Kerala High Court
A. Yousuf Rawther vs Sowramma on 24 June, 1970
Equivalent citations: AIR 1971 Ker 261
Author: V K Iyer
Bench: V K Iyer
JUDGMENT V.R. Krishna Iyer, J.

1. This case, like most others, reveals a human conflict, over-dramatised by both sides and dressed up in legal habiliments, as usual; and when, as here, parties project a matrimonial imbroglio on the forensic screen, the court attempts a reconciliation between law and justice. What deeply disturbs a judge in such case-situations is the conflict between doing justice by promoting a rapprochement and enforcing the law heedless of consequence. Sowramma, a Hanafi girl, around 15, married in 1962 Yusuf Rowthan, nearly twice her age, but the husband's home hardly found them together for more than a few days and after a long spell of living apart, an action for dissolution was instituted by the wife against the husband. The matrimonial court should, and I did, suggest to counsel, in vain though, to persuade the parties to repair the broken bond. Unhappily, irreversible changes in the conjugal chemistry baulked the effort, the husband having taken another wife and the latter having wed again after dissolution was granted in appeal. And thus their hearts are pledged to other partners. The prospect of bringing together the sundered ends of the conjugal knot being absent a decision on the merits, according to the law of the parties, has to be rendered now. Even so, the legal impact of such subsequent events on granting or moulding the relief falls to be considered.

2. A brief narration of the facts will help to appreciate the questions argued before me, with thoroughness and fairness, by counsel for the appellant and his learned friend opposite. (A young advocate of this court, Sri Manhu, who has impressed me with his industrious bent and depth of preparation on questions of Muslim law, has, as amicus curiae, brought into my judicial ken old texts and odd material which are outside the orbit of the practising lawyer). The plaintiff had attained puberty even before her marriage and soon after the wedding, the bridal pair moved on to the husband's house. The very next day the defendant left for Coimbatore where he was running a radio dealer's business. A month's sojourn in the house of the husband and then the girl went back to her parents, the reason for her return being blamed by each on the other. This separation lasted for over two years during which span the defendant admittedly failed to maintain the wife, the ground alleged by the defendant being that he was willing and indeed, anxious to keep her with him but she wrongfully refused to return to the conjugal home -- thanks to the objectional inhibition by the father of the girl. The husband, finding the young wife recalcitrant, moved the mosque committee, through his brother (Ext. D2) but the effort failed and so they reported that divorce was the only solution (Ext- D4). Anyway, after preliminary skirmishes, in the shape of lawyer notices, a litigation for dissolution of marriage erupted. The trial court dismissed the suit but the Subordinate Judge's Court granted a decree for dissolution of the marriage. The aggrieved husband has come up to this court challenging the validity of the decree of the lower appellate court. His counsel, Shri Chandrasekhara Menon, has highlighted a seminal issue of Muslim law -- the right of a female wrongfully leaving the matrimonial home to claim dissolution through court for mere failure of the husband to maintain the erring wife for 2 years.

3. The concurrent findings are that the plaintiff was 15 years old, that she had attained puberty and the marriage had been consummated. Again, while both the courts have held that the defendant had failed to provide maintenance for the plaintiff for a period of two years, they have also recorded a crucial finding "that it was through her own conduct that she led her husband .....to stop maintenance for a period of 2 years".

