IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 7TH DAY OF JANUARY 2000

BEFORE

THE HON'BLE MR.JUSTICE K.H.N.KURANGA

R.P.F.C. NO.15 OF 1998

Between:

ZULEKHA BEGUM
@ RAHMATHUNNISA BEGUM,
D/o Abdul Raheem,
aged about 33 years,
residing at Azadanagar,
Raichur. .. PETITIONER.

(By Sri.S.Nagaraja, Adv. for the Petitioner)

And:

ABDUL RAHEEM, Major,
S/o Abdul Nabi alias
Laddumiyan, K.S.R.T.C.
Driver, Badge No.1217,
residing at Arab Mohalla,
Raichur. .. RESPONDENT.

(By Sri.R.B.Deshpande, Adv. for the Respondent)

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This petition is filed under Section 19 (4) of the Family Courts Act, against the Order dated 21-08-1998 passed in C.Misc.No.49/1998 on the file of the Judge, Family Court, Raichur, dismissing the petition filed under Section 125 of Cr.P.C.

This petition coming on for final hearing this day, the Court made the following:

ORDER

This petition is by the wife challenging the order dated 21-08-1998 passed by the Family Court, Raichur, in Crl.Misc.No.49/1998.

2. The case of the petitioner is that she is the legally wedded wife of the respondent. Both are Muslims by religion and their marriage was solemnized in accordance with Mohammedan Law on 19-06-1982. For a period of two years she lived happily with her husband. Thereafter it is the case of the petitioner that the respondent started ill-treating, harassing and abusing her. During the year 1984 the respondent drove her away from his house. On account of the intervention of the elders, the respondent took the petitioner with him in the month of October, 1984. Again he continued to ill-treat her. In the month of January, 1986, the respondent finally drove her away from his house, by then the petitioner was pregnant of five months. Having no other alternative, she had to return to her parents' house and there she gave birth to a son by name Mohd.Jaffar on 24-03-1986. The respondent never cared to visit her and her

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son. The respondent later married another woman at Gulbarga and now he is residing in Arab Mohalla at Raichur. The respondent is employed as a Driver in K.S.R.T.C. and he is earning good salary. The petitioner is not employed any where and she has no income of her own. She cannot maintain herself. She requires atleast a sum of Rs.500/- per month towards her maintenance. Therefore, she filed the petition under Section 125 Cr.P.C., before the Family Court, Raichur, for grant of maintenance of Rs.500/- per month.

3. The respondent contested the petition by filing objections. The averments made in the objection statement in brief may be stated as follows:

The petitioner was the wife of the respondent. But he has divorced her under Muslim Personal Law about one year back and has sent the Talaq Nama and the Mehar amount and also the maintenance for Iddat period by way of two cheques drawn in her favour. The petitioner received the Talaq Nama as well as the two cheques sent to her under registered post. Therefore, the divorce is

complete and the petitioner is not entitled to be maintained by the respondent and the petition filed by her under Section 125 of Cr.P.C., is not maintainable. He has denied all other allegations made against him in the petition filed by the petitioner and thus he prayed for dismissal of the petition filed by the petitioner.

4. In support of the case of the petitioner, the petitioner got herself examined as P.W.1 and got marked 6 documents as Exs.P-1 to P-6. In support of the defence taken by the respondent, the respondent got himself examined as R.W.1 and he examined one more witness, Mohd. Jaffar as R.W.2 and got marked 6 documents as Exs.R-1 to R-6.

5. The Court below framed two points for consideration, namely:

1. Whether the petitioner proves that she continues to be the legally wedded wife of the respondent and that there was no divorce given by her husband?

2. Whether the petitioner is entitled for maintenance as claimed by her?

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6. The Court below has held that Ex.R-1 is the copy of the Talaq Nama, which is in Urdu language and Ex.R-2 is the postal acknowledgment which bears the LTM of the petitioner for having served the Talaq Nama with two cheques drawn in her favour containing the Mehar amount and the maintenance amount for the Iddat period. The petitioner has sent a reply through her counsel which is marked as Ex.R-3. The petitioner has admitted having been served with the Talaq Nama dated 04-11-1996 with two cheques drawn in her favour for a sum of Rs.530/-, the Mehar amount and a sum of Rs.600/-, maintenance for the Iddat period. Under Ex.R-3 the petitioner has stated that she is not agreeable for the divorce and therefore she is refusing those two cheques. In the reply notice, the petitioner has specifically stated as under:

> 'That now again you have sent the Talaq Nama dated 4.11.96 along with two demand drafts which is not in accordance with the principles of shariat and Muslim Law and he cannot divorce twice (i.e., on 18.4.84 and on 4.11.96) the said talak-nama does not bear the names and addresses of the witnesses and the talak is not pronounced before any client. So it is illegal.'

