APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

1931
November, 2.

WAJID ALI KHAN, KHAN SAHEB, DEFENDANT-APPELLANT *v.* JAFAR HUSAIN KHAN AND ANOTHER, PLAINTIFFS-RESPONDENTS.*

Muhammadan law—Divorce—Husband addressing his wife and saying "I give up all relations and would have no connection of any sort" with thee—Expression used whether amounts to a talaq—'Talaq', meaning of.

Where a Muhammadan husband addressing his wife said 'I give up all relations and would have no connection of any sort" with thee, *held*, that these words are certainly not 'express' within the meaning of the Hanafi Muhammadan law to effect a divorce nor are they understood in that law as implying divorce. The express words are well-known to be *talaq* and its grammatical variations the root being composed of letters ق , ل , ط (tu, lam, q). These words are terms of art and the technical meaning which they have acquired by usage is 'freedom from the bondage of marriage' and not from any other bondage. Once they are used they must be given effect according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Muhammadan law. The words used by the husband as quoted above have not acquired by usage the meaning which the word '*talaq*' bears among the Muhammadans of India. At the best they may be used with the intention of effecting a divorce or they may be used without such an intention. They are ambiguous and when the intention of the user of those words was not to effectuate a divorce the words must be treated as innocuous altogether. Amongst the Indian Muhammadans they are frequently used for the purpose of dissociating oneself from the company or the presence of the addressee, of relieving such a person from the obligation of rendering service to the user and also for the purpose of withdrawing restraints from the movements of

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*First Civil Appeal No. 1 of 1931, against the decree of Pandit Bishnath Hukku, Additional Subordinate Judge of Hardoi, dated the 10th of November, 1930.

the addressee. *Ma Mi* v. *Kallander Ammal* (1) and *Asha Bibi* v. *Kadir Ibrahim Rowther*, (2) referred to.

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Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the appellant.

Messrs. *M. Wasim*, *Manni Lal* and *Siraj Husain* for the respondents.

HASAN, C. J. and SRIVASTAVA, J. :—This is the defendant's appeal from the decree of the Additional Subordinate Judge of Hardoi dated the 10th of November, 1930.

Musammat Saghir-un-nissa was married to the defendant, Wajid Ali Khan, on the 12th of March, 1909, according to the Hanafi Muhammadan law at Shahabad in the district of Hardoi. She died on the 11th of May, 1928 and the plaintiff No. 1, Jafar Husain Khan, is her brother and Musammat Mahmud-un-nisa, plaintiff No.2, is her sister. It is admitted that the plaintiffs and the defendant are the sole heirs-at-law of Musammat Saghir-un-nisa entitled to share in equal moieties in the inheritance.

The plaintiff's case is that Musammat Saghir-un-nisa's dower was fixed at Rs. 80,000 as a deferred dower at the time of her marriage with the defendant. The plaintiffs are thus entitled to recover Rs. 40,000 from the defendant. They also claim from the defendant certain ornaments the value of which they stated to be Rs. 1,063-8-0. Lastly they asked for a decree for a sum of Rs. 25,000 only by reason of the insufficiency of the defendant's means. In defence the defendant pleaded that the amount of dower fixed at the marriage was only Rs. 10,000; that Musammat Saghir-un-nisa had relinquished her claim for dower, whatever the amount, by executing a document, dated the 4th of February, 1924; that early in December, 1921, the defendant had irrevocably divorced Musammat Saghir-un-nisa and that therefore counting the period

(1) (1926) L.R., 54 I.A., 61. (2) (1919) I.L.R., 33 Mad., 22.

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of limitation for a claim for dower from December, 1921, the present suit was barred by time. The court was also asked to determine the reasonable amount of dower under section 5 of the Oudh Laws Act, 1876, for which a decree might be passed against the defendant.

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On the question of the amount of dower fixed at the marriage of Saghir-un-nisa with the defendant the finding of the learned Additional Subordinate Judge is that it was Rs. 80,000. The issue as to the release of dower has been decided by him in the negative and against the defendant. On the question of the alleged divorce in December, 1921, his finding is again in the negative and against the defendant. As to what was the reasonable amount of dower, having regard to the means of the husband and the status of the wife, for which a decree should be made in favour of the plaintiffs in the present case, his finding is that the defendant is possessed of property of the value of at least Rs. 90,000 and his opinion on this issue is that Rs. 30,000 was the reasonable amount of dower within the meaning of section 5 of the Oudh Laws Act. Finally, he decreed the plaintiffs' suit for their half share of Rs. 15,000. As regards the ornaments, he has found that the plaintiffs are entitled to a decree of Rs. 125 for their share in the value of the ornaments. Except the last-mentioned finding every other finding of the learned Additional Subordinate Judge has been challenged before us.

