1872.

VA'SUDEV VISHNU v. NA'RA'YAN JAGANNA'TH.

Macpherson (with him *Vishvanáth N. Mandlik*), for the respondent.

PER CURIAM :—This is an appeal against an order of the District Judge of Khandesh, directing execution against the applicant of a decree passed on an award. It appears that the proceedings, which Section 327 of Act VIII. of 1859 requires to be taken on an application to file an award, were taken when the applicant, who was, and still is, a minor, was not represented by a person holding a certificate of administration. He could not, therefore, be heard against the application, the proceedings on which were of the nature of a suit (Section 2, Act XX. of 1864). It follows that there is no valid decree against the applicant, and that the order for execution, which is appealed against, must be set aside so far as it affects him.

Order annulled with costs.

[APPELLATE CIVIL JURISDICTION.]

Sept. 11.

Appeal from Parsee Matrimonial Court.

ARDESAR JAHA'NGIR FRA'MJI ..... *Appellant.*
AVA'BA'I..... *Respondent.*

Restitution of conjugal rights—Parsee Marriage and Divorce Act (No. XV. of 1865), Secs. 36 and 40—Civ. Proc. Code, Sec. 200—Execution of decree.

A decree for restitution of conjugal rights under the Parsee Marriage and Divorce Act is enforceable only in the manner provided in Section 36 of the Act; such provision is in substitution of, and not in addition to, the ordinary remedies provided by Sec. 200 of the Code of Civil Procedure.

THIS was an appeal from an order made by MELVILL, J., while sitting as Judge in the Parsee Chief Matrimonial Court at Bombay, on the 29th June 1871.

Ardesar Jahángir obtained a decree against his wife, Avábái, on the 29th March 1869, directing her to return to her husband and to render to him all conjugal rights. Avábái did not return to her husband in obedience to this decree,

and, on the application of Ardesar, was, on the 2nd of April 1870, committed to jail for one month, under Section 36 of the Parsee Marriage and Divorce Act, for disobedience of the decree. Avábái underwent the month's simple imprisonment, but, upon its expiration, refused to return to her husband. Ardesar again applied for the execution of his decree, under Sec. 200 of the Civil Procedure Code, and on the 27th April 1871 obtained a *rule nisi*, calling upon Avábái to show cause why she should not be ordered immediately to return to her husband, and to render him all conjugal rights, or, in the event of disobedience, why she should not be dealt with according to law.

The rule was argued before MELVILL, J.

Macpherson showed cause against the rule.

Atkinson, Sergeant, was heard in support of it

Cur. adv. vult.

MELVILL, J:—This is an application for the execution of a decree, dated 29th March 1869, by which the defendant was directed to return to the plaintiff, and to render to him all conjugal rights.

The defendant was, on the 2nd April 1870, committed to prison for one month for disobedience of this decree, under the provisions of Section 36 of the Parsee Marriage and Divorce Act, 1865. Since her release she has been residing with her father in Bombay, and, until the present application, no further step has been taken to enforce obedience to the decree.

At the hearing, having been informed that this application was for execution under the Code of Civil Procedure, and not for a second order under Section 36 of the Parsee Marriage and Divorce Act, I directed that the application should be amended in accordance with the provisions of Section 212 of the Code. As it now stands, it is an application for the arrest and imprisonment of the defendant in execution of the decree.

It may be taken as settled that disobedience to the order of a court, directing a wife to return to cohabitation, is or-

1872.

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

dinarily enforceable under Section 200 of the code by imprisonment, or attachment of property, or both: *Chotun Beebee* v. *Ameerchund* (*a*), *Koobur Khansama* v. *Jan Khansama* (*b*), *Moonshee Buzloor Ruheem* v. *Shumshoonissa Begum* (*c*). If the wife can obtain her discharge, under Section 280 by the surrender of her property (a point which I am not called upon to decide) it is clear that the remedy provided in Section 200 is a very inadequate one for its purpose, but such as it is, it is the only remedy which the code provides.

By Section 40 of the Parsee Marriage and Divorce Act, it is enacted that "the provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act."

The question, which I have to decide, is whether the general application of Section 200 of the code to decrees for the restitution of conjugal rights is, in the case of Parsees, superseded by the special provisions of Section 36 of the Parsee Marriage and Divorce Act, which provides that "if such decree shall not be obeyed by the party against whom it is passed, he, or she, shall be liable to be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both."

