

In Re: Bai Aisha

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Court : Mumbai

Decided On : Oct-04-1928

Reported in : (1929)31BOMLR62

Judge : Mirza and; Baker, JJ.

Appeal No. : Criminal Application for Revision No. 198 of 1928

Appellant : In Re: Bai Aisha

Judgement :

Mirza, J.

1. This is an application for revision of an order of the Chief Presidency Magistrate, Bombay, ordering the applicant to surrender herself on a warrant dated April 20, 1928, issued by the Resident at Baroda, or in the alternative to give bail as required by the warrant to attend before the Second Class Magistrate at Navsari in the Baroda State. The warrant is issued under the provisions of Article 7 of the Indian Extradition Act (XV of 1903). It recites that the applicant Bai Aisha (Mabel Ferris alias Isa Badruddin) wife of Akuji Isabji of Taluka Navsari, stands charged with having committed in the Baroda State the offences of criminal breach of trust and theft, which in British India would be punishable under Sections 406 and 380 of the Indian Penal Code.

2. It appears that on July 17, 1927, the Bombay Police had at the instance of the Baroda Police arrested the applicant for the same alleged offence. The proceedings were adjourned from time to time as the extradition warrant from Baroda had not been issued. By his letter dated September 6, 1927, the Resident at Baroda informed the Chief Presidency Magistrate at Bombay that the Baroda Government had intimated to him that there was not sufficient evidence to enable them to apply for the extradition of the applicant and that she might, therefore, be discharged. On September 16, 1927, the Chief Presidency Magistrate passed orders discharging the applicant. The same charge has since been revived at the instance of Sakharam Gangaram Surve, Naib Sub-Inspector, Baroda State, and the Bombay Police again arrested the applicant on April 14, 1928. The Magistrate, on April 16, 1928, made an order granting bail on certain terms and in default remanded the applicant to jail custody. The extradition warrant was received in Bombay on April 23 or 24, 1928. The Chief Presidency Magistrate then heard the evidence of two prosecution witnesses and recorded the applicant's statement. He intimated that as the applicant's statement made before him had not been challenged by the prosecutor he would, before proceeding further, report the case to the Local Government. The case was adjourned for that reason. By his letter to Government dated April 28, 1928, the Magistrate recommended that the Local Government should refuse the applicant's extradition. He stated in the letter that the accused (applicant) was a European British subject and it was open to the complainant, if so advised, to proceed against her in British India on obtaining the certificate required by Section 188 of the Criminal Procedure Code. The report to Government was made by the Magistrate under the provisions of Section 8A of the Indian Extradition Act. The Government would be competent under the provisions of Section 15 of the Act to have the extradition warrant cancelled and the person for whose arrest such warrant was issued discharged. By their letter dated June 25, 1928, the Government, acting on a report made to them by the Remembrancer of Legal Affairs, intimated to the Chief Presidency Magistrate that the applicant should be surrendered to the Baroda State for trial. The Legal Remembrancer's report, dated June 19, 1928, states :-

As the woman (applicant) is the wife of a Baroda subject, she is not a European British subject.... For the rest there is a prima facie case which satisfied the

Resident at Baroda before he issued his warrant. I do not see any reason why extradition should not be granted in the ordinary course.

3. After the receipt of this letter the Chief Presidency Magistrate further heard the matter and made his order now complained of. In the reasons given for the order the Magistrate states:-

There is nothing before me to show what the law of South Africa is or to show that the marriage contracted by the applicant is not valid. The facts as at present disclosed show that she is married to a Baroda subject and thus she ceases to be a European British subject. Moreover the applicant was informed on the last occasion that any application she had to make with regard to these proceedings should be made to the High Court. Applicant is, therefore, ordered to furnish bail or surrender herself.

