

BOYAMMA
v.
BALAJEE
RAU.

District Court, an appellant is entitled to deduct the last day being a gazetted holiday, although the District Judge held his Court on that day.

APPEAL against the order of E. J. Sewell, Acting District Judge of North Arcot, in Miscellaneous Appeal No. 11 of 1895, dismissing, as being barred by limitation, an appeal preferred against the order of T. Sami Ayyar, District Munsif of Chittoor, on execution petition No. 129 of 1895.

Ponnusami Ayyangar and Subramania Ayyar for appellant.

Respondent was not represented.

JUDGMENT.—We do not think that the fact that the District Judge held Court on a gazetted holiday is sufficient to disentitle the appellant to regard the day as *dies non* in calculating the time allowed by law for presenting an appeal.

We, therefore, set aside the order of the District Judge refusing to admit the appeal and direct him to now admit it and dispose of it according to law.

Costs will abide and follow the result.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Shephard, Mr. Justice Subramania Ayyar and Mr. Justice Benson.

IN CRIMINAL REVISION CASE No. 472 OF 1896.

GANTAPALLI APPALAMMA

v.

GANTAPALLI YELLAYYA.*

IN CRIMINAL REVISION CASE No. 505 OF 1896.

PERIANAYAGAM

v.

KRISHNA CHETTI.*

Criminal Procedure Code—Act X of 1892, s. 488—Maintenance—Adultery.

Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under Criminal Procedure Code, section 488.

* Criminal Revision Cases Nos. 472 and 505 of 1896.

CASES referred for the orders of the High Court under Criminal Procedure Code, section 438, by the Acting Sessions Judges of Godavari and Tanjore, respectively.

In each of these cases the Magistrate had ordered a husband, under Criminal Procedure Code, section 488, to make a monthly allowance for the maintenance of his wife who alleged that he was living in adultery. In the one case the adultery was alleged to have been committed with a widow, and in the other case with a concubine who had lived with the husband for many years. The Sessions Judges reported the cases on the ground that the adultery alleged was not within the definition of the offence of adultery in the Indian Penal Code and referred to Criminal Procedure Code, section 4.

These cases came on for orders before SHEPHARD and BENSON, J.J., who the Court made the following order of reference to Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—As the question involved in these two cases is one of some importance and we do not agree with the decision reported as *Queen-Empress v. Mannatha Achari*(1), we resolve to refer for the decision of the Full Bench the following question, viz. :—

Whether adultery on the part of the husband, not being such adultery as would justify a conviction under the Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under the provisions of the Criminal Procedure Code?

These cases coming on for hearing on the above reference before the Full Bench constituted as above.

The parties were not represented.

COLLINS, C. J.—I think it would be wrong to limit the meaning of the word 'adultery' in section 488, Criminal Procedure Code, to the very limited definition of the word in section 497 of the Penal Code. Adultery is a crime under that section that can only be committed by a man having sexual intercourse with the wife of another without the consent or connivance of the husband of that wife.

Section 488 of the Criminal Procedure Code provides for the maintenance of the wife and enacts that a Magistrate may make an

(1) I.L.B., 17 Mad., 260.

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order for maintenance in favour of the wife, even though the husband offers to maintain his wife on condition of her living with him if the Magistrate is satisfied that the husband is living in adultery. The term adultery is used in that section in the ordinary sense, that is a married man having sexual connection with a woman who is not his wife. It appears to me that this construction is not affected by the last words of section 4 of the Criminal Procedure Code, but is consistent with it. It is clear that a different intention appears from the subject or context—see the first part of section 4.

A difficulty must always arise in deciding in what cases the adultery of the husband is sufficient cause for the wife to claim maintenance. Amongst the Hindu community concubinage is recognised, and it is possible for concubines to have a certain status. If, therefore, a husband keeps a concubine in a house apart from his wife, it is doubtful, whether such an act alone would entitle the wife to separate maintenance, but if he kept such concubine in the same house as his wife lived in and against the wishes, or in such a manner as to offend the self-respect of his wife, in my opinion that would entitle the wife to separate maintenance under section 488, Criminal Procedure Code.

I answer the question referred to the Full Bench in the affirmative.

