1928

THE MAHARAJA OF FARIDKOT v. ANANT RAM.

JAI LAL J.

stated above it follows that the plaintiff, the *Raja* of Faridkot, had a perfectly good title to the properties in dispute and consequently they were not liable to attachment in execution of the decrees against Mr. G. H. Coates and therefore the plaintiff's suit should have been decreed. I would accept this appeal, set aside the decree of the Senior Subordinate Judge and decree the suit with costs.

FFORDE J.

FFORDE J.—I agree.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Agha Haidar.

1928

Oct. 24.

GHULAM MOHY-UD-DIN KHAN (DEFENDANT) Appellant

versus

KHIZAR HUSSAIN (PLAINTIFF) Respondent.

Civil Appeal No. 2443 of 1923.

Indian Evidence Act, I of 1872, section 112—Birth within 280 days after father's death—presumption of legitimacy—Muhammadan Law—Hanafi *School—Divorce*—Talak-us-sunnat—Talak hasan— *necessary requisites for completion.*

The plaintiff claimed from the defendant a moiety of the estate left by their deceased father H. B. on the ground that he (plaintiff) was also a son of H. B. The plaintiff was born in 1920, about six months after the death of H. B. Defendant alleged that H. B. had divorced the plaintiff's mother in 1913. The only material evidence of this on the record was a postcard written by H. B. to the defendant which stated, *inter alia*, that he had divorced his wife on the 15th September, 1913, and that the period of 'the third divorce' would expire on the 15th November, 1913. The parties were Muhammadan *Rajputs* governed by the *Hanafi* school of Muhammadan Law.

1928

GHULAM MOHY-UD-DIN KHAN v. KHIZAR HUSSAIN.

Held, that the plaintiff having been born within 280 days after the death of H. B., who had married his mother more than 14 years before his death, was presumably the legitimate son of H. B., *vide* section 112 of the Indian Evidence Act ; and this presumption could only be rebutted by showing that H. B. was not his mother's husband at the time when the plaintiff could have been begotten. The *onus* of proving the alleged divorce in 1913 was, therefore, upon the defendant.

Held also, that taking the post card of 15th September, 1913, at its face value, it showed that the divorce which H. B. intended was a *talak hasan*, by which it is necessary to repeat the declaration of divorce three times, and, as the defendant had failed to prove that two subsequent declarations on 15th October and 15th November, 1913, respectively, had taken place, the *talak* was not completed and there was, therefore, no valid dissolution of the marriage.

The difference between *talak-ul-sunnat* and its sub-divisions *ahsan* (very proper) and *hasan* (proper) and *talak-ul-bidaat*, pointed out.

First appeal from the decree of Lala *Ram Kanwar, Senior Subordinate Judge, Gurdaspur, dated the the 27th August 1923, decreeing the plaintiff's suit.*

ABDUL RASHID and ANANT RAM KHOSLA, for Appellant.

MEHR CHAND MAHAJAN, NAWAL KISHORE and DESH RAJ MAHAJAN, for Respondent.

JUDGMENT.

SHADI LAL C.J.

SIR SHADI LAL C. J.—The dispute between the parties relates to the estate of one Hussain Bakhsh, a *Rajput* of the Gurdaspur District, who died in August, 1919. The defendant Ghulam Mohy-ud-Din, who is admittedly a son of Husain Bakhsh, is in possession of the entire estate; but a moiety thereof is claimed by the plaintiff, Khizar Hussain, on the ground that

1928

GHULAM MOHY-UD-DIN KHAN v. KHIZAR HUSSAIN.

SHADI LAL C.J.

he too is a son of the deceased. Now, it is beyond dispute that Khizar Hussain's mother *Mussammat* Zainab had married Hussain Bakhsh in January, 1905, and that Khizar Hussain was born in February, 1920, about six months after the death of Hussain Bakhsh. It is, therefore, clear that the plaintiff was born to *Mussammat* Zainab within 280 days after the death of Hussain Bakhsh who had married her more than 14 years before his death, and these facts attract the presumption in favour of legitimacy created by section 112 of the Indian Evidence Act. Ghulam Mohy-ud-Din, however, retorts that Hussain Bakhsh had dissolved his marriage with *Mussammat* Zainab by granting her a divorce in 1913, and that he was not her husband at the time when the plaintiff could have been begotten.

The proposition of law is firmly established that, when a particular relationship such as marriage has been shown to exist between two persons, there is a presumption in favour of its continuance, and the burden of proving that they do not stand to each other in that relationship lies on the person who affirms it. The defendant seeks to discharge this *onus* by showing that Hussain Bakhsh severed the marital tie by making a declaration of *talak* three times in 1913, namely, on the 15th September, 15th October and 15th November, respectively. The most important piece of evidence, to which our attention has been invited in this connection by Mr. Abdul Rashid, is a post card sent by Hussain Bakhsh to his son Ghulam Mohy-ud-Din on the 19th September, 1913. It appears that Hussain Bakhsh had acquired a plot of land in *Chak* No. 84 in the Shahpur district, and that the post card was written by him while he was lying ill in a hospital at Sargodha, away from his wife *Mussammat* Zainab,

1928

GHULAM MOHY-UD-DIN KHAN v. KHIZAR HUSSAIN.

SHADI LAL C.J.

who was living at that time in the *Chak*. This document, which purports to have been written by Hussain Bakhsh himself, states that he had divorced his wife on the 15th September, 1913, and that the period of "the third divorce" would expire on the 15th November, 1913. After stating that he would have no connection with her he declared his intention to pay her maintenance for two months in the event of her leaving the village in order to live with her sister.

