Bombay High Court
Saira Bano vs Mohd. Aslam Ghulam Mustafa Khan ... on 28 September, 1999
Equivalent citations: I (2001) DMC 457
Author: A Palkar
Bench: G Patil, A Palkar
JUDGMENT A.B. Palkar, J.

1. These two criminal revision applications have been placed before us by the order of the Honourable the Chief Justice as the learned Single Judge (D.D. Sinha, J.) hearing these petitions found that conflicting views were taken by different Single Judges of this Court in respect of requirement of proving divorce as contemplated by the provisions of Mahomedan Law and the matter is required to be decided by larger Bench.

2. Criminal Revision Application No. 164 of 1995 arises out of Misc.. Criminal Case No. 64 of 1993 decided by the 2nd Judicial Magistrate, First Class, Akot who allowed the application under Section 125, Criminal Procedure Code directing the respondent-husband to pay Rs. 150/- to the applicant-wife and Rs. 75/- each per month to the two children. The order having been challenged before the Sessions Judge, Akola in Criminal Revision No. 211 of 1994, was reversed and the maintenance claim of the wife came to be rejected.

3. While resisting the claim of wife, respondent-husband made a statement in the witness-box that he has divorced his wife and had sent Talaqnama to her by registered post. She refused to accept the same. The envelope containing the Talaqnama with the postal remark 'refused' was produced. Learned Magistrate found that the factum of the respondent having given divorce to applicant-wife was not proved. It is pertinent to point out that plea of divorce was not taken in the written statement by respondent-husband.

4. While reversing the order, the learned Sessions Judge found that although no contention was raised in the written statement regarding divorce, the respondent had led evidence and had produced the Talaqnama as well as envelope containing postal endorsement. In view of this evidence, when the divorce was communicated by registered post with acknowledgement due to the wife and she refused to accept the registered envelope, the wife was entitled to claim maintenance only upto the period of Iddat and she was not beyond that period and this order is impugned in revision before us.

5. Criminal Revision Application No. 27 of 1996 arises out of similar application under Section 125, Criminal Procedure Code filed before the Judicial Magistrate, First Class, Wardha and registered as Misc. Criminal Application No. 152 of 1991. When the said proceedings were pending before the Magistrate, Revision Application No. 182 of 1992 was filed before the High Court and the High Court granted stay of further proceedings. While disposing of the case, the High Court directed that both the parties be heard before deciding whether there is divorce between the parties or not.

6. Thereafter two documents were produced before the Trial Court in order to substantiate the case that there was divorce between the parties and it was also contended that the husband had paid Rs.

7,786/- towards Mahr and Rs. 670/-towards maintenance for Iddat period. Learned Magistrate, however, found that filing of such document was not sufficient to prove that there is divorce and as such, he allowed the application for maintenance granting the same @ Rs. 300/- per month to the wife.

7. This judgment was challenged by filing revision application before the Sessions Judge bearing No. 41 of 1994. The order of learned Sessions Judge granting stay to the execution of maintenance order was challenged before this Court and by order dated 10th October, 1995, the learned Single Judge (R.M. Lodha, J.) directed the Sessions Judge to hear revision application on merits and dispose it of as per the directions of this Court and the Additional Sessions Judge held that as oral Talaq is admissible in Mahomedan community, it is sufficient for the husband to pronounce oral Talaq even in the absence of wife and as per Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, it is provided that divorced women are not entitled to claim anything more than maintenance for the period of Iddat and the amount of Mahr, the wife was not entitled to claim anything more than that and thus the order of learned Magistrate granting maintenance to the wife was set aside which she has challenged before this Court.

