

dismissed with costs, and they will humbly advise his Majesty accordingly.

Appeals dismissed.

Solicitors for defendant-appellant: T. L.
Wilson & Co.

Solicitors for plaintiff-respondent: W. W.
Box & Co.

A. M. T.

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PRAFULLANATH
TAGORE,
v.
SATYABHUSHAN
DAS.

MATRIMONIAL JURISDICTION.

Before Costello J.

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Mar. 8.

Divorce—Adultery of wife—Husband's petition—Delay—Acquiescence.

Unreasonable and unexplained delay between a petitioner's knowledge of the adultery committed by the respondent and the filing of his petition for dissolution of the marriage may induce the Court to dismiss the petition as indicating acquiescence in the injury complained of.

The principles discussed in the cases of *Mortimer v. Mortimer* (1), *Boulting v. Boulting* (2) and *Rickard v. Rickard* (3) applied.

ORIGINAL SUIT. *

This was a suit brought by Edward Aloysius King against his wife, Esther Matilda King, for dissolution of marriage, on the ground of her adultery with Henry Frewin. Acts of adultery during several periods both at Calcutta and Darjeeling were alleged; and, in particular, one such act was alleged to have taken place on the 18th of June, 1926, when the petitioner stated that he found the respondent in bed with the co-respondent. The alleged acts of adultery were denied and the respondent made counter-allegations to the effect that, on the

*Matrimonial Suit, No. 14 of 1928.

- (1) (1820) 2 Hagg. Con. 310; (2) (1864) 3 Sw. & Tr. 329;
161 E. R. 753. 164 E. R. 1302.
(3) (1920) 37 T. L. R. 26.

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very same date, namely the 18th of June, 1926, she found the petitioner in bed with another woman. After that date, the parties separated, but the husband did not bring this suit until the month of June, 1928. It transpired that, sometimes in 1927, the petitioner had brought certain proceedings against the respondent in the criminal court regarding an alleged theft of furniture, in course of which he, for the first time, charged her with having committed adultery with the co-respondent; and, therefore, the respondent brought a civil case against the petitioner, in which she retorted by making counter-charge against the petitioner.

Mr. H. S. Suhrawardy, for the petitioner.

Mr. R. C. Bonnerjee and *Mr. N. C. Chatterjee*, for the respondent.

Mr. Sikhar K. Basu, for the co-respondent.

COSTELLO J. In this suit, the petitioner, Edward Aloysius King, who is a guard in the employment of the Eastern Bengal Railway, is seeking a dissolution of his marriage, on the ground of his wife's adultery with Henry Frewin. The parties were married as long ago as the 2nd January, 1900, the respondent then being Esther Matilda Ryan, Spinster, and the marriage took place at the Roman Catholic Church of the Sacred Heart at Dharmatalah Street in this city. The petitioner and his wife are both Anglo-Indians, and they profess the Christian religion and they are domiciled in this country. After the marriage, the parties lived at various places, and finally in the railway quarters of the Eastern Bengal Railway at Sealdah. There were two children of the marriage, both of whom, however, died in infancy, and, therefore, no question arises with regard to them.

Very little, if any, evidence has been given in the course of this case as to the married life of the parties prior to the year 1917 and the acts of adultery all relate to the period between the year 1917 and the

date of the institution of this suit. One of the allegations made by the petitioner against the respondent being that she is still living in adultery with the co-respondent at a house No. 24/1 Sheriff Lane, Calcutta. The acts of adultery charged may roughly be said to relate to three definite periods of time, *i.e.*, for a matter of convenience, the charges brought by the husband against the wife may be dealt with in three parts.

