
(1878) 08 CAL CK 0005

Calcutta High Court

Case No: None

Furzund Hossein

APPELLANT

Vs

Janu Bibee and Others

RESPONDENT

Date of Decision: Aug. 2, 1878

Citation: (1879) ILR (Cal) 588

Hon'ble Judges: R.C. Mitter, J; Maclean, J

Bench: Division Bench

Judgement

R.C. Mitter, J.

This is a suit for restitution of conjugal rights; the defence raised is that of divorce. The Court of first instance overruled this plea, and decreed the plaintiff's claim. The Court of appeal has come to a different conclusion, and has dismissed the suit, holding that the plea of divorce is established. There is no difference in the findings of the Courts below as to the facts of the case.

2. Those facts, as found by the lower Appellate Court, are briefly these: "The plaintiff, a native doctor, being about to leave Silchar, wished to take his wife, Mussamut Janu Bibee, with him; he was opposed in this by his wife and her family, with whom he appears to have been on very unsatisfactory terms, and, in the hope of settling disputes, he convened a punchayet, before whom, on the plaintiff's stating his intention of removing his wife, the defendants produced the kabinnama, which contained a condition to the effect that, in the event of the husband's attempting to remove his wife from her parents' house, the marriage would become void. Regarding this stipulation I will merely remark that it is opposed to Mahomedan law, and that, if this were the only obstacle to the plaintiff's obtaining his wife, I should certainly overrule it. On the plaintiff's stating that, in spite of this condition, he was determined to remove his wife, the defendant Ayay Mahomed informed the plaintiff, that as he, the father of the girl, had not given his consent to the marriage, and as the girl was at the time a minor, the marriage was absolutely illegal: this view was supported by one of the witnesses, a Moulavi, accredited with a thorough

knowledge of the law, and, after some further discussion, the plaintiff, yielding to the importunities addressed to him, said, "if she be not my wife, I can give her 1,000 (or 20) talaks, so why not three"; and having so said, pronounced the three talaks which are held to constitute one form of Mahomedan divorce. This statement of the facts, which I believe to be accurate, is that made by the plaintiff's own witness. As subsequent proceedings in the Criminal Court disclosed, the statement of Ayay Mahomed was so far untruthful that, although the plaintiff was unaware of the true paternity of the girl when he married her, her actual father did not disapprove of the match."

3. Upon these facts the Court of first instance held that, as the defendants by making false representations to the plaintiff induced him to believe that Janu Bibee was not his legally married wife, and to go through the form of divorce under that belief, whereas Janu Bibee was his lawful wife, the divorce was invalid. The Court of appeal has held that, although this fraud was practised upon the plaintiff, yet, as he has gone through the prescribed formula of divorce, it is valid according to Mahomedan law. After referring to the opinion of the first Court, the Court of appeal says: "His view of the case seems to me also a very reasonable one, but we are concerned not with reason but with law, and on this head the Mahomedan law appears to me to be distinctly in favour of the defendants."

4. If the formula of divorce prescribed in Mahomedan law-books has been really pronounced by the plaintiff, the view of the Mahomedan law taken by the Court of appeal is probably right. But upon the finding of the lower Appellate Court, it seems to us that the proscribed formula has not been pronounced by the plaintiff. What was done by the plaintiff was simply this that he pronounced the word "talak" three times, without addressing it to any person in an assembly where he and certain others who were called by him as punchayets, as well as his wife's relatives, were present.

5. We are of opinion that pronouncing the word "talak" three times under the circumstances of this case does not constitute a valid divorce under the Mahomedan law. In Hamilton's Hedaya, Vol. I, page 200, the definition of "talak" is given: "Talak in its primitive sense means dismissal in law; it signifies the dissolution of a marriage or the annulment of its legality by certain words," Now what are these words to be pronounced? In page 213 of the same volume, it is laid down that "Talak-sareek, or express divorce, is where a husband delivers the sentence in direct and simple terms, as if he were to say "I have divorced you," or "you are divorced," which effects a talak-rifai, or divorce reversible, &c." These are the ordinary forms of the formula to be pronounced in talak-sareek, or express divorce. Then there are other forms of talak-keneyat, or divorce by implication, given in the same chapter of the Hedaya, where the passage quoted above occurs. From a careful examination of all these forms, it would appear that simply pronouncing the word "talak" is not sufficient to constitute a valid divorce.

6. The same view of the law is taken in Baillie's Digest of Mahomedan law. "Talak, as explained in the dictionaries," says he in page 204," is the taking off of any tie or restraint in the language of law; it has the taking off of the marriage tie by appropriate words." In page 205 of the same work it is laid down that" repudiation, or talak, as the term is defined in law, is a release from the marriage tie, either immediately or eventually, by the use of special words, &c., &c., &c., &c., &c., &c., &c." Its pillar is the expression, "thou art repudiated," or the like.

7. These authorities clearly show that a valid divorce in this case was not effected by the plaintiff pronouncing merely the word "talak" three times. Therefore, we are of opinion that the conclusion to which the Court of first instance came is right, although not for the reasons given by that Court.

8. The result is, that the plaintiff's suit must be decreed, and the decree of the lower Appellate Court reversed with costs. The decree of the first Court declares that the husband should get possession of the person of his wife. This form of the decree is erroneous--Chotun Bebee v. Ameer Chund (6 W.R. 105). It must be therefore amended. The decree should simply declare that the plaintiff is entitled to the restitution of conjugal rights, and that the defendant Janu Bibee be directed to go to her husband's house. The plaintiff is entitled to recover costs of this litigation in all the Courts from the defendant other than Janu Bibee.