

1871.
Sept. 8.

CHAKU *Petitioner.*
ISHVAR BHUDAR *Opponent.*

Maintenance Order—Adultery of Wife proved after Order for Maintenance made—Cancelling Order—Crim. Proc. Code, Sec. 316.

It is open to a husband upon whom an order to make an allowance for the maintenance of his wife has been made, under Sec. 316 of the Criminal Procedure Code, after such order has been made, to prove that his wife is living in adultery, and upon such proof a Magistrate is justified in cancelling an order made under the above section.

A. A. BORRADAILE, Magistrate of the District of Ahmedábád, submitted the papers and proceedings in the above case, under Sec. 434 of the Criminal Procedure Code, for the orders of the High Court.

The petitioner, Chaku, obtained from Jagjivandás Khusháldás, Magistrate F. P., under date the 22nd of June 1865, an order of maintenance from her husband, Ishvar Bhudar. The order was made by the Magistrate under Sec. 316 of the Criminal Procedure Code. On the 1st of July 1871, however, Jágjivandás's successor (J. F. Fernandez, Magistrate F. P.) cancelled the order in question on the application of Ishvar Bhudar, who proved that Chaku was living in adultery. Chaku thereon applied to the Magistrate of Ahmedábád for a review of the order of the 1st of July 1871, by which her maintenance was disallowed. The District Magistrate considered the cancelling order to be illegal, for the following reasons:—

“I am certainly of opinion that Sec. 316 refers to original applications only, and that Sec. 317 provides the procedure for alteration of an order.

“I am not inclined to hold that reduction does not include cancellation; there is no limit to the reduction possible.

“I hold that Sec. 317 refers to cases based on “alteration in the circumstances” of the person on whom the order was passed, his wife or child, and in the present case there is no such alteration. The fact of the wife leading an immoral life cannot create such alteration, because the husband has

all along complained of her leading such a life: it is no new fact which has arisen since the original order.

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“It may, it is true, be urged that the original order was passed in the absence of proof of adultery, and that the adultery being new ground, the alteration in the circumstances of the wife is created. I am not prepared to say that such argument is unreasonable, but I cannot sufficiently agree with it to reject the application thereon; the less so, that this would necessitate my weighing the evidence as to the immoral life.

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“I find that an illegality has apparently been committed by the Magistrate F. P. in altering the order of his predecessor, and I determine, under Sec. 434, to forward the case for the orders of the High Court.”

The reference was considered by GIBBS and WEST, JJ., on the 8th of September 1871.

Nagindás Tulsidás for the petitioner, Chaku.

Nánabhái Haridás for the husband, Ishvar Bhudar.

The following answer was forwarded to the District Magistrate of Ahmedábád, in reply to his reference:—

“I have the honour, by direction of the Honorable the Judges, to state that their Lordships are of opinion that it is open to the husband to prove adultery on the part of the wife at any period, and that the last para. of Sec. 316, which provides that no wife shall be entitled to receive an allowance from her husband if she is living in adultery, sufficiently shows the object of the Legislature. If you, therefore, upon a review of the facts, are of opinion that Chaku *alias* Jari is living an adulterous life, you would be legally justified in upholding the decision of the Magistrate F. P.”