

MATRIMONIAL JURISDICTION.

Before Costello J.

SMITH

v.

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Aug. 28.

Divorce—Adultery of petitioner—Discretion of the Court to grant decree—Conduct of petitioner conducing to guilt of respondent—Interest of public morality—Interest of children—Future of guilty party—Indian Divorce Act (IV of 1869).

In a proper case, the Court may grant divorce to a wife, on the ground of cruelty and adultery of the husband, although the wife herself is guilty of adultery. But it is essential, in matrimonial cases, that if a petitioner wishes the Court to exercise its discretion in his or her favour, he or she should make a frank disclosure of all the circumstances of the case.

Stuart v. Stuart and Holden (1) followed.

In such cases, it is the duty of the Court to consider the whole of the circumstances, bearing in mind the interests of public morality, the position and interest of the parties themselves and of the children of the marriage and the future of the children and of the guilty party.

Apted v. Apted and Bliss (2) relied on.

Where the adultery of the petitioner has conduced to that of the respondent, the Court will refuse to grant decree.

WIFE'S PETITION FOR DIVORCE.

The facts of the case and relevant portions of the arguments of counsel appear from the judgment.

R. C. Bonnerjee and *Sikhar Basu* for the petitioner.

D. N. Mitra for the respondent.

COSTELLO J. In this case the petitioner Olive Kathleen Smith prays for the dissolution of her marriage on the ground of the cruelty and adultery of her husband, Henry Percival Smith. The parties were married on the 15th May, 1918, at the Church of the Sacred Heart, Calcutta, and at that time the

*Matrimonial Suit No. 14 of 1931.

(1) [1930] P. 77.

(2) [1930] P. 246.

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petitioner was a girl of about eighteen years of age and the respondent was twenty-three or thereabouts. The parties are of British Indian domicile and they both profess the Christian religion and accordingly this suit is brought under the Indian Divorce Act of 1869.

The petitioner makes a general allegation of cruelty against her husband but in particular relies upon three specific instances which are set forth in paragraph 10 of the petition.

In that paragraph the petitioner states that some time in August, 1920, at No. 21, Sooterkins Lane, the respondent struck her at a time when she was pregnant and threw her on the bed thereby causing injuries to her mouth. Secondly, towards the end of the year 1926, the respondent struck the petitioner at No. 5, Alimuddin Street, of Calcutta. Lastly, there is an allegation that the respondent, at No. 11, Turner Street, between the 15th and the 28th March, 1928, frequently attempted to have unnatural sexual intercourse with the petitioner. With regard to this latter charge, I do not think I need say any more than that it has recently been laid down that where a charge of that nature is alleged the Court ought generally speaking, to require some corroboration of the petitioner's story because if she in any degree assents to what happened she becomes an accomplice to her husband in the matter. I accordingly disregard that charge altogether. I am, however, satisfied on the evidence of the petitioner and the witnesses who were called that the other two charges are established. I am also satisfied that the respondent did, in general, treat his wife in the way he should not have done, and that on various occasions he did use physical violence towards her.

With regard to the charge of adultery the petitioner's case is that after she had left her husband in March, 1928, he brought to No. 11, Turner Street, where he was then living, a woman whom he had caused to be procured for him for the purpose of

living with him as a substitute for his lawful wife, who at that time had left him. I have no doubt whatever that the evidence given by Mrs. Kiernan and her son John Kiernan is wholly accurate. I can see no reason whatever why John Kiernan should have done other than tell the whole truth and nothing but the truth in this matter. It is clear from his evidence that the respondent did have a woman, whose name was said to be Mary McCarthy, living with him at No. 11, Turner Street for two or three months in the year 1928. I hold, therefore, as a fact that the respondent has been guilty of cruelty in the legal sense towards his wife and that he has committed adultery.

