*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Moonshee Buzl-ul-Ruheem* v. *Luteefut-oon-Nissa, from the Sudder Dewanny Adawlut at Calcutta; delivered 12th July,* 1861.

---

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

---

SIR LAWRENCE PEEL.

THIS suit was instituted in the Civil Court of the Twenty-four Pergunnahs by the Respondent, Luteefut-oon-Nissa, suing as a pauper against the Appellant, Moonshee Buzul-ul-Ruheem, to whom she had been married, to recover her "dyn-mohr," consisting of the sum of 10,000 rupees and of 1,000 gold mohurs valued at 16,000 rupees, amounting together to 26,000 rupees.

This sum was payable by the Appellant to the Respondent in the event of the dissolution of the marriage, and she alleged in her plaint that the Appellant had dissolved the marriage by divorcing her. She further stated, that two instruments by which she was alleged to have given up her dyn-mohr, had been obtained from her by the force or fraud of the Appellant, and were of no avail to bar her rights.

The Appellant in his answer denied the divorce as stated by the Respondent, but alleged that two instruments, one a kholanamah, had been executed by her, by which she released her dyn-mohr, and which deeds he insisted were binding upon her.

The Zillah Judge was of opinion that no divorce except by khola had been proved by the Respondent,

but he held that the plea of the Appellant admitted a divorce by khola, and that the instruments set up by him as containing a release of the dyn-mohr were fraudulent and void, and that therefore the marriage being dissolved, the Respondent was entitled to recover her claim, and he decreed accordingly.

This decision by the Zillah Court was confirmed by the Sudder, and from the order of the Sudder the present appeal is brought.

Upon the facts we think that there is little doubt. The question is mainly one of Mahomedan law, and we should not lightly in such a case disturb the concurrent decision of two Courts. But we are quite satisfied that the decision is conformable both to law and to justice.

It appears that by the Mahomedan law divorce may be made in either of two forms—tilacq or khola. A divorce by tilacq is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopts that course he is liable to repay her dowry or dyn-mohr, and, as it seems, to give up any jewels or paraphernalia belonging to her.

A divorce by khola is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In this case the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mohr and other rights, or make any other agreement for the benefit of the husband.

It seems that according to existing usage, a divorce by tilacq is not complete and irrevocable by a single declaration of the husband: but a divorce by khola is at once complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. In these particulars the two modes of divorce differ.

But there is one condition which attends every divorce, in whichever way it takes place, viz., that the wife is to remain in seclusion for a period of some months after the divorce, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, called her "iddit," for her maintenance during this period.

At the hearing of this case, two points were made by the Appellant's Counsel. They insisted, first, that the instruments releasing the Respondent's claim under her settlement were valid; and, secondly, that if the kholanamah executed by the wife were laid out of the case, there was no evidence at all of divorce, and then the marriage was not shown to be dissolved; that the Respondent could not approbate and reprobate the same deed—insist that it was good for the purpose of establishing a divorce, and bad for the purpose of securing to the husband the price which he was to receive for consenting to it.

This objection, however plausible, is founded on a misconception of the real nature of the divorce. The divorce is the sole act of the husband, though granted at the instance of the wife, and purchased by her. The kholanamah is a deed securing to the husband the stipulated consideration, but it does not constitute the divorce. It assumes it and is founded upon it. The divorce is created by the husband's repudiation of the wife, and the consequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the Law Officers of the Indian Courts as from the authorities cited at our Bar, that the law is otherwise.

The non-payment by the wife of the consideration for the divorce no more invalidates the divorce than in England the non-payment of the wife's marriage portion invalidates the marriage.

In this case the husband, while denying a divorce by tilacq, not only did not deny but set up a divorce by khola. He alleged distinctly, in his answer, that the Respondent took from him a furuckhuttee (which is a bill of divorcement), that she took from him also the subsistence money of her iddit, and gave him a receipt for it, and that she then quitted his house with the assent and under the care of her mother.

That a divorce, therefore, had taken place, was the common case of both parties, and the only question was, whether the husband could insist on receiving the consideration for which he says that he had stipulated.

This must depend on the validity of the deeds

which he sets up in bar of the Respondent's demand. The dissolution of the marriage being admitted, it is for the Appellant to make out that the Respondent has given up the rights which *primâ facie* result from the dissolution, and upon this part of the case their Lordships have never felt the least doubt.

Two instruments are relied on by the Appellant: one an ibrarnamah, or instrument by which the wife is made, out of regard and affection for her husband, voluntarily to release to him all claim to her dyn-mohr. This instrument purports to have been made on the 16th April, 1847. It states that the settlement by which the dyn-mohr is secured is in the possession not of the wife, but of her mother; that the wife, therefore, cannot give up the instrument, and is not aware of what the dyn-mohr consists.

There is nothing like satisfactory proof that the Respondent ever gave her assent to this deed with a knowledge of its contents, and the admitted facts of the case make it in the highest degree improbable, almost impossible, that she should have done so.

At the time at which this instrument purports to have been made, the husband had married, or was on the point of marrying, a second wife, as by law he was entitled to do. The evidence of one of the witnesses states that the marriage took place either in April 1847 or in the following October; and from the time of the marriage, and indeed from the time when it was decided upon, their Lordships are quite satisfied on the evidence that the Appellant and the Respondent were equally desirous of a divorce. Indeed, it appears that the second wife stipulated as a condition of her consent to the marriage, that her husband should divorce his first wife. He had the power to do so by tilacq, but this would not answer his purpose; he desired to get rid of his wife, but to retain her dowry, and he prepared this deed in order that, having procured a release of the dowry, he might exercise his power of divorce. The mother of the wife, however, had possession of the settlement, and refused to give it up, and it seems to have been thought by the husband that it would be impossible for him to establish the ibrarnamah unless he could procure a confirmation of it, and a surrender of the settlement by the mother, and a divorce by khola. For this

purpose he had recourse to measures of great cruelty; he refused to permit the mother to see her daughter, and, by a long series of ill-usage, unless there be much exaggeration in the evidence, injured the health and even endangered the life of the Respondent. The mother, after repeated applications to the Foujdarry Court for the protection of her daughter, at last yielded, and gave up the settlement; under such circumstances the kholanamah was obtained, which professed to confirm the ibrarnamah.

The Courts below have most properly held that instruments so obtained can have no legal effect. They can be of no more avail when used as a defence against the claims of the wife than they would have had if the husband were suing upon them as Plaintiff to enforce rights secured to him.

Their Lordships are quite satisfied that the judgment complained of is correct, and they will humbly advise Her Majesty to affirm it, with costs.