Jammu & Kashmir High Court
Mariyam Akhter & Anr vs Wazir Mohd on 14 October, 2010

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU.
Cr Rev No. 51 OF 2005 AND Cr M P No. 15 OF 2005
Mariyam Akhter & anr
Petitioners
Wazir Mohd
Respondent
!Mr. Nirmal Kotwal, Advocate
^Mr. S. S. Ahmed, Advocate

Hon ble Mr. Justice Dr. Aftab H. Saikia, Chief Justice
Date: 14.10.2010
:J U D G M E N T :

Introduction:

Before delving upon to resolve the issue raised in the instant revision petition, it is considered that the judgment will be benefited if the status of Muslim women, vis- `-vis, the scope and effect of valid divorce as mandated under the Mohammadan law is highlighted. The same is, accordingly, discussed hereinunder.

During the early period of Islam, Muslim women were held in high esteem and they occupied exalted positions and in the days of Holy Prophet Mohammad, a Muslim woman was given in the society a position of equality with the opposite gender. Equal treatments were meted out to the women. The ladies of the family of the Prophet were noted for their learning, their virtue, courage and their strength of character. (See S.A.Kader s Muslim Law of Marriage and Succession in India, p. 80-81) Even, in the terms of modern concept of giving gender justice, which is essential, integral and inseparable part of human rights, women, who form one half of the human race, have every right to claim equality before law and equal protection of laws as envisaged under Article 14 of the Constitution of India.

Therefore, when women have the right to marry, they have also the right to be maintained by their husbands. This right has been emphasized in Article 6(1) of Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on 10th December 1948 declares thus:- Men and women, of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

5. The Verse 35 Sura Al-Ahzab (35) of the Holy Quran would clearly show that how the women were treated as equals with men. The Verse 35 reads thus-

> For Muslim men and women, For believing men and women, For devout men and women, For true men and women, For men and women who are Patient and constant, for men And women who humble themselves, For men and women who give In charity, for men and women Who fast For men and women who Guard their chastity, and For men and women who Engage much in Allah s remembrance For them has Allah prepared Forgiveness and great reward. However, in post-Islamic period, it is seen that the degradation and degeneration set in, in the status of women. In male-dominated world, Muslim women were pushed to the whims and fancies of the men- folk and this is reflected primarily in the case of dissolution of marriage, i.e., divorce, which is known as Talaq in Arabic meaning. The doctrine of talaq-ul-bidet (triple talaq-one form of talaq) was evolved as a convenient divorce to dissolve the marriage at the will and whims of the Muslim husband.

None the less, it is incumbent on the part of Muslim husband to maintain his wife so long as she is loyal and faithful to him and obeys his reasonable orders. But once she is divorced, she is entitled to maintenance as per law being in force in India, i.e., Muslim Women (Protection of Rights on Divorce) Act, 1986.

In the above background, it is to be considered that under what circumstances a Muslim married woman can be divorced and what are the essential conditions for causing divorce and procedure to be followed to effect a valid divorce.

The instant revision petition witnesses the deliberation of these fundamental issues pertaining to the validity of the pronouncement of the divorce to a Muslim woman, vis-`-vis, her entitlement to maintenance, as married woman. Maintenance includes food, raiment and lodging (Mulla-Mohammedan Law, para-369) Factual Matrix in brief outlined:

The petitioner herein was married to the respondent on 12.5.1991 and the marriage between them was solemnized according to Muslim rites (Sharah Mohmdi) at Incha Mohra Kula Tehsil Ramnagar. After marriage, both of them lived like husband and wife at the respondent s residence. As luck would have it, the petitioner s marriage life experienced turbulence. She was meted out ill-treatment by the respondent. The respondent used to beat her and made false allegations of unchastity on her.

Eventually, she was driven out of her husband s house five and half months after the marriage and, on the relevant time, she was pregnant. The respondent also snatched her ornaments and clothes and did not care to look after her till date and she was compelled to stay at her parental house, since she was turned out from her matrimonial house.

Meanwhile, she had born the respondent a female child. Even after the birth of their daughter, the respondent refused to pay any maintenance either to the petitioner or to her baby child.

Finding no other alternative, the petitioner initiated proceeding under Section 488 of the Code of Criminal Procedure Svt. 1989 (for short Cr. P. C) for granting maintenance allowance of Rs. 1000/- per month to her and Rs. 500/- per month to her daughter against the respondent-husband before the Court of Sub-Judge(Judicial Magistrate Ist Class), Ramnagar.

It is on record that on 22.6.1994, the respondent, on being noticed, appeared before the Court and granted opportunities to file objections from 22.6.1994 to 24.9.1994.

On 17.10.1994, being an adjourned date, neither the respondent nor his engaged counsel appeared in the Court and their absence resulted in ex-parte proceedings against the respondent.

Meanwhile, the respondent moved a revision petition before this High Court for transfer of the present petition, but the same was dismissed by the High Court on 6.5.1995 with a direction to the Court of Sub-Judge (Judicial Magistrate Ist Class), Ramnagar to decide the claim of the petitioner within a period of three months, directing the parties to appear before the Court on 29.5.1995.

But on 29.5.1995 also, neither the respondent nor his counsel appeared before the Court despite directions given by the High Court and, ultimately, the matter was fixed on 2.6.1995, on which date also the respondent preferred not to appear in person or through counsel.

