

MATRIMONIAL JURISDICTION.

Before Panckridge J.

MATHERS

v.

MATHERS.*

1938

Nov. 7, 8, 10.

Divorce—Cruelty—Jurisdiction—Supreme Court of Judicature (Consolidation) Act (15 & 16 Geo. V, c. 49), s. 176—Indian and Colonial Divorce Jurisdiction Act (16 & 17 Geo. V, c. 40), s. 1.

In proviso (c) to s. 1 of the Indian and Colonial Divorce Jurisdiction Act, the word "crime" cannot include cruelty, but must be taken to refer to the specific criminal offences mentioned in s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1926, *i.e.*, rape, sodomy, bestiality.

PETITION for divorce by the wife.

The facts of the case are fully set out in the judgment.

R. C. Bonnerjee for the petitioner argued the case on the facts and conceded the point of law.

Sikhar Basu for the intervener.

Respondent *in person*.

Cur. adv. vult.

PANCKRIDGE J. The petitioner in this case, then Emma Caroline Finlayson, was married to the respondent, George Stanley Alexander Mathers at St. Paul's Church, Airdrie, Lanarkshire, on November 18, 1909. The parties are domiciled in Scotland. At the time of the marriage the petitioner was twenty-one and the respondent twenty-three years of age. The respondent was then employed by the East Indian Railway, and his employment terminated in 1933. After the marriage husband and wife resided together at various places on the

Railway to which the respondent was posted. There have been four sons and two daughters born of the marriage. They are all surviving. The eldest child was born in December, 1910, and the youngest in October, 1921.

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Cohabitation ceased in October, 1935, in circumstances with which I shall deal hereafter.

On January 28, 1936, the present petition was filed under the Indian and Colonial Divorce Jurisdiction Act, 1926, the petitioner asking for dissolution of her marriage on the ground of her husband's cruelty, the acts of cruelty alleged having been all committed in India. In filing the petition the petitioner sought to avail herself of the amendment of the English Matrimonial Law effected by s. 2 of the Matrimonial Causes Act, 1937, which came into operation on January 1, 1938.

This section amends s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, *inter alia* by making it possible for a husband or wife to present a petition for divorce on the ground that the respondent has since the celebration of the marriage treated the petitioner with cruelty. On March 18, 1938, the respondent filed an answer whereby he denied the allegations of cruelty contained in the petition, and also stated that the petitioner was and had been for some time past living in adultery with a Mr. Colin Silvester.

Mr. Silvester intervened and filed an answer on April 27, 1938, denying the charges of adultery, and stating that the petitioner was employed by him in the capacity of a house-keeper.

This was the state of the pleadings when the case was first called on before me, I think in the month of July.

Having examined the record I expressed the following views as to the jurisdiction of the Court which I continue to hold.

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In my opinion, s. 1 of the Act of Parliament of 1926 together with proviso (a) thereto has the effect of conferring upon a Chartered High Court the power to grant a decree of dissolution where the parties are British subjects domiciled in England or Scotland on the grounds specified in s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as that section has stood since January 1, 1938. In other words a High Court has power to grant a decree of dissolution on the ground of cruelty alone.

This power is, however, subject to proviso (c) of s. 1 of the Act of 1926 which is to the effect that no Court shall make any decree of dissolution of marriage except when either the marriage was solemnized in India, or the adultery or crime complained of was committed in India. Admittedly the first condition, *i.e.*, solemnization of the marriage in India is not satisfied in this case.

Further, in my opinion, the word "crime" cannot include cruelty, but must be taken to refer to the specific criminal offences mentioned in s. 176, that is to say, rape, sodomy and bestiality.

Matrimonial cruelty is not a crime though of course a particular act of cruelty may be punishable criminally.

It, therefore, appeared to me that the case was not one in which, if I were to find the cruelty proved, I should have jurisdiction to make a decree for dissolution. In addition to indicating my views on the question of jurisdiction, I informed learned counsel for the petitioner that I had good reason to suppose that non-contentious legislation would shortly be laid before Parliament, having as its object the amendment of the Act of 1926 so as to give the High Courts jurisdiction to make decrees of dissolution in cases like the one before me. I suggested to learned counsel that in view of my observations the petitioner would be well advised to reconsider her position. However, on August 17,

1938, she obtained leave to amend her petition by charging adultery committed by the respondent with a woman unknown on various dates during the months of June to August, 1935, at No 3, Madge Lane, Calcutta.

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Obviously, if the petitioner succeeds in establishing this charge, the second condition of the proviso is satisfied.

On November 7, the respondent filed a further answer in which he denied the charges of adultery contained in the amended petition.

The issues which I have to decide in these circumstances are :—

(1) Has the respondent treated the petitioner with cruelty?

(2) Has the petitioner committed adultery with the intervener?

(3) Has the respondent committed the adultery charged in the amended petition?

[His Lordship then discussed the evidence and found (a) that the charge of cruelty against the respondent was established and (b) that the intervener and the petitioner had not committed the adultery charged against them.

On the question of the adultery of the respondent, as charged in the amended petition, his Lordship's conclusion was as follows :—]

I feel compelled to hold that the evidence as to adultery is entirely false, and has been concocted for the purpose of getting out of the difficulty which became obvious when I first raised the point as to the jurisdiction of the Court to grant a decree for dissolution, having regard to the fact that the marriage was not solemnised in India. Whether Mrs. Mathers has been a party to this deception I do not know, and I am not prepared to say that she has been a party and not the victim of injudicious

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sympathisers : but that cannot alter the fact that I am precluded from giving a decree for dissolution unless I hold that the respondent's adultery is proved as charged. That for the reasons which I have given I am unable to hold. I asked learned counsel for the petitioner whether in the event of my finding myself unable to pass a decree for dissolution he would desire me to make a decree for judicial separation and after consideration he said he wished me to take that course. The decree for judicial separation if passed will of course be under the Indian Divorce Act of 1869 and not under the Indian and Colonial Divorce Jurisdiction Act of 1926. Accordingly the cause title will be amended by adding the words "Under the Indian Divorce Act of 1869". The petition will be further amended by adding alternatively a prayer for judicial separation.

Accordingly I pass a decree for judicial separation with costs. The respondent will also pay the costs of the intervener.

Attorneys for petitioner : *Mitters & Basus.*

Attorney for intervener : *H. N. Sen.*

Respondent *in person.*

S. M.