APPELLATE CIVIL.

Before Mr. Justice Broadway and Mr. Justice Abdul Raoof.

Mussammat FATIMA BIBI AND OTHERS (DEFENDANTS)—*Appellants*, 1920

July 15.

versus

NUR MUHAMMAD (PLAINTIFF)—*Respondent.*

Civil Appeal No. 1229 of 1918.

Muhammadan Law—suit by husband for restitution of conjugal rights where he had entered into agreement that his wife should live permanently in the house of her parents—payment of dower—discretion of Court.

The plaintiff sued his wife for restitution of conjugal rights and for an injunction against her parents and friends who were alleged to prevent her from living with him. On their marriage the plaintiff had agreed to the dower being fixed at Rs. 500, without specifying what part of it was prompt or deferred, and also that the girl should live for the whole of her life with her parents. Defendants pleaded that in the face of those agreements plaintiff was not entitled to restitution of conjugal rights till he had paid the dower of Rs. 500, and could not claim that his wife should live with him at his house and not at her parents. The first Court decreed plaintiff's suit and the Lower Appellate Court upheld the decree of the first Court with the condition that plaintiff before applying for execution shall pay 1/5th part of the dower fixed, *viz.*, Rs. 100. The defendants appealed to this Court. It was found as a fact that the wife did live with her husband for a time at his residence and there gave birth to a child.

Held, that the agreement that the wife should live with her parents was not legal and could not be utilised to defeat the husband's claim for restitution of conjugal rights and that in any case the wife by living with her husband for a time away from her parent's house had waived the right, if any, acquired under the agreement.

Imam Ali Patwari, v. *Arfatunnessa* (1), followed.

Hamid-un-Nisa Bibi v. *Zohir-ud-Din* (2), referred to, also Ameer Ali's Muhammadan Law, Volume II, 1917 Edition, pages 369 and 478-80.

Tyabji's Muhammadan Law, II Edition (1919), page 109, disapproved.

(1) (1913) 18 Cal. W. N. 693. (2) (1890) I. L. R. 17 Cal. 670.

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Held also, that the Lower Appellate Court in its discretionary power having fixed the part of the dower to be paid by plaintiff, this Court was not prepared to hold that it had not exercised its discretion properly.

Second appeal from the decree of Lala *Maya Bhan, Additional District Judge, Gujranwala, dated the 23rd January* 1918, *modifying that of* Pandit *Sri Kishan, Subordinate Judge, 2nd Class, Gujranwala, dated the 7th August* 1917, *decreeing the claim.*

GULLU RAM, for Appellants.

TAJ-UD DIN, for Respondents.

The facts of the case are given in the judgment of the Court, delivered by—

ABDUL RAOOF, J.—The plaintiff, Nur Muhammad Khan, brought a suit for the restitution of conjugal rights, which has been decreed by the Courts below. Hence the second appeal. *Mussammat* Fatima Bibi, the wife, her father Fazal Din, and her mother, *Mussammat* Bego, were impleaded as defendants to the suit. As against the father and the mother the relief claimed was that an order should be made prohibiting them from interfering with the plaintiff's right to take his wife to his own house. Various defences were put forward to resist the claim, two of which were :—

(1) That the plaintiff when contracting the marriage had executed an *iqrarnamah* in favour of the parents of the girl agreeing to reside for his whole life with his wife in the house of the parents of the girl.

(2) That the dower fixed being a prompt one the plaintiff was not entitled to the decree claimed without paying up the whole amount of the dower as well as arrears of maintenance allowance.

The Court of first instance decreed the claim in terms of the prayer in the plaint and issued a permanent injunction against the defendants Nos. 2 and 3 prohibiting them from restraining defendant No. 1 from living with the plaintiff as his wife. The Lower Appellate Court in appeal maintained the decree, but made a slight modification by ordering the plaintiff to pay 1/5th of the dower before executing the decree for restitution of conjugal rights. The defendants have come up in second appeal to this Court challenging the decree for restitution of conjugal rights and injunction

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and praying that, in any case, the decree should be made conditional on the payment of the whole amount of dower and maintenance. The plea that the *iqrar-namah* executed by the plaintiff is legally binding upon him and that he is not entitled to take away his wife from the house of her parents is repeated in this Court and Ameer Ali's Muhammadan Law, Volume 2, 1917 Edition, is relied upon in support of this contention. The subject is discussed at pages 369, 478-80. At page 478 dealing with the subject of conjugal domicile and restitution of conjugal rights the learned author states the law in these words :—

"The Muhammadan Law lays down distinctly—

(1) that a wife is bound to live with her husband, and to follow him wherever he desires to go ;

(2) that on her refusing to do so without sufficient or valid reason the Court of Justice on a suit for restitution of conjugal rights by the husband may order her to live with her husband."

