Delhi High Court
Munavvar-Ul-Islam vs Rishu Arora @ Rukhsar on 9 May, 2014
Author: Najmi Waziri

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of Decision: May 09, 2014

\+ MAT. APP. (FC) NO.34/2013, CM APPL.14330/2013

MUNAVVAR-UL-ISLAM ..... Appellant
Through: Sh.Suman Kapoor, Sh. Osama Suhail and Sh. Samama Suhail, Advocates.

Versus

RISHU ARORA @ RUKHSAR ..... Respondent

Through: Sh.Sanjay Dewan, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT HON'BLE MR. JUSTICE NAJMI WAZIRI % MR. NAJMI WAZIRI

1. The appellant is aggrieved by the judgement and decree of 26 th July, 2013 of the Family Court, Saket, New Delhi ("Trial Court") whereby his marriage with the respondent - contracted as per Muslim personal law - was decreed to have been dissolved due to the latter's subsequent apostasy ("impugned order"). The respondent had sought for divorce under sections 2(ii), 2(viii)(a) and 2(ix) of the Dissolution of Muslim Marriage Act, 1939 ("Act").

2. In the divorce petition ("Petition"), while the respondent-wife had also alleged cruelty and neglect by the appellant, she admitted to having become apostate, having reconverted to her original faith, Hinduism, on 4th March, 2012. She contended that inasmuch as she had apostatized, the marriage stood ipso facto dissolved under Muslim personal law. In his reply to the petition, the appellant gave his own version of the facts and opposed/denied inter alia the factum of the respondent's conversion to Hinduism.

3. Before entering upon a discussion of what the Trial Court concluded on the issues, a few further facts need to be traversed. It is the case of the appellant that pursuant to a college-time romance between the parties, they married each other according to Islamic rites. Prior to contracting the nikah on 15th July, 2010, the respondent had embraced Islam, having renounced Hinduism, admittedly her former religion. She even changed her name from Rishu Arora to Rukhsar.

4. After the marriage, the respondent filed a suit, being CS No. 132 of 2010 before the Senior Civil Judge, New Delhi. She sought a declaration of validity and subsistence of the marriage, allegedly in the apprehension that the appellant / his family may not accept her. The suit was disposed off as the parties appeared before the learned Judge and gave statements as to the validity and subsistence of the marriage. The appellant had relied upon the statement made in these proceedings to contend

that the respondent is estopped from denying the existence of the marriage. However, given that there is no estoppel against the law, this contention would be of no relevance in the present matter, as will be discussed further in this Judgment.

5. It was contended that a short while thereafter, differences arose between the parties and they started living separately; the respondent returned to her parents' home. Thereafter, the respondent filed a complaint under the Prevention of Domestic Violence Against Women Act, 2005 as well as a petition seeking maintenance under section 125 of the Code of Criminal Procedure, 1973. However, both the cases were subsequently withdrawn by her. The withdrawals were sought to be explained as being the result of different legal advice given to her upon change of counsel, that since she had apostatized, neither the marriage nor any right to claim maintenance subsisted. It was in these circumstances that the Petition came to be filed.

6. She contended that whereas the issue of dissolution of the marriage on the grounds of cruelty and neglect required detailed trial, the issue of dissolution on the ground of apostasy did not. She argued that for the latter issue, no evidence is required to be led, as her mere statement ipso facto amounts to abjuration of Islam and its tenets. She filed an affidavit admitting to her apostasy. She also filed two fatwas1 from two muftis2 that the abjuration of Islam would ipso facto dissolve the marriage. A decree to this effect was, ergo, sought by an application under Order XII rule 6 of the Code ("Code").

7. The appellant opposed the application under Order XII rule 6. He argued that apostasy would need to be proved through trial in a court of law and refuted the contention that apostasy ipso facto dissolves a marriage contracted under Muslim law. He contended that therefore, at 1 An advisory decision based on the Shariat school of Islamic jurisprudence by a mufti (jurisconsult), Masroor Ahmad v State (NCT of Delhi) & Anr., ILR (2007) 2 Del 1329 at para. 15, p. 1349. 2 A mufti is a specialist on law who can give an authoritative opinion on points of doctrine; his considered legal opinion is called a fatwa. Joseph Schacht, An Introduction to Islamic Law, (Clarendon Press, Oxford, 1982), p.73, cited with approval in Masroor Ahmad v State (NCT of Delhi) & Anr., supra.

the initial stage of the proceedings, a decree of divorce, as sought in the application under Order XII rule 6 of the Code, could not be granted.

8. The impugned order, which was passed in the aforesaid circumstances, observes that the appellant's admission of the reconversion is, doubtless, not explicit. It however, proceeds to observe that the lack of an explicit admission does not necessarily mean that the implicit admission suffers from ambiguity, requiring a trial to explain the same. It observes that the first substantive defence raised by the appellant in his reply to the Petition was that the Petition was filed contrary to the terms of section 4 of the Act, with especial emphasis on the proviso. It observed that this is an unambiguous admission as to the factum of reconversion.

