ORIGINAL CIVIL.

Before Mr. Justice Harington.

1911
June 9.

MOZELLE JOSHUA
v.
SOPHIE ARAKIE. *

Jewish Law—Custom—"Ketubah"—Marriage settlement—Charge on husband's property—Priority—Intestacy—Rights of Wife in event of a Divorce.

A *ketubah* does not create any charge in favour of a widow against her deceased husband's estate. It gives a right enforceable by an innocent wife when she is divorced by her husband.

THIS was a suit brought by a Jewish widow to enforce her claim to a sum of Rs. 10,555, settled by way of dower under the Jewish law, in terms of her marriage contract called "ketubah," and for a declaration that she was entitled to that sum in priority to the other creditors of her deceased husband. The husband had died intestate; the debts exceeded the assets and the estate was being administered by the Administrator-General.

The suit originally came on for hearing on the 17th of June, 1909, but was dismissed on the ground that the claim should have been brought in certain administration proceedings then pending.

The plaintiff appealed from that decree, and the Appellate Court remanded the case to be heard and decided on the merits.

The case finally came on for hearing on the 9th of June, 1911.

Mr. C. C. Ghose (with *Mr. A. N. Chaudhuri*), for the plaintiff. The *ketubah* creates a valid charge on the husband's estate.

* Original Civil Suit No. 974 of 1908.

Mr. Hyam, for the defendant. This Court has no jurisdiction to administer Jewish law: *Musleah* v. *Musleah* (1). The document in question should be construed according to the law of British India. The domicile of the deceased being British India, the law of matrimonial domicile should apply in construing marriage settlements: Dicey on Conflict of Laws, 2nd Ed., pp. 510, 511. The *ketubah* is generally understood to be necessary to give validity to marriage; it is a part of the religious ceremony. The recitals are not true in fact, and the figures are fictitious; it is no evidence of any declaration of trust.

Mr. J. E. Bagram, for the Administrator-General. The document is vague and cannot be said to constitute any declaration of trust.

Mr. A. N. Chaudhuri, in reply. The *ketubah* creates a valid charge. It is not necessary to have a writing to create a pledge, nor is delivery necessary: *Shrish Chandra Roy* v. *Mungri Bewa* (2).

HARINGTON J. The plaintiff is the widow of a gentleman, A. R. Joshua, and she asks for a declaration that a sum of Rs. 10,555 constitutes the first charge on the estate of her deceased husband, and that sum is due to her in priority to the sums due to all the other creditors. The estate is being administered under the direction of the Court and the liabilities exceed the assets. Now to make good her claim to this charge on the estate of her husband, the lady relies on a document which was executed at the time of her marriage. The document has been described as a *ketubah*, and it is alleged by the plaintiff that it has the effect of creating in her favour the charge which she asks to have declared on her husband's estate. She supports her claim further by a number of gentlemen of the Jewish persuasion, who have come to say what effect this document has amongst their people. I have very great doubt as to whether the evidence they give is, strictly speaking, admissible.

(1) (1844) 1 Fulton 420, 423, 445. (2) (1904) 9 C. W. N. 14.

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Now before dealing with the witnesses, it becomes necessary to examine the document itself and see how far it bears out the plaintiff's contention that it creates a charge enforceable in her favour on her husband's death on his estate. The defendant's case is that this is an ancient form, the signing of which is part of the ceremony in every Jewish marriage, and it is not intended to create any liability enforceable against the husband's estate, but only to provide a sum of money, which should be payable to the lady, in case the husband should divorce her when she herself had not been guilty of misconduct. Now the document in question is singular in its appearance and in its form, it is certainly archaic. In it the husband says he allows endowment from his money to the extent of 100 silver and he undertakes to give food and clothing and other requirements of the lady, but then he states "that she brought to her husband orna-"ments of gold and silver and dresses, etc., totalling to "Rs. 5,000, which he has accepted, and wrote upon himself "(*sic*) on the former, and the latter also, in all Rs. 5,000, and "he further agreed to add out of his money an addition on "the principle of the edict, Rs. 455 in all, together with the "endowment, additions, and gifts, Rs. 10,555, and Mr. Aaron "acknowledged that the abovementioned sums are received "and accepted, by him and under his command, and he ac-"knowledged that the said sums are as but to him, and he "possessed the same, and like the trade of goat and iron, should "it increase and decrease, will be sustained by him, and ac-"cordingly the said Mr. Aaron told us, that the security and "responsibility of this edict, the endowment and the addition "which are stipulated for her, accepted and agreed by me and "my heirs after me, from all my properties and also moveable "and not moveable will be security and pledge to realize from "the best, etc."