8. Both the applications came up before the learned Single Judge of this Court. The learned Single Judge (D.D. Sinha, J.) has passed detailed order in Criminal Revision Application No. 164 of 1995 and has directed Criminal Revision Application No. 27 of 1996 alongwith Crl.R.A. No. 164/95 be placed before the Honourable the Chief Justice for referring the matter to larger Bench. In the detailed order, the learned Single Judge has referred to the judgments of this Court reported in 1996 (l) Mh. LJ 810, Shaikh Mobin Sk. Chand v. State of Maharashtra and Anr. (Manoharan, J.), and reported in 1995 (3) BCR 433, Mehatabbi v. Sk. Sikandar (Chapalgaonker, J.). The learned Single Judge found that the view of both the learned Judges (Justice Manoharan and Justice Chapalgaonker) are conflicting with the view taken by Shah, J. in the case of Chandbi Bandesha Mujawar v. Bandesha Balwant Mujawar, , wherein the learned Judge found :

"...although a Mahomedan may fail to prove the allegation that he had divorced his wife some years ago, nevertheless, the statement made by him to the effect that he had so divorced his wife, even if it be false, would operate as an acknowledgement of the divorce by him or at any rate as a declaration of divorce as from the c ate on which the statement was made and the wife is then entitled to a maintenance for a period of Iddat."

Similar view was taken by Sambre, J. in Jaidabai v. Mohammad Shaft Mohd. Ismile and Anr., reported in II (1990) DMC 14.

9. In this Court, in view of the complicated questions of law required to be decided in these two revision applications, Senior Counsel Mr. K.H. Deshpande, was appointed amicus curiae. We have heard learned Counsel appearing for the parties, Mr. V.R. Chaudhari, Mr. Bharat Deshpande, Mr. T.A. Mirza as well as Additional Public Prosecutor and Mr. K.H. Deshpande, Sr. Counsel a,t length. Although no specific points have been framed by the learned Single Judge, it is clear from the detailed judgment in Criminal Revision Application No. 164 of 1995, that the points required to be decided by us can be briefly stated as below :

(1) Whether in case of parties governed by Mahomedan Law, it is sufficient for a husband to resist claim of his wife for maintenance beyond the period of Iddat merely by making an averment in the written statement or in any application filed in the Court contending that he has given her the divorce?

(2) Whether even without pleading divorce, the husband can resist successfully the claim of his wife for maintenance by making a statement in the witness-box to the effect that he has divorced her?

(3) Whether such mere assertion either in the pleading or in the witness-box amounts to an acknowledgement of divorce given earlier by the husband and he is not required to prove to have given divorce in accordance with Mahomedan Law sometime prior to date of such an assertion?

(4) Whether even otherwise such assertion either in the pleadings or in the witness-box or in some application filed in Court by the husband by itself amounts to divorce in accordance with Mahomedan Law from the date of such assertion if not from an earlier date?

(5) Whether even if it is found that the statement regarding divorce given earlier is found to be false, still the statement in the Court proceedings can be taken as acknowledgement of divorce or even otherwise a fresh declaration of divorce?

10. Although arguments were advanced at length to show as to how a divorce can be legally given by Mahomedan person to his wife, we are making only a passing reference to that aspect of the matter in view of the fact that it is not necessary for us to decide in these petitions as to in what facts and circumstances a divorce can be held to have been given in fact and to be valid in accordance with the Mahomedan Law.

11. In order to find out how divorce is permissible under the Mahomedan Law, it is worthwhile to go through the different sources of the Mahomedan Law. It has mainly four different sources. The Holy Quaran is the primary source. It represents the Will of God communicated through the Prophet by the angel Gabriel. Number of commentaries have been written on Quaran. The second source is Ahadis and Sunna. After the death of Prophet when problems arose, the stories of occurrences concerning the Prophet given by eye-witnesses are known as Ahadis which means a tradition or precept and Sunna is the practice of the Prophet. The third source is Ijmaa. It consists of new problems faced after the death of Prophet and decisions thereon by the concerned jurists. The fourth source is Kiyas. It is in brief a process of deduction by which law of text is applied to cases which though not covered by the language are governed by the reason of text which is technically called as Illiat or effective cause. There are different schools of thought. The three principal schools being Sunnis, Shias and Mujtahids. The Sunni School is further divided into four, and Hanafi is the most prominent amongst them in India. This is only to point that Hanafi is one of the schools of thought representing the Sunnis. After a careful scrutiny of old texts, the Law of Divorce has been concisely stated by Mulla in his Text of Principles of Mahomedan Law. According to Section 308, any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause. This position is more or less accepted. However, we may add at this stage only that even regarding this, recently there has been a debate as some of the scholars do not

