APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

BADAL AURAT AND ANOTHER (APPELLANTS) *v.* QUEEN-EMPRESS, RESPONDENT.* 1891 *Sept.* 21.

Bigamy—Mahomedan Law—Marriage of Minor—Repudiation of marriage by minor on attaining puberty—Assent of the wife after puberty—Penal Code (Act XLV of 1860), s. 494.

B, a Mahomedan girl, whose father was dead, was alleged to have been given in marriage by her mother to *J* some years before she attained puberty. Prior to her attaining puberty *J* was sentenced to a term of imprisonment for theft. While he was in jail, *B*, after she had attained puberty, contracted a marriage with *P*. The marriage with *J* was never consummated. On *J* being released from jail, he proceeded to prosecute *B* and *P* for bigamy and abetment of bigamy, and also charged *P* with adultery. It appeared that before taking proceedings *J* requested *B* to return to him, but she refused to do so. The marriage between *B* and *J* was sought to be proved by the evidence of *J*, *B's* mother, and two witnesses who were said to have been present. *B* and *P* were both convicted.

Held on appeal that the evidence of the marriage between *B* and *J* was insufficient to justify a conviction in the absence of proof that a Mollah was present at the ceremony, or that the *sigha* required to be recited at the marriage of minors was recited, or the *akd* performed.

Held further, that assuming *B* to have been given in marriage to *J* when a mere child by her mother, she had the option of either ratifying or repudiating such marriage on attaining puberty. Under the *Shiah* law such a marriage is of no effect until it has been ratified by the minor, and under the *Sunni* law it is effective till cancelled by the minor. Under both schools of law the minor has the absolute power, on attaining puberty, to ratify or cancel unauthorised marriage, though under the *Sunni* law ratification is presumed if the girl remains silent after attaining puberty and allows the marriage to be consummated.

Held on the facts of the case that the circumstances afforded sufficient indication, even assuming the girl to be governed by the *Sunni* law, that she never ratified the marriage.

Held also, that a judicial order was not necessary to effect the cancellation of the marriage.

THE facts of this case were as follows:—The first accused, Badal Aurat, was married to Joy Lal Shaik, the complainant, when she

* Criminal Appeal No. 670 of 1891, against the order passed by F. E. Pargiter, Esq., Sessions Judge of Rajshahye, dated the 28th of July 1891.

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was about five years old by her mother Atar Bewah, her father being then dead. Joy Lal, Atar Bewah, and Badal all appeared to have lived together in the same house after the marriage till Joy Lal contracted a *nikah* marriage with another woman and set up a separate *bari* of his own. Badal some time after went to this *bari* for a time, and then returned to her mother, but the marriage was not apparently consummated, as Badal had not then attained puberty.

Atar Bewah, when Badal was living with her, contracted a *nikah* marriage with one Shabaz, who was an old convict, and about five years before the institution of the case against Badal, Shabaz and Joy Lal were convicted and each sentenced to 4½ years' rigorous imprisonment for theft. While Joy Lal was in jail, Badal attained her puberty, and in June 1890 her mother was alleged to have given her in *nikah* marriage to the second accused, Poran Shaik, and she went and lived with him in his village as his wife. Joy Lal, after being released from jail in September 1890, attempted to get Badal to go and live with him, but she refused to do so, and he thereupon instituted proceedings against Badal and Poran Shaik, which resulted in their being committed for trial to the Sessions Court on charges as against Badal of bigamy and as against Poran Shaik of abetment of bigamy and adultery.

The case was tried by the Sessions Judge and assessors, and resulted in the conviction of both accused on the charges preferred against them, and their being sentenced respectively to three and six months' rigorous imprisonment.

The Sessions Judge found that the marriage between Badal and Joy Lal had been clearly proved, and that it was in fact not disputed by either accused. Badal, however, denied that she had contracted a *nikah* with Poran, although he admitted it and pleaded ignorance of the existence of Joy Lal, and alleged that Badal had told him she was a widow. The Sessions Judge, however, found the *nikah* between the two accused to have been proved, and that they had lived together for several months as man and wife. Upon the question of law raised in the case, the material portion of the judgment of the lower Court was as follows:—

"The offence of bigamy is fully proved, and the only doubt which the assessors had at one time was whether the marriage with

Joy Lal was valid, since consummation did not take place, and Badal had not expressly assented to it, but those conditions are not required by the *Sunni* law, and Badal never repudiated the marriage with Joy Lal. [See Mr. Ameer Ali's *Mahomedan Law*, *Newab Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan* (1) and *The Empress* v. *Abdool Kurreem* (2).]"

Against the conviction and sentence both accused now appealed to the High Court.

No one appeared for either side at the hearing of the appeal.

The judgment of the Court (AMEER ALI and BEVERLEY, JJ.) was delivered by

AMEER ALI, J.—In this case the first prisoner has been convicted under section 494 of the Indian Penal Code and the second under section $\frac{494}{114}$, and they have been sentenced to three months and six months' rigorous imprisonment respectively. The facts of the case are shortly these:—The girl Badal, when only five years old, is alleged to have been given in marriage by her mother, Atar, to the complainant. Before the girl had attained puberty, the complainant was sentenced to imprisonment for a term of four years and six months, and whilst he was in jail the girl attained puberty and married the second prisoner. The Judge and assessors find that the second prisoner was aware of the first marriage with the complainant, and they have accordingly convicted the two accused as mentioned above.

This is not a case involving a question as to the legitimacy of a child or the validity of a marriage contracted by two adult persons where a legal union may be presumed from continued relationship or otherwise. This is a prosecution for a criminal offence; and we have to examine the evidence carefully regarding the alleged marriage of the girl to the prosecutor.

