BOMBAY HIGH COURT

Rashid Karmali

Vs

Sherbanoo

(Batty and Pratt , JJ.)

23.01.1907

JUDGMENT

Batty, J.

1. In this case it lay on the appellant to establish affirmatively that the divorce was valid under the Mahomedan law. The Judge who tried the case, decided it on an appreciation of evidence which we do not feel it necessary to discuss For it appears to us that the talak was ineffectual in this particular instance to deprive the wife of her right to inherit, even if the evidence of witnesses to the ceremony be accepted as credible. The Judge observed that the requirements of Mahomedan law are so vague and undefined that he docs not feel justified in saying that Naser was suffering from a death-bed illness at th time of the first talalc. The most recent decision which deals with the essentials or the Marz-ul-mant affecting a talak or a gift, is that of *Sarabai v. Rabiabdi*[1]*.,* which follows the case of Fativia Bibeex. *Ahmad Baksh*[2] Three tests are there laid down as to whether illness is to be regarded as death-bed illness. The first condition is :-

(1) Proximate danger of death, so that there is a preponderance of Khauf or apprehension that at the given time death must be more probable than life.

2. In this case so far as the deceased himself was concerned we have the fact that he had already executed his will and transferred the whole of his property to his brother, evidently in anticipation of near death and we have further the evidence of the doctor who attended the deceased, that the disease was incurable and that the deceased was sent away from the hospital, because it was useless for him to remain there any longer. He was dying of consumption and it is not suggested that he ever rallied to the date of his death. He was in bed in the hospital at the time of the first talalc. He was also in bed at the time of the second talak; and from the letters written by Mr. Laskari, purporting to be on his behalf, it would appear that he was unable during the interval to go abroad on the most urgent occasions. Secondly, "'there must be some dearee of subjective apprehension of death in the mind of the sick person."This we have already discussed with reference to the first question and we find that the apprehension was not merely confined to

medical attendants or friends but extended to the deceased person himself.Thirdly, "there must be external indicia, chief among which would be the inability to attend to ordinaiy avocations."
3. The deceased was confined to his bed and it was found that he was unable to attend to his business or go about the ordinary affairs of life until the date of his death, which followed in four or five months from the date of the first talak and within the period of iddat or three months reckoned from the second talak.

4. In these circumstances we hold that as the death was within the year, the widow was not deprived of the right to inherit.

5. We accordingly confirm the decree of the lower Court and dismiss the appeal.

Cases Referred.

1(1905) I.L.R. 30 Bom. 537
2(1903) I.L.R. 31 Cal. 319