Jammu & Kashmir High Court
Amad Giri vs Mst. Begha on 7 March, 1955
Equivalent citations: 1955 CriLJ 1067
Author: Shahmiri
Bench: Wazir, Shahmiri
JUDGMENT Shahmiri, J.

1. This is a reference made by the Additional Sessions Judge, Jammu, in the proceedings arising out of a revision petition filed by the applicant against an order of the Tehsildar Magistrate First Class, Kishtwar, by which the applicant has been ordered to pay Rs. 30/- per month as maintenance to the non-applicant Under Section 488, Cr.PC

2. We have heard counsel for the parties. It appears that on 1st Maghar, 2009 Mst. Begha, non-applicant put in an application Under Section 488, Cr.PC against Amad Giri, the applicant, alleging that she was his wife and had borne him ten children and that she had been driven put of his home by the applicant, and praying that, as ho had refused to maintain her, she may be granted an allowance of Rs. 30/- per month from him for her maintenance. In paragraph 5 of her petition, she admitted that she had heard that her husband had divorced her. She, however, added that even if she had been divorced by her husband she could claim maintenance from him, as she was in old age and could neither remarry nor earn her own living. The applicant in his objections stated that the proceedings Under Section 488, Cr.PC could not proceed as he had divorced his wife. In support of his objections, he produced in Court an unopened registered cover, Ex. D-2, on opening which a Talaknama, Ex. D-l, executed on 12th Katik 2009, written by petition writer, Kunj Lai, and attested by two witnesses, Ahmad Sheikh and Rasul Giri. was recovered.

It appeared that this Talaknama which is written on a stamp paper had been sent by the applicant to the non-applicant under the registered cover, Ex, D-2, which bears an endorsement of the postman, Ram Saran and of Aziz Giri, who has been produced by the applicant as has witness, to the effect that Mst. Begha, non-applicant, had refused to take delivery of this communication addressed to her. The scribe of the document, Ex. D-l, Kaaj Lai and one of the attesting witnesses, Rasul Giri, were produced by the applicant before the Tehsildar Magistrate and they prove the contents of the Talaknama. Aziz Giri has stated that he was present in the house of the non-applicant when the postman brought the registered cover to her of which she refused to take delivery. From the facts stated above, it is obvious that Talaknama, Ex. D-l, was executed on 12th Katik 2009 and Mst. Begha, non-applicant, refused to take delivery of it on 19th Katik 2009 and that she had not only refused to take delivery of this document but that she had also heard that she had been divorced by her husband before 1st Maghar 2009 the date on which she presented her application Under Section 488, Cr.PC to the Tehsildar Magistrate.

Despite these clear facts proved by Amad Giri, applicant, before the Tehsildar Magistrate and in spite of the fact that his counsel drew the attention of the Magistrate to the provisions of Mohammadan Law as contained in the text books by Mulla and Ameer Ali, the Tehsildar Magistrate after quoting, a large number of verses (AYATS) from the holy Quran and making references to certain Hadises (sayings of the prophet) and other books of theology came to the conclusion that

this Talaknama was absolutely invalid and ineffectual and, therefore, the relationship of husband and wife continued to exist between the parties. In the alternative he found that even if the divorce be held to be valid, the applicant was bound to maintain the non-applicant as she was old and could neither remarry nor earn her living. He, therefore, granted her a monthly maintenance allowance of Rs. 30/- and made no order with regard to the maintenance for the minor children of the couple as this had not been claimed in the application filed by the non-applicant.

The learned Additional Sessions Judge Jammu, after referring to certain paragraphs of Mulla's Mohammadan Law held that the divorce in this case was good in law and had become irrevocable. He has, therefore, recommended that the order of the Tehsildar Magistrate granting a maintenance of Rs. 30/- per month in favour of the non-applicant be vacated but relying on 'In re Shekhanmian Jehangirmian' AIR 1930 Bom 178 (A) he has arrived at the conclusion that the non-applicant was entitled to claim maintenance allowance of Rs. 70/-in all for the period of her that

3. Before examining the question under reference on its merits, I feel no hesitation in recording my strong disapproval of the manner in which the Tehsildar Magistrate has written his judgment. However learned the Tehsildar Magistrate may be in theology, he should have known that he was acting as a Judicial Officer, and it was not for him as such Officer to give his own interpretations of the verses of the holy Quran. Times without number the highest Judicial Courts in India including the Privy Council have sounded a note of warning against entertaining new and novel interpretations of the texts of the Quran and Hadis by persons who are not recognized as competent to give such interpretations. So far as these are concerned, we have to rely on the interpretation of only such commentators of yore (Muffasirs and Muhaddises) whose authority is acknowledged throughout the Muslim world.

