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delivery, the plaintiff may, by at once rushing into Court, prevent the defendant from calling upon him before suit to go to arbitration.

WILSON, J.—I will not trouble you, Mr. Branson. I think Mr. Phillips is right in saying that this is a contract to refer to arbitration, and that he is right in saying that the present suit is brought in respect of the subject-matter which the parties had agreed to refer to arbitration. But I think that before s. 21 of the Specific Relief Act can be relied upon, it must be shown that the plaintiff had refused to refer to arbitration. I do not think that the filing of the plaint is such a refusal. I, therefore, hold that nothing has been shown under the section to bar the present suit.

Attorney for the plaintiff: *A. T. Dhur.*

Attorney for the defendant: *C. D. Linton.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

JOGENDRONUNDINI DOSSEE v. HURRY DOSS GHOSE.

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July 18.

Restitution of Conjugal Rights—Hindu Law—Cruelty—Condonation—Maintenance.

A suit for restitution of conjugal rights may be maintained by a Hindu: but *quere*, if the same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, would be equally so in the case of a Hindu?

Where cruelty on the part of the husband has been condoned by the wife, a much smaller measure of offence would be sufficient to neutralize the condonation, than would have justified the wife, in the first instance, in separating from her husband. But the act or acts constituting the offence must be of such a nature as to give the wife just reason to suppose that the husband is about to renew his former course of conduct, and consequently to entertain well-founded apprehension for her personal safety.

THESE were cross-suits: one for restitution of conjugal rights brought by one Hurry Doss Ghose against his wife Jogendronundini Dessee, and the other a suit for maintenance by the

latter. The parties, who are Hindus, were married in Calcutta in December 1868, and, up to the month of January 1876, lived together chiefly in the husband's house, and sometimes in the house of his father. It appeared from the evidence of the wife, that, some time prior to the month of January 1876, the husband had given way to intemperate habits, and that, while in a state of intoxication, he abused and beat his wife, and on two occasions had attempted her life. It was further proved that he had on several occasions brought prostitutes into the outer apartments of the house in which his wife lived; and that, on more than one occasion, he brought a prostitute into the inner apartments. It appeared, on the wife's cross-examination, that the husband's violence was usually consequent on her reproaching him for leading such a dissolute life. In January 1876, the wife, in consequence of ill-treatment, left her husband's house and went to reside with her mother. While there the parties became reconciled: the husband visited the wife continually, sometimes staying five or six days together, and cohabitation was resumed. During this time the wife used frequently to urge her husband to give her money and to settle some of his property upon her as *stridhan*. In the month of May 1877 the husband went to visit his wife. He was then in a state of intoxication. She said to him: "You are squandering your money; set apart some money in my name, that it may be my *stridhan*, and that no one else may have control over it?" He replied, "As a woman, you ought not to have any money," at the same time giving her a slap on the face. He then left the house and never returned. Some time after this, he desired his wife to come and live with him at his father's house, promising, at the same time, that he would treat her properly. She refused to go, though her mother and brother advised her to accede to her husband's request. On the 18th of August 1877, the husband instituted the present suit for restitution of conjugal rights, and on the 20th of September 1877 the wife instituted a cross-suit, in which she charged her husband with cruelty and adultery, and prayed for a separate maintenance out of his estate. The two suits were heard together.

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The *Advocate-General*, *offg.* (Mr. J. D. Bell) and Mr. Bonnaud for the husband.

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Mr. *Jackson* and Mr. *Bonnerjee* for the wife.

WILSON, J.—I think the husband is entitled to judgment with costs. It has been shown beyond doubt, and admitted by his counsel, that the young man is addicted to drunkenness. Evidence has also been given as to certain acts alleged by the wife to be acts of cruelty. I desire to abstain from expressing any opinion as to whether any of the acts would justify the wife in separating from her husband. The law in this country being, as I understand it, in accordance with the law in England, considers the wife is only justified in separating from her husband when the acts of cruelty are sufficiently grave to cause apprehension of real danger to the wife—danger to life or health.

