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On the whole, then, I consider the plaintiff is entitled to succeed, and to recover the amount of the bill or hundi from the defendant. I should probably not have awarded the plaintiff costs in this case, but the defendant's conduct in the witness-box exhibited such gross dishonesty of purpose, as to lead me to believe that the suit has been dishonestly defended. I consequently consider the ordinary rule that the successful party should have his costs, should not be departed from in this case. The plaintiff is entitled to a decree with costs.

*Judgment for plaintiff.*

Attorney for the plaintiff : Mr. *Dover*.

Attorneys for the defendant : Messrs. *Judge and Gangooly*.

[APPELLATE CIVIL.]

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 May 25.

*Before Mr. Justice E. Jackson and Mr Justice Mookerjee.*

BADARANNISSA BIBI (PLAINTIFF) v. MAFIATTALÁ (DEFENDANT).\*

*Mahomedan Law - Suit for a Divorce by a Wife—Private Agreement.*

A husband entered into a private agreement with his wife, authorising her to divorce him upon his marrying a second wife during her life, and without her consent.

*Held*, that the Mahomedan law sanctioned such an agreement, and that the wife, on proof of her husband having married an second time without her consent, was entitled to a divorce.

THIS was a suit instituted by a Mahomedan lady against her husband for a dissolution of marriage, on the ground that the husband, who had executed a deed of settlement (*Rabinnama*), covenanting not to marry another woman, so long as the plaintiff was living, without her consent, and that if he had so, the second marriage would entitle the plaintiff to divorce herself from him, had broken his contract by marrying another woman. The defendant alleged that there was no such condition in the deed

\* Special Appeal, No. 1702 of 1870, from a decree of the Judge of Tipperah, dated the 7th May 1870, affirming a decree of the Moonsiff of that district, dated the 25th August 1869.

of settlement as stated by the plaintiff; that there was no provision in the Mahomedan law entitling her to have the divorce asked for; and that, in fact, his second marriage was made with the consent of the plaintiff.

The first Court was of opinion that the Civil Court had no jurisdiction to deal with matters of divorce under the Mahomedan law, but still it gave a decision on the merits. It found that the deed of settlement did contain the condition mentioned by the plaintiff, along with other stipulations regarding property, food, &c.; that at the end of the deed, there was the clause which gave the wife power to marry another husband on the defendant's violating the provisions recited in it. The Moonsiff therefore held that the plaintiff was not entitled to a divorce, according to the deed, until the husband had violated all the conditions mentioned in it. He also held that the defendant had proved the plaintiff's consent to the second marriage. He therefore dismissed the suit both on the merits, as well as on the point of jurisdiction.

Against this decision the plaintiff appealed to the Court of the District Judge. The Judge held that the Civil Court had jurisdiction to adjudicate on matters of divorce under the Mahomedan law. He was of opinion that, according to the deed of settlement, a violation of any one of the conditions was sufficient to entitle the plaintiff to a divorce. But he held that there was no provision in the Mahomedan law which applied to a divorce by a wife against her husband, upon the condition in the private arrangement put forward by the plaintiff. On this point the Judge observed,—“ Now a Mahomedan is entitled to marry four wives at the same time; “ there is therefore no illegality in his having married another “ woman during the life-time of the plaintiff. The Mahomedan “ law gives great facilities to the husband to divorce his wife, “ but puts every obstacle in the way of the wife divorcing her “ husband, and this was the natural consequence of Mahomedan society as it was when the law was made, and indeed “ as it now exists. It is unequal and unfair, but with this we “ have nothing to do. We have only to administer the law as “ it stands. With scarcely any exception, the law does not

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“ allow a woman to divorce her husband. He cannot claim her  
 “ indeed, if, for instance, her dowry has not been paid (just as  
 “ in the purchase of a horse or cow, the price must be given in  
 “ order to make the bargain a settled one); but once having  
 “ obtained her, it is very difficult for the wife ever to get herself  
 “ free from him.” A little further on in his judgment, the Judge  
 said:—“ I find nothing in Macnaghten or other Mahomedan law  
 “ authors which authorises a wife to divorce her husband, on the  
 “ ground of any private agreement made between the parties, such  
 “ as has been adduced in this case.” As to the consent of the  
 plaintiff to her husband’s second marriage, the Judge remark-  
 ed,—“ It would appear, moreover, from the evidence of the wit-  
 “ nesses that the plaintiff was not averse to the defendant’s  
 “ marrying another woman, if indeed she did not give her  
 “ permission.” The Judge therefore dismissed the appeal.

