

We, therefore, order accordingly, and direct that in the circumstances of the case the parties should bear their own costs in this Court.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice Gokaran Nath Misra and Mr. Justice Bisheshwar Nath Srivastava.*

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October, 8.

MUSAMMAT FAKHRE JAHAN BEGAM (PLAINTIFF-APPELLANT) v. MUHAMMAD HAMIDULLAH KHAN (DEFENDANT-RESPONDENT).\*

*Muhammadian law—Shia law—Divorce—Adultery imputation of—Retraction of imputation of adultery by Muhammadian husband, effect of—Courts entitled to determine charge of adultery by Muhammadian husband against his wife—Locus poenitentiae, whether available to a Muhammadian husband before decree for dissolution of marriage passed—‘La’an’ under Muhammadian law—Wife not entitled to maintain claim for divorce if accusation of adultery be true.*

There is no authority in support of the proposition that under the Shia law a retraction by a husband cannot under any circumstances nullify the effect of the imputation of adultery on the dissolution of the marriage-tie.

No doubt the truth or falsity of the charge of adultery has to be determined at the present day according to the rules of evidence and the procedure governing British courts of law. yet it is clear that when the wife appeals to the courts of law for dissolution of marriage the husband is allowed a *locus poenitentiae* before the marriage is dissolved. If he avails himself of this *locus poenitentiae* he may be liable to punishment for slander or defamation but the marriage cannot be dissolved.

\* Second Civil Appeal No. 170 of 1928, against the decree of Shamlu Dayal, First Subordinate Judge of Kheri, dated the 15th of March, 1928, confirming the decree of Tirheni Prasad, Additional Munsif of Kheri, dated the 10th of December, 1927, dismissing the plaintiff's claim.

One of the conditions laid down under the Muhammadan law in respect of *la'an* entitling wife to a divorce is that she should be innocent. It follows from this condition that if the accusation is true the wife cannot maintain a claim for divorce on that ground. In order to claim divorce the wife must prove that the accusation made against her was false.

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*Zafar Husain v. Ummatur-Rahman* (1), *Rahima Bibi v. Fazil* (2), and *Khatijabi v. Umarsaheb Anseraheb* (3), reliev upon.

Mr. Naimullah, for the appellant.

Mr. M. Wasim, for the respondent.

MISRA and SRIVASTAVA, JJ. :—This appeal arises out of a suit by a wife belonging to the Shia sect against her husband, who belongs to the Sunni faith, for dissolution of marriage on the ground that the husband had accused her of committing adultery and of her leading an unchaste life. The parties belong to respectable families but unfortunately their married life has been an unhappy one. They have been living separate for a long time. In 1912 the defendant husband instituted a suit for restitution of conjugal rights. The wife in her defence pleaded that she had been divorced and that the husband had been treating her very cruelly. The plea of divorce was rejected but legal cruelty was proved and the suit for restitution was dismissed on that ground. Some years later in 1920 the plaintiff brought a suit for a declaration that she had been divorced and in the alternative for cancellation of the marriage on the ground of legal cruelty. It was held that the plea of divorce was barred by *res judicata* by reason of the decision in the previous suit and that the claim for cancellation of marriage on the ground of legal cruelty was time-barred. On the 10th of October, 1925, the

(1) (1919) I. L. R., 41 All., 278. (2) (1926) I. L. R., 48 All., 834.

(3) (1928) I. L. R., 52 Bom., 295.

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husband filed a complaint in the criminal court under section 498 of the Indian Penal Code against one Abdul Wahid on the allegation that the accused had been detaining his wife with criminal intent. Abdul Wahid was convicted by the trying Magistrate. The conviction was upheld by the Session Judge but was set aside by this Court on the ground that the case did not fall within section 498 of the Code. The plaintiff based her claim for dissolution of marriage in the present case on the imputations which had been made by the defendant in the above-mentioned complaint in the criminal court. In the beginning a plea of legal cruelty was also raised but it was abandoned in the trial court and therefore we are no longer concerned with it.

As regards the ground about the husband having accused her of adultery and infidelity, we have to note that the plaintiff in her plaint does not say one word either admitting the accusations made against her or alleging that they were false. The defendant in his written statement pleaded that he had made the accusations in good faith and said that he withdrew his previous statements unconditionally. As much of the arguments in this appeal have been based upon the attitude taken up by the defendant in his defence it would be useful to reproduce the relevant portions of the written statement below :—

“*Paragraph 16.*—The defendant filed a complaint against Abdul Wahid Khan, mentioned in paragraph 10 of the plaint, in good faith on the basis of certain facts within his personal knowledge and of some facts which he learnt on reliable information and the defendant brought no accusation against the plaintiff knowing it to be wrong, groundless and false.”

