Calcutta High Court
Mohammad Nur Baksh vs Mst. Sahanara Begum on 16 May, 1995
Equivalent citations: II (1996) DMC 14
Author: N N Bhattacharjee
Bench: N N Bhattacharjee
JUDGMENT Nikhil Nath Bhattacharjee, J.

1. This application under Section 401 read with Section 482 of the Code of Criminal Procedure is directed against the judgment and order dated 29th December, 1990 passed by the learned Sub-Divisional Judicial Magistrate, Barasat in Misc. Case No. 49 of 1989 of his Court. By the said order the learned SDJM dismissed petitioner's application under Section 127 of the Code of Criminal Procedure for cancellation of an earlier order dated 18th August, 1988 granting maintenance of Rs. 200/- p.m. to the opposite party wife and Rs. 100/- p.m. to their only child under Section 125 Cr.P.C. The ground on which the said application under Section 127 Cr.P.C. was based was that the petitioner had in the meantime given talaq to the opposite party, wife and that as in pursuance of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, Denmahr and maintenance during the Iddat period had already been sent to her and accepted by her, the order of maintenance under Section 125 Cr.P.C. was liable to be withdrawn or vacated. But the application under Section 127 was rejected by the learned SDJM by the impugned order and being aggrieved and dissatisfied with the same the petitioner has come up with the present revisional application.

2. Mr. Yamen Ali, learned Advocate appearing for petitioner at the very outset submitted that he was not challenging the impugned order in so far the same relates to paying maintenance to the child who was living with the mother as the petitioner is eager and willing to maintain the child. As a matter of fact, the petitioner in open Court handed over in cash whatever sum had fallen in arrear and was due to the child by virtue of the order passed by the learned SDJM. At the same time Mr. Yamen Ali on behalf of his client undertook to remit by money order future maintenance allowance for the boy at the address of the mother month by month. Thus subject to the said undertaking there is no dispute between the parties in regard to the monthly maintenance allowance payable to the boy and accordingly this revisional application so far as the boy is concerned fails and stands dismissed.

3. Mr. Yamen Ali next submitted that pursuant to the decree of restitution of conjugal rights passed by the learned Munsif, 1st Court, Barasat in Case No. Mat. 28 of 1986, the opposite party wife was invited to live with the husband, the Lawyer's notice whereof dated 15.9.88 was also served upon her by registered post but neither the wife came back nor any reply from her was received by the petitioner. However, the petitioner paid her due monthly maintenance all along. On 27th September, 1989 the petitioner being exasperated gave talaq to the opposite party by pronouncing 3 talaqs in presence of witnesses and the same was also recorded in writing as a talaqnama which was sent to her by registered post with acknowledgement due. But the same was refused by her. The petitioner hereafter sent the said talaqnama to the opposite party wife under certificate of posting. Simultaneously Denmahr and maintenance during the Iddat period were sent by money order which were accepted by her and then the petition under Section 127 Cr.P.C. was lodged for cancellation or

withdrawal of the order of maintenance passed earlier. The petitioner also adduced evidence in support of the factum of talaq but the learned SDJM, Mr. Yamen Ali contended, failed to appreciate the evidences recorded by him and failed to apply correctly the law applicable in the matter and came to an absolutely wrong decision.

4. The opposite party wife contests this revisional application on the grounds, first that the factum of talaq was not established by cogent evidence, secondly, the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, cannot be invoked by an application under Section 127 Cr.P.C. for divesting the wife of the maintenance allowance passed earlier under Section 125 Cr.P.C, thirdly, as Mr. Rahamani, learned Advocate appearing for the opposite party wife submitted, Holy Quran discourages divorce and permits divorce only in extreme cases and that too only after pre-divorce conference and accordingly a Mohamedan husband cannot divorce his wife at his whim and caprice.

5. In respect of the first ground, Mr. Rahamani placed his reliance on the decision reported in Dolna Khatoon v. Jamal Uddin, 1987 C.Cr.Lr. (Calcutta) 283, wherein a learned Single Judge of this Court held that if an application under Section 127 Cr.P.C. is filed, it does not have immediate effect in stifling the original order for maintenance as made under Section 125 Cr.P.C. and that the factum of divorce, if any, has to be proved by cogent evidence by the husband in the Court of Law if he seeks any alteration under Section 127 Cr.P.C.

