

very day, almost till the very hour of the sale, rendering it impossible to transmit the order in time. We are doubtful, as we have said above, whether the decreeing Court has power to stay execution. In any case, it was not, we think, a proper order to make under the circumstances.

It is not, therefore, necessary to go into the question as to whether the order of stay did or did not precede by a few minutes the time of the sale, much less to go into the question whether the clocks of the Subordinate Judge and the Mamlatdar agreed. One of the effects of allowing an application such as the present would be that whilst a few minutes before the sale a stay could be obtained on easy terms, immediately after the sale, Order XXI, rule 89, would come into effect, imposing much heavier terms on the judgment-debtor. We do not think the law intended, or desired, to encourage action of this kind on the judgment-debtor's part.

It appears to us, therefore, that both on the facts and in law the judgment-debtor has put himself in the wrong.

We dismiss the appeal. Costs throughout on the appellant.

Decree confirmed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Madgankar and Mr. Justice Patkar.

KHATIJABI KOM UMARSAHEB (ORIGINAL PLAINTIFF), APPELLANT *v.*
UMARSAHEB ANSERSAHEB (ORIGINAL DEFENDANT), RESPONDENT.*

1927
December 7

*Mahomedan Law—Divorce—Adultery—Special oath—Evidence of adultery—
Procedure of Laan, validity of—Indian Oaths Act (X of 1873), sections 8,
9 and 11.*

Under Mahomedan law, an oath under the form prescribed for "Laan" does not, *ipso facto*, entitle a wife, who has been found on evidence to be adulterous, to a divorce.

*Second Appeal No. 273 of 1926.

1927
—
RUDRAPPA
VIRAPPA
v.
BASHETTAPPA
CHIENBASAPPA

1927

—
 KHATIJABI
 v.
 UMARSAHEB
 ANSERSAHEB

Where an illegitimate child is in existence, no room is left for the right or the procedure of "Laan."

An innocent wife who proves that her husband falsely charged her with adultery is alone entitled to a divorce, and not, the wife who is proved to be guilty.

Zafar Husain v. Ummat-ur-Rahman⁽¹⁾ and *Rahima Bibi v. Fazil*,⁽²⁾ referred to.

A special oath can only be administered under section 8 of the Indian Oaths Act, 1873, and it would not be conclusive proof under section 11 of the Act, in a case where neither of the parties had offered under section 9 to be bound by the oath of the other.

SECOND APPEAL against the decision of D. D. Cooper, Assistant Judge at Sholapur, confirming the decree passed by I. C. Munsif, Subordinate Judge at Sholapur.

Suit for divorce.

The parties to the suit were Sunni Mahomedans. The suit was instituted by the plaintiff for the dissolution of her marriage with the defendant and to recover Rs. 500 being the amount of Meher. The plaintiff alleged that the defendant had falsely charged her with adultery and, regard being had to the Mahomedan rule of "Laan," she was entitled to the aforesaid relief.

The defendant contested the claim on the ground that the charge of adultery made by him against the plaintiff was true and therefore the plaintiff was not entitled to the relief prayed for.

In the Court of Subordinate Judge before the recording of evidence was proceeded with, the pleader for the plaintiff made an application that both the parties should be put to special oath as laid down under the rules of "Laan." The application was granted. The defendant took the special oath and charged the plaintiff with adultery. The plaintiff, on special oath, repudiated the charge. Her pleader, thereupon, applied to the Court to pass a decree for divorce in her

⁽¹⁾ (1919) 41 All. 278.

⁽²⁾ (1926) 48 All. 834.

1927

KHAJIJABI
v.
UMARSAHEE
ANSERSAHEE

favour. This the Subordinate Judge refused to do as in his opinion it was necessary to inquire into the truth or falsity of the charge of adultery especially as the plaintiff had given birth to a child, the paternity of which was disclaimed by the defendant. On evidence the Subordinate Judge found that the plaintiff had failed to disprove the charge of adultery and was therefore not entitled to a divorce. The suit was, therefore, dismissed.

On appeal, the Assistant Judge confirmed the decree.

The plaintiff appealed to the High Court.

G. S. Mulgaonkar, for the appellant.

Faizee, with *G. B. Chitale*, for the respondent.

MADGAVKAR, J.:—This was a suit by the appellant wife against the respondent husband for a dissolution of marriage under the Sunni Mahomedan law by which the parties are governed and for the amount of the Meher or dower fixed at the time of the marriage, on the ground that the husband had falsely charged her with adultery. The suit was defended by the respondent on the ground that the charge was true. Both the lower Courts have found that the appellant was guilty of adultery and dismissed the suit for divorce, the trial Court holding that the claim for Meher was premature. The wife appeals.

Before evidence was led in the case, the pleader for the wife applied that both the parties should be put upon special oath. The Court granted the application and each took an oath under the form prescribed for "Laan" with the necessary imprecations. The husband asserted, the wife denied the charge. Thereupon the pleader for the wife asked the Court to pass a decree for divorce immediately on the ground that the wife was so entitled under Mahomedan law.

