APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee, Acting C.J., and Fletcher J.

1920

April 7.

CONSTANCE CATHERINE MORENO

v.

HENRY WILLIAM BUNN MORENO.*

Divorce—Adultery—Condonation—Desertion—Unreasonable delay—Indian Divorce Act (IV of 1869) ss. 12, 13 and 14.

Condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, so that if after condonation the offences are repeated, the right to make the condoned offences a ground for divorce revives. To constitute a revival of the condoned offences, the offending spouse need not be guilty of offences of the same character as those condoned.

Peacock v. *Peacock* (1), *Keats* v. *Keats* (2), *Ellis* v. *Ellis* (3), *Ste. Croix* v. *Ste. Croix* (4), *Windham* v. *Windham* (5), *Thompson* v. *Thompson* (6), *Price* v. *Price* (7), *Moss* v. *Moss* (8), *Roberts* v. *Roberts* (9), *Blandford* v. *Blandford* (10) referred to.

Although poverty is almost always a sufficient excuse for delay, it is not to be supposed that there is no lapse of time where a line may be drawn.

Mortimer v. *Mortimer* (11), *Coode* v. *Coode* (12), *Short* v. *Short* (13), *Harrison* v. *Harrison* (14), *Nicholson* v. *Nicholson* (15), *Mason* v. *Mason* (16), *Edwards* v. *Edwards* (17), *Pears* v. *Pears* (18), *Hughes* v. *Hughes* (19), *Coppinger* v. *Coppinger* (20) and *Mitter* v. *Mitter* (21) referred to.

* Appeal from Original Civil No. 5 of 1920 in suit No. 3 of 1918.

(1) (1858) 1 Sw. & Tr. 183.
(2) (1859) 1 Sw. & Tr. 334.
(3) (1865) 4 Sw. & Tr. 154.
(4) (1917) I. L. R. 44 Calc. 1091.
(5) (1863) 32 L. J. P. M. & A. 89 ; 9 Jurist N. S. 82.
(6) (1911) I. L. R. 39 Calc. 395
(7) [1911] P. 201.
(8) [1916] P. 135.
(9) (1917) 117 L. T. 157.
(10) (1883) 8 P. D. 19.
(11) (1820) 2 Hag. Con. 310.
(12) (1838) 1 Curt. 755.
(13) (1874) L. R. 3 P. & D. 193.
(14) (1864) 3 Sw. & Tr. 362.
(15) (1873) L. R. 3 P. & D. 53.
(16) (1882) 7 P. & D. 233 ; (1883) 8 P. & D. 21.
(17) (1900) 17 T. L. R. 38.
(18) (1912) 107 L. T. 505.
(19) (1915) 32 T. L. R. 62.
(20) (1918) 34 T. L. R. 588.
(21) (1908) 12 C. W. N. 1009.

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Appeal from a judgment of Greaves J.

On 21st May 1902, the petitioner Henry William Bunn Moreno was married to the respondent Constance Catherine Moreno. In February 1905 the respondent left the petitioner and is now alleged to have lived in adultery with one Pratti, since deceased. In 1909 the petitioner was made a co-respondent in some divorce proceedings by one Abro against his wife and in 1910, on the basis of the alleged adultery in Abro suit, divorce proceedings were instituted by the present respondent against the petitioner. Both the suits were dismissed. In 1912 they were again reconciled and thereafter lived together till the end of 1913, when the petitioner alleges he came to know of his wife having committed adultery with Pratti, and thereafter they separated. In 1914 the respondent instituted proceedings before a Presidency Magistrate for an order directing the petitioner to pay her maintenance and in January 1915 an order was made directing him to pay Rs. 50 a month. On 19th December 1918 the petitioner filed the present petition for dissolution of marriage on the ground of adultery with Pratti and desertion. The defence was that the respondent's adultery with Pratti was known to the petitioner at the time of reconciliation and she was forgiven.

Mr. J. N. Mitter, for the appellant. The petitioner condoned the offences committed by his wife. There was unreasonable delay in filing the petition. Indian Divorce Act (IV of 1864) s. 14. *Coppinger* v. *Coppinger* (1), *Mitter* v. *Mitter* (2).

Mr. Avetoom (with him *Mr. R. C. Bonnerjee*), for the respondent. There was no condonation. Even if there were, by subsequent matrimonial offence condonation

(1) (1915) 32 T. L. R. 62. (2) (1908) 12 C. W. N. 1009.

