

IN THE HIGH COURT OF ALLAHABAD

Decided On: 21.01.1886

Appellants: **Abdul Kadir**

Vs.

Respondent: **Salima and Ors.**

Hon'ble Judges/Coram:

William Comer Petheram, Kt., C.J., Douglas Straight, Oldfield, Brodhurst and Tyrrell, JJ.

Case Note:

Suit for restitution of conjugal rights - Muhammadan Law--Dower--Plea of non-payment--Form of decree.

JUDGMENT

William Comer Petheram, Kt., C.J.

1. This case was argued before the Full Bench on the 26th March 1885, when the Judges constituting the Court were the same as now, except that Mr. Justice Mahmood was officiating for Mr. Justice Tirrell. Mr. Justice Mahmood has now left the Court, but we have had the advantage of his written opinion, which we adopt and deliver as the judgment of the Court. His opinion answers the question referred to the Full Bench in the affirmative, as follows:

2 . Syed Mahmood, J. -- The question raised by this reference is one not free from difficulty, arising partly from the manner in Which the subject has been dealt with in the text-books of Muhammadan law, and partly from the ratio decidendi adopted in some of the reported cases which I shall presently refer to and discuss. But before doing so, I consider it necessary to recapitulate the facts of this case, so far as they are required for the purposes of answering this reference.

3 (After stating the facts as stated above, the learned Judge continued as follows): The plaintiff has preferred this second appeal impugning the view of the Muhammadan law taken by the Lower Appellate Court, and the question raised by the contention of the parties is one the decision of which will affect the domestic family life of the Muhammadan community. It therefore falls essentially within the purview of Section 24 of the Bengal Civil Courts Act (VI of 1871), which binds us to adhere to the rules of Muhammadan law in determining such questions. The clause is a reproduction of Section 15, Bengal Regulation IV of 1793. Referring to that clause, the Lords of the Privy Council, in *Moonshee Buzloor Ruheem v. Shums-oon-nissa Begum* 11 I.A. 551 which was a suit for restitution of conjugal rights by a Muhammadan against his wife, made certain observations which furnish the guiding principle upon which such cases should be determined. After quoting certain passages from the judgment of the learned Judges of the Calcutta High Court, their Lordships went on to say: "The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Muhammadan law but according to what is termed equity and good conscience, i.e.,

according to that which the Judge may think the principles of natural justice require to be done in the particular case. Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India.... and they can conceive nothing more likely to give just alarm to the Muhammadan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be over-ridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Muhammadan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society, as for instance if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own senses of what is just and fair, without reference to positive law, would let the wife go free; and yet, the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband" (pp. 614-615).

4 . I have quoted the passage at such length, because it has come within my notice that vague and variable notions of the rule of "justice, equity and good conscience" are sometimes regarded as affecting the administration of native laws in such matters to a degree not justified or necessitated by the general municipal law applicable to all persons, irrespective of their race or religion: and applying the observations of the Lords of the Privy Council to the present case, I have no doubt that this case must be decided according to the rules of Muhammadan law, the order of the Court, whatever it maybe, being, of course, subject to such rules as the exigencies of the general municipal law may require.

5 . In this view of the case the reference cannot, in my opinion be satisfactorily answered without considering, first, the exact nature and effect of marriage under the Muhammadan law upon the contracting parties; secondly, the exact nature of the liability of the husband to pay the dower; thirdly, the matrimonial rights of the parties as to conjugal cohabitation; and fourthly, the rules of the general law as to the decree of Court in such cases.

6 . But, as preliminary to the consideration of these various points, I may observe that a suit for restitution of conjugal rights is a suit "of a civil nature," within the meaning of Section 11 of the Civil Procedure Code, and this view is supported by the terms of Articles 34 and 35, Schedule ii, Limitation Act (XV of 1877), and the provisions of Section 260 of the Code itself. To quote the language of the Privy Council in the case already referred to, "upon authority, then, as well as principle, their Lordships have no doubt that the Mussulman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Muhammadan law" (p, 610).