There is no documentary evidence whatsoever to show as to what the amount of dower was but it is agreed that it was fixed at the marriage. The plaintiffs have therefore produced witnesses to prove that the dower was fixed at Rs. 80,000. On the other hand, the defendant has also examined witnesses in support of his case as to the amount of the dower,

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At the hearing of the appeal the record of the evidence produced on both sides was read to us *in extenso.* The conclusion at which we have reached is that the finding of the learned Additional Subordinate Judge is correct and must be accepted. The plaintiffs' witnesses are Israr Husain Khan, Abdus Sattar Khan, Muhammad Raza Khan and Amir Husain Khan. All these four witnesses were present at the marriage. Amir Husain Khan acted as a vakil at the marriage and Muhammad Raza Khan was a witness. Abdus Sattar Khan is the nephew of Musammat Saghir-un-nisa and Israr Husain Khan joined the marriage as a friend of the defendant. The *qazi* who recited the formula is now dead. The learned Additional Subordinate Judge has answered some of the criticisms advanced on behalf of the defendant against the testimony of these witnesses and has accepted their evidence as reliable and worthy of credence. In the arguments before us nothing was urged which would induce us to disagree with the learned Additional Subordinate Judge in his opinion as to the trustworthiness of the plaintiffs' witnesses. He has also given reasons for forming the opinion that the fixing of the amount of dower at Rs. 80,000 was in consonance with the probabilities and the circumstances of the case. He has pointed out that one Hakim Khadim Husain Khan, who was a holder of the title of Khan Bahadur, an Honorary Magistrate and one of the most respectable men of Shahabad, acted *in loco parentis* at Musammat Saghir-un-nisa's marriage. Her father had died. She was the first cousin of Khadim Husain Khan and the marriage took place at his house. The evidence on both sides agrees that the amount of dower was settled by him. In the case of Khadim Husain Khan's own daughters like sum of money that is Rs. 80,000 had been fixed as the dower. The learned Additional Subordinate Judge has pointed

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out to the fact that Musammat Saghir-un-nisa's sister's dower, that is the plaintiff No. 2's, was also settled at Rs. 80,000. We are of opinion that these are sufficiently weighty grounds in support of his finding.

On the side of the defendant he himself went into the witness-box and produced five more witnesses in support of his allegation as to the amount of the dower. Obviously the evidence of the defendant himself cannot be accepted without strong corroboration. Such a corroboration is not available out of the testimony of his witnesses, all of whom have been disbelieved by the learned Additional Subordinate Judge. He has examined the statements of these witnesses with great care and rejected them as unworthy of belief. The result of his consideration of the evidence as a whole is thus stated by him :—"Thus it would appear that the evidence of the plaintiff with regards to the amount of dower is much more worthy of belief than the defendant's evidence which could not impress me." We affirm this finding.

The plea of the relinquishment of dower has a short history behind it. The defendant filed two written statements in this case; the first on the 17th of April, 1930. This written statement has unfortunately not been translated and printed for the record of this appeal. In paragraph 12 of this written statement it was stated that Musammat Saghir-un-nisa had relinquished her claim for dower in favour of the defendant long before her death. No mention was made of any deed of relinquishment. The defendant filed a second written statement on the 14th of May, 1930, and in paragraph 12 of that written statement he mentioned a deed of release with reference to its date, the 14th of February, 1924. Along with this written statement the defendant produced in court what purported to be the original deed of relinquishment. It

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was brought on the record of the case and marked as exhibit A3. The plaintiffs then asked for a certified copy of it and received it. Subsequently the defendant also obtained a certified copy of the same. After this the original (exhibit A3) disappeared from the record of the case. The defendant then substituted the certified copy which he had obtained and which was also marked as exhibit A3. In the circumstances the certified copy has been accepted as admissible in evidence in proof of the issue relating to the relinquishment. As to the loss of the original the learned Additional Subordinate Judge is of opinion that it was "to the advantage of the defendant for the plaintiffs have been deprived of the opportunity of disproving its genuineness by comparison of signature of Saghir on the original with her other signatures." He further points out that the amount of dower is not mentioned in this deed of release. The fact, he thinks, raises strong suspicion against the authenticity of the release. The learned Additional Subordinate Judge further comments on the fact that in the deed of release the marriage is stated to have taken place 20 years before its execution. This will place the marriage in February, 1904, while as a matter of fact it took place in March, 1909; but, says the learned Additional Subordinate Judge, "the present suit was instituted 20 years and some months after the marriage." He therefore opines that the deed of release was fabricated after the institution of the suit. The recital in the deed of continuous happy relations between the defendant and Musammat Saghir-un-nisa is also untrue according to the learned Additional Subordinate Judge. As to the direct evidence in proof of the deed of release furnished by the testimony of the defendant and his three witnesses, Obaidullah, Muhammad Ahmad and Muhammad Tahir Khan, the learned Additional Subordinate Judge is of opinion that it is unworthy of credence. He has examined the evidence

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in details and has given reasons for his opinion. We are not prepared to disagree with him. We therefore maintain the finding that the release is not proved.

