IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN PENAL CODE

Crl MC 10078/ in BAIL APPLN. 4746/2006

Judgment delivered on: 03.10.2007

MASROOR AHMED ... Petitioner

versus -

STATE (NCT OF DELHI) and Another ... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Jitendra Sethi
For the Respondent/State : Mr O.P. Saxena
For the Complainant : Mr Mohd. Tabrez and Mr Mashi Alam

BADAR DURREZ AHMED, J

1. This is a very unusual case. The petitioner was originally seeking bail [Bail Appln 4746/2006] in respect of FIR No. 817 dated 12.12.2006 registered at police station Preet Vihar under section 376 of the Indian Penal Code, 1860. The petitioner's bail application filed before the sessions court had been rejected by the learned Sessions Judge by an order dated 20.12.2006. Consequently, an application for bail [Bail Appln 4746/2006] had been filed before this court. During the pendency of the said bail application, in which this court had granted interim bail to the petitioner, the complainant and the petitioner have arrived at a settlement which has been reduced to writing in the form of a compromise deed dated 01.09.2007. By virtue of the said deed, the petitioner and the complainant have decided to settle all their disputes and cases which include the present case as well as cases arising out of FIR No. 637/2006 u/s 498-A/406/34 IPC and FIR No. 79/2007 u/s 506/34 and the maintenance case u/s 125 CrPC pending before the Metropolitan Magistrate, all of which have been initiated by the complainant, and the case arising out of FIR No. 91/2007 at P.S. Tilak Marg u/s 506/34, which has been registered at the instance of the petitioner and in which the complainant herein, Aqil Ansari, Altamash and others are accused. The question of custody of the minor daughter [Sara @ Ushna], aged about 2 years, born out of the wedlock

of petitioner and the complainant has also been settled. Because of this settlement/compromise between the petitioner and the complainant as also on merits, this application has been filed under section 482 CrPC for quashing of FIR No.817/2006 u/s 376 registered at P.S. Preet Vihar. The Facts

2. The case is unusual, not because of the circumstances narrated above but, because of the facts which led to the registration of the FIR in question. The complainant, Aisha Anjum, filed a written complaint at the above-mentioned police station on 12.12.2006. In her written complaint, she stated that her marriage was solemnised with the petitioner on 2.4.2004 in accordance with Muslim rites. She further stated that out of this marital relationship a daughter was born to her. She alleged that the petitioner and his family members threw her out of the house on account of non-fulfillment of dowry demands for which she had already complained to the crime against women cell. It was then alleged that the petitioner had filed a case for restitution of conjugal rights and on 13.4.2006, from the court itself, she went with her husband to their matrimonial home. It is further alleged in the written complaint that after her return to her matrimonial home her husband committed rape on her upto 19.4.2006 because she had later come to learn that he had already given her talaq earlier and that he had lied in court that she was still his wife and on this misrepresentation he had taken her home. She further submitted that the petitioner's family members also knew about the talaq but they participated in the fraud committed against her. It is further alleged that on 19.4.2006 a second nikah was performed which came to light only when she obtained a duplicate copy of the nikahnama. She alleged that the petitioner had unlawful relations with her during that time as he was not her husband then. She further stated that had she known, at that point of time, that he was not her husband and that he had already given her talaq, she would never have agreed to have conjugal relations with him. She alleged that her consent was taken by playing a fraud upon her and that the petitioner, in the guise of being her lawful husband, had unlawful relations with her by deceitful means. She reiterated that had she known of the truth at that point of time she would never have given her consent. She therefore requested that legal action against the petitioner and other accused persons be taken under sections 376/34 IPC.

3. It is an admitted position that the complainant and the petitioner got married on 2.4.2004 and that they lived together till 8.4.2005. On that date, according to the complainant, she was thrown out of the house on account of non- fulfillment of dowry demands. But, according to the petitioner, the complainant left their house without informing him and of her own will. On 22.10.2005, the complainant gave birth to a baby girl (the said Sara @ Ushna, who is now about 2 years old). It is alleged by the petitioner that towards the end of October 2005, his brother-in-law and his sister attempted to arrange for the return of the complainant to her matrimonial home. But, this was in vain. It is further alleged by the petitioner that

upon hearing of the failure of this mission, he became very sad and extremely angry and in this mental condition, in the presence of his brother-in-law and another man, he uttered the words giving talaq to his wife (the complainant) approximately three times or even more. According to the petitioner, he forgot about this incident and continued to make efforts for the return of his wife. Admittedly, the factum of the purported talaq was not communicated to the complainant.