It is to be regretted that this section (which has already given rise to much doubt and discussion on the question whether the penalty mentioned is to be enforced by the court making the decree or by a magistrate) was not drafted in such a manner as to indicate more clearly the intention of the Legislature (*Reg.* v. *Dosábhái Frámji*). As it is, there is nothing in the Act to show whether the Legislature intended that the punishment provided in Section 36 should be in addition to, or in substitution for, the ordinary remedies provided by Section 200 of the Code of Civil Procedure. If the imprisonment and fine, which may be awarded under Section 36, were intended simply as a punishment for an offence, simply as a mode of vindicating the dignity of

(*a*) 6 Calc. W. Rep. Civ. R. 105.
(*b*) 8 Ibid 467. (*c*) 11 Moo. Ind. App. 551.

the court, then I see no reason why the party aggrieved by the disobedience to the decree should not have his civil remedy. But if, on the other hand, such imprisonment and fine were intended to operate solely in satisfaction of the decree, or in satisfaction of the decree as well as *in pœnam* for the contempt, then the party aggrieved has no remedy beyond that specifically provided.

Now, though the words of the section do, to some extent, favor the former of these two suppositions, they do not do so so clearly as to outweigh, in my mind, the antecedent improbability that the Legislature should have had any such intention. I can conceive no reason why the Legislature should have considered that a decree for the restitution of conjugal rights should be not only enforceable by the ordinary civil process, applicable to decrees for the performance of particular acts, but should be also punishable by a special additional punishment which is not provided for disobedience of any other similar decree. On the other hand, I can conceive many reasons why the Legislature should have considered that disobedience of an order to return to cohabitation should be punished, and obedience enforced, by less severe penalties, and less stringent measures, than disobedience of an order for the performance of any other act. The suit for the restitution of conjugal rights is not one which commends itself to all minds, and has not found a place in the judicial system of all nations. Closely as the Americans have in general followed the English law, they have deliberately excluded from their system the suit for the restitution of conjugal rights. "Over England," says an American writer (Bishop on Marriage and Divorce, 4th ed., vol. i., p. 30) with national grandiloquence—"Over England, but not over this country, walks still that spawn of a dark age whose mission it was to keep unconjugal sinners in the strait performance of holy matrimonial duties, termed the suit for the restitution of conjugal rights." The Scotch enjoin "adherence," but it does not appear that they enforce a reunion against the wife or against the husband, when hateful to either. The Code

1872.

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

Napoleon, which governs the greater part of Europe, has no process for compelling the cohabitation of discordant couples, or for constraining them, as Blackstone sarcastically remarks, "to come together again if either party be weak enough to desire it contrary to the inclination of the other." I take these remarks from Mr. Macqueen's work on the law of marriage and divorce (pp. 314—315)—"No French lawyer," he says, "ever proposed the rude expedient of a prison" (although the French law reprobates matrimonial severance more strenuously than the English law does) "nor would it be just to say that any English lawyer deliberately recommended a thing so palpably tyrannical and futile." He arrives at the conclusion that even in England there is now no legal process that can prevent desertion or compel cohabitation. In this he seems to be mistaken; for there can be no doubt that the Court for Divorce and Matrimonial causes has the same powers which the Court of Chancery formerly exercised on the requisition of the Ecclesiastical Courts; and in the case of *Cherry* v. *Cherry* (*d*) a writ of attachment was actually granted (though not executed) against the respondent who refused to return to her husband. But, however this may be, it is certain that even in England, where suits of this description have always been allowed, the action of the courts in enforcing their decrees has been very hesitating and uncertain. By the Canon law, from which the suit for the restitution of conjugal rights was derived, the court could compel cohabitation in every sense of the term. Before the Reformation, however, the courts were generally content to enforce their decrees by spiritual reprehension and excommunication; means which would commend themselves to a large class of the natives of this country, and, if they could be applied, would perhaps have more efficacy than any other remedy. When the Ecclesiastical Courts lost much of their authority, they had to invoke the aid of the Court of Chancery;—and upon a *significavit* from the Ecclesiastical Court that a party was in contempt, the Court of Chancery would proceed to enforce obedience by attachment

(*d*) 29 L. J. P. D. & M. 141.

and sequestration. But the paucity of reported cases shows how seldom this power was exercised, and I can only find one case—*Barlee* v. *Barlee* (*e*)—in which severity against a recusant wife was carried to an extreme.

