

FASAKH FOR FAILURE TO MAINTAIN

One of the ways in which a Muslim wife can obtain the dissolution of her marriage is by *fasakh*. The word *fasakh* means annulment or abrogation. It comes from a root which means "to annul a deed" or to "rescind a bargain". Hence it refers to the power of a Muslim *Katbi* to annul a marriage on the application of a party to the marriage.¹ It is therefore more akin to nullity of marriage than to divorce.

There is no explicit mention of *fasakh* in the Holy Quran although the principles may be deduced from two verses to the effect –

- (a) "If you fear a breach between them two appoint two arbiters one from his family and the other from hers. If they wish for peace Allah will cause their reconciliation: For Allah has full knowledge and is acquainted with all things".²
- (b) When you divorce women and they fulfil the term of their *iddat* either take them back on equitable terms or set them free on equitable terms. But do not take them back to injure them or to take undue advantage. If anyone does that he wrongs his own soul".³

There is a hadith related by Abu-Hurairah to the following effect. "Abu Hurairah said "The Prophet (Peace be upon him) said regarding a person who does not possess anything to enable him to give maintenance to his wife, they can both dissolve their marriage"⁴.

It is also related that Umar, the Second Caliph, used to send letters to the commanders of the army about men who had left their wives at home, telling them to detain such persons and request them to send maintenance to their wives or to divorce them. He also asked them to ensure that if such men divorced their wives they should pay all the maintenance due to them.⁵

There is a difference of opinion among the Muslim jurists regarding the right of a Muslim wife to seek *fasakh* where her husband does not give her maintenance. In this regard the dominant Maliki opinion is more favourable to such wives than the dominant Shafii view, although a minority view exists among the Shafiis which is equally liberal. But the Hanafis are

¹ Asaf A.A. Fyzee, *Outlines of Muhammadan Law* 4th Edition Delhi, 1974, p. 168.

² Holy Quran, Commentary by A. Yusuf Ali, Lahore, 4:35.

³ *Ibid* 2:231.

⁴ Daraqutni and Baihaqi. See Idris Ahmad, *Fiqh Shafii*, Vol. 2 Jakarta, 1969 p. 263.

⁵ Shafii and Baihaqi. See Idris Ahmad *op. cit.* p. 263.

more rigid than even the dominant Shafii opinion.

According to the doctrine of the Maliki school, the wife is entitled to claim dissolution of her marriage by *fasakh* if the husband is unable to provide for her maintenance at the time of the claim, without regard to whether he had been unable in the past, unless the wife knew at the time of the conclusion of the marriage that the husband was indigent. If the poverty of the husband has not been legally established, the kathi will order him to provide for her maintenance or to divorce her; if the husband does neither or if his poverty has been proved, the kathi at his discretion may allow the husband a period of grace to fulfil his obligation, which may be one month, or according to some jurists not more than two months. If the term expires without the husband having provided for maintenance the kathi dissolves the marriage. Where the husband is absent, the wife will similarly be granted a dissolution of the marriage, but not until the husband has been warned, if this is feasible and given a suitable period of respite. Under the Maliki law, the dissolution of the marriage takes the form of a talak pronounced by the court if the husband fails to pronounce it. Such a talak, is revocable if he proves himself able and willing to maintain his wife during the *iddah* period.⁶

The dominant Shafii view may be summarised as follows:—

- (a) If the husband is present but unable to maintain his wife, the wife is entitled to a judicial dissolution of her marriage. This is agreed by all Shafii jurists but the better view according to Nawawi prescribes that a period of three days shall first be granted.

Nawawi says:—

“Where a husband during his marriage becomes so insolvent that he can no longer give the minimum maintenance prescribed, but his wife in spite of this continues to live with him, the maintenance becomes a debt due to her from him and exigible at any moment. If she no longer can bear such an insolvent husband she can at once demand the dissolution of the marriage since her husband no longer fulfils his obligation.

If a husband gains enough money by his work to maintain his wife, it may be admitted that he has sufficient substance to allow him to discharge his pecuniary obligations towards her. And a claim for dissolution of marriage on account of complete insolvency is not admissible unless the husband is incapable of supplying his wife even with the maintenance due from an insolvent husband in ordinary circumstances.

A degree of complete insolvency is manifested where a husband is unable to give not only the provisions that constitute the principal nourishment, but also the clothing, the condiments or the habitation that

⁶ F.H. Ruxton *Maliki Law*, London 1916, p. 151; A.D. Russell and Abdullah Al-Mamun Suhrwardy, *A Manual of the Law of Marriage*, London pp. 313–315.

the law requires. (Some authorities state that a) claim for dissolution should be rejected if it is founded merely upon the fact that the husband is unable to supply the condiments.

