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the said will transmitted from the office of the Testamentary Registrar of this Honourable Court, where it has been lodged pursuant to the said order, to the office of the Chief Translator for translation, and that he do apply for probate thereof within two days after obtaining the translation of the said will from the Translator's office. And this Appellate Court doth further order that the residue undistributed in the hands of the said respondent as executor of the said will (the accumulations of interest on the sum of rupees one lákh set apart to meet the bequest mentioned in clause sixteen of the said will appearing for the purposes of this order to be the only undistributed residue) be, without prejudice to the rights of any son who may be hereafter adopted under the said clause 16 of the said will, applied in the first instance in and towards payment of the costs and expenses of applying for and obtaining the probate of the said will including the probate duty, and that in the event of such undistributed residue being insufficient the appellant and respondent do pay such deficiency in equal shares after the probate duty is ascertained and at the time it is payable by the respondent.

Attorneys for the appellant:—Messrs. *Chitnis, Motilál and Málvi.*

Attorneys for the respondent:—Messrs. *Thákurdás, Dharamsi* and *Cáma.*

MATRIMONIAL COURT.

Before Mr. Justice Strachey and Mr. Justice Tyabji.

A. (THE WIFE), PLAINTIFF, *v.* B. (THE HUSBAND), DEFENDANT.*

1896. *July* 24.

Husband and wife—Divorce—Suit for nullity of marriage—Suit by wife against husband—Costs of wife—Alimony—Maintenance—Suit between Mahomedans—Mahomedan law.

The English law which makes the husband in divorce proceedings liable *primâ facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans.

A wife sued her husband for dissolution of marriage (both parties being Mahomedans) on the ground of his impotency and malformation. An interlocutory order was made by the Court adjourning the further hearing of the suit for one year, in order that the parties might resume cohabitation for that period. The husband desired to carry out the order of the Court and was anxious that his wife should live with him; she, however, refused to do so and only paid occasional visits to his house. The suit was subsequently dismissed with costs. The wife appealed and subsequently applied for alimony until the disposal of the appeal.

Held, that having regard to the conduct of the wife she was not entitled to alimony. By Mahomedan law a husband's duty to maintain his wife is conditional upon her

* Suit No. 88 of 1893, Appeal No. 895.

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obedience, and he is not bound to maintain her if she disobeys him by refusing to live with him or otherwise.

RULE to show cause against order for costs and alimony.

This was a rule taken out by the plaintiff, a Mahomedan lady, in a suit brought by her for dissolution of her marriage with the defendant on account of his impotency and malformation. The suit was heard by Farran, J., and dismissed with costs.

The plaintiff filed an appeal against the decision, and on the 2nd July, 1896, she obtained a rule calling upon the respondent (defendant) to show cause why he should not be ordered to pay her (the appellant's) costs of the said suit and appeal already incurred, and why he should not pay or give security for her costs of the appeal to be subsequently incurred, and why he should not be ordered to pay alimony until the disposal of the appeal or the further order of the Court.

Affidavits were filed by the parties; the allegations in them material to this report appear from the judgment.

Macpherson for the respondent (defendant) showed cause against the rule:—At Mahomedan law a woman living apart from her husband in disobedience is a rebellious wife or "Naschizah" and is not entitled to any maintenance—Baillie's Digest, p. 458. If the plaintiff in this case were a European, she would not be entitled either to alimony or maintenance. This is a suit which is not provided for in any statute, and it is, therefore, governed by the Civil Procedure Code (Act XIV of 1882), section 220. The costs are thus in the discretion of the Court, as is the case in England—Browne on Divorce, p. 341. The rule as to wife's costs is given at p. 345 of Browne on Divorce, Rules 158, 159. The same rule obtains in suits for nullity—*Ibid.* p. 353; *M*——v.——*C*[(1)]. The application must be before the hearing or trial.

As to alimony, Browne on Divorce, p. 228; *Madan* v. *Madan* [(2)]. We say the absolute discretion possessed by the Courts in

(1) L. R., 2 P. and D., 414. (2) 37 L. J. (P. and M.), 10.

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England is possessed by this Court, and that the Court will not exercise that discretion in favour of the plaintiff in this case.

