



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 26TH DAY OF JULY 2024 / 4TH SRAVANA, 1946

CRL.MC NO. 6383 OF 2023

CRIME NO.838/2022 OF Mathilakom Police Station, Thrissur
CC NO.32 OF 2023 OF JUDICIAL MAGISTRATE OF FIRST CLASS,
KODUNGALLUR

PETITIONER/ACCUSED:

SAJID MUHAMMEDKUTTY
AGED 32 YEARS, S/O MUHAMMED KUTTY,
PULLATTU SOPANAM HOUSE, AYYANTHOLE,
M.R VASU ROAD THRISSUR, PIN - 680003.

BY ADVS.
ALIAS M.CHERIAN
K.M.RAPHY
BRISTO S PARIYARAM
AMEERA JOJO
MINNU DARWIN

RESPONDENTS/STATE OF KERALA:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.

2 DR. FATHIMA SHERIN,
AGED 29 YEARS, D/O ABDUL RASHEED,
PADINJAREVEETTIL HOUSE,
AYYANTHOL VILLAGE THRISSUR, PIN - 680003.

BY ADVS.
PUBLIC PROSECUTOR
Abdul Jaleel P.M
T.V.SHAJI (K/131/2005)
K.N.MUHAMMED THANVEER (K/529/2014)
K.SHAMEER MOHAMMED (K/158/2008)
ARUNIMA.T.S. (K/1599/2023)
ALTHAF AHMED ABDU (K/002945/2023)

PUBLIC PROSECUTOR SRI M P PRASANTH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR
ADMISSION ON 10.07.2024, THE COURT ON 26.07.2024 PASSED
THE FOLLOWING:



“C.R”

A. BADHARUDEEN, J.

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Crl.M.C No.6383 of 2023
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Dated this the 26th day of July, 2024

O R D E R

This criminal miscellaneous case has been filed under Section 482 of the Code of Criminal Procedure, by the sole accused in C.C.No.32/2023 on the files of Judicial Magistrate of First Class, Kodungallur, arising out of Crime No.838 of 2022 of Mathilakom Police Station, Thrissur, and the prayers are as under :

“i. To quash Annexure A1/final report in C.C.No.32/2023 on the file of Judicial First Class Magistrate Court, Kodungallur.

ii. To permit the petitioner from personally present for the trial of the case in C.C.No.32 of 2023 on the file of



Judicial First Class Magistrate Court, Kodungallur and permit the petitioner to conduct the case through his counsel.

iii. To grant such other relief which are deem fit and proper in the circumstances of the case.”

2. Heard the learned counsel for the petitioner, the learned counsel for the defacto complainant and the learned Public Prosecutor at length. Perused the relevant documents and the decisions cited by them.

3. Here the prosecution alleges commission of offence punishable under Sections 3 r/w 4 of the Muslim Women (Protection of Rights on Marriage) Act, 2019 ('Act, 2019' for short hereafter), by the accused. The allegation is that the petitioner/accused herein pronounced instantaneous and irrevocable talaq upon his wife/the defacto complainant and thereby committed the above offence.

4. While seeking quashment of the proceedings on the ground that the offence is not made out, *prima facie*, it is



submitted by the learned counsel for the petitioner that in this matter there is no instantaneous talaq or talaq-e-biddat of irrevocable nature since the petitioner pronounced talaq periodically on 23.12.2021, 13.07.2022 and 16.10.2022 and the form of talaq pronounced by the petitioner is talaq-e-sunnat., which is legally permissible. The learned counsel for the petitioner placed decisions of this Court reported in [2022 (5) KHC 50 : 2022 KHC OnLine 532 : 2022 (4) KLT 659 : 2022(3) KLJ 537], *Jahfer Sadiq E.A & anr. v. Marwa & anr.*, to contend that once the talaq is not instantaneous and irrevocable, it could not be said that offence under Sections 3 r/w 4 of the Act, 2019 would attract.

