

the learned Munsif was doubtful as to whether he had jurisdiction to entertain it in view of the provisions of the Tenancy Act. The Munsif was doubtful whether the defendant was a tenant of the plaintiff company within the meaning of that expression in the Tenancy Act and as to whether or not the return agreed to be made by the defendant for the appropriation of the grass on the embankment was not rent within the meaning of section 4 of the Tenancy Act. We are of opinion that the defendant is not a tenant of the plaintiff company within the meaning of the Tenancy Act. He has merely obtained from the company a license to go upon their embankment and cut grass therefrom. The right which he obtained under the agreement was in the nature of a *profit à prendre* and nothing more. He did not thereby become a tenant of the plaintiff company and the payment which he agreed to make was not in the nature of rent within the meaning of that expression in the Tenancy Act. We direct the learned Munsif to proceed with the hearing of the suit.

1909

B. AND N.-W.
RAILWAY
T.
BANDHU
SINGH.

APPELLATE CIVIL.

1909

March 20.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

ABDUL LATIF KHAN AND ANOTHER (PLAINTIFFS) v. NIYAZ AHMED KHAN
(DEFENDANT).*

Muhammadian Law—Sunnis—Marriage brought about by fraud—No consummation—Dower—Liability of the husband to pay to the heirs of wife.

When consent to a marriage is obtained by fraud or force, such marriage is invalid unless ratified, and the husband is not liable to pay the dower of the deceased wife to her heirs.

THE facts of this case are as follows :—

One Musammat Akbari was married on 5th February 1896, to the defendant. She died before consummation of the marriage, on 28th December, 1896. The father and brother of Musammat Akbari brought the present suit to recover their share of the dower debt which was settled at Rs. 20,000, but only half of which, *viz.*, Rs. 10,000, was recoverable as the marriage was not

*Second Appeal No. 285 of 1908 from a decree of C. D. Steel, District Judge of Shahjahanpur, dated the 20th of December 1907, confirming a decree of Achal Bihari, Subordinate Judge of Shahjahanpur, dated the 15th of July 1907.

1909

ABDUL LATIF
KHAH
v.
NIZAZ
AHMAD KHAN.

consummated. Out of this sum of Rs 10,000, half devolved on the husband and the other half was claimed by the plaintiffs. The defendant pleaded that the dower settled at the time of marriage was only Rs. 150 and further that he was induced to marry Musammat Akbari on the misrepresentation that she was in sound health, while as a matter of fact she was seriously ill. The Court of first instance held that at the time of the marriage Musammat Akbari had been suffering from serious illness and that therefore according to the Hanafi law, to which the parties were subject, the marriage was void. On appeal, the District Judge held that the case was governed by the Contract Act and as there was fraud practised upon the husband the suit was not maintainable.

The plaintiffs appealed to the High Court.

Babu *Durga Charan Banerji* (for whom *Maulvi Ghulam Mujtaba*).

The law applicable to marriage and dower was the Muhammadan law; as the parties were *Sunnis* it had to be decided whether under the *Sunni* law the marriage was void. According to that law, the illness of the wife does not invalidate the marriage. Baillie, *Muhammadan Law*, pages 96 and 102. A. F. Abdul Rahman's *Institutes of Muhammadan Law*, page 52, Article 81. The passage quoted by the District Judge from Amir Ali's *Muhammadan Law*, Vol. II, p. 326, does not apply to *Sunnis*. Mr. Ameer Ali quoted no authority for the proposition that the *Shia* and *Sunni* laws on this point were the same. There was no direct authority in favour of the proposition that marriage is invalid even if procured by fraud and the Contract Act would not apply.

According to the Bengal and North-Western Provinces Civil Courts Act, the Muhammadan Law only would be applicable in questions of marriage and dower.