4. It is contended on behalf of the Crown that this Court has no jurisdiction to revise the order made by the Chief Presidency Magistrate. It is urged that the act of the Magistrate is not a judicial but an executive act and that he is bound, under the terms of Section 7 of the Indian Extradition Act, to act in pursuance of the warrant, and that the only discretion he can exercise is that given him by Section 8A, which provides that he may, if he thinks fit, after the statement (if any) of the accused person has been recorded, before proceeding further, report the case to the Local Government and, pending the receipt of orders-, detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required. It is further urged that by Article 15 of the Act, the jurisdiction of this Court is ousted and the Government of India or the Local Government alone are empowered, by order, to stay any proceedings in respect of such a warrant or to direct that the warrant be cancelled and the person for whose arrest it has been issued be discharged. Reliance is placed in this connection on the ruling in *Gulli Saint, v. Emperor* I.L.R (1914) Cal 793. which is to the effect that where a warrant has been issued by the Political Agent, under Section 7 of the Indian Extradition Act, its execution by the District Magistrate (or the Chief Presidency Magistrate) in British India, in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the

Magistrate and the order to surrender the fugitive criminal, but ii the latter considers himself aggrieved thereby, he can invoke the action of the Government under Section 15. A reference 19 as to the petition in that case shows that the applicant there was challenging the issue of the extradition warrant against him on four grounds, two of which related to the reliability of the prima facie case made out against him in the Native State. The third ground related to the allegation of the applicant that he was a British subject and not a subject of the Native State. The District Magistrate had considered the evidence produced by the applicant on this point and had given an adverse finding on it. The fourth ground was that the Resident in a Native State could not be regarded as a Political Agent within the meaning of the Act. On this point too, the District Magistrate had held against the applicant, There was no point before the Court that the extradition warrant was without jurisdiction and hence illegal, If such a point was raised before the District Magistrate he had found against it and it does not appear that the appeal Court was invited to reverse that finding. With great respect, the proposition laid down in Gulli Sahu v. Emperor appears to me to be too wide and should be confined to the facts of that case. The intention of the Legislature in referring the extradition warrant to the District Magistrate or the Chief Presidency Magistrate for orders is that the Magistrate should judicially consider the matter and decide whether the warrant can be executed according to law. The execution of the warrant depends not upon the order of the Political Agent or Resident, but upon the order of the District Magistrate or Chief Presidency Magistrate as the case may be.

5. If the warrant is without jurisdiction or there is some other illegality to be found on the face of the warrant, the Magistrate in the exercise of his judicial powers would not be justified in issuing an order for its execution. Any order judicially made by the Magistrate would be subject to the revisional powers of this Court under Section 439 of the Code of Criminal Procedure. This Court has also, in my opinion, been given powers under Section 561A of the Code of Criminal Procedure in addition to what it possesses under its Charter and Letters Patent to interfere in order to secure the ends of justice. This Court would also have power on proper proceedings being taken to interfere under b. 491 of the Code of Criminal Procedure, by which, whenever the Court thinks fit, it can direct that a person illegally or improperly detained in public or private custody within the limits

of its jurisdiction be get at liberty. In *Emperor v. Huseinally* (1905) 7 Bom. L.R. 463. Russell J. expressed the opinion that Section 15 of the Indian Extradition Act ousts the jurisdiction of the High Court to enquire into the propriety of the extradition warrant, but leaves open the question of the High Court's power to interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. In *Gulli Sahu v. Emperor* I.L.R (1913) Cal. 400. it was held that Section 15 of the Indian Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chapter III, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, when it is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it. In *Jaipal Bhagat v. King-Emperor* I.L.R (1921) Pat. 57. it was held that although Section 15 empowers the Government of India and the Local Government to stay proceedings taken under Chapter III of the Act and to direct any warrant to be cancelled and the accused person to be arrested discharged, this does not oust the jurisdiction of the High Court to interfere in a case where action under the Act has not been taken under a valid warrant. The extradition warrant in execution of which the accused in that case was arrested mentioned that the accused had absconded from jail and had fled from Nepal to British territory. The Court held that Section 7 applied only to an 'extradition offence' and the absconding from jail was not one of the offences mentioned in the schedule to the Act enumerating such offences; that Section 7 would have no application and the warrant issued by the Political Agent was, therefore, without jurisdiction. The Court held that the warrant was wholly illegal as it was without jurisdiction.

