

## **Majah v Majah**

**(2010) SLR 327**

Lucy POOL for the petitioner  
Nichol GABRIEL for the respondent

### **Judgment delivered on 6 October 2010 by**

**KARUNAKARAN J:** This is a petition for divorce, which indeed, has opened up an appalling vista on the conflict of personal law and the clash of civilizations. The petitioner, Hameeda Rashidah Majah, a middle-aged Muslim lady has applied to this Court for a dissolution of her marriage with the respondent, on the ground that the marriage has irretrievably broken down since the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him continuing the marriage.

The respondent, who was duly served with the notice of the petition, put in appearance in Court through his counsel Mr Gabriel and contested the matter. Accordingly, he filed an answer to the petition dated 12 January 2009 objecting to the grant of divorce. It is contended therein by the respondent that all the allegations made by the petitioner in her petition are not true, reliable or correct. Moreover, it is the contention of the respondent that this Court, since based on Western ideology, has no jurisdiction to dissolve any Islamic marriage and grant a divorce, when the parties are Muslims. Hence, the Court proceeded to hear the case on the points of law as well as on the merits. Both parties testified in support of their respective stance on religious and factual issues.

The petitioner was duly represented by counsel Ms Pool throughout the proceeding. In a nutshell, the petitioner testified that she was lawfully married to the respondent on 27 June 1985 at the Central Civil Status Office Victoria, Mahe, Seychelles (vide exhibit P1) having solemnised the Islamic marriage. After the marriage the parties lived and cohabited as a wedded Muslim couple at Pte Larue, Mahe. The petitioner is employed as a cleaner at the Libyan Embassy, whereas the respondent is self-employed. Both the petitioner and the respondent are Seychellois nationals, domiciled and resident in Seychelles. Both are Muslims professing Islam. There are six children born of the marriage. The last two children are still minors. The petitioner categorically testified that her marriage has broken down irretrievably because of unreasonable behaviour on the part of the respondent. According to the petitioner, although the parties had been married for over 24 years, only in the past three years has the marriage been on the rocks. The respondent has been treating the petitioner with persistent cruelty and neglect causing her mental torture and hardship. The respondent did not even allow her to sleep on the mattress. He took the mattress away from the bedroom and forced her to sleep on the floor. He also stopped giving her maintenance and refused to provide even important things a woman needs for her personal use including sanitary towels. He also used to hide everything from the bathroom such as toothpaste and body soap. He never gave money for her to buy things for her personal use. He was always telling her to go out of the matrimonial home so that he could bring his other wife, whom the petitioner

referred to as the "white-wife", into the house to replace the petitioner. He used to insult her in front of the children, who were also afraid of his violent behaviour and attitude. Moreover, the petitioner testified that the respondent even asked her to go out and sell her body for money to buy things in order to meet her personal needs. She also testified that he neglected the family and failed to provide maintenance for the petitioner and for the children. Also, the petitioner stated that the respondent used to tell her that since he is a Muslim, he had a right to have sex whenever he wants: for four, five or even six times in a day. Whenever the petitioner refused to accommodate his sexual desires, the respondent got wild and used to threaten her with violence. Moreover, she stated that the respondent used to snore very loudly at night and she could not sleep in the same room with the respondent. As a result of the ill-treatment, the petitioner became hypertensive, fell sick and could not even sleep at night. Consequently, the petitioner was forced to leave the matrimonial home and is now living with her parents. The petitioner testified that despite several attempts with the assistance of the Imam, the religious leader, they could not succeed in a reconciliation. The petitioner thus testified that there is no possibility at all for reconciliation. Therefore, she asks the Court for an order dissolving the marriage of the parties and to render justice by granting divorce in her favour.

On the other side, the respondent testified in essence that all the allegations made by the petitioner against him are false and incorrect. According to the respondent, he has always provided maintenance as a good husband and treated the petitioner with love and affection for more than 25 years. The respondent also stated that he is now providing adequate maintenance to the family including the minor children since the petitioner had lodged a complaint with the Family Tribunal. He is now paying R 1200 every month for the maintenance of the minor children. The respondent further testified that since this court is not an Islamic court and the petitioner is a Muslim wife she cannot bring her husband, the respondent, before this Court for a divorce or separation or *talaq*. According to him, the petitioner does not have the right to come before this court in order to seek a divorce. Moreover, he testified that his personal law (Islamic law) allows polygamy and he can have another wife in addition to the petitioner. He could bring that wife into his family and have engagement with her. According to Islamic law, he is not committing any sin in doing so. His existing wife, the petitioner, has no right to complain against the polygamy practiced by the husband, the respondent. He stated that polygamy was his privilege and he had a right to do so as per Qur'anic injunction. He further stated that men in Islamic law have the authority over women in all aspects of life. The crucial aspect of the evidence given by the respondent ran thus -