4. The claim of a Muslim wife to divorce is now provided for and canalised by the Dissolution of Muslim Marriages Act, Act 8 of 1939 (for short, referred to as the Act). Section 2 is the charter of the wife and, in this case, the plaintiff has pressed into service Subsections (ii), (vii) and (ix) thereof. I shall deal briefly with the second ground, which has been negatived by both the courts, and then pass on to the first and the last which, in the circumstances of this case, require detailed consideration. Section 2, Clause (vii) vests in the woman, who has been given in marriage by her father or other guardian before she attains the age of 15 years, the right to repudiate the marriage before attaining the age of 18 years, provided that the marriage has not been consummated. The plaintiff and her father had no qualms in pleading, notwithstanding the Child Marriage Restraint Act, 1935, that the girl was only 134 years old at the time of the marriage. Social legislation, without the community's militant backing, is often a flop. However, the court held: "as there is no evidence to show that the plaintiff was under the age of 15 years when her marriage was solemnised and as the probabilities establish that the marriage had been consummated, it is obvious that the second ground which the plaintiff relied upon for dissolution of her marriage with the defendant has not been made out". On these findings, Section 2 (vii) is off altogether. However, the assumption of the learned Subordinate Judge that if the marriage has been consummated Section 2 (vii) is excluded irrespective of the tender age of the female partner, may be open to question. The Lahore High Court had occasion to consider the import of this provision in a ruling reported in Mt. Ghulam Sakina v. Falak Sher Allah Baksh, (AIR 1950 Lah 45). The learned Judge expatiated on the real significance of the option of puberty thus:

"The marriage under Muhammadan law is in the nature of a contract and as such requires the free and unfettered consent of the parties to it. Normally speaking, a man and a woman should conclude the contract between themselves but in the case of minors i.e., who have not attained the age of puberty as recognised by Muhammadan law, the contract might be entered into by their respective guardians. Before the Act 8 of 1939 (The Dissolution of Muslim Marriages Act 1939) a minor girl given in marriage by the father or the father's father, had no option to repudiate it on the attainment of her puberty but this has now been changed. The contract of the father or the father's father stands on no higher footing than that of any other guardian and the minor could repudiate or ratify the contract made on his or her behalf during the minority, after the attainment of puberty. 'Puberty' under Muhammadan law is presumed, in the absence of evidence, on completion of the age of 15 years. It would, therefore, necessarily follow that the minor should exercise the option after the age of 15 years unless there was evidence to the contrary that the puberty had been attained earlier and the burden of proving this shall lie upon the person so pleading. Anything done by the minor during the minority would not destroy the right which could accrue only after puberty. The co-habitation of a minor girl would not thus put an end to the 'option' to repudiate the marriage after puberty."

There is persuasiveness in this reasoning but on the facts found in the present case, even the Lahore view cannot sustain the plaintiff's claim, while another ruling reported in Rabia Khatoon v. Mohd. Mukhtar Ahmad, (AIR 1966 All 548) goes against her stand.

5. Now, to the other grounds. Section 2 (ix) of the Act is of wide import and preserves the woman's right to dissolution of her marriage on any ground recognised as good under Muslim law. Thus, it is perfectly open to a female spouse to press into service not merely the ground set out in Clauses (i) to (viii) but also any other which has enjoyed recognition under the Shariat. Section 2 (ii) liberates a woman from her matrimonial poundage if her husband "has neglected or has failed to provide for her maintenance for a period of two years". We have, therefore, to examine whether the plaintiff has been able to make out any ground sanctioned by the Muslim law or set out in Section 2 (ii) of the Act. There is a sharp cleavage of opinion in India on the scope and meaning of this latter provision while the former clause has not been expressly pronounced upon.

6. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute.

7. There has been considerable argument at the bar -- and precedents have been piled up by each side -- as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim law. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture -- law is largely the formalised and enforceable expression of a community's cultural norms -- cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce and this is a relevant enquiry to apply Section 2 (ix) and to construe correctly Section 2 (ii) of the Act.

"Marriage under Islam is but a civil contract, and not a sacrament, in the sense that those who are once joined in wed-lock can never be separated. It may be controlled, and under certain circumstances, dissolved by the will of the parties concerned. Public declaration is no doubt necessary, but it is not a condition of the validity of the marriage. Nor is any religious ceremony deemed absolutely essential."

