

## APPELLATE CIVIL.

*Before Mr. Justice Kernan and Mr. Justice Parker.*

KUNHI (PLAINTIFF), APPELLANT,

and

MOIDIN (DEFENDANT), RESPONDENT.\*

1888.  
March 2, 13.

*Muhammādan law—Marriage—Suit by husband for restitution of conjugal rights—  
Duty of wife to cohabit with husband—Plea of non-payment of dower bad.*

Suit by a Muhammādan to recover possession of his wife, the defendant. Defendant pleaded that she was not bound to return to plaintiff until plaintiff paid Rs. 42, prompt for dower, which plaintiff promised to pay by the marriage contract and had not paid.

The lower Courts following *Eidan v. Mazhar Husain* (I.L.R., 1 All., 483) dismissed the suit :

*Held*, on appeal that defendant could not refuse cohabitation on the plea that her dower had not been paid—*Abdul Kadir v. Salima* (I.L.R., 8 All., 149) followed.

APPEAL from the decree of F. H. Wilkinson, District Judge of South Malabar, confirming the decree of V. Kelu Eradi, District Munsif of Shernad, in suit 366 of 1886.

The facts appear from the judgment of the Court (Kernan and Parker, JJ.).

*Rajaratna Mudaliar* for appellant.

Respondent was not represented.

JUDGMENT.—The original suit No. 366 of 1886 in the Shernad Munsif's court was brought by the plaintiff to obtain possession of his wife, the defendant. The Munsif in the court of first instance and the District Court on appeal dismissed the suit. The facts found are—the plaintiff and defendant entered into a contract of marriage and the plaintiff agreed to pay 12 miscals equal to Rs. 42, prompt for dower to the defendant, but did not pay it. After the marriage the parties lived together and the defendant withdrew from his house, but in her defence she says she is willing to return if dower was paid. Both the lower courts followed the decision in *Eidan v. Mazhar Husain*(1) to the effect that when prompt-dower was not paid the wife might refuse cohabitation

\* Second Appeal No. 434 of 1887.

(1)\* I.L.R., 1 All., 483.

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to her husband. The opinion of Haneefa, though opposed to the views of his two disciples as recorded in the *Hedaya*, pages 150 to 152, was in that case followed. However, a Full Bench of that court have since reversed that decision and followed the views of the two disciples, *Abdul Kadir v. Salima*(1). There is no case on the subject reported in the Madras Supreme or High Courts. The reasons given by the Allahabad Full Bench for their decision seem to us sound and we agree therein. The Muhammadan matrimonial contract involves separate and independent contract by the husband and wife. The wife is by contract bound to submit herself to her husband and he is bound to pay the prompt or other dower according to the contract, or if no sum agreed on, according to the provision of the law. Each has a separate remedy against the other for non-performance of the contract. We reverse the decree of both the lower Courts and direct the defendant to return to cohabitation with the plaintiff within three months from this date.

Another suit No. 410 of 1886 in the Munsif's Court for payment of dower was brought by the wife against the husband. Both suits were heard together and were heard in appeal together and dismissed. We cannot interfere as to suit No. 410, as there has been no appeal. The parties will bear their own costs respectively of this suit No. 434 throughout including this appeal, as the appellant set up an untrue case in respect of the payment of the dower and the respondent without legal excuse left her husband's house.

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(1) I.L.R., 8 All., 149.

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