Madras High Court
Saleem Basha vs Mrs. Mumtaz Begam on 22 April, 1998
Equivalent citations: 1999 (1) ALD Cri 182, 1998 CriLJ 4782
Author: S Sidickk
Bench: S Sidickk
ORDER S.M. Sidickk, J.

1. This Criminal Revision is directed as against the order dated 28-11-1995 passed by the District Munsif-cum-Judicial Magistrate, Neyveli, in Cri. M.P. 2922 of 1995.

2. The revision petitioner, who is the husband and the only respondent in this revision is his wife.

3. It is the contention of the revision petitioner/husband that he has divorced his wife, namely, the first respondent in Cri. M:P. No. 2922 of 1995 by "talaq" on 30-11-1992 and he is not liable to pay maintenance for the period subsequent to the divorce on 30-11-1992 except for the Iddat i.e, a period of 4 months 10 days subsequent to the date of divorce and the fact of divorce was also communicated to the wife Jamath and the Muthavalli of the Mosque by registered post and the respondent herein is employed as "Aya" in Javahar School, Thiruvalluvar Road. Neyveli, drawing a monthly salary of Rs. 1,687.50 and she is no more the wife of the revision petitioner from 30-11-1992 which is the date of divorce and so the maintenance ordered earlier should be cancelled.

4. The respondent herein, who is the wife of the revision petitioner, filed a counter statement before the trial Magistrate repudiating the averments contained in his petition and claiming that she was not informed of the divorce and the "talaq" pronounced by him is a false allegation and the revision petitioner is liable to pay maintenance and so the application filed by him for cancellation of maintenance amount deserves a dismissal.

5. On the above pleadings and after hearing the learned counsel for both the parties the learned Judicial Magistrate at Neyveli came to the conclusion on 28-11 -1995 in Crl. M.P. No. 2922 of 1995 that the "Talaq" pronounced by the revision petitioner is not valid under law and the revision petitioner has only pronounced the "Talaq" for the sake of the petition for cancellation of the maintenance and the those circumstances the learned Magistrate dismissed the application filed by the revision petitioner for the cancellation of maintenance under Section 127 of Criminal Procedure Code.

6. Aggrieved against the said findings of the learned Judicial Magistrate, Neyveli, the revision petitioner/husband has come up before this Court by filling this criminal revision.

7. After hearing the learned counsel for both the parties the point that arise for determination in this criminal revision are as follows :-

(1) Whether the "Talaq" pronounced by the revision petitioner on 30-11-1992 divorcing his wife viz., the respondent herein is valid under law?

(2) Whether the order of maintenance passed as against the revision petitioner has to be cancelled under Section 127 of Cr.P.C. for any one of the reasons?

(3) To what relief is the revision petitioner entitled?

8. Point No. 1 :-

It is not in dispute that originally a petition was filed by the respondent/wife along with her minor child for maintenance under Section 125 of Criminal Procedure Code in M.C. No. 7/1989 and the same was dismissed by the Judicial Magistrate at Neyveli on 12-10-1992 and as and her child preferred a revision before the High Court in Criminal R.C. No. 77 of 1993 and the matter was settled between the parties and in pursuance thereof an order was passed directing the revision petitioner to pay a sum of Rs. 350/-as maintenance to his wife and a sum of Rupees 200/- to his minor child every month. During the course of the arguments before the High Court in Crl. R.C. No. 77/1993 it was brought to the notice of the learned Judge that the revision petitioner herein has divorced his wife by pronouncing "talaq" and so His Lordship Justice Rengasamy, J., in his order dated 10-3-1995 in Criminal Revision Case No. 77/1992 has observed as follows :-

It is brought to my notice that the respondent herein has divorced his wife by pronouncing Talak and the counsel Mr. Balasubramanian represents that the respondent may not be liable to pay maintenance for the period subsequent to the divorce except for the Iddat period. Any how this matter has to be considered by the Magistrate if a petition is filed under Section 127 of Cr.P.C. for alteration or cancellation of the maintenance for the period subsequent to the alleged divorce. The respondent is at liberty to move before the learned Magistrate for the appropriate relief which he is entitled to under the Code.

9. After the disposal of the Criminal Revision case No. 77/1993 by the High Court the Revision Petitioner has filed the petition in Crl. M.P. No. 2922 of 1995 on 20-7-1995 for the cancellation of maintenance under Section 127, Cr.P.C. on the ground that he has divorced his wife by pronouncing talaq". The respondent/wife repudiated the above said fact of "talaq" and also contended that the "talaq" pronounced by her husband is not valid under law.

