APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice E. M. Nanavutty.

MANSUR (DEFENDANT-APPELLANT) *v.* MUSAMMAT AZIZUL (PLAINTIFF-RESPONDENT).* 1928 *April*, 2.

Muhammadan law—Maintenance—Public policy—Agreement by a Muhammadan husband to pay guzara to his wife even if she lives separately, whether opposed to public policy—Wife's claim for maintenance, maintainability of.

Where a Muhammadan husband executes an agreement expressly providing therein that the wife would be entitled to a certain amount of *guzara* even if she does not live with him in his house, the agreement is not one opposed to public policy and the wife is entitled to claim maintenance under it. *Baifatima* v. *Ali Mahomed Aiyeb* (1), dissented from and distinguished.

Mr. *Ghulam Hasan*, for the appellant.

Mr. *Ali Jawad*, for the respondent.

RAZA and NANAVUTTY, JJ. :—This is an appeal from a decree of the Subordinate Judge, Partabgarh, dated the 13th of October, 1927, affirming a decree of Munsif of Partabgarh, dated the 20th of July, 1927.

The facts of the case so far as it is necessary to state them for the purpose of disposing of this appeal are as follows :—

The plaintiff Musammat Azizul is the first wife of the defendant Mansur Ali. Mansur Ali married a second wife in September, 1925. The two wives could not pull on well and the agreement exhibit 1 was then executed by Mansur Ali on the 25th of September, 1925. It was executed about a week after Mansur Ali married his

*Second Civil Appeal No. 367 of 1927, against the decree of Gokul Prasad, Subordinate Judge of Partabgarh, dated the 13th of October, 1927, confirming the decree of Pandit Dwarka Prasad Shukla, Munsif of Partabgarh, dated the 20th of July, 1927.

(1) (1913) I.L.R., 37 Bom., 280.

1928

MANSUR v. MUSAMMAT AZIZUL.

Raza and Nanavutty, JJ.

second wife. The plaintiff went to live in her father's house sometime after the execution of the agreement. The plaintiff brought the present suit for recovery of Rs. 58-7-0 arrears of maintenance, against the defendant on the basis of the agreement, dated the 25th of September, 1925.

The defendant admitted the execution of the agreement, but denied his liability to give maintenance to the plaintiff on the ground that the agreement was without consideration and that the plaintiff was not living with him as his wife.

The learned Munsif found that it was unsafe for the plaintiff to live in the same house with the defendant's second wife. He found also that the plaintiff had once gone to the defendant's house after the agreement was executed by the defendant, but she had to leave the place and to return to her father's house as she could not pull on well with the defendant's second wife. He held that the deed dated the 25th of September, 1925, was not without consideration and that the plaintiff was entitled to the maintenance even if she did not reside in the defendant's house. He, therefore, decreed the claim.

The defendant appealed, but his appeal was dismissed by the learned Subordinate Judge. It was contended before the learned Subordinate Judge that the agreement was without consideration and against public policy. The point that the agreement was against public policy was not expressly taken in the first court. It was taken in appeal before the learned Subordinate Judge. The learned Subordinate Judge agreed with the learned Munsif that the agreement was not without consideration. He held also that the agreement was not opposed to public policy. He, therefore, dismissed the appeal.

The defendant has now come to this Court in second appeal.

1928

MANSUR v. MUSAMMAT AZIZUL.

Raza and Nanavutty, JJ.

We think there is no substance in this appeal.

The contention that the agreement was without consideration cannot be supported. The defendant is bound to maintain his wife during the subsistence of marriage. So long as the right to maintenance lasts, the contract in question subsists and it cannot be treated as devoid of consideration. We should like to note also that this plea was not pressed before us by the appellant's learned Counsel.

The appellant's learned Counsel has contended before us that the agreement in question is opposed to public policy and the plaintiff is not entitled to maintenance from the defendant under the agreement. We are not prepared to accept this contention. We have examined the agreement carefully. We are not prepared to hold that the lower courts were wrong in construing the agreement. It was, of course, stated in the agreement that the defendant would provide his wife plaintiff with food and clothing if she would live with him in his house, but it was expressly provided by the agreement that the plaintiff would be entitled to *guzara* at Rs. 5 per mensem, even if she would not live with him in his house. It was stated at the end of the agreement that if the plaintiff would leave the defendant's house without any sufficient reason and without any fault of the defendant and others, the *panches* named in the agreement would manage to send her to his (defendant's) house. It has been found in this case that the plaintiff had not left the defendant's house without a sufficient reason. Besides, that statement in the agreement is not binding on the plaintiff. Having examined the whole document carefully we have come to the conclusion that the intention of the parties was that the plaintiff would be entitled to the *guzara* even if she did not reside in the defendant's house.

