
ABDURAHIMAN V. KHAIRUNNESSA, I(2010)DMC707, A CASE COMMENTARY

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Introduction

For the purposes of the case commentary, the writer would focus on one of the most remarkable cases in the realm of divorce in the cases of Muslim marriages, namely *Abdurahiman v Khairunessa*.¹ This case highlights the importance of the rights of women in the marital alliance from the eyes of the law. Under Muslim law, when considering divorce, the couple has two options. The couple can either take the discourse of extra-judicial methods of divorce or the judicial procedure of obtaining a divorce through filing for divorce in Court under the Dissolution of Muslim Marriages Act, 1939.² These extra-judicial methods provided by the Quran largely favour the husband and elevate his position in the marriage.

Though, the wife can obtain a divorce through *Talaaq-i-tafweez*, where the power of divorce may be granted to the wife or any other person through a pre-nuptial agreement or post marriage agreement or through *Lian* under a false allegation of adultery levelled by husband on his wife would be treated as a ground for divorce. Still, these grounds are minimal and don't cover cruelty as a ground for divorce.³ Thankfully, this gap was addressed in the Dissolution of Muslim Marriages Act. While considering *Khairunessa's* case, the Court took a very revolutionary approach by linking her misery with the fundamental Right to Life and thus set a very woman-friendly and progressive precedent for similar cases in the future. Although, this attempt is not very sound as there are many flaws inherent in the Court's reasoning, which are highlighted in this paper, followed by facts, issues, and statutes pertinent to the case.

Facts of the Case

In this case, per Muslim religious rights, the spouses married in 1980. They had four children as a result of their marriage. The husband took the wife abroad because he was employed there.

¹ *Abdurahiman 49 years v. Khairunnessa 43 years*, (2010) D.M.C. 707 Ker

² Dissolution of Muslim Marriages Act, No. 08 of 1939

³ Prof. Prama Mukhopadhyay, *Muslim Divorce* lecture Presentation

The wife also found a well-paying job there. Unfortunately, the husband lost his job, and the wife was compelled to resign and come back to India with him. They established a joint residence, and he informed her that the property had been purchased in her name. She had given him money and gold ornaments based on this belief. She found out a few days later that her husband had cheated on her. When her husband discovered this, he began to abuse her. He forced her to live alone in a one-bedroom kitchen house while failing to fulfil his marital obligations. He also married another woman and moved in with her. On this basis, the first wife filed a suit under the Muslim Marriage Dissolution Act.

Issues in the Case and Court's Holding

The Court identified two significant issues in this case. The first was how to interpret the phrase "does not treat her equitably in accordance with the injunctions of the Quran" in Section 2 (viii) (f) of the Dissolution of Muslim Marriages Act, 1939.⁴ The second issue identified was whether Article 21 of the Constitution's Fundamental Right to Life should include the right to a healthy and harmonious marital life.⁵ The decision favoured the wife because the second marriage was proven in the Court. In her petition and evidence, the first wife asserted that she was not treated equitably, providing sufficient grounds for divorce under Section 2(viii)(f) of the Act.⁶ As a result, the challenge to the divorce order was dismissed. The Court opined in this case that the mere assertion by a wife in a polygamous marriage of inequitable treatment is a sufficient standard for determining equitable treatment in accordance with the Quran's injunctions.

Critical Analysis of Court's Reasoning

In this case, Kerala High Court's efforts have to be acknowledged, and they do deserve applause since the Court in a highly patriarchal society like India took a commendable feminist approach and gave preference to the rights of a woman in a marital alliance. However, the Court's bonafide intention lacks sound reasoning. Beginning with the issues that the Court identified, the very first issue reveals a dispute between the statute's implication and the Court's outlook on that. The statute provides that if a wife is being treated with cruelty, then the wife can file for divorce. The statute also specifies the scope of the term cruelty. One of the grounds for getting a divorce under cruelty is if the husband marries more than one woman, and doesn't treat the wives equitably in accordance with Quran, then a decree for divorce can be obtained

⁴ *Supra* note 2

⁵ *Supra* note 1

⁶ *Supra* note 2

by the wife. The issue that the Court found is that of the standard of equitable treatment, but the statute itself addresses this issue by specifying that the question of equitable treatment has to be tackled by referring to the holy book of the Quran. The Court should have looked into the issue of polygamy primarily and explained how polygamous marriage is not desirable instead of stressing on what is apparent from the plain reading of the statute.