9. The impugned order then proceeded to consider whether the reconversion would indeed ipso facto dissolve the marriage. It observed that the fatwas filed by the respondent indicates that contemporary experts / scholars of Muslim personal law are of the opinion that abjuration of Islam ipso facto dissolves the marital relationship and even a decree of divorce would not be necessary. It

referred to a judgement of this Court in Rajini Murthi v Murshid Abdullah Mohd.,3 and of the Lahore High Court in Mussammat Resham Bibi v Khuda Bakhsh,4 and to a translation of Ayat 10 of the Holy Quran, to come to the conclusion that the respondent, who has 3 1994 III AD 299.

4 (1938) 19 Lah 277 : AIR 1938 Lah 482.

reconverted to Hinduism from Islam is entitled to a decree of dissolution of the marriage. It thus proceeded to grant a decree of divorce, aggrieved whereby, the appellant has approached this Court.

10.After hearing only the appellant's counsel, this Court reserved the matter for judgement. Learned Counsel for the appellant strenuously contended that the impugned order is invalid and contrary to the express provisions of both Muslim personal law as well as the Act. He contended that the Act makes it amply clear that the abjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslim personal law.

11.This Court finds itself unable to agree with this contention. Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law, nor could it be said that the Act makes any change to this general law. There is sufficient authoritative literature in this regard by the various scholars of Muslim personal law to obviate the need to take recourse to the various theological sources.

12.As early as 1870, Mr. Charles Hamilton, in his translation of Hedaya observes:

> "In a case of apostacy separation takes place without divorce.- If either husband or wife apostatize from the faith, a separation takes place without divorce, according to Haneefa and Aboo Yoosaf. Mohammed alleges that if the apostacy be on the part of the husband, the separation is a divorce... Haneefa makes a distinction between refusal of the faith and apostacy from it ; and his reason for this distinction is that apostacy annuls marriage, because the blood of an apostate no longer remains under the protection of the law...now divorce is used for the purpose of dissolving a marriage which actually exists ; and hence apostacy cannot possibly be considered as divorce : contrary to the case of refusal of the faith, because it is on account of the ends of matrimony being thereby defeated that separation is enjoined, in that instance, as has been already said ; and for this reason it is that the separation is there suspended upon a decree of the magistrate, whereas in apostacy it takes place without any such decree..."5 (Emphasis supplied)

13.Shortly thereafter, in 1875, Mr. Neil Baillie observes in his Digest as under:

> "Apostasy from Islam by one of a married pair is a cancellation of their marriage, which takes effect immediately without requiring the decree of a judge ; and without being a repudiation, whether the occurrence is before or after consummation... If they apostatize together, and then together reembrace the faith, the marriage remains valid on a favourable construction ; but if only one of them returns to the

> faith a separation takes place between them. If it is not known which of them was first in apostatizing, the result is the same as if they apostatized together..."6 (Emphasis supplied) "If one of two spouses should apostatize from the Mussulman faith before connubial intercourse has taken place, their marriage is cancelled on the instant, and the wife has no right to dower if the apostasy be on her side ; but if it is on the side of the husband she is entitled to half the dower. If the 5 Charles Hamilton, Hedaya or Guide: A Commentary on the Mussulman Laws, (Second Edition, edited by Stanish Grove Grady, Volume 1, William H. Allen & Co., London, 1870), at p. 66.

6 Neil BE Baillie, A Digest of Moohummudan Law, (Second Edition, Part First, Smith, Elder, & Co, London, 1875) pp. 182-183 apostasy does not take place till after connubial intercourse, the cancellation of the marriage is suspended till the expiration of the iddut, whether the husband or the wife be the apostate, and no part of the dower abates, because the right to it has been fully established by consummation. There is an exception, however, if the husband were born in the faith, for in that case, the marriage is cancelled immediately, though it should have been followed by connubial intercourse, because a return to the faith is not allowed."7

14.Thereafter, in 1880, Mr. Syed Ameer Ali observed in his book:

> "Under the Mahommedan law, if a Moslem husband or a Moslem wife apostatise from Islâm, the apostasy has the effect of dissolving the marriage-tie between the parties. The Native Converts' Marriage Act has made a variation in this rule of Mahommedan law. Under the provisions of this Act, if the husband apostatise, he can still demand that his wife should maintain conjugal relations with him, and in case of her refusal he case sue for a divorce from her.
>
> If the wife should elect to live with him after his apostasy from Islâm, the rule of the Mussulman law would have no effect, and the marriage would under the Act remain valid, though its legal effects will be regulated by principles other than those of the Islâmic law. Should the wife, however, refuse to cohabit with the apostate husband, the Mahommedan law, as well as the provisions of the Act, would set aside the marriage."8 (Emphasis supplied)

15.Relying on Mr. Hamilton's observations, Sir D. F. Mulla, in 1905, observed that apostasy from the Mahomedan religion of either party to a marriage operates as a complete and immediate dissolution of the 7 Op. cit., Part Second, pp. 29-30.

