The decree of the Court of First Instance is set aside and the case remanded for a fresh decision. The costs will abide and follow the result.

NOTES.

[STATUTORY ALTERATION —

The governing words were altered in the Stamp Acts of 1879 and 1899 into "the amount or value of the average annual rent reserved." With reference to this alteration it was observed in (1894) 4 M. L. J. 201 at 204 that "it is not unreasonable to presume from the alteration in the description of the subject-matter of a lease that the probable intention was to designate as the subject-matter the average value of the rent during the period of the lease instead of the value of the rent in any particular year and thereby to enable parties to such lease to secure its exemption from the operation of Section 26 by sufficiently estimating the the average value beforehand.]

[3 Mad. 347.]

APPELLATE CIVIL.

The 21st July, 1881.

PRESENT:

MR. JUSTICE MUTTUSAMI AYYAR AND MR. JUSTICE TARRANT.

Vadake Vitil Ismal.....(Defendant), Appellant

and

Odakel Beyakutti Umah.....(Plaintiff), Respondent.*

Muhammadan law—Khoola divorce—Compromise of suits by consent when no cause of action arose at suggestion of Court.

Where a Muhammadan woman claimed a divorce from her husband on grounds which she failed to establish, but the husband, at the suggestion of the Court, agreed to a Khoola divorce on terms to be settled by a Kazi.

Held that the action of the Court in not dismissing the suit but proceeding to suggest a compromise by means of a Khoola divorce was not illegal.

Held also that a Khoola divorce is valid though granted under compulsion.

IN this case the plaintiff, a Muhammadan, alleging that the defendant, her husband, was guilty of cruelty to her, did not maintain her and was, moreover, diseased and impotent, and that she did not learn the defects of defendant till after marriage, prayed for a dissolution of marriage.

[348] The defendant contended that plaintiff had no cause to ask for dissolution of marriage, and proved that he had sued for recovery of the possession of the plaintiff's body in 1878 and taken out warrants to enforce the decree, but the plaintiff had evaded the warrants, resisted the execution of the order of Court, and been convicted and fined for so doing.

The Munsif upon the evidence found that defendant was "unfit for cohabitation," and that plaintiff had been "annoyed" by him; and held that (marriage being meant for the enjoyment of pleasure, and plaintiff being determined not to go to the defendant, and defendant being determined

*Second Appeal No. 86 of 1881 against the decree of H. Wigram, Acting District Judge of South Malabar, modifying the decree of V. Bappu, District Munsif of Shernad, dated 22nd July 1880.

to recover the body of plaintiff "contrary to the freedom allowed under the English administration of the country"), as the Muhammadan law prescribed no rule for such cases of the husband's fault, he was bound to decide the case according to the law of good conscience (*Madras* Act III of 1873, Sec. 16, cl. *c.*). The Munsif therefore, "according to the direction of his conscience, dissolved the marriage tie; but as, in his opinion, it is the duty of the wife, however cruel the husband may be, to bear cruel treatment and always live with the husband, saddled the plaintiff with costs, as she had "totally forsaken this duty."

Upon appeal the District Judge held that the Muhammadan law was the only law applicable under Section 16,* Act III of 1873, as ruled in *Moonshee Bazloor Ruheem* v. *Shumsoon Nissa Begum* (11 M. I. A., 551), found there was no evidence of impotence and cruelty; and, therefore, held that the suit ought to be dismissed, but, as it was impossible not to feel sympathy with a Muhammadan wife who had conceived such a violent dislike to her husband (who in early life had been in jail for eight years, and who, after plaintiff at the instigation of her relatives had left him after one year of married life, had obtained a decree for restitution of conjugal rights and ineffectively attempted to execute it), suggested to the defendant that the Kazi should decide upon what terms a Khoola divorce should be granted to plaintiff.

The defendant after some reluctance agreed to this proposal, and the case was referred to the Kazi, who decided that plaintiff should pay Rs. 135-2-8.

[349] The District Judge decreed that on payment of this sum into Court within one month the plaintiff be declared separated from her husband, otherwise that the suit do stand dismissed with costs.

The defendant appealed to the High Court.

Mr. *Wedderburn* for the Appellant.