7 . What, then, are the rules of the Muhammadan law upon the first three points which I have already enumerated? I will deal with each of those points separately, and in doing so will refer to the important rulings which constitute the case law upon the subject.

8 . In dealing with the first point, I adopt the language employed in the Tagore Law Lectures (1873) in saying that "marriage among Muhammadans is not a sacrament, but purely a civil contract; and though it is solemnised generally with recitation of certain verses from the Kuran, yet the Muhammadan law does not positively prescribe

any service peculiar to the occasion. That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other, of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case" (p. 291). That this is an accurate summary of the Muhammadan law is shown by the best authorities, and Mr. Baillie, at page i of his Digest, relying upon the texts of the Kanz, the Kifayah, and the Inayah, has well summarized the law: 'Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age after hope of offspring has ceased, and even in the last or death illness. The pillars of marriage, as of other contracts, are Eejab-o-kubool, or declaration and acceptance. The first, speech, from whichever side it may proceed, is the declaration, and the other the acceptance.' The Hedaya lays down the same rule as to the constitution of the marriage contract, and Mr. Hamilton has rightly translated the original text (1): "Marriage is contracted--that is to say, is effected and legally confirmed--by means of declaration and consent, both expressed in the preterite". These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Muhammadan law. I have said enough as to the nature of the contract of marriage, and in describing its necessary legal effects I cannot do better than resort to the original text of the Fatawa-i-A lamgiri which Mr. Baillie has translated, in the form of paraphrase, at page 13 of his Digest, but which I shall translate here literally, adopting Mr. Baillie's phraseology as far as possible: "The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives and their rights, and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category (1)" (with reference to prohibitions of the marriage law).

9. That this conception of the mutual rights and obligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law and other European systems which are derived from that law cannot, in my opinion, be doubted; and even regarding the power of correction, the English law seems to resemble the Muhammadan, for even under the former "the old authorities say the husband may beat his wife;" and if in modern times the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily, stepped in to give to the wife personal security which the matrimonial law does not. To use the language of the Lords of the Privy Council in the case already cited: "The Muhammadan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following: 'There must be actual violence of such a

character as to endanger personal health or safety, or there must be a reasonable apprehension of it.' 'The Court,' as Lord Stowell said, in *Evans v. Evans* 'has never been driven off this ground'" (pp. 611-612).

10. Now the legal effects of marriage, as enumerated in the *Fatawa-i-Alamgiri*, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Muhammadan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife.

11. This leads me to the consideration of the second point, upon which the greatest stress has been laid in the argument at the bar. It was contended by the learned pleader for the respondent that, under the Muhammadan law, the wife's dower is regarded as nothing more or less than price for connubial intercourse, and that the right of cohabitation does not therefore accrue to the husband till he has paid the dower to the wife. The argument, so urged, renders it convenient to deal with the third point along with the second.

12. I have already shown that, under the Muhammadan law, the right of cohabitation comes into existence at the same time and by reason of the same incident of law as the right of dower. That the latter right may modify and affect the former cannot be doubted: how it affects and modifies it is the main subject of this reference. Dower, under the Muhammadan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the *Hedaya*, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower."--(Hamilton's *Hedaya* by Grady, p. 44). Even after the marriage the amount of dower may be increased by the husband during coverture (*Baillie's Digest*, p. 111); and indeed in this, as in some other respects, the dower of the Muhammadan law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text-books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law, and sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy. Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Muhammadan law. Under that law marriage does not make her property the property of the husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the Law-giver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has been imposed, and it may either be prompt, that is immediately payable upon demand, or deferred, that is payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when at the time of the marriage ceremony no specification in this respect is made, the whole dower is presumed to be prompt and due on demand Mirza Bedar Bukht