The question as to the means of the husband for ascertaining the reasonable amount of dower has been considered by the learned Additional Subordinate Judge with care and caution. We adopt his finding that the dower in the present case should be fixed for the purpose of section 5 of the Oudh Laws Act at Rs. 30,000 only. It now remains to consider the plea of divorce.

The question of divorce has been argued before us mainly as a proposition of law. So far as the facts are concerned we were asked in the first instance to accept the defendant's and his witnesses' testimony to the effect that the defendant pronounced the well-known formula of *talaq* thrice in rapid succession, that is to say he actually said "*main ne tumko talaq diya*,, (I have divorced thee.) We agree with the learned Additional Subordinate Judge that it is impossible to accept this evidence as true. We also accept his view of the events as they happened. This view is supported by a letter of Musammat Saghir-un-nisa, dated the 3rd of December, 1921 (exhibit 9). Exhibit 12 is the envelope containing exhibit 9 and bears post-mark, "Bhopal 3/12/1921." The letter is in the handwriting of Musammat Saghir-un-nisa herself and was addressed to her brother, Jafar Husain. On the record of the case it has come from the custody of Jafar Husain. We hold in agreement with the learned Additional Subordinate Judge that only so much of the facts in connection with the question of divorce are proved as are proved by the contents of this letter.

It appears that one fine morning when the defendant was ready to leave his house for his office he found

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that his breakfast was not ready. Thereby he lost temper and addressing Musammat Saghir-un-nisa said that "he was entirely giving up all relations and would have no connection of any sort" with her. As to the true import of these words Musammat Saghir-un-nisa asks in this letter the opinion of his brother as to whether they amounted to an irrevocable divorce. So far as we can gather anything from this letter as to the state of her own mind it is clear that she never treated the utterances of the defendant as a final divorce. The defendant in his evidence in the case says "I really never intended to divorce her. Excepting sexual intercourse I treated Saghir in all respects after divorce till her death exactly as I treated her before the divorce. Saghir was unfit for sexual intercourse on account of her illness from 1918 till her death. There was no change in the treatment of Saghir too towards me before and after divorce." After the death of Musammat Saghir-un-nisa the defendant performed the obsequies as if she was his undivorced wife. Thus it is clear that there was no divorce either in thought or in action: but it is argued that the words used by the defendant as evidenced by the contents of the letter amount in law as a complete divorce. This is the question which we have to decide. The latest pronouncement of their Lordships of the Judicial Committee is contained in the decision of *Ma Mi* v. *Kallander Ammal* (1). Sir JOHN WALLIS, in delivering the judgment of the Judicial Committee, said:—"According to that law (Muhammadan law) a husband can effect a divorce whenever he desires. He may do so by words without any *talaqnama* or written document, and no particular form of words is prescribed. If the words are 'express' or well understood as implying divorce, such as *talaq*, no proof of intention is required. If the words used are

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ambiguous the intention of the user must be proved." With reference to this pronouncement argument was addressed to us that the words used by the defendant in this case are not ambiguous and if they are not ambiguous divorce would come into effect in spite of the defendant's intention to the contrary.

We have already rejected the evidence that the defendant used the word *talaq* in addressing Musammat Saghir-un-nisa on that particular morning. The words which we have found on the authority of the letter (exhibit 9) to have been used were "I give up all relations and would have no connection of any sort". These words are certainly not "express" within the meaning of the Hanafi Muhammadan law to effect a divorce nor are they understood in that law as implying divorce. The express words are well-known to be *talaq* and its grammatical variations, the root being composed of letters ط , ل , ق (tu, lam, q). These words are terms of art and the technical meaning which they have acquired by usage is "freedom from the bondage of marriage" and not from any other bondage. Once they are used they must be given effect according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Muhammadan law. Several illustrations of the express formula of *talaq* are given in Hedaya: انت طالق (Thou art the objective of divorce); مطلقة (Thou are divorced); طلقتك (I have divorced thee) In Hedaya the reason for treating these expressions as terms of art is given as follows:—

فكان صريحاً و انه يعقب الرجعة بالنص ولايفتقرالى النية لانه صريح فيه لغلبة الاستعمال –

(Therefore they amount to express divorce. To this is attached reversibility and such a divorce is free from the question of intention because usage preponderates). Now it is clear that the word *talaq* with its grammatical variations has acquired this technical meaning by reason of usage. It may be a moot question whether the same meaning must always

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be attached to those words when used by the Urdu speaking Muhammadan community of India. The question assumes a more serious importance when words other than *talaq* are found to have been used by a member of the same community. We on our part are unable to affirm that apart from the word *talaq* there are words of Urdu used by the Musalmans of India bearing the same technical meaning as the word *talaq* bears. We find this question raised in an Urdu translation of Hedaya by Maulana Syed Ameer Ali printed in Newal Kishore Press, Lucknow.

