APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Pratt.

1907. *March* 14.

BAI JINA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KHARWA JINA KALIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Husband and wife—Suit for restitution of conjugal right—Suit by an ex-communicated member of a caste—Mussalman Kharwa Community of Broach —Custom.

The plaintiff, an ex-communicated member of the Mussalman Kharwa community of Broach, sued his wife (defendant No. 1) for restitution of conjugal rights. At the time of their marriage, the parties were members of the caste; but subsequently the plaintiff was ex-communicated from his caste. The defendant contended that she should not be compelled by the Court to go and live with him as his wife before the plaintiff was re-admitted into the caste:

Held, upholding the contention, that at the time of marriage she was not only a Mahomedan by faith but also a member of the Kharwa community: occupying that status, she married the plaintiff. It was, therefore, of the essence of the marriage contract that they married because they were members of that particular community and they must be regarded as having entered into the marital relation on the basis of that status.

JOINT appeals from the decision of J. C. Gloster, District Judge of Broach, varying the decree passed by Gulabdas Laldas Nanavati, Subordinate Judge of Broach.

Suit for restitution of conjugal rights.

The parties to the suit belonged to the Mussalman Kharwa community of Broach. They were married on the 30th September 1901: and they lived as man and wife for about one year after their marriage.

The plaintiff (the husband) was then ex-communicated from his caste. From the day of this ex-communication the wife (defendant No. 1) left her husband's protection and went to the house of her father (defendant No. 2).

The plaintiff sued his wife for restitution of conjugal rights.

In her written statement the defendant contended that though they followed the Mahomedan faith their manners and customs

* Joint appeals Nos. 507 and 557 of 1905.

were like those of Hindus, they "have no intercourse whatever with other Mussalman communities" and that to be put out of caste and continue as an outcaste was very annoying to the whole family; and that she had no objection to live with plaintiff as his wife on his re-admittance into the caste.

The Mussalman Kharwa community of Broach formed a caste by themselves. They were originally Hindus, but turned Mahomedans several years ago, retaining many traces of Hindu manners and customs. They possess—the institution of caste, their Panch and their regulation of social and domestic matters by the rules framed and resolutions passed by the members as a body—a system in vogue from very ancient times among Hindus.

The Subordinate Judge passed a decree in plaintiff's favour directing the wife to return to her husband's protection but subject to the condition that he should get himself re-admitted into the caste.

This decree was on appeal varied by the District Judge, who held that the plaintiff was entitled to an unconditional decree for restitution of conjugal rights. His reasons were as follows:—

"As the evidence shows very clearly the result of 'outcasting' a person from this community cannot in any sense deprive him of his position as a Mahomedan. The only result is that he is debarred from social intercourse with the other members of his community. He still attends the mosque, and when he dies he may be buried in the usual burial ground, nor is there anything to prevent him from associating with other Mahomedans outside the community which he has attended. His position thus more closely resembles that of a person expelled from a social club than that of a Hindu outcaste.

"By virtue of his marriage with defendant 1, plaintiff, in the absence of cruelty, non-payment of dower or other recognized cause, is entitled as of right to demand that she should reside and cohabit with him. Is he to be deprived of this right, secured to him by the law to which as a Mahomedan he is subject, because he has offended against the rules of the small community of which he is a member?

There is here no case of an immemorial usage at variance with the ordinary Mahomedan Law. It is not disputed that the marriage law prevailing among the Kharwas is the same as that followed by other Mahomedans. The contention rather is that the rules of this caste, comprising of some 100 male persons, should be recognized by the Courts and so construed as to prevail over the ordinary civil law rights of the husband. The result sought in effect is

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that the Court should so frame its decree as to compel the plaintiff to conform to the order passed by the Panch, on pain of being otherwise deprived of the relief to which he is by law entitled. In my opinion such a position cannot be for one moment accepted. The rules embodied in Exhibit 25, or rather the spirit which actuated the framers of those rules, may be deserving of high commendation as indicating a recognition of the rights of a wife to more equal treatment, but it is impossible to regard them as incorporated in the principles of the Mahomedan Law. They are purely the creation of the local Kharwa community itself, not binding on the civil Courts whose function it is to administer the Mahomedan Law, not the rules of the Broach Kharwas."

The defendant appealed to the High Court.

M. N. Mehta, for the appellant:—The lower appellate Court has erred in deleting from the decree the condition which the first Court had imposed upon the husband before he could insist on the restitution of conjugal rights. The wife had a certain status in the community in which she was born: this status she still had when she married plaintiff. She should not by an act of Court be compelled to lose her status by living with an excommunicated person. It is open to the Courts to impose conditions to safeguard the interests of the wife: see *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*[1]; *Paigi* v. *Sheonarain*[2]; *Jogendronundini Dossee* v. *Hurry Doss Ghose*[3]; and *Surjyamoni Dasi* v. *Kali Kanta Das*[4].

