1939

NOOR MUHAMMAD v. LALLOO

no doubt referred to a suit in which a zamindar sued under a definite lease under which the weighment dues were payable. But we do not consider that it makes any difference for the purpose of jurisdiction whether the suit was brought on a lease or on a license. Reference was made to an old ruling, *Sadanand Pande* v. *Ali Jan* (1). This ruling laid down that "cesses mentioned in sections 56 and 86 of the Agra Land Revenue Act are rates levied as a rule by the zamindar upon tenants and residents of villages. Moneys paid by frequenters of markets are voluntary payments made by persons who are under no obligation to use the market unless they please and cannot be called cesses at all." This, however, is a different case and we are not concerned with the question of the weighment dues paid by the persons who got their goods weighed. We are in the present case concerned with a claim by the zamindars for a share of those weighment dues from the people who make the weighments.

We consider that the court below was correct in its view that the jurisdiction in the case of the present plaint lies in the revenue court and accordingly we dismiss this appeal with costs.

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*Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath*

1939
*April*, 19

ASMAT ULLAH AND OTHERS (DEFENDANTS) *v.* KHATUN-UN-NISSA (PLAINTIFF)*

*Muhammadan law—Divorce—Evidence of—Statement or acknowledgment by husband that he had divorced his wife by repeating* talak *thrice—Divorce effective from date of statement.*

In a suit by a Muhammadan widow to recover possession of her husband's property as his heir the defence was that she

*Second Appeal No. 953 of 1936, from a decree of Kunwar Bahadur, Additional Civil Judge of Gorakhpur, dated the 30th of April, 1936, reversing a decree of S. Ghayas Alam, First Additional Munsif of Deoria, dated the 18th of January, 1936.

(1) (1910) 7 A.L.J. 176.

1939

ASMAT ULLAH v. KHATUN-UN-NISSA

had been divorced by her husband during his lifetime. This was denied by her. The only evidence of divorce consisted of a statement on oath which had been made by the husband, in a claim for maintenance against him by the wife, that he had divorced her by pronouncing *talak* on her thrice:

*Held* that, under the Muhammadan law, where a statement or acknowledgment of *talak* is made by the husband the divorce will be held to take effect at least from the date on which the statement or acknowledgment was made.

Dr. *M. Wali-ullah,* for the appellants.

Mr. *Ambika Prasad,* for the respondents.

THOM, C. J., and GANGA NATH, J.:—This is a defendants' appeal arising out of a suit for possession of property.

The plaintiff is one Mst. Khatun-un-nissa, and she claims the property as the heir of her deceased husband. As his heir she is entitled to one-eighth of the property. She alleges that she has been in possession of the whole property in dispute in lieu of dower, which she averred was Rs.3,000.

The defence was that the plaintiff had been divorced by her deceased husband during his life time and she was not entitled to anything in lieu of dower or to any share in her deceased husband's estate.

The learned Civil Judge in the lower appellate court has held, upon a consideration of the evidence, that the defendants had failed to prove that the plaintiff's husband had divorced her. He has held further that the dower was not Rs.3,000 but Rs.35-4-0 and that this amount had been paid. He held finally that the plaintiff was not in possession of the property in dispute in lieu of dower. He accordingly granted decree for joint possession.

The main question for consideration in this appeal is as to whether, in fact, the plaintiff was divorced by her husband as is alleged by the defendants.

The learned Civil Judge in the lower appellate court observed in the course of his judgment upon this question that "there is absolutely no evidence on the record

to prove that the plaintiff's husband ever pronounced divorce on oath."

It is not in dispute, however, that some fifteen years before his death in 1930 the plaintiff had instituted criminal proceedings against her husband in which she claimed maintenance. In his written statement in the course of these proceedings the husband stated that three or four months before the date upon which he filed this statement he had divorced his wife according to Muhammadan law. It further appears that the husband made a statement on oath on the 12th of January, 1915, in the course of which he deposed that he had divorced his wife by repeating thrice "I divorce you."

It was contended for the defendants that it must be held in these circumstances that the plaintiff's deceased husband Abdul Samad had in fact divorced his wife on the date upon which he made the aforementioned statement. In support of this contention learned counsel referred to Macnaghten's Principles and Precedents of Muhammaden Law, 1890 Edition, at page 296. The learned author there refers to "Case XLII". In this case it was decided that where a husband states that he has divorced his wife and the wife denies that she has been divorced, the divorce should be held to take effect from the date upon which the statement was made.

Learned counsel for the defendants further referred to Syed Ameer Ali's Muhammadan Law, 5th Edition, page 479. The learned author dealing with the "Capacity for Talak" observes: "According to the Hanafi doctrines, although an acknowledgment of a *talak*, namely, an acknowledgment by a man that he had divorced his wife, extracted from him under compulsion, is ineffective, a *talak* actually pronounced under compulsion is valid. . . . . Whilst an acknowledgment extracted from the husband by compulsion, whether embodied in writing or not, is ineffective, an acknowledgment of *talak* made in jest or falsely will take effect 'judicially', though

1939

ASMAT ULLAH v. KHATUN-UN-NISSA

it will not have any force *in foro conscientioe. . . .*" One may reasonably infer from the passage above quoted that if an acknowledgment of *talak* is made by the husband the divorce will be held to take effect at least from the date upon which the acknowledgment is made.

Learned counsel for the plaintiff was unable to refer us to any authority to the contrary.

We are constrained, in the circumstances, to hold that the evidence upon the record establishes that the plaintiff was divorced by her husband in the year 1915. This finding concludes the case against the plaintiff.

In the result the appeal is allowed, the order of the learned Civil Judge is set aside and the suit is dismissed. Parties will bear their own costs. The cross-objection is dismissed.

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*Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath*

1939 *April*, 24

RAM BIJAI PRASAD (PLAINTIFF) *v.* RAM BHANJAN SINGH (DEFENDANT)*

*Agra Tenancy Act (Local Act III of 1926), section 264; second schedule, list 2, serial No. 14—Copy of first court judgment must be filed in second appeals—Jurisdiction—High Court can not, by amending order XLII, rule 1, affect the provisions of the Agra Tenancy Act—"Second appeal", meaning of.*

In accordance with the provisions of section 264, and serial No. 14 of list 2 of the second schedule, of the Agra Tenancy Act every memorandum of second appeal must be accompanied by a copy of the judgment of the first court.

The proviso introduced by the High Court in order XLII, rule 1 of the Civil Procedure Code, to the effect that it shall not be necessary in a second appeal to file a copy of the judgment of the first court, did not form part of the original rule. The High Court has, no doubt, jurisdiction to amend the rules in the first schedule of the Civil Procedure Code; it has no

*Second Appeal No. 1404 of 1936, from a decree of Radha Kishan, District Judge of Ghazipur, dated the 2nd of March, 1936, confirming a decree of N. B. Ranade, Assistant Collector first class of Ballia, dated the 10th of June, 1935.