accept this proposition as, according to them, it is against the principles of Quaran which enjoins a pre-divorce conference or conciliation as according to the Prophet, divorce was most detestable and had to be given only when there is no other alternative. Therefore, an attempt of conciliation or settlement prior to divorce was considered essential by the Prophet. Divorce given at the instance of husband, is known as talak whereas divorce at the instance of wife, is called Khula. According to Section 310, talak may be oral or in writing.

12. So far as oral talak is concerned, there is no prescribed form. If the words are express or well-understood as implying divorce, no proof of intention is required. If the words are ambiguous, the intention must be proved. It is also not necessary that the talak should be pronounced in presence of wife or even addressed to her and talak expressed in the absence of wife becomes effective as against her when it is communicated to her.

13. Talak in writing: A talaknama may only be the record of the fact of an oral talak or it may be the deed by which the divorce is effected. The deed may be executed in the presence of the Kazi or of the wife's father or of other witnesses. The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so superscribed and addressed, it is said to be in unusual form. If it is in customary form, it is called "manifest" provided that it can be easily read and comprehended. If the deed is in customary form and manifest the intention to divorce is presumed. Otherwise the intention to divorce must be proved. In the undernoted case the talaknamas were held to be customary and manifest and so operative without proof of intention. On the other hand if the deed is in the form of a declaration not addressed to the wife or any other person, it is not in customary form and is not effective if there was no intention to divorce. If the talaknama is customary and manifest it takes effect immediately even though it has not been brought to the knowledge of the wife. There are different modes of oral talak, viz. (1) Talak ahsan, which consists of single pronouncement of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat; (2) Talak hasan, which consists of three pronouncements made during successive period between menstruations, no intercourse taking place during period between menstruations. The aforesaid two forms are considered to be regular forms. However, there is third form known as Talak-ul-biddat or talak-i-badai which consists of, (i) three pronouncements made during a single tuhr either in one sentence, e.g. "I divorce thee thrice", or in separate sentences, e.g. "I divorce thee, I divorce thee, I divorce thee"; or (ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage, e.g. "I divorce thee irrevocably" although Talak-ul-biddat or talak-i-badai are irregular forms, they arc considered legal.

Section 312 of Mulla's Mahomedan Law shows as to when talak becomes irrevocable. A talak in the ahsan mode becomes irrevocable and complete on the expiration of the period of iddat whereas a talak in the hasan mode becomes irrevocable and complete on the third pronouncement irrespective of the iddat and a talak in the badai mode becomes irrevocable immediately it is pronounced, irrespective of the iddat.

14. We have referred to these different forms only to show that even though it is unilateral power of the husband to pronounce a talak, the law prescribes certain modes of effecting even oral talak.

Whether in a particular case there is divorce or not, will always depend on establishment of the facts which constitute the same. It will not be a question of fact alone, but a mixed question of law and fact. The first part being, whether talak has, in fact, taken place and the other part of the question would be, whether that is in accordance with the principles of Mahomedan Law. As pointed earlier, the question as to how a talak can be effected and whether in the facts and circumstances of a given case, the talak, as alleged by the husband was in fact effected and whether that is legal and valid, are the questions which are required to be decided in the facts and circumstances of each case.