1927

—
 KHATIJABI
 v.
 UMARSAHEB
 ANSERSAHEB

The trial Court held that she was not so entitled and that it was necessary to proceed to record evidence and findings upon the issues. Evidence was then recorded on both sides and a finding as to adultery was recorded against the wife, and her suit was dismissed.

It is argued for the appellant in this Court that the special oath complied with the form of "*Laan*" laid down under the Mahomedan law and that the appellant is therefore entitled to a decree for divorce, even if we accept in second appeal the finding that she has been guilty of adultery. Reliance is placed on the observations of Sir Roland Wilson in his Anglo Muhammedan Law, 5th edition, page 148, which are as follows:—

"The fact of a husband having (whether truly or falsely) charged his wife with adultery, will (probably) entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute, and independently of the result of any such proceedings."

For the respondent, reference is made to Baillie page 336 and the observations of Mahomed Yusoof Khan Bahadur in his Tagore Law Lectures, Vol. III, paragraph 2822. It is contended that under Mahomedan law, it is only an innocent and not a guilty wife, who is entitled to a divorce and that the procedure for "*Laan*" is only applicable to cases where there is no evidence *aliunde* as to adultery.

The relevant verses from the Koran are to be found in Sura XXIV verses 6 to 9. The 6th verse is as follows (Muhammad Ali, 2nd Edn., p. 597):—"And (as for) those who accuse their wives and have no witnesses except themselves, etc." Then follow the swearing four times, and imprecation the fifth time, first by the husband and similarly by the wife, if she wishes to avert punishment. It is not necessary to refer to the following verse as to the well-known incident of the slandering of the Prophet's wife Ayesha at page 289

of Muir's Life of Mahomed. In his Mahomedan Law, Vol. II (fourth edition), at page 591, Mr. Ameer Ali observes: "As M. Sautayra points out, in countries where the Mussulman Law is not in force, the proceeding by *laan* has fallen into disuse The disapprobation with which the proceeding of *laan* is regarded by Moslem jurists, is shown by the directions contained in the *Sharaya* and the *Fatawai 'Alamgiri.*" The oldest case on the point is *Jaun Beebee v. Sheikh Moonshee Beparee.*⁽¹⁾ That was a suit by the husband for restitution of conjugal rights and therefore is not relevant. The other cases on the point are *Zafar Husain v. Ummat-ur-Rahman*⁽²⁾ and *Rahima Bibi v. Fazil,*⁽³⁾ in both of which the wife sued for divorce on the ground that her husband had falsely charged her with adultery and succeeded, the Courts holding that the charge was false.

Taking the Mahomedan law of divorce in its entirety and the verses of the Koran quoted above, we see no reason to hold that it differs from other systems of jurisprudence or entitles a wife guilty of adultery to divorce, to say nothing of Meher. On the contrary, the verses and the context merely point to the principle that in cases where there are no eye witnesses or other evidence, an innocent wife's own denial in the proper form should be accepted. The procedure, however it might be applicable in Mahomedan countries and where no other evidence exists, is not applicable in the Courts in British India. We agree with the remarks of Mr. Ameer Ali on this point rather than with the observations of Mr. Tyabji in his note 194 at page 248 of the Principles of Muhammadan Law (second edition). We cannot agree with the learned pleader for the appellant that the oath, which on the application

1927

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KHATIJABI
v.
UMARSAHEB
ANSERSAHEB

⁽¹⁾ (1865) 3 W. R. 93.⁽²⁾ (1919) 41 All. 278.⁽³⁾ (1926) 48 All. 834.

1927

KHATIJABI
v.
UMARSAHEB
ANSERSAHEB

of the pleader for the plaintiff, the parties were allowed to take in the lower Court, *ipso facto* entitles the wife, even if she were found on the evidence to be adulterous, to a divorce.

We doubt if the learned Subordinate Judge should have acceded to the application for the plaintiff for these special oaths. They could only be administered under section 8 of the Indian Oaths Act (X of 1873). But neither party offered under section 9 to be bound by the oath of the opposite party. Without such undertaking, it could not be conclusive proof under section 11 of that Act. The whole procedure, therefore, was of doubtful utility.

Further, there is authority that where, as here, an illegitimate child is in existence, no room is left for the right or the procedure of *laan*; Hedaya, p. 23 and p. 124. To hold otherwise would be contrary to all principles of Mahomedan law and of morality. We agree, therefore, with the view in the Allahabad cases and are of opinion that, procedure apart, an innocent wife who proves that her husband falsely charged her with adultery is alone entitled to a divorce, and not, as in the present case, the wife who is proved to be guilty.

We dismiss the appeal with costs throughout on the plaintiff-appellant.

Decree confirmed.

J. G. R.

APPELLATE CIVIL

Before Mr. Justice Madgankar and Mr. Justice Patkar.

1927

November 15

SHAMU BIN SHRIPATI, MINOR, BY HIS GUARDIAN RADHA KOM SHRIPATI POWER, AND ANOTHER (ORIGINAL PLAINTIFFS); APPELLANTS v. BABU ABA KALWAT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Sudras—Illegitimate sons—Self-acquired property—Father's deed declaring rights of illegitimate sons—Illegitimate sons forming joint Hindu family in regard to property inherited.

*Second Appeal No. 418 of 1924.