6. In the instant case, as it appears the talaqnama written and executed on a stamped paper and attested by a Notary Public was annexed to the petition under Section 127 Cr.P.C. as Annexure A. A xerox copy of the postal receipt showing receipt of Rs. 601/- and Rs. 501/- being the maintenance for the Iddat period of 3 months and the Denmahr was also enclosed as Annexure B. In his evidence the petitioner without being shaken by cross-examination established that he divorced his wife by uttering talaq three times in presence of Md. Saheb Ali, Nurul Islam and Sahid. Md. Saheb Ali as PW however denied to have witnessed the talaq. Nurul Islam as PW 3 corroborated the factum of talaq as also execution of the talaqnama and stood the test of cross-examination satisfactorily, Md. Sahid as PW 4 corroborated the factum of talaq in his examination and cross-examination. The opposite party wife alongwith her witness of course sought to deny the talaq.

7. It appears that the learned SDJM made much of PW 2's denial of any knowledge about the talaq and came to his finding as he made without considering the totality of the evidence on record. Having considered all aspects and the evidences on record, I have no doubt in my mind that the factum of talaq was proved by cogent evidence and that the learned SDJM's finding that it was not established by credible evidence must stand reversed.

8. Regarding the second ground taken on behalf of the opposite party wife, reliance has been placed on a Division Bench judgment of Gauhati High Court reported in Idris Ali v. Ramesha Khatun, AIR 1989 Gauhati page 24, wherein the question arose whether the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 shall have application when a divorced woman approaches the Court for execution of the order of maintenance passed in her favour under Section 125 Cr.P.C. before the commencement of the said Act. In the instant case there is no such question

involved. Here the husband has come long after enforcement of 1986 Act for variation of the order passed earlier under Section 125 Cr.P.C. on the ground that he has in the meantime divorced his wife and that under the 1986 Act, the wife after the divorce is not entitled to get maintenance from the husband. The non obstante clause in Sections 3, 4 and 7 of 1986 Act leaves no room for doubt that such applications under Section 127 Cr.P.C. filed by the husband cannot be decided other than in accordance with the provisions of the said Act. It is not a case of divesting the wife of her maintenance allowance because under her personal laws she is not entitled to any maintenance after the divorce from her former husband excepting for the Iddat period. There will be no question of she being made a destitute by the variation/withdrawal, as under Section 5 of the said Act her future maintenance, in case she is unable to maintain herself, has been provided for. The objection fails.

9. Regarding the third ground, Mr. Rahamani submitted that the Holy Quran discourages divorce and permits divorce only in extreme cases and that too only after pre-divorce conference and as such a Muslim husband cannot divorce his wife at his whim and caprice. In this connection Mr. Rahamani relied on a Division Bench judgment of Gauhati High Court in Jeenat Fatema Rashid v. Md. Iqbal Anwar, reported in 1993(2) Crimes page 153 and a Single Bench judgment of this Court in Motiar Rahman v. Sabina Khatoon, reported in 98 CWN 763. The Division Bench of the Gauhati High Court in the said decision observed as follows :

