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the parties themselves that the number of persons fined is very large, and that, therefore, the total sum is substantial. But on the other hand, as every one knows, these faction fights consist very largely of either a particular set of families or a particular set of *biradari*, and when the individual fine is multiplied by a large number, no doubt it falls very heavily on the whole community. We, for this reason, reduce the fines in each case from Rs. 25 to Rs. 15 under section 147 and from Rs. 25 to Rs. 10 under section 323 in case of each of the persons who was convicted by the Magistrate in the two cases. In other respects the order of the Magistrate will stand. The fines, if paid, shall be refunded.

FULL BENCH.

*Before Sir Grimwood Mears, Knight, Chief Justice,
Justice Sir Cecil Walsh and Mr. Justice Kendall.*

JAMES PETER SHERRING (PETITIONER) v. SHAH-ZADI SHERRING (RESPONDENT) AND JACKSON IBRAHIM PETER (CO-RESPONDENT).*

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22.

Divorce—Husband's petition—Wife charged with committing adultery—Misconduct of petitioner—Discretionary bar—Principles governing exercise of discretion vested in matrimonial court.

In the trial of matrimonial cases, the court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer, respectively *inter se*, but also to the interests of society and public morality, and the court should, therefore, in the exercise of every discretion which is vested in it, endeavour to promote virtue and morality and to discourage vice and immorality while exercising its discretion.

Where Parliament has not thought fit to define or specify any cases, or classes of cases, for its application the court ought not to limit or restrict that discretion by laying

*Matrimonial Reference No. 5 of 1926.

down rules within which alone the discretion is to be exercised. *Morgan v. Morgan* (1), *Constantinidi v. Constantinidi* (2), *Wyke v. Wyke* (3), *Pretty v. Pretty* (4), *Schofield v. Schofield* (5), *Tickner v. Tickner* (6), *Constantinidi v. Constantinidi* (7), and *Wickins v. Wickins* (8), referred to.

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THIS was a husband's petition for divorce on the ground of his wife's adultery, in which a *decree nisi* was granted by the District Judge in September, 1926.

The case was before the High Court for confirmation in May, 1927, when the Court's attention was drawn to the fact that the petitioner admitted that he had contracted syphilis during his married life, and a Bench of the Court, presided over by the CHIEF JUSTICE, remitted the case to the District Judge's Court for a decision, without fresh evidence, whether this fact did not constitute a discretionary bar. The matter remitted was disposed of by another District Judge in July of this year, who held that the discretion might be suitably exercised in the petitioner's favour, because the husband's record, though not spotless, was not so bad as his wife's and it did not appear that "any useful purpose could be served by refusing to dissolve a bond that had ceased to perform any useful function".

The parties were Indian Christians, engaged in mission work. They were married in January, 1919, and the first and only child was born to them in December, 1919, at Palwal, where the husband and wife resided. Miss Shahzadi, the wife, had been a member of the Baptist Church at Palwal, the husband being connected with the Church Missionary Society. Miss Shahzadi had been intimate before marriage with the co-respondent, to whose brother her sister was married, and she had had a child by the co-respondent. The

(1) (1869) 1 P. and M., 644.

(2) (1903) P., 246.

(3) (1904) P., 149.

(4) (1911) P., 83.

(5) (1915) P., 207.

(6) (1924) P., 118.

(7) (1905) P., 253.

(8) (1918) P., 265.

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trial court found that adultery, as alleged in the petition, was proved against the respondent, and refused, as mentioned above, to consider the fact that the husband had, during his married life, contracted syphilis while in Bombay, to be a discretionary bar to its granting a decree *nisi*.

On the decree coming up again for confirmation—

Mr. O. M. Chiene, for the petitioner.

The other parties were not represented.

The judgement of the Court (MEARS, C. J., and WALSH and KENDALL, JJ.), after stating the facts, proceeded to discuss at some length the evidence relating to the alleged adultery. The Court found itself unable to confirm the finding of the District Judge that the wife's adultery was proved. The judgement then continued :—

On the whole, therefore, we come to the conclusion that the finding of adultery against the respondent and co-respondent cannot be confirmed, that the respondent is entitled to a finding of "not guilty" on this issue, and that on this ground alone the petition must be dismissed. The woman's misconduct before marriage must have been fairly well-known in the community. Her marriage with the husband no doubt rehabilitated her, and there are expressions in her letters which show how keenly she realized this, and it is difficult to understand what motive she should have had, after deciding to marry Mr. Sherring and being willing to bear him children, for continuing a connection with the co-respondent which could do her no good, and would probably put an end to any chance of her continuing a respectable member of the community.

It is, however, incumbent upon us to continue our consideration of the case, as if we were in agreement with the Judge in his finding against the wife. This

consideration raises questions of importance in the administration of the Divorce Act.

