Bombay High Court
Dagdu S/O Chotu Pathan, Latur vs Rahimbi Dagdu Pathan, Ashabi ... on 2 May, 2002
Equivalent citations: 2003 (1) BomCR 740, 2003 BomCR Cri, (2002) 3 BOMLR 50, II (2002) DMC 315, 2002 (3) MhLj 602
Author: Marlapalle
Bench: B Marlapalle, N Dabholkar
JUDGMENT Marlapalle, J.

1.The Petitioner was married to the Respondent No. 1 Rahimbi; and they begot three children from the approached the Judicial Magistrate, First Class at Latur by an application under section 125 of the Criminal Procedure Code for maintenance for herself and for the three children claiming that the Petitioner neglected her and the children after he married one Khamrunbee from whom also he begot children. He neglected the applicants and refused to maintain them during the last three years before she approached the learned Magistrate.

2. On receipt of summons, the Petitioner appeared before the Magistrate and filed a written statement opposing the claim made by the Applicants i.e. the present Respondent Nos. 1 to 4. He claimed that he had given Divorce (Talaq) to the Respondent No. 1 on 24th February, 1996 in the presence of Qazi and two witnesses and thereafter he had performed the second marriage with Khamrunbee. He also stated that one of the witnesses was a Muslim whereas the other one was a Hindu. He, therefore, prayed that the application filed under section 125 of the Criminal Procedure Code be dismissed. This plea was rejected by the learned 2nd Joint Judicial Magistrate First Class at Latur vide his judgment and order dated 21st November, 1998 and the maintenance application filed by the Respondent Nos. 1 to 4 came to be allowed. The learned Magistrate held that the fact of Talaq must be proved and it cannot be accepted by the Court merely on pleadings in the written statement. In this regard, the learned Magistrate relied upon a judgment of this Court [Single Judge] in the case of "Mehtabbi W/o Shaikh Sikandar V/s Shaikh Sikandar" [1995 (3) Bombay C.R. 433]. This order, passed by the learned Magistrate, has been impugned in the instant Petition.

3. When this petition came up for hearing alongwith Criminal Writ Petition No. 308 of 1999 before the learned Single Judge (Vagyani, J.) on 7th February, 2001 it was noted that a Division Bench of this Court [A.V.Savant & T.K.Chandrashekhara Dass,JJ.] in the case of "Jaitunbi Mubarak Shaikh V/s Mubarak Fakruddin Shaikh" [1993 (3) Mh.L.J. 964] had held that the view taken by the learned Single Judge in the case of Mehtabbi (supra) was not a good law and when a plea of Talaq is taken in the written statement filed before the Court, the wife is deemed to have been divorced from the date such a statement was made in the written statement though the husband takes the plea of Talaq on any date earlier to the filing of such a written statement and was not required to prove the factum of divorce by leading evidence before the Court.

4. However, it appears that another Single Bench of this Court at Nagpur had also made a reference to decide the controversy as arising in view of two different judgments of the Single Benches viz.

"Chandbi Ex W/o Bandesha Mujawar V/s Bandesha S/o Balwant Mujawar" on one hand and "Shaikh Mobin S/o Shaikh Chand V/s State of Maharashtra" [1996 (1) Mh.L.J. 810] on the other

hand and, therefore, a reference came to be made to a Division Bench at Nagpur, in the case of "Saira Bano W/o Mohd. Aslam V/s Mohd. Aslam Ghulam Mustafa Khan" [1999 (3) Mh.L.J. 718] though similar reference was already answered by the Division Bench at Mumbai [A.V.Savant and T.K.Chandrashekhara Dass, JJ.) in the judgment dated 22nd April, 1999 the said opinion was not placed before the Nagpur Bench which decided the said reference [1999 (3) Mh.L.J. 718] on 28th September, 1999. The Division Bench at Nagpur [G.D.Patil and A.B.Palkar, JJ.), without referring to the view of the earlier Division Bench in Jaitunbi Mubaraks case (supra) held that the factum of divorce (Talaq) as stated in the written statement was required tobe proved and, therefore, the law laid down in the case of Mehtabbi (supra) and Shaikh Mobin (supra) was correct and the view taken in Chandbis case (supra) was erroneous. The learned Single Judge of this Bench (Vagyani, J.) noted the controversy between the views taken by two Division Benches in the case of Jaitunbi (supra) and Sairabanu (supra) and, therefore, directed the office to place the petition before the learned Chief Justice for His Lordships consideration to make a reference to the Full Bench to resolve the controversy. Accordingly, the learned Chief Justice was pleased to make a reference and constitute a Full Bench by order dated 15th March, 2002. This petition has thus been placed before us for answering the reference so as to settle the controversy.

5. In the case of Jaitunbi (supra) the wife had moved an application under section 125 of the Criminal Procedure Code and the maintenance amount came tobe fixed at Rs.60/- per month by order dated 26th June, June, 1981 passed by the learned Magistrate.

Subsequently, the wife filed maintenance application No. 297 of 1986 under section 127 of the Code for enhancement of the maintenance amount. In reply to this application the husband filed his written statement on 1st November, 1987 and contended, inter alia, that he had already given Talaq to the claimant on 29th October, 1987 and, therefore, in view of the provisions of The Muslim Womens (Protection of Rights on Divorce) Act, 1986 the application filed in the Magistrates Court was not maintainable. The Division Bench framed four issues for consideration and the first two issues are relevant in deciding this reference and, therefore, they are reproduced, as under:

[i] In proceedings for maintenance instituted by a Muslim wife, if a Muslim husband takes a plea in his written statement that his marriage had been dissolved at an earlier date in the Talaq form, even assuming that the fact of such dissolution at an earlier date is not proved, whether the filing of the written statement containing such a plea of divorce in the Talaq form amounts to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made.

[ii] Whether the law laid down by this Court in Chandbi Ex Wife of Bandesha Mujawar V/s Bandesha S/o Balwant Mujawar still holds good or whether it requires reconsideration in view of the two contrary decisions of this Court in (a) Mehtabbi W/o Sk. Sikandar V/s Shaikh Sikandar S/o Sk.

Mohd. reported in 1995 (3) BCR 433 and (b) Shaikh Mobin S/o Shaikh Chand V/s State of Maharashtra reported in 1996 (1) Mh.L.J. 810.

6. In reply to the first issue the Division Bench held that the pronouncement by a husband in his written statement that he has divorced his wife earlier though such a fact is not proved..... would

operate as a divorce in the Talaq form at least from the date of filing of the written statement and such a contention made in the written statement would operate as an acknowledgment of a divorce by him and a declaration of divorce from the date on which the statement was made. In reply to the second issue the Division Bench held that the view taken in Chandbis case did not require reconsideration and the view taken subsequently in Mehtabbis case and Shaikh Mobins case was over ruled.

7. In the case of Sairabanu (supra) the application for maintenance under section 125 of the Code was allowed by the learned Judicial Magistrate First Class at Akot and, therefore, Criminal Revision Application No. 164 of 1995 was filed challenging the said order. While resisting wives claim the husband made a statement in the witness box that he had divorced his wife and had sent Talaqnama to her by registered post which she refused to accept. The envelope containing the Talaqnama with the postal endorsement "refused" was produced before the learned Magistrate who found that the factum of the husbands having given divorce to the wife was not proved, the plea of divorce was not taken in the written statement by the husband but such a plea was taken for the first time by oral depositions in the witness box. The Division Bench at Nagpur framed the following five issues:

(1) Whether in case of parties governed by Mahomedan Law, it is sufficient for a husband to resist claim of his wife for maintenance beyond the period of Iddat merely by making an averment in the Written Statement or in any application filed in the Court contending that he has given her the divorce?

(2) Whether even without pleading divorce, the husband can resist successfully the claim of his wife for maintenance by making a statement in the witness box to the effect that he has divorced her?

(3) Whether such mere assertion either in the pleading or in the witness box amounts to an acknowledgment of divorce given earlier by the husband and he is not required to prove to have given divorce in accordance with Mahomedan Law sometime prior to date of such an assertion?

(4) Whether even otherwise such assertion either in the pleadings or in the witness box or in some application filed in Court by the husband by itself amounts to divorce in accordance with Mahomedan Law from the date of such assertion if not from an earlier date?

(5) Whether even if it is found that the statement regarding divorce given earlier is found to be false, still the statement in the Court proceedings can be taken as acknowledgment of divorce or even otherwise a fresh declaration of divorce?

The Division Bench held that (a) pleadings is formal allegation by the parties of their respective claims and defences to provide a notice of what is to be expected at the trial and proof is establishment of fact by leading evidence, (b) there is no authority to the proposition that mere allegation in the pleading by itself should be taken either tobe a proof of the fact alleged or even otherwise tobe independently as a declaration of existence of cessation of legal relationship between the parties; (c) pleadings in Courts of proceedings or any statement made in the witness box or in any application is for the purpose of making out a case of parties and evidence is led for supporting

the case already pleaded; (d) the forum of judicial proceedings cannot be used for declaring existence or cessation of legal relationship between the parties and, therefore, mere contention in the written statement or in any application or in plaint by itself cannot be accepted tobe either an acknowledgment of divorce already given specially even without deciding upon the validity and legality of the earlier divorce. It can never be said mean a fresh declaration of divorce from the date of such assertion or even from the date stated in the proceedings; (e) the Court proceedings should be confined to the assertion of facts by parties and to the proof of facts so asserted or alleged and not for any other purpose specially for acknowledgment of declaration of divorce. The rights and interest of the parties cannot be jeopardized by a unilateral statement made during the course of proceedings by other party either orally or in writing.