8 Syed Ameer Ali, The Personal Law of the Mahommedans, (William H. Allen & Co., London, 1880), p. 276:

> marriage9 - an opinion that was echoed by him till 1933, when he last revised the book himself, and indeed, till 193810 by Sir George Rankin, who edited the same. Shortly thereafter in 1907, Mr. Abdur Rahman relied on both Mr. Hamilton's work and Mr. Baillie's work to conclude that if either the husband or the wife should

apostatize, both of them being Muslims, the marriage is immediately dissolved and separation must take place. In this case there is no need for a judicial decree.11

16.Further, prior to the enactment of the Act, the Courts in India have followed this view regularly and without exception.12 This pre- enactment state of affairs that apostasy ipso facto dissolved a marriage contracted under Muslim personal law is recognised by the jurists in their authoritative legal treatises even in editions subsequent to the Act.13 The issue as to whether an act of apostasy prior to the passing of the statute operated to dissolve the marriage ipso facto also arose before the Courts. The Lahore High Court answered the issue in the affirmative in three different matters.14 In one judgement, DIN MOHAMMED J. of the Lahore High Court does answer the issue in the 9 Sir Dinshah Fardunji Mulla, Principles of Mahomedan Law, (Thacker & Company, Bombay, 1905), § 203 at p.

170. 10 Sir Dinshah Fardunji Mulla, Principles of Mahomedan Law, (Eleventh edition, edited by Sir George Rankin, Eastern Law House, Calcutta, 1938), § 237 at p. 239. 11 Nawab AFM Abdur Rahman, Institutes of Mussalman Law, (Thacker, Spink & Co., Calcutta, 1907), Art. 303 at p. 172.

12 Amin Beg v Saman, (1911) 33 All 90; Mt. Sardaran v Allah Baksh, AIR 1934 Lah 976; Sardar Mohammad v Mt. Maryam Bibi, AIR 1936 Lah 666; Iqbal Ali v Halima Begum, (1939) ILR All 296; Resham Bibi v Khuda Bakhsh, AIR 1938 Lah 482.

13 Sir Dinshah Fardunji Mulla, Principles of Mahomedan Law, (Twentieth Edition, edited by Prof. Iqbal Ali Khan, LexisNexis Butterworths Wadhwa, Nagpur, 2013), § 321, para. (2), at pp. 403-404; Faiz Badruddin Tyabji, Muslim Law, (Fourth Edition, edited by Mr. Muhsin Tayyibji, NM Tripathi Pvt. Ltd., 1968) at § 200, p. 190; Asaf AA Fyzee, Outlines of Muhammadan Law (Fifth Edition, edited by Tahir Mahmood, Oxford University Press, 2013) at p. 138-139.

14 Mt. Mariam v Fazal Karim, AIR 1940 Lah 448; Mt. Rashid Bibi v Tufail Muhammad, AIR 1941 Lah 291; Mt. Rabian Bibi v Ghulam Ali, AIR 1941 Lah 292.

negative;15 however, this view was not accepted by BECKETT J.,16 in his subsequent judgement, who agreed with the other judgements by MONROE J.

17.A Division Bench of the Andhra Pradesh High Court was faced with the issue, where both DIN MOHAMMED J's as well as BECKETT J's judgements were respectively relied upon by either parties. SATYANARAYANA RAJU J. (as he then was), who spoke for the Bench, agreed with the reasoning of BECKETT J. and held that an act of apostasy prior to the passing of the statute indeed operated to dissolve the marriage ipso facto.

18.While doubtless the jurists are divided on whether the factum of apostasy dissolves the marriage or renders it invalid or void or null, there is certainly unanimity amongst both the jurists as well as the judgements of the Courts, that apostasy of either party to a marriage contracted under Muslim personal law shall put an end to the marriage. Thus the question arises as to whether the Act, more specifically, section 4 thereof, alters this state of law.

As to section 4 of the Act

19.It would be useful to set out the provisions of section 4 of the Act:

15 Mt. Fazal Begum v Hakim Ali, AIR 1941 Lah 22.

16 Mt. Rabian Bibi v Ghulam Ali, AIR 1941 Lah 292.

4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

20.The contention of the appellant before this Court is that even assuming the pre-existing rule of Muslim personal law was that apostasy ipso facto dissolves the marriage, the law has been altered by section 4 of the Act, inasmuch as it provides that a Muslim woman's conversion to another faith does not by itself operate to dissolve her marriage. Hence, he argues, the pre-existing law has been overridden by the Act and cannot be applied in India any longer. The argument, though attractive at first blush, proceeds on an incorrect construction of section 4. The contention of the appellant, in effect, is that the Act is declaratory in nature or, in any case, amends the pre-existing Muslim law. As a logical sequitur, it is contended, a Muslim marriage could be brought to an end by a woman only under the provisions of the Act and the pre- existing rules of Muslim personal law qua a woman's right to divorce would need to be ignored.

21.That a woman married under Muslim personal laws could seek a divorce only under the Act was confirmed by Kerala High Court.17 As to the contention that the Act is declaratory or that it ought to be 17 KC Moyin v Nafeesa & Ors., AIR 1973 Ker 176.

considered sans reference to Muslim personal law there are a few judicial pronouncements,18 although the Courts are divided on this issue.19 However, it would be incorrect to regard these pronouncements as supporting the case of the appellant. These judgements were rendered in the context of their own facts and the issues under consideration therein. Since the cases were concerned specifically with various grounds under section 2 of the Act, they cannot be considered as authoritative pronouncements on the scope and ambit of section 4 of the Act. As far as this Court could ascertain, there has been no pronouncement directly dealing with the issue presently before this Court: - whether section 4 has altered the rule of Muslim personal law that apostasy dissolves a marriage.

