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BHIM SEN v. MOTI RAM.

BY THE COURT:—The order of the Court is that the appeal be allowed, the decision of the lower court set aside, and the case remanded to the court of first instance through the lower appellate court, with directions that it be reinstated in the file of pending suits in its proper number and be disposed of on the merits, regard being had to the observations made by us in our judgements this day delivered. Costs here and hitherto will abide the event.

Appeal decreed: Cause remanded.

APPELLATE CIVIL.

1910
July 20.

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

AMIN BEG (PLAINTIFF) *v.* SAMAN (DEFENDANT).*

Marriage—Muhammadan law—Conversion of wife to Christianity—Dissolution of marriage—Suit for restitution of conjugal rights.

Under the Muhammadan Law a wife's conversion from Islam to Christianity effects a complete dissolution of marriage with her Muhammadan husband. The fact of such a conversion is therefore a bar to a suit by the husband for restitution of conjugal rights. *Zuburdust Khan* v. *His wife* (1) and *Imamdin* v. *Hasan Bibi* (2) followed.

THE plaintiff and defendant in this case had been Muhammadans married to each other according to the Muhammadan law. The wife became a convert to Christianity and left her husband. Thereafter the husband brought a suit for restitution of conjugal rights. Both the courts below dismissed the suit as unmaintainable.

The plaintiff appealed to the High Court.

Mr. *Ishaq Khan*, for the appellant, contended that under the Muhammadan law a wife who abandoned Islam should be forced to embrace it. This was, however, not possible now. If she was converted to Christianity, the previous relation did not come to an end, since there was no bar to a Muhammadan marrying a Christian lady. He relied on Ameer Ali's *Mahomedan Law*, 3rd edn., p. 432.

* Second Appeal No. 1260 of 1909 from a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 9th of October, 1909, confirming a decree of Kunwar Sen, Munsif of Bulandshahr, dated the 9th of August, 1909.

(1) (1870) 2 N-W. P., H. C. Rep., 370. (2) (1906) Punj. Rec., 309.

If the marriage were taken to be dissolved it would open a very wide door to wives who would desire to renounce Islam and the whole Muhammadan community would be seriously affected. The mere fact that there was a conversion could not dissolve a Muhammadan marriage.

Maulvi *M. Shafi-uz-zaman*, for the respondent, cited *Zubur-dust Khan* v. *His wife* (1); Baillie's *Digest*, p. 182; Wilson's *Anglo-Mahomedan Law*, pp. 159 and 179; Ameer Ali's *Mahomedan Law*, 2nd edn., Volume II, p. 343; Hamilton's *Heday*, p. 66; *Khan Bibi* v. *Pir Shah* (2), *Nowroz Ali* v. *Aziz Bibi* (3), *Allah Bakhsh* v. *Amir Begum* (4) and *Imamdin* v. *Hasan Bibi* (5).

STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for restitution of conjugal rights. The plaintiff and the defendant both being Muhammadans were married a number of years ago. The defendant Musammat Saman has apostatized from Islam and become a Christian and has since left the protection of her husband. He now sues for restitution of conjugal rights and the defence is that by the fact of her apostacy the marriage tie became dissolved and a decree cannot be passed for restitution of such rights. Both the lower courts have held that the suit cannot be maintained in view of the authorities upon the subject.

We have heard the argument of the learned counsel for the plaintiff appellant, which was based on a passage to be found in the third edition of Mr. Ameer Ali's work on Muhammadan Law. Mr. *Ishaq Khan* admits that there is no authority to be found in support of his contention outside the writings of the jurists of Balkh and Samarkhand, and this apparently is so. In the second edition of Mr. Ameer Ali's work it is definitely stated that "under the Muhammadan Law if a Moslem husband or a Moslem wife apostatize from Islam, the apostacy has the effect of dissolving the marriage tie between the parties." Baillie in his digest of Muhammadan Law at page 182 also states that "apostacy from Islam by one of a married pair is a cancellation of their marriage." In Hamilton's translation of the Hedaya at page 66

(1) (1870) 2 N-W. P., H. C. Rep., 370. (3) (1876) Punj., Rec., No. 124.
(2) (1884) Punj., Rec., No. 132. (4) (1899) Punj., Rec., No. 61.
(5) (1906) Punj., Rec., No. 85.

