1912.

Present : Lascelles C.J. and Grenier J.

UMMA *v.* MARIKAR

386—D. C. Galle, 10,702

Muhammadan law—Action by wife against husband for maggar—*Separation of parties before cohabitation—Wife entitled to half the* maggar.

Under the Muhammadan law the general rule is that the wife is entitled to half the dower if the husband and wife separate without consummating the marriage. To this rule there is an exception. The wife is not entitled to any dower if the separation is due to *vices redhibitoires* on her part, that is to say, to certain mental or physical defects which are considered in Muhammadan law to be disqualifications for marriage.

The plea that there was no evidence that non-consummation was due to any fault on the part of the husband was held to be no answer to the wife's claim.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for the defendant-appellant.

Bawa, K.C., for the respondent.

The following authorities were cited at the argument: *Vander Bey's Minhadi-at-Talibin 389 and 148; Amir Ali's Muhammadan Law, vol. II., p. 589; Hamilton's Hedaya, vol. I., p. 127; Natchia v. Pitche;* [1] *Natchia v. Marikar;*[2] *Vand. Rep. 1869-1871, 196,203; Digest of Muhammadan Law 96.*

Cur. adv. vult.

February 23, 1912. LASCELLES C.J.—

The plaintiff, who is a Muhammadan lady, sued her husband for Rs. 750, which he had promised at the time of their marriage to give her by way of dower or *maggar*. The defendant pleaded that he was not liable to pay this amount, on the ground that his marriage with the plaintiff was not perfected by cohabitation. Two issues were fixed, namely:—

(1) Was the alleged marriage between the plaintiff and defendant perfected by cohabitation? and

(2) If not, can the plaintiff sue for *maggar*?

[1] *(1911) 14 N. L. R. 276.* [2] *(1889) 9 S. C. C. 21.*

On October 16 there is a journal entry: "The plaintiff is not ready on the issue of fact." On October 25 the plaintiff's advocate stated that the plaintiff declined to attend and give evidence on the issue of fact, and, after referring to the Muhammadan law on the subject, urged that the plaintiff was in any case entitled to one-half of the stipulated *maggar*.

The learned District Judge in his judgment held that as the plaintiff had failed to give evidence the marriage must be taken not to have been consummated, and he gave judgment for the plaintiff for half the amount claimed. From this judgment the defendant now appeals, on the ground that, as there was no proof that non-consummation was due to any default on his part, he is not liable to pay any part of the dower. In order to deal with this plea it is necessarily to consider the general rule of Muhammadan law which is applicable in such cases, and also the Shafei doctrine, which is followed by the Muhammadans of Ceylon. Of the general rule of Muhammadan law there can be no doubt that if the parties separate before consummation, the wife receives half the specified dower. "If ye divorce them," runs the text of the Koran, "before ye shall have touched them, ye shall pay them one-half of what ye have settled."

Acording to the Shafei doctrine the wife's right to the entirety of the dower vests in her only when the marriage has been consummated, or when she or her husband has died before consummation and during the existence of the contract.

Under the Hanafi rule, when separation takes place before consummation or valid retirement the wife is entitled to half the specified dower (*Amir Ali, vol. II., p. 589*). The rule would appear to be the same under the Shafei doctrine, subject to the exception that "valid retirement" is not accepted as equivalent to consummation (*Hamilton's Hedaya, vol. I., p. 127*). But the defendant alleges that this right does not exist where the non-consummation is not proved to be due to some fault of the husband. The Shafei doctrine on the subject is plainly stated in Vander Bey's French version of the *Minhadi-at-Talilin*. The following is a rough translation of the French text at page 389 of vol. II.: "The separation of husband and wife before the marriage is consummated, whether it takes place at the instance of the wife or is attributable to something for which the wife is responsible, as where the marriage is dissolved by reason of *vices redhibitoires* on her part, cancels the obligation to pay dower. Where separation before consummation is due either to some act of the husband, as repudiation, the conversion or apostasy of the husband, &c., or to some act of a third party, the husband is always liable for half of the dower which the wife might have claimed if the marriage had remained intact." Thus, the general rule is that the wife is entitled to half the dower if the parties separate without consummating the marriage. To this rule there is an

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exception. The wife is not entitled to any dower if the separation is due to *vices redhibitoires* on her part, that is to say, to certain mental or physical defects which are considered in Muhammadan law to be disqualifications for marriage. But according to the Shafei doctrine as enunciated in the *Minhadi-at-Talilin*, the defence put forward in the petition of appeal, namely, that there is no evidence that non-consummation was due to any default on behalf of the defendant, will not help the defendant. He might have escaped his obligation to pay any part of the dower, if he had pleaded and proved that non-consummation was attributable to some defect on the part of his wife which the law acknowledges as a disqualification for marriage; but the plea that there is no evidence that non-consummation was not due to any fault on his part, even if it had been raised at the proper time, is no answer to the claim. In any case it is not a plea which could have been raised for the first time in the petition of appeal.

The respondent has given notice of objection to the decree on the ground that there was no evidence of non-consummation, and that she should therefore have been awarded the whole and not half only of the dower. I think that the onus of proving non-consummation properly rested on the defendant, who had raised that ground of defence in his answer. But it seems clear that when the plaintiff declined to go into the box, the case proceeded to trial on the footing that consummation had not taken place. In view of the respondent's acquiescence in this cause, I think she cannot now take advantage of the circumstance that non-consummation was not strictly proved.

For the above reasons, I think the judgment of the District Court was right, and I would dismiss the appeal with costs.

GRENIER J.—

This case is in a very unsatisfactory condition, as no evidence was called on either side on certain questions of fact in regard to which the parties were apparently not in agreement. On the materials placed before the lower Court, and in view of the position taken up by the plaintiff's counsel, it is manifest, however, that the plaintiff admitted there had been no consummation of the marriage. The defendant expressly denied that the marriage was perfected by cohabitation, and the weight of the authorities cited to us at the argument and referred to in the judgment of my Lord supports the finding of the District Judge, that where there is no consummation the wife is entitled only to half the *maggar*. I agree to dismiss the appeal with costs.

Appeal dismissed.