

1883

In re
 ABDUL ALI
 ISHMAILJI.

Sakhina(1) ; *Nepoor Aurat v. Jurai*(2) ; 1 Hedaya 209. The authorities show that the right to divorce remains, and the divorce having taken place, the Magistrate's order ceases to have operation.

Hakim with *D. Sealy* for *Husenbi*.—The wife is a Suni, and the *talak biddat*, or irregular form of divorce, does not prevail among Sunis. There was, therefore, no valid divorce in this case.

Per Curiam.—The '*talak biddat*' or irregular divorce, which is effected by three repudiations at the same time, appears from the authorities to be sinful, but valid ; and it was recognized as valid by this Court *In re Kasam Pirbhai and his wife Hirabai*(3). The Magistrate should, therefore, no longer enforce his order for payment of maintenance made on the 19th May, 1882.

(1) I. L. R., 5 Calc. 558.

(2) 19 Calc. W. R., 73 Cr. Rul.

(3) 8 Bom. H. C. Rep., 95 Cr. Ca.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

1882
 March 23.

UKHA (ORIGINAL DEFENDANT), APPELLANT, v. DAGA AND ANOTHER
 (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Civil Procedure Code Act VIII of 1859, Sec. 7—Act X of 1877, Sec. 43—
 Relinquishment of claim.*

If a person intentionally omit to sue for any portion of his claim, the provisions of section 43 of Act X of 1877 as well as the provisions of section 7 of Act VIII of 1859 bar the institution of a second suit for the portion so omitted. So that where a family property consisted of lands as well as debts, and the plaintiff at first sued for a partition of debts only and then compromised and withdrew the suit without the permission of the Court, it was held that his second suit to demand a partition of the whole property was not maintainable.

THIS was a second appeal from the decision of H. F. Aston, Assistant Judge (F. P.) of the district of Thana at Nasik, confirming the decree of the Subordinate Judge of Malegaon.

Two brothers, Hari and Giri, were joint owners of certain moveable and immoveable property, including outstanding debts

* Second Appeal, No. 335 of 1881.

due to the family. Both of them died, each leaving two sons. In 1861 the present plaintiffs, who were the sons of Giri, sued the present defendants, who were the sons of Hari, for a partition of certain assets which they averred had been recovered by the defendants. They asserted that a division took place, after the death of their fathers, of their lands and other immoveable property. This suit was eventually compromised and withdrawn without the permission of the Court. The present suit was brought in 1878 by the sons of Giri against the sons of Hari for a partition of certain lands, being part of the original family estate; and they alleged that the said lands remained joint.

The defendants (*inter alia*) contended that the suit was barred by section 43 of the Civil Procedure Code Act X of 1877. Both the lower Courts held that this section did not bar the institution of the present suit, and on the merits decreed for the plaintiffs, Ukha, one of the defendants, appealed to the High Court.

Pandurang Balibhadra for the appellant.—The lower Courts have misconstrued and misapplied section 43 of Act X of 1877. A partition having actually been made between the parties, and each of them having held possession of separate portions of the ancestral lands for more than twelve years, it is not competent for the respondents in a second suit to ask for a partition of the lands held by the appellant and his brothers. The suit is barred by the respondents' omission to include the said lands in the previous suit. The respondents are not entitled to lay any claim to the lands by reason of the distinct statement in their former plaint that all the property, except the debts due to the family, had been divided. No partition of these lands having been asked for in the former suit, and the same having been withdrawn, it is not competent to the lower Courts to entertain the second suit.

Vinayak Mahadev Pandit for the respondents.—The present suit is brought to enforce a partition of the joint lands, and the cause of action was the alleged refusal of the original defendants to allow the original plaintiffs to effect such a partition. The demand was made after the original understanding about the lands had been disregarded by the defendants for eight years before the institution of the suit. The causes of action in the

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two suits are distinguishable, and section 43 of Act X of 1877 do not bar the second suit.

MELVILL, J.—We are of opinion that the present suit is barred by section 43 of Act X of 1877. In 1861 the present plaintiffs sued the present defendants for a partition of certain debts due to the family. In their plaint they alleged that all the family property, with the exception of the debts, had already been divided. The suit was compromised and withdrawn, but without the permission of the Court. The present suit is brought for a partition of certain lands which are alleged to have been left for subsequent division at the time of the former partition. If this allegation be true, the plaintiffs were bound in their former suit to demand a partition of the whole property which remained undivided,—that is, of the lands as well as the debts; and having intentionally omitted to do this, they are barred from bringing the present suit by the provisions of section 7 of Act VIII of 1859, equally with those of section 43 of Act X of 1877.

For these reasons we reverse the decrees of the Courts below and reject the claim with costs on the plaintiffs throughout.

Decree reversed.

APPELLATE CRIMINAL.

Before Mr. Justice West and Mr. Justice Pinhey.

EMPRESS v. ARJUN.*

1882
November 2.

Indian Penal Code, XLV of 1860, Secs. 211, 182—False charge—False information.

Where a person specifically complains that another man has committed an offence, and does so falsely with the object of causing injury to that person, he is guilty of making a false charge of an offence under section 211 of the Indian Penal Code, and not under section 182.

In this case the accused was convicted of having falsely informed the chief constable of Chopda, in the district of Khandesh, that he had been robbed of Rs. 150 by one Ganpat valad Gan-garam, intending to cause the chief constable to use his lawful power to the injury of Ganpat. The trying Magistrate (Mr. L. G.

* Criminal Review, No. 201 of 1882.