The Division Bench, therefore, over ruled the view taken in Chandbis case (supra) and accepted the view taken in Mehtabbis case and Shaikh Mobins case (supra) as the correct law without referring to the view taken by the Division Bench in the Case of Jaitunbi (supra).

8. So as to assist us in resolving the controversy under reference we had appointed Shri Gulam Mustafa and Shri Khader as Amicus Curiae and Shri Khader argued for the Petitioner whereas Shri Gulam Mustafa opposed the Petition. Both the amicus curiae are well known for their scholarship in Muslim Personal Law and we have heard them at length in addition to the learned counsel for the respective parties.

9. The Mahomedan Law has mainly four different sources. The Holy Qur-an is the primary source and it represents the Gods will communicated to the Prophet through angel Gabriel. The second source is Ahadis and Sunni. It is claimed that after the death of Prophet the story of occurrences concerning the Prophet given by eye witness are known as Ahadis which means a tradition or precept and Sunnas is the practice of the Prophet. The third source is Ijmaa which consists of new problems faced after the death of Prophet and decisions thereon by the concerned jurists. The fourth source is Qiyas which, in brief, is a process of deduction by which law of text is applied to cases which though not covered by the language are covered by the reason of text which is technically called as Illiat or effective cause.

10. There are three different schools of thought in regard to the Mahomedan society and those are Sunnis, Shias and Mustahids.

11. The All India Muslim Personal Law Board has published a Compendium of Islamic Laws and Part-II therein deals with the law of divorce. The preliminary note on "Divorce in Islam", reads thus:

"Marriage is a blessing, and when this relationship is established it is meant to subsist and be lasting. It is through this relationship that God grants children.

Divorce terminates marital relationship and leads to several problems in the family.

Divorce in itself is, therefore, an undesirable act. However, it is also true that if there is no temperamental compatibility between the parties, or the man feels that he cannot as husband fulfil

the womans rights, or because of mutual difference of nature Gods limits cannot be maintained, keeping the marriage intact in such situations or to compel the parties by legal restrictions to continue in the marital bond may be more harmful for the society. The Shariat, therefore, regards divorce as permissible although it is an undesirable act.

Thus, uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin.

Similarly, imposing such restrictions on the right of divorce due to which the man is compelled not to divorce the wife despite his feeling that he cannot live a happy life with her is also not lawful.

The decision whether a man can live a happy life with his wife or not and whether divorce is necessary or not relates to the sentiments of the husband. The decision in this regard can, therefore, be taken by the husband himself. If the man is sure that he cannot have cohabitation as per rules, e.g., if he is impotent, or cannot fulfil marital obligations, or any other such situation is there, it will be necessary for him to pronounce a divorce. To divorce the wife without reason only to harm her, or revengefully due to the non-fulfilment of his unlawful demands by the wife or her guardians, and to divorce her in violation of the procedure prescribed by the Shariat, is haram (absolutely prohibited)."

12. The Holy Quran (English translation to the meanings and commentary ..... and edited by the Presidency of Islamik Research IFTA was also placed before us by Shri Gulam Mustafa and our attention to the following provisions on divorce, was invited:

225.Allah will not Call you to account For thoughtlessness In your oaths, But for the intention In your hearts, 252 And He is Oft-forgiving Most Forbearing.

226.For those who take An oath for abstention From their wives, A waiting for four months Is ordained;

If then they return, Allah is Oft-forgiving, Most Merciful.

227.But if their intention Is firm for divorce, Allah heareth And knoweth all things 253

228.Divorced women Shall wait concerning themselves For three monthly periods.

And it is not lawful for them To hide what Allah hath created in their wombs, If they have faith In Allah and the Last Day.

And their husbands Have the better right To take them back In that period, if They wish for reconciliation. 254 And women shall have rights Similar to the rights Against them, according To what is equitable;

But men have a degree Over them 255 And Allah is Exalted in Power, Wise.

SECTION 29.

229.A Divorce is only 256 Permissible twice, after that, The parties should either hold Together on equitable terms, Or separate with kindness. 257 It is not lawful for you, (Men), to take back Any of your gifts (from your wives), Except when both parties Fear that they would be Unable to keep the limits Ordained by Allah 258 If ye (judges) do indeed Fear that they would be Unable to keep the limits Ordained by Allah, There is no blame on either Of them if she give Something for her freedom These are the limits Ordained by Allah;

So do not transgress them If any do transgress The limits ordained by Allah, Such persons wrong (Themselves as well as others). 229

230.So if a husband Divorces his wife (irrevocably), 260 He cannot, after that, Re-marry her until After she has married Another husband and he has divorced her.

In that case there is No blame on either of them If they re-unite, provided They feel that they Can keep the limits Ordained by Allah.

Such are the limits Ordained by Allah, Which He makes plain To those who know

231.When ye divorce 261 Women, and they (are about to) fulfil The term of their (Iddat), Either take them back On equitable terms Or set them free On equitable terms:

But do not take them back To injure them, (or) to take Undue advantage; 262 If any one does that, he wrongs his own soul.

Do not treat Allahs Signs As a jest, 263 But solemnly rehearse 264 Allahs favours on you, And the fact that He Sent down to you The Book And Wisdom, For your instructions.

And fear Allah, And know that Allah Is well acquainted With all things.

SECTION 30

232.When ye divorce Women, and they fulfil The term of their (Iddat), Do not prevent them 265 From marrying Their (former) husbands, If they mutually agree On equitable terms.

This instruction Is for all amongst you, Who believe in Allah And the Last Day.

That is (the course Making for) most virtue And purity amongst you.

And Allah knows, And ye know not.

SECTION 31

236.There is no blame on you If ye divorce women Before consummation Or the fixation of their dower;

But bestow on them (A suitable gift), The wealthy According to his means, And the poor According to his means;-

A gift of a reasonable amount Is due from those Who wish to do the right thing.

SECTION 39

282. O ye who believe! When ye deal with each other, In transactions involving Future obligations In a fixed period of time, Reduce them to writing 329 Let a scribe write down Faithfully as between The parties: let not the scribe Refuse to write: as Allah 330 Has taught him, So let him write.

Let him who incurs The liability dictate, But let him fear Allah His Lord And not diminish Aught of what he owes, If the party liable Is mentally deficient, Or weak, or unable Himself to dictate, Let his guardian Dictate faithfully, And get two witnesses, Out of your own men. 332 And if there are not two men, Then a man and two women, Such as ye choose, For witnesses, So that if one of them errs, The other can remind her.

The witnesses Should not refuse When they are called on (For evidence).

Disdain not to reduce To writing (your contract) For a future period, Whether it be small Or big; it is juster In the sight of Allah, More suitable as evidence, And more convenient To prevent doubts Among yourselves But if it be a transaction Which ye carry out on the spot among yourselves, There is no blame on you If ye reduce it not To writing.

But take witnesses Whenever ye make A commercial contract;

And let neither scribe Nor witness suffer harm.

If ye do (such harm), It would be wickedness In you. So fear Allah;

For it is Allah That teaches you.

And Allah is well acquainted.

With all things. 333 [Sura II, Verses 225 to 232, 236, 282]

35.If ye fear a breach.

Between them twain, Appoint (two) arbiters, One from his family, And the other from hers; 549 If they seek to set things aright, Allah will cause Their reconciliation:

For Allah hath full knowledge, And is acquainted With all things.

128.If a wife fears Cruelty or desertion On her husbands part, There is no blame on them If they arrange An amicable settlement Between themselves;

And such settlement is best;

Even though mens souls Are swayed by greed. 638 But if ye do good And practise self-restraint, Allah is well-acquainted With all that ye do.

129.Ye are never able To do justice Between wives Even if it is Your ardent desire:

But turn not away (From a woman) altogether, So as to leave her (as it were) Hanging (in the air). 639 If ye come to a friendly Understanding, and practise Self-restraint, Allah is Oft-forgiving, Most Merciful.

130.But if they separate Allah will provide abundance For each of them for His All-reaching bounty:

For Allah is He That careth for all And is Wise.

[Sura IV, Verses 35, 128 to 130]

1. O Prophet!5503 When ye Do divorce women, 5504 Divorce them at their Prescribed periods, 5505 And count (accurately) Their prescribed periods:

And fear Allah your Lord: 5506 And turn them not out Of their houses, nor shall They (themselves) leave, 5507 Except in case they are Guilty of some open lewdness, Those are limits Set by Allah: and any Who transgresses the limits Of Allah, does verily Wrong his (own) soul:

Thou knowest not if Perchance Allah will Being about thereafter Some new situation. 5508

2.Thus when they fulfil Their term appointed, Either take them back On equitable terms 5509 Or part with them On equitable terms;

And take for witness Two persons from among you, Endued with justice, And establish the evidence 5510 For the sake of Allah. Such Is the admonition given To him who believes In Allah and the Last Day.

