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 MAHOMED HAJI
 HAROON, *In re*
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for any aspersion being cast against them. No suspicions should be allowed to arise that the funds are not being utilized for the most suitable and proper objects. Every portion of the funds should be manifestly put to uses entirely in accordance with the principles of Islam, which is a progressive and enlightened religion.

Attorneys for petitioner: MESSRS. *Bhaishankar, Kanga & Girdharlal.*

G. C. O'G.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

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 November 23

ABDUL RAHIMAN ALIAS RAJA MUHAMMAD (PLAINTIFF) v.
 AMINABAI, WIFE OF ABDUL RAHIMAN, AND TWO
 OTHERS (DEFENDANTS).*

Mahomedan law—Marriage—Woman married when minor—Consummation of marriage on puberty if living with her husband—Repudiation of marriage by wife—Consummation without wife's consent does not affect repudiation.

A person who entices away the wife of a Muslim may be sued by the husband for damages.

Muhammad Ibrahim v. Gulam Ahmed,⁽¹⁾ followed.

The Muslim husband being dominant in matrimonial matters, the Court leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief.

Under the Mahomedan law the right of a girl to repudiate her marriage on attaining puberty is not lost by the mere fact of consummation without her consent.

THE facts are sufficiently fully stated in the judgment.

T. T. Barodawala, for the plaintiff.

Y. B. Rege, for defendant No. 3.

TYABJI J. The plaintiff prays for a declaration that defendant No. 1 is his lawfully married wife, and that the marriage between them is subsisting; for a decree against

* O. C. J. Suit No. 1118 of 1929.

⁽¹⁾ (1864) 1 Bom. H. C. 236 at p. 250.

her to live with him as his wife, and to allow him all his conjugal rights and for an injunction restraining her from marrying defendant No. 3. The plaint also contains the allegation that defendants Nos. 2 and 3 entered into a conspiracy and enticed away defendant No. 1. Defendant No. 2 is the mother of defendant No. 1. Defendant No. 3 is a stranger.

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Defendants Nos. 1 and 2 do not appear. Ordinarily slight evidence of the allegations in the plaint would be accepted for giving the plaintiff a decree against the absent defendants. But the nature of this suit makes me cautious. It is by a husband who claims that he was married to a girl nine years old. The girl was thus not competent to give her consent to the marriage. The consent alleged to be given on her behalf is not by her father but by her paternal uncle. To the plaint is annexed a copy of a letter (the original of which is filed in Court) dated November 30, 1927, in which the alleged wife informs the plaintiff that on August 9, 1927, when she attained puberty she, in accordance with Muhammadan law, repudiated her marriage with the plaintiff in the presence of some of the members of the jama'at, and since then had ceased to be his wife. She adds that a "fatwa" was issued by the Chief Qazi of Bombay to this effect and was circulated among the members of the jama'at.

It was argued that there was no cause of action disclosed in the plaint so far as defendant No. 3 is concerned. Though no authority was cited to me from the original texts, and I am not aware of any, recognising suits against strangers for enticing away a wife, such suits clearly lie in our Courts: *Muhammad Ibrahim v. Gulam Ahmed.*⁽¹⁾

But the Muhammadan law gives unfettered powers of divorce to the husband and the Quran enjoins the husband—

"to retain his wife with kindness or separate from her with kindness."

Quran, Sura 65, v. 3.

⁽¹⁾ (1864) 1 Bom. H. C. 236 at p. 250.

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The law does not in consequence favour suits of a matrimonial nature at the instance of the husband. Few respectable husbands desire to bring their matrimonial matters before the Court. Being dominant in matrimonial matters the husband can divorce his wife or marry a second wife without pursuing a wife who is disinclined to live with him, nor does he owe any duties to such a wife. The injunction of the Quran can consequently be obeyed without any great self-sacrifice on the part of the husband.

I am, therefore, not inclined, unless I am satisfied that there is credible evidence in favour of the allegations of the plaintiff, to give him the kind of relief that he seeks.