Finally, the matter was heard on 24.6.1995 and after having considered the evidence and arguments on behalf of the petitioner, maintenance allowance of Rs. 350/- per month and Rs. 250/- per month were granted to the petitioner as well as petitioner no. 2, daughter of the petitioner respectively.

Being dis-satisfied with the granting of such maintenance, respondent-husband moved the Court of Sessions, Judge, Udhampur by filing a revision petition being no. 3/1996, which was dismissed by the learned Judge by his order dated 19.12.1997.

It is pertinent to mention herein that meanwhile, the respondent has contracted second marriage and has been living with his second wife and a daughter has been born to his second wife from him.

Be it also noted herein that the respondent, on 8.8.1995, made an application before the Magistrate for setting aside the ex-parte order of maintenance granted by order dated 24.6.1995 in file no. 17/Misc of 1995. The application for setting aside the ex-parte order of maintenance is extracted below:

The respondent applicant most respectfully submits this application as under:- That the above titled proceedings were pending in this court against the applicant respondent for maintenance.

That the applicant had filed a Criminal Transfer application No. 66 of 1994 in the High Court to transfer the said proceedings to any court at Jammu because the applicant respondent apprehended harm at the hands of the relatives of the petitioner in this above titled maintenance application. That the Criminal Transfer application of the applicant respondent was dismissed by the Hon ble Court on 6th May, 1995. The applicant was not personally present in the Hon ble High Court when the

order was made. A photo copy of the order is filed and marked Annexure-1.

That the applicant received information by post from the advocate vide his letter dated 16th June, 1995 photo copy whereof isw filed and marked Annexure-2. That therefore the applicant did not know that the applicant had to appear in this court on 29th of May, 1995 and was, therefore, not present on that day in this court. That it appears that the advocate of the applicant did not take steps to inform the applicant respondent in the above proceedings because his clerk was absent and he was busy. In any case, for the negligence of the advocate, the applicant should not suffer because the applicant had properly instructed and engaged the said advocate. That the absence of the applicant respondent was, therefore, for the reasons beyond the control of the applicant respondent who all along remained under the impression that the transfer matter is still pending in the High Court. The absence of the applicant respondent was, therefore, not deliberate and the applicant had, therefore, not been absent wilfully or deliberately.

That, however, it appears that the exparte proceedings were ordered against the applicant herein on 2nd June, 1995 and exparte order directing the payment of maintenance was made on 24th of June, 1995.

That the applicant Marriyam Akhtar in the absence of the applicant respondent concealed the fact that she had been divorced vide divorce deed dated 18.5.1992. A legible copy of the divorce deed is also filed herewith for ready reference. That in this court Shri Sudesh Kumar Advocate represented the applicant respondent. However, it appears that no notice was sent to him by this court after the file was received from the Hon ble Court.

That all the proceedings under Sec. 488 Cr. P. C had to be conducted in the presence of respondent. However, in this case the respondent has been proceeded against exparte and as stated above the absence was neither wilful nor deliberate.

An affidavit duly sworn in is enclosed herewith in support of this application.

IN THE PREMISES It is most respectfully prayed that your honour may be pleased to allow this application and to set aside the exparte order dated 24.6.95 and to afford the applicant an opportunity to appear and contest the application of the petitioner referred above.

Sd/-

Applicant-respondent through counsel Dated 1.8.1995. Having failed to get any relief against the order of granting of maintenance allowance, the respondent preferred an application under Section 489 of the Cr. P. C being file no. 19-A/Misc before the Judicial Magistrate Ist Class, Ramnagar for cancellation of the Court s order dated 24.6.1995, which awarded monthly maintenance allowance to the petitioner and her child, claiming that she was not entitled for any maintenance for the reasons that:

the respondent divorced the petitioner through written divorce executed on 18.5.1992, which was duly communicated to her through registered post; such divorce was admitted by the petitioner by executing an agreement on 4.1.1993; and the petitioner admitted voluntarily to be divorcee while making a statement before the Tehsildar, Ramnagar in a proceeding for seeking Residents of Backward Area Certificate for her.

The learned Magistrate by order dated 22.2.2002, having considered the statements made in the application as well as upon hearing the parties, found that the petitioner was divorced on 8.8.1995 or on 18.5.1992 as stated in para 9 of the application for seeking to set aside the exparte order dated 24.6.1995, as quoted herein above at paragraph 22 of the judgement and the Ruling that the respondent-husband had unfettered power of divorce and, accordingly, it was held that the petitioner, being the divorcee wife, should have no claim to maintenance after 8.8.1995. However, according to Court, the child would continue to get the maintenance, as awarded.

The order dated 22.2.2002 was carried to the High Court by the petitioner in Cr. Rev. no. 27/2002. This Court vide order dated 10.12.2002 refraining itself from rendering any decision as to whether there was a valid divorce against the petitioner, only dealt with the quantum of maintenance and modified the maintenance allowance granted under order dated 22.2.2002 holding that the daughter would be held entitled to interim maintenance at the rate of Rs. 1000/- per month to the exclusion of the petitioner. It was further held as under:- As to whether valid divorce or not, parties are left free to put this aspect before the Court below. This issue would be settled and the parties can lead evidence. Parties would appear before the trial Court on 24th of January, 2003. Further maintenance would depend on the final verdict of the Court. With the above directions, this Court remitted the matter back to the Court below.