Not only has the Magistrate given interpretations of the texts of the holy Quran and of Hadis which render nugatory the well-established rules of FIQA, as evolved by the Faqihs (Doctors of Muslim Law) and accepted by the Judicial Courts in India, but he has made disrespectful references to non-Muslim Judges who in the course of their duty have to interpret Mohammadan Law in conformity with the sources of that Law and also to some distinguished text book writers, such as the late Sir Dinshah Fardunji Mulla, whose erudition and lucidity in expression none can gainsay, and to the late Sir Syed Ameer All, a profound scholar and eminent Judge of the Calcutta High Court and later a member of His Majesty's Privy Council who has earned a unique place in the legal and Islamic world by his masterly treatises on Mohammadan Law and the Law of Evidence and by his meritorious services to the cause of Islam. The explanation that the Magistrate has submitted on the requisition of the Additional Sessions Judge is still worse and deserves the severest condemnation. In this explanation, he has made many undesirable references to the administration of Muslim Law by non-Muslim Judges and has cast reflection on non-Muslim Advocates and I do not think any useful purpose will be served by repeating any of these uncalled for references here.

4. Now coming to the merits of the case the Tehsildar Magistrate has entirely forgotten that the Muslim Law, as administered by the Judicial Courts in India, is based not only on "Holy Quran (the word of God), "Sunna" (the sayings and doings of the Prophet) but also on "Ijma-ul-Ummat", i.e., consensus of opinion of the companions and disciples of the Prophet and "Qiyas"; that is to say,

analogical deductions derived from a compari- son of Quran, Sunna and Ijma by those capable of forming judgment in "matters in relation to which the above three sources do not offer a clear and direct guidance. Under this heading, in my humble view, would come the different rules of Fiqa which have been elaborated by four great Jurists of Surmis, namely Imam Abu Hanifa along with his two distinguished disciples, Imam Muhammad and Abu Yusuf, Imam Shafei, Imam Hanbal and Imam Malik and the Imams and Mujtahids of Shias, Muatazilas and of other sects of Islam.

Now according to Hanafia, the principal Subdivision of Sunnia almost all Sunnis of this sub continent are Hanafies except a small Shafei minority of Bombay two kinds of Talak are recognized by the Muslim Law, Talak-us-Sunnat and Talak~ul-bidat. Talak-us-Sunnat is again in two forms, namely "Ahsan" (the best) and "Hasan" (the next best). In the Ahsan form the formula of Talak is expressed only once by the husband when the wife is in 'Tuhar', i.e. in a state of purity and this Talak, unless the husband resumes conjugal relationship, becomes irrevocable after three Tuhara which is equivalent to the period of Iddat. 'Hasan is also a variation of the same form. In this the husband pronounces the formula during each of the three successive Tuhars. When the third Talak is pronounced it becomes irrevocable. In Talak-ul-bidat which is only recognized by Hanafls and not by Shias the husband may pronounce the three formulas at one time whether the wife is in a state of purity or not and this Talak becomes effective and irrevocable the moment it is given. Even the pronouncement of the formula of Talak thrice is not necessary, if the intention to make the Talak effective and irrevocable at once is apparent. Reference in this connection may be made to Ameer Ali's Mohammadan Law, Vol. II (1929 Edition), pages 474-475 and Faiz Badruddin Tyabji's Mohant-madan Law. sections 134 to 142 (1940 Edition.;.

There is no doubt that the Prophet was exceedingly averse to do this form of Talak and it is considered to be the most disapproved form of Talak but nonetheless, though bad in theology, it is good in law so far as Hanafi School of Smmi Muslims is concerned. It is also correct, as pointed out in the judgment of the Tehsildar Magistrate, that the Prophet desired to put a great check on the capricious and irregular exercise of the power of divorce in the hands of husbands. He was pleased to pronounce:

Talak to be the most detestable before God of all permitted things, as it prevented conjugal happiness and interfered with the proper bringing up of children.