4. On 23.3.2006, the petitioner, wanting the return of his "wife", filed a suit for restitution of conjugal rights in the court of the Senior Civil Judge, Delhi. In paragraph 1 of the plaint, the petitioner stated that the complainant was married to the petitioner on 2.4.2004 at Delhi and was "still the wife" of the petitioner. The purported talaq of late October 2005 was not mentioned in the plaint. On 13.4.2006, statements of the complainant and the petitioner were recorded in the said suit for restitution of conjugal rights. The complainant stated:- "I am ready to join the company of the plaintiff/ husband and from the court I am going to my matrimonial home with my husband." The petitioner made the following statement:- "I have heard the statement of defendant. I am ready to take the defendant/ my wife to my home. My suit stand[s] satisfied and I do not want to pursue the present matter. My suit may be disposed of as satisfied." On the basis of these statements, on 13.4.2006 itself, the learned Civil Judge passed the following order:- "It is stated that matter has been settled between the parties and defendant is ready to join the company of the plaintiff. Statement of parties recorded. In view of the same suit of the plaintiff is disposed of as satisfied. File be consigned to Record Room."

5. The complainant returned with the petitioner to their matrimonial home on 13.4.2006 from court itself. Thereafter, another remarkable event allegedly took place. As mentioned in the FIR, a second nikah was performed between the petitioner and the complainant on 19.4.2006. Which, according to the complaint, the complainant got to know only upon receiving a duplicate copy of the nikahnama from the Qazi who performed the ceremony. According to the petitioner, the second nikah was necessitated because after the settlement of 13.4.2006, he was reminded by his brother-in-law that he had already divorced the complainant by way of a triple talaq in october 2005. Faced with this situation, the petitioner, who did not want any illegitimacy in his marital status, allegedly sought an opinion from a mufti on 16.4.2006. The mufti reportedly gave a fatwa on 17.4.2006 that three talaqs pronounced in one sitting would be regarded as one talaq-e-rajai and, consequently, the petitioner could have taken back the complainant within the iddat period of three months. But, as that period had elapsed, the petitioner and the complainant could renew their matrimonial relationship only by performing a fresh nikah. According to the petitioner, it is because of this fatwa that the second nikah was performed on 19.4.2006 which,

according to the petitioner, was witnessed by the complainant's brother (Shahid Naeem) who also signed as a witness on the nikahnama (as also the compromise deed dated 01.09.2007). It was, of course, earlier alleged by the complainant that the factum of the nikah was not in her knowledge and came to light much later, before the CAW cell. According to her, signatures were taken on the pretext that the documents had to be filed in court as a formality.

6. After her return to the matrimonial home on 13.04.2006, the complainant continued to reside with the petitioner. Once again, there was discord between them and the petitioner pronounced talaq (again) on 28.08.2006. On 30.8.2006, the petitioner left the matrimonial home. Since then, she is residing at her parental home. On 6.9.2006, she filed a complaint before the crime against women cell. It is further alleged by her that during the inquiry it came to light that the petitioner had given her talaq earlier also (ie., in October, 2005). According to the complainant, on 3.10.2006 when the petitioner appeared before the CAW cell, he disclosed that he had already given the "first" talaq to the complainant in October 2005. It is then, according to the complaint, that the complainant came to know for the first time that a fraud had been played upon her and that the petitioner had sexual intercourse with her during 13.4.2006 and 19.4.2006 when, in law, he was not her husband. However, she filed her written complaint only on 12.12.2006 with regard to the alleged rape committed during 13.4.2006 and 19.4.2006. The FIR under section 376 IPC was registered on the same date (12.12.2006).

7. The prosecution case is that the sexual intercourse which allegedly took place between the petitioner and the complainant during 13.4.2006 and 19.4.2006 constituted rape under section 375 IPC as the complainant had been deceived into believing that the petitioner was still her husband on 13.4.2006, when the order in the suit for restitution of conjugal rights was passed. It is contended that the petitioner knew of the talaq, yet, he misrepresented that the complainant was still his wife and the complainant, believing this, returned to her matrimonial home. Her consent to re-establish the conjugal relationship was, therefore, based upon a fraud played by the petitioner and his family members.

8. It is pertinent to mention that the petitioner"s bail application was dismissed by the learned Additional Sessions Judge on 20.12.2006 holding that the petitioner had not disclosed the factum of talaq, either to the complainant or to the court, in his suit for restitution of conjugal rights. It was further held that-- "Pronouncement of triple 'talak' amounts to talaq-ul-Biddat which became irrevocable and it does not lie in the mouth of the applicant to say that the complainant was his wife. As far as case of re-marriage is concerned, there should be an intermediate marriage with some other person, consummation of marriage and then divorce and thereafter applicant can marry the complainant. Therefore, second marriage on 19.4.06 nowhere answers religious tenets of the parties. Consent, given by the complainant

from 13.4.2006 till 19.4.2006, was a tainted consent, which can not be termed as free consent by her." These observations in respect of muslim law as applicable in India are not correct. The foundation of the prosecution case as also the decision of the learned sessions judge is that the marriage stood dissolved by the purported triple talaq of October, 2005. On the contrary, as indicated below, the "foundation" is illusory and is not supported by the facts stated in the complaint considered in the light of the principles of muslim law as applicable in India. This would be clear from the discussion below. The compromise, Sections 320 and 482 CrPC