Mahomed Ali Bahadoor v. Mirza Khurram Bukht Yahya Ali Khan bahadoor 2 S.P.C.J. 823. The question when such dower becomes payable was discussed by the Lords of the Privy Council in *Mulleeka v. Jumeela* Ind. Ap. 135 : 11 B.L.R. 375 and in *Ranee Khajooroonissa v. Ranee Ryeesoona* 2 Ind. Ap. 235 : 5 B.L.R. 84 and in the former of these cases their Lordships approved the rule laid down by the Sadr Diwani Adalat of these provinces in *Nawab Buhadoor Jung Khan v. Uzeez Begum* N.W.P. S.D.A. Rep. 1843-46 p. 180 wherein the Court considered "the nature of the exigible dower to be that of a debt payable generally on demand after the date of the contract, which forms the basis of the obligations, and payable at any period during the life of the husband, on which that demand shall be actually made, and therefore until the demand be actually made and refused, the ground of an action at law cannot properly be said to have arisen." These rulings leave no doubt that although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture, and that it is only upon making such demand that it becomes payable in the sense of performance being rendered in fulfilment of an obligation.

13. The right of dower confers another right upon the Muhammadan wife, and the nature of this second right is described in the *Hedaya* in a passage on which the learned pleader for the respondent has relied for his contention. The passage is to be found in Grady's edition of Hamilton's *Hedaya*, at page 54; but as the translation is not sufficiently close, and is moreover interpolated with paraphrases, I translate the original text here literally, since much depends upon the exact meaning of the passage: "It is the wife's right that she may deny herself to her husband until she receive the dower, and she may prevent him from taking her away (that is, travelling with her), so that her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her from travelling or going out of his house and visiting her friends until he has paid the whole exigible dower, because the right of restraint is for securing fulfilment (of his right) to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment (himself); and if the whole dower is deferred, it is not for her to deny herself because of her having dropped her right by deferring it, as in sale. And in this matter Abu Yusuf holds the contrary opinion. And if the husband has retired with her, the same would be the answer according to Abu Hanifa: but the two disciples have said she has not the right to deny herself, and the difference of opinion subsists where there is retirement with her consent; but if she was forced or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our Doctors." (1)

14. Another passage to be found in the *Durrul Mukhtar* has also been cited by the learned pleader for the respondent, and I translate it here before considering the exact effect of these authorities upon the present case:

15. It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein and from journeying with her, even though after connubial intercourse and retirement to which she has consented, because all connubial intercourse has been contracted with her, and the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly.' (1)

16. Relying upon these passages, the learned pleader for the respondents contends that the right of cohabitation does not accrue to the husband at all until he has paid the prompt dower, and that, inasmuch as the plaintiff in the present case had not

paid the dower to his wife, defendant No. 2, her refusal to cohabit with him did not afford a cause of action for a suit for restitution of conjugal rights. In support of this contention certain reported cases have been cited, which I wish to notice here. In *Sheikh Abdool Shukkoar v. Raheem-oon-mssa* 1874 N.W.P. H.C. Rep. 94 it was held that a suit will not lie by a Muhammadan to enforce the return of his wife to his house, even after consummation with consent, until her prompt dower has been paid. The rule was followed to its fullest extent in *Wilayat Husain v. Allah Rakhi* I.L.R. All. 831 and in *Nasrat Husain v. Hamidan* I.L.R. All. 205 and in the former of these cases it was held that a Muhammadan cannot maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is prompt and has not been paid. In *Eidan v. Mazhar Husain* I.L.R. All. 483 where the suit prayed for restitution of conjugal rights, and the defendant in her written statement having claimed dower, the Lower Appellate Court, setting aside the decree of the first Court, decreed the claim conditional upon payment of prompt dower, this Court upheld the decree by a judgment which is silent upon the specific question whether the dower not having been paid before suit, the plaintiff had the right to come into Court with such a prayer. In *Nazir Khan v. Umrao* Weekly Notes. 1882 p. 96 however, Division Bench of this Court upheld the decree of the Lower Appellate Court, which had dismissed the suit in toto, reversing the decree of the Court of First Instance, which had passed a decree in favour of the plaintiff (husband) conditional upon his paying the prompt dower. The ruling is in full accord with the ratio decidendi adopted in the case of *Sheikh Abdool Shukkoar* N.W.P. H.C. Rep. 1874, p. 94, which appears to be the leading case upon the point under consideration, so far as this Court is concerned. No ruling of any other High Court was cited at the hearing in support of the respondents' contention except the case of *Jaun Beebee v. Sheikh Munshee Beparee* 3 W.R.C.R. 93 which does not appear to me to be decisive on either side of the contentions raised in the case. The ruling of this Court in *Sheikh Abdool Shukkoar v. Raheem-oon-nissa* 1874 N.W. P.H.C. Rep. 94 is, therefore, the only leading case upon the subject, but, with due deference, I am unable to agree in the rule there laid down.

