

(2010) 09 GAU CK 0036

Gauhati High Court

Case No: Intest Case No. 4 of 2002

Musstt. Rebun Nessa

APPELLANT

Vs

Musstt. Bibi Ayesha and Others

RESPONDENT

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**Date of Decision:** Sept. 24, 2010**Acts Referred:**

- Muslim Women (Protection of Rights on Divorce) Act, 1986 - Section 3
- Succession Act, 1925 - Section 384

**Citation:** AIR 2011 Guw 36 : (2011) 2 DMC 116**Hon'ble Judges:** Anima Hazarika, J**Bench:** Single Bench**Advocate:** M.H. Rajbarbhuiya, N.A. Laskar and A. Mannaf, for the Appellant; A.M. Mazumdar, A. Choudhury and S. Islam, for the Respondent**Final Decision:** Allowed

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**Judgement**

Anima Hazarika, J.

Challenge in this appeal u/s 384 of the Indian Succession Act, 1925 is made against the judgment and order dated 4.3.2002 passed by the learned District Judge, Hailakandi, in Misc. (Succession) Case No. 97/99 titled as (Mustt. Bibi Ayesha and 3 Ors. v. Mustt. Rebun Nessa and 2 Ors.), whereby and whereunder the learned District Judge, Hailakandi, directed to issue the succession certificate in favour of the first wife (Mustt. Bibi Ayesha) and her three daughters including the opposite party Nos. 2 & 3 depriving the second wife, the Appellant herein, holding that she is the divorcee of the deceased Intaj Ali Laskar, therefore, not entitled to get the share in the debts and securities left by the deceased husband.

2. Heard Mr. M.H. Rajbarbhuiyan, learned Counsel appearing for the Appellant. Also heard Mr. A.M. Mazumdar, learned Senior Counsel assisted by Mr. F.K.R. Ahmed, learned Counsel for the Respondents.

3. The following facts would emerge from the facts pleaded by the contesting parties The Petitioners, namely Bibi Ayesha, Khairun Nessa, Hayatun Nessa and Nur Khatun have filed a petition for grant of succession certificate in respect of debts and securities of the deceased Intaj Ali Laskar. In the said petition, Appellant herein alongwith her son and daughter have been arrayed as opposite party Nos. 1, 2 & 3 contending, interalia, that the opposite party No. 1 Mustt. Rebun Nessa is the second wife of the deceased Intaj Ali Laskar and opposite party Nos. 2 & 3 are son and daughter of the deceased through the opposite party No. 1 who was divorced by the deceased and as a consequence she has left the house of the deceased and is therefore not entitled to get share of debt and securities left by the deceased Intaj Ali Laskar.

4. The learned District Judge took cognizance of the case and issued summons on the opposite parties. Accordingly, the opposite party No. 1 entered appearance by filing objection contending interalia that Mustt. Bibi Ayesha is the first wife of deceased Intaj Ali Laskar and the Petitioner Nos. 2, 3 & 4 are the daughters of the deceased through Ayesha Bibi. But denied to have divorced her by the deceased. On the contrary she pleaded that the first wife Bibi Ayesha is the divorcee of the deceased and the divorce was pronounced due to quarrel with her children and after divorce, Bibi Ayesha left her husband's house alongwith her daughter, the Petitioner No. 4 to her parental house and lived there since then. But after the demise of Intaj Ali Laskar she came to the house of the husband and filed the petition seeking issuance of succession certificate to which she is not entitled.

5. From the pleadings of the parties the core question required to be answered by the learned District Judge, Hailakandi was, as to whether the first wife, Bibi Ayesha was divorced by her husband or the second wife Rebun Nessa was divorced by her husband Intaj Ali Laskar since deceased.

6. To substantiate the claim of the parties the opposite parties/Appellants including proforma Respondent Nos. 5 & 6 herein have examined four witnesses including Rebun Nessa, whereas the Respondent Nos. 1 to 4/Petitioners have examined three witnesses including Bibi Ayesha.

7. The learned District Judge on consideration of materials on record and evidence led by the Respondent No. 1 as PW 1 including PW 2 neighbour, PW 3 a co-villager. PW 4 elder brother of the deceased has held that second wife was divorced by the deceased in presence of PW-2, PW 3 and PW 4 thereby discarding the evidence led by the second wife holding that second wife was divorced by the deceased, therefore, not entitled to get the share in the debts and securities left by the deceased Intaj Ali Laskar. Hence the present appeal.

8. Mr. Rajbarbhuiyan learned Counsel appearing for the second wife, Appellant has drawn the attention of the court to the pleadings of the parties, more particularly, the evidence of PWs upon which the learned District Judge has relied on heavily,

while discarding the evidence of DWs in drawing the conclusion that the Appellant was divorced, though it did not fulfill the norms of divorce under Muslim law, hence the order impugned requires interference in this appeal.

9. Learned Counsel would further urge that the provision of Muslim Women (Protection of Rights on Divorce) Act, 1986 has escaped the notice of the learned District Judge wherein Section 3 of the Act mandates that a divorced woman is entitled to certain relief (s).