6. In my judgment, this Court clearly has jurisdiction to revise the order of the Magistrate.

7. The applicant's contention is that she is a European British subject. Section 7 of the Indian Extradition Act excludes from its operation persons who are European British subjects. If, therefore, the allegation of the applicant that she is a European British subject is established, the Resident at Baroda would have no jurisdiction to issue a warrant against her under Section 7 of the Indian Extradition Act. If the

warrant is issued without jurisdiction it is illegal and a nullity. The Magistrate cannot validly give effect to a warrant which is issued without jurisdiction.

8. The inquiry before the Magistrate seems to have proceeded on the basis that the facts disclosed showed that the applicant, although a European British subject by birth, had ceased to be such owing to her marriage to a Baroda subject. It is owing to this finding that the Magistrate has given effect to the warrant. If the finding is based upon an error of law, this Court can revise it.

9. By Section 2(a) of the Indian Extradition Act, 'European British subject' is said to mean a European British subject is defined by the Code of Criminal Procedure for the time being in force. European British subject is defined by Article 4, Clause (i), of the Code of Criminal Procedure, as meaning : (1) 'any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony.' It is not disputed that the applicant was born in Cape Town of European parents. Cape Town is in South Africa which is a British Colony. The question, therefore, to be determined is whether by her marriage to a subject of the Baroda State she has ceased to be a European British subject within the meaning of the Indian Extradition Act. The Indian Extradition Act and the Code of Criminal Procedure both being penal enactments their terms must be strictly construed in favour of accused persons wherever such construction can be reasonably justified.

10. The definition of 'European British subject' given in the Code of Criminal Procedure is silent on the subject of a female European British subject ceasing to be such on her marriage to an alien. No doubt by a presumption of the law relating to civil matters, e. g., of succession, a woman by her marriage is presumed to adopt the domicile of her husband; but nationality and domicile do not always go together. Nationality attaches to a person, generally speaking, by birth. Generally speaking he owes allegiance to the Sovereign in whose territory he is born if he is born of parents who owed similar allegiance to that Sovereign. He may subsequently by his own act become a naturalised subject of another Sovereign. It would not necessarily follow from such act that he ceases to owe allegiance to the Sovereign whose subject he originally was, although by his act of naturalisation he

undertakes allegiance to another Sovereign and his duty to the one might under certain conceivable circumstances conflict with his duty to the other. Domicile is a matter of a person's own choice and intention. He can have but one domicile at a time, although he may change it as often as he pleases, In the case of a married woman although she acquires the domicile of her husband on her husband, on her divorce or widowhood she may adopt any other domicile or revert to the domicile of her birth. The change of domicile in itself would not necessarily amount to a change of nationality.

11. In the present case it is urged by the Government Pleader that the applicant owes allegiance to His Highness the Gaikwar of Baroda and not to His Majesty the King. The position of Native States in India is somewhat peculiar. The more important ones among them-Baroda belongs to that class-enjoy a certain amount of autonomy in internal matters. They are under the protection of the British Empire and the Ruler of the State owes allegiance to the British Sovereign. No doubt by adopting the domicile of a Native State the applicant would from the very fact of her residence within the territorial jurisdiction of the Native Prince owe a certain allegiance to him, but that allegiance cannot, in my judgment, in the absence of any statutory provision in British India to the contrary, be said to oust the allegiance which she owes to the Sovereign whose subject she is by birth.

12. Under the English common law up to 1844 marriage did not affect a woman's nationality. In the *Countess Conway* a case (1834) 2 Kna 364. Baron Park said (p. 568): '...A Frenchwoman becomes in no way a British subject by marrying an Englishman; she continues an alien, and is not entitled to dower.' He referred to *Coke on Littleton*, p. 326. Since 1844 several statutes have been enacted in England by which a woman is deemed to have the same nationality as her husband. By the British Nationality and Status of Aliens Act 1914 (Sections 10 and 11) a British subject who becomes the wife of an alien is deemed to be an alien. Section 10 of the Naturalization Act, 1870, expressed it in the simpler form that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject. According to Dicey (*Conflict of laws*, p. 187, 4th Ed.) the explanation of the change in terminology is probably a desire to avoid ascribing to a woman a nationality which may not be her nationality under the law

of the State of which her husband is a subject as some States do not admit the principle that a wife's nationality is always that of her husband, e.g., France, See *In the Goods of Brown-Sequard (deceased)* (1894) 70 L.T. 811.