Now, with the exception of the statement of Joy Lal that he married the girl, and of Atar that she gave her daughter to him in marriage, and of two witnesses, who say that they were present at the time, there is no evidence to establish the fact of the first marriage. Had there been a legal marriage, a Mollah would have been present, with the necessary witnesses and *vakils*, to read the

(1) L. R. I. A., Supp. Vol., 192 (197).

(2) I. L. R., 4 Calc., 10.

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sigha. No Mollah has been called, nor is it suggested that any Mollah was present. There is no evidence that any of the ceremonies usual at a Mahomedan marriage in this country were ever performed. It is well known that the *sigha* (formula) recited at the marriage of minors is different from that recited at the marriage of adults. There is no evidence that any *sigha* was in fact recited on the occasion, or the *akd* performed, without which there can be no marriage. It is possible that the girl was betrothed to the complainant by her mother, as is frequently the case among the lower class of Mahomedans, and sometimes even among respectable people. But I am by no means satisfied that there was any valid marriage. In prosecutions for bigamy it has been invariably held by this Court that, where proof of either marriage is unsatisfactory, there ought to be no conviction. In the case of *Empress* v. *Lutfunnissa and others* (1) tried on the 3rd August 1887 in the High Court before Macpherson, J., where the evidence regarding the first marriage was as unsatisfactory as in the present case, the learned Judge directed the jury to return a verdict of not guilty. In another case Wilson, J., took the same course.

This view is sufficient to dispose of the case; but as prosecutions of this character are not infrequent among the lower classes of Mahomedans, it may be as well to dispose of one other question. The girl is said to have been married to the complainant when a mere child by her mother. Under the Mahomedan law, when a child is given in marriage by any person other than the father or grandfather, he or she has the option of either ratifying it or repudiating it on attaining puberty (Radd-ul-muhtar, vol. II, Egypt. edition, p. 500, and the Sharaya-ul-Islam, p. 309). This is called the *Khyar-ul-bulúgh*, or option of puberty. Under the Shiah law such a marriage is of no effect, and produces no legal consequences until it has been ratified by the minor upon his or her attaining majority. The Shafees agree with the Shiahs in this view. There is no evidence in this case to show to which sect the girl belongs.

Assuming, however, that she is a Hanafi Sunni, how would the matter stand? The only difference between the Sunni and the

(1) Unrep. (Case No. 3; 5th Sessions of 1887).

Shiah law on the question of option of puberty is that whereas according to the latter school a marriage contracted for a minor by a person other than the father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty, according to the (Hanafi) Sunni school it continues effective until it is cancelled by the minor. Both schools give to the minor an absolute power either to ratify or to cancel the unauthorised marriage. The (Hanafi) Sunni law presumes ratification when the girl after attaining the age of puberty has remained silent and has allowed the husband to consummate the marriage.

In the present case the man to whom the girl is said to have been married was in jail when she attained puberty. It was not necessary for her, therefore, to signify her assent or dissent. After attaining puberty she entered into a contract of marriage with the second accused. This is sufficient indication in my opinion that she never ratified the unauthorised marriage, which was never consummated.

The only question that remains to be considered is whether a judicial order was necessary to effectuate the cancellation. The Fatawa-i-Alamgiri says such an order is necessary, but the Radd-ul-muhtar (vol. II, p. 502) explains it by saying that a judicial declaration is not needed for imparting validity to an act which the parties have the power to do, but to provide judicial evidence in order to prevent disputes. No time, however, is limited for seeking the assistance of the Kazi—Fatawa-i-Alamgiri, I, p. 267 (Egypt. edition). Besides it has been held by Mahomedan lawyers that in a claim for restitution of conjugal rights the defendant may plead the exercise of "the right of option," and if it is established the Kazi may grant the declaration in that proceeding. It seems to me that this principle would apply equally to a proceeding like the present, where a conviction can take place only if it is found conclusively that the former marriage was still binding and effective.

For all these reasons, without going into the question whether the enforced absence of the alleged husband for four years, admittedly without making any provision for the wife's maintenance, justified her or not in contracting a second marriage, I think that this conviction ought to be set aside.

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BEVERLEY, J.—I concur with my learned colleague in setting aside the convictions in this case on the ground, *first*, that there is no sufficient legal evidence of the first marriage, and, *secondly*, that under the circumstances of this case—the girl having been betrothed in marriage by her mother before she attained puberty, that marriage having never been consummated, and the husband being in jail at the time the girl attained puberty—it was open to her to repudiate the betrothal and contract a valid marriage with another person.

The conviction of the appellants is accordingly set aside and they will be released.

Appeal allowed and conviction quashed.

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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July 28.

MATANGINI DASI AND ANOTHER (PLAINTIFFS), *v.* JOGENDRA CHUNDER MULLICK AND OTHERS (DEFENDANTS).*

Hindu Law—Husband and Wife—Cruelty—Maintenance.

A Hindu wife is justified in leaving her husband's protection, and is entitled to separate maintenance from his income, when he habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety. *Sitanath Mookerjee* v. *Haimabutty Dabee* (1) referred to.

THIS was a suit for maintenance brought by the plaintiff, Matangini Dasi, on behalf of herself and her minor son, Ratneswar Mullick, against her husband, Jogendra Chunder Mullick (defendant No. 1), on the ground that his cruelty and misconduct endangered her life and compelled her to seek refuge in her father's house, accompanied by her minor son. She claimed Rs. 50 per mensem as maintenance for herself and her son, and Rs. 25 per mensem for her son's education. She also claimed Rs. 450 as maintenance at the rate of Rs. 75 per mensem for the six months

* Appeal from original decree No. 41 of 1890 against the decree of Babu Dwarka Nath Bhuttacharji, Subordinate Judge of Midnapore, dated the 18th of September 1889.

(1) 24 W. R., 377.