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also in favour of his daughter-in-law, in the following words:—"After my death they (*i.e.*, the donees) shall under this document get their names recorded in the public records in respect of the respective properties given to them and remain in possession as *owners* with proprietary powers." The words used are "*malik wa khud ikhtiar*," that is, "owners to deal with as they liked." It was held that these words did not confer an absolute estate. This decision appears to us to be in conflict with the canon of construction laid down by their Lordships of the Privy Council in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1). The language of Lord Davey as to the true interpretation of the word "*malik*" is not confined to the case of a male but is quite general. Ordinarily it denotes absolute ownership. Even without the words "*wa khud ikhtiar*" we think that according to the ruling of the Privy Council the gift in question passed the absolute estate.

We find nothing in the will before us to qualify the language in which the gift to the testator's daughter and wife is expressed. Interpreting the language of the will therefore according to its ordinary signification, we are of opinion that Kadam Kunwar thereby acquired an absolute interest in the property, the subject matter of the gift to her. We agree in the view expressed by the Court below as to this. This disposes of the appeal, and it is unnecessary to consider the other questions which have been raised before us. We dismiss the appeal with costs.

Appeal dismissed.

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December 17.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HUSAINI BEGAM (DEFENDANT) *v.* MUHAMMAD RUSTAM ALI KHAN (PLAINTIFF).*

Muhammadan law—Suit for restitution of conjugal rights—Legal cruelty—Other misconduct of the plaintiff pleaded as a defence to the suit.

In a suit for restitution of conjugal rights, the parties being Muhammadans, if the defendant raises a plea of legal cruelty, the facts to be proved to establish such a plea are similar to those which must be proved to establish

*Second Appeal No. 827 of 1905, from a decree of D. R Lyle, Esq., District Judge of Moradabad, dated the 5th of May 1905, confirming a decree of Pandit Alopi Parsad, Additional Subordinate Judge of Moradabad, dated 7th of December 1904.

(1) (1897) I. L. R., 24 Calc., 834.

a similar plea under the English law. *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) referred to.

But in a suit for restitution brought by the husband misconduct on the plaintiff falling short of legal cruelty may be a ground for the Court refusing relief. Thus where the plaintiff apparently only brought his suit on account of his wife having filed another suit against the plaintiff's father, and in his plaint accused his wife of immorality of the most serious kind, a charge which he totally failed to substantiate, it was *held* that the Court would be justified in refusing him relief. *Mackenzie* v. *Mackenzie* (2) referred to.

On the general facts of the case also it was found that the defendant had reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house, which was situated in a native State.

This was a suit for restitution of conjugal rights brought by one Muhammad Rustam Ali Khan against his wife Husaini Begam. The parties were married on the 2nd of November 1877, and at the time of the marriage the plaintiff's father agreed to pay the defendant Rs. 500 a month as pin-money. The plaintiff and the defendant lived together from 1883 to 1896, when the defendant, on the ground, as she alleged, of her husband's misconduct, left him and went to live with her father. Subsequently the defendant sued her father-in-law for arrears of the monthly allowance which he had agreed to pay her. In this suit a decree based upon a compromise was passed in favour of the plaintiff in the suit. Default was, however, made in the payment of the allowance in accordance with this decree, and Husaini Begam again sued her father-in-law for fresh arrears. After, and apparently in consequence of, this second suit on the part of Husaini Begam, the present suit was instituted by Muhammad Rustam Ali Khan on the 12th of July 1904. The Court of first instance (Additional Subordinate Judge of Moradabad) gave the plaintiff a decree for restitution as claimed. On appeal this decree was affirmed by the District Judge. The defendant thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

Mr. *Karamat Husain* and Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff Muhammad Rustam Ali Khan against his wife for restitution of conjugal rights. The plaintiff

(1) (1867) 11 Moo. I. A., 551. (2) (1895) A. C., 384.

