

## MATRIMONIAL JURISDICTION.

*Before Costello J.*

STONES

*v.*

STONES.\*

1934

Dec. 1.

*Divorce—Condonation—Subsequent matrimonial offence—Revival—Evidence on affidavit in matrimonial cases.*

A matrimonial offence, subsequent to the condonation of a prior matrimonial offence, operates to revive the condoned offence, enabling the aggrieved party to rely thereon as a ground for divorce.

In matrimonial cases, it is undesirable and contrary to established practice to accept evidence on affidavit (especially evidence of the petitioner) except as regards evidence other than that of the petitioner in some very exceptional cases.

### DIVORCE SUIT.

This was a petition by the wife for dissolution of marriage on the ground of the husband's cruelty and desertion which, the petitioner submitted, had revived the husband's prior condoned adultery. At the first hearing of the suit, evidence of the petitioner was sought to be given on affidavit. But upon His Lordship expressing his view that that was not in accordance with the English practice, the hearing was adjourned; and the petitioner herself gave evidence at the final hearing of the suit.

*F. R. Surita* for the petitioner.

No one appeared for the respondent.

COSTELLO J. When this matter was before me on the 28th August last, I held that it was not in accordance with the practice and procedure in England to allow a petitioner to prove the whole of her case on affidavit evidence, except possibly in some

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very extraordinary and abnormal circumstances. Apart altogether from the requirements of normal procedure, however, it is obvious that this particular case was essentially one in which the petitioner herself at least should appear before me and give an explanatory account of the events leading up to the institution of the suit.

The parties were married in the year 1921—on the 15th March of that year—at Christ Church, Byculla, in the Diocese of Bombay.

At that time, the husband, the respondent in the present suit, was employed in Bombay. In the year 1924, the respondent obtained some other appointment in or near Calcutta. He was employed by a firm of engineers, having business premises at Agarpara and the petitioner and the respondent occupied at Agarpara a bungalow provided by the husband's employers.

In the year 1924, the petitioner went to England for a period of something like six months. It appears that during that time the husband took to drinking to excess and moreover he had relations with a woman whose name is given in the petition as being the person with whom the husband committed adultery. Shortly after the petitioner's return to her husband at Agarpara, she discovered a letter written by the woman in question from which it appeared that this woman was expecting a child, and was alleging that the present respondent was the father of that child. A child was born to that woman shortly afterwards, and as she had been a ward at the St. Andrew's Homes, Kalimpong, she wrote to Dr. Graham, who is in charge of those Homes, a letter, in which she told him that she had had relations with the respondent, as a result of which the child had been born to her. Dr. Graham seems to have been distressed, and not unnaturally, that a girl who had been his ward should have gone astray and he came down, he says in his affidavit which has been put before me, to remonstrate with the respondent. It is

clear and I am quite satisfied from the evidence of the petitioner herself and from what Dr. Graham says in his affidavit that the respondent admitted, in the presence of his wife (the petitioner) and in the presence of Dr Graham, that he was the father of the child which had been born to the girl who was Dr. Graham's ward.

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It is not usual for the court generally speaking, to act on the uncorroborated admission of a respondent with regard to his own adultery, even if that admission is contained in some written document. But I think I can hold in the present case that the circumstances are such that the admission made by the respondent before Dr. Graham is corroborated by other features in the case and, in particular, by the fact that he made other similar admissions to his wife on other occasions.

The petitioner, after the interview with Dr. Graham, forgave her husband and resumed conjugal relations with him, as a result of which a child was born to the petitioner on the 1st March, 1928. In the meantime the husband and wife had gone on leave to England for a period of some months and had returned to Agarpara in or about October, 1927. After the child was born, the respondent seems to have resumed his drinking habits and he began to treat the petitioner with much unkindness and even violence, and his general mode of living became such that he was dismissed from his employment.

It is beyond all dispute that at that time the position was that the petitioner had condoned the adultery which the husband had committed, and the petitioner is not in a position to put before the Court any evidence of any subsequent adultery. The question then arises as to whether anything which happened subsequently, enables the petitioner to say that there has been a revival of the antecedent adultery in a way which will enable her to rely upon it as a ground for dissolution of her marriage.

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The respondent, as I have said, lost his employment in the early part of 1928. Thereupon, he went to England by means of a passage provided by his employers, ostensibly, at any rate, with the object of endeavouring to obtain other employment and so to enable his wife to rejoin him either in England or in India. I did not gather from anything that the petitioner has said, that at that time she thought that her husband had left her for good, nor was she herself intending at that time to refuse to have anything more to do with him, should an opportunity have come for them to resume life together. It would, therefore, be difficult for the Court to say that at the time when the husband went to England, in the way I have described, there was, in law, any desertion, or at any rate desertion of the kind which would constitute a matrimonial offence. But nothing more was heard by the wife from her husband for a considerable period. It seems that she wrote to him from time to time over a period of two or three years, but she received no reply to any of her communications. Some time in the year 1931, however, she received a letter which apparently came from South Africa but which contained no address, and in that letter the respondent said he was in very low water financially and there were indications that he had no intention either of rejoining his wife or providing for her subsistence.

This suit was instituted on the 26th August, 1933. Having regard to the facts of the case, which I have briefly outlined, I think it is not unreasonable to hold that at any rate by the date of the petition there had been such conduct on the part of her husband as would in law constitute desertion for a period of two years or upwards. That is a matrimonial offence, and it is clearly the law that any matrimonial offence committed subsequent to the condonation of a prior matrimonial offence will operate so as to revive that prior offence and to such an extent as to enable the petitioner to rely upon it as affording a ground or one

of the grounds for seeking dissolution of marriage. In this case, the original offence was that of adultery and upon the assumption that that particular offence was revived by the subsequent desertion, that is of itself sufficient in law to found a petition for dissolution where the suit is brought under the Act of 1926.

Looking at this matter as a whole, I think I should be justified in holding that the petitioner has satisfied the Court, upon the facts, that she is entitled to a decree. At first sight it would appear as if the petitioner might find her way barred by reason of the apparent delay in the institution of the proceedings. If there was any inordinate delay, however, it seems to have been due to a two-fold clause: (i) that the petitioner was misinformed, if not ill-advised or rather wrongly advised as to her legal position, and (ii) that, owing to her husband's neglect to provide for her, she was not financially in a position to instruct experienced solicitors to institute the necessary proceedings. The financial circumstances of the petitioner also make it quite clear that it was reasonable and proper that she should institute this suit in India, and I, accordingly, hold that there was sufficient ground for bringing these proceedings in India rather than in the High Court in England.

No question arises as to the domicile of the parties. Both the husband and the wife were of English domicile prior to their marriage and have retained their English domicile ever since.

I desire to add that the circumstances of this case are such as to show not only the desirability but indeed the necessity of having before the court in matrimonial suits proper oral evidence, and I say most emphatically that, in my opinion, it is altogether undesirable, and indeed contrary to established practice to accept evidence on affidavit—especially evidence of the petitioner—except as regards evidence other than that of the petitioner in some very exceptional circumstances, and not otherwise. In my opinion, this was clearly a case where

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there was no sufficient reason why the petitioner herself should not come before the court. She has now come before the Court, having taken advantage of the opportunity which I gave her by standing this matter over from the 28th August last till now, and having heard what she has to say and having considered the evidence given on affidavit by Dr. Graham, I pronounce a decree *nisi*, grant the petitioner custody of the child of the marriage and make an order for costs of the proceedings as against the respondent.

*Decree nisi.*

A.K.D.