After all the acts complained of, except one, had been committed, the wife, being in her mother's house under the protection of her mother and brother, being animated, no doubt, by a very proper spirit, without any apparent unwillingness, allowed her husband to resume cohabitation there. I do not think it is necessary to say, whether all the doctrines, and all the presumptions of the law of England, with reference to condonation, apply in this country; but where a wife being under her mother's roof, amongst her own family and removed, as far as a Hindu wife can be removed from her husband's influence, voluntarily resumes cohabitation, I can come to no other conclusion than that she desired to forgive past offences and resume her conjugal position and duties. I think, therefore, that everything which took place before cohabitation was resumed, was condoned, and that the wife cannot now bring forward those acts as grounds for separating from her husband.

There was one act subsequent to cohabitation incident at the mother's house. A quarrel took place, and the husband struck his wife a slap on the face. This was said to have been seen by the brother. Such an act was unmanly; but I do not think that it is such cruelty as to justify the wife in separating herself from her husband. On these grounds, I think, the husband is entitled to judgment. But, having regard to what has occurred, he should be warned that if such acts of violence as those complained of are repeated, not only is the civil law

strong enough to give redress to the wife, but he may lay himself open to punishment under the criminal law.

There will be a decree for the husband with costs on scale No. 2. The wife's suit will be dismissed with costs on scale No. 2.

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From this decision the wife appealed.

Mr. Jackson and Mr. Bonnerjee for the appellant.

The *Advocate-General*, *offg.* (Mr. J. D. Bell) and Mr. Bonnaud for the respondent.

Mr. Jackson.—Even if the learned Judge was right in holding that there had been condonation, yet he was wrong in ruling that the slap on the face, given by the husband to his wife, was not sufficient to revive the lady's right to a separation. Condonation is forgiveness with an implied condition that the injury shall not be repeated; on breach of the condition, the right to separation revives—*Durant v. Durant* (1). The question of how much cruelty is sufficient to revive, depends on the previous character of the husband and his former treatment of the wife—*Wilson v. Wilson* (2); *Macqueen on Divorce*, p. 64. [PONTIFEX, J.—Lord Brougham says, there was no condonation in *Wilson v. Wilson* (2). If so, that case is not in point. Your present argument is, that there was condonation, but that its effect was done away with by the slap on the face.] We do not admit there was any condonation, and the evidence shows there has been none. Cohabitation is not sufficient to raise a presumption of condonation in the case of the wife, though it is so in the case of the husband—*Durant v. Durant* (3); *Greenhill v. Ford* (4); *Curtis v. Curtis* (5). [PONTIFEX, J.—As far as cruelty alone is concerned, there can be no difference between condonation in the case of a man and condonation in the case of a woman.] The evidence in this case shows cruelty and adultery sufficient to entitle the wife to a separation—*Lalla Gabind Prasad v. Doulat Batti* (6); *Sitanath Mookerjee v.*

(1) 1 Hagg., p. 761.

(2) 6 Moo. P. C., 485-86.

(3) 1 Hagg., 734.

(4) 2 Shaw's Scotch Ap., 443.

(5) 1 Sw. & Tr., 75 & 192.

(6) 6 B. L. R., Appx., 85.

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Haimabutty Dabee (1). The husband is not entitled to a decree for restitution of conjugal rights. His proper remedy is pointed out in Colebrooke's Digest, Chap. II, p. 412; and in *Moonshee Buzloor Ruheem v. Shumsoonnissa* (2). In *Gatha Ram Mistree v. Mookita Kochin Atteah Domoonee* (3), Markby, J., doubted whether there was such a thing as restitution in Hindu law. The High Court of Bombay, in *Yamunabai v. Narayana Moreshwar Pendse* (4), disagree with Markby, J.; but the latter case is very different from the present.