It follows that had the matter rested there the petitioner would have been entitled to the relief which she seeks in this suit. But the petitioner has herself committed adultery and she has set forth in her petition some account of the circumstances in which the adultery was committed. She frankly admits in her petition that she has committed adultery with two persons: firstly with a man by the name of Pearson, and secondly, with Ambrose Lawrence Andree, with whom she has been living for the last two or three years and with whom she is still living. The petitioner, however, asks the Court to exercise its discretion and to grant her a decree in spite of the fact that she herself has committed a matrimonial offence. The respondent by his answer denied the cruelty and adultery alleged against him, and further set up, as a plea in bar, the facts which I have just mentioned and contended that the petitioner is not entitled in any event to succeed in the suit by reason of her own adultery.

Having regard to the findings of fact to which I have arrived it is necessary that I should decide whether or not this is a case in which the Court ought to exercise the discretion, which it undoubtedly possesses, and grant a decree to the petitioner in spite of her own adultery. At the outset it may be said in the petitioner's favour that she has made a very full

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and frank avowal to the Court. It is essential, as a matter of practice, in matrimonial cases that if a petitioner wishes the Court to exercise its discretion in his or her favour he or she should make a frank disclosure of all the circumstances of the case. In a recent case, in England, *Stuart v. Stuart and Holden* (1), Hill J. said, "It is the condition upon which the Court can properly exercise its discretionary power that there should be complete frankness on the part of those who are asking for its discretion." In that case as there had not been a complete and frank disclosure the decree was refused. Here, however, as I have said, the petitioner has made a frank disclosure of the whole of the circumstances as regards her own conduct. I have to ask myself whether this is a case where in spite of the facts and circumstances which the petitioner has revealed I ought to give her the relief which she seeks. The principles upon which this kind of discretion ought to be exercised are discussed by Lord Merrivale, President of the Divorce Court in England, in a case tried before him last year, *Apted v. Apted and Bliss* (2). In that case the learned President considered all the leading cases bearing upon this point and summarised the effect of those cases in the passage in his judgment which appears on page 259 of the report where he says, "Reviewing the cases in question as a whole these principles appear: in every exercise of discretion the interest of the community at large in maintaining the sanction of honest matrimony is a governing consideration; a strong affirmative case is necessary before a judge is justified under the statutes in negating their conditional prohibition; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised where that course will probably encourage immorality; if it is not unlikely to do so that is an argument against leniency." There is no doubt

(1) [1930] P. 77, 79.

(2) [1930] P. 246, 259.

the more strict and early view of the principles on which discretion should be exercised has to some extent been departed from. Nowadays it is the duty of the Court to consider the whole of the circumstances bearing in mind the considerations referred to by the learned President. The Court has to take into consideration the position and interest of the parties themselves and of the children of the marriage, and possibly the conditions as regards the future of the children as well as the future of the guilty party. In the present case there were four children of the marriage, two sons and two daughters, all of them born between the years 1919 and 1923. The petitioner's case comes to this that throughout her married life her husband did not treat her with proper consideration and kindness and that matters finally came to a head at the beginning of the year 1928, and that in consequence of her husband's attitude towards her she left him on the 3rd January of that year. She stayed away for something like three months, and then owing to her feelings towards her children and at the request of her husband she returned to him about the middle of March, 1928. Thereupon the parties lived together for some two or three months. The petitioner says that prior to her leaving her husband at the beginning of January, 1928, the position had become intolerable by reason of the fact that he was constantly nagging at her and abusing her because he had then recently discovered from certain letters of his wife which he extracted from an attache case belonging to Pearson—who was living in the house at the time—that she had had illicit relations with Pearson. The petitioner's original story with regard to that was that she had not committed adultery with Pearson at that time. But it is quite clear, in my opinion, from the letters she herself had written to Pearson that she had had intercourse with him prior to the discovery of the letters by her husband, and in the witness box she ultimately admitted that such was, in fact, the case and that on divers occasions during the temporary absence of her husband from the house she

