

Allahabad High Court

Mt. Anis Begam And Ors. vs Malik Muhammad Istafa Wali Khan on 25 April, 1933

Equivalent citations: AIR 1933 All 634

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JUDGMENT Sulaiman, C.J.

1. This is a defendants' appeal arising out of a suit for restitution of conjugal rights. The plaintiff alleged that the parties were married in 1903 and defendant 1 was sent to the plaintiff's house in October 1926, and began to live with him as his wife and gave birth to a daughter; but that about two years ago the other defendants took her away from the plaintiff's house to their own house for a week under the pretext of attending a ceremony; that, when after the expiry of the week, the plaintiff, went to bring his wife, the defendants made excuses and ultimately refused to send her, although they sent the plaintiff's daughter to the plaintiff's house. He accordingly prayed that the defendant should be ordered to come to the plaintiff's house and that a perpetual injunction should be granted against the other defendants from interfering with defendant is returning to the plaintiff's house.

2. Defendant 1 in her written statement asserted that the plaintiff became immoral and contracted illicit connection with one Mt. Hibia who was kept in the same house and at her instigation the plaintiff began to ill treat the defendant and ultimately turned her out of his house. She did not admit the paragraph containing the allegation that the daughter was sent to the plaintiff's house afterwards. She pleaded that when the plaintiff neglected her and did not pay her dower debt, she was obliged to file. a suit to recover Rs. 15,000 as her prompt dower and that the plaintiff's suit was filed by way of reply to her suit. She pleaded that so long as the plaintiff does not pay the prompt dower due to the defendant, he is not competent to maintain the suit, and she also urged that the suit should be dismissed on the ground of the plaintiff's cruel acts in illtreating her and in contracting illicit connection with Mt. Hibia, and that the defendant's refusal to go to his house is through fear of life and honour. She admitted that she was staying away from the plaintiff's house at her own instance and no other defendant is exercising any influence over her. The other defendants denied that they were in any way preventing the defendant from going to the plaintiff's house. The learned Subordinate Judge framed four issues: (1) As to whether the plaintiff had been guilty of cruelty towards the defendant? (2) Whether any prompt dower was due to the defendant, and if so, can the plaintiff get a decree without paying it? (3) Whether the plaintiff has any cause of action against the other defendants? and (4) As to what relief was the plaintiff entitled and against whom? He decided all the issues in favour of the plaintiff and against the defendants and decreed the claim.

3. All the defendants have accordingly appealed. It may be here stated that the suit for dower brought by the defendant against the plaintiff succeeded in the Court below and the plaintiff, in spite of the contest, obtained a decree for Rs. 15,000 which decree has become final. Thus neither the amount of the dower debt due to the defendant nor the fact that it has not been paid is now in question.

4. The learned. Subordinate Judge, relying very properly on certain reported rulings of this Court, has held that after the consummation of her marriage, the defendant's right to resist the claim for restitution of conjugal rights was destroyed. Finding that legal cruelty was not established, he has decreed the suit. He does not appear to have considered whether apart from legal cruelty there are any circumstances justifying the passing of a

decree conditional on the payment of the dower debt. I propose to consider first of all the question whether under the Mahomedan law the right of a wife to insist on the payment of the prompt portion of her dower subsists even after consummation of marriage. The leading case of this Court is undoubtedly that of Abdul Kadir v. Salima (1886) 8 All 149 . The judgment of Mahmood, J., was adopted by the Full Bench. It has since been regarded as a detailed survey of the Mahomedan law with: particular reference to the points noted on p.154, viz:

(1) the exact nature and effect of marriage upon the contracting parties ; (2) the exact nature of the liability of the husband to pay the dower ; (3) the matrimonial rights of the parties as to conjugal cohabitation ; and (4) the rules of general law as to the decree of Court in such cases,

