

## MATRIMONIAL JURISDICTION

*Before Mr. Justice Allsop*

DOUTRE (PETITIONER) v. DOUTRE (RESPONDENT)\*

1939  
February,  
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*Divorce—Adultery of wife—Birth of illegitimate child—Non-access—Evidence by husband of non-access—Admissibility—Admission by wife of illegitimacy of child—Admissibility—Divorce Act (IV of 1869), section 7—Refers to principles of substantive law and not to rules of evidence—Petitioner's own adultery—Discretion of court.*

In a suit for divorce by the husband on the ground of the wife's adultery, alleged to be established by the fact of her having given birth to an illegitimate child, evidence by the husband of non-access to the wife at any time when the child could have been begotten is admissible; and an admission by the wife that the child is illegitimate is also admissible in evidence.

The English law rule, laid down in *Russell v. Russel* (1), that such evidence is inadmissible because it is evidence which tends to bastardise the child is not applicable to the courts in India; there is nothing in the Indian Evidence Act which renders this evidence inadmissible.

The rule in section 7 of the Indian Divorce Act, that Indian courts must exercise their jurisdiction under that Act in accordance with the principles which are at the time applied in the English courts, refers to principles of substantive law and not to principles of evidence.

Whether a petition for divorce should be refused on the ground of the petitioner's past misconduct or adultery is a matter of discretion of the court depending on the circumstances of the case.

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

The respondent was not represented.

ALLSOP, J.:—This is a petition by Ernest Lionel Doutre for the dissolution of his marriage with the respondent Anne Ruth Doutre on the ground of her adultery with some person unknown. The fact of adultery is alleged to be established by evidence of non-access and by the fact that the respondent gave birth

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to an illegitimate child in Bombay on the 4th of May, 1937. The petitioner has been allowed by the Court not to name and implead any co-respondent. There is no reason to disbelieve his allegation that in spite of all efforts he was unable to discover who the man was with whom his wife committed adultery and who was the father of her child. There is no direct evidence of adultery. The petitioner has stated that he was living in Lucknow or Cawnpore at the relevant time and his wife was living in Delhi or Bombay so that he was unable to discover who this man was.

The sole oral evidence is that of the petitioner. It appears that the petitioner and his wife are European British subjects domiciled in India and that they were married in a Christian church, i.e., St. Patrick's church, Cawnpore in the year 1926. In these circumstances this Court has jurisdiction to give a decree for dissolution of marriage.

The evidence of the petitioner is that his relations with his wife became unhappy in the year 1932 because of her general carelessness about the house, her relations with other men and her extravagance. These relations continued in 1933 and the parties eventually agreed to separate in December of that year. The petitioner went to Lucknow and his wife remained in Cawnpore till the beginning of the year 1936 when she went away to Delhi. The petitioner has deposed that he did not see his wife at any time in 1936 and that he never went to Delhi in that year. His wife later went to Bombay and he did not see her after that. He himself did not go to Bombay till some time in the year 1938 after he had heard that his wife had given birth to a child. There is evidence of registration of the birth of a child to the respondent in Bombay on the 4th of May, 1937. If the petitioner is to be believed it is impossible that he could have been the father of her child and it follows that the respondent must have committed adultery. The

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evidence of the petitioner is supported by a letter written to him by his wife in which she admitted that she had given birth to an illegitimate child and suggested that he might take proceedings for divorce if he wished to do so. There is not the slightest reason for disbelieving this evidence and it undoubtedly proves the fact of adultery if it is admissible.