Where this insolvency is proved the court must either pronounce dissolution of the marriage or authorise the wife to pronounce it herself. (The better view is that) three days respite must first be allowed. Only one jurist admits that dissolution may be pronounced without allowing any respite to the husband. Where, with the majority, a respite of three days is insisted upon, the wife is free to leave on the morning of the fourth day, unless the husband then gives her maintenance for this day. Where for two whole days the wife has not received her maintenance and the husband gives it only on the third day and then omits to do so on the fourth, the days of omission are added together and the woman is free on the fifth. Only a few authors maintain that three consecutive days' omission is necessary before the respite expires. All agree that during the respite enjoyed by the husband the wife may quit the conjugal domicile to get necessary provisions, provided she returns at night".⁷

Ibn Hajar remarks that "such dissolution is not allowed on the ground that the husband cannot pay for past maintenance or for a servant, and the matter must first be referred to, and the husband's inability to support his wife be proved before, a kathi or an arbitrator, who shall either himself dissolve the marriage or give her permission to do so".⁸

(b) Where the husband is present and could support his wife but refuses or fails to do so, no dissolution of marriage can be granted according to the dominant Shafii view, since the husband is not destitute and the wife is held to be able to obtain the maintenance due to her by reference to the courts.

Nawawi says "No such claim (that is for dissolution of the marriage) is admissible against a solvent husband who refuses the wife her prescribed maintenance."⁹

(c) Where the husband is present but all his property is at a distance, the dominant Shafii view is that the wife is entitled to a dissolution if the property is at a distance so great as to admit of prayer being abridged. (*masafat al-qasr*).¹⁰

⁷ Nawawi, *Minhaj-et-Talibin*, translated by L.W.C. Van Den Berg and E.C. Howard, London, 1914, p. 387-388.

⁸ Ibn Hajar, *Al-Tuhfa* Vol. VIII p. 335.

⁹ Nawawi *op. cit* p. 388.

¹⁰ The Arabic term is "masafat-al-qasr" and the distance is given as two marhalah or the distance that can normally be covered by a camel travelling a day and a night. The equivalent distance is given as 88½ kilometres or 48 miles.

Nawawi says:— "A claim for dissolution is admissible if the husband is present and solvent but his property is elsewhere, at a distance so great as to admit of prayer being abridged. If this is not the case the woman cannot obtain the dissolution of the marriage; but the court should then order the husband to send for the necessary money."¹¹

Ibn Hajar states "If the husband be present and his property at a distance and he does not support her on credit, then if his property is more than forty-eight miles distance she has a right to the dissolution of the marriage on the grounds of hardship (*darar*)".¹²

- (d) Where the husband is absent but of known whereabouts and able to be contacted, the dominant Shafii view is that dissolution of the marriage is allowed, after three days' respite, if he can be shown to be destitute, but no dissolution is permitted if he is in a position to maintain her.

Ibn Hajar states: "And the more correct view is that no dissolution of marriage is allowable where a husband who is well-off or of medium means fails to maintain his wife whether he be present or absent, since she is in a position to obtain her maintenance from him even if he is elsewhere. *Al-Mughni* says that this is because she may obtain her rights by means of the courts or by helping herself where this is possible; — while *Al-Nibaya* says that this is because the quality of destitution which alone justifies dissolution of marriage is lacking and because she could obtain her rights".¹³

- (e) Where the husband is missing or cannot be contacted, Ibn Hajar again states that no dissolution of marriage can be obtained. He says "There can be no dissolution of marriage where the husband has means even if no news can be obtained of him and no maintenance procured from his property. This is stated (by Imam Shafii) in *Al-Umm* and has been accepted by the school. True our Sheikh (Nawawi) in his *Minhaj-et-Talibin* asserts that dissolution of marriage is allowable in the case of one of whom no news can be obtained and who has no property available for maintenance but this assertion is contrary to the tradition of the school".¹⁴

The minority view in the Shafii School is thus stated in the *Bughyat-al-Mustarshidin* "Many have preferred the view and Ibn Ujayl, Ibn Kubunn, Ibn al-Subbagh and Al-Ruyani have given fatwas accordingly, that where a wife can obtain no maintenance from her husband for a period of three

¹¹ Nawawi *op. cit* p. 388.

¹² Ibn Hajar *op. cit* p. 337.

¹³ *Ibid* p. 341. The references are to Muhammad Sharbaini Al Khatib's *Mughni al-Muhtaj* and Shamsuddin Ar-Ramli's *Nihayatul Muhtaj*.

¹⁴ *Ibid* p. 337.

days she is entitled to dissolution of the marriage, whether her husband be present or absent. Ibn Al-Salah has supported this view which is regarded as the stronger view by Ibn Ziyad, Al-Tanbidawi, Al-Muzjid, the authors of Al-Muhadhdhab and Al Kafi and others, where a husband goes away and no maintenance can be obtained from him, even for example by means of a complaint. Ibn Qasim moreover said that such circumstances represent a stronger case for dissolution of marriage than of one whose property only is absent, yet the latter is regarded as justifying dissolution of marriage'.¹⁵

The Hanafi jurists refuse dissolution of marriage for failure of maintenance in all cases, that is, whether the failure is wilful or involuntary, whether the husband is present or absent and whether his whereabouts are known or unknown. But many later Hanafi jurists have said that *fatwas* may be given according to the Maliki school, in case of hardship, in such circumstances. In India and Pakistan, the Disolution of Muslim Marriages Act, 1939, has given a statutory right to apply for divorce in such cases.¹⁶