The condition imposed by the first Court is expunged by the lower appellate Court mainly on the ground that the plaintiff by being ex-communicated does not cease to be a Mahomedan. He could still enjoy all the privileges of a Mahomedan and his excommunication had the effect of a mere expulsion from a club and the determination of such a question would not fall within the proper jurisdiction of civil Courts. It is submitted that this view is untenable as the expulsion from a particular community brings on civil disabilities, the determination of which properly falls within the purview of civil Courts.

K. N. Koyaji, for the respondent:—The decision of the lower appellate Court is in accordance with legal principles and

(1) (1867) 11 M. I. A. 551 at p. 615.
(2) (1885) 8 All. 78.
(3) (1879) 5 Cal. 500 at p. 508.
(4) (1900) 28 Cal. 37 at pp. 46, 47, 48.

supported by authority. See *Sahadur* v. *Rajwanta*[1] and *Binda* v. *Kaunsilia*[2].

The Privy Council case relied upon by the other side merely lays down that the law to be applied in questions relating to marriage and divorce is the particular law governing the community to which the parties belong. This law admittedly is the Mahomedan Law, which does not recognize the validity of such a condition. In that case the Privy Council have no doubt said that in granting a decree for restitution of conjugal rights, a Court can impose a condition on the husband to secure the welfare of the wife; but this only means that the condition can be imposed in exceptional cases where there exists legal cruelty or some matrimonial offence. It would be against the law to impose a condition which the law does not recognize as a bar to the *consortium*. It can be asked in this connection whether a wife can refuse to live with her husband who has undergone a sentence for some offence or who is shunned by society for a similar reason.

CHANDAVARKAR, J.:—It is common ground between the parties to these two second appeals, preferred against the decree of the District Court at Broach, that they belong to the Kharwa community of Mahomedans, which has formed itself into a caste. The respondent, who is the husband of the 1st appellant, sued her in the Court of the Second Class Subordinate Judge at Broach, for restitution of conjugal rights. The appellant resisted the claim upon the ground that the respondent had been excommunicated by the community to which they belonged and that until he should get himself re-admitted into it, she should not be compelled by the Court to go and live with him as his wife. The Subordinate Judge, having found the excommunication proved, allowed the appellant's defence and passed a conditional decree in favour of the respondent in these terms:—The appellant "do return" to the respondent "and live with him as his wife" but "that as a condition precedent to the execution of the decree" the respondent "do pay as deposit Rs. 251" to the second appellant (father of the first appellant) to enable the

(1) (1904) 27 All. 96. (2) (1890) 13 All. 126 at p. 156.

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said second appellant "to pay over the fine imposed by the caste of the parties." From that decree the respondent having appealed, the District Court at Broach has varied it by striking out the portion as to the condition precedent.

The ground upon which the learned Judge of the District Court has proceeded is shortly this. He finds that the respondent has been excommunicated by the Kharwa community, to which the parties belong, but he holds that the fact of such excommunication ought to have no bearing on the merits of the respondent's claim for restitution of conjugal rights, because such claims must be determined solely with reference to the principles of the Mahomedan Law; and that law does not regard excommunication from a caste as "a recognised cause" entitling a Mahomedan wife to refuse conjugal rights to her husband, so long as such excommunication has not deprived him of "his position as a Mahomedan." The learned Judge has found upon the evidence that the respondent still retains his position "as a Mahomedan," notwithstanding the sentence of excommunication passed upon him by his community. In the words of the judgment now under appeal, "the only result is that he is debarred from social intercourse with the other members of the community. He still attends the Mosque, and when he dies he may be buried in the usual burial ground, nor is there anything to prevent him from associating with other Mahomedans outside the community which he has offended. His position thus more closely resembles that of a person expelled from a social club than that of a Hindu outcaste." So far as this is a finding of fact, it is binding upon this Court in second appeal; and the only question is, whether and how, in point of law, that finding affects the rights of the parties now in dispute.

