

1909
 ASHRUF ALI
 v.
 EMPEROR.

JENKINS C.J. AND CASPERSZ J. On the facts we are in agreement with the learned Magistrate, for we hold with him that the accused was in possession of the railway receipt. The question then arises whether that constitutes possession of the opium to which the railway receipt relates, so as to be an offence within section 9 of the Opium Act (I of 1878). If unfettered by authority, I should have been disposed to hold that there was no such possession, for, as I read the Act, it relates to possession of opium, and not of a receipt for the opium. However, there is a decision of this Court by which we are bound, *Kashi Nath Bania v. Emperor* (1), in which, on facts not fairly distinguishable from the present, it was held that possession of the railway receipt was possession of opium within the meaning of the section. It appears to me that this decision overlooks the distinction between "possession" and the "right to possession." But there the decision stands, and we are bound by it. We, therefore, dismiss this appeal.

E. H. M.

Appeal dismissed.

(1) (1905) I. L. R. 32 Calc. 557.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN v. BOWEN.*

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 Aug. 10.

Divorce—Alimony pendente lite, application for, after decree nisi—Indian Divorce Act (IV of 1869) s. 36.

Notwithstanding a decree *nisi* for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under section 36 of the Indian Divorce Act, to order alimony *pendente lite* for the period between decree *nisi* and decree absolute.

Dunn v. Dunn (1) considered.

THIS was an application by the wife, against whom a decree *nisi* (2) for dissolution of marriage had been made, for an order for alimony, until the decree should be made absolute. τ

On the 7th January 1909, Mr. Bowen filed a petition for dissolution of marriage on the ground of his wife's adultery,

* Application in Original Civil Suit No. 1 of 1909.

(1) (1888) L. R. 13 P. D. 91.

(2) (1909) I. L. R. 36 Calc. 874.

and on the 14th June 1909, Harington J. pronounced the decree *nisi* (1).

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Mr. Bowen was a berthing master in the employment of the Commissioners of the Port of Calcutta, with an income of about Rs. 350 per month. Since the institution of the suit, by a private arrangement between the parties, the husband had made the wife an allowance at the rate of Rs. 100 a month for the months of January and February, and thereafter at the rate of Rs. 70 a month. On the 5th July 1909, Mr. Bowen tendered the sum of Rs. 35 as the amount due up to the date of the decree *nisi*, and refused to make any further allowance.

Mr. Asghur, for the applicant. Under section 36 of the Indian Divorce Act the wife may present a petition for alimony pending the suit, and the alimony shall continue until the decree is made absolute. Now the *lis* does not terminate with the decree *nisi*. Hence an application for alimony can be made after decree *nisi*: *Ellis v. Ellis* (2), *Foden v. Foden* (3), *Thomas v. Thomas* (4). The Indian Divorce Act does not deprive a guilty wife of alimony: *Thomas v. Thomas* (4). See Rattigan on Divorce, page 204.

Mr. Stokes, for the opposite party. In *Thomas v. Thomas* (4), alimony was allowed to the guilty wife only up to the pronouncement of decree *nisi*. It has been the uniform practice of the Courts in England to order a discontinuance of alimony after the wife's adultery has been proved: *Dunn v. Dunn* (5). Section 36 of the Indian Divorce Act does not contemplate an application for alimony being made after decree *nisi*. Under that section, if an order for alimony had been made before decree *nisi*, it would continue until the decree was made absolute.

Cur. adv. vult.

HARINGTON J. This is an application by the wife against whom a decree *nisi* for dissolution of marriage has been made for alimony until the decree is made absolute.

(1) (1909) I. L. R. 36 Calc 874..

(3) [1894] P. 307.

(2) (1883) L. R. 8 P. D. 188.

(4) (1896) I. L. R. 23 Calc. 913.

(5) (1888) L. R. 13 P. D. 91.

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 HARRINGTON
 J.

The husband has tendered the amount due up to the decree *nisi* and says that, inasmuch as the wife has been found guilty of misconduct, she has forfeited her right to receive any alimony subsequent to the decree *nisi*.

Alimony has been paid by the husband to the wife since the institution of the suit : that payment was made in pursuance of a private arrangement between the parties, no application was made in Court in respect of it.

The husband relies on the case of *Dunn v. Dunn* (1), in which it was held in England that where alimony *pendente lite* had been granted to a wife in a petition for divorce the right to such alimony ceased upon the wife's being found guilty of adultery.

But in this country the period during which alimony is payable is regulated by section 36 of the Divorce Act, which provides that it shall continue in the case of a decree for dissolution of marriage until the decree is made absolute. This provision, therefore, makes the law as laid down in *Dunn v. Dunn* (1) inapplicable in this country. Had alimony been granted it must by the express words of the statute have been continued to be payable until the decree is made absolute.

The decree *nisi* then under Indian law is no ground for depriving the wife of her alimony, and if it be no ground for depriving a wife of alimony, it appears to me equally to be no ground for refusing a wife the alimony which would otherwise be granted to her. The Indian Divorce Act contemplates the payment to the wife of alimony as long as she is in law a wife. Mrs. Bowen is still the wife of Mr. Bowen and should therefore be supported until she ceases, under a decree absolute, to fill that position. The parties are agreed that alimony, if payable, shall be at the rate of Rs. 70 a month.

The result is that the application must be granted with costs on scale 2.

J. C

Application allowed.

Attorney for the applicant : G. K. Ghose.

Attorneys for the opposite party : Pugh & Co.