Mr. *M. L. Agarwala*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit brought by two of the legal representatives of one Musammat Akbari, deceased, for a portion of her alleged dower. Musammat Akbari was married to the defendant on the 5th of February 1906. She died on the 28th of December 1906, before

consummation of the marriage. The plaintiff states that the amount of her dower was Rs. 20 000, that as the marriage was not consummated only one-half of that amount is payable by the husband, and that the plaintiffs are entitled to a half of that half, namely to Rs. 5,000. This sum the plaintiffs seek to recover in this suit. The Court of first instance dismissed the suit and the decree of that court was affirmed by the lower appellate court. It has been found by the learned Judge that at the time of her marriage Musammat Akbari was suffering from a serious illness which prevented consummation of the marriage and that she died of that illness. It has also been found that the defendant, her husband, was not aware that she was suffering from that illness at the time of the marriage, and that the fact of the illness was suppressed by the father of the girl. On these findings the learned Judge has come to the conclusion that the consent of the husband was obtained by fraud. As according to the finding of the court below, there was an active concealment of a fact which should have been brought to the notice of the husband in order to obtain his free consent to the marriage, a fraud was perpetrated on him at the time of the marriage. It is stated in Mr. Amir Ali's work on *Muhammadian Law*, Vol. II, p. 326, on the authority of the *Raddul Mukhtar* that "when consent to a contract of marriage has been obtained by force or fraud such marriage is invalid unless ratified." He also lays down on the same page that "a marriage contracted by a sick person is dependent on consummation, so that if he die of that illness without consummation, the contract is void and the woman has no right to dower or succession." The authority for this view is the *Sharaya*, which is an authority on *Shia* law, by which the parties to this case are not governed. But Mr. Amir Ali also says on the same page that, "it is needless to add that there is very little difference on these points between the *Shias* and the *Sunnis*." The learned vakil for the appellant contends that this is the learned author's own view only and that he has cited no authority in support of it. The learned vakil however has not been able to refer us to any authority which would justify us in coming to a different conclusion. He relies on the following passage on page 405 of the same work: "If the wife however was suffering from

1307

ABDUL LATIF
KHAN
v.
NIYAZ
AHMAD KHAN.

1909

ABDUL LATIF
KFRAN
".
NIVAZ
AHMED KHAN.

some illness at the time of marriage which prevented consummation and eventually caused her death, her right to the dower would be transmitted to her heirs," and contends that this is inconsistent with the opinion expressed on page 326 as quoted above. We do not think this is so. What is referred to on page 405 is the case of a valid marriage, where there has been no fraud or coercion. As we have pointed out above, if a marriage was procured by fraud it is invalid. In this case according to the finding of the court below the marriage of the defendant with the deceased Musammat Akbari was the result of a fraud perpetrated upon him, and therefore it was an invalid marriage. It necessarily follows that the defendant was not liable to pay the dower of the deceased and the plaintiff's suit has been rightly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir George Knox and Mr. Justice Griffin.

THAN CHAND (DECREE-HOLDER) v. JAGANNATH (JUDGMENT-DEBTOR).*

Code of Civil Procedure (Act XIV of 1882), section 310A—Act No. IV of 1882 (Transfer of Property Act), section 89—Sale held in pursuance of a decree under section 89 of the Transfer of Property Act.

The appellant obtained an order absolute under section 89 of the Transfer of Property Act, caused the property to be sold and purchased it himself. The judgment-debtor made an application under section 310 A of the Code of Civil Procedure for setting aside the sale. *Held* that in the absence of special rules framed by the High Court for carrying out orders under chapter IV of Act No. IV of 1882, the provisions of the Code of Civil Procedure applied and the application by the judgment-debtor could be entertained under section 310A.

THE facts of this case are as follows:—

The appellant, Lala Than Chand, got a decree for sale under a mortgage in a suit to which the respondent, Jagannath, was a party as puisne mortgagee. The decretal amount was not paid within the time fixed by the Court under section 88 of the Transfer of Property Act, 1882. The mortgagee decree-holder obtained an order absolute under section 89 of Act IV of 1882, and brought the mortgaged property to sale and purchased it himself. Jagannath deposited the purchase money and applied

* Second Appeal No. 673 of 1908 from a decree of Ahmad Ali Khan, officiating Additional District Judge of Aligarh, dated the 29th of April 1908, confirming a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 16th of July 1907.