4. Such of your women As have passed the age Of monthly courses, for them The prescribed period, if ye Have any doubts, is Three months, and for those Who have no courses (It is the same):5513 For those who are pregnant, Their period is until They deliver their burdens:

And for those who Fear Allah, He will make things easy for them. 5514 [Sura : 65 verses 1, 2 and 4]

13. Chapter-XVI in Mullas Principles of Mahomedan Law deals with the subject "divorce" and section 307 gives three forms of divorce viz. (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. When the divorce proceeds from the husband, it is called Talak, when it is effected by mutual consent, it is called Khula or Mubaraat, whereas the third form of divorce by way of decree at the suit of the husband or wife is called as Faskh. The first form of divorce is called as "Talaq", the second one as "Khula". Talak literally means to remove a restriction or to put an end to the marriage with immediate or deferred effect by using any of the special words meant for it, whether those words are used by the husband himself or by his representative, or by the Qazi who in certain situations is regarded by the Shariat as the husbands deputy and is empowered to pronounce a divorce on his behalf without his consent. A Talak may be effected (1) orally (by spoken words) or (2) by a written document called a Talaknama.

In the oral form of Talak there are three different modes of Talak viz. (a) Talak Ahsan which consists of a single pronouncement of divorce made during tuhr (period between menstruations) followed by abstinence from sexual intercourse for the period of Iddat; (b) Talak Hasan which 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), and (c) Talak-ul-biddat or Talak-i-badai. This form 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" or (ii) a single pronouncement made during a tuhr clearly indicating an intention irrevocably to dissolve the marriage e.g. "I divorce thee irrevocably". A Talak in Ahsan mode becomes irrevocable and complete on the expiration of the period of Iddat, whereas a Talak in Hasan mode becomes irrevocable and complete on the third pronouncement, irrespective of the Iddat; whereas a Talak in badai mode becomes irrevocable immediately it is pronounced, irrespective of the Iddat. Until a Talak becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or implied as by resuming sexual intercourse. To utter by mouth any of the special words implying Talaq is of the essence in a Talaq. Just thinking of Talaq or silently deciding on it will not result into Talaq.

Talak in writing is a written mode of Talak reduced in a Talaknama which may only be the record of the fact of an oral Talak or it may be the deed by which the divorce is effected. The deed may be effected in the presence of a Qazi or the wives father or of two witnesses. In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (Talak-i-bain) and takes effect immediately on its execution. Talak by a delegation is permissible and it is called as Talak by Tafweez.

14.Written Talaq may have several forms and some of them are (a) Kitabat-e-mustabinah (legible writing), It is of two kinds -- Mustabinah Marsumah (formal legible writing and Mustabinah Ghair Marsumah (informal legible writing). Kitabat-e-mustabinah Marsumah which is a formal divorce-deed or letter which is written with a title and the addressees name. Section 5 in Chapter-II of Part-II of the Compendium of Islamik Laws deals with conditions for effectiveness of Talaq let us refer to these provisions.

"Section 5

(a) The man pronouncing a Talaq should be sane and adult and should have pronounced the Talaq while he was awake and conscious. Therefore, a Talaq pronounced by a person who is a minor, insane, imbecile, overwhelmed, delirious, unconscious or asleep, will not be effective.

(b) For the effectiveness of Talaq it is, in principle, necessary that the man pronouncing it should be in his senses.

This demands that a Talaq pronounced in an inebriated condition should not be effective. However, if a person has unlawfully consumed an intoxicant by his own liking and habit, his Talaq will become effective by way of punishment. But if a person has consumed any intoxicant as a treatment, or under compulsion or strong pressure, or in ignorance, and pronounces Talaq in that state, it will not be effective.

(c) If a person consumes something which in fact is not intoxicating but because of its unsuitability for his system he gets inebriated, a Talaq pronounced in such condition will not be effective.

(d) It is also necessary that in the sentence used for Talaq the divorce must have been related to the wife, either expressly or by necessary implication.

(e) It is further necessary that the woman divorced should be a proper object of Talaq, i.e., she must be either married to the man or observing for him "Iddat" of a revocable or irrevocable Talaq other than a triple Talaq.

Section 6 states that if a person under compulsion or duress pronounces a Talaq it will be valid if it is verbal, but not otherwise. Section 11 in Chapter-III speaks of proper and improper Talaq and the first form is in section 11 whereas the second form is in section 12, which read as under:

"PROPER AND IMPROPER TALAQ Section 11:

There are two conditions for Talaq-e-sunnat [proper Talaq] first, in a consummated marriage the wife should not be divorced during menstruation and the Talaq should be pronounced in a tuhr (period following one menstruation and preceding the next) before having coitus in it. Second, if the marriage has been consummated, only one revocable divorce should be pronounced in any single tuhr. If a man pronounces a single revocable Talaq in a single tuhr and keeps away from the woman till her "Iddat is over, this will be Talaq-e-ahsan (better divorce). If a single revocable Talaq is pronounced before coitus in a new tuhr till three talaqs are over, this will be Talaq-e-hasan (good divorce). Similarly, in a non-consummated marriage pronouncing a single Talaq even though when the wife is in menstruation will be Talaq-e-hasan.

Pronouncing three Talaqs in three months on a minor or a woman past menopause is also Talaq-e-hasan.

Section 12 Talaq-e-bidat [improper Talaq] includes: in a consummated marriage divorcing the wife during menstruation, or divorcing her in a tuhr after coitus, or pronouncing an irrevocable divorce, or pronouncing more than one Talaq in a single tuhr - and in an unconsummated marriage pronouncing together more than one Talaq, or pronouncing more than one Talaq in a single month on a minor or woman past menopause." It is also necessary to refer to the rules of revocable and irrevocable Talaq and they are in sections 17, 18, 19 and 20 and they read, as under:

"Section 17:

In a revocable Talaq the husband can take back the wife during "Iddat" without her consent and without a remarriage; but after the expiry of "Iddat" she will become irrevocably divorced and can be lawfully taken back only by a fresh marriage.

Section 18:

Revocation may be either by conduct -- e.g., if the husband has had coitus, kissing and caresses with the wife --- or by spoken words, e.g. if the husband says that he has taken back his wife and informs her of the same. Revocation by words is preferable in the presence of witnesses (two men or a man and two women).

Section 19:

An irrevocable Talaq, whether express or implied, (words of implication are explained hereinafter) is of two kinds: bainunat-e-khafifah (minor separation) and bainunat-e-ghalizah (major separation).

Less than three Talaqs effect bainunat-e-khafifah, otherwise there will be bainunat-e-ghalizah.

Section 20:

In bainunat-e-khafifah though the wife goes out of the marital bond but the parties may by mutual consent remarry during or after the "Iddat". In bainunat-e-ghalizah remarriage is possible only where after the expiry of "Iddat" the woman has married another man who has either died or divorced her and the "Iddat" of death or divorce has expired."

Section 23:

For proposal and acceptance it is necessary to utter such words which seem to signify immediate establishment of relationship between the parties, whether those words affirm this meaning literally or by implication or usage and whether the language is Arbic or non-Arabic -- as Nikah (marriage), Zawaj (matrimony), Biyah (marriage), Hiba (gift), Baksh dena (giving away) Malik bana dena (make master), etc. On the contrary, if words like Ariyat (lease) or Ijara (rent) are used, there will be no marriage.

Section 24:

To establish a marriage it is also necessary that no such words are mentioned in the proposal and acceptance which signify that the marriage is for a fixed period.

Section 30:

The parents and offspring of the groom and the bride can also be witnesses to the marriage, but it is better to have others as witnesses.

Explanation:

If ascendants or descendants act as witnesses, the marriage will be established but their evidence will not be admissible to prove the marriage in a court and, therefore, it is better to have others as witnesses.

15. The term "Iddat" literally means numeration and it may be described as the period during which it is incumbent upon any woman whose marriage has been dissolved to remain in seclusion and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband so as to avoid conclusion of the parentage. The Act of 1986 has defined the term "Iddat Period" in section 2 (b) and it means in the case of a divorced woman (1) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier.

Iddat of a divorced woman, if she menstruates is three complete menstrual courses and if she does not due to young or old-age it is three lunar months. If the divorced woman is pregnant her Iddat period is till the end of pregnancy. If the Iddat does not begin on the first day of the month, 30 days will be counted for each month and in that case total days of Iddat will be 130 in the case of death and 90 in the case of divorce/dissolution of marriage and mutual repudiation (Mutarakat).

16.Under the Mahomedan Law the Qazi was chiefly a judicial officer and may be said to have duties corresponded to the present day judge or magistrate.