It is first of all said that, between the years 1917 and 1920, the respondent habitually committed adultery with the co-respondent while the petitioner was away from home and from Calcutta, being on war service or something in the nature of war service in Mesopotamia and other places. It is then said that, in the year 1924, for a period of about a month, *viz.*, from the 20th May of that year to the 30th June, the respondent stayed with the co-respondent in Darjeeling and occupied the same room for that period, and there committed adultery with him. Next it is alleged by the petitioner that, from and after the time when he returned from his war service in 1920, whenever he was absent from home fulfilling his duties as a guard on the railway, the co-respondent took the opportunity afforded by the petitioner's absence to visit the respondent and actually to stay with her in the quarters occupied by the petitioner and the respondent. One specific date is given by the petitioner, on which he charges his wife with having committed adultery with the respondent. That date is the 18th, or rather the night of the 17th of June, 1926. The 18th June is the cardinal date in this case, because, admittedly on that date, the husband and wife separated and the wife left the quarters where she had up to that time been living with her husband. The petitioner says, *after his wife left the railway quarters at Sealdah, she went and lived with the co-respondent or at any rate she was living in such circumstances that ample opportunity was afforded to her and co-respondent to continue the

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guilty relations which had previously existed between them.

The petitioner's story with regard to the events of the 18th June in brief is this. He says that, on the morning of the 17th June, he was the guard on a train going to Goalunda, which left shortly after midnight, and having got to Goalanda, owing to a break-down on the railway line, he returned on a train as second guard of the train, which brought him back to Sealdah and to his own quarters at an earlier hour than he would have otherwise arrived, and that thus having come back before his wife had expected him, he found the co-respondent asleep in bed with the respondent, and that, thereupon, he roughly woke him up and proceeded to beat the co-respondent in such a way that he rushed about the flat, and finally out into the street, leaving behind him his out-door attire. The petitioner went on to say that while he was engaged in chasing the co-respondent about the flat, the respondent dressed herself and left the flat more or less in company with the co-respondent, and that, subsequently, while he had gone out to obtain, permission to seek the assistance of the police, someone came back to his flat and removed the co-respondent's clothes, which the petitioner had locked up in an *almirah*, thereby, in the petitioner's view, removing the tangible evidence of which he had become possessed, of the presence of the co-respondent in the flat in the way I have described.

The petitioner also said that the co-respondent, while being pursued by the petitioner, sought refuge in a kind of pantry constructed in a part of one of the verandas of the flat, where a nephew, by name Eric Ryan, was at that time sleeping.

It seems a little curious that, if this story is true, the petitioner did not see fit to call this nephew to give corroborative evidence as to the events of that morning, and Mr. Suhrawardy, on behalf of the petitioner, sought to explain that omission by saying that this particular nephew would have been more

likely to take the part of the respondent, his aunt, than to give evidence in favour of the petitioner, who was not a blood relation.

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As against the story of the petitioner, the respondent says that so far from her being discovered in bed with the co-respondent by the petitioner as the latter alleges, the real situation was almost entirely the reverse in fact, because she, in her turn, says that it so happened that, on the 17th June, she had taken a journey by the Eastern Bengal Railway with the intention of going to consult a lawyer in connection with some proceedings which were at that time pending against her nephew, Rupert Ryan, and she avers that, on the evening of the 17th June, she and this nephew Rupert took train with the intention of going to Nattore, but that, after proceeding some short distance on the way, she was overcome by indisposition, and she felt so ill that, instead of proceeding to her destination, she left the train at a place called Ishurdi, and thence returned direct to Sealdah, with the result that she arrived back in her flat at a time prior to that when her husband would have expected her had she completed her journey to Nattore and come back from there. The respondent goes on to say that, having returned to the flat in that way, she discovered her husband in her bedroom with a Mrs. Abraham, who was then sitting on the bed fully dressed, but without her hat, which was on the floor, and there was also, I think, an empty brandy bottle by the side of the bed. The respondent declares that, having discovered her husband in this compromising situation, in the early hours of the morning of the 18th June, he then used violence towards her and struck her forcibly on the ear, and finally drove her out of the flat.

