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If we assume that there was no right of pre-emption based either on custom or agreement, we see no reason to differ from the view taken by the court below that the plaintiff had a right under the Muhammadan law and duly performed the formalities required by that law. It has been argued on behalf of the appellant that the plaintiff having set up a custom of pre-emption and at the same time claimed under the Muhammadan law her suit must fail, and reliance was placed on the case of *Muhammad Salim* v. *Sadar-ud-din Beg* (1). We have already stated that in our opinion the reasonable construction of the plaint in the present case is an alternative claim. The law allows a plaintiff to put his claim in the alternative. The only principle of law decided in the case cited is the principle that where in a mahal it is proved that a custom of pre-emption exists, then the Muhammadan law of pre-emption connot prevail at the same time. So that where there is an established custom and the plaintiff pre-emptor fails to bring himself within that established custom, he cannot fall back on Muhammadan law.

The only other point taken was that the court below was wrong in the award of costs. In our opinion the plaintiff's case substantially succeeded, and we see no reason to vary the decree of the court below in this respect.

The objections filed on behalf of the respondents cannot be pressed.

The result is that we dismiss the appeal with costs. The objections are also dismissed with costs.

Appeal dismissed.

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May, 7.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

WAHID KHAN AND ANOTHER (DEFENDANTS) *v.* ZAINAB BIBI (PLAINTIFF)*

Muhammadan law—Sunni sect—Divorce—Evidence—Burden of proof.

No special form or formula is prescribed for a divorce under the Hanafia law. All that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage.

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*Second Appeal No. 220 of 1913 from a decree of Srish Chandra Basu, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 6th of December, 1912, modifying a decree of Raja Ram, Munsif of Agra, dated the 29th of June, 1912.

(1) (1910) 7 A. L. J., 680.

Where witnesses depose that a divorce was effected in their presence it is for the party alleging the contrary to prove by cross-examination that the words used by the husband when pronouncing the divorce were insufficient and incomplete to support a valid divorce.

THIS was a suit brought by a Muhammadan widow to recover her dower-debt and her legal share in the estate of her deceased husband, as also her wearing apparel or its value which she alleged was retained by the defendants. The suit was brought against her two step-sons called Wahid Khan and Majid Khan. She stated in her plaint that she was the second wife of Mehrab Khan, to whom she was married some six or seven years ago on a dower of Rs. 500, and that she lived with him until his death which occurred on the 2nd of November, 1910. After his death her two step-sons turned her out of the house, retaining all her personal goods and declining to give her any share in the estate of her deceased husband or to pay her dower-debt. The suit was resisted on various grounds. It was urged in defence that the plaintiff was not the lawfully married wife of Mehrab Khan, but was his mistress, and that she herself had taken away articles worth Rs. 1,000 from the house, when Mehrab Khan died. The property in which she claimed a share was said to be the property of one of the sons of Mehrab Khan. The court of first instance decreed the claim in full. On appeal the learned Judge modified the decree as regards the claim to the legal share in the landed property. He held that the said property belonged to the defendant Wahid Khan. The defendants appealed to the High Court.

Mr. *S. A. Haidar*, for the appellants.

The Hon'ble Munshi *Gokul Prasad*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—This appeal arises out of a suit brought by a Muhammadan widow to recover her dower-debt and legal share in the estate of her deceased husband, as also her wearing apparel or its value, which she alleged was retained by the defendants. The suit was brought against her two step-sons called Wahid Khan and Majid Khan. She stated in her plaint that she was the second wife of Mehrab Khan, to whom she was married some six or seven years ago on a dower of Rs. 500, and that she lived with him until his death, which occurred on the 2nd of November, 1910. After his death her two step-

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sons turned her out of the house, retaining all her personal goods and declining to give her any share in the estate of her deceased husband or to pay her dower-debt. The suit was resisted on various grounds. It was urged in defence that the plaintiff was not the lawfully married wife of Mehrab Khan, but was his mistress, and that she herself had taken away articles worth Rs. 1,000 from the house, when Mehrab Khan died. The property in which she claimed a share was said to be the property of one of the sons of Mehrab Khan. The court of first instance decreed the claim in full. On appeal the learned Judge modified the decree as regards the claim to the legal share in the landed property. He held that the said property belonged to the defendant Wahid Khan. The defendants have come up in second appeal to this Court, and the only point urged before us is that the plaintiff was not legally married to Mehrab Khan. They said that the plaintiff was first married to a man of the name of Mahbub Ali, who never legally divorced her, and therefore she could not be lawfully married to Mehrab Khan This question was agitated in both the lower courts and was found against the defendants appellants on the evidence in the case. But it is contended that the question was not purely one of fact, but a mixed question of fact and law and can be raised in second appeal. The argument is that the plaintiff was admittedly married to Mahbub Ali, but says that she was divorced by him almost immediately after the marriage, and that some time after the divorce she married Mehrab Khan. The evidence of the alleged divorce consists of the statements of two witnesses who say that in their presence Mahbub Ali divorced her. That evidence is not sufficient, because the witnesses do not say what words were used by Mahbub Ali when he pronounced the divorce, for unless such words are known it cannot be said whether the divorce was valid or not. It was for the plaintiff respondent to prove the validity of the divorce in order to succeed in her claim; and therefore it was incumbent on her to produce evidence with regard to the formula pronounced by her first husband Mahbub Ali. We are unable to agree with this contention. The parties to the present appeal are Sunnis and are governed by the Hanafia law. No special form or formula is prescribed for a divorce under the Hanafia law. All

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that the law requires is to see that the words of divorce pronounced by a husband should show a clear intention on his part to dissolve the contract of marriage. In the present case the two witnesses, whom the courts below have believed, depose that in their presence Mahbub Ali divorced Musammat Zainab, the plaintiff respondent. It was for the defendants to cross-examine the witnesses as to the words used by the husband when pronouncing the divorce in order to show that the words used were insufficient and incomplete to support a valid divorce. We think that the lower courts were right in holding that the divorce of the plaintiff by Mahbub Ali was proved. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

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May, 8.

DWARKA AND OTHERS (DEFENDANTS) *v.* RAM PAT (PLAINTIFF) AND SHEO DULARE AND OTHERS (DEFENDANTS)*

Civil Procedure Code (1908), *order XX, rule* 18—*Act (Local) No. II of* 1901 *(Agra Tenancy Act), section* 32—*Joint Hindu family—Partition—Occupancy holding—Existence of occupancy holding no bar to partition.*

Held that the presence of an occupancy holding as an item of joint family property is no reason for not effecting a partition of the property as a whole. The Court can either give the occupancy holding to one party, taking from that party an equivalent in value, or if it be found impossible to do this, the court can leave the occupancy holding undivided, merely making a declaration that the parties are entitled jointly to the holding.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are fully set forth in the judgement under appeal, which was as follows :—

"This is an appeal by some of the defendants in a suit for partition. According to the pedigree appended to the plaint, the correctness of which was admitted, there were three brothers, Sheo Tahal, Bhairo and Sheo Sahai. The plaintiff, Ram Pat, is the only son of Sheo Tahal. The contesting defendants, who are appellants before this Court, are the sons and grandsons of Bhairo. The family of Sheo Sahai is said to be represented by a single grandson, Sheo Dulare, who was impleaded as a defendant in the court of first instance and is one of the respondents before this Court. The plaintiff's case is that he and the defendants were all members of a joint undivided Hindu family, and that no separation or partition had ever taken place between them, although the plaintiff until recently was earning his livelihood abroad. When he returned

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Appeal No. 131 of 1913 under section 10 of the Letters Patent.