

(1912) 10 BOM CK 0020

Bombay High Court

Case No: Second Appeal No. 164 of 1912

Bai Fatma

APPELLANT

Vs

Ali Mahomed Aiyab

RESPONDENT

Date of Decision: Oct. 1, 1912

Acts Referred:

- Contract Act, 1872 - Section 23

Citation: (1912) 14 BOMLR 1178 : 17 Ind. Cas. 946

Hon'ble Judges: Rao, J; Batchelor, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Batchelor, J.

We have before us in this appeal an agreement made between a Mahoraedan husband and his wife, providing for a certain maintenance to be given to the wife in the event of a future separation between them. There can be no doubt that that is the effect of the agreement, and that it contemplates not a present but a prospective separation. In fact the separation did not take place until the lapse of some weeks after the execution of the agreement.

2. The question is whether that agreement is good in law or is void as being opposed to public policy u/s 23 of the Contract Act. This question, arising also between Mahomedans, was considered by me in Meherally v. Sakerkhanoobai (1905) 7 Bom. L.R. 602 where to the best of my ability I have explained the reasons which led me to hold that such an agreement, which would admittedly be bad in English law, is bad also as between Mahomedan spouses. My learned brother informs me that he is in agreement with the decision in Meherally's case, and it is unnecessary therefore, to repeat the reasons which were there adduced.

3. Upon further consideration I remain of the same opinion, and I think it necessary to notice only the one additional argument which Mr. Shah brought forward in

support of the wife's case. That argument is that the rule as to the public public which obtains in England in regard to such agreements cannot properly be applied to similar agreements executed among people to whom polygamy is by their law allowed. It appears to me, however, that on analysis this argument cannot be sustained. The utmost extent to which, I think, it goes is that whereas as a result of a separation between English spouses there are two people married yet living separate, among Mahomedans, owing to the husband's power of mar-mine another wife, you would have in similar circumstances only one of the spouses, namely the wife, married yet living separate. It appears to me that this reduction in the extent of the evil which the rule of law aims at suppressing ought not to affect the general result. It is, as I understand it, as much the policy of the Mahomedan law as of the English law, that people who are married should live together and not apart; and if that is so it seems to me that there should be no difficulty in applying to Mahomedans the English Rule that any agreement such as this, which provides for, and therefore encourages, future separation between the spouses, must be pronounced void as being against public policy.

4. For these reasons I think that the appeal fails and must be dismissed with costs.

Rao, J.

5. I agree.