Mr. *Bonnerjee* on the same side.—The position of the Hindu wife is shown in Menu, Chap. V, vv. 147-56, and the husband's duties, in Menu, Chap. IX, vv. 11, 18, 12, 72, 75, 162-76. The Hindu wife cannot get a divorce either in this world or the next, and she has no remedy if the Court does not allow her to remain separated. There has been no condonation—*Keats v. Keats* (5), *Newsome v. Newsome* (6). This husband is not a person in whose favor the Court would act—*McCord v. McCord* (7). Under the circumstances the wife is entitled to a separate maintenance—*Bhoirub Chunder Ghose v. Nobo Chunder Gooho* (8). The husband is not entitled to costs. [*The Advocate-General* (Mr. J. D. Bell).—We do not ask for costs.]

Mr. *J. D. Bell* and Mr. *Bonnaud* for the respondent were not called upon.

The judgment of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

GARTH, C. J.—We are of opinion that the decree of the Court below should be confirmed. Speaking only for myself, I confess I think it very probable that, if we only had to consider the comfort and happiness of the parties concerned, the best way of disposing of the case would be to dismiss both suits. But the parties have taken their own course; they have insisted upon going to the expense of a trial. The case has been

(1) 24 W. R., 377.

(2) 11 Moo. I. A., 607.

(3) 14 B. L. R., 298.

(4) I. L. R., 1 Bom., 164.

(5) 1 Sw. & Tr., 346.

(6) L. R., 2 P. & D., 306.

(7) L. R., 3 P. & D., 237.

(8) 1 Norton's Lea. Ca., 38.

decided by the Court below, and we have only to consider whether that decision is right.

Now, although we entertain no doubt, that, as a matter of law, a suit for restitution of conjugal rights may be maintained by a Hindu in this country, we are not at all prepared to say, that the same state of circumstances which would justify such a suit, or which would be an answer to such a suit, in the case of a European, would be equally so in the case of a Hindu. The habits and customs of the native community, especially as regards the marriage state, are so different from ours, that we think in such a matter as a suit for the restitution of conjugal rights, the Hindu and the European cannot always be fairly judged by the same rules.

We are bound to say, however, that, in this particular case, the conduct of the husband was such, both as regards adultery and cruelty, as in our opinion to justify the wife at one time in seeking her mother's protection, and if nothing had afterwards occurred, which amounted to condonation of the husband's offence, we are not prepared to say that he would have been entitled to sue her for the restitution of his conjugal rights.

He appears to have lived a very profligate life ; he was not only in the habit of consorting openly with prostitutes, but he seems to have insulted his wife by introducing one of them on several occasions into her private apartments. He indulged habitually in wine and spirits (not perhaps to the extent which his wife would lead us to believe), but at any rate so as to be very constantly in a state of intoxication, and when he was in this condition, he illtreated and threatened his wife with knives and other weapons, in such a way as to induce very natural apprehensions on her part for her own personal safety.

Under these circumstances, she left his house, and went to live with her mother under the protection of her own family. Here her husband visited her, and through the wise and proper mediation of her own relations (her mother and brother) a reconciliation to all appearance took place. The husband, on the occasion of these visits, slept and cohabited with his wife in the usual way, and, so far as appears, with her full and free consent. On one occasion he stayed with her for several

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days, and the result of this intercourse was that she became with child.

It appears to us that this conduct of the wife unexplained, is certainly very cogent evidence that she had condoned his previous conduct. We think that, if in this state of things he had requested her to return to his house and she had refused to do so, he would have been entitled to bring a suit against her for the restitution of his conjugal rights.

It has been urged upon us strongly on behalf of the wife, that the fact of her thus cohabiting with him at her mother's house, must be attributed, not to any desire for reconciliation, but rather to a sense of duty, and to the obligations under which a Hindu wife is placed, to submit herself to her husband's wishes and authority, and we have been referred to a class of cases in England, of which *D'Aguilar v. D'Aguilar* (1) and *Curtis v. Curtis* (2) are a type, where it is undoubtedly said by high judicial authority, that condonation on the part of the wife must, in many cases, not be presumed from the mere fact of her continuing to cohabit with her husband after infidelity or cruelty on his part, because a virtuous and self-denying woman will often, for the sake of her children, or for the peace or reputation of her family, submit to live and even sleep with her husband as a matter of duty, against her own inclinations, and without any intention of condoning his offence. No doubt, there is much force in this argument, and if, in this instance, we could see that the cohabitation and apparent reconciliation between husband and wife were the result of actual or moral force or compulsion, we might take a different view of the case.

