(1890) 03 CAL CK 0010

Calcutta High Court

Case No: None

Zohiruddin Sheik		APPELLANT
	Vs	
Hamidunnessa Bibi		RESPONDENT

Date of Decision: March 24, 1890

Citation: (1890) ILR (Cal) 670

Hon'ble Judges: W. Comer Petheram, C.J; Banerjee, J

Bench: Division Bench

Judgement

Banerjee, J.

This was a suit by a Mahomedan husband for restitution of conjugal rights. The defendant No. 1 amongst other things, which it is not necessary now to consider, urged that the plaintiff was not entitled to succeed, first, because he had entered into a stipulation to live with the defendant, his wife, in the house of her father; and, secondly, because he had not paid the exigible portion of the dower due to the defendant.

2. The First Court overruled these objections, and gave the plaintiff a decree which was made conditional, however, as regarded execution, upon payment of the prompt part of the dower. On appeal, the learned District Judge has modified that decree by striking out the condition and making it a decree absolute. In second appeal it is contended on behalf of the defendant, the wife, first, that the Courts below are wrong in giving the plaintiff a decree for restitution of conjugal rights when they ought to have held that he was not entitled to such a decree by reason of the stipulation entered into at the time of the marriage; and, secondly, that the Courts below are further wrong in giving him a decree when he has not paid the prompt part of the dower due to the defendant.

3. Now this is how the facts stand. The stipulation relied upon is contained in a kabinnamah, the execution of which is not denied. The stipulation is to the effect that the plaintiff shall live with his wife in the house of her father. But the kabinnamah contains another stipulation, which is to the effect that the plaintiff

shall allow his wife to see her parents; and this, in our opinion, goes to show, that the stipulation as to residence was not intended to be absolutely obligatory- It further appears that the plaintiff, in his plaint, alleged that, after his marriage, his wife, the defendant No. 1, lived with him, sometimes in her father''s house and sometimes in his own house; and this allegation was not denied in the written statement, though the defendant alleged that the periods of her stay in the house of her husband were short. And the learned District Judge has found, upon the presumptions arising in the case, and the correctness of that finding is not in any way questioned before us, that the marriage has been consummated. These being the facts of the case, let us see how far the objections taken before us are valid.

4. It is an ordinary incident of marriage, under the Mahomedan law, that the husband acquires dominion over the person of his wife. See Macaghten''s Principles of Mahomedan Law, Chap. VII, para. 7; Baillie''s Digest of Mahomedan Law, 2nd Edition, p. 13; see also Buzloor Ruheem v. Shumsoonnissa 11 Moore''s I.A. 551. The authority to which the learned Vakil for the appellant has referred to show that this general right can be restrained by a contract to the contrary, is a passage from Mr. Ameer Ali''s work on the Personal Law of the Mahometans, p. 287, which is to this effect: "If it be agreed that a husband shall allow his wife to live always with her parents, he cannot afterwards force her to leave her father''s house for his own:" But the learned author goes on to add: "If the wife, however, once consent to leave the place of residence agreed upon at the time of marriage she would be presumed to have waived the right acquired under express stipulation, and to have adopted the domicile chosen by the husband." The authority cited is really therefore, upon the facts of this case, an authority in favour of the respondent.

5. There are other authorities still more in favour of the respondent''s contention. In the Hedaya, Book II, chap. 3, Grady''s Edition, page 49, it is said: "If a male marry a woman on a dower of one thousand dirms, on a condition that he is not to carry her out of her native city, or that he is not to marry, during his matrimonial connexion with her, any other woman,--in this case, if he observe the condition, the woman is entitled to the above specified dower only, as that consists of a sum sufficient to constitute a legal dower, and she has agreed to accept it; but if he should infringe the condition, by either carrying her out of her native pity, or marrying another wife, she is in this case entitled to her proper dower, because he had acceded to a condition on behalf of the woman which was advantageous to her, and that not being fulfilled, the woman is not supposed to be satisfied with the thousand dirms, and must therefore be paid her complete proper dower." This goes to show-that a stipulation like the one relied upon in this case is not generally considered to be absolutely binding, though any infringement of it may entitle the wife to a larger amount as her dower than that agreed upon.

6. Then there is a case in Macnaghter.''s Precedents of Mahomedan Law, Chapter VI, Case VIII, in which it was held that a condition like the present is illegal and invalid.

But without determining the question whether a stipulation as to residence such as this can be valid in any case-a question which it is not necessary for us now to decide-we think it sufficient to say that, having regard to the terms of the kabinnamah and also to the subsequent conduct of the parties, the stipulation relied upon is not in our opinion a sufficient answer to the plaintiffs claim for restitution of conjugal rights.

7. Then, as regards the second point, there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Mohammed, upon the question whether a woman can refuse herself to her husband after consummation upon the ground of non-payment of the prompt dower, the former answering the question in the affirmative and the two latter in the negative. (See Hedaya, Book II, Chap. 3, Grady''s Edition, page 54). But upon this point the practice of later jurisconsults has been to follow the two disciples, though they agree with Abu Hanifa upon the question of the wife''s right to refuse to accompany the husband on a journey.-Baillie''s Digest, 2nd Edition, page 125. And this view has been approved by a Full Bench of the Allahabad High Court in the case of Abdul Kadir v. Salima ILR All 149

8. That being the state of the authorities bearing upon the question, we think the learned District Judge was right in holding that the non-payment of prompt dower was not a sufficient plea in this case, the marriage having been consummated. The result is that this second appeal must be dismissed with costs.