9. But, before that, let me deal with the issue of exercise of power under section 482 CrPC. The learned counsel for the petitioner contented that this was a fit case for exercise of the power under section 482 CrPC so as to quash the said FIR No.817/2006 and all proceedings emanating from it. The learned counsel for the complainant also requested that in view of the settlement/compromise the said FIR be quashed. The complainant, who was also present, endorsed the submissions of her counsel and stated that she was not interested in pursuing the case. Consequently, the learned counsel for the petitioner submitted, there was absolutely no chance of a conviction. However, the learned counsel for the State submitted that the offence u/s 375 was not compoundable under section 320 CrPC and, therefore, the case cannot be extinguished merely because the complainant and the accused have settled. The learned counsel for the petitioner rejoined by submitting that the power under section 482 is not limited by section 320 CrPC and, in any event, even on merits this was a fit case for quashing as the offence of rape is not made out. He submitted that upon a proper application of muslim law, the talaq purportedly given by the petitioner to the complainant in October, 2005 would have to be held as invalid. Consequently, at the relevant time (ie., 13.04.2006 to 19.04.2006) the petitioner and the complainant would be husband and wife. Therefore, no case of rape can at all be made out in view of the exception1 to section 375 IPC.

10. Section 482 CrPC provides that: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or other wise to secure the ends of justice." The provision saves the inherent and plenary power of the High Court to do justice. The fact that section 320 CrPC does not in any way abridge the scope and amplitude of the power of the High Court for quashing an FIR, even in respect of an offence which is otherwise not compoundable, for securing the ends of justice, is no longer open for debate. In B.S. Joshi v. State of Haryana: (2003) 4 SCC 675, the Supreme Court held: "We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or

not such a power." In an earlier decision in the case of State of Karnataka v. L. Muniswamy: (1977) 2 SCC 699, the Supreme Court explained the expanse of the powers of the High Court in the following words:- "In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court"s inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction." After referring to the said decision in Muniswamy (supra), the Supreme Court in B. S. Joshi (supra) observed as under: "" What would happen to the trial of the case where the wife does not support the imputations made in the FIR of the type in question. As earlier noticed, now she has filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be either for the reason that she has resolved disputes with her husband and his other family members and as a result thereof she has again started living with her husband with whom she earlier had differences or she has willingly parted company and is living happily on her own or has married someone else on the earlier marriage having been dissolved by divorce on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would it then be proper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences" The answer clearly has to be in the "negative". It would, however, be a different matter if the High Court on facts declines the prayer for quashing for any valid reasons including lack of bona fides.

11. In Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre2 it was held that while exercising inherent power of quashing under Section 482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the court, chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be

served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a case, also quash the proceedings.

12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes." (underlining added) Thus, in matrimonial matters which take on a criminal hue, it would be quite in order to quash an FIR where the parties have settled and decided to bring to an end all their disputes. Apart from freeing the husband and wife and their families from the rigours of long drawn legal battles, genuine settlements also reduce the burden on courts and the entire prosecution machinery from pursuing cases which would ultimately see a dead end. The ultimate chance of conviction is bleak, if at all, in such cases as the complainants would not support any of the imputations made in the complaint. A prompt an early end to such cases would certainly secure the ends of justice. Of course, since the powers of the High Court are plenary, the High Court must exercise them with circumspection. On merits: submission that the offence u/s 375 IPC is not made out 11. The settlement between the petitioner and the complainant would in itself have been sufficient for this court to exercise its inherent powers to put to an end the FIR in question as also proceedings emanating from it. This is so because I am of the view that the parties have genuinely settled all their disputes and have decided to part with each other in terms of the compromise which brings to an end bitter legal matrimonial battles. The present case being one of them. It is also worth keeping in mind that the petitioner and the complainant have a daughter, who shall always remain their daughter even though they no longer remain as husband and wife. Apart from this, it was also stressed by the learned counsel for the petitioner (and, not opposed by the learned counsel for the complainant) that on merits also no case for rape was made out. The learned counsel for the petitioner, submitted that- (1) The alleged triple talaq of october 2005 did not result in a divorce in law. The talaq was invalid. And, it was not even communicated to the complainant. He relied upon the following decisions:- (i) Riaz Fatima and Anr v. Mohd Sharif : 135 (2006) DLT 205; (ii) Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan: 2002 (3) Mh.L.J. 602 (FB); (iii) Dilshad Begum Ahmadkhan Pathan v. Ahmadkhan Hanifkhan Pathan and anr: Criminal Revision Applications 313 and 314/1997 decided on 17.1.2007 (Bombay High Court); (iv) Shamim Ara v. State of U.P.: AIR 2002 SC 355. (2) Consequently, the complainant continued to be the petitioner's wife. Therefore, there was no question of any rape during 13.4.2006 and 19.4.2006 inasmuch as a "wife" is excepted under section 375 IPC itself. (3) In any event, the triple talaq pronounced in a single sitting could, at best, be regarded as one talaq and therefore the second nikah performed on 19.4.2006 was permissible and valid under muslim personal law. (4) Consequently, consent can well be presumed for sexual acts prior to the nikah of 19.4.2006. Reliance was placed on State of Andhra Pradesh v. P Narasimha and anr: 1994 SCC (Cri) 1180. Five questions 12. Several questions impinging upon muslim law concepts arise for consideration. They are :- (1) What

