

MATRIMONIAL JURISDICTION.*Before Fletcher J.*

COX v. COX.*

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June 3.

Divorce—Co-respondent, absence of—Leave of Judge for dispensing with co-respondent, when to be obtained—Jurisdiction of Court, in case of want of such leave—Matrimonial Causes Act of 1857 (20 & 21 Vict. c. 85) s. 28—Divorce Court Rules (English) 4, 5 and 6—Indian Divorce Act (IV of 1869), ss. 7, 11.

Where the husband was petitioner for divorce but could not name the alleged co-respondents, (the Master having issued citations), and at the hearing the petitioner applied for leave to dispense with the co-respondents :

Held, that the direction for such leave must be by application to the Judge on motion founded on affidavit *before the hearing* of the petition.

Held, further, that the Court had no jurisdiction to entertain the petition where such leave had not been obtained.

PETITION for divorce by Charles Walter George Cox.

The petitioner, who was an assistant in the firm of Messrs. Jessop & Co. and resided at No. 49-5, Bentinck Street, Calcutta, presented his petition on the Original Side of the High Court, for dissolution of his marriage with the respondent, Emily Florence Cox (*née* Lambert) of No. 24, Tangra Road, Entally. As the petitioner could not ascertain the names of the two co-respondents they were not named in the petition. The Master issued citations. No application, however, was made to the Judge for leave to dispense with the co-respondents. The following letter was filed with the petition:—"Calcutta, 31st January 1910. My dear George. This is to tell you that your ill-treatment to me has entirely killed my love for you, and in a weak

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moment I committed adultery with a man who sympathises with me, but whose name I will not give up. I can under no circumstances live with you as your wife again. Your unfaithful wife, Emily Cox." The petition further stated that the respondent asked the petitioner to forgive her, but as he refused she occupied a separate room in petitioner's house till the 3rd February 1910 when she left. The petitioner's servant is said to have seen a man on three occasions in respondent's room. The parties had been married by the Senior Marriage Registrar at his house, No. 2, Park Lane, Calcutta, on 21st October 1909, and had last resided together at No. 49-5, Bentinck Street, Calcutta. On 3rd May 1910, Mr. A. C. Banerji, counsel, applied on behalf of the respondent for leave to appear and defend saying he was prepared to put in an affidavit stating that the respondent's letter admitting her guilt had been obtained by coercion whereas she had not committed adultery. The following order was made by Fletcher J. "I will let her appear and file warrant. Answer must be filed in 2 days. Case to appear on the list a fortnight to-day subject to part-heard and commercial cases. Costs reserved."

Mr. A. N. Chaudhuri (with him *Mr. P. C. Mitter*), for the petitioner, read the petition and the answer, and submitted that the other side's affidavit was not sworn when they applied for leave to defend and file answer.

[FLETCHER J. Have you obtained leave to proceed without a co-respondent? See s. 11 of the Divorce Act.]

I ask leave now to proceed without a co-respondent and pray for an adjournment to consider my position.

[FLETCHER J. I am afraid I must dismiss the petition. See *Brown and Watts on Divorce*, 8th Edition,

p. 285, and section 28 of the Matrimonial Causes Act of 1857, which is as follows:—" Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a co-respondent, and the parties or either of them may insist on having the contested matters of fact tried by a Jury, as hereinafter mentioned."]

Mr. P. C. Mitter (following on behalf of the petitioner). I submit that no order should be made as to costs because the question as to leave was not raised by the other side and was practically waived. Leave was not necessary for the purpose of giving jurisdiction but of procedure only: on the analogy of Order II, rule 4, the Court can grant leave now.

Mr. Avetoom and *Mr. A. C. Banerji*, for the respondent, were not called upon.

FLETCHER J. This is a petition presented to the Court by C. W. G. Cox for the dissolution of his marriage with the respondent E. F. Cox on the ground of adultery. To this petition there is no co-respondent. The adultery alleged in the petition is said to be proved by the admission contained in a letter, dated the 31st January, written by the respondent and addressed to the petitioner, in which it is said that she admitted that in a weak moment she had committed adultery with a man who sympathises with her but whose name she will not give up. The other case of adultery alleged is in the month of December when it is said the respondent on three occasions was visited

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in the petitioner's house by a man whose name the petitioner has been unable to discover. Now the petition was presented to the Court and the Master directed citations to issue to the respondent. In my opinion, he was wholly wrong in doing that. However that may be, the jurisdiction is a special jurisdiction vested in the Court by the Indian Divorce Act to enable it to grant divorces in respect of persons professing the Christian religion and resident in India. The Act is chiefly modelled on the Matrimonial Causes Act of 1857. Section 7 is the first material section, being placed under the heading "Jurisdiction" and it says:—"Subject to the provisions contained in this Act, the High Court and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." The other section that is material in this case, and which is substantially taken from section 28 of the Matrimonial Causes Act of 1857, is section 11 which enacts:—"Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition unless he is excused from so doing on one of the following grounds, to be allowed by the Court:—(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed; (ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it; (iii) that the alleged adulterer is dead." Now the rules in England which govern this application are rules 4, 5 and 6 of the Divorce Court Rules. First rule 4 provides "Upon a husband

filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct." Rule 5 says "Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit" That it must be by affidavit shows obviously that the direction must be by application to the Judge on motion founded on affidavit before the hearing of the petition. Then rule 6 applies to the case where the address of the adulterer is unknown to the petitioner. It is obvious in this case that the direction ought to have been applied for on motion to the Judge supported by an affidavit and the affidavit ought to be sufficient to satisfy the Court that the petitioner after having made reasonable endeavours has been unable to find the name of the co-respondent. It seems to me to be a matter of grave public importance that a person should not be allowed to proceed in a Court for the dissolution of his marriage without having observed all the safeguards imposed by the law to prevent the chance of connivance or collusion. In my opinion, the Master ought not to have issued the citation when the petition contained no co-respondent, unless the Judge had granted leave to the petitioner to proceed without a co-respondent. In my opinion, the Court has no jurisdiction to entertain the petition and that, therefore, the petition must be dismissed with costs to the respondent.

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*Petition dismissed.*Attorney for the petitioner: *G. C. Moses.*Attorneys for the respondent: *Orr, Dignam & Co.*