APPELLATE CIVIL.

Before Mr. Justice Young, and Mr. Justice Baguley.

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June 10

KALENTHER AMMAL
v.
MA MI AND ONE.*

Sunni Mahomedan Law—Divorce—Divorce by document sent to the wife—Document read over to the witnesses—Secondary evidence—Evidence Act (I of 1872), sections 60 and 63 (5)—Statements of persons who merely heard a document read whether admissible—Oral explanation by the husband, of contents of document, whether constituting a valid oral divorce—Necessity of intention to break the tie by the words used and in no other way.

Held, that a Sunni Mahomedan husband may divorce his wife by any words, susceptible of being interpreted as a pronouncement of divorce if the words are uttered with a clear intention on his part to dissolve the contract of marriage.

Held, that where a Sunni Mahomedan husband sent his wife a document divorcing her, and that document was not produced in evidence though a notice to produce was served on the wife, oral evidence of those who merely heard the contents of the document read was not admissible to prove the document.

Held, further, that under the circumstances mentioned, the words uttered by the husband when explaining the contents of such a document to the witnesses did not constitute an oral divorce as the intention of the husband was to divorce his wife not by word of mouth at the time but by a written document sent to her.

Kanayalal v. *Pyarabai*, 7 Bom., 139—*referred to.*

Asha Bi Bi v. *Kadir Ibrahim Rowther*, 33 Mad., 22; *Maung Chit U* v. *Maung Tha Ku*, 4 U.B.R., 135—*followed.*

Tyabji on Mahomedan Law; *Ameer Ali on Mahomedan Law*—referred to.

In the District Court of Pegu, the appellant instituted her Civil Regular Suit No. 74 of 1923 for the administration of the estate of her deceased husband, Sheik Moideen. Her status was disputed by the defendants upon the ground that in his life-time Sheik Moideen had divorced her by an instrument in writing duly forwarded to her at her residence in India and also by an oral divorce pronounced against her at Tawa in her absence but in the presence of a number of witnesses. The District Court held the divorce proved and dismissed her suit.

* Civil First Appeal No. 74 of 1923 against the decree of the District Court of Pegu in Civil Regular No. 8 of 1922.

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Against this decision the appellant preferred her present appeal in the High Court and the same was heard by a Division Bench composed of Young and Baguley, JJ.

The facts appear fully in the judgment of Baguley, J., reported below.

Patker—for the Appellant.

Doctor—for the Respondents.

BAGULEY, J.—Sheik Moideen died at Tawa in the Pegu District on the 29th February, 1920, leaving a fairly large estate. A suit was brought by Kalenther Ammal for the administration of his estate, which had been taken possession of by Ma Mi and Mahomed Esoof who are the defendants in this case. Kalenther Ammal claims to be the widow of the deceased, Sheik Moideen. Ma Mi also claims to be a widow of the deceased, and Mahomed Esoof claims to be his son.

The defendants raised a large number of issues, and the Court framed nine issues for trial. Some of these have apparently been dropped by mutual consent, and others have not yet beeen tried. Evidence has been recorded at length, and issue No. 2 alone has been decided. Issue No. 2 ran as follows:—"Was there a vali divorce between plaintiff and Sheik Moideen?" And the Lowe Court has answered it in the affirmative. In this way Kalenther Ammal's claim to any interest at all in the estate of the deceased has been negatived, and her suit has been dismissed.

She now comes on appeal.

Defendants claim that the deceased had divorced the plaintiff. On examination of the evidence recorded by the Lower Court, it is manifest that a double divorce is alleged to have taken place—a written divorce which is said to have been sent to her in

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India where she lived, and also an oral divorce pronounced against her in her absence by the deceased in the presence of witnesses at Tawa. The written divorce being a document, can only be proved in the way allowed by the Evidence Act.

The document itself has not been produced. The defendants allege that it was sent to the plaintiff and must, therefore, be in her possession. Notice was given to her to produce it Plaintiff denies that any such document exists. The defendants, in consequence, seek to prove the contents of the document by secondary evidence.

Secondary evidence is defined in section 63 of the Evidence Act, and the particular form of secondary evidence, which the defendants produce, comes under section 63(5). According to the witnesses whom they produce, Sheik Moideen executed this document in his house at Tawa. It was a document written in the Tamil language, and signed by him and attested by certain other witnesses. The writer of the document has not been called as a witness, but witnesses are called to say that they saw the document signed, and had it read out to them by the writer, or else it contents explained to them either in Tamil or Burmese, according to their nationality, by the deceased himself.

