

(1962) 01 AHC CK 0015
In the Allahabad High Court
Case No : Civil Revision No. 1170 of 1958

Faqir Mohammad

APPELLANT

Vs

Amina

RESPONDENT

Date of Decision : 18-01-1962

Acts Referred:

Arbitration Act, 1940 — Section 20, 21
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1964 All 246

Hon'ble Judges : S.C. Manchanda, J

Bench : Single Bench

Advocate : N.A. Kazmi, for the Appellant; M.H. Beg, for the Respondent

Final Decision : Allowed

Judgement

S.C. Manchanda, J.—This is a revision against an order of the Civil Judge rejecting an appeal against an order of the Munsif dismissing the objections against the award taken by the petitioner.

2. It is necessary to set out the facts in order to appreciate the contentions raised. The respondent wife had filed a suit for dissolution of marriage under the Dissolution of Muslim Marriages Act VIII of 1939 on the ground of cruelty of the husband petitioner and his failure to maintain her. Mr. Kidwai an advocate was appointed Commissioner to examine the respondent wife. The date fixed for this purpose was the 13th of December, 1957 but on that day the parties and their counsel made an application addressed to the court wherein it was stated that the parties had agreed to refer the matter of divorce to the arbitration of Haji Mohd. Ismail. Hakim Murtaza Hussain and Himayat Ullah Kidwai, an advocate of Faizabad.

It was categorically stated that the arbitrators were at liberty to take evidence or to decide the case in any manner they deemed fit or as it pleased them or by making private or secret enquiries. It was further provided that the arbitrators

could decide the matter in any manner they liked and the parties to the application will have no objection and such award will be binding on them in every way and the parties will not have any right to raise any objection thereto. The above is a free rendering of the aforesaid application which is in Urdu. This application was signed by the parties and their respective counsel and handed over to the commissioner appointed by the court, the said Himayat Ullah Kidwai for presentation to the court. This was presented on the 20th of December, 1957 which was the date fixed in the case and the court ordered as follows.:

"Let the arbitrators named in the application decide the suit and submit their award by the 20th of January, 1958."

3. The aforesaid arbitrators filed their award on the 18th of February, 1958. This award stated that evidence of the parties was heard and enquiries were made and they had come to the conclusion that the marriage be dissolved and it be declared that the respondent had ceased to be the wife of the petitioner.

4. Objections to the award were filed alleging misconduct and some technical objections were also taken that the proceedings could not have been referred to the arbitrators as the Arbitration Act had no application and further that the application for arbitration had not been presented to the court by the parties but it was through the commissioner who had been appointed by the court. These objections were rejected by the learned Munsif who held that a suit for dissolution of marriage could be referred to arbitration. It was also held that the application need not be presented directly to the court and it could be filed before the Commissioner who in his turn could have forwarded it to the court.

5. Against the order of the Munsif an appeal was filed but the Civil Judge, Faizabad, who heard the appeal, also held that the objections had rightly been disallowed. Against this order the petitioner has filed this revision.

6. The first point which arises for consideration is whether the Arbitration Act stands excluded by the provisions of the Dissolution of Muslim Marriages Act VIII of 1939. The preamble of the latter Act shows that it was merely an Act to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage of women married under Muslim Law. The Act itself does not prescribe any special procedure which is to be followed in the disposal of suits instituted under the said Act. In the absence of any specific procedure the general procedure which governs all civil suits and actions would be applicable. The C. P. C., the Arbitration Act and other procedural laws would, therefore, clearly be attracted to suits under Act VIII of 1939.

7. u/s 21 of the Arbitration Act parties to any suit may apply for an order of reference to arbitration. A suit under Act VIII of 1939 is certainly a suit within the meaning of Section 21 of the Arbitration Act. As already observed. Act VIII of 1939 does not specifically or even by implication attempt to exclude the application of the Arbitration Act. It would, therefore, follow that the provisions of the Arbitration Act could be legitimately invoked by the parties to a suit under

Act VIII of 1939.