SHEPARD, J.—I have nothing to add to the observations already made by me about the applicability of the Penal Code definition of ‘adultery.’* The solution of the question what conduct

* “I do not think we are compelled to put such an unreasonable interpretation on the language of the Legislature as the Sessions Judge suggests. Adultery, according to the Penal Code, is an act capable of being done by a man only. It is an offence committed by a third person against a husband in respect of his wife. In the Criminal Procedure Code the term adultery is used in the larger and ordinary sense. Either the husband or the wife may be guilty of it. It is with the breach by either party of the marriage obligation, not with offence of a third party, that section 488, Criminal Procedure Code, is concerned. If the Sessions Judge’s view were correct, it would follow that the husband could not properly be charged with adultery in a maintenance case, unless all the conditions of section 497 of the Penal Code, including absence of consent or connivance on the part of the other husband, could be established. This is to my mind absurd. Comprising section 497 of the Penal Code and section 488 of the Criminal Procedure Code, I think we are entitled to say that, while in the former adultery of one species only is dealt with, in the latter adultery in the sense of a breach by either party of the matrimonial tie was intended. I would therefore decline to interfere.”

on the part of the husband amounts to 'living in adultery' within the meaning of the Criminal Procedure Code is however not much advanced by the conclusion that the Penal Code definition cannot be applied. The words point to a continuous course of conduct, not to isolated acts of immorality. But conduct of this sort which according to Western notions would be condemned as a breach of the marital obligation is not so condemned either by Hindus or by Muhammadans. No doubt the right of maintenance enforceable under the Procedure Code is a right which exists independently of the personal law of the parties. The provision is analogous to that made by the English Poor Law, under which children who have no common law right to maintenance at their fathers' hands, may claim it from them before a Magistrate (see *Bazeley v. Forder*(1)).

The circumstance, however, that the right rests on statute and not personal law, does not, I think, preclude a consideration of the usages of the particular community for the purpose of determining the meaning of the term 'adultery.' I cannot conceive that it was intended to apply the term to conduct considered by the community to which the parties belong as innocent from a matrimonial point of view. Subject to these observations on the general question I am of opinion that the question referred must be answered in the affirmative.

SUBRAMANIA AYYAR, J.—Adultery, according to the Penal Code, is an act of which a man alone can be guilty. It is an offence committed by a third person against a husband in respect of his wife. If, as was held in *Queen-Empress v. Mannatha Achari*(2), this limited meaning be adopted in construing the term adultery in section 488 of the Criminal Procedure Code, it would follow that the husband could not properly be charged with adultery in a maintenance case unless all the conditions of section 497, Indian Penal Code, are complied with. Such, however, could not possibly have been the intention of the legislature. For, what difference does it make to the wife, whom the husband has neglected or refused to maintain, whether the woman with whom he is living in adultery is a married woman or not and, if the woman be married, whether the woman's husband connives at the adultery or not? So far as the wife is concerned her grievance is all the same. Therefore while in section 497, Indian Penal Code, adultery of

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(1) L.R., 3 Q.B., 559.

(2) I.L.R., 17 Mad., 260.

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one specific description only is dealt with, it is clear that in section 488 of the Criminal Procedure Code adultery is used in the wider and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse. This construction is not inconsistent with any part of the interpretation clause, section 4 of the Criminal Procedure Code, referred to in *Queen-Empress v. Mannatha Achari*(1). For though the concluding paragraph of that section says that all words and expressions used in the Criminal Procedure Code and defined in the Indian Penal Code, but not defined in the previous part of the section 4 should be deemed to have the meanings respectively attributed to them by the Penal Code, yet this provision must, in reason, be held to be governed by the qualification laid down in the opening sentence of the section, viz. : " Unless a different intention appears from the subject or context." Now looking to the context, a different intention cannot but be inferred, considering that the offence of adultery under section 497 of the Indian Penal Code, as already observed, is one against the husband, whereas under section 488 of the Criminal Procedure Code, the term includes cases where the wrong done is to the wife. And notwithstanding that the concluding paragraph of section 4 is separated by a full stop from that part of the section which contains the qualifying words " Unless, &c., &c.," it is difficult to believe that the framers of the section intended that that paragraph was not to be taken subject to the qualification specified in the beginning of the section. To the extent stated above, therefore, the conclusion arrived at in *Queen-Empress v. Mannatha Achari*(1) cannot be supported. But it should not be understood that the ruling in Criminal Revision Case No. 547 of 1884* referred to and relied on by Muttusami Ayyar, J., in that case is dissented from. In determining, in cases like the present, whether the cause shown by the wife for refusing to live with her husband is good and reasonable, it is but just that the Magistrate should take into consideration

(1) I.L.R., 17 Mad., 260.

