1919.

EMPEROR
v.
VISHWANATH
VISHNU.

jurisdiction to deal with the complaint. This conclusion derives support from the decision in *Budhan Mahto* v. *Issur Singh*[1].

We direct the record and proceedings to be returned.

Order accordingly.

R. R.

CRIMINAL REVISION.

Before Mr. Justice Shah and Mr. Justice Hayward.

1919.
June 20.

In re RAJASAHEB RASULSAHEB.*

*Mahomedan law—Divorce—*Talaknama*—Registration of the deed—Neither Kazi nor wife present at the time of the execution of the deed—Deed not immediately communicated to wife—Wife's knowledge of the deed within a reasonable time—Validity of* Talaknama.

A Mahomedan executed a *talaknama* (deed of divorce) in the presence of witnesses, and got it duly registered under the Indian Registration Act, 1908. Neither the Kazi nor the wife was present at the time the deed was executed. The deed was not immediately communicated to the wife, but it came to her knowledge within a reasonable time :—

Held, that the *talaknama* was valid according to Mahomedan law.

THIS was an application in revision against an order passed by K. V. Joshi, City Magistrate, First Class, at Bijapur, confirmed by A. C. Wild, Sessions Judge of Bijapur.

The applicant was married to one Khatijabai and had a child by her.

On the 22nd July 1918, Khatijabai obtained an order from a Magistrate directing the applicant to pay to her

[1] (1907) 34 Cal. 926.

* Criminal Application for Revision No. 26 of 1919.

a sum of Rs. 10 per month as maintenance for herself and the child, under the provisions of section 488 of the Criminal Procedure Code, 1898.

Three weeks afterwards, the applicant executed a *talaknama* (deed of divorce) divorcing his wife Khatijabai. The deed was duly executed in the presence of witnesses and registered under the Indian Registration Act, 1908. But at the time of the execution, neither the Kazi nor the wife was present. It was also not brought to the knowledge of the wife immediately.

On the 4th December 1918, the applicant applied to the Magistrate for cancellation of the order of maintenance, on the ground that he had already divorced his wife and that he was no longer bound to maintain her.

The Magistrate declined to cancel the order, for he was of opinion that the *talaknama* was not valid, on the following grounds :—

Among the cases which were shown to the Court there are two (I. L. R. 7 Bom. 180 ; I. L. R. 30 Bom. 537) in which the divorce is given in writing. In both these cases the writing is executed in the presence of Kazi. In the present case the writing called *talaknama* is registered before the Sub-Registrar, Bijapur. The principle laid down in *Sarabai's case* is that the writing must be manifest and customary. The writing in question is no doubt manifest but I doubt whether it can be called customary. Nowhere is it laid down in Mahomedan law what the custom is. But from the two cases referred to above it can be gathered that such a writing should be before a Kazi (who is considered as religious head of the Mahomedan Community). The *talaknama* in the present case is not executed in this way. It cannot, therefore, in my opinion be called customary.

The applicant applied to the Sessions Judge of Bijapur. The learned Judge also did not cancel the order for maintenance, as he was of opinion that the amount awarded was sufficient to maintain the child, though

1919.

RAJASAHEB RASULSAHEB, *In re.*

he came to the conclusion that the *talaknama* was valid, on the following grounds :—

The learned Magistrate has apparently referred to the case reported in I. L. R. 30 Bom. 537 when he says that the writing of divorce must be manifest and customary and he seems to think that this divorce cannot be said to be made by a customary writing because the deed was not prepared in the presence of the Kazi as was the case in the ruling reported in I. L. R. 30 Bom. 537. It appears, however, that the meaning of "customary" is only that the writing is properly superscribed and addressed and is such as is written to an absent person and bears on its face from such a one to such a one: see Baillie's Mahomedan Law, pp. 232 and 233. The *talaknama* in the present case fulfils these conditions and is therefore customary. Even were it not so, and it were a writing manifest but not customary it would effect a divorce: *vide* Baillie, page 233, as the intention to divorce is clearly expressed. I hold then that the applicant has in fact divorced his wife by the *talaknama*.

The applicant applied to the High Court under its criminal revisional jurisdiction.

H. B. Gumaste, for the applicant :—The lower appellate Court has found that the *talaknama* effects a valid divorce: the order for maintenance should therefore go. The sum of Rs. 10 was awarded as maintenance on the basis that Rs. 3 would be required for the child and Rs. 7 for the wife. The amount of maintenance must be proportionately reduced.

V. D. Limaye, for the opponent :—I submit that the *talaknama* is not valid under Mahomedan law and does not effect a valid divorce.

Under Mahomedan law, the *talak* (divorce) was originally oral and its essential was communication to the wife. Subsequently, the pronouncement of *talak* in the presence of either the Kazi or the father of the wife was considered to be tantamount to communication to the wife. In course of time written *talaknamas* came into vogue, but the essential element of communication to the wife remained. It had to be either

in the presence of the Kazi or the father of the wife : or it gained validity by the immediate communication to the wife. Here the *talaknama* was not immediately communicated to the wife, nor was it executed either in the presence of the Kazi or the father of the wife. Its registration under the Indian Registration Act does not invest it with validity. The cases of *Sarabai* v. *Rabiabai* [1], *Asha Bibi* v. *Kadir Ibrahim Rowther* [2] and *Ful Chand* v. *Nazab Ali Chowdhry* [3] were referred to.

Gumaste, in reply.

