APPELLATE CIVIL.

Before Hon'ble Sir Mya Bu, Kt., Offg. Chief Justice, and Mr. Justice Mackney.

A. M. EBRAHIM *v.* FATIMA BIBI.*

1938

Aug. 4.

Mahomedan law, Sunni—Apostasy of wife—Divorce by operation of law—Wife's claim to dower—Consummation of marriage essential—Large amount of dower—Husband's financial condition.

Under Sunni Mahomedan Law, apostasy from Islam by one of a married pair is a cancellation of their marriage which takes effect immediately. If the wife be the apostate, she is entitled to the whole dower agreed upon at the time of the marriage provided that consummation has taken place before the divorce. But she is entitled to no part of it if the marriage has not been consummated.

However large the dower fixed may be, the wife is entitled to recover the whole of it from her husband, or if he be dead, from his estate without reference to his circumstances at the time of marriage or the value of his estate at the time when the dower becomes payable.

Sugra Bibi v. *Masuma Bibi*, I.L.R. 2 All. 573, referred to.

Paul for the appellant.

M. I. Khan for the respondent.

MYA BU, OFFG. C.J.—This is an appeal against a decree for the payment of Rs. 2,000 by the appellant to the respondent as the amount of the dower alleged to have been agreed upon by the appellant in favour of the respondent when they were married on the 4th April 1930.

The parties were Sunni Mohammedans and each of them had been previously married—the appellant twice before, while the respondent was a widow with some children by her previous husband.

At their marriage on the 4th April 1930, the appellant, in accordance with the usual practice and custom, executed a *kabinama*, which is Exhibit A in the case, agreeing, *inter alia*, to pay the respondent a dower of fifty ticals of gold. They lived together as

* Special Civil First Appeal No. 59 of 1938 from the judgment of the Small Cause Court of Rangoon in Civil Regular No. 545 of 1938.

1938

EBRAHIM v. FATIMA BIBI.

MYA BU, OFFG. C.J.

man and wife for a few years, after which they separated. While living apart the respondent obtained an order of maintenance under section 488, Criminal Procedure Code. Subsequently, on the 28th May 1936 the appellant effected a divorce by means of a *talaknama*.

In making her claim for the payment of the dower mentioned in the *kabinama*, the respondent relies on the divorce as a fact which gave rise to her right to the immediate payment of the dower.

The main grounds upon which the appellant resisted the claim in the Trial Court are : that the marriage between himself and the respondent had become automatically dissolved by reason of the respondent having apostatized by worshipping spirits, images and Buddhist shrines, that, upon the dissolution of marriage by such apostasy, the respondent was not entitled to any dower and that, in any event, the amount mentioned in the *kabinama* was not the amount agreed upon which was only five ticals of gold. The learned Trial Judge dismissed the defence based upon the alleged apostasy on the ground that the issue as to the dissolution of marriage in consequence of the alleged apostasy was *res judicata* in view of the decision given in the proceeding under section 488 of the Criminal Procedure Code to the effect that the status of husband and wife still subsisted at the time of the order made under that section.

It is urged on behalf of the appellant that this view of the Trial Judge upon the point is erroneous. There is considerable force in this contention of the learned advocate for the appellant but, even assuming that the alleged apostasy had taken place and that such apostasy had brought about a dissolution of marriage between the parties, the respondent is, in our opinion, entitled to a decree for the payment by the appellant of the dower agreed upon at the time of the marriage under the

Mohammedan Law. In " A Digest of Moohummudan Law " by Baillie, who is a well-known authority on the subject, the following passage appears at page 182 :

" Apostasy from Islam by one of a married pair, is a cancellation of their marriage, which takes effect immediately without requiring the decree of a judge ; and without being a repudiation, whether the occurrence is before or after consummation ; yet if the husband be the apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not. If the wife be the apostate, she is equally entitled to the whole dower in the former case, but to no part of it in the latter."