22.The rule of law as to interpretation of statutes is well established:

> where the words of the statute are plain and unambiguous, there is no justification for attempting to look at the legislative intent or providing a different meaning than the plain meaning of which the words would admit.20 However, this is not to say that the Court ought to hold the statute in one hand and a dictionary in the other and merely apply to every word the meaning given in the dictionary. The Court would be required to construe the words used in the statute, ascertain the plain meaning of the statute, and assure itself of the fact that the plain meaning is the only meaning possible, before giving effect to the same.

18 Mian Said Ahmad Jan v Mt. Sultan Bibi, AIR 1943 Pesh 73; Mt. Zainaba v Abdul Rahman, AIR 1945 Pesh 51; Robasa Khanum v Khodadad Bomanji Irani, AIR 1947 Bom 272; Kalloo v Mt. Imaman, AIR 1949 All 445; Mt. Noor Bibi v Pir Bux, AIR 1950 Sind 8; A. Yousuf Rawther v Sowramma, AIR 1971 Ker 261. 19 Muhammad Baksh v The Crown through Khuda Baksh & Ors., AIR 1950 Lah 133; Jamila Khatun v Kasim Ali Abbas Ali, AIR 1951 Nag 375; Tufail Ahmad v Jamila Khatun, AIR 1962 All 570. 20 Harbhajan Singh v Press Council of India & Ors., (2002) 3 SCC 722.

23.Section 4 of the Act, specifies that the renunciation or conversion of a married Muslim woman does not by itself operate to dissolve the marriage. To this Court's mind, the plain meaning of this provision would be to the effect that even if prior to the passing of the Act, apostasy would have operated to dissolve the marriage ipso facto (as seen from the authorities given hereinabove), subsequent to the coming into force of section 4, the marriage is not ipso facto dissolved. However, to read section 4 as meaning that the renunciation or conversion does not per se operate to dissolve the marriage would be incorrect, inasmuch as it would render the words "by itself" as appearing in the provision otiose.

24.Superfluity cannot be imputed to the words of a statute. They have to be assigned a meaning. It would be inappropriate for the Court to lightly assume that words used in a statute are mere surplusage to be ignored. In the circumstances, it is apparent from the provisions of section 4 of the Act that the pre-existing rule of Muslim personal law - that apostasy operates to dissolve the marriage - has not been altered by the Act. In the opinion of this Court, all that section 4 has done is to introduce an intervening mechanism, but to reach the same conclusion, i.e., that apostasy would not by itself dissolve the marriage and some further substantive act would be required to be done in this regard; the substantive act being the filing of a suit seeking declaration as to dissolution under section 2 (ix) of the Act.

25.The Court is fortified in coming to this conclusion as to the legislative intent behind section 4 of the Act not merely from the words of section 4 but from the scheme of the Act as well. It must be noticed that clause

(ix) of section 2 provides that a woman married under Muslim personal law shall be entitled to obtain a decree for the dissolution of her marriage on any ground recognised as valid for the dissolution of marriages under Muslim personal law in addition to the grounds provided in clauses (i) to (viii) thereof. In the opinion of this Court, this, in itself is substantiation of the fact that the Act has not intended to entirely do away with the rules as to dissolution that existed in Muslim personal

law prior to the coming into force of the Act.

26.This is further evident from the long title of the Act,21 which provides that the Act is to consolidate and clarify the provisions of Muslim law in relation to dissolution of marriage and to remove doubts as to the effect of apostasy. The statute does not indicate that the pre-existing rule of Muslim personal law, that apostasy operates to dissolve a marriage, has been intended to be altered by the legislature in the enactment. Rather, section 4 of the Act was stipulated with the intent of removing the mischief of fraudulent apostasies, as will be discussed at a more appropriate juncture in this judgement.

27.The Court is mindful of the fact that the debates in the Legislative Assembly as well as the Statements of Objects and Reasons appended 21 "An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie."

> to a statute hardly give an indication as to what was in the mind of the members of the Assembly who passed it.22 Indeed, if one were to peruse the debates that took place in the Assembly in respect of section 4 of the Act, a sharp cleavage can be ascertained in the opinion of the members as to the justification for the provision being passed in the manner it was, giving hardly any reliable insight into what weighed in the minds of the members who were present and voting on the Bill. Thus, this Court shall refrain from considering any expressions of opinions found in the debates as aids to ascertaining the intent of the Assembly. However, while not referring to the debates as aids to construction, the Court would not hesitate to refer to the same to ascertain the mischief prevalent in the society that impelled the enactment of the Act.23

28.The provision that is now section 4 was to be found in draft clause 5 of the Bill as originally drafted. The debates, which spanned over a period of a little over a year, indicated that the provision was the subject of controversy even amongst the members. Speaking of the provision in the Statement of Objects and Reasons, the mover of the Bill, Mr. Qazi Muhammad Ahmad Kazmi, sets out the anxiety of the Muslim community at the fact that Courts in British India had been holding that apostasy by a woman dissolves a marriage contracted under Muslim personal laws ipso facto. He observes that Ulemas have issued fatwas supporting non-dissolution of the marriage by reason of the wife's 22 Union of India & Ors. v Martin Lottery Agencies Ltd., (2009) 12 SCC 209, at p. 226. Cites with approval the dictum of PN Bhagwati J. in KP Varghese v Income Tax Officer, Ernakulam & Anr., (1981) 4 SCC 173. 23 Ibid.

apostasy. He observes that a number of articles have appeared in the press demanding legislation to rectify the situation. He further also observes that the Act is in itself being sought to be enacted because of the unspeakable misery to Muslim women in British India for lack of grounds being available to seek a decree of divorce. He draws reference to the monograph entitled Heelat-un-Najiza,24 by Maulana Ashraf Ali Thanawi; the same provided for grounds of divorce

under the Maliki school of jurisprudence being applied to Muslims following Hanafi school - which formed the majority of Muslims in India.25 This Court recollects its judgement in Masroor Ahmad v State (NCT of Delhi) & Anr.,26 which acknowledged the introduction by the Act into Muslim personal law, as it is administered in India, of the salutary principle of applying the beneficial principles of one school of Islamic jurisprudence to adherents of the other schools as well.