17. . The texts cited by the learned pleader for the respondents undoubtedly show, what is a well-recognised rule of the Muhammadan law of marriage, that the marriage contract having been completed and its legal effects having been established, the right of claiming prompt dower comes into existence in favour of the wife, and that she can use such a claim as a means of obtaining payment of the dower and as a defence for resisting a claim for cohabitation on the part of the husband against her consent. And when I say this, I put the case in favour of the respondents in its strongest possible light, for even upon this question in cases where co-habitation has taken place, the conflict of authority is too great to render it an undoubted proposition of the Muhammadan law. The learned Judges in the case to which I have just referred seem to have appreciated this difficulty, but preferred to adopt the view of Imam Abu Hanifa in preference to the concurrent opinions of his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, notwithstanding the fact that a passage was cited to them from the *Durrul Mukhtar* in support of the view that "where on such a point there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail." Both Imam Abu Hanifa and Imam Muhammad were purely speculative jurisconsults, who spent their lives in extracting (sic) principles from the traditional sayings of the Prophet; but Qazi Abu Yusaf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the Khalifa Harun-ul-Eashid, the advantage of applying legal principles to the actual conditions of human life, and his dicta (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever

either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction. But before proceeding any further, I wish to quote a passage from the celebrated Fatawa Qazi Khan, a text-book as high in authority as the Durrul Mukhtar:

18. . "A wife, having surrendered herself to her husband before the fulfilment (i.e., payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower. She has this right in the opinion of Abu Hanifa; but Abu Yusaf and Imam Muhammad maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. And according to the opinion of Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey (1)." But the best summary of the law is to be found in the latest authoritative work on the Muhammadan law, the Fatawa-i-Alamgiri in a passage which Mr. Baillie has translated somewhat briefly at pages 124-25 of his celebrated Digest. The passage being the most complete exposition of the law upon the subject, I translate it here myself as closely as possible, from the original text itself:

19. . "In all places, when the husband has had connubial intercourse with her, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing fulfilment {i.e., payment) of her exigible dower, it is her right to do so according to Imam Abu Hanifa; but this is opposed to the opinions of his two disciples (Qazi Abu Yusaf and Imam Muhammad), and in like manner the husband cannot prevent her from going out or travelling or going on a voluntary pilgrimage, according to Abu Hanifa, except when she goes out in an indecent manner. As to her right to all this before she has surrendered herself (consummation), there is unanimity of opinion, as there is as to the rule when the husband has had connubial intercourse with her whilst she is a minor or has been forced or insane, in which cases her father might refuse to surrender her until the payment of her prompt dower--so in the Itabiyyah. And if the husband has had connubial intercourse with her or retired with her with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower according to the written engagement, or the prompt part of it according to the custom of our country. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Shaikh-ul-Imam, the jurisconsult, the pious Abul Qasim Assaffar, was accustomed to decide according to Abu Hanifa, so far as going on a journey is concerned; but in matter of refusing herself, he used to decide according to the opinions of the two disciples, and several of our learned doctors have approved of this distinction (1)."

20. . Having cited these various passages from text-books of the highest authority upon the Muhammadan law, I proceed to consider the exact effect they have upon the present case. And here I have to point out that in this case the Court of First Instance found that no demand for dower had been made by the wife (defendant No. 2) before the institution of the suit, and that she had already cohabited with her husband, the plaintiff, and there is no question that she had attained majority when she was married. These matters were not dealt with by the Lower Appellate Court, which decided the case upon the preliminary point, and they may be taken to be so for the purpose of this reference.

