

APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge, and
Mr. Justice Wazir Hasan.

1927
March, 8.

MUSAMMAT MAQBOOLAN AND OTHERS (DEFENDANTS-
APPELLANTS) v. RAMZAN (PLAINTIFF-RESPONDENT).*

*Muhammadan law—Restitution of conjugal rights, rules of—
Legal cruelty—Unfounded accusation of adultery by
husband, whether a violation of marital rights—Prin-
ciple of justice, equity and good conscience, applicability
of.*

Held, that where it is proved that a Muhammadan hus-
band accused his wife of adultery and the accusation was
held to be unfounded, the facts so proved constitute legal
cruelty and the husband is not entitled to a decree for res-
titution of conjugal rights.

An Indian court might well admit defences founded on
the violation of marital rights and an unfounded accusation
of adultery by a husband against his wife is certainly a viola-
tion of marital rights. There is no rule of the Muhammadan
law by which in all circumstances and even in the face of
unfounded accusation of adultery a decree for restitution of
conjugal rights must be granted against the wife by the
courts of justice.

The principles of justice, equity and good conscience not
inconsistent with any positive rule of Muhammadan law may
well be applied in determining the ground on which a claim
for restitution of conjugal rights may be refused by the courts
of justice. [*Mackenzie v. Mackenzie* (1), *Husaini Begum v.
Muhammad Rustam Ali Khan* (2), *Moonshee Buzloor
Ruheem v. Shumsoonnissa Begum* (3), and *Jafar Husain
v. Musammât Husn Ara Begum* (4), relied upon.]

Messrs. *Ali Zaheer and Shaukat Ali*, for the
appellants.

Mr. *Khalig-uz-zaman*, for the respondent.

* Second Civil Appeal No. 343 of 1926, against the decree of Damodar
Rao Kelkar, Subordinate Judge of Rae Bareilly, dated the 29th of July, 1926,
confirming the decree of Girja Shankar, Munsif of Rae Bareilly, dated the
24th of April, 1926.

(1) (1895) L.R., A.C., 384.

(3) (1867) 11 M.I.A., 551.

(2) (1907) I. L. R., 29 All., 222.

(4) (1912) 15 O.C., 159.

STUART, C. J., and HASAN, J.:—This is the defendants' appeal from the decree of the Subordinate Judge of Rae Bareli, dated the 29th of July, 1926, affirming the decree of the Munsif of the same place, dated the 24th of April, 1926.

The plaintiff-respondent brought the suit, out of which this appeal arises, for a decree for restitution of conjugal rights against his wife, Musammat Maqboolan (defendant No. 1). The defendant No. 2, Musammat Mariam, is the mother of Musammat Maqboolan, and the other three defendants, Badlu, Shubrati and Razzaq, are the brothers of Musammat Maqboolan.

The main defence, with which we are concerned in the present appeal, was the plea of legal cruelty. The courts below have entertained the defence, but on merits have declined to give effect to it.

In support of the plea of legal cruelty the defendant Musammat Maqboolan has through her learned Counsel filed before us at the hearing of the appeal a certified copy of a judgment of a first class Magistrate of Rae Bareli, dated the 26th of January, 1927, in an action brought by the husband, Ramzan, the plaintiff-respondent, against another Ramzan and against the mother and the brothers of Musammat Maqboolan for offences under sections 497 and 498 of the Indian Penal Code. By this judgment the action was dismissed and the accused persons were discharged. The prayer before us is that the judgment may be admitted in evidence. This judgment was pronounced about six months after the appeal in the court below was decided and therefore could not be produced in that court. With the consent of the learned Pleader of the opposite party we have admitted the judgment in evidence. It proves that the plaintiff Ramzan accused his wife Musammat

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Maqboolan of adultery and that the accusation was held to be unfounded. In our opinion the facts so proved constitute legal cruelty and the plea is made out in the present case.

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The parties are Hanafi Muhammadans. The leading case on the subject is the decision of their Lordships of the Judicial Committee in *Moonshree Buzloor Ruheem v. Shumsoonnissa Begam* (1). The Right Hon. Sir JAMES W. COLVILLE, in delivering the judgment in that case, said:—"The Muhammadan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—'There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.' 'The Court,' as Lord STOWELL said, in *Evans v. Evans* (2), 'has never been driven off this ground.' If, however, it be granted that, according to Muhammadan law, the husband may sue to enforce his right to the custody of his wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows that she has not other defences to the suit which would not be admitted by our ecclesiastical courts in a suit for the restitution of conjugal rights. The marriage tie amongst Muhammadans is not so indissoluble as it is amongst Christians. The Muhammadan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian court might well admit defences founded on the violation of those rights and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment

(1) (1867) 11 M.I.A., 551.

