak is of two kinds: Bainunat-e-khafifah (minor separation); and Bainunat-e-

ghalizah (major separation). Less then three Talaks effect minor separation, otherwise there will be major separation. If it is minor separation (Bainunat-e-khafifah) the parties may by mutual consent remarry during or after the iddat. However, in case of major separation (Bainunat-e-ghalizah) they cannot remarry unless Halal formality is complied with by the wife.

18. Thus, in our opinion, where Talak becomes irrevocable through any mode between the parties, for re-marriage between them, it is not necessary that the Halala must be observed. In other words, merely because a talak has become irrevocable, does not mean that in case of every irrevocable Talak, irrespective of its mode, for re-marriage between the same couple, it is necessary that the Halala formality must be complied with by the wife.

19. Where the husband has repudiated his wife by three pronouncements (Triple Talak), as provided for in the Hasan mode of Talak (See: S.311(2)) and in Talak-i-badai by three pronouncements (See: S.311(3)(i)), it is not lawful for him to marry her again until she remarries another man and the later divorced her or he dies after actual consummation of the marriage. In other words, in case of a Talak in the Hasan mode and a Talak in Talak-i-badai by the three pronouncements mode, remarriage is possible only if Halala is observed by the wife. A Talak in the Ahsan mode and a Talak in the Talak-i-badai by a single pronouncement mode, Halala need not be observed.

Where the husband has repudiated his wife by three pronouncements, even if re-marriage between them is proved, the marriage is not valid unless it is established that the bar to remarriage by observing Halala was removed. The mere fact that the parties have remarried does not raise any presumption as to the fulfillment of Halala formality. (See: Akhtaroon-nissa Vs Shariutoollah Chowdhry, (1867) 7 WR 268).

20. That takes us to consider "Khula". In Moonshee Buzu -

Ul-Rahem Vs Luttee Fatoonisa (1961) 8 MIA 399, Khula is defined as "a divorce by khula is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. It signifies an arrangement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property.

21. Section 319, Chapter XVI in Mulla Mahomedan Law deals with "Khula and Mubara'at". In this section, it is stated that a marriage may be dissolved not only by talak, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of Khula or Mubara'at. A divorce by Khula is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case, the terms of the bargain are matters of

arrangement between the husband and wife, and the wife may, as the consideration, release her dower and other rights, or make any other agreement for the benefit of the husband. A Khula divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights, and acceptance by the husband of the offer.

Once the offer is accepted, it operates as a single irrevocable divorce (talak-i-bain, that is, Irrevocable divorce) (Ss.311(3),

312), and its operation is not postponed until execution of the Khulanama (Deed of Khula).

22. Mubara'at means mutual release. A Mubara'at divorce like Khula, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called Khula. When the aversion is mutual, and both the sides desire a separation, the transaction is called Mubara'at. The offer in a Mubara'at divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is complete, and it operates as a Talak-

i-bain as in the case of Khula. As a talak, so in khula and mubara'at, the wife is bound to observe the iddat.

23. Khula is a form of divorce recognised by the Muslim Law.

It is virtually a right of divorce purchased by the wife from her husband. It is complete from the moment when the husband repudiates the wife. There is no period during which such a divorce can be revoked at the instance of the husband. Thus, a divorce by Khula is complete if the following conditions are satisfied : (i) if it is at the instance of the wife or there must be an offer from the wife; (ii) she gives or agrees to give a consideration to the husband for her release; and (iii) acceptance by the husband of the offer. Over and above this, under Sunni law, the husband must be adult and of sound mind.