29.The Bill itself was introduced in the Assembly initially by circulation amongst the members in February, 1938 for eliciting opinions prior to it being considered. Welcoming the introduction of the Bill, a member, Mr. Sardar Sant Singh inter alia observed:

> "...Here is a provision by which the author of this Bill wants to interfere in the Muslim law of his own community. Sir, I have great sympathy for it, because in the course of my practice at the bar extending over 30 years, I have come 24 More fully known as Al-Hilat un-Najiza li'l-Halitat al-'Ajiza. Urdu: A successful legal device for the helpless wife.

25 Statement of Objects and Reasons: "...Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of „Maliki, Shafií or Hambali Law..."

26 ILR (2007) 2 Del 1329.

across many dishonest conversions, and advantage of the Muslim law is taken to get the marriages dissolved. The High Courts have gone so far as to say that whether the conversion is malafide or bona fide it is immaterial, and the very conversion itself dissolves the marriage. I have always been condemning the actions of those women who have undergone baptism in order to get rid of their husbands; for them an alternative provision has been made in this Bill..."27 (Emphasis supplied)

30.A similar indication of the position of law that existed prior to the passing of the Act is again hinted at by Mr. Kazmi, the mover of the Bill, at the second reading of the Act, where he states:

> "...The law as it stands today is that apostasy ipso facto dissolves marriage. The courts have not stopped there but they have even refused to go into the motives of the parties in regard to the conversion and in regard to the apostasy..."28

31.Mr. Kazmi cites further in his speech the opinions of the District and Sessions Judge of Baluchistan and of the District and Sessions Judge of Cuddappah, which opinions, it appears, were also circulated with the members.29 These two judges have also given an indication that the Courts have expressed an unwillingness to look into the motive of conversions, despite some parties converting ostensibly only to escape their subsisting marriage under Muslim personal law. A similar indication appears to have been given by the Sessions Judge of Multan in his opinion, who appears to have observed that there have been 27 Legislative Assembly Debates, 3rd February, 1938, at p. 322. 28 Legislative Assembly Debates, 26th August, 1939, at p. 1097. 29 Legislative Assembly Debates, 26th August, 1939, at pp. 1101-1102.

numerous cases in which Muslim women have had recourse to apostasy simply in order to put an end to her marriage.30

32.Another member, Mr. Syed Ghulam Bhik Nairang, who claimed responsibility for drafting draft clause 5, provides detailed insight into the anxiety of the community to have pre-existing rule of Muslim law changed. He states:

> "...For a very long time the courts in British India have held without reservation and qualification that under all circumstances, apostasy automatically and immediately puts and end to the married state without any judicial proceedings, any decree of court, or any other ceremony..." "Now, from the very beginning, when one or two cases were decided by the Courts in that way, the Muslims began to protest and protest vehemently. Agitation has been going on spasmodically in order to get this view corrected, but the Courts, as you know, Sir, are very difficult to persuade to go against an established precedent, when it happens to take the form of a ruling of a High Court..."
>
> "... [I]t is precisely because these rulings are there that we have introduced this Bill and we ask this House to pass [draft] Clause 5. Our position is that those rulings are erroneous..."31

33.A similar insight is given by the Leader of the House, Sir Muhammad Zafrullah Khan:

> "...British Indian Courts, as I have said, have unduly narrowed the grounds upon which the wife of a Muslim might obtain divorce and this doctrine having, unfortunately, been accepted that if a Muslim woman adopts any faith other than Islam, one of the consequences of this change of faith shall be 30 Cited by Mr. Bhai Parma Nand, Legislative Assembly Debates, 26th August, 1939, at p. 1109.

31 Legislative Assembly Debates, 9th September, 1938, at p. 1899-1090.

that her marriage shall automatically be dissolved, resort has often been had to this device for the purpose of obtaining relief from a marriage tie that has become intolerable. That is how that doctrine has come in. Attempts have been made in British Indian Courts occasionally to argue that even if that is so, the Courts should at least find that the alleged conversion is not a device or a trick for the purpose of bringing the marriage to an end and they have ruled that all that they are concerned with is that the woman says that she is no longer the wife of the person to whom she was married. I am not for the moment saying whether that is right or wrong. I am merely describing the state of the law which made it necessary to have it clearly declared by means of a legal enactment..."32 (Emphasis supplied)

34.Thus, it is evident that the pre-existing rule of Muslim law that apostasy ipso facto dissolves the marriage was being taken advantage of in certain matters, resulting in a fraud being played upon the law and Courts. Although there is a catena of judgements in this regard,33 the unwillingness of the

