Tufail Ahmad Vs Jamila Khatun

Court: Allahabad High Court

Date of Decision: April 2, 1962

Acts Referred: Dissolution of Muslim Marriages Act, 1939 â€" Section 2

Citation: AIR 1962 All 570 : (1962) 32 AWR 771

Hon'ble Judges: D.P. Uniyal, J; B. Mukerji, J

Bench: Division Bench

Advocate: N.A. Kazmi, for the Appellant; S.N. Kakkar, for the Respondent

Final Decision: Allowed

Judgement

Mukerji, J.
This second appeal has been referred to a Bench for decision by the Chief Justice as a learned single Judge asked for such a

decision because of the importance of the question of law involved in the case.

2. Jamila Khatoon, the plaintiff, was married to Tufail Ahmed, the defendant, sometime in the year 1935. In 1947 it appears that matrimonial

bickerings started between the husband and wife. In 1948 the plaintiff-wife left her husband and went to live with her brother. In November, 1948,

there was a complaint u/s 498 of the Indian penal Code by the husband and in this complaint the husband apparently made an allegation of

unchastity against the wife. Subsequent to the complaint mentioned above, which was dimissed the husband filed a suit in 1948 for restitution of

conjugal rights. In this suit the husband unequivocally retracted the allegation which he had, apparently stupidly, made against the wife in the 498,

Indian Penal Code proceedings. The suit for restitution of conjugal rights was dismissed and we are really not concerned with the grounds on

which that suit was dismissed, for we are concerned with something that followed subsequently.

3. On the 30th March, 1949, the wife filed the present suit out of which this appeal has arisen for the, dissolution of her marriage with the

defendant. The suit was filed under the Dissolution of Muslim Marriages Act 1939 (VIII of 1939). The ground on which dissolution was sought

was the false imputation of unchastity by the husband to the wife. In his written statement the husband did not stand by the alleged imputation of

unchastity. On the other hand, he relied on the reaction and claimed the benefit of that retraction to defeat the plaintiff"s claim for divorce.

4. On the pleadings, the Court below framed four issues; the two material issues were, first, whether the defendant had falsely charged the plaintiff

with adultery, and secondly, whether that alleged charge of adultery had been retracted by the defendant. The findings of fact recorded by the

Courts below, which findings are binding on us, were first that the husband-defendant did accuse the wife-plaintiff falsely of adultery, and secondly,

that the husband had retracted that accusation prior to the filing of the suit out of which this appeal has arisen. We have earlier referred to the fact

that in his suit for restitution of conjugal rights the husband had in effect and in substance retracted the false imputation of adultery to the wife. Even

so, the courts below decreed the plaintiff"s suit for dissolution of marriage because they were of the view that they were bound by the law laid

down by this Court in Kalloo Vs. Mt. Imaman, which was a single Judge decision by Mr. Justice Mushtaq Ahmad. Mr. Justice Upadhya at whose

instance this case was referred to a Bench did not apparently agree with the view expressed by Mushtaq Ahmad, J., in Kalloo Vs. Mt. Imaman, ,

even though he did not say so in so many words in his referring order.

5. The question which falls for our consideration is whether the retraction which was made by the husband in the instant case in his plaint in the suit

for restitution if conjugal rights was a sufficiently good ground for non-suiting the plaintiff.

6. The false imputation of adultery was not specifically one of the grounds mentioned in section 2 of the Dissolution of Muslim Marriages Act as a

ground for divorce. This ground, if available to wife to ask for divorce, would be available under Clause (ix) of Section 2 of the Act, which is in

these words:

On any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

There never was any doubt that false imputation of unchastity to a wife did form a recognised valid ground under the Mohamedan Law. The only

question that was disputed was whether that ground for dissolution which a wife had on the husband making a false imputation of unchastity to her

ceased to be a ground if the husband retracted, or to put it slightly differently, whether the ground on winch a wife could obtain divorce from her

husband for unchastity was to be an imputation of unchastity which had not been retracted by the husband at any proper stage prior to the wife"s

obtaining relief.