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7. Hence the Court below has held that the admission made by the petitioner in the reply notice proves that she has been served with the Talaq Nama sent by the respondent.

8. After referring to Section 310 of Mohammedan Law, the Court below has held that the respondent has served the petitioner with the Talaq Nama dated 04-11-1996 through the registered post and hence the divorce is complete.

9. Dealing with the contention advanced on behalf of the petitioner by the Advocate appearing for the petitioner that the Talaq Nama pronounced by the respondent and the Talaq Nama prepared by him is not as per Muslim Personal Law and therefore it has no sanctity under Mohammedan Law and the respondent was bound to offer an opportunity to the petitioner to negotiate and to live with him, the Court below has held that this argument has no force, because it is an absolute right of a Muslim husband to give divorce to his wife and the divorce given by the respondent to the petitioner is on valid grounds and it is complete.

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10. The Court below has relied upon the Judgment in the case of **MOHD.UMAR KHAN -Vs- GULSHAN BEGUM AND ANOTHER** reported in **1992 CRIMINAL LAW JOURNAL 899** and held that the petitioner has no right to challenge the Talaq given by the respondent to her. The Court below has also held that the petitioner being the divorced woman, cannot approach the Court under Section 125 of Cr.P.C. The remedy open to her is only under Section 3, 4 and 7 of the Muslim Woman (Protection of Rights on Divorce) Act, 1986 and accordingly dismissed the petition filed by the petitioner under Section 125 of Cr.P.C.

11. The learned counsel for the petitioner submitted that the divorce given by the respondent to the petitioner is not a valid divorce under Muslim law. He submitted that Muslim law requires that there should be an attempt of reconciliation between husband and wife by two mediators one chosen by the wife from her family and other chosen from his side. If there is no evidence to show that any attempt for settlement prior to divorce was made, divorce effected is not valid divorce under law. Wife thus cannot be denied maintenance on the ground of divorce. He further submitted that a Mohamedan husband cannot divorce his wife at

his whim or caprice, the divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference to arrive at a settlement and relied upon the Judgment of the Madras High Court in the case of **SALEEM BASHA -Vs- MRS.MUMTAZ BEGAM** reported in **1998 CRIMINAL LAW JOURNAL 4782** and the Judgment of the Division Bench of the Gauhati High Court in the case of **ZEENAT FATEMA RASHID -Vs- MD.IQBAL ANWAR** reported in **1993(2) CRIMES 853.**

12. The learned counsel for the respondent on the other hand submitted that when a Mohomedan husband gives a Talaq to his wife, it is complete and the wife cannot challenge the same. He submitted that in applying the personal law of the parties, a Judge cannot introduce his own concepts of modern times but should enforce the law as derived from recognized and authoritative sources of Hindu law as referred to in the commentaries. He further submitted that Talak may be given orally under Mohammedan Law. No evidence or witnesses is required to prove the Talak. He further submitted that new plea based on facts which is not raised or argued before the Lower Court cannot be raised for the first time in the revision before this Court.

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He also submitted that after coming into force of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the application filed under Section 125 Cr.P.C., by the wife before the Family Court was not maintainable. She has to approach the Court under Section 3 or 4 of the said Act and relied upon the Judgments of the Supreme Court in the case of KRISHNA SINGH -Vs- MATHURA AHIR AND OTHERS reported in AIR 1980 SUPREME COURT 707, in the case of MS.JORDEN DIENGDEH -Vs- S.S.CHOPRA reported in AIR 1985 SUPREME COURT 935, and the following judgments, in the case of SHAHIDA BEGUM -Vs- ADUL MAJID reported in 1997 CRIMINAL LAW JOURNAL 2229 OF RAJASTHAN HIGH COURT, MOHD.UMAR KHAN -Vs- GULSHAN BEGAM AND ANOTHER reported in 1992 CRIMINAL LAW JOURNAL 899 OF MADHYA PRADESH HIGH COURT, SYED JAMALUDDIN -Vs- VALIAN BE AND ANOTHER reported in 1975 CRIMINAL LAW JOURNAL OF ANDHRA PRADESH HIGH COURT, MOHAMMED IBRAHIM -Vs- AHMED BEE reported in 1966(2) MYSORE LAW JOURNAL 666, J.LAXMAN BHAT -VsNARAYANA NAYAK AND OTHERS reported in 1992(4) KARNATAKA LAW JOURNAL 21 and RUKIYA AND ANOTHER -Vs- SRI MOHAMMED reported in ILR 1996 KARNATAKA 3254.