Courts to look into the intent behind the conversion/apostatizing is best seen from a judgement of a Division Bench of the Lahore High Court, barely three months before the introduction of the Bill, in Mussammat Resham Bibi v Khuda Bakhsh.34

35.The matter involved a lady renouncing Islam and thereafter filing a suit for declaration that she is no longer the wife of the respondent. The Trial Court held that the mere declaration of apostasy found in the Plaint is sufficient proof and decreed the suit. This was, however, 32 Legislative Assembly Debates, 9th September, 1938, at p. 1970-1971. 33 Ghaus v Musammat Fajji, (1915) 29 IC 857; Mt. Bakho v Lal, AIR 1924 Lah 397; Amar Nath v Mt. Ved Kaur, AIR 1928 Lah 956; Mt. Sardaran v Allah Baksh, AIR 1934 Lah 976; Sardar Mohammad v Mt. Maryam Bibi, AIR 1936 Lah 666.

34 (1938) 19 Lah 277 : AIR 1938 Lah 482.

overturned in appeal by the District Judge, who was unconvinced by her statement and summoned her for inquiry. He was unconvinced even by her statement in Court as to her apostasy and directed pork to be brought to Court and was impressed by her unwillingness to consume the same and held that her words of apostasy are not true and were uttered merely to dissolve the marital tie. In second appeal the learned Single Judge, given the far reaching implications of the question of law in issue, referred the matter to the Division Bench. DIN MOHAMMAD J., speaking for the Bench, reversed the ruling of the learned District Judge and upheld the original decree. After analysing a catena of authorities on the issue of looking into the motive behind the apostasy, he observed:35 "...I am disposed to think that wherever the Judges applied their mind to this aspect of the case and remarked that the conversion or renunciation was not a colourable transaction, they meant nothing more than that the conversion or renunciation had taken place in fact. They neither referred to the sincerity or insincerity of the motive... Renunciation of a religious faith, therefore, requires no other proof than a person's declaration, the only condition being that the declaration is not casual, of which the declarer may repent afterwards, but it should be attended with violation (sic: volition) and should be such to which the declarer adheres and in which he persists. The motive of a declarer is similarly immaterial. A person may renounce his faith for love or for avarice. He may do so to get rid of his present commitments or to truly keep salvation elsewhere. But that would not affect the factum of renunciation and in cases like the present, it is the factum alone that matters and not the latent spring of action which results therein."

35 Ibid., at pp. 285-286 : at pp. 483-484.

(Emphasis supplied)

36.Thus, it is evident that section 4 was enacted in its form to prevent a fraud from being played upon the courts law by women married under Muslim personal law apostatizing solely to escape marital ties. However, on a consideration of the words of the provision, the other provisions in the Act, the long title of the Act, as well as the legislative history and given the mischief sought to be rectified by the provision, this Court is of the view that section 4 only operates to modify the pre-existing rule to the extent of specifying that apostasy does not ipso facto dissolve a marriage

contracted under Muslim personal law. It cannot be said - certainly not without doing some violence to the words of the statute - that the plain and simple meaning of the words employed in the provision admits of the construction that apostasy does not per se dissolve a marriage contracted under Muslim personal law.

37.That being the construction of section 4, it necessarily follows that a woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under section 2 (ix) seeking dissolution of the marriage and this Court holds so. All that is required is that she proves before the appropriate Court that she intended to and has indeed apostatized from Islam and accordingly seeks a declaration that the marriage has come to an end.

38.Before concluding on this issue, this Court must observe that the learned Trial Court has, in its decree, specified that the marriage stands dissolved from the date of the respondent apostatizing from Islam.

Given that section 4 has sought to modify the pre-existing rule to the extent that apostasy does not ipso facto dissolve a marriage, it could be contended - although it was not contended in the present appeal - that the marriage would stand dissolved only from the date of the decree, since section 4 has fettered such dissolution from taking effect immediately. However, the Court shall not express an opinion on this issue. Whether section 4 modifies the pre-existing rule to the limited procedural extent of relegating the party to the filing of a suit for a declaration of dissolution from the date of apostasy or whether it alters the same substantively, mandating that the marriage stands dissolved from the date of the decree, is not in issue in the present matter. An opinion in this regard would be appropriate in a case where the same is actually in issue. In the present matter, it is an admitted fact that the respondent was initially professing Hinduism and had embraced Islam prior to the marriage, and then re-converted to Hinduism. Thus, she falls within the exemption under the second proviso to section 4; in a way, she walks out of the constraints of section 4. Thus, in the present matter, the Trial Court was right in specifying that the marriage stands dissolved from the date on which the respondent apostatized from Islam.

39. In the circumstances, the challenge by the appellant to the impugned order on the ground that apostasy is not a ground for dissolution of marriage under the law ought to fail and is rejected.

As to proof of apostasy

40.This leads us to the second part of the appellant's contention, that apostasy is a fact to be proven in trial. Counsel for the appellant has contended that the learned Trial Court erred in relying only upon the statement and self-serving affidavit of the respondent and ought to have afforded the appellant with an opportunity to rebut the same in trial. It was contended that the learned Trial Court ought to have considered whether the apostasy / reconversion was of her own volition or whether she was compelled by her family members to so reconvert.