15. From the points indicated in the earlier part of the judgment, the scope of discussion is limited. In order to substantiate his case, reliance has been placed on different authorities by learned Counsel appearing for the husband and it is necessary to refer to these different authorities. Learned Counsel for respondent-husband also draw our attention to certain part of commentary contained in the Hedaya, Vol. I, translated by Charles Hamilton. The said commentary, however, refers to different modes of talak and number of examples are quoted therein. In view of the fact that we are not deciding the issue as to how a talak can be effected legally, it is not necessary to refer to the various instances quoted in the Hedaya. All that we can say is that even the Hedaya also gives certain modes of oral talak and number of examples have been quoted. A very old judgment of the Privy Council is useful for reference. In Ma Mi and Anr. v. Kallander Ammal, , the wife claimed to be the sole heir of her husband and contended that the first defendant falsely claims to have been his lawful wife and that the second defendant falsely claims to be the legitimate son of her deceased husband. The defendants contended that prior to his death the deceased had divorced the plaintiff according to the Mahomedan Law. The reference to this judgment is made only to point out that ultimately the Privy Council also found that it was necessary to consider whether there was any evidence on record sufficient to prove that the deceased on the occasion when the document was drawn up and executed, used the words which would be sufficient to constitute oral divorce under the Mahomedan Law. There was evidence of two witnesses on record showing that the deceased had uttered the word "talak" three times and had also shown the document of talaknama to the witnesses that it was a document of divorce. After considering the entire evidence on record, the High Court had come to a conclusion that the evidence on record was not sufficient to establish what the deceased said, to enable them to hold whether the words amounted to constitute divorce or merely indicated his intention of divorcing her by execution and transmission of the talaknama. Confirming the decree of the High Court, the Privy Council held that the divorce, as contended, was not proved by the evidence on record and the High Court was justified in coming to such a conclusion.

16. It is true that this case was decided after the death of husband who was alleged to be the person who had executed the document and had pronounced the talak. What is material to be noted is that merely because there was a document and witnesses who had heard the husband stating that it was a document of divorce and also uttering the word 'talak', was considered to be inadequate to prove that in fact there was divorce and the same was legal and valid and in accordance with the principles of Mahomedan Law.

17. Before we consider the various authorities on which the arguments are advanced at length, it is necessary to refer to a case cited by Macnaghten in Principles and Precedents of Mahomedan Law

(2nd Edition) as the same has been referred to in number of authorities. Case XLII at page 296 of the said Edition quoted as below :

"Q. A person on the 20th of Suffer in the year 1232 Hijree (corresponding with the 7th Pous of 1224, B.S.) declared that he had repudiated his wife by three divorces, agreeably to the rules of Moohummudan Law, from the year 1178 or upwards of forty-six years back. In this case, from what date should the divorce be held to take effect?

R. Under the above circumstances, if the wife deny the fact of her having been divorced by the husband, the divorce according to law, should be held to take effect from the date on which it was declared, as is laid down in the Surhi Vigaya. If a person say to his wife, whom he married previously to the day to which he referred the divorce, "you are divorced yesterday", and she deny it, the divorce takes effect only from the moment of its being declared."

Referring to the above instance of Case No. XLII learned Sr. Counsel, Mr. K.H. Deshpande appearing amicus curiae stated that this case is an authority only on the point as to when the divorce would be effective if it is an acknowledgement of divorce given sometimes in the past and in the said case about 46 years back. It presupposes a valid divorce having been given earlier and by no stretch of imagination can be said to be an authority to show that even if earlier there was no divorce at all or earlier divorce was not legal and valid or was not proved as required by law, still then a later statement of the husband would tantamounts either to a declaration of divorce on that date or an acknowledgement of divorce which, in fact, did not exist.