8. That the Arbitration Act is applicable to suits relating to rights arising out of matrimonial causes is supported by authority. A Division Bench in AIR 1934 494 (Oudh) held that in a suit for restitution of conjugal rights a reference to arbitration can be made. It was pointed out that by making a reference to arbitrators the court does not delegate its powers to the arbitrators. The court has ample powers to remit the award to the arbitrators for re-consideration or to refuse to make the award a decree of the Court.

A similar view was taken in *Mt. Kunti Devi v. Bhola Ram* AIR 1941 Pesh 43. The Madras High Court in *Nalla Ramudamma Vs. Nalla Kasi Naidu*, also held that the court has power u/s 21 to refer for decision of arbitrators a matrimonial dispute. These cases relate to Hindus but the ratio decidendi is of general application. The only case which remotely appears to rule out the application of the Arbitration Act to matrimonial disputes is the case of *Abdul Ghani v. Mt. Sardar Begum*, AIR 1945 Lah 183 decided by a learned single Judge of the Lahore High Court. The observation of the learned Judge to arbitration proceedings in that case is clearly an obiter dicta.

In that case no question of any arbitration had arisen nor had any reference to arbitration been made. The wife had brought suit for dissolution of marriage on the grounds that the husband had failed to provide for her maintenance and on the allegation of cruelty. The husband had denied the allegations. After some witnesses were examined on behalf of the wife in support of her allegations and when the sixth witness who was her father came into the witness box the husband stated that if the plaintiff's father made a statement with his hands on the Holy Quran that he had no knowledge up till then that the wife's ornaments were with her maternal grandfather then a decree may be passed in her favour. This offer was not accepted by the plaintiff or on her behalf but nevertheless the witness who was prepared to make the statement on oath did so. The court thereupon passed a decree for dissolution of marriage on the basis of the husband's offer.

The only question, therefore, which arose was whether the statement of the wife's father was made in accordance with Section 11 of the Oaths Act and was binding on the parties. It was held that it was wrong for the court to have decided the suit on the oath of the plaintiff wife's witness. In passing an observation was also made that a case could not be decided on the oath of a witness nor as a result of arbitration. The attention of the learned Judge does not appear to have been drawn to Section 21 of the Arbitration Act nor to the general proposition that statutory law such as the Arbitration Act or the C. P. C. would override the personal law unless specifically exempted. The case also does not make any reference to the rights of the parties under their personal law. It is, therefore, manifest that the observations in this case that such a suit could not be referred to arbitration is mere obiter dicta, as the point did not arise at all for decision in that case.

9. The character and nature of a Muslim marriage shows that it is a civil contract and not a sacrament. It was so held by a Full Bench of this Court in Abdul Kadir v. Salima ILR All 149:

"Marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnized generally with recitation of certain verses from the Kuran, yet the Muhammadan Law does not positively prescribe any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted."

10. Being a civil contract and not a sacrament it would follow that, in the absence of any provision to the contrary in Act VIII of 1939, a suit for dissolution would be a suit to which the provisions of the Arbitration Act would apply.

11. The next question which arises is whether there was any misconduct by the Arbitrators. On this point the concurrent finding of fact given by the two courts below cannot be gone into in a revision.

12. The objection that the application was made not directly to the court but to the commissioner appointed by the court is without substance. As already observed the application was addressed to the court and was duly signed by the parties and their counsel. The commissioner obviously was authorised to file the application in court on the date fixed and obtain the orders of the court. The counsel for the respondent was present on the 20th of December, 1957 when the court made the reference to the arbitrators. The petitioner was not represented but that was for a very good reason that he had signed the application and there was no point in his appearing on that date. It is difficult to appreciate how any grievance can be made by the petitioner on this point. The petitioner has relied on the case of Asutosh Deb Sarkar v. Apurba Kumar Deb Sarkar 4 Ind. Cas. 370 (Cal). This case, however, is clearly distinguishable as no final agreement to refer the matter in dispute to arbitration had been arrived at and in these circumstances the court held that the parties may resile from the position when an application is made to the commissioner who was only appointed to examine the witnesses and had limited authority. In the case of AIR 1933 521 (Oudh) (of the late Oudh Chief Court) which considered and dissented from the aforesaid Calcutta case it was held that an application addressed to the court stating that they had agreed to refer their dispute to arbitration but presented to the commissioner for proper presentation to the court and the order passed by the court thereon making a reference to the arbitrators was a perfectly correct and valid order. This objection also is, therefore, without any force,