41.The answer to this issue will be found in the lucid words of DIN MOHAMMAD J. in the abovereferred judgement in Mussammat Resham Bibi v Khuda Bakhsh.36 In virtually identical

circumstances, rejecting the contention of the respondent / husband therein that an inquiry was necessary into the truthfulness and bona fides of the conversion / apostasy of the appellant therein, he held:

> "...If therefore apostasy takes the form of conversion to another faith, proof of conversion in accordance with the tenets of that faith will be sufficient to indicate apostasy and if it is not accompanied by any such extrinsic manifestation, declaration as stated above [i.e., in the Plaint, as well as in Court] will do. A genuine conversion is one which has actually taken place and if once it is proved as an accomplished fact, further enquiry is barred. In the case before us, as soon as the plaintiff declared not only in the plaint but even in her statement in Court as her own witness that she did not believe in God, the Quran and the Prophet of Islam, she at once went out of the pale of Islam. As remarked by Plowden J. in Mussammat Khan Bibi v Pir Shah, it is impossible to be of the Muhammadan religion without the 36 (1938) 19 Lah 277 : AIR 1938 Lah 482.
>
> belief that the Prophet of Islam was and is the Prophet of God or as remarked by Stodgon and Beachcroft JJ. in Mussammat Nani Jan v Husain Bakhsh "the essentiality of apostasy is said to consist in the uttering of words against the Muhammadan religion, after embracing the Muhammadan faith, which is the belief in the Prophet of Islam with respect to all that came down to him from Almighty God.""37 (Emphasis supplied)

42.This Court finds itself in respectful agreement with the above pronouncement. Being of a religious persuasion or belief in a particular religion and continuance thereof is an existential choice. Manifestations of religious practices of a particular religion could lead to the inference of the person's adherence to that religion. However, faith itself cannot be seen unless the person chooses to make it obvious. A clear and direct way of making known one's religion would be by way of a public statement or deposition through an affidavit in a Court. In the instant case the respondent made such public declaration - that she had re-embraced Hinduism and produced a certificate from the organisation which facilitated it. She reiterated this factum in the Plaint and then deposed so in an affidavit in the Petition. No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy. It is inconceivable how any trial could even be conducted in this regard. The best that the appellant would be able to achieve would be that upon the respondent deposing as to her apostasy in the witness box, the appellant would suggest vehemently to the respondent that she had not apostatized and the respondent would deny 37 Ibid. at pp. 286-287 : at pp. 484.

the same with vehemence. Faith cannot be determined simply by the vehemence of the suggestion or its denial in a trial in Court.

43.Essentially, belief in One God and in Prophet Muhammad being His last apostle constitutes Islam and those who accept this are Muslims. Any doubt about this fundamental tenet of the Muslim faith casts one outside the Muslim fold. Such a doubt would remain hidden inside the

individual and be never known to the world until it is so expressed. But in the present case the respondent went far beyond mere doubts about her belief in Islam or adherence to Islamic tenets. She expressed her apostasy - her reconversion to Hinduism by overt public acts. The 18th century renowned Urdu poet Meer Taqi Meer describes it, some may say sardonically, as:

> "Meer ke deen-o-mazhab ko poochhtey kya ho ab, Un-ney toh kashqa khaincha, dair mein baitha, kab ka tark Islam kiya."
>
> (It's been a while since he applied a tilak, ensconced himself in an idol-house, abandoned Islam, You ask about Meer's religion now)38

44.In the circumstances, this Court has no hesitation in upholding the finding of the learned Trial Court - based on the declaration of apostasy made in the Petition and the affidavit filed in Court - that the respondent has indeed apostatized. Thus, the appellant's challenge to the impugned order on this ground too fails.

As to the order being made under Order XII rule 6 38It is sought to be conveyed that alteration of faith or shift in loyalties can be discerned from manifest conduct of the party.

45.The appellant has also challenged the propriety of the procedure adopted by the learned Trial Court in passing the impugned order under Order XII rule 6 of the Code. It was contended that the Trial Court has proceeded to decree the Suit solely on the basis of the Petition and the documents filed therewith. It was contended that for a decree to be passed under Order XII rule 6 of the Code, there ought to be a clear and unambiguous admission in the reply to the Petition; that the factum of apostasy was denied by the appellant in the Petition and hence the learned Trial Court ought to not have passed the impugned order under Order XII rule 6 of the Code.

46.This Court finds itself unable, once again, to agree with this contention. The learned Trial Court observed that the first substantive defence of the appellant was that the Petition was filed contrary to the terms of section 4 of the Act, with especial emphasis on the proviso. The Trial Court observed that this is an unambiguous admission as to the factum of reconversion. This Court finds no error in this finding of the Trial Court. The finding of the Trial Court, in effect, is that the appellant has taken a plea of demurrer as to the issue of apostasy / reconversion.

47.Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further.39 This Court has perused the copy of the reply to the Petition filed with the appeal and is reassured that the Trial Court has indeed come to a correct conclusion. Not only has the appellant raised any plea other than a bald denial as to the factum of reconversion in his reply, he has reiterated the demurrer in the same by stating that the Petition is filed contrary to the mandate of section 4 of the Act. It has been contended that Muslim personal law does not recognise apostasy as a ground for divorce.