In addition, however, to his functions under the Mahomedan Law, the Qazi in this country, before the advent of the British Rule, appears to have performed certain other duties partly of secular and partly of religious nature. On the advent of British Rule, judges and magistrates took the place of Qazis who, in his judicial capacity, disappeared. However, the office of the Qazi was not abolished even in the British regime. By certain regulations passed from time to time the appointment of Qaki-ul-Kuzzat and Qazis by the State was provided for and the performance of non-judicial duties was recognised by law. The duties of the Qazi, under these regulations, comprised some functions like celebrating marriages and presiding at divorces as well as performing various rites and ceremonies.

Under these circumstances it appeared no longer necessary that the Government should appoint these officers. Qazis Act, 1864 was formulated and some provisions therein raised certain difficulties and, therefore, the Qazis Act, 1880 came tobe enacted specifying the limited duties of a Qazi.

17.Under the Wakf Act, 1954 as well as the amended Wakf Act, 1995 there is a provision for granting certificate of divorce and the divorce is registered at the office of Qazahat. The certificate is in the prescribed form and it contains the columns for (1) reason of Talaq/ Khula (Divorce), (2) date of divorce/ Talak/ Khula, (3) names of witnesses with fathers name, ages, residences and occupations, signature of divorcer, (4) certificate of Qazi or presiding officer of the Court, (5) name of wife with fathers name, age, residence and occupation etc.

18. Having considered the relevant provisions, as applicable to Talaq under the Muslim Personal Law, let us now go to the views of eminent Muslim Scholars/ Jurists in that regard.

(a) Maulana Mohammad Ali in his commentary on the Holy Quran has stated:

"Divorce is one of the institutions in Islam regarding which much misconception prevails, so much so that even the Islamic Law, as administered in the Courts, is not free from these misconceptions."

"Some Muslim jurists and scholars point out that from the very beginning of the recognition of the principle of unilateral divorce, forces had been at work which has restricted and limited its free and unnecessary use."

On the meaning and scope of Sura IV verse 35 of the Holy Quran the said author has commented as under: "This verse lays down the procedure to be adopted when a case for divorce arises.

It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should the divorce case be made too public. The Judge is required to appoint two arbitrators, one belonging to the wives family and the other to the husbands. These two arbitrators will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed. But the final decision rests with the Judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam."

"From what has been said above, it is clear that not only must there be a good cause for divorce, but that all means to effect reconciliation must have been exhausted before resort is had to this extreme measure. The impression that a Muslim husband may put away his wife at his mere caprice, is a grave distortion of the Islamic institution of divorce."

"Divorce is thus discouraged:

If you hate them i.e. (your wives) it may be that you dislike a thing while Allah has placed abundant good in it."

"And if you fear: breach between the two (i.e. the husband and the wife), then appoint a judge from his people and a judge from her people; if they both desire agreement. Allah will effect harmony between them.

"The principle of divorce spoken of in the Holy Quran and which in fact includes to a greater or less extent all causes, is the decision no longer to live together as husband and wife. In fact, marriage itself is nothing but an agreement to live together as husband and wife and when either of the parties finds him or herself unable to agree to such a life, divorce must follow. It is not, of course, meant that every disagreement between them would lead to divorce; it is only the disagreement to live any more as husband and wife."

"The "Shiqaq" or breach of the marriage agreement may also arise from the conduct of either party; for instance, if either of them misconducts himself or herself, or either of them is consistently cruel to the other, or, as may sometimes happen there is incompatibility of temperament to such an extent that they cannot live together in marital agreement."

"The "Shiqaq" in these cases is more express, but still it will depend upon the parties whether they can pull on or not.

Divorce must always follow when one of the parties finds it impossible to continue the marriage agreement and is compelled to break it off. At first sight it may look like giving too much latitude to the parties to allow them to end the marriage contract thus, even if there is no reason except incompatibility of temperament, but this much is certain that if there is such disagreement that the husband and the wife cannot pull together, it is better for themselves, for their offspring and for society in general that they should be separated than that they should be compelled to live together. No home is worth the name wherein instead of peace there is wrangling; and marriage is meaningless if there is no spark of love left between the husband and the wife. It is an error to suppose that such latitude tends to destroy the stability of marriage, because marriage is entered into as a permanent and sacred relation based on love between a man and a woman, and divorce is only a remedy when marriage fails to fulfil its object."

"Though the Holy Quran speaks of the divorce being pronounced by the husband, yet a limitation is placed upon the exercise of this right."

"It will be seen that in all disputes between the husband and the wife, which it is feared will lead to a breach, two judges are to be appointed from the respective people of the two parties. These judges are required first to try to reconcile the parties to each other, failing which divorce is to be effected. Therefore, though it is the husband who pronounces the divorce, he is as much bound by the decision of the Judges, as is the wife. This shows that the husband cannot repudiate the marriage at will. The case must first be referred to two judges and their decision is binding.

... ... The Holy Prophet is reported to have interfered and disallowed a divorce pronounced by a husband, restoring the marital relations (Bu.68:2). It was no doubt matter of procedure, but it shows that the authority constituted by law has the right to interfere in matters of divorce.: "Divorce

may be given orally, or in writing, but it must take place in the presence of witnesses."

(b)Ameer Alis Treaties on Mahomedan Law inter alia states, as under:

"The Prophet pronounced Talaq to be most detestable thing before the Almighty God of all permitted things."

"If Talaq is given without any reason it is stupidity and ingratitude to God."

"The author of the Multeks (Ibrahim Halebi) is more concise. He says - "The law gives to the man primarily the power of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy, but in the absence of serious reasons, no Musalman can justify a divorce either in the eyes of the religion or the law. If he abandons his wife or put her away from simple caprice, he draws upon himself the divine anger, for "the curse of God", said the Prophet," rests on him who repudiates his wife capriciously."

(c)Abdullah Yusuf Ali, commenting on the subject of "Talaq" has observed:

"Islam tried to maintain the married state as far as possible, especially where children are concerned, but it is against the restriction of the liberty of man and women in such vitally important matters as love and family life. It will check hasty action as far as possible and leave the door to reconciliation open at many stages. Even after divorce a suggestion of reconciliation is made, subject to certain precautions ...

... against thoughtless action. A period of waiting (Iddat) For three monthly courses it prescribed, in order to see if the marriage conditionally dissolved, is likely to result in issue. But this is not necessary where the divorced woman is a virgin. It is definitely declared that women and men shall have similar rights against each other."

"Where divorce for mutual incompatibility is allowed, there is danger that the parties might act hastily, then repent, and again wish to separate. To prevent such capricious action repeatedly, a limit is prescribed. Two divorces (with a reconciliation between) are allowed. After that the parties must unitedly make up their minds, either to dissolve their union permanently, or to live honourable lives together in mutual love and forbearance to hold together on equitable terms, neither party worrying the other nor grumbling nor evading the duties and responsibilities of marriage."

"All the prohibitions and limits prescribed here are in the interest of good and honourable lives for both sides, and in the interests of a clean and honourable social life, without public or private scandals. ... ..."

"If the man takes back his wife after two divorces, he must do so only on equitable terms, i.e. he must not put pressure on the woman to prejudice her rights in any way, and they must live clean and honourable lives, respecting each others personalities."

"The termination of a marriage bond is a most serious matter for family and social life. As every lawful device is approved which can equitably bring back those who have lived together, provided only there is mutual love and they can live on honourable terms with each other. If these conditions are fulfilled, it is no right for outsiders to prevent or binder re-union. They may be swayed by property or other considerations."

"An excellent plan for settling family disputes, without too much publicity or mud-throwing, or resort to the chicaneries of the law. The Latin countries recognise this plan in their legal system. It is a pity that Muslims do not resort to it universally, as they should. The arbiters from each family would know the idiosyncracies of both parties, and would be able, with Gods help, effect a real reconciliation."

18. Now, let us go to the enunciations on the subject of "Talaq" as made by different High Courts. In ILR 5, Rangoon 18, their Lordships of the Privy Council observed:

"According to that law (the Muslim Law), a husband can effect a divorce whenever he desires."

In the case of Sarabai V/s Rabiabai" [ILR 30 Bombay 537] regarding the cause of divorce mere whim is sufficient, it was observed that it is good in law though bad in theology.

In ILR 33 Madras 22 a Division Bench of the Madras High Court [Munro and Abdur Rahim, JJ.] held: "No doubt as arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Quran and in the reported saying of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husbands conduct would in no way affect the legal validity of a divorce duly effected by the husband."

In the case of "Ahmad Kasim Molla V/s Khatun Bibi" [ILR 59 Calcutta 833] the Court held: "From that point there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the Courts. I regret that I have to come to the conclusion that as the law stands at present, any Mahomedan may divorce his wife at his mere whim and caprice."

In the case of "Asmat Ullah V/s Khatun-Unnissa" it has been held that if an acknowledgment of Talaq is made by a husband, Talaq will be held to take effect at least from the date upon which the acknowledgment is made.

In the case of "Wahab Ali V/s Qamro Bi" [AIR 1951 Hyderabad 117] it was held that where the husband stated in his written statement to the application under section 488 that he had already divorced his wife and the Court came to the conclusion that the divorce pleaded was not proved, even then, such a statement in the written statement itself operated as an expression of divorce by the husband from that moment.

