



ECLI:NL:GHDHA:2017:3297

Authority	Court of Appeal The Hague
Date of ruling	21-11-2017
Date of publication	22-11-2017
Case number	200.189.809/01
Judicial areas	Personal and family law
Specifics	Appeal
Indication as to content	

Religious divorce. No civil marriage. Application HR 22 January 1982, NJ 489. The husband's refusal to cooperate towards a divorce in accordance with Sunni religious law was judged to be unlawful. Sharia Court no independent judge appointed by law (section 112 Constitution). Husband sentenced to cooperation in the dissolution of the religious marriage under penalty of a penalty payment.

Relevant sites	Rechtspraak.nl EB 2018/21 RFR 2018/32 PFR-Updates.nl 2017-0329
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Ruling

COURT OF APPEAL THE HAGUE

Department Civil Law

Case number: 200.189.809/01

Case and docket number court: C/10/482958/HA ZA 15-873

ruling of 21 November 2017

concerning

[the wife]
residing at [place of
residence], appellant,



hereinafter: the wife,

lawyer: mr. V.K.S. Budhu Lall,

versus

[the husband]

residing at [place of residence],

defendant,

hereinafter: the husband

lawyer: mr. drs. H. Durdu.

The lawsuit

By the writ served on 5 April 2016 the woman appealed against the ruling of 6 January 2016 of the Court of Appeal Rotterdam found between parties.

For the course of the first instance proceedings the Court refers to that which the Court stated concerning this in the ruling contested.

The wife has by document formulated one complaint against the contested ruling.

The husband concluded by document to reject the complaint.

Evaluation of the Appeal

General introduction

1. Insofar no complaint has been submitted against the facts the Court accepts the facts as they have been determined in the ruling contested.

The ruling contested

2. The court rejected the wife's claims under compensation of the legal costs.

The dispute

3. The dispute between parties concerns the religious marriage of parties, concluded [in] 2002 in Rotterdam. Parties never concluded a civil marriage.



4. The wife claims, in brief, that the ruling contested be annulled and that the court, giving judgment again,

- will order the husband to cooperate towards the dissolution of the religious marriage of parties within two weeks of service of the ruling, more specifically by sending to the wife by registered mail a letter signed by him reading:

'The undersigned [the husband] residing at [address] states to want to divorce [the wife] and states to pronounce herewith the talaq, talaq, talaq.'

at least to perform such an act as is required in accordance with Sunni religious law in order to dissolve the religious marriage between parties;

- to rule that the husband pay a penalty payment of EUR 500, at least a penalty payment to be determined as justice may require, for each day that he fails to comply with the aforementioned ruling.

Legal context

5. A refusal by the husband to do that which is required to effect a religious divorce can be unlawful towards the wife, because this can be in conflict with the diligence that he should observe in the social intercourse towards the person of his divorced wife. Whether this is a case of unlawfulness, depends on the circumstances of the case, including the extent to which the wife, should such a divorce fail to be effected after the dissolution of the civil marriage, is restricted in her further life prospects, the nature and the weight of the objections that exist on the husband's side against this cooperation and the costs associated with this cooperation, this also in relation to the financial position of parties and the possible willingness of the wife to bear these costs wholly or in part. Refer to January 1982, NJ 1982/489



Complaint of the wife

6. In brief, the wife's complaint reads that the court wrongly disregarded her invocation of the aforementioned ruling by the Supreme Court from 1982. The Court has failed to recognise that the wife by refusal of the husband to cooperate towards the dissolution of her religious marriage by Talaq or Khula was adversely affected in her interests as protected by the Dutch legal order.

7. According to the wife the Court has unjustly deemed applicable the aforementioned ruling to civil marriages exclusively, in addition to a religious marriage. In this case similar circumstances apply as in the case that resulted to the ruling of the Supreme Court in 1982. Whilst this case concerned a civil marriage in addition to a religious marriage - according to the wife, in accordance with the Court's understanding of the complaint, a marriage concluded in Islamic fashion in Pakistan is considered to be legally binding in accordance with Civil Law in The Netherlands .

8. Furthermore the wife stated to have a legal interest in her claims for two reasons.

Firstly she cannot enter into a new relationship because in her religious community she is considered to be married to the husband. This is inconsistent with Article 8 (right to private life) and Article 12 (right to remarry) European Convention on Human Rights. The Court has failed to recognise that within the cultural circle in which the wife lives it is not permitted to conduct a civil marriage with a new relationship as long as the religious marriage with the previous relationship has not been dissolved.

Secondly she cannot travel to an Islamic country with the children on her own, because the children (also) are under the authority of the husband according to religious law, different from Dutch law because she has the exclusive custody of the children. Her interest in unrestricted travel lies in her parents' wish who are from Pakistani origin and are elderly.

9. According to the wife the alternative Court proceedings proposed by the Court, notably that she could submit the dissolution of the religious marriage to a Sharia Court is not an option. Such a Court does not exist in The Netherlands and going to a Sharia Court in England causes practical problems. Moreover she states, as the Court will understand, that this Court as an independent authority will not have sufficient consideration for the interests of the wife, in view of the inequality in Islamic marriage laws.

