IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1825 of 2007

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAMIRBHAI HAJI MUSTUFA BAJARIYA - Applicant(s)
Versus
RIZWANA D/O HAJI DAUDIBHAI PATUK & 1 - Respondent(s)

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Appearance :
MR M.IQBAL A SHAIKH for Applicant(s) : 1,
MR MA KHARADI for Respondent(s) : 1,
MR LB DABHI, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 29/02/2008

ORAL JUDGMENT

1. Rule. Mr.M.A.Kharadi, learned advocate waives service of

notice of rule on behalf of respondent No.1 and Mr.L.B.Dabhi, learned Additional Public Prosecutor waives notice of rule on behalf of respondent No.2 – State of Gujarat.

2. Having regard to the facts of the case and with the consent of the learned advocates for the parties, the matter is taken up for hearing today.

3. By this petition, the petitioner seeks quashment of the order dated 13th September, 2007 passed by the learned Additional Sessions Judge, Dahod in Criminal Revision Application No.51 of 2007 and prays that the application Exh.28 in Criminal Miscellaneous Application No.168 of 2005 pending before the learned Chief Judicial Magistrate, Dahod, be allowed.

4. The facts of the case stated briefly are that marriage between the petitioner and the respondent No.1 was solemnized under the Muslim Law. Thereafter on account of differences between the parties, the marriage resulted in a divorce. Subsequently, the respondent No.1 wife, moved an application under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (the Act) being Criminal Miscellaneous Application No.168 of 2005, before the learned Chief Judicial Magistrate, Dahod praying for maintenance.

5. In the proceedings before the learned Chief Judicial Magistrate, the respondent No.1 filed an affidavit of her examination-in-chief, which was admitted in evidence as

Exhibit-22. According to the petitioner in view of the provisions of Rule 4 of the Muslim Women (Protection of Rights on Divorce) Rules, 1986 (the Rules) it is not permissible to file affidavit of examination-in-chief. He, therefore, moved an application (Exhibit-28) contending that there is no provision under the Act or the Rules for giving deposition in the form of affidavit and prayed that the affidavit Exhibit-22, is not admissible in evidence and is accordingly liable to be de-exhibited.

6. By the impugned order dated 30th August, 2007 the learned Chief Judicial Magistrate held that there was no legal basis for the application. That as the procedure provided for summary trial is required to be adopted with a view to ensure that the applicant gets speedy justice, the petitioner's application cannot be accepted. Besides, there is no provision under the Indian Evidence Act, which provides for de-exhibiting a document. He, accordingly, rejected the application. Being aggrieved, the petitioner has filed the present petition praying to quash the said order.

7. Heard Mr.M.Iqbal Shaikh, learned advocate for the petitioner, Mr.M.A.Kharadi, learned advocate for respondent No.1 and Mr.L.B.Dabhi, learned Additional Public Prosecutor for respondent No.2 – State of Gujarat

8. From the facts noted hereinabove it is apparent that the dispute involved in the present petition lies in a very narrow compass. The only controversy in issue is whether under the Act and the Rules framed there under, affidavit

of examination-in-chief is admissible in evidence.

9. It is an admitted position that the respondent No.1 has filed the application for maintenance under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986. In the circumstances the proceedings before the concerned Court would be governed by the said Act and Rules framed there under.

10. It would, therefore, be pertinent to refer to rule 4 of the Rules, which reads as under:

> "***4. Evidence***. *All the evidence in the proceedings under the Act shall be taken in the presence of the respondent against whom an order for the payment of provision and maintenance, Mahr or (dower) or the delivery of property is proposed to be made or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner specified for summary trial under the Code*."

11. A plain reading of the aforesaid provision shows that the same envisages two things: firstly that all the evidence under the Act shall be taken in the presence of the respondent or when his personal attendance is dispensed with, in presence of his pleader; and secondly that the evidence shall be recorded in the manner specified for summary trial under the Code.

12. Thus, the first requirement under the Rule to record

evidence in the presence of the respondent, itself negates the taking of evidence on affidavit as by no stretch of imagination can the same be said to have been taken in the presence of the respondent or his pleader.

13. As regards the second requirement viz. that the evidence be recorded in the manner specified for summary trial under the Code, it would be necessary to refer to the relevant provisions of the Code in this regard. Provision for Summary Trials is made under Chapter XXI of the Code. Section 262 there under, provides for the procedure for summary trials and reads as under:

> "***262. Procedure for summary trials***.- *(1) In trial under this Chapter, the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned.*
>
> *(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter*."

14. Chapter XXIII that falls under the heading Evidence in Inquiries and Trials provides for the mode of taking and recording evidence. Section 274 makes provision for record in summons-cases and inquiries and reads as under:

> "***274. Record in summons-cases and inquiries***.- *(1) In all summons-cases tried before a Magistrate, in all inquiries under sections 145 to 148 (both inclusive), and in all proceedings under section 446 otherwise than in the course of a trial, the*

Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of the evidence in the language of the Court;

Provided that if the Magistrate is unable to make such memorandum himself, he shall after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation in open Court.

(2) Such memorandum shall be signed by the Magistrate and shall form part of the record."

15. Thus the procedure for recording evidence in summary trials is that the Magistrate shall as the examination of each witness proceeds; make a memorandum of the substance of the evidence in the language of the Court. The said procedure, therefore, requires the Magistrate to record the evidence during the course of examination of a witness, which does not envisage recording of evidence by way of affidavit. In the circumstances, the examination-in-chief of the respondent No.1 by way of affidavit does not satisfy either of the two requirements of Rule 4 of the Rules, and as such cannot be taken on record by way of evidence in proceedings under the Act. The application Exhibit 28 made by the petitioner, therefore, deserves to be allowed.

16. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned order dated 30th August, 2007 passed by the learned Chief Judicial Magistrate, Dahod on the application Exhibit 28 in Criminal Miscellaneous Application No.168 of 2005 is

hereby quashed. The petitioner’s application exhibit 28 is hereby allowed. The affidavit of examination-in-chief of the respondent No.1 (Exhibit-22) dated 3.5.2007 is held to be not admissible in evidence as examination-in-chief of the respondent No.1 and as such the same shall stand de-exhibited. Rule is made absolute.

[HARSHA DEVANI, J.]

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