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is the passage:—"If either husband or wife apostatize from the faith a separation takes place without divorce according to Haneefa and Aboo Yoosuf." Sir Roland Wilson in his work on Anglo-Mahomedan Law, at page 156, writes as follows:—"It seems that the effect of either or both of the parties to a Mahomedan marriage renouncing the Mahomedan religion is to dissolve the marriage *ipso facto*, so far as the British Courts are concerned, leaving it open to the parties to solemnize a fresh marriage under the Christian Marriage Act, XV of 1872, according to circumstances." In the case of *Zuburdust Khan* v. *His wife* (1) TURNER, officiating C. J., and TURNBULL, J., expressed the opinion that the effect of the apostacy of a Muhammadan wife was to dissolve the marriage contract and that according to the Muhammadan Law if either party to a marriage becomes a convert to Christianity, a claim for restitution of conjugal rights cannot be supported. In addition to these authorities, we have the ruling in the case of *Imam Din* v. *Hasan Bibi* (2). In that case it was also held that according to the Muhammadan Law a wife's conversion from Islam to Christianity effects a complete dissolution of her marriage with her Muhammadan husband. There is thus a great mass of authority in support of the view taken by the courts below. The only ground, as we have said, upon which the learned counsel for the appellant supports his argument is the statement of Mr. Ameer Ali in the third edition of his work at page 432. The learned author directs attention to the divergence of opinion as to the effect of the wife's abjuration of Islam on the status of marriage, and points out that the lawyers of Bokhara have always taken a narrow view of the law but that the law of the jurists of Balkh and Samarkhand "laid down that when a woman abjures Islam for a scriptural or revealed religion like Judaism or Christianity, her renunciation of the faith does not dissolve the marriage." Then the learned author refers to the arguments in support of their contention and to the decision which we have just cited from the Punjab Chief Court Records and submits that "the British Indian Courts are by their constitution bound to follow the more reasonable enunciations of the jurists of Balkh and Samarkhand." We find ourselves unable to

(1) (1870) 2 N-W. P., H. C. Rep., 370. (2) (1906) Punj., Rec., 809.

disregard the authorities in support of the view taken by the courts below and depart from the course of decision hitherto prevailing. However weighty be the view expressed by Mr. Ameer Ali, we do not think that we should be justified in doing so. We therefore dismiss the appeal with costs.

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Appeal dismissed.

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

1910. *July* 21.

KISHORI LAL AND ANOTHER (PLAINTIFFS) v. KUBER SINGH (DEFENDANT).*

Act No. XV of 1877 *(Indian Limitation Act), section* 3; *schedule II, articles* 13, 14—*Civil Procedure Code* (1882), *section* 310*A.—Execution of decree—Suit involving the cancellation of an order setting aside a sale—Limitation.*

A Civil Court acting under section 310A of the Code of Civil Procedure, 1882, set aside a sale on an application made about 14 months after the sale. The auction-purchaser more than a year after this order sued for possession of the property and for a declaration that the order under section 310A was passed without jurisdiction. *Held* that the order whether passed rightly or wrongly was not a nullity, and that the order having been passed in a proceeding other than a suit, article 13 of the second schedule to the Indian Limitation Act, 1877, barred the present suit, inasmuch as the plaintiff could not obtain a decree for possession without first having the order set aside.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J. The facts of the case are stated in the judgement under appeal, which was as follows :—

"The facts necessary for the disposal of this appeal are briefly these :— The suit under appeal was brought for the possession of the property bought in execution of a decree on the 20th September, 1901, and the sale of that property was set aside by the learned Munsif on the 26th of September, 1901. On appeal the order of the learned Munsif setting aside the sale was reversed by the lower appellate court on the 16th of January, 1902. That order of the lower appellate court was upheld by the High Court on the 4th of December, 1902. The judgement-debtor again on the 23rd of December, 1902, applied under section 310A to have the sale set aside. The learned Munsif on the 20th of April, 1903, allowed the application and set aside the sale. On appeal to the lower appellate court the order of the Munsif setting aside the sale was again reversed on the 17th of July, 1903. On second appeal to the High Court it was held that no appeal lay to the lower appellate court. After the above-mentioned proceedings a fresh suit was instituted by the plaintiff for possession of the property sold. The result of the above proceedings, it is to be noticed, was, that the property sold on the 20th of September, 1901, passed to the possession of the judgement-debtor. The decree-holder therefore brought the suit under appeal for the recovery of

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* Appeal No. 161 of 1909 under section 10 of the Letters Patent.