I put a proposition to her (petitioner) regarding all the allegations and false charges that she has brought me here for. I told her "let us go the Imam Idris, I know him, we went to University together, he is the best man" as we don't have a proper Jamaat here. I think she does not have the proper education regarding the religion even though she is in that religion. A lot of Seychellois people come into this religion but they don't have the basic knowledge of the religion. I am very sorry for those Seychellois people... I suggested to her that we did not have to come to a civil court. I told her we are wasting the time of the court. This is a European court. We have a Muslim affair. We should go to the Jamaat. But she went to the wrong Jamaat, not a man of experience. I put a

complaint to the Imam and he told me that according to the Muslim law she does not have a right except under extreme circumstances.

For these reasons, the respondent urged the court not to grant divorce in favour of the petitioner and to dismiss the petition.

I meticulously perused the evidence adduced by the parties in this matter. I diligently examined the points of law relevant to the issues joined by the parties. First of all, I note that there is conflict of law; that is, between the personal civil law (*lex loci* and *lex fori*), which is universally applicable to all in Seychelles irrespective of their religious belief, faith and worship, and the personal Islamic law applicable to the marriage of the parties. As I see it, although the parties were married under Islamic law being Muslims, they are still subject to the personal law of the land (*lex loci* and *lex fori*), since their marriage has been solemnised and registered under the Civil Status Act in accordance with the law of the land. In the circumstances, I find that the Supreme Court of Seychelles has unfettered jurisdiction to entertain this petition and grant any relief in accordance with domestic laws, particularly the Matrimonial Causes Act. In my view, although there appears to be a conflict of personal laws in this matter, since both parties are Seychellois nationals, resident and domiciled in Seychelles, they are undoubtedly, subject to the laws of Seychelles. Their marriage, divorce and civil status are obviously governed by the *lex loci* and *lex fori*. In the circumstances, I decline to accept the contention of the respondent that the petitioner being a Muslim woman has no right to come before this Court for divorce. I also reject the respondent's contention that this court has no jurisdiction to entertain the petition for divorce in this matter. At this juncture, it is pertinent to observe that the Supreme Court of Seychelles has unlimited original jurisdiction in all civil matters in terms of article 125(1)(b) of the Constitution. Obviously, no other law or any practice, whether customary or religious in this country can take away that jurisdiction conferred on this Court by the Constitution. No attempt by anyone to whittle it down in the name of religion, culture, tradition or custom can be entertained by this Court.

Having said that, in essence, the defence raised by the respondent in this matter, constitutes three components, namely:

- (1) The respondent being a Muslim, as a man and as her husband, has the legal right in Islamic law to oppress the petitioner on account of her gender as a woman and of her status as his wedded wife;
- (2) The respondent being a man and husband of the petitioner, has an unconditional right or freedom in Islam, to practise polygamy; and
- (3) The credibility of the evidence given by the petitioner pertaining to the breakdown of marriage.

The appalling argument advanced by the respondent on the first two components challenges the civil rights and status of the petitioner, as a wife and as a woman in Islamic society. This indeed, raises two fundamental questions, which I believe, require candid answers so as to demystify the false impression and misapprehension of the Islamic teachings as wrongly portrayed by some, including the respondent in this matter. The questions are:

1. Does Islam discriminate and oppress women in society?
2. Does Islam permit polygamy unconditionally in favour of men causing social injustice to the detriment of women's rights and equality in society?

In answering the first question - vide *Discover Islam* (edited by Al-Jumuah - ISBN 9960-9406-7-5) - one must differentiate between the teachings of Islam and the practice of some Muslims. Although some Muslim cultures oppress women, that often reflects local customs that are inconsistent, if not contrary to Islamic teachings. Islam expects its adherents to uphold the rights of women, to protect their social status, marriage, family life and prevent their degradation in every way. Islam further holds that women are equal to men in their origin, their humanity, their honour and their accountability before God.

