

APPELLATE CIVIL.

Before Akram J.

SHAMSUNNESSA KHATUN

v.

MIR ABDUL MANNAF.*

1939

July 10, 17.

Mahomedan Law—*Divorce—Lâan—Charge of adultery made by husband against wife—Retraction, Effect of.*

A retraction of a charge of adultery made by a husband against the wife cannot defeat the wife's suit for dissolution of marriage, unless it is unconditional, *bona fide*, and the result of sincere repentance for having brought the false charge. A retraction is not proper and unconditional unless there is an unequivocal assertion that the accusation was false.

The purpose behind the principle of retraction is to give the husband a *locus poenitentiae* before the marriage is dissolved and the object is to re-establish cordial relationship between husband and wife.

Rahîma Bibi v. Fazîl (1) referred to.

In coming to a finding as to whether a retraction was honest or not the Court should consider the entire evidence in the case and surrounding circumstances.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The facts of the case and the points raised in the arguments are sufficiently stated in the judgment.

Amrita Lal Mukerjee for the appellant.

Surajit Chandra Lahiri for the respondent.

Cur. adv. vult.

AKRAM J. This appeal arises out of a suit instituted by one Shamsunnessa Khatun against her

*Appeal from Appellate Decree, No. 1304 of 1937, against the decree of Bishnu Pada Ray, First Subordinate Judge of Faridpur, dated Mar. 31, 1937, reversing the decree of Bishnu Rath Sen, Munsif, Faridpur, dated Aug. 28, 1936.

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husband for dissolution of marriage. It was alleged in the plaint that the husband used to ill-treat his wife and, when she left for her paternal house, he brought successively three criminal cases under s. 498, Indian Penal Code, falsely stating in the petitions of complaint that his wife was of loose character and was enticed away by some of her relatives (accused in the case) who were committing adultery with her. It was further averred that, out of these three criminal cases, two were dismissed by the Court and one was withdrawn by the husband.

The defendant contested the suit and filed a written statement. He denied the allegation of ill-treatment and pleaded in paragraphs 3 and 4 of the written statement that the accusations in the petitions of complaint were made in good faith, but, in case they were found to be false, he was willing to withdraw and express heartfelt regret for the same. The material portions of the written statement are reproduced below :—

Para. 3 :—* * * * *

This defendant instituted criminal cases against this plaintiff for her infidelity, honestly believing the statements of his neighbours in good faith on the basis of some facts learnt from reliable information * * *
* * * this defendant brought no accusation against the plaintiff knowing it to be wrong, groundless and false. If it be proved by the just decision of the Court that the defendant brought those cases against the plaintiff by making false accusation against her, this defendant withdraws those accusations made in those written complaints against the plaintiff and this defendant retracts those accusations, expressing heartfelt regrets for them.

Para. 4 :—* * * * *

Even if the accusations made against the plaintiff in the petitions of complaint filed by this defendant are found to be true this defendant withdraws those charges unconditionally.

Several issues were framed, the issue No. 3 which alone is relevant for this appeal being as follows :—

Are the imputations of adultery false and sufficient for the dissolution of marriage as alleged in the plaint, and, if so, whether retractions as made by the defendant are sufficient for disentitling for a decree for judicial divorce.

At the trial, four witnesses were examined for the plaintiff and two for the defendant. The

defendant's witness No. 1 was the defendant himself who stated, in the course of his deposition—

I instituted these cases as I believed the reports of my friends and relatives. I do not believe that the plaintiff is unchaste, I withdraw the accusations unconditionally.

The learned Munsif trying the case decided in favour of the plaintiff and dissolved the marriage observing in his judgment after a consideration of the evidence of P. W. 2 and P. W. 4:—

All these show that the defendant has taken recourse to the principle of retraction simply to defeat the plaintiff's suit and still calls her unchaste and will punish her, if he could get hold of her. I believe that the retraction, whether made in the written statement or in the deposition, is not honest and sincere and that it is merely eyewash and has been made with the sinister motive of getting the suit dismissed* * * * *
The retraction made in the written statement is, in my opinion, no retraction at all* * * * * I may note here that the case laws show that a retraction made after the commencement of the hearing is of no avail.