The learned Magistrate on receipt of the order of the High Court and in compliance of the directions to resolve the issue of divorce between the parties, proceeded to decide the application and examined three witnesses adduced by the petitioner- wife, when two witnesses were examined for the respondent-husband. Having appreciated the evidence so recorded and also upon hearing the learned counsel for the parties, learned Magistrate came to the conclusion that the respondent-husband divorced his wife/ the petitioner in accordance with the Mohammadan Law, and, as such, the petitioner is not entitled to claim maintenance from the respondent being the divorcee wife. Accordingly, the application under Section 489 Cr. P. C was disposed of, maintaining the modified order passed by the High Court on 10.12.2002, as regard the maintenance allowance to petitioner no. 2, their daughter (C) Order under challenge:

Order dated 26.2.2005, as mentioned above, has been assailed by the petitioner pleading that:

There is no valid divorce ever pronounced by the respondent against her; The procedure of divorce, i.e., Talaq has not been strictly followed; and Petitioner, being continued to be wife, is entitled to get the maintenance.

In consideration of the above, it is the case of the petitioner that the impugned order is liable to be set aside and quashed.

(D) Arguments Against the impugned order:

Mr. Nirmal Kotwal, learned counsel representing the wife-petitioner has vehemently contended that the learned Magistrate committed error both in law and on facts in entertaining the application under Section 489 Cr. P. C. itself and thereby disentitling the petitioner from getting maintenance. According to him, such finding was legally incorrect, based on no evidence, and against the basic principles of Muslim law.

Rejecting the divorce, at the very outset, the learned counsel has submitted that no divorce was ever pronounced by the respondent to the petitioner at any point of time. The divorce deed dated 18.5.1992 produced by the respondent and relied by the Magistrate was never received by the petitioner and the same has already been disputed and rejected by her. The finding of the learned Magistrate to the effect that the divorce was pronounced by the husband much earlier before the maintenance proceedings, i.e., the divorce was pronounced on 18.5.1992 and the petition for maintenance was instituted on 4.11.1992, i.e., after six months, cannot be legally accepted, for the simple reason that it is on the record that after institution of petition for maintenance on 4.11.1992, due notices were sent to the respondent and he, for the reasons best known to him, neither appeared nor filed any written statement through which he could have informed the court the factum of divorce against his wife. Instead, he preferred an application before the Hon ble High Court for transfer of the case from Ramnagar to Jammu in Cr. Revision no. 63/1994 on the ground that it was not convenient for him to go to Ramnagar and faced a threat to his life from his wife/ the petitioner and the said application was rejected by the High Court by order dated 6.5.1995. Conveniently the respondent did no mention or divorce caused on 18.5.1992 in the said application so as to bring it to the knowledge of the petitioner.

The submissions of the learned counsel is that the respondent having got ample opportunities to file written statement, neither he appeared before the Court nor did he file the written statement.

It is further contended that reliance on the cutting of the daily English newspaper Kashmir Times as a proof of factum of divorce and its knowledge to the petitioner by the court below is not tenable under law. The petitioner, being a lady from Ramnagar, did not have any knowledge about such paper publication not being prominently exhibited in the concerned newspaper which was not in wide circulation in the area where the petitioner did reside and the same is clearly evident from such publication itself. In a case of divorce, of present nature, such publication is not acceptable under the law.

As regards the finding of the learned Magistrate pertaining to the admission made before the Tehsildar, Ramnagar by the petitioner on her divorce, it is contended that said admission is valid in law because the same was not made in any proceedings in the Court of law and was not to be put any cross-examination. Even the Tehsildar, before whom such statement was made, was not examined by the respondent to prove the said factum. According to the learned counsel this is not acceptable under the law of evidence. Mere making of such statement before a Tehsildar in a matter of seeking Residence of Backward Area Certificate will not go to show that the petitioner was a divorcee and thereby to make her disentitlement from getting maintenance.

The last contention advanced on behalf of the petitioner is that the alleged divorce was not pronounced in terms of the provisions of Muslim law based on Quranic injunction and, as such, the instant divorce, genuineness of which has been strongly objected and refuted by the petitioner, is not a divorce in the eye of law. In order to bolster up his submission, Mr. Kotwal has relied on the following judicial authorities of the Supreme Court and of this Court:- Shamim Ara v. State of U. P. and anr (AIR 2002 SC 3551);

Manzoor Ahmad Khan v. Mst. Saja and ors (2003 (II) SLJ 619); and Mst. Amina Banoo v. Abdul Majid Ganai (2005 (I) SLJ 341).

(E) Submission and contention in support of the impugned judgment:

supporting of the impugned judgment, Mr. S. S. Ahmed, learned counsel for the respondent has forcefully argued that under the Muslim Law, right of pronouncing divorce has been absolutely bestowed upon the husband who can only pronounce the Talaq in any form as Mohammadan law does not prescribe any particular form for causing divorce. A divorce can be effected either by orally by spoken word or by written document. In the instant case, the petitioner was divorced by written divorce deed on 18.5.1992, six months before the initiation of the maintenance proceedings by the petitioner on 4.11.1992. Even thereafter also, divorce was effected by an agreement executed by both the parties on 4.1.1993 and the petitioner was very much aware of both the written documents, more particularly agreement of 4.1.1993, where she was a party.