10. It is the contention of the revision petitioner that he has informed the respondent/wife about, the fact of "talaq" by sending a registered post. A copy of the said communication dated 30-11-1992 is marked as Exhibit, P. 5 in this case. The said communication dated 30-11-1992 pronouncing "talaq" by the revision petitioner was also sent by registered post to the respondent/wife and also to the Muthavalli and the Secretary of the Jamath in the said locality. The postal receipt for sending the same on 30-11 -1992 is marked as Exhibit P. 1 but unfortunately the cover containing the said communication addressed to the respondent/wife was returned and the returned cover is marked as Exhibit P. 2, wherein we find the endorsement made by the postman by stating that the addressee was not found on several dates and so the cover was returned to the sendor viz., the revision petitioner herein. Thus the respondent/wife was not duly informed about the pronouncement of "talaq" by sending the registered notice. However the Muthavalli and the secretary of the Jamath have received the said communication sent by the revision petitioner as evidenced by the postal

acknowledgments marked as Exhibits P. 3 and P. 4.

11. Even admitting that the respondent/wife was not informed about the pronouncement of "talaq" by registered post which was returned, it was brought to the notice of the respondent/wife about the pronouncement of "talaq" by her husband when he filed the petition for cancellation of maintenance in Crl. M.P. No. 2922/1995 on 20-7-1995. The respondent/wife has also filed a counter statement to the said petition for cancellation in Crl. M.P. No. 2922 of 1995. Therefore it may be held that the respondent/wife was informed about the pronouncement of "talaq" on 30-11-1992 though at a later point of time by filing an application for cancellation of maintenance. This view gains support from the decision reported in Ma Mi v. Kallander Ammal AIR 1927 Privy Council 15 and M. M. Abdul Khader v. Azeeza Bee AIR 1944 Mad 227:45 Cri LJ 672 and Kannoth Meethal Ayissu (Minor) by next friend, mother Kadeessa v. Theyikandiyil Ahamed (1965 Mad LJ (Cri) 48 and Aboobaker v. Kadeesa 1967 Mad LJ 45 and Waheb Ali v. Qamro Bi AIR 1951 Hyd 117 : 52 Cri LJ 1299). It follows from the above decisions that a husband under Mohammedan law can effect a divorce whenever he desires and he may do so by words without any written order and no particular form of words is prescribed and no proof of intention is required and under Mohammedan law the husband can declare a talak in the absence of his wife but before it can be acted upon it must be communicated to his wife and where the wife has come to know of the talak given by her husband, it should be deemed to have come into effect on that day and in a petition filed by a Muhammadan wife for maintenance, it will be deemed to have come into effect atleast from the date on which the written statement by the husband was filed and the written statement filed by the husband would amount to an unequivocal expression of the desire to divorce and therefore it would operate as a divorce and the wife is not entitled to claim maintenance thereafter except for the iddat and so the statement made by the husband in his petition of written statement amount to the pronouncement of talak and operates from that moment and even then a divorced woman by such talak is entitled to maintenance during the period of iddat, which is four months and 10 days from the date of divorce.

12. Applying the abovesaid decisions to the facts of the present case it can be seen that the petitioner/husband filed the application for cancellation of maintenance in Crl. M. 2292/1995 before the Judicial Magistrate, Neyveli on 20-7-1997 and the respondent/wife filed her counter statement before the Judicial Magistrate, Neyveli on 6-9-1995 and so the "talaq" pronounced by the revision petitioner has come into effect with effect from 6-9-1995. In those circumstances it is futfile to contend on behalf of the respondent/wife that she was not duly informed about the talak by her husband.

13. Even then the crucial question that has to be answered in this case is whether the "talaq" pronounced by the revision petitioner/husband is valid under Mohammadam law. The only document filed in support of the "talaq" is the talaknama executed by the revision petitioner in the presence of the witnesses marked as Exhibit P. 5, which is dated 30-11-1992. It reads in Tamil as follows :-

(vernacular matter omitted)

