

KHAN
V.
MOOMIN AND OTHERS

COURT OF APPEAL.

ISMAIL, J.

C.A. APPLICATION 777/92

BOARD OF QUAZIS

NO. 3155/R

QUAZI COURT COLOMBO NORTH

NO. 166/T

SEPTEMBER 05 AND 22, DECEMBER 06 1994.

Muslim Law of divorce – Certiorari and mandamus – Pronouncement of talak – Rules in Second Schedule of Muslim Marriage and Divorce Act, S. 27 – Is the presence of the husband necessary for the pronouncement of the 2nd and 3rd talaks – Procedure for Muslim divorce – Forms of talak.

Held:

In Muslim Law a husband who wishes to divorce his wife, should give notice of his intention to the Quazi of the wife's area, who would then attempt to reconcile the parties with the help of elders. Thirty days after the initial notice if there is no reconciliation the husband may appear before the Quazi and utter the talak in the presence of two witnesses. This is recorded by the Quazi and the wife notified if she was not present. After 30 further days if the husband was still not reconciled with the wife he should appear again before the Quazi and have such non-reconciliation recorded. After yet another 30 days if he still persisted in his intention to divorce his wife he would appear for the last time and have his divorce registered by the Quazi.

The Rules require the presence of the husband before the Quazi on the second and third occasions if the talak has been pronounced on the wife in her absence and her presence cannot be secured. Similarly, where the husband has failed to appear after the pronouncement of the talak at the end of each of the two successive periods of 30 days, the Quazi may, at any time after the expiry of three months examine the wife in regard to the failure of the husband to appear and the causes for the failure to reconcile. The Quazi is then required to register the divorce.

There are 2 broad categories of talak. Talak ar-Raji (revocable divorce) and Talak al-Bain (irrevocable divorce). Talak ar-Raji has two forms: (1) Talak Ahsan, the most approved divorce and (2) Talak Hasan, approved divorce.

Talak Ahsan consists of a single pronouncement of divorce. When the wife's cycle falls into what is known as the "tuhr" period, that is when she is free from her menstrual flow, the husband pronounces a talak. He must then refrain from sexual intercourse during the Iddah period of three menstrual cycles (or, if her periods are irregular then three lunar months). At the end of this Iddah period the marriage is terminated – the dissolution arising directly from the unilateral talak pronounced three months earlier. This form of repudiation provides an opportunity of revocation as the husband can take back his wife during the period of this Iddah.

The Hasan form of talak is an approved method of repudiation. The procedure for this is as follows: the husband repudiates his wife three times. The first talak takes place during a tuhr period and he pronounces two subsequent talaks during the following two tuhr periods. As soon as the husband pronounces the third talak, the talak becomes irrevocable. The talak, is raji (revocable) until the third pronouncement. In the Hasan form, the marriages does not come to an end until the pronouncement of the third talak. The wife has to observe an Iddah period after the third pronouncement and at this time the husband cannot revoke the decision to divorce his wife.

The Rules in the Second Schedule prescribe a procedure for Ahsan form of talak as it has reference only to the pronouncement of a single talak rather than the Hasan type of Talak.

Pronouncement of a second talak is not a requirement after the initial pronouncement. Pronouncement of talak in the presence of the wife and before 2 witnesses is sufficient. Petitioner has confirmed to Rules 1 and 2 of the Second Schedule and pronounced talak in the Ahsan form and two successive tuhr periods have lapsed. Hence petitioner is entitled to have his divorce registered.

Case referred to:

1. *Northumberland Compensation Appeal Tribunal Ex.P. shaw* (1952) 1 KB 338.

APPLICATION for writs of certiorari and mandamus.

*Faiz Mustapha, P.C. with A. R. M. Kaleel for petitioner.
Mr. Markhani with M. I. Adamlebbe for 7th respondent.
Kumar Paul, S.C. as amicus curiae.*

Cur. adv. vult.

February 06, 1995.

ISMAIL, J.

The petitioner Mohamed Farook Khan gave notice on 7.11.90, to the Quazi (Colombo North) of his intention to pronounce the talak on his wife, Sithy Sabira, the 7th respondent. Thereafter both the petitioner and the 7th respondent appeared before the Quazi on 15.12.90, 26.1.91, 20.2.91 and 4.3.91. The attempts of the Quazi to effect a reconciliation between them with the assistance of elders were not successful. Both parties were present before the Quazi when the matter was next taken up on 2.5.91 and the petitioner pronounced the "first" talak on his wife in the presence of two witnesses.

The Quazi then fixed the case to be called on 3.6.91 for the petitioner to pronounce the "second" talak. The petitioner was absent on that date. The 7th respondent wife who was present stated that the petitioner has gone abroad. The Quazi then fixed the case to be called on 24.6.91, indicating that the application would stand dismissed if the petitioner failed to be present that day.