5 . But the only point that had been referred to the Full Bench for an answer was "whether under the circumstances of the case the plaintiff had the right to maintain the suit." In that case the dower debt had not been paid before the suit for restitution of conjugal rights though the marriage had been consummated, but the amount was tendered in the trial Court. That Court held that the plaintiff was entitled to succeed in his claim for bringing his wife to his house. On appeal, the District Judge accepted the defendant's contention that the payment into Court after the institution of the suit was insufficient because the husband had no cause of action, when he brought the suit, and it was on this ground that he dismissed the suit in toto. The main point which was for consideration before the Full Bench was therefore whether the non-payment of the dower before the institution of the suit was fatal to the suit because without such payment there was no cause of action for suing for restitution of conjugal rights. The opinion of the Court was that it is not correct to say that there was no cause of action and that non-payment of the dower before the suit was not a fatal defect. That opinion is binding upon us. I am not aware that this view has ever been questioned in any other Court. But although we are bound to respect the expression of opinion on the other points mentioned in the judgment of that learned Judge, some of the observations made by him are obviously in the nature of obiter dicta which he had to make when surveying the whole law. It is therefore not possible for one to hold oneself bound by all the observations that have been made or all the opinions expressed in connection with all the four fields of inquiry enumerated by the learned Judge at the outset. Nor would it be convenient to refer to a Full Bench of five or more Judges whenever any observation made therein is called into question. Much less would such a course be necessary if the observation of the learned Judge is followed, though the reasoning on which it is based is not accepted. Now at p. 166, it was observed:

I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two (out of the three Masters, namely, Imam Abu Hanifa and his two disciples) will prevail against the opinion of the third.

6. A similar observation was made by the same learned Judge in *Agha Ali Khan v. Altai Hasan Khan* (1892) 14 All 429, (at p.448), I do not think that the learned Judge meant to lay down any inflexible rule which would have universal application. Presumably, what he meant was that ordinarily the opinion of the majority has been accepted. But it would be easy to cite instances in which the opinion of Imam Abu Hanifa alone has prevailed, particularly in matters of prayer and ritual, or of Imam Yuisuf in matters of worldly affairs, or of Imam Muhammad in matters of inheritance. There appears to be no such invariable rule which would make the decision depend on the majority of votes only. Mr. Ameer Ali, in his *Mahomedan Law*, Vol.2, Ch.12,S.3,p. 460, has pointed out that there is no such fixed rule as over and over again the opinion of only one has been adopted for fatwas and decrees. In Vol.1 at pp. 16 and 17, he has quoted Himidia, Jamaaul

Fuslain and Kazi Khan for the proposition that the joint opinion of the two disciples can be preferred to that of Imam Abu Hanifa if the difference is due to a change of circumstances and alteration in the conditions of mankind.

7. The learned advocate for the appellants has adopted as part of his argument a well-known judgment of 1891 delivered by Moulvi Sami Ullah, District Judge of Rai Bareilly, in which original authorities were quoted to challenge the opinion of Mahmud, J., both as regards this rule of preference and also the distinction of the right of the wife whose prompt dower remains unpaid to resist restitution of conjugal, rights even after consummation. This judgment has been referred to by Mr. Ameer Ali as well as Sir Roland Wilson in their learned treatises. These authorities were subsequently incorporated in the judgment of an Oudh Bench in *Wajid Ali Khan v. Sakhawat Ali Khan* (1912) 15 IC 127. On pp. 144-7 of the Oudh Cases some of the texts have been reproduced to show that even in the case of a difference, the opinion of Imam Abu Hanifa is to be preferred. Of course, there is no such general rule either. As a matter of fact, there does not appear to be any fixed rule: see *Irfan Ali v. Bhagwant Kishore* A.I.R. 1929 All. 180, at p.187. Different doctors have followed different rules of preference. Those, who were more orthodox, and generally speaking, more ancient, in many cases preferred the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. There are later text-book writers who have preferred the opinion of two as against that of one. But such rules are helpful only when there is no clear consensus.