14. Thus the Talaknama dated 30-11-1992 marked as Exhibit P. 5 executed by the revision petitioner in the presence of the witnesses states that the respondent/wife filed a false case for maintenance at the instigation of her parents and the respondent/wife insulted the revision petitioner/husband by dragging him to a Court of law and the said case filed by the respondent/wife was dismissed and the respondent/wife lost her status as wife due to her act in claiming maintenance and in filing a case for maintenance and the respondent/wife did not join with the revision petitioner to run the family for a long period and thereby the respondent/wife failed to perform her duties as a Muslim woman and the respondent/wife abused her husband the revision petitioner besides her mother-in-law and in those circumstances they were unable to run the family and in as much as the respondent/wife filed false case and in as much as difference of opinion arose between the revision petitioner/husband divorced the respondent wife by pronouncing "talaq" three times. Thus two reasons given in the Talaknama dated 30-1-1-1992. One is that the respondent wife has filed a false case for maintenance. Another is that the respondent/wife insulted the revision petitioner and her mother-in-law. Due to, these reasons and due to the difference of opinion they could not run the family and in these circumstances the "talaq" was pronounced. No whisper is made in this Talaknama dated 30-11-1992 marked as Exhibit P. 5 that any conciliation proceeding was initiated between them at any point of time by any mediator nor it is stated in this Talaknama dated 30-11-1992 marked as Exhibit P. 5 that the revision petitioner/husband called upon his wife, the respondent herein, to reform herself and then to run the family amicably. The The Taknama dated 30-11-1992 marked as Ex. P. 5 is silent about any reference made by the revision petitioner/husband to pursuant to his wife, the respondet herein, to come and live with him or he referred to any conciliation proceedings by mediators to reform his wife and thereby to enable the revision petitioner to run his family. These aspects were totally absent in the Talaknama dated 30-11 -1992 marked as Exhibit P. 5 in this case.

15. When we come to the oral evidence of the revision petitioner examined as P.W. 1 Saleem Basha, he merely stated that he divorced his wife the respondent herein as per Mohammadan law by pronouncing "talaq" in the presence of two witnesses on 30-11-1992. He did not state any reason to give talak. The version about this aspect in the chief examination, of P.W. 1 is in tamil in the following words :-

16. The only witness examined in support of this case by the revision petitioner is P.W. 2 Jaffar. He deposed in the Chief Examination in Tamil as follows :-

(vernacular matter omitted)

17. So the witness examined on the side of the revision petitioner as P.W. 2 Jaffar would state that he was informed by the revision petitioner that the respondent/wife did not live with him as per Muslim religion and the respondent/wife did not respect him as well as his mother and the respondent/wife filed a false case for mainte-nance and in those circumstances, the revision petitioner pronounced "talaq" thrice before her and another witness. Except this statement there is no other statement made by P.W. 2 Jaffar in his testimony to come to the conclusion that the "talaq" pronounced by the revision petitioner is in accordance with law and it is valid "talaq" in as much as there were no conciliation proceedings earlier between the revision petitioner and the respondent

earlier in the presence of two mediators.

18. The learned Magistrate of the trial Court referred to a passage of the learned author Dr. Tahir Mahmood in his book. "The Muslim Law of India "at page 114 of 1980 Edition published by Law Book Company, Allahabad and it is very helpful to decide the question of talak in this case. The said passage as extracted by the learned Magistrate from the Book" The Muslim Law of India" 1980 Edition by the learned author Dr. Tahir Mahmood reads as follows:-

The law of Islam placed the unilateral and extra-judicial power of pronouncing a talaq of the husband with a firm expectation that in the first place he will not exercise it ordinarily at all and secondly that if he finds it avoidable to have recourse to it, he will do so with a sense of Justice and rationality, which are the basic demands of Islam from every God fearing Muslim. There is nothing in the law of Islam suggesting that the husband can exercise the power of talaq in an arbitrary, irrational or unreasonable manner.

19. Moreover the learned Magistrate of the trial Court has also extracted another passage in the book titled. "Islamic and Comparative Law Quarterly" by the learned author Dr. Tahir Mahmood 1982 March Edition Volume 2 at page 38 wherein a judgment of His Lordship Justice Beharul Islam of Gauhati High Court reported in Jiauddin Ahmed v. Anwar Begum was quoted and which judgment laid down the law as follows :-

There has been a good deal of misconception of the institution of talaq under the Muslim law. Both from the Holy Quran and the Hadith it appears that though divorce was permitted, yet the right could be exercised only under exceptional circumstances. The holy prophet is reported to have said, "Never did Allah allow anything more hateful to him than divorce.

According to a report of Iba Umar he said "With Allah the most detestable of all things permitted is divorce." (see the Religion of Islam by Maulana Muhamed Ali at page 671).

In his commentary on the Holy Quran Muhamed Ali has said :-

Divorce is one of the institution in Islam regarding which such misconception prevails, so much so that even the Islamic law as administered in the Courts, is not free from these misconceptions.

In Asha Bibi v. Kadir Ibrahim Towther (1910) ILR 33 Mad 22, His Lordship Justice Munro and Abdul Rahim, JJ., at page 25 held as follows :-

No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct could in no way affect the legal validity of a divorce duly effected by the husband.