13. The English Statutes on the subject have not been made applicable to British India. On grounds of equity and good conscience, we are still governed by the old English common Law as it stood in 1776. There is no evidence to show what the law of Baroda on the subject is. No doubt for purposes of English law natives of Native States in India which do not form part of British India are not British subjects. The status of a woman married to a subject of a Native State would be governed by the same considerations which apply to independent Sovereign States. The subject of a Native State owes allegiance directly to his own Prince and indirectly to the King Emperor. In law, he would be regarded as an alien although for practical purposes he enjoys most of the amenities extended to British subjects more especially outside his own State. The sovereign or semi-sovereign powers of a Native State are confined strictly to its own territory. In the absence of a special enactment or usage to the contrary, it would not be reasonable to hold that a European British subject by her marriage to a subject of a Native State becomes the subject of that State. Such a proposition may lead to an anomalous position in the case of Native States where as under the French law marriage of an alien to a husband who is a subject of a Native State does not confer the husband's nationality upon the wife. In such a case the wife would find that she has lost the nationality of her birth without acquiring a new one or in other words that she is the subject of no State and owes allegiance to no Sovereign. The Court would be reluctant to declare that such a result has ensued, unless there is clear authority to the contrary that the laws of British India contemplate it. If the Baroda authorities were relying upon a change of nationality in this case it was incumbent on them to prove that at any rate according to Baroda law or usage the fact of the marriage would confer upon the wife the nationality of her husband.

14. If the authorities were to the effect that by marriage the applicant has lost her nationality of birth and has acquired the nationality of her alien husband it would still remain to consider whether the change of nationality under any rule of international law, public or private, having the force of law in British India, amounts

to a change of nationality within the meaning of the criminal law of this country. The language of the definition of 'European British subject' in the Code of Criminal Procedure does not, in my opinion, provide for such an exception to the general definition and we would not be justified in reading into the terms of the definition any such provision imported from another branch of the law.

15. It is clear from the definition of a 'European British subject' in the Criminal Procedure Code that certain rights and privileges which belong to the class are conferred upon it qua such class irrespective of considerations of change of status owing to marriage. It will not be contended that a native British Indian woman if she marries a European British subject would come under the definition of 'European British subject' although she may thereby be said to acquire his domicile, nor will it be contended that a European British subject who marries a native British Indian husband thereby ceases to be a 'European British subject' as defined in the Code, It must be assumed that by excluding European British subjects from the operation of Section 7 of the Indian Extradition Act the Legislature had a similar intention. The onus in such a case would be on the Baroda authorities to show that by the fact of her marriage to a Baroda subject the applicant has ceased to be a European British subject within the meaning of the Indian Extradition Act.

16. Mr. Shingne has further urged that to come under the definition of 'European British subject', it is necessary not only that the applicant should be a European British subject by birth but that she should also be domiciled at the time in the British island or any colony. In my judgment the definition cannot be so restricted. If it were so restricted it would exclude from its operation all European British subjects who are domiciled in British India unless British India can be said to come within the definition of a colony. Such could not have been the intention of the Legislature. The use of a ',after'born' in Section 4(i) indicates, in my opinion, that the words 'naturalised or domiciled' which follow it are disjunctive of and not conjunctive with what precedes. The applicant, in my judgment, can claim the privilege of being a European British subject apart from any foreign domicile she may have acquired by her marriage. In this view of the case the extradition warrant issued by the Resident at Baroda would be without jurisdiction and illegal.

