Present : De Sampayo J.

1919.

PATHUMMA *v.* CASSIM

124—C. R. Colombo, 65,913.

Muhammadan law—Claim for maggar *and* kaikuli—*Is separation a defence?*—Kaikuli *spent for the sustenance of marriage.*

The fact that a Muhammadan wife wilfully separated herself from her husband and refused to return to him was held not a defence against a claim by the wife against her husband for *maggar* or *kaikuli*.

"Dowry or *kaikuli* is held in trust by a husband for the wife, and cannot be withheld on the ground that it has been spent for the sustenance of the marriage. It may, perhaps, be satisfied if the wife should willingly accept from the husband jewellery or any other thing in lieu of money."

THE facts appear from the judgment.

Abdul Cader, for defendant, appellant.—*Kaikuli* as such is unknown to Muhammadan law proper, and is not even referred to in the text books. In Ceylon it has been held that dowry, or *seethanam*, paid to the husband cannot be reclaimed, even if the term *kaikuli* is used in that connection. In *Saibo v. Saibo* [1] this Court has held that where in a deed of donation both terms were used to describe the gift, *kaikuli* was a synonym for dowry, and the benefit of the donation should go to the husband. If the Muhammadan law applicable to gifts is to govern a matter of this kind, *kaikuli*, being essentially a gift in consideration of marriage, cannot be reclaimed either by the bride's father or the bride. Again, if the thing gifted has been consumed or spent, it cannot be reclaimed. The husband in this case says that he spent it for the sustenance of his wife and himself, and further gave his wife furniture and jewellery. It is idle to invent a trust in this connection, because such a trust must be expressly created. Moreover, *Wakfs*, or trusts recognized by Muhammadan law, have nothing to do with marriage settlements. In Ceylon *kaikuli* has been confused with maggar, or the *Islamic Dower*, and this confusion has led to bad decisions in the cases reported in *Vanderstraaten's Reports, pp. 162 and 196*. Legal rights *re kaikuli* have to be regulated by the customs and usages prevailing among Muhammadans in Ceylon. And they have been collated in this respect in the case reported in *Marshall's Judgments, p. 221*. This case falls under proviso (1), just as the other cases

[1] *(1916) 2 C. W. R. 263.*

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in *Vanderstraaten's Reports* have been decided as falling under proviso (2). That decision is conclusive on this point, and has been referred to and approved in case reported in *Vanderstraaten's Reports, p. 162.*

H. V. Perera, for plaintiff, respondent.—There is no difference between *kaikuli* and *maggar*. It has been so held by this Court. See *Saibo v. Saibo* [1] and *Vanderstraaten's Reports, p. 196.* It is settled law that *maggar* can be recovered by the wife at any time of the marriage. It is submitted that *kaikuli* is similarly recoverable. Although *kaikuli* is given to the husband, it is really to be held by him in trust for the wife, and, according to the decisions of this Court, " forms a settlement exclusively for her own personal benefit. " Being trust property, it can be demanded by the wife at any time. The case reported in *Marshall's Judgments* contains no binding decision. In that case the Supreme Court having taken the evidence of eight Moorish assessors gave certain general directions to the District Court, and also directed that the District Court should take further evidence on law and custom.

September 4, 1919. DE SAMPAYO J.—

The parties to this action are Muhammadans, the plaintiff being the wife of the defendant. They were married to each other on January 23, 1916. On the occasion of the marriage the defendant agreed to pay to the plaintiff as *maggar* the sum of Rs. 150, and the parents of the plaintiff gave to the defendant a sum of Rs. 150 for the plaintiff's dowry or *kaikuli*. The plaintiff now sues the defendant for these two sums of Rs. 150 each. With regard to the dowry money, the defendant pleaded that it was spent for the sustenance of the marriage, and that he also gave the plaintiff certain jewellery and furniture worth more than Rs. 300, and the dowry money " become absorbed " in the jewellery and furniture which were in the possession of the plaintiff. Dowry or *kaikuli* is held in trust by a husband for the wife, and cannot be withheld on the ground that it has been spent for the sustenance of the marriage. It may, perhaps, be satisfied if the wife should willingly accept from the husband jewellery or any other thing in lieu of the money, but the Commissioner has rightly found on the evidence that there has, in fact been no such satisfaction. The claim can, therefore, only be resisted on other grounds, if any are available.