(The Religion of Islam by Ahmad A. Galwash, p. 104). It is impossible to miss the touch of modernity about this provision; for, the features emphasised are precisely what we find in the civil marriage laws of advanced countries and also in the Special Marriage Act, Act 43 of 1954. Religious

ceremonies occur even in Muslim weddings although they are not absolutely essential. For that matter, many non-muslim marriages, (e.g. Marumakkathayees) also do not insist, for their validity, on religious ceremonies and registered marriages are innocent of priestly rituals. It is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. "The whole Quoran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, "if they (namely, women) obey you, then do not seek a way against them"." (Quaran IV:34). The Islamic "law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the Prophet, rests on him who repudiates his wife capriciously." As the learned author, Ahmad A. Galwash notices, the pagan Arab, before the time of the Prophet, was absolutely free to repudiate his wife whenever it suited his whim, but when the Prophet came He declared divorce to he "the most disliked of lawful things in the sight of God. He was indeed never tired of expressing his abhorrence of divorce. Once he said: 'God created not anything on the face of the earth which He loveth more than the act of manumission. (of slaves) nor did He create anything on the face of the earth which he detesteth more than the act of divorce". Commentators on the Quoran have rightly observed -- and this tallies with the law now administered in some Muslim countries like Iraq -- that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce. Dr. Galwash deduces.

"Marriage being regarded as a civil contract and as such not indissoluble, the Islamic law naturally recognises the right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract, ..."

"It is clear, then, that Islam discourages divorce in principle, and permits it only when it has become altogether impossible for the parties, to live together in peace and harmony. It avoids, therefore, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes." We have to examine whether the Islamic law allows the wife to claim divorce when she finds the yoke difficult to endure "for such is marriage without love ..... a hardship more cruel than any divorce whatever". The learned author referred to above states, "Before the advent of Islam, neither the Jews nor the Arabs recognised the right of divorce for women: and it was the Holy Quoran that, for the first time in the history of Arabia, gave this great privilege to women". After quoting from the Quoran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. When the proposal of divorce proceeds from the husband, it is called 'Talaq', and when it takes effect at the instance of the wife it is called 'Kholaa'" Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay off the settlement debt to the wife and at the time of Kholaa she has to surrender to the husband her dower or abandon some of her rights, as compensation.

8. Maulana Muhammad Ali in his book "The Holy Qur'an" has this to say:

"Divorce is one of the institutions of Islam regarding which much misconception prevails, so much so that even the Islamic law as administered in the courts, is not free from these misconceptions ..... The Islamic law has many points of advantage as compared with both the Jewish and Christian laws as formulated in Deut. and Matt. The Chief feature of improvement is that the wife can claim a divorce according to the Islamic law, neither Moses nor Christ (nor Manu, may I add) conferring that right on the woman,....." (Page 96) The Prophet, however, warned:

"of all things which have been permitted divorce is the most hated by Allah (AD. 13:3)."

Dealing with divorce, the Holy Quoran says:

"And women have rights similar to those against them in a just manner .

This statement, Muslim doctors of law assert, was 'a revolutionalising one' for the Arab

9. The decisions of court and the books on Islamic law frequently refer to the words and deeds of the Prophet in support of this truly forward step. He said "if a woman be prejudiced by a marriage, let it be broken off". "The first 'kholaa' case in Islam is quoted by Bukhari in the following words: The wife of Thabit-ibn-Quais came to the Prophet and said 'O Messenger of God, I am not angry with Thabit for his temper or religion; but I am afraid that something may happen to me contrary to Islam, on which account I wish to be separated from him.' The Prophet said: 'Will you give back to Thabit the garden which he gave to you as your settlement?' She said, 'Yes': Then the Prophet said to Thabit, 'Take your garden and divorce her at once'." (Bukhary is the greatest commentary of Mohammadan orthodox traditions). "This tradition clearly tells us that Thabit was blameless, and that the proposal for separation emanated from the wife who feared she would not be able to observe the bounds set by God namely not to perform her functions as a wife. The Prophet here permitted the woman to release herself by returning to the husband the ante-nuptial settlement as compensation for the release granted to her." Asma, one of the wives of the Holy Prophet, asked for divorce before he went to her, and the Prophet released her as she had desired. Yusuf Ali, in his commentary on the Holy Quaran, says:

"While the sanctity of marriage is the essential basis of family life, the incompatibility of individuals and the weaknesses of human nature require certain outlets and safeguards if that sanctity is not to be made into a fetish at the expense of human life." Here is a significant verse from the Quoran.