1928

MANSUR v. MUSAMMAT AZIZUL.

Raza and Nanavutty, JJ.

The appellant's learned Counsel has referred to the ruling of the Bombay High Court in the case of *Baifatima* v. *Ali Mahomed Aiyeb* (1) in support of his argument that the agreement is opposed to public policy. It was held in that case that an agreement which provides for, and therefore encourages, future separation between the spouses (Muhammadans) is void as being against public policy. The agreement in that case was an agreement made between a Muhammadan husband and his wife providing for certain maintenance to be given to the wife in the event of a future separation between them. With great respect we find great difficulty in following the view adopted in that case. Moreover the point raised in that case is not similar to that which arises in this case. No question of *separation* between husband and wife really arises in this case.

Under the Muhammadan law "the maintenance (*nafkah*) of a wife includes everything connected with her support and comfort, such as, food, raiment, lodging, etc. and must be provided in accordance with the social position of the parties. The wife is not entitled merely to maintenance in the English sense of the word, but has a right to claim a habitation for her own exclusive use to be provided consistently with the husband's means. It is incumbent on the husband to provide a separate apartment for his wife's habitation to be solely and exclusively appropriated by her, because this is essentially necessary to her and is, therefore, her due same as her maintenance, and the word of God appoints her a dwelling house as well as a subsistence" (See Ameer Ali's Muhammadan law, volume II, page 449 (3rd edition). "It is incumbent upon a husband to provide a separate apartment for his wife's habitation to be solely and exclusively appropriated to her use so as that none of the husband's family, or others may enter without her per-

(1) (1913) I.L.R., 37 Bom., 280.

mission and desire, because this is essentially necessary to her and is therefore her due the same as maintenance, and the word of God appoints her a dwelling house as well as subsistence; and as it is incumbent upon a husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it, as this would be injurious to her, by endangering her property, and obstructing her enjoyment of his society; but if she desire it, the husband may then lawfully admit a partner in the habitation, as she by such a request voluntarily relinquishes her right; neither is the husband at liberty to intrude upon his wife his child by another woman, for the same reason. If the husband appoints his wife an apartment within his own house giving her the lock and key, it is sufficient, as the end is by this means fully obtained''. (See Hamilton's Hedaya, volume I, pages 401—2). If a Muhammadan marries a second wife and finds that his first wife cannot pull on well with his second wife and if he does not or cannot provide a separate apartment or habitation for her exclusive use, and for the sake of preservation of the family peace executes an agreement in her favour giving her maintenance, even if she does not reside in the same house with him and his second wife, that agreement is not in our opinion against public policy. This arrangement does not necessarily result in *separation* between husband and wife. The husband may conveniently manage to visit her in the house which she occupies after leaving his house. By occupying another house she does not necessarily refuse ''herself'' to her husband. We think the courts should not lightly take upon themselves in such cases to declare agreements to be void on the ground of public policy. It should be borne in mind that it is the highest policy of the law that contracts should be enforced. The plaintiff in this case is residing in her father's house. The defendant may conveniently visit

1928

MANSUR v. MUSAMMAT AZIZUL.

her there, if he cares for her. We are not, therefore, prepared to disagree with the finding of the learned Subordinate Judge on the point under consideration.

The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower appellate court is confirmed in all respects.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Louis Stuart, Knight, Chief Judge.

1928
April, 4.

MESSRS. LACHHMI NATH AND BISHAMBHAR NATH (ACCUSED-APPLICANTS) *v.* THE LUCKNOW MUNICIPAL BOARD (COMPLAINANT-OPPOSITE PARTY).*

United Provinces Municipalities Act (II of 1916), *sections* 128 *and* 299—*Chance visitor bringing a motor-car within a municipality—Motor-car used in a municipality for short periods, whether vehicle "kept" within a municipality under section* 128—*Proprietor, when liable to pay tax on a car in a municipality.*

Held, that motor-cars brought by chance visitors into a municipality and not used in the municipality for more than short periods are not vehicles "kept" within the municipality within the meaning of section 128 of the U. P. Municipalities Act II of 1916 (local). Before it can be found that such a vehicle is kept within the municipality it must be established that it is retained within the municipality for more than short periods. There must be something in the nature of permanent retention.

Where the accused who were residents of another district visited Lucknow occasionally but never resided there at one time for a consecutive period longer than seven days and on some of these visits brought with them duly licensed and registered motor-cars but did not obtain licenses from or pay taxes to the Lucknow Municipality, *held*, that they were not liable to conviction and fine under section 299 of the said Act.

*Criminal Reference No. 6 of 1928.