The plaintiff having failed to establish any cause of action, the suit ought to have been dismissed. The defendant was entitled by law to have the case dismissed, and the procedure of the District Judge is illegal, for there was nothing to compromise. (MUTTUSAMI AYYAR, J.—If the parties consent, is the action of the Judge illegal?) The defendant did not consent freely. The Judge says, "after some reluctance he agreed." The Court had no right to press for his consent from sympathy for the plaintiff. The proper course was to dismiss the suit and *then* give the parties good advice. The plaintiff never claimed a Khoola divorce, and the conditions necessary to support such a claim did not exist. *Macnaughten* (App.), p. 522.

A. Ramachandrayyar for the Respondent.

The parties having consented to the Judge's proposal, the only question left was to settle the amount and no objection is taken to it.

Law administered by Courts to Natives.

*[Sec. 16:—Where in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste or any religious usage or institution,

(*a*) The Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, or

(*b*) any custom (if such there be) having the force of law and governing the parties or property concerned,

shall form the rule of decision, unless such law or custom has, by legislative enactment been altered or abolished.

(*c*) In cases where no specific rule exists, the Court shall act according to justice equity, and good conscience.]

The Court (MUTTUSAMI AYYAR and TARRANT, JJ.) delivered the following

Judgment:—The plaintiff (respondent), a Muhammadan lady, sued for dissolution of marriage on the ground of cruelty and impotence, and, though she failed to prove her allegation, the Court of First Instance decreed in her favour on the ground that the claim was governed by equity and good conscience, and that, owing to the strong feeling that existed between the plaintiff and her husband, no good would result to either from the continuance of the conjugal relation. The Lower Appellate Court, however, held that the suit ought to be decided in accordance with the Muhammadan law; but, having regard to the strong dislike conceived by the respondent to the appellant, suggested that the latter might grant the former a Khoola divorce for such sum of money as might be fixed by the Kazi of *Calicut*. The defendant consented to do so, though, as stated by the District Judge, after some reluctance. The Kazi having decided, upon a reference made to him, that Rs. 135-2-8 was payable, the Judge decreed that the plaintiff's marriage with the defendant be dissolved if the plaintiff **[350]** paid into Court the sum of Rs. 135-2-8 within one month, and that, in default, the suit do stand dismissed with costs. Against his decision the defendant appeals, and contends that the suit should have been dismissed on the plaintiff failing to establish her case, and that the conditions prescribed by the Muhammadan law for a valid Khoola have not been complied with.

It was clearly competent to the appellant under the Muhammadan law to grant a Khoola divorce to his wife at her request, and he was also at liberty to compromise a suit for dissolution of marriage by granting such divorce. There is, further, no objection under the Muhammadan law to the wife ransoming herself from her husband when they disagree and apprehend that they cannot perform the duties incumbent on them by virtue of the marriage relation (*Baillie's* Muhammadan Law, page 304). Although we might not have felt inclined to suggest by way of compromise a dissolution of marriage of the Khoola kind after the wife had failed to prove her case, still we are not prepared to hold that the compromise entered into in the Lower Appellate Court is *illegal* and ought to be set aside on second appeal. The conditions of a valid Khoola are, as stated in *Billie's Imameea*, page 133, puberty, sanity, freedom of choice, and intention on the part of the husband, and abstinence for one menstrual period (Toohr) from connubial intercourse, and some aversion on the part of the woman to her husband. There is evidence to show that all these conditions existed in this case. Nor was this ground of objection insisted upon at the hearing. Further, it does not appear to have been taken in the Lower Appellate Court. It is true, however, that the appellant consented to grant Khoola to his wife after some reluctance, but looking to the fact that in compliance with the order of reference he appeared before the Kazi and proceeded with the reference, we see no reason to think that when he finally made up his mind to divorce the respondent, he did not do so with free will. Uuder the Muhammadan law a Khoola is valid even though it may be granted under compulsion. The conditions, however, which nullify a Khoola are those which are repugnant to the nature of the contract, and the Khoola would not be valid if the husband were to say to the wife, "I have granted you a Khoola when you give me a thousand." But in this case there is a definite period **[351]** fixed by the decree of the Lower Appellate Court for payment of the ransom, and though when a Khoola is once granted the husband has ordinarily no power of revocation, the wife may reclaim the ransom during the *iddut*, in which case the husband is at liberty to revoke the Khoola if he pleases (*Baillie's Imameea*, 134 and 135). Further, neither the appellant nor the respondent has taken objection to the form of the decree, and we therefore dismiss this appeal with costs.

NOTES.

[*See* the comments of Mr. Tyabji in his Muhammadan Law (1913) p. 134 sec. 123.]