Bombay High Court
Chandbi Ex vs Bandesha on 27 June, 1960
Equivalent citations: AIR 1961 Bom 121, (1960) 62 BOMLR 866, 1961 CriLJ 470, ILR 1961 Bom 191
Bench: Shah
ORDER

1. This is a reference made by the learned Additional Sessions Judge of Osmanabad with a recommendation that the order passed by the learned Magistrate was bad in law and that it should be altered so as to allow maintenance to the wife only for a period of three lunar months from 6-4-1959, the date of the filing of the written statement by the husband.

2. The parties to these proceedings are Maliomedans. It appears that the wife made an application for maintenance to the learned Magistrate under Section 488 of the Criminal Procedure Code, The husband resisted the application mainly on three grounds; (1). that he had already divorced the wife about 30 years ago and that he was not liable to maintain her; (2) that there was no neglect or refusal on his part to maintain her; and (3) that he had not sufficient income for giving separate maintenance to her. The learned Magistrate found in favour of the wife on all the three grounds and granted a sum of Rs. 10/- per month as maintenance allowance to her as against die husband. The husband there-

after filed a revision application in the Court of Session at Osmanabad and submitted that the order of the learned Magistrate was bad in law. It was contended on his behalf that the statement by him in his written statement that he had divorced his wife operated as a divorce as from the date of the written statement since it was an expression of his intention to divorce her. The divorce, according to the husband, was thus effective from the date of the written statement which was 6-4-59 and it was contended that under Mahomedan Law the wife could claim maintenance only during the period of iddat which would be only three months. It was further contended that in so far as the learned Magistrate awarded maintenance without specifying the period for which it was to be paid, the order in that behalf was bad in law as it had the effect of awarding maintenance during the life time of the wife.

3. The learned Additional Sessions Judge was inclined to accept the contention raised on behalf of the husband and relying upon the decision in Wahab-Ali v. Qamro Bi AIR 1951 Hyd 117, he was of the opinion that the statement by the husband in his written statement that he had divorced his wife about 30 years ago, if the fact of such divorce was not proved as had been held by the learned Magistrate in this case, operated as a declaration of divorce as from the date of the written statement and that, in that event, the wife would be entitled only to maintenance for a period of Iddat i.e. for three lunar months. The learned Additional Sessions Judge, accordingly, referred the matter to this Court with the recommendation as aforesaid.

4. It was contended on behalf of the wife before me that such a statement as appeared in the written statement filed by the husband in this case only related to what was alleged to have taken place 30 years ago and that by no stretch of imagination or by any canon of construction could it have the effect of a declaration of divorce in present. It was further contended that even if such a construction

could be put upon the statement made in the written statement, there was no evidence on the record to show that it was made between the two period of Tuhr as required by the Mahomedan Law.

5. Turning to the first contention, prima facie it does appear that the statement in the written statement that the husband had divorced his wife 30 years ago could have no effect and would not amount to a divorce in presenti if it was not proved that the divorce had taken place as a matter of fact 30 years ago as alleged. The Mahomedan law, however, seems to favour the husband more than the wife and it has given liberty to the husband not only to divorce the wife orally in the manner set out under the Mahomedan Law, but also by a writing, and there are authorities to show that if a Mahomedan husand makes a statement that he had divorced his wife some time in the past and the wife denies it, then the statement itself should be regarded as amounting to a declaration of divorce as on the date on which the statement is made. This may sound very strange to a layman. Nevertheless, if the Mahomedan Law allows this kind of latitude to a Mahomedan husband, it must be given effect to.

