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and the Courts would desire to see altogether suppressed.

I must, therefore, award the plaintiff's claim, subject to the deductions I have already mentioned, with all costs.

There will be a decree for the plaintiff for Rs. 3,046-8-0 with interest at 6 per cent. per annum from the 8th of April 1911.

Attorneys for the plaintiff: *Messrs. Payne & Co.*

Attorneys for the defendant: *Messrs. Raghavayya Bhimji and Nagindas.*

Suit decreed.

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1912.
October 1.

BAI FATMA WIFE OF ALIMAHOMED AIYEB (ORIGINAL PLAINTIFF), APPELLANT, *v.* ALIMAHOMED AIYEB (ORIGINAL DEFENDANT), RESPONDENT.*

Indian Contract Act (IX of 1872), section 25—Public policy—Agreement for future separation between husband and wife—Mahomedan Law—Agreements void.

An agreement for future separation arrived at between husband and wife (who are Mahomedans) is void as being against public policy under section 25 of the Indian Contract Act (IX of 1872).

Meherally v. *Sakerkhanoobai*[1], followed.

Second appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by H. K. Mehta, Additional Joint Subordinate Judge at Ahmedabad.

Suit to recover arrears of maintenance.

The plaintiff was the wife of the defendant. They were married in 1898, and had lived together as husband and wife. The parties were Mahomedans.

* Second Appeal No. 164 of 1912.

[1] (1905) 7 Bom. L. R. 602.

In 1907, the defendant was thinking of taking a second wife to himself; he, therefore, executed a document in favour of the plaintiff in that year. The material provisions of the document were as follows :—

"You are my married wife. And now as I mean to marry a second wife, I give you this agreement in writing as follows :—We are to live together as long as I and you (*i. e.*) all agree. However, if disagreement takes place between us, I am to go on paying you from month to month at the rate of Rs. 8, namely, Rupees eight per month for (your) maintenance."

Even after the execution of this document the parties lived together as husband and wife. They separated about the beginning of the year 1908.

The plaintiff filed this suit on the 24th October 1910, to recover from the defendant arrears of maintenance for 18 months from April 1909 to October 1910 at the rate of rupees eight per month as provided in the agreement.

The defendant contended *inter alia* that the plaintiff was not entitled to claim any maintenance from him as he had already divorced her.

Both lower Courts held that the divorce set up by the defendant was not proved, and that the plaintiff was not entitled to any relief, for the document relied on by her, having been an agreement for future separation between husband and wife, was void as against public policy.

The plaintiff appealed to the High Court.

L. A. Shah, for the appellant :—We submit that the agreement in question is not against public policy. The case of *Meherally* v. *Sakerkhanoobai*[1] appears at first sight to be against us; but it is distinguishable from the present case. There the suit was for restitution of conjugal right, whereas the present case is for recovery of maintenance. Further, what is against public policy in England, will not necessarily be so in India. An agreement between Parsi husband and wife to live

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separate is valid : *Kawasji Edalji Bisni* v. *Sirinbai*[1] ; and also among Hindus. See *Parshottam* v. *Bai Jadi*[2].

The agreement here is valid for the parties separated soon after its execution. See *Wilson* v. *Wilson*[3] and *Hamidoolla* v. *Faizunnissa*[4].

T. R. Desai, for the respondent :—The agreement in question is void as against public policy, for it contemplates future separation. See *Wilson* v. *Wilson*[3]; *Cartwright* v. *Cartwright*[5] ; *Westmeath* v. *Salisbury*[6]; *Merryweather* v. *Jones*[7] ; *Hindley* v. *Marquis of Westmeath*[8].

The decision in *Meherally* v. *Sakerkhanoobai*[9] is quite in point and ought to govern this case.

BATCHELOR, J. :—We have before us in this appeal an agreement made between a Mahomedan husband and his wife, providing for a certain maintenance to be given to the wife in the event of a future separation between them. There can be no doubt that that is the effect of the agreement, and that it contemplates not a present but a prospective separation. In fact the separation did not take place until the lapse of some weeks after the execution of the agreement.

The question is whether that agreement is good in law or is void as being opposed to public policy under section 23 of the Contract Act. This question, arising also between Mahomedans, was considered by me in *Meherally* v. *Sakerkhanoobai*[9] where to the best of my ability I have explained the reasons which led me to hold that such an agreement, which would admittedly be bad in English law, is bad also as between Mahomedan spouses. My learned brother informs me that he is in agreement with the decision in *Meherally's*

(1) (1898) 23 Bom. 279.
(2) (1899) 2 Bom. L. R. 72.
(3) (1848) 1 H. L. C. 538.
(4) (1882) 8 Cal. 327.
(5) (1853) 3 De G. M. & G. 982.
(6) (1831) 5 Bli. N. S. 339 at p. 368.
(7) (1864) 4 Giff. 509.
(8) (1827) 6 B. & C. 200.
(9) (1905) 7 Bom. L. R. 602.

case, and it is unnecessary, therefore, to repeat the reasons which were there adduced.

Upon further consideration I remain of the same opinion, and I think it necessary to notice only the one additional argument which Mr. Shah brought forward in support of the wife's case. That argument is that the rule as to the public policy which obtains in England in regard to such agreements cannot properly be applied to similar agreements executed among people to whom polygamy is by their law allowed. It appears to me, however, that on analysis this argument cannot be sustained. The utmost extent to which, I think, it goes is that, whereas as a result of a separation between English spouses there are two people married yet living separate, among Mahomedans, owing to the husband's power of marrying another wife, you would have in similar circumstances only one of the spouses, namely the wife, married yet living separate. It appears to me that this reduction in the extent of the evil which the rule of law aims at suppressing ought not to affect the general result. It is, as I understand it, as much the policy of the Mahomedan law as of the English law, that people who are married should live together and not apart; and if that is so, it seems to me that there should be no difficulty in applying to Mahomedans the English Rule that any agreement such as this, which provides for, and therefore encourages, future separation between the spouses, must be pronounced void as being against public policy.

For these reasons I think that the appeal fails and must be dismissed with costs.

RAO, J. :—I agree.

Appeal dismissed.

R. R.