Patna High Court
Fazlur Rahman vs Musammat Ayasha And Ors. on 18 January, 1929
Equivalent citations: 115 Ind Cas 546
Author: F Ali
Bench: Courtney-Terrell, J Prasad, F Ali
JUDGMENT Fazl Ali, J.

1. This is an appeal under the Letters Patent from the judgment of Wort, J., in an appeal from appellate decree in a suit for restitution of conjugal rights. The case of the appellant who was the plaintiff in the suit was, that Musammat Ayasha one of the defendants, was his lawfully wedded wife, that on 27th June, 1923, she left the house of the appellant in his absence and went away to her parents, and that on 28th June, 1923, the appellant went to the house of defendants Nos. 2 and 3 to bring defendant No. 1 back but the latter was not allowed to return to the plaintiff. Thereupon the appellant filed a petition under Section 552, Criminal Procedure Code, on 29th June, 1923, in the Court of the District Magistrate at Monghyr against defendant No. 2 and a notice was issued to him; but ultimately the District Magistrate rejected the application, holding that there being a matrimonial dispute between the parties no action could be taken under Section 552, Criminal Procedure Code. The main defence in the case was that defendant No. 1 (Musammat Ayasha) had been divorced by the appellant on 16th June, 1923, and, therefore, the appellant was not entitled to sue for the restitution of conjugal rights.

2. The learned Munsif who tried the suit disbelieved the defence story and decreed the suit holding that no divorce had actually taken place. Thereupon the defendants appealed to the District Judge who reversed the decision of the Munsif and dismissed the suit, holding that the plaintiff having irrevocably divorced his wife could not succeed in a suit for the restitution, of conjugal rights. The plaintiff then appealed to the High Court, and the appeal was heard and disposed of by Wort, J., who elaborately dealt with the points raised by the appellant before him and agreed with the lower Appellate Court that Musammat Ayasha had been legally divorced by the appellant and that the divorce was irrevocable.

3. The appellant has now preferred an appeal under the Letters Patent, and the main points urged before us on his behalf are: (1) that the divorce relied on by the defendant was not a valid divorce according to the Muhammadan Law (2), that in any case it should be held that the divorce was a revocable one and (3) that the appellant had in fact revoked this divorce by his conduct in going to the house of his wife's parents on 26th June, 1923, to take her back and in filing an application under Section 552, Criminal Procedure Code before the District Magistrate on 29th June, 1923.

4. The parties in this case are governed by the Hanafi Law, and the finding of fact behind which the appellant cannot go is that on 15th June, 1923, the appellant made three declarations of talaq one after another; or, in other words, he pronounced a triple divorce on one and the same occasion. This form of talaq has been in vague among the Hanafi Muhammadans for a very long time and is technically known as talaq ul-bidat, an expression which literally means an innovated form of divorce, but which has been generally translated in the text books on Muhammadan Law as "a heretical sinful or irregular form of divorce." It may be mentioned that broadly speaking two kinds

of talaq are in vogue among the Hanafi sect of Muhammadans, (1) talaq us-sunnat and (2) talaq ul bidat. The two expressions have been explained by Mr. Ameer Ali as follows:

The talaq us sunnat is the divorce which is effected in accordance with the rules laid down in the traditions (the sunnat) handed down from the Prophet or his principal disciples. It is, in fact, the mode or procedure which seems to have been approved of by him at the beginning of his ministry, and is, consequently, regarded as the regular or pro per and orthodox form of divorce. The talaq ul bidat, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Muhammadan era. It was then that the Ommey yade monarchs finding the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law and found in the pliability of the Jurists a loophole to effect their purpose.

5. Mr. Ameer Ali further goes on to explain that talaq us sunnat is either ahsan or hasan and says:

In the talaq us-sunnat pronounced in the ahsan form, the husband is required to submit to the following conditions, viz.: (a), he must pronounce the formula of divorce once, in a single sentence; (b) he must do so when the woman is in a state of purity (tahr), and there is no bar to connubial intercourse, nor has there been any during that state; and (c) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three tahrs.... In the hasan form, the husband is required to pronounce the formula three times during three successive tahrs, namely, three periods of purity of the wife. When the last formula is pronounced, the talaq or divorce becomes irrevocable.