"And if ye fear a breach between husband and wife, send a judge out of his family, and a judge out of her family: if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and apprised of all."

(Chapter IV, Verse 35). Maulana Muhammad Ali has explained this verse thus:

"This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should divorce cases be made too public. The, judge is required to appoint two arbiters, one belonging to the wife's family and the other to the husband's. These two arbiters will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed, but the final decision for divorce rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

In Mulla's Principles of Mahometan Law (16th Edn.) there is an interesting reference to a Pakisthani decision.

"In an important recent judgment the Pakistan Supreme Court in Khurshid Bibi v. Mohd. Amin, PLD 1967 SC 97, has endorsed the Lahore High Court's view in Mat. Balqis Fatima v. Najmul-Ikram, (1959) 2 (WP) p. 321 (1959 Lah 566), that under Muslim Law the wife is entitled to Khula, as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union."

To sum up, the Holy Prophet found a dissolute people dealing with women as mere sex-satisfying chattel and he rid Arab society of its decadent values through his doings and the Quoranic injunctions. The sanctity of family life was recognised; so was the stubborn incompatibility between the spouses as a ground for divorce; for it is intolerable to imprison such a couple in quarrelsome wedlock. While there is no rose but has a thorn if what you hold is all thorn and no rose, better throw it away. The ground is not conjugal guilt but actual repulsion.

10. The Indian Judges have been sharply divided on the woman's right to divorce. Is she eligible only if she has not violated her conjugal duties? Or can she ask for it on mere failure of the husband to provide maintenance for her for two years, the wife's delinquency being irrelevant? If the latter view be the law, judges fear that women, with vicious appetite, may with impunity desert their men and yet demand divorce -- forgetting, firstly that even under the present law, as administered in India, the Muslim husband has the right to walk out of the wedlock at his whim. and secondly, that such an irreparably marred married life was not worth keeping alive. The rulings reported in Ahmad Jan v. Mt. Sultan Bibi, (AIR 1943 Pesh 73), Mt. Zainaba v. Abdul Rahman, (AIR 1945 Pesh 51), Manak Khan v. Mt. Mulkhan Bano, (AIR 1941 Lah 167), Mt. Akbari Begum v. Zafar Hussain, (AIR 1942 Lah 92). Mt. Noor Bibi v. Pir Bux, (AIR 1950 Sind 8) and Najiman Nissa Begum v. Serajuddin Ahmed Khan, (AIR 1946 Pat 467) speak for the stand of the 'moralists' while the realists find expression of their viewpoint in the rulings reported in Zafav Hussain v. Mt. Akbari Begum, (AIR 1944 Lah 336), Mt. Umat-ul-Hafiz v. Talib Hussain. (AIR 1945 Lah 56), (AIR 1950 Lah 45). Mst. Badrulnisa Bibi v. Mohammad Yusuf. (AIR 1944 All 23), Mt. Shamim Fatma v. Ahmad Ullah Khan. (AIR 1947 All 3), (AIR 1966 All 548), Khatijan v. Abdulla, (AIR 1943 Sind 65), Fazal Mahmud v. Mt. Umatur Rahim, (AIR 1949 Pesh 7), Jamila Khatun v. Kasim Ali Abbas Ali, (AIR 1951 Nag 375) and Amir Mohd. v. Mst. Bushra, (AIR 1956 Raj 102). The learned Munsif chose to follow the leading case in AIR 1951 Nag 375, while in appeal, the Subordinate Judge was impressed by the reasoning in AIR 1950 Sind 8. Neither the Kerala High Court nor the Supreme Court has spoken on the issue and

speaking for myself, the Islamic law's serious realism on divorce, when regarded as the correct perspective, excludes blameworthy conduct as a factor and reads the failure to provide maintenance for two years as an index of irreconcilable broach, so that the mere fact of non-maintenance for the statutory period entitles the wife to sue for dissolution.