18. On behalf of the respondent, reliance is placed on , Asmat Ullah and Ors. v. Mt, Khatun Unnisa and Ors, In this case before the Division Bench of the Allahabad High Court, Khatun claimed property as heir of her deceased husband. She was claiming to be entitled to 1/8th share in the property. She alleged that she has been in possession of whole property in dispute in lieu of dower which she averred as Rs. 3,000/-. The defence was that the plaintiff had been divorced by her husband during his lifetime and she was not entitled to anything in lieu of dower or to any share in the husband's estate. The lower Appellate Court had held that defendant had failed to prove that the plaintiff's husband had divorced her. The facts in dispute in that case showed that 15 years before his death in 1930, the plaintiff had instituted criminal proceedings against her husband in which she claimed maintenance and in his written statement in the course of those proceedings the husband stated that three or four months before the date upon which he filed that statement he had divorced his wife according to Mahomedan Law. Accepting the argument, the Allahabad High Court referred to Syed Ameer Ali's Mahomedan Law, Edn. 5, page 479, which is reproduced below :

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

Whilst an acknowledgement extracted from the husband by compulsion whether embodied in writing or not is ineffective, an acknowledgement made in jest or falsely will take effect "judicially" though it will not have any force inforo conscience..."

and it held, "One may reasonably infer from the passage above quoted that if an acknowledgement of talak is made by the husband the divorce will be held to take effect at least from the date upon which the acknowledgement is made. Learned Counsel for the plaintiff was unable to refer us to any authority to the contrary. We are constrained, in the circumstances, to hold that the evidence upon the record establishes that the plaintiff was divorced by her husband in the year 1915. This finding concludes the case against the plaintiff. In the result the appeal is allowed, the order of the learned Civil Judge is set aside and the suit is dismissed. Parties will bear their own costs. The cross-objection is dismissed."

Similar view was taken by the Kerala High Court in a judgment reported in Madras LR (Cri.) Vol. XII 660, Manoli Pathayi v. Moideen. In this case also reference was made to Case No. XLII, Principles and Precedents of Mahomedan Law by Macnaghten as well as 2nd Edn. of Hamilton's Translation of Hedaya, page 79. In this case before the Kerala High Court, wife had filed petition for maintenance on 18th February, 1967 under Section 488, Criminal Procedure Code and in the counter filed on behalf of the husband, it was contended that he had already divorced her on 18th August, 1966. The learned District Magistrate found that the statement was not true and granted maintenance which was set aside in the revision by learned Additional Sessions Judge of Calicut who awarded her maintenance only for three months from the date on which the counter was filed accepting that at least on filing of the counter, the divorce was effected and this view was upheld by the Division Bench of Kerala High Court. Reference was also made to , Chandbi Ex. w/o Bandesha Mujawar v. Bandesha s/o Balwant Mujawar (supra), and Asman Ullah and Ors. v. Mt. Khatun Unnisa and Ors. (supra), and it was observed :

"In the instant case when on 18th February, 1967, the wife filed a petition under Section 488, Criminal Procedure Code, in the Court of the District Magistrate, Calicut, for maintenance for herself and her child. The husband on 27th March, 1967 filed a counter stating that he had already divorced her on 18th August, 1966. The learned District Magistrate found that statement to be not true. Consequently he ordered maintenance being granted to her at the rate of Rs. 20/- and to the child at the rate of Rs. 10/- per mensem. In revision from that order, the learned Additional Sessions Judge, Calicut, following the decision in Aiyussu v. Ahammad, and Aboobker v. Kadeesa, found that the husband should be deemed to have divorced heron 27th March, 1967. Consequently, he was of opinion that she should be awarded maintenance at the rate fixed by the learned District Magistrate only for the period from 18th February, 1967 to 27th March, 1967, and for three months and ten days from 27th March, 1967, that being the period of Iddat and he made a reference to this Court under Section 438 of Criminal Procedure Code. Advocate Mr. M.M. Abdul Khadar appeared in this case as amicus curiae and placed before us all the relevant authorities. We record our appreciation of the able assistance received from him.

The findings entered and the opinion expressed by the learned Additional Sessions Judge are correct. We find that the husband in the present case divorced his wife on 27th March, 1967 and that she is entitled to maintenance only for the period from 18th February, 1967 to 27th March, 1967 and for three months and ten days from 27th March, 1967, at the rate of Rs. 20/- per mensem. To that extent alone the order of the learned District Magistrate is-modified. In all other respects it shall stand confirmed. The reference is decided accordingly."