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is the son of Khwaja Muhammad Khan, a Nawab of Dholepur, and was married to the defendant Husaini Begam, who is the daughter of a wealthy resident of Moradabad, now deceased, on the 2nd of November 1877. At the time of the marriage the plaintiff's father agreed to give the defendant Rs. 500 a month for pin-money. The plaintiff and the defendant lived together from the year 1883 up to the year 1896, when she left her husband and went to her father's house on the ground, as she alleges, of her husband's misconduct. She subsequently sued her father-in-law for arrears of the monthly annuity, agreed to be paid to her, up to 1901, and obtained a decree in the terms of a compromise. Her father-in-law failing to pay the annuity after the date of this decree, a suit was instituted by the defendant against him for arrears of it, from the 1st of May 1901 to the 31st of October 1903. The Court below dismissed her suit, but upon appeal to this Court the decision of that Court was reversed and a decree passed in her favour.†

During the pendency of that suit, the suit which has given rise to this appeal was instituted. In his plaint the plaintiff makes serious charges against his wife, alleging not merely that she had become immoral, but that she had actually committed adultery and was at the time, as a consequence of that adultery, pregnant. The following is the allegation in paragraph (6) of the claim:—"Although her parents are dead, yet the defendant lives alone at Moradabad, where there is no near relative of hers who may look after and take care of her. She wanders about wherever she likes and has become immoral. Moreover, she has now become pregnant by adultery." It is a significant fact that it only occurred to the husband to institute a suit for restitution of conjugal rights when the wife had taken legal steps to recover her arrears of annuity from his father. And it is also significant that he should desire to resume connubial relations with a person in the condition in which he alleges his wife to be.

In her defence the defendant avers that owing to the enmity subsisting between her and the plaintiff she has strong apprehension of danger to her life. She further alleges acts of immorality on the part of her husband, and that owing to pressure exercised

† *Vide supra*, p. 151—*Husaini Begam* v. *Khwaja Muhammad Khan.*

by his father he had shamelessly charged her with adultery. She further states that she has what she describes as magnificent houses of her own in the city of Moradabad, and that she is willing that her husband should live with her in that city as he formerly did, or arrange for a separate house at Moradabad. She charges in answer to the suit that it was brought in consequence of the institution of the suit for arrears of pin-money.

Both the Courts below have found that there is no reasonable apprehension of danger to the life of the defendant if she goes and lives with her husband in his house, or of serious maltreatment. The learned District Judge in the course of his judgment says:—"It is urged that the case at present pending in appeal before the High Court between the appellant in this case and the respondent's father shows that enmity exists and the fact that the respondent charged her with having committed adultery indicates that he would maltreat her were she to be compelled to live with him. I do not think that these facts are sufficient to warrant the conclusion that the danger of the woman being maltreated is so great as to justify the Court in a refusal to grant a decree for restitution of conjugal rights, and I note that the parties have admittedly lived together after the institution of the suit by the appellant against the respondent's father." From this we gather that in the opinion of the learned judge there is some danger. The last remark of the learned Judge refers to a visit paid by the plaintiff to the defendant in Moradabad.

A case such as the present must, as Mr. *Karamat Husain* has rightly said, be decided according to the Muhammadan law. This was so held in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1). Their Lordships of the Privy Council further in that case, at p. 611, say :—"The Muhammadan law on a question of what is legal cruelty between man and wife would probably not differ materially from our own, of which one of the most recent expositions is the following :—'There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.'"

If it be granted that according to the Muhammadan law a husband may sue to enforce his right to the custody of his wife,

(1) (1867) 11 Moo. I. A., 551.

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and that, if her defence be legal cruelty, she must prove cruelty of the nature just described, it does not follow that she has no other defences to a suit for the restitution of conjugal right. In the case which we have cited their Lordships say (at p. 712):—"The marriage tie amongst Muhammadans is not so indissoluble as it is among Christians. The Muhammadan wife, as has been shown above, has rights which the Christian, or at least the English, wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the *Kazee* by the *Fatwa* (if the law indeed warrants such a jurisdiction) of selecting a proper place of residence for the wife other than the husband's house." Lord Herschell, L. C., in the course of his judgment in *Mackenzie* v. *Mackenzie* (1) discussing the question whether in an action in Scotland for adherence by the husband, which corresponds to a suit for restitution of conjugal rights in England, misconduct on his part short of cruelty or other matrimonial offence may be a ground for refusing relief, observes (at p. 390):—"It seems to me open to question whether the Courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as *sævitia* or cruelty; can he, when his own misconduct has led his wife to separate herself from him, come into Court and, allowing his misdeeds, insist that it is bound to grant him a decree of adherence?"