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had misconducted herself with Pearson. In order to make the position clear it is necessary to refer to the fact that during the year 1920 the parties were in poor circumstances financially. It appears that the husband after he left his employment with the Eastern Bengal Railway in the year 1919 had never at any time earned more than a very small salary. The petitioner had supplemented the family resources from time to time by getting employment as a shorthand-typist. Towards the end of 1927 the petitioner apparently by accident came into contact with this man Pearson who, she has said, had been her "sweetheart" when she was a girl of some fourteen years of age. It seems that more or less upon her suggestion, though no doubt the respondent was perfectly willing to have the advantage of the extra income which it would entail, in or about the month of October, 1919, Pearson took up his abode with the respondent and the petitioner. At that time they were living at No. 5, Alimuddin Street. The accommodation they had available was extremely limited. They had a small bed-room, some kind of a living room and a very small verandah. The petitioner has sworn there was only one bed available and that that bed was occupied by herself and her husband and this man Pearson as well as the one child of the petitioner and the respondent. The petitioner has said that there were occasions when, the husband being out late, she and Pearson retired to this communal bed-room, so to describe it, to share this bed and that they there committed adultery in the absence of the husband. The respondent has denied that all these three persons occupied the same bed, but I accept the evidence of the petitioner upon this point. It seems to me that the story is so deplorable and the situation so revolting to anyone with any sense of the common decencies of life that one can only come to the conclusion that it is true for I do not believe the petitioner is of such an utter depravity of mind that she would have invented a story of this kind. It is not surprising, therefore, that living in such conditions, which were apparently acquiesced in by the respondent,

the petitioner committed adultery with this man Pearson. As I have said, the letters written by the petitioner to Pearson during his temporary absences from Calcutta disclose beyond all shadow of doubt that there was adulterous intercourse taking place between them. The petitioner further makes it plain in those letters that to all intents and purposes she was actually having sexual relations with her husband during the very period in which she was giving herself to Pearson. The position in fact was, not to mince matters, that the petitioner was carrying on adulterous intercourse actually in the marital bed. The whole of that part of the story reveals a state of things which to say the least of it is of a shocking description. I have no doubt at all but that the petitioner did leave the respondent on the 3rd January because he had abused her and possibly assaulted her, as a result of his discovery of her relations with Pearson. Further, I have no doubt that the respondent made the petitioner write the note which was produced in the case, which seems to indicate that the petitioner left her husband's house of her own accord. No doubt the respondent more or less extorted it from his wife in order to protect himself from any proceedings on her part or proceedings on the part of possible creditors in respect of debts incurred by the wife. There is this to be said on behalf of the respondent that he did in fact shortly after his wife left him, take proceedings in the police court charging the man Pearson with adultery with Mrs. Smith. Those proceedings were abandoned. The respondent's explanation of that is that his wife had expressed her willingness to return to him upon condition that he abandoned his proceedings against her lover. Whether that is so or not the proceedings were in fact abandoned, and as I have already mentioned, about the middle of March, Mrs. Smith returned to her husband and they resided together as husband and wife, at No. 11, Turner Street, until the end of that month. Now, it seems clear from the evidence not only of the

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petitioner herself but from that of Mrs. Kiernan and her son that during the time the parties were living at No. 11, Turner Street, there were incessant quarrels between them and the respondent frequently assaulted the petitioner. She seems to have complained to Mrs. Kiernan that the strain was intolerable and she told her that she proposed leaving her husband for that reason and she did, in fact, leave at the end of March. She then, according to the evidence of Mrs. Ogg, went back to reside in the house of that lady for some time, she having already lived in the same house during the time she was away or part of the time she was away from her husband in the months of January and February, previously. After a short interval Pearson came on the scene again; he had returned to Calcutta and thereupon the petitioner set up a joint menage with him and lived with him as his wife until he died on 8th August, 1928. So after leaving her husband the petitioner resumed her previous relations with Pearson and continued them as long as he was alive.

So far as the events of the latter part of 1928 are concerned no doubt they were condoned by the respondent resuming conjugal relations with his wife in the subsequent March. Had the matter rested there it would have been open to the petitioner to say that any matrimonial offences that she had committed had been obliterated by the fact that she had lived with the respondent as his wife at No. 11, Turner Street, but, as I have said, the petitioner apparently, as soon as she could, resumed her intercourse with Pearson. That action on her part was, of course, sufficient to remove the effect of the condonation and to revive the effect of the antecedent adultery with Pearson.

