1907.

RAMKRISHNA v. HAJI DAWOOD.

be contested in which the *decree* is made otherwise than by consent of, or in default of appearance by the defendant.

The condition therefore on which the Small Cause Court can interfere under section 38 does not arise on a proceeding under Chapter VII. It may be that this leads to inconvenience, and the language of section 36 suggests that this consequence was not contemplated; that however does not justify a departure from the plain words of the Act. If the defect calls for a remedy, it must be otherwise than by a decision by the Court. For these reasons we hold that the Full Court rightly decided it had no jurisdiction, and the rule must therefore be discharged with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Pratt

1907.

January 23.

RASHID KARMALLI AND ANOTHER (DEFENDANTS-APPELLANTS), APPLICANTS, *v.* SHERBANOO (PLAINTIFF-RESPONDENT), OPPONENT.*

Mahomedan Law—Divorce—Marz-ul-maut—Death-bed illness, tests for determining.

The tests to determine whether illness is to be regarded as death-bed illness (Marz-ul-maut) under Mahomedan Law are:—

(1) Proximate danger of death so that there is a preponderance of Khauf or apprehension that at the given time death must be more probable than life.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person.

(3) There must be external indicia chief among which would be the inability to attend to ordinary avocations.

Sarabai v. *Rabiabai* (1) followed.

APPEAL against the decision of S. Turner, Assistant Judge of His Britannic Majesty's Court for Zanzibar, at Zanzibar.

* First Appeal No. 54 of 1904.

(1) (1905) 30 Bom. 537.

The facts are stated in the report of the case contained in I. L. R. 29 Bom. 85.

Rashid Karmali, the appellant therein, presented a petition to review that Judgment. The petition was heard by Russell and Chandavarkar, JJ., and their Lordships in granting the petition delivered the following interlocutory Judgment:

"In this case we are compelled to make the rule for a review absolute. It appears that it was under a mistaken view of the law that this specific issue was not insisted upon by the defendant, and under the circumstances we have no other alternative but to make the rule absolute. The defendants must pay to the plaintiff any costs incurred by her in the appeal or in the review and must furnish security for her further costs to the extent of Rs. 1,000 to be justified in this Court. The further hearing to be confined to the issue whether the plaintiff was divorced by the deceased or not and the evidence to be sent here.

"The issue will be whether or not the respondent was legally divorced before the death of her husband Narsu Karmali. The evidence and finding on that issue to be recorded and sent to this Court within six months. The question as to Court-fees to stand over."

Upon this issue the finding of the lower Court was in the negative.

The case came up for final disposal.

Robertson with *Sorabji and Jehangir*, and *S. V. Bhandarkar*, *V. G. Deshpande* and *M. M. Karbhari*, for the appellants.

The respondent did not appear.

BATTY, J.:—In this case it lay on the appellant to establish affirmatively that the divorce was valid under the Mahomedan Law. The Judge who tried the case, decided it on an appreciation of evidence which we do not feel it necessary to discuss. For it appears to us that the *talak* was ineffectual in this particular instance to deprive the wife of her right to inherit, even if the evidence of witnesses to the ceremony be accepted as credible. The Judge observed that the requirements of Mahomedan Law are so vague and undefined that he does not feel justified in

1907.

RASHID v. SHERBANOO.

saying that Nasrula was suffering from a death-bed illness at the time of the first *talak*. The most recent decision which deals with the essentials or the *Marz-ul-maut* affecting a *talak* or a gift, is that of *Sarabai* v. *Rabiabai*,(1) which follows the case of *Fatima Bibee* v. *Ahmad Baksh*.(2) Three tests are there laid down as to whether illness is to be regarded as death-bed illness. The first condition is :—

(1) "Proximate danger of death so that there is a preponderance of *Khauf* or apprehension that at the given time death must be more probable than life".

In this case so far as the deceased himself was concerned we have the fact that he had already executed his will and transferred the whole of his property to his brother, evidently in anticipation of near death and we have further the evidence of the doctor who attended the deceased, that the disease was incurable and that the deceased was sent away from the hospital, because it was useless for him to remain there any longer. He was dying of consumption and it is not suggested that he ever rallied to the date of his death. He was in bed in the hospital at the time of the first *talak*. He was also in bed at the time of the second *talak*, and from the letters written by Mr. Laskari, purporting to be on his behalf, it would appear that he was unable during the interval to go abroad on the most urgent occasions.

Secondly, "there must be some degree of subjective apprehension of death in the mind of the sick person."

This we have already discussed with reference to the first question and we find that the apprehension was not merely confined to medical attendants or friends but extended to the deceased person himself.

Thirdly, "there must be external indicia, chief among which would be the inability to attend to ordinary avocations."

The deceased was confined to his bed and it was found that he was unable to attend to his business or go about the ordinary affairs of life until the date of his death, which followed in four

(1) (1905) 30 Bom. 537. (2) (1903) 31 Cal. 319.

or five months from the date of the first *talak*, and within the period of *iddat* or three months reckoned from the second *talak*.

1907.

RASHID v. SHEEBANOO.

In these circumstances we hold that as the death was within the year, the widow was not deprived of the right to inherit.

We accordingly confirm the decree of the lower Court and dismiss the appeal.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

RAMCHANDRA BALLAL GOGTE (ORIGINAL DEFENDANT 2), APPELLANT, *v.* DATTATRAYA VISHNU PRABHU AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 1), RESPONDENTS.*

1907. *February* 15.

Khoti Settlement Act (Bom. Act I of 1880), sub-section 5 of section 3, sections 9 and 10(1)—Privileged occupant—Dharekari, quasi-Dharekari, Occupancy tenant—Transfer of land to another on sale—Not a resignation so as to be at the disposal of the Khot.

* Second Appeal No. 70 of 1905.

(1) Sub-section 5 of section 3 and sections 9 and 10 of the Khoti Settlement Act (Bom. Act I of 1880):—

3. In this Act, unless there be something repugnant in the subject or context,

(1) * * * * *
(2) * * * * *
(3) * * * * *
(4) * * * * *

(5) "privileged occupant" means:

(*a*) a dharekari, or

(*b*) a quasi-dharekari, or

(*c*) an occupancy tenant.

9. The rights of Khots, dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy tenants' rights shall be heritable, but shall not be otherwise transferable, unless in any case the tenant proves that such right of transfer has been exercised in