11. Mulla, in his book on Mahomadan Law, commenting on the failure to maintain the wife as a ground for divorce under the Act, says:

"Failure to maintain the wife need not be wilful. Even if the failure to provide for her maintenance is due to poverty, failing health, loss of work, imprisonment or to any other cause, the wife would be entitled to divorce .....unless, it is submitted, her conduct hag been such as to disentitle her to main-tenance under the Mahomedan Law. In 1942 it was held by the Chief Court of Sind that the Act was not intended to abrogate the general law applicable to Mahomedans, and 'the husband cannot be said to have neglected or failed to provide maintenance for his wife unless under the general Mahomedan Law he was under an obligation to maintain her'. The wife's suit for divorce was dismissed as it was found that she was neither faithful nor obedient to her husband. So also was the wife's suit dismissed, where the wife, who lived separately, was not ready and willing to perform her part of marital duties." The Nagpur High Court read Section 2 (ii) of the Act to mean that where the wife voluntarily stayed away from her husband's house despite the husband's request to return to his house and live with him, there was no neglect or failure to maintain the wife merely because he did not send any money to her during this period and the wife was not entitled to claim divorce. Mudholkar, J. was of the view that the words "to provide for her maintenance" occurring in Clause (ii) would apply only when there was a duty to maintain under the general Mahomedan law.

12. The learned Judge explained the need to answer the question with reference to the Muslim law:

"It is true that Act 8 of 1939" observed his Lordship, "crystallises a portion of the Muslim law ..... but it is precisely for that reason that it must be taken in conjunction with the whole of the Muslim law as it stands. Under the Muslim law, it is the duty of the wife to obey her husband and to live with him unless he refuses to live with her or unless he makes it difficult for her to live with him ..... When the law enjoins a duty on the husband to maintain his wife, it is obvious that the wife can only be maintained at the place where she ought properly to be ..... If she wants for no reason to be maintained elsewhere, she can clearly claim no maintenance from husband under the Mahomedan law. Since her right to claim maintenance is limited to this extent by the Mahomedan law, it must necessarily follow that in Clause (ii) of Section 2 of Act 8 of 1939 the Legislature intended to refer only to this limited right and to no other .....It would be against all canons of judicial interpretation to hold that a wife's right of maintenance, in so far as Act 8 of 1939 is concerned, is different from that contained in the rest of the Mahomedan law".

13. A Division Bench of the Rajasthan High Court (AIR 1956 Raj 102 at p. 103) agreed with the construction and observed:

".....we are of opinion that the failure or neglect to provide maintenance in order to give rise to claim for dissolution, must be without any justification. For if there is justification, there cannot be

said to be neglect. Neglect or failure implies non-performance of a duty. But if the husband is released from the duty on account of the conduct of the lady herself, the husband cannot be said to have neglected or failed to provide maintenance". The Peshawar court also was of opinion that where the wife was entirely to blame, it could not be said that the husband had failed or neglected to provide for her maintenance within the meaning of Section 2 (ii) of the Act. Their Lordships harked back to and endorsed the opinion expressed in AIR 1944 All 23 "that the word 'neglect' implies wilful failure and that the words 'has failed to provide' are not very happy, but even they imply an omission of duty." Allsop AG. C. J., speaking on behalf of the Bench in AIR 1947 All 3, said:

"The Act does not mean that the husband is bound to follow his wi

14. Even here, I may mention that Section 2 (ii) does not speak of the wife's right of m
"Having very carefully considered the reasoning in all these cases

The learned Chief Justice expatiated on the Muslim law and observed:

"The principles upon which maintenance is enforced during the subsistence

"Sir, the outstanding merit of this Bill is that it puts down, in the space of on

(Sir Zafrulla proved a poor prophet on this point any way1)

15. Tyabji, C. J. relied on Beckett, J., (AIR 1943 Sind 65) who had made a like approach

"Where the words of the statute are unambiguous, effect must be given to them whatever the consequences. It is laid down expressly in Clause (iv) of Section 2, that where the husband has failed to perform without reasonable cause his marital obligations for a period of three years the wife is entitled to a dissolution of her marriage. In Clause (ii), however, the words 'without reasonable cause' do not occur. It must, therefore, be held that whatever the cause may be the wife is entitled to a decree for the dissolution of her marriage, if the husband fails to maintain her for a period of two years, even though the wife may have contributed towards the failure of the maintenance by her husband."

