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no money was available for the purpose, and no effort, either within the time or outside the time, had ever been shown with a view to establishing that redemption was contemplated, and, therefore, the final decree was the result of the failure to issue notice. The result would have been just the same if the notice had been issued to the Nazir. We agree with what a member of this Court has already said in one of the cases relied upon by Mr. *Durga Prasad*, in the case of *Ram Barechha Ram* v. *Tarak Tewari* (1):—" Where there has been an irregularity in the appointment of a guardian, the moment it is shown that there has been no fraud and that the minor's interests have not been prejudiced by the irregularity, the minor's right to set aside the proceedings must be denied." The same principle is applicable, not only to the appointment of the guardian, but to all the machinery relating to the appointment in respect of which the guardian stands in the shoes of the nominal litigant.

The appeal must, therefore, be allowed and the decree of the first court restored with costs here and below.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.

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RAHIMA BIBI (PLAINTIFF) *v.* FAZIL (DEFENDANT).*

Muhammadan law—Divorce—Charge of adultery made by husband against wife—Retractation.

A Muhammadan wife, having been accused by her husband of adultery, sued in the court of a Subordinate Judge for dissolution of her marriage. The defendant denied (falsely) that he had ever made the charge complained of. During the course of the suit, however, he filed an application, in

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* Second Appeal No. 229 of 1925, from a decree of K. G. Harper, District Judge of Benares, dated the 10th of November, 1924, reversing a decree of Man Mohan Sanyal, Subordinate Judge of Benares, dated the 11th of September, 1924.

(1) (1916) 14 A.L.J., 589 (596).

which, while denying again that he had ever accused his wife of misconduct, proclaimed her innocence, and asked that the application might be treated as a retractation.

Held, that the suit was properly brought in the court of the Subordinate Judge, that the application of the defendant could not be treated in any way as a retractation of the charge, and that the plaintiff, under the Muhammadan law, was entitled to a decree. *Zafar Husain* v. *Ummat-ur-Rahman* (1), referred to.

THE facts of this case fully appear from the judgement of MEARS, C. J.

Hafiz *Mukhtar Ahmad* (for Maulvi *Iqbal Ahmad*), for the appellant.

Mr. *B. Malik* and Dr. *Surendra Nath Sen*, for the respondent.

MEARS, C. J.:—This is a perfectly simple and straightforward case. We are going to allow the appeal because we are of opinion that the Judge in the lower appellate court in considering what were the principles laid down in the case of *Zafar Husain* v. *Ummat-ur-Rahman* (1), included in it a principle which the case does not warrant.

The suit was commenced by Musammat Rahima Bibi. She was a young woman, who is said to have been a minor, but may have been on the eve of her majority, or may in fact have been major at the time of the happening of the event complained of. She sued her husband for a dissolution of marriage, and her case was that, having been married on the 21st of June, 1922, her husband in September, 1922, made an accusation against her that she had committed adultery, at first with a man whom he did not name but ultimately with a named relative, and as a result of that adultery she had become pregnant. He made that accusation at a moment when she had returned to his

(1) (1919) I.L.R., 41 All., 278.

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house, and demanded and received from her the jewels which he had given her on her marriage and turned her out of the house. That is to say she remained during the rest of the night under her husband's roof. In the morning he sent for her relatives, charged her in their presence with adultery and said he wished to have no more to do with her. Thereupon they took her away. She has never since resided with her husband. The husband on other occasions made repeated charges to various people of the misconduct of his wife. The father of the lady apparently went to the people of the brotherhood and a great deal of time was occupied in trying to make arrangements either to settle the matter amicably or to bring about some form of matrimonial separation, and it came to me as a considerable astonishment, that this suit, commenced as it was on the 2nd of January, 1924, was brought 15 months after the accusation had been made. In ordinary circumstances I should have said that a delay for that length showed that the lady really did not feel so outraged by the accusation as to entitle her to relief. The gap has to some extent been satisfactorily filled up by the interviews and negotiations which the father had with members of the brotherhood and I am satisfied that the charge shocked and outraged the feelings of the lady.