Now, it is not my business, nor, in the remarks which I have made, do I intend to criticise the policy of the Legislature in introducing into the Parsee Marriage and Divorce Act the suit for the restitution of conjugal rights. That measure was in accordance, not only with the English law, but also with the feelings of the Parsee community; for the Draft Bill, on which the Act was founded, was drawn up by a commission composed equally of Europeans and Parsees. But in endeavouring, as I am obliged to endeavour, to conjecture what were the intentions of the Legislature, I think that I may fairly refer to considerations which must have been present to the minds of the framers of the Act, and could hardly have failed to influence them. They must have known that the duty of cohabitation, which they were determining to enforce, is regarded in most systems of law as a duty of imperfect obligation, and not to be enforced by courts of law. They must have known that in England it has been enforced hesitatingly, and not without strong protest by those who have thought and written on the subject. It could not have failed to occur to them that to force a woman to live with a husband whom she detests can be of no real benefit to him: and to punish her with extreme severity for refusing to do so is only to make our courts the instrument of the husband's revenge. It could hardly have occurred to them that the dignity of a court required that this particular act of disobedience should be punished more severely than any other act of disobedience. And, therefore, it seems to me that in the minds of the framers of this Act, there must have been present many considerations which would induce them to mitigate, and none which would induce them to increase, the penalties by which cohabitation might be enforced under the general provisions of the Code of Civil Procedure.

(*e*) 1 Add. 301.

1872

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

It cannot be said that a measure of exceptional severity may have been thought necessary in order to satisfy the wishes of the Parsee community, for in the Draft Bill, to which I have referred as having been drawn up partly by the representatives of that community, refusal to render conjugal rights was declared to subject the offender to only a pecuniary penalty. The framers of the Act seem to have preferred to follow the English law in regard to the nature, though not in regard to the extent, of the penalty by which obedience should be enforced, and disobedience punished. The writ *de contumace capiendo* may be regarded as a commitment in execution, as well as for contempt, and may be satisfied by the husband waiving his rights, as well as by the wife obeying the monition, and so purging the contempt. The penalty provided in Section 36 of the Parsee Marriage and Divorce Act appears to be of the same nature, but it differs from the English process, inasmuch as a definite term is fixed for its duration. Under the English process the duration of imprisonment to which an obstinately recusant wife might be subjected is unlimited, and in the case of *Barlee* v. *Barlee*, to which I have already alluded, the wife was actually confined, until, as it is stated, she became a lunatic. The framers of the Parsee Marriage and Divorce Act may well have recoiled before such a precedent, and may reasonably have considered that it was not desirable to subject a wife even to imprisonment for so long a period as two years to which she would be liable under the Code of Civil Procedure. The contempt of court would certainly be sufficiently punished by the same punishment (simple imprisonment for one month and a fine of two hundred rupees) which may be awarded under Section 100 of the Indian Penal Code for disobedience of an order promulgated by a public servant, and which under Section 163 of the Code of Criminal Procedure all courts can inflict for a contempt committed in the presence of the court. And, on the other hand, regarding the commitment as a process in execution, it might well be considered that if imprisonment for a month would not induce a woman to overcome her dislike to her husband, it would be cruelty to attempt to force her to "the lowest degradation

of a human being" (I refer to Mr. John Stuart Mill's remarks in his Essay on the Subjection of Women, p. 57) by a further prolongation of her imprisonment.

On the best consideration, then, which I am able to give to the matter, I am of opinion that the intention of Section 36 of the Parsee Marriage and Divorce Act is that the penalty therein provided should operate not only as a purging of the contempt, but in full satisfaction of the decree.

This view seems to be in accordance with that adopted by the High Court (ARNOULD and WESTROPP, JJ.) in the unpublished case of *Regina* v. *Dossábhái Frámji*, to which I have already alluded. In that case Sir J. Arnould is stated, in the newspaper report of the case, to have said—"Section 40 of the Parsee Marriage and Divorce Act vested in the Parsee Matrimonial Court the powers given by the Code of Civil Procedure, and as one of the sections of the Code of Civil Procedure—viz., the 200th—gave the power of enforcing, by imprisonment or attachment, decrees for the performance of particular acts, it appeared to him that the words which formed the conclusion of Section 36 of the Act merely altered the mode in which the Court should enforce its own decrees, and punish a contempt or any disobedience of its decrees, the alteration being in effect that the punishment should consist, not of simple imprisonment and attachment but of simple imprisonment and fine." Mr. Justice Westropp is stated to have added that he concurred in the observation of Mr. Justice Arnould in reference to the bearing which Section 200 of the Civil Procedure Code had upon the 36th section of the Act. The Court seems to have held that the penalty provided in Section 36 was not a penalty for an offence, but a process in execution, as well as for contempt; that as such it was a process to be enforced, not by a magistrate, but by the court which made the order; and that it was in alteration of, and, therefore, in substitution for, the penalties provided by Section 200 of the Civil Procedure Code.