Lang (Advocate General) for the appellant (plaintiff) in support of the rule:—The English rule as to costs applies to the case. It is clear that if plaintiff were a European, she would be entitled to what she asks. There is no reason why she should not have the benefit of the rule because she is a Mahomedan. The rule in England does not now depend on husband and wife being one person in law, or on the interest the husband acquires by marriage in his wife's property—*Mayhew* v. *Mayhew*[1]. It depends on public policy and is as applicable to a Mahomedan as to an English woman.

The reason of the rule is that the Court will not allow any risk of a wife suffering injustice. Rule No. 159 only relates to the order for *paying* costs and has nothing to do with giving security for them. In this case the affidavits show the plaintiff has spent all her money on costs—*Allen* v. *Allen*[2].

As to alimony, the assertion that she is a rebellious wife is answered by the assertion that he is an impotent husband. A wife is entitled to alimony during a suit for nullity—Browne on Divorce, p. 217.

STRACHEY, J.:—This is a rule obtained by a Mahomedan wife, who is an appellant in an appeal now pending from a decree dismissing her suit for the dissolution of her marriage, calling upon the respondent to show cause why he should not be ordered to pay the appellant's costs of the suit and appeal already incurred, and why he should not pay or give security for the appellant's costs of the appeal to be hereafter incurred, and why he should not be ordered to pay to the appellant alimony until the disposal of the appeal or the further order of the Court.

The respondent has shown cause on several grounds, such as that the appellant has independent means of her own, and that the application is made too late and is not *bonâ fide*. In the view which I take of the case, I need not consider these matters, because there is one short ground on which I think the rule must be discharged; and that is that the principle upon

(1) I. L. R., 19 Bom., 293. (2) (1894) P. 134.

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which it is supported has, in my opinion, no application to cases of this kind. I shall deal separately with the question of costs and that of alimony.

As to the former question, there is no doubt that section 220 of the Code of Civil Procedure (Act XIV of 1882) gives the Court the fullest discretion. The question is whether in the exercise of that discretion we ought to order the respondent to pay or secure the appellant's costs of the suit and the pending appeal. The general rule is no doubt that a litigant must provide for his or her own costs, and the mere inability of the appellant to do this can be no reason for ordering the respondent to provide for them. That being the general rule, what is the ground on which we are asked to make an exception in favour of this particular appellant and to order the respondent to provide for her costs? We are asked to do so solely on the ground of a rule which is applied by the Divorce Court in England in dealing with matrimonial causes between English people. That rule is, speaking generally, that subject to the discretion of the Court, the husband in divorce proceedings is *primâ facie* liable to provide for the wife's costs, except where she is possessed of sufficient separate property—*Jones* v. *Jones*(1); *Robertson* v. *Robertson*(2); *Butler* v. *Butler*(3); *Allen* v. *Allen*(4).

The question is whether we ought to apply that rule to divorce proceedings between Mahomedans in this Court. The rule may be considered in two aspects: first with reference to its origin; and secondly with reference to the grounds upon which it is now maintained. As to its origin, there can be no doubt that it was founded, as stated in *Proby* v. *Proby*(5), upon the right which by the Common Law the husband acquired upon marriage to the whole of his wife's personal property and the income of her real property—*Robertson* v. *Robertson* (at p. 122). It was thought unjust that the wife, who by her marriage gave up all her property to her husband, should be destitute of the means of conducting her case against him. But that doctrine of the Common Law is totally different from the Mahomedan law, according to which the wife does not upon marriage lose any of her rights

(1) L. R., 2 P. and D., 333.
(2) 6 P. D., 119.
(3) 15 P. D., 126.
(4) (1894) P. 131.
(5) I. L. R., 5 Cal., 357; see p. 362.

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of property; so that, so far as the origin and foundation of the rule in England are concerned, it has obviously no application to suits for divorce between Mahomedans.