The defendant has also raised the defence that the plaintiff has wilfully separated herself from him and refused to return to him, though she promised to do so on October 25, 1918, when a maintenance case instituted by her against him was settled and withdrawn.

[1] *(1916) 2 C. W. R. 263.*

The Commissioner has not found on the evidence that the plaintiff acted in this manner. Assuming this to be true, however, the question is whether it affords a defence against a claim for *maggar* or *kaikuli*, which is generally payable on demand. Mr. Abdul Cader, for the defendant, admits that it is not a defence so far as *maggar* is concerned, but he has cited certain authorities in support of his contention, that if the wife leaves her husband against his will, she is not entitled to claim *kaikuli*. The authority on which the greatest reliance is placed is *Marshall's Judgments 221*. There a Madawalatenna case No. 68, May 9, 1835, is noted, which was sent back by the Supreme Court for inquiry as to the circumstances in which the separation between the husband and wife took place, the Court adding that it had consulted certain Moorish assessors, who expressed their opinions on certain points which the Supreme Court thought might, perhaps, assist the District Court in the prosecution of the inquiry. These points were (1) that if a wife leaves her husband by her own desire and contrary to his wishes, neither she nor any one on her behalf can claim a return of the dowry property; (2) that if the husband turn his wife out of the house, or if he deserted her, she or any one authorized to act on her behalf may recover back such property; (3) that if they separate by mutual consent, such separation should be made the subject of an agreement, specifying the terms on which the separation was to take effect, and the proportion of property to be restored by the husband to the wife. The Supreme Court directed that the District Court should after inquiry record its opinion and that of Moorish assessors on the law or custom and return the proceedings to the Supreme Court. Marshall notes that up to March, 1836, the proceedings had not been returned to the Supreme Court. In any case it will be noticed that there was no decision of the Court itself on the point, and Marshall, after noticing another case on the subject of *kaikuli*, concludes thus: " These decisions, if so they may be called, are not sufficiently definite or precise to be very satisfactory as authorities. " I can attach no higher value to the passage cited. The next reference is to D. C. Colombo, 3,107.[1] That is a judgment of the District Court, but the District Judge, after examination of the authorities on Muhammadan law, correctly lays down that the aggregate amount of *maggar* and *kaikuli*, " although it remains in the hands of the husband and under his control and management, only does so until it is demanded from him by the wife, and it forms a settlement exclusively for her own personal benefit, independent of her husband and children and all others. It is payable to her heirs at her death, if she has not already received it, and forms a first charge on the husband's property. It is also payable to her on divorce. But not only so, but it has been decided in No. 54,376 (referred to below) it may be demanded by her at any time, even

[1] *Van. Rep. 162.*

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during the subsistence of the marriage." He then says that it forms a preferent debt on the husband's property, "unless (as decided in Madawalatenna D. C. 98 [1]) she has without cause deserted him." The Madawalatenna case here referred to is the same as that mentioned in *Marshall's Judgments 221*, and therefore the reference to it as a decision, or as an authority for the qualification mentioned, appears, as shown above, to be a mistake. The point, however, was irrelevant to the case which the District Judge had to decide, and the Supreme Court merely affirmed his judgment without giving any reasons of its own. On the other hand, D. C. Colombo 54,376,[2] which is also a judgment of the same District Judge, shows that both *maggar* and *kaikuli* are governed by the same principles, and are recoverable under the same circumstances. That being so, and there being no definite authority in the Muhammadan law to the contrary, I think, as the learned Commissioner has also held, the sum of Rs. 150 given to the defendant as his wife's, the plaintiff's, *kaikuli* can be recovered irrespectively of any question of separation of the plaintiff from the defendant.

I think the judgment in favour of the plaintiff is right. This appeal is therefore dismissed, with costs.

Appeal dismissed.

[1] *Morg. Dig. 43.*

[2] *Van. Rep. 196.*