19. The judgment of this Court strongly relied upon by the respondent is naturally the one reported in Chandbi Ex. w/o Bandesha Mujawar v. Bandesha Balwant Mujawar (supra), delivered by Shah, J. in that case, in an application under Section 488, Criminal Procedure Code, husband filed written statement to the effect that he had already divorced the wife about 30 years ago and it was held that the statement, even if the fact of such divorce is not proved, operates as a declaration of divorce as from the date of the written statement and the wife is then entitled only to a maintenance for the period of Iddat. The material portion of this judgment has already been reproduced by us in para 8. The learned Single Judge also made reference also referred to Case No. XLII from the Principles and Precedents of Moohummudan Law by Macnaghten, 2nd Edn. Similar view is taken by the Kerala High Court in the case of Ayissu v. Mohammad, 1964 KLT 472.

20. However, in two recent judgments, the Bombay High Court has taken a different view. In the case before the Aurangabad Bench reported in 1995 (3) BCR 433 (Chapalgaonker, J.), Mehtabbi w/o Sk. Sikandar and Anr. v. Sk. Sikandar s/o Sk. Mohd. and Anr. (supra), it has been held :

"3. Though it is true that the powers under Section 125 of the Code of Criminal Procedure will have to be exercised reading them alongwith the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the proposition that whenever a divorce is pleaded by the husband, the Magistrate should dismiss the application for maintenance without recording evidence is totally unsustainable in law. There is no presumption in favour of a divorce. When a party pleads that the divorce is given, the Magistrate is duty bound to record the evidence and thereupon test the veracity of the claim. The learned Magistrate appears to have also overlooked the relevant provisions of the Act of 1986. When a plea of divorce is taken as defence, Magistrate is also duty bound to see whether the maintenance for the Iddat period has been paid to the wife or not."

It is further observed in para (6):

"6. Learned Single Judge of this Court has taken a view that even if the oral divorce is not proved, if the divorce is pleaded by a Muslim husband in written statement, it can be taken to be a declaration of the divorce and the wife would be entitled only to the maintenance for the period of Iddat from the date of the written statement. Chandbi ex w/o Bandesha Mujawar v. Bandesha s/o Balwant Mujawar, (supra). It is well-established principle of law that existence of fact has to be first pleaded and then to be proved by reliable and cogent evidence. Mere pleadings in written statement that respondent No. 1 has divorced petitioner by itself will not prove the factum of divorce and absolve the husband from proving divorce by cogent and reliable oral evidence. It is, therefore, erroneous to presume that if the divorce is pleaded by husband in the written statement in answer to an application under Section 125 of the Code of Criminal Procedure, the oral evidence is not necessary and the factum of such divorce can be presumed. The approach of the learned Magistrate is wholly untenable."

Similarly, another learned Single Judge of this Court in Shaikh Mobin Shaikh Chand v. State of Maharashtra and Anr. (supra), while considering the argument as to whether the statement in the objection (written statement) by the husband that he had dissolved the marriage would constitute dissolution, the learned Judge (Manoharan, J.) held :