The part of this passage applicable to this case, on the assumption that the appellant's allegation as to the apostasy of the respondent is true, is the first part of the last sentence in the passage quoted above, *i.e.*, " If the wife be the apostate, she is equally entitled to the whole dower " when consummation has taken place, the parties having lived together as man and wife for quite a few years before being separated.

Sir Dinshah Fardunji Mulla in his " Principles of Mahomedan Law ", 11th edition, also states in section 243, sub-section 2, first paragraph :

" If the marriage was consummated, the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred."

Read with the opening clause of the section this statement means that the wife is entitled to the immediate payment of the whole of the unpaid dower on the completion of a divorce whatever may be the mode of divorce.

These authorities clearly enunciate the rule of Mohammedan law to the effect that, even if a divorce is brought about by the operation of law on the apostasy of the wife, she is entitled to the whole dower if consummation of the marriage had taken place before such divorce just as much as in a case where the divorce

1938

EBRAHIM v. FATIMA BIBI.

MYA BU, OFFG. C.J.

has occurred under a *talaknama*. The law on the subject has, however, been stated in sections 196 and 197 of the "Principles of Muhammadan Law" by Tyabji as follows :

" 196. Where a marriage is made void by the apostasy of the husband, (1) if it has been consummated, the wife is entitled to the whole of her ' mahr ' ; (2) if it has not been consummated, she is entitled to half of the ' mahr.' "

" 197. The wife is entitled to no part of the ' mahr ' where the marriage becomes void by her apostasy."

As authority for the proposition the learned author quotes Baillie part I, page 182 ; part II, pages 29, 15 and 127. Sunni Mohammedan law is to be found in part I of Baillie's Digest. The passage appearing in that Digest, volume I, at page 182, has already been quoted above. In our opinion, with all respect to the learned author, it does not appear to support the proposition that if the marriage has been consummated the wife is not entitled to the *mahr* where the marriage becomes void by her apostasy.

For these reasons we hold that in this case, assuming that the respondent had apostatized as alleged by the appellant, and, even if the dissolution of marriage between the appellant and the respondent took place in consequence of such apostasy, the marriage having been consummated the respondent did not lose her right to obtain the dower from the appellant.

On the question as to the amount of the dower agreed upon the learned Trial Judge considered the evidence of the parties in detail and has pointed out that the witnesses called by the appellant to speak to the amount alleged to have been mentioned at the time of the marriage were not such as to inspire confidence in their testimony. Their evidence gave the learned Trial Judge the impression that they were either not in a position to know what the actual amount

mentioned was or that they were not present at the ceremony of marriage. The respondent adduced the evidence of two witnesses whose presence there could not be denied. One was the *moulvi* who conducted the ceremonies and the other one of the attesting witnesses. The fact that the witness is a cousin of one of the respondent's parents does not militate against the weight of his evidence but tends to show that he was a person who would ordinarily be expected to be present at, and take more than the ordinary interest in, the ceremony of marriage of the respondent. We see no sufficient ground for interference with the finding of fact arrived at by the Trial Judge upon the evidence as a matter of probability.

The learned advocate for the appellant has pointed out that, in view of the fact that the appellant was at the time when he entered into marriage with the respondent a penniless man, while the respondent had some property which she had inherited from her deceased husband, it was unlikely that the parties would have fixed such a heavy dower as is mentioned in the *kabinama*, but it does not seem unusual that the amount fixed was incommensurate with the husband's means. In *Sugra Bibi* v. *Masuma Bibi* (1) a Full Bench of the Allahabad High Court ruled, *inter alia*, that :—"however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death." Section 218 of the "Principles of Mahomedan Law", 11th edition, by Sir Dinshah Fardunji Mulla, is also to the same effect.

In all the circumstances of the case the appeal fails and is dismissed with costs.

MACKNEY, J.—I agree.

(1) (1877) I.L.R. 2 All. 573.