
(1996) 01 BOM CK 0018

In the Bombay High Court

Case No : Criminal Writ Petition No. 176 of 1991

Shahadabi M. Isak

APPELLANT

Vs

Abdul Ajij Abdul Latif and others

RESPONDENT

Date of Decision : 25-01-1996

Acts Referred:

Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3

Citation : (1996) CriLJ 1812

Hon'ble Judges : B.N. Deshmukh, J

Bench : Single Bench

Advocate : app, V.J. Dixit, for the Appellant; W.J. Shaikh and Mohd. Mustaffa Ahmed Momin, for the Respondent

Judgement

1. This writ petition arises out of an application filed by the petitioner u/s 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The learned trial Judge has held that the wife i.e. petitioner-Shahadabi, is entitled for Mehar amount for maintenance during Iddat period. The learned trial Judge allowed the application of the present petitioner-wife and directed the husband to pay a sum of Rs. 7000/- towards Mehar amount and also pay Rs. 900 towards Iddat period maintenance. The husband was further directed to return the articles which he had received at the time of marriage totalling Rs. 7,360/-. It was, further, directed that the husband shall pay Rs. 5000/- towards future maintenance. The applicant was granted cost of Rs. 300/-.

2. The order passed by the learned trial Judge was challenged in Criminal Revision Application before the learned Sessions Judge at Jalgaon.

3. The learned Sessions Judge was pleased to allow Revision filed by the husband and the order passed by the learned trial Judge against the husband was set aside.

4. The present petitioner-wife has, therefore, filed this Criminal Writ Petition, challenging the order passed by the learned Sessions Judge.

5. Shri Dixit, learned counsel for the petitioner contended that the lower Court was correct in granting the Mehar amount and also further amounts to the petitioner-wife. According to him, the learned Sessions Judge has misdirected himself in reading the recitals of the so called Kabuliyat, a deed of divorce (Exh. 42). He has contended that after the husband gave Talaq, (Exh. 42) was obtained from the wife. According to him, the learned Sessions Judge considered the Kabuliyat (a deed of divorce)/Exh. 42 as a document by which the divorce was obtained by the parties.

6. Shri Mohammed Mustaffa Ahmed Momin, learned counsel for the respondent No. 1, on the contrary, contended that Kabuliyat (Exh. 42) is a peculiar mode of obtaining divorce under the provisions of the Mahomedan Law. According to him, by this Kabuliyat (Exh. 42) dated 12-8-1976, the dissolution of marriage has been given an effect to by the parties, by agreement. Such an agreement is lawful under the provisions of Mohomedan Law as it provides for a dissolution of marriage by agreement in the form of "Khula" or "Mubarat". Section 319, Mulla's Principles of Mohomedan Law (Eighteenth Edition) by Hidayatullah, provides for divorce by Khula and Mubarat. Sub-section (1) of the said Section provides that a marriage may be dissolved not only by Talaq, which is the arbitrary act of the husband, but also by agreement between the husband and the wife. A dissolution of marriage by agreement may take form of Khula or Mubarat. Sub-section (2) provides that a divorce by Khula is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mahr (dower) and other rights, or make any other agreement for the benefit of the husband. Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce, though the husband may sue the wife for it.

7. A Khula divorce is effected by an offer from the wife to compensate the husband if he releases her from his marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (talak-i-bain), and its operation is not postponed until execution of the Khulanama (deed of Khula). Sub-section (3) deals with Mubarat. A mubarat divorce like Khula, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called Khula. When the aversion is mutual, and both the sides desire a separation, the transaction is called mubarat. The offer in a mubarat divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is incomplete (sic) and it operates as a talak-i-bain as in the case of Khula. Sub-section (4) provides that as in talaq, so in Khula and mubarat, the wife is bound to observe the iddat. In the commentary in Mulla's Mahomedan Law, the distinction between Khula and Mubarat is clearly brought out. Khula means to put off, as a man is said to khoola his garment when he puts it off. In

law it is the laying down by a husband of his right and authority over his wife for an exchange, while Mubarat means mutual release. In respect of Pakistan, the distinction between Khula and Mubarat is stated as follows :-

"In Khula, the marriage is dissolved by an agreement between the parties for a consideration paid, or to be paid, by the wife to the husband, it being also a necessary condition that the desire for separation should come from the wife. Where the desire for separation is mutual, there too dissolution by mutual agreement for a consideration to be paid by the wife to the husband is lawful, but it is described in that case as mubarat."