8. In the early days when new points arose and the decision had to depend on an inference drawn from other fat-was or from analogy, it was open to the learned doctors to prefer one opinion over the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not law-givers but merely interpreters of the law. But if one finds a question well threshed out and in later centuries a particular interpretation adopted by the leading doctors and text-book writers, it would not be proper for us in the 20th century to go behind such a consensus of opinion and decide a point contrary to such opinion on the ground that the majority of the three Imams favoured that view in the earlier centuries. Such a course of action would be unsettle the Mahomedan Law. Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. It would be too late now to resort to such rules in support of a new conception as to how a point ought to have been decided though contrary to accepted opinion. Moulvi Abdul Hai of Lucknow, the most renowned and learned Hanafi jurist of his time, has in his introduction of *Sharah Wiqayah* dealt with this matter at considerable length.

9. A good deal of that matter is to be found in *Raddul Mutator* summarised in Sir Abdur Rahim's *Mahomedan Jurisprudence* at p.187-8, which can be conveniently referred to. He has rightly pointed out that there is no accepted rule that when there is a difference of opinion amongst the founders and schools and their disciples, opinion or ruling of a lawyer ought to be given according to the opinion of Abu Hanifa, even if all his disciples differ from him; and in the absence of any dictum of his in accordance with the opinion of Abu Yusuf, then Muhammad, then Zafar and then Hasan Ibn Ziad. If the authorities were examined it will generally be found that in some matters the solitary view of Abu Hanifa has been preferred whereas in other matters the view of Abu Yusuf, Muhammad or Zafar has been followed. According to Alhawi the correct rule was that in cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed:

But according to the modern interpretation of Taqlid as above stated a lawyer of the present day should, in such cases, accept the view which according to the jurists of the fourth, fifth and sixth degrees is correct and has been acted upon. But if in any case the latter doctors have not adopted in clear language any one of the conflicting opinions, the law is to be ascertained by proceeding on the view which is most in accord with the habits and affairs of men : (p. 188).

10. (After referring to the Ruddul-Mukhtar, Vol.1, p.73, the judgment proceeded). It would follow that if jurists of the first rank have differed among themselves but the jurists of the second, third and fourth ranks have followed the opinion of one of them, it would not be proper in later times to go behind the opinion of these jurists and prefer the opinion of the majority of the jurists of the first rank which has been discarded by those of subsequent periods. The proper course undoubtedly is to abide by the opinions which have been adhered to in the commentaries which are of recognised authority in India and not to decide the point on any general rule of interpretation based on the majority of votes of the ancient jurists. Their Lordships of the Privy Council in the case of Agha Mohammad Jaffar Bindanim v. Koolsom Bee-bee (1898) 25 Cal 9, at p.18, remarked:

It would be wrong for the Courts on a point of this nature (the right of the widow to inherit) to attempt to put their own construction on the Quran in opposition to the express ruling of commentators of such great antiquity and authority as the Hedaya and the fatwai Alamgiri.

11. It is the practice of the great commentators to state the difference of opinion which at one time prevailed on a particular point and then to add on which view is the fatwa or which is the more correct and stronger view, or to use other expressions of like import. But where the learned commentators content themselves with a mere statement of the conflict of opinion without expressing any definite opinion of their own in favour of one or the other view and without saying anything about the consensus of opinion or the fatwa being in accordance with a particular view, they imply that the conflict of opinion was still continuing and that no unanimity or general concurrence had still then been obtained. This would have the effect of leaving the question open. The qazi would then be free to choose whichever of the two opinions appears to him to be the sounder and better adapted to the conditions and needs of the times. (After referring to the original authorities, viz., the ancient texts, commentaries and books which prefer the opinion of the disciples, the judgment proceeded). This being the state of the authorities the question is whether the obiter dictum of Mahmood, J., which has been accepted by so many other High Courts is to be followed.
12. Had I been sitting as a Judge in the times of the East India Company, I might then possibly have been inclined to prefer the opinion of Imam Abu Hanifa, because, although a conflict ensued afterwards no eminent commentator expressly dissented from that view. But if another Judge had been prepared to take the contrary view, I would not have been in a position to say that he was necessarily wrong. The two considerations which might well justify the acceptance of the view of the disciples in India, are: First, that owing to the prevalent practice, the amounts of dower fixed in this country are often unduly high and beyond the means of the husband. To allow to the wife the right of refusing to live with, her husband, even after consummation, so long as any part of the prompt dower remains unpaid would, in many cases, where the husband and wife quarrel, amount to an absolute option of the wife to refuse to live with, her husband and yet demand a maintenance allowance. This would dislocate domestic life. Secondly, as will be shown hereinafter, under the Anglo-Mahomedan Law as administered in this country a suit for restitution of conjugal rights, though brought for the enforcement of a right under the Mahomedan Law, is in the nature