"5. Mr. Phukan, the learned Counsel for the petitioner, has contended that a Mohamedan husband cannot divorce his wife at his whim and caprice. The next question which, therefore, arises for consideration is whether a Mohamedan husband can divorce his wife at his whim and . caprice. In Sarabai v. Rabiabai, (I.L.R. 30 Bom. dissented 537), it has been held that there may not be a particular cause for divorce, and mere whim is sufficient. It is good in law, though bad in theology. In Asha Bibi v. Kadir Ibrahim, I.L.R. 33 Mad. 22 Dissented it has been held that, although an arbitrary or unreasonable exercise of divorce of marriage is strongly condemned in the Quran and is treated as spiritual offence, it does not affect the legal validity of a divorce duly effected by husband. In Ahmed Kasim Molla v. Khatun Bibi, I.L.R. 59 Cal. 833, the Calcutta High Court has held that any Mohamedan husband may divorce his wife at his mere whim and caprice. However, a Single Judge of this Court has, in Jiauddin Ahmed v. Anwara Begum, 1981 CLR 358, held that divorce must be for a reasonable cause, and that must be preceded by an attempt at reconciliation between the husband and wife by two Arbitrators, one chosen by the wife from her family and the other by husband from his side. Learned Single Judge, after considering the cases cited above, the observations of some of the High Courts, the Mandates of the Quran, and the treaties of Mohamedan Law of various authors and scholars came to the above conclusion. This decision of the learned Single Judge was approved by a Division Bench of this Court in Rukia v. Abdul Khaliaue, 1981 (1) CLR 375.

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

7. We are not inclined to accept the submission made by Mr. Barua. We approach the matter as follows: under the Quaran, the marriage state is to be maintained as far as possible and there should be conciliation before divorce (see note 254 of vol: 1 of Holy Quran, by A Yusuf Ali). Therefore, the Quran discourages divorce and it permits only in extreme cases after pre-divorce conference. Therefore, a Mohamedan husband cannot divorce his wife at his whim and caprice..... Therefore, we are in agreement with the decision of this Court, and we respectfully are unable to agree with the view taken by the other High Courts that divorce can be made at whim and caprice of the husband. The decisions of this Court were made by the Single Judge in the year 1979, before 14/15 years ago. Therefore, the question of unsettling the settled position of law does not arise".

10. Relying on the said decision of the Gauhati High Court the learned Single Judge in the Calcutta decision cited above made the following observation:

"13. Even though under Section 308 of the Mohamedan Law (vide Mulla's principles of Mohamedan Law) any Mohamedan of sound mind, who has attained puberty may divorce his wife whenever he desires without assigning any cause, a Division Bench of the Gauhati High Court in the decision in Zeenat Fatema Rashid v. Md. Iqbal Anwar, 1993 (2) Crime 853, has held that a Mohamedan husband cannot divorce his wife at his whim or caprice and divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference to arrive at a settlement with which I fully concur. Though under the aforesaid Section 308 of the Mohamedan Law the husband is not required to assign any cause for the divorce, but there must be a reasonable cause for the same, which should be pre-divorce conference so as to make an endeavour for reconciliation between the parties, if possible....."

11. There can be no denying that Mulla's Principles of Mohamedan Law since its first publication in the year 1906 has been held to be an authentic codification of the rules of Mohamedan Law. It is a prescribed text book for L.L.B. and L.L.M. courses of different Universities and has all along been accepted by the Courts in India and Pakistan as the standard and authentic exposition of the Personal Law of the Muslims of India and Pakistan. When Mulla's Mohamedan Law prescribes that a Mohamedan marriage can be dissolved at the sweet Will of the husband, vide Rule 308, it is difficult to accept any other exposition of the law on the subject based on logical conclusion flowing from sympathy and compassion. In Baqar Ali v. Anjuman, (1902) 25 Allahabad 236, it was laid down that new rules of Mohamedan Law are not to be introduced because they seem to lawyers of the present day to follow logically, when the doctors of the law have not themselves drawn those conclusions. In the Calcutta decision no attempt has been made to explain how and when Mulla's Mohamedan Law became redundant.

12. Gauhati High Court referred to note 254, Vol. 1 of the Holy Quran by A. Yusuf Ali. In Abdul Fate v. Rassomoy, (1940) 22 Cal. 619, the Privy Counsel observed that it was not safe to rely abstract precepts taken from the mouth of Prophet without knowing the context in which the precepts were uttered. Holy Quran is no doubt a source of Mohamedan Law but not the only source. The other sources of importance are Hadias i.e. sayings of the Prophet preserved by tradition. Ijma i.e. concurrent opinions of Prophet's companions : and Qiyas Viz, when Quran, Hadias and Ijma are silent or cannot be applied, analogical deduction made from them. It is firmly established that in

administering Mohamedan Law, Courts are not to put their own construction on the Quran but have to rely on the interpretation made by Mohamedan commentators of antiquity and authority. It does not appear that the Gauhati High Court or the learned Single Judge of this Court made any attempt to trace any authoritative comment about the aforesaid Rule of the Quran as published by A. Yusuf Ali.