6. Now, it is urged by Mr. Nooruddin who appears for the appellant that a divorce in the ahsan or hasan form, or, in other words, a divorce in the form and under the conditions sanctioned by the sunnat or the holy traditions is the only effective form of divorce under the Muhammadan Law, and that we should hold that a talak (divorce) pronounced in the bidai or heretical form is not at all binding or valid under the Muhammadan Law.

7. It is true that the Shia and the Maliki sects of Muhammadans do not recognize the validity of the talaq ul-bidat, but the whole trend of authorities on the Hanafi Law is against the contention raised by the learned Vakil in this case. The author of Hedaya says in Chap. I of his book which relates to divorce: "Divorce is of three kinds;--first, the ahsan (most laudable);--second, the hasan or laudable (which are the distinctions of the talaqus sunnat) and third, the bidat or irregular... taluq-ul bidat or irregular divorce, is where a husband repudiates his wife by three divorces at once,--(i.e., included in one sentence), or, where he repeats the sentence separately, thrice within one tahr, and if a husband give three divorces in either of those ways the three hold good, but yet the divorcee is an offender against the law...."(Hamilton's Hedaya, 2nd Edition, passes 72-73. It is further mentioned in Hedaya that Shafai has said that all these three descriptions of divorce (viz., ahsan, hasan, and bidat) are equally unexceptionable and legal. In Fatawah Alamgiri also talaq is said to be of two kinds, (1) talaq sunna and (2) talaq-bidat and the validity of either form is fully recognized (Vol. 2, page 52 See also Raddul-Muhtar Vol. 2 pages 492 93 and 582-85, (Tahtevi, Vol. 2 page 175). The same is the view put forward in the modern treatises on Muhammadan Law. (See Baillie's Digest of Muhammadan Law

pages 205-07; Ameer Ali's Muhammadan Law, 5th Edition, page 136; Tayabji's Principle of Muhammadan Law, 2nd Edition pages 215-19, Abdur Rahim's Institutes of Mussalman Law, page 141).

8. The view that talaq-ul-bidat is one of the recognized and binding forms of divorce among the Hanafi Muhammadans is not confined to a number of Jurists only but has received ample support from a series of judicial decisions also.

9. In the case of Furzund Hossein v. Janu Bibee 4 C. 588 the question arose whether the mere pronouncing of talaq three times by the husband without its being addressed to any person was sufficient to constitute a valid divorce according to Muhammadan Law and although the learned Judges decided that the words being not specifically addressed to the wife, no valid divorce had been ejected yet, at the same time, they observed that if the formula of divorce prescribed in Muhammadan Law books has been really pronounced by the plaintiff, the view of the Muhammadan Law taken by the Court of Appeal (that a complete divorce had been effected) is probably right."

10. In the case of In re Abdul Ali Isamilji (2) the learned Judges held as follows:

Talaq-ul bidat or irregular divorce which is effected by three repudiations at the same time, appears from the authorities to be sinful, but valid, and it was recognized as valid by this Court In re Kasim Pirbhai 8 B.H.C.R. 95 Cr.

11. In Sarabai v. Rabiabai 30 B. 537 : 8 Bom. L.R. 35 (at page 544 Page No. 33 M--[Ed.]) Bachelor, J., who decided that case observed as follows:

There can be no doubt that a talaq ul-bidat or irregular divorce, is good in law though bad in theology.

12. In Asha Bibi v. Kadir Ibrahim 3 Ind. Cas. 730 : 33 M. 22 : 6 M.L.T. 295 : 20 M.L.J. 1 (at page 26 Page No. 30 B--[Ed.]) the husband was found to have used the following expressions in the presence of his wife's father in pronouncing the talaq:

13. "This is the talaq to your daughter; This is the talaq to your daughter; This is the talaq to your daughter. Talaq once, talaq twice, talaq thrice, etc, etc." and it was held by Abdur Rahim and Munro, JJ., that the words of repudiation, though not addressed directly to the wife, constituted a valid divorce according to the Hanafi Law.

14. In the case of Ameeruddin v. Khatoon Bibi 39 Ind. Cas. 513 : 39 A. 371 : 15. A.L.J. 272 which was decided by Rafique and Piggot, JJ., the learned Judges had to deal with the very arguments which have been advanced before us in this case and they disposed of them as follows:

We do not think that the contention for the appellant should prevail. It is true that the sunna or the traditions sanction only two modes of divorce, i, e., ahsan and hasan but ever since the second century of the Muhammadan era the bidai or sinful or irregular form introduced by the Jurists,

which is admittedly inconsistent with the traditions, has been also recognized as a valid mode of repudiation. Mr. Ameer Ali on whose book great stress is laid nowhere says that divorce pronounced in the bidai form is invalid and should not be given effect to. Such a divorce has been upheld in Courts in this country. We would refer to the case of In re Abdul Ali Ismailji 7 B. 180....