His further contention is that assuming, divorce was not effected by those above mentioned documents, it is the petitioner, who herself admitted about her divorce by making a statement in file no. 143/NB dated 28.7.1995, wherein her statement was recorded on 21.12.1997 by the Tehsildar, Ramnagar, before whom she sought for a Residence of Backward Area certificate, to the effect that she was a divorcee. Her this statement itself was sufficient to prove that the petitioner was divorced by the respondent.

To substantiate his submission, he has relied upon a decision of the Apex Court in a case of Thiru John v. The Returning Officer and ors, reported as AIR 1977 SC 1724, wherein in paragraph 15, it was held that it was well settled that a party s admission as defined in Sections 17 to 20 of the Evidence Act, 1872 (the Act) fulfilling the requirements of Section 21, of the Act, was substantive evidence proprio vigore. An admission, if clearly and unequivocally made was the best evidence against the party making it and though not conclusive, shifted the onus on to the maker on the principle that what a party himself admits to be true may reasonably be presumed to be so and until the fact admitted was rebutted the fact admitted must be taken to be established .

(F) Issues to be decided:

39. Having heard learned counsel for the parties at length as well as on thorough scrutiny of the factual situation emerged from the arguments advanced on behalf of the parties, the basic questions that have arisen for resolution in this case, are:

Whether there had been a divorced duly effected under the Mohammadan law against the petitioner.

Whether the divorce was proved.

(G) Tenets of Mohammadan Law on Divorce:

40. According to Mulla in his Principles of Mohammadan law (19th Edition) By M. Hidayatullah and Arshad Hidayatullah, the contract of marriage under Mohammadan law may be dissolved in any one of the following ways : (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. However, the wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage, but she may, in some cases, obtain a divorce by judicial decree(Section 307 page 258).

41. When the divorce proceeds from the husband, it is called talak; when it is effected by mutual consent, it is called khula or mubaraat, according to the terms of the contract between the parties.{ (Mulla s Principles of Mohammadan Law (supra) (Section 307) By M. Hidayatullah and Arshad Hidayatullah at page 258)}.

42. A talak may be effected (1) Orally (by spoken words) or (2) by a written document called a talaknama. So far oral talak is concerned, no particular form of words is prescribed for effecting a talak. If the words are express (saheeh) or well understood as implying divorce, no proof of intention is required. If words are ambiguous (kinayat), the intention must be proved. It is not necessary that talak should be pronounced in presence of the wife or even addressed to her.

43. As regards talak in writing, talak can be effected by a written document called talaknama. It is required that such type of deed may be executed in presence of the kazi or of the wife s father or of the 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 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. {Mulla s Principles of Mohammadan Law (supra) (Section 310 page 259)}.

44. There are two kinds of talaq as recognized under Hanaf I s Mohammedan Law namely; (i) Talaq-us-sunnat and (ii) Talaq-ul-bidat or (iii) Talaq-ul-badai. Talaq-us-sunnat is effected in accordance with the rules laid down in the traditions, i.e., Prophet Sunnat headed down by him or by his principle disciples. On the other hand, the talaq-ul-bidat is heretical or irregular mode of divorce which was introduced in 2nd Century of Mohammedan era. In this kind of talaq, as a matter of fact, there is capricious and irregular power of divorce ,which was, in the beginning, left to the husband, was strongly disapproved by the Prophet.

45. Talaq-us-sunnat is either Talaq Ashan or Talaq Hasan. The mode of giving this talaq may be discussed as under:-

(1) Talak ashan, which consists of a single pronouncement of divoce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat.

(2). Talak hasan that consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs. And (3) Talak-ul bidaat or talak-i-badai which consists of three pronouncements made during a single tuhr either in one sentence, e.g., I divorce thee thrice, - or in a separate sentences, e.g., I divorce thee, I divorce thee, I divorce thee .

The above proposition of law as regards divorce or talaq primarily emerged from the text of Holy Quran, which is the primary source of Muslim law on the relationship between the husband and the wife as well as pronouncement of divorce by the husband against the wife.

The mode and procedure to effect a valid divorce has been mandated in the Holy Quran. The Holy Quran ordains in clear and un-equivocal terms for re-conciliation to effect a valid divorce in Sura Nisa (4). In this regard Verses Nos. 128 to 130, being relevant, may be quoted as under:-

> 28. If a wife fears Cruelty or desertion On her husband s part, There is no blame on them If they arrange An amicable settlement Between themselves;
>
> And such settlement is based; Even though men s souls Are swayed by greed.
>
> But if ye do good And practice self-restraint, Allah is well-acquainted With all that ye do.

129. Ye are never able To do justice Between wives Even if it is Your ardent desire;

But turn not away (From a woman) altogether, So as to leave her (as it were) Hanging (in the air).

If ye come to a friendly Understanding, and practice Self-restraint, Allah is Oft-forgiving, Most merciful.

But if they separate Allah will provide abundance For each of them from His All-reaching pounty;

For Allah is He That careth for all And is wise.

(see the Holy Quran English Translation of the Meaning and the Commentary (Revised and Edited) by the Presidency of Islamic Researchers, IFTA, Mushaf Al-Madinah).