The plaint sets out the facts I have narrated and adds :—" The plaintiff was put to great disgrace on account of the false accusations and suffered a mental pain." She asked that she might be given a dissolution of her marriage. The defendant who throughout the whole proceedings has behaved badly, chose to adopt a line which he knew to be false. He asserted that he had never made any defamatory statement with regard to his wife. He added (quite truly) that she was a woman of good character and chaste. When

the matter came up before Mr. Man Mohan Sanyal he tried it with great care and he came to a conclusion of fact with regard to the charge, which was undoubtedly right. He believed that, notwithstanding the denial of the husband in his written statement, and his denial on oath in the box, that he was telling falsehoods, and the learned Subordinate Judge gave a decision in favour of the lady.

Before, however, that happened, a very curious incident took place. The evidence on both sides had been recorded and the defendant was advised to make a retractation. He was in a position of very great difficulty, because he had already sworn on oath that he had never accused this lady of adultery, and he had the hardihood to do this notwithstanding that he had been opposed in the witness-box by witness after witness of undoubted probity, who swore to his having made this accusation when he was face to face with them. Therefore when he wished to make a retractation, he could not do so because the essential element of a retractation is the withdrawal of a statement previously made. An admission might have and indeed should have involved him in proceedings for perjury. There is, therefore, in the document, dated the 2nd of September, 1924, nothing in the nature of a withdrawal of what had originally been said, and indeed the defendant in this very document denies in terms that he ever had accused his wife of misconduct. He is good enough in the document to proclaim to the world her innocence and he prayed to the court that it might be treated as a retractation of the alleged accusation which he denied ever having made. The document is not worth the paper it is written on from any point of view whatever, and is as dishonest as his written statement and

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evidence. The learned Subordinate Judge was perfectly right in disregarding it.

However, when the matter got up before the District Judge, he took a different view, and a view which, I am of opinion, was the wrong one. He dealt with the document as if it is a document of retractation, overlooking the meaning of the word. There can be no doubt that if he had come to the opposite opinion, that it was not in fact a retractation because it lacked the necessary element set out in the definition in Webster's Dictionary, namely, the withdrawal of a statement previously made, his decision, I believe, would have been entirely different.

The authority of *Zafar Husain* v. *Ummat-ur-Rahman* (1) to which we have been referred, is a decision which, in my opinion, completely covers this case. I believe it to be in accordance not only with the law but certainly in accordance with the times in which we live. We have been treated at very great length to extracts from law of a very remote period, which, in my opinion, have very little to do with the matter and therefore I do not discuss them. The law on the subject of *la'an* and of the authority of the court to grant dissolution of marriage in cases of this character is clearly and satisfactorily set forth in the *Zafar Husain* case. That case is an unchallengeable authority for the proposition that a Muhammadan wife can apply to the courts of British India for a divorce against her husband, and can obtain a decree for dissolution of marriage against him if she proves that he has falsely charged her with adultery. All the elements of the present case fit in with all the material allegations in the case of *Zafar Husain*. We have in the case under consideration a Muhammadan lady untruly charged with misconduct by her husband, who has made an

(1) (1919) I.L.R., 41 All., 278.

application to the court in British India, and has asked for a decree of dissolution of marriage. The only answer the husband puts in is a denial. The finding of the court is that the charge was made. What must be the decision in a case of that kind? The decision is that the lady is entitled to a decree for dissolution.

The learned District Judge in dealing with this very case of *Zafar Husain* v. *Ummat-ur-Rahman* (1) quotes the most important passages from Mr. Justice BANERJI's judgement on which I rely: "The Muhammadan law of evidence being no longer in force and the ordinary courts having taken the place of *qazis*, these courts are the authorities which should make a decree for divorce on being satisfied according to the ordinary rules of evidence that a false imputation was made by the husband, and it is unnecessary to comply with the formalities of *la'an.*" The learned District Judge having cited that passage says:—" At the same time the court seems to have been of opinion that if there had been retractation, the result might have been different." Later on the learned District Judge says:—"I think that the judgement must be interpreted as authority for the proposition that on a false imputation being made the wife is entitled to divorce unless the husband retracts the imputation." I have studied the case line by line to find where it can be suggested that either of the Judges committed themselves to that proposition. I have been unable to find any such principle laid down and counsel for the respondent is unable to suggest any passage from which such an inference can be drawn. But it is unnecessary to consider a position which does not arise, because I am of opinion that there was no retractation here from first to last and that the husband has always proceeded on the basis of a denial

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of his ever having made the assertion. That, in my view, brings the case into correspondence with the case of *Zafar Husain*, and I am of opinion that the learned Subordinate Judge was in every way right in decreeing the suit for dissolution of marriage. I am not prepared to express any opinion as to what the position would have been if the husband in the written statement had behaved like an honest man and told the truth and made a full unequivocal retractation. I propose to express no opinion on that matter, believing, as I do, there never was in this case any retractation and the lady very satisfactorily proved her case.

