BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.10.2024

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.R.P.(MD).No.2255 of 2023
and
C.M.P.(MD)No.11579 of 2023

M.A.Rafi Ahamed ... Petitioner / Appellant / Respondent

Vs.

Vaseela Banu ... Respondent /Respondent/ Petitioner

PRAYER : Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records relating to the order dated 02.12.2022 made in Crl.A.No.47 of 2021 on the file of the I Additional District and Sessions Judge, Tirunelveli confirming the order dated 23.02.2021 passed in D.V.C.No.2 of 2018 on the file of the Judicial Magistrate Court No.1, Tirunelveli and set aside the same.

For Petitioner : Mr.K.C.Maniyarasu

For Respondent : Mr.D.Srinivasa Ragavan

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O R D E R

The marriage between the petitioner and the respondent was solemnised as per the Islamic rites and customs on 18.04.2010 at Palayamkottai. A male child was born through the wedlock. The parties are doctors by profession. The respondent herein filed DVC No.2 of 2018 on the file of the Judicial Magistrate No.I, Tirunelveli under Sections 12(1) and (2), 18(a) and (b), 19(a), (b) and (c), 20(1)(d) and 22 of the Protection of Women from Domestic Violence Act, 2005. The learned trial Magistrate vide order dated 23.02.2021 directed the petitioner herein to pay a sum of Rs.5 Lakhs as compensation for having inflicted domestic violence on the complainant and a sum of Rs.25,000/- per month towards the maintenance of the minor child. Protection order was also granted. Aggrieved by the said order, the revision petitioner filed Criminal Appeal No.47 of 2021 before the I Additional District and Sessions Judge, Tirunelveli. The appeal was dismissed on 02.12.2022. Questioning the same, this civil revision petition came to be filed under Article 227 of the Constitution of India.

2.The learned counsel appearing for the revision petitioner reiterated all the contentions set out in the memorandum of grounds. He submitted that the complainant / respondent herein is a Government doctor and that she was never subjected to any kind of domestic violence. He called upon this Court to set aside the impugned order and grant relief as prayed for.

3.Per contra, the learned counsel appearing for the complainant submitted that the impugned orders are well reasoned and that they do not call for interference.

4.I carefully considered the rival contentions and went through the materials on record.

5.As already noted, the parties got married on 18.04.2010. The relationship between them came under strain. The complainant concedes that the revision petitioner sent the first Talaq notice dated 03.08.2017 and the second Talaq notice dated 11.09.2017. The revision petitioner claimed that the third Talaq notice was sent on 11.11.2017 following

which the Shariat Council of Tamil Nadu Thowheed Jamath granted divorce certificate on 29.11.2017. He also admits having married one Halima on 28.01.2018. On the other hand, the complainant / wife asserts that her marriage with the revision petitioner was not dissolved and that the third Talaq notice was never received and that during the subsistence of their marriage, the revision petitioner marrried Halima.

6.The revision petitioner is a well-qualified doctor who was employed in Apollo Hospital and whose family is also possessed of considerable properties. There is no serious challenge to the maintenance order passed in favour of the minor child. The only question that calls for consideration is whether the courts below were justified in awarding compensation of Rs.5.00 lakhs to the complainant.

7.As per the definition of the term “domestic violence” set out in Section 3 of the Central Act 43 of 2005, any act or conduct of the husband which injures or causes harm, whether physical or mental to the wife shall constitute domestic violence. If a Hindu/Christian/Parsi/Jew husband contracts second marriage during the subsistence of the first

marriage, it would constitute cruelty besides being an offence of bigamy. It would obviously be considered an act of domestic violence entitling the wife to claim compensation under Section 12 of the Act. Will this proposition apply in the case of Muslims ?. The answer is "Yes". It is true that a Muslim male is legally entitled to contract as many as four marriages. For this legal right or liberty, there is only a limited hohfeldian jural correlative on the part of the wife. The wife cannot stop the husband from entering into a second marriage. She, however, has the right to seek maintenance and refuse to be a part of the matrimonial household. The Hon'ble Division Bench of Karnataka High Court in the decision reported in ILR 2021 KARNATAKA 746 (Yusuf Patel V. Ramjanbi) held that though contracting a second marriage by a Muslim during the subsistence of the first marriage may be lawful, it would amount to enormous cruelty to the first wife. It was also held that the aggrieved wife can seek dissolution of marriage. Once it is concluded that marrying another woman during the subsistence of the first marriage would constitute cruelty, the corollary is that the first wife is entitled to claim damages and compensation.