1872.

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

Mr. Serjeant Atkinson, in support of the rule, has relied upon the case of *in re Boyce* (*f*) in which it was held that, under Stat. 9 & 10 Vict., c. 95, a defendant is liable to be committed repeatedly upon the same judgment. It appears to me that that case would be more in point, if the present application were for a second order of commitment under Section 36 of the Parsee Marriage and Divorce Act. Now, it is true that after much discussion in Westminster Hall, it has been held that a commitment under 9 & 10 Vict., c. 95, Section 98, is in the nature of a qualified execution, and not by punishment for contempt: *Kinning's case* (*g*), *Swann* v. *Dakins* (*h*). But in *in re Boyce* there had been, previous to each commitment, a fresh summons and a fresh default; and, moreover, as pointed out by the learned Serjeant himself, the statute contains express provision (9 & 10 Vict., c. 95, s. 103) that no imprisonment under the Act shall in any wise operate as a satisfaction or extinguishment of the debt. The learned Serjeant argued that this provision was inserted *ex majore cautelâ* and was merely declaratory; but it seems to me that, were it not for this provision, a commitment under Section 98, being by way of execution, would operate to discharge the debt. The Parsee Marriage and Divorce Act contains no similar provision, and, therefore, if any argument can be founded on a comparison of that Act with the English County Courts Act, it is rather to the effect that the framers of the former Act omitted the provision above referred to, because they intended that a commitment under Section 36 should operate in satisfaction of the decree.

The rule must be discharged with costs.

Against this order Ardesar preferred the present appeal.

It was argued before SARGENT, Acting C.J., and GREEN, J., on the 24th of July 1872.

Atkinson, Serjeant, (with him *Pándurang Balibhadra*) for the appellant:—There are no antecedent improbabilities in this case to lead us to believe that the words of Sec. 36 of

(*f*) 2 E. & B. 521.
(*g*) 16 L. J. Q. B. (N. S.) 257 (*h*) 24 L. J. C. P. (N. S.) 131.

the Act should be construed otherwise than in accordance with their literal meaning. The analogy drawn by the learned Judge from the institutions of other countries, has misled him; for these institutions are not as stated by him, and are, in fact, in accordance with the contention of the appellant. Stair's Institutes of Scotland, pp. 29, 36, 745, 795; Mourlin's Commentaries on the Code Napoleon p. 384; Kent's Commentaries on the American Law; Blackstone's Commentaries Vol. III., p. 94, show that the view taken by Mr. Macqueen of the practice of those countries is erroneous. Stat. 20 & 21 Vict., c. 85, Act IV. of 1869, and the practice of the Parsee Punchayet at the time Act XV. of 1865 was passed, clearly show that the argument deduced from the antecedent improbabilities of the case is baseless. The instances in which courts in England have enforced such decrees as the present are numerous. See Addam's Ecc. Reports and Haggard's Consistory Reports. As to this being an unpopular procedure, it is remarkable that the suit for jactitation of marriage, and the suit for restitution of conjugal rights have alone survived unimpaired. All others, both at common law and in equity, have undergone changes.

The reason why the penal provisions contained in Sec. 36 of the Parsee Marriage and Divorce Act (not found in Stat. 20 & 21 Vic., c. 85, and Act IV. of 1869) were introduced into the former Act arises from the defective character of the old Ecclesiastical Courts in England as explained in Blackstone's Commentaries Vol. III., p. 101. The courts established under Stat. 20 & 21 Vict., c. 85, and Act IV. of 1869, can punish for contempt *proprio vigore*. The Parsee Divorce Court could not. It is *quoad hoc* in the same position as the old Ecclesiastical Courts in England.

