

## APPELLATE CIVIL.

*Before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa  
Ayyangar.*

KOZHIKOTI KHADIR PALLIVEETIL MAHAMED HAJI  
(DEFENDANT), APPELLANT,

1917,  
March, 28.

z.

MOIDEEN VEETIL KALIMABI (PLAINTIFF), RESPONDENT.\*

*Muhammadian Law—Shafi School—Maintenance, arrears of—Whether recoverable  
in the absence of a decree or agreement to pay.*

According to the Shafi School of Muhammadian Law maintenance is a debt and the wife is entitled to recover from her husband arrears of maintenance though there be no decree of Court or mutual agreement in respect of such maintenance.

The distinction in this respect between Shafi and Hanafi school pointed out. Muhammadian Law Texts examined.

SECOND APPEAL against the decree of F. J. DeROZARIO, the acting Subordinate Judge of South Malabar at Calicut, in Appeal No. 910 of 1914, preferred against the decree of L. R. ANANTHANARAYANA AYYAR, the Principal District Munsif of Calicut, in Original Suit No. 563 of 1913.

This Second Appeal arises out of a suit brought by a Muhammadian woman against her husband for arrears of maintenance. The parties belonged to the Shafi sect of the Sunni school. The husband neglected to maintain his wife for some time past. The wife filed a suit against the husband for the recovery of arrears of maintenance for about a year and a half. The defendant pleaded that according to the law of his sect arrears of maintenance were not recoverable unless the amount had been previously fixed by agreement between the parties. The Court of First Instance decreed the claim. The decree was confirmed on appeal. The defendant preferred this Second Appeal.

*P. Appu Nayar for C. Madhavan Nayar for the appellant.*

*K. V. Madhavan Nayar for K. P. M. Menon for the respondent.*

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\* Second Appeal No. 1326 of 1915.

MAHAMED  
HAJI  
v.  
KALIMABI.  
—  
ABDUR  
RAHIM AND  
SRINIVASA  
AYYANGAR,  
JJ.

JUDGMENT.—That in the Shafi Law which governs the parties to this case the wife is entitled to recover arrears of maintenance, though not due under a decree of Court or a mutual agreement, contrary to the Hanafi Law, admits of no doubt. For according to the theory of the former system, maintenance is a debt and not in the nature of a gratuity as is the doctrine of Hanafi lawyers. In the Hedaya (Hamilton, Volume I, page 398), it is expressly laid down as the rule of Hanafi Law that,

“ if a length of time should elapse during which the wife has not received any maintenance from her husband she is not entitled to demand any for that time except when the Kajee had before determined or decreed it to her. . . . ”

Then the learned author after giving the reasons in support of the Hanafi view and in connection with the further deduction that “ arrears of decreed maintenance drop in the case of the death of either party ” states, that

“ Shafi says that the maintenance is in all circumstances to be considered as a debt upon the husband in conformity with his tenet that it is not a gratuity but a return, wherefore it cannot drop like demands of the former description.”

The Hedaya is devoted to the exposition of the Hanafi Law, but the erudition and accuracy of its learned author was so great that whenever according to the practice that prevailed in those days, he states on any point the contrary doctrine of the Shafi or any other branch of the Sunni system, that statement may generally be safely accepted as correct. In Minhajet Talabin of Namawi, a high authority on the Shafi Law and recently translated by Messrs. Van Ien Beg and Howard it is stated (at page 385 of the translation) :

“ During his stay in Egypt, Shafi adopted the doctrine that a wife’s maintenance is obligatory only if she puts herself at her husband’s disposition and not in virtue of the contract of marriage . . . ; consequently a husband owes his wife no maintenance so long as she refuses to come to him ; but owes it from the moment he hears she is willing to put herself at his disposition.”

Then further on it is laid down,

“ when a husband during his marriage becomes so insolvent that he can no longer give the minimum maintenance prescribed, but his wife in spite of this continues to live with him the maintenance becomes a debt due to her from him and exigible at any moment.”

This makes it clear that according to the Shafi school arrears of maintenance can be recovered by the wife counting from the date when her husband wrongfully refused or neglected to maintain her.

In Tohfatal Mierhaj which is an authoritative commentary on the Mirhaj by Shahabuddin Ahmad Ibu Hayanul Hailini who flourished in the sixteenth century, it is expressly stated that the maintenance is a debt on her husband "even if it was not decreed by the Kazeer" (Volume 3, page 382, in original Arabic text). The law therefore is correctly stated in Mr. Tyabji's Principles of Muhammadan Law, section 307, cited in the lower Court's judgments. It may however be pointed out that in paragraph (2) of that section 'Sunni Law' is a mistake for the 'Hanafi Law.' The decision in *Abdul Futter Moulvie v. Pabunesa Khatun*(1) is according to the Hanafi school of law which is followed by the Muhammadans of Bengal generally. The appeal is dismissed with costs.

MAHAMED  
HAJI  
v.  
KALIMABI.  
—  
ABDUR  
RAHIM AND  
SRINIVASA  
AYYANGAR,  
JJ.

S.V.

## APPELLATE CIVIL.

*Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.*

ARUNACHELLAM CHETTY (PLAINTIFF), APPELLANT,

v.

SABAPATHY CHETTY (DEFENDANT), RESPONDENT.\*

1917,  
March, 28.

*Jurisdiction of Inferior Court to set aside decree of Superior Court obtained by fraud—Reliefs that can be granted.*

A District Munsif can entertain a suit for a declaration that a decree passed by a District Court was obtained by fraud when the amount decreed and the subject-matter of the suit are within his jurisdiction; but he cannot direct a retrial of the suit by the District Court. The previous suit can be revived only by an application to the District Court.

APPEALS under clause 15 of the Letters Patent against the judgment of NAPIER, J., in *Arunachallam v. Sabapathy*(2).

(1) (1881) I.L.R., 6 Calc., 631.

\* Letters Patent Appeal No. 215 of 1916.

(2) Civil Revision Petition No. 951 of 1916 praying the High Court to revise the order of D. G. WALLER, the District Judge of Coimbatore, in Civil Miscellaneous Appeal No. 6 of 1916, preferred against the order of S. RAJAGOPALA AYYANGAR, the District Munsif of Tiruppur, in Original Suit No. 1631 of 1915.