A proposal by Khula made by the wife may be retracted by her at any time before the acceptance by the husband and the proposal stands revoked if the wife rises from the meeting where the proposal is made. Abu Hanifa has provided three days of options for wife to accept or revoke Khula but does not allow this option to husband but his disciples are of the opinion that the option is for the both sides. (See: Principles of Muslim Law by Yawer Qazalbash, page 135) Under Hanafi law, no form is necessary but only intention must be proved besides the proposal, acceptance and consideration. In case of a divorce by Mubara'at, offer may be either from the side of wife or from the side of husband. When an offer for mubara'at is accepted it becomes irrevocable divorce. (Talak-Ul-bain). No particular form is required under Sunni law but mutual agreement must be made at the same time and the word Mubara'at must be clearly expressed in the proposal and if ambiguous expressions are used intention must be proved. Under Sunni law, when the parties enter into a mubara'at all mutual rights or obligations came to an end. Thus, Khula is redemption of the contract of marriage while Mubara'at is a mutual release from the marriage tie. In Khula the offer is made by the wife and its acceptance is made by the husband, whereas in Mubara'at any of the two may make an offer and

other accepts it. In Khula, a consideration passes from wife to husband, whereas in Mubara'at the question of consideration does not arise.

24. In Asaf A.A.Fyzee, Outlines of Muhammadan Law, Fifth Edition in Chapter IV dealing with divorce by consent after defining Khula and Mubara'at so also after narrating the distinguishing factors between the two, the learned author has concluded the discussion stating that "Khula and Mubara'at operates as a single irrevocable divorce. Therefore, marital life cannot be resumed by mere reconciliation; a formal remarriage is necessary. In either case iddat is incumbent on the wife and, in the absence of agreement to the contrary, the wife and her children do not lose the rights of maintenance during the period". The learned author has not made any reference to Halala formality in case of remarriage of the couple. In either case, iddat only is incumbent on the wife.

25. In Mohammadan Law by Faiz and Tyabji, Third Edition, 1940, in section 41 it is stated that "after the husband has pronounced three Talaqs against his wife, their marriage is irrevocably dissolved, marital co-habitation by them becomes illegal, and they are prohibited from re-marrying each other unless and until the woman has been lawfully married to a second husband, her marriage with her second husband is actually consummated, and it has, after such consummation, been lawfully dissolved". In section 42 the learned author has observed that "the rule in section 41 did away with great engine of oppression in the hands of the pre Islamic Arabs, who could keep their wives in a species of perpetual bondage, pretending to take them back after repeated divorcees, merely for the purpose of preventing the wives from re-marrying and from seeking the then much needed protection of a husband." In section 42, under Shafi'i law (Sunni) a khul or mubarat does not count as a pronouncement of divorce, for prohibition under section 41, viz. Halala would not apply to the divorce by "Khula"

or "Mubara'at".

26. Thus, a Khula divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (Talak-i-bain, that is, irrevocable divorce), and its operation is not postponed until execution of Khulanama. In our opinion, merely because Khula becomes irrevocable (talak-i-bain) on complying with all the three conditions, (that is, i. it should be at the instance of the wife or there must be an offer from the wife; ii. the wife gives or agrees to give a consideration to the husband for her release; and iii. acceptance by husband of the offer) does not mean that the rigors of irrevocable divorce by Triple pronouncements are applicable and Halala is mandatory.

There is a clear distinction between "Triple Talak" and "talak by single pronouncement" and, therefore, the Talak by single pronouncement cannot be treated as a talak by triple pronouncement, only because at some stage it becomes irrevocable (talak-i-bain). If a talak is the talak by single pronouncement, in our opinion, Halala need not be observed.

27. In the present case, the arguments advanced by learned counsel for the parties centered around the divorce agreement dated 18.4.2004. The learned senior counsel for the appellant, after taking us

through the agreement, endeavoured to interpret the preamble and the clauses in the agreement to contend that it was a Talak by the Talak Ahsan mode, whereas the learned counsel for the respondent submitted that it was a divorce by Khula. It would be relevant to reproduce the divorce agreement for better appreciation of the submissions advanced by the learned counsel for the parties so also to address the questions raised in the appeal. The agreement reads thus :

"Issued in Mumbai - India on 18/4/2004 between :

1. Mr Adnan Sam Khan, Pakistani National, Muslim, Resides in Pakistan, holder of passport number J033468 issued in Pakistan with the attached Passport no.LA097889 issued in Dubai.

(First Party - Husband)

2. Mrs Sabah Abdul Rahim Galadari, UAE, National Muslim, resides in Dubai holder of Passport No.A0850802 issued in Dubaii.