The doctrine of the Hanbali school does not provide for the setting of a term or the according of a delay in dissolving the marriage by *fasakh* once the inability of the husband to provide maintenance has been proved. Should the husband have the means and still fail to provide maintenance, the wife may seize his assets if she is able to do so, or apply to the authorities who will order the husband to provide for maintenance, force him to do so (if necessary by putting him into prison) and even seize his property and sell it. Should this be not sufficient or impossible the wife may claim dissolution of the marriage by *fasakh*.¹⁷

Provision for the making of a decree of *fasakh* is made in the various Administration of Muslim Law Enactments in the States of Malaysia. In Kedah section 123 of the Enactment provides as follows—

- (1) Any Kathi having jurisdiction in this behalf may receive from a married woman who has been resident for not less than four months in the area for which he is appointed an application for the divorce known in Muslim law as *fasah*—
- (2) Upon receiving such application the Kathi shall immediately cause notice thereof to be served upon the husband of the woman.
- (3) If it is made to appear to the Kathi by sworn statement that the husband is not within the State and that in the circumstances of the case it is impossible to serve the notice on him the Kathi may order the notice to be served upon the husband's nearest relative or if no relative is known to be in the State may order the notice to be

¹⁵ Ba'Alawi Al Hadrami, *Bughyat al-Mustarshidin* p. 287.

¹⁶ Fyzee op. cit. p. 171f.

¹⁷ See Ibn Qudama's *Mughni* and the *Shar-al-Kabir*

advertised in a newspaper circulating in the State or may dispense with such notice.

- (4) If at the hearing of the application the husband of the woman does not appear the service of the notice shall unless the Kathi has dispensed with the notice under this section be proved by sworn statement.
- (5) The Kathi shall then record in a book to be kept for that purpose the sworn statement of the woman and of at least two witnesses and may then if satisfied that the provisions of Muslim law have been complied with, make such order or decree as is lawful'.¹⁸

In Kelantan section 71 of the Enactment provides —

- (1) A married woman may apply by suit in the court of a Kadhi for a decree of dissolution of marriage or "fasakh" in accordance with Hukum Shara'.
- (2) In any such case the Court shall if possible serve the husband, or if satisfied an oath or an affirmation that the husband is not in the State or cannot be found shall serve notice of the proceedings on the nearest male relative of the husband resident in the State or if no such person be known, shall cause notice to be posted on the husband's last known place of residence in the State.
- (3) No decree shall be pronounced save in accordance with the provisions of Hukum Shara' and in pursuance of the evidence of the married woman and at least two witnesses given an oath or affirmation.
- (4) Upon pronouncing a decree of dissolution of marriage the Kadhi shall register the same as a divorce and shall issue a certificate thereof in the prescribed form to the wife.¹⁹

It is proposed in this note to examine some decisions of the Kathi's courts in Malaysia in the light of the above summary of the law.²⁰ In the Kedah case of *Cik Pab v. Abdul Aziz bin Ahmad*²¹ the plaintiff, a school teacher claimed fasakh on the ground that her husband, the defendant, had not given her any maintenance and that he was insolvent. At the trial she called three witnesses, the first of whom spoke of an assault by the

¹⁸ Kedah Administration of Muslim Law Enactment, 1962, S. 123.

¹⁹ Kelantan Shariyah Courts and Muslim Matrimonial Causes Enactment, 1966, S. 71.

²⁰ I am indebted to Mr. Ishak bin Ahmad, B.A. (Universiti Kebangsaan, Malaysia) and to Miss Nik Ramlah binte Nik Mahmood a student of the Faculty of Law, University of Malaya, for their research, which has enabled me to have copies of the judgments referred to.

²¹ Kedah Kes Maj 23/72. Appendix A.

husband which caused the wife to leave the house in tears, but did not say anything about the condition of the defendant-husband. The two other witnesses however said that the defendant had no employment and one of them said he only looked after children in the house. The defendant in his statement said he was working as a lorry driver. He said that it was the plaintiff who left the house and although she tried to persuade her to come back, she refused to do so. He called two witnesses but the Kathi found that the witnesses could not say positively that the defendant was not insolvent and had given maintenance to the plaintiff. The Kathi then obtained the consent of the defendant to ask the plaintiff to swear an oath (*yaminul istikzar*). The wife then swore that the husband was insolvent and had not given her a house and maintenance and she also swore that she had been faithful (*taat tamkin*) to the husband. The Kathi found that on the evidence and on the oath of the plaintiff, he was satisfied that the defendant was destitute and that the plaintiff had remained faithful and had not received any maintenance from her husband. He then gave a respite (*mublah*) of three days and adjourned the case for nine days. After the adjournment the plaintiff again made a statement that she had not received any maintenance from her husband during the period of three days and that she had not left her father's house where she stayed, except to go to work. She called the same two witnesses who had supported her claim that the defendant was insolvent and they stated that she had not left her father's house and that to their knowledge the defendant had not given her any maintenance. The defendant in his reply said that he had gone over to the house of the plaintiff's father but found no one at home. He said he had intended to ask the plaintiff to come back to him. The defendant called one witness who said he knew nothing about what happened during the period of respite. The Kathi again obtained the consent of the defendant to ask the plaintiff to take an oath. The plaintiff did so and the Kathi then found that on the evidence and on the oath of the plaintiff, he was satisfied that the defendant was indigent and that he had not given any maintenance to the plaintiff. He then allowed the plaintiff to pronounce a fasakh and decreed a fasakh divorce the iddah to begin immediately and the divorce to be registered within fourteen days.