It is further provided in the said Commentary that where the wife asked for divorce and the husband did not seek the severance of the marital tie, and by compromise the marriage was severed, it was held that this was a case of Khula and not mubarat.

8. Section 320 provides for effect of Khula and Mubarat divorce and it is provided that unless it is otherwise provided the contract, a divorce effected by Khula or mubarat operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her iddat, or to maintain his children by her.

9. Thus, there are three modes provided for obtaining a divorce under Mahomedan Law. By Talaq, a marriage may be dissolved by the husband which is purely an arbitrary act of the husband and does not depend on the presence or absence of the wife and further does not depend on the agreement or consent by the wife. Talaq is purely an act of the husband for dissolution of the marriage. In Khula, the marriage is dissolved by an agreement between the parties for a consideration paid, or to be paid by the wife, to the husband. However, the necessary condition for such a divorce is that the desire for separation should come from the wife. When the desire for separation is mutual, the dissolution of the marriage is described as Mubarat and not as Khula.

10. It seems that the learned Sessions Judge proceeded on the footing that Kabuliyatnama (Exh. 42) is a mutual divorce. He, therefore, recorded the finding to the effect that if one minutely peruses the recitals of both these documents - Exh. 42 and 44, it will be clear that both the parties, i.e. applicant and opponent, have mutually decided to sever their relations. If this is so, the wife is not entitled to Meher amount as well as articles listed in para 2 of her application.

11. It is worthwhile to reproduce the recitals in Exh. 42, which is titled as Kabuliyatnama Talaq, wherein it is mentioned that the writing is obtained by the husband from the wife-Shahadabi. In the body, it is recited,

"Karane Kubuliyat nama Talaq lihun deto ki mi tumache lagnache patni aahe. Aapale lagnala aandaje ek warsha zhala. Yaa kalat mi tumache ghari ek warshaparyant rahile va aataparyant aapan sukhane sansar kele aahe. Parantoo aapala aapasaat banat nahin. Mahnun tumhi mala Balapur Courtath sakshidara

samor teen vela Sharte Mohomedan pramane Talaq, Talaq, Talaq dile. Mala poornapane kabool aahen. Aata maza tumache var patnitwacha haqa rahila nahi. Tumache paasoon maza meher va khavati kahich ghene nahin. Rajikhushine ha lekh lihun dile va maza dan dahej vagaire kahich ghene baki nahi. Aata tumhans dusre lagna karanyachi mokaliq aahe. Ha lekh purna vachoon samajoon tyacha poornapane sahin kele aahe. Jar mi tumache virodha Courtath dava bhangad kele tar yaa lekhanvaye radda aase."

12. This document (Exh. 42) seems to have been signed by wife-Shahadabi as well as the other witnesses. The recitals of Exh. 42 indicate that this document Kabuliyatnama Talaq is executed after the regular talaq was given and after the marriage was dissolved by the husband. In the Kabuliyatnama, it is mentioned that in Balapur Court in the presence of witnesses under the law of Shariyat and as per Mahomedan Law by uttering words "Talaq" thrice, the husband has already given Talaq and from that date, the relationship of husband and wife have come to an end.

13. Exhibit 44 document is said to have been obtained by wife-Shahadabi from the husband Abdul Aziz Abdul Latif who has signed the same. In this document (Exh. 44) it is mentioned that both were not on good terms. The husband Abdul Aziz Abdul Latif has stated in this document that he has given divorce as per Shariyat and Mahomedan Law by uttering words "Talaq" thrice in the presence of witnesses. It is categorically mentioned that by uttering these words the husband has given Talaq."

"Mee tula talaq dile."