is the legality and effect of a triple talaq " (2) Does a talaq given in anger result in dissolution of marriage" (3) What is the effect of non-communication of the talaq to the wife" (4) Was the purported talaq of October 2005 valid" (5) What is the effect of the second nikah of 19.4.2006 " Certain Muslim Law Concepts: 13. Before I examine these questions it would be necessary to set out certain concepts of muslim law (shariat) which are oft ignored. Islamic jurisprudence (fiqh) has developed from four roots (usul al-fiqh):- (1) The Quran; (2) the hadis3 or sunna; (3) Ijma4; and (iv) Qiyas5. Employing these usul al-fiqh, the ulema (the learned) conducted a scientific and systematic inquiry. This is known as the process of ijtihad. Through this process of ijtihad sprung out various schools of law each of which owed its existence to a renowned master6. For example, the jurisprudence (fiqh) developed by Abu Hanifah and continued by his disciples came to be known as the Hanafi school. The Maliki school owed its origin to Malik b. Anas, the Shafie school to al- Shafi'i, the Hanbali school to Ibn-Hanbal and so on. These are the sunni schools. Similarly, there are shia schools such as the Ithna Ashari, Jaffariya and Ismaili schools. In India, muslims are predominantly sunnis and, by and large, they follow the hanafi school. The shias in India largely follow the Ithna Ashari school. 14. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of ijtihad employing the sophisticated jurisprudential techniques. The primary source is the Quran. Yet, in matters not directly covered by the divine book, rules were developed looking to the hadis and upon driving a consensus. The differences arose between the schools because of reliance on different hadis, differences in consensus and differences on qiyas or aql as the case may be7. 15. The question which arises is, given the shariat and its various schools, how does a person proceed on an issue which is in dispute" The solution is that in matters which can be settled privately, a person need only consult a mufti (jurisconsult) of his or her school8. The mufti gives his fatwa or advisory decision based on the Shariat of his school9. However, if a matter is carried to the point of litigation and cannot be settled privately then the qazi (judge) is required to deliver a qaza (judgment) based upon the Shariat10. The difference between a fatwa and a qaza must be kept in the forefront. A fatwa is merely advisory whereas a qaza is binding711. Both, of course, have to be based on the shariat and not on private interpretation de hors the shariat12. The Muslim Personal Law (Shariat) Application Act, 1937 and the various forms of dissolution of marriage recognised by it. 16. In India, the confusion with regard to application of customary law as part of muslim law was set at rest by the enactment of The Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the 1937 Act reads as under:- "2. Application of Personal Law to Muslims.-- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including

talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).” The key words are “notwithstanding any customs or usage to the contrary” and “the rule of decision in cases where the parties are muslims shall be the muslim personal law (shariat).” This provision requires the court before which any question relating to, inter-alia, dissolution of marriage is in issue and where the parties are muslims to apply the muslim personal law (shariat) irrespective of any contrary custom or usage. This is an injunction upon the court13. What is also of great significance is the expression -- “dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat..” This gives statutory recognition to the fact that under muslim personal law, a dissolution of marriage can be brought about by various means, only one of which is talaq. Although islam considers divorce to be odious and abominable, yet it is permissible on grounds of pragmatism, at the core of which is the concept of an irretrievably broken marriage. An elaborate lattice of modes of dissolution of marriage has been put in place, though with differing amplitude and width under the different schools, in an attempt to take care of all possibilities. Khula, for example, is the mode of dissolution when the wife does not want to continue with the marital tie. She proposes to her husband for dissolution of the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to Mahr (dower). Khula is a divorce which proceeds from the wife which the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return14. Mubaraat is where both the wife and husband decide to mutually put an end to their marital tie. Since this is divorce by mutual consent there is no necessity for the wife to give up or offer anything to the husband. It is important to note that both under khula and mubaraat there is no need for specifying any reason for the divorce. It takes place if the wife (in the case of khula) or the wife and husband together (in the case of mubaraat) decide to separate on a no fault/no blame basis. Resort to khula (and to a lesser degree, mubaraat) as a mode of dissolution of marriage is quite common in India. 17. Ila15 and Zihar16 as modes of divorce are virtually non-existent in India. However, lian is sometimes resorted to. If a man accuses his wife of adultery (zina), but is unable to prove the allegation, the wife has the right to approach the qazi for dissolution of marriage. In India, a regular suit has to be filed. Once such a suit is filed by the wife, the husband has the option of retracting his charge of adultery, whereupon the suit shall fail. However, if he persists then he is required to make four oaths in support of the charge. The wife makes four oaths of her innocence, after which the court declares the marriage dissolved. This is the process of dissolution of marriage by lian17. The Dissolution of Muslim Marriage Act, 1939 18. At this juncture it would be relevant to mention the Dissolution of Muslim Marriages Act, 1939 which enabled muslim women of all sects to seek dissolution of marriage by