SHAH, J. :—The parties to this application are Mahomedans. The wife applied to the Magistrate in the first instance for maintenance for herself and her daughter. An order was made by the Magistrate under section 488 of the Criminal Procedure Code on the 22nd of July 1918 awarding her Rs. 10 per month for their maintenance. The husband executed a *talaknama*, on the 14th August 1918, in the presence of witnesses and that document was registered. Subsequently, on the 4th of December 1918, he made an application to the Magistrate for the cancellation of the said order in favour of his wife on the ground that he was no longer bound to maintain her. The learned Magistrate was of opinion that the *talaknama* was not valid as it was not made in the presence of a Kazi and that there was no ground to cancel his previous order. The husband then applied to the Sessions Court. But that Court refused to take any action on his application, though it was of opinion that the *talaknama* was valid. He has now applied to this Court for the revision of the order made by the Magistrate on the ground that the *talaknama* is valid and that the amount of maintenance should be reduced proportionately.

(1) (1905) 30 Bom. 537.

(2) (1909) 33 Mad. 22.

(3) (1908) 36 Cal. 184.

1919.

RAJASAHEB RASULSAHEB, *In re.*

I am of opinion that the *talaknama* is valid according to Mahomedan law. It is true that it was not made before a Kazi, that it was not made in the presence of the wife, and that no attempt appears to have been made immediately on the execution of the *talaknama* to communicate it to her. It is clear, however, on these proceedings that this *talaknama* came to the notice of the wife at the latest when the husband made the present application for the cancellation of the previous order for maintenance.

Mr. Limaye appearing for the wife has contended that the *talaknama* is not valid as no attempt was made immediately to communicate the same to the wife. He has not, however, been able to cite any authority in support of this proposition; and all that appears necessary is that the fact of the *talak* having been effected must come to the notice of the wife. There is nothing to show that it must be brought to the notice of the wife within a particular time from the date on which it is executed. In the present case the *talaknama* came to her knowledge within a reasonable time from the date of its execution; and that seems to be sufficient to satisfy the requirements of the Mahomedan law. The observations in *Sarabai* v. *Rabiabai*[1], *Ful Chand* v. *Nazab Ali Chowdhry*[2] and *Asha Bibi* v. *Kadir Ibrahim Rowther*[3] bearing on the point support this view. I am, therefore, unable to agree with the Magistrate that the *talaknama* is invalid.

Taking the *talaknama* to be valid, the question is whether any case for the reduction of the amount of maintenance is made out. The *talaknama* states in terms that one of the reasons for the divorce was the fact that the wife had obtained an order for maintenance. The child whose maintenance is obligatory

(1) (1905) 30 Bom. 537. (2) (1908) 36 Cal. 184.
(3) (1909) 33 Mad. 22.

upon the present petitioner is said to be about 3 years old. The mother is entitled to the custody of the child and it is not disputed before us, and indeed it cannot be disputed that the petitioner is bound to provide adequate maintenance for the child. No doubt at first sight it would appear that some reduction might fairly be made in favour of the petitioner. But having regard to the circumstances under which this *talaknama* came to be executed and to the necessity of keeping the child with the mother, I do not think that any reduction would be appropriate.

On these grounds, I would not reduce the amount of maintenance which was awarded in the first instance for the wife and the child, but would allow that order to stand making it clear that it is for the maintenance of the child only.

I would discharge the rule.

HAYWARD, J.:—I concur that no reason has been shown for reducing the maintenance granted by the Magistrate. It is true that that maintenance was granted both for the infant child and the wife, but it would in my opinion only be sufficient for the maintenance of the infant child even if supported by the opponent not as a wife but as a third party as pointed out by the learned Sessions Judge.

It has been argued that the wife has been duly divorced and is therefore in the position of a third party. It is not strictly necessary in the view taken of the sufficiency of the maintenance to decide the question. There is, however, a clear divorce in writing registered which could leave no doubt whatever as to the intention to divorce the wife. It is also clear that knowledge of this intention was brought to the notice of the wife not many months afterwards by these very proceedings taken before the Magistrate. It seems to me that the divorce was wrongly held to be invalid by the Magistrate

1919.

RAJASAHEB RASULSAHEB, *In re*.

and that the correct view of the matter was taken by the learned Sessions Judge. It would appear that there is no provision requiring that the divorce should be pronounced in the presence of the wife or that it should be immediately communicated to her under Mahomedan law, and these views find support in the recent decision of *Sarabai* v. *Rabiabai*[1] in this Court, which was approved by the Calcutta High Court in the case of *Ful Chand* v. *Nazab Ali Chowdhry*[2], and by the Madras High Court in the case of *Asha Bibi* v. *Kadir Ibrahim Rowther*[3].

The rule, therefore, should in my opinion be discharged.

Rule discharged.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919.

July 25.

TIPANGAVDA BIN SANDYAWANGAVDA GAVDAR (ORIGINAL OPPONENT No. 2), APPELLANT, *v.* RAMANGAVDA BIN VENKANGAVDA GAVDAR AND ANOTHER (ORIGINAL APPLICANT AND OPPONENT No. 1), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Auction sale—Application made to the Mamlatdar to set aside sale—Mamlatdar not a Court within the meaning of Order XXI, Rule 89—Application must be made to Civil Court—Limitation Act (IX of 1908), Schedule I, Article 166.

An application by a judgment-debtor to have an auction sale held by the Mamlatdar set aside under Order XXI, Rule 89, Civil Procedure Code, 1908, must be made to the Civil Court. A Collector or other Revenue Officer cannot be considered as a Court within the meaning of Order XXI, Rule 89, and, therefore, the judgment-debtor who presents his application to the Collector cannot stop limitation running against him.

(1) (1905) 30 Bom. 537. (2) (1908) 36 Cal. 184.

(3) (1909) 33 Mad. 22.

*Second Appeal No. 416 of 1918.