21. I have already said enough to show that the right of dower does not precede the right of cohabitation which the contract of marriage necessarily involves, but that the two rights come into existence simultaneously and by reason of the same incident of law. The right of the wife to claim maintenance from her husband arises in the same

manner as one of the legal effects of marriage, and to say that any of those effects are not simultaneously created by the contract of marriage amounts, in my opinion, to a violation of the fundamental notions of jurisprudence regarding correlative rights and obligations arising from one and the same perfected legal relation. Indeed, so far as the question now under consideration is concerned, the rules of Muhammadan law leave no doubt when that system of law is consulted as a whole and not upon isolated points. The fact of the marriage gives birth to the right of cohabitation not only in favour of the husband but also in favour of the wife, and to say that the payment of dower is a condition precedent to the vestiture of the right, is to hold that a relationship, of which the rights and obligations are essentially correlative, may come into existence at one time for one party and another time for the other party. If the payment of dower were a condition precedent to the initiation of the right of cohabitation, a Muhammadan wife, having quarrelled with her husband, could not sue him for cohabitation till she had in a previous litigation sued and, obtaining a decree, realized her dower, because, *ex hypothesi*, her right of cohabitation with her husband would be dependent for its coming into existence upon the payment of her dower. Yet such is the logical result of the argument pressed upon us on behalf of the respondents. Such, however, is not the rule of the Muhammadan law, and even the passages which have been cited on behalf of the respondents do not support any such proposition. The passage in the *Hedaya*, which I have closely translated from the original Arabic text, no doubt entitles the wife to resist the claim of the husband for cohabitation with her by pleading the non-payment of her prompt dower, but it proceeds essentially upon the assumption that his right to put forward such a claim is antecedent to the plea. In the passage itself he is called "the rightful person," and the impediment to the enforcement of his right of cohabitation with his wife is stated to be the non-payment of her prompt dower, a rule which, having been borrowed from the Muhammadan law of sale, is based simply upon the analogy of the lien which the vendor possesses upon the goods for payment of the price before delivery. The rule is simply analogical, and giving to it its fullest scope, it falls far short of maintaining the proposition upon which the argument for the respondents rests. The passage from the *Durrul Mukhtar*, following the analogy of sale even further, expressly lays down that the right of the wife to resist the husband's claim for cohabitation is intended to be for the purpose of realizing her prompt dower. The same is the effect of the passage which I have cited from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, and the rule, as stated by the Muhammadan jurists, bears, in the eye of jurisprudence, the strongest possible analogy to the ordinary rule of the law of sale, which has been best stated in Section 95 of the Indian Contract Act (IX of 1872), namely, that "unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid." The same is the principle upon which, in the law of sale, the right of stoppage in transitu is based, and the lien which the vendor has amounts to nothing more or less than the definition given by Grose, J., in *Hammonds v. Barclay* 2 East 227 that it is "a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied." But this lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place. I have followed up the analogy of sale so far, because nearly the whole argument of the learned pleader for the respondents proceeded upon the circumstance that in the passages, which he cited, marriage has been compared to sale, dower to the price, and surrender of the wife to her husband to delivery of goods in the law of sale.

22. But to return to the passages which I have quoted from the *Fatawa Qazi Khan* and the *Fatawa Alamgiri*, it is apparent that the sole object of the rule which entitles

the wife to resist cohabitation is to enable her to secure payment of her prompt dower. And it is equally apparent from those passages that the opinion of Imam Abu Htnifa is contradicted, not only by his two eminent disciples, Qazi Abu Yusaf and Imam Muhammad, but also by Shaikh Assaffar so far as the question of cohabitation is concerned. Imam Abu Hanifa and his two disciples are known in the Hanifa school of Muhammadan law as the three Masters," and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the third. Now, bearing this in mind, it is clear that the two disciples of Imam Abu Hanifa, regarding the surrender of the wife to her husband as bearing analogy to delivery of goods in sale, held that the lien of the wife for her dower, as a plea for resisting cohabitation, ceased to exist after consummation. According to the ordinary rule of interpreting Muhammadan law, I adopt the opinion of the two disciples as representing the majority of "the three Masters," and hold that, after consummation of marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower "in a separate action.