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is cancelled: *Thompson* v. *Thompson* (1). Condonation always implies the condition of good behaviour of the offending spouse. The delay was due to petitioner's poverty.

Cur. adv. vult.

MOOKERJEE, A. C. J. This is an appeal against a decree *nisi* for dissolution of marriage made upon a petition presented by a husband under section 10 of the Indian Divorce Act, 1869, on the ground that his wife had, since the solemnization of the marriage, been guilty of adultery.

The petitioner and the respondent were married on the 21st May, 1902, and lived together until the month of February 1905. During this period, two children were born to them, a daughter, now sixteen years of age, and a son who is dead. In February 1905, the respondent left the petitioner and lived apart till the end of the year 1912, or the beginning of the year 1913. The petitioner alleges that after the respondent had left him, she lived in adultery with one Pratti now deceased. She gave birth to two children in 1907 and 1908; but the petitioner was not aware either of the adultery with Pratti or of the birth of the children. In 1909, one Abro commenced divorce proceedings against his own wife and made the petitioner a co-respondent, on the allegation of adultery with her. Shortly after, in 1910, the respondent instituted divorce proceedings against the petitioner on the basis of the adultery alleged in the Abro suit. Both the suits were dismissed as against the petitioner. In 1912, the petitioner and the respondent became reconciled through the intervention of a friend, and from the beginning of 1913, they resumed co-habitation. According to the petitioner, he discovered, for the

(1) (1911) I. L. R. 39 Calc. 395.

first time towards the end of that year or in the beginning of next year, that his wife had committed adultery with Pratti and that children had been born of the intercourse. The parties accordingly separated again. The respondent instituted proceedings before a Presidency Magistrate for maintenance order under section 488 of the Criminal Procedure Code, but withdrew them as the parties came to an arrangement. In December, 1914, she again instituted similar proceedings, and on the 6th January, 1915, the Magistrate made an order in her favour directing the petitioner to pay her maintenance at the rate of Rs. 50 per month. On the 19th December, 1918, that is, nearly four years after the date of the maintenance order, the petitioner commenced the present proceedings for the dissolution of marriage and for the custody of his daughter. The respondent did not deny the alleged adultery, but opposed the petition substantially on two grounds, namely, *first*, that the petitioner had condoned the adultery, within the meaning of section 13 of the Indian Divorce Act, and, *secondly*, that the petitioner had been guilty of unreasonable delay in presenting the petition, within the meaning of section 14. Mr. Justice Greaves has overruled both these contentions and has granted the husband a decree *nisi* for dissolution with the custody of the child of the marriage. The respondent has appealed to this Court and counsel on her behalf has reiterated the two defences which were unsuccessfully urged in the trial Court.

As regards the first contention, namely, that the husband had condoned the adultery and was consequently no longer entitled to an order for dissolution of marriage, reliance has been placed upon the admitted fact that the parties resumed cohabitation in 1913. The only point in controversy is, whether at the time

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when cohabitation was resumed or during the continuance thereof, the husband was aware of the antecedent adultery on the part of his wife. The wife asserts that he had full and definite knowledge of all the circumstances before cohabitation was resumed; the husband maintains on the other hand that he had no such knowledge when he took back his wife, and that as soon as he made the discovery, he separated from her in the beginning of 1914. There is conflict of testimony on this point; and upon an examination of the evidence we have arrived at the conclusion that, even though it may be difficult to ascertain whether the story narrated by either party is true in all its details, there is no room for reasonable doubt that, after cohabitation had been resumed, the husband became aware of the misconduct of his wife, and notwithstanding such knowledge continued to cohabit with her. Upon this part of the case, we have the following definite statement made by the husband, on the 6th January 1915, in the course of the maintenance proceedings instituted by his wife in the Court of the Presidency Magistrate: "I lived with my wife for one "year in 1913. I discovered about Pratti, about the "middle of 1913. She lived with me up to the end of "1913." The statement was put to him in cross-examination by Mr. Mitter, and it is sufficient to state that the witness was not able to explain it away satisfactorily. Besides this, indications are not altogether lacking that the petitioner was in all likelihood aware of the misconduct of his wife much earlier than 1913. In the divorce proceedings instituted by the respondent against the petitioner, shortly after the Abro suit, Mr. Justice Pugh received an anonymous letter on the 19th August 1910. The letter was sent to the Government Solicitor, who submitted a report on the 18th November 1910, embodying the result of the enquiries