a decree of the court under the various grounds enumerated in section 218 thereof which included the husband's cruelty, impotency, failure to maintain, leprosy, virulent venereal disease, etc.. Section 2(ix) of the 1939 Act contained the residuary clause entitling a muslim woman to seek dissolution of her marriage through a court on any other ground which is recognised as valid for the dissolution of marriages under Muslim law. So, the position after the 1937 and 1939 Acts is that dissolution of a muslim marriage is permissible by the modes of talaq, ila, zihar, lian, khula and mubaraat (as mentioned in the 1937 Act) as also on a wife's suit under the 1939 Act, on any of the grounds mentioned therein or on any other ground which is recognised as valid for the dissolution of marriages under Muslim law which would include lian. Divorce through talaq, ila, zihar, khula and mubaraat takes place without the intervention of the court. Divorce under the 1939 Act (which would also include lian) is through a wife's suit and by a decree of the court. The muslim wife, therefore, can seek divorce either outside the court (through khula) or through court (under the 1939 Act or lian). She can also put an end to the marital tie by pronouncing talaq upon herself in the case of talaq-e- tafwiz where the husband delegates the power of pronouncing talaq to his wife. On the other hand, the muslim husband can dissolve the marriage only outside court through talaq (ila and zihar being virtually non-existent in India). Both the husband and wife can mutually decide to dissolve the marriage, again without the intervention of court, through mubaraat. 19. The 1939 Act introduced a very salutary principle into muslim law as it is administered in India. This is the principle of applying beneficial provisions of one school to adherents of other schools as well. The Statement of Objects and Reasons19 of the 1939 Act clearly indicates the application of Maliki law to all muslim women seeking divorce through court. It was specifically noted in the said Statement of Objects and Reasons that “the Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafii or Hambali Law”. Talaq and its three forms 20. I now return to the central point in this case “ talaq. This mode of dissolving a marriage is unique to muslim law. In this connection the Supreme Court, in Zohara Khatoon v. Mohd. Ibrahim: (1981) 2 SCC 509, observed :- “19. There can be no doubt that under the Mahomedan law the commonest form of divorce is a unilateral declaration of pronouncement of divorce of the wife by the husband according to the various forms recognised by the law. A divorce given unilaterally by the husband is especially peculiar to Mahomedan law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws viz. the Hindu law or the Parsi Marriage and Divorce Act, 1936, contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in a Court of law.” Three forms of talaq have been in existence “ (1) Ahsan talaq; (2) Hasan talaq; and (3) Talaq-e-bidaat. 21. Ahsan talaq20: When the husband makes a single pronouncement of talaq during a period of purity (tuhr) followed by abstinence from sexual intercourse for the period of

iddat21, such a talaq is called ahsan talaq. A divorce of this kind is revocable during the period of iddat. It becomes irrevocable when the period of iddat expires. It is irrevocable in the sense that the former husband and wife cannot resume a legitimate marital relationship unless they contract a fresh nikah with a fresh mahr22. This is subject to a limitation and that is that if the talaq was the third time such a talaq was pronounced, then they cannot re-marry unless the wife were to have, in the intervening period, married someone else and her marriage had been dissolved either through divorce or death of that person and the iddat of divorce or death has expired. This latter process is known as halala23. However, the process of halala cannot be employed as a device to re-marry the same spouse but, it must happen in the natural course of events. It is, in effect, a near impossibility and, for all intents and purposes, the third talaq brings about a final parting of the erstwhile spouses. 22. Hasan talaq24: Where the husband makes a single pronouncement of divorce during three successive tuhrs, without any sexual intercourse during the said tuhrs, the divorce is known as hasan talaq. The first two pronouncements are revocable. The third is irrevocable. The first two pronouncements can be revoked during iddat. The third, cannot be. And, after iddat, the former husband and wife cannot even enter into a nikah unless the said process of halala is completed. 23. Talaq-e-bidaat25: Where three pronouncements are made in one go (triple talaq) either in one sentence or in three sentences signifying a clear intention to divorce the wife, for instance, the husband saying “I divorce you three times” or “I divorce you, I divorce you, I divorce you” or the much publicised “Talaq, talaq, talaq”. Sanctity and effect of Talaq-e-bidaat or triple talaq. 24. There is no difficulty with ahsan talaq or hasan talaq. Both have legal recognition under all fiqh schools, sunni or shia. The difficulty lies with triple talaq which is classed as bidaat (an innovation). Generally speaking, the shia schools do not recognise triple talaq as bringing about a valid divorce26. There is, however, difference of opinion even within the sunni schools as to whether the triple talaq should be treated as three talaqs, irrevocably bringing to an end the marital relationship or as one rajai (revocable) talaq27, operating in much the same way as an ahsan talaq. 25. When a difference of opinion is discernible within a particular school, normally the dominant opinion is taken as representative of the school. But, this does not mean that a qazi, when required to render a decision in a specific case, cannot, in the interest of justice and equity, adopt the view of the minority within the school28. It is also interesting to note that traditionally the qazi gave the ruling based upon the school which he followed29. So, if he was a follower of the hanafi school he decided cases on the basis of hanafi fiqh. Consequently, if a dispute were to be brought to a qazi who followed shafei fiqh he would decide according to shafei precepts. In India, the secular courts while applying muslim law to muslims in accordance with section 2 of the 1937 Act have adopted the principle of applying the fiqh to which the parties belong30. Meaning thereby, that hanafi principles would be applied to adherents of the hanafi school and ithna ashari law to ithna asharis and so on. This, however, has not been strictly followed, perhaps in