This observation was extracted, with approval, in the Sind decision and the ancient texts, traditions and fatwaas were adverted to for holding that the Indian Hanafis had all along allowed divorce for simple failure by the husband to maintain his wife. The most compelling argument in the Sind ruling runs thus:

"The Muslim marriage differs from the Hindu and from most Christian marriages in that it is not a sacrament. This involves an essentially different attitude towards dissolutions. There is no merit in preserving intact the connection of marriage when the parties are not able and fail 'to live within the limits of Allah', that is to fulfil their mutual marital obligations, and there is no desecration involved

in dissolving a marriage which has failed. The entire emphasis is on making the marital union a reality, and when this is not possible, and the marriage becomes injurious to the parties, the Quran enjoins a dissolution. The husband is given an almost unfettered power of divorce, the only restraints upon him being those imposed by the law relating to dower and by his own conscience. He has to remember the Prophet's words: 'Of all things permitted by the law, the worst is divorce.' The Quran enjoins a husband either to render to his wife all her rights as a wife and to treat her with kindness in the approved manner, or to set her free by divorcing her, and enjoins him not to retain a wife to her injury (Cf. verses II, 229 and 231). Any suspension of the marriage is strongly condemned (Cf. e.g. Quran IV, 129). The attitude of the Prophet is illustrated by the well-known instance of Jameela, the wife of Sabit Bin Kais, who hated her husband intensely although her husband was extremely fond of her. According to the account given in Bukhari (Bu. 68:11) Jameela appeared before the Prophet and admitted that she had no complaint to make against Sabit either as regards his morals or as regards his religion. She pleaded, however, that she could not be wholeheartedly loyal to her husband, as a Muslim wife ought to be, because she hated him, and she did not desire to live disloyally ('in Kufr'). The Prophet asked her whether she was willing to return the garden which her husband had given to her, and on her agreeing to do so, the Prophet sent for Sabit, asked him to take back the garden, and to divorce Jameela. From the earliest times Muslim wives have been held to be entitled to a dissolution when it was clearly shown that the parties could not live 'within the limits of Allah', when (1) instead of the marriage being a reality, a suspension of the marriage had in fact occurred, or (2) when the continuance of the marriage involved injury to the wife. The grounds upon which a dissolution can be claimed are based mainly on these two principles ..... When a husband and a wife have been living apart, and the wife is not being maintained by the husband, a dissolution is not permitted as a punishment for the husband who had failed to fulfil one of the obligations of marriage, or allowed as a means of enforcing the wife's rights to maintenance. In the Muslim law of dissolutions, the failure to maintain when it has continued for a prolonged period in such circumstances, is regarded as an instance where a cessation or suspension of the marriage had occurred. It will be seen therefore that the wife's disobedience or refusal to live with her husband does not affect the principle on which the dissolution is allowed."

16. I am impressed with the reasoning of Tyabji, C. J. which, in my humble view, accords with the holy Islamic texts and the ethos of the Muslim community which together serve as a backdrop for the proper understanding of the provisions of Act 8 of 1939.

17. I may also point out with satisfaction that this secular and pragmatic approach of the Muslim law of divorce happily harmonises with contemporary concepts in advanced countries. For instance, in the Family Code of the German Democratic Republic, recently enacted, the provisions on the dissolution of marriage have been explained in an official legal publication thus:

"Their most characteristic feature is the doing away with the guilt-principle of the erstwhile German civil family law. According to that principle a partner of a petition for divorce had to prove that the other partner had in a culpable manner violated marital duties. According to the principle which now prevails in the German Democratic Republic the only valid yard-stick for the dissolution of a marriage are its objective conditions. If a marriage--as formulated in the draft--has lost its significance for the married partners, for the children and thereby for society, if it has become

merely an empty shell, it must be dissolved, independently whether one of the married partners or which of the two bears the blame for its disintegration. In view of the most personal and variegated relations within married life and the fact that conflicts which lead to divorce, have frequently been simmering for years, and might have their deepest roots in an ill-considered marriage, it may be, as a result, hardly possible to declare either of the spouses guilty for the disintegration of the marital partnership."