17. The applicant's case has been that her marriage with Akuji Isabji was from its inception a nullity as at the time of that marriage he had a wife Khatijabai living. The marriage was performed at Johannesburg in 1914 according to the South African law. That law being the law of a Christian country, must be presumed to have made a polygamous marriage illegal. The prosecution have not denied the applicant's allegation that the marriage in South Africa was performed under such conditions. If the marriage was a nullity the applicant acquired no domicile in the Baroda State, apart from her intention to adopt such domicile. If such intention is to be presumed from her residence in the Baroda State from 1921 to 1925, she must be deemed by her departure from that State in 1925 and her settling down in British India since, to have abandoned her former domicile and to have adopted the domicile of British India.

18. The order of the Magistrate is set aside, the warrant discharged, the bail bonds cancelled, and the applicant set at liberty.

Baker, J.

19. The petitioner, Mabel Ferris alias Bai Aisha, applies for revision of the order passed on July 11, 1928, by the Chief Presidency Magistrate, Bombay, directing her to furnish bail or surrender herself, a warrant under Section 7 of the Indian Extradition Act having been issued against her by the Resident of Baroda in respect of a charge of theft brought against her by her husband. The theft was alleged to have been committed within the jurisdiction of the Baroda State.

20. Several points of law arise in the case. The facts are that the applicant, Mabel Ferris, was a European British subject born in South Africa, a British colony, of European parents. In 1914 she went through a form of marriage before a Registrar at Johannesburg with a Mahomedan, a native of Baroda State, and afterwards lived with him as his wife. She alleges that she was at that time a minor, and that the marriage was without the consent or knowledge of her parents. That part of the case has not been pressed, and no birth certificate has been produced. Subsequently the petitioner came to India with her husband, who may be so called for the purposes of this judgment, and lived for some time in a village in the

Baroda State, Petitioner states that her husband represented himself to be a bachelor, and that on arrival she found he had another wife living. Disputes broke out between her and her husband which resulted in her being turned out of the house, and she went to reside in British territory. Subsequently a charge of theft was made against her by her husband, but proceedings were dropped as the Government of Baroda considered there was not sufficient evidence. The proceedings were, however, revived, and ultimately a warrant under Section 7 of the Indian Extradition Act was issued against her by the Resident of Baroda, who is the Political Agent under the section, for her arrest and extradition, directed to the Chief Presidency Magistrate. The petitioner was arrested by the Bombay Police, but on her representation to the Chief Presidency Magistrate that she was a European British subject to whom Section 7 did not apply, a reference was made to Government, who under Section 15 have the power to refuse extradition. The matter was referred to the Remembrancer of Legal Affairs for opinion. He was of opinion that as the petitioner was married to a subject of Baroda State, she was not a European British subject, and the Government refused to interfere. The Chief Presidency Magistrate directed her to furnish bail or to surrender herself to the Baroda authorities. It is against this order that the petitioner applies in revision.

21. The important question in this case is whether the applicant by her marriage with a subject of the Baroda State has lost her right to be dealt with as a European British subject under the Criminal Procedure Code. At present I am assuming the marriage to be valid. The question of jurisdiction will, in my opinion, to a great extent, depend on whether the applicant has lost her right to be dealt with as a European British subject. In this case we are dealing with a construction of a specific definition, and any remarks in my judgment must be taken as having reference to the particular question before us. This appears to be the first time in which this particular point has come before the Courts, and the matter is, therefore, one of importance. Section 7 of the Indian Extradition Act (XV of 1903) states where an extradition offence has been committed or is supposed to have been committed by a person, not being a European British subject, in the territories of any State not being a Foreign State, and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed

to be, or if such person is believed to be in any Presidency-town, to the Chief Presidency Magistrate of such town, for his arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly. It will be seen that a European British subject is expressly excluded from the provisions of this section. By Section 2 of the Act a European British subject is defined to mean a European British subject as defined by the Code of Criminal Procedure for the time being in force. 'European British subject' is defined under Section 4(1)(i) of the Criminal Procedure Code as follows :-

- (i) any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or
- (ii) any subject of His Majesty who is the child or grandchild of any such person by legitimate descent.