Under these circumstances, as pointed out in Ameer Ali's Mohammadan Law referred to above, great divergence exists among the various schools regarding the exercise of the power or divorce by the husband on his own motion and without the intervention of a Judge.

It is also true, as stated by the Tehsildar Magistrate in his judgment, that it is highly desirable that the differences between the husband and the wife when their relations become strained, should be referred to two arbiters, one from the family (A the husband and the other from the family of the wife, and they should do their utmost to bring about reconciliation between the parties. But I might as well point out that the verse in the Holy Quran giving this direction does not figure in the sections relating to Talak (divorce) in Sura Baqar (Chapter II, Sections 28 to 81 both inclusive) but is contained in Sura Nisa (Chapter IV, Section 6) which relates to the desertion by wife and it appears

that according to Hanafis it is only a counsel of perfection. Be as it may, Hanafi School recognizes Talak-ul-bidat and in view of its being least onerous for the husbands, it is the most prevalent form obtaining in India, Any change in this respect cannot be brought about by the Judicial interpretation. If there is a general desire among the Muslims to "revert to the pristine purity of Islam" how such changes in the present state of Muslim Law can be brought out, in the words of late Sir Syed Ameer Ali "whether by a general Synod of Muslim doctors or by the direct action of the legislature it is impossible to say."

5. So far as the facts of this case are concerned, it is clear that Talak in bidat form has been pronounced by the husband in the presence of two attesting witnesses on 12th Katik 2009 and it was sent to the wife under a registered cover addressed to her, though she refused to take delivery of it. The fact that she had been divorced came to the knowledge of the non-applicant before she put in her application Under Section 488, Cr, P. C. So far as the contents of the document, Ex. D-l, are concerned, in my view these amount to the irrevocable form of Talak-ul-bidat. It is clearly stated in Ex. D. 1 that all rights of the applicant as the husband have ceased to exist, and the non-applicant can take another husband and that the non-applicant has become 'haram' to the applicant. This document denotes that the Talak expressed therein is given as talak-ul-bidat in bian form and is, therefore, irrevocable and operates from the moment of the execution of the deed of talak. It is, therefore, crystal clear that on the date when the non-applicant put in her application Under Section 488, Cr.PC she was no longer the wife of the applicant and she was not competent to file an application Under Section 488, Cr.PC demanding maintenance from a person who was no longer her husband. As stated in Chitaley's Code of Criminal Procedure (1950 Edition) a valid divorce of the wife by the husband, where it is sanctioned by personal law, puts an end to the marital relation and the status of husband and wife and no order for maintenance can be made subsequent to the date of such divorce. The wife is not entitled to maintenance after she comes to know that she has been divorced (vide 'Abdul Khader v. Azeeza Bee' AIR 1944 Mad 227 (B)).

6. The question, however, remains whether the non-applicant can claim maintenance Under Section 488, Cr.PC for the period of Iddat. AIR 1930 Bom 178 (A) no doubt supports the view that maintenance can be given during Iddat. In Ameer Ali's Mohammadan Law (1929 Edition) also, it has been stated that the separation in the case of Talak-ul-bidat takes effect definitely after the woman has fulfilled her Iddat or period of probation. Till then according to the observations made by the late Sir Syed Ameer Ali the power of recantation in the husband is not lost and till this power continues, the Talak is simply "rajai" or revocable. With great respect to the late Sir Syed Ameer Ali and the view expressed in AIR 1930 Bom 178 (A) I am clearly of the opinion that Talak-ul-bidat comes into operation at once and is irrevocable right from the moment of its pronouncement or of the execution of the deed if the Talak is in writing. My reason for tliis view is that if this Talak were revocable or rajai till the end of Iddat there would be hardly any difference between this Talak and Talak-us-Sunnat which can be pronounced in either Ahsan or Hasan form.