It may be noticed that the learned Judges Munro and Abdul Rahim, in my respectful opinion, advisedly used the expression "divorce duly effected" in the judgment. No divorce is duly effected if

it is in violation of the injunction of the Quran.

It will be seen that in all disputes between the husband and the wife which it is feared will lead to a breach, the Judges are to be appointed from the respective people of the two parties. These Judges are required first to try to reconcile the parties to each other failing which divorce is to be effected. Therefore though it is the husband who pronounces the divorce, he is as much bound by the decision of the Judges, as is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two Judges and their decision is binding. Divorce may be given orally or in writing, but it must take place in the presence of witnesses. Costollo, J. in (1932) ILR 59 Cal 833 : (AIR 1933 Cal 27) has with respect, laid down the correct law of talaq. In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by the arbitrators one from the wife's family and the other from the husband'. If the attempts fail, talaq may be effected. In other words, an attempt at reconciliation by two relations, one each of the parties is an essential condition precedent to talaq. It is fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. The Holy Quran expressly forbids a man to seek pretext for divorcing his wife, so long as she remains faithful and obedient to him. "If they (Namely women) obey you, then do not seek way against them" (Quran IV 34). It is clear that Islam discourages divorce in principle and permits it only when it has become altogether impossible for the parties to live together in peace and harmony, it avoids therefore a greater evil by choosing the lesser one and open a way for the parties to seek agreeable companion and thus to accommodate themselves more comfortable in their new homes. Divorce is permissible in Islam only in cases of extreme emergency. Registration of marriage and divorce under the Assam Muslim Marriages and Divorce Registration Act, 193.5 is voluntary and unilateral. Mere registration of divorce even if proved, will not render valid a divorce which is otherwise invalid under Muslim law. Relying on the decisions reported in AIR 1939 All 592 1975 Cri LJ 1884 and 1977 Cri LJ 43, Mr. Saikia appearing for the petitioner submits that if the husband fails to prove talaq before the wife's petition under Section 125 of Cr. P.C. the talaq will be valid and take effect from the date of his mention of talaq in his written statement saying that he has divorced her. With respect I am unable to subscribe to the above view, as this view appears to be contrary to the Qaranic injunction on the subject referred to above.

The correct law of talaq as ordained by the Holy Quran is that:

(a) Talaq must be for a reasonable cause;

(b) It must be preceded by attempts at reconciliation (by nominees of both the spouses); and

(c) It may be effected, if the said attempts fail.

20. The same view was expressed by His Lordship Justice V. R. Krishna Iyer of Kerala High Court (as he then was) in the decision reported in A. Yousuf v. Sowramma , wherein His Lordship quoted in extenso the commentaries of the learned author Dr. Ahmad Galwash in his book on "The Religion of Islam" at page 104, which states as follows :-

It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. The whole Quaran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him. "If they (namely women) obey you, then do not seek a way against them". (Quaran IV. 34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her infidelity or her bad character, renders the married life unhappy but, in the absence of serious reasons, no man can justify adivorce either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of god, said the Prophet, rests on him who repudiated his wife capriciously... After quoting from the Quran and the Prophet Dr. Galwash concludes that divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. When the proposal of divorce proceeds from the husband, it is called 'talaq' and when it takes effect at the instance of the wife it is called 'Khola'

21. In the decision reported in Fazlunbi v. K. Khader Vali , speaking before the Supreme Court His Lordship Justice Krishna Iyer stated as follows (at page 1256 of Cri LJ) :-

Before we bid farewell to Fazlunbi it is necessary to mention that Chief Justice Beharul Islam in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and Judges, who dealt with talaq in Muslim law as good even if pronounced at whim or in tantrum and argued against the diehard view of Batchelor, J. ILR (1906) 30 Bom 537 (539), that this view is good in law, though bad in theology..

22. A Division Bench of Gauhati High Court in the decision reported in Zeenat Fatema Rashid v. Md. Iqbal Anwar (1993) 2 Crimes 853, held that a Mahomedan 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.

23. Similar view was also expressed by a single Judge of Calcutta High Court in the decision reported in Motiur Rahaman v. Sabina Khatun 1994 (3) Crimes 236 at page 241 and in para-30 : (1994 Cri LJ NOC 217) (Cal), wherein it is stated as follows : -

Though under the aforesaid Section 308 of the Mohammedan Law by the author Mulla, 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 preceded by a pre-divorce conference so as to make an endeavour for reconciliation between the parties, if possible. But no reasonable cause has been disclosed by the husband in the relevant proceedings for the alleged divorce. There is neither the nearest and faintest whisper by him that the alleged divorce on 15-10-1990 had been preceded by a pre-divorce conference to arrive at a settlement. That being so, even most charitably assuming for the sake of argument that the husband had di vorced the wife on 15-10-1990, the alleged divorce could not be held to be according to Muslim Law.

