CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

ABDUL GHANI

v.

AZIZUL HUQ.*

1911

Dec. 13

Mahomedan law—Bigamy—Effect of apostacy of husband after marriage, and re-conversion to Islam during the period of iddut—Second marriage of the wife with another man during such period—Abetment—Penal Code (Act XLV of 1860), ss. 494 and $\frac{494}{109}$.

Under the Mahomedan law the marriage of a man, who subsequently embraces Christianity, becomes *ipso facto* void, notwithstanding his reconversion to Islam during the period of *iddut;* and the wife, in contracting a second marriage during such period, does not commit bigamy under s. 494 of the Penal Code.

Per HOLMWOOD J. A second marriage contracted by the wife during the period of her *iddut* is not void by reason of its taking place during the life of the first husband, but by reason of a special doctrine of the Mahomedan law with which the Penal Code has nothing to do. Where the parties have acted in good faith or what they believe to be a sound interpretation of a very difficult point of Mahomedan law, even though they are mistaken, the consequences cannot be visited upon them in a Criminal Court in a trial for bigamy.

ONE Azizul Huq was married to the petitioner, Jaitan Bibi, in 1906, the parties belonging to Hanafi sect of Mahomedans. The girl was given in marriage by her father, the petitioner Abdul Ghani, and the marriage was duly registered by the Mahomedan Marriage Registrar. About a year ago a difference arose between the families of the husband and wife, and Azizul Huq took his wife away by force from

* Criminal Revision No. 993 of 1911 against the order of Naba Gopal Chaki, Sub-divisional Officer of Gopalganj, dated June 23, 1911.

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her father's house, where she was then residing, but the father persuaded her to return. It appeared that Azizul embraced Christianity some time after his marriage with Jaitan, but reverted to Islam during the period of her *iddut*. Before the expiry of the latter period, Abdul Ghani married her to the petitioner, Abdul Aziz. Azizul thereupon filed a complaint against Jaitan, her father and her second husband, under ss. 494 and $\frac{494}{109}$ of the Penal Code, respectively, before the Sub-divisional Officer of Gopalgunj, who directed a local investigation, before process, by the Mahomedan Marriage Registrar. The latter reported that both marriages had taken place, but that the first one was not celebrated according to social customs and was further void by reason of the apostacy of the complainant. The Magistrate, after recording evidence, held that the marriage with the complainant was duly solemnized according to Mahomedan law, notwithstanding the non-observance of some minor social customs, and that, although it was dissolved by the complainant having become a Christian for a month and a half, no fresh marriage was necessary on account of his re-conversion to Islam during the period of the wife's *iddut*. He also found the second marriage proved, and committed the accused to the Court of Sessions under ss. 494 and $\frac{494}{109}$ of the Penal Code, respectively. The petitioners, thereupon, moved the High Court under s. 215 of the Criminal Procedure Code, and obtained this Rule to quash the commitment.

Mr. Acharya (with him *Babu Satyendra Nath Mukherjee*) showing cause. The marriage tie of a Mahomedan is not dissolved *co-instanti* on the apostacy of the husband. He may, on re-conversion to Islam during the period of *iddut*, resume cohabitation without a fresh contract of marriage with the woman.

During such period she cannot lawfully marry another man. Refers to Rahim's Muhammadan Jurisprudence, p. 341; Wilson's Anglo-Muhammadan Law, 3rd ed., pp. 109, 512, 514, 524; Rahman's Institutes of Musalman Law, Art. 304 and the authorities cited therein; Ameer Ali's Mahomedan Law, Vol. II. (3rd ed.), p. 431; Baillie's Digest, pp. 182, 352. Marriage is much more than a private contract: it is one which creates a status and involves the status and rights of persons not parties to it, *e.g.*, the issues thereof. It further imposes on the parties special duties towards the State. It cannot be dissolved at the will of the parties: see Dicey's Article in the Law Quarterly Review, vol. XXV, pp. 204 and 205, and his comments on *Chetti* v. *Chetti* (1). Herein we find the root causes of the period of *iddut*. Such a probationary term has also been fixed by s. 57 of the Divorce Act (IV of 1869). A marriage, under Mahomedan Law, is dissolved *ipso facto* by apostacy, that is, without a judicial decree, but not *co-instanti* and a fresh marriage contracted during the *iddut* is illegal.