In the case of Chandbi V/s Balwant Mujawar (supra) it was held (a) that though the husband failed to prove the divorce which he alleged had taken place 30 years ago, he did divorce the wife as from

the date on which he filed the written statement viz. 6th April, 1959; (b) even where a divorce is given orally to a wife who has passed the age for periods of menstruation, the condition that oral declaration of divorce, should be made between two periods of Tuhr would not be applicable, because it would be physically impossible to have any such periods between which such a declaration could be made.

In the case of Enamul Haque V/s Bibi Taimunnisa it was held that although the factum of divorce was not proved by the husband, the wife was liable to be saddled with the knowledge of divorce from the date of filing of the written statement and, therefore, the divorce would be final when the wife is informed of it.

In the case of Mohammad Ali V/s Fareedunnissa Begum it was held that on the wives demand of maintenance, if husband issues a notice that she had been divorced on the date of marriage itself in spite of wives denial of divorce, such a notice will operate as a declaration of divorce from its date.

In the case of "Saiyid Rashid Ahmad and another V/s Mt. Anisa Khatun and others" [AIR 1932 Privy Council 25" the Appellants case was that on 13th of September, 1905 Ghiyas Uddin pronounced triple Talaq in the presence of witnesses though in the absence of the wife (Anisa Khatun) received Rs.1,000/- of prompt dower for which a registered receipt was produced and there was also a Talaqnama or deed of divorce dated 17th September, 1905 which narrated the divorce and which alleged to have been given to Anisa Khatun. The wife had denied the factum of divorce and, in any event, she challenged its validity and effect. The Courts below had given a concurrent finding that Ghiyas Uddin had pronounced the triple Talaq of divorce and that the date of divorce was genuine. This finding was not disturbed by the Privy Council which further held that

(a) in the Biddat form the divorce advanced become irrevocable irrespective of the Iddat; (b) it is not necessary that the wife should be present when the Talaq is pronounced and though her right to alimony may continue until she is informed of the divorce; (c) the pronouncement of the triple Talaq by Ghiyas Uddin constituted an immediately effective divorce and its validity and effectiveness would not be affected by Ghiyas Uddins mental mental intention that it should not be a genuine divorce, as such a view is contrary to all authority.

In the case of "A. Yusuf Rawther V/s Sowramma"

Krishna Ayer, J. (as His Lordship then was) observed:

"The interpretation of a legislation, obviously intended to protect a weaker section of the community, like women, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociological background which inspired the enactment of the law before locating the precise connotation of the words used in the statute. ... ...Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. Marginal distortions are inevitable when the Judicial Committee in Downing Street has

to interpret Manu and Muhammad of India and Arbis. The soul of culture - law is largerly the formalised and enforceable expression of a communities culture norms cannot be fully understood by alien minds. The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions ..... Indeed a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce. ..."

"It is a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. The whole Quran expressly forbids a man to seek pretext 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" (Quran IV: 34).

In the case of "Sri Jiauddin Ahmed V/s Mrs. Anwara Begum" [(1981) GLR 358] Baharul Islam, J. (as His Lordship then was) dealt with a case of seeking maintenance by the wife under section 125 of the Code and in the written statement the husband, though admitted the marriage, had stated that he had pronounced Talaq on 10th October, 1976 and the same was registered at Qazis office on 12th October, 1976 at Dihrugarh. He also stated that the wife was paid all sums payable under the Mahomedan Law on the day of divorce. The first point that was considered by the learned Judge was whether there had been a valid Talaq of the wife by the husband under the Muslim law. The learned Judge recorded his opinion in the following words:

"14.The modern trend of thinking is to put restrictions on the caprice and whim of the husband to give Talaq to his wife at any time without giving any reason whatsoever.

This trend is in accordance with the Quranic injunction noticed above, namely, that normally there should be avoidance of divorce and if the relationship between the husband and the wife becomes strained, two persons - one from each of the parties should be chosen as arbiters who will attempt to effect reconciliation between the husband and the wife; and if that is not possible the Talaq may be effect. In other words, an attempt at reconciliation by two relations - one each of the parties, is an essential condition precedent to "Talaq"." ...

"16.In the instant case the petitioner merely alleged in his written statement before the Magistrate that he had pronounced Talaq to the opposite party; but he did not examine himself, nor has he adduced any evidence worth the name to prove "Talaq".

There is no proof of Talaq, or its registration. Registration of marriage and divorce under the Assam Muslim Marriages and Divorces Registration Act, 1935 is voluntary, and unilateral. Mere registration of divorce (or marriage) even if proved, will not render valid divorce which is otherwise invalid under Muslim Law.

"... ... In my view the correct law of Talaq as ordained by the Holy Quran is that Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wives family the other from the husbands. If the attempts fail, Talaq may be effected.

In support of the above view, the learned Judge also relied upon the view expressed by Krishna Ayer, J. in the case of A. Yusuf Rawther (supra).

An identical issue again came tobe referred to the Division Bench of the Gauhati High Court in the case of "Must. Rukia Khatun V/s Abdul Khalique Laskar" [ (1981) 1 G.L.R. 375] and again Baharul Islam, C.J. (as His Lordship then was), speaking for the Division Bench reiterated and confirmed the view he had taken in the case of Jainuddin Ahmed (supra).

In the case of Rukia Khatun (supra) an application for maintenance was filed under section 125 of the Criminal Procedure Code, 1973 and in opposing the same, though the husband admitted the marriage, but took a plea that he had divorced the Applicant on 12th April, 1972 by executing a Talaqnama and had paid the dower money to her. When the application came up before the learned Single Judge the decision in the case of Jiauddin Ahmed was relied upon but the husband prayed for reconsideration of the issue again by a larger bench and, therefore, the reference was made to the Division Bench. In addition to the views expressed in Jiauddin Ahmeds case (Supra) Baharul Islam, C.J., speaking for the Division Bench, added the following views:

"The first point to be decided, is whether the opposite party divorced the Petitioner. The equivalent of the word "divorce" is "Talaq" in Muslim law. What is valid "Talaq" in Muslim law was considered by one of us (Baharul Islam, J., as he then was) sitting singly in Criminal Revision No. 199/77 (supra). The word "Talaq" carries the literal significance of "freeing" or "the undoing of knot". "Talaq" means divorce of a woman by her husband. Under the Muslim law marriage is a civil contract.

Yet the rights and responsibilities consequent upon it are of such importance to the welfare of the society that a high degree of sanctity is attached to it. But inspite of the sacredness of the character of the marriagetic, Islam recognises the necessity in exceptional circumstances of keeping the way open for its dissolution."

The learned Judge quoted the words in Sura IV Verse 35 from the Holy Quran and observed: "From the verse quoted above, it appears that there is a condition precedent which must be complied with before the Talaq is effected. The condition precedent is when the relationship between the husband and the wife is strained and the husband intends to give "Talaq" to his wife he must choose an arbiter from his side and the wife an arbiter from her side, and the arbiters must attempt at reconciliation, with a time gap so that the passions of the parties may calm down and reconciliation may be possible. If ultimately conciliation is not possible, the husband will be entitled to give "Talaq". The "Talaq" must be for good cause and must not be at the mere desire, sweet will, whim and caprice of the husband. It must not be secret."

In para 11 of the said judgment, the Division Bench sumed up its final opinion as follows: "11.In our opinion the correct law of "Talaq" as ordained by Holy Quran is: (i) that "Talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the another by the husband from his. If their attempts fail, "Talaq" may be effected.... ..."

The Division Bench disagreed with the law laid down by the Calcutta High Court in ILR 59 Calcutta 33 and this Court in ILR 30 Bombay 537.

19. Again the Gauhati High Court (Division Bench), in the case of "Zeenat Fatema Rashid V/s Md. Iqbal Anwar" [1993 (2) Crimes 853] was called upon to deal with a similar issue. The wife had filed an application under section 125 of Cr.P.Code against her husband on 13th August, 1990 for maintenance for herself and her minor child. Husband opposed the claim by filing a written statement and took a defence that he had divorced the claimant on 31st August, 1990 i.e. after she had approached the Family Court. The Court held that there had been a divorce duly effected and claim for maintenance would be determined under section 3 of the 1986 Act. The questions that arose for consideration before the Division Bench were (a) whether there had been a divorce duly effected; (b) whether a Mahomedan husband can divorce his wife at his whim and caprice; (c) whether divorce by Talaq was proved. The Division Bench referred to the earlier enunciations in the case of Sarabai (supra) Asha Bibi (supra) Ahmed Qasim Mulla (supra) Jiauddin Ahmed (supra) and Rukia (supra).

"(a) A Mahomedan husband cannot divorce his wife at his whim and caprice; (b) under the Mahomedan Law marriage, though recorded as a civil contract between a man and a woman, they become husband and wife after the solemnisation of the marriage and their respective rights and obligations are regulated by the rules under relevant law.