It is not disputed that the applicant was born in Cape Town, a British Colony, of European parents, and, therefore, until her marriage she fulfilled the definition under the Code of Criminal Procedure, But it is contended that by her marriage to a subject of the Baroda State she ceased to be a subject of His Majesty. The Criminal Procedure Code does not provide for marriage with a subject of another State being a manner in which a European British subject loses a right to be dealt with as such. On reference to Sohoni's Code of Criminal Procedure, 12th Edition, p. 21, it will appear that a male European British subject forfeits his privilege to be dealt with as such by being declared to be a European vagrant under the European Vagrancy Act (IX of 1874) and in no other manner.

22. Natives of the Native States of India, which do not form part of British India, are not British subjects for the purposes of English Law. (Dicey's Conflict of Laws, 4th Edition, p. 159). Consequently I assume that the husband of the applicant is not a subject of His Majesty. The opinion of the Remembrancer of Legal Affairs is on the record, and the decision of Government under Section 15 of the Extradition Act not to interfere, is based on it. No reasons were given for the opinion except that the applicant is the wife of a Baroda State subject. The learned Government Pleader has based his arguments mainly on the point of domicile. No doubt, under

the general law, not only of England, but of all nations, a wife takes the domicile of her husband, and if he changes his domicile, her domicile changes also. Section 15 and the following sections of the Indian Succession Act (XXXIX of 1925) deal with this subject, and, therefore, in a civil matter such as succession the applicant will no doubt have the same domicile as her husband, and be governed by the law appertaining to persons of that domicile, in this case, Baroda, But in this case we are dealing with a specific definition in a penal statute, which must be strictly construed. Apparently under the definition the status of a European British subject can, in certain cases, be acquired by domicile in the British Islands or any Colony, but the question is whether it can be lost by a change of domicile. In my opinion the definition in the Criminal Procedure Code does not contemplate the loss of the status of a European British subject by change of domicile, whether by marriage or otherwise. The learned pleader for the applicant has put the case of a male European British subject marrying an Indian wife, and contended that though the wife would acquire the domicile of her husband, it would be ridiculous to suppose that she would fall within the definition of a European British subject, and obviously this is so, because the wife would not be of European descent. And even a clearer case is that of a European British subject born in England and coming out to India, who by choice acquires an Indian domicile, as he is perfectly competent to do. By reason of his change of domicile he undoubtedly would not lose his right as a European British subject under the Criminal Procedure Code. The definition does not contemplate a change of domicile as involving a loss of status. The section does not say so, and we cannot read in the section what is not there. We must be guided by the definition as framed. The applicant being a subject of His Majesty of European descent in the male line born in British Colony, fulfils the condition of the definition, and there does not appear to be any provision in the Criminal Procedure Code by which her marriage can deprive her of her status. It is argued that the question of nationality is distinct from that of domicile. The learned pleader for the applicant has quoted a number of authorities to that effect, but so far as England is concerned the matter is covered by an express provision, for under the British Nationality and Status of Aliens Act, 1914, Sections 10, 11, a British subject who becomes the wife of an alien shall be deemed to be an alien and shall not by reason only of the death of her husband or the dissolution of her marriage cease

to be an alien.

23. Formerly marriage was not recognised as in itself working any change in the national character of a woman, and hence till 1844(7 & 8 Viet. c. 66) an alien woman, e, g., a French woman, who married a British subject, did not cease to be an alien and on the other hand a British subject, who married an alien husband, e. g., a Frenchman, did not till 1870, in the eye of English law, become an alien. The Naturalization Act, 1870, Section 10, enacted that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject.

24. We are not, however, dealing with the status of the applicant under the British Nationality and Status of Aliens Act, 1914, but under the Criminal Procedure Code. If it had been the intention of the Legislature that a female European British subject should lose her status for the purpose of the Act by marriage with a non-British subject it would have said so. The Criminal Procedure Code was revised in 1908 and again in 1923, when numerous changes were made and the definition of European British subject amended, but no amendment was made as regards the status of married women, and in the absence of authority to the contrary I feel justified in assuming that it was not the intention of the Indian Legislature that a woman who was a European British subject by birth should lose that status for the purpose of the Code by reason of her marriage. I am considering the question solely from the point of view of the Criminal Procedure Code, which is the only question in this case.

