
(1871) 05 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 1702 of 1870

Badarannissa Bibi

APPELLANT

Vs

Mafiattala

RESPONDENT

Date of Decision: May 25, 1871

Final Decision: Allowed

Judgement

Jackson, J.

The plaintiff brought this suit for a declaration that her marriage with her husband was dissolved. She alleged that, at the time she was married to her husband, an agreement was entered into between them, one condition of which was that, if he married another wife without her consent, she would be entitled to divorce herself and take another husband. There seems to have been no question before the lower Courts as to this agreement having taken place. There was an allegation that the second marriage took place with the consent of the first wife. But both the Courts seem to have found that this was not proved. Still both Courts dismissed the plaintiff's suit, on the ground that such a condition was against the Mahomedan law. The Judge says that there are numerous modes in the Mahomedan law by which a husband can divorce his wife whenever he pleases, but it does not give equal facility to the wife to divorce her husband. The Judge is of opinion that this contract is against the law, and that the plaintiff's suit should be dismissed.

2. The special appeal to this Court is on the ground that the contract is directly according to the Mahomedan law. No one has appeared on the part of the special respondent to support the decision of the lower Court upon this point of law. We have looked into the Mahomedan law books. The Judge has stated in his decision that Macnaghten does not allude to the subject. But both the Hedaya and Baillie's Mahomedan Law have special chapters upon it.

3. The Hedaya in book IV, chapter III, page 257, lays down as the law that a husband may give power to the wife to divorce herself:--"If a husband say to his wife, "Divorce

yourself when you please," she is at liberty to divorce herself either upon the spot or at any future period, because the word when extends to all times; and hence it is the same as if he were to say, "Divorce yourself at whatever time you like." If this is the correct law, the husband can certainly enter into an agreement with his wife that, if he enter into a second marriage during her life-time, without her consent, she can divorce herself.

4. Baillie in chapter II on the subject of divorce, section 2, page 218, says:--Repudiation is said to be referred to a time when its effect is postponed from the time of speaking to some future time specified, without any condition. And repudiation is said to be suspended on, or attached to, a condition, when it is combined with a condition and made contingent on its occurrence. In the former case repudiation takes effect immediately on the arrival of the time to which it has been referred; in the latter, it takes effect on the occurrence of the event on which it has been made to depend. And revocable, as well as irrevocable repudiations are susceptible of being referred to a time, or made subject to a condition. The two kinds, *izafat* or reference to a future time, with or without a condition, might, therefore, I think, be treated together; but as they have been treated separately by the compilers of the *Fatwa Alungir* and other writers on the Mahomedan law, I follow the same arrangement. He goes on to show that repudiation may take place either at some future time, or in consequence of any particular acts, either on the part of the husband or on the part of the wife.

5. Looking to these chapters of the law, we think that the agreement between the parties was not contrary to the Mahomedan law. But, on the contrary, there are clauses in the law which are distinctly consonant with such agreement. We therefore set aside the Judge's decision, and decree the plaintiff's suit with all costs.