Bombay High Court
Saiyid Rashid Ahmad vs Mussammat Anisa Khatun on 19 November, 1931
Equivalent citations: (1932) 34 BOMLR 475
Author: Thankerton
Bench: Thankerton, Salvesen, G Lowndes
JUDGMENT Thankerton, J.

1. This is an appeal from a decree of the High Court at Allahabad, dated February 1, 1927, which reversed a decree of the Court of the Subordinate Judge of Bijnor at Moradabad, dated December 15, 1923.

2. The dispute relates to the succession to the estate of Ghiyas-uddin, a Muhammadan, who died on April 4, 1920, leaving considerable moveable and immoveable property.

3. The appellants are plaintiffs in the suit, which was instituted on June 28, 1922, and are a brother and sister of Ghiyas-ud-din, and, along with respondents Nos. 10 to 12, who were impleaded as pro forma defendants, would be heirs to Ghiyas-ud-din according to Muhammadan law, if the respondents Nos. 1 to 6 (who were defendants Nos. 1 to 6), are unable to establish their claim to be the widow and legitimate children of Ghiyas-ud-din.

4. The main controversy turns on four stages in the matrimonial history of Anis Fatima, respondent No. 1, viz.:

(1) her marriage to Manzur Husain in 1901; (2) her divorce by Manzur Husain early in 1905; (3) her marriage to Ghiyas-ud-din on August 28, 1905 and (4) her divorce by Ghiyas-ud-din on or about September 13, 1905.

5. It is admitted that Anis Fatima was married to Manzur Husain in 1901, but the respondents maintain that the marriage was invalid on the ground that both parties were minor at the time. The Subordinate Judge held the marriage to be valid on the ground that Anis Fatima was then adult and Manzur's marriage was contracted through his mother as his guardian, and this conclusion appears to have been accepted by the High Court.

6. The alleged divorce by Manzur Husain early in 1905 was challenged by the appellants on the grounds that it was not proved, and that, even if proved, it was invalid in respect that Manzur had not then attained the age of discretion. Manzur himself was the only witness as to the fact of divorce, and his evidence was rejected by the Subordinate Judge, but was accepted by the High Court as proving the fact. On consideration of the conflicting evidence as to Manzur's age, the Subordinate Judge held that he had not then reached the age of discretion, but the High Court reached the opposite conclusion.

7. The Subordinate Judge held that the marriage of Ghiyas-ud-din to Anis Fatima was not proved, but this finding was reversed by the High Court, and the appellants acquiesced in the decision of the High Court, and merely maintained the invalidity of this marriage in the event of it being held that

Anis Fatima was then the undivorced wife of Manzur.

8. The fourth stage was the alleged divorce by Ghiyas-ud-din in September, 1905. The appellants' case was that on September 13, 1905, Ghiyas-ud-din pronounced the triple talak of divorce in the presence of witnesses, though in the absence of the wife, and that the latter received Rs. 1,000 in payment of her dower on the same day, for which a registered receipt is produced; there was also produced a talaqnamah, or deed of divorce, dated September 17, 1905, which narrates the divorce, and which is alleged to have been given to Ants Fatima. The respondents denied the fact of the divorce, and, in any event, they challenged its validity and effect for reasons which will be referred to later. They maintained that the payment of Rs. 1,000 was a payment of prompt dower, and that the deed of divorce was not genuine, in that it was not written or signed by Ghiyas-ud-din.

9. There are concurrent findings by the Courts below that Ghiyas-ud-din did pronounce the triple talak of divorce, and that the deed of divorce is genuine, and their Lordships have seen no reason to depart a this case from their usual practice of not disturbing such findings.

10. The Subordinate Judge held that Ghiyas-ud-din irrevocably divorced Anis Fatima, and that she was therefore not his wife at the date of his death in 1920, and also that respondents Nos. 2 to 6, who were admittedly their offspring but all born after the date of divorce were not legitimate. The High Court came to the contrary conclusion on the ground that the divorce was fictitious and inoperative, because it was a mock ceremony performed by Ghiyas-ud-din to satisfy his father, but without any intention on his part that it should be real or effective.

11. As it was obvious that, in the event of their Lordships agreeing with the conclusion of the Subordinate Judge on this stage of the case, consideration of the earlier stages of the case would be rendered unnecessary, counsel were requested to confine their arguments to this stage in the first instance, and, after full consideration of these arguments, their Lordships are of opinion that the decision of the Subordinate Judge was right, and, there-fore, it will be sufficient to deal with this stage alone.

12. There is nothing in the case to suggest that the parties are not Sunni Muhammedans 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 (6th edition) at p. 139, as follows:-

The divorce called talak may be either irrevocable (bain) or revocable (rajaji). 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 the 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 bidaat (sinful), but are nevertheless regarded by Sunni lawyers as legally valid.

13. In the present case the words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas-ud-din 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 that the three divorces were given " in the abominable form,"

i.e., bidaat. The learned Judges of the High Court have erred in treating the divorce as in the ahsan form, instead of the bidaat form.

14. 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 Furzund Hossein v.

Janu Bibee (1878) I.L.R. 4 Cal. 588, where the words of divorce were alone pronounced. In the bidaat form the divorce at once becomes irrevocable, irrespective of the iddat (Baillie's Digest, 2nd edn., p. 206). It is not necessary that the wife should be present when the talak is pronounced, Ma Mi v. Kallander Ammal (No. 2) (1926) L.R. 54 I.A. 61, 65 : s.c. 29 Bom. L.R. 772, Ful Chand v. Nazab Ali Chowdhry (1908) I.L.R. 36 Cal. 184, Asha Bibi v. Kadir Ibrahim Rowther (1909) I.L.R. 33 Mad. 22, 23, though her right to alimony may continue until she is informed of the divorce.

15. Their Lordships are of opinion that the pronouncement of the triple talak by Ghiyas-ud-din constituted an immediately effective divorce, and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas-ud-din's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective (Baillie's Digest, 2nd edn., p. 208; Ameer Ali's Mohammedan Law, 3rd edn., vol. 2, p. 518; Hamilton's Hedaya, vol. 1, p. 211).

16. The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas-ud-din treated Anis Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant No. 1 and respondent pro forma No. 10, who are brothers of Ghiyas-ud-din, but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.

17. While admitting that, upon divorce by the triple talak, Ghiyas-ud-din could not lawfully remarry Anis Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgment of their legitimacy by Ghiyas-ud-din, subsequent to the divorce, raised the presumption that Anis Fatima had in the interval married another, who had died

or divorced her, and that Ghiyas-ud-din had married her again, and that it was for the appellants to displace that presumption. In support of this contention, they founded on certain dicta in the judgment of this Board in Habibur Rahman Chowdhury v. Altaf Ali Chowdhury (1921) L.R. 48 I.A. 114. Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of Muhammedan marriage by acknowledgment of a son as a legitimate son is as follows (p. 120):

It must not be impossible upon the face of it: i.e., it mast not be made when the ages are such that it is impossible in nature for the acknowledge to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not juris et de jure, it is like every other presumption of fact capable of being set aside by contrary proof.

18. The legal bar to re-marriage created by the divorce in the present case would equally prevent the raising of the presumption. If the respondents had proved the removal of that bar by proving the marriage of Anis Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgment as legitimate, the respondents might then have had the benefit of the presumption, but not otherwise.

19. Their Lordships are, therefore, of opinion that the appeal should be allowed, that the decree of the High Court should be reversed, and that the decree of the Subordinate Judge should be restored, the appellants to have the costs of this appeal and their costs in the High Court. Their Lordships will humbly advise His Majesty accordingly.