APPELLATE CIVIL.

Before Mukerji and Graham JJ.

JAMIRUDDIN AHAMMED

v.

SAHERA KHATUN BIBI.*

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Dec 1.

Mahomedan Law—Restitution of conjugal rights, suit for—Legal cruelty, nature of.

To speak of a wife that she has been living in adultery at a time when she has been so living can hardly be said to be cruelty at all and, in any event, it cannot be said to be cruelty of such a type as would disentitle a Mahomedan husband to claim restitution of conjugal rights against his wife.

Moonshee Buzloor Ruheem v. *Shumsoonnissa Begum* (1) relied on.

SECOND APPEAL by the plaintiff, Jamiruddin Ahammed, against his wife, Sahera Khatun Bibi, the co-respondent, Munshi Maslimuddin Ahammed and three other defendants.

The plaintiff brought a suit for restitution of conjugal rights against defendant No. 1, who was his wife, and her paramour, defendant No. 4, and others who stood in his way She pleaded that there was *talak* and that by a document he had agreed to remain in the house of her father and not to remove her therefrom. She further pleaded that he had no means to support her and her six children by him

* Appeal from Appellate Decree, No. 34 of 1925, against the decree of Kumud Bandhu Gupta, Subordinate Judge of Tippera, dated Sep. 24, 1924, affirming the decree of Satish Chandra Bagchi, Munsif of Comilla, dated July 29, 1924.

(1) (1867) 11 Moo. I. A. 551.

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and that the suit was brought to defeat her right of maintenance.

The Munsif of Comilla, who tried the case, found that there was no *talak* and that the document was not valid. He found, however, that she had illicit intercourse with defendant No. 4, that she was very intelligent, as her letters to her paramour would show, that the husband was foolish and that, taking a common sense view of the case, it was not desirable that there should be restitution of conjugal rights. In the opinion of the Munsif, the suit being a declaratory one, he had a discretion as to whether relief should be granted or not. He dismissed the suit.

On appeal by the plaintiff, the Subordinate Judge of Comilla agreed with the learned Munsif in holding that there was no *talak* and that the document was invalid. In regard to the question of restitution, the Appellate Court held that the union of the plaintiff and defendant No. 1 was not desirable, as there would be constant quarrel and their lives might be endangered. He held further that, as the plaintiff had openly charged the wife with adultery, there was clear cruelty and he was, therefore, not entitled to claim specific performance of the contract. He held, moreover, that the suit had been brought not for the sake of the plaintiff himself, but on account of the selfish end of the father of the paramour, who wanted to extricate his son from this situation and that all this trouble arose out of negligence on the part of the husband, who was, therefore, guilty of contributory negligence and not entitled to equitable relief in Court. In this view of the case, he dismissed the appeal.

The plaintiff, thereupon, preferred this Second Appeal in the High Court.

Dr. Jadunath Kanjilal (with him *Babu Sasadhar Ray, Senior*), for the appellant, contended that the judgments of the Courts below were based on mere suspicions and surmises and not on any positive evidence. The husband is entitled as of right to claim restitution of conjugal rights. The poverty of the husband or the superior intelligence of the wife is no answer to such a suit. Her illicit intercourse is highly reprehensible and separation would encourage immorality. Respondent No. 4 should bear the costs of all Courts. Discretion of a Court should not be arbitrary. It must be based on equitable and reasonable grounds. Law is common sense based on experience of the world. See *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1), *Purshotamdas Maneklal* v. *Bai Mani* (2), *Dhanjibhoy Bomanji* v. *Hirabai* (3) and *Abdul Kadir* v. *Salima* (4).

Babu Kalikinkar Chakrabarti for *Babu Bepin Chandra Bose*, for the respondents. The concurrent decisions of the Courts below are that no restitution should be allowed. The husband is brought up by her father and is too poor to maintain his wife and children. To direct restitution would create misery. I rely on the Privy Council case (1) cited by my learned friend.

Dr. Kanjilal, in reply.

Cur. adv. vult.

MUKERJI J. This appeal arises out of a suit instituted by a husband for restitution of conjugal rights against the wife. Several defences were taken on behalf of the wife, one being to the effect that there was a *talak* by reason of which the plaintiff was not entitled to claim restitution of conjugal rights any

(1) (1867) 11 Moo. I. A. 551, 611.
(2) (1896) I. L. R. 21 Bom. 610.
(3) (1901) I. L. R. 25 Bom. 644.
(4) (1886) I. L. R. 8 All. 149 F. B.

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further. Various allegations were made against the husband in the written statement alleging, *inter alia*, that he had got no means, and that there was cruelty on his part. Both the Courts below have refused to grant the plaintiff the decree asked for in the suit. Both the Courts below have come to the conclusion that the story as to *talak* was altogether unfounded. The Court of first instance towards the end of its judgment observed that the alliance between the husband and the wife was an unhappy one—unhappy from the side of both of them, that the husband's only fault was that he was poor and foolish and that the wife was too intelligent to be under his protection. It observed further that the letters of the wife to her paramour,—it may be stated here that the defendant No. 4 was the alleged paramour of the wife,—showed that the wife had an intelligence far beyond the reach of her husband. That Court held that there was evidence to show that the wife had already given her affection to the said defendant No. 4 and here I may quote the words used by the learned Munsif: "The "law cannot have a duel with nature as the latter "must have its own course"—and by this process of reasoning the learned Munsif came to the conclusion that the husband was not entitled to a decree. The husband then preferred an appeal to the Subordinate Judge. That learned Judge affirmed all the findings of fact which had been arrived at in favour of the husband by the Court of first instance. There is no specific finding on the question of adultery in the judgment of the Subordinate Judge, but towards the conclusion of his judgment the learned Judge states that the suit had been instituted by the plaintiff not for his own sake but at the instigation of the father of the defendant No. 4, who wanted to extricate his son from the struggle, meaning evidently that the wife was

