

1882

LARAITI
v.
RAM DIAL.

antecedent thereto and connected with the objection of Ram Dial as to his wife's leading an adulterous life. Upon the general principles of the rule of *res judicata*, I am of opinion that the Deputy Magistrate was wrong in law in re-opening matters already adjudicated upon, and his order directing the discontinuance of maintenance on the ground of facts antecedent to the District Magistrate's order must be held to be illegal.

I therefore set aside the order of the Deputy Magistrate dated the 4th August, 1882, and direct that he should hold an inquiry *de novo* in regard to the adulterous conduct of Laraiti, alleged by her husband Ram Dial, with reference to the period subsequent to the District Magistrate's order of the 2nd March, 1880.

In conclusion, I wish to observe that the record shows that the notes of evidence recorded by the Deputy Magistrate are very inadequate and vague, and the order recorded by him proceeds upon no distinct findings of facts, but upon a vague finding that "Laraiti is a bad character." The proceedings under Chapter XLI. of the Criminal Procedure Code are judicial proceedings in their nature and must not be conducted as if they were merely ministerial matters.

Before Mr. Justice Mahmood.

IN THE MATTER OF THE PETITION OF DIN MUHAMMAD.

Maintenance of wife—Act X of 1872 (Criminal Procedure Code), s. 536—Muhammadan Law—Divorce—"Iddat."

An order for the maintenance of a wife, passed under Chapter XLI of Act X of 1872, becomes inoperative, in the case of a Muhammadan, by reason of his lawfully divorcing his wife, and thus putting an end to the conjugal relation, but it does not become so before the expiration of the divorced wife's "iddat."

Abdur Rohoman v. Sakhina (1); *In re Kasam Pirbhui* (2); and *Luddun Sahiba v. Mirza Kamar Kudar* (3); Madras High Court Proceedings, 2nd December 1879; referred to and followed.

The Muhammadan law of divorce relating to the maintenance of a divorced wife during her "iddat" referred to.

THIS was a reference under s. 296 of Act X. of 1872 (Criminal Procedure Code) by Mr. T. Benson, Officiating Magistrate of the Allahabad District, of a case under s. 536 of that Act decided

(1) I. L. R., 5 Calc., 558. (2) 8 Bom. H. C. R., Cr. Cas. 95.
(3) I. L. R., 8 Calc., 736.

1882

November 1.

by Mr. C. D. Steel, Magistrate of the first class in that district. The facts of the case are stated in the judgment of the High Court. The parties did not appear.

1882

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

MAHNOOD, J.—Upon the application of Nasiban (a Muham-
madan) the Assistant Magistrate made an order on the 10th June,
1882, under s. 536, Criminal Procedure Code (Act X. of 1872), di-
recting her husband, Din Muhammad, to make a monthly allowance
of Rs. 5 for her maintenance. On the 26th July, 1882, Din Muham-
mad made an application praying that the order of the 10th June
might be set aside on the ground that he had divorced his wife ac-
cording to the Muhammadan law. The Assistant Magistrate, how-
ever, summarily rejected the application without inquiry, express-
ing a doubt whether “a divorce made with a view to getting rid of
an order of maintenance would be valid.” He also expressed his
opinion that “until a Musalman husband pays his wife’s dower, his
liability to maintain her in accordance with the marriage contract
continues,” and he declined to interfere with his former order
“until the parties have either agreed among themselves as to the
amount of dower or have had the question settled in the Civil Court,
and until the dower has been paid.” Upon an application being
made by Din Muhammad, the District Magistrate directed the
Assistant Magistrate to inquire into and adjudge upon Din Muham-
mad’s application, by an order which purports to have been passed
under s. 298, Criminal Procedure Code, and is dated the 1st Sep-
tember, 1882. The Assistant Magistrate thereupon examined Din
Muhammad and Nasiban on oath, and their evidence contradicted
each other, both as to the fact of the divorce and the amount of
dower. It appears from the record that upon the conclusion of
Nasiban’s evidence, Din Muhammad in the presence of the Assist-
ant Magistrate addressed the words “I divorce you” to the woman
three times. The Assistant Magistrate, without determining the
facts of the case, refused to interfere, referring as grounds of his
order to the opinion expressed by him in another case to the effect
that “a Magistrate would be justified in passing an order of main-
tenance from the time of divorce till the time when the question
of dower had been settled.” and that “s. 536 clearly gives a
Magistrate discretionary power to order maintenance against a

1882

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

man until he has completed his divorce by giving his wife her dower.”

The case having again come to the notice of the District Magistrate, he has arrived at the conclusion that the Assistant Magistrate's last order was illegal, and has referred this case under s. 296, Criminal Procedure Code, for the orders of the Court.

Both the Magistrates seem to have regarded the proceedings initiated by Din Muhammad's application as falling under the purview of s. 537 of the Criminal Procedure Code. But it seems to me clear that cases of this nature are not contemplated by that section at all.