made by him. This report states definitely that the then petitioner (the wife) had in 1907 and 1908 committed adultery with Pratti and that she had in 1907 given birth to a daughter who was in the Entally Convent in the suburbs of Calcutta, and in 1908 again given birth to another daughter who had died on the 1st January 1909, an infant five months old. The Government Solicitor added in the report that there was good ground to believe that there was collusion between the husband and the wife in the matter of those divorce proceedings. This report was made part of the record, and the proceedings were, as already stated, discontinued immediately afterwards. No doubt, direct evidence is not available to show that the petitioner became aware of the contents of this report; but it looks very improbable that he could have remained totally ignorant of a report of this character which was filed in Court. He was a party to those proceedings and may reasonably be expected to have enquired why the proceedings suddenly collapsed. On the other hand, if the proceedings were collusive, as suspected by the Government Solicitor, that significant fact alone materially weakens his case. We cannot also overlook that although in 1909 and 1910 the petitioner used to live at Allahabad, he was in Calcutta in 1908 and employed a detective to watch his wife who had left his protection and had already given birth to two illegitimate children, the survivor of whom was subsequently placed in the Entally Convent. It seems hardly probable that a person in the position of the petitioner should remain entirely ignorant of the mode of life led by his wife and the consequences thereof. But even if all these circumstances do not show conclusively that he had definite knowledge of the misconduct of his wife before he resumed cohabitation with her, there is no escape from

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his own statement made on the 6th January 1915. The question thus arises, whether there was such condonation on his part as is contemplated by sections 12 and 13 of the Indian Divorce Act.

It is well settled that resumption or continuance of cohabitation with complete knowledge of all the circumstances operates as condonation. Sir C. Creswell explained in *Peacock* v. *Peacock* (1) that condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances. Lord Chelmsford held in *Keats* v. *Keats*(2) that condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position as he or she occupied before the offence was committed. In *Ellis* v. *Ellis*(3), condonation of matrimonial offences was explained to mean the complete forgiveness of all such offences as were known to or believed by the offended spouse so as to restore between spouses the *status quo ante*. Consequently, mere forgiveness is not condonation; to be condonation, it must completely restore the offending party and must be followed by cohabitation. This is essentially the view adopted by the Indian Legislature in section 14 which requires that no adultery shall be deemed to have been condoned, unless where conjugal cohabitation has been resumed or continues. The expression conjugal cohabitation or its equivalent, connubial intercourse, should not be given a restrictive meaning but should be so interpreted as to leave the nature of the cohabitation or intercourse to be adapted to the varying conditions and circumstances of different parties: *Ste. Croix* v. *Ste. Croix*(4). There may thus be room for discussion or difference of opinion in individual instances, whether a particular conduct on the part of the

(1) (1858) 1 Sw. & Tr. 183.
(2) (1859) 1 Sw. & Tr. 334.
(3) (1865) 4 Sw. & Tr. 154.
(4) (1917) I. L. R. 44 Calc. 1091, 1107.

husband or the wife could be construed as condonation. But the present case is reasonably free from difficulty, because as was said in *Windham* v. *Windham*(1) the best evidence of condonation is the continuance or resumption of sexual intercourse. Here the parties lived as husband and wife for several months in 1913, even after the husband had discovered the misconduct of his wife. We must hold accordingly that the respondent has successfully established condonation of the adultery complained of.

Counsel for the petitioner has argued that, if this view be adopted, he is entitled to invoke the aid of the well established principle that condonation is cancelled by subsequent matrimonial offence and the old cause of complaint is revived. Reliance has been placed upon the decision of my learned brother, Mr. Justice Fletcher, in *Thompson* v. *Thompson* (2), where it was conclusively shown, upon an exhaustive review of the relevant authorities on the subject, that condoned adultery is revived by a subsequent matrimonial offence. This principle is based on the theory that condonation of a matrimonial offence implies that no further matrimonial offence shall occur. Amongst recent cases, where this doctrine has been recognised and applied may be mentioned *Price* v. *Price* (3), *Moss* v. *Moss* (4), *Roberts* v. *Roberts* (5). We may then treat it as well settled that condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives; to constitute a revival of the condoned offences, the offending spouse

(1) (1863) 32 L. J. (P. M. & A.) 89 ; 9 Jurist N. S. 82.
(2) (1911) I. L. R. 39 Calc. 395.
(3) [1911] P. 201.
(4) [1916] P. 155.
(5) (1917) 117 L. T. 157.