10. In support of his submission the learned Counsel has referred the following decisions:

1 [Shamim Ara Vs. State of U.P. and Another,](#)

2. (1993) 1 GLJ 499 Zeenat Fatema Rashid v. Md. Iqbal Anwar.

In Shamim Ara (supra), the Supreme Court after discussing various decisions has held that the talak to be effective has to be pronounced. The term Talak means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate.

In Zeenat Fatema (supra), a Division Bench of this Court held that divorce must be for reasonable cause and it must be preceded by pre-divorce conference to arrive at settlement. In Zeenat Fatema, there was no evidence that there was pre-divorce conference, the Court thus held that the husband has failed to prove the alleged divorce by talak.

11. Countering the submission made by Mr. Barbhuiyan, learned Counsel appearing for the Appellant, Mr. A.M. Mazumdar learned Senior Counsel assisted by Mr. F.K.R Ahmed learned Counsel appearing for the Respondents has contended that the claim of succession under the Indian Succession Act, 1925 is a summary procedure and Rules of pleadings and evidence are not strictly followed. The evidence led by the PWs would amply demonstrate that the Petitioners have proved that the second wife (the Appellant) was divorced by the deceased. Therefore, the impugned judgment and order rendered by the learned District Judge do not require to be interfered with in the facts and circumstances of the case.

12. Considered the arguments advanced alongwith pleadings set forth by the contesting parties including the evidence led in the case and the decisions cited by the learned Counsel. Admittedly the Petitioner (Respondent No. 1 herein) Bibi Ayesha is the first wife and Rebun Nessa is the second wife of deceased Intaj Ali Laskar. From first wife three daughters were born, whereas from the second wife one son and one daughter was born, but the contesting parties have claimed that the first wife was divorced and second wife was also divorced by the deceased Intaj Ali Laskar. In order to prove the divorce of Rebun Nessa, the Appellant, PW 1 Bibi Ayesha has led the evidence that the deceased had divorced the second wife. In support of her claim PW 2 and PW 3 who are neighbours have proved that the second wife was divorced in their presence which would find support from PW 4, the

brother of the deceased.

13. Under the Mahomedan Law, marriage though regarded 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. Their respective rights and obligations are regulated by the rules under the relevant law. Mulla on principles of Mahomedan Law (19th Edn, 1990) states vide para 310; 310. Talak may be oral or in writing A Talak may be effected (1) Orally (by spoken words) or (2) by a written document called Talaknama.

14. In the instant case, there is no written document or Talaknama and therefore, the Court is required to see as to whether there was oral Talak in the form of words of divorce. The words of divorce must indicate an intention to dissolve the marriage which would clearly specify that I divorce my wife forever and render her haram from me, which clearly indicates an intention to dissolve the marriage and no proof of intention is necessary which is absent in the instant case.

15. The evidence led by the Petitioner as PW 1 including PWs 2, 3 & 4 have miserably failed to establish that the deceased divorced the second wife orally by taking recourse to the words of divorce as indicated above whereof both the witnesses and pleadings are lacking to prove the factum of divorce of the second wife by the deceased. Moreover, in the case reported in (1981) 1 GLR 358 (Jiauddin Ahmed v. Anwara Begum) this Court 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 inspite 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. The court has further observed that the correct law of Talak as ordained by the Holy Quran is that (i) Talak must be for a reasonable cause (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one from the wife's family and the other from the husband. If an attempt fails, Talak may be effected. The said proposition has been affirmed by the Division Bench of this Court in Mustt. Rukia Khatun v. Abdul Khalique Laskar reported in (1981) 1 GLR 375 and Zeenat Fatima (supra).

16. The decision rendered by this Court in Jiauddin Ahmed (supra) and affirmed by the Division Bench in Mustt. Rukia Khatun (supra) finds weighty judicial opinion by the Apex Court in Shamim Ara (supra). Therefore in absence of reasonable cause and preceded by an attempt of reconciliation between the husband and the wife by two arbiters, there cannot be any valid divorce/Talak. This Court has thus no hesitation to declare that the Appellant i.e. the second wife Mustt. Rebun Nessa was not a divorcee of the deceased Intaj Ali Laskar.

17. In the aforesaid circumstances, the impugned judgment and order dated 4.3.2002 passed by the learned District Judge, Hailakandi, granting succession

certificate in favour of the first wife (Mustt. Bibi Ayesha) and her three daughters including the opposite party Nos. 2 & 3 depriving the due share of Appellant herein cannot be sustained as the same has been done by the learned trial Court without taking the relevant facts and materials into consideration. That being the position, the impugned judgment and order is modified to the extent as follows - the learned District Judge, Hailakandi shall issue a succession certificate in respect of debt and securities of the deceased Intaj Ali Laskar jointly in favour of Mustt. Rebun Nessa alongwith others by issuing a fresh certificate in cancellation of the earlier certificate issued on 4.3.2002 as aforesaid.

18. In the result, the appeal succeeds as indicated above. The parties are left to bear their own cost.

19. Registry is directed to send down the LCR immediately.