It is interesting to note that even in the use of the word *talaq* the change in phonetics alters the meaning. Hadaya says— اوقال انت مطلقة بتسكين الطاء لايون طلاقا الا بانيته (If it is said *mutlaqa* with *sukun* on ta (طا) then this is not divorce without the intention). All this shows how much the legal effect of the use of the word *talaq* depends upon the accuracy of its form and the usage which has clothed it with that technical connotation. We are not aware of and we have tried in vain to find in Arabic text-books of Muhammadan law any other word than *talaq* as a well understood expression implying divorce without proof of intention or circumstances. All other expressions are treated in the books not under طلاق صريحي (express divorce) but under طلاق كنايه (implied divorce). The expressions of the latter class are always regarded as ambiguous and the meaning of "divorce" is given to them only on proof of the accompanying intention or the surrounding circumstances. This is certainly so in the Hanafi Muhammadan law though there is some difference in this respect between that law and the Shafai law.

The chapter on divorce in Hedaya begins by saying الطلاق علي ضربين صريح و كنايه (there are two kinds of *talaq*, express and by implication). After having dealt with the former the Hedaya proceeds—

اما الضرب الثاني – و هو الكنايات – لايقع بها الطلاق الا بانيته او بدلالة الحال

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(Now as to the second class, and they are kinayas which do not effect divorce without intention or the force of surrounding circumstances). Under this heading several forms of expressions are given which may or may not have the effect of a divorce according to the intention and the circumstances. It is not possible to identify the expression used in this case in Urdu with any of the expressions dealt with by the author of Hedaya in Arabic. One thing is however clear that it is not shown by proof nor is it within our knowledge that the words used by the defendant in this particular case have acquired by usage the meaning which the word *talaq* bears among the Muhammadans of India. At the best they may be used with the intention of effecting a divorce or they may be used without such an intention. We are clearly of opinion that they are ambiguous and as it is admitted that the intention of the user of those words was not to effectuate a divorce the words must be treated as innocuous althogether. Amongst the Indian Muhammadans they are frequently used for the purpose of disassociating oneself from the company or the presence of the addressee, of relieving such a person from the obligations of rendering service to the user and also for the purpose of withdrawing restraints from the movements of the addressee.

Amongst the expressions given under the heading of "divorce by implication" in Hedaya are certain expressions which when used in anger constitute divorce even in the absence of any intention to effect a divorce and on this part of the book great reliance was placed by the learned Advocate for the defendant in support of his arguments. The particular passage in Hedaya is as follows :—

كقوله اعتدي و اختاري و امرک بيدک فانه لايصدق فيها لان الغضب يدل على ارادة الطلاق

(In expressions such as "count", "choose", "your work is in your hands" intention against divorce will

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not be affirmed because anger indicates that divorce was intended). It is argued that in the circumstances in which the defendant used the expressions aforementioned they establish a divorce.

We are of opinion that this is not the meaning of the passage which we have just now quoted. When read with the context it will be found that the passage is used in relation to the question of assent on the part of the wife or exclamations of contumely or reproach on the part of the husband. It is also clear from the context of the passages preceding the one just now quoted that expressions such as these when used by a husband in reply to a *requisition of divorce* are construed to effect a divorce as they cannot bear a construction of denial; but apart from this we are quite clear in our mind that expressions such as the defendant used in the present case in Urdu are never, among the members of the community to which he and his deceased wife belonged, understood *proprio vigore* to effect a divorce. It will be seen that we have refrained from referring to Hamilton's Hedaya because it was suggested in *Asha Bibi* v. *Kadir Ibrahim Rowther* (1), that it may not be a correct translation of the original Arabic text, being a translation of the Persian version of Hedaya. We ourselves do not agree with this suggestion. Whenever we had occasion to refer to Hedaya in its original Arabic form we have found that the translation by Hamilton is not only accurate but is also best in form and elegance if we may respectfully say so.

On the above grounds we agree with the learned Additional Subordinate Judge on the above question also and dismiss the appeal with costs.

Appeal dismissed.

(1) (1919) I.L.R., 33 Mad., 22.