(Second Party -Wife) Preamble:

Whereas, the First Party is the husband of the second party pursuant to the marriage contract dated 15/9/2001, signed by the First Party personally and Mr Abdul Latif Ibrahim Galadari as an attorney of the Second Party by the witness of Samir Mohamed Abdul Khaliq Gargash and Ali Haider Khan.

Whereas, both parties acknowledged that the marriage relation exist and that they became as a man and wife with no children.

Whereas, according to the request of the Second Party for divorce, both parties agreed to terminate the marriage relation and they have agreed with their full eligibility as follows:

First: The above preamble is an integral part of this agreement and shall read and interpret with it.

Second: By this agreement and as soon as signing it by both parties, the Second Party shall be considered as a divorcee from the First Party since the First Party uttered in the meeting in front of the two witnesses "My wife Sabah Abdul Rahim Galadari is divorced"

Third: Both parties agreed that the Second Party is not permitted to return back to the First Party except against a new marriage contract and new dowry.

Fourth: The Second Party (Wife) understood that her divorce from the First Party (Husband) commence from uttering the words mentioned in above article two of this agreement dated 18.4.2004 and she should calculate her Shariat Iddat as a divorcee from that date and she can remarry after the expiration of Iddat.

Fifty: The First Party undertakes to hand over the Second Party of all belonging related to the Second Party. The Second Party undertakes to handover all First Party's belonging.

Sixth: Both Parties fully and finally and absolutely discharge each other of any financial right claim due to the marriage relation.

Seventh: This agreement issued in two identical copies, one copy with each party signed by the parties and the two witnesses."

28. The agreement was admittedly signed by the parties and the witnesses. There is no dispute that after the divorce and before the second marriage, the Halala formalities were not complied with. It is against this backdrop, we would now like to consider what was the mode of Talak by which the parties separated under the Divorce Agreement dated 18.4.2004.

29. It is true that in the preamble of the agreement, it is clearly mentioned that "according to the request of the appellant", both the parties agreed to terminate the marriage relation. The second clause of the agreement, however, shows that even before execution of the agreement the respondent had uttered (by spoken words) in the meeting in front of the two witnesses "My wife Sabah Abdul Rahim Galadari is divorced".

The second clause clearly shows that the respondent had divorced the appellant by single oral pronouncement, which was simply recorded in writing and, therefore, it cannot be stated that the divorce was effected by the deed, that is, the Divorce Agreement dated 18.4.2004. The fourth clause shows that the appellant understood that her divorce from the respondent commenced from uttering the words mentioned in the second clause and she should calculate her Shariat Iddat as a divorcee from that date and that she can re-marry after the expiration of Iddat. The third clause states that they had agreed that the appellant was not permitted to return back to the first party except against a new marriage contract and new dowry. It does not even indirectly suggest that the wife should observe Halala.

Thus, the 2nd, 3rd and 4th clauses do not even indirectly suggest that for re-marriage they were expected to comply with the Halala formalities and that their divorce was by triple (the third time) pronouncement. By no stretch of imagination it could be said that the respondent repudiated the appellant by three pronouncements, which is required in the case of Talak Hasan and Talak-i-badai. (See: S.311(2)(3)(i) and S.336(5), Chapter XVI in Mulla's Mahomedan Law).

The fifth clause of the agreement states that the husband had agreed to hand over to the appellant all belongings, and in the sixth clause they fully and finally and absolutely discharged each other of any financial right/claim due to the marriage relation.

The sixth clause, according to the learned counsel for the respondent, amounts to relinquishment of right as is required in Khula. In case of Khula, the wife requires to give or agrees to give a consideration to the husband for her release from the marriage tie. A bare perusal of the sixth clause shows, as is usually seen in all contracts, parties had given up their claims against each other. In this clause, if the appellant alone had discharged the respondent of her financial right/claim, perhaps, there was scope to contend that she had agreed to give consideration to the respondent for her release from the marriage tie. However, that is not the case here and it is not possible to say so.

