

(1917) 03 CAL CK 0026
In the Calcutta High Court

Badu Mia

APPELLANT

Vs

Srimati Badrannessa Alias Behari Banoo by her Father and
Guardian Ahmed Ali and the Said Ahmed Ali also in his own
right

RESPONDENT

Date of Decision : 09-03-1917

Acts Referred:

Contract Act, 1872 — Section 26

Citation : 40 Ind. Cas. 803

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. We are of opinion that the decree made by Mr. Justice Newbould must be affirmed. We have been invited to hold that the right conferred on the wife by the dower-deed was not properly exercised, and considerable time elapsed between her knowledge of the second marriage of her husband and the institution of this suit. This point, however, was not taken in the Court of First Instance and there has consequently been no determination of two material questions of fact, viz., first, whether the dower-deed was an anti-nuptial or a post-nuptial contract ; and secondly, when did the wife become aware of the second marriage of her husband. The sole question in controversy throughout has been whether valid authority to divorce was conferred upon the wife and whether she has exercised that authority in accordance with law. Upon that point, there can be no doubt that the view taken by the Subordinate Judge and confirmed by Mr. Justice Newbould is correct. The decision of this Court in the case of Maharam Ali v. Ayesa Khatoon 31 Ind. Cas. 562 : 19 C.W.N. 1226 has not been challenged. That case is an authority for the proposition that a provision in a dower-deed whereby a Muhammadan husband authorises his wife to divorce herself from him in the event of his marrying a second wife, is not void u/s 26 of the Contract Act ; it is, lawful for a Muhammadan husband to delegate to his wife power to divorce on certain conditions and the husband marrying a second wife is such a condition. It has been argued before us, however, that as in the deed of

divorce the wife relied upon the ninth clause of the dower-deed, she is not now entitled to fall back upon the tenth clause. In our opinion, there is no force in this contention. If she has authority conferred upon her under the dower-deed, it is really immaterial under which clause of the document she purports to act.

2. A refined argument was finally addressed to us as to the meaning and effect of the third Clause which provides as follows: "So long as you live I shall not and cannot take any other wife. If I take one, then to that wife (1, 2, 3 talaks) the divorce by three talaks would apply." It was argued that there could not be a breach of the condition not to take a second wife, as by virtue of this clause immediately upon the second marriage of the husband the second wife stood divorced. It is not necessary for us to decide whether this is the true effect of the second part of the clause or whether the second part merely emphasises the fact that the husband undertook not to take a second wife; for even if the interpretation put forward by the appellant be accepted as correct, it is clear that there could not be a divorce of the second wife till she had become a wife, and the moment she became a wife, there would be, on the part of the husband, breach of the condition not to take a second wife. We express no opinion upon the question whether such a covenant, according to the interpretation of the appellant, would be operative as against the second wife; nor do we decide the question raised before Mr. Justice Newbould, namely, whether there would be a difference in law in the relative positions of the parties according as the contract was post-nuptial or anti-nuptial.

3. The result is that the decree made by Mr. Justice Newbould is affirmed and this appeal dismissed with costs.