This being the position, marriage is the basis for social organisation and foundation of legal rights and obligations. The modern concept of divorce is also that the matrimonial status should be maintained as far as possible; (c) If a Mahomedan husband divorces his wife as at his whim and caprice it would not only be a spiritual offence but it would also affect the divorce and a Mahomedan husband cannot divorce his wife at his whim or caprice, as divorce must be for a reasonable cause and it must be preceded by pre-divorce conference to arrive at a settlement. The husband failed to prove the alleged Talaqnama on the basis of its photostat copy. However, in the evidence of the husband he had stated that he also made pronouncement of the word "Talaq" three times. There was no evidence or material to corroborate that Talaq was effected orally.

Under the circumstances it is held that the Talaq pleaded has not been proved. There is no evidence that there was a pre-divorce conference and in that view of the matter the husband failed to prove the alleged divorce by "Talaq".

A further plea was taken on behalf of the husband that even if Talaq pleaded was not proved, the husband had stated that the wife had been divorced not only in his written statement but also in his deposition and, therefore, the divorce would be deemed to have been effected from the date of filing of the written statement or from the date of the statement on oath. The Division Bench disagreed with the view taken earlier taken in this regard in the case of "Asmat Ulla V/s Mst Khatun Unnisa, Wahab Ali V/s Qamro Bi, Chand Bi V/s Bandesha, Abdul Shakoor V/s Kulsum, and Mohammad Ali V/s Fareedunnisa for the following reasons:

"Written statement is a pleading.

Pleading is formal allegations by the parties of their respective claims and defences to provide notice of what is tobe expected at trial. Proof is establishment of a fact of evidence or matters before the Court or legal Tribunal. Where the parties are in dispute as regards the material fact, an averment in the pleadings does not constitute evidence as what is stated in the pleading is recital of past event which is required to be proved. Under the Evidence Act if material fact pleaded is not proved, it follows that one Court considers or believe that the fact does not exist.

Therefore, averment in the pleading cannot be used in favour of the maker. This being the position, statement made by the husband in his pleading or deposition that he had divorced his wife is a recital of past event and if Talaq pleaded is not proved such statement shall be of no consequence. In that view of the matter, if statement made by the husband that he had divorced his wife in his pleading or deposition is considered as acknowledgment of divorce by Talaq, it will be against the policy of law and it would also amount to furnishing or providing evidence of Talaq which is against the rule of pleading and proof. That apart, in view of our conclusion above that divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference, if the statement made orally in evidence or in the written statement that the husband has divorced his wife in a proceeding under section 125 of Cr.P.C. will be a valid Talaq from the date of making statement cannot be sustained as it would be contrary to our conclusion.

In the case of "Moti-ur-Rahaman V/s Sabina Khatun and another" [1994 (3) Crimes 236] the wife had filed an application under section 125 before the Magistrate for maintenance. By order dated 15th September, 1990 the said application was allowed. On 3rd May, 1992 the husband filed an application under section 3 and 7 of the 1986 Act before the Magistrate contending that he had given divorce to the wife according to Mahomedan Law on 15th October, 1990 and an affidavit to that effect was sworn. It was also stated that a copy of the declaration was sent to the wife.

This application came to be rejected by order dated 4th September, 1992 which was challenged before the High Court. The learned Judge disagreed with the husband that he had divorced or given Talaq to the claimant wife on 15th October, 1990 and the reasons in support of this view are stated in para 13.

"13.Even though under Section 308 of the Mohammedan Law (vide Mullas principles of Mohammedan Law) any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause, a Division Bench of the Gauhati High Court in the decision in Zeenat Fatema Rashid V/s 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, with which I fully concur. Though under the aforesaid Section 308 of the Mohammedan Law 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 predivorce 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 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. ... ..."

In the case of "Saleem Basha V/s Mrs. Mumtaz Begam" [1998 Cri.L.J. 4782] S.M.Sidickk, J., speaking for the Madras High Court also took the same view as was taken by the Calcutta High Court in the case of Moti-ur-Rahaman (supra) after referring to the long list of enunciations, as referred to herein above. The husband had taken a plea that he was not liable to pay maintenance for the period subsequent to the divorce on 30th November, 1992 except for the Iddat period and the fact of divorce was communicated to the wife, Jamat and Mutawalli of the Mosque by registered post. The wife filed affidavit in the Court repudiating averments and she claimed that she was not informed of the divorce and the Talaq pronounced by him was a false allegation.

One of the issues framed by the learned Single Judge of the Madras High Court was whether the Talaq pronounced by the husband on 30th November, 1992 divorcing his wife was valid under law.

It was brought to the notice of the Respondent wife about the pronouncement of Talaq by her husband when he filed the petition for cancellation of maintenance on 20th July, 1995 though she was not informed about the pronouncement of Talaq by registered post, which was returned. A presumption was, therefore, drawn that the pronouncement of Talaq was informed to the wife on 30th November, 1992 and on 20th July, 1995. The Talaqnama executed by the husband in the presence of the witnesses (Exhibit P5) was on record. The reasons stated in the Talaqnama for divorce were that the wife had filed a case for maintenance and she insulted the husband and her mother-in-law as well as there were differences of opinion, as a result of which they could not run the family. The Talaqnama did not indicate that any conciliation proceeding was initiated between them at any point of time by any mediator nor it was stated therein that the husband called upon his wife to reform herself and then to run the family amicably. In his oral depositions before the trial Court the husband had stated that he divorced his wife as per Mahomedan Law by pronouncing Talaq in the presence of two witnesses on 30th November, 1992 but he did not give any reason to give Talaq. The learned Judge observed that the correct law of Talaq as ordained by the Holy Quran is that (a) Talaq must be for reasonable cause, (b) it must be preceded by an attempt at reconciliation (by nominees of both the spouses), and (c) Talaq may be effected if the said attempt failed. The learned Judge entirely agreed with the view taken by the Gauhati High Court in the case of Zeenath Fatima Rashid (supra) and by the Calcutta High Court in the case of Chandbi Ex W/o Bandesha Mujawar (supra) and he held that the Talaq pronounced by the husband on 30th November, 1992 divorcing his wife was not valid under the Mahomedan Law.

20.The issues which we formulate for decision so as to resolve the controversy between the two divergent views of this Court are as under:

(1) Whether a Muslim husband has the right to divorce his wife without reasons and at his mere whim and caprice.

(2) Whether the Muslim Law mandates predivorce reconciliation between the parties.

(3) In proceedings for maintenance instituted by a Muslim wife, if her husband makes a plea in his written statement or in any form before the Court concerned that his marriage was dissolved at an earlier date in the Talaq form, even assuming that the fact of such dissolution at an earlier date is not proved, whether the filing of the written statement containing such a plea or making such a statement in other written form or orally of divorce in the Talaq form amounts to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made.

(4) Whether mere assertion either in the pleadings or in the witness box amounts to an acknowledgment of divorce given earlier by the husband and he is not required to prove to have given divorce in accordance with Mahomedan Law sometimes prior to the date of such an assertion.

(5) Whether even otherwise an assertion, either in the pleadings or in the witness box or in some application filed in Court by the husband by itself amounts to divorce in accordance with Mahomedan Law from the date of such assertion if not from an earlier date.

(6) Even if it is found that the statement regarding divorce given earlier was false, can the statement in the Court proceedings, be taken as an acknowledgment of divorce or even otherwise a fresh declaration of divorce.

(7) Whether the husband is required to prove that the Talaq was duly effected/ given.

(8) Whether the husband of a minor or a woman past menopause has the unqualified right to pronounce Talaq at any time either in the Ahsan or Hasan mode.

20A)While dealing with the above formulated issues, we would like to be reminded of the observations made by the Constitution Bench of the Apex Court in the case of "Danial Latifi and another V/s Union of India" in the following words:

"20.In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs."

21. It is popularly said that a Muslim marriage is nothing but a civil contract and a large section believes that the husband has an absolute freedom to dissolve the marriage without assigning reasons and at his free will. The Holy Quran as well as the other sources of Personal Law teach us that the process of reaching to the marital tie is certainly a civil contract but once the marriage is solemnised it becomes an institution life long for both husband and the wife and they do not live together by way of a mere contract but in a holy and sacred bond of love, care and mutual respect with equal status to both the partners. It happens, in some cases, that on account of incompatible temperament, extreme divergent upbringings, likes and dislikes or other physical incompatibilities or incapacities, the institution of marriage comes in peril. The Mahomedan Law does recognise the

husband tobe on a high pedestal than the wife but that by itself does not mean that he can check-out his wife at his whim and caprice and without assigning any reasons.

Islam recognises the principle of equity between the husband and wife during the subsistence of their marital tie. If the husband and wife are not able to get along as partners or to cohabit with happiness, Islam does not force them to continue in such unhappy and unsettling conditions. However, both the parties are given some chance to reform or mend their ways so as to keep the institution of marriage in-tact and this could be achieved by the process of reconciliation between the parties with the intervention of arbiters.