The only evidence before me in support of the plaintiff's claim was of the husband himself. He was extremely unsatisfactory as a witness. I am not prepared to act on his uncorroborated evidence. If his appearance in the witness-box were any criterion for judging whether he had been cruel and selfish in his relations with his wife, I am afraid I should be inclined to hold that he had been. He alleges that he was married to defendant No. 1. This is not denied in the written statement. The real question, however, is that raised by the latter half of issue 3,—whether the marriage between the plaintiff and defendant No. 1 is still subsisting. Defendant No. 1 had the option, on attaining puberty, of repudiating her marriage, which was solemnised when she was nine years old. It is in evidence that defendant No. 1 is not living now with the plaintiff, on the express ground, which she has stated in the letter to which I have referred, that she had exercised her option. The plaintiff says that she attained puberty on a particular date and that the marriage was consummated thereupon. These facts are alleged by the plaintiff no doubt with the intention of making out that the right of repudiation had been lost by defendant No. 1 and that she was not entitled to exercise it when she purported to

do so. I cannot, however, rely upon anything said by the plaintiff.

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The Court leans in cases of this kind in favour of the wife. The option of repudiation given to the wife is based on principles repeatedly emphasised in the Quran. It is one of the safeguards by which Islam alleviates the incidence of pre-Islamic institutions pressing harshly against women and children. This safeguard, it is true, has suffered as many similar safeguards introduced by the founder of Islam have suffered: cf. *Amir-ud-din v. Khatun Bibi*.⁽¹⁾ Later developments having their origin long after the date of the Prophet and the Khulafa-i-Rashidin, have a tendency to attenuate their beneficence by restrictions and technicalities. I do not make these observations as a portal for escaping from the confines of the law as expounded by the great commentators who have laid down that the option in question must be exercised by the wife immediately on attaining puberty; and that it is lost if the wife permits the marriage to be consummated thereafter. But I should certainly not like to be responsible for a decision given in contravention of the general principles to which I have alluded and which have their due place in all texts. Nor would it be right for me to forget that if the wife arrives at puberty while she is living with her husband (as was the case here according to the plaintiff) her option is not determined unless she assents explicitly or by implication to the marriage. Nor is mere consummation sufficient. There must be consummation with the wife's consent. Baillie, I, 50-51-59. Moreover all the necessary facts must be proved by the husband to the satisfaction of the Court.

On the facts considered in view of all the allegations, and circumstances and in the light of the broad policy of the law, I am not prepared to say that the marriage is subsisting and has not been validly repudiated.

⁽¹⁾ (1917) 39 All. 371 at p. 375.

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I will not therefore make the declaration or give a decree to the plaintiff on the basis that the marriage is subsisting.

The second issue is that on which there was contest before me by the 3rd defendant. I have already held that the plaint discloses a cause of action against the 3rd defendant and have at the same time referred to those general considerations which affect both aspects of this matrimonial suit. The 3rd defendant appeared at the hearing and tendered himself for cross-examination. The plaintiff's evidence is so unsatisfactory, that against the 3rd defendant also, I should have been prepared to dismiss the suit even if there had been no evidence before me to contradict that of the plaintiff. But certainly after the cross-examination of the 3rd defendant I have no doubt that there cannot be a decree against the 3rd defendant. I disbelieve the allegation that the 3rd defendant enticed away the 1st defendant, and the other allegations made by the plaintiff against the 3rd defendant. The suit will therefore be dismissed with costs against the 3rd defendant.

Attorneys for defendants : Messrs. *Dorab & Co.*

Suit dismissed.

G. C. O'G.

APPELLATE CIVIL.

Before Mr. Justice Ranqnekar.

MOTIBHAI JESINGBHAI PATEL (ORIGINAL DEFENDANT), APPLICANT

v. RANCHODBHAI SHAMBHUBHAI PATEL AND ANOTHER

(ORIGINAL PLAINTIFFS), OPONENTS.*

Civil Procedure Code (Act V of 1908), Order XLI, rules 27, 28, 29 and sections 115, 151—Trial Court disallowing certain questions to plaintiffs' witness and excluding evidence—Suit dismissed—Appellate Court setting aside decree and remanding the case to trial Court—Appeal from order—Procedure—Interlocutory order—Inherent jurisdiction—High Court—Revision.

The plaintiffs filed a suit for a declaration that they were entitled to cultivate the lands in suit on payment of assessment and local fund cess only, on the ground that

* Appeal from Order No. 58 of 1933 (converted into Revision Application No. 515 of 1934).

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November 15