of a suit for specific performance, and there is accordingly a certain amount of discretion in the Courts of justice which can impose a condition of previous payment of the dower debt, or, at any rate, a portion of it, in the decree. And now the position is still stronger. For nearly 40 years the observation of Mahmood, J., even though an obiter dictum, has been accepted in this Court, and indeed, it has been followed by all the other High Courts excepting Oudh. *Kunhi v. Moidin* (1888) 11 Mad 327, *Hamidunnisa Bibi v. Zohiruddin Sheikh* (1890) 17 Cal 670., *Bai Hansa v. Abdulla Mustafa* (1906) 30 Bom 122, *Ashi Khatoon v. Abdul Hakim Maistry* A.I.R. 1929 Rangoon 189, and *Mt. Saleh Bibi v. Rafiuddin* (1889) 164 PR 1889. In the case of *Abdul Karim Khan v. Mt. Chhoti* (1906) 3 ALJ 432, a learned Judge of this Court followed an earlier decision in the case of *Wilayat Husain v. Allah Rakhi* (1878) 2 All 831., which had been overruled by the Full Bench. But apparently the attention of the learned Judge was not drawn to the observation in the Full Bench case as there is no reference to it in his judgment. On the other hand, a Division Bench of this Court in the case of *Hijaban v. Sher Khan* AIR 1921 All 15, adhered to the view expressed in *Abdul Kadir's* case (1886) 8 All 149. Numerous cases must have been decided, though not reported, on the assumption that the view of the disciples is to be preferred. When the law has been interpreted in a particular way, it may well be that in some cases the law governing the rights of the parties to a marriage was implied as a part of the terms of the contract of marriage.

13. No doubt, in Oudh, a Bench of that Court has taken a contrary view, but the Oudh Court was not bound to follow the opinion expressed by the Full Bench of this Court; and further, in Oudh., the difficulty of a wife insisting on the previous payment of an unreasonably high dower, which is beyond the means of her husband, does not at all arise, for under Section 5, Oudh Laws Act, the Courts of Oudh have power to reduce the amount of the dower debt if it is "excessive with reference to the means of her husband," though in fact agreed upon. It also appears that the authorities placed before the Oudh. Court were those quoted in the judgment of Maulvi Sami Ullah and were all one way. The authorities in support of the contrary view were apparently not cited before them. Nor is it clear that the effect of the point having been left open in the later commentaries was put prominently before the learned Judges. It is true that in the other High Courts the question has not been re-examined in the light of the original authorities, but the observation of Mahmood, J., has been simply followed. It is also true that a Bench of the Calcutta High Court in *Hamidunnisa Bibi's* case (1890) 17 Cal. 670 [one member of which, Petheram, C.J., had been a party to the Full Bench of Allahabad in *Abdul Qadir's* case (1886) 8 All 149] thought that according to the *Fatawai Alamgiri* the practice of the later jurists was to follow the two disciples; whereas in point of fact, the *Fatawal Alamgiri* also in one sense leaves the matter open. But the fact remains that throughout India, excluding Oudh, the same view has prevailed for several decades. I therefore consider that it would now be dangerous to go back upon this course of decisions and not to adhere to the well recognised principle of *stare decisis*, particularly when at the time when Mahmood, J., made his observation it was to some extent open to him to prefer the view of the disciples. In this view of the matter, I hold that the rule laid down in *Abdul Qadir's* case (1886) 8 All 149, though an obiter dictum, must be followed even though the analogy of sale may not be accepted. It may be restated as follows:
14. The absolute right of a wife to insist on the payment of the whole of the prompt portion of her dower before restitution of conjugal rights (except when the husband wants to take her out on a journey to another town) is lost after the consummation of the marriage, unless the consummation took place when she was a minor or of insane mind so as to be incapable of giving consent.

