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Abbakke v. *Kinhiamma* (1). *Christacharlu's case* (2) is distinguishable from the present case, for in that case

"it is plain that the plaintiff neither stated in the plaint the original "contract, nor did he claim the debt as created thereby ; nor did he intend "to do so. He sued on the instrument as altered, and on it alone".

But their Lordships also held that

"if in this case it appeared on the plaint that the plaintiff's cause of "action was the debt as created by the original bond, even though the "plaintiff might also have claimed to sue on the altered bond, then the "plaintiff would be entitled to relief for the first instalment".

For these reasons I agree that the appeal should be allowed, and a decree passed in the sense which my learned brother has indicated.

B. M. S. *Appeal allowed.*

(1) (1906) I. L. R. 29 Mad. 491. (2) (1885) I. L. R. 9 Mad. 399, 409.

MATRIMONIAL JURISDICTION.

Before Chatterjea A. C. J., Walmsley and Page JJ.

C. E. STUART

v.

D. A. C. STUART.*

1926

Jan. 26.

Divorce—Cruelty, what constitutes—Indian Divorce Act (IV of 1869), s. 17.

In a petition for divorce, the wife alleged adultery, cruelty and desertion. The husband admitted adultery, but subsequently the wife condoned that adultery by cohabitation with her husband. The husband again deserted her on two occasions, on one of which she had a baby three months old, and on the other when she was about to be confined. On joining the Army in 1916 the husband had stated that he was a widower and thereby the wife was caused considerable pain and anxiety, and with difficulty obtained an allowance out of his pay as his wife.

Held, that the husband's conduct amounted to cruelty ; that such cruelty effected a revival of the condoned adultery ; and that the wife was entitled to a divorce.

* Divorce Case No. 55 of 1924.

Palmer v. *Palmer* (1), *Thompson* v. *Thompson* (2), *Waring* v. *Waring* (3), *Curtis* v. *Curtis* (4), *Kelly* v. *Kelly* (5), *Mytton* v. *Mytton* (6), *Bethune* v. *Bethune* (7), *Aubourg* v. *Aubourg* (8), and *Evans* v. *Evans* (9), referred to.

THIS was a reference by Mr. S. C. Mullick, the District Judge of 24-Parganas, for confirmation of a decree for divorce under section 17 of the Indian Divorce Act, 1869.

The facts of the case shortly were these. Carolina Evalina Stuart, the petitioner was married to Douglas Archibald Campbell Stuart, the respondent, on the 27th July 1914 at St. Thomas' Church, Calcutta, under the Christian rites, and there were four children issue of the marriage. The petitioner, and the respondent lived together at Baniapukur Road, Calcutta, from where the respondent deserted the petitioner when the petitioner was in an advanced state of pregnancy, with the result that the petitioner was left in a destitute and helpless condition, and had to depend upon the kindness of friends for the bare necessities of her life. The petitioner alleged desertion and various acts of cruelty, and that the respondent had committed adultery. The respondent denied the allegations made by the petitioner, and the co-respondent denied that she had committed misconduct with the respondent.

The District Judge found that the respondent had committed adultery and cruelty, but that desertion for two years was not proved, and granted the petitioner a divorce *nisi*.

No one appeared in the case.

(1) (1860) 2 Sw. & Tr. 61.
(2) (1911) I. L. R. 39 Calc. 395.
(3) (1813) 2 Phillim. 132.
(4) (1858) 1 Sw. & Tr. 192.
(5) (1869) L. R. 2 P. & D. 31, 59.
(6) (1886) 11 P. D. 141.
(7) [1891] P. 205.
(8) (1895) 72 L. T. 295.
(9) (1790) 1 Hag. Con. 35.

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PAGE J. - The decree in this suit is brought before the Court for confirmation. The District Judge of the 24-Parganas granted the petitioner a divorce upon the grounds of adultery and cruelty. The issue which falls for determination is whether there is sufficient evidence of cruelty to justify the passing of the decree. The allegation that the respondent had committed adultery with a Mrs. Newton was admitted, and, although the petitioner afterwards condoned this adultery by cohabitation with her husband, it is well settled that condoned adultery is revived by the commission of a later matrimonial offence: *Palmer* v. *Palmer* (1), *Thompson* v. *Thompson* (2). Now in order to justify a decree separating the parties *a mensa et thoro* upon the ground of cruelty, it is incumbent upon the petitioner to prove violence or ill-treatment "endangering or at least threatening the life or "person or health of the complainant": *Waring* v. *Waring* (3), *Curtis* v. *Curtis* (4). But in order to found a charge of cruelty it is not essential that an act of physical violence should be established, for studied neglect or a course of degradation may well prove more deleterious to the health of a spouse than the receipt of a blow: *Curtis* v. *Curtis* (4), *Kelly* v. *Kelly* (5), *Mytton* v. *Mytton* (6), *Bethune* v. *Bethune* (7), and *Aubourg* v. *Aubourg* (8). Now for the present purpose we must accept the findings of the learned District Judge, and although the petitioner alleged and stated that on one occasion her husband had put some substance into her tea which caused hæmorrhage and illness, this allegation in the learned Judge's opinion was not substantiated, and it

