MUNRO AND SANKARAN-NAIR, JJ.

YOGAMBAL BOYEE AMMANI AMMAL v. NAINA PILLAI MARKAYAR.

was the sole property of Government was the source of irrigation not only for Government ryotwari lands but also for the wet inam lands of the defendant therein. The Government claim for contribution from the defendant for the repair of the tank was disallowed and the Judges held that neither section 69 nor section 70 applied.

I do not think therefore that the decision in *Damodara Mudaliar* v. *Secretary of State for India*(1) supports the plaintiff's contention. Moreover it does not refer to the ruling of the Judical Committee in *Abdul Wahid Khan* v. *Shaluka Bibi*(2). The decree of the lower Appellate Court must be reversed and the suit dismissed with costs throughout.

MUNRO, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. July 27. September 3.

ASHA BIBI (SECOND DEFENDANT), APPELLANT,

v.

KADIR IBRAHIM ROWTHER (PLAINTIFF), RESPONDENT.*

Muhammadan Law—Hanafi Law—Divorce—Talak need not be addressed directly to the wife to constitute a valid divorce.

According to the Hanafi Law, it is not necessary that the Talak or words of repudiation should be addressed directly to the wife to constitute a valid divorce.

The expressions mentioned in the 'Hedaya' as constituting express divorce are not exhaustive, but merely illustrative of the different forms in which the Talak may be pronounced.

The incidents of marriage and divorce under the Muhammadan Law fully discussed.

Furzund Hossein v. *Janu Bibee*, [(1879) I.L.R., 4 Calc., 588], referred to and doubted.

SECOND APPEAL against the decree of E. L. Thornton, Esq., District Judge of Trichinopoly, in Appeal Suit No. 154 of 1907, presented against the decree of K. S. Kothandarama Aiyar, District Munsif of Srirangam, in Original Suit No. 199 of 1906.

The facts for the purpose of this case are sufficiently set out in the judgment.

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(1) (1895) I.L.R., 18 Mad., 88 at p. 91. (2) (1894) I.L.R. 21 Calc., 496 at p. 504.

* Second Appeal No. 896 of 1908

S. Srinivasa Ayyangar and *K. V. Krishnaswami Ayyar* for appellant.

The Hon. The Advocate-General for respondent.

JUDGMENT.—One of the defences of the appellant as defendant in a suit for restitution of conjugal rights was that she had been divorced in the irrevocable form by the respondent (plaintiff in the suit) by pronouncement of Talak three times on the 9th January 1906, that is, sometime before the institution of the suit. The District Munsif believed the evidence adduced on behalf of the defendant on the point but the District Judge in appeal did not come to a finding on the question whether Talak was in fact pronounced as alleged but being of opinion that the words of repudiation must be addressed to the wife held that as in the present case Talak is not shown to have been addressed to the defendant it would not be effective to dissolve the marriage. We have considered the evidence as to repudiation for ourselves and we think that the Munsif's conclusion that the respondent pronounced Talak three times is supported by evidence and the probabilities of the case. The words which the respondent actually used were "Oh, Naina Mahamad Rowther! It is 4 or 4½ since I married your daughter. Yow have now brought her away. This is the Talaku for your daughter. This is the Talaku for your daughter. This is the Talaku for your daughter. Talaku once, Talaku twice, Talaku thrice, Muttalaku. Hereafter you may marry your daughter yourself or marry her to a Pallan. She has become my mother."

We have no doubt that the District Judge in holding that these words did not effectuate a divorce because they were addressed to the defendant's father, although they undoubtedly referred to the defendant took an erroneous view of the Hanafi Law which is the law of both the parties on the subject. According to the principles of that law the husband, as we shall see, has an absolute right to dissolve the marriage, and the only condition for a valid exercise of such a right is that he must be major and of sound mind at the time. The wife's consent or absence of consent to the action of her husband is immaterial and there is nothing therefore, in the reason of the law why in order that a divorce pronounced by a husband should be valid the words of repudiation should be addressed to or uttered in presence of the wife. All that the law requires is that the words should

MUNRO AND ABDUR RAHIM, JJ.

ASHA BIBI v. KADIR IBRAHIM ROWTHER.

refer to the wife though if they be not communicated to her at the time a question may possibly arise as to whether she is not entitled until she comes to know of the divorce to bind her husband by certain acts such as pledging his credit for obtaining the means of subsistence. That the law on the point is as we have stated will be easily intelligible if we bear in mind the theory and the principles which constitute the Muhammadan conception of marriage as a legal institution. In Tawzib, marriage is described as "a contract which has been legalised for manifold objects such as preservation of the species, the fixing of descent, restraining men from debauchery and the encouragement of chastity, promotion of love and union between the husband and the wife and of mutual help in earning livelihood." Marriage is regarded as a contract (aqd), for no such relations as those connoted by marriage can be established between two members of the opposite sexes except by their voluntary action. In the case of minors, persons recognised by the law as guardians or curators for this purpose are authorised, subject to certain important conditions and restrictions, to enter into the contract on the minor's behalf. Marriage differs however from other contracts in one important respect; it cannot according to the Sunni law be expressed to be limited for a period of time.