"Paragraph 18.—If it be proved that the defendant had brought any false charge against the plaintiff in the complaint, mentioned in paragraph 10 of the plaint, or on any other occasion, the defendant withdraws such charges and expresses his regret for the same."

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Paragraph 19.—This suit has not been brought by the plaintiff in good faith. The plaintiff has been making efforts to get the marriage dissolved in any way but she remained unsuccessful up to this time. Now the plaintiff tries to do the same in another way so that the marriage be cancelled and the plaintiff may have every freedom but the defendant wishes to maintain the relationship of husband and wife between the parties and if it be held that the plaintiff is entitled to sue for cancellation of marriage even if the charge brought against her be true, the defendant withdraws those charges unconditionally."

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On the date on which the issues were framed, the defendant's counsel made the following statement in explanation of the pleas contained in the written statement :—

"The defendant never made any false imputation. The defendant only filed a complaint against Abdul Wahid Khan to the effect that the plaintiff was being detained by him for adultery. This imputation was not false and does not give rise to any cause of action. If true imputation can

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give rise to the cause of action, the defendant withdraws it, even if the imputation was false the defendant withdraws it unconditionally."

Neither of the parties produced any oral evidence. The arguments were heard by the learned Munsif on the 5th and 6th of December, 1927. It appears that in the course of the arguments it was argued on behalf of the plaintiff that the imputations were false and the defendant thereupon made two applications to the trial court one on the 5th of December, and the other on the following day. In the application made on the 5th of December, it was stated that "the defendant unconditionally withdrew all his words and statements made in any application or in any court on any occasion from which it might be inferred that the defendant made any imputation about the plaintiff having committed adultery with Abdul Wahid or with any other person and expressed his regret and prayed that the plaintiff's suit might be dismissed." Again in his application made on the 6th of December, he stated that "he had filed the complaint in good faith believing the facts mentioned therein to be true, the defendant himself not being an eye-witness of the occurrence: that since however it was argued for the plaintiff that the imputation was false the defendant now unconditionally withdrew the said imputation with these words that it was false and the defendant was sorry for it."

The learned Munsif in a careful and well-considered judgment decided that a true imputation of unchastity cannot annul the marriage and that the plaintiff having made no attempt to show that the imputation against her was false and in any case the imputation having been withdrawn the plaintiff could not get a decree for dissolution of marriage. On appeal the learned Subordinate Judge has held that the defendant having

in his application, dated the 6th of December, 1927, admitted the imputation to be false it was not necessary for the plaintiff to give any evidence to prove it to be so but agreed with the trial court that there had been a valid retraction and therefore the suit had been rightly thrown out.

The plaintiff comes here in second appeal. Two contentions have been urged by her learned Counsel in support of the appeal. The first is that the Shia law should govern the decision of the dispute and that according to that law the retraction by the husband cannot under any circumstances nullify the effect of the imputation of adultery on the dissolution of the marriage-tie. The second contention is that there has been no valid retraction in the present case.

In support of the first contention he has referred to Mulla's "Principles of Muhammadan Law," 8th edition, page 12, where the learned author says that a Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia law and that the same proposition would hold good of a Shia woman marrying a Sunni. We accept this proposition as perfectly correct, but it is of no help in determining the rule of law which should govern decision of a dispute between the parties one of whom is a Shia and the other a Sunni. It is not necessary for us to arrive at a definite decision on this point because, as we will show presently, there is no material difference between the Shia and the Sunni law on the question of retraction as it arose in the present case. However we are inclined to think that in a case like the present the question at issue should be determined by reference to the law of the sect to which the defendant belongs.

Then, as regards the alleged difference between the Shia and the Sunni law the learned Counsel for the

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appellant has referred us to Baillie's "Digest of Imameea Law," page 157. The passage referred to is as follows :—

"If he should give himself the lie, or retract in the midst of the *la'an*, or refuse to take it, the liability to *hudd* is established against him, but none of the other consequences are established. . . . If he should give himself the lie, or retract after the *la'an*, the child's paternity is restored, and with it his right of inheritance; but neither the father, nor any one related through him, can inherit to the child, while the mother, and those related through her, retain their right of inheritance to him. Her wifehood, however, does not return, nor is there any abatement of the prohibition."

