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giving the plaintiff a decree, and that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellants : *Waterhouse & Co.*

Solicitors for Respondent : *T. L. Wilson & Co.*

PRIVY COUNCIL.

J.C.* 1926

Nov. 30

MA MI AND ANOTHER *v.* KALLANDER AMMAL (No. 2).

(On Appeal from the High Court at Rangoon.)

Mahomedan law—Divorce—Evidence—Secondary Evidence—Contents of Document—"Person who has himself seen it"—Indian Evidence Act (I *of* 1872), *ss.* 60, 63.

According to Mahomedan law a Mahomedan can divorce his wife whenever he desires. He may do so without a *talaknama* or written document and no particular form of words is prescribed. If the words used are well understood as implying divorce, such as "*talak*," no proof of intention is required ; otherwise the intention must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife or even addressed to her.

After the death of a Sunni Mahomedan resident in Burma, it was alleged in a suit that he had divorced his wife. Evidence was given by witnesses that the deceased had read to them a document which was not produced at the trial but alleged to have been a *talaknama*, and there was other evidence of statements by him.

By the Indian Evidence Act, 1872, section 63 "Secondary evidence means and includes . . . . (5) oral accounts of the contents of documents given by some person who has himself seen it ; " by section 60 " oral evidence must in all cases whatever be direct ; that is to say—if it refers to a fact which could be seen it must be the evidence of a person who says he saw it. "

Held, (1) that oral evidence of the contents of a document is admissible as secondary evidence under section 63 (5) only if the witness has himself read the document ; and that consequently that the section did not render the evidence admissible in proof of the contents of the document.

(2) that the evidence that the deceased had used to the witnesses the word "*talak*" was not reliable, and that it was not proved that he told them that he had divorced his wife or indeed that he had any intention of effecting a divorce otherwise than by the execution and transmission of the document, which had not been proved.

(3) that accordingly the alleged divorce was not established.

Decree of the High Court (I.L.R. 2 Ran. 400) affirmed.

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* PRESENT :—LORD ATKINSON, LORD CARSON and SIR JOHN WALLIS.

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Appeal (No. 52 of 1925) from a decree of the High Court (June 10, 1924) reversing a decree of the District Court of Pegu (March 10, 1923).

The respondent brought a suit against the appellants alleging that she was the widow of one Sheikh Moideen, a Sunni Mahomedan, and claiming to recover from the appellants property of the deceased. The appellants by their written statement pleaded that Sheikh Moideen had divorced the respondent according to Mahomedan law.

The facts appear from the judgment of the Judicial Committee.

The District Court held that there had been a valid divorce and dismissed the suit. An appeal to the High Court was allowed and the case remitted to the District Court for disposal.

The learned Judges (Young and Baguley, JJ.) held that certain secondary evidence of a document relied on as a *talaknama*, an instrument of divorce, was not admissible under the Indian Evidence Act, 1872, section 63 ; and that the words uttered by the husband as to the document did not effect an oral divorce as his intention was not to divorce his wife orally at the time, but by a document. The joint judgment of the learned Judges is reported at I.L.R. 2 Ran. 400.

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Sir George Lowndes, *K.C.* and *R. W. Leach* for the Appellants.

The respondent was validly divorced according to Mahomedan law of the Hanafi School. The statements of the husband in regard to the document were admissible as secondary evidence under section 63 (5) of the Indian Evidence Act, 1872. The question was not as to the contents of the document, but whether the husband had executed a written document which he intended should operate as a divorce. Further the statements of the husband proved in

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evidence showed an intention to dissolve the marriage, and under Mahomedan law that was sufficient for the purpose. The word *talak* was used by him, and if so the intention is to be inferred; the High Court was wrong in its view that three *talaks* were necessary. The view of the learned Judges that the statements of the husband did not effect a divorce because his intention was to divorce not orally but by a written document was erroneous. The primary intention was to divorce, the intention to do it by the document was a secondary intention. Reference was made to Baillie's Digest of Moohummudan Law, pp. 212 to 214, 228; Wilson's Digest of Anglo-Muhammadan Law, paras 62, 63; Ameer Ali's Mahommedan Law (4th Edition) Vol. 2, p. 534, 535; *Mozuffer Ali* v. *Kumurunissa Bibee* (1), *Ibrahim* v. *Syed Bibi* (2), *Sarabhai* v. *Rabiabai* (3), *Asha Bibi* v. *Kadir Ibrahim Rowther* (4), *Fulchand* v. *Nazab Ali Chowdhry* (5), and observations therein on *Furzund Hossein* v. *Janu Bibee* (6).