The case of *Reg.* v. *Dossábhái Frámji* simply *decided* that the Magistrate could not enforce the punishment under Sec. 36, but the *dicta* of the Judges who decided that case are of no authority. They do not appear in any authorized report. The case of *in re Boyce* (*i*) is in point, for it shows

(*i*) 2 El. & B. 521.

1872.

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

that if the Stat. 9 & 10 Vict., c. 95, had not contained a clause enabling the execution debtor to get his discharge upon payment of the original debt, the imprisonment would have been considered *in pœnam* only, and not in satisfaction of the judgment. That the month's imprisonment was not in the nature of execution upon the judgment is shown by this—that payment, release, or the like would not satisfy it.

The Honourable C. J. *Mayhew* for the respondent, relied chiefly upon the case of *Reg.* v. *Dossábhái Frámji*, and referred to Sec. 278 of the Code of Civil Procedure as supporting the contention of the respondent.

Atkinson, Serjeant, was heard in reply.

Cur. adv. vult.

SARGENT, Acting C.J.—This is an appeal from a decision of the Judge of the Parsee Divorce Court, refusing the application of Ardesar Jahángir Frámji for the arrest and imprisonment of his wife, Avábái, against whom he had obtained a decree for the restitution of conjugal rights.

The application was made under Section 200 of the Civil Procedure Act which, it was said, was incorporated in the Parsee Marriage and Divorce Act of 1865 by Section 40 of that Act. It appeared that the defendant had already been committed to prison, on the 2nd April 1870, for one month, under Section 36 of the Marriage and Divorce Act, which provides that "if a decree for the restitution of conjugal rights shall not be obeyed by the party against whom it is passed, he or she shall be liable to be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to Rs. 200, or with both." Now, Section 40 says that "the provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act," and Section 200, which relates to the enforcement of a decree directing the performance of any particular act, would *primâ facie* be applicable to a decree for restitution of conjugal rights. Again, the three authorities cited to the learned Judge, from whose order this appeal is preferred, and again at the hearing

of this appeal, namely, *Chotum Bebee* v. *Ameer Chund* (*ubi supra*,) (a case apparently between Hindus), *Koobur Khansama* v. *Jan Khansama* (*ubi supra*) *and Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (*ubi supra*) establish that the civil courts of British India, as administering general law and apart from any special Legislative Act, will entertain suits between Hindus and Mussulmans, which are directed to enforce the right of husband and wife to require the cohabitation of the other, and that in such cases the relief proper to be asked and the decree proper to be made, when the husband is complainant, is to declare him entitled to have his wife to cohabit with him, and to order that she do return to his protection. And at p. 609 of the report of the case before the Privy Council, their Lordships, in holding that according to Muhammadan law, a husband has a right to the possession of his wife, and that such right may be enforced by a decree ordering her to return to him and observe her duties, remark as follows: "Whether this (*i.e.* that in the event of disobedience the wife is to be given bodily into her husband's hands) could be done under the new Act of Procedure, which now regulates the civil courts of India, may well be doubted. Disobedience to the order of a court directing the wife to return to cohabitation would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment or attachment of property or both." It seems, therefore, that the section of the Civil Procedure Code as to execution of decrees, and particularly Section 200, might, in the judgment of the Privy Council, have been resorted to before the passing of the Act for the enforcement of a decree ordering a wife to return to cohabitation with her husband, or, in other words, of a decree for restitution of conjugal rights.

But, assuming that the provisions of the Civil Procedure Code as to enforcing decrees are, in the absence of any others, applicable to the case of decrees for restitution of conjugal rights, the case may be very different when the Legislature has provided for a particular class and community legislative provisions deemed to be adapted to their peculiar

1872.

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

wants and sentiments, as the Legislature has in fact done in "The Parsee Marriage and Divorce Act, 1865." In such a case, the question for consideration is whether, having regard to the special provisions of the Act itself, these provisions of the Civil Procedure Code, which are designed to meet the case of the enforcement of decrees generally, can still be deemed applicable to decrees made in exercise of the special jurisdiction created by that Act, or, in other words, whether the imprisonment or fine provided by Sec. 36 of that Act are not intended to be in substitution of, and not in addition to, the ordinary remedies provided by the Code of Civil Procedure. Now, we can entertain no doubt, and indeed it was almost conceded in argument, that if the imprisonment and fine contemplated by Sec. 36 of the Parsee Act were in the nature of process of execution of the decree, they must be deemed to have been substituted for the imprisonment and attachment of property, which are the modes of enforcing decrees provided by the Code of Civil Procedure, or in other words, that the Act itself, having specified a mode of enforcing its decrees, similar in its nature to that provided by the Code of Civil Procedure, and differing principally in degree, the sections which relate to execution of decrees will so far be not applicable. It was, however, contended that the imprisonment and fine were by way of punishment or for contempt, and did not, therefore, by implication deprive the decree-holder of the means provided by the Code of Civil Procedure for enforcing decrees.