13. In view of the rival contentions advanced on behalf of the parties, the question that arises for consideration is:

> Whether the right given to the Mohammedan husband under the Muslim Personal Law to divorce his wife by giving a Talaq is an absolute right and whether he can exercise that right at his whim or caprice?

14. His Lordship Justice V.R.KRISHNA IYER of Kerala High Court (as he then was) in the decision in A.YOUSUF -Vs- SOWRAMMA reported in (AIR 1971 KERALA 261) has held thus:

> "It is a popular fallacy that a Muslim male enjoys, under the Quuranic law, unbridled authority to liquidate the marriage. The whole Quaran 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". (Quaran IV.34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her infidelity 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 repudiated his wife capriciously... After quoting from the Quran 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,

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> the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'. When the proposal of divorce proceeds from the husband, it is called 'talaq', and when it takes effect at the instance of the wife it is called 'Khola'..."

15. A Division Bench of Gauhati High Court in the case of ZEENAT FATEMA RASHID -Vs- MD.IQBAL ANWAR, has held that a Mahomedan husband cannot divorce his wife at his whim or caprice, and divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement.

16. Similar view was also expressed by a Single Judge of Calcutta High Court in the case of MOTIUR RAHAMAN -Vs- SABINA KHATUN, reported in 1994(3) CRIMES 236, wherein he has stated as follows:

> "Though under the aforesaid Section 308 of the Mohammedan Law by the author Mulla, the husband is not required to assign any cause for the divorce, but there must be a reasonable cause for the same, which should be preceded by a pre-divorce conference so as to make an endeavour for reconciliation between the parties, if possible. But no reasonable cause has been disclosed by the husband in the relevant proceedings for the alleged divorce. There is neither the

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> nearest and faintest whisper by him that the alleged divorce on 15-10-1990 had been preceded by a pre-divorce conference to arrive at a settlement. That being so, even most charitably assuming for the sake of argument that the husband had divorced the wife on 15-10-1990, the alleged divorce could not be held to be according to Muslim Law."

Similar view has been taken by the Madras High Court in the case of SALEEM BASHA Vs. MRS.MUMTAZ BEGAM reported in 1998 CRI.L.J. 4782.

17. It follows from the above decisions that under the Quran the marriage status is to be maintained as far as possible and there should be conciliation before divorce and therefore the Quran discourages divorce and it permits only after pre-divorce conference.

18. In the case of KRISHNA SINGH -Vs- MATHURA AHIR AND OTHERS reported in AIR 1980 SUPREME COURT 707, the Supreme Court has stated thus:

> "In applying the personal law of the parties, a Judge cannot introduce his own concepts of modern times but should enforce the law as derived from recognized and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modified or abrogated by statute."

19. It is clear from this Judgment of the Supreme Court that a Judge cannot introduce his own concepts of modern times but should enforce the law

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as derived from recognized and authoritative sources of law, as interpreted in the judgments of various High Courts. The Courts are enforcing the law as interpreted in the judgments of various High Courts. In the circumstances, I am unable to agree with the contention advanced by the learned counsel for the respondent in this regard.

20. In the case of Ms.JORDEN DIENGDEH -Vs S.S.CHOPRA, the Supreme Court after considering the provisions regarding grounds for divorce in different acts suggested that the intervention of legislature in these matters is necessary to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples find themselves in.

21. In the case of SHAHIDA BEGUM -Vs- ADUL MAJID, the Rajasthan High Court has held that no evidence in proof of divorce is necessary. Declaration by husband in reply to the application for execution of maintenance allowance under Section 125 Cr.P.C., that he had divorced his wife is sufficient and is effected from the date of such statement filed in the Court and the oral divorce is permissible.