22. A divorce by the husband is Talaq and it has its oral as well as written forms. The oral form of Talaq can be effected in three modes viz. Talaq-e-Ahsan, Talaq-e-Hasan, Talaq-ul-Biddat or Talaq-e-Badai. The first two forms are conditioned and they are accepted tobe more civilized but while resorting to any of these two forms there are conditions precedent and it is not that the husband is at his free will to resort to any of these modes at any time and without assigning any reasons. If the husband feels that his wife does not care for him, she is incompatible, she does not listen to him, she does not love him, she refuses to cohabit with him, she engages in cruel behaviour, she is unfaithful or for any other reason, he has the right to give Talaq to his wife but by following certain procedure. Firstly, he has to make it known to his wife about any of these reasons and she must be given time to change her behaviour. If by his direct conversation/ persuasions she does not change her behaviour, the husband has to resort to the process of conciliation by informing to her father or any other parental relations. Two arbitrators, one from wife and one from the husband, are required to be appointed and it shall be the duty of the Arbiters to bring in a settlement between the parties so that they live together happily and inspite of these efforts having been made if the discord still persists to an irreparable level there is no alternative but to separate and it is at this stage that the husband has the right to give Talaq to his wife. The stage of conciliation with the intervention of the arbiters is a condition precedent for effecting Talaq either in Ahsan form or Hasan form.

It will be seen that in all disputes between the husband and the wife the judges are tobe appointed from the respective people of the two parties. These judges are required first to try to reconciliate the parties to each other failing which divorce is to be effected. Therefore, though it is the husband, who pronounces the divorce, he is as much bound by the decision of the judges as is the wife. This shows that the husband cannot repudiate the marriage at his will.

The case must be first referred to two judges and their decision is binding. Talaq must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by the arbitrators, one from the wives family and the other from the husbands. If the attempts failed, Talaq may be effected. In other words, an attempt at reconciliation by two relations, one each of the parties, is an essential condition precedent to Talaq.

23. Even if the reconciliation process has been gone through and found to be ineffective or in-vain, the husband has to follow the prescribed procedure for Talaq by Ahsan or Talaq by Hasan mode. Section 11 and 12 of the Compendium deal with proper and improper Talaq whereas section 2 prescribes the conditions governing the essence of Talaq. Even written Talaq in terms of section 3

has several forms. Section 5 has set out the conditions for effectiveness of Talaq and it has laid down the situations where the Talaq would not be effective. The Muslim Law, thus, recognises effective/ proper as well as ineffective/ improper Talaq and while exercising the right of Talaq it is imperative that the husbands action of invoking this right meets these requirements. Lest, the Talaq will be ineffective or invalid or improper. The utterances/ pronouncements aimed at Talaq-e-Ahsan or Talaq-e-Hasan are required to be made during a specific period i.e. a Tuhr (period between menstruation) followed by abstinence from sexual intercourse during the period of Iddat. In the later form three pronouncements are required to be made during successive Tuhrs and no intercourse taken place during any of the three Tuhrs.

Thus, the period of Iddat varies from 90 to 130 days.

A Talaq in Ahsan mode becomes irrevocable and complete on the expiration of the period of Iddat, whereas a Talaq in Hasan mode becomes irrevocable and complete on the third pronouncement irrespective of Iddat. Until Talaq becomes irrevocable the husband has the option to revoke it which may be done either expressly or impliedly as by resuming sexual intercourse. In a non-consumated marriage pronouncing a single Talaq even though the wife is in menstruation, will be Talaq-e-Hasan. Pronouncing three Talaqs in three months on a minor or a woman past menopause is also Talaq-e-Hasan. These modes are required tobe followed so as to rule out the possibility that the wife has conceived and if the divorced woman is pregnant, her Iddat period is till the end of pregnancy. The Iddat period, thus, varies in three different forms depending on the physical conditions of the wife and these are three menstruation courses. After the date of divorce if she is subject to menstruation, three lunar months after she is divorced if she is not subject to menstruation and if she is in enceinte at the time of her divorce the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier. The pronouncement of Talaq by the husband in the oral form or giving Talaq in writing has to necessarily satisfy all these conditions of pronouncing the Talaq at a particular time and such a Talaq must be valid and effective. It is not that on his sweet will the husband has the unqualified prerogative to exercise this right of pronouncing Talaq. Uncontrolled use of divorce without regard to the restrictions established by the Shariat is a sin. To divorce the wife, without reason, only to harm her or revengeful due to the non-fulfilment of the husbands unlawful demands by the wife or her guardians and to divorce her in violation of the procedure prescribed by the Shariat is Haram (absolutely prohibited).

The Holy Quran expressly forbids a man to seek divorce so long as she remains faithful and obedient to him. However, it is also true that if there is no temperamental compatibility between the parties or the man feels that he cannot, as husband, fulfil the womans rights or because of mutual difference of nature, Gods limits cannot be maintained, keeping the marriage in-tact, in such situation compel the parties by legal restrictions to continue the marital life may be more harmful for the society. It is, thus, clear that the Islam discards divorce in principle and permits it only when it has become altogether impossible for the parties to live together in peace and harmony. Divorce is permissible in Islam only in cases of extreme emergency. Mere registration of divorce, even if proved, will not render valid a divorce which is otherwise invalid under the Muslim Law. Even if there is any reasonable cause for the divorce yet there must be evidence to show that there was an attempt for a

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

24. However, there is a third form of oral Talaq and that is Bidai. This Talaq-e-Biddat or Bidai (improper Talaq) within the meaning of section 12 of Islamic Laws and it includes in a consummated marriage divorcing the wife during menstruation or divorcing her in a Tuhr after coitus or pronouncing an irrevocable divorce or pronouncing more than one Talaq in single Tuhr and in an unconsummated marriage pronouncing together more than one Talaq or pronouncing more than one Talaq in a single month on a minor or a woman past menopause. Though such a form is prohibited but if person pronounces such a Talaq it will be effective while the man will be guilty of severe sin. Thus, the Talaq-e-Biddat or Bidai form is sinful or may be described as barbaric or is prohibited but if the husband pronounces such a Talaq it would not be unlawful. Mr. R.K.Wilson, in his digest of Anglo-Mahomedan Law (5th Edition) at page 136 stated on the law of divorce in the following words:

"The divorce called Talaq may be either irrevocable (bain) or revocable (rajai). A Talaq-e-bain, while it always operates as an immediate and complete dissolution of the marriage bond differs as to one of its ulterior effects according to the form in which it is pronounced. A Talaq-e-bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage either (a) once, followed by abstinence from sexual intercourse for the period called "Iddat" or, (b) three times during successive intervals of puberty i.e. between three successive menstruations, no intercourse taking place during any of the three intervals, or (c) three times at shorter intervals or even in immediate succession, or (d) once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first name of the above method is called as "Ahsan" (best), the second "Hasan" (good), the third and fourth are said to be "Biddat" (sinful) but are nevertheless regarded by Sunni Lawyers as legally valid.

In the case of "Syed Rashid Ahmed and another V/s Anisa Khatun and others" (supra) Ghiyas Uddin had given Talaq on 13th September, 1905 to Anisa Khatun by pronouncing the triple Talaq of divorce in the presence of witnesses. The words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas Uddin "I divorce Anisa Khatun forever and render her Haram for me". These words clearly showed an intention to dissolve the marriage. The Privy Council held that there can be no doubt that the method adopted was the fourth, above described, and it was confirmed so by the deed of divorce which stated that the three divorces were given "in the abominable form" i.e. "Biddat". The Privy Council also held that the High Court committed an error in treating the divorce as in the "Ahsan" form instead of "Biddat" form in which the divorce at once becomes irrevocable but irrespective of the Iddat and it is not necessary that the wife should be present when the Talaq is pronounced and her right to alimony may continue until she is informed of the divorce. The Privy Council also held that once the divorce is held proved such facts could not undo its effect. It is, thus, necessary that the factum of divorce is required to be proved and the conditions precedent for such valid or effective divorce are as stated in the Holy Quran, of reconciliation by the arbitrators or by appointing judges and for specific reasons unless the divorce is in the third and fourth form i.e. Biddat or Bidai and Rajazi.

Islam also recognises the husbands right to give Talaq in front of Qazi or the wives father or two witnesses, both of them being man professing Islam or one of them being a man and other two being women all professing Islam and such a Talaq, either in the Ahsan or Hasan form will be irrevocable. Nevertheless, in this form also the conditions for reconciliation and giving reasons for Talaq are required to be followed so that the husband and wife are restrained from an undesirable act of divorce which leads to several problems in the family. If the man is sure that he cannot have cohabitation as per rule, that if he is impotent or cannot fulfil marital obligations or any other such situation exists, it would be necessary for him to pronounce a divorce and in such a situation he may be justified in invoking the Talaq-e-Biddat or Bidai form of Talaq.

25. In the written form of Talaq there is no prescribed format but the conditions for effective or proper Talaq, as are applicable in the oral form of Talaq, are also applicable to the written form of Talaq and the pronouncements of divorce are required tobe communicated to the wife. In the absence of words, showing a different intention, a divorce in writing operates as an irrevocable divorce and takes effect immediately on its execution. Such a Talaq in writing is required to be addressed to the wife and absence of such an address leads to ineffective/ invalid Talaq.

The husband must address to his wife and pronounce the Talaq in writing. If such a pronouncement is not addressed to the wife it becomes ineffective and invalid.