The learned Counsel for the appellant wants us to take a different view. He says that the point has never come up before, and has never been decided by, this Court and that we are not bound to follow the Bombay case. We should follow and enforce Muhammadan Law as it is and not as it has been improved upon and added to by the Jurists at the instance of the Ommey yade monarchs. We think that it is too late in the day for the appellant to ask us to disapprove of an established practice which has been in vogue for centuries.

15. The learned Judges further quoted the following passage from Mr. Tayabji's Muhammadan Law to show that the bidai form of divorce is not only valid but is also the form of divorce which is most favoured in this country:

By a deplorable, though natural, development of the Sunni Law, it is the fourth and the most disapproved or sinful mode of divorce (that is the bidai form) that seems to be most favoured even by the law itself. For, the requirements of the other mode being seldom attended to, it is generally assumed (on the principle that the intention of the parties must as far as possible be given effect to) that the fourth mode was intended to be employed, with the result not only that the formalities for the divorce are done away with, but even its effects are aggravated for, inasmuch as the pronouncement is presumed to be in this mode, it is presumed to be irrevocable. It is indeed possible that the Sunni Jurists wished to inflict on a husband, who disregarded the requirements of Section 136 (that is, divorce according to the traditions) the penalty of rendering the divorce irrevocable, and there are indications that they considered it always a favour to the wife to relieve her of the husband.

16. Thus it will be seen that talaq-ul-bidat has been in vogue at least since the second century of the Muhammadan era and all the Muhammadan Jurists of the Hanafi School are unanimous that a divorce pronounced in this form is valid and binding. This view has also been upheld in a number of reported judicial decisions of the various High Courts of this country. Mr. Nooruddin admits all this: but it is urged by him that the functions of the British Courts in administering the Muhammadan Law are more or less the same as the functions of a qazi under the Muhammadan rule, and it is contended by him that if we find that this form of divorce is not sanctioned by the laws of koran, it is our duty to declare that the divorce pronounced in the bidai form is not valid. The learned Vakil refers us in this connexion to Section 27, Regulation II of 1772, by which it was enacted that in all suits regarding inheritance, succession, marriage and caste and any other religious usages or institutions the laws of the Koran with respect to Muhammadans, and those of the Shastras with respect to Hindus shall be invariably adhered to. Now the Regulation has since been repealed and the enactment which is in force now is Act XII of 1887. Section 37 of that Act reads as follows:

Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution the

Muhammadan Law in cases where the parties are Muhammadans and the Hindu Law where the parties are Hindus shall form the rule of decision, except in so far as such law has by legislative enactments been altered or abolished.

17. Thus it will be seen that the term "Muhammadan Law" has been substituted in that enactment for the "laws of the Koran" and the term "Hindu Law" for the "Laws of the Shastras." The change is not without significance because the term "Muhammadan Law" is certainly a wider term than the "Laws of the Koran" Nevertheless, the argument advanced in this case by Mr. Nooruddin would have been entitled to consideration if he could satisfy us that a divorce of the type said to have been pronounced in the present case has been expressly prohibited by the Koran. This is, however, not the case. The verses of the Koran which are pertinent to the question under enquiry are to be found in the second Surat of the Koran and have been translated as follows by Maulvi Muhammad Ali:

Verse 229. Divorce may be (pronounced) twice; then keep (them) in good fellowship or let (them) go with kindness: and it is not lawful for you to take any part of what you have given them, unless both fear that they cannot keep within the limits of Allah; then if you fear that they cannot keep within the limits of Allah, there is no blame on them for what she gives up to become free thereby. These are the limits of Allah, so do not exceed them.... Verse 230. So if he divorces her she shall not be lawful to him afterwards until she marries another husband, etc. etc.