23. . But the rule enunciated by me need not be applied in its fullest extent to the present case, because here, in the first place, it has not been found that the wife ever demanded her dower before the suit was filed, or that she declined to cohabit with her husband the plaintiff upon the ground that her dower had not been paid. She relied upon allegations of divorce and cruelty, both of which were found by the Court of First Instance to be untrue, and upon these findings I hold that she had no defence to the action. The plaintiff, as I have already shown, acquired by the very fact of the marriage the right of cohabitation; he was not bound to pay the dower before it was demanded, and upon the findings of the first Court, the first intimation which he had of such demand was the written defence of his wife (defendant No. 2) in the course of this unfortunate litigation. And upon intimation of such a demand, he actually brought the money into Court and deposited it for payment to his wife, the defendant No. 2, as her dower. Under such circumstances, the view of the learned District Judge, which follows the rulings to which he has referred, simply amounts to saying that the plaintiff must institute another suit like the present for enforcing the same remedy. I have already said that the present suit, bearing in mind the conjugal rights created by the Muhammadan law, was not premature, and the view of the learned District Judge can only have the effect of circuitry of action in contravention of the maxim that it is to the benefit of the public that there should be an end to litigation.

24. This leads me to the consideration of the fourth point formulated by me at the outset, namely, the general law as to decrees in such cases. The question involves mixed considerations of substantive law and procedure, and the answer to it is fully furnished by the dicta of the Lords of the Privy Council in the case of Munshee Buzloor Ruheem v. Shums-oon-nissa Begum 11 Moo. I.A. 551 to which reference has already been made. After giving a brief sketch of the matrimonial law of the Muhammadans, Their Lordships went on to say: "The Muhammadan wife, as has been shown above, has rights which the Christian--or at least the English--wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Qazi... Enough has been said to show that, in Their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Muhammadan law, as well as strict proof of the facts to which it

is to be applied (p. 612)."

25. Abiding by this dictum, I have carefully considered the Muhammadan law as I have already stated, whilst the facts of the case must, for the purposes of this reference, be taken to be those found by the Court of First Instance. And upon this state of things I am of opinion that the decree passed by the Court of First Instance was right and proper. The question as to the form of decree in such cases and the manner in which it may be executed was discussed in a very learned judgment by Mabkby, J., in *Gatha Ram Mistree v. Moohita Kochin Atteah Doomoonee* 14 B.L.R. 298 in which that learned Judge, after briefly reviewing the laws of other civilized countries, came to the conclusion that the Ecclesiastical Law of England was the only system which justified the view that "a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment;" but the learned Judge declined to follow that law in Indian cases, and held that the provisions of Section 200 of the old Civil Procedure Code (Act VIII of 1859) were not applicable to decrees for restitution of conjugal rights. The Legislature has, however, stepped in to remove doubts upon this point, and Sections 259 and 260 leave no doubt as to the manner in which a decree for recovery of a wife or for restitution of conjugal rights can be enforced under the present Code. The case before Mr. Justice MARKBY was, however, one between Hindus, and all that he said in that case would not necessarily apply to a case between Muhammadans. Nor need the English law upon the subject be consulted, though I may observe that, judging by the ruling of Mr. Justice COLEBIDGE in *In re Cochrane* 8 Dowling's P.C. 630 : 4 Jur. 534, the rule of English law as to the husband's general power over the wife's personal liberty goes as far as any civilized law can go in the direction of subjecting the wife to the control of the husband. An account of that case is given by Mr. Macqueen in his treatise on the Rights and Liabilities of Husband and Wife, and it appears that the order of the Court in that case was very peremptory--"Let her be restored to her husband." The rules of our law, however, necessitate no such course, and in passing decrees in suits for restitution of conjugal rights among Muhammadans, the dictum of the Privy Council already quoted furnishes the guiding principle. Courts of Justice in India, in the exercise of their mixed jurisdiction as Courts of Equity and Law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case, upon the principles which have been so well stated by Mr. Justice STORY in his celebrated work on Equity Jurisprudence, 11th ed., Sections 27 and 28. So I understand the principle upon which the observations of the Lords of the Privy Council in the case to which I have so often referred were based, and I may with advantage cite another passage from that judgment: It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Muhammadan law (pp. 615-616),"