7. In Mohamedan Law the right of the wife to get a divorce on the husband imputing false unchastity to her fell under a doctrine which wont by the

name of Lian. In Baillie"s Mohamedan Law (Hanifeea) lian has been defined thus:

Lian according to "us", are testimonies confirmed by oaths on both sides, referring to a curse on the part of the man, which is a substitute for the

hudd-col-kuzf, of specific punishment of scandal, and for ghuzub or wrath on the part of the woman, which is a substitute for the huddooz-zina, Or

specific punishment of adultery. Though a man should have slandered his wife several times, only one lian is incumbent on him. And all are agreed

that lian is to be taken between spouses only once. It does not admit of forgiveness, or release, or composition; so that, if the wife should forgive

her husband before the matter is brought before the judge, or should enter into a composition with him for property the composition would not be

valid, and she would be liable for restitution of the amount received in exchange, and might still demand the lian. Neither does it admit of agency;

and if one of the parties should appoint an agent for lian the appointment would not be valid; though an agency for proof is lawful, according to

Aboo Haneefa and Moohummud. The cause for lian is a husband"s scandalizing his wife in such a manner as would call for the infliction of hudd if

the parties were strangers to each other, though it induces only lian between married persons.

Baillie subsequently pointed out that:-

The legal effect of lian as soon as it has passed between the parties, is to render sexual intercourse between them, and all excitement to it,

unlawful; but a separation is not effected by the mere lian. So that if the husband should repudiate his wife while in this condition by an irrevocable

repudiation, it would take effect; or if he should retract, by declaring that he lied, intercourse would again become lawful without a renewal of the

marriage.

It appears that under the ancient Muslim procedure in regard to lian it was a condition precedent that the wife should ask or demand lian and that if

a husband refused to take the lian ..... the judge was to imprison him until he submitted or until he retracted by giving himself the lie; whereupon be

only became liable to the hudd for scandal. From the above quotations from Baillie it would be clear that retraction was a part of the doctrine of

Lian and that the right of the wife to get a divorce was dependent really on there being no proper retraction of the accusation by the husband.

8. The matter which we have to consider came up more or less pointedly before this Court in Mt. Rahiman Bibi Vs. Fazal, where Sulaiman, J., (as

he then was) observed as follows:-

It is further contended on his behalf that after it was proved that he had made the accusation an opportunity should have been given to him other

to retract his accusation or to substantiate it. As stated above, the defendant from the very outset admitted that he did not undertake to prove her

adultery. He could not, therefore, expect that another option would be given to him to prove such a charge. The so called retraction came after the

evidence was closed. Even assuming that under the old procedure of the Muhammadan law the qazi had to give the husband a fresh option to

retract, after it had been established by evidence that his denial of it was false, it may be doubtful how far that rule of procedure can now be

applicable to a case where both parties have gone to trial only on the question whether an accusation was or was not made, and the retraction did

not come till after the close of the evidence.

The aforequoted observations of Sulaiman, J., clearly indicated that there was an escape for the husband from the marital consequences of a false

imputation of adultery to the wife if he retracted such an imputation at a proper stage. What was denied to the husband in Mt. Rahiman Bibi Vs.

Fazal, was the right to say that the Court had to give him again an opportunity to retract the accusation before the Court could pronounce a decree

for dissolution in favour of the wife.

9. In 1929 the Oudh Chief Court had to consider a similar question in the case of Mt. Fakhre Jahan Begum v. Mohamed Hamidullah Khan AIR

1929 Oudh 16 where a Bench of the Oudh .Chief Court ..... observed this:

No doubt the truth or falsity of the charge has to be determined at the present day according to the rules of evidence and procedure governing

British Courts of law yet it is clear that when wife appeals to the Court of law for dissolution of marriage the husband is allowed a locus

poenitentiae before the marriage is dissolved. If he avails himself of this locus poenitentiae he may be liable for punishment for the slander or

defamation but the marriage cannot he dissolved.