ignorance. Clearly, a qazi or a judge is permitted to apply a minority view within a school of fiqh to adherants of that school. He is also permitted to apply a view taken by a school of law of which the parties are not members of. This can be done in the interest of justice and equity and to avoid hardship to any one or both the parties provided, of course, that what the judge proposes to do is not contrary to a basic tenet of Islam or the Quran or a ruling or saying or act of prophet Muhammad. 26. It is accepted by all schools of law that talaq-e-bidaat is sinful31. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression " bad in theology but valid in law " is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by prophet Muhammad32. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by shia schools. There are views even amongst the sunni schools that the triple talaq pronounced in one go would not be regarded as three talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a reconciliation. It is an innovation which may have served a purpose at a particular point of time in history33 but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad. 27. In this background, I would hold that a triple talaq (talaq-e-bidaat), even for sunni muslims be regarded as one revocable talaq. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the iddat period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the iddat period expires and the talaq can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh nikah on fresh terms of mahr etc. Importance of the attempt at reconciliation 28. The attempt at reconciliation which is recommended under the shariat, has been assigned a key role by the Supreme Court. This, we shall see presently. It all began with the decision of Baharul Islam J. of the Gauhati High Court in a case under section 125 CrPC for maintenance by a "wife" in Sri Jiauddin v. Mrs Anwara Begum: (1981) 1 Gauhati Law Reports 358. When the "wife" (Anwara Begum) filed the petition for maintenance, Jiauddin alleged in his written statement before the Magistrate that he had pronounced talaq earlier and that Anwara Begum was no longer his wife. No evidence of the pronouncement of talaq was produced. When the matter reached the High Court, the question was -- whether there had been a valid talaq" Baharul Islam J. observed that while a muslim marriage was a civil contract, a high degree of sanctity attached to it. The necessity of dissolution was recognized but, only under exceptional circumstamces. He held that :- " "talaq" must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters " one from the wife"s family the other from the husband"s. If the attempts fail, talaq may be effected." 29. In arriving at this

conclusion, Baharul Islam J. considered various verses34 of the Quran and opinions of scholars and jurists such as Mohammad Ali, Yusuf Ali, Ameer Ali and Fyzee. The learned Judge went on to hold:- "" In other words, an attempt at reconciliation by two relatives " one each of the parties, is an essential condition precedent to "talaq"." 30. In a subsequent decision of a Division Bench (Baharul Islam CJ and D. Pathak J.) of the Gauhati High Court in the case of Mst Rukia Khatun v. Abdul Khalique Laskar: (1981) 1 Gauhati Law Reports 375, the decision in Jiauddin (supra) was held to have correctly laid down the law on the subject and the decisions of the Calcutta and Bombay High Courts in ILR 59 Calcutta 83335 and ILR 30 Bombay 53736 were observed to be not correct law. In Rukia Khatun (supra), the said Division Bench held:- "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 other by the husband from his. If their attempts fail, "talaq" may be effected." 31. Now I come to the decision of the Supreme Court in Shamim Ara v. State of U.P.: AIR 2002 SC 3551 which was also a case arising out of an application for maintenance under section 125 CrPC filed by a "wife". To avoid the payment of maintenance, the husband had taken the plea in his written statement that he had already divorced her by pronouncing talaq. The Supreme Court referred to the two decisions of the Gauhati High Court in Jiauddin (supra) and Rukia Khatun (supra) and expressed its agreement with the abovementioned observations made in those judgments. Thereafter, examining the facts of the case before it, the Supreme Court noted that no evidence in proof of the alleged talaq had been adduced by the husband and that there were "no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq". The Supreme Court held that a talaq has to be pronounced to be effective. It said:- "A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of the filing of the written statement in the court followed by delivery of a copy thereof to the wife." 32. In these circumstances37, the Supreme Court held that the marriage was not dissolved and that the liability of the husband to pay maintenance continued. Thus, after Shamim Ara (supra), the position of the law relating to talaq, where it is contested by either spouse, is that, if it has to take effect, first of all the pronouncement of talaq must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that talaq was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place. This would apply to ahsan talaq, hasan talaq as also talaq-e-bidaat38. The latter, also because of the view taken by me that a talaq-e-bidaat or triple talaq (so called) shall be regarded as one revocable talaq. An issue which needs to be un-knotted is " does the attempt at reconciliation necessarily have to precede the pronouncement of talaq or can it be after the pronouncement also" The two Gauhati High Court decisions and that of the Supreme Court in Shamim Ara