26. The above discussion does indicate that mere pronouncement of Talaq by the husband or merely declaring his intentions or his acts of having pronounced the Talaq is not sufficient and does not meet the requirements of law. In every such exercise of right to Talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for Talaq. Conveying his intentions to divorce the wife are not adequate to meet the requirements of Talaq in the eyes of law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as condition precedent for the husbands right to give Talaq to his wife. It is, thus, not merely the factum of Talaq but the conditions preceding to this stage of giving Talaq are also required to be proved when the wife disputes the factum of Talaq or the effectiveness of Talaq or the legality of Talaq before a Court of law. Mere statement made in writing before the Court, in any form, or in oral depositions regarding the Talaq having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.

It is a fallacious argument that in case of a minor or a woman past menopause, the oral Talaq in the form of Ahsan or Hasan could be pronounced by the husband at any time or at his sweet will as in such cases there is no Iddat. However, the period of Iddat has been specifically defined and even in such cases there is a waiting period of three lunar months even though there is no occurrence of menstruation. The view taken by this Court in the case of Chandbi Ex W/o Bandeshah Mujawar (supra) cannot be accepted as a good law.

27. Pleadings before the Court, though made on oath, either in writing or in oral form, when disputed by the wife, are required to be proved and when it comes to proving all these pleadings the process is governed by the common law viz. the Civil Procedure Code and Evidence Act etc. and mere statement on oath, either in writing or in oral form itself does not prove the factum of divorce as well as valid or effective divorce. If the Talaq pronounced is ineffective or invalid it is no divorce under the Mahomedan Personal Law. It is also required to be noted, at this stage, that though the husband has the right to divorce his wife, he also has the right to revoke the said pronouncement and take her back, as his wife, provided the divorce has not become irrevocable. This also shows the tolerance of Islam that after having uttered divorce once, the wife is provided an opportunity for reformation/ correction and to take steps accordingly so that the institution of marriage is saved. It is possible that sometimes the husband pronounces Talaq in haste and subsequently repents for it and, therefore, before the Talaq has reached its irrevocable stage, the husband has the right to retrieve himself from such an extreme step and reconciliation with the situation and correct himself.

28. Even in case of irrevocable Talaq in the presence of a Qazi or the wives father or two witnesses the factum of this form of Talaq is required to be proved, if challenged before a competent court in appropriate proceedings. This may involve examining either the Qazi or the father or the witnesses. If there are two witnesses, both of them must be professing Islam. If there is only one male witness and remaining two are women all of them must be professing Islam. Their presence, when the husband pronounced Talaq and his so pronouncing Talaq, are required to be proved if the factum of valid Talaq is questioned by the wife. Mere assertion by the husband, in any form, is not sufficient to hold that he has exercised the right to give Talaq legally and validly.

If any of the witnesses does not profess Islam, the Talaq given in his/ her presence shall be invalid and inoperative.

29. If the husband has not been able to prove his statement regarding divorce given earlier to making such a statement before the Court, there does not exist a Talaq in the eyes of law and such a statement cannot be taken as a fresh declaration of divorce; as mere declaration of divorce is not sufficient, by itself, for a valid divorce. Even if such statement in writing or made orally before the Court is supported by a Talaknama, which may be a record of the fact of an oral Talaq or may be the deed by which the divorce is effected but that supportive document by itself does not lead to a conclusion that the Talaq was valid, effective and legal. Under the Wakf Act there is also a provision of registration of Talaq and a certificate to that effect is issued by the Qazi. In most of these cases, the Talaknamas are customary and unless the factum of Talaq is proved, these documents in isolation have no sanctity in support of a valid Talaq. Mere existence of this document does not make the Talaq valid or legal and, therefore, it is necessary that the factum of Talaq and the stages it is preceded by, are required to be proved before the Court, if disputed by the wife and mere intentions of the husband while making such a statement before the Court cannot be accepted tobe a valid Talaq from the date such a statement was made before the Court and in any form.

30.Let us consider now specific cases of husband taking the plea of having divorced his wife:

(a) In the written statement filed before the Court the husband takes a plea of divorce given on some date in the past and files a copy of the Talaqnama and/ or divorce certificate with such a written statement.

(b) The husband does not say anything about the divorce in the written statement and while in the witness box takes a plea of divorce given on some earlier date and produces in support a copy of the Talaqnama and/ or divorce certificate as issued by the Qazi.

(c) In the written statement the husband takes a plea that he has given divorce to the claimant on any date earlier in the presence of a Qazi or in the presence of the father or in the presence of two or three witnesses professing Islam.

(d) In his written statement the husband takes a plea of divorce given on an earlier date in the presence of two or three witnesses and one of them does not profess Islam.

(e) In the written statement or while in the witness box the husband invokes his right of Talaq under the Ahsan or Hasan form.

(f) In the written statement the husband takes a plea that on a given date he had pronounced the triple Talaq of divorce in the presence of witnesses, though in the absence of the wife, and the words addressed to the wife were repeated three times as follows: "I divorce my wife "Smt." forever and render her Haram for me."

And, in support thereof, copy of the Talaqnama or deed of divorce or certificate of divorce is produced.

31. On the proceedings initiated by the wife before a competent Court the divorce allegedly given by the husband in the first three forms (a) to (c), if disputed about its factum, cannot be valid and operative. Such a divorce will be fictitious and inoperative unless the husband proves his plea of any of these forms of Talaq before the Court by leading evidence. Mere taking such plea, even in a statement on oath, does not by itself operate as a divorce from the date it is so made because there are conditions precedent to such a form of Talaq and it is required to be exercised during a particular period. The husband is required to discharge his burden of proving that he had no physical relationship with the wife during the waiting period and the reasons for exercising such a right are required to be putforth. The factum of conciliation or arbitration is also one of the conditions preceding the process of Talaq in any of these forms namely "Ahsan" and "Hasan".

In the (d) form even if the factum of divorce is proved it cannot be held to be a valid divorce as one of the witnesses does not belong to the Mahomedan religion and as per the Holy Quran it is a condition precedent that both witnesses (men) must profess Islam and in case one witness is a man the other witnesses must be two women and all of them must profess Islam.

Any breach in this regard results into an invalid Talaq as being contrary to the command of the Holy Quran, even though the factum of divorce may be established before the Court.

In the fifth form i.e. (e) it would not be enough for the husband to invoke his right of giving Talaq under the "Ahsan" or "Hasan" form before the Court by way of written statement or while in the witness box and under oath. It is not in each case that the husband and wife (the two litigating parties before the Court) are staying under different roofs and similarly the wife may take a plea that the husband did not observe the condition precedent in that regard.

The burden then falls on the husband to prove these conditions of abstinence from sexual intercourse. In addition, he has to set out before the Court the reasons for such a divorce and whether he had sought the help of arbitrators for reconciliation at any time before the wife approached the Court before he filed his written statement or before he appeared in the witness box to take such a plea of Talaq.

However, in the last contingency the divorce becomes effective and irrevocable forthwith and the wife becomes "Haram" for the husband. If the husband claims to have exercised his right of divorce in the form of Biddat/ Bidai or Rajai, in the written statement on an earlier occasion the divorce is complete and irrevocable provided the factum of due Talaq given in this form, on an earlier occasion, is duly proved before the Court. The words uttered for giving Talaq in these two forms or in any of them are required to be proved before the Court and mere statement of the husband or the proof in support thereof by way of Talaqnama or deed of divorce or certificate of divorce will not be sufficient to prove the factum of having exercised this power sometimes in the past. This view is inconsonance with the law laid down by the Privy Council in Anisa Khatuns case (supra).

32. We accordingly hold, with profound respect, that the view taken in Jaitunbis case (supra) does not meet the requirements of the Mahomedan Personal Law for a valid and irrevocable divorce. The plea taken by the husband in his written statement that he had given Talaq at an earlier date shall not amount to the dissolution of marriage under the Muslim Personal Law from the date on which such a statement was made unless such a Talaq is duly proved and it is further proved that it was given by following the conditions precedent viz. that of arbitration/ reconciliation and for valid reasons and more so when the mode of divorce alleged to have been given in the "Ahsan" or "Hasan" form. The factum of divorce is required to be proved, including the conditions precedent therefor, by evidence both oral and documentary, when the same is disputed by the wife before a competent Court of law. We agree with the view taken subsequently by a Division Bench of this Court in the case of "Saira Banu" (supra) and further lay down the clarifications, as set out herein above.

We hold that the view taken by the Gauhati High Court in the case of Mast. Rukia Khatun (supra) and Zeenat Fatima Rashid (supra) is more in tune with the ethos of Islamic Personal Law. However, if the husband relies upon the Biddat or Rajai form of Talaq given at an earlier occasion either in his written statement or in his oral depositions, he is required to prove the factum of the same by leading evidence before the Court, if disputed by the wife.

33. We answer the reference in the above opinion and direct the office to place the Petition alongwith the connected matters, if any, before the appropriate Single Bench.

34. We record our appreciations for the able assistance rendered by both the amicus curiae.