As incident to a valid marriage the law imports certain rights and obligations *inter se* between the parties. The theory on which such marital rights and obligations are based is that the wife upon marriage surrenders her further marital freedom and the husband acquires a right to her connubial services (mutát) in consideration of certain obligations mostly of a pecuniary character incurred by him. Hence the husband is spoken of in the books as the owner, as it were, of her conjugal services, to secure which he is entitled to exercise over the wife a certain amount of personal authority and control. The wife has also a right to the conjugal society of the husband during the continuance of the marriage, but it cannot be said to be of the same absolute character as the corresponding right of the husband. The husband does not by marriage lose his further marital liberty though the law for reasons of policy has restricted that liberty to his having four wives at one and the same time. Neither of the parties to a marriage acquires a right to or power over the property of the other, but on the death of one partner the survivor takes a specified

share of the inheritance as an heir. The obligation of the husband consists mainly in his being made responsible for the maintenance of the wife and of the children born of the marriage according to his status in life and he is further bound to make a certain settlement of money or property called mahr or dower on the wife. In case he has more than one wife, his dealings with them all must be on a strictly just and impartial basis.

The authority with which the husband is armed over the wife is of a disciplinary nature and gives him the power to control her liberty of movement, and in cases of flagrant misbehaviour and disobedience even to inflict corporal chastisement on her, provided the exercise of his authority does not in any case infringe her right to the safety of life, limb or health nor amounts to cruelty such as by depriving her of social relations with her own people. The right to domestic authority is conceded to the husband rather than to the wife in consideration as hinted above of the pecuniary burden imposed upon the husband and also because of the presumed superiority of the male sex in judgment and discretion For the same reasons the husband is recognised as having an absolute right to put an end to the marriage by his private act. No doubt an arbitrary or unreasonable exercise of the right to dissolve the marriage is strongly condemned in the Koran and in the reported sayings of the Prophet (Hadith) and is treated as a spiritual offence. But the impropriety of the husband's conduct would in no way affect the legal validity of a divorce duly effected by the husband. Upon divorce being pronounced, the wife becomes at once entitled to be paid her dower; unless it has been paid before and after a certain period of probation she is free to marry again. In addition to the husband's right to dissolve the marriage whenever he chooses, in certain cases, such as that of the physical incapacity of the husband or the wife and of improper marriages contracted by the guardian of a minor, the aggrieved party may ask the Court to annul or set aside the marriage.

These are the ordinary incidents of a Muhammadan marriage; but as marriage among the Muhammadans is in its constitution a contract, it is open to a man and a woman entering upon marriage to define their future marital rights and liabilities *inter se* so as to considerably modify the rights and obligations that ordinarily flow from a valid marriage. For instance the wife may protect herself if she so chooses by stipulation made either before or after

MUNRO AND ABDUR RAHIM, JJ.

ASHA BIBI v. KADIR IBRAHIM ROWTHER.

marriage to the effect—it is not necessary to consider here the exact form in which such stipulations may be made—that the husband shall not exercise such control over her liberty of movement as the law otherwise vests in him or that he shall not take to himself another wife. The husband may, on the other hand, by especial stipulation free himself from liability to maintain the wife who may also release her right to the dower, or they may agree that non-payment of the dower shall not be a bar to the exercise of his marital rights. In some parts of India stipulations for the protection of the wife such as have been mentioned are of common occurrence at the time of marriage, but almost all over India generally protection of the wife against an improper exercise by the husband not only of his marital authority but also of his power to dissolve the marriage is for all practical purposes secured by fixing the dower payable to the wife at an amount quite out of proportion to the means of the husband. However that may be, the husband always has a right to dissolve the marriage at his discretion whatever be the consequences he may have to face.