The petitioner was absent on 24.6.91. He was represented by his brother A. R. Khan to whom the petitioner had given a duly attested special power of a attorney bearing No. 72 dated 27.5.91. He tendered an affidavit affirmed to by the petitioner which contained pronouncements of the second and third talaks on his wife.

The Quazi reserved his order (P1A) and on 7.8.91 he dismissed the petitioner's application. He took the view that it is mandatory for the husband to be present before him even after the initial pronouncement of the talak so that he could endeavour to effect a reconciliation, as stipulated in Rules 6 and 7 of the Second Schedule to the Muslim Marriage and Divorce Act. As such he formed the opinion that the petitioner cannot be represented before him by another.

The Board of Quazis entertained the application filed to have the aforesaid order of the Quazi revised. Three members of the Board of Quazis by their decision (P7) dated 16.9.92 dismissed the revision application and affirmed the order of the Quazi. Another member of the Board also dismissed the application but only for the reason as stated in his order P9, that "there was no representation by the husband or by the duly appointed representative to act on his behalf in these proceedings." The dissenting order (P8) of the fifth member of the Board, was supported by counsel for the petitioner as representing the correct statement of the Muslim Law. He took the view that the Quazi (Colombo North) has erred in law and has set out his reasons for not agreeing with the order delivered by the majority of the members.

This is an application by the petitioner for a writ of certiorari seeking to have the order (P1A) of the Quazi (Colombo North), and the orders (P7) and (P9) delivered by the majority of the members of the Board of Quazis, quashed. The petitioner has also sought a writ of mandamus to direct the Quazi (Colombo North) to register the divorce in terms of Rule 8 of the Second Schedule to the Muslim Marriage and Divorce Act.

The main submission of Counsel for petitioner is that the Quazi erred in law by misconstruing the Rules, prescribed in the Second Schedule to the Muslim Marriage and Divorce Act, relating to the procedure to be followed in the case of a divorce by a Muslim husband. The Quazi has fixed the case for the pronouncement of the "first" talak on 2.5.91 and after the talak was pronounced that day, he proceeded to fix another date – 3.6.91, as the date for pronouncing the "second" talak. The Quazi has thus proceeded on the basis that there is a requirement in the law for the pronouncement of a second and a third talak, whereas the requirement in the Rules prescribed in the Second Schedule is for the pronouncement of only one talak. It was submitted that the Quazi acted in excess of his jurisdiction by requiring the petitioner to pronounce more than one talak and that he has failed to consider Rules 6 and 7 in its true perspective. The further submission was made that the Board of Quazis erred in law by affirming the unlawful order of the learned Quazi.

Section 27 of the Muslim Marriage and Divorce Act provides that where a husband desires to divorce his wife the procedure laid down in the Second Schedule shall be followed. The Second Schedule sets out the Rules to be followed in the case of a divorce by a husband. In terms of these Rules, the husband should give notice of his intention to divorce his wife to the Quazi of her area, who would then attempt to effect a reconciliation between the husband and wife with the help of elders. Thirty days after the initial notice, if there has been no reconciliation in the meanwhile, the husband may appear before the Quazi and utter the talak in the presence of two witnesses. This is recorded by the Quazi and the wife notified if she was not present. Upon the lapse of a further period of thirty days, if the husband was still not reconciled with his wife, he should appear again before the Quazi and have such non-reconciliation recorded. After yet another thirty days, if he still persisted in his intention to divorce his wife he would appear for the last time and have his divorce registered by the Quazi.

The Rules require the presence of the husband before the Quazi on the second and third occasions if the talak has been pronounced on the wife in her absence and her presence cannot be secured. Similarly, where the husband has failed to appear after the pronouncement of the talak at the end of each of the two successive periods of thirty days, the Quazi may, at any time after the expiry of three months, examine the wife in regard to the failure of the husband to appear and the causes for the failure to reconcile them. The Quazi is then required to register the divorce.

There are two broad categories of talak: Talak ar-Raji (revocable divorce) and Talak al-Bain (irrevocable divorce). Talak ar-Raji has two forms (1) Talak Ahsan, the most approved divorce and (11) Talak Hasan, approved divorce – Verma's Muslim Marriage, Maintenance and Dissolution 2nd ed.Ch. 6.183.

Talak Ahsan consists of a single pronouncement of divorce. When the wife's cycle fails into what is known as the "tuhr" period, that is when she is free from her menstrual flow, the husband pronounces a talak. He must then refrain from sexual intercourse during the Iddah period of three menstrual cycle, (or, if she be beyond the age for menstruation, or if she has not menstruated, or if her periods are

irregular, then three lunar months). At the end of this Iddah period the marriage is terminated; the dissolution arising directly from the unilateral talak pronounced three months earlier. This form of repudiation provides an opportunity of revocation as the husband can take back his wife during the period of this Iddah.