5. While resisting the said contention, the learned counsel for the defacto complainant would submit that in the instant case though talaq was pronounced on 3 separate occasions, the same would fall within the purview of instantaneous talaq prohibited under the Act, 2019, as the pre-



conditions to satisfy talaq-e-sunnat, were not fulfilled. In support of this contention, he has placed decisions of this Court reported in [2010 (2) KHC 63 : 2010 (2) KLT 71 : ILR 2010 (2) Ker. 140], *Kunhimohammed v. Ayishakutty*, [[2021 (5) KHC 582 : 2021 KHC OnLine 629 : 2021 (5) KLT 564 : ILR 2021 (4) Ker. 561 : 2021 KER 36499], *Sajani A. v. Dr. B. Kalam Pasha and Anr.* It is zealously argued by the learned counsel for the defacto complainant that here the prosecution allegation is that the accused herein pronounced instantaneous and irrevocable talaq and thereby liable for the penal consequences under Sections 3 and 4 of the Act, 2019 and the said allegation is specifically made out.

6. As per Section 3 of the Act, 2019, any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal. Section 4 provides that any Muslim husband, who pronounces *talaq*



referred to in Section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine for pronouncement of talaq stated under Section 3 of the Act, 2019. Section 2(c) of the Act, 2019 defines talaq mentioned in Sections 3 and 4. As per Section 2(c), 'talaq' means, *talaq-e-biddat* or any other similar form of *talaq* having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband. Thus it is emphatically clear that in order to attract punishment provided under Section 4 and to treat pronouncement of talaq by a Muslim husband upon his wife as *talaq-e-biddat* or any other form of talaq, as per Section 2(c), it must be instantaneous and irrevocable.

7. Paragraph 311 of the Principles of Mahomedan Law deals with different modes of talaq, the same are as under:

“311. Different modes of talaq:-- A talaq may be effected in any of the following ways:--

(1) Talaq ahsan:- This consists of a single pronouncement of divorce made during a tuhr (period between



menstruations) followed by abstinence from sexual intercourse for the period of iddat (para.257).

When the marriage has not been consummated, a talaq in the ahsan form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a tuhr is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing (w).

(2) Talaq hasan:- This consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs.

The first pronouncement should be made during a tuhr, the second during the next tuhr, and the third during the succeeding tuhr.

(3) Talaq-ul-biddat or talaq-i-badai:- This consists of -

(i) three pronouncements made during a single tuhr either in one sentence, e.g, "I divorce thee thrice, -- or in separate sentences e.g., "I divorce thee, I divorce thee, I divorce thee" (x) or,

(ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage (y), e.g., "I divorce thee irrevocably."

8. So, talaq is generally classified into 2, viz., 'talaq-e-biddat' or instantaneous pronouncement of divorce in the form



of triple talaq. `Talaq-e-sunnat' is in two forms, viz., `talaq hasan' and `talaq ahsan'. Talaq ahsan consists of a single pronouncement of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat (para.257). Talaq hasan consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs.

9. In *Sajani A.*'s case (*supra*), a Division Bench of this Court after referring a 5 Judge Bench decision of the Apex Court in [2017 KHC 6574], *Shayara Bano v. Union of India*, considered the different forms of talaq and in paragraph 8 it has been stated as under:

“8. In our view, the feature of instant irrevocability takes in two independent features - instantaneousness and irrevocability - both of which contribute to making the practice legally odious. The Supreme Court in Shamim Ara v. State of UP (2002 KHC 829 : (2002) 7 SCC 518 : 2002



(3) KLT 537 : (2002) SCC (Cri) 1814 : AIR 2002 SC 3551 : 2002 CriLJ 4726), while endorsing the views taken in two decisions of the Gauhati High Court, spelt out the requirements of a valid talaq as (i) that the talaq must be for a reasonable cause; and (ii) that it must be preceded by attempts at 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 family. If their attempts fail, talaq can be effected. A division bench of this Court in Kunhimohammed v. Ayishakutty (2010 (2) KHC 63 : 2010 (2) KLT 71 : ILR 2010 (2) Ker. 140), went further to clarify that if an attempt for reconciliation by two arbiters has taken place, and they have not succeeded in bringing about a reconciliation, it can be held that there is a reasonable cause for pronouncement of talaq, and the specific reason for divorce need not be established before the Court and further, the specific reason will not be justiciable also. The Court reasoned that Muslim law - either through Quaranic injunctions or through the Sunnahs or