SULAIMAN, J.:—I concur in the conclusion arrived at by the learned CHIEF JUSTICE. The plaintiff claimed dissolution of her marriage on the ground that her husband had accused her of having committed adultery. The defendant denied that he ever made any such accusation, and he did not offer to substantiate any such charge. He did not ask the court to decide the plaintiff's allegation of the accusation as a preliminary issue. After both the parties had closed their evidence an application, dated the 2nd of September, 1924, was filed on behalf of the husband in which he adhered to his denial of ever having accused his wife of adultery, but prayed that if the court were to find that allegation proved he would retract the alleged accusation.

The court of first instance came to the conclusion that the husband had in fact accused his wife of adultery, and that there was no proper retractation and in any case it came too late. The suit was accordingly decreed.

On appeal the learned District Judge has come to a contrary conclusion, being of opinion that it was open to the defendant even at the last moment to

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retract, and that his application amounted to such retractation. In support of his view he has relied on the ruling in *Zafar Husain* v. *Ummat-ur-Rahman* (1). As pointed out by the learned CHIEF JUSTICE that ruling in no way supports the proposition of law stated by him.

The learned counsel for the respondent in supporting the decree has, however, argued that under the Muhammadan law the jurisdiction of the *qazi* to effect a divorce arose out of the oath taken by the husband and not out of the accusation made by him. It is impossible to accept this contention, because the cause of action for the wife to appeal to the *qazi* and seek relief for divorce arose out of the accusation by the husband. The procedure as to the taking of the oaths in the course of the trial was a method of proof only and could not confer on the *qazi* jurisdiction which existed before the trial began.

It is further contended on his behalf that after it was proved that he had made the accusation an opportunity should have been given to him either to retract his accusation or to substantiate it. As stated above, the defendant from the very outset admitted that he did not undertake to prove her adultery. He could not, therefore, expect that another option would be given to him to prove such a charge. The so-called retractation came after the evidence was closed. Even assuming that under the old procedure of the Muhammadan law the *qazi* had to give the husband a fresh option to retract, after it had been established by evidence that his denial of it was false, it may be doubtful how far that rule of procedure can now be applicable to a case where both parties have gone to trial only on the question whether an accusation was or was not made, and

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the retractation did not come till after the close of the evidence.

In the present case, however, there was no proper retractation at all. The defendant never admitted that he had made the accusation and that it was false. The real basis of the procedure of the Muhammadan law seems to be that when the wife appeals to the *qazi* and asks for the dissolution of the marriage on the ground that she has been falsely accused by her husband of adultery, it is open to the husband to admit that he made a false accusation and thereby render himself criminally liable, or to substantiate the accusation. In the present case the defendant did not offer to substantiate the accusation, and at the same time took good care to save himself from all criminal liability. The whole object of the retractation was to obtain an admission by the husband of his having wrongly slandered his wife, on the basis of which he could be punished forthwith. In the Hedaya, Book 4, chapter X, the form of retractation is stated to be as follows :—"It is also a condition of imprecation that the wife require her husband to produce the ground of his accusation . . . . , and if he decline it, the magistrate must imprison him until he either make an imprecation, or acknowledge the falsity of his charge by saying '*I falsely attributed adultery to her*' as this is a right due from him to his wife . . ."

Further on in the same chapter it is stated :—"If a husband, after imprecation, contradict himself *by acknowledging that he had accused his wife falsely*; let the magistrate punish him, because he then acknowledges himself liable to punishment." These passages show conclusively that for a proper retractation the husband must acknowledge that he had falsely accused his wife, and that he must be punished on his own acknowledgement. In the present case the husband has

not contradicted himself by admitting that he falsely slandered his wife, and has, therefore, not retracted his accusation. The plaintiff is accordingly entitled to a decree for divorce on the ground that she has been falsely accused by the husband of adultery, which accusation remains unretracted. There is no question of taking any further oaths as the defendant is not prepared to substantiate the accusation. The decree of the first court must, therefore, be restored.

BY THE COURT.—We, therefore, allow the appeal, set aside the decree of the learned District Judge and restore the judgement and decree of the learned Subordinate Judge and order the defendant to pay all the costs in all courts.

Appeal allowed.