24. It follows from the above decisions that under the Quoran the marriage status is to be maintained as far as possible and there should be conciliation before divorce, and, therefore, the

Quoran discourages divorce and it permits only after pre-divorce conference. 1 am also in agreement with the principles laid down in the above decisions and take the view that the divorce must be preceded among Muslims by an attempt of reconciliation between the husband and wife by two mediators - one chosen by the wife from her family and the other by the husband from his side. In the above view of the matter a Mohomedan husband cannot divorce his wife at his whim or caprice i.e., divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference to arrive at a settlement. Even if there is any reasonable cause for the divorce, yet there must be evidence to show that there was an attempt for a settlement prior to the divorce and when there was no such attempt prior to divorce to arrive at a settlement by mediators, then there cannot be a valid divorce under Mohomedan Law.

25. In the present case, the reasons given by the revision petitioner in his Talaqnama dated 30-11-1992 are not justifiable reasons for divorce. Even admitting that the Revision Petitioner in his Talaqnama dated 30-11-1992 has given justifiable reasons, there is no whisper in this Talaqnama dated 30-11-1992 marked as Exhibit P.5 that the alleged divorce on 30-11-1992 had been preceded by a pre-divorce conference to arrive at a settlement by two mediators one chosen by the wife from her family and the other by the husband from his side. There is no evidence worth its name in this case to show that such an attempt for reconciliation and settlement was made by the Revision Petitioner and there was a pre divorce conference to arrive at a settlement. That being so, even taking for granted that the Revision Petitioner divorced his wife on 30-11-1992 for reasonable cause, yet the divorce given by the Revision Petitioner would not be held to be valid according to Muslim Law. Taking into consideration of the above facts and circumstances of the case I am to hold that the "lalaq"' pronounced by the Revision Petitioner on 30-11-1992 divorcing his wife viz., the respondent herein is not valid under Mohamedan Law and consequently I answer this point as against the Revision Petitioner.

26. Point No: 2:-

The Revision Petitioner sought for cancellation of maintenance on the ground of "talaq" and on the basis that the respondent herein is employed. As I have already stated, the "talaq" pronounced by the Revision Petitioner is not valid in law. The first ground urged by the Revision Petitioner for the cancellation of maintenance payable to his wife viz., talaq to the respondent herein must fail. There is no satisfactory proof to show that the respondent herein is drawing a monthly salary of Rs. 1,687.50 from her school. Except the ipse dixit of the Revision Petitioner examined as P.W. 1 Saleem Basha there is not proof forthcoming to show that the respondent is drawing salary of Rs. 1867.50 from her employment in a school. The respondent examined as R.W. 1 Mumtaz Begum denied the said payment of Rs. 1687.50 by the school but she has stated that she is paid a sum of Rs. 20/- per day if she went to the said school to attend to the, duties of an 'Aya'. Therefore the contention of, the Revision Petitioner that the respondent herein is living in affuluent circumstances drawing a monthly salary of Rs. 1,687-50 is not entitled to any acceptance in this case. In those circumstances I am to hold that the maintenance payable to the respondent by the Revision Petitioner cannot be cancelled on the grounds urged by the Revision Petitioner and the order of maintenance passed against the Revision Petitioner cannot be cancelled under Section 127 of Criminal Procedure Code for any one of the reasons set out by the Revision Petitioner in his application and consequently I

answer this point also in favour of the respondent herein and against the Revision Petitioner.

27. Point No. 3 :-

Consistent with my findings on the earlier points I am to hold that this Revision is devoid of merits and there is no illegality, impropriety or irregularity in the order passed by the learned Judicial Magistrate, Neyveli, in Crl. M.P. No. 2922 of 1995 and so this Criminal Revision is dismissed and the order of the learned Judicial Magistrate, Neyveli dated 28-11-1995 in Crl. M.P. No. 2922/1995 is confirmed and consequently I answer this point also in favour of the respondent and as against the Revision Petitioner.

28. In the result, this Criminal Revision is dismissed. The order of the learped District Munsif-cum-Judicial Magistrate, Neyveli dated 28-11-1995 in Crl. M.P. No. 2922 of 1995 is confirmed.