8.Of course, the revision petitioner claims that he entered into second marriage only after dissolving his first marriage with the complainant by pronouncement of talaq in the manner laid down by law. This claim has to be tested. It is true that there is material to show that the first talaq notice was issued on 03.08.2017 and the second talaq notice was issued on 11.09.2017. There is dispute between the parties as to whether the third talaq notice was issued. While the husband would claim that the third talaq notice was sent on 11.11.2017, the complainant/wife denies the same. It cannot be denied that the marriage between the parties can be taken to have been dissolved only after the pronouncement of the third talaq. In this case, no material has been placed by the revision petitioner/husband that the third talaq notice was served on the complainant/wife. The complainant has been consistently asserting that her marriage with the petitioner is still in subsistence. A mere look at the long cause title of the complaint would show that the complainant had described herself as the wife of the revision petitioner.

9.In ***Shamim Ara v. State of Uttar Pradesh (2002) 7 SCC 518),*** the Hon'ble Supreme Court held as follows :-

"**11.** V. Khalid, J., as His Lordship then was, observed in ***Mohd. Haneefa v. Pathummal Beevi [1972 KLT 512] : (KLT p. 514, para 5)***

> "… I feel it my duty to alert public opinion towards a painful aspect that this case reveals. A Division Bench of this Court, the highest court for this State, has clearly indicated the extent of the unbridled power of a Muslim husband to divorce his wife. I am extracting below what Their Lordships have said in ***Pathayi v. Moideen [1968 KLT 763] :***
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> 'The only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law. … The husband can effect it by conveying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge.'

Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these

unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."

12. In an illuminating judgment, virtually a research document, the eminent Judge and jurist V.R. Krishna Iyer, J., as His Lordship then was, has made extensive observations. The judgment is reported as ***A. Yousuf Rawther v. Sowramma [AIR 1971 Ker 261 : 1970 Ker LT 477]*** **.** It would suffice for our purpose to extract and reproduce a few out of the several observations made by His Lordship: ***(AIR pp. 264-65, paras 6-7)***

> "*6*. 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.
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> *7*. … Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim

jurists that the Indo-Anglican 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 formalized 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. … It is a popular fallacy that a Muslim male enjoys, under the Quoranic 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). The Islamic 'law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, 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 repudiates his wife capriciously'. … 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 applied 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 wife's right to divorce. … After quoting from the Quoran 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 '*khula*'. … Consistently with the secular concept of marriage and divorce, the law insists that at the time of *talaq* the husband must pay off the settlement debt to the wife and at the time of khola she has to surrender to the husband her dower or abandon some of her rights, as compensation."

13. There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in ***Jiauddin Ahmed v. Anwara Begum [(1981) 1 Gau LR 358]*** and later speaking for the Division Bench in ***Rukia Khatun v. Abdul Khalique Laskar [(1981) 1 Gau LR 375] .*** In ***Jiauddin Ahmed case [(1981) 1 Gau LR 358]*** a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid *talaq* of the wife by the husband under the Muslim law. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognized scholars of great eminence, the learned Judge expressed disapproval of the statement that “the whimsical

and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. 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 two arbiters — one from the wife's family and the other from the husband's; if the attempts fail, *talaq* may be effected (para 13). In ***Rukia Khatun case [(1981) 1 Gau LR 375]*** the Division Bench stated that the correct law of *talaq*, as ordained by the Holy Quran, is: (*i*) that "talaq" must be for a reasonable cause; and (*ii*) that it must be preceded 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. If their attempts fail, "*talaq*" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law.

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15. The plea taken by Respondent 2 husband in his written statement may be renoticed. Respondent 2 vaguely makes certain generalized accusations against the appellant wife and states that ever since the marriage he found his

wife to be sharp, shrewd and mischievous. Accusing the wife of having brought disgrace to the family, Respondent 2 proceeds to state, vide para 12 (translated into English) — "The answering respondent, feeling fed up with all such activities unbecoming of the petitioner wife, has divorced her on 11-7-1987." The particulars of the alleged *talaq* are not pleaded nor the circumstances under which and the persons, if any, in whose presence *talaq* was pronounced have been stated. Such deficiency continued to prevail even during the trial and Respondent 2, except examining himself, adduced no evidence in proof of *talaq* said to have been given by him on 11-7-1987. There are no reasons substantiated in justification of *talaq* and no plea or proof that any effort at reconciliation preceded the *talaq*.