The first point to be considered is whether the statements of any of these witnesses are admissible as oral accounts of the contents of a document given by some person who has himself seen it. In my opinion, none of these persons can be said to have "seen" the document within the meaning of section 63 of the Evidence Act.

In Woodroffe and Ameer Ali's Law of Evidence (7th Edition) at page 489 it is stated that the person must have seen the original. It will not be sufficient

that he heard it being read. No authority for this statement is quoted. But in *Maung Chit U* v. *Maung Tha Ku* (1), where the point in issue was how a judgment or decree, the original of which had been destroyed, should be reproduced, the learned Judicial Commissioner remarked—"What was required was an oral account of the contents of the judgment or decree by some one who had read the one or the other." And there is also the statement—statements of persons who merely heard judgment pronounced were not admissible in evidence."

It has been argued in the present case that, if a witness has seen a document without reading it, nevertheless under section 63 (5), he becomes qualified to give evidence of the contents of the document through knowledge that he has acquired otherwise than by reading it, or seeing it in such a way that he became acquainted with its contents by so seeing it. With this contention I am not in agreement.

Section 60 of the Evidence Act says that oral evidence must, in all cases, be direct. If a person by merely seeing a document, possibly a document in a language which he does not understand, or, possibly a document which he is unable to read, being illiterate, deposes to the contents of the document merely from what other people have told him about it, he is giving hearsay evidence. The man who reads out the document to him would certainly be entitled to give evidence of its contents. But another person who repeats what is read out to him is giving hearsay evidence of what would be legitimate secondary evidence, were it before the Court.

Section 63 (5) of the Evidence Act does not overrule the general principle of law that hearsay evidence is

(1) (1907-1908) 4 U.B.R., 135.

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ordinarily not admissible. The reason for this is quite understandable. The law says that, if it is possible, the document itself must be produced. If the document itself is produced, there can be no possibility of a mistake with regard to its terms. If the document itself cannot be produced, then the law allows secondary evidence of its contents to be given. But it will be noted that in all forms of secondary evidence allowed by section 63 only one possibility of a mistake exists. The first three sub-sections of section 63 refer to copies made from, or compared with, the original. In each of these cases there is only one possibility of a mistake. The fourth sub-section refers to counterparts of documents as against the parties who did not execute them. Ordinarily speaking, it would be assumed that counterparts of a document would be copies of the original. Then we have sub-section (5) which says that a person who has seen a document may give his account of the contents of it. Here again, there is only one possibility of a mistake, namely, that the person's memory may play false. It is quite clear that, if a person has only seen a copy of a document, there are two chances altogether, and, therefore, the evidence given by him would be of a different category to the secondary evidence allowed by law, and a person who has seen a copy of a document is not entitled to give secondary evidence of the contents of the original, see *Kanayalal* v. *Pyarabai* (2).

Again, a person who heard a document read out gives an account of its contents might make a mistake himself, or the person reading it out to him might have made a mistake. Again, we get secondary evidence one degree lower than that described by section 63.

(2) (1883) 7 Bom., 139 at 144.

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For these reasons I hold that merely because the witnesses produced by the defendants say that they saw the document, this does not entitle them to give an account of its contents, which is obviously derived from another source than seeing it.

Two of the witnesses cited by the defendants are Burmese witnesses and they were unable to read the document which was in Tamil. They say that Sheik Moideen explained its contents to them; but it would seem that he also was unable to read it, for he was illiterate, only being able to sign his name. These Burmese witnesses are patently useless.

The others are Tamil speaking but none of them alleges that he has read the document.

I, therefore, hold that there is no admissible evidence of the contents of this document alleged to have been a talaknama or written divorce, and, therefore, I hold that the written divorce has not been proved.

We then fall back on the question of whether an oral divorce has been proved.

Two of the winesses, Manika Meera and Mada Sar, state that Sheik Moideen pronounced three talaks. The rest of the witnesses, with regard to this divorce, make no such allegation. I note that Manika Meera was apparently silent on this point until a very leading question was put to him in examination-in-chief. Mada Sar, on the other hand, says that Sheik Moideen uttered the word "talak" three times at the suggestion of the lugyis present. He does not specify which of the lugyis it was; and none of the other witnesses who have been examined by the defendants make any suggestion that they told Sheik Moideen to utter the word "talak" three times or heard him utter it. It is in fact, not quite clear who were called "lugyis." Mada Sar says that a moulvi of the

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mosque was present; but nobody else seems to have noticed him. It would then appear that of the six witnesses of the alleged divorce, who have been called, only two say that three talaks were pronounced, and one of them only made the statement in answer to a very leading question by the defendant's counsel. I must then hold that a divorce by pronouncement of three talaks has not been proved.

