

In re KA'SAM PÍRBHÁ'I and his wife HÍRBA'I.

1871.
July 21.

Order for Maintenance upon Husband—Muhammadan Law—Divorce of Wife by Husband—Effect upon Order—Act XLVIII. of 1860, Sec. 10—Custom—Khojá Muhammadans—Divorce.

An order made by a Magistrate under Act XLVIII. of 1860 (Police Amendment Act), Sec. 10, directing a Muhammadan husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the Magistrate's order can no longer be enforced.

Custom as to divorce amongst Khojá Muhammadans of the *Sunni* sect considered.

ON the 3rd of October 1870, *Mayhew* obtained a rule *nisi* for a writ of *certiorari* to issue, directed to John Connon, Esquire, J. P., and Senior Magistrate of Police, for the removal into the High Court of the proceedings taken before him in the matter of a complaint made against Kásam Pírbháí by his wife Hírbái for her maintenance, and the order on Kásam Pírbháí to pay Rs. 25 *per mensem* for the maintenance of Hírbái, and in the matter of the application of Kásam Pírbháí to cancel the lastmentioned order.

The facts of the case were these :—Kásam Pírbháí and Hírbái, Khojá Muhammadans, were married to one another in the *Sunni* form, before the Kázi of Bombay, about the year 1849. At that time all Khojá Muhammadans resorted to one common *jamát*. Kásam Pírbháí and Hírbái apparently did not live happily together, and Hírbái about six months after her marriage went to live with her mother. Kásam Pírbháí applied to the *jamát* for leave to marry a second wife. Leave was granted to him to do so. Before the second marriage took place, Pírbháí's father, by the direction of the *jamát*, made an arrangement for the maintenance of Hírbái, which, as entered in the books of the *jamát*, ran thus :—

“To the *Mukhi* of the Bombay community (*jamát*, namely): Dost Muhammad Ladháni and Pírbháí Abhrám and Varas Nathuáni, and all the community: written by Pírbháí Assar (to wit). The reason of this being written is as follows :—I am about to get my son Kásam Pírbháí married to a second wife in addition to (his present) one wife. As long as she may remain faithful to my son, should she act agreeably to the rules of the *jamát* and according to its directions, the *jamát* (community) shall cause

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food and clothes to be given to her. 3rd of *Vaisák Shud S. 1908* (21st April 1852). Written by Khojá Pírbháí Assar, his signature, agreeably to what is written above. It is valid."

About two years after Pírbháí's second marriage, Hírbái went and lived with him for about a year. She then, being pregnant, left her husband and went to live with her mother. A daughter was subsequently born to Hírbái. About two years after her return to her mother's house, Hírbái applied to the *jamát* for maintenance, and the *jamát* ordered Rs. 5 per month to be paid to her by her husband (as he said, for the maintenance of her daughter, but as she alleged, for her own maintenance). This sum was paid to Hírbái down to March 1870, when she applied to the Senior Magistrate for an order directing her husband to maintain her. The Magistrate, on the 28th of March 1870, made an order, under Sec. 10 of Act XLVIII. of 1860, directing Kásam Pírbháí to pay Rs. 25 per mensem for the maintenance of Hírbái. This sum was paid down to the 28th of August following, when Pírbháí divorced his wife Hírbái with the concurrence of the *jamát* to which he belonged. Hírbái's *mohar* or dower was then offered to her, but she refused to receive it, as she did not admit the validity of the divorce.

The *talaknámá* (which was registered in the books and impressed with the seal of the Kázi of Bombay) was in the following form:—

"The cause of these lines being written is as follows:—I, who am named Kásam, the son of Pírbháí Khojá, am an inhabitant of the populous seaport town of Bombay. I make a true declaration, and clearly give in writing, while sound in mind and body, willingly and without being forced by any person, to the effect as follows:—A female named Hírbái, the daughter of Vali Pírbháí Khojá, is married to me, and resides in her mother's house, and does not come to my house, and does not remain obedient and subject to me, and the abovenamed female is refractory. Wherefore, by reason of our disagreeing, disputes have arisen between us. I, therefore, in person having appeared in the Muhammadan Law Court, and having paid to the abovenamed female named Hírbái her dowry, which is 19 *miskáls* of gold, making Rs. 125; and her *parla* (i.e.) marriage presents, amounting to 10 *tolás* of gold, making Rs. 150; and 5 *seers* of silver, making Rs. 140; and an allowance for maintenance for three months during the *ídat* time, making Rs. 75: amounting in all to Rs. 490, which it was proper for me to pay, have divorced her three times, and have dismissed her from her relation of wife to me. Henceforth there does not

exist and will not remain any claim whatever by me to the abovenamed female Hírbái on account of her relation as wife and her nuptial alliance to me. Should I raise any claim, the same will be null and void, and inadmissible according to the law and custom. Therefore these few words have been written by way of a record of divorce that it may be a voucher in times of need. Written on Monday the 1st day of the month Jamá-di-Ussáni in the Hijri year 1287 (29th August 1870)."