Their Lordships of the Oudh Chief Court relied on the following observation of Sulaiman, J., in Mt. Rahiman Bibi Vs. Fazal, :-

The real baste of the procedure of the Mahomdan law seems to be that when the wife appeals to the Kazi and asks for the dissolution of the

marriage on the ground that she has been falsely accused by her husband of adultery, it is open to the husband to admit that he had made a false

accusation and thereby render himself criminally liable, or to substantiate the accusation.

In our judgment--and we are saying it with respect--the observation by the learned Judges of the Oudh Chief Court, which we have quoted above,

had good reason behind it. The reason that we see behind the necessity of giving the husband a locus poenitentiae was that the law was jealous of

preserving matrimonial relations: the law did not lightly put asunder man and wife, even though they had come together by virtue of a contract and

not as a result of a sacrament. The basis of society, in a sense, at any rate as the conception of society visualised by the law obtained, was to see

its security in the security of the home, which again depended vitally on the marriage lie not being broken or sullied lightly. It is oft quoted that to err

is human, and it that is so, then, inherent in that realisation is the fact that the erring should have an opportunity to say that he has erred and that his

error should now be not taken note of in view of his regained wisdom or in view of his better knowledge. The law has always recognised and

acted on locus poenitentiae and has tried to forgive where forgiveness was possible arid tried to whittle down the rigors of punishment where

complete exoneration under the, law was not possible, in all cases where the Court was of the view that there was honest locus poenitentiae.

Therefore, in the setting in which this doctrine of locus poenitentiae was engrafted by the Muslim law there was not only perfect justification for it

but that it would be unjust and against the conception of the marriage tie not to give effect to it.

10. In Shamsunnessa Khatun Vs. Mir Abdul Mannaf, , Akram, J., said this;

The purpose behind the principle of retraction is to give the husband a locus poenitantiae before the marriage is dissolved. The object is to

reestablish cordial relationship between husband and wife. The retraction therefore must be bona fide and not a mere device for defeating the suit

for dissolution.

The question whether a retraction is bona fide or not is a question of fact, and in the instant case there was no suggestion that the retraction was not

bona fide. Indeed, as we have noticed earlier, the retraction came much earlier than the ..... tiling of the suit out of which this appeal has arisen.

There was not only retraction, but we have also noticed the fact that the husband wanted the wife back, and indeed he did all that the law

permitted him to do, namely, file a suit for restitution of conjugal rights, even though it may be that he was unsuccessful in that suit.

11. Counsel for the respondent Mr. L. P. Naithani put up a spirited defence for his client and ho relied strongly on the decision of Mr. Justice

Mushtaq Ahmad in Kalloo Vs. Mt. Imaman, , particularly on the learned Judge''s view that:-

After the parsing of the Dissolution of Muslim Marriages Act VIII of 1939, however, the plea of retraction of a false charge of adultery is no more

available, inasmuch as the Act which is complete and self-sufficient nowhere prescribes that in case the dissolution is sought on the ground of a

false charge of adultery against the wife, its effect can be nullified if the husband retracts the charge.

We may point out, with respect, that the Dissolution of Muslim Marriages Act of 1939 nowhere lays down that false imputation of unchastity or a

false charge of adultery against the wife was a ground for divorce. This ground, as we pointed Out earlier, fell within, what we may call, the

omnibus ground provided for in Clause (ix) of Section 2 of the Act.

12. Mr. Naithani further contended, to lend support possibly to the view expressed by Musntaq Ahmad, J., in Kalloo Vs. Mt. Imaman, , that if the

intention of the Legislature was to give a husband the right to retract or to place a husband''s retraction of the false imputation of unchastity to the

wife as a ground for defeating the wife''s claim for dissolution of marriage, then the Legislature should have specifically provided for it as one of the

provisos to the section like the other three provisos which are already there in the section. We have seen no justification at all for this contention of

Mr. Naithani, for we are of the opinion that the right of the wife to claim a dissolution of marriage arose not merely on there being a false imputation

of unchastity against her but a failure to retract or failure to prove that imputation.

13. For the reason given above, we set aside the decision of the Courts below and dismiss the wife-plaintiff''s suit for dissolution of marriage. The

appeal is allowed, but under the circumstances of the case we direct the parties to bear their own costs.