26. In the case in which Their Lordships made these various observations the question of non-payment of dower as a defence to the action did not arise, nor do the facts of the case as found in the report show whether the dower was prompt or deferred, whether it had been demanded or not before institution of the suit, and of course there was nothing in the way of deposit by the husband of the amount of

dower during the course of the trial in the Court of First Instance. These are the distinguishing features of this case; and if the distinction has any tendency to alter the principle, such tendency is entirely in favour of the plaintiff-appellant's case.

27. To return once more to the case of Sheikh Abdool Shukkoar v. Baheem-oon-nissa N.W. P.H.C. Rep. 1874 p. 94 which is the leading case upon the subject, I have to observe, with profound deference, that the ratio decidendi adopted in that case seems to me to proceed upon a misconception of the rule of Muhammadan law as to the exact time when the right of mutual cohabitation vests in the married parties, and also as to the exact nature of the husband's liability to payment of dower, and the exact scope of the right which a Muhammadan wife possesses to plead non-payment of dower in defence of a suit by her husband for restitution of conjugal rights. It is one thing to say that such a defence may be set up under certain conditions: it is a totally different thing to say that "until the dower was paid no cause of action could accrue to the plaintiff." The payment of dower not being a condition precedent to the vesting of the right of cohabitation, a suit for restitution of conjugal rights, whether by the husband or by the wife, would be maintainable upon refusal by the other to cohabit with him or her; and in the case of a suit by the husband, the defence of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be prompt. Such was actually the form of the decree which was upheld by this Court in Eidan v. Mazhur Husain I.L.R. All. 483 and a decree to the opposite effect was approved by another Bench of this Court in Nazir Khan v. Umrao Weekly Notes. 1882 p. 96. Defences which do not go to the root of the action, but only operate in modification of the decree, are well known to our Courts, and the principles upon which they are based are recognised by Courts of Equity both in England and in America under the general category of compensation or lien when pleaded by the defendant in resistance or modification of the plaintiff's claim. I have already said enough, with reference to the argument of the learned pleader for the respondents, to introduce an analogical comparison between the contract of sale and the contract of marriage under the Muhammadan law, and between the claim of a Muhammadan wife for her dower and a lien as understood in the law of sale. 'A lien is not in strictness either a jus in re or a jus ad rem, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged.... It is often created and sustained in equity where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money.'--(Story Eq. Jur. 11th ed., Section 506). So that, pushing the analogy of the law of sale to its fullest extent, the right of a Muhammadan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Muhammadan law which would render such lien capable of being pleaded so as to defeat altogether the suit for restitution of conjugal rights.

28. There is one more consideration which I wish to add to the reasons which I have already given at such length in support of my view. The Muhammadan law of marriage recognizes nothing except right, in its legal sense, as the basis of legal relations and of those consequences which flow from them. And if the husband did not before payment of dower possess the right of cohabitation with his wife, it would follow as a necessary consequence in Muhammadan jurisprudence that, where the dower is prompt and cohabitation has taken place before the payment of such dower, the issue of such cohabitation would be illegitimate. It would be easy to show that such would be the logical consequence in Muhammadan law of the reasoning pressed on behalf of the respondents; but I need not go further in considering this matter, as

I have referred to it only because in the course of the argument it was said that, before payment of prompt dower, the cohabitation of a Muhammadan wife with her husband was simply a matter of concession and not of right as understood in that law.

29. For these reasons I would answer the question referred to the Full Bench in the affirmative, leaving it to the Bench that referred the case to deal with its other aspects. And I may add that I have considered it my duty to go so fully into this question out of respect for the rulings which were cited on behalf of the respondents, but in which I have been unable to concur, and also because such questions, which unusually arise only among the poorer classes of the Muhammadan population, seldom come up to this Court for adjudication, but of course affect domestic relations of the Muhammadan community at large.