15. Just as we respect the observation made as regards the loss of the right of the wife on consummation, even though it be an obiter dictum, we must, in the same way, respect the other observation, though an equal obiter dictum made in Abdul Qadir's case (1886) 8 All 149 that:

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:

16. Mahmood, J., undoubtedly held that the loss of the absolute right of the wife to resist the claim for restitution of conjugal rights did not prevent the Court from making the previous payment of the dower debt a condition precedent to the execution of the decree for restitution of conjugal rights. At p. 157 it was observed that:

the right of dower may modify and affect the right of cohabitation cannot be doubted ; how it affects and modifies it is the main subject of this reference.

17. The observation at p. 160 shows that the contention for the wife was that the right of co-habitation does not accrue to the husband at all until he has paid the prompt dower. The observation at p.169 has already been quoted. At p.170 it was stated:

It is one thing to say that such a defence may be set up under a certain condition ; 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.

18. Similarly at p.71, the conclusion was :

So that pushing the analogy of the law of sale to its fullest extent, the right of a Mahomedan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Mahomedan law which would render such lien capable of being pleaded so as to defeat altogether the suit for restitution of conjugal rights.

19. It is thus clear that the learned Judge was prepared to make the decree for restitution of conjugal rights conditional upon the payment of the dower debt. This, for all practical purposes, would amount to upholding the right of the widow to claim her dower, even though consummation of marriage has taken place, the only difference being that the power of the Court to impose such terms is held to be based on the general rules of justice, equity and good conscience and not on the strict principles of the Mahomedan Law as is now interpreted. This view was accepted by the Punjab Chief Court in the case of Mt. Saleh Bibi v. Rafi Uddin (1889) 164 PR 1889, and the passing of a conditional decree was approved by a Bench of this Court in the case of Hijaban v. Ali Sher Khan AIR 1921 All 15. No doubt no conditional decree was passed in the case of Kunhi v. Moidin (1888) 11 Mad. 327 nor in the case of Hamidunnissa Bibi v. Zohiruddin Sheikh (1890) 17 Cal. 670. But the point does not appear to have been raised in those cases. Wazir Jahan Begum v. Haidar Raza Khan (1907) 10 OC 11., was apparently a Shia case. It is argued on behalf of the respondent that the

husband has a substantive right to claim restitution of conjugal rights after consummation, even though the dower has not been paid. It is said that this right is not a matter of mere procedure but is a substantive right under the Mahomedan Law which the Court has no discretion to refuse. Their Lordships of the Privy Council in the case of *Munshee Buzloor Raheem v. Shamsunnissa Begum* (1866) 11 I A 551 (P C), (at p.622) observed that a suit for restitution of conjugal rights, though in the nature of a suit for specific performance is in reality a suit to enforce a right under the Mahomedan Law and the Courts should have regard to the principles of Mahomedan Law. The observation of their Lordships was directed to emphasising the point that Courts should not exercise their discretion in complete supersession of the Mahomedan Law, but that in exercise of their discretion they should refer to that law. But the principle was fully recognised that in passing a decree for the restitution of conjugal rights the Court has power to take into account all the circumstances of the case and impose terms which it considers to be fair and reasonable. The rule may therefore be re-stated as follows:

There is no absolute right in a husband to claim restitution of con-jugal rights against his wife unconditionally ; the Courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case.