6. On this point, reference may be made to Macnaghten's Moohummadan Law, 4th Edition, p. 296, where the learned author under case No. XLII has set out the question as well as the answer in the following form:

"Q. A person on the 20th of Suffur in the year 132 Hijree (corresponding with the 7th Pous of 1224, B. S.) declared that be had repudiated his wife by three divorces, agreeably to the rules of the Moohummadan Law, from the year 1178 or upwards of forty-six years back. In this case, from what date should the divorce be held to take effect? R. Under the above circumstances, if the wife deny the fact of her having been divorced by the husband; the divorce according to Law should be held to take effect from the date on which it was declared; as is laid down in the Shurhi Vicaya. "If a person say to his wife, whom he married previously to the day to which he referred the divorce 'you are divorced yesterday', and she deny it, the divorce takes effect only from the moment of its being declared."

Reference may also be made to Syed Ameer Ali's Mahomedan Law, 5th Edition, page 479. The learned author dealing with the "Capacity for talak" observes as follows:

"According to the Hanaft doctrines, although an acknowledgment of a talak, namely an acknowledgment by a man that he had divorced his wife, extracted from, him under compulsion, is ineffective, talak actually pronounced under compulsion is valid.....

Whilst an acknowledgment extracted from the husband by compulsion whether embodied in writing or not is ineffective, an. acknowledgment of talak made in jest or falsely will take effect "Judicially' though it will not have any force in foro censcien-tiae...."

These passages make it clear that although a Mahomedan may fail to prove the allegation that he had divorced his wife some years ago, nevertheless, the statement made by him to the effect that he had so divorcd his wife, even if it be false, would operate as an acknowledgment of the divorce by him or at any rate as a declaration of divorce as from the date on which the statement was made.

7. The principles laid down by these two authorities appear to have been followed by the Allahabad High Court in Asmat Ullah v. Mt. Khatun-Unnisa, . That was a case precisely on all fours with the one before me, It was held by the trial Court in that case that there was absolutely no evidence on the record to prove that the husband had ever pronounced a divorce on oath. It appeared, however, and it was not disputed, that some 15 years before his death in 1930, the wife had instituted criminal proceedings against her husband in which she had claimed maintenance. In the written statement filed by the husband in those proceedings the husband had stated that three or four months before the date upon which he filed the written statement, he had divorced his wife according to Mahornedan Law. It also appeared that the husband had made a statement on oath on 12-1-1915 in the course of which he deposed that he had divorced his wife by repeating thrice "I divorce you". In view of the finding, however, by the trial Court that the divorce by the husband was not proved at all, the, suit for possession of certain property, which the wife claimed as the heir of her husband, was decreed. In appeal, it was contended for the husband's heirs that it must be held that the husband had at any rate divorced his wife on the date upon which he made the afore-mentioned statement in the written statement filed by him in the maintenance proceedings. It was held that the statement in the written statement field by the husband was an acknowledgment of Talak alleged to have been granted by him already and that the divorce would be held to have effect at least from the date upon which the acknowledgment was made. Applying the ratio of that case to the facts of this case in my opinion, it must be he'd that although the husband failed to prove the divorce which, he alleged, had taken place 30 years ago, he did divorce the wife as from the date on which he filed the written statement, namely, 6th April, 3959.

8. It was next contended for the wife that such a statement even if it amounted to a declaration of divorce as from the date on which the statement was made, should have been made between two periods of menstruation as required by the Mahomedan Law. The learned advocate, however, was unable to point out any authority to me stating that the condition which applied in case of an oral divorce equally applied to a divorce in writing, Besides, it appears that the wife in this case is well over 50 years of age and even if the condition as regards an oral divorce applied to a divorce in writing, the condition was superfluous and incapable of performance for the obvious reason that the wife had passed the age for periods of menstruation. In my opinion, even where a divorce is given orally to a wife who has passed the age for periods of menstruation, the condition that oral declaration of divorce, should be made between two periods of Tubr would not be applicable, because it would be physically impossible to have any such periods between which such a declaration could be made.

9. For these reasons. I accept the reference and modify the order passed by the learned Magistrate to the extent that the maintenance should be allowed to the wife at the rate fixed by the learned Magistrate only for a period of 3 lunar months from 6-4-59.

10. Reference accepted.