APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Doss.

FUL CHAND

v.

NAZAB ALI CHOWDHRY.*

1908
Nov. 10.

Mahomedan Law—Divorce—Talak—Dower, suit for—Limitation.

Under the Mahomedan Law, absence of the wife does not make the pronouncement of *talak* void and inefficacious.

Furzund Hossein v. *Janu Bibi* (1) and *Sarabai* v. *Rabiabai* (2), referred to and discussed.

SECOND APPEAL by the plaintiff, Ful Chand Bibi.

The plaintiff's allegation was that she married one Mosad Chowdhury in 1294 B.S. (1897), and that a registered *kabin* was executed by the husband, under which the deferred portion of the dower had not been paid, and became due, at the death of Mosad in the month of Assin last.

The defendants, the heirs, alleged to be in the enjoyment of the property left by the late Mosad Chowdhury, denied the liability and alleged that the plaintiff fled from her husband's house in 1304 B.S., and was thereupon divorced, on the following day by her husband, and that the father of the plaintiff appeared and agreed verbally to relinquish the claim for the deferred portion of the dower; that the plaintiff had never since lived with her husband; and that they had inherited no property from Mosad and so were not liable for any dower. The defendants further contended that the divorce having taken place in 1304, the claim for dower was barred by limitation, as it had not been claimed within the statutory period of three years.

The plaintiff filed her plaint on the 15th of February, 1905.

* Appeal from Appellate Decree, No. 542 of 1906, against the decree of F. J. Jeffries, Additional District Judge of Sylhet, dated Dec. 22, 1905, reversing the decree of Mohor Lal Dey, Munsif of Habiganje, dated June 13, 1905.

(1) (1878) I. L. R. 4 Calc. 588. (2) (1905) I. L. R. 30 Bom. 537.

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The Court of first instance decreed the suit on the grounds that the *kabin* produced was not disputed by the defendants, and that the story of *talak* and relinquishment was not worthy of credit, because the plaintiff herself was not present at the meeting, in which Mosad Chowdhury was said to have divorced his wife; and that the father had no right to relinquish the dower on behalf of his daughter, who was of full age.

The Additional District Judge, on appeal, held that the plaintiff was divorced in 1304, (1897), and that her right to sue for the dower was therefore barred by limitation; and he accordingly allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court mainly on the ground that the *talak* having been pronounced in the absence of the wife, the Court below ought to have held that there was no valid divorce under the Mahomedan Law, and that consequently the suit was not barred by limitation.

Babu Bepin Chandra Mallik (with him *Babu Tarakishore Chowdhury*), for the appellant. The main point in the case is whether a divorce can be effected under the Mahomedan Law by uttering the *talak* in the absence of the wife. Sir Roland Wilson in his Digest of Anglo-Muhammadan Law says that "a divorce may be accomplished by the utterance of any words addressed to the wife clearly indicating an intention to dissolve the marriage"; that shows that the wife must be present: see also Baillie's Digest of Mahomedan Law, page 201. The case of *Furzund Hossein* v. *Janu Bibi* (1) is an authority in my favour. [STEPHEN J. If the wife runs away what is the husband to do?] He can send her a written divorce. It must be remembered that divorce does not extinguish the right to a deferred dower; it only makes the limitation for an action for dower run from the date when the *talak* is pronounced.

Moulvi Shamsul Huda (with him *Moulvi Nuruddin Ahmed*), for the respondents. The presence of the wife is not necessary,

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when *talak* is pronounced. The absence of the wife only requires that her maintenance is to be paid, until the fact of divorce comes to her knowledge: see Ameer Ali on Mahomedan Law, page 452. The case of *Sherif Saib* v. *Usana Bibi Ammal* (1) is also in my favour. See also Ballie on Mahomedan Law, page 205.

Babu Bepin Chandra Mallik, in reply. Even, on the assumption that divorce could be effected in the absence of the wife, still as it could not affect the recovery of dower, till it came to the knowledge of the wife, this case should be remanded for a finding whether the wife came to know of it before the period of limitation. The *onus* as to that is upon the defendants, and there is no finding as to the time when the pronouncement of *talak* came to the knowledge of the plaintiff.

STEPHEN AND DOSS JJ. This is a suit in which a woman sues the heirs of a deceased Mahomedan for the deferred portion of the *moharana* provided for by a *kabinnamah*. The defence to the suit was that the woman was divorced in 1304 B.S. or 1897, and that the cause of action accrued at the time of her divorce and that she is therefore Statute-barred under Article 104 of the Limitation Act. To this it is answered that, admitting the facts found by the lower Appellate Court, still no divorce took place. The divorce was by *talak* being pronounced three times, but it was pronounced in the absence of the wife though in the presence of various witnesses including the wife's father.

The first question, which we have to decide, is whether the absence of the wife makes the pronouncement of the *talak* void and inefficacious. In our opinion it does not. The point is dealt with in the book of Mr. Ameer Ali in section 3. of Chapter XII, where he says:—"It is not necessary for the husband himself to pronounce *talak* in the presence of the wife,

(1) (1871) 6 Mad. H. C. 452.

but it is necessary that it should come to her knowledge." The matter is also dealt with in Wilson's Digest at page 164, but not so decisively. It also seems to be the opinion expressed in Nawab Abdur Rahman's Institutes of Mussalman Law. The matter has twice, as far as we are aware, been dealt with by the Courts; in the first place, in the case of *Furzund Hossein* v. *Janu Bibi* (1) and, secondly, in the case of *Sarabai* v. *Rabiabai* (2). In the second of these cases a distinct opinion is expressed that it is not necessary for the wife to be present, when the *talak* is pronounced, although this is an *obiter* inasmuch as that case dealt with a written instrument of divorce. In the previous Calcutta case, the matter is also dealt with and the point itself is not directly noticed, but *talak* was there pronounced in the absence of the wife, and it is significant that the case is not decided on that point, which it would have been, if it had been fatal to the effect of the divorce. We therefore hold that it is not necessary for the wife to be present when the *talak* is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of *talak* should come to her notice. That it came to the notice of the woman there can be no doubt, for before her husband's death she saw him and claimed the dower.

This, however, leads us to the second question as to whether or not the present suit is barred by limitation. The *talak*, as we have said, was pronounced in 1897. The suit was brought in 1905 and the husband died a few months only before the suit. If we count the period of limitation from the time of divorce or from a little later, it is obvious that the suit is Statute-barred. Now, the findings are that the *talak* was pronounced in the presence of witnesses including the woman's father, who took or purported to take a leading part in the proceedings as representing the woman, and the findings also go to show that the woman has been living with her father, apparently continuously, since the time of the divorce. This particular question, when the woman got

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knowledge of the *talak*, was not argued in the first instance, and consequently the findings are not as definite on this point as they may be. But on the findings such as they are before us, we have no doubt at all that the woman had notice of the *talak* anterior to the period of limitation.

The result is that the suit is brought without any foundation, and consequently this appeal must be dimissed with costs.

Appeal dismissed.

B. D. B.