(Law and legislation in the G. D. R. 2/65, p. 32) One of the serious apprehensions judges have voiced, if the view accepted in AIR 1950 Sind 8 were to be adopted, is that the women may be tempted to claim divorce by their own delinquency and family ties may become tenuous and snap. Such a fear is misplaced has been neatly expressed by Bertrand Russel in his "Marriage and Morals".

"One of the most curious things about divorce is the difference which has often existed between law and custom. The easiest divorce laws by no means always produce the greatest number of divorces ..... I think this distinction between law and custom is important, for while I favour a somewhat lenient law on the subject, there are to my mind, so long as the biparental family persists as the norm, strong reasons why custom should be against divorce, except in somewhat extreme cases. I take this view because I regard marriage not primarily as a sexual partnership, but above all as an undertaking to co-operate in the procreation and rearing of children."

The law of the Marumakkathayees provides a large licence for divorce but actual experience allays the alarm. The law has to provide for possibilities; social opinion regulates the probabilities. For all these reasons, I hold that a muslim woman, under Section 2 (ii) of the Act, can sue for dissolution on the score that she has not as a fact been maintained even if there is good cause for it--the voice of the law echoing public policy is often that of the realist, not of the moralist.

18. The view I have accepted has one other great advantage in that the Muslim woman (like any other woman) comes back into her own when the Prophet's words are fulfilled, when roughly equal rights are enjoyed by both spouses, when the talaq technique of instant divorce is matched somewhat by the Khulaa device of delayed dissolution operated under judicial supervision. The social imbalance between the sexes will thus be removed and the inarticulate major premise of equal justice realised,

19. Act 8 of 1939 does not abrogate the grounds already available to a woman and Section 2 (ix) is clearly a statutory preservation of prior Islamic rights. I have dilated on the incidents of Khulaa the last gateway for a Muslim woman out of an irreparably embittered co-existence. Having affirmed the decree under Section 2 (ii) of the Act, the applicability of Section 2 (ix) is, perhaps, supererogatory. I do not decide the plaintiff's claim to Khulaa under Section 2 (ix) of the Act. Having succeeded on the ground set out in Section 2 (ii) of the Act the respondent is entitled to a divorce.

20. A minor point was urged by the respondent. Now that both parties were married to others, it was urged that the decree for divorce may be upheld. Precedents are legion that a court must have due regard to subsequent developments which fundamentally alter the jural relations or make the relief originally sought altogether unworkable or unjust. But such pragmatic considerations are

permitted only in a limited category of events, as the Full Bench ruling in 1962 Ker LT 446 = (AIR 1962 Ker 341) (FB) has circumscribed. Certainly, the wife cannot jettison her husband through court by hurriedly marrying another when the case is pending and force the court to grant what is the subject of dispute; for, 'if the law supposes that', borrowing the words of Mr. Bumble, in Oliver Twist, 'the law is an ass--an idiot'.

21. What is the proper order as to costs? A direction regarding costs does not always depend on who wins and who loses in the end. The view of the judge on the equity and the tragedy on the human side on the moral as well as the legal merits, on the conduct of the parties before and during the litigation and other like intangible factors have a play in shaping the judicial verdict regarding costs. Here, the panorama un-' folds a jilted husband, an imprudent father, a youngish, peevish woman, a marriage marred by tears -- all these climaxed by the ex-spouses choosing fresh partners, even pendente lite, and let us hope, living happily. Counsel agree with me that the financial burden of this litigation, which 'costs' theoretically represent should be borne by both equally throughout so that this misalliance may end on a less unhappy note. I direct that the parties will bear their respective costs in all the courts.

22. The appeal fails and is dismissed but without costs at any tier.