The idea that Islam treats women as second class citizens worth half a man is nothing but a myth. Islam elevated the status of women over 1,400 years ago by declaring them the sisters of men, giving them the right to education to the highest level, the right to choose a husband, the right to end an unhappy marriage, the right to inheritance, and in general, the rights of a full citizen of the state. Not only material and physical rights, but those of kindness and consideration are equally specified and significant in Islamic law.

According to Islam, men and women are two equally important component parts of humanity, and the rights and responsibilities of both sexes are equitable and balanced in their totality. The Qur'an confirms that men and women are equal in the sight of God. They are one of another male or female as the male comes from the female and the female comes from the male, vide Qur'an 3:195. The roles of men and women are complementary and collaborative. Although their obligations might differ in certain areas of life in accordance with their basic physical and psychological differences, each is equally accountable for their particular responsibilities. Ignoring these differences is surely unrealistic, but there is no reason to assume from them that one sex is either superior or inferior to the other in any way as the respondent wrongly assumed against the petitioner in this case.

Under Islamic law, when a Muslim woman gets married she does not surrender her maiden name, but keeps her distinct identity unlike in some other religions. In a Muslim marriage, the groom gives a dowry to the bride herself, and not to her father. This becomes her own personal property to keep, invest or spend and is not subject to the dictates of any of her male relatives. The Qur'an places on men the responsibility of protecting and maintaining all of their female relatives. It means, as well, that a man must provide for his wife and family even if she has money of her own. She is not obliged to spend any of her money towards the maintenance of her family. This relieves a woman of the need to earn a living, but she can work if she chooses to do so or if her circumstances warrant it.

The family, like any other organisation, needs order and leadership. The Qur'an states that the husband has a "degree" of authority over his wife, which means guardianship. It is important to note, however, that guardianship is in no way a licence to be a tyrant within the household. Rather, it is a burden of responsibility for

the husband to care completely for his wife and children. Hence, it is so evident that the answer to the first question should be in the negative. That is: Islam does not oppress women in any manner whatsoever; nor does it grant a license to any man for that matter - let alone a husband - to discriminate, exploit, mistreat or ill-treat any woman either in one's family or in society. However, it is deplorable to note that some men like the respondent in the instant case, who mistakenly or wrongly believe in male chauvinism, do so in the guise of religion. A non-believer, who is ignorant of Islam, is closer to the truth than a believer, who believes what is wrong. Ignorance is preferable to error!

I will now proceed to find the answer to the second question on the issue of polygamy raised by the respondent in this matter. As I see it, unless one goes into the theological and philosophical labyrinth of the major religions of the world, it is not easy to find the answer in the proper perspective. Please, forgive me for my inevitable embarkation upon a sensitive area of clashing culture and human civilisation.

It is truism that in Islam, a limited form of polygamy is permitted; whereas polyandry is completely prohibited. In contrast to Islam, one will not find a limit for the number of wives in the Jewish Talmud or the Christian Bible or the Hindu Epics and in the pantheon of Hindu gods. According to these scriptures, there is no limit to how many women a man may marry. Therefore, polygamy is not something exclusive to Islam as generally perceived by many but it has been practiced by early Hindus, Christians, Jews and Baha'is as well. Even in the Baha'i faith, there are pages in *Baha'u'llah's Kitab-i-Aqdas* that suggest that two wives are permitted. It is therefore, wrong to single out and portray the people of a particular religious denomination as protagonists or promoters of polygamy.

Be that as it may, according to the Talmud, Abraham (ie Ibrahim) to whom Allah said "I will make thee an Imām [a leader] to the Nations" vide Qur'an Part I Surah II Al-Baqarah V 124 had indeed, had three wives, while King Solomon had hundreds of wives. The practice of polygamy continued in Judaism until Rabbi Gershom Ben Yehudah (955-1030 CE) issued an edict against it. The Jewish Sephardic communities continued the practice until as late as 1950, when an Act of the Chief Rabbinate of Israel extended the ban on marrying more than one wife, thus prohibiting the practice for all Jews. In the early teachings of Christianity, men were permitted to take as many wives as they wished, since the Bible placed no limit on the number of wives a man could marry. It was only in recent centuries that the Church limited the number of wives to one and so did the Hindus.

At a time when men were permitted an unlimited number of wives, Islam limited the number to a maximum of four. Before the Qur'an was revealed, there was no upper limit for polygamy and many men had scores of wives. The Koran gives a man permission to marry two, three or four women, on the condition that he deals with all of them equitably, benevolently and justly, as indicated by Allah's statement in Qur'an Sūra IV Nisāa v 3:

Marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then [marry] only one...