"8. Now, it necessarily takes to the next point argued by the learned Counsel that the statement of the writ petitioner in the objection that he has dissolved the marriage, would constitute dissolution, has to be adverted to. Though by necessary implication, para 3 at page 15-A would show that there was allegation that the divorce has been effected, the question for consideration is, whether there could be divorce as per the Mohammedan Law by a mere statement in the pleading. As noticed, the method of divorce has been dealt with in the Mohammaden Law by Mulla, advertence to. which has already been made. The dissolution could be either oral or by executing an oral Talaq-deed. A mere statement in the written statement cannot be treated to be an oral Talaq neither can the same be treated as a deed of Talaq executed in the presence of Qazi, wife's father or witnesses; a mere statement to that effect in the written statement cannot constitute dissolution. Now coming to the decision of this Court , cited supra, wherein it is observed that even though the husband failed to prove the Talaq alleged in the written statement, his statement in the written statement that he has dissolved the marriage would constitute dissolution, as I have indicated, does not appear to be consistent with what Mulla's Principles of Mohammedan Law, to which advertence has already been made earlier. Apart from the same, identical question was considered by this Court in the case of Mehtabbi v. Sk. Sikandar, reported in 1995 (3) BCR 433. In para 6 at page 435, the learned Judge has adverted to the decision and has observed that existence of a fact has to be first pleaded and then has to be proved by reliable evidence. Mere pleading in the written statement that the husband has divorced the wife by itself will not prove the factum of divorce. The learned Counsel for 2nd respondent, Mr. Khubalkar, relied on the decision in the case of Masbullah v. State of U.P. and Ors., reported in 1995 (2) Crimes 715, to contend that the plea of divorce is required to be proved after adducing evidence. He also referred to the decision in the case of Moti-ur-Rahman v. Sabina Khatun and Anr., reported in 1994 (3) Crimes 236, in support of his case that the factum of alleged dissolution has to be proved. I am in respectable agreement with the proposition in 1995 (3) BCR 433, wherein it was held that mere pleading in the written statement by itself cannot prove the factum of divorce. It will not be out of place to mention that the writ petitioner in his objection to the petition under Section 125 of Code does not specifically mention the date, month or year in which he dissolved the marriage by pronouncing Talaq. Thus, though adherence to the pleading as required in a civil suit as such may not be necessary in a proceeding under* Section 125 of the Code the jurisdictional facts which have got nexus with the jurisdiction of the Court to adjudicate the issue have to be specifically pleaded. That again is a defect in the case of the writ petitioner."

21. A Division Bench of Gauhati High Court has also taken similar view in a judgment reported in 1995 AIHC 416, Zeenat Fatema Rashid v. Md. Iqbal Answar. In the first part, the Gauhati High Court held that there cannot be a divorce merely at the whim or caprice of the husband. There must be reasonable cause for the same preceded by pre-divorce conference to arrive at settlement. We have already pointed out that we are not entering into this question as the same is not required to be decided in the present case. The Division Bench referred to the judgment of Shah,J, in (supra), and other judgments and observed that it is unable to agree with the proposition laid down In the above referred judgment. The relevant portion of para 10 needs to be reproduced :

"10. 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 of matters before the Court of legal Tribunal. Where the parties are in dispute as regards a material fact, an 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, the 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 the 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 also amount to furnishing or providing evidence of talak, which is against the rule of pleading and proof..."

22. We are fully in agreement with the Division Bench of the Gauhati High Court which has in categorical terms pointed out that the pleading is one thing and proof is another. Pleading is formal allegation by the parties of their respective claims and defences to provide a notice of what is to be expected at trial and proof is establishment of fact by leading evidence. There is no authority to the proposition that mere allegation in the pleading by itself should be taken either to be a proof of the fact alleged or even otherwise to be independently as a declaration of existence of cessation of legal relationship between the parties. In our view, the reference to Case No. XLII in the earlier cited authorities which take a view that making of a statement in the pleading or in the witness-box or in any other application in course of proceedings by itself amounts to either an acknowledgement of earlier divorce which in turn may be valid or not or even may not be true at all as a matter of fact. It can at the most be said to be an authority to the proposition that there can be acknowledgement of divorce given long back and from the date of acknowledgement the divorce is effective. It is, however, not legal and valid or is not otherwise proved, the statement of the husband should itself be taken as a declaration of divorce. The question in Case No. XLII was only pertaining to the date from which the divorce should be held to have taken effect and on a presupposition that the said divorce effected was legal and valid, it was found that it is effective in any case from the date of such assertion or declaration. Case No. XLII can, by no stretch of imagination be said to be an example conveying a totally new mode of giving divorce which we do not find anywhere in any of the commentaries or texts of the Mahommedan Law.