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need not, however, be guilty of offences of the same character as that condoned; any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied. But there is, in our opinion, no room in the present case for the application of this rule in favour of the husband. The argument on his behalf is that desertion by his wife, subsequent to what constitutes condonation on his part, revived the effect of the original adultery. The facts admitted or proved, however, negative this plea of desertion. It is desertion if one party to a marriage, without the consent or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart. Here the parties separated in the beginning of 1914. Immediately afterwards, the wife had recourse to maintenance proceedings under the Criminal Procedure Code, which were withdrawn because the parties came to an arrangement. Some months later, she again instituted maintenance proceedings and obtained an order under section 488 of the Criminal Procedure Code, sub-section (*4*) whereof lays down that no wife shall be entitled to receive an allowance from her husband, if, without any sufficient reason, she refuses to live with her husband. In view of this provision, it is impossible to maintain the position that the Magistrate made an order for maintenance, although the wife had deserted her husband and refused to live with him without any sufficient reason. Consequently, we must hold that the principle recognised in *Blandford* v. *Blandford* (1) that condoned adultery is revived by subsequent desertion and condoned desertion by subsequent adultery, is of no assistance to the petitioner.

As regards the second contention we are clearly of opinion that the petition should have been dismissed

(1) (1883) 8 P. D. 19.

on the ground that the husband had been guilty of unreasonable delay in presenting it. We ignore, for the present purpose, the allegation of the respondent that her husband was aware of her misconduct in 1912, and limit ourselves to the statements of the petitioner. According to the statement made by him in these proceedings, he became aware of the adultery of his wife towards the end of the year 1913. According to the statement made by him on the 6th January, 1915, he had made the discovery about the middle of 1913. Whichever date is accepted—though we must prefer the middle of 1913 as the more probable time—it is plain that sufficient reasons have not been shown to justify the delay in the institution of these proceedings. The only plea urged is poverty. Now, the Courts look with great suspicion on petitions for dissolution presented on the ground of adultery, after long delay by a husband, and relief is given, as is said in *Mortimer* v. *Mortimer* (1), *vigilantibus non dormientibus*; yet delay will generally be excused if it is really due to poverty: *Coode* v. *Coode* (2). But although poverty is almost always a sufficient excuse, if convincingly established [*Short* v. *Short* (3)], it must not be supposed that there is no lapse of time where a line may be drawn. These principles have been recognised in a long series of decisions: *Harrison* v. *Harrison* (4), *Nicholson* v. *Nicholson* (5), *Short* v. *Short* (3), *Mason* v. *Mason* (6), *Edwards* v. *Edwards* (7), *Pears* v. *Pears* (8), *Hughes* v. *Hughes* (9), *Coppinger* v. *Coppinger* (10) and *Mitter* v. *Mitter* (11). Now, in the case

(1) (1820) 2 Hag. Con. 310.
(2) (1838) 1 Curt. 755.
(3) (1874) L. R. 3 P. & D. 193.
(4) (1864) 3 Sw. & Tr. 362.
(5) (1873) L. R. 3 P. & D. 53.
(6) (1882) 7 P. & D. 233; (1883) 8 P. & D. 21.
(7) (1900) 17 T. L. R. 38.
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(9) (1915) 32 T. L. R. 62.
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before us, the petitioner had admittedly an income of Rs. 250 a month and, for some time at any rate, resided in the College premises where he worked. He had also a small printing press. It must further be borne in mind that he had acquiesced in the order of the Magistrate which made him liable to pay his wife, after he had knowledge of her misconduct, Rs. 50 a month from January, 1915. We are not prepared to hold, under these circumstances, that the petitioner has established satisfactorily such poverty as would constitute an excuse for the undoubted delay in the institution of these proceedings. We should not further wholly ignore the probable effect of an order for dissolution of marriage on the wife who is older than her husband and must now be fairly advanced in years. Indeed, the circumstances of the case point to the conclusion that the proceedings have been instituted, not so much because the petitioner feels aggrieved by the misconduct of his wife (which has been within his knowledge for several years), but rather because he is anxious to get rid of the order for maintenance (which was made against him now more than five years ago). Upon a review of all the facts and circumstances, our conclusion is that the petitioner has delayed action too long and cannot now justly claim an order for dissolution of marriage.

The result is that this appeal is allowed and the petition dismissed with costs in both Courts.

FLETCHER J. I agree.

N. G. *Appeal allowed.*

Attorney for the appellant: *J. N. Mitra.*
Attorneys for the respondent: *Khaitan & Co.*