It is not incumbent upon Muslims or upon the respondent or anyone for that matter to practice polygamy. In fact, in Islam, taking an additional wife is neither encouraged nor prohibited. Incidentally, even Baha'u'llah (with the highest reverence to the Glory of God), who had three legally wedded wives during his lifetime also stated that monogamy brings tranquility to a marriage, and that plurality should be conditional upon justice.

Furthermore, a Muslim who has two, three or four wives may not be a better Muslim as compared to a Muslim who has only one wife. John Esposito, a professor of religion and international affairs and Islamic studies at Georgetown University, writes:

Although it is found in many religious and cultural traditions, polygamy is most often identified with Islam in the minds of Westerners. In fact, the Qur'an and Islamic Law sought to control and regulate the number of spouses rather than give free license.

He further continues thus:

The Qur'an allows a man to marry up to four wives, provided he can support and treat them all equally. Muslims regard this Qur'anic command as strengthening the status of women and the family, for it sought to ensure the welfare of single women and widows in a society whose male population was diminished by warfare, and to curb unrestricted polygamy. (Vide: 12 John Esposito, *Islam: The Straight Path*, Oxford University, 1988, p 97).

There are certain circumstances which warrant the taking of another wife. For instance, if there is a surplus of unmarried women in society, especially during times of war when widows are in need of shelter and care. Infant mortality rates among males are higher when compared to that of females. During wars, there are usually more men killed than women. Statistically, more men die due to accidents and diseases than women. The average life span of females is also generally longer than that of males. As a result, at any given time in practically any given society, there is a possibility of shortage of men in comparison to women. Therefore, even if every single man got married to one woman, there would be millions of women who would still not be able to find a husband.

In Western society, it is not uncommon for a man to have girlfriends, or if he is married, to have extramarital affairs. Seldom is this practice scorned, despite the harms that stem from it. At the same time, polygamy is banned in Western society although it produces none of these adverse effects; rather it preserves the honour and chastity of women. Within a second, third or fourth marriage the woman is a wife, not a mistress; she has a husband who is obliged by Islamic law to provide for her and her children, not a "boyfriend" who may one day cast her aside or deny knowing her if she becomes pregnant and at times even deny the innocent child a legitimate paternity.

There is no doubt that a second wife who is lawfully married and treated with honour is better off than a mistress without any legal rights or social respect. A child born of

wedlock is better placed than a child born without legitimate paternity. Islam strictly prohibits and penalises prostitution, fornication, and adultery and permits polygamy under strict conditions, obviously out of social necessity. At the same time, in Islam, polygamy is neither desirable nor recommendable. In any event, Islam prohibits additional wife/s when there is a likelihood of fear that the man in question would not be able to do justice for more than one wife. Hence, I find the answer to the second question also in the negative. That is: Islam does not permit polygamy unconditionally in favour of men causing social injustice to the detriment of women's rights and equality in society. If a man/husband opts for an additional wife, he ought to satisfy the precondition that he has the ability to do justice between his wives respecting their rights and equality of status in the family and in society.

In my judgment, the respondent in the instant case has obviously failed to do justice to the petitioner through his polygamous approach to life. His justification of polygamy though based on Islamic jurisprudence, does not appeal to me in the least, since he did not satisfy the necessary conditions spelt out in the Qur'an Sūra IV Nisāa v 3 and so I find.

Finally, on the question of credibility, I believe the petitioner in every aspect of her testimony. Whatever be the merits and demerits of the arguments advanced by the respondent based on his religious belief and misconceived ideas on Islamic teachings, the fact remains that his marriage with the petitioner has, to say the least, practically come to an end; the parties have been living apart for more than three years. In the circumstances, I find on a balance of probabilities that the marriage has irretrievably broken down due to unreasonable behaviour on the part of the respondent. The petitioner cannot therefore, reasonably be expected to live or continue to live or resume cohabitation with the respondent. I am equally satisfied that there is no possibility of reconciliation between the parties. Therefore, it is just and necessary that the marriage should be dissolved and I do so accordingly.

Therefore, I hereby dissolve the marriage of the parties and grant a conditional order of divorce, which may be made absolute, after the expiry of six weeks from the date hereof.

**Record: Divorce Side No 127 of 2008**