10. In Appeal the husband maintained his point of view that Court proceedings at the Sharia Court in England are open and he pointed out that if it is true that the religious marriage in Pakistan is considered to have civil legality, the wife has the option to request a divorce at the Court in Pakistan.

11. In essence the husband stated that the wife entered into the religious marriage of her own free will and that he does not commit a wrongful act by opposing the dissolution of this marriage if the wife wants to end this marriage unilaterally.

12. The Court finds as follows.

13. From the circumstance that the religious marriage concluded in The Netherlands did not precede a civil marriage concluded in The Netherlands it does not follow that maintaining the religious marriage against the will of one of the spouses cannot have factual consequences that could be considered a wrongful act from one of the spouses against the other spouse. Insofar as the wife is entitled to an appeal on Article 6:12 Civil Code (wrongful act) she is entitled to judgment by an independent Court established by law (within the meaning of Section 112 Constitution and Article 6 European Convention on Human Rights). A Sharia Court does not meet these criteria and insofar the complaint is founded.

14. This gives rise to the question whether this is a case of a wrongful act. If not or insufficiently motivated as contested it is a fact that the religious marriage within the cultural environment within which the wife lives is an actual restriction for her to enter into a new relationship or a new marriage, which holds for a civil as well as a religious marriage. This restriction predominantly consists of the



circumstance that the wife's social environment will continue to consider her to be married without a divorce in accordance with Islamic law. This in itself is a considerable restriction to the wife's further prospects in life after the end of the affective relationship with the husband. Whether or not there are legal impairments with respect to a civil marriage is not relevant in this case.

15. It has also been established that it has not or not sufficiently been contested that the wife runs the risk that - without a religious divorce - the husband will be able to claim rights concerning the children of parties that he is not entitled to in The Netherlands, when the wife travels, for example to visit her parents, moves in Islamic countries or even that she, upon entering into a new relationship or civil marriage will subsequently be exposed to legal measures on account of adultery or bigamy. In combination with what has been considered in legal consideration 14 the actual consequences of the continuation of the religious marriage against the wife's will constitute a violation of the rights and liberties of the wife.

16. In the first instance the husband argued that he hoped for a reconciliation. In Appeal he apparently dropped this defence but insofar this is still relevant in relation to the devolutive effect of the appeal the following holds. Between parties it is uncontested that parties stopped living together in July 2011, therefore over six years ago, and that the wife consistently, at least as of 2015 through a lawyer and through court proceedings has tried to persuade the husband to cooperate towards a religious divorce.

17. That the wife in the past made a voluntary choice to enter into this religious marriage does not alter her interest in terminating these restrictions after the relationship with the husband had been terminated; this interest is protected within the Dutch legal sphere.

18. The husband's hope for a reconciliation does not provide an argument of decisive importance. This is because the husband has not stated facts and circumstances on the basis of which it could be considered that in this case there is an interest to be respected in law to justify the continuation of the violation of the wife's rights and liberties. Insofar this is necessary it has been sufficiently established that the wife is consistent in her wish to continue the termination of the relationship, which entails that the relationship can be considered to be permanently disrupted. After the permanent disruption there is no justification for the continuation of the restrictions that the religious marriage de facto entails for the wife.

The aforementioned entails that under the circumstances of the case the husband is committing a wrongful act by refraining from doing that which is necessary to effect a religious divorce, because he in doing so he does not observe the diligence that he should observe in social intercourse with respect to his ex-partner. The claim to order the husband to cooperate towards the dissolution of the religious marriage of parties within two weeks after the service of the forthcoming ruling, more in particular by sending by registered mail to the wife a letter signed by him is therefore sustainable.

19. The husband deems the consequences of imposing a penalty payment disproportional, because the rising new debts will jeopardise his debt rescheduling provided by the Debt Rescheduling for Natural Persons Act. From this the Court concluded that the husband is not prepared to respond to the ruling of the Court in case the Court deems the wife's claim granted. This proves the wife's interest in case a penalty payment is granted. Therefore, the Court ignores the stated interest of the husband to entail no further debts, because he himself controls whether he either executes the Court's ruling or whether he forfeits a penalty payment.

Ruling

The court:

reverses the contested ruling of 6 January 2016 of the Court of Appeal Rotterdam issued between the parties;



rules that the man has to cooperate towards the dissolution of the religious marriage of parties within two weeks after the service of this ruling by sending to the wife by registered mail a letter signed by him with the text:

'The undersigned [the husband] residing at [address] states to want to divorce [the woman] and to pronounce herewith the talaq, talaq, talaq.'

at least to perform an act which, according to the Sunni religious law, is necessary to dissolve the religious marriage between parties;

rules that the man should pay to the wife a penalty payment of EUR 500 for each day he neglects to comply with that which is claimed above with a maximum of EUR 100,000;

neglects which was claimed more or otherwise;

declares this ruling immediately enforceable.

This ruling was issued by mr A.N. Labohm, mr J.M. van Baardewijk and O.I.M. Ydema and was pronounced at the public hearing of 21 November 2017 in the presence of the court clerk.