48. Even recognition of the institution of marriage is manifest from the Quranic Verses in Sura Nisa (4). In Verse No. 1 wherein, it is mandated as under:

> . O mankind ! fear Your Guardian Lord, Who created you From a single Person, Created, out of it, His mate, and from them twain Scattered (like seeds) Countless men and women;- Fear Allah, through Whom Ye demand your mutual (rights), And

be heedful of the wombs (That bore you): for Allah Ever watches over you.

{see the Holy Quran (Supra)}.

49. The learned Commentator Yousuf Ali in his Book Translation and Commentary of Holy Quran at note 254 page 90, commenting on the subject of talaq has observed;-

Islam tried to maintain the married state as far as possible. Especially where children are concerned, but it is against the restriction of the liberty of men and women in such vitally important matters as love and family life. It will check hasty action as far as possible and leave the door to reconciliation open at many stages. Even after divorce a suggestion of reconciliation is made, subject to certain precautions against thoughtless action. A period of waiting (iddet) for three monthly courses is prescribed in order to see if the marriage conditionally dissolved is likely to result in issue. But this is not necessary where the divorced woman is virgin: it is definitely declared that woman and man shall have similar rights against each other.

Yousuf Ali (Supra at note 256 page 90) has further observed:

Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastly, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorce (with a reconciliation between) are allowed after that the parties must unitedly make up their minds , either to dissolve their union permanently or to leave honourable lives together in mutual love and forbearance to hold together or equitable terms, neither party worrying the order nor grumbling nor evading the duties and responsibilities of marriage. Yousuf Ali proceeds:

All the prohibitions and limits prescribed here are in the interest of good and honourable lives for both sides, and in the interest s of a clean and honourable social life without public or private scandals ..

50. The Holy Quran lays down the procedure for effecting a re- conciliation. Verse No. 35 Sura Nisa (4) provides as under:-

5. If ye fear a breach Between them twain, Appoint (two) arbiters, One from his family, And other from hers;

If they seek to set thighs aright, Allah will cause Their reconciliation:

For Allah hath full knowledge, And is acquainted With all things.

51. In the above verses, the Holy Quran stipulated a condition precedent to divorce. Yusuf Ali, the great Jurist and Commentator (Supra) at Note 549 page 191, observed about the above those verses as follows:

An excellent plan for settling family disputes, without too much publicity or mud- throwing, or resort to the chicaneries of the law. The Latin countries recognize this plan in their legal system. It is a pity that Muslim do not resort to it universally, as they should. The arbiters from each family would know the idiosyncraeies of both parties, and would be able, with God s help, effect a real reconciliation. Maulana Mohammad Ali in his book Religion of Islam at page 671 commented that:

This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belong to the wife s family and the other to the husband s. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail a divorce is allowed. But the final decision rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam.

53. Commenting further on these verses, Maulana Mohammad Ali (Supra) observed:

From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce. Keeping in view these teachings of the Holy Quran, the Prophet declared divorce to be a most hateful of all things permitted. The mentality of the Muslim is to face difficulties of the married life along with its comforts and to avoid disturbing the disruption of the family relations as long as possible, turning to divorce only as a last resort.

A close perusal of our Quranic verses as quoted above and commentaries thereon by well recognised scholars of great eminence would come to indicate that no divorce is duly effected if it is in violation of injunction of Holy Quran. Ameer Ali in his treaties on Mohammedan Law observed :

The Prophet pronounced talak to be a most destable thing before the Almighty God of all permitted things. If talak is given without any reason it is stupidity and ingratitude to God. (I) Judicial Interpretation:

It is said that talaq is a sword which is brandished by the Muslim husband against his wife with whims and caprice. Even judicial authorities gave in the past its nod to this concept of talaq to be exercised by the husband.

In the case of Ahmad Kasim Mulla v. Khatun Bibi, reported in ILR 59 Calcutta 833, which has so long been regarded as a leading case on the law of divorce, Justice Costello held as under:-

Upon that point (divorce), there are a number if authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the mere recent decisions of the Courts. I regret that I have to come to the conclusion that as the law stands at

present, any Mohamedan may divorce his wife at his mere whim and caprice. In another case of Sarabai v. Babiabai (ILR 30 Bombay 537), while observing that divorce can be effected mere on whims, held:

It is good in law, though bad in theology.

59. However, the whole approach to Muslim divorce has started changing with the deeper study of the subject that discloses significantly realistic, rational and modern law divorce. Those are effectively reflected in the judicial decisions of the recent years. The Kerala High Court speaking through Krishna Ayer, J (as the then) in case of A. Yusuf Rawther v. Sawramma, reported in AIR 1971 Kerala 261, took a revolutionary view as regards divorce of Muslim women. In paragraphs 6 & 7 it was held as under:-

. The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute.

. . . . . .

Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture-law is largely the formalised and enforceable expression of a community s cultural norms-cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions Indeed, a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce ..It is a popular fallacy that a Muslim male enjoys, under the Quaranic law, unbridled authority to liquidate the marriage. the whole Quoran 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 Quoran IV: 34 ..