As against this he has referred to Hamilton's "Hedaya by Grady", book IV, chapter X, page 125. The passage referred to is as follows :—

"If, after imprecation, the husband should acknowledge that his accusation was false, by saying, 'I falsely laid adultery to her charge', he becomes privileged with respect to her, that is to say, it is lawful for him to marry her as well as any other person. This is according to Hanifa and Muhammad—Abu Yusuf says that she is for ever prohibited to him, and that he cannot marry her,—the Prophet having said, 'two who make imprecation can never come together;' which shows the separation established between them to be perpetual; wherefore his marriage with her is illegal."

On the authority of the extracts quoted above it has been argued by the learned Counsel for the plaintiff that according to the Shia law the status of a wife does not return even after retraction nor is there any abatement of the prohibition against any remarriage between the parties thereafter; whereas according to the Sunni law, at least according to Abu Hanifa and Muhammad, they can remarry after the retraction. Apart from the difference between Abu Hanifa and Muhammad on the one hand and Abu Yusuf on the other the alleged difference between the Shia and the Sunni law is of no consequence in the present case firstly because the retraction referred to in the authorities quoted is retraction after the *la'an* and secondly because the difference, if any, is as regards remarriage with which we are not concerned in this case. We must accordingly hold that the plaintiff has failed to cite any authority in support of the proposition that under the Shia law a retraction by the husband cannot under any circumstances nullify the effect of the imputation of adultery on the dissolution of the marriage-tie. We, therefore, over-rule the contention.

The second contention as regards the validity of the retraction makes it necessary for us to make a reference to the law and procedure relating to *la'an* as laid down in the authoritative works on Muhammadan law. In Hamilton's "Hedaya by Grady", book IV, chapter 10, page 124, the form of imprecation and the manner of making it is stated in the following terms :—"The manner of imprecation is as follows :—The *qazi* first applies to the husband, who is to give evidence for several times, by saying, 'I call God to witness to the truth of my testimony concerning the adultery with which I charged this woman;' and again, a fifth time, 'may the curse of God fall upon me if I have spoken falsely concerning the adultery with which I charge this woman;'—after

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which the *qazi* requires the woman to give evidence, four separate items, by saying "I call God to witness that my husband's words are altogether false, respecting the adultery with which he charges me; 'and again, a fifth time,' may the wrath of God light upon me if my husband is just, in bringing a charge of adultery against me. . . . And on both making imprecation in this

manner, a separation takes place between them; but not until the *qazi* pronounces a decree to that effect." In an earlier passage in the same chapter it is laid down that "it is also a condition of imprecation that the wife requires 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." It is stated further on:—"If a husband after imprecation, contradicts himself by acknowledging that he had accused his wife falsely, let the Magistrate punish him, because he then acknowledges himself liable to punishment."

The Right Honourable Mr. Ameer Ali in his work on "Muhammadan Law," 4th edition, at page 595 remarks as follows:—"When both parties have taken the oath in the prescribed form and the charge has been conclusively established, the *qazi* must draw up an order of separation between the parties; and in accordance with such decree, the husband must divorce his wife. If he refuse to do so, the Judge himself is to pronounce a divorce between them. The marriage, however, continues in existence with all its concomitant rights, until the Judge has made the order. All the schools are agreed in the opinion that a proceeding by imprecation can be validly effected only before the *qazi* or *hakim*, and that until he has made his order dissolving the marriage, it continues intact." Khan Bahadur Mahomed Yusoof

Khan in his "Muhammadan Law" (Tagore Law Lectures, 1891-92), volume III, page 352, explains the reason of the rule as follows:—"The husband having accused the wife of *zina*, he would have been liable to the punishment of *kuzuf* or slander but for this procedure, and, therefore, the punishment for slander is extinguished and *la'an* takes its place—and so far as the woman is concerned, her evidence or testimony standing in the place of *hudd-i-zina*, that is, the punishment for *zina* having become extinguished, *la'an* takes the place of the punishment for *zina* so far as the woman is concerned—because to invoke God, when giving evidence is more destructive in its effect than punishment."

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It is obvious that in the changed circumstances of the present day it cannot be possible to follow the letter of the original Islamia law. We are in entire agreement with the observations of Sir PROMODA CHARAN BANERJI, J. in the case of *Zafar Husain v. Ummatur-Rahman* (1) that "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*." But we venture to add that the spirit of the law should be kept in view and the principles underlying it should be adhered to as far as possible.