Ahadis - did not enumerate causes for divorce that are reasonable or causes that are unreasonable. It was found that Islamic Law did not obligate a man to give reasons for the divorce or satisfy anyone else of such reasons. As regards the non - justiciability of the reasons, it was observed that if Courts were to look into the reasonableness of the cause for divorce, there would be as many interpretations about the reasonableness of the cause for divorce as there are judges, making the law of divorce in Muslim law uncertain, vague and confusing. Thus, the test for ruling out the vice of instantaneousness is to see whether there were genuine attempts at 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 family. If such reconciliation attempts have in fact taken place, then, notwithstanding that such attempts proved futile, the pronouncement of talaq must be seen as valid and for a reasonable cause. That, however, is just one aspect of the matter.”



10. In *Kunhimohammed's* case (*supra*), another Division Bench of this Court, held that before termination of Muslim marriage by unilateral pronouncement of talaq, the husband must attempt for reconciliation by two arbiters in accordance with Ayat 35 Sura IV. Attempt for reconciliation is vital. Court further held that a divorced Muslim wife's right to claim maintenance under S.125 CrPC doesn't stand extinguished by the enactment of the Muslim Women (Protection of Rights on Divorce) Act.

11. Going by the definition of 'talaq' as meant under Section 2(c) of the Act, 2019, it is discernible that the talaq-e-biddat, ie. instantaneous and irrevocable talaq, is prohibited under Section 3 of the Act, 2019 and made punishable under Section 4 of the Act, 2019. But Mahomedan Law and its illustration herein would recognize the other form by name talaq-ul-sunnat. There are two types of Talaq-ul-sunnat, namely, (1) ahsan, that is, most proper, and (2) hasan, that is,



proper. In the case of talaq ahsan and talaq hasan, the husband has an opportunity of reconsidering his decision and the talaq in both these cases does not become absolute until a certain period has elapsed (para.312) and the husband has the option to revoke it before then. But the talaq-ul-biddat becomes irrevocable immediately if it is pronounced (para.312). The essential feature of a talaq-ul-biddat is its irrevocability. One of tests of irrevocability is the repetition three times of the formula of divorce within one tuhr. But the triple repetition is not a necessary condition of talaq-ul-biddat, and the intention to render a talaq-irrevocable may be expressed even by a single declaration. Thus if a man says: “I have divorced you by a talaq-ul-bain (irrevocable divorce)”, the talaq is talaq-ul—biddat or talaq-i-badai and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression “bain” (irrevocable) manifests of itself the intention to effect an irrevocable divorce.



12. Paragraph 312 of the Principles of Mahomedan Law makes it clear that a talaq in the ahsan mode becomes irrevocable and complete on the third pronouncement irrespective of the iddat period. Now the question to be considered in this case is whether the talaq effected in the present case is to be held as void or illegal having the effect of instantaneous and irrevocable divorce.

13. In the instant case, it is argued by the learned counsel for the defacto complainant that pronouncement of talaq as per Annexure A1 dated 23.12.2021 without any attempt for reconciliation by 2 arbiters in accordance with Ayat 35 Sura IV is void and is therefore instantaneous and irrevocable. Here as per Annexure A1 the first talaq was pronounced on 23.12.2021; the second talaq was pronounced on 13.07.2022, after 6 months and the third one on 06.10.2022. On perusal of the talaq pronouncement it is discernible that no attempt was made by the husband for



reconciliation by 2 arbiters in accordance with Ayat 35 Sura V. In this realm, it is argued by the learned counsel for the petitioner that if at all the talaq-e-sunnat pronounced by the petitioner is invalid for non-compliance of pre-conditions, then also, it is unsafe to hold that the petitioner pronounced talaq-e-biddat, i.e instantaneous and irrevocable talaq. Thus no offence would attract. But the argument of the learned counsel for the defacto complainant is that when talaq-e-sunnat is not pronounced without complying conditions to effect talaq, the same is akin to talaq-e-biddat and, therefore, the offence would attract. Anyhow, whether talaq-e-sunnat allegedly effected in this case is void, for want of attempt to reconciliation is a question, to be decided, when such a challenge is raised and I leave the same unanswered, to be decided in an appropriate proceedings.

