

1944

Present: **Soertsz S.P.J.**

AL-AYED, Appellant, and AYED, Respondent.

1,194—*Kathi Court, Slave Island, No. 2,205**Mahr—Claim by Muslim wife—Facts admitted—Requirement of two witnesses—Marriage and Divorce Ordinance (Muslim) (Cap. 99), s. 21 (3).*

In a claim for Mahr by a Muslim wife against her husband the requirement of the rule in regard to at least two witnesses is not peremptory in cases in which the facts are admitted.

**A** PPEAL from a judgment of the Board of Kathis with the leave of the Supreme Court.

*H. W. Jayawardene*, for respondent, appellant.

*M. M. Kumarakulasingham*, for applicant, respondent.

*Cur. adv. vult.*

December 31, 1944. SOERTSZ J.—

This was a suit brought by a Muslim wife in the Kathi Court of Slave Island to recover a sum of Rs. 1,000 as Mahr due to her by her husband. Her suit was successful and an appeal by the husband to the Board of Kathis failed. The matter has now come up before this Court in pursuance of an order made by it, granting the husband's application for leave to appeal and the two questions submitted for decision are—

- (1) whether the claim for Mahr was satisfied by the granting of the cheque and whether, thereafter, the wife's only course was to sue on the cheque?
- (2) whether the proceedings before the Kathi were of any legal consequence, the wife and the Court having violated as alleged, the rule which requires that the evidence of at least two witnesses for the wife to be recorded by the Kathi?

It is this second question that was strongly pressed and I would deal with it at once.

The Marriage and Divorce Ordinance (Muslim) (Cap. 99) contemplates suits for divorce at the instance of the husband or of the wife as well as the claims enumerated in section 21 of the Ordinance. Section 14 provides that in suits for divorce by the husband, the Kathi shall follow the procedure laid down in the second schedule to the Ordinance. Similarly, section 15 says that in suits for Fasah Divorce brought by the wife, the rules of procedure in the third schedule shall be adopted. So far, so good. But when it comes to the question of procedure to be followed in regard to the claims enumerated in section 21, there is the rule, for sub-section (3) of that section says—

“ All such inquiries shall be held as nearly as possible *mutatis mutandis* in accordance with the rules in Schedule III ”.

which is entitled “ Rules to be adopted in the case of a Fasah Divorce by the wife. ”

Rule 8 of that schedule says—"The Kathi shall record in the book to be kept by him for the purpose the sworn statements of the wife and of at least two of her witnesses and the sworn statements of the husband (if he is present) and of his witnesses".

The claim made in this case is within the classes of claims enumerated in section 21 and in virtue of sub-section (3) the rules in the third schedule shall apply as "nearly as possible *mutatis mutandis*". Counsel for the appellant basing himself on that requirement, contends that the inquiry in this case which admittedly lacked the evidence of at least two witnesses on the side of the wife was an inquiry of no legal consequence and that, therefore, the order made upon is null and void.

There is, it must be conceded, great literal force in this contention and it is difficult to resist the impression that when the Legislature framed sub-section (3) of section 21 as it did, it overlooked a case such as this. The rules in Schedule III. are described as Rules to be adopted in the case of a Fasah divorce by a wife and it is easy to think of many good reasons for the insistence of at least two witnesses being called in support of the wife's evidence in a divorce proceeding regardless of any admission or acquiescence on the part of the husband, but in regard to a claim for maintenance or for Mahr, which are the other claims within the Ordinance a similar requirement of at least two witnesses in cases in which the facts are admitted, would be to subject a party to the tyranny of an empty form. In this instance the aggrieved wife's sworn evidence was taken and also that of the Lebbe who registered the marriage. They said that the Mahr was Rs. 1,000 and that a cheque was given in respect of it. The next entry on the record reads thus—

"Advocate Seyed Ahamed addressed the Court and accepted the evidence of the Registrar of Marriage that the Mahr was paid by cheque but contended that the cheque having not been presented to the bank duly, &c."

In my opinion once that admission was made, the wife and the Kathi were absolved from the requirement of rule 8 in regard to at least two witnesses in a case like this, in virtue of the operation of the words "as nearly as possible *mutatis mutandis*" although it seems to me that in a suit for Fasah divorce there is a peremptory requirement that the sworn statements of the wife and of at least two witnesses shall be taken. What I said in *Umma Saidu v. Hassim Marikar*<sup>1</sup> must be read in the light of what I have observed in this case.

In regard to the 2nd question I see no reason for differing from the view taken by the Board of Kathis.

I dismiss the appeal with costs.

*Appeal dismissed*