25. Assuming the marriage to be valid, I am of opinion that the applicant has not lost her status as a European British subject.

26. If the marriage is not valid of course no question of the applicant losing her status could arise.

27. It is the applicant's contention that her marriage is invalid as her alleged husband had a wife living. Polygamous marriages are not recognized by the English law and would presumably be invalid in South Africa, but in the absence of evidence as to the former marriage, though it has not been denied by the Crown, I

do not think it necessary, in view of my opinion expressed above, to enter into this part of the case.

28. In view of my finding that the applicant is still a European British subject no warrant under Section 7 of the Indian Extradition Act could validly be issued against her.

29. It was held by this Court in *Emperor v. Hmeinally* (1905) 7 Bom. L.R. 463. that Section 15 of the Indian Extradition Act ousts the jurisdiction of this Court to inquire into the propriety of the warrant, but leaves open the question of the Court's power to interfere with the Magistrate's action if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal. In the case of *Gulli Sahu v. Emperor* I.L.R (1913) Cal. 400. the accused was arrested under Section 10 on certain information received from the Nepal authorities and the Sub-Divisional Magistrate directed his surrender. It was held that on the facts the procedure followed by the Sub-Divisional Magistrate was not according to law and the Court said (p. 404):

It is true that Section 15 of the Act ousts the jurisdiction of this Court to enquire into the propriety of a warrant issued under Chapter III, but where the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, not being sanctioned by it, we cannot but assume that the Magistrate has acted in his general jurisdiction, and as such his order is revisable by this Court and liable to be set aside at the instance of the party whose liberty is affected by it.

In *Gulli Sahu v. Emperor* I.L.R (1914) Cal. 793. the petitioner was the same as in the case cited above. He had previously been released as the result of the decision in the above case. After his release a 'warrant was issued by the Resident in Nepal under Section 7 of the Act, and the case was again brought before the High Court in revision. It was held that the District Magistrate was merely performing an executive act, and the Court had no power to interfere in revision. But the Court went on to say that the absence of revisional powers did not affect its powers under Section 491 of the Code of Criminal Procedure, which were powers not created by the Indian Extradition Act. The rule was, however,

discharged, On the other hand, in Jaipal Bhajat v. King-Emperor I.L.R (1921) Pat 57. the accused was arrested under a warrant issued by the Resident in Nepal for absconding from jail. It was held that the absconding from jail was not an extradition offence and the arrest was therefore illegal. As regards Section 15 the Court said (p. 62) :-

No doubt Section 15 of the Act empowers the Government of India and the Local Government to stay any proceeding taken under Chapter III of the Act and to direct any warrant to be cancelled and the person arrested to be discharged. But that does not necessarily oust the jurisdiction of this Court to interfere in a case where the action under the Act has not been taken under a valid warrant.

30. The view of the Patna High Court is the same as that taken by this Court in Emperor v. Suseintilly (1905) 7 Bom. L.R. 463, In the circumstances of the present case where the applicant has been held to be a European British subject, and as such excluded by the Act itself from the terms of Section 7, the case is, in my opinion, within the ruling in Emperor v. Huseinally and Jaipal Bhajat v. King-Emperor, and I agree with my learned brother in holding that this Court has jurisdiction. The terms of Section 439 of the Code of Criminal Procedure are very wide.

31. The High Court has also extensive powers under Section 561A of the Code

32. The present proceedings are not under Section 491 of the Criminal Procedure Code, but the powers of the High Court under that section are not restricted by the terms of the Indian Extradition Act, and even if this Court had no jurisdiction in revision it would be open to us to consider the validity of the warrant on a proper application under Section 491 being made.

33. The question of the powers of the Court to interfere under the Letters Patent and the Charter Act has not been argued.

34. In any case I have no doubt that Government would, in view of the finding of this Court as to applicant's status, reconsider their decision not to interfere under Section 15 of the Act, but in view of my finding that this Court has jurisdiction that

question does not arise.

35. I concur in the order proposed that the applicant should be set at liberty and her bail bond cancelled.

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