Next as to the grounds on which the rule in England is now based. Although it originated, as I have said, in the old doctrine of the Common Law, there is authority for the view that it has survived that doctrine which, since the Married Women's Property Act, 1882, has virtually ceased to exist. In *Mayhew* v. *Mayhew*[1], Farran, J., differing from the judgment in *Proby* v. *Proby*, held that whatever may have been the origin of the rule, it was now a rule of public policy, the reason for its continuance being that it is not just that a wife should be without the means of putting her case fairly before the Court. He further observed that the passing of the Act of 1882 had not produced any alteration of rule 158 of the rules and regulations of the Divorce Court, which still continued to govern the practice of the Court in England—*Allen* v. *Allen*[2]. Without disputing the correctness of this view, I observe that it does not appear, from the report of the case just mentioned, whether the parties were married before or after the Act of 1882, and that in *Otway* v. *Otway*[3] Cotton, L. J., with the concurrence of his colleagues said that if a case came before the Court where a married woman had been married after the Act of 1882, it would be a very serious question for consideration how far they ought to follow the old rule, or what decision they ought to give. Such a case does not appear to have since arisen. I will assume, however, that the rule would even in cases of marriage since the Act of 1882 be maintained in England as a rule of public policy. The Advocate General for the appellant contends that this principle of public policy is equally applicable to matrimonial causes in India between Mahomedans, in which the wife is without sufficient property of her own. There is no precedent for the introduction of such a principle into cases between Mahomedans. It appears to me that if we were now, for reasons of supposed public policy, to apply that rule to Mahomedans, we should

(1) I. L. R., 19 Bom., 293.

(2) (1894) P. 134.

(3) 13 P. D., 141; see pp. 155, 156.

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virtually be legislating, and legislating on extremely doubtful grounds. It is by no means obvious to my mind that it would be right, or in accordance with public policy, to impose this obligation on Mahomedan husbands. The decision in *Mayhew* v. *Mayhew* is fully consistent with this view. That case differs essentially from the present in being a suit for divorce between Europeans or Eurasians, governed by the Indian Divorce Act, IV of 1869; and in applying rule 158 of the English Divorce Court, the Chief Justice expressly acted under section 7 of that Act, which provides that, subject to the provisions of the Act, the Court shall, in all suits and proceedings thereunder, act and give relief on principles and rules as nearly as may be conformable to those on which the Divorce Court in England for the time being acts and gives relief. He did not apply rule 158, because as a matter of discretion and on grounds of public policy he thought that it ought to govern the practice of Indian Courts, but because by legislative enactment he was bound to apply that rule to cases under the Indian Divorce Act. The cases of *Fowle* v. *Fowle*(1), *Natall* v. *Natall*(2) and *Thomson* v. *Thomson*(3) are distinguishable on the same ground. The present is not a case to which the Indian Divorce Act applies, and rule 158 could only be extended to it by what, in my opinion, would be virtually a piece of legislation on our part.

For these reasons I think that no sufficient ground has been shown for departing from the usual practice that a litigant has to provide for his own costs, and that the rule so far as it relates to the question of costs must be discharged.

Next as regards the question of alimony, that must, in my opinion, be dealt with exclusively in accordance with the Mahomedan law relating to the maintenance of a wife by her husband. According to that law, the husband's duty to maintain his wife is conditional upon her obedience, and he is not bound to maintain her if she disobeys him by refusing to live with him or otherwise—Baillie, p. 438. In this case an interlocutory order was made by the Chief Justice, by which in accordance with the

(1) I. L. R., 4 Cal., 260. (2) I. L. R., 9 Mad., 12.

(3) I. L. R., 14 Cal., 580.

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Mahomedan law governing suits of this description brought by the wife, he adjourned the further hearing of the suit for one year in order that the parties might resume cohabitation for that period. That order was made on the 26th July, 1894. I am satisfied by the affidavits that while the respondent did all in his power to carry out that order, and was anxious that the appellant should live with him, she on the contrary refused to do so and only paid occasional visits to his house, staying for a night or so at a time from the 6th March to 23rd June, 1895, returning on each occasion to her mother's house. Upon the authorities I am clearly of opinion that in such circumstances a Mahomedan husband is not bound to give his wife separate maintenance and that the appellant is, therefore, not entitled to alimony. The result is that the rule must be discharged with costs, to be enforced only against the separate property of the appellant.