(Attestations here follow.)

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"Agreeably to what is written above—it is valid."

Kásam Pírbháí then applied to the Senior Magistrate to cancel his order for the maintenance of Hírbái. This was refused, and Kásam was obliged to continue to pay the maintenance-money, in consequence of which he made the present application to the High Court, and asked that the order for the maintenance of Hírbái, so far as it related to future payments, should be quashed or annulled.

It appeared from a joint affidavit of Rahim Hemráj and three other members of the Khojá community that the Khojás, about ten years before the present application, separated into two sections, the *Sunni* Khojás and the *Shiá* Khojás, and that the former, who had down to that time always resorted to the general Khojá *jamát*, thenceforth resorted to a separate *jamát* of their own, having a separate *mulkhí* and *kamaria*. Kásam Pírbháí, being a *Sunni*, attended the new *Sunni jamát*.

The *rule nisi* was argued before WESTROFF, C. J., and BAYLEY, J., on the 20th and 21st of July 1871.

Green showed cause on behalf of Hírbái:—(I.) A Muhammadan cannot, by divorcing his wife, get rid of the effect of an order for her maintenance made upon him, as there is no provision in Act XLVIII. of 1860 which, under such circumstances as the present, or indeed under any circumstances, gives the Magistrate power to cancel his order, though on an alteration in the circumstances of the husband or wife the Magistrate is given power to *reduce* the amount of such maintenance: see Sec. 10. To admit a husband's power thus to evade an order for maintenance would be to render the salutary provisions of the Act a mere nullity

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in the case of Muhammadans. (II.) The parties in this case at the time of their marriage belonged to the general Khojá community before the *Sunnis* seceded from it. There is a custom amongst that community that no divorce shall be valid unless made with the consent of the wife and with the approval of the *jamát*, which consent is not given unless provision is made by the husband for the future maintenance of his divorced wife. That custom I am prepared to prove by evidence. A husband cannot, by seceding from the community to which he and his wife belonged at the date of their marriage, deprive his wife of the benefit of the customs of that community. Before giving Hírbái a *talaknámá*, Kásam Pírbháí was bound to obtain the consent of the general *jamát* of the Khojá community; and, not having done so, the alleged divorce is invalid.

Anstey (with him *Mayhew*) in support of the rule:—There can be no doubt of the right of a Muhammadan, whether *Shiá* or *Sunni*, to divorce his wife: Baillie's *Imameea*, pp. 29, 33. As to the form in which such divorce should be given, see p. 114 of the same work. "The declaration of divorce is wholly in the will or caprice of the husband, and he is not bound to disclose the causes which move him thereto. As to the wife the divorce is unconditionally obligatory on her, but the husband is bound to hand over to the wife all her property and the *mohar*." *Nicholaus von Jornaauw* (German ed., 1850), p. 168: *Moonshee B. Ruheem v. Luteefoortee Nissa* (a). A *Sunni* may marry a *Shiá* wife: *Syud Gholam v. Mussamut Sitaba-Begum* (b), and if so, *à fortiori* he may divorce her. Here there has been a divorce by competent authority, namely, that of the husband: and the simple question is, can a Magistrate's order under Sec. 10 of Act XLVIII. of 1860 put it out of a Muhammadan husband's power to dissolve the relation of marriage between him and his wife, and thus abrogate the general provisions of the Muhammadan law in this respect. So to hold would be inconsistent with the principle of numerous cases decided by the Privy Council. In the present case Kásam Pírbháí has always been a *Sunni*,

(a) 1 Ind. Jur., O. S., 1. (b) 6 Cal. W. Rep., Civ. R. 88.

but there is no law to prevent him changing his sect if he so pleases : *Barlow v. Orde* (c). *Muhammad Ibráhim v. Gulam Ahmed* (d) was also referred to. Under these circumstances, the court will set aside the Magistrate's order. The marriage contract was the groundwork of the jurisdiction of the Magistrate to make the order ; when that ceased to exist, the order *ipso facto* expired, and should be set aside. [WESTROPP, C.J. :—It is admitted on all sides that the order, as made by the Magistrate, was, at the time when it was made, a valid order. Being valid, the application to the Senior Magistrate to set it aside was wrong. He might have been asked to stay the execution of it. We have no power to quash or set aside a valid order ; but I understand that Mr. Green wishes to have the decision of the court on the merits of this case, and waives all objections to the form of the present application. We will, therefore, hear whatever evidence he desires to adduce in support of the custom he alleges on behalf of his client.]