(supra) have gone on the understanding that the attempt at reconciliation must precede the pronouncement of talaq itself. But, those decisions did not consider the distinction between a revocable and an irrevocable talaq. Those decisions, in my respectful view, proceeded on the basis that the talaq in each of the cases was of an irrevocable nature. Once a talaq is of the irrevocable kind, it is obvious that the effort at reconciliation must precede its pronouncement. But, where a talaq is revocable, the attempts at reconciliation can take place even after the pronouncement. This is so, because, in a revocable talaq, the dissolution of marriage does not take place at the time of pronouncement but is automatically deferred till the end of the iddat period. This duration is specifically provided so that the man may review his decision and a reconciliation can be attempted. A hasan talaq is revocable. So also are the first two talaq pronouncements in the case of ahsan talaq. Now, talaq-e-bidaat has also been held by me to be operative as a single revocable talaq. In all these cases of revocable talaq, the attempt at reconciliation may, in my view, take place after the pronouncement of talaq. The crucial point is that for a pronouncement of talaq to result in the dissolution of the marital tie there must be an attempt at reconciliation. In the case of an irrevocable talaq, it must precede the pronouncement and in the case of a revocable talaq, it may precede or it may be after the pronouncement but before the end of the iddat period. Pronouncement of talaq and dissolution of marriage 33. In this connection it would be relevant to note that pronouncement of talaq does not ipso facto amount to a dissolution of the marital tie between husband and wife. Some assistance may be taken of traditional English law in explaining the concept. As indicated in Jowitt's dictionary of English Law, Edition-II, Sweet and Maxwell, divorce was a term used by the ecclesiastical courts to signify an interference by them with the relation of husband and wife. It was of two kinds " a divorce a mensa et thoro (from bed and board), granted in cases where the husband or wife had been guilty of such conduct as to make conjugal intercourse impossible (as in the case of adultery, cruelty, etc.); and a divorce a vinculo matrimonii (from the bond of marriage), granted where the marriage was voidable or void ipso jure (as in the case of the parties being within the prohibited degrees, or one of them having been already married, or being impotent when married). The former is now represented by judicial separation, the latter by a decree of nullity of marriage. 34. In Halsbury's Law of England, Fourth Edition, Volume 13, in paragraphs 501 and 502 it is mentioned that the law relating to matrimonial causes was much influenced by the ecclesiastical canons and former practice of the ecclesiastic courts. That influence gradually diminished, and modern legislation has very considerably cut it down. It was also noted that from the middle of the twelfth century the ecclesiastic courts were recognized as having exclusive jurisdiction in matters of marriage and divorce, as that term was then understood, and since the Church of Rome was the supreme ecclesiastic authority in England the ecclesiastic courts applied the canon law in matrimonial causes. Christian marriage was indissoluble, but divorce a mensa et thoro, in the nature of the present day judicial

separation, that is divorce without the right thereafter to marry another person while the former spouse still lives, was granted for certain causes. Subsequently, there developed in course of time a method of divorce a vinculo matrimonii, that is divorce in its current meaning of dissolution with the right thereafter to marry another person while the former spouse still lives. It was also noted that after the enactment of Matrimonial Causes Act, 1857 in England, divorce means dissolution of marriage with the right thereafter to marry another person while the former spouse still lives. 35. From the above discussion, it is clear that the marital relations between husband and wife under English law could be interfered with by way of judicial separation, annulment of marriage or dissolution of marriage. The last of the expressions has now become synonymous with the word “divorce”. It is, however, important to note that traditional divorce included the concept of judicial separation without resulting in a dissolution of marriage. Principles under Muslim Law are somewhat different from the straightforward classification of a divorce implying dissolution of marriage. When a talaq is pronounced, the marital relationship may not terminate immediately. If the talaq is revocable then the same can be revoked during the iddat period. If it is so revoked, then the marital tie between the husband and the wife is not severed and no dissolution of marriage takes place. However, if the talaq is not revoked during the period of iddat, then upon the termination of such period, dissolution of marriage takes place. During the period of iddat, under Muslim Law, the wife upon whom talaq has been pronounced, has the right of residence as well as of maintenance and she cannot be disturbed from where she was residing at the time of pronouncement of talaq. She continues to be the wife of the petitioner for the entire duration of the period of iddat and, therefore, her status would be akin to that of a wife under traditional English law in the case of divorce a mensa et thoro. The dissolution of marriage takes place only upon the completion of the iddat period provided the talaq is not revoked. It is then that the parties are released from their marital bond and a divorce a vinculo matrimonii takes place amounting to dissolution of marriage. These are also important factors to be kept in mind while construing the question of divorce under Muslim Law. It is, therefore prescribed that the period during which the marital tie remains in suspense ought to be utilized for the purposes of bringing about a reconciliation between the husband and the wife and it is for this purpose that the courts have recognized that a reconciliation must be attempted in the manner indicated in the Quran. Can talaq be pronounced in the absence of the wife” Is communication of the pronouncement of talaq necessary” 36. The Supreme Court made it clear in Shamim Ara (supra) that a talaq, to be effective, has to be pronounced. The manner of pronouncement of oral talaq also brings in differences in hanafi and ithna ashari schools. For one, the latter requires the presence of two competent witnesses, while the former does not. Then there is the issue of communication. A talaq may be pronounced in the absence of the wife39. But, does it not need to be communicated to her” As discussed above, pronouncement of talaq materially alters the status of the wife. Her rights and