After the death of Pearson the petitioner seems to have supported herself for a time until in the early part of 1929 or thereabouts she met, apparently at a dance, Ambrose Lawrence Andree. To his credit it may be said that he seems to have treated the petitioner with considerable kindness and during some

months to have given her financial assistance without in terms asking for anything in return. But in the light of after-events one cannot help suspecting that all along Mr. Andree had it in mind to seduce the petitioner. At any rate, about the middle of 1929, the petitioner did consent to go and live with Mr. Andree after the death of a sister of his who had been keeping house for him till that time, and from that time down to the present the petitioner and Andree have been living together as man and wife apparently quite openly.

The children of the marriage are, it appears, all of them being educated in good schools. It is said that the respondent is paying for the education of two boys and the petitioner by means of money allowed to her by Andree is paying the necessary charges in respect of the two girls.

That is in brief an outline of the main facts and circumstances which I have to consider in deciding whether I ought to exercise a discretion in favour of the petitioner. There is, however, one other matter which has some importance in the case. The petitioner has said that she has delayed taking proceedings against her husband for two reasons: the first is that she herself had not the necessary means for the purpose, and, secondly, she was anticipating and indeed hoping throughout that her husband would take proceedings against her. I am bound to say that in my opinion there seems to be no real reason why if the petitioner in fact felt herself to be the more aggrieved party she should not have instituted proceedings against her husband sooner than in fact she did.

As regards the position of the respondent it must be observed that there is no allegation against him on the part of his wife that he at any time was unfaithful to her in the sense of having sexual relations with other women until after she herself, be the reason good or bad, had in fact finally left him. On the other hand, I am faced with the fact that the wife undoubtedly committed adultery at a time when she

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was actually residing with her husband and living with him as his wife, and that the adultery actually took place under the husband's roof. It seems to me that if the wife as early as October or November, 1927, had come to the conclusion that life with her husband was intolerable owing to his treatment of her, she should have left him at that time. It is obvious that she did not in fact leave him until after the discovery by the husband of her intrigue with Pearson. No doubt as a result of that discovery the respondent did make himself extremely unpleasant to his wife. This is not one of that class of case where a wife has been driven from her husband's house by reason of his conduct and then finds herself in a destitute or desperate position. So far as I can see, but for the Pearson episode, there would have been no reason, or at any rate no sufficient reason, for the petitioner to have left respondent at the time when she did. It therefore comes to this that if, as she says, the wife was driven from the house by the husband's conduct that was brought about by reason of her own conduct as regards Pearson. That view of the matter seems to be emphasised by the fact that she did join Pearson and cast in her lot with his at the earliest possible opportunity. In my view the petitioner's position would have been materially different if she had left her husband's house as an innocent woman to whom conditions of life had become intolerable or who had been actually driven out by her husband's ill-treatment. If that had been the case and afterwards she had found herself in difficulties and had become desperate and then given herself to another man who was prepared to be kind to her and look after her and support her, there would have been much to be said in extenuation and excuse of her conduct. Reluctant as I am as a matter of general principle to refuse to dissolve a union that has become impossible, in all the circumstances of this case I think I should be going far beyond any of the authorities and I should be ignoring altogether the paramount consideration applicable to these cases, namely, the interests of

public morality, were I to follow that general principle. Giving careful consideration to the position of the parties and after taking into account the interests of the children of the marriage I can only come to the conclusion that in this case it is my duty to refuse a decree to the petitioner. In my opinion she has by her conduct disentitled herself to claim relief at the hands of the Court.

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This petition must accordingly be dismissed. The respondent has been ordered to pay a certain sum toward his wife's costs and that sum he must pay.

Petition dismissed.

Attorney for petitioner : *B. K. Bose.*

Attorney for respondent : *S. C. Bose.*

S. M.