13. Now Section 127 Cr.P.C. was already available for alteration / cancellation of a maintenance granted under Section 125 Cr.P.C. as would be evident from Section 127(3)(b) which runs as follows :

"127. Alteration is allowance-(1) on proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the following as he thinks fit.....

(2).....

(3) Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall if he is satisfied that

(a) .....

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or Personal Law applicable to the parties, was payable on such divorce, cancel such order,

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman".

14. In Mst. Zohara Khatoon v. Mohd. Ibrahim, reported in 1981 Crl. L.J. page 754, the Supreme Court observed as follows:

"18. There can be no doubt that under the Mohamedan Law the commonest form of the divorce is a unilateral declaration of pronouncement of divorce of the wife by the husband according to the various forms recognised by the law. A divorce given unilaterally by the husband is especially pecular to Mohamedan Law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws viz. the Hindu Law or the Parsi Marriage and Divorce Act, 1936 contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in Court of Law".

15. In paragraph 22 of the said decision while discussing implication of Section 127(3)(b) of the Code of Criminal Procedure, the Apex Court observed, "For the application of Clause (b), two conditions are necessary:

(1) that an application for cancellation of the maintenance is made by the husband under Section 127(2), and (2) that after the wife has been divorced by the husband she has received the whole of the sum which under any customary or Personal Law applicable to the parties was payable on divorce."

In other words, under the Mohamedan Law the husband could still get the maintenance cancelled after divorcing his wife according to Personal Law if he paid the entire dower specified at the time of marriage.

16. This decision of the Supreme Court sets at rest all controversy in the matter. It is in direct contradiction to Gauhati and Calcutta High Courts' judgments cited above. It appears that the decision of the Supreme Court was not brought to the notice of the said learned Judges. It has been argued that the Supreme Court decision was pronounced long before the Act of 1986 came into force and so has no relevance. But what the Act of 1986 codified is the Personal Law of the Muslims regarding the right to get maintenance by a divorced Muslim woman notwithstanding anything contained in any other law for the time being in force. Section 3 of the said Act is in tune with the Supreme Court decision which cannot be distinguished. It has every manner of application to the facts of the present case.

17. This being the position, it follows that the Gauhati and Calcutta High Courts' decision relied on by Mr. Rahamani were made per incuriam and are not good law. The 3rd ground taken on behalf of the respondent wife also fails.

18. The petitioner herein had proved before the lower Court by adducing cogent evidence the factum of talaa. It was also established that the maintenance for the Iddat period and the dower money were paid to the respondent immediately after the said talaq. Thus the conditions necessary for alteration of the order of maintenance were fulfilled and the petitioner was entitled to get an order for variation/ cancellation of the maintenance as envisaged under Section 127 Cr.P.C. read with Sections 4 and 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. But the learned Magistrate dismissed the application. The order is manifestly unjustified and accordingly the order is liable to be set aside and quashed.

19. As the matter is pending for a long time, no useful purpose would be served by remanding the matter back to the lower Court for a fresh decision. In all considerations and for ends of justice the following order is passed:

This revisional application is allowed. The impugned order of the learned Magistrate is set aside and quashed. Petitioner's application under Section 127 read with Sections 4 and 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 stands allowed. The order of maintenance granted under Section 125 Cr.P.C. on 18th of August, 1988 is withdrawn and cancelled with effect

from the date of the impugned order i.e. 29th December, 1990. Maintenance allowance calculated upto the said date shall be paid by the petitioner herein to the respondent wife within a fortnight from this date. If any excess amount have already been paid to the respondent, the same shall not be liable to be refunded by her. The petitioner herein shall continue to pay the monthly maintenance allowance for the child, the rate of which is, however, raised from Rs. 100/- p.m. to Rs. 150/- p.m. There will be no order as to costs.