18. Now, all the commentators are agreed that the words "a third time" should be read after the words "divorces her" in versa 230, and the verse means that if the wife has been divorced thrice the divorce is irrevocable and the wife cannot lawfully return to the husband. This is so, because under verse 229 after the divorce is pronounced twice there is an option with the husband to keep or abandon his wife, and in order to complete the divorce he must pronounce it a third time. This is obvious from the use of the words "then in the aforesaid verse". After the divorce is completed by three pronouncements contemplated by verse 229, it becomes irrevocable under verse 230. The Shias and the Malikis have interpreted the three divorces referred to in these verses to mean divorces pronounced on three different occasions. There is, however, one school of commentators which has taken the view that the language used in the Koran is wide enough to include cases in which the divorce has been pronounced thrice on the same occasion. Thus although it may be said that, of the two views the one is not so broad and not so well supported by reason as the other, yet when there is a consensus of opinion among a large and influential section of theologians who hold that the words of the Koran are capable of the interpretation which sanctions the bidai form of divorce and when we find that the bidai form of divorce has been in vogue among the Hanafi Muhammadans for so many centuries, it is not for us to lay down that the interpretation which does not favour the bidai form must necessarily be preferred to the interpretation which favours it. Nor do I think we shall be justified in introducing a sudden and drastic change in what has been for generations the accepted law of the Hanafi Muhammadans. I must, therefore, hold that talaq ul bidat is a valid and binding form of divorce according to the law of the Hanafi and as such is binding upon the parties in this case.

19. There is one more argument which was advanced by the learned Vakil for the appellant when dealing with the question of the invalidity of talaq-ul bidat. It was urged by the learned Vakil that

this from of talaq was not sanctioned by the holy traditions and he referred us to the following passage in Mr. Ameer Ali's Muhammadan Law, Vol. 2, at page 533:

It is reported that when once news was brought to him (the Prophet) that one of his disciples had divorced his wife, pronouncing the three talaqs at one and the same time, the Prophet stood up in anger on his carpet and declared that the man was making a plaything of the words of God, and made him take back his wife.

20. It was conceded by the learned Vakil for the appellant that it was the son of the second Caliph Umar who was concerned in the incident referred to by Mr. Ameer Ali. The full facts of this incident, however, have been given by the author of Hedaya in the following passage under the heading "divorce pronounced during menstruation."

"It is recorded that the son of Umar having divorced his wife during her courses the Prophet desired Umar to command his son to take her back again. This shows that the divorce during the courses is valid, but that reversal in this case has been laudable.

21. It will, therefore, appear that at least in the opinion of a number of learned theologians the divorce in the case referred to by Mr. Ameer Ali was reversed on the ground that it had been pronounced when the wife was in a state of impurity.

22. The next question raised by the learned Vakil for the appellant was that the divorce pronounced by the appellant in this case was a revocable one and should be held to have been actually revoked. According to the aforesaid verses a completed divorce by three pronouncements is irrevocable. The learned Vakil has failed to cite a single authority which lays down in clear terms that a divorce in triple form is rajai (revocable) and not bain (irrevocable). On the other hand, all the authorities are unanimous that a divorce becomes irrevocable after it has been pronounced thrice. All that the learned Vakil can rely on in support of his proposition is the following passage in Mr. Ameer Ali's book on Muhammadan Law:

All these schools allow revocation; that is, a husband who has suddenly and under inexplicable circumstances pronounced the formula against his wife, may revoke any time before the three tahrs have expired. When the power of recantation is lost, the separation of talaq becomes bain; whilst it continues, the talaq is simply rajai or revocable.

23. The same passage was relied on by the learned Counsel who appeared for the appellant in the case of Amiruddin v. Khatun Bibi 39 Ind. Cas. 513 : 39 A. 371 : 15. A.L.J. 272 and the learned Judges of the Allahabad High Court in dealing with the arguments advanced in that case which were exactly the same as those advanced in this case, observed as follows:

It is argued that the words 'all these schools allow revocation' mean that revocation is permissible in all modes of repudiation. We are unable to place that interpretation on the words. What is meant by the words 'all schools' is all the schools of Jurists. A careful examination of the passage and of other passages preceding and following it will show that the learned author never meant that revocation

was permissible in all modes of repudiation. The opinion expressed in the passage under discussion has reference to revocable modes of divorce only. If the contention for the appellant were correct, the word rajai (revocable) and bain (irrevocable) used by the Jurists with reference to modes of divorce would be meaningless. All writers on Muhammadan Law, when dealing with the subject of repudiation, speak of revocable and irrevocable form of divorce: vide Ameer Ali, pages 536 and 537; Wilson, page 144; Tayabji, pages 132, etc. We are of opinion that a husband has not got the option of revocation in all cases. The manner in which the defendant-appellant repudiated his wife was bain. He made three pronouncements of divorce to her at the same time in three separate sentences. The divorce he pronounced was thus irrevocable: vide Tayabji, page 141; Abdul Rahim's Muhammadan Jurisprudence, pages 336and 337; Baillie, page 207. He had, therefore, no option or revocation.