It is an established principle of our Courts, sanctioned by the authority of the Judicial Committee of the Privy Council, that suits relating to marriage, where the parties are Mahomedans, must be determined according to the principles of the Mahomedan Law. In laying down that principle in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, and *Jodonath Bose* v. *Shumsoonnissa Begum*[1], the Judicial Committee point out, that

(1) (1867) 11 Moo. I. A., 551 at p. 615.

marriage being, according to the Mahomedan Law, a contract, "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 Mahomedan Law." Their Lordships are particular in using the words "some reference to Mahomedan Law," which must be construed to mean reference to the spirit, not the letter, of the law, and not to exclude any ground of refusal which, though not falling within the conditions annexed in express terms to the marriage contract by the Mahomedan Law, is based upon the customary law of status to which the parties were subject at the time of marriage. It was held so long ago as 1847 by Sir Erskine Perry in the *Kojahs and Memons' Case*[1] that "customs conflicting with the express text of the Koran can be valid among a Mahomedan sect." And according to Mr. Ameer Ali in his Mahomedan Law, Vol. II, at p. 372 (2nd Edition): "Every case, in which the question of conjugal domicil is involved, will depend, says De Menerville, upon its own special features, the general principle of the Mahomedan Law being the same as in other systems of law, *viz.*, that the wife is bound to reside with her husband, unless there is any valid reason to justify her refusal to do so. The sufficiency or validity of the reasons is a matter for the consideration of the Kazi or Judge, with special regard to the position in life of the parties and the usages and customs of the particular country in which they reside."

It has been held by this Court in *Abdul Kadir* v. *Dharma*[2] that there may be a community among Mahomedans, having its own usages and forming a caste within the meaning of Bombay Reg. II of 1827. That is a distinct recognition by this Court of the existence and legal validity of the institution of caste, in some form or other, among Mahomedans. If a Mahomedan belonging to such community or caste marries a woman also

(1) (1847) Perry O. C., p. 110.

(2) (1895) 20 Bom. 190.

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belonging to it, the contract must be presumed, in the absence of evidence to the contrary, to have been entered into upon the faith that, as both are Mahomedans of that caste, both shall continue as such so long as they live as husband and wife.

In the present case, the defence of the wife made in her written statement was that "the parties and their caste people are Musalman Kharwas and though they follow the Mahomedan faith, their manners and customs are like those of Hindus, that they have no intercourse whatsoever with other Musalman communities, and that to be put out of caste and continue as an outcaste is very annoying to the whole family." The Subordinate Judge, who tried the suit, held these allegations proved. The finding of the learned District Judge in appeal is substantially to the same effect. But he has negatived the defence in question upon the ground that the husband is still able, notwithstanding the excommunication, to retain his position as a Mahomedan. It may be that he is still able to attend the Mosque and have social intercourse with Mahomedans other than those of the Kharwa community. But the effect of the excommunication is that he cannot have social intercourse with members of that community, in which he was born, to which both he and his wife have belonged, and as members of which they have married. Such social intercourse may be of no moment to him; but the wife pleads that it is of moment to her. At the time of marriage she was not only Mahomedan by faith but also a member of the Kharwa community. Occupying that *status*, she married the husband. Under these circumstances it was of the essence of the marriage contract that they married because they were members of that particular community and they must be regarded as having entered into the marital relation on the basis of that status.

The learned District Judge further observes:—"There is here no case of an immemorial usage at variance with the ordinary Mahomedan Law. It is not disputed that the marriage law prevailing among the Kharwas is the same as that followed by other Mahomedans." The answer to that is, that though the marriage law is the same, it is subject to the *status* of the

parties as members of the Kharwa community. That law is annexed to the status.

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On these grounds the decree of the District Court passed in appeal must be varied by adding the following words after: "defendant 1 do return to the plaintiff and live with him as his wife and that defendant No. 2 do refrain from prohibiting her from doing so":—

"Upon the plaintiff securing re-admission into the Kharwa community of Mahomedans of which he and defendant No. 1 were members at the time of marriage."

The appellant must pay to the respondents the costs throughout.

Decree varied.

R. R.

PRIVY COUNCIL.

BACHOO HURKISONDAS (PLAINTIFF) *v.* MANKOREBAI AND OTHERS (DEFENDANTS).

P. C.*
1907.
February 14.
May 7.

[On appeal from the High Court of Judicature at Bombay.]

Hindu Law—Adoption by widow with authority of husband—Adoption after birth of posthumous son to sole surviving co-parcener—Joint family—Mitakshara Law—Gift to daughter out of joint property—Gift out of income—Right to partition.

Two brothers formed a joint family governed by the Mitakshara law as in force in Bombay and were possessed of considerable ancestral property. One of them died on 14th September 1900 without male issue but leaving his widow pregnant. The other brother died on 17th December 1900 leaving a will dated 30th November by which he purported to make certain dispositions of the family property, and also authorised his widow to adopt a son with the consent of persons specifically mentioned in the will: "such adoption to be made even though a son is born to my brother's widow." On 18th December his brother's widow gave birth to a son, the plaintiff. On 17th February 1901 the testator's widow adopted a son to her husband with the consents directed in the will. It was contended that on the face of the will the adoption was illegal and void because the power to adopt was part of a plan for the disposi-

* *Present*:—LORD MACNAGHTEN, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.