Several witnesses were then examined, from whose evidence it appeared that Kásam Pírbháí had been a *Sunni* Khojá for at least twenty-five years ; that the *Sunni* Khojás were not now allowed to resort to the original *jamát* of the Khojá community ; and that it was the custom for *Sunni* Khojá husbands, both before and since the secession of the *Sunni* Khojás, to divorce their wives according to the *Sunni* law, and to register such divorces in the Kázi's Court. Seven instances were given of divorces so registered, and it was stated that there were others.

WESTROPP, C. J. :—We are of opinion that the validity of this divorce has been established. This man no longer belongs to the larger branch of the Khojá community, who have excommunicated him and many others in the same position. That cannot, however, deprive him of the benefit of the general Muhammadan law ; and by that law a husband has the right to divorce his wife. It may be that that right amongst Khojás is limited by the necessity of

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obtaining the consent of the husband's *jamát*. We give no opinion upon that point, for the applicant here has obtained the consent of the *jamát* to which he belongs. The consent of the other *jamát* he could not obtain, for it would have nothing to say to him. He is now a *Sunni*, and has been so for many years. For five and twenty years he has been known to belong to that sect. The fact—whether it be true or not—that his wife belongs to the other sect, cannot deprive him of his right to divorce her on obtaining the consent of the only *jamát* to which he can have recourse.

Having then validly divorced his wife, Kásam Pírbháí is no longer liable, under the order made upon him on the 28th of March 1870, under Act XLVIII. of 1860, Sec. 10, to pay a monthly sum of Rs. 25 for the maintenance of his wife. That was a proper order at the time it was made, but we think the groundwork 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, was introduced into an Act passed in amendment of the Presidency Towns Police Act (XIII. of 1856), applicable to the Presidency Towns alone. Sec. 10 of the amending Act (XLVIII. of 1860) does not relate more especially to Muhammadans than to Hindús, 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. Whether the applicant has tendered to his wife upon the divorce all that he ought to have given, or that she was entitled to receive from him, by way of dower or otherwise, is a point that has not been raised before us; if disputed, it must form the subject of a separate suit to recover; but, no doubt, the respective solicitors of the parties will be able to arrange that matter.

On the question that is before us, we say that 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; but we do what

both parties expressed their wishes that we should do, namely, express our opinion as to its continuing force: and we declare that in our opinion the order ought not to be any further executed. There will, of course, be no costs given on either side.

There being no dispute as to the proper amount of the dower, it was by consent ordered that Rs. 490, less the several sums paid since the divorce (namely), Rs. 250, should be paid to Hírbái's solicitor for her.

Attorney for Kásam Pírbháí: *C. Tyabji.*

Attorney for Hírbái: *G. S. Lynch*, Acting Attorney for Paupers.

REG. v. MOROBA' BHA'SKARJI.

July 13.

Criminal Intimidation—Threat of Injury—Ind. Pen. Code, Sec. 503.

Where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the Sarkár and would get him six months' imprisonment if he (the complainant) did not let his sister go:

Held that these words did not constitute either criminal intimidation, within the meaning of Sec. 503 of the Indian Penal Code (there having been no threat of an *injury* in the sense of the Code), or any other offence known to the law.

Where there is anything peculiar in the circumstances of a case, a criminal appellate court should notice it, even when such court confirms the conviction by the court which tried the accused.

THIS was an application for the exercise of the court's extraordinary criminal jurisdiction.

It was heard before KEMBALL and WEST, JJ.

Pándurang Balibhadra for the accused.

Dhirajlál Mathurádás, Government Pleader, for the Crown.

The judgment of the court was delivered by

KEMBALL, J. :—The accused in this case was convicted, by a First Class Subordinate Magistrate in the Ahmedábád District, of criminal intimidation, under Sec. 506 of the Indian Penal Code, apparently for having gone to the complainant, and, with the purpose of making him release his (com-

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