APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

AYATUNNESSA BEEBEE

v.

KARAM ALI.*

1908

July 15.

Mahomedan law—Divorce—Marriage contract stipulating wife's option to divorce herself on husband marrying again, when to be exercised.

When a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears the news.

The injury done to her is a continuing one and she should have a continuing right to exercise the power.

The case is different when such a power is given to the wife after marriage.

Meer Ashruf Ali v. *Meer Ashad Ali* (1) and *Nuruddin* v. *Mussummat Chenuri* (2) followed. *Hamidoolla* v. *Faizunnissa* (3) applied.

APPEAL by defendant No. 1, Ayatunnessa Beebee.

Karam Ali Kagzi, the plaintiff, married the defendant No. 1, Ayatunnessa Beebee, on the 11th Sraban 1305. After they had lived together for 5 years without any issue, he married again, in order to obtain issue, at the wish of defendant No. 1, as it is alleged by the plaintiff and denied by the defendant No. 1. It was further alleged that defendant No. 1 had lived with the plaintiff for a year thereafter and was then taken away by defendants Nos. 3 and 4 in plaintiff's absence, in Asarh 1310, and that since then the defendants were not allowing her to come to the house of the plaintiff.

The defendant No. 1 admitted the marriage and pleaded *inter alia* divorce, which took place on the 27th Aughran 1311 in exercise of the power given to her by him before marriage.

The Subordinate Judge decreed the suit on the ground that Mahomedan law does not favour such rights and that the

* Appeal from Original Decree No. 392 of 1906, against the decree of J. C. Das, Subordinate Judge of Dacca, dated the 30th June 1906.

(1) (1871) 16 W. R. 260. (2) (1905) 3 C. L. J. 49.

(3) (1882) I. L. R. 8 Calc. 327.

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option to divorce being delegated on the happening of a condition and no time being specified, within which the option should be exercised, it should have been done immediately on hearing that the condition had happened.

Mou'vi Serajul Islam, for the appellant. Plaintiff cannot succeed, as he has broken a condition of the marriage contract, on which the defendant according to the contract has divorced herself. She had an option given to her, which did not become inoperative by reason of her not exercising it at once. *Hamidoolla* v. *Faizunnissa* (1) and *Meer Ashruf Ali* v. *Meer Ashad Ali* (2).

Dr. Priyanath Sen, for the respondent. According to Mahomedan law, such a conditional power must be exercised as soon as the condition is fulfilled. It cannot be kept in reserve, unless the power itself prescribes the time, within which it may be exercised. See Ameer Ali's Mahomedan Law, Vol. II, 3rd ed., p. 431; Baillie's Digest, 2nd ed., p 250; Hedaya by Grady, 2nd ed., p. 90 and Wilson's Anglo-Mahomedan Law, 2nd ed., p. 163. The case of *Meer Ashruf Ali* v. *Meer Ashad Ali* (2) is distinguishable, inasmuch as there the condition on which the option to repudiate was given to the wife, was 'the keeping of a concubine', and this was a wrong of a recurring character, so that the failure to repudiate on one occasion would not debar the exercise of the right to repudiate, when the occasion arises again. In the present case the wrong done to her could not be of a recurring nature, and she should have exercised her rights as soon as she came to know of the intention to remarry. Evidently she did not make up her mind then to exercise the right and waived it. She could not again exercise it. [Doss J. May not the passages in the text-books relate to post-nuptial delegation of power?] The Mahomedan Law makes no distinction between ante-nuptial and post-nuptial delegation of power, and by that law, delegated powers must be exercised as soon as possible and in the

(1) (1882) I. L. R. 8 Calc. 327. (2) (1871) 16 W. R. 260.

strict form enjoined by that law. In *Hamidoolla* v. *Faizunnissa* (1) this question was not at all discussed, the main contention there being that the delegation of power to the wife was invalid except on certain specified occasions, and there the Court held that such delegation was not contrary to Mahomedan law.

COXE AND DOSS JJ. This appeal arises out of a suit for the recovery of a wife.

The defence is that at the time of the marriage it was stipulated between the parties that in the event of the husband taking another wife the wife should have the power to divorce herself and that in the exercise of that power the defendant divorced herself in December 1904.

The Subordinate Judge has found that the stipulation was made and that the plaintiff broke it by marrying a second time. But he has held that the divorce is invalid, because the defendant did not exercise the option given to her immediately on hearing of the second marriage. The Subordinate Judge accordingly decreed the suit.

The wife appeals. The learned vakeel for the appellant relying on the decision in *Meer Ashruf Ali* v. *Meer Ashad Ali* (2) argues that the wife did not lose her option of declaring herself divorced by reason of the delay between the time, when she heard of the second marriage of her husband and the time, when she exercised her right. We cannot see that there is any real distinction between the case cited and the present one. If we follow that decision we are bound to hold that the defendant's divorce was valid and the suit must necessarily fail.

The learned pleader for the respondent has relied upon the authorities cited in the judgment of the learned Subordinate Judge and on certain passages in Wilson's Anglo-Mahomedan Law, second edition, page 163. But the passages, which have been read to us from these authorities, appear to deal only with cases in which the husband has, after marriage, given his wife the option of declaring herself divorced.

(1) (1882) I. L. R. 8 Calc. 327. (2) (1871) 16 W. R. 260.

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In Wilson's Anglo-Mahomedan Law, page 168, it is stated—"It is a fact that nearly all of what is said on the subject in the Fatawa Alamgiri and the Hedaya has reference to permission given by the husband to the wife after marriage to divorce herself at her option in specified contingencies." The cases referred to are therefore different from the case now before us in which the parties entered before marriage into this contract that the wife should have power to divorce herself under certain circumstances. This stipulation was a most important element in the marriage contract. That the above is a true distinction appears to be accepted in *Hamidoolla* v. *Faizunnissa* (1), in which the learned Judges say, "The Mahomedan law on the subject, which has been laid before us, provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions * * * * * *. We are aware of no reason, why an agreement entered into before marriage between parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan law, should not be carried out." We agree with this decision and think that we are not bound in dealing with a stipulation in a marriage contract, to be governed strictly by the rules laid down in the passages, which have been read to us, which deal with the exercise of the power of divorce by a wife, when an option is given by a husband after marriage. We think that, when a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then, if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise the power. This was the view taken

(1) (1882) I. L. R. 8 Calc. 327.

by the Court in the case of *Meer Ashruf Ali* v. *Meer Ashad Ali* (1), which has already been cited. And that view was followed in *Nuruddin* v. *Mussummat Chenuri* (2), in which it is clear that the wife exercised the power of divorcing herself some time after the contingency, which gave rise to it, occurred.

On reading the evidence we do not think that the delay, which the wife made in this particular case, was under the circumstances unreasonable.

Accordingly we must hold that the divorce was valid and the suit should have been dismissed.

The appeal is accordingly allowed with costs in both the Courts.

Appeal allowed.

(1) (1871) 16 W. R. 260. (2) (1905) 3 C. L. J. 49.

S. M.