The words “the Magistrate may make such alteration in the allowance ordered as he deems fit,” preceded as they are by the word “wife,” and followed as they are by a limitation as to the amount of the monthly allowance, clearly indicates that “the alteration in the allowance” contemplated by that section only refers to a power to alter that amount, and not to a total discontinuance thereof. This view is supported by the ruling of the Calcutta High Court in the case of *Abdur Rohoman* (1), in which the learned Judges placed a similar interpretation upon s. 235 of the Presidency Magistrates' Act (IV. of 1877), the words of which are *ipsissima verba* with the wording of s. 537 of the Criminal Procedure Code. Nor is there any other explicit rule to be found in the Criminal Procedure Code which empowers the Magistrate to direct cessation of a wife's maintenance on the ground of her having been divorced since the order of maintenance was passed. It is only by analogies furnished by the express provisions of Chapter XLI. of the Criminal Procedure Code that a rule upon the subject now under consideration can be evolved. The learned Judges of the Calcutta High Court, in the case above cited, seem to have adopted such a course in placing a liberal construction upon the wording of s. 234, Act IV. of 1877, which corresponds to s. 536 of the Criminal Procedure Code, and in holding that it is “as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and consequently.....a

(1) I. L. R., 5 Calc., 558.

Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution." This view of the law is consistent with the opinion expressed by Westropp, C. J., in the case of *Kasam Pirbhai* (2), in which the learned Chief Justice, referring to the order of maintenance and to the subsequent divorce, observed:—"That was a proper order at the time it was made, but we think the ground-work of that order has now been removed, and we cannot consider it any longer a continuing binding order upon the applicant. The enactment under which that order was made does not relate more especially to Muhammadans than to Hindus, Buddhists, Indo-Britons, Europeans, or any other branch of the general community, and the Legislature could never have intended by it to interfere with or restrict the Muhammadan law of divorce. We do not think that the Magistrate ought to issue an attachment upon or otherwise to execute the order, it being in fact *functus officio*. We do not, however, quash or set aside the order, it having been a valid order when made."

1882

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

I fully concur in the views above cited, and though I am of opinion that there is no express provision in the Criminal Procedure Code to meet a case like the present, the interpretation is warranted by the general principles of liberal construction. The construction, perhaps, goes beyond the letter of the statute, but extension by equity of the language of statutes has been recognized to be allowable in cases where such extension clearly gives effect to the intention of the Legislature. The whole of Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place, is a question which, *ex necessitate rei*, must be determined according to the

1882

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

personal law to which the parties concerned are subject. In the present case, the parties being Muhammadans, the rules as to divorce provided by that system must be held to govern the decision of the point. But beyond the question of continuance or cessation of the conjugal relation, that law can have no further effect upon the exercise of the power of the Magistrate in regard to maintenance. The right to maintenance conferred by s. 536 of the Criminal Procedure Code is a statutory right, which the Legislature has framed irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of the conjugal relation. This principle has been fully recognized by the Calcutta High Court in the recent case of *Luddun Sahiba* (3), which was a case between Muhammadans.

In the present case the Assistant Magistrate was entirely wrong in holding that a magisterial order for maintenance could in any manner operate as an impediment in the way of a Muhammadan to exercise the power conferred on him by his personal law to divorce his wife. He is also in error in thinking that the payment of dower is a condition precedent to the completion of a divorce, or that "a Magistrate would be justified in passing an order of maintenance from the time of divorce till the time when the question of dower has been settled." Such is not the rule of the Muhammadan law. Under that law divorce is in no way dependent upon the payment of dower, though the ordinary form of dower-debt becomes payable on the cessation of the conjugal relation, whether such cessation takes place by divorce or death. But these are matters which are entirely beyond the scope of Chapter XLI., and with which Magistrates, in exercising their powers as to maintenance, are in no way concerned. All that the Magistrate has to determine in a case of this kind is, whether the woman claiming maintenance is still the wife of the person against whom she advances such a claim. If the question is determined in the affirmative, the order of maintenance must continue to be operative. On the other hand, if it is found that by the effect of some rule of the personal law of the parties concerned, the conjugal relation has absolutely ceased to exist, the

order of maintenance, *ipso facto*, becomes *functus officio*, and can no longer be enforced.