B. Tyabji, J.:—I am also of the same opinion and think that the rule must be discharged. There is no precedent, so far as I am aware, of any Mahomedan lady having obtained funds from her husband for her costs of litigation against him or security for such costs, and I am not disposed to create any precedent of that sort. The rule which obtains in the Divorce Courts in England is founded upon the doctrine of the English Common Law that all the personal property of a married woman becomes vested in her husband, and that the husband is even entitled to take the income of the immoveable property of his wife. The wife being thus under English law deprived of all means of providing funds for litigation against her husband, it was only equitable that the Courts should compel the husband to furnish her with those means when necessary. But this rule was not of universal application even in England. An exception was made when the wife was shown to be possessed of separate property of her own which owing to the interposition of the Courts of Equity she was allowed to enjoy through the medium of trustees. This being the foundation of the rule obtaining in the English Courts of Divorce, it is at once apparent that it is entirely inapplicable to the case of a Mahomedan lady in India. Under the law of Islám, a woman occupies a very much

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higher position than an English woman, so far as her rights of property and inheritance are concerned. She is entitled to inherit and to acquire property exactly in the same way as her husband. Her legal status or position as regards her property is in no way changed by her marriage; she has the same power and dominion over her own property after and during her marriage as before her marriage. By marriage her husband acquires no interest whatever in his wife's property. In short, the husband and wife are in the eyes of the Mussulmán law perfectly distinct and independent—each being entitled to the protection of the law against the other—so far as his or her rights of property are concerned, as if they were perfect strangers.

This being so what possible ground could there be for compelling a Mussulmán husband to provide funds or to give security for costs of his wife? It seems to me that there would be just as much reason for doing this as for compelling a Mussulmán wife to provide funds for the costs of her husband.

As to the question of policy, while I perfectly admit that the interests of public policy demand, where the rule of the English Common Law prevails, that the husband should furnish security for the costs of his wife, I am absolutely unable to see how that principle can be extended to a Mussalmán wife, unless indeed we are to hold that it is in the interests of the public to encourage wives to start or to continue litigation against their husbands. That would be the only result of compelling husbands to provide security for the costs of their wives in cases where the wives are entitled to enjoy their property quite independently of their husbands. I am of opinion that public policy requires us rather to discourage litigation of this kind than to encourage it and thus to add injury to insult which the unfortunate husband may have to suffer. Even if the English rule was more binding upon us than it really is, I should be prepared to say, *cessante ratione cessat ipsa lex*.

As regards alimony also I am of opinion that, having regard to the conduct of the plaintiff, she is not entitled to the order asked for. She has proved herself to be a disobedient and rebellious wife. The Court of first instance has already decided that

she had no just cause of complaint against her husband; and unless and until that decision is reversed, it is impossible to hold that a Mussalmán wife defying her husband, refusing to live with him and bringing scandalous charges against him, can yet claim to be maintained separately at the expense of her husband. I think the rule must be discharged with costs as against the plaintiff's property.

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Attorneys for the appellant:—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for the respondent:—Messrs. *Payne, Gilbert and Sayáni.*

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

ALI SA'HEB (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHA'BJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1895. *September* 23.

Dámdupat—Mortgage—Original mortgagor a Hindu—Mortgage to a Mahomedan—Hindu mortgagor's interest subsequently purchased by a Mahomedan—Suit by Mahomedan purchaser for redemption—Rule of dámdupat how far applicable.

A Hindu mortgaged his property in 1843 to a Mahomedan for Rs. 150 with interest at 12 per cent. per annum. On 5th April, 1880, the Hindu mortgagor's interest was sold to the plaintiff, who was a Mahomedan. In March, 1893, the plaintiff sued for redemption, both parties to the suit being Mahomedans.

Held, that as long as the mortgagor was a Hindu (*i.e.* until 1880) the rule of *dámdupat* applied, and that as soon as the interest doubled the principal, further interest stopped. The sum of Rs. 300 was, therefore, the full amount of debt for which the land could be charged and liable in the hands of a Hindu debtor. But on the 5th April, 1880, the plaintiff (a Mahomedan) became the debtor. The rule of *dámdupat* then no longer applied; the stop was removed and interest again began to run. The decree, therefore, ordered the plaintiff to redeem on payment of Rs. 300 (*i.e.* double the principal Rs. 150) with further interest at Rs. 12 per annum from the date of his purchase (5th April, 1880) until payment.

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Ratnágiri, confirming the decree of Ráo Sáheb Parashrám B. Joshi, Second Class Subordinate Judge of Rájápur.

Suit for redemption. The property originally belonged to one Bhagvantráo Bájiráo Surve, a Hindu, who in 1843 mortgaged

*Second Appeal, No. 315 of 1894.