The chief distinguishing feature of Talak-us-Sunnat is that it does not come into operation at once, it gives the husband time to reflect and revoke, if he has done something in hot haste, so that he may not have to repent at leisure. In order to penalise the husband, who does not conform to the Ahsan or Hasan form of Talak-us-Sunnat, for his arbitrary and irregular exercise of the power of divorce, it

is laid down by the Doctors of Hanafi Law that this Talak must be deemed as "bian" or irrevocable so that the wife may be released at once and the husband may no longer enjoy the option of resuming marital relationship. A reference may in this connection be made to Section 142 and to the concluding portion of notes under this section at pages 218 and 221 jf Faiz Badruddin Tyabji's Mohammadan Law (1940 Edition).,, Section 142 referred to above says that by the fourth mode of Talak known as Talak-i-bian the marriage is immediately and irrevocably dissolved. Section 312(3) of Mulla's Mohammadan Law (1950 Edition) is also to the same effect. It reads: "A talak in the badai mode (S. 311(3) becomes irrevocable immediately it is pronounced, irrespective of the iddat (b). As the talak becomes irrevocable at once, it is called talak-i-bain, that is, irrevocable talak."

The different modes of Talak are also very lucidly discussed by their Lordships of the Privy Council in 'Rashid Ahmad v. Mt, Anisa Khatun' AIR 1932 PC 25 (C) and it would be quite apposite to quote the following passage from it here:

There is nothing in the case to suggest that the parties are not Sunni Mohammadans governed by the ordinary Hanafi Law, and, in the opinion of their Lordships, the Law of Divorce applicable in such a case is correctly stated by Sir R. K. Wilson, in his Digest of Anglo-Muhammadan Law (5th Edition) at page 136, as follows :

The divorce called talak may be either irrevocable (bain) or revocable (raja). A talak bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced, A talak bain may be effected by words addressed to the wife; clearly indicating an intention to dissolve the marriage, either:

(a) Once, followed by abstinence from sexual intercourse, for the period called iddat; or

(b) Three times during successive intervals of purity, i.e. between successive menstruations no intercourse taking place during any of the three? intervals; or

(c) Three times at shorter intervals, or even in immediate succession; or

(d) Once, by words showing a clear intention that the divorce shall immediately become irrevocable.

The first named of the above methods is called ahsan (best), the second hasan (good), the third and fourth are said to be biddat (sinful) but are, nevertheless, regarded by Sunni Lawyers as legally valid.

In the present case the words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyasuddin as follows: 'I divorce Anisa Khatun for ever and render her haram for me', which clearly showed an intention to dissolve the marriage. There can be no doubt that the method adopted was the fourth above described, and this is confirmed by the deed of divorce, which states the three divorces were given 'in the abominable form', i.e., biddat. The learned Judges of the High Court have erred in treating the divorce as in the ahsan farm, instead of the biddat form.

The talak was addressed to the wife by name, and the case is not affected by the decision of the High Court of Calcutta in 'Farzund Hus-sain v. Jann Bibee', 4 Cal 588 (D) where tha words of divorce were alone pronounced. In the biddat 'form the divorce at once becomes irrevocable, irrespective of the iddat ' (Bailie's Digest, 2nd Edition, page 206). It is not necessary that the wife should be present when the talak is pronounced 'Ma Me v. Kallander Animal' AIR 1927 PC 15 (E); 'Ful Chand v. Nawab AH', 30 Cal 184 (F); 'Asha Bibi v. Kadir Ibrahim Rowther', 33 Mad 22 (G), though her right to alimony may continue until she is informed of the divorce.

Under these circumstances, the application Under Section 488, Cr.PC in this case, was not competent at the time it was made by the non-applicant as she was no longer the wife of the applicant. It may be clearly understood, however, that I am not expressing any opinion on the question whether the non-applicant in such circumstances cannot claim maintenance for the period of Iddat in a civil suit to be instituted by her strictly in accordance with the principles of Muslim Law. But this question cannot be entertained in an application filed Under Section 488, Cr.PC when the non-applicant is no more the wife of the applicant. 'Mahomed Nagman v. Zullekhan' AIR 1939 Sind 179 (H) may be referred to in this context. I may also add that the minor children of the applicant can certainly seek maintenance from their father Under Section 488, Cr.PC but for this an application shall have to be made by them or by their mother in the proper form. In this application the non-applicant has not prayed for grant of any allowance for them. With these observations this reference is accepted in so far as the order of the Tehsildar Magistrate is set aside in its entirety.

Wazir, C.J.

7. I agree that the reference should be accepted and the order of the trial Magistrate which is erroneous should be vacated. In the circumstances of the case no maintenance is allowed even for the period of Iddat.