

APPELLATE CIVIL.

Before D. N. Mitter and Patterson J J.

KADIR

v.

KOLEMAN BIBI.*

1935

Mar. 22.

Mahomedan Law—Divorce—Wife, if can maintain a suit for dissolution of marriage on the ground of cruelty and desertion by the husband—Failure to provide maintenance, when a ground for divorce.

Under the Mahomedan law, a wife is entitled to maintain a suit for judicial divorce or dissolution of marriage on the ground of cruelty and desertion on the part of the husband.

Khabilal Rahaman v. Marian Bibi (1) referred to.

Mere inability of the husband to provide maintenance is not a sufficient ground for the wife to ask for a divorce, but when the husband is possessed of means and is able to provide for the support of both himself and his wife, and wilfully refuses to do so and neglects her, the wife is entitled to apply for a divorce.

FIRST APPEAL by the defendant.

The material facts of the case and the arguments in the appeal are sufficiently stated in the judgment.

Phanibhooshan Chakrabarti for the appellant.

Shacheendrakumar Ray for the respondent was not called upon to reply.

MITTER J. The question raised by this appeal is one of considerable importance. It appears that the appellant was the defendant in the suit brought by the plaintiff-respondent Sreemati Koleman Bibi for dissolution of her marriage with the appellant. The grounds on which the application was rested are: (i) that she had been subjected to ill-treatment and beating and ultimately turned out of his house, that is, cruelty; and (ii) that, after having been turned out of his house, the husband failed to bring her back and to maintain her. These are substantially the two grounds on which this suit was founded. The defence was that the petition for dissolution of

*Appeal from Original Decree, No. 112 of 1931, against the decree of A. F. M. Rahaman, Additional District Judge of Dacca, dated Dec. 10, 1930.

(1) [1920] A. I. R. (L. B.) 59; 59 Ind. Cas. 804.

marriage was not maintainable according to Mahomedan law and custom. A further defence was taken denying the allegation of cruelty. The positive case of the defendant was that his father-in-law was under undue influence of other persons, with one of whom he was negotiating his daughter's marriage, and consequently the petitioner was detained by her father in his house. It was further said by way of defence that the appellant was willing to maintain his wife and keep her in his house. The learned District Judge, after taking the evidence on both sides, has come to the following conclusions: (i) that there has been habitual beating and cruelty, as a result of which the wife was compelled to leave the house of the defendant and (ii) that the defendant failed to provide her with maintenance. He has, accordingly, granted a decree to the plaintiff. Hence the present appeal.

In appeal it has been contended by Mr. Chakrabarti that cruelty and desertion are no grounds for dissolution of marriage under the Mahomedan law as administered in British India. It has been further contended that, assuming that cruelty is a ground for dissolution, the cruelty must be a legal cruelty and not the cruelty such as has been proved in this case. It is said further that there has been no desertion as understood in the Mahomedan law. The next ground is that the offer made by the husband not having been considered the decree contravenes the provisions of the Mahomedan law. Mr. Chakrabarti wants to raise an additional ground that the learned District Judge has no jurisdiction to entertain the petition as a court of first instance. We do not think it right, in the circumstances of this appeal, that this point should be allowed to be raised for the first time in this appeal. It is true it is a question of law and question of jurisdiction of the District Judge, which goes to the root of the matter. Still courts of appeal should always be chary of entertaining points which are not sifted in the court below. Nothing need be said

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further with regard to this ground. The real point which we need consider is as to whether, having regard to some texts of Mahomedan law, cruelty or desertion constitutes any ground for a suit for dissolution of marriage by the wife. It has been contended on behalf of the appellant that the grounds on which dissolution can be allowed are stated by Sir Dinshaw F. Mulla in his "Principles of Mahomedan Law," tenth edition, at page 209. Impotence of the husband is said to be a ground which entitles a Mahomedan wife to sue for divorce. In Article 241 the learned author says this:—

The wife is not entitled to claim a judicial divorce on any other ground such as conjugal infidelity on the husband's part, or inability to maintain her or cruelty.

In support of his statement of the law to the effect that inability to maintain the wife is no ground for a suit at the instance of a wife for dissolution of marriage, the learned author refers to a passage in Baillie's Digest of Mahomedan Law, second edition, page 447, to which we will presently refer. That passage runs as follows:—

A man is not to be separated from his wife for inability to maintain her. But the judge may direct her to raise her maintenance by borrowing on his credit. And if a judge should decree a separation, the decree would not be valid, nor even though allowed by another judge would it become operative, because it is not within the power of a judge to pass such a decree, for the reason already given, that inability to maintain a wife is not a sufficient reason for separating the parties.