But here, as it seems to us, the wife was to all intents and purposes a free agent; she was under her mother's roof, and the protection of her mother and brother. There was no reason why, if she had so pleased, her husband might not have been excluded from access to her altogether. There was no difficulty about her child, because she had the child under her own charge, and no threats or intimidation appear to have been used by the husband, either to compel compliance with his wishes, or to take away the child from her, in case she refused to consort with him.

(1) 1 Hagg., 774, &c., and 3 Hagg., 777. (2) 1 Sw. & Tr., 75 & 102.

We cannot, therefore, accede to the contention of the appellant's counsel, that any force, either actual or moral, was used to coerce her free-will, and that being so, we are disposed to put the same construction upon her conduct as we should upon that of a European lady under similar circumstances, and to say that a reconciliation did in fact take place, and that she did so far condone his offence, as to restore him to his former conjugal rights and position.

The only remaining question is, whether the slap on the face, which he afterwards gave her on one occasion, was such an act of cruelty and ill-usage as to neutralize the effect of the condonation and to justify her in treating the reconciliation as if it had never taken place.

Mr. Bonnerjee was, no doubt, quite right in saying, that condonation, however complete it may be, in the sense of restoring the husband to his former privileges, is so far conditional—see *Durant v. Durant* (1), *Curtis v. Curtis* (2)—that it depends upon the offence of the husband not being repeated; and in the case of cruelty, we quite think that a much smaller measure of offence would be sufficient to neutralize the condonation, than would have justified the wife in the first instance in separating herself from her husband. But then we consider that the act or acts of cruelty must be of such a nature as to give the wife just reason to suppose that the husband is about to renew his former course of conduct, and consequently to entertain well-founded apprehensions for her personal safety.

Now we cannot put so serious a construction upon what occurred in this case. The slap on the face was given with the open hand, at a time when the husband was under the influence of drink, and in a moment of irritation, when his wife was worrying him for money,—a subject which seems to have been a very frequent cause of discord between them. The brother certainly says, that he heard his sister cry out, and on coming into the room he saw the traces of tears upon her face; but, considering the state of temporary excitement under which the husband was labouring, we think it would be taking too serious a

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(1) 1 Hagg, 751.

(2) 1 Sw. & Tr., 75 & 192.

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view of the circumstances to say that the blow was sufficient to neutralize the effect of the condonation. If the wife had only exercised, as she should have done, a little good sense and discretion, she would have known that it was not a prudent thing to introduce irritating topics at such a time; and it is to be hoped, that when she returns to her husband's house, which we think it our duty to require her to do, she may learn so to regulate her own conduct, and to deal patiently and judiciously with her husband's frailties, as to secure her own happiness and comfort.

There seems reason to suppose, that she is under some mistake as to the character of the woman who is living in Loknath's house. From the affidavit which has been read to us, it appears that this woman is an old nurse and dependant of the family, who has lived there for many years. But we think it right, after what has occurred, to secure the defendant a home untainted by the presence of any persons of bad character; and we, therefore, propose so far to modify the decree of the lower Court, as to make it a condition that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife.

As regards the costs, the Advocate-General has very properly offered on behalf of his client to waive his right to them in both Courts; but much as we approve of the spirit in which that offer is made, we think that we ought only to act upon it, conditionally upon the defendant submitting herself to the decree of the Court in all obedience and good faith. If she does so, she will have to pay no costs. If she does not, she must pay the costs of both Courts on scale No. 2. Either party will be at liberty to apply to the lower Court in the event of the terms of the decree not being fairly and properly carried out.

Attorneys for the appellant: *Swinhoe & Co.*

Attorney for the respondent: *Mr. Wilson.*