[Here His Lordship discussed the evidence in the case and found that the various acts of adultery were proved against the respondent. His Lordship then continued:]

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There remains, however, another matter with which I have to deal, and that is the question whether, in the circumstances of this case, the petitioner is entitled to the relief which he seeks. It is clear, to my mind, that the petitioner has been guilty of considerable delay in the institution of these proceedings. The explanation which he gives amounts to this. He says that he did not take proceedings against his wife, after he had discovered her in bed with the co-respondent on the 18th June, because he thought his story, without further corroboration, would not be believed, and that, after the co-respondent's garments and shoes had been surreptitiously removed from the petitioner's premises, he found himself in the position of having no tangible evidence to support his story. I have already indicated that if the petitioner's story is accurate in every detail there was available the evidence of his nephew, Eric, who was said to be sleeping in the place which has been described as the pantry, and who was aroused by the co-respondent seeking to take refuge in that place. According to the petitioner, the co-respondent went quietly into this pantry and awakened Eric Ryan by saying quite calmly, "Uncle has returned, you better get up," or words to that effect. That of itself strikes me as being a very unlikely thing for the co-respondent to have done seeing that he was being violently pursued by the petitioner and being chased through the different rooms of the flat, but it does appear from the petitioner's story that the co-respondent did either go into the pantry or knock at the door or do something which must have indicated to Eric Ryan that a stranger was in the flat. That of itself would have afforded very ample and satisfactory corroboration of the petitioner's story. For some reason or other, the petitioner did not see fit to call Eric Ryan in these proceedings, even now that he has brought his affairs before the Court. The explanation given is the one I have already referred to, *viz.*, that the probability was that Eric Ryan

would decline to say anything which might be of assistance to the petitioner as against the respondent who was his aunt by blood.

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I am not at all disposed to accept the explanation, given by the petitioner with regard to his inaction and his failure to take proceedings at or about the time when these events took place. Had he really been burning with a sense of the wrong which had been done to him by the co-respondent, I think he would have found time and made an occasion to go and take legal advice with regard to the position with a view to ascertaining whether he was likely to succeed if he took proceedings for divorce. I take the view that, at that time, the petitioner was more or less content to let his wife go, and it may be that they were living on such terms that the petitioner was rather glad to be relieved of the presence of his wife. At any rate, it seems clear to my mind that at that time he was not so righteously indignant either with his wife or the co-respondent that he had any intention of taking proceedings at all, because he admits that, for the space of a year or more, he really made no serious attempt to obtain any evidence in corroboration of his own story. It is a very significant fact that, when this case finally does come before the Court, the main evidence, on which the petitioner relies, is the evidence of persons who, one would have expected, would have been available to the petitioner from the very outset, *viz.*, Mr. Dunn and the three servants. It seems to me that if the petitioner could obtain the evidence of these four persons in the year 1926 or 1928, he could just as easily, or possibly more easily, have obtained that evidence in the year 1926. To some extent, the same observation applies with regard to the evidence in connection with the events at Darjeeling. It is quite true that the petitioner says that what put him on enquiry with regard to Darjeeling was the fact that, in October, 1927, he received a letter from Mr. Wallace, but even that did not have the effect of causing

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the petitioner to institute proceedings. Indeed he does not seem to have pursued the matter, because right up to the very moment when this case was coming for trial, he had not, as far as I can see, obtained any proof either from Mrs. Wallace or from Mr. Singh, and actually an application was made to me that this case should be postponed in order that the petitioner might get the evidence of these witnesses from Darjeeling. It is a significant and curious feature of the case, therefore, that the petitioner really did not get any of the evidence with which he now establishes his contentions, until just before this case had come for trial. I cannot help feeling, therefore, that had no other proceedings taken place between the parties this husband would have been quite content to go on living apart from his wife and to continue to permit her to live in adultery with the co-respondent. It appears that the husband was finally aroused to action by reason of the fact that the respondent removed certain articles of furniture and he was so incensed at his wife's action that he promptly took proceedings against her in the police court with regard to the removal of the furniture, and then for the first time publicly made a charge against his wife of having committed adultery with the co-respondent. After those proceedings, his wife instituted civil proceedings in this Court, as I understand, in respect either of some of the same articles of furniture or some other articles of furniture, which were in the flat at Sealdah, and it is only after she had retorted upon the petitioner by taking civil proceedings as a sort of *quid pro quo* for the criminal proceedings which he himself brought that at last he was stung into instituting proceedings for a dissolution of his marriage. It does not really matter which of these persons first made accusations against the other with regard to the morning of the 18th June, 1926, having regard to the fact that I have come to the conclusion that the petitioner's story is substantially the correct story. What does matter is that the husband should

have remained quiescent with the knowledge of his wife's infidelity and misconduct and have taken no steps to vindicate his honour until the wife had aroused his indignation by reason of her action in regard to the furniture. I cannot help coming to the conclusion, therefore, that the petitioner seems to have set a higher value on his furniture than upon his wife's honour.