(2) 1 Hagg. Con. Rep., 37, *et seq.*

of her personal safety, and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the *Kazee* by the *Fatwa* (if the law, indeed, warrants such a jurisdiction) of selecting a proper place of residence for the wife, other than her husband's house."

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It seems to us that the principles of justice, equity and good conscience not inconsistent with any positive rule of Muhammadan law may well be applied in determining the ground on which a claim for restitution of conjugal rights may be refused by the courts of justice. The courts of Oudh are fortunately seized with a jurisdiction of that nature. By sub-section (g) of section 3 of the Oudh Laws Act (XVIII of 1876) cases not specifically provided for by any custom or the Muhammadan law where the parties are Muhammadans or by any other law for the time being in force the courts are invested with jurisdiction to act according to justice, equity and good conscience. As observed by their Lordships of the Judicial Committee in the case quoted above, an Indian court might well admit defences founded on the violation of marital rights. An unfounded accusation of adultery by a husband against his wife is certainly a violation of marital rights. Cases may, therefore, frequently arise in which courts would act on principles of justice, equity and good conscience when such principles are not in conflict with any well-defined positive rule of law. Such principles were indicated by Lord HERSCHELL, L. C., in the case of *Mackenzie v. Mackenzie* (1). Lord HERSCHELL said:—"It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the

(1) (1895) L.R., A.C., 384.

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reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife but has just stopped short of that which the law regards as saevitia or cruelty; can he, when his own misconduct has led his wife to separate herself from him, come into court and, avowing his misdeeds, insist that it is bound to grant him a decree of adherence?" Further, Lord HERSCHELL asks the question:—" Might not the court refuse its aid to one who had so acted and regard his conduct as a bar to his claim to relief?" His Lordship then observes:—" It is not a motion strange to our law that the court should refuse its aid to one who does not come into it with clean hands."

The observations of Lord HERSCHELL in *Mackenzie v. Mackenzie* (1) were quoted and applied by two learned Judges of the High Court at Allahabad in the case of *Husaini Begam v. Muhammad Rustam Ali Khan* (2). We are not aware of any rule of the Muhammadan law by which in all circumstances and even in the face of unfounded accusation of adultery a decree for restitution of conjugal rights must be granted against the wife by the courts of justice. That there is no such rule of law is manifest to our mind from the decision of their Lordships of the Judicial Committee in the case of *Moonshee Buzloor Ruheem v. Shumsoonissa Begam* (3) already quoted.

We may with advantage refer to a decision of Sir MUHAMMAD RAFIQUE (then Mr. RAFIQUE) in the case of *Jafar Husain v. Musammat Husn Ara Begam* (4). It appears to us that the decision in the case just now mentioned also supports the view which we are taking in the present case.

(1) (1895) L.R., A.C., 384.

(2) (1907) I.L.R., 29 All., 222.

(3) (1867) 11 M. I. A., 551.

(4) (1912) 15 O.C., 159.

We accordingly allow this appeal, set aside the decrees of the courts below and dismiss the plaintiff's suit with costs in all courts.

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Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan.

SHIVARATAN SINGH (PLAINTIFF-APPELLANT) v. RAM
SIROMAN (DEFENDANT-RESPONDENT).*

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Malicious prosecution—Essential elements to be proved in a claim for damages for malicious prosecution.

The general rule of common law is that "an action for malicious prosecution lies whenever one man puts the process of the law in motion against another maliciously and without reasonable and probable cause."

In the class of actions to which a claim of damages for malicious prosecution belongs the state of the defendant's mind at the time when he did the act is most important. The plaintiff cannot succeed unless he can show either guilty knowledge or some wicked or indirect motive in the defendant. [*Balbhaddar Singh v. Badri Sah* (1), and *Nand Lal v. Debi Din* (2), relied upon. *Hira Lal v. Bandhu Bhagat* (3), and *Radhe Lal v. Munnoo* (4), dissented from.]

Mr. *Gopal Chandra* (holding brief of Mr. *R. D. Sinha*), for the appellant.

Mr. *Iqbal Narain*, for the respondent.

HASAN, J. :—This is the plaintiff's appeal from the decree of the First Subordinate Judge of Bahraich, dated the 28th of October, 1926, reversing the decree of the Munsif of Qaisarganj, dated the 31st of July, 1926.

*Second Civil Appeal No. 19 of 1927, against the decree of M. Mahmud Hasan, First Subordinate Judge of Bahraich, dated the 28th of October, 1926, reversing the decree of Sheo Charan, Munsif of Qaisarganj at Bahraich, dated the 31st of July, 1926, decreeing the plaintiff's claim.

(1) (1926) I.L.R., 1 Lucknow, 215 = (2) 91 I.C., 223.

29 O.C., 163.

(3) (1889) A.W.N., 189.

(4) 11 A.L.J., 125.