At page 479, however, the learned author says :—

"At the same time the law recognises the validity of express stipulations entered into at the time of marriage respecting conjugal domicile if it be agreed that the husband shall allow the wife to live always with her parents he cannot afterwards force her to leave her father's house for his own."

On this later passage great reliance is placed on behalf of the appellant, but we find the following passage immediately after the passage mentioned above :—

"If the wife, however, were once to consent to leave the place of residence agreed upon at the time of marriage she will be presumed to have waived the right acquired under the express stipulation and to have adopted domicile chosen by the husband."

If there was any force in the contention it has been altogether taken away by the last statement of the law in the book relied upon because it is admitted before us by Fazl Din that the defendant No. 1, *Mussammat* Fatima Bibi, did leave his house and went to live with the plaintiff at Karkan, the place of his residence, where she gave birth to a second child. Fatima Bibi, therefore, must be taken to have waived the right, if any acquired under the *iqrarnamah* executed by the plaintiff

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It is not, however, clear whether the stipulation as to the permanent residence of the couple in the house of the wife's parents is based on any rule of Muhammadan Law to be found in the text-books on the subject, as the learned author has not quoted any such authority while we find quite a contrary rule stated in Macnaghton's Precedents of Muhammadan Law, Chapter 6, case 8, according to which a condition like the present is illegal and invalid. The question was raised in the Calcutta High Court in the case of *Hamid-un-Nisa Bibi* v. *Zohir-ud-Din* Sheikh (1) but was not decided. The learned Judges who decided the case quoted certain passages from Grady's Hidaya, Book 2, Chapter 3, page 49, and Ameer Ali's Muhammadan Law, but left the question undecided. The question again came up before the Calcutta Court in the case of *Imam Ali Patwari—defendant appellant* v. *Arfatunnessa—plaintiff-respondent* (2) and was decided by Justices Stephen and Mullick. Their judgment on the point runs thus :—

"There is some good authority for the statement that the condition that the wife shall be at liberty to live with her parents is void. We may for this refer to Wilson's Digest of Anglo-Muhammadan Law, Section 50, Abdur Rahim's Institutes of Mussalman Law, Article No. 7, paragraph 3, and to the decision in the case of *Abdul Piroj Khan* v. *Hussainbi*. We hold, therefore, that the condition is illegal ....."

The subject is also discussed by Tyabji in his Muhammadan Law, Second Edition (1919), at page 109. He has discussed all the authorities mentioned above and has expressed a pious wish in these significant words :—

"The law is quite sufficiently partial to the husband, and it is submitted that the Court should not be astute to enhance the burden on wives."

The opinion expressed by the learned author is quite inconclusive and is opposed to the authorities already quoted.

In this state of authorities we are not prepared to hold that the stipulation relied upon is legal and can be utilised to defeat the claim of the plaintiff for restitution of conjugal rights. This plea, therefore, fails.

(1) (1890) I. L. R. 17 Cal. 670. (2) (1913) 18 Cal. W. N. 693.

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The next contention put forward on behalf of the appellant is that the decree of the Court below ought to have provided for the payment of the entire amount of dower and arrears of maintenance, and we are asked to modify the decree of the Lower Appellate Court by making the decree for conjugal rights conditional upon the payment of the amounts claimed. It is, however, admitted that the matter entirely depended upon the discretion of the Court. The Lower Appellate Court in exercise of its discretion has held that the plaintiff should be ordered to pay only 1/5th part of the dower under the circumstances of this case. We are not prepared to hold that the Lower Appellate Court has not properly exercised its discretion. This plea also must fail. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.