liabilities flow from the nature of the talaq. Is it a revocable talaq or is it an irrevocable talaq" Then there is the question of iddat. Her right to residence. Her right to maintenance. Her right to mahr (if deferred). Custody of children, if any. Her right of pledging her husband"s credit for obtaining the means of subsistence. How would she know that it is time for her to exercise these rights (or time for her not to exercise them, as in the case of pledging her husband"s credit) if she does not even know that her husband has pronounced talaq" So, linked with the question of her rights is the issue of communication of the talaq to her" Furthermore, as pointed out above, the iddat period, in the case of a revocable talaq, is also a period during which the husband and wife have a re-think and attempt reconciliation. How would this be possible if the husband pronounces talaq secretly and does not at all inform the wife about it" Consequently, while it may not be essential that the talaq has to be pronounced in the presence of the wife, it is essential that such pronouncement, to be effective, is made known to her, communicated to her39, at the earliest. Otherwise she would be deprived of her rights post talaq and pre-dissolution. What is the earliest will depend on the facts and circumstances of each case and would necessarily be a function of the access to communication that the husband and wife have. In the modern day, where every nook and cranny has landline or cellular coverage, in almost every case it would mean the same day. To my mind, communication is an essential element of pronouncement. Where the pronouncement of talaq is made in the presence of the wife, the acts of pronouncement and communication take place simultaneously. The act of pronouncement includes the act of communication. Where the wife is not present, pronouncement and communication are separated by time. The pronouncement would be valid provided it is communicated to the wife. The talaq would be effective from the date the pronouncement is communicated to the wife. In case it is not communicated at all, even after a reasonable length of time, a vital ingredient of pronouncement would be missing and such a talaq would not take effect. The answers to the five questions 37. (1) What is the legality and effect of a triple talaq " It is not even considered to be a valid divorce by shia schools. I hold that a triple talaq which is talaq-e-bidaat, even for sunni muslims be regarded as one revocable talaq. (2) Does a talaq given in anger result in dissolution of marriage " If a talaq is pronounced in extreme anger where the husband has lost control of himself it would not be effective or valid40. (3) What is the effect of non-communication of the talaq to the wife" If the pronouncement of talaq is communicated to the wife, the talaq shall take effect on the date it is so communicated. However, if it is not communicated at all the talaq would not take effect. (4) Was the purported talaq of October 2005 valid" No. First of all, it was given, if at all, in extreme anger. Secondly, it was never communicated to the complainant, at least not by the relevant period (i.e., till 13.04.2006 or even by 19.04.2006). Thirdly, there was no attempt at reconciliation in the manner suggested in the Quran either before or after the purported pronouncement of talaq in October 2005. Consequently, the marital tie of the petitioner and the complainant subsisted during the relevant

period (ie., 13.04.2006 to 19.04.2006). Therefore, the offence of rape is not made out even on the basis of allegations contained in the complaint. (5) What is the effect of the second nikah of 19.4.2006 " It was not necessary. Since the marriage was subsisting, the second nikah between them would be of no effect. However, had the purported talaq of October, 2005 been valid, it would have operated as a single revocable talaq and it would have been permissible for the couple to re-marry. In that case, the second nikah would have been effective and valid. And, then, the presumption of consent just prior to the marriage would be available to the petitioner. But, we need not labour on that aspect as the talaq of October, 2005 itself was invalid and their first marriage subsisted. Conclusion 38. In R.P. Kapur v. State of Punjab: (1960) 3 SCR 388 : AIR 1960 SC 866 the Supreme Court summarised some categories of cases where inherent power of the High Court can and should be exercised to quash the proceedings: (i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction; (ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged; (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge. The present case falls under the second category. The purported talaq of October 2005 was invalid as the essential ingredients of pronouncement, communication and attempt at reconciliation are absent. The petitioner and the complainant continued as husband and wife during the relevant period (i.e., 13.04.2006 to 19.04.2006). The exception in section 375 IPC becomes applicable and, consequently, the offence of rape is not made out. Thus, apart from the ground of settlement of all matrimonial disputes, on the ground that the offence of rape itself is not made out, the FIR in question is liable to be quashed. 39. FIR No. 817/2006 registered at police station Preet Vihar under section 376 IPC stands quashed. All pending proceedings emanating from the said FIR also stand quashed. Consequently, the bail application no. 4746/2006 has become infructuous and also stands disposed of. The surety stands discharged. This petition is allowed.

Sd/-
BADAR DURREZ AHMED
(JUDGE)