The husband appealed to the committee of appeal but the appeal was dismissed unanimously.²²

In the Kelantan case of *Atikah binte Abdul Hamid v. Razali bin Haji Ahmad*,²³ the plaintiff in her statement stated that she and her husband originally came from Cambodia and that she was married to him at Phnom Pheng, Cambodia. She lived with her husband for seven years from 1966

²² Kedah Kes Rayuan Mal No. 1 of 1972, Appendix B

²³ Kelantan Kes Fasakh No. 2 of 1978, Appendix C.

to 1972 in Cambodia but in 1972 when the communists occupied Cambodia they took away the plaintiff's husband. Since then she had no contact with her husband and in 1975 she came to Kelantan. Her husband had no property when he was taken away by the Communists and she had not taken any of his property or obtained maintenance from him. She first made her complaint to the Kathi on the 12th March 1978 and it seemed she was asked to stay at her house and to be faithful to the husband. The case was called again on the 5th April 1978 and she then stated that she had complied with the order of the Kathi. She called two witnesses who knew the parties in Cambodia. They confirmed her story that her husband had been taken away by the Communists, that he had no property and had sent no maintenance to her and that she had remained faithful to him. The Kathi was satisfied after hearing the plaintiff and her two witnesses that the defendant was indigent (*mu'sir*) and he asked the plaintiff to take an oath (*sumpab istizabar*). After she had taken the oath the Kathi ruled that fasakh can be granted according to the Islamic law. The case was adjourned to the 18th April 1978 when the Kathi ruled that as a period of respite had been given, fasakh should be granted and he ordered a certificate of fasakh to issue.

It is interesting to note that neither in Kedah nor in Kelantan did the Kathis follow strictly the procedure set out in the respective Administration of Muslim law enactments. The procedure might be said to be a modified form of the procedure laid down in Islamic law or a modified form of the procedure laid down in the Enactment. The plaintiff makes a declaration on affirmation, calls the required number of witnesses who give their evidence on oath. Then the defendant is asked to make a statement of defence on affirmation and he then calls his witnesses who give their evidence on oath. The records do not show that there was any examination, cross-examination or re-examination. We also find that the Kathis obtained the consent of the defendant to ask the plaintiff to make an oath and in the Kedah case, the plaintiff was asked to make an additional oath, after the period of respite.

In Kedah, the period of respite is stated to be three days, and the case was in fact adjourned for 3 days. In Kelantan the period of respite was not specified but the case was adjourned for 13 days. It may be noted that in the Kedah case the Kathi allowed the wife to pronounce the fasakh divorce and he declared that the marriage was dissolved by fasakh. In Kelantan on the other hand the fasakh is said to take effect according to the Muslim Law.

In Saudi Arabia there is a report of the case of *Munira v. Muhammad* (High Court of Mecca Case No. 2 Vol. 1 (1337AH-1957AD)).²⁴ In that

²⁴ See Ibrahim Ahmad Ali and Abdul Wahab Abu Sulaiman "Recent Judicial

case the husband, after failing to support his wife for a considerable time, was enjoined by the court to pay arrears and to continue maintaining her. But the husband failed to comply with the order and returned to his native country leaving no property in Saudi Arabia. The case was brought before the court which, on the strength of the adequate evidence, granted the wife the right to dissolve her marriage contract on the ground of her husband's failure to maintain her. The husband's objection raised after the dissolution of the marriage was declared by the Mufti not actionable. It may be noted in this case the court delegated its right to dissolve the marital contract to the wife.

Ahmad Ibrahim

"Developments in Saudi Arabia", *Journal of Islamic and Comparative Law, Nigeria*, Vol. 3 (1969), p. 11 at p. 15.

APPENDIX "A"

CIK PAH v ABDUL AZIZ BIN AHMAD

(Mahkamah Kadi Kubang Pasu (Shaikh Ismail bin Omar, Kadi Litar, Kedah Utara) October 22, 1972).
(Kedah Kes Mal No. 23 of 1972).

Undang-Undang Keluarga – Penceraian – Fasakh – Alasan bahawa suami tidak mampu memberi nafkah – Acara – Enakmen Pentadbiran Undang-Undang Islam, Kedah, 1962, S. 123.

Perkara: Tuntut Faskh Nikah kerana Papa Jawapan.

Pada 1hb. August 1972 kedua pihak hadir, Tuntutan membawa tiga orang saksi manakala jawapan tidak membawa saksi dan baru di sampina* dua saksi.

Di Periksa halusi Tuntutan:

Setelah memberi ikrar katanya saya Cik Pah @ Olah Bt. Ahmad, tinggal di Tanjung Pauh, bekerja sebagai guru di Sekolah Kebangsaan Teluk Malik. Sebenarnya suami saya Abdul Aziz B. Ahmad tidak beri sara nafkah hari dan saya tuntutan fasakh nikah kerana tiada apa-apa hartanya dan papa.

Di Periksa Saksi Pertama Tuntutan:

Setelah bersumpah katanya: Saya Ahmad B. Rejab duduk di Teluk Malik, nombor kad pengenalan 3214494. Tuntutan menangis dan lari kerumah saya mengatakan yang jawapan memukulnya.