Those are the circumstances in which this case comes before the Court and Mr. Bonnerjee has invited me to say, upon the authorities, that there has been such delay and neglect upon the part of the petitioner as disentitles him to the relief he seeks. Mr. Bonnerjee referred me to the leading cases on this point, *e.g.*, the case of *Mortimer v. Mortimer* (1), which contains the well-known dictum of Lord Stowell that the court "will be indisposed to relieve a party who appears to have slumbered in sufficient comfort....." and it will be inclined to refer either insincerity in the complaint, or an acquiescence in the injury whether real or supposed, or a condonation of it." That dictum of Lord Stowell was quoted with approval and emphasised by Sir C. Cresswell in the case of *Boulting v. Boulting* (2), where he said delay is not of itself a bar to the suit, "but it is a most material matter, which unexplained would lead the court to conclusions fatal to the petitioner's relief." The same point was dealt with by Mr. Justice Horridge in the Divorce Court in England in the case of *Rickard v. Rickard* (3), where, in effect, Mr. Justice Horridge said that it is not open to a party in a matrimonial suit to choose his own time for coming to court and asking for relief, and I, on my part, desire to say that it is not fitting, and it cannot be tolerated that the petitioner in a matrimonial suit should delay taking proceedings until such time as he is moved to start proceedings by reason of some oblique motive. The

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matrimonial jurisdiction of the Court is intended to afford relief to a husband or to a wife who feels that he or she has been grievously wronged by the other party, and therefore desires to have the marriage dissolved and possibly to obtain compensation from the person who is responsible for the wrong which has been done. The Court is not to be used merely as an engine for enabling a husband or a wife to retaliate on the other by reason of some injury which has been done outside the matter of violation of conjugal rights of the parties as such. In this particular case, one cannot help feeling that these proceedings would never have been instituted by this petitioner if the wife had not irritated him by the action which she took in connection with his furniture. It does seem to me that this husband, so far as the wrong done to him by the co-respondent and respondent is concerned, by reason of their having committed adultery, that this petitioner, in the words of Lord Stowell, has "slumbered in sufficient comfort." He continued his ordinary mode of living, and went to football matches and other places of amusement, and went on living his life for a considerable period just as he had lived it before, and, as far as I can see, he made no attempt to provide himself with corroboration of his own story of the events of the 18th June, nor to obtain other evidence directed to show that his wife had been carrying on an adulterous association with the co-respondent.

In these circumstances, and because this Court should not allow itself to be resorted to at the mere whim and pleasure and at the convenience of a petitioner, I think I ought not to grant the relief which is claimed in this case. The question of delay is always a matter for the discretion of the Court, and I consider, on the whole, this is one of the cases where the Court ought not to exercise its discretion in favour of the petitioner, because the inaction, on the part of the petitioner, shows not that he was

insincere in his complaint (to use the words of Lord Stowell) in the sense of not believing that his wife had committed adultery, but because there was an acquiescence by him in the injury which he knew he had suffered. Although he knew, as he says, that his wife had committed adultery on or about the 18th June, although he had good reason for supposing that she was continuing to live in adultery with the co-respondent, he took no steps in the matter for a very considerable period, and that leads me to think that there was an acquiescence in the situation of such a character as disentitles him to the relief which he claims. The suit is accordingly dismissed.

I shall make an order that the respondent's costs must be paid by the petitioner in the ordinary way and the petitioner's costs must be paid by the co-respondent.

Suit dismissed.

Attorney for the petitioner: *J. J. De Meudonca.*

Attorneys for the respondent: *S. S. Mukherjee
& Co.*

Attorney for the co-respondent: *S. K. Basu.*

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