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22. In the case of MOHS.UMAR KHAN -VsGULSHAN BEGAM AND ANOTHER, the Madhya Pradesh High Court has held that the Talak may be given orally under Mohammedan Law. No evidence or witnesses is required to prove the Talak. Muslim wife cannot challenge Talak and the application filed by her under Section 125 Cr.P.C., is not maintainable.

23. In the case of SYED JAMALUDDIN -VsVALIAN BE AND ANOTHER, the Andhra Pradesh High Court held that the averment by the husband in the counter filed to the application filed by the wife under Section 488 Cr.P.C., that he had already divorced his wife, divorce is effective from the date of such statement is filed in the Court.

24. Same is the view taken by this Court in the case of MOHAMMED IBRAHIM -Vs- AHMED BEE.

25. But the question whether the right given to the Mohammedan husband under the Mohammedan law to divorce his wife is absolute right or not and whether the divorce must be preceded by a pre-divorce conference to arrive at a settlement has not been considered in the above judgments. In

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the circumstances, the said judgments are not helpful to the respondent and therefore I am unable to agree with the contentions advanced by the learned counsel for the respondent.

26. The learned counsel for the respondent submitted relying upon the judgment of this Court in the case of J.LAXMAN BHAT -Vs- NARAYANA NAYAK AND OTHERS reported in 1992(4) KARNATAKA LAW JOURNAL 21 that the new pleas based on facts not raised or argued in the Lower Court cannot be raised for the first time in the revision before this Court.

27. The petitioner has not raised this question for the first time before this Court in this revision. It is seen from the order passed by the Court below that in the reply notice given by the petitioner to the respondent she has stated that the Talak given by the respondent was not pronounced before any client and it was illegal and the Talak given by the respondent to her is not in accordance with principles of shariat and Muslim Law. The order passed by the Court below also shows that the Advocate appearing for the

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petitioner argued before the Court below that the Talak Nama pronounced by the respondent and the Talak Nama prepared by him is not as per Muslim Personal Law and therefore it has no sanctity under Mohammedan Law and the respondent was bound to offer an opportunity to the petitioner to negotiate and to live with him. In view of this, I am unable to agree with the contention of the learned counsel for the respondent that the petitioner is raising a new plea before this Court in this revision.

28. I am in respectful agreement with the principles laid down in the aforesaid judgments of the Kerala, Calcutta, Madras and the Division Bench of the Gauhati High Court and take the view that the divorce must be preceded among muslims by an attempt of re-conciliation between the husband and wife by two mediators, one chosen by the wife from her family and the other by the husband from his side. In the above view of the matter, a Mohammedan husband cannot divorce his wife at his whim or caprice, i.e., divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement. Even if there is any reasonable cause for the divorce, yet there must be evidence to show that

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there was an attempt for a settlement prior to the divorce and when there was no such attempt prior to divorce to arrive at a settlement by mediators, then there cannot be a valid divorce under Mohammedan Law.

29. In the present case it is admitted by both the counsel for the petitioner and the respondent that there is no evidence on record adduced by the parties before the Court below to show that there was an attempt for a settlement between the parties prior to the divorce given by the respondent to the petitioner. Therefore, I hold that the Talak or divorce given by the respondent to the petitioner is not valid in law.

30. The contention of the learned counsel for the respondent is that the application filed by the petitioner under Section 125 Cr.P.C. before the Court below is not maintainable, since the petitioner is a divorced woman. Since I have already held that the divorce given by the respondent to the petitioner is not valid in law, the judgment of this Court in the case of RUKIYA AND ANOTHER -Vs- SRI MOHAMMED reported in ILR 1996

KARNATAKA 3254 is not applicable to the facts of the present case and accordingly the contention advanced on behalf of the learned counsel for the respondent stands rejected.

In view of the aforesaid findings, the order passed by the Court below cannot be sustained and the revision petition filed by the petitioner deserves to be allowed and accordingly it is allowed and the order dated 21-08-1998 passed by the Family Court, Raichur, in Criminal Miscellaneous No.49/1998 is set aside.

Since the Family Court has not disposed of the application filed by the petitioner under Section 125 Cr.P.C., on its merits, case stands remitted to the Family Court, Raichur, for disposing of the application filed by the petitioner under Section 125 Cr.P.C., on its merits, after hearing the parties, in accordance with law.

Sd/-
Judge

AGV.