Thus, we find that it was a divorce by single pronouncement; the parties had agreed to come together only against new marriage contract without putting any restriction of Halala; and that the appellant had not agreed to give any consideration to the respondent for her release from the marriage tie. In the circumstances, it is not possible to hold that it was a divorce by Khula, as tried to be urged by the learned counsel for the respondent, and we are satisfied that it was a divorce by Talak Ahasan.

30. Talak Ahsan consists of a single pronouncement of divorce (Talak) made during a tuhr. It becomes irrevocable and complete on expiration of the period of Iddat. Merely because it becomes irrevocable does not necessarily mean that the parties should observe the rule of Halala. The rule of Halala requires to be complied with only where the husband has repudiated his wife by three pronouncements as is necessary in triple Talak, such as in Talak Hasan or Talak-i-badai consisting of three pronouncements. Talak Ahasan consists of single pronouncement of divorce made during a tuhr followed by abstinence from intercourse for the period of Iddat. Once the period of Iddat expires it becomes irrevocable and in that case parties can re-marry even without following the rule of Halala.

Even if it is assumed that it was a divorce by Khula, it is clear that it was by single pronouncement and cannot be treated as a Talak by three pronouncements - (Triple Talak) and, therefore, even in case of Khula, in our opinion, Halala need not be observed.

31. We are unable to accept the submission of learned counsel for the respondent that since Khula is Talak-i-bain, the rigors of irrevocable divorce by triple pronouncements is applicable and Halala is mandatory. This submission proceeds on the assumption that the moment Talak becomes irrevocable (Talak-

i-bain), Halala is mandatory. After considering the relevant provisions/sections in Mulla's Mahomedan Law, in Chapter III of Part-I of the Compendium of Islamic Laws published by the All India Muslim Personal Law Board and the Commentaries in Asaf A.A. Fyzee and by Faiz and Tyabji, so also the Judgments of the Delhi High Court in Mansroor Ahmed's case and of this High Court in Dagdu Pathan's case, we have observed that merely because Talak in the Ahsan mode or Khula become irrevocable does not necessarily mean that the rigors of irrevocable Talak by triple pronouncement are applicable and Halala is mandatory.

Irrevocable talak in the sense that the former husband and wife cannot resume a legitimate marital relationship unless they contract a fresh Nikah with a fresh Mehr. As observed earlier, there is a clear distinction between the Talak by single pronouncement and the Talak by triple pronouncement. It is only in case of a triple Talak, re-marriage with the same husband is legal and valid if Halala is observed. In case of a talak in the Ahsan mode, Halala is not mandatory. Thus, even if it is accepted that the Talak under the divorce agreement between the appellant and the respondent was Talak-i-bain, it cannot be stated that Halala was mandatory.

32. In the result, we hold that the divorce between the appellant and the respondent under the Divorce Agreement dated 18.4.2004 was a Talak in the Ahasan mode and, therefore, the appellant

was not obliged to undergo Halala prior to the second marriage. In our opinion, even in case of a divorce by Khula, the wife is not obliged to undergo Halala before contracting remarriage with the same husband. Under the circumstances, the petition filed by the wife and her Misc.Application under the provisions of the Domestic Violence Act before the Family Court are tenable. The judgment and order dated 14.10.2009, impugned in the present appeal, is set aside and the petition and the Misc. Application stand restored to file. The Family Court shall endeavour to dispose of the petition expeditiously.

Insofar as the application under the provisions of the Domestic Violence Act is concerned, liberty to the appellant to move the Family Court for interim order. The Family Court shall dispose of the Misc Application as expeditiously as possible and preferably within a period of 12 weeks from the date of receipt of this order.

We make it clear that we have not expressed any opinion on merits of the case and the Family Court shall decide the petition as well as the other proceedings between the parties uninfluenced by any opinion expressed on facts and/or merits of the case. No order as to costs.

At this stage, learned counsel for the respondent, prays for direction to the Family Court not to proceed with the trial for a period of six weeks. Mr Jethmalani, learned Senior Counsel for the appellant, has no objection for issuing such direction. Hence, we pass the following order. The Family Court shall not proceed with the trial or hearing of the application under the Domestic Violence Act for a period of six weeks from today.

(R.Y.GANOO, J.) (D.B.BHOSALE,J.)