Commentators on the Quoran have rightly observed and this tallies with the law now administered in some Muslim countries like Iraq _ that the husband must satisfy the Court about the reasons for divorce. However, Muslim law, as supplied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wives right to divorce Quoting Dr. Galwash, the learned Judge opined :

Marriage being regarded as a civil contract and as such not indissoluble, the Islamic law naturally recognises the right in both the parties, to dissolve the contract under certain given circumstances. Divorce, then, is a natural corollary to the conception of marriage as a contract, . It is clear, then, 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, greater evil by choosing the lesser one, and opens a way for the parties to seek agreeable companions and, thus, to accommodate themselves more comfortably in their new homes . Dr. Galwash, as observed by this Court, concluded that divorce is permissible in Islam in cases of extreme emergency ..

60. The Gauhati High Court in a case of Jiauddin Ahmed v. Mrs. Anwara Begum, reported as (1981) 1 Gauhati Law Reports 358, authored by Bahorul Islam, J (the then), following A. Yusuf Rawther s case (Supra), categorically held that a talaq could not be exercised at a caprice and whim of the husband and an attempt of reconciliation was a condition precedent to divorce.

61. The ratio of Jiauddin Ahmed s case (supra) approved by Division Bench of Gauhati High Court in (1) Rukia Khatun v. Abdul Khalique Laskar, reported in (1981) 1 GLR 375; (2) Zeenat Fatima v. Mohd Iqbal Anwar, reported in 1993 GLR Supp 256.

62. The Supreme Court in Shamim Ara s case (supra) following A. Yusuf Rawther case (supra) , Jiauddin Ahmed v. Anwara Begum (supra), Rukia Khatun s case (supra), and relying to observations made in Bai Tahira v. Ali Hussian (AIR 1979 SC 362) wherein the right of maintenance of a Muslim divorcee was dealt, was in full agreement with the observations made on this judicial proceedings to the effect that:

Talak must be of reasonable cause ; and That must be proceeded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his family.

In paragraph 14, at page 3556 of Shamim Ara (Supra), the Apex Court observed: We are in respectful agreement with the above said observations made by the learned Judges of High Court. We must note that the observations were made 20-30 years before and out country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive tends. What this Court observed in Bia Tahira v. Ali Hussain, AIR 1979 SC 362 dealing with right to maintenance of a Muslim divorcee is noteworthy. To quote:

The meaning of meanings is derived from values in a given society and its legal system. Article 15(3) has compelling compassionate relevance in the context of S. 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill- used wife and the derelict divorcee. This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Art. 15(3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Art.39 is part of social and economic justice, specificated in Art.38, fulfilment of which is fundamental to the governance of the county (Art.37). From this coign of vantage we must view the printed text of the particular Code. Law is dynamic and its meaning cannot be pedantic but purposeful.

63. This Court in Manzoor Ahmed Khan s (supra) and Mst. Amina Banoo s case (supra) took the same view, as indicated above. It will be apt to quote relevant portions of the reasons and findings

recorded in Manzoor Ahmed Khan s (supra). Relevant Paragraph i.e; 11 is quoted herein below:

The law on Talaq as ordained by Holy Quran is (i) that talaq must be for a reasonable cause and (ii) that must be preceded by an attempt of reconciliation between her husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. The issue has been subject matter of judicial scrutiny since long. IN Shamim Ara v. State of U.P. (supra), the Apex Court has relied upon and quoted the passages from various judgments of various High Courts which are eye openers for those who think that a Muslim man can divorce his wife merely at whim or on caprice. One of those illuminating judgments was recorded by Justice V. R. Krishna Iyer as Judge of the High Court of Kerala (as his lordship then was) in A. Yousuf Rawther v. Sowramma, AIR 1971 Ker 261. The Supreme Court, while relying on this judgment, has observed that it is virtually a research document. While commenting on the above judgment in A. Yousuf Rawther v. Sowramma, Tahir Mahmood in his book The Muslim Law of India (third edition 2002 New Version), in Chapter 6 on Divorce has stated as under:

. Policy of Islamic Divorce Law:

Noting the view of some Muslim scholars that the Indo-Anglican judicial exposition of the Islamic law of divorce has not been just to its original tests, a learned Judge of India has observed that indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce .

This observation presents a correct, unbiased and authentic view of the Islamic law of divorce .

(I) Reasons and Findings:

64. At the very outset it should be noted that the question of talak to be pronounced by the husband in case of oral divorce does not involve here in this case. It is no body s case that the petitioner was divorced by pronouncement of spoken word by the husband against her. The basic case made out by the respondent-husband against the petitioner herein is that he divorced his wife by a written divorce on 18.5.1992 and, that too, prior to the institution of the maintenance proceedings by the wife on 4.11.1992. According to him, there was an another agreement executed on 4.1.1993. The case of the respondent is that written divorce deed dated 18.5.1992 was also sent to the petitioner through registered post. That apart, the petitioner voluntarily admitted before the Tehsildar, Ramnagar on 28.7.1995, before whom, she filed an application seeking for Resident of Backward Area certificate, stating therein that she was a divorcee. It was also the case of the respondent that the factum of divorce was published in daily newspaper Kashmir Times on 9.11.1992.

65. So the entire matter revolves around as to whether the divorce has been duly effected by the above written divorce deeds or by her admission before the Tehsildar, Ramnagar or by publication in the newspaper Kashmir Times .