Di Periksa Saksi Kedua Tuntutan:

Setelah bersumpah katanya: Saya Taib B. Nik Ali nombor kad pengenalan 2389844, duduk di Tanjung Pauh, bekerja bendang. Setahu saya bahawa Jawapan ini tidak mempunyai apa-apa pekerjaan.

Di Periksa Saksi Ketiga Tuntutan:

Setelah bersumpah katanya: Saya Arifin B. Hj. Ahmad nombor kad pengenalan 3582074, duduk di Tanjung Pauh bahawa Jawapan ini sejak dari tahun 1971 tidak mempunyai sebarang pekerjaan dan hanya menga-

*Sampina: Mahkamah mengeluarkan summons meminta saksi itu hadir ke Mahkamah untuk menjadi saksi kepada pihak tertentu.

suh¹ anak di rumah dan tidak punya apa-apa harta.

Di Periksa Jawapan:

Setelah memberi ikrar katanya: Saya Abdul Aziz B. Ahmad duduk di Guar Cempedak mengaku bahawa sebenarnya saya bekerja sebagai derebar lori tanah merah dan daripada gaji ini saya memberi sara nafkah. Pada 19hb. Mei 1972, Tuntutan lari daripada rumah. Pada 22hb. Mei 1975 Tuan Imam Haji Man beritahu yang Tuntutan ada dirumahnya sudah dua malam. Saya pergi mengajak isteri saya balik tetapi ia enggan dan pada 23hb. Mei 1972 saya bawa dua orang anak saya balik ke rumah ibu bapa saya di Guar Cempedak dan bekerja seperti biasa.

Di Periksa Saksi Pertama Jawapan:

Setelah bersumpah katanya: Saya Said Bin Din, duduk di Alor Teja, Alor Star, saya duduk menumpang di rumah Jawapan buat bendang kepunyaan nenek Jawapan dan sewa bendang itu diambil oleh Jawapan.

Di Periksa Saksi Kedua Jawapan (Sampina):

Setelah bersumpah katanya: Saya Mahmud B. Daif duduk di Kampung Alor Rambai, Bukit Tinggi, bahawa pada lapan tahun dahulu Jawapan bekerja sebagai askar polis di Kuala Lumpur, kemudian bekerja membawa lori sentab tanah merah selama dua tahun, saya dengar Jawapan memiliki sebuah kereta jenis Morris Miner bilangan 773 dan sekarang Jawapan bekerja tanah merah di Guar Cempedak.

Oleh sebab Jawapan tidak ada saksi yang tepat untuk menunjukkan yang ia tidak papa dan memberi sara nafkah dan Tuntutan tidak taat maka Mahkamah meminta persetujuan Jawapan supaya Tuntutan bersumpah dan Jawapan bersetuju.²

Selepas Mahkamah ambil halusi kedua dua pihak dan saksi mereka serta sumpah Tuntutan sebagai (*Yaminnul Istikzar*) didapati sabitlah Jawapan ini orang yang papa harta dan didapati sebenarnya Tuntutan ini di dalam taat dan tidak pernah mendapat apa-apa sara nafkah sejak dulu hingga

¹ Mengasuh: Menjaga

² Lafaz Sumpah Tuntutan: I

Wallah al Azim (3 kali) aku bersumpah dengan nama Allah Tuhan Yang Maha Besar dengan sebenar-benarnya adalah suami aku Abdul Aziz B. Ahmad sekarang ini seorang yang papa usaha dan tiada dapat memberi nafkah hari-hari kepada aku, Demi Allah suami aku tidak dapat menyediakan rumahtangga untuk kediaman aku dengannya seperti suami isteri. Demi Allah aku sekarang ini di dalam taat tamkin kepadanya dan aku tetap tempat kediaman, Demi Allah jika aku bohong pada sumpah ini nescaya dibala Allah dan laknatnya turun menimpa di atas aku tiada selamat aku selamanya.

sekarang. Oleh itu diberi Muhlah selama tiga hari dan disambung bicara pada 22hb, Oktober 1972.

Tanda Tangan,

.....
Syikh Ismail B. Omar
Kadi Litar Kedua Utara,
18.10.1972

Sambungan lepas Muhab³

Di Periksa Tuntutan:

Saya dalam masa muhlah tiga hari duduk di rumah ibu bapa saya di Tanjung Pauh. Dalam masa Muhlah Jawapan tidak pernah hadir beri apa-apa sara nafkah dan tidak pernah mengajak berpindah ke rumah yang berasingan yang disediakan oleh Jawapan. Dalam masa Muhlah Jawapan masih tidak punya apa-apa harta dan masih dalam papa. Saya tidak keluar daripada rumah hanya pergi mengajar saja.

Di Periksa Saksi Pertama Tuntutan:

Setelah bersumpah katanya: Saya Arifin B. Haji Ahmad duduk di Tanjung Pauh, dalam masa Muhlah saya tidak lihat Jawapan datang beri apa-apa nafkah manakala Tuntutan tetap di rumahnya. Jawapan ini tidak mempunyai harta walau di mana sekali pun dan saya tidak pernah lihat Jawapan hadir ajak tuntutan pindah ke lain tempat.