Dunne, K. C. and *E. B. Raikes* for the Respondent.

The evidence relied on was not admissible to prove the contents of the document. In the absence of both the document and secondary evidence as to its contents, it was not shown that it was in terms which in Mahomedan law constituted a divorce. In the case of a divorce by writing, the document must be communicated to the wife, or to her agent to receive it; Baillie, pp. 212, 233. Ameer Ali (4th Edition), Vol. 2, p. 543, Wilson, para. 62, Tyabji on Mahomedan Law, para. 145. Though the decision in *Sarabhai* v. *Rabiabai* [(3) at page 537] was correct some of the *obiter* observations were erroneous. The evidence of the statements by the husband was unreliable and

(1) (1864) Suth. W.R. 32.
(2) (1888) I.L.R. 12 Mad. 63.
(3) (1905) I.L.R. 30 Bom. 542.
(4) (1909) I.L.R. 33 Mad. 22.
(5) (1908) I.L.R. 36 Cal. 184.
(6) (1878) I.L.R. 4 Cal. 588.

insufficient to discharge the onus of proving that a divorce according to Mahomedan law was effected.

Sir George Lowndes, K.C., replied.

The judgment of their Lordships was delivered by—

Sir JOHN WALLIS :—This is an appeal from the decree of the High Court at Rangoon reversing the decree of the District Court of Pegu. The suit was brought by the respondent Kallander Ammal, to recover the whole, or in the alternative, a part of the estate of her deceased husband, Sheik Moideen, who died intestate on the 29th February 1920.

In her plaint she claims to be the sole heir of her deceased husband, and alleges that the first defendant, Ma Mi, falsely claims to have been his lawful wife, and that the second defendant, Mohamed Eusoof, falsely claims to be the legitimate son of the deceased Sheik Moideen by one Ma Kin ; and that neither of them has any claim to any portion of or interest in the estate of the deceased. Notwithstanding which, as she alleges, the defendants have been withholding the property of the deceased from her. The defendants filed a joint written statement in which they denied that the plaintiff was heir to the estate, and pleaded that prior to his death the deceased divorced the plaintiff according to Mohamedan law, and that the said divorce was communicated to the plaintiff and the plaintiff thereafter ceased to be the wife of the deceased if she was legally married to him at any time. They also pleaded that as widow and son of the deceased they were his only heirs and legal representatives.

The District Judge framed four issues of which the second : " Was there a valid divorce between plaintiff and Moideen ? " alone was tried. On this issue the District Judge found that there was ample

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evidence to prove that the deceased executed a *talaknama* or a divorce document about two years before his death in Burma, where he resided, and sent it to his wife in India where she was residing, and he accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court at Rangoon, who held that there was no legal evidence on record of the contents of the divorce document, as the evidence tendered in the absence of the document itself was not secondary evidence within the meaning of section 63 of the Indian Evidence Act. They accordingly held that a divorce by *talaknama* or writing was not proved ; and being further of opinion that no oral divorce was proved by the evidence on record, they allowed the appeal and decreed the plaintiff's suit.

At the trial, several of the witnesses deposed to having heard the *talaknama* read out, and to having seen it executed by the deceased, but the writer of the document was not called, and none of the witnesses had read it so as to be able to speak *de visu* to its contents. Their Lordships are of opinion that in this state of things the learned judges of the High Court were right in holding that the statements of the witnesses were not secondary evidence within the meaning of section 63 of the Act, which so far as material, is as follows :—

> " Secondary evidence means and includes—
>
> * * * * * *
>
> (5) oral accounts of the contents of a document given by some person who has himself seen it."