14. Hence the question is; whether there is instantaneous and irrevocable talaq in the present case? As discussed in the



foregoing paragraphs, pronouncement of talaq-e-biddat is instantaneous and irrevocable and would definitely attract criminal culpability meted out in Sections 3 and 4 of the Act, 2019. But when the very intention was to pronounce talaq-e-sunnat, if the talaq-e-sunnat pronounced is found to be illegal for want of compliance of the pre-requisites, then the said talaq would not become talaq-e-biddat. To put it otherwise, pronouncement of talaq-e-biddat, (instantaneous and irrevocable talaq) is prohibited and punishable. But when pronouncement of talaq-e-sunnat is effected, no offence under Section 3 r/w 4 of the Act, 2019 would attract. Similarly when pronouncement of talaq-e-sunnat is attempted, but not legally completed for want of compliance of pre-requisites, the same would not tantamount to talaq-e-biddat to attract Sections 3 and 4 of the Act, 2019. That is to say, in such an instance, no talaq or divorce takes place and the marital relation will continue. This discussion leads to the conclusion that the intention of the



petitioner herein was not to pronounce instantaneous and irrevocable talaq, i.e talaq-ul-biddat, which would attract penal consequences under Section 4 of the Act, 2019 and the intention was to pronounce talaq-e-sunnat. In view of the matter, it is held that the talaq pronounced by the accused in the present case is not talaq-e-biddat, ie. instantaneous and irrevocable to rope in Sections 3 and 4 of the Act, 2019. In the above circumstances, the matter requires quashment.

15. In the result, this CrI.M.C stands allowed. Resultantly, C.C.No.32/2023 on the files of Judicial Magistrate of First Class, Kodungallur, arose out of Crime No.838 of 2022 of Mathilakom Police Station, Thrissur, shall stand quashed.

Registry shall forward a copy of this order to the jurisdictional court for information and further steps.

Sd/-

A. BADHARUDEEN, JUDGE

rtr/

APPENDIX OF CRL.MC 6383/2023

PETITIONER' S ANNEXURES

- Annexure 1 A TRUE COPY OF THE FINAL REPORT DATED 30/12/2022 IN CRIME NO. 838 OF 2022 ON THE FILE OF MATHILAKAM POLICE STATION AND FILED IN C.C NO. 32 OF 2023 BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KODUNGALLUR.
- Annexure A2 A COPY OF THE FINAL REPORT IN CRIME NO. 1486 ON THE FILE OF THRISSUR TOWN WEST POLICE STATION AND WHICH IS THE SUBJECT MATTER IN C.C NO.9 OF 2021 ON THE FILE OF THE CHIEF JUDICIAL MAGISTRATE COURT, THRISSUR.
- Annexure A3 A TRUE COPY OF THE COMPLAINANT IN M.C NO. 1 OF 2021 BEFORE THE CHIEF JUDICIAL MAGISTRATE COURT, THRISSUR.
- Annexure A4 A TRUE COPY OF THE TALAQ NOTICE DATED 23/12/2021 ISSUED TO THE 2ND RESPONDENT/DEFACTO COMPLAINANT.
- Annexure A5 A TRUE COPY OF THE TALAQ NOTICE DATED 13/07/2022 ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT/DEFACTO COMPLAINANT.
- Annexure A6 A TRUE COPY OF THE POSTAL RECEIPT DATED 20/07/2022 ISSUED BY THE POSTAL AUTHORITIES.
- Annexure A7 A TRUE COPY OF THE TALAQ NOTICE DATED 06/10/2022 ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT/DEFACTO COMPLAINANT.
- Annexure A8 A TRUE COPY OF POSTAL RECEIPT DATED 12/10/2022 ISSUED BY THE POSTAL AUTHORITIES.