Di Periksa Saksi Kedua Tuntutan:

Setelah bersumpah katanya: Saya Taib B. Ali, duduk di Tanjung Pauh, Dalam masa Muhlah saya tak lihat Jawapan datang beri apa-apa sara nafkah dan Tuntutan tetap di rumah ibubapanya. Jawapan tidak ada harta walau di mana pun dan saya tidak pernah tenguk Jawapan hadir pindah ke tempat lain dalam masa Muhlah.

Di Periksa Jawapan:

Pada 21hb. Oktober 1972 saya datang ke rumah Ahmad B. Salleh iaitu bapa Tuntutan, saya dapati Tuntutan tidak ada di rumah dan siapa pun tidak ada. Tujuan saya datang itu ialah untuk mengajak Tuntutan balik.

³Muhlah: Tangguh

JMCL

Di Periksa Saksi Jawapan:

Setelah bersumpah katanya: Saya Ismail B. Ahmad duduk di Titi Gajah, sebenarnya dalam masa Muhlah itu saya tidak tahu apa-apa yang berlaku.

Oleh kerana Jawapan tidak mempunyai saksi yang tepat maka Mahkamah meminta persetujuan Jawapan supaya Tuntutan bersumpah tambah⁴ dan Jawapan bersetuju.

Hukuman dan Alasan:

Setelah dihalusi di atas perkataan kedua pihak didapati Jawapan tidak ada cukup saksi-saksinya. Kemudian Tuntutan telah bersumpah tambah di atas perkataan-perkataan dan saksi-saksinya itu didapati sebenarnya Tuntutan di dalam taat dan Jawapan sebenarnya seorang yang papa tiada dapat menunaikan sara nafkah kepada Tuntutan, kemudian pada 22hb. Oktober 1972 kedua-dua pihak hadir, Jawapan tidak ada saksi baginya oleh itu dibenarkan Tuntutan dengan bersumpah maka berpegang kepada perkataan perkataan Tuntutan dan saksi saksinya juga sumpahnya maka aku hukum sabitlah pada syarak Tuntutan tiada mendapat apa-apa sara nafkah dan tempat kediaman daripada Jawapan dan sabitlah Jawapan ini seorang yang papa pada hal Tuntutan di dalam taat tamkin dan mustahak sara nafkah daripadanya. Oleh yang demikian aku benarlah Tuntutan fasakh nikahnya daripada Jawapan teruzur sara nafkah hari maka Tuntutan pun lafaz Fasakh.

Telah aku fasakhkan nikah suami aku Aziz B. Ahmad daripada aku.

Dengan itu aku hukum terpasakhlah nikah Che Pah @ Olah Bt. Ahmad, dan mula beredah daripada hari ini dan daftar cerai dalam tempuh empat belas hari.

⁴ Lafaz Sumpah Tambahan Tuntutan:

Wallah al Azim, Wabillahi, Watallahi, Demi Allah aku bersumpah dengan nama Allah Tuhan Yang Maha Besar dengan sebenar-benarnya adalah di dalam masa Muhlah tempuhan selama tiga hari hingga hari ini sebenarnya aku tinggal di rumah ibu-bapa aku dan aku tidak berpindah keluar ke mana-mana dan aku di dalam taat tamkin kepada suami aku, Demi Allah di dalam Muhlah itu sebenarnya suami aku tidak pernah beri apa-apa sara nafkah kepada aku, pada hal aku di dalam taat dan mustahak sara nafkah daripadanya. Demi Allah suami aku Aziz B. Ahmad benar ia seorang papa tidak mempunyai apa-apa harta yang boleh diambil untuk dijadikan nafkah aku, Demi Allah pada 21hb. Oktober 1972 tidak sebenarnya sama sekali suami aku datang ambil akan daku, Demi Allah jika aku bohong pada sumpah aku ini nescaya dibala Allah dan laknatnya turun menimpa di atas aku tiada selamat aku selama-lamanya.

APPENDIX B

ABDUL AZIZ BIN AHMAD V. CIK PAH

(Mahkamah Rayuan Syariah, Alor Star (Datuk Haji Wan Ibrahim bin Wan Soloh, Tuan Haji Abdul Rahman bin Mohamed Noor Al Haj and Datuk Sheikh Abdul Majid bin Mohamed Nor Al-Haj) October 10, 1972).
(Kedah Kes Rayuan Mal No. 1 of 1972).

Undang-Undang Keluarga - Pencernaan - Fasakh - Rayuan - Enakmen Pentadbiran Undang-Undang Islam Kedah, 1962, S. 123.

Perkara:

Pohon ulang bicara di atas kes Mal nombor 23/72. Mahkamah Kadi Daerah Kubang Pasu, Jitra dalam fasal tuntutan fasakh nikah kerana papa pada 22.10.1972.

Hukuman:

Ahli Jawatankuasa ulangbicara dengan sebulat suara mengesahkan keputusan Mahkamah Kadi setelah diambil halusi di atas buku catitan Tuntutan ulangbicara maka Jawatankuasa ini dapati bahawa hukuman yang dijatuhkan oleh Kadi Litar Kedah Utara iaitu terpasakh nikah Cik Pah @ Olah Binti Ahmad (Jawapan) daripada suaminya Aziz bin Ahmad di atas alasan-alasan dan hujah-hujah itu adalah berbetulan.