I might end my observations here, had not the District Magistrate, referring to the opinion of the Assistant Magistrate, made the observation that a divorced wife "may possibly be entitled to maintenance for the period of '*iddat*,' three months and thirteen days." Upon this point there is a note (under s. 488) in Mr. Justice Prinsep's edition of the new Criminal Procedure Code (Act X of 1882) and also in the edition by Messrs. Agnew and Henderson which refers to the Madras High Court Proceedings, dated 2nd December, 1879, laying down the rule that "a divorced Muhammadan wife is entitled to maintenance during the *iddat* or period of probation, but an order for maintenance for a period subsequent to the expiration of the *iddat* is illegal. If she be pregnant, she will be entitled to maintenance during gestation." I have unfortunately not had access to those proceedings, but as the note stands, the latter sentence must be regarded as only explanatory of the former, as in the case contemplated the period of gestation and *iddat* is identical. In connection with the exercise of the powers conferred by s. 536, Criminal Procedure Code, I am of opinion that the rule adopted by the Madras High Court is a salutary one, and consistent with the principles of the Muhammadan law. *Iddat* is defined in the Hedaya to be "the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connexion; the most approved definition of *iddat* is the term by the completion of which a new marriage is rendered lawful." Moreover, an ordinary divorce under the Muhammadan law is revocable within the period of *iddat*, and to use the words of the Hedaya, "a marriage is accounted still to subsist during the *iddat* with respect to various of its effects, such as the obligation of alimony, residence, and so forth; and hence it may lawfully be accounted to continue in force with respect to the woman's inheritance, but, as soon as the *iddat* is accomplished, a further procrastination is impossible, because the marriage does not then continue in any shape whatever."

As a general rule, therefore, it may be laid down that the severance of the conjugal tie, caused by divorce, does not become

1882

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

1882

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

absolute till the termination of the period of the *iddat*, the length whereof, in the case of a divorced woman, (not pregnant), extends over a period of three months, reckoned from the divorce, and not three months and thirteen day as the Magistrate seems to think.

The rule of Muhammadan law in regard to maintenance of a divorced woman during her *iddat* is clearly stated in the *Hedaya*. "Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her *iddat*, whether the divorce be of the reversible or irreversible kind. The argument of our doctors is, that maintenance is a return for custody, and custody still continues on account of that which is the chief end of marriage, namely offspring (as the intent of *iddat* is to ascertain whether the woman be pregnant or not), wherefore subsistence is due to her, as well as lodging, which last is admitted by all to be her right."

Therefore, whilst I am of opinion that an order for maintenance of a wife passed under Chapter XLI. becomes inoperative, in the case of a Muhammadan, by reason of his lawfully divorcing his wife and thus putting an end to the conjugal relation, I hold that that relation does not cease to exist so absolutely as to render the wife free to marry again, or to look to any other means of support during her *iddat*. And this being so, it would be putting an inequitable and unreasonable construction upon the law to hold that the Magistrate's order for maintenance of the wife ceases to be operative before the expiration of the divorced wife's *iddat*.

Under this view of the law the application by Din Muhammad to set aside the order of maintenance was rightly rejected by the Assistant Magistrate, though on erroneous grounds. The legality of the order for maintenance has not been impugned; and there is no reason to interfere with it, and it must be held to have operative force till the expiration of the *iddat*. But the case has not been gone into by the Magistrate from this point of view, and the circumstances of the case do not require any further inquiry at this stage. The proper occasion for the inquiry will arise when the enforcement of the order of maintenance becomes necessary, and Din Muhammad objects to such enforcement on any of the grounds which may be lawfully available to him. It will then be the duty

of the Magistrate to consider the case with reference to the above observations, and after trying the issues of fact as to divorce, &c., to enforce the order, or stay the operation thereof, as the case may be.

In view of these observations, I see no reason to interfere in the order to which this reference relates.

1882.

IN THE MAT-
TER OF THE
PETITION OF
DIN MUHAM-
MAD.

APPELLATE CRIMINAL.

1882
December 8.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. KALLU.

Adultery—Act XLV of 1860 (Penal Code), s. 497—Evidence of marriage—Act I of 1872 (Evidence Act), s. 50—Prosecution for adultery—Act X of 1872 (Criminal Procedure Code), s. 478.

K was accused by *D* and *P*, alleged to be *D*'s wife, of raping *P*, and was committed for trial charged in the alternative with rape or adultery. The evidence of marriage between *D* and *P* consisted of their statements that they were married to each other, and of a statement by *K* that *P* was *D*'s wife. *K* was convicted on the charge of adultery.

Held that such evidence, having regard not only to s. 50 of the Evidence Act 1872, but to the principle that strict proof should be required in all criminal cases, was not sufficient to establish the vital incident to the charge of adultery, namely, the marital relation of *D* and *P*. *Empress v. Pitambur Singh* (1) concurred in.

Also that, as no complaint had ever been actually instituted by *D* against *K* for the offence of adultery, as contemplated by s. 478 of Act X of 1872 (Criminal Procedure Code), (the circumstance of *D*'s appearing as a witness for the prosecution for the offence of rape not amounting to the institution of a complaint within the meaning of that section), *K*'s conviction for adultery must be quashed.

APPEAL from a judgment of conviction of Mr. J. C. Leupolt, Officiating Sessions Judge of Allahabad, dated the 26th October, 1882. The facts of the case are stated in the judgment of the Court.

Mr. Howard, for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—This is an appeal from a decision of the officiating Sessions Judge of Allahabad, dated the 26th of October last, convicting the appellant of adultery with the wife of one Dubri, *kachi*,

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