Further, to address an issue, it is relevant to understand the complete and unbiased meaning of the components of the issue. Therefore, when the Court is considering the issue of equitable treatment, it is crucial to understand what is meant by equitable treatment. However, in the present case, the Quranic injunctions that the Court referred to do not describe the meaning of equitable treatment. Ayat 3 mentions the need for equitable treatment in a polygamous marriage, but it doesn't explain clearly what this equality means; instead mentions an ambiguous term, 'perfect equality'.⁷ Moreover, Ayat 129 also doesn't much help in clearing the ambiguities as Yusuf Ali's commentary reveals a stark contradiction. According to the commentary, Ayat 129, it is quite impossible to treat all the wives equally in a polygamous marriage. At the same time, Ayat 3 validates polygamy, but the Court fails to consider this contradiction and jumps to its desired outcome.

One of the most contradictory stances taken by the Court that strikes one in this judgment is how the Court, to support its decision, attempted to attain the Quran's backing. According to the conclusion that the bench reached in this case, Quran doesn't state that in a polygamous marriage, all the wives can be treated equally; instead suggests the contrary that it is impossible to treat all the wives equally in a polygamous marriage. This inference drawn by the Court is doubtful because it runs in contradiction to what the Ayat 3 of the Quran states. As per Ayat 3, a Muslim man can marry more than one woman. If this injunction is taken into account, then the Court's inference raises more questions than answers because if it was already known that it is impossible to treat all the wives equally in such a marriage, then why was such an injunction inserted into Quran in the first place. Furthermore, Section 2 (vii)f would also lose its meaning as it also doesn't put a blanket ban on the practice of polygamy. It only stipulates that if a man marries more than one woman but does not treat them equally, then a decree for dissolution of marriage can be obtained.

Moreover, the Court did not substantiate its reasoning with the facts and evidence of the cruelty

⁷ *Supra* note 1

that the wife suffered in this case. All the Court does is support its decision based on its interpretation of the Quran which can be observed from the judgment. Throughout the judgment, the Court only reflects on the Quranic injunctions but not on the statute's non-confirmation with Article 21. The judgment does clarify that in a marriage, the wife has the power to assess the standard of equitable treatment but fails to ascertain the evidentiary requirements relevant for proving the standard of equitable treatment, which could be dangerous as a mere assertion could also lead to misuse of the statute considering the statute still doesn't prohibit the practice altogether.

Apart from these blemishes in the reasoning of the Court, the other flaw is the reliance on the precedents that declare that polygamy is cruelty itself. This reliance in the light of the wording of Section 2 (vii) (f) is again bound to create confusion. As earlier explained, this Section doesn't prohibit the practice of polygamy, but the Court didn't once address this critical gap between the Section and the Court's view towards polygamy.

Conclusion

In sum, the Court should have analyzed the Quranic injunctions in more depth instead of just one or two sources and should have considered more sources to avoid contradictions and make its reasoning more convincing. Further, the Court should have addressed the major pieces of evidence supporting the wife's claim, such as denial of maintenance and the husband's failure to perform his marital obligations in the judgment. More so, this aspect of evidence should have formed the central part of the judgment. Further, there is also a dire need to amend Section 2 (vii) (f) to change its wording so as to put a complete halt to the practice of polygamy as the Court, in this case, observed that it is impossible to treat the wives equally in a polygamous marriage.

Nonetheless, I agree that women should be allowed to leave polygamous marriages because polygamy undoubtedly is against the fundamental right to life. The Court indeed took a very positive step towards reforming the women's position in a marital alliance. Thereby, the Court also made it crystal clear that the wife is not a use-and-throw object but has every right to be treated equally and be given respect.