48.However, conspicuous by its absence is any actual basis for the denial of the factum of reconversion. It has not been the contention of the appellant that the respondent's words of disbelief are not with an intent to apostatize, but were uttered without any belief or conviction in the words. Nor has it been contended that the respondent is likely to repent her act of apostasy and re-embrace Islam. In short, it has never been the case of the appellant that the acts said to constitute apostasy do not amount to apostasy with intent to leave the faith of Islam.

49.All that is found - apart from the contention that Muslim personal law does not recognise apostasy as a ground for divorce - is a bald and mechanical denial of the factum of apostasy. It is inconceivable how these mechanical and bald denials could be even considered as valid denials as required under Order VIII rule 5 of the Code. In the circumstances, given that the appellant had only raised a plea of demurrer in respect of the factum of reconversion, this Court finds no 39 Ramesh B. Desai & Ors. v Bipin Vadilal Mehta & Ors., (2006) 5 SCC 638.

fault in the procedure adopted by the learned Trial Court in decreeing the Petition under Order XII rule 6 of the Code.

As to the husband's right to divorce by pronouncing talaq being abridged

50.The learned Counsel for the appellant then raised a curious contention;

> he contended that if a woman married under Muslim personal law were to be held entitled to dissolve the marriage by her mere act of apostasy, it would abridge the right of the husband to divorce her by pronouncing talaq thrice. He thus sought to contend that the right of a woman married under Muslim personal law to dissolve the marriage by the mere act of apostasy ought to not be recognised.

51.It must be noted that this contention was not raised before the Trial Court, nor is there any specific ground in the appeal to support this contention. In any case, on its own merit, the contention deserves to be rejected as proceeding from an incorrect understanding of Muslim personal law, and of law in general. A woman married under Muslim personal law is not empowered, nor is she conferred with a right to divorce her husband by apostatizing. All that the law states is that were a woman married under Muslim personal law to apostatize, the marriage stands dissolved. In such circumstances, the woman is entitled to seek a decree of declaration that the marriage stands dissolved from the date of her apostatizing. Secondly, while it is doubtless that the husband's right in such a case to divorce his wife by pronouncing talaq is affected, the same is not due to operation of law or of a judicial pronouncement; the right stands affected by the simple fact that the marriage has already dissolved. Inasmuch as it is not the contention of the appellant that any of his vested right is taken away by the Act retrospectively, the contention is not one to be taken up in support of this appeal.

52.This Court bears in mind that the legislation enacted 75 years ago was to empower Muslim women to seek redress from a miserable marriage, which otherwise was wholly dependent upon the husband's prerogative to give her a talaq (divorce; un-tethering from the bonds of marriage). It must

be noted that even khula, which was a procedure for dissolution initiated at the instance of the wife, required the consent of the husband. However, with the enactment of the Act, the husband's right to talaq has to be seen in the context of the wife's competing rights. An equitable scheme as per Islamic tenets has been recognised in the Act and attitudes of parties would need a subtle adjustment to align with the basic tenets. Accordingly, the contention that the impugned judgement, if upheld, would adversely affect the appellant's prerogative of talaq, is rejected.

As to the authorities relied on, and not relied on

53.Lastly, the learned Counsel for the appellant contended that the learned Trial Court has failed to consider pronouncements of the Supreme Court that were binding on it, and has relied on authorities that ought to not have been relied upon. The second of these contentions, is that the learned Trial Court has placed reliance on selective verses of the Quran and on fatwas stated to have been issued by religious clerics, which is not correct in law. However, given that this Court agrees with the conclusion that the learned Trial Court has arrived at, it does not deem it necessary to pronounce upon this issue, and reserves its opinion on the propriety or otherwise of reliance upon such authorities for a matter where the same is actually at issue.

54.The learned Counsel for the petitioner further contended that the learned Trial Court has failed to consider the binding precedents of Sarla Mudgal & Ors. v Union of India & Ors.,40 and Lily Thomas & Ors. v Union of India & Ors.41 This Court is of the view that neither judgement is binding, being irrelevant in the present context, since the issues involved were different. In the former, the issue was as to whether a man married under Hindu law would be entitled to solemnise a second marriage by / after embracing Islam, without the first marriage being validly dissolved. The Supreme Court had answered the same in the negative. It held that a marriage solemnised under a statute and according to one personal law cannot be dissolved according to another personal law on conversion of one of the parties to that religion. In the latter case, the issue was as to: whether, a married man professing a religion which stipulates monogamy, when he renounces such religion and converts to Islam and solemnises a second marriage without divorcing his first wife, would be guilty of bigamy under section 494 of the Indian Penal Code, 1860. The Supreme Court 40 (1995) 3 SCC 635.

41 (2000) 6 SCC 224.

answered the same in the affirmative. Thus, this contention of the petitioner also ought to fail.

55.In light of the above discussion, and the admitted fact that the Respondent was originally a Hindu, who reconverted to her original faith from Islam, this Court holds that she falls within the second proviso to Section 4 of the Act, which is properly described as an exception to that section. Her marriage is accordingly regulated not by the rule enunciated in Section 4 of the Act, but rather the pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto.

56.In the circumstances, this Court finds no merit in the Appeal. Accordingly, it is dismissed.

NAJMI WAZIRI (JUDGE) S. RAVINDRA BHAT (JUDGE) MAY 09, 2014