The only question is whether a husband or wife should be allowed to give evidence of non-access and this depends upon the further question whether the rule in *Russell v. Russell* (1) applies to the courts of this country in exercise of their jurisdiction in matrimonial matters. The English rule is that the evidence of a husband or wife that there has been no access by the husband to the wife is inadmissible because it is evidence which tends to bastardise the issue. There is certainly nothing in the Indian Evidence Act which renders this evidence inadmissible in India. Indian courts must exercise their jurisdiction under the Indian Divorce Act in accordance with the principles which are at the time applied in the English courts, but it seems to me that this rule refers to principles of substantive law and not to principles of evidence. The English rule is general and applies in divorce proceedings only because it applies in other proceedings in which the legitimacy of the children of the marriage is in issue. It appears to me that in Indian courts if the legitimacy was in question in any proceeding other than one under the Divorce Act evidence of non-access would certainly be admissible. It would be anomalous to hold that the rule in *Russell v. Russell* would apply in India in matrimonial suits where legitimacy is not directly in issue when it would not apply in other suits in which legitimacy was directly in issue. The Madras High Court in the case of *John Howe v. Charlotte Howe* (2) held that the English rule did not apply in Indian courts. Following this decision I hold

(1) [1924] A.C. 687.

(2) (1913) I.L.R. 38 Mad. 466.

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that the evidence of the petitioner and the admission of the respondent are admissible to prove impossibility of access at any time when the child born to the respondent in May, 1937, could have been begotten. I hold in consequence that the petitioner was not the father of the child and that the respondent committed adultery. In these circumstances the petitioner would be entitled to a decree for the dissolution of his marriage.

He has, however, admitted that he was cited as co-respondent in the case of *Nugent v. Nugent* in the year 1933 and that he committed adultery with the respondent in that case. The question therefore arises whether the Court should refuse to give him a decree or should exercise its discretion in his favour. The petitioner has admitted that his wife learnt of his relations with Mrs. Nugent and that that was one of the reasons why they separated, but there are a number of other circumstances which convince me that this is a case in which discretion should be exercised in his favour. There are four children of his marriage, two girls aged 12 and 6 years and two boys aged 10 and 8 years respectively. The parties separated at the end of the year 1933 and have been living apart ever since. The respondent has given birth to an illegitimate child and there is obviously not the slightest hope of a reconciliation. The petitioner has stated that he is anxious to marry Mrs. Nugent. He alleges that he is not living in adultery with her but that she is living in the same place as himself at the present time. It would be advantageous to the children that they should have a respectable and normal household in which to live. It is to the advantage of the petitioner and Mrs. Nugent that their relations should be legitimised. The respondent from her letter is obviously not averse to a divorce and if it is possible it would be better that she might be in a position to marry the father of her illegitimate child or some other man who may wish to marry her and should not be precluded from living a respectable life. Discretion should

certainly be exercised with due care and strictness, but this in my judgment is a case in which a decree for dissolution of marriage should not be refused upon the ground of the petitioner's misconduct. There is nothing to suggest that the petitioner is a man of loose and profligate character. He met Mrs. Nugent after she had left her husband and at a later time she lived with him in Lucknow as his wife.

This is a case not dissimilar from that of *Wilson v. Wilson* (1) in which the English Courts exercised discretion in favour of the husband. In view of the fact that the parties were living apart and that the respondent gave birth to an illegitimate child I have no doubt that there has been no collusion or connivance between them. I therefore pass a decree *nisi* in favour of the petitioner for the dissolution of his marriage with the respondent.

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### APPELLATE CIVIL

Before Mr. Justice Sir Edward Bennet and Mr. Justice Verma

SRIMATI DROPADI (PLAINTIFF) *v.* BANKEY LAL AND  
OTHERS (DEFENDANTS)\*

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*Partnership Act (IX of 1932), sections 11, 44—Right to sue for dissolution of partnership—Controlled by terms of agreement between the partners—"Subject to the provisions of the Act"—Section 44(c) and (d) are subject to the terms of agreement—"Protection of court"—Other relief, e.g. retirement, available—Discretion of court to refuse dissolution.*

A partner's right to sue for dissolution of partnership may be controlled or negatived by the terms of the agreement among the partners; and the court may, in view of the terms of agreement and of other remedies provided therein like retirement or sale of his share or settlement of disputes by arbitration, refuse to entertain a partner's suit for dissolution, although the grounds alleged may come within section 44 of the Partnership Act.

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\*First Appeal No. 257 of 1937, from a decree of S. Nasir-ud-din Alvi, Civil Judge of Aligarh, dated the 10th of February, 1937.