20. Applying these principles to the case before us I would hold that the condition of the previous payment of the dower debt should be imposed on the decree for restitution of conjugal rights if passed. My reasons are as follows: (1) There are original texts of unquestionable authority where such a condition has been directed. (2) The amount of the dower debt is not excessive, and there is no suggestion that it is in any way beyond the means of the plaintiff who claims to be related to the late Nawab of Rampur. (3) The defendant had contested the plaintiff's claim for dower, and in spite of her contest the plaintiff obtained a decree which has now become final. (4) The present suit was instituted after the institution of the suit for dower, and if the defendant is compelled to go to live in the plaintiff's house she may find it very difficult to realise her decree for dower which would in that event become futile. (5) The plaintiff had remained quiet and did not sue for restitution of conjugal rights till the claim for dower had been made in Court and there is ground for apprehending that the suit is by way of nullifying the decree for dower. As a matter of fact, the decree for dower was attached by the plaintiff in execution of his decree for restitution of conjugal rights when the defendant refused to obey the decree. (6) The conduct of the plaintiff as disclosed by the finding on the next point makes it fair and just that he should be called upon to pay the dower debt before he has possession of his wife. The next question is whether the defendant succeeded in establishing legal cruelty which would disentitle the plaintiff from claiming restitution of conjugal rights. That question is one of fact and depends mainly on oral evidence.
21. The learned Subordinate Judge who heard the witnesses has recorded a clear finding against the defendant. It has to be conceded that the Subordinate Judge was in a better position to judge whether the statements of the witnesses were credible, because he was in a position to mark their demeanour which we, who have to go by the written evidence only, are not. I would accordingly be most reluctant to take a view contrary to that held by the Subordinate Judge, but as it is not only a mere question of a right to property but of compelling the defendant to go and live with her husband against her will, when there may possibly be an apprehension of danger to her life or person, it is our duty to examine the evidence afresh, and satisfy ourselves that the finding of the Court below is correct. The points to which the learned Subordinate Judge has not attached due weight or which he has altogether overlooked are the following: (a) When the question

is of the husband's cruel, treatment towards his wife, evidence of a large number of witnesses cannot be expected to be forthcoming, and much will depend on the statement of the wife corroborated by the circumstantial evidence, particularly when the cruelty is alleged to have taken place inside the house of her husband. (b) In the written statement the defendant had made specific allegations as regards the keeping of Mt. Hibia as a mistress inside the house and her own illtreatment by her husband. This gave sufficient opportunity to the husband to produce rebutting evidence. (c) Although the learned Judge has held that the defendant has failed to prove any legal cruelty against her; the positive finding recorded by him only amounts to. saying that she has tried to exaggerate her allegations because her dower was not paid. (After discussing the evidence and the circumstances of the case, the judgment proceeded). I have no hesitation in holding that the husband misbehaved in this way: that he kept a mistress in his house along with his wife and caused mental pain to her in consequence and that he must have, when quarrels ensued, treated his wife cruelly; and that as the quarrels were not and could not be patched up, so long as Mt. Hibia remained in the house, defendant 1 had reasonable apprehension of injury to her person. I think that the wife is fully justified in: refusing to go and live with her husband so long as there is no undertaking not to keep any mistress in his house; she can go to live with him only if a separate house is given to her. Further I think that in order to protect her safety it is necessary that she should have the option of keeping one female servant and one male servant, according to her choice, in the house, Mr. Khwaja on behalf of the husband agrees to the last mentioned conditions. (After considering the evidence against defendants, 2 to 5 and holding it to be nil, the judgment concluded). I would accordingly allow the appeal, in part, and impose conditions on the decree for the restitution of conjugal rights.

Thom, J.

22. I concur.