Mr. Huq (with him *Maulvi Shamsul Huda*), for the petitioner. The marriage tie is dissolved immediately on the apostacy of the husband, and he ceases thereafter to possess such status. Refers to the Hedaya, as translated by Hamilton, Vol. I, Book 2, Chap. 5. If a woman contracts a marriage with another man during the *iddut*, the marriage is invalid; but she cannot be said to have married again during the life-time of a husband within s. 494 of the Penal Code.

Mr. Acharya, in reply.

Cur. adv. vult.

HOLMWOOD J. I have had the advantage of reading the judgment which is about to be delivered by

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my learned brother, and I entirely agree with him that the marriage of a Mahomedan man and woman is rendered *ipso facto* void by the apostacy of the former, though there are certain methods, as pointed out by my learned brother, by which the marriage tie may be renewed.

But what I wish to lay stress upon is that whatever view be taken of the uncertain status of the parties during the period of *iddut*, and however illegal and void under Mahomedan law the second marriage of the woman during the period of *iddut* may be, there is no foundation for any charge under s. 494 of the Indian Penal Code against her. Her second marriage is not void by reason of its taking place during the life of a prior husband, but by reason of a special doctrine of the Mahomedan law of *iddut* with which the Indian Penal Code has nothing to do.

The parties in this case appear to have acted in good faith on what they believed to be a sound interpretation of a very difficult point of Mahomedan law. Even though they were mistaken, the consequences could not be visited upon them in a Criminal Court administering the penal laws against bigamy. The consequence is a purely civil one, namely, the nullity of the second marriage. For these reasons, I agree that the commitment of the petitioners to the Sessions under s. 494 and s. $\frac{494}{109}$ of the Indian Penal Code must be quashed, and the Rule made absolute.

SHARFUDDIN J. This is a Rule calling on the Magistrate and on the complainant to show cause why the commitment of the petitioner should not be quashed on the ground that the first marriage has been dissolved.

It appears that one Azizul Huq and Musummat Jaitan, both Mahomedans of the Hanafi sect, were

husband and wife. Some years after marriage the husband, Azizul Huq, became a Christian, but within a month and-a-half he again reverted to Islam. During the above interval, the woman, Jaitan, married a man named Abdul Aziz, and her father gave her in marriage to the new husband.

The first husband, after his conversion to Islam, complained with the result that Musummat Jaitan, her father Abdul Ghani, and her second husband Abdul Aziz have been committed to the Court of Sessions for trial, the first under section 494 of the Indian Penal Code, and the other two for abetment of that offence. On an application by the three accused, under section 215 of the Criminal Procedure Code, to quash the commitment, the present Rule was granted.

The point of law on which the present application was made is, that, as the Mahomedan Law does not permit a marriage between a Mahomedan female and a non-Mahomedan male, the marriage tie in the present case was broken on the complainant's conversion to Christianity. It was also contended that in such a case Musummat Jaitan did not marry Abdul Aziz during the lifetime of a husband.

On behalf of the complainant it was urged that inasmuch as Azizul Huq reverted to Islam, during the period of *iddut*, he could continue his conjugal rights without re-marrying Musummat Jaitan, and on his behalf a certain passage from *Raddul-Muhtar* was relied on, in order to show that the marriage does not become dissolved instantly the man abandons Islam. We have consulted the original book in Arabic, and the context relied upon is—

المرتد إذا لحق بدار الحرب فطلق امرأته لا يقع و إن عاد مسلما

و هي في العدة فطلقها يقع —

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The translation of this passage is—"if an apostate goes to Darul-Harab (an alien country where the laws of Islam are not in force) and arriving there divorces his wife, the divorce will not take place; but if he returns as a Muslim and divorces her during the *iddut* period, the divorce will take place: *vide Raddul Muhtar*, page 425, Egyptian edition.

On the strength of the above doctrine it is urged that the marriage tie does not absolutely break during the period of *iddut*, for otherwise a divorce given by the husband after his return to the faith would not be effective.

The view, however, of lawyers like the authors of the *Hedaya*, the *Fatawa Alamgiri* and some other works, unanimously is that apostacy from Islam, whether it takes place before or after consummation, *ipso facto* dissolves the marriage tie.

