APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Sharpe.

REV. PO TUN v. MA CHIT AND ANOTHER.*

1937

Dec. 23.

Divorce—Imprisonment of wife for serious offence—Refusal of husband to live with her—Conviction not a justification for desertion—Desertion without reasonable excuse—Wife's adultery—Court's discretion to grant divorce—Duty of District Judge under the Divorce Act—High Court's power on appeal to pass decree for dissolution of marriage—Form of decree—Decree nisi—Divorce Act, ss. 14, 16, 17, 55—Civil Procedure Code, O. 41, r. 24.

The conviction and imprisonment of a husband or wife for an offence against the criminal law is no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of a serious offence such conviction does not justify him in deserting her.

Williamson v. *Williamson*, 7 P.D. 76, followed.

Despite the fact that the husband has deserted his wife without reasonable excuse the Court has a discretion as to whether it will, in all the circumstances of the case, grant the husband a decree for divorce from his wife on the ground of her adultery.

Duty of District Judges in cases under the Divorce Act, explained.

S. 55 of the Divorce Act, read with O. 41, r. 24 of the Civil Procedure Code, gives the High Court sitting on appeal, power, when the case falls within the proviso to s. 14 of the Divorce Act, to say whether or not a decree for dissolution of marriage should be passed, where the evidence upon the record is sufficient to enable the Court to do so.

Williams for the petitioner.

No appearance for the respondents.

The facts of the case which were detailed in the judgment reported below may be summarized as follows: On the 2nd April 1923 the petitioner, a Methodist

* Civil First Appeal No. 128 of 1937 from the judgment of the District Court of Pakôkku in Civil Reg. No. 5 of 1936.

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Minister and a widower, then aged 33, married the respondent Ma Chit, a hospital nurse who was a widow and one year his junior in age. After the marriage the couple lived, and both of them carried on their respective callings, at Pakôkku. On the 3rd December 1923 Ma Chit was convicted under s. 406 of the Penal Code of a criminal breach of trust in respect of jewellery entrusted to her for sale, and was sentenced to nine months' rigorous imprisonment. Whilst in jail she was also prosecuted for forgery of a Post Office Savings Bank Pass Book belonging to her husband. She had made entries therein showing a credit balance of Rs. 1,106-10 when the real balance was only Rs. 6-10 and had deposited this pass book with the owner of the jewellery as security. On the 4th August 1924 she was convicted of forgery and sentenced to three years' imprisonment, the sentence to run concurrently with that for the criminal breach of trust.

In January 1925 the husband was transferred from Pakôkku to Pyawbwe. On 26th August 1926 the husband advertised that he would not be responsible for the debts of his wife who had left his protection in 1923. The wife was released from jail apparently early in 1927, and in that year her husband was transferred to Mandalay. The wife wrote to him from Bassein asking for maintenance, which he refused, adding that he would not receive her in his house so long as she did not give up her bad habits. The parties remained apart and the wife took up employment at Bassein as a midwife under the Bassein municipality. There she met the second respondent, Maung Thein Maung, a clerk employed by the municipality there. She committed adultery with him, as a result of which she gave birth to a child in August 1932. The husband said that he heard of this in 1933, and on the 14th September 1936 he petitioned the District Court of Pakôkku under

s. 10 of the Divorce Act praying that his marriage might be dissolved on the ground of his wife's adultery. The wife sent a written statement to the Court by post. She said she had returned to her home town, Bassein, as there was no one to support her, and her husband had deserted her for the last 13 years. She, however, did not want to contest the suit and was willing that the marriage should be dissolved. Maung Thein Maung also sent a written statement but did not contest the suit.

SHARPE, J.—[After setting out the facts of the case continued :]

The learned District Judge found that the respondent did commit adultery with Maung Thein Maung, but, quite properly, having regard to the wife's written statement which was before him, he did not thereupon pronounce a decree under the first part of section 14 of the Divorce Act ; for the reason that the proviso to that section enacts that

" the Court shall not be bound to pronounce such decree . . . if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

. . . . . .

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery."

It was therefore necessary for the learned District Judge first of all to find whether or not the petitioner had been guilty of such conduct as made the pronouncement by him of a decree not a matter of obligation under the first part of section 14 but a matter of discretion under the proviso to that section ; and then, if he came to such findings as made it a

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matter of discretion, to exercise his discretion as to whether, on the particular facts and in the particular circumstances of this case, he would grant the relief prayed for by the petitioner.

It was here that the learned District Judge fell into some confusion of thought. I think he was undoubtedly led into making at any rate part of his mistake by the petitioner's advocate inserting paragraph 4 in the Petition. Time and again I find that plaints, petitions and written statements infringe the most elementary rules of pleadings. The general function of pleadings was well stated by Lord Jessel M.R. in *Thorp* v. *Holdsworth* (1), where he said

> " The whole object of pleadings is to bring the parties to an issue . . . The whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay."

[His Lordship commented upon the many irregularities to be found in pleadings filed in courts and pointed out the duty of advocates and pleaders to give careful thought to the pleadings.]

Now what happened in the present case? This is a husband's petition for dissolution and accordingly, by section 10 of the Divorce Act, the only ground upon which the petitioner can ask for the dissolution of his marriage is that his wife has been guilty of adultery. Paragraph 4 of the petition alleges " that since the petitioner's wife had left the threshold of the jail after serving the term of imprisonment the petitioner's wife never came back to the petitioner and that she had been living in separation up to the present time at Bassein." That paragraph, therefore, contains wholly immaterial allegations and accordingly

(1) 3 Ch.D. 637, 639.

infringes Order 6, rule 2. The mischief which is done by these irregularities in pleading is shown by the fact that in the present case the learned District Judge was led to frame the following issue (No. 3) : "Did she" (meaning thereby the wife) "desert her husband the petitioner as alleged in paragraph 4 of the plaint ?" It was wholly unnecessary to determine any such issue. Although neither of the respondents appeared to contest the case, it was the duty of the learned District Judge, having regard to the allegations made by the wife in the first three paragraphs of her written statement, to consider, in the event of his being satisfied that the wife had committed adultery, whether the petitioner had been guilty (*a*) of unreasonable delay in presenting his petition, (*b*) of having deserted or wilfully separated himself from his wife before the adultery complained of, and without reasonable excuse, or (*c*) of such wilful neglect or misconduct of or towards his wife as had conduced to the adultery. It will thus be seen that one of the issues proper to be determined was whether the husband had deserted his wife, not whether the wife had deserted her husband, which is how the matter was put in the third issue framed in the Court below. The three matters which I have mentioned did receive the attention of the learned District Judge although he framed no specific issues about them ; he considered them when he was deciding the latter part of the fifth issue which he had framed in the following terms : "Whether the respondent No. 1 committed adultery with the respondent No. 2 and did they have an issue to the union as alleged ? If so, is the petitioner entitled to the relief claimed ?"

The learned District Judge held that the wife had not deserted her husband ; that finding was, however, for reasons hereinbefore appearing, an entirely immaterial consideration, and I feel certain that it was

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his initial error in permitting himself to enter upon that unnecessary enquiry that created the confusion in his mind which finally resulted in his never considering whether he ought to exercise his discretion in the petitioner's favour.

The learned District Judge's findings on the other three points may be summarized as follows: It was the duty of the petitioner to enquire from the Jail Authority as to the time of his wife's release and as to her whereabouts; and, if he failed to do so, it was only natural for his wife to return to her parents at Bassein. The petitioner admitted (*a*) that he heard that that is what in fact she did do after her release, (*b*) that he did not send her any maintenance although she wrote and asked for it, and (*c*) that he wrote and said that so