First we have to consider the state of mind of the petitioner when he was in Bombay. According to Irene, if she ever mentioned the alleged adultery at Palwal to her father, a fact which her father does not himself mention, she did not mention it until her father returned from Bombay. According to the husband he learnt of his wife's infidelity in some casual conversation with the co-respondent's brother, a circumstance strange, if true, and not consistent, either with a desire on the part of the co-respondent to continue in mission work in Bombay, or with an insidious attempt, as is alleged, on the part of the co-respondent to persuade Mr. Sherring to bring his wife to Bombay. But if this conversation ever took place, Mr. Sherring does not connect his adultery in Bombay with it. It was not an isolated act of adultery. According to the evidence he kept this woman, who was a Bombay prostitute, for some 2 or 3 months, and probably contracted syphilis from her. Even this is not certain, because he pretended to the court that he had been told by a Doctor that it was the result of something he had eaten. It would be in our opinion a case of the worst possible example if we were to treat this as one of those acts of adultery which could be brought by the court within any rule, however much extended, upon which a Matrimonial Court has acted in such cases.

The importance of this case is that, although the question of a discretionary bar is not one of frequent occurrence, it has to be dealt with in the lower courts of these Provinces, without the assistance of the English Law Reports where the principles of English practice, which we are bound to follow, are laid down, and without the advantage of expert assistance from the Bar.

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The principles deducible from the English cases were formerly as follows:—If a petitioner's adultery has no special circumstances placing it in some category capable of distinct statement and recognition, the court will refuse to grant a decree. The court will not assume to itself a right to grant, or withhold, its decree upon the mere footing of the petitioner's adultery being more or less pardonable or capable of excuse; *Morgan v. Morgan* (1). "A loose and unfettered discretion", it was there said, "is a dangerous thing to entrust to a single Judge". Re-marriage in the belief that the first wife is dead, or in ignorance that the decree *nisi* did not dissolve the marriage, and adultery long pardoned and condoned, and not repeated, are three cases in which the discretion has been exercised. Cases in which it has been exercised in favour of a husband are rare; *Constantinidi v. Constantinidi* (2). Even in the case of a wife, no feeling of sympathy can be entertained. Her adultery must be shown to have been caused directly by her husband's cruelty and adultery; *Wyke v. Wyke* (3). This principle of direct causation has been applied occasionally to a husband, but BARGRAVE DEANE, J., said that misconduct may be excusable in a woman which would not be excusable in a man; *Pretty v. Pretty* (4). In more recent cases, the practice in England seems to have been somewhat relaxed in favour even of a husband, e.g., Sir SAMUEL EVANS, the President, exercised his discretion in one case in favour of a husband petitioner who, years after his wife had deserted him, had committed an isolated act of adultery with a woman whom he intended to marry, resulting in the birth of a child, and who had concealed it from the court. The President, in his judgement, founded it upon grounds of public morality, and the interests of the woman and her child; *Schofield v. Schofield* (5). The most recent decision is

(1) (1869) 1 P and M., 644.

(2) (1903) P., 246.

(3) (1904) F., 149.

(4) (1911) P., 88.

(5) (1915) P., 207.

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that of the President, Sir HENRY DUKE as he then was, in *Tickner v. Tickner* (1). The decision of Lord ST. HELIER in *Constantinidi v. Constantinidi* (*supra*) was subsequently discussed in the Court of Appeal, and the President quotes from VAUGHAN WILLIAMS, L. J., "the court must have regard not only to the rights and liabilities of the matrimonial person wronged, and of the wrong-doer respectively *inter se*, but also to the interests of society and public morality" (2). He also quotes STIRLING, L. J., as having said:—"in the exercise of every discretion which is vested in the court, the court should endeavour to promote virtue and morality and to discourage vice and immorality" (3) He further quoted SWINFEN EADY, M. R., in *Wickins v. Wickins* (4): "Where Parliament has not thought fit to define or specify any cases, or classes of cases, fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised". He ultimately prefers the broader view thus enunciated to the more restricted one of confinement to special categories of cases, as originally laid down in *Morgan v. Morgan* (5), and exercises his discretion in favour of the wife-petitioner, in that case, on grounds of public policy.

We are of opinion that, if the above principles are kept steadily in view, there ought to be no difficulty in the courts of these Provinces exercising the discretion rightly in any case in which the question arises. As we have said already, we are unable to approve the reasoning by which the District Judge reached his decision in this case, and we have no alternative but to decline to confirm the decree, which must be set aside. The husband must pay the costs both of the wife and of the co-respondent.

Decree set aside.

(1) (1924) P., 118.

(2) (1905) P., at p. 270.

(3) (1905) P., at p. 278.

(4) (1918) P., at p. 272.

(5) (1869) 1 P. and M., 644.