immovable property—*Musammat Bhawani Kuar* v. *Gulab Rae* (1) and *Hari G. Joshi* v. *Rámchandra*.(2)

If, however, this had been the only ground for setting aside the order for sale, and consequently the sale, we should have felt bound to remit for inquiry the issue whether the irregularity had caused substantial injury. The appeal has come before us as against the order for sale because the Subordinate Judge has treated the property as movable, and it is for that reason only that we have admitted it. The more correct course would have been for the appellant to have moved the Subordinate Judge to set aside the sale and to have appealed against his refusal. He is not entitled to have the sale cancelled for a mere irregularity unless he is able to show that substantial loss has resulted.

But there is another ground on which, as held by the District Judge, the sale to, and purchase by, the respondent are absolutely bad. The respondent is a pleader practising in the District Court and his purchase is opposed to s. 136 of the Transfer of Property Act.

We set aside the order directing the sale to proceed and declare the sale null and void. We make no order as to costs as the appellant did not take the first objection, upon which he has now succeeded, in the Court below, although he threw every obstacle he could think of in the way of the decree-holder, and because he has not applied, as he should have done, to the Subordinate Judge to set aside the sale.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Hutchins.

QUEEN-EMPRESS

against

SUBBARÁYAN AND ANOTHER.*

1885. August 25.

Penal Code, s. 498—*Marriage—Proof.*

S and G having been convicted of enticing away the wife of the complainant, the conviction was quashed on appeal, on the ground that strict proof of marriage being necessary for a conviction under s. 498 of the Indian Penal Code, the evidence

(1) I.L.R., 1 All., 348. (2) 9 Bo.H.C.R., 64.

* Criminal Revision Case 289 of 1885.

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adduced (viz., of the complainant, the woman, and her mother, who swore to the fact of the marriage) was not sufficient to enable the Court to form an opinion whether the marriage took place as a fact, and if it did take place, whether it was according to law. The accused did not cross-examine the witnesses as to the fact or validity of the marriage or otherwise impugn it:

Held, that the marriage was sufficiently proved—*Empress* v. *Pitambur Singh* (I.L.R., 5 Cal., 566) discussed.

THIS was a case referred to the High Court by G. A. Parker, Sessions Judge of Tanjore, on the 16th June 1885.

The facts of the case appear from the judgment of the High Court (Muttusámi Ayyar and Hutchins, JJ.).

Counsel were not instructed.

HUTCHINS, J.—The charge in this case was of an offence punishable under s. 498 of the Indian Penal Code, viz., enticing away a married woman. The Second-class Magistrate convicted, but the Head Assistant Magistrate (Manavédan Rájá) on appeal has reversed the conviction on the ground that "the Bengal High Court have ruled that strict proof of marriage is necessary for convictions under ss. 497 and 498," and that, in view of that ruling, the evidence adduced was not "sufficient to enable the Lower Court to form an opinion whether the alleged marriage actually took place, or, if it did take place, whether it was according to law."

The authority referred to appears to be the *Empress* v. *Pitambur Singh*.(1) In delivering the judgment of the Full Bench in that case the Chief Justice observed: "The marriage of the woman is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (s. 50) seem to point out very plainly that, where the marriage is an ingredient in the offence, the fact of the marriage must be proved in the regular way."

We of course agree both that the fact of the marriage must be proved, and that it must be proved in the ordinary way, *i.e.*, by other and more reliable evidence than that of the mere "opinion—*expressed by conduct*—of a person who, as a member of the family or otherwise, has special means of knowledge." It is such an opinion which s. 50 of the Evidence Act makes admissible evidence of a relationship, such as marriage, except in certain cases of which one is a prosecution under s. 498 of the Indian

(1) I.L.R., 5 Cal., 566.

Penal Code. That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge. The Calcutta case has been followed by Straight, J., in *Empress* v. *Kallu*,(1) but if the learned Judges meant to decide that a husband or wife is precluded from proving his or her marriage, we must, with great deference to their opinion, express our dissent.

In the English Courts a marriage is usually proved by the production of the parish or other register, or a certified extract therefrom; but, if celebrated abroad, it may be proved by any person who was present at it, though circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. "Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it—see *R.* v. *Inhabitants of Brampton*,(2) so as to throw on the defendant the onus of impugning its validity" (Archbold, p. 925, Bigamy). And even a marriage in England may be proved by any person who was actually present and saw the ceremony performed: it is not necessary to prove its registration or the license or publication of the banns (*Ibid.*, quoting *R.* v. *Allison*,(3) *R.* v. *Manwaring*.(4)

In this country there is no statutory marriage law for natives, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong. In the case before us the parties to the marriage are Maravas—a class not over-exact or nice as to religious observances or ceremonies. The wife, as witness No. 1, deposed: "The complainant is my married husband only" (the Tamil word rendered 'only' implies he is fore my *married* husband and nothing more or less): it was four unde[illegible] ago that the marriage was performed; upon my attaining in a [illegible]

(1) 3 All., 233.
[illegible], 109.
(2) 10 East, 282.
(4) Dears & B., 132, s.c. 26, L.J. (M.C.), 10.

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puberty, we cohabited." Similarly the husband said: "I married Veláyi five years ago: she is 18, the *nuptial ceremony* was performed soon after the (first ceremony of) marriage (or betrothal)." Witness No. 4 is the mother of the wife Veláyi. She swore that she had her daughter married to the prosecutor. None of these witnesses were cross-examined as to the factum or validity of the marriage, and the accused persons in no way impugned its validity.

We entertain no doubt that the marriage has been sufficiently established. We accordingly set aside the first-class Magistrate's judgment of acquittal and direct him to restore the appeal to his file and pass fresh orders upon it.

ORIGINAL CIVIL.

Before Mr. Justice Handley.

1885. Sept. 22.

NATALL

v.

NATALL.*

Divorce suit—Costs of wife—Indian Succession Act, 1865, *s.* 4—*Married Woman's Property Act*, 1874.

A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit.

Proby v. *Proby* (I.L.R., 5 Cal., 357) distinguished and observed upon.

THE facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (HANDLEY, J.).

Mr. *Branson* for plaintiff.

Biligiri Ayyangár (Solicitor) for defendant.

JUDGMENT.—Application by petitioner (the wife) for an order that her costs up to date be taxed and paid by respondent, and that her costs up to, and of, and incidental to, the hearing may be taxed *de die in diem*, and that respondent be ordered to pay into Court a sufficient sum to cover such costs, out of which sum the costs when so taxed *de die in diem* be paid to petitioner.

I think petitioner is entitled to the order prayed for. I time to consider this matter because I thought at first ther some difference in principle between giving this relief t

* Matrimonial suit No. 2 of 1885.