The learned District Judge has cited Baillie's Digest and a decision of the Calcutta High Court, *Furzund Hossein* v. *Janu Bibee*(1) as authority for his proposition that the works of Talak in order to be effective in law must be addressed to the wife. He does not however mention the passage he relies on in Baillie's 'Digest', but presumably he relies on the passage cited in *Furzund Hossein* v. *Janu Bibee*(1) and other passages of a similar significance. It has been urged by the learned vakil for the appellant that this decision is not an authority for the view propounded by the District Judge. It is not quite easy to ascertain the exact nature of the proposition intended to be laid down there by Mitter and McLean, JJ., but their decision, having regard to the facts of that case, seems to involve two propositions, that the Muhammadan law has prescribed certain formulas for divorce which must be strictly observed if the divorce is in the Sureeh or express form and that the direct form of speech is of the essence of those formulas. We are unable to assent to either of those propositions. The learned Judges quote from Hamilton's 'Hedaya' the passage "Talak Sureeh or express divorce

(1) (1879) I.L.R., 4 Calc., 588 at p. 591.

is where a husband delivers the sentence in direct or simple terms as if he were to say 'I have divorced you' or 'you are divorced', which effects a Talak Rijai or divorce reversible" as an authority for this view of the law. 'Hedaya' itself is undoubtedly a book of supreme authority on Hanafi law and if it has laid down that a Sureeh or express divorce to be effective must be couched in the direct form of speech as Hamilton is understood to suggest, one would feel the greatest hesitation in holding the law to be otherwise. But 'Hedaya' lays down no such proposition which as we have pointed out would be inconsistent with the principles governing the Muhammadan law of divorce. At the beginning of the chapter in which the question as to how divorce may be effected is considered the passage in the original literally translated would run thus:—'divorce is of two kinds, Sureeh (usually translated as express) and Kinayah (usually translated as ambiguous). Sureeh or express divorce is his words (*i.e.*, is constituted by words of the husband). 'Thou art Táliqun' (or divorced) and Mutallagatun (another combination of the root letters t, l and q also meaning divorced) and 'I have divorced thee'. With these a reversible divorce is effected. Because these words are used in divorce (*i.e.*, in pronouncing divorce) and are not used in others (*i.e.*, other connections) and are therefore Sureeh and reversibility is attached on the authority of the text (meaning a passage in the Koran). "And it does not require Kiyat (*i.e.*, proof of intention to use the word in the sense of divorce.) Because it is express in that connection by reason of preponderance of usage." In plain English what is meant is that divorce may be effected either by use of words which are regarded in law as Sureeh or explicit such as 'I have divorced thee,' etc., or by words of equivocal meaning technically called Kinayah. If the words which the law regards as clearly and explicitly meaning dissolution of the marriage tie by the husband have by usage acquired that meaning, such as the different forms of the word Talak, then it is not necessary to prove that the husband by using such an expression meant to convey divorce. In Muhammadan jurisprudence the distinction between Sureeh and Kinayah is this: when a person expresses his legal act whether it be a contract, release of rights or dissolution of legal relations in spoken words, the meaning of which is unmistakable either because the expressions used have acquired a particular significance by long usage or

MUNRO AND ABDUR RAHIM, JJ.

ASHA BIBI v. KADIR IBRAHIM ROWTHER.

otherwise, the law will take him to mean what his words convey and will neither permit him to say that he meant something else nor entertain such a question at all. When on the other hand the language used is ambiguous, it is open to the person using it to say what he meant and the circumstances may be taken into account to ascertain his meaning (See Tawzíb' Cal. Ed., p. 110 and, Talwít Constantinople Ed., pp. 137—9 and Fatawa Alamgiri Búláq Ed., Vol. I, p. 374). This rule, it may be observed, is not without a parallel in the rules of the English law regarding the interpretation of deeds. The word 'Talak' or rather the different formations of the root letters t, l and q, has acquired a clear and definite meaning as denoting dissolution of the marriage tie by declaration of the husband. It is not only used in that sense in the Koran and the sayings of the Prophet, but habitually by the people as a matter of usage although its root meaning is "Setting free" or "letting loose." Hence in law the word 'Talak' and its variations are regarded as having the force of a Sureeh expression so that when a man uses the expression with reference to his wife he cannot afterwards be allowed to say that he meant not divorce but something else. On the other hand if a man were for instance to say to his wife "Thou art not my wife" or "I am not thy husband" or on being asked by a third person "hast thou a wife" answers "no", there would be no divorce unless he meant it (see Fatawa Alamgiri Búláq Ed. Vol. I, p. 375). This is all that is meant by the express (Sureeh) or ambiguous (Kinayah) forms of divorce and nothing turns upon the direct or indirect form of speech. If therefore when Mr. Hamilton speaks of direct and simple words he means thereby that the words of divorce in order to be Sureeh or express must be addressed to the wife, then he is laying down a proposition for which there is really no warrant in the 'Hedaya' or any other authoritative writing on Muhammadan law or in the principles of the Muhammadan law of divorce. Mr. Hamilton's 'Hedaya' as is well known is not a translation of the original Hedaya in Arabic, but of a certain commentary of it prepared in Persian especially for the use of Mr. Hamilton, who apparently was unfamiliar with Arabic, by certain Moulvies of Calcutta. This Persian Commentary is not ordinarily available and is seldom, if ever, used among the Muhammadans nor ever referred to as an authority. Mr. Hamilton's translation of it has however found vogue in the Courts and

is constantly relied on as authority on questions of Hanafi law, though often under the wrong impression that it is a translation of the 'Hedaya' itself. But no statement in Mr. Hamilton's book which is not to be found in the original 'Hedaya' can be accepted as an authoritative exposition of the Muhammadan law on a particular point unless it agrees with the principles of that law or with what is laid down by well-known Muhammadan Jurists of authority on the subject.