Now in trying to ascertain whether this is an archaic form or whether, as the plaintiff says, this is a statement of a real transaction, I think it is important to say how far the statements made in it are in fact true. Is there any evidence that

the lady brought to her husband ornaments of gold and silver totalling in all Rs. 5,000? At the previous hearing the lady stated that when she was married she had no property of her own, and that she had a few ornaments of gold and silver, which she says she got from her father and none from her former husband, as his were left for her daughter. She said, "I made over those ornaments to him. They were worth about Rs. 1,500. Beyond the ornaments I had only some furniture." But when she is recalled for the purpose of further examination in the present hearing, the lady says she did take to her husband Rs. 5,000 in silver and jewellery. The result is that the lady makes two contradictory statements, one at the present hearing and the other at the previous hearing. I should have hesitated to accept it if she had stated in the earlier statement that she had brought to her husband ornaments of gold and silver totalling Rs. 5,000, without some particulars, but there was no statement with regard to it at the previous hearing. There were no particulars of the ornaments, and the lady has made two contradictory statements with regard to her property. On that evidence, it has not been established that the lady brought Rs. 5,000 or any other sum to her husband on the occasion of her marriage.

Then with regard to Rs. 555, it has not been asserted by any one on behalf of the plaintiff that that sum was ever added to any money brought in by the lady. On the contrary the witness, Mr. Cohen, who was called on behalf of the plaintiff, says that the amount of Rs. 555 does not represent any actual sum but it is a fictitious figure inserted for the purpose of avoiding having a number of noughts in the figure which is written. The result is, that on the document itself part of the figures, presented, is proved to be fictitious, and that the lady brought to her husband the amount of Rs. 5,000 has not been proved, and there is no evidence as to whether the deceased was in possession at the time of marriage of Rs. 5,000, so that of the statements in the document some have not been proved and one has been shewn to be fictitious.

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Then one has to consider the evidence of the Jewish witnesses who have been called. First, there is Mr. Cohen. He says that the lady has certain claims on the husband in consideration of the agreement and its terms. Mr. Leniardo, who was called on the previous hearing, puts the lady's rights rather higher than any one else. He says that the document is a document of marriage-settlement, and that the amount should be paid either by the husband in his lifetime, or after his death. Then comes Mr. Arakie, who was the last witness called for the plaintiff, and he only expresses what is the belief of his countrymen; and according to their belief this *ketubah* constitutes a charge on the estate of her husband, and then he further says that if the husband is insolvent the wife is to go without it. His evidence, if it is true, would be destructive of the plaintiff's case, because she claims to be given priority over all the other creditors of the deceased. Then there was another gentleman, who was called just before Mr. Arakie and that is Mr. David Ezra, and he says that the lady gets her rights under this document, and they arise in the case of divorce and do not come into operation during the husband's lifetime. He says that a sum of money is inserted in all these documents. This amount is put for the purpose of indicating the rank and position of the parties, rather than for any other reason; and he says that he has never heard of a Jewish widow asserting her rights to the *ketubah* money. The plaintiff has referred to a book, under the Evidence Act, which supports the plaintiff's contention as to the effect of the *ketubah* under the Jewish law. Now that is all the evidence which the plaintiff can rely upon to support her claim. The defendant relies on the evidence of the persons who were called at the earlier hearing and whose views are that the money can only be claimed in the case of divorce. Now the evidence of the gentlemen, who have been called by the plaintiff, when it comes to be examined, does not really establish her claim, because they only refer specially to what in their opinion is the effect of the document. It is conceded and, indeed, has been spoken to by almost every witness, that the execution of the document of this