APPENDIX "C"

ATIKAH BINTE ABDUL HAMID v. RAZALI BIN HAJI AHMAD

(Mahkamah Kadi, Kota Bharu (Haji Yaacob bin Haji Taib, Kadi Jajahan)
April 18, 1978).

(Kelantan Kes Fasakh No. 2 of 1978).

Undang-Undang Keluarga – Penceraian – Fasakh – Alasan bahawa suami tidak mampu memberi nafkah – Acara – Enakmen Mahkamah Syariah dan Hal-ehwal Perkahwinan Islam, Kelantan, S. 71.

Mendakwa hadir serta dua orang saksinya, (1) Ali bin Shaidi dan (2) Zahari bin Haji Yaacob. Kesemuanya asal dari Kemboja dan sekarang duduk di Sungai Budor, mereka pelarian. Dan Mendakwa menyatakan Razali bin Haji Ahmad Kenadakwa tersebut suami saya dengan sah yang bernikah dalam tahun 1965, kemudian dalam tahun 1972, suami saya tersebut telah diambil oleh Kominis dan pada tahun 1975, saya dan saksi saya lari masuk Siam duduk di sana 4 bulan, kemudian masuk Malaysia di Pengkalan Kubor, Kelantan, kemudian dibawa ke pengkalan duduk selama sebulan kemudian saya dijamin boleh keluar, saya pergi duduk di Sungai Budor hingga sekarang ini.

168, t.t. Hj. Yaacob bin Hj. Taib
12.3.78

Kerani,

Sila keluar Notis ke rumah Mendakwa dan semua Mahkamah Kadi Kelantan.

t.t. Hj. Yaacob bin Hj. Taib
12.3.78

Pada hari ini 5.4.78 Mendakwa hadir Cik Asiah dari Biro Bantuan Guaman Kelantan, hadir mewakili Mendakwa, Kenadakwa tidak hadir, Notis ke rumah Mendakwa dan semua Mahkamah telah disempurnakan oleh itu didengar dakwaan Mendakwa.

t.t.: Hj. Yaacob bin Haji Taib
5.4.78

Kenyataan Mendakwa:

Setelah ikrar Mendakwa menyatakan Cik Arikah binti Ab. Hamid, Kampung Sungai Budor, Kota Bharu, umur 31 tahun bekerja berjual kain, dan saya dakwa suami saya nama Razali bin Haji Ahmad Kenadakwa yang tersebut dan pohon di Fasakhkan Nikah saya dengannya. Kenadakwa suami saya yang berkahwin dengan dia dalam tahun 1965, Di Phnom Pheng, Kemboja, Tok Imam Haji Osman, dan perkahwinan ini disahkan oleh Mahkamah ini bagaimana surat diserahkan kepada Mahkamah. Setelah berkahwin dengan Kenadakwa, kami duduk bersama di Kampung Kampur, di Kemboja, dekat Phnom Pen selama lebih kurang 7 tahun, dari tahun 1965 hingga 1972 dan pada tahun 1972, Kominis ambil Kenadakwa dari semenjak itu tidak pernah berjumpa dengan saya. Saya ikhtiar cari juga tetapi tidak berjumpa. Saya mari ke Malaysia ini tahun 1975, fasal Komunis, dan kalau hendak dudukpun tidak selamat juga. Di masa Kenadakwa diambil Komunis, harta kepunyaannya tidak ada dan saya mari ke Malaysia ini pun tidak membawa apa-apa harta daripada Kenadakwa, di masa saya di Malaysia ini pun Kenadakwa tidak hantar nafkah saya. Mahkamah telah perintah saya supaya duduk dengan taat kepada Kenadakwa selama 21 hari dan saya duduk dengan taat kepada Kenadakwa di rumah saya di Sungai Budor, mengikut bagaimana perintah Mahkamah dan tidak keluar rumah melainkan mencari makan, dan saya keluar mencari makan itu tidak keluar dengan lelaki lain, dalam masa tersebut Kenadakwa tidak datang ke rumah saya, oleh itu saya pohon dijalankan Fasakh Nikah saya dari Kenadakwa.

t.t. : Hj. Yaacob bin Hj. Taib
5.4.78

Saksi Mendakwa (1):

Setelah bersumpah saksi ini menyatakan iaitu Ali bin Shaidi duduk di Sungai Keladi, Kota Bharu, umur 43 tahun, bekerja berniaga kain dan saya naik saksi bahawa saya kenal Mendakwa ini dari Negeri Kemboja lagi dan suami Mendakwa ini pun saya kenal nama Razali dan di antara keduanya ini suami isteri yang berkahwin dalam tahun 1965 di Phnom Pheng dikahwini oleh Imam Haji Osman dan telah di Fasakhkan oleh Mahkamah ini. Selepas berkahwin kedua duduk sebagai suami isteri di Kampung Kampur, kemudian Kenadakwa suaminya itu Komunis bawa lari dalam tahun 1972 dan tidak balik mendakwa bersama-sama saya, ke Malaysia ini tahun 1975 fasal Kominis juga. Kenadakwa tidak hantar nafkah kepada Mendakwa, hidup atau mati tidak tahu. Rumah saya dengan rumah Mendakwa dari sini ke Pejabat Biro Bantuan Guaman. Di masa Mahkamah perintah saya hadir di Mahkamah, Mendakwa duduk dengan taat kepada Kenadakwa, bagai-

mana perintah Mahkamah melainkan keluar mencari makan, dan tidak pernah berjalan dengan lelaki lain.

