Legislature have deliberately substituted the word 'petition' for 'regular suit,' intending to show that one-quarter fee alone is leviable. I am clear that, under Act XVI. of 1864 a full fee was payable, and it has been so ruled in *Mowla Buksh* v. *Bahadoor Ali Khan* (*a*).

"The procedure now under Act XX. of 1866 is exactly the same as it was under Act XVI. of 1864. The only question is whether the word 'petition' being used instead of 'regular suit' takes away the right to full fee. I do not think that the change in the name of the proceeding can take away the right to full fee. If such a proceeding was a regular suit under Act XVI. of 1864, this is *really* one now, although it is called a petition. I am inclined to think that the change in nomenclature had not a change in Pleader's fee in view, but was adopted to distinguish between an action of this kind and an ordinary regular suit under the Civil Procedure Code."

PER CURIAM (GIBBS and MELVILL, JJ.):—The Court does not agree with the District Judge, and is of opinion that, a petition having been substituted by Act XX. of 1866 for a regular suit as the remedy for a refusal to register a document, under the provisions of Sec. 7 of Act I. of 1846, the amount allowed for Pleader's fees should be one-fourth of what it would have been in a regular suit.

Special Appeal No. 405 *of* 1870.

Dec. 5.

UJI, daughter of Hargovan Ranchhod *et al.* .....*Appellants.*

HA'THI LA'LU .....*Respondent.*

Nátrá *Marriage—Permission by Caste—Divorce—Immoral Custom.*

A custom which authorises a woman to contract a *nátrá* marriage without a divorce, on payment of a certain sum to the caste to which she belongs, is an immoral custom, and one which should not be judicially recognised.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the district of Ahmedábád, in

(*a*) 9 Calc. W. Rep., Civ. R. 101.

1870.

UJI *et al.* v. HA'THI LA'LU.

Appeal Suit No. 30 of 1870, confirming the decree of Dinsháji Pestanji, Subordinate Judge of Ahmedábád.

The plaintiff sued his wife for the restitution of conjugal rights; and joining with her as co-defendants her father, mother, and a person who had gone through the ceremony of *nátrá* marriage with her, prayed that the obstruction caused by these people to his wife's returning to him should be removed. The defendants pleaded that the plaintiff had divorced his wife, and that the custom of the *Mochi* caste, to which they belonged, allowed a *nátrá* marriage with a woman having a husband alive, on the payment of a sum of money to the caste.

The court of first instance made a decree for the plaintiff. This decree the court of appeal upheld, recording the following finding:—

"The points at issue are—(1) Has the woman been divorced by her husband, so that her subsequent marriage is legal? (2) if not, can the custom pleaded by the defendant, even if proved, be considered valid? and (3) if so, is it proved?

"I find on the first point in the negative. It is admitted that no deed of divorce was executed, but it has been urged, and evidence has been adduced to prove, that the plaintiff, when called upon by the caste to take his wife back or maintain her, refused to do either, and said that he gave her up. In an important question like this, oral evidence must be admitted with the greatest caution, and I do not consider it proved that he did, by any words which he used, abandon his legal rights. He may have treated her badly; in fact, there is no doubt that he has turned her off, and for many years refused to maintain her. But, as his married wife, she had claims on him, which she could have enforced by law, and the mere fact that she has not chosen to enforce these rights (for instance, that of maintenance), and that she has, to a certain degree, quietly acquiesced in his resolution that he would not have her in his house, can give her no right to look upon the marriage as dissolved.

"The custom pleaded by the defendant is embodied in a deed (No. 37) passed by the caste in 1835. It was then for

1870.

UJI et al. v. HA'THI LA'LU.

the first time reduced to writing, but it is stated to be immemorial. In this deed it is laid down that in the event of a divorce taking place, the sum of Rs. 32 shall be paid to the caste by either the man or the woman, according as it was the one or the other by whose desire the divorce was effected; and that if a man contracts a *nátrá* marriage with a woman having a married dress (*sáchuri*), he or her parents shall pay a fine of Rs. 105 to the caste. The defendants argue from this that any woman may contract a *nátrá* marriage, even without a divorce, if the fine be paid; and a number of witnesses have been called to prove that such is the custom recognised in the caste, and that such marriages have taken place, and are considered binding. Merely looking at the deed, I think it is extremely doubtful whether the right interpretation has been placed on it, as no mention is made in it of the woman not having obtained a divorce. But I will first consider whether, if the custom be proved, it can be held to be valid. Now such a custom is clearly opposed to Hindú law. This fact is not denied by the defendants, but it is pleaded that the courts must look first to the custom of the country. It is urged for the plaintiff that no custom can be recognised if it is immoral. Of the tendency of such a custom there can be no doubt, as by it any man with Rs. 105 to spare might marry any married woman who might be tired of her husband, and has a fancy to him. This would be nothing more or less than legalising adultery. The Pleader for the plaintiff has quoted a ruling by the Bombay High Court (Rep., Vol. II., Pt. I., p. 124) (*a*), in a criminal case. A precisely similar custom had been set up as a defence against a charge of adultery. It was there held that such a caste custom, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of Hindú law, and that a marriage entered into in accordance with such a custom is void. If, then, such a custom cannot be looked upon as a good defence in a criminal case, much less can it be in a civil case.

(*a*) *Reg.* v. *Karsan Goja.* See corrected report, 2 Bom. H. C. Rep. (2nd ed.), p. 117.

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"The Pleader for the defendants has referred to another Crown Case, reported in Bombay High Court Reports, Vol. V., p. 17 (*b*); but the ruling in that case does not apply to the present case.

"I find, then, that the custom, even if proved, is invalid.

"No finding is required on the third point at issue."

The special appeal was heard before LLOYD and KEMBALL, JJ.

Dhirajlál Mathurádás, Government Pleader, for the special appellants.

Nánábhái Haridás for the special respondent.

PER CURIAM :—It has not been shown to us that the Judge has, as alleged, misconstrued the document exhibit No. 37; for, with the explanation now attempted by the appellants' *vakíl,* we do not find that it professes to go to the extent argued, and authorises a woman to contract a *nátrá* marriage without a divorce on payment of a certain sum to the caste, but, even admitting that it does go as far as this, we are of opinion that it is an immoral custom, which should not be recognised judicially, and that, therefore, the lower courts were right in their decision in favour of the plaintiff.

Decree confirmed with costs.

Dec. 22.

Special Appeal No. 277 *of* 1870.

MULJI BECHAR *et al.* .....*Appellants.*

ANUPRA'M BECHAR.....*Respondent.*

Certificate of Sale—Registration—Admission—Traverse.

A certificate of sale of immoveable property of the value of more than one hundred rupees must be registered, and the fact of sale cannot be proved except by the production of such certificate.

The mere fact that an allegation is not traversed does not relieve a plaintiff from the burden of proving his case.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge at Ahmedábád, in Appeal Suit No. 352 of 1869, reversing the decree of the Subordinate Judge of Neriad.

(*b*) *Reg.* v. *Manohar Raiji.*