66. In support of their respective claims, both parties adduced evidence examining the witnesses.

67. The petitioner has strongly objected and refuted both the agreement of divorce as well as the written divorce deed. According to her, she has never executed any agreement of divorce on 4.1.1993, as claimed by the respondent nor had she received any written divorce deed dated 18.5.1992 by registered post.

68. Records placed before this Court do not reveal any document to show that the written divorce deed dated 18.5.1992 was ever sent by registered post. In fact, in the instant case, the respondent/ husband, as it appears, did not make any attempt to prove those documents relied upon by him.

69. Amazingly, from a close perusal of the record, it transpires that the respondent did not appear before the proceedings initiated by the petitioner against him for granting maintenance on 4.11.1992 in her favour and in favour of her daughter nor had he preferred any written statement. By filing written statement before the Court, he would have brought on record the written divorce deed dated 18.5.1992. In that case, a written statement stating of divorce filed by the husband would have been amounted to divorce.

70. It is on the record and also appears from the submissions and contentions that instead of filing written statement, he having taken this plea or that plea , moved the higher forum either for transfer of the case or for cancellation of the maintenance allowance having been granted by the Magistrate.

71. This Court has also considered the submissions put forward on behalf of the parties as regards the paper publication, as noted above, by which the respondent has declared that he has divorced the petitioner. Carefully perused the paper cutting, in question, published in daily newspaper Kashmir Times which has been placed as Exhibit before the Court. The said paper cutting itself would indicate that the same lacks adequate and prominent exhibition in the space of the newspaper which can easily be skipped from the sight of an ordinary reader. Besides, the nature of publication, as noticed, would not help the husband/respondent to prove that the divorce was effectively executed.

72. The plea of admission made before the Tehsildar, Ramnagar has also been given due consideration. The admission, as claimed on behalf of the respondent, is not an admission made in a proceeding. In this regard, the judicial authority reported in Thiru John s case (Supra) relied upon to support the contention of admission by the petitioner as she is a divorcee, in our opinion is not applicable in the case in hand. Reason is that in the cited case, at paragraph 15 at page 1726 the Supreme Court observed that it was well settled that a party s admission as defined in Sections 17 to 21 of the Evidence Act, fulfilling the requirements of Section 21 of the Evidence Act. In the instant case, the so called admission, ex-facie does not fulfil the provisions of Section 21 of the said Act. In this connection, it would be proper and necessary to quote Section 21 of the said Act.

1. Proof of admissions against persons making them, and by or on their behalf-admissions are relevant and may be proved as against the persons who makes them, or his representative in interest; but they cannot be proved by or on behalf of the persons who makes them or by his representative in interest, except in the following cases:-

An admission may be proved by or on behalf of the persons making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.

An admission may be proved by or on behalf of a person making it, when it consists of statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, as is accompanied by conduct rendering its falsehood improbable. An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. The Supreme Court in a case of Biswanath Prasad and others v. Dwarka Prasad & Ors. reported in AIR 1974 SC 117, at para 8 ruled that:

There is no merit even in the contention that because these three statements Exs. G, G2 and H- had not been put to the first plaintiff when he was in the witness box or to the eighth defendant although he had discreetly kept away from giving evidence, they cannot be used agasint him. counsel drew out attention to S.145 of the Indian Evidence Act. There is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by use of his prior statement. In the former case an admission by a party is substantive evidence, if it fulfils the requirements of S.21 of the Evidence Act: in the latter case a prior statement is used to discredit the credibility of the witness and does not become substantive evidence. In the former, there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence proprio vigore: in the latter case the Court cannot be invited to disbelieve a witness on the strength of prior contradictory statement unless it has been put to him, as required by S.145 of the Evidence Act, this distinction has been clearly brought out in the ruling in Bharat Singh s case (1966) 1 SCR 606; 615- 16=(AIR 1966 SC 405). This Court dispose of a similar argument with the following observations:

Admissions are substantive evidence by themselves, in view of Sections 17 & 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. We are of the opinion that the admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting the witness under S.145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

74. In the light of above precedent, the present admission cannot be said to be the admission for the purpose of making it substantial evidence. Proof is establishment of fact by evidence or matters before the Court or legal Tribunal. Such admission made before an officer seeking certain certificate does not constitute evidence. Since the admission was not be made in any proceeding having scope of cross-examination, the same cannot be relied upon by the respondent in support of a case raising the issue as to whether the respondent has duly divorced the petitioner.

75. The most important point which has also taken note by the leaned Magistrate is the question of reconciliation between the parties. Learned Magistrate has categorically observed in his finding that the mediation and reconciliation meeting between the parties were also proved by the statement of one witness namely Ghulam Rasool, who was examined as PW-3 on petitioner s side but surprisingly on going through the statement of PW-3 Ghulam Rasool, which has been quoted in the impugned judgment itself, it is seen that there is even no whisper as regards having such reconciliation. For the sake of convenience the statement recorded in the judgment itself may be reproduced herein below: PW-3 Ghulam Rasool; has deposed that the parties to the petition are husband and wife. The petitioner had divorced by the respondent. He has heard about the divorce but does not possess personal knowledge. In his presence, the dowry articles were returned to the petitioner. At the time of handing over the dowry articles, he had stood a witness to that document. He has identified his signatures. The dowry articles were brought from Latti, the house of the respondent and the same were delivered to the petitioner. He had acted on the mutual consent of the parties.