13. Even, if for the sake of argument it be assumed that reference to arbitration could not have been made in proceedings under Act VIII of 1939, the effect of the petitioner husband having put his signatures to the application dated 13-12-1957 undoubtedly under the Mohammaden Law amount to a delegation of his right to divorce his wife to named persons, i.e., the aforesaid three persons

mentioned in the said document. That divorce by delegation is permissible is amply borne out by the original texts and the provisions of Mohammaden Law. Baillie in his Digest of Mohammaden Law Second Edition at page 2-38 points out:

"As a man may in person repudiate his wife, so he may commit the power of repudiating her to herself or to a third party. This is termed TUFWEEZ, and it is of three kinds: IKHTIYAR, or choice; AMR BU YUD, or business in hand: and MUSHEEUT, or pleasure. The two first have been already met with as belonging to the second class of the Kinayat, or ambiguous expressions from which repudiation may be inferred. The last requires the imperative mood of the word by which the sureeh, or express repudiation is given, as "repudiate if you please". The discretion conferred by each kind of Tufweez will be found to correspond with the nature of the expression by which it is constituted."

14. In the instant case the nature of the expression, which has been reproduced hereinabove leaves no manner of doubt that the power of dissolving the marriage that the husband possessed was undoubtably being committed to the aforesaid three persons mentioned in the said document.

15. Sayed Ameer Ali in his Mahommedan Law, Fifth Edition Volume II also supports Baillie that Talak by Tafwiz is legal and valid. The learned author at page 495 observes:

"As already observed, both schools allow the husband to delegate his power of repudiation to a third person, or to the wife herself. The delegation of option called Tafwiz by the husband to his wife, confers on her the power of divorcing herself, but this right is restricted to the precise place or situation in which she receives the power, and falls to the ground on her rejection of the power. The intention on the part of the husband is requisite to constitute a delegation. If the delegation be accepted by the wife and the right exercised it would take effect as an irrevocable divorce under the Hanafi Law."

16. For this proposition reliance is placed on Fatawa-i-Alamgiri Vol. I, page 543. The author goes on to say:

"Tafwiz is of three kinds (a) ikhtidar, giving her the authority to talak herself, (b) amr-ba-yed", leaving the matter in her own hand, (c) mashiat, giving her the option to do what she likes. All these, when analysed, resolve themselves into one, viz., leaving it in her or somebody else's option to do what she or he likes."

17. In this state of the law the only question that arises is whether there was a clear intention on the part of the husband to leave the question of divorce to somebody else's opinion to do what he likes--to borrow the very words of the learned author. A reading of the aforesaid document dated 13-12-1957 signed by the husband and his counsel leaves no manner of doubt that the husband had delegated his powers to the three persons mentioned in the document as objectly (sic), unequivocally and categorically as it is humanly possible for anyone to do. The three persons to whom the powers were delegated have

chosen to say on the basis of evidence and other enquiries made by them on behalf of the husband that the wife stood divorced and the marriage tie was dissolved. Once such power has been delegated the wife can use it in her favour even after a suit for restitution of conjugal rights had been instituted against her by the husband, vide *Sainuddin v. Laltifan Nesa Bibi* ILR Cal 141 : AIR 1919 Cal. 631.

18. Talak by Tafwiz being legal and valid according to the personal law of the parties who are Hanifis the marriage would in any event stand dissolved. The wife has also re-married after the decree was passed by the lower appellate court. Therefore in either view of the matter the dissolution of marriage would result and as such this is not a fit case for invoking the revisional powers of this court.

19. For these reasons the revision is dismissed with costs.