living in adultery with the defendant No. 4. That learned Judge, however, also refused to pass a decree in favour of the plaintiff. His reasons are that the case was one of an unhappy alliance, that the plaintiff had openly charged the wife with adultery and this was clear cruelty on the part of the plaintiff and on this ground he thought that no specific performance of the contract should be allowed. He further found that there was a great risk in the two living together as there would be constant quarrels and fightings and their lives would be in danger and one day one would find himself killed or both may be killed together. He recorded an opinion to the effect that the parties could not be expected to live in amity and that if all those troubles arose out of the negligence on the part of the husband the latter should be considered guilty of contributory negligence. On those grounds the learned Subordinate Judge affirmed the decree of the Court of first instance. By "contributory negligence" the learned Judge evidently meant that the husband had not taken sufficient precaution so that the wife might not go on living in adultery. Be that as it may, these are all the grounds which have been referred to by one Court or the other in refusing the plaintiff the relief that he sought for in the present suit. As regards cruelty, the Judicial Committee in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) has observed thus: "The Mahomedan law, on a question of what is legal cruelty "between Man and Wife, would probably not differ "naturally from our own, of which one of the most "recent expositions is the following: 'There must be "actual violence of such a character as to endanger "personal health or safety; or there must be a reasonable apprehension of it.' 'The Court,' as Lord Stowell

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"said, in *Evans* v. *Evans*(1), has never been driven "off this ground'". Judging the finding of the Courts below by the test of this observation of their Lordships of the Judicial Committee, it is clear to my mind that the cruelty that has been found in the present case falls far short of the mark. To speak of a wife that she has been living in adultery at a time when she has been so living, can hardly be said to be cruelty at all and in any event it cannot be said that this conduct on the part of the husband fulfils the requirements of the conditions laid down by their Lordships in those observations.

It has been contended on behalf of the respondent and rightly contended that cruelty is not necessarily the only ground upon which a claim for specific performance of a contract of this character may be resisted and my attention has been drawn to some other observations of their Lordships in their judgment in the same case; for instance, to the passage where their Lordships say: "It may be, too, that gross "failure by the Husband of the performance of the "obligations which the marriage contract imposes on "him for the benefit of the Wife, might, if properly "proved, afford good grounds for refusing to him the "assistance of the Court" Their Lordships, however, proceeded to observe as follows: "And, as their "Lordships have already intimated, there may be "cases in which the Court would qualify its interference by imposing terms on the Husband. But all "these are questions to be carefully considered, and "considered with some reference to Mahomedan "Law". There is in the present case hardly anything which may be said to justify an inference that in point of fact the plaintiff was unable to perform or that there was gross failure on his part to perform

(1) (1790) 1 Hagg. Con. Rep. 35.

those obligations which the marriage imposed on him for the benefit of his wife. None of the findings to which I have referred, nor any of the reasons which have been given by the Courts below would fulfil the requirements laid down by their Lordships of the Judicial Committee to which I have referred. I am accordingly of opinion that there was no justification whatsoever for the Courts below to have refused the plaintiff the relief that he sought for in the present case.

An unreported case of this Court has been brought to our notice in which it was laid down in a case in which the husband was living in the house of his second wife and wanted to take his first wife, the defendant in the suit, to that house and there was a finding to the effect that he was unable to maintain his first wife, that the plaintiff in that case was not entitled to restitution of conjugal rights. The facts of that case are entirely different from those of the present. To refuse the plaintiff relief in a case like the present would be to put a high premium on immorality and adultery.

Furthermore, it has been argued that the husband has not got means enough to maintain the wife, and that he has got no house of his own. Several other matters have also been brought to our notice which are to be found stated in paragraph 11 of the wife's written statement. These matters were alleged no doubt, but none of the Courts below have come to any finding which would go to show that these allegations are well-founded.

I am accordingly of opinion that the decrees passed by the Courts below cannot be sustained, that they should be set aside and a decree should be entered in favour of the plaintiff granting him restitution of conjugal rights which he prayed for. The

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plaintiff will be entitled to all costs in all the Courts. Having regard to the facts of the case the decree for costs will be as against defendant No. 4 only.

GRAHAM J. I entirely agree. In my judgment the *ratio decidendi* which has been adopted by the Courts below is fundamentally erroneous, being contrary alike to the principles of Mahomedan law, as well as to the dictates of common sense. Having regard to the facts alleged and proved and, indeed, it may also be said, found, there was no real answer to the case set up by the plaintiff. No facts have been either proved, or found, which can deprive the plaintiff of his right to the custody of his wife's person. Certainly poverty can be no ground for refusing to grant to the plaintiff the relief, which he was entitled to expect from the Court. Nor can it be said that any case of cruelty was made out. Apparently the only cruelty, which has been found, consisted in the husband openly charging the wife with adultery with another man notwithstanding the fact that such adultery had undoubtedly taken place, and the findings are to that effect. Apart from this there is no other finding as to other acts of cruelty.

In my opinion, the decisions of the Courts below amount to a denial of justice, and I agree with my learned brother that the appeal must be allowed.

S. M. *Appeal allowed.*