14. Merely because the document is styled as Kabuliyatnama Talaq, the recitals of both Exhs. 42 and 44 indicate that the divorce is executed not under the Kabuliyatnama, but was executed prior to the execution of the document styled as Kabuliyatnamas. The divorce was given not on the basis of Kabuliyatnama for the first time, but after giving Talaq by the husband, the documents Kabuliyatnamas were got executed. It is an admitted position that under Muslim Law a divorce is complete even if it is pronounced in any form of compulsion or by way of just and become effective and irrevocable as soon as it is pronounced. As per Exh. 42 Kabuliyat executed by the wife it is mentioned that the word Talaq was thrice uttered in the presence of the witnesses in the Court prior to the execution of the document. As the Talaq i.e. divorce was given by uttering those pronouncement, it has become effective and irrevocable as soon as it is pronounced. The relationship of husband and wife were brought to an end by the husband after uttering the words Talaq. The divorce was, therefore, not brought into effect by the Kabuliyatnama, but the divorce was effectively given prior of execution of Kabuliyatnama by way of Talaq arbitrarily by the husband.

15. The fact of Talaq given by the husband is mentioned in unequivocal terms both in Exhs. 42 and 44. The fact that such a Talaq was given by husband is recited in the body of the documents Kabuliyatnamas (Exhs. 42 and 44).

16. Mr. Mohammed Mustaffa Ahmed Momin, learned counsel for the respondent No. 1, contended that the documents will have to be read as a whole and if Talaq really was given by the husband, it was not necessary for the parties to execute the documents (Exhs. 42 and 44). The intention of the parties, however, according to him, is to obtain divorce on the basis of Kabuliyatnamas. This connection cannot be accepted as it militates the dictates of Mahomedan Law. In Mulla's Commentary on Mahomedan Law in respect of Talaq, Section 310 clearly states that the talaq pronounced in the absence of wife takes effect though not communicated to her, but for purposes of dower it is necessary that it should come to her knowledge. The documents (Exhs. 42 and 44) both mentioned giving of a talaq by the husband in the presence of the witnesses. It is, therefore, not possible to consider that the divorce was brought into existence after the documents Kabuliyatnamas were executed.

17. There is no doubt that after the Talaq, the Meher and the amount of maintenance for Iddat period and other valid documents are required to be made by the husband and there is no question of giving away by way of consideration by the wife or relinquishing her rights in this regard.

18. The learned Sessions Judge has considered Kabuliyatnamas as the basis for the divorce and has come to the conclusion that Kabuliyat divorce was mutual divorce wherein the wife was relinquished all her rights as the same is stated in the Kabuliyat (Exh. 42).

19. The recitals in Kabuliyatnamas (Exhs. 42 and 44) are regarded as giving rise to the dissolution of marriage by mutual consent and in the form of Khula or Mubarat. As already pointed out in Khula form of divorce, the marriage is dissolved by agreement between the parties for a consideration paid, or to be paid by the wife to the husband. But the most essential condition for Khula form of divorce is that the desire of separation should come from wife. In Mubarat form of divorce, a desire for separation must be mutual. In the present case, having regard to the recitals in the Kabuliyatnamas, there is no doubt that it was not the desire of the wife for separation which led to the dissolution of marriage, but in unequivocal terms the parties have mentioned that the Kabuliyatnamas are executed when the divorce was already given by the husband in the form of Talaq. The desire for separation, therefore, was expressed not by the wife but by the husband. The question of consideration to be paid by the wife to the husband does not arise at all as the form of divorce followed in this case is Talaq and not Khula or Mubarat. So also the question of relinquishment considered by the learned Sessions Judge does not arise at all in view of the fact that the form of dissolution of marriage in the present case is Talaq and not Khula or Mubarat.

20. As the relationship of husband and wife was brought to an end by Talaq much prior to the execution of the document (Exhs. 42 and 44), the relationship of being husband and wife had ceased much prior to the execution of the documents Exhs. 42 and 44. The wife could not have relinquished her rights by way of consideration to be paid by the wife to the husband as the dissolution of

marriage is not by an agreement between the parties but the dissolution is at the instance of the husband when he uttered the words "Talaq" thrice in the Court prior to the execution of Kabuliyatnamas. The Kabuliyatnama, therefore, though mentions the relinquishment of her rights qua Mehr and other rights, is ineffective and cannot be considered at all to take away the rights vested in wife after the Talaq.