The next question to be considered with reference to the ruling in *Furzund Hossein* v. *Janu Bibee*(1) is whether the expressions mentioned in the 'Hedaya' as constituting express divorce are exhaustive of the forms of such divorce or are mere illustrations of the ways in which the different combinations of the root-word t, l and q may be used. On reading the passage from 'Hedaya' cited above one would *primâ facie* be led to think that the phrases in question were meant to be exhaustive of the forms of such divorce, but that is not so as pointed out in Fathul Kadar, Vol. 3, page 350 (printed at Maimania Press, Cairo), a most authoritative Commentary on 'Hedaya.' The *primâ facie* meaning of the passage would be that there were no Sureeh forms of divorce except those mentioned but that is not what is meant; and later on the author (*i.e.* of Hedaya) mentions taliq the infinitive form of t, l, q as among the express terms of divorce although not mentioned before. And the language of the Kanz (a treatise of great authority on the Hanafi law) which is to the effect "*for instance*, 'thou art Táliqun (divorced) and Muttallagatun (divorced)' and 'I have divorced thee (tallaqtoke)' is better . . . ." That this is so can admit of no doubt if once we remember that the only question in connection with a word or phrase being either Sureeh or Kinayah is whether the law does or does not regard it as clearly and unmistakably expressive of the meaning of the man the legal significance of whose act is in dispute. And we are not aware that the Muhammadan law in this connection pays any regard to the fact of the speech being in the direct or indirect form. Similarly by the definition of Talak given in Fatawa Alamgiri quoting from Bahmr Ráiq and cited in *Furzund Hossein* v. *Janu Bibee*(1) from Baillie's "Digest" at p. 205 what is meant by the passage 'Repudiation

(1) (1879) I.L.R., 4 Calc., 588 at p. 591.

MUNRO AND ABDUR RAHIM, JJ.

ASHA BIBI v. KADIR IBRAHIM ROWTHER.

or Talak as the term is defined in law is a release from the marriage tie either immediately or eventually by the use of especial words' is not that the law gives effect to a divorce only if some special or particular words are used, but that Talak denotes dissolution of the marriage tie when it is effected by words of the husband conveying that meaning as distinguished from the setting aside by the Court of a marriage on grounds like those mentioned above (see "Bahmr Ráiq", Egyptian Ed., Vol. II, p. 252).

The learned Judges also rely upon another passage in Baillie's "Digest," viz., 'Its pillar is the expression.' "Thou art repudiated" or the like. But with great respect it is difficult to see how that passage affords any authority for the proposition that the words of repudiation must be directly addressed to the wife, since the expression within inverted commas is cited as a mere illustration. We may mention that the ruling in *Furzund Hossein* v. *Janu Bibee*(1) has been considered in two recent cases of *Sarabai* v. *Rabiabai*(2) and *Ful Chand* v. *Nazab Ali Chowdhry*(3). In *Sarabai* v. *Rabiabai*(2) Batchelor, J., observes that if *Furzund Hossein* v. *Janu Bibee*(1) be understood to lay down that a pronouncement of divorce in order to be valid must be made directly to the wife, he is not prepared to follow the ruling because the Muhammadan law nowhere lays down such a condition. We quite agree in that view. In *Ful Chand* v. *Nazab Ali Chowdhry*(3) Stephen and Doss, JJ., also held that the absence of the wife makes no difference to the validity of a divorce otherwise duly effected, but they think that in *Furzund Hossein* v. *Janu Bibee*(1) there is no express decision to the contrary.

The result is that the defendant having been in our opinion validly divorced by the plaintiff the latter's suit for restitution of conjugal rights fails. The appeal will therefore be allowed and the judgment of the lower Appellate Court set aside and that of the Munsif restored. The appellant will have her costs throughout. We may mention that in the view we have taken it becomes unnecessary to consider the other questions raised by the appellant, viz., whether the plaintiff has been guilty of such cruelty as would disentitle him to restitution.

(1) (1879) I.L.R., 4 Calc., 588 at p. 591. (2) (1906) I.L.R., 30 Bom., 537 at p. 544.
(3) (1909) I.L.R., 36 Calc., 184.