The plaintiff then preferred a special appeal to the High Court against the decision of the Judge.

Moulvi *Marhamat Hossein*, for the appellant, contended that the Judge below was wrong in holding that the private agreement entered into between the parties was contrary to the Mahomedan law, and in not giving effect to that contract. He referred to page 259, chapter III, book IV of the Hedaya, as showing that, where a husband gives his wife the power to divorce herself from him at any time, she is at liberty to do so; therefore there was nothing repugnant to the Mahomedan law in a husband entering into an agreement with his wife, consenting to her divorcing him on his marrying again during her life-time. He quoted section 2, chapter II, page 218 of Baillie’s Mahomedan Law in support of the same proposition. He next urged that, as all the facts were found in the plaintiff’s favor by the Court below, which entirely based its decision on an erroneous view of the law, the plaintiff was entitled to a decree.

No one appeared for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—The plaintiff brought this suit for a declaration that her marriage with her husband was dissolved. She

alleged that, at the time she was married to her husband, an agreement was entered into between them, one condition of which was that, if he married another wife without her consent, she would be entitled to divorce herself and take another husband.

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There seems to have been no question before the lower Courts as to this agreement having taken place. There was an allegation that the second marriage took place with the consent of the first wife. But both the Courts seem to have found that this was not proved. Still both Courts dismissed the plaintiff's suit, on the ground that such a condition was against the Mahomedan law. The Judge says that there are numerous modes in the Mahomedan law by which a husband can divorce his wife whenever he pleases, but it does not give equal facility to the wife to divorce her husband. The Judge is of opinion that this contract is against the law, and that the plaintiff's suit should be dismissed,

The special appeal to this Court is on the ground that the contract is directly according to the Mahomedan law. No one has appeared on the part of the special respondent to support the decision of the lower Court upon this point of law. We have looked into the Mahomedan law books. The Judge has stated in his decision that Macnaghten does not allude to the subject. But both the Hedaya and Baillie's Mahomedan law have special chapters upon it.

The Hedaya in book IV, chapter III, page 257, lays down as the law that a husband may give power to the wife to divorce herself:— "If a husband say to his wife, 'Divorce yourself when you please,' she is at liberty to divorce herself either upon the spot or at any future period, because the word *when* extends to all times; and hence it is the same as if he were to say, 'Divorce yourself at whatever time you like.'" If this is the correct law, the husband can certainly enter into an agreement with his wife that, if he enter into a second marriage during her life-time, without her consent, she can divorce herself.

Baillie in chapter II on the subject of divorce, section 2, page 218, says:—"Repudiation is said to be referred to a time when its effect is postponed from the time of speaking to some future time specified, without any condition. And repudiation is

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“ said to be suspended on, or attached to, a condition, when it is combined with a condition and made contingent on its occurrence. In the former case repudiation takes effect immediately on the arrival of the time to which it has been referred; in the latter, it takes effect on the occurrence of the event on which it has been made to depend. And revocable, as well as irrevocable repudiations are susceptible of being referred to a time, or made subject to a condition. The two kinds, *izafat* or reference to a future time, with or without a condition, might, therefore, I think, be treated together; but as they have been treated separately by the compilers of the *Fatwa Alum-gir* and other writers on the Mahomedan law I follow the same arrangement.” He goes on to show that repudiation may take place either at some future time, or in consequence of any particular acts, either on the part of the husband or on the part of the wife.

Looking to these chapters of the law, we think that the agreement between the parties was not contrary to the Mahomedan law. But, on the contrary, there are clauses in the law which are distinctly consonant with such agreement.

We therefore set aside the Judge's decision, and decree the plaintiff's suit with all costs.

*Appeal allowed.*

[APPELLATE CRIMINAL.]

1871  
 July 24.

*Before Mr. Justice Ainslie and Mr. Justice Paul.*

THE QUEEN v. RAMKRISHNA DAS AND ANOTHER.\*

*Penal Code (Act XLV of 1860), s. 161—Public Servant—Illegal Gratification.*

A peon of the Collector's Court, who received no fixed pay from the Government, but was remunerated by fees whenever employed to serve any process, and was placed on the register of supernumerary peons, had been ordered by the Magistrate to do duty on a particular day at the office of the special Sub-Registrar, where he was detected receiving an eight-anna piece from a person, and was prosecuted for receiving an illegal gratification as a public servant.

\* Reference, under section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Backergunge,