The question then arises whether the statement made by Sheik Moideen with regard to the contents of the document, which he is said to have signed at the time, would constitute a divorce.

The parties are agreed to have been Sunnis, and subject to the Hanafi Law. In Tyabji's Principles of Mahommedan Law, section 146, it is stated according to Hanafi Law, that where the husband utters ambiguous words, susceptible of being interpreted as a pronouncement of divorce, they effectuate a divorce if they are uttered with that intention.

Ameer Ali on page 545 of his work on Mahommedan Law states that Sunnis, for the purpose of effecting a divorce also allow the use of an infinite number of formulæ. All that the law requires is to see that the words of divorce pronounced by a husband could show a clear intention on his part to dissolve the contract of marriage, and a Madras case of *Asha Bi Bi* v. *Kadir Ibrahim Rowther* (3) is to the same effect.

The point then arises as to whether the words uttered by Sheik Moideen, when he was explaining the contents of this document to the various witnesses, constituted an oral divorce. In my opinion they did not. In Ameer Ali's work before quoted, at pages 535 and 546 it is shown that, if an oral divorce is in the correct form, the word "talak" being used,

(3) (1910) 33 Mad., 22.

the divorce is effected even if the man had no intention of divorcing his wife. If, however, other forms of words are used, they must be pronounced with the intention of effecting a divorce.

In the present case I am unable to see how it can be held that Sheik Moideen was intending to divorce his wife by the words which he used in the presence of the witnesses. His object at the time was—if the statements of the witnesses can be taken at their face value—to effectuate a divorce by a written document. He had no *intention whatsoever of effecting an oral divorce* on the spot in her absence. Such a divorce would have been quite unnecessary and superfluous in view of the talaknama which he had written at the time. The words, he used, or is said to have used, to the witnesses, were simply explanatory of that writing, and were not intended by him in any way, to effect the divorce. It is true he had the intention of divorcing his wife, but no intention of divorcing her by word of mouth at the time, and, in consequence, the words which he uttered did not affect the oral divorce.

For these reasons I come to the conclusion that, at the time Sheik Moideen died, he had not divorced the plaintiff, Kalenther Ammal. It is impossible to pass orders in the case, because the issues with regard to the status of Ma Mi and Mahomed Esoof has not been decided; nor had any conclusion been come to as to the extent or value of the estate.

I would set aside the decree of the Lower Court dismissing the plaintiff's suit and remand the case for disposal on its merits. When the District Court deals with the case now, it should come to a finding on every one of the issues already framed in order that, if any further appeal is filed, the appellate Court

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may be in a position to pass final orders without further delay.

Costs of the appeal to be costs in this case as ultimately decided.

YOUNG, J.—I concur.

APPELLATE CIVIL.

Before Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

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June 20.

HARDAYAL AND ONE v. RAM DOO.*

Account, suit for an—Estimated value within the jurisdiction of the Subdivisional Court—Decree for an amount within the jurisdiction of that Court—Appeal claiming an amount without the jurisdiction of that Court—Forum of appeal whether the District Court or the High Court—Burma Courts Act, 1923, *section* 9 (1) (*b*)*—Lower Burma Courts Act,* 1900*—Burma Courts Act,* 1923, *section* 7 (*b*), *provisos* 1 *and* 2*—Suits Valuation Act* (*VII of* 1887), *section* 8.

A suit for an account, the plaintiff making an approximate valuation of the relief claimed at Rs. 3,100, was decreed by the Subdivisional Court in the amount of Rs. 2,128-2-9. The plaintiff appealed claiming that he was entitled to an amount exceeding Rs. 11,000. The District Court to which the appeal was filed returned it to be presented to the High Court under proviso 2 to section 7(*b*) of the Burma Courts Act, 1923.

Held, that the appeal, being from a Subdivisional Court, which has not been specially empowered under section 7 (*b*), proviso (1) of the Burma Courts Act, lies to the District Court.

Held, also, that the appellant, by increasing the valuation on appeal, cannot change the venue of appeal.

Held, further, that where, in a suit for accounts, the Court entertaining it on the preliminary valuation finds that the final valuation would be outside its jurisdiction, the proper procedure would be to return the plaint for presentation in the proper Court.

Bhupendra Kumar Chakravarti v. *Purna Chandra Bose*, 43 Cal., 650 ; *Golam Singh* v. *Indra Coomar Hazra*, 13 C.W.N., 493 ; *Hirjibhai Navroji Anklesaria*

* Civil First Appeal No. 103 of 1923 against the decree of the Subdivisional Court of Toungoo in Civil Regular No. 84 of 1922.