On cross-examination he has deposed that parties were not divorced in his presence. Now the parties are living separately and the respondent has contracted second marriage. There is a custom in our community that divorce may be pronounced either orally or written and in the Court. The original list of property produced by the respondent has been admitted by him as true but denied its contents.

76. Be that as it may, having closely scrutinized the basic concept of divorce, mandate of Holy Quran and commentaries of the jurists as legal authorities, it is seen that the action taken and procedure adopted by the respondent to divorce his wife, is not permissible under the law. No reasonable cause has been shown for divorcing the petitioner and, such divorce was not preceded by nor has any attempt on reconciliation ever been made between them by the two arbiters, as required under the law.

77. In terms of the above discussion, this Court is of the view that all those basic questions taken up for consideration have been appropriately answered and it can unhesitatingly be held that :

the divorce was not properly effected;

ii. the divorce was not validly proved.

78. The basic concept of law on divorce in the modern trend of thinking is to put restrictions on the caprice and whim of the husband to give talak to his wife at any time without giving any reason whatsoever. It must be exclusively dealt with in accordance with the Quranic injunction. If the relationship between the husband and wife becomes strained, there should be two persons, one from each of the parties, chosen as arbiters, who shall endeavour to cause reconciliation between the husband and wife and, if the same is not possible, then the divorce or talak may be effected. In other words, an attempt for reconciliation by the two relations, one each of the parties is an essential condition precedent to divorce. {see also Jiauddin Ahmed s case (supra) at para 4}.

79. Having regard to the Quranic mandate, commentaries of the eminent jurists of Mohammedan law as well as the judicial authorities pronounced by the highest and higher Courts, this Court held that divorce is allowed only for a reasonable cause and, secondly, it must be preceded by an attempt to reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his family. If such reconciliation fails only then there can be a valid divorce.

(J) The concept of Reconciliation:

80. Black s Law Dictionary (7th Edition) defines reconciliation as follows: . Restoration of harmony between persons or things that had been in conflict <a reconciliation between the plaintiff and the defendant is unlikely even if the lawsuit settles before trial> 2. Family law. Voluntary resumption after a separation of full marital relations between spouses <the Court dismissed the divorce petition after the parties reconciliation>3.....

81. The concept of reconciliation, the meaning of which has been noticed hereinabove and as has been emanated from the basic source of Muslim law, as discussed above, has got its acceptability in the modern litigations specially pertaining to the matrimonial disputes. The reconciliation has become an effective and important tool and mechanism for resolution of disputes particularly in dissolution of marriages.

82. In Hindu Marriage Act, which is enacted in 1995 has already contained such provisions of reconciliation in Section 23 (2) wherein a duty has been cast on the Court to make an endeavour for reconciliation between the parties at the very initial stage. Provision of Section 23(2) is quoted as follows:

3. (2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties;

83. Similarly, in The Family Court s Act, 1984, Section 9 provides that it is the duty of the Family Court to make efforts for settlement and the same reads as under:

9. Duty of Family Court to make efforts for settlement._(1) in every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any Rules made by the High Court follow such procedure as it may deem fit.

84. In 2002 by amendment of the Code of Civil Procedure, 1908, Section 89 has been incorporated providing for settlement of the disputes, outside the Court by adopting primarily four methods, namely, (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat, or (d) mediation, which are popularly coined as alternative dispute resolution(ADR)

mechanism. So it is evident that the process of reconciliation has to be given priority as well as importance in the present days. In view of above, it is essential that a dissolution of Muslim marriage by way of divorce or talaq must be based on reconciliation as mandated by Quranic text followed by commentaries on the topic by the various eminent legal personalities.

(K) Conclusion:

85. In consideration of what has been stated, observed and discussed, the impugned judgment and order being not in consonance with law explained and highlighted above, deserves interference and the same is, accordingly, set aside and quashed.

86. It is, consequently, held that the petitioner is not a Muslim divorcee of the husband/respondent and she is entitled to get her maintenance in terms of Section 488 Cr. P. C and this Court does, accordingly, uphold the maintenance granted to the petitioner by the learned Magistrate by its initial order dated 24.6.1995.

87. It is further provided that order dated 10.12.2002 passed by this Court as regards granting interim maintenance to respondent no. 2, daughter of the parties, is hereby made absolute.

88. Liberty is also granted to petitioner no. 1 to approach the appropriate Forum/Authority, if she desires further increase in her maintenance allowance, if so advised.

89. In the result, the revision petition is, accordingly, allowed.

(L) Remarks:

90. Before parting with the judgment, it is necessary to put on record certain observations.

91. The learned Judicial Officers while quoting cited judgments and judicial authorities, shall extract the relevant paragraphs of the judgment referred to with clear mention of the said paragraph/paragraphs therein instead of quoting the Head notes of a particular judgment. In the instant case, on perusal of the impugned judgment and order, it appears that the learned Magistrate has quoted the Head Notes only of the judgment referred to or relied upon. Be it noted that Head Notes are not the ratio or operative part of the judgment. It is simply an editorial comment and, accordingly, attempt should be made to avoid quoting the Head Notes only.

Sd/-

(Dr. Aftab H. Saikia) Chief Justice Jammu:

14 .10.2010 Tilak, Secy.