From this decision the defendant preferred an appeal. The learned Subordinate Judge, who heard the appeal, took the view that the nature of the retraction was to be gathered —

from the materials relating to the same and not from any extraneous sources alleging motive for such a course of action.

And he, after considering only the written statement and the deposition of the defendant, came to the conclusion that the retraction in the written statement was honest and unconditional.

The learned Subordinate Judge, accordingly, allowed the appeal, observing in the judgment—

On the principles of Mahomedan law and various other authorities, such as *Rakima Bibi v. Fazil* (1) and *Fakhre Jahan v. Muhammad Hamidullah Khan* (2) there was "no other alternative but to dismiss the plaintiff's case".

The present Second Appeal was then filed by the plaintiff and, at the time of the hearing, only two points were urged before me, first, that the learned Subordinate Judge was in error in not considering the evidence of P. W. 2 and P. W. 4 while deciding

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(1) (1926) I.L.R. 48 All. 834.

(2) (1928) I.L.R. 4 Luck. 168.

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the question whether the retraction was honest or not; and, secondly, that the learned Subordinate Judge was in error in treating the retraction in the written statement as unconditional. As to the first point the purpose behind the principle of retraction is to give the husband a *locus poenitentiae* before the marriage is dissolved. The object is to re-establish cordial relationship between husband and wife. The retraction, therefore, must be *bona fide* and not a mere device for defeating the suit. In my opinion, the learned Subordinate Judge was in error in not taking into consideration the evidence of P. Ws. 2 and 4, while determining the question whether the retraction was honest or not. P. W. 2 is a near relation of the parties and his evidence shows that a few days before the hearing of the suit the defendant told him that by expressing regret he (defendant) would defeat the suit and then punish the plaintiff. The evidence of P. W. 4 is also of a similar nature.

The defendant, no doubt, in his evidence contradicts these witnesses, but, having regard to the history of the case and the behaviour of the defendant in making repeated imputations of misconduct against the plaintiff, I am inclined to accept the evidence of P. Ws. 2 and 4 in preference to the evidence of the defendant. I, therefore, hold that the retraction is not honest and as such should be disregarded. Unless the retraction is *bona fide*, the suit cannot be dismissed. The direction given in the Koran is :—

“Retain them (wives) with humanity or dismiss them with kindness”
(Hamilton’s Hedaya, Second Edition, Vol. 1, Book IV, Chap. X, footnote).

As to the second point, the words “If it be proved by the just decision of the Court, *etc.*”, in para. 3 of the written statement imply that the retraction is dependent upon the finding of the Court that the charge is false; there is thus no admission by the defendant in his written statement that he has made the accusation falsely rendering himself liable to

punishment. In the case of *Rahima Bibi v. Fazil* (1), Sulaiman J. made the following observations:—

The whole object of the retraction was to obtain an admission by the husband of his having wrongly slandered his wife, on the basis of which he could be punished forthwith. In the Hedaya, Book IV, Chap. X, the form of retraction is stated to be as follows:—"It is also a condition of imprecation that the wife required her husband to produce the ground of his accusation* * * * *and if he declines it, the magistrate must imprison him until he either makes an imprecation or acknowledges the falsity of his charge by saying 'I falsely attributed adultery to her' as this is a right due from him to his wife

Further on in the same chapter it is stated:—"If a husband, after imprecation, contradict himself by acknowledging that he had accused his wife falsely, let the magistrate punish him, because he then acknowledges himself liable to punishment".

I, accordingly, find that the retraction in para. 3 of the written statement is not proper and unconditional.

The retraction in para. 4 of the written statement can be of no help to the defendant, because, if the accusation is true, there is no cause of action for the suit.

The retraction in the deposition cannot also be availed of, because it was made after the commencement of the hearing of the suit:—*Fakhre Jahan v. Muhammad Hamidullah Khan* (2).

I, therefore, allow this appeal, set aside the judgment and decree of the learned Subordinate Judge and restore those of the learned Munsif.

Having regard to the circumstances of the case I make no order for costs.

Considering the importance of the question involved the prayer of the defendant for leave to appeal under s. 15 of the Letters Patent is granted*.

Appeal allowed. Suit decreed.

A. A.

(1) (1926) I.L.R. 48 All. 834, 842.

(2) (1928) I.L.R. 4 Luck. 168.

*No appeal was filed.—Ed.

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