The Hasan form of talak is an approved method of repudiation. The procedure is as follows: the husband repudiates his wife three times; the first talak takes place during a tuhr period and he pronounces two subsequent talaks during the following two tuhr periods. As soon as the husband pronounces the third talak, the talak becomes irrevocable. The talak is raji (revocable) until the third pronouncement. In the Hasan form, the marriage does not come to an end until the pronouncement of the third talak. The wife has to observe an Iddah period after the third pronouncement and at this time the husband cannot revoke the decision to divorce his wife.

The Rules in the Second Schedule prescribe a procedure for the Ahsan form of talak as it has reference only to the pronouncement of a single talak.

These Rules may be contrasted with the Rules which were prescribed in the repealed Muslim Marriage and Divorce Registration Ordinance, No. 27 of 1929. The Second Schedule to that Ordinance prescribed a procedure for the Hasan form of talak. The Rules 1, 3 and 4 therein required the pronouncement of the "first" talak, the "second talak" and the "third and final talak" at the expiry of thirty days reckoned from the date of each pronouncement.

The majority of the members of the Board of Quazis have referred in their order P7 to the procedure prescribed in the Second Schedule to the Act and observed as follows: "though the learned Quazi speaks of a second talak and the affidavit of the respondent too speaks of a second and third talak it **should** be stated that the present Muslim Marriage and Divorce Act contemplates the pronouncement of only one talak known to Muslim law as "Ahsan and thereafter the effluxion of time commences in the manner stated in the second schedule". (The typed order (P7) had the word "cannot" in place of the word "should" underlined above. It has been corrected in ink to read as "should").

The uncorrected draft of the majority of members of the Board has apparently been considered in the dissenting order P9 as it is stated there as follows: "The Board's ruling: it **cannot** be stated that the present Muslim Marriage and Divorce Act contemplates the pronouncement of only one talak known to Muslim law as "Ahsan and thereafter effluxion of time commences in the manner stated in the second schedule. I must with respect disagree with this order for this reason, that is, the second schedule now prescribes a procedure adapted to the Ahsan rather than the Hasan type of talak."

Although the majority decision accepted that the Ahsan form of talak requiring the pronouncement of a single talak is now prescribed in the Rules of the Second Schedule to the Act, curiously, they have failed to focus their attention on the legality of the procedure followed by the Quazi by requiring the petitioner to pronounce the second talak. The majority of the members in their orders P7 and P9 have taken up for determination other matters but have wrongfully refused to determine this question which they were obliged to determine. As de Smith in *Judicial Review of Administrative Action*, 4th ed. page 123 has stated, "A refusal to exercise jurisdiction may be conveyed by express words or by conduct. Thus, a tribunal is deemed to have declined jurisdiction if it fails to decide the question before it and instead decides a different question."

However this error has been focussed upon in the dissenting order P8 where it is stated ". . . the second schedule of the Act bears no reference at all to the pronouncement of a second talak. Thus the Quazi has erred in statutory law by fixing a date for the pronouncement of a second talak."

It is clear therefore that this was an error on the face of record. A mistake of law which appears on the face of the record of the proceedings is an affront to the law which cannot be overlooked. The case of *Northumberland Compensation Appeal Tribunal ex.p.Shaw*⁽¹⁾, concerned an alleged error of law made by the tribunal in its assessment of periods of service in respect of which a clerk, made redundant by the passing of the National Health Service Act 1946, was entitled to compensation. It was held that since the determination of the tribunal bore on its face an error of law certiorari

would issue to quash the decision. Denning LJ said in the Court of Appeal: "It would be quite intolerable if in such a case there were no means of correcting the error. The authorities to which I have referred amply show that (the Court) can correct it by certiorari."

The order of the learned Quazi which required the petitioner to pronounce the second talak after the initial pronouncement, not being a requirement of the Ahsan mode of repudiation prescribed in the Second Schedule to the Muslim Marriage and Divorce Act, constitutes an error of law and it cannot therefore be permitted to stand. The subsequent orders made by the learned Quazi would thus become unlawful. The order of the Quazi P1A is therefore quashed. The orders of the Board of Quazis P7 and P9, affirming the said order, are also quashed.

The petitioner has pronounced talak on the 7th respondent on 2.5.91 in her presence and before two witnesses. He has thus conformed to Rules 1 and 2 of the Second Schedule and has pronounced talak in the Ahsan form. As two successive tuhr periods have lapsed thereafter the petitioner is entitled to have the divorce registered in terms of Rule 8 of the Second Schedule. I therefore order the issue of a *writ of mandamus* directing the Quazi (Colombo North) to register the divorce applied for by the petitioner.

The application is allowed. I make no order for costs.

Application allowed.