Gauhati High Court
Zeenat Fatema Rashid vs Md. Iqbal Anwar on 5 May, 1993
Equivalent citations: II (1993) DMC 49
Author: Manisana
Bench: Manisana, S Roy
JUDGMENT Manisana, J.

1. This revision petition arises from an order of the Principal Judge of the Family Court at Gauhati made on 7-8-92 in Case No. FC(Cril) No. 111/92/74-M/90.

2. Facts, -- The case of the petitioner, in brief, is thus. The petitioner Zeenat Fatema Rashid married Md. Iqbal Anwar, on 2-12-87, according to Muslim rites. After the marriage they lived as husband and wife at husband's residence. She had borne him a son on 3-11-1989. After that she was ill-treated by her husband and her in-law. She, therefore, instituted a criminal case on 13-8-1990 being case No. 87 of 1990. Finding no other alternative, she had to leave her husband's house and had to file a criminal case for getting back her properties and those properties were recovered on 31-8-1990. She also filed a case under Section 125, Cr. P.C., against her husband on 29-8-1990 claiming maintenance for herself and her minor child. Md. Iqbal Anwar (the respondent contested the case by filing written statement. His main defence is that he had divorced his wife, the petitioner herein, on 31-8-1990.

3. The Family Court has held that there had been a divorce duly effected and, therefore, claim for maintenance would be determined under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. With regard to maintenance of child, the Family Court has directed that interim maintenance granted would continue pending final disposal of the case. Hence this petition.

4. The question which arises for consideration is whether there had been a divorce duly effected. Under the Mohammedan Law, divorce by talak may be effected either orally (by spoken words) or by a written document called a talaknama. No particular form of words is prescribed for effecting a talak, but the words of divorce must indicate an intention to dissolve the marriage (see Mulla's Principles of Mohammedan Law).

5. Mr. Phukan, the learned Counsel for the petitioner, has contended that a Mohammedan husband cannot divorce his wife at his whim and caprice. The next question which therefore, arises for consideration is whether a Mohammedan husband can divorce his wife at his whim and caprice. In Sarabai v. Rabiabat, ILR 30 Bom. 537, it has been held that there may not be a particular cause for divorce, and mere when is sufficient, it is good in law, though had in theology. In Asha Bibi v. Kadir Ibrahim, ILR 33 Mad. 22, it has been held that, although an arbitrary or unreasonable exercise of divorce of marriage is strongly condemned in the Quran and is treated as spiritual offence, it does not affect the legal validity of a divorce duly effected by husband. In Ahmed Kasim Molla v. Khatun Bibi, ILR 59 Cal. 833, the Calcutta High Court has held that any Mohammedan husband may divorce his wife at his mere whim and caprice. However, a Singles Judge of this Court has, in Jiauddin Ahmed v. Anwara Begum, (1981) 1 OLR 358, held that divorce must be for a reasonable cause, and that must be preceded by an attempt at reconciliation between the husband and wife by

two arbiters one chosen by the wife from her family and the other by the husband from his side. Learned Single Judge, after considering the cases cited above, the observations of some of the High Courts, the mandates of the Quran, and the treaties on Mohammedan Law of various authors and scholars, came to the above conclusion. This decision of the learned Single Judge was approved by a Division Bench of this Court in Rukia v. Abdul Khalique, (1981) 1 GLR 375.

6. Mr. Barua, learned Counsel for the respondent, has submitted that in view of the earlier decisions of other High Courts that a Mohammedan husband may divorce his wife at his whim and caprice, the decisions of this Court are required to be reviewed for the settled position of law prevailing for a considerable long period, that is to say, long standing legal position, should not be disturbed. Mr. Barua has further submitted that the matter may be referred to a larger Bench.

7. We are not inclined to accept the submission made by Mr. Barua. We approach the matter as follows. Under the Quran, the marriage state is to be maintained as far as possible and there should be conciliation before divorce (See note 254 of Vol. 1 of Holy Quran by A Yusuf Ali). Therefore, the Quran discourages divorce and it permits only in extreme cases after pre-divorce conference. Therefore, a Mohammedan husband cannot divorce his wife at his whim and caprice. The question then is,--Whether, if divorce by talak is made arbitrarily, is should be treated as spiritual offence only ? Under the Mohammedan Law, marriage though regarded as a civil contract between a man and a woman, they become husband and wife after solemnization of the marriage and their respective rights and obligations are regulated by the rules under relevant law. This being the position, marriage is the basis for social organisation and foundation of legal rights and obligations. The modern concept of divorce is also that the matrimonial status should be maintained as far as possible. Under Section 7 of the Family Courts Act, 1984, cases relating to matrimonial status of any person are within the jurisdiction of the Family Court. The Family Court aims at reconciliation and pursuation of parties to arrive at a settlement. For these reasons, if a Mohammedan husband divorces his wife at his whim and caprice, it would not only be a spiritual offence but it would also affect the divorce. In the above view of the matter, a Mohammedan husband cannot divorce his wife at his whim or caprice, that is, divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement. Therefore, we are in agreement with the decision of this Court, and we respectfully are unable to agree with the view taken by the other High Courts that divorce can be made at whim and caprice of the husband. The decisions of this Court were made by the Single Judge in the year 1978 and by the Division Bench in the year 1979, before 14/15 years ago. Therefore, the question of unsettling the settled position of las does not arise.

