APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

1912

Aug. 22.

JOSHUA

v.

ARAKIE.*

Jewish law—Marriage custom—"Ketuba," legal effect of—Rights of wife.

In a suit brought by a Jewish lady married in Calcutta, for the recovery from her deceased husband's estate of the sum mentioned in a *ketuba*, executed on the occasion of their marriage :—

Held, that the *ketuba* was a necessary but formal incident of the marriage contract and ceremonial, and created no such right in favour of the widow.

APPEAL by the plaintiff, Mozelle Joshua, from the judgment of Harington J.(1)

On the 8th December 1907 the plaintiff married Aaron Raphael Joshua, both being of the Jewish faith, at Calcutta, and on the occasion of the marriage an instrument called a *ketuba* was executed, of which the following is a translation :—

"On Sunday, the 3rd day of the month of Tabeth in the year 5668 from the creation of the world that we are counting here in the town of Calcutta which is situated and lying on the bank of river Ganges which is running to the big sea, How Mr. Aaron the son of Raphael Joshua spoke to this woman Muzzaltoke daughter of Jacob Ezackial Hakam Moses to be my wife in accordance with the law of Moses and Israel and I by the help of the Almighty will serve and respect provide feed and clothe you in accordance with the usage of Jewish gentlemen who are serving respecting providing feeding and clothing their wives in the best manner and we allow you endowment (*mohrana*) with oath I establish from my own money one

* Appeal from Original Civil No. 56 of 1911.

(1) (1911) I. L. R. 38 Calc. 708.

hundred silver which are allowed to you by the Rabbis and your food clothing and your requirements and I will visit you in the way of the world and the said bride has acceded and became his wife according to the Law of Moses and Israel and that she brought to her husband ornaments of gold and silver and dresses etc. totalling to Rs. 5,000 which he has accepted and wrote upon himself 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 principal of this 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 acknowledged that the said sums are as lent 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 accordingly the said Mr. Aaron told us that the security and the 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 of my woven goods and landed properties which I have under the heaven and that I may possess hereafter and even from the robe that is on my shoulders during my existence and after my existence from this day and for ever and security and responsibility and the strength as of all other edicts the endowment and addition as are in custom with the daughters of Isreai also 4 umma (measurement) of ground as worthy and as it is ordered by our Rabbis. Not like a support and not like a draft to be considered this on cancelling all sorts of previous understandings in the world and in rejecting all evidences and oaths. We the undersigned are witnessing that all aforesaid are spoken by the said Mr. Aaron to Muzzaltobe his this bride his wife trust all that are written above and explained with solemn oath and complete. To purchase with the valuable articles. All those mentioned above are correct right firm and true.

I accept those mentioned above.

AARON RAPHAEL JOSHUA.

Witness. *Witness.*

RAHIM MOSEL COHEN. DAVID AELIA DAVID JOSEPH EZRA."

Aaron Raphael Joshua died intestate on the 5th March 1908, leaving him surviving the plaintiff his widow, and the defendant Sophie Arakie his daughter by a previous wife.

Letters of administration to the estate and effects of the deceased were obtained by the Administrator-General of Bengal on the 18th June 1908. The assets

1912

JOSHUA v. ARAKIE.

consisted of Government securities of the value of about Rs. 29,000, and claims were preferred by creditors against the estate to the extent of about Rs. 70,000.

On the 11th November 1908 the widow instituted this suit claiming under the *ketuba*, which she described as a marriage settlement, the sum of Rs. 10,555 as a first charge on her husband's estate, contending that he "had charged his property with the payment to the plaintiff of the said sum being sums settled granted or given by way of dower or gifts to the plaintiff by the said deceased in consideration of the marriage of the plaintiff with the deceased."

Sophie Arakie and the Administrator-General of Bengal were made defendants in the suit. It was contended by the former that the instrument did not operate as a charge, and that "the execution of an instrument of this form and nature is by Jewish custom a part of the marriage ceremony and nothing more, that the mention of money or property therein is merely nominal, and no money or property is really forthcoming as intended to be given settled or secured."

The suit came on for hearing before Harington J., and was dismissed by his Lordship on the 9th June 1911 (1).

From this judgment the plaintiff appealed. On the 6th March 1912, when the appeal was first opened before the Appellate Court, an adjournment was granted to enable the parties to adduce further evidence in the shape of appropriate books of reference or affidavits of acknowledged authorities in support of their rival contentions. These books and affidavits were now placed before the Court of Appeal.

(1) (1911) I. L. R. 38 Calc. 708.

Mr. B. Chakravarti (with him *Mr. A. N. Chaudhuri*), for the appellant, referred to certain affidavits, and to the text-books : Milzinia on Divorce, pp. 85, 86, 87, Ambler, and the Jewish Encyclopædia. The preponderance of authority is in favour of the appellant. The opinions of authorities are relevant under section 50 of the Evidence Act. Dr. Gaster's opinion is that the right arises out of the relationship between the parties. The instrument is evidence of the amount. According to Dr. Gaster, even if the wife does not in fact bring in any money, the husband is not absolved from liability for the sum mentioned in the instrument. The Indian Succession Act does not interfere with customary law. The instrument creates a charge on the husband's estate.

