

(1913) 07 CAL CK 0034

Calcutta High Court

Case No: Appeal from Appellate Decree No. 4171 of 1910

Imam Ali Patwari

APPELLANT

Vs

Arfatunness

RESPONDENT

Date of Decision: July 9, 1913

Final Decision: Allowed

Judgement

1. This suit is brought by a Mahomedan wife for declaration that she is divorced and for prompt and deferred dower. There is now no question as to the justness of the demand for the prompt dower. As to the deferred dower the question rests on certain terms in a kabinamah between the two parties. The condition which is laid down by the terms to which we have referred is that the husband is to live with the wife in her father's house and that if he breaks this condition she is to have a right to divorce him. That of course implies that the Wife will continue to live in her father's house. The first Court held that the contract was not illegal, but the condition we have referred to was not fulfilled. He accordingly gave a decree only for the prompt dower. Against this the wife appealed to the lower Appellate Court. In considering the question the Judge refused to consider whether the condition to which we have referred was or was not illegal on the ground that the Respondent had not entered any cross-appeal on the subject.

2. We are now asked to say that this decision of his was wrong and that the contract was in fact an illegal one. The findings of fact by the lower Appellate Court are sufficient for us to proceed to the determination of the case on the validity of the contract. We have no doubt that the Defendant had a right to ask for a decision on this point in the lower Appellate Court, since it was a point on which he could have upheld the decision of the Court below. Therefore the Judge was wrong in not considering it.

3. There is some good authority for the statement that the condition that the wife shall be at liberty to live with her parent is void. We may for this refer to Wilson's Digest of Anglo Mahomedan Law, sec. 56, Abdur Rahim's Institutes of Mussalman

Law, Article No. 7, para. 3 and to the decision in the case of Abdul Piroj Khan v. Husseinbi 6 Bom. L.R. 728 (1904). We hold therefore that this condition is illegal and that the Plaintiff is accordingly not entitled to use it for supporting her claim to divorce and consequently to the deferred dower. Accordingly we allow this Appeal and though we differ from the Munsif in the reasons given for his decision we affirm his decree. The Appellant is entitled to his costs in this Court and in the lower Appellate Court.