8. The next question which arises for consideration is whether divorce by talak has been proved. The case of the husband is that he had divorced his wife by a written document in presence of the witnesses and he handed over talaknama to his wife. Thereafter, a photostate copy of the talaknama was made over to Sadar Kazi of Gauhati for registration of the divorce. A photostat copy of talaknama has been filed. It is settled that a photostat copy of a document is admissible as secondary evidence, if it is proved to be genuine (see Ashok Dulichand v. Madhavlal Dube, AIR 1975 SC 1748). In the present case, the foundation for admission of the photostat copy as secondary evidence has not been laid. No attested copy of the entry of registration of divorce has been produced. Therefore, the husband has failed to prove alleged talaknama. However, in the evidence of the husband, he has

stated that he also made pronouncement of the word "talak" three times. There is no evidence or material to corroborate that talak was effected orally. That apart, the written statement indicates that the case is solely based on talaknama. Under the circumstances, it is held that the talak pleaded has not been proved. Further, we have concluded that the divorce must be for reasonable cause and it must be preceded by pre-divorce conference to arrive at a settlement. There is no evidence that there was a pre-divorce conference. In that view of the matters, the husband has failed to prove the alleged divorce by talak.

9. Mr. P.K. Barua, learned Counsel for the respondent, has contended that, even if talak pleaded as not proved, the husband has stated that she had divorced not only in his written statement; but also in his deposition and therefore, the divorce would be deemed to have been effected from the date of filing of the written statement or from the date of statement on oath. The learned Counsel has, in order to support his contention, relied on the decisions reported as Asmat Ullah v. Mst. Khatun Unnisa, AIR 1939 All 592; Wahab Ali v. Qamro Bi, AIR 1951 Hyd. 117, Chand Bi v. Bandesha, AIR 1961 Bom. 121; Abdul Shakoor v. Kulsum, 1962(1) CrLJ 247; and Mohammad Ali v. Fareedunnisa, AIR 1970 AP 199.

10. In the above cited cases, wife made claim for maintenance under Section 488(old): 125(new), Cr. P. C. In those cases, it has been held that where in a proceeding started under Section 488(old) : 125 (new), Cr.P.C. by a Mohammedan wife against her husband for her maintenance, the husband states in the written statement that he had already divorced his wife and the Court comes to the conclusion that divorce pleaded is not proved, then such a statement in the written statement itself operates as an expression or declaration of divorce by talak, and the divorce would be held to take effect at least from the date on which the written statement was filed by the husband. The reason for the decision is that the statement made by the husband orally in his deposition or in his written statement that he had divorced his wife is an acknowledgement of talak alleged to have effected by him already and, therefore, the divorce would be held to have effect at least from the date upon which the acknowledgement in made.

11. We respectfully submit that we are unable to agree with the decisions in the above-referred cases for the following reasons. Written statement is a pleading. Pleading is one thing and proof is another. Pleading is formal allegations by the parties of their respective claims and defences to provide notice of what is to be expected at trial. Proof is establishment of a fact by evidence or matters before the Court or legal Tribunal. Where the parties are in dispute as regards a material fact, in averment in the pleading does not constitute evidence, as what is stated in the pleading is recital of past event which is required to be proved. Under the Evidence Act, if a material fact pleaded is not proved, it follows that the Court considers or believes that the fact does not exist. Therefore, averment in the pleading cannot be used in favour of the maker. This being the position, statement made by the husband in his pleading or deposition that he has divorced his wife is recital of past event, and, if talak pleaded is not proved such statement shall be of no consequence. In that view of matter, if statement made by the husband that he had divorced his wife in his pleading or deposition is considered as an acknowledgement of divorce by talak, it will be against the policy of law, and it would also amount to furnishing or providing evidence of talak, which is against the rule of pleading and proof. That apart, in view of our conclusion above that divorce must be for a

reasonable cause and it must be preceded by a pre-divorce conference, if the statement made orally in evidence or in the written statement that the husband his divorced his wife in a proceeding under Section 125 Cr. P.C. will be a valid talak from the date of making statement cannot be sustained as it would be contrary of our conclusion. For the reasons stated above, the contention of Mr. Barua is rejected.

12. In the result, the order of the Family Court made on 7-8-1992 in Case No. FC (Cril) 111/92/74-M/90 in so far as findings with regard to divorce is set aside. The matter is sent back for disposal afresh in accordance with law.

14. The revision petition is allowed.