According to the finding of the learned judge in this case, however, there is something more than mere inability to maintain. The learned judge has found, to quote his own words,—

That the defendant habitually ill-treated the plaintiff and subjected her to considerable physical cruelty, that ultimately over four years ago, he turned her out of his house after a severe beating (though she was at the time with child) and that after that he never sought to bring her to his house or to arrange for her maintenance.

On this finding, in our view, the case of desertion has been made out. That being so, there being cruelty as deposed to by the plaintiff's witness, which deposition we have no reason to disbelieve, in addition to desertion. We think, according to the view taken by the modern Mahomedan jurists, the plaintiff has a

right to maintain the suit. In Syed Ameer Ali's Mahomedan Law, Volume 2, at page 520, the learned author gives the reasons for which a wife is entitled to a divorce. He says this:—

A wife is entitled to a divorce for the following among other reasons and his reason No. 10 is: "When "he (husband) treats her (wife) habitually in a cruel "manner." His reason No. 11 is: "When he (husband) "is in the habit of beating her (wife) or threatening her "(wife) with bodily injuries." "According to the "Hanafis", says the learned author, "mere inability to "provide maintenance is not a sufficient ground for ask- "ing for a divorce." When the husband is possessed of means and is able to provide for the support of both himself and his wife, and *wilfully refuses to do so and neglects her*, then only can she apply for a divorce. The *kāzi* or judge has the power of granting a divorce when the refusal or neglect is wilful and unjustifiable.

We think, having regard to this statement of law in Syed Ameer Ali's book, that the suit of the plaintiff can be sustained. Having found cruelty and wilful neglect to maintain the wife, it was open to the District Judge to entertain the suit. This view is also supported by a passage which has been quoted by Mr. Wilson in his well-known treatise on "Anglo-Mahomedan Law". The passage is taken from Baillie's Digest of Mahomedan Law, Second edition, at page 306. The learned author says this:—

When married parties disagree, and are apprehensive that they cannot observe the bonds prescribed by Almighty God (or, in other words, perform the duties incumbent on them by the marriage relation) there is no objection to the woman's ransoming herself from her husband with property in consideration of which he is to give her a *khuld*, and when they have done this, one irrevocable repudiation takes place, and she is liable for the property. When the aversion is on the part of the husband, it is not lawful for him to take any thing from her in exchange for the *khuld*.

With reference to this passage, Mr. Wilson in his "Anglo-Mahomedan Law," sixth edition, at page 154 says this:—

As to judicial divorce for the husband's cruelty or adultery, the Hedaya and Fatawa-i-Alamgiri are silent, unless indeed, we are to understand in a compulsory sense an isolated expression in an extract from the latter work which is thus rendered by Baillie, second edition, page 306.

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Then he quotes the passage which we have quoted already. After citing this passage, the learned author observes this:—

If this means that the *kāzi* must, or may, on the wife's demand, compel the husband to give her a *khulā*, we must further suppose ; (i) that he can pass such a decree on mere proof of incurable disagreement, or incompatibility, irrespective of actual cruelty or other breach of conjugal duty, and (ii) that he can fix at his discretion the price at which the woman is to purchase her freedom. The propositions, if accepted, would to a certain degree assimilate the woman's position as regards divorce to that of the man, but the point has never come up for judicial decision in that form.

The learned author then refers to a Burma case, namely the case of *Khalilal Rahaman v. Marian Bibi* (1), and says that the grounds for a judicial divorce are stated there in wide terms, including habitual cruelty and perhaps even desertion and neglect. Having regard to the view taken by the modern Mahomedan jurists, including Syed Ameer Ali, and the view taken in Baillie's "Digest of Mahomedan "Law" at page 306 of the second edition, we think it right to hold that a suit can be maintained at the instance of a Mahomedan wife if cruelty is accompanied with desertion of wife, as in the present case. We think, therefore, that the appeal must be dismissed.

No order is made as to costs.

The findings of facts have also been challenged by Mr. Chakrabarti, but, having regard to the remarks made by the learned District Judge that he has seen the witnesses and that by observing their demeanour he has come to the conclusion that the defendant's witnesses are all unreliable, we think that we should not interfere with his finding on an issue on such a simple question of fact as arises in the present case, as to whether desertion and cruelty on the part of the husband has been established.

PATTERSON J. I agree.

Appeal dismissed.

A. A.