(1) (1860) 2 Sw. & Tr. 61.
(2) (1911) I. L. R. 39 Calc. 395.
(3) (1813) 2 Phillim. 132.
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(5) (1869) L. R. 2 P. & D. 31, 59.
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(8) (1895) 72 L. T. 295.

must be taken that no act of physical violence was proved against the respondent, and that with the exception of the admitted adultery with Mrs. Newton no other specific act of adultery was made out. Further, desertion for two years has not been proved. Nevertheless, the learned District Judge has found; and, in my opinion, having regard to the evidence correctly found, that the petitioner has been subjected to such cruelty as entitles her to a divorce. There can be no doubt that the respondent is a man of loose habits, who has withdrawn from his wife the moral and physical support which she was entitled to expect from him as the mother of his four children. The petitioner stated that during the ten years of their married life he had deserted her on three specific occasions, and the respondent admitted in the witness box that "on some occasions I deserted my wife for "short periods". In 1916 when the respondent joined the Army he described himself as a widower with one child, the result being that the petitioner was rendered destitute with a child to provide for, and had great difficulty in establishing her claim to an allowance out of his pay as his wife and the mother of his child. This cruel and disloyal act was committed when to his knowledge the petitioner had a baby three months old; and one can readily believe the petitioner when she states that she was made to suffer considerable pain and anxiety by the respondent's conduct on that occasion. Being helpless and without means, however, the petitioner, as appears from the correspondence, took back the respondent, and resumed cohabitation with him upon his assurance that he would reform his ways. But that was not to be, for in 1920 the respondent again deserted the petitioner and his children. The petitioner stated in the witness box that he deserted her in 1920, and the

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only answer that the respondent could bring himself to make was "I do not remember if I deserted my "wife in 1920". Why not, unless his periods of absence were so frequent that any particular occasion on which he deserted his wife was not a matter which would be likely to impress itself on his memory? Who could doubt that such a course of conduct if persisted in would be likely to break down the petitioner's health? But the case does not rest there. Once more the petitioner consented to receive back the respondent as her husband, and in September 1924 she found herself again about to become a mother. One would have expected after all that had happened in the past, if the respondent had any sense of decency left within him, or any regard for the welfare of his wife and children, that he would have sustained her at such a time. Not so the respondent, who took the opportunity once more to desert his wife and family, and to philander with Miss Wood, a young woman with whom he had become associated. As I have stated it must be taken that the allegation that the respondent committed adultery with Miss Wood was not made out, but, as the learned District Judge has observed, "admittedly "there was some kind of familiarity between the "respondent and the co-respondent". It is, to my mind, difficult to conceive of an act of cruelty more callous or more likely to injure the petitioner's health than the respondent's desertion of his wife in September 1924, on the eve of her confinement. In my opinion, it was the culmination of a series of acts deliberately committed by the respondent with the knowledge that his conduct might reasonably and naturally cause injury to his wife's health. But is the Court bound to withhold its hand until the inevitable has happened, and the petitioner's health has

actually given way? It would, indeed, be calamitous if that were the law. But I am glad that there is no warrant for a proposition so inhumane either in India or in England. In *Evans* v. *Evans* (1), Sir William Scott laid down what I apprehend to be the law when he observed that it is sufficient that proof should be "given of a reasonable apprehension of "bodily hurt. I say an apprehension, because "assuredly the Court is not to wait till the hurt is "actually done: but the apprehension must be reasonable—it must not be an apprehension arising merely "from an exquisite or diseased sensibility of mind". In these circumstances I have no hesitation in holding that, there was evidence adduced in the case from which the learned District Judge might reasonably have come to the conclusion that the respondent had been guilty of cruelty at a period subsequent to his admitted adultery with Mrs. Newton; that such cruelty effected a revival of the condoned adultery with Mrs. Newton; and that the petitioner was entitled to a divorce from the respondent. In my opinion, the decree should be confirmed.

CHATTERJEA A. C. J. I agree.

WALMSLEY J. I agree.

B. M. S.

(1) (1790) 1 Hag. Con. 35.