The after-effects of separation through *talaque* (divorce) and apostacy are different. There are three forms of *talaque*, namely:—*(a) Talaque-rajai* (طلاق رجعي). In this *talaque*, the husband says *tal-luk-to-kay* (طلقتك) without any intention on his part that it should operate as *talaque-ba-in* (طلاق بائن), which is the second form of *talaque*. In *talaque-raiai* the woman has to observe *iddut;* but during the period of *iddut* if the husband reverts to Islam, he can continue his conjugal rights without renewal of the marriage tie.

(b) Talaque-ba-in.—In this form of *talaque* the husband is required to utter the expression (طلقتك) which means "I renounce thee" with the intention that it should operate as *talaque-ba-in*, the effects of which are that the woman has to observe *iddut;* and

if the husband reverts, he can continue his conjugal rights by a renewal of the marriage tie (تجديد عقد).

(c) Talaque-mogallaz (طلاق مغلظ). In this form of *talaque* the husband is required to utter the above expression three times, or he may say: "I give you three *talaques*." The effects of this form of *talaque* are that the woman has to observe the *iddut* period and she becomes *haram* (حرام), that is, within prohibited degrees, and the husband cannot re-marry her until she has formed another connection by marriage with another man, cohabitation has taken place with this other husband and the latter has divorced her, and she has observed the period of *iddut* after her second divorce. The stage of the second marriage and the second divorce is technically called *halala* (حلاله).

From the above it is manifest that in every form of separation caused either by *talaque* or apostacy, the woman has to observe the period of *iddut*. There is consensus of opinion that a woman's marriage during *iddut* is illegal, but in case of *talaque rajai*, the husband can continue his conjugal rights without a re-marriage if he reverts during the *iddut*.

There is a passage in the *Sharah Waquaya* (شرح وقايه), chapter *Al-murtud* (المرتد) page 377, Lucknow edition, which also lays down that after apostacy the marriage tie becomes null, but the man can still exercise his right of *talaque*. The passage referred to is—

وبطل نكاحه ذبحه وصح طلاقه - إعلم ان النكاح والذبح باطلان

اتفاقاً - والطلاق والاستيلاد صحيحان اتفاقاً -

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which means "the *nikah* (marriage) of the apostate with his Mahomedan wife becomes *batil* (باطل), that is, null, but he can still legally divorce her."

It is clear from the above passage that in spite of the marriage tie having been absolutely broken in consequence of apostacy, the man has still the right, which is vested in him, to divorce his Mahomedan wife. It, no doubt, seems an anomaly that an apostate husband can divorce his Mahomedan wife. The Mahomedan jurists have explained the anomaly; as, for example, the author of *Raddul-Muhtar* has explained it in the following passage:—

فيقع طلاقه عليها في العدة متتابعا فائدته من حرمتها عليه بعد الثلاث حرمة مغلظة بوطئ زوج اخر -

which means that the object of vesting the power of divorce in the apostate is for a certain purpose only, namely, if an apostate recites the formula (بغه) three times, and thus divorces his wife in the *mogullaz* (مغلظ) form of *talaque*, she becomes *haram* to him, as stated above in the third form of *talaque*, that is to say, he cannot continue his conjugal rights with the woman without marriage or with a renewal of marriage without the intervention of a *halala*.

On reference to the different authorities, we are of opinion that Musummat Jaitan's marriage with the complainant became absolutely null at the moment he apostatised, and that from the date of his apostacy he was not her husband, and that he could re-marry her during the period of *iddut* if he reverted to Islam.

We have observed before that during the period of *iddut* a woman cannot marry another husband.

In the present case she is said to have done so. Her marriage with Abdul Aziz is, therefore, invalid. Her act, therefore, may be considered as invalid and sinful. and according to the jurists it is the duty of the Kazi to separate them and compel her to observe the *iddut* period. In the present case we are not concerned with the question as to whether her second marriage was legal or not according to the Mahomedan law. We are only concerned with the question as to whether her second marriage, if it can be called a marriage, took place during the lifetime of a husband. On the authorities discussed above, we are of opinion that, although her second marriage, having taken place during the period of *iddut*, was not a legal marriage, yet she cannot be said to have gone through the form of the second marriage while her legal husband was alive. For the above reasons, we quash the commitment, and make the Rule absolute.

Rule absolute.

E. H. M.