Now, *Mussammat* Zainab was the second wife of Hussain Bakhsh, and he was apparently on affectionate terms with her It is not clear what led him to write this post card, but the evidence on the record shows that he was a rash and fickle-minded person. Even if we take this document at its face value, it is undeniable that he intended to make two more pronouncements in order to complete the divorce, and the question for determination is whether he made the divorce irrevocable by making the required pronouncements. The defendant has attempted to prove this essential requirement by examining two witnesses, Abdul Hamid and Abdul Aziz, but neither of them can be regarded as a disinterested or reliable witness. The former is not only a first cousin of Ghulam Mohy-ud-Din but is also his brother-in-law (wife's brother), and professes to have gone with him to Sargodha on receipt of the post card. The witness states that two declarations of *talak* were made in his presence, and that a deed of divorce was also written It is, however, significant that no such deed has been produced; and that the witness's alleged companion Ghulam Mohy-ud-Din, who is vitally interested in the matter, does not depose either to the declarations of divorce or to the execution of the deed. The second witness, Abdul Aziz, is only a chance witness, and makes a bald statement

1928

GHULAM MOHY-UD-DIN KHAN v. KHIZAR HUSSAIN.

SHADI LAL C.J.

to the effect that Hussain Bakhsh divorced his wife in 1913. It is not clear whether he is referring to the second or the third pronouncement. The testimony of these witnesses is not only vague but also unreliable, and cannot, in my opinion, sustain the conclusion that Hussain Bakhsh made the two declarations of divorce after the month of September, 1913.

The question, however, arises whether a single declaration of *talak* as evidenced by the post card constituted a valid divorce and dissolved the marriage between *Mussammat* Zainab and her husband. For the determination of this question it is necessary to state briefly the rules of the Mohammadan Law on the subject of divorce. According to the *Hanafi* school, by which the parties are governed, *talak* is of two kinds, *talak-us-sunnat* and *talak-ul-bidaat*. *Talak-us-sunnat* is effected in accordance with the rules laid down in the traditions (*sunnat*), and is regarded as the regular or orthodox form of divorce. *Talak-ul-bidaat* is the irregular form of divorce, but it is the most common and prevalent method of dissolving marriage. *Talak-us-sunnat* is again subdivided into (1) *ahsan*—very proper— and (2) *hasan*—proper. *Talak ahsan* is effected by a single declaration of *talak* followed by abstinence from sexual intercourse for the period of *iddat*. But in the case of *talak hasan* it is necessary to repeat the declaration of *talak* three times, once during each successive *tohr* (period between menstruations), and to abstain after pronouncing the first formula from the exercise of conjugal rights until the third pronouncement. The *talak-ul-bidaat* is effected by a declaration of *talak* repeated three times in immediate succession or at intervals within one *tohr*.

It will be observed that both the modes of *talak-us-sunnat* give the husband an opportunity of changing his mind, for in neither case does the divorce become absolute until a certain period has expired. In the case of *ahsan* there is the period of *iddat*, while in the case of *hasan* there is the period of two *tohrs*, within which the husband can reconsider his decision. But *talak-ul-bidaat* becomes irrevocable as soon as it is pronounced and gives no *locus penitentiæ* to the husband. Indeed, it is not necessary to repeat the formula of divorce three times, and even a single declaration is sufficient to dissolve the marriage, if the intention to make the divorce irrevocable is clearly indicated.

Now, the post card of the 19th September, 1913, may be taken as evidence of a single declaration of *talak* made on the 15th September, 1913; but it shows that the husband intended to adopt the *hasan* form of divorce. The evidence produced by the defendant does not, however, prove that that declaration was followed by two more pronouncements in October and November respectively. On the other hand, we have the fact that Hussain Bakhsh and *Mussammat* Zainab subsequently lived together as man and wife, and that he described her as his wife in several documents. It is also clear that she bore him a daughter whom he recognized as his own child, and, as stated above, she gave birth to the plaintiff about six months after his death. On these facts I am clear that Hussain Bakhsh did not complete the *talak hasan*, and consequently there was no valid dissolution of the marriage.

The learned counsel for the appellant, however, urges that the pronouncement of *talak* referred to in the post card should be treated as *talak-ul-bidaat*, and that the divorce became absolute as soon as the husband manifested his intention irrevocably to dis-

1928

GHULAM MOHY-UD-DIN KHAN v. KHIZAR HUSSAIN.

SHADI LAL C.J.

solve the marriage. This argument, though sound in law, rests upon a very uncertain foundation of fact. It must be remembered that in the trial Court the defendant relied upon *talak hasan* alone, but the requirements of that *talak* have not been established. It was not suggested at any stage of the trial of the suit that the husband, contrary to the statement contained in the post card itself, had put an end to the marriage irrevocably by making only one pronouncement; and the plaintiff consequently had no opportunity to meet the case which is sought to be set up in this Court. As observed already, *talak-ul-bidaat* is usually pronounced by the triple repetition of the formula of *talak*, and though the marriage may be dissolved by a single declaration, it must be accompanied by a clear manifestation of an intention to dissolve it irrevocably. In order to ascertain this intention it is of vital importance to know the exact words used by the husband; but the record is silent as to the precise formula employed by Hussain Bakhsh on the 15th September, 1913, when he made the declaration in question. It would be manifestly unjust to the plaintiff, if we allowed the defendant to put forward in the appellate Court a new case which depends mainly upon a question of fact.

Upon a careful examination of the entire material before me I have reached the conclusion that the defendant, on whom the *onus* rested, has failed to rebut the presumption in favour of the plantiff's legitimacy. I accordingly affirm the decree of the trial Judge and dismiss the appeal with costs.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

A. N. C.

Appeal dismissed.