16. We are also of the opinion that the *talaq* to be effective has to be pronounced. The term "pronounce" means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (see *Chambers 20th Century Dictionary*, New Edition, p. 1030). There is no proof of *talaq* having taken place on 11-7-1987. What the High Court has upheld as *talaq* is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in

the past cannot by itself be treated as effectuating *talaq* on the date of delivery of the copy of the written statement to the wife. Respondent 2 ought to have adduced evidence and proved the pronouncement of *talaq* on 11-7-1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr Tahir Mahmood in their respective commentaries, wherein a mere plea of previous *talaq* taken in the written statement, though unsubstantiated, has been accepted as proof of *talaq* bringing to an end the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of *talaq* by the husband on the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31-8-1988, filed in some previous judicial proceedings not inter partes, containing a self-serving statement of Respondent 2, could not have been read in evidence as relevant and of any value."

10.This Judgment has been holding the field and has been approvingly referred to in several subsequent decisions of the Hon'ble

Supreme Court. Talaq thus involves a certain procedure. In the very nature of things, strict compliance has to be insisted upon. If the husband claims that he had divorced the first wife by properly pronouncing talaq three times, and it is disputed by the wife, the question arises if the marriage has been validly dissolved. The issue cannot be left to the unilateral determination of the husband. That would amount to the husband becoming a judge of his own cause. The only appropriate and legally permissible course would be to call upon the husband to obtain a judicial declaration that the marriage has been validly dissolved. So long as such a declaration has not been obtained from the jurisdictional court, the resultant effect is that the marriage is deemed to subsist. The burden is entirely on the husband to satisfy the Court that he had pronounced the talaq in the manner approved by law. It is he who must go to the court and obtain declaration. This of course would be necessary only if the wife disputes the validity of the talaq pronounced by the husband.

11.Let me come to the case facts. It is seen that it was the complainant who alone stepped into the witness box and deposed at

length about her woes and as to how she suffered at the hands of the husband. She even alleged that the revision petitioner subjected her to unnatural sex. She had elaborated on other factual aspects of cruelty. As many as 20 Exhibits were marked on her side. Though the complainant was cross examined, she could not be shaken. Even though serious allegations were made against him, the husband did not bother to examine himself as a witness. No evidence was adduced on his side.

12.The certificate dated 29.11.2017 issued by Shariat Council, Tamil Nadu Thowheed Jamath makes a shocking reading. It states that the revision petitioner submitted petition before the Shariat Council for obtaining divorce (talaq) and that steps were taken to reconcile the parties. It faults the respondent herein for not extending her cooperation. Letters were sent on 22.07.2017, 18.10.2017 and 11.11.2017. Shariat Council finally records that since the parties are living separately for around five months and since Vasila Banu did not extend cooperation, the talaq pronounced by the revision petitioner in the presence of two witnesses, namely, Abdul Majith and Shehana would constitute valid divorce. I fail to understand as to how the revision petitioner's father

could have stood as witness for the pronouncement of talaq before the Shariat Council. There is a saying in Tamil "Velikku Onan Satchi, Vendhadhuku Chockan Satchi". The chamelion is the witness of the hedge, the cook boy will testify to the food being well boilt. Father being a witness for his son's pronouncement of talaq is akin to this. The certificate issued by the Chief Kazi of the Shariat Council of Tamil Nadu Thowheed Jamath concludes that Shariat judgment is accordingly delivered. Only courts duly constituted by the State can deliver judgments. Shariat Council is a private body and not a court. The learned counsel for the respondent also submits that the very act of issuing such certificate by the Shariat Council is contemptuous as it runs counter to the interim order granted in Bader Sayeed v. UOI (W.P No. 13539 of 2018 on 10.01.2017).

13.The revision petitioner had failed to obtain any judicial declaration that his marriage with the respondent herein was legally dissolved. I conclude that the marriage between the complainant and the revision petitioner is still holding good. Even on the own showing of the revision petitioner, he married one Halima on 28.01.2018. The revision

petitioner being a Muslim is at liberty to do so. But then, he has to pay for his act. The act of second marriage would have caused considerable emotional distress and pain to the complainant. Without doubt, it amounts to cruelty. The Courts below were therefore justified in awarding compensation for a sum of Rs.5 Lakhs. Interference of the well considered orders passed by the courts below is not warranted.

14.This civil revision petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

25.10.2024

Index : yes/No
Internet:Yes/No
PMU/skm

To

1. The I Additional District and Sessions Judge,
   Tirunelveli.

2. The Judicial Magistrate No.1,
   Tirunelveli.

G.R.SWAMINATHAN,J.

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