Now we have it here that the defendant left her husband's house and came to Moradabad in 1896. From that time until the time when the suit out of which this appeal has arisen was instituted,

(1) (1895) A. C., 384.

namely, on the 12th of July 1904, plaintiff took no steps to obtain restitution of conjugal rights. It was only when the suit for arrears of pin-money was instituted by his wife against his father that he took action. This suggests the idea that the suit was not instituted with a view to renew happy connubial relations, but with the sinister object of giving trouble and annoyance to his wife. We find him in the plaint itself heaping the vilest insults upon her. He charges her with immorality and with adultery. In view of her parentage, position and fortune, this charge, if untrue, is sheer cruelty. If the plaintiff believed that there was any truth in it, it is hard to understand why he should desire to resume conjugal relations with a woman who had proved so faithless. If he believes it to be true, as we must assume he does, can we say that the defendant has not any ground for reasonable apprehension, that, if she return to Dholepur, a native State, in which she could not invoke the protection of the British law, she will be subject to maltreatment and violence. We think that the charge of immorality and adultery, which has not been substantiated, is of so cruel a nature as to justify a Court in refusing to grant him a decree for restitution of conjugal rights. The defendant in view of all the facts has established that she has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house at Dholepur. We arrive at this conclusion as an inference of law from the facts found and admitted in the lower Courts.

The defendant states in her defence, and it is not denied, that she has property worth between 4 and 5 lakhs of rupees, and has houses in the city of Moradabad suitable to the position in life of her husband. She says that she has no objection to her husband residing with her in one of her houses as he did formerly, and that she has no objection to resume connubial relations with him in her own home or in a separate house, if he so choose, in Moradabad. We think under the circumstances that this offer is not unreasonable. The course then which we propose to adopt is to allow this appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit, upon the defendant's undertaking, as mentioned in the written statement, to live with her husband in Moradabad and there resume conjugal relations with him.

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If this undertaking be not fulfilled, liberty is reserved to the plaintiff to seek in another suit restitution of conjugal rights. We accordingly allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all Court.

Appeal decreed.

1906
December 18.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt and Mr. Justice Richards.

CHUNNI LAL AND OTHERS (PLAINTIFFS) *v.* THE NIZAM'S GUARANTEED STATE RAILWAY COMPANY, LD., (DEFENDANT).*

Contract—Railway Company—Receipt of goods by one company for carriage over its own and another Company's line—Liability in respect of overcharge made by delivering Company—Bye-laws—Power of Railway Company to alter the principle of calculation of rates.

Two wagon loads of chillies were received by the Station Master at Bezwada on the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsula Railway at a rate of Rs. 270 per wagon for the whole distance. On arrival at Agra the Great Indian Peninsula Railway Company's station master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges.

Held that the contract for carriage of the goods for the whole distance was one entire contract with the receiving company, who where liable for the overcharge, if any, wrongfully demanded from the consignees. *Muschamp* v. *Lancaster and Preston Junction Railway Company* (1), *Webber* v. *The Great Western Railway Company* (2) and *Kalu Ram Maigraj* v. *The Madras Railway Company* (3) followed.

Held also that a bye-law of the Great Indian Peninsula Railway Company, which reserved to the Railway the right of remeasurement, reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or under-charged, did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge at the place of destination maund rates instead of wagon rates.

* Second Appeal No. 623 of 1904, from a decree of H. G. Warburton, Esq., District Judge of Agra, dated the 16th of April 1904, reversing a decree of Babu Baidya Nath Das, Munsif of Agra, dated the 31st of November 1903.

(1) (1841) 8 M. and W., 421; 58 R. R., 758. (2) (1865) 3 H. and C., 771.
(3) (1881) I. L. R., 3 Mad., 240.