* TURNER, C.J.—" It has been held that concubinage is so far recognized by persons who are by religion Hindus, that the circumstance that the husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position. The order of the Magistrate must be set aside and he is directed to pass fresh orders."

the social habits of the particular community to which the parties belong. If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights (*Yashwant Rao v. Kashi-bai*(1)), the fact that the husband keeps a concubine ought not by itself entitle the wife to claim separate maintenance. The question in each case will be whether the conduct of the husband is such as the wife consistently with self-respect and due regard to her position as wife, can live in the house of the husband. If this is possible and the husband is willing to receive her, the Magistrate may refuse to order separate maintenance. I concur therefore in answering the question in the affirmative.

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BENSON, J.—I have no doubt but that the question proposed must be answered in the affirmative. The concluding words, no doubt, of section 4 of the Criminal Procedure Code enact that any word used but not defined in that Code shall be deemed to have the meaning attributed to it in the Indian Penal Code, but this provision is subject to the opening words of section 4, which say “unless a different intention appears from the subject and ‘context.’” This limitation seems to have been overlooked by the learned Judges who decided the case of *Queen-Empress v. Mannatha Achari*(2).

In the present case “the subject and context” show that “adultery” in section 488, Criminal Procedure Code, has a much wider significance than adultery as defined in section 497, Indian Penal Code. In the Indian Penal Code it is an offence committed by a man against another man in respect of the wife of the latter. It is an offence which cannot be committed by a woman; but the Criminal Procedure Code expressly contemplates adultery by a woman. For this reason, if for no other, it is impossible to say that ‘adultery’ in section 488, Criminal Procedure Code, has the limited meaning attributed to it in section 497, Indian Penal Code.

Again ‘adultery’ under the Indian Penal Code is not committed by a man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it, but such considerations cannot, in reason, be held to make any difference in the ‘adultery’ contemplated by the

(1) I.L.R., 12 Bom., 26.

(2) I.L.R., 17 Mad., 230.

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Criminal Procedure Code. The 'adultery' there contemplated is, I think, adultery in the popular sense of the term, viz. :—a breach of the matrimonial tie by either party.

I would not, however, be understood to imply that a Magistrate ought, as a matter of course, to decree maintenance for a wife who refuses to live with her husband, solely because he has been guilty of an isolated act or acts of adultery or even because he keeps a concubine. The words "living in adultery" imply a course of action more or less continuous. Moreover, a discretion is vested in the Magistrate. He 'may,' not he 'shall,' make an order, &c. He has, then, a discretion to consider and be guided by the social ideas and feelings of the community to which the parties belong. Concubinage is, within certain limits, recognized both by Hindu and Muhammadan Law, and is not in all circumstances reprobated by the public opinion of those communities. It follows that the keeping of a concubine is not necessarily and in all circumstances, to be regarded by the Magistrate as a sufficient reason for a woman refusing to live with her husband, though it is equally clear that a Magistrate may in certain circumstances regard it as a sufficient reason, and award separate maintenance to the wife. The Magistrate must be guided by all the facts and circumstances of each case and with due regard to the social ideas and customs of the community to which the parties belong. With these remarks, I would answer the reference in the affirmative.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.*

KUMARA AKKAPPA NAYANIM BAHADUR (DEPENDANT),
APPELLANT,

v.

SITHALA NAIDU (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, ss. 6, 12—Rent Recovery Act—Act VIII of 1865 (Madras), ss. 18, 69—Deduction of time occupied in obtaining copy of judgment appealed against.

A tenant whose property had been distrained for arrears of rent sued under Rent Recovery Act, s. 18, by way of appeal against the distraint. The Revenue

* Second Appeal No. 1104 of 1896.