nature, has been customary amongst the Jewish people, from time immemorial, as a portion of the wedding ceremony, and no witness has ever heard of a case in which it was sought by any Jewish widow to assert that that document created a liability in her favour on the estate of her deceased husband. I confess that that part of the evidence presses me very strongly, and I am unable to believe, that if this document was really effective to give the rights to the wife which the plaintiff says it does, no case should ever have arisen in which the claim was made or established.

There is evidence that the *ketubah* gives a right enforceable by an innocent wife when she is divorced by her husband, but the evidence in this case does not, to my mind, establish that she has any rights under it against her deceased husband's estate, and my view is strengthened by the evidence that when a marriage is contracted by Jews of wealth and position, although the sums inserted may be larger, yet for the purpose of giving the widow, the rights to her husband's property, an ordinary marriage-settlement is executed, and parties never treat the provisions in the *ketubah* as giving any real rights. On the whole case, therefore, there must be judgment for the defendant and the grounds on which I base my judgment are (i) I do not believe the *ketubah* is intended to create any charge, because the statement of facts in it, as to the money brought in by the lady, appears to be without any foundation; and (ii) because, while all the witnesses are agreed that it gives rights to the wife in the event of a divorce, every witness says that no case has ever occurred in which it was contended that it gave any right to the widow until the present suit; and, (iii) because there is evidence that, where it is desired to settle the property on the wife notwithstanding the existence of a *ketubah*, a marriage-settlement is executed.

I think that if the widow had been so convinced that the *ketubah* created a charge, she would, in the first instance, have made her claim as against her deceased husband's estate.

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The suit must be dismissed and the plaintiff must pay costs to the defendant on scale No. 2.

G. M. F. *Suit dismissed.*

Attorney for the plaintiff: *N. C. Bose.*

Attorney for Mrs. Arakie: *R. Westmacott.*

Attorneys for the Administrator-Genl.: *Orr, Dignam & Co.*

CRIMINAL REFERENCE.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911

June 12.

CORPORATION OF CALCUTTA

v.

HAJI KASSIM ARIFF BHAM.*

Bustee land—Owner of bustee—Receiver—Liability of actual owner to carry out bustee improvements when his estate is under a Receiver appointed by the High Court—Calcutta Municipal Act (Beng. Act III of 1899) s. 408.

When a notice under section 408 of the Calcutta Municipal Act has been served on the actual owner of an estate in the hands of a Receiver appointed by the High Court, he is liable under the section as such, and not the Receiver, to carry out the requisitions made therein. It is incumbent on the owner in such a case to request the Receiver to comply with the notice, after taking the directions of the Court, and on the latter's failure to do so he should himself apply to the High Court making the Receiver a party. If the Court refuses the application, the owner would be enabled to satisfy the Magistrate that he had used all diligence to carry out the requisitions, and in the event of a conviction the penalty would be merely nominal. If the owner is helpless in the matter the General Committee may proceed under the section against the occupiers.

Parker v. *Inge* (1) referred to.

A Receiver appointed by the High Court is not the "owner" of the premises he holds as such, nor is he an "agent or trustee" within the definition of the term in section 3 *(32)* of the Calcutta Municipal Act.

Fink v. *Corporation of Calcutta* (2) followed.

* Criminal Reference, No. 2 of 1911, by N. C. Ghattack, Municipal Magistrate of Calcutta, dated May 3, 1911.

(1) (1886) 17 Q. B. D. 584. (2) (1903) I. L. R. 30 Calc. 721.