t.t. Hj. Yaacob bin Hj. Taib
5.4.78

Setelah disoal oleh Mahkamah saksi ini menegaskan bahawa Mendakwa ini betul-betul taat sebagai isteri kepada Kenadakwa.

t.t. Hj. Yaacob bin Hj. Taib
5.4.78

Saksi (2) pihak Mendakwa.

Setelah bersumpah saksi ini menyatakan saya nama Zahari bin Haji Yaacob duduk di Jalan Bayam, umur 40 tahun, bekerja berniaga kain dan saya naik saksi bahawa Mendakwa ini saya kenal dari Kampung Kemboja lagi dan suaminya juga saya kenal bernama Razali bin Haji Ahmad dan kedua-dua ini bersuami isteri, bernikah dalam tahun 1965 dinikah oleh ayah saya, di Phnom Phen. Kedua-dua selepas kahwin duduk Kampung Kapor hingga tahun 1972, kemudian Komunis tangkap suaminya, tidak balik-balik dan tidak hantar nafkah kepada Mendakwa duduk di Sungai Budor. Mendakwa mari ke Malaysia pada bulan 6 tahun 1975 bersama-sama saya kerana lari dari Kominis. Rumah saya dengan rumahnya jauh juga dan hari-hari saya pergi ambil tahu Mendakwa. Mendakwa duduk dengan taat kepada suaminya tidak keluar rumah melainkan mencari makan berjual kain, hari-hari keluar dan malam balik dan tidak ada keluar dengan lelaki lain.

t.t. Hj. Yaacob bin Hj. Taib
5.4.78

Saksi itu menjawab soalan Mahkamah, harta kepunyaan Kenadakwa tidak ada bersama-sama Mendakwa hanya bersama-samanya anaknya jua.

Cik Aziah menyatakan, dari kenyataan Mendakwa dan saksinya bahawa Kenadakwa ghaib tidak tahu ke mana dan harta bapanya tidak ada maka sangatlah adil Mahkamah menjalankan Fasakh yang Menuntut ini.

t.t. Hj. Yaacob bin Hj. Taib
5.4.78

Keputusan pada 5.4.78

Mahkamah telah periksa Mendakwa dan saksinya didapati Mendakwa taat dan Kenadakwa termasuk dalam golongan *Mu'sir* maka Mahkamah hukum kenalah Mendakwa bersumpah istizahar. Apabila Mendakwa bersumpah demikian maka sabitlah tuntutan Mendakwa dan boleh dijalankan Fasakh mengikut hukum Syara'.

t.t. Hj. Yaacob bin Hj. Taib
5.4.78

Pada hari ini 18.4.78 Mendakwa hadir, Kendakwa tidak hadir maka dijalankan tempoh mengikut keputusan yang tersebut di atas dan dijalankan Fasakh mengikut hukum Syara'.

t.t. Hj. Yaacob bin Hj. Taib
18.4.78

Kerani,

Sila keluar Surat Cerai Fasakh.

t.t. Hj. Yaacob bin Haji Taib

CASE NOTES

THE STRANGE FATE OF A FOREIGN TORT IN A MALAYSIAN COURT

CHAN KWON FONG & ANOR. v. CHAN WAH¹

An interesting appeal was heard in the Federal Court last year, concerning a tort committed in Indonesia. The plaintiff (the respondent on appeal) was employed by the defendants as a lorry driver, and worked in their logging operations in Samarinda, Kalimantan. The facts are not as clear as they might be, but it appears that in the course of loading his lorry a log slipped and injured the plaintiff, fracturing his spine, destroying one of his kidneys, and incapacitating him from work for about fifteen months. He sued his employers, and in the trial court was successful, being awarded \$19,000 general damages and \$8,000 special damages. The defendants appealed; the appeal was heard by Ali Ag. C.J. (Malaya), Wan Suleiman F.J. and Raja Azlan Shah F.J.; and the judgment of the court was delivered by Raja Azlan Shah F.J.

In the course of his judgment, Raja Azlan Shah F.J. found it "necessary . . . to ascertain the rule of private international law which defines the conditions of civil liability in (Malaysia) for an act done abroad." He continued:

As the law stands it must be accepted that an action of tort will lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed.

The learned judge then briefly commented on *The Halley, Phillips v. Eyre*, *Machado v. Fontes* and, naturally enough, *Boys v. Chaplin*, with particular reference to Lord Hodson's judgment therein, quoting an extract in which that judge observed that:

If the decision in *Machado v. Fontes* could be supported on the ground that actionability is not essential the respondent must succeed but, in my opinion, that decision is wrong and should be overruled.

In consequence of this rejection of *Machado v. Fontes*, the learned judge then offered a significant variation of his exposition of the law in Malaysia, by observing:

¹[1977] 1 M.L.J. 232.