In their Lordships' opinion the learned judges were right in holding that this means that the oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by someone

else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of section 60 as to oral evidence generally :—

> " Oral evidence must in all cases whatever be direct ; that is to say—if it refers to a fact which could be seen it must be the evidence of a witness who says he saw it."

The question whether the document was a *talaknama* or deed of divorce was a fact which could be seen by reading it, and, therefore, in accordance with the general principle embodied in the section, could only be spoken to by a witness who had himself read it.

In this state of the evidence the learned judges in their Lordships' opinion rightly held, in the absence of any legal evidence of the contents of the document in question, that a divorce by *talaknama* or written document, as found by the District Judge, was not proved.

They then proceeded to consider whether there was any evidence on record sufficient to prove that the deceased, on the occasion when the document was drawn up and executed, used words which would, in themselves, be sufficient to constitute an oral divorce under Mohammedan law. According to that law, a husband can effect a divorce whenever he desires. He may do so by words without any *talaknama* or written document, and no particular form of words is prescribed. If the words used are "express" or well understood as implying divorce, such as *talak*, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. On an examination of the evidence the learned judges came to the conclusion that there was no sufficient evidence of any such oral divorce, and they accordingly reversed

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the judgment of the lower Court and gave the plaintiff a decree.

There is no doubt the evidence of two witnesses on the record that the deceased on this occasion uttered three times the word "*talak*," which, if uttered once, would be sufficient to constitute an oral divorce, and that he also told the witnesses that the document was a *talaknama* or divorce document. As to this, the learned judges have held that the evidence as to the use of the word *talak* by the deceased was not reliable, and that it was not proved that the deceased told the witnesses that he had divorced his wife, or indeed that he had any intention of effecting a divorce otherwise than by the execution and transmission of the document which has not been proved.

Their Lordships see no sufficient reasons for differing from these findings, which are sufficient to dispose of the case.

It may be observed, in the first place, that the District Judge confined himself to holding that there had been a divorce by written document. Not only did he not find an oral divorce by the pronouncement of *talak*, but in his summary of the evidence of the two witnesses who spoke to the use of the word *talak*, he omitted this portion of their evidence nor did he anywhere refer to it in the course of his judgment. In these circumstances, it cannot be inferred that the District Judge would have been prepared to find an oral divorce upon the evidence of these two witnesses if he had considered it necessary to record a finding on this question.

As regards the pronouncement of *talak*, it is only spoken to by two witnesses out of several. As to the first witness, P. N. Manika Meera, the learned judges were of opinion that the witness was silent on this point until a very leading question was put to him

in examination in chief. Putting aside this objection to his evidence, which is not clearly established, it is worthy of observation that the next witness, Mahomed Ali, who went to the house with him and left at the same time, says nothing about an oral divorce by the pronouncement of *talak*, and was not even questioned about it. A formal pronouncement of a divorce by the use of the word *talak* would naturally take place in the presence of all the persons who had been summoned, and this witness must have heard it equally with Manika Meera. It is also significant that Abdul Rahim otherwise known as Ko Po O, who is found to have been the most reliable of the defendants' witnesses, says nothing about it.

The only corroboration of Manika Meera's evidence is to be found in the evidence of Madar Sar, a petty bazaar keeper and a dependant of the defendants. Their Lordships agree with the High Court that the evidence of these two witnesses is not sufficient to support a finding of an oral divorce by the pronouncement of *talak*.

As regards the other statements said to have been made by the deceased, their Lordships agree with the learned judges that the evidence does not sufficiently establish what the deceased actually said to enable them to say whether the words used amounted to a statement that the deceased had divorced his wife, or merely indicated his intention of divorcing her by the execution and transmission of the *talaknama*.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed with costs, and will humbly advise His Majesty accordingly.

Solicitors for Appellant : *Waterhouse & Co.*

Solicitors for Respondent : *T. L. Wilson & Co.*