Mr. S. R. Das (with him *Mr. Hyam*), for the respondent, Sophie Arakie. The *ketuba* is merely an archaic incident of the Jewish marriage ceremony, and has no legal effect. The recitals in the instrument have no foundation on fact : the figures are fictitious. There is no evidence that these instruments are enforceable. Jews are governed by the ordinary municipal law.

Mr. Hyam (following). This Court has no jurisdiction to administer Jewish law : *Musleah* v. *Musleah*(1). The *ketuba* is an instrument connected with the marriage ceremony, and must be construed according to the law of the domicile of the parties, which is British Indian : Story on Conflict of Laws, 7th edition, clauses 110, 113. The instrument purports to be a declaration by two witnesses, and admitted by the husband. According to the evidence, the declarants signed the instrument without knowing its contents. Such an instrument can have no legal effect.

(1844) 1 Fulton 420, 423.

1912

JOSHUA v. ARAKIE.

Mr. J. E. Bagram, for the Administrator-General of Bengal. The instrument cannot be said to constitute a declaration of trust. Nor can it constitute a charge on the husband's estate : such a charge is unknown to English law.

Mr. Chakravarti, in reply. The law of contract allows a provision in consideration of marriage.

Cur. adv. vult.

JENKINS C.J. The plaintiff, Mozelle Joshua, is the widow of Aaron Raphael Joshua; and she has brought this suit to establish her right to Rs. 10,555 under an instrument, which she describes as a marriage settlement or *ketuba*. The defendants are Sophie Arakie, Aaron Raphael Joshua's daughter by a former wife, and the Administrator-General of Bengal, his representative under a grant of letters of administration.

This *ketuba* came into existence on the marriage of the plaintiff with the deceased. A translation of it is annexed to the plaint.

It opens with a narration of the bridegroom's proposal to the bride, his promise to feed and clothe her and endow her with 100 pieces of silver, her acceptance of his proposal, and their marriage.

Then it is said the bride brought to her spouse "ornaments of gold and silver and dresses totalling to Rs. 5,000 which he has accepted and wrote upon himself 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 principal of this 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 acknowledged that the said sums are as lent 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."

The instrument then concludes as follows :—

"And accordingly the said Mr. Aaron told us that the security and the 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 of my woven goods and landed properties which I have under the heaven and that I may possess hereafter and even from the robe that is on my shoulders during my existence and after my existence from this day and for ever and security and responsibility and the strength as of all other edicts the endowment and addition as are in custom with the daughters of Israel also 4 umma (measurement) of ground as worthy and as t is ordered by our Rabbis. Not like a support and not like a draft to be considered this on cancelling all sorts of previous understandings in the world and in rejecting all evidences and oaths. We the undersigned are witnessing that all aforesaid are spoken by the said Mr. Aaron to Muzalltobe his this bride his wife trust all that are written above and explained with solemn oath and complete. To purchase with the valuable articles. All those mentioned above are correct right firm and true."

It was signed by two witnesses, and there is a written statement by the bridegroom accepting what was mentioned in the document.

Though the translation leaves much to be desired, the general drift of the instrument is clear.

The question for our determination is whether it was intended to operate as an effective legal instrument, entitling the plaintiff to recover Rs. 10,555 on her husband's death. Harington J. decided adversely

1912

JOSHUA v. ARAKIE.

JENKINS C.J.

to the plaintiff, and so she has preferred this appeal.

When the appeal was first opened before us, both sides sought an opportunity of obtaining further authorities in support of their rival contentions. As the case was one of first impression, at least in this Court, and of considerable importance to the Jewish community in Calcutta, we, by consent of parties, allowed an adjournment, and gave each side permission to adduce further evidence in the shape of appropriate books of reference or affidavits of acknowledged authorities with a view to showing whether or not an instrument such as this *ketuba* was ordinarily intended to have legal operation on the husband's death.

Affidavits have been placed before us on both sides, but they do not meet the point on which we desired assistance.

Text-books too have been procured, but they are of historical rather than of practical interest.

On a consideration of the materials on the record I am convinced that the *ketuba* is a necessary incident of a marriage contract in Calcutta between those of the Jewish faith.

And though it is expressed in terms that suggest pecuniary endowment, yet according to modern ideas and modern practice this expression (in my opinion) is not intended to have the legal consequences for which the plaintiff contends.

A solemn declaration of endowment, forming a part of the marriage ceremonial but leading to no practical result, is not unknown, and I see no difficulty in the way of regarding the *ketuba* as a survival, which is now a mere formality and nothing more.

This view gains support from the fact established in this case, that what is recited did not in truth occur;

and the evidence shows that though the instrument purports to be an assertion by the witnesses of their actual experience, they both signed the document in ignorance of its contents. And then again it is a significant circumstance that no instance is recorded in the evidence or disclosed in any reported case where a *ketuba* has been treated as creating a right to recover the sums mentioned in it.

The present suit is based on the *ketuba* and on that alone, so that I refrain from considering the problem whether a Jewish widow has any rights of dower. Nor do I intend to express any opinion as to her rights in the event of divorce.

I propose to deal only with that which is before us, the right of a Jewish widow married in Calcutta to sue on her husband's death for the sums mentioned in the *ketuba*, and on that my opinion is that the plaintiff has failed to establish her claim, and I would therefore dismiss this appeal with costs.

WOODROFFE J. I agree.

Appeal dismissed.

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

Attorneys for the respondents: *O. C. Ganguly & Co.; R. Westmacott.*

J. C.