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with examples. We think that the contention urged by the appellant is opposed to the ruling of the Privy Council.

This does not preclude a litigant from relying on the provisos to the section; but there is no case made here which would enable us to say that any of them are applicable to the circumstances of this case.

We must, therefore, confirm the decree with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905. *August 4.*

BAI HANSA (ORIGINAL DEFENDANT), APPELLANT, *v.* ABDULLA MUSTAFFA (ORIGINAL PLAINTIFF), RESPONDENT.*

Mahomedan Law—Suit for restitution of conjugal rights—Non-payment of dower—Consummation of marriage.

To a husband's suit for restitution of conjugal rights, the wife pleaded non-payment of dower. To this the husband pleaded consummation of marriage.

Held, that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights.

Abdul Kadir v. *Salima*(1), *Kunhi* v. *Moidin*(2), and *Hamidunnessa Bibi* v. *Zohiruddin Sheik*(3), followed.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, confirming the decree of S. B. Upasani, Subordinate Judge of Ankleshvar.

The plaintiff sued the first defendant for restitution of conjugal rights alleging that she was married to him about twelve years before suit and had since then been living with him and had issue by him, that about three years before suit she went to her father's house on business and was not allowed to return to him, that he gave a written notice on the 25th December 1900 to her father asking that she might be sent back and that notice

* Second appeal No. 124 of 1905.

(1) (1886) 8 All. 149. (2) (1888) 11 Mad. 327.

(3) (1890) 17 Cal. 670.

not being complied with the plaintiff had brought the present suit. He prayed that defendant 1 might be ordered to return to him and live with him as his wife.

Defendant 1 answered that she had been living away from the plaintiff for nine or ten years, that before that she lived with him but he ill-treated her and drove her out from his house and she had to go to stay with her father, defendant 2, that on the intercession of common friends she again went to live with the plaintiff, but about ten years before suit he again assaulted her and pursued her to her father's house and that finding it not safe to live with the plaintiff, she had since then continued to live with her father. She further stated that she was married to the plaintiff about seventeen years before suit, and at the time of the marriage her *meher* (dower) was settled at Rs. 127-8-0, but the said *meher* was not paid to her in spite of her repeated demands for the same and that until it was paid to her the plaintiff's suit for restitution of conjugal rights should not be entertained.

Defendant 2, the father of defendant 1, was joined as a defendant on the ground that he had prevented the first defendant from returning to the plaintiff; but as the said defendant died during the pendency of the suit and as no steps were taken to continue the suit as against his heirs, the suit abated so far as he was concerned.

The Subordinate Judge found that it was not proved that the defendant was ill-treated or driven from his house by the plaintiff, that no misconduct or ill-treatment sufficient to justify the defendant's refusal to stay with the plaintiff was proved, that the non-payment of the *meher* did not justify the defendant's refusal to stay with the plaintiff and that the defendant might be ordered to go and live with the plaintiff as his wife. He, therefore, passed a decree allowing the plaintiff's claim.

On appeal by the defendant, the Judge without considering the question relating to the payment of the *meher* as a condition precedent to the maintenance of the suit, confirmed the decree on the following ground:—

On the whole I do not consider that the evidence shows that the wife has any good reason "to entertain well-founded apprehensions for her personal safety"—vide *Jogendronundini* v. *Hurry Doss*(1)—at the same time it is clear

(1) (1879) 5 Cal. 500 at p. 507.

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that the husband's conduct has been far from exemplary, and though a decree is passed in his favour its lasting effect must depend on his treating appellant properly in the future.

The defendant preferred a second appeal.

Markand N. Mehta appeared for the appellant (defendant):—The first Court having raised an issue with respect to the *meher*, it ought to have recorded a finding as to whether it was paid or not. Our contention is that the non-payment of the *meher* is a good answer to a suit for restitution of conjugal rights, and if the suit cannot be dismissed on that ground, then the payment of the *meher* should be made a condition precedent to the execution of the decree. The rulings in *Eidan* v. *Mazhar Husain*(1) and *Wilayat Husain* v. *Allah Rakhi*(2) are in our favour, but the subsequent ruling in *Abdul Kadir* v. *Salima*(3) made a distinction between a suit for restitution of conjugal rights brought before consummation and one brought after consummation. It was held there that non-payment of the *meher* may be a good ground for resisting a suit brought before consummation, but it is not a good ground for defending a suit brought after consummation. We contend that such distinction is not warranted in Mahomedan Law, see Ameer Ali's Mahomedan Law (2nd Edn.), Vol. II, p. 399; Wilson's Digest of Anglo-Mahomedan Law (2nd Edn.), p. 151. Though the ruling in *Abdul Kadir* v. *Salima*(3) is followed in *Kunhi* v. *Moidin*(4) and *Hamidunnessa Bibi* v. *Zohiruddin*(5) there is no decision of this High Court following that view. The texts of the Mahomedan Law as expounded by Ameer Ali and Wilson should be followed. Further we rely on the decision in *Abdul* v. *Hussenbi*(6) in which a conditional decree was passed.

[JENKINS, C. J.:—In that case the question of consummation was not gone into and there was no finding as to consummation.]

It seems from the summary of the written statement in that suit that there had been consummation but there was no distinct issue or finding on the point.

Next we contend that having regard to the past ill-treatment of the plaintiff and his moral conduct some terms should be

(1) (1877) 1 All. 483.
(2) (1880) 2 All. 831.
(3) (1886) 8 All. 140.
(4) (1888) 11 Mad. 327.
(5) (1890) 17 Cal. 670.
(6) (1904) 6 Bom. L. R. 728.

imposed on him for safe-guarding the interests of the wife, *Surjyamoni Dasi* v. *Kali Kanta Das*.[1]

L. A. Shah, who appeared for the respondent (plaintiff), was not called upon.

JENKINS, C. J. :—To a husband's suit for restitution of conjugal rights, the wife has pleaded non-payment of dower. To this the husband has pleaded consummation of the marriage.

The question is whether under these circumstances the husband is entitled to a decree absolutely or only conditional upon his paying dower.

It has been decided by a Full Bench of the Allahabad High Court in *Abdul Kadir* v. *Salima*[2] that after consummation of marriage, non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights.

That has been followed by the Madras High Court in *Kunhi* v. *Moidin*[3] and by the Calcutta High Court in *Hamidunnessa Bibi* v. *Zohiruddin*[4].

There is no authority on the point in this Court. Although Mr. Mehta suggests that *Abdul* v. *Hussenbi*[5] supports his contention, it is clear that it does not, because in that case there was no finding that the marriage had been consummated, nor was it suggested in argument that the cases to which we have referred had any application.

Under these circumstances we are of opinion that, notwithstanding the forcible criticisms that have been urged against the cases that we have cited, we ought still for the sake of conformity to follow them, and adopt the legal proposition established by them.

It is suggested that having regard to the husband's conduct in the past and the wife's apprehensions, we might introduce some condition in the decree, but the materials for that purpose are insufficient.

The result, therefore, is that we must confirm the decree without any order as to costs.

Decree confirmed.

G. B. R.

(1) (1900) 28 Cal. 37, 41.
(2) (1886) 8 All. 149.
(3) (1888) 11 Mad. 327.
(4) (1890) 17 Cal. 670.
(5) (1904) 6 Bom. L. R. 728.