24. I am in complete agreement with the reasoning employed by the learned Judges in the case referred to and I hold that the divorce in the present case having been pronounced thrice became bain and irrevocable. This being my view, it is not necessary for me to consider whether the conduct of the appellant subsequent to his having divorced his wife amounted to a revocation of the divorce or not.

25. The last point argued before us was that, as it is one of the necessary conditions of a valid and irrevocable divorce that the divorced woman should have been in a state of purity (tahr) at the time the divorce was pronounced, and as there is no evidence that defendant No. 1 was in a state of purity, it must be held that the divorce was neither a valid nor an irrevocable divorce. The learned Vakil in urging this proposition asks us to hold that the onus of proving that Musammat Ayasha was in a state of purity was not on the plaintiff but on the defendants in this case, and his contention is that as no evidence was given by the defendants to prove the condition of defendant No. 1 one way of the other at the time of the alleged divorce it must be held that one of the prerequisites of a valid and irrevocable divorce has not been established. I am afraid I cannot agree with the learned Vakil that the onus of proving tahr (purity) was upon the defendants in this case. In the first place according to the Hanafi Law the divorce pronounced when the wife is not in a state of purity is not invalid. Mr. Ameer Ali says:

In the talaq-ul bidat, the husband may pronounce the three formulae at one time, whether the wife be in a state of tahr or not.

26. The same view has been put forward in Hedaya in the following passage:

If a man repudiates his wife during her courses, it is valid; because, although divorce within the terms of the courses be disapproved, yet it is lawful, nevertheless, as the disapproval is not on account of anything essential, but merely because a divorce given during the courses occasions a protraction of the iddat. This kind of disapproval, or interdict, is termed nihee leghirehee and does not forbid legality, whence a divorce given during the courses is valid; yet it is laudable that the husband reversed it, as it is recorded that the son of Umar having divorced his wife during her courses, the Prophet desired Umar to command his son to take her back again; which tradition shows that divorce during the courses is valid but that reversal is in this case laudable (Hamilton in Hidaya, Vol. I, Book 4, Chap. I. page. 74).

27. If this view is accepted then it is clear that the divorce was, in any case, valid and if the appellant wanted to show that it was liable to be reversed owing to the divorce having been pronounced when defendant No. 1 was in a state of impurity, it was for him to prove that she was in that condition. Assuming, however, that the state of purity is one of the necessary conditions of a valid divorce, even then the onus of proving that the wife was not in a state of tahr will, in my opinion, in the present case be on the plaintiff, if he wants to prove that the divorce was not a valid one. In this case it was clearly stated in the written statement that a divorce had been effected according to the provisions of Muhammadan Law and the connexion between plaintiff and defendant No. 1 had ceased to exist. The facts found are that when the divorce was pronounced it was accepted to be a good divorce by the parties and none of them raised the question that the wife was not in a fit condition to be divorced. Thus the present case seems to be governed by Illustration (6), Section 102, Evidence Act, and it was as incumbent on the plaintiff to show that the divorce was not valid on account of the impurity of the wife, as it would be incumbent on a party who wants to avoid a contract on the allegation that one of the parties to the contract was a minor or of unsound mind, to prove the fact of minority or unsoundness. In any case we find that the plaintiff never asserted in the Court of trial that the divorce was ineffective by reason of the impurity of the wife nor has he made the slightest attempt to elicit this fact by means of cross-examination from Musammat Ayasha (defendant No. 1) or any other witness for the defendants, and we cannot, in the absence of any evidence, assume that the divorce was pronounced when the wife was not in a state of purity.

28. Thus all the contentions raised in this case on behalf of the appellant have failed, and the appeal must be dismissed with costs.

Courtney-Terrell, C.J.

29.--I agree.

Jwala Prasad, J.

30.--I agree.