QUEEN-EMPRESS v. SUBBARAYAR.

omission or irregularity within the meaning of the section. If it were necessary to decide the point we should hesitate to accede to this contention. But the present case is peculiar. The Magistrate had to consider whether a legal proclamation had been legally published. It was his duty in considering this to have regard to the actual facts as they appeared before him. Instead of confining himself to the facts he exercises a dispensing power which he does not possess, and by the aid of it holds that the proclamation was a legal one. In our opinion the proceedings of the Magistrate was wholly illegal.

There was no legal proclamation. The petitioner could not have been convicted on a charge of disobedience to the proclamation and for the same reason the other penal consequences of disobedience cannot be visited on the petitioner.

The order of the Sessions Judge who adopts the reasoning of the Magistrate is wrong and must be set aside, as also that of the Joint Magistrate and the attachment declared void.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

1895. October 3.

KANDASAMI PILLAI (PLAINTIFF),

v.

MURUGAMMAL (DEFENDANT).*

Hindu law—Wife's right of maintenance among Sudras—Continued unchastity and misconduct.

In 1887 a suit was instituted against a Sudra by his wife and a decree was passed for her maintenance. The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child. The wife denied the adultery and stated that her husband had become reconciled to her and that her child was legitimate. It was found that the plaintiff's case was established and that the defendant's misconduct had been recent, open and continuous:

Held, that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance.

* Civil Suit No. 143 of 1895.

Quære: Whether apart from the other circumstances in the case, the fact of having given birth to an illegitimate child would have constituted a bar to the wife's claim to bare maintenance.

THE facts of the case are stated above sufficiently for the purpose of this report.

Mr. *J. Adam* for plaintiff.

Gurusami Chetti for defendant.

JUDGMENT.—The plaintiff in this case seeks to set aside the decree passed in original suit No. 129 of 1887 in favour of the defendant, his wife, awarding to her a maintenance of ten rupees per mensem. The suit is founded on the allegation that in 1893 the defendant committed adultery with one Velayuda Asari. The defence is a simple denial of the case set up in the plaint.

The only issues to be determined are—has the plaintiff made out the case set up by him, and, if so, to what relief is he entitled?

[His Lordship recorded an admission that the parties had separated in 1886 and had never since resided together, and, after discussing the evidence, stated, as his finding thereon, that the defendant had in 1893 become pregnant by Velayuda Asari and had given birth to a child by him. The judgment continued as follows:—]

I have no hesitation in finding that the plaintiff has made out his case.

As to the relief prayed, it has been contended on behalf of the defendant, that she is entitled under any circumstances to at least bare maintenance. *Honamma* v. *Timannabhat*(1) relied upon in support of this contention has been dissented from in *Valu* v. *Ganga*(2). In *Roma Nath* v. *Rajonimoni Dasi*(3), Petheram, C.J., and Banerjee, J., however, seem inclined to hold that the view taken in the earlier Bombay case is warranted by the texts of Hindu law, and further that it has the support of reason, inasmuch as the allowance of mere food and raiment to an unchaste woman is prescribed in order that she may have a *locus pœnitentiæ*, and that she may not be compelled by sheer necessity to continue to lead a life of shame and misery. However, in *Nagamma* v. *Virabhadra*(4) recently decided by this Court, the learned Chief Justice and Shephard, J. observe:—"We must follow the decision in *Valu* v.

(1) I.L.R., 1 Bom., 559.
(2) I.L.R., 7 Bom., 84.
(3) I.L.R., 17 Calc., 674, 679.
(4) I.L.R., 17 Mad., 392.

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"*Ganga*(1) and *Vishnu Shambhog* v. *Manjamma* (2), and hold that "unchastity of a widow deprives her wholly of her right to maintenance. No text has been cited in favour of the theory that a "bare maintenance can be allowed." In the above cases it will be seen that the question related to the provision to be made for widows, whilst here it is as to the maintenance of a wife. Referring to the existence of a distinction between the two classes of cases, Sargent, C.J., in *Valu* v. *Ganga*(1) already cited observes thus:—"The only analogous cases in which such a distinction "is to be found, are those of an adulterous wife and mother for "which special texts are provided. The close and tender relations "which exist between husband and wife and mother and son may "well account for the ancient law-givers laying down, as a rule "of conduct, for a husband and son, that even the wife or mother "who has been guilty of unchastity should not be left in a state "of perfect destitution; but it has still to be determined how far "these texts will be regarded as mandatory and not merely precep-"tive; and if the former, in what cases and to what extent the "Court will enforce them." It must be admitted that the point is one of some difficulty. For although the doctrine of the ancient law-givers enunciated in the texts in question is grounded on the sound considerations adverted to by Petheram, C.J., and Banerjee, J., yet it is not easy to formulate precisely the cases in and the extent to which that doctrine is to be applied. But assuming that the texts are not mere moral precepts but mandatory, I think—following the view adopted by the Calcutta Court in *Roma Nath* v. *Rajonimoni Dasi*(3) in the case of the widow—it be safely laid down that maintenance, however small, ought not to be awarded by Courts, even to a wife when it appears that she, about the time of the litigation, persists in a vicious course of life. To hold otherwise would be contrary to all morality and principle; and I have little doubt that before a decree for maintenance is given to a wife who has once been guilty of infidelity, she must show, not only that at the time of the plaint and the trial she was leading a chaste life, but also that she had done so for a sufficient period previously so as clearly to lead to the conclusion that she has completely renounced her immoral course, and that, in fact, she is a reformed woman. In the present case, however, there is not a

(1) I.L.R., 7 Bom., 84. (2) I.L.R., 9 Bom., 108.
(3) I.L.R., 17 Calc., 674, 679.

particle of evidence to prove such is the case with the defendant. On the contrary the defendant appears to be so strongly addicted to vice, and her misconduct has been so recent, open, and continuous, that I am unable to say that I am satisfied that even the idea of definitely changing her present mode of life has occurred to her. Her case seems moreover to be complicated by the fact that she is the mother of an illegitimate child; since a text of Yajnavalkya treats conception by unlawful commerce to be such an aggravation of a disloyal wife's offence as to justify complete desertion by the husband, though it should be added that Vijnaneswara appears to restrict the text to the case of the three regenerate classes—Colebrooke's Digest, Book IV, Chapter I, Verse LXXVII; and therefore, by implication, to hold it to be inapplicable to Sudras, to which caste the parties in the present case belong. But whether even among Sudras the existence of an illegitimate issue born to the wife before she changed her life would not, under certain circumstances, be an obstacle in the way of her claiming even bare maintenance is rather a delicate question. However this may be, and although no doubt a mere false defence by itself would not deprive the party setting it up of her legal right, the attempt which the defendant has made in this case to fasten upon the plaintiff as his legitimate issue the fruit of adultery is clear proof that she is far from a penitent wife who may be allowed to seek the benefit of the humane provision mentioned in the texts referred to in *Vulu* v. *Ganga*(1) and *Roma Nath* v. *Rajonimoni Dasi*(2).

The plaintiff is, therefore, entitled to the relief claimed. I set aside the decree in original suit No. 129 of 1889 and the execution proceedings taken therein subsequent to this suit. The defendant must pay the costs of the plaintiff.

Ramanujachariar attorney for plaintiff.

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(1) I.L.R., 7 Bom., 84. (2) I.L.R., 17 Calc., 674, 679.