21. We may refer to the decision reported in AIR 1945 Lah 51, Mr. Umar Bibi v. Mohammad Din, where the distinction between different forms of divorce under Mahomedan Law were considered, and it was observed that the act of divorce in Khula is as much an act of husband (whether directly by dissolving the marriage himself or indirectly by conferring the power on the wife so to do) as it would be in Mubarat (i.e. mutual release) and in an ordinary divorce effected at his sweet will or pleasure without even necessarily a knowledge on the part of the wife that the marriage was being terminated. The difference in these divorce merely lies in the fact that while the desire to separate and for emancipation emanates in the case of Khula from the wife only, it is a result of mutual arrangement between the parties in Mubarat and in execution of his one-sided desires to bring the matrimonial bond to an end in third case. It is further stated that similarly Durr-ul-Mukhtar in its Chapter on Khula (page 261 Calcutta edition) describes that the term by word "Izalat" which means "removal" and states its requisites to be similar to a divorce and its nature being that of an oath on his (i.e. the husband's) part as it is a divorce by accepting property which it would not be valid for him to retract. It is further stated that Khula or release is on the part of the wife an exchange with property and therefore it is right (or possible) for her to retract before the husband's acceptance and it is valid for the wife to have an option of revoking it even for more than three days.

22. Thus, the form adopted for divorce in the present case is Talaq and not Khula. The Kabuliyatnamas (Exhs. 42 and 44), therefore, do not take away the right of the wife in respect of Mehr in spite of having recited to that effect. The Kabuliyatnama seems to have been executed under wrong notions and contrary to the principles of divorce enunciated in Mahomedan Law. It is the principles of Mohomedan Law which take precedence over writing executed by the parties. The principle of Talaq cannot restrict in any way the right of the husband on the consent of the wife nor are dependent on the consideration to be paid by the wife to the husband. It is the exclusive right of the husband to give Talaq to the wife and on exercise of such a right, the divorce becomes effective after the utterance of the words "Talaq". Any document executed thereafter by the parties as husband and wife are nullity and cannot be given an effect to.

23. I, therefore, find that the learned Sessions Judge has committed an error in holding that the recitals of both these documents (Exhs. 42 and 44) make it clear that both the parties i.e. the applicant and opponent have mutually decided to sever the relationship. In fact, they have severed the relations much prior to the execution of Exhs. 42 and 44 when the husband had given Talaq to the wife in

the Court and the divorce was complete and irrevocable after the utterances by the husband and that the divorce cannot be said to be effective only after the execution of documents Exhs. 42 and 44. The recitals in the documents indicate that the divorce was not at the instance of the wife. It was not the desire of the wife to have divorce but the divorce was given by the husband after uttering the words Talaq. The documents executed thereafter the husband and wife by the parties are ineffective and are invalid, and therefore, it cannot be given an effect to at all. The mentioning of the relinquishment of the rights, therefore, has no bearing on the rights of the wife to claim the amounts towards Meher and maintenance as per Mahomedan Law.

24. In the result, I set aside the order passed by the learned Sessions Judge, Jalgaon on 3rd May, 1991 in Criminal Revision Application No. 212/1989 and the order passed by the learned Judicial Magistrate, First Class, Jalgaon dated 4-4-1989 in Criminal Misc. Application No. 248/87 is restored, with modifications as mentioned below.

25. Shri Mohammed Mustaffa Ahmed Momin has pointed out that presently the wife is not entitled for any amount towards future maintenance. Shri Momin seems to be right in his submission. The order passed by the learned Judicial Magistrate to, First Class, Jalgaon on 4-4-1989 granting Rs. 5000/- towards future maintenance is cancelled. With this modification, the order passed by the learned Judicial Magistrate, First Class, Jalgaon, is confirmed.

26. It would be open for the petitioner-wife to apply for future maintenance if in law she is entitled for the same or becomes entitled hereafter.

27. Shri Dixit, learned counsel for petitioner contended that the petitioner-wife is unnecessarily deprived of the benefits. Therefore, some costs should be awarded to her of this writ petition. I quantify the cost at Rs. 500/-.

28. Criminal writ petition is allowed accordingly.

29. Petition allowed.