23. We are also of the view that pleading in course of proceeding or any statement made in the witness-box or in any application is for the purpose of making out a case by parties, and evidence is led for supporting the case by parties, and evidence is led for supporting the case already pleaded. The Forum of judicial proceedings cannot be used for declaring existence or cessation of legal relationship between the parties and, therefore, in our view mere contention in the written statement or in any application or in plaint by itself cannot be accepted to be either an acknowledgement of divorce already given specially even without deciding upon the validity and legality of the earlier divorce. It can never be said to mean a fresh declaration of divorce from the date of such assertion being made in the proceedings or even from the date when it is stated in the proceedings. The Court proceedings should, in our view, be confined to the assertion of facts by parties and to the proof of facts so asserted or alleged and not for any other purpose specially for acknowledgement of declaration of divorce. It is, however, an altogether different thing if the parties

settle their disputes and the settlement is recorded and decree on terms passed. The rights and interests of the parties cannot be jeopardised by a unilateral statement made during the course of proceedings by the other party either orally or in writing. We are, therefore, unable to agree with the view of Shah, J. and Sambre, J. and the other judgments taking similar view, cited supra. We agree with the view of the Division Bench of the Gauhati High Court and also with the views expressed by this Court (Chapalgaonker, J. and Manoharan, J.). We accordingly record our finding on all the five points in the negative. Consequently, the judgments of learned Single Judges of this Court reported in Chandbi ex-w/o Bandesha Mujawar v. Bandesha s/o Balwant Mujawar (supra), and Jaidabai v. Mohammad Shaft Mohammad Ismile and Anr, (supra), are overruled. We are grateful to the learned Counsel appearing for the parties and specially to Mr. K.H. Deshpande, Sr. Counsel appearing amicus curiae and record our appreciation for the valuable assistance rendered to us in deciding the controversy pertaining to a delicate issue.

24. Coming to the present petitions, we find that the finding of the learned Sessions Judge against which Criminal Revision Petition No. 164 of 1995 is filed, is not legally sustainable as the same is based on incorrect approach on the question of proof of divorce. The learned Sessions Judge found that although no contention was raised in the written statement regarding divorce, respondent had led evidence and had produced talaknama as well as envelope containing postal endorsement. This evidence was considered in the absence of any pleading and, therefore, the learned Sessions Judge was not justified in reversing the finding of the Magistrate granting maintenance to the wife and restricting her claim only to the period of Iddat. Said revision petition will have to be allowed by setting aside the order of the learned Sessions Judge and confirming the order of the Magistrate.

Similarly, in Criminal Revision Petition No. 27 of 1996, only the documents were filed before the Magistrate and on appreciation of evidence, learned Magistrate had granted maintenance. This finding of the learned Magistrate regarding evidence was not disturbed and the learned Sessions Judge did not come to a conclusion that such a conclusion could not be arrived at by any reasonable man on the evidence led before him. Learned Sessions Judge has not even discussed the legal aspects of the matter and has stated in a very slipshod manner holding that oral talak is permissible in Mahomedan community and it is sufficient for the husband to pronounce oral talak even in the absence of wife and, therefore, case was not governed by Section 125, Criminal Procedure Code. Both the revision petitions will have to be allowed for these reasons.

25. In the result, Criminal Revision Petition No. 164 of 1995 is allowed and the order of learned Sessions Judge in Revision No. 2311/1994 dated 28.8.1995 is set aside and the judgment of Judicial Magistrate, First Class, Akot in Misc. Criminal Case No. 64 of 1993 is restored. Respondent No. 1 is directed ,to pay all arrears of maintenance as per the order of the Magistrate to the applicant-wife within a period of one month from today.

Criminal Revision Petition No. 27 of 1996 is allowed and order dated 17.1.1996 passed by the Additional Sessions Judge, Chandrapur in Criminal Revision No. 41 of 1994 is set aside and the order of the Judicial Magistrate, First Class, Warora in Misc. Criminal Application No. 152 of 1991 is restored. Respondent No. 1 is directed to pay all arrears of maintenance as per the order of the Magistrate within a period of one month from today.