The principles which can safely be deduced from the above rules are, firstly, that mere accusation by the husband cannot affect the relationship of husband and wife between the parties. Dissolution of marriage takes place only by means of a decree for divorce passed by the *gazi*, for whom we should now substitute our law courts.

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

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Secondly, when such accusation is made and the wife moves the *qazi* in the matter the husband can either retract the accusation or substantiate it by taking oath and making the imprecation invoking the curse of God upon him if his accusation is false. If the husband retracts at this stage he is liable to punishment for slander. If, on the other hand, he persists in the accusation and makes the necessary oath and imprecation the said oath and imprecation save him from punishment for slander. After this the wife can either admit the charge in which case she would be liable for punishment for adultery or she can repudiate it by taking oath and imprecation invoking the wrath of God against her if her denial is false. In this case her taking the oath and making the imprecation saves her from punishment for adultery. It is only after going through this procedure that the *qazi* can pronounce a decree for divorce. No doubt the truth or falsity of the charge has to be determined at the present day according to the rules of evidence and procedure governing British courts of law yet it is clear that when the wife appeals to the court of law for dissolution of marriage the husband is allowed a *locus poenitentiae* before the marriage is dissolved. If he avails himself of this *locus poenitentiae* he may be liable for punishment for the slander or defamation, but the marriage cannot be dissolved. We are supported in this view by the following observations of Mr. Justice SULAIMAN in *Rahima Bibi v. Fazil*(1) :—

“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 had made a false

(1) (1926) I. L. R., 48 All., 834.

accusation and thereby render himself criminally liable, or to substantiate the accusation."

Now it remains for us to see whether the retraction made in the present case is or is not valid and sufficient. In agreement with both the courts below we are of opinion that it is valid. In paragraph 16 of his written statement the defendant simply alleged that he acted in good faith in making his complaint against Abdul Wahid Khan which, as would appear from the statement made by his pleader in the course of oral pleadings, was only to the effect that the plaintiff was being detained by Abdul Wahid Khan for adultery and not that any adultery had actually been committed. He justifies his making of the charge, but not the charge itself. The written statement was unfortunately somewhat argumentative, but this much is quite clear that the defendant did not undertake to prove that the accusation was true or that the plaintiff had, as a matter of fact, committed adultery. We think that the subsequent applications made by the defendant on the 5th and the 6th of December, 1927, were quite unnecessary. However, they confirm the view which we take about the defendant making a retraction and not trying to substantiate the charge.

The learned Counsel for the appellant in support of his contention about the retraction being invalid has relied on *Rahima Bibi v. Fazil*(1). That case is quite distinguishable. In that case the defendant denied his making any defamatory statement and wished to make a retraction after evidence on both sides had been recorded. The court held that the essential element of a retraction is the withdrawal of a statement previously made, and as the defendant denied making a defamatory statement he could not make any retraction. It was

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(1) (1926) I. L. R., 48 All., 884.

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further held that as the defendant sought to make a retraction at a very late stage and in the light of his conduct during the trial of the case there was no proper retraction. In the present case the defendant from the first moment admitted the accusation made by him and although he tried to explain the circumstances under which he made it he made no attempt to substantiate it and on the contrary expressed regret for it.

Lastly, there remains the fact that the defendant raised a plea to the effect that a true accusation does not give rise to any cause of action, though he coupled it with the statement that if a true imputation can give rise to a cause of action the defendant withdrew it. We are of opinion that this was merely a legal plea which is also well founded. One of the conditions laid down under the Muhammadan law in respect of *la'an* entitling wife to a divorce is that she should be innocent. It follows from this condition that if the accusation is true the wife cannot maintain a claim for divorce on that ground. This view is supported by the decision of the Bombay High Court in *Khatijabi v. Umarsaheb Anersaheb* (1). This legal plea therefore can at best amount only to this that the plaintiff in order to claim a divorce must prove that the accusation made against her was false. But in the light of the entire pleadings it cannot mean that the defendant undertook to prove that the accusation was true. Under these circumstances we cannot regard the fact of the defendant raising this plea as detracting from the validity of his retraction.

For the above reasons we hold that the retraction was valid and proper and the claim of the plaintiff for dissolution of marriage has been rightly dismissed. The appeal fails and is dismissed with costs.

*Appeal dismissed.*