Now, as the language of the Act is ambiguous, we shall do well to call to our aid the circumstances which led to the passing of that Act. The preamble of the Act says that its object was to make the law relating to marriage and divorce among Parsees conformable to the customs of the community. At the time the Act was passed, Parsees, as appears from the case of *Ardaseer Cursetjee* v. *Perozeboye* (*j*), could only have resorted to the High Court, in its ordinary civil jurisdiction, to obtain a decree for restitution of conjugal rights, and such a decree could only have been enforced like

(*j*) Moo. 357.

all other decrees by the provisions of the Code of Civil Procedure.

In the report made by the Commissioners, appointed to make an inquiry into the usages of the Parsee community, it appears "that the statement relating to marriage and divorce, which was framed by the managing committee of the Parsee Law Association, and upon which the present Act was based, was itself, with one addition, based upon the English Divorce Act of 1858." That Act treats a decree for restitution of conjugal rights like all other decrees and orders. We may conclude, therefore, that there could have been no intention on the part of the framers of the Act to treat disobedience of a decree for restitution of conjugal rights as differing in its character from disobedience of any other decree of the Court. This question, however, is not altogether clear of authority, as it would appear to have been already under the consideration of this Court in the case of *Reg.* v. *Dosábhái Frámji*, on an application to compel the defendant, a Police Magistrate, to entertain an application for commitment under Sec. 36, and Sir J. Arnould and the present Chief Justice decided that the application should be made to the court which passed the decree for restitution of conjugal rights, and not to the Magistrate under Secs. 46 and 47. Whatever were the grounds on which they base their decision (of which, having regard to the objection of the appellant's counsel, we cannot consider ourselves as having a report of authority), they must, we think, be held to have decided that "an offence under the Act" had not been committed. It was contended, however, by Mr. Serjeant Atkinson that the above considerations did not necessarily touch the question whether the imprisonment and fine were intended as a punishment for contempt of court, as distinguished from a process for enforcing its decree. But if the Legislature had such object in view in punishing disobedience of its decree, we should expect to find a general provision in the Act applicable to all cases of contempt. If, therefore, the Legislature intended that the provisions of the Civil Procedure Code should continue to be appli-

1872.

ARDESAR JAHA'NGIR FRA'MJI v. AVA'BA'I.

cable as the appropriate means of enforcing a decree of the Court, we have a difficulty in seeing any ground for the enactment of the latter part of Sec. 36 of that Act. The measure provided by the Act is doubtless not a very stringent one for compelling a woman to return to her husband, but it may well be that the framers of the Act, recognizing the futility of attempting to force a woman to return to her husband, considered that a less severe penalty than is provided by the Code of Civil Procedure in other cases would best accord with the feelings of the Parsee community. On the whole we are of opinion that the Judge was right in refusing to put in force Sec. 200 of the Code of Civil Procedure, and that the rule *nisi* was rightly discharged with costs. The costs of this appeal must be borne by the appellant.

Appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Sept. 19.

Special Appeal No. 258 *of* 1872.

CHINTA'MAN BHA'SKAR.....*Appellant.*

SHIVRA'M HARI and others.....*Respondents.*

Mortgage—Possession—Registration—Notice.

A mortgage without possession is not, in Hindu law, absolutely invalid but is binding as between the mortgagor and mortgagee.

A purchaser with possession at a Court's sale, whose certificate of sale is registered, buys the right, title and interest of the debtor, burdened with the lien of a prior mortgagee, without possession, whose deed of mortgage is registered.

THIS was a special appeal from the decision of H. F. Parsons, Assistant Judge of Ratnagiri, reversing the decree of the Subordinate Judge of that town.

The special appeal was heard by SARGENT, Acting C.J., and MELVILL, J.

Mánekshâh Jehangirshâh for the special appellant.

Râvsâheb V. N. Mandlik for the special respondents.