APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

EMPRESS *v.* UMI, WIFE OF DHULA, AND SEVEN OTHERS.*

1882
January 11.

India Penal Code (Act XLV of 1860), Secs. 494 and 109—Marrying again during the lifetime of husband—Abetment—Divorce among Rajput Gujaratis in Khandesh—Deed of divorce by husband—Validity of divorce.

A member of the caste of Ajanya Rajput Guzars residing in Khandesh executed a deed of divorce to his wife. The Court held on the evidence that the deed was proved, and that in this caste a husband was for a sufficient reason, such as incontinence, allowed to divorce his wife; that the deed in the present case had not been executed for a sufficient reason; and that, consequently, the parties entering into a second marriage were guilty of an offence under section 494 of the Indian Penal Code (XLV of 1860); and that the priest who officiated at that marriage was an abettor under sections 494 and 109.

Mere consent of persons to be present at an illegal marriage, or their presence in pursuance of such consent, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage.

THE first accused, Umi, was convicted of marrying again during the lifetime of her husband, and the other seven accused of having abetted her in the performance of the illegal marriage, by M. H. Scott, Session Judge of Khandesh, who passed upon each of them a sentence of rigorous imprisonment for six months.

The following facts were admitted or proved :—

The first accused, Umi, was legally married to the complainant Dhula, both parties being members of the caste of Ajanya Rajput Gujaratis residing in Khandesh; that Dhula subsequently married another wife, and did not live with Umi in consequence of certain differences which arose between them; that Umi went through the ceremony of a second marriage with the accused Nago; that the accused Damodar Bhat officiated as a priest at the marriage; that Umi's father—the accused Punju—and her sister—the accused Chimi—approved of the marriage; that accused Lalchand and Bhagvan lent their influence by consenting to be present at the marriage; and that the accused Hula allowed the parties the use of his house upon that occasion.

On behalf of the defence it was alleged, amongst other things, that divorce was allowable in the caste to which Umi belonged,

* Criminal Appeal, No. 178 of 1881.

and that her husband the complainant had in 1872 executed a deed of divorce addressed to Umi's father, and releasing Umi from her marital bonds, leaving her free to re-marry if she felt so disposed. The Session Judge held on the evidence that this deed of divorce was a forgery; and, being of opinion that the fact of the second marriage was established, convicted Umi of re-marrying during her husband's lifetime, and the others of abetting her.

All the accused appealed to the High Court.

Branson (with him *Daji Abaji Khare*) for the appellants.—The evidence clearly establishes the deed of divorce. Divorce is permissible among Hindus of the lower castes—that is, other than Brahmans and Vaishyas. [The Court referred to answer No. 7 to questions put to the caste of Rajput Gujaratis by Mr. Borradaile under the head "Divorce, Gujaratis."]

Nanabhai Haridas, Government Pleader, for the Crown.—According to the answer, divorce would be valid only on the ground of incontinence.

The judgment of the Court was delivered by

MELVILL, J.—We are of opinion that five out of the eight prisoners in this case are not proved to have done any act which would amount to abetment of the principal offence. The Session Judge says: "Hula valad Bhivaji allowed the marriage to be performed in his house. Accused Punja and Chimi are the father and sister of Umi; and they and accused Lalchand and Bhagvan, the two last of whom are influential patels of the village, are alleged to have abetted the marriage by their consent, and by being present." It does not, however, appear that the consent of any of the prisoners was necessary for the performance of the marriage ceremony, and certainly mere presence at an illegal marriage would not constitute abetment on the part of the person present. Nor would the grant of accommodation in a house for a marriage, which could equally well be celebrated elsewhere, be such an act towards facilitating the marriage as would constitute abetment. There is no proof of any conspiracy on the part of the five prisoners referred to. On the contrary, as the Session Judge says, "the truth probably is, that Umi, finding herself pregnant by Nago, persuaded him to marry her." After the marriage had

1882

Empress v. Umi.

been thus arranged between Umi and Nago, the mere consent of other persons to be present at the celebration, would not, we think, constitute abetment.

On this ground the convictions and sentences on prisoners Nos. 3, 5, 6, 7, and 8 are reversed.

As regards the other three prisoners—viz., Umi, Nago, and the priest Damodar, who performed the ceremony—the case stands on different grounds. The contention that no marriage ceremony was gone through, has been abandoned by the learned counsel for the defence. What he relies on is the execution of a *farigh-khat*, or writing of divorce, by the prosecutor to his wife Umi, which, he argues, rendered the second marriage permissible and valid. On a careful consideration of the whole evidence we are of opinion that the execution of the *farigh-khat* is established. The evidence on the point is very strong, and the prosecution failed to explain away the circumstance that the stamp on which the document was executed was undoubtedly purchased more than ten years ago in the name of the prosecutor, whom there was at that time no apparent reason for personating. But, taking the *farigh-khat* as proved, we do not find sufficient evidence on the record to show that it would have the effect of a valid divorce. The very witnesses who say that a divorce is allowed by the custom of their caste, admit that the prosecutor was punished by being made to give a caste dinner on account of the divorce. Among the answers to Mr. Borradaile given by the castes in 1830 we find one from the Rajput Gujaratis, (to which the parties in the present case appear to belong), in which they say that in their caste a husband is allowed to divorce his wife for incontinence. But it is not alleged for the defence in this Court that the writing of divorce given by the prosecutor was on account of Umi's incontinence; and, therefore, so far as the available evidence goes, we must come to the conclusion that, though, in the caste to which the parties belong, a husband may divorce his wife for a sufficient reason, yet in this case it was done for an insufficient reason, and probably it was on this account that the prosecutor was punished by the caste. We are, consequently, not satisfied that there is sufficient reason for dis-

turbing the convictions in the case of prisoners Nos. 1, 2 and 4. As, however, we have come to the conclusion that a *farigh-khat* was actually executed, and as the persons concerned probably believed that it was valid, we think that a lighter sentence than that inflicted by the Session Judge will satisfy the ends of justice; and we, accordingly, reduce the sentences on prisoners Nos. 1, 2 and 4 to two months' rigorous imprisonment; and, as the sentence has been undergone, we direct the prisoners to be discharged.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

1881
August 31.

VASUDEV VITHAL SAMANT (ORIGINAL DEFENDANT), APPLICANT, *v.* RAMCHANDRA GOPAL SAMANT, DECEASED, AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

The Hereditary Officers' Act (Bombay) No. III of 1874, Secs. 24 and 25—Act X of 1876, Sec. 4, Cl. a, para. 2—Civil Courts.

Under Bombay Act III of 1874 the Civil Courts cannot entertain a suit which seeks to recover damages against the defendant for wrongly continuing in office as patel, instead of resigning in favour of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office.

Quære—whether the claims excluded by Act X of 1876 as amended by Act XVI of 1877, sec. 1, are limited to claims against Government.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of J. W. Walker, Assistant Judge at Ratnagiri, affirming the decree of P. B. Joshi, Second Class Subordinate Judge at Vengurla.

The facts of the case are fully stated in the judgment of the High Court.

The Assistant Judge, in affirming the decree of the first Court on appeal, observed: "It is said that no suit lies, as the Collector had the right of appointing. The case alleged, and found proved, is that, by the village custom, certain families have the right of acting as *kabulayatdars* of the village in rotation, and that each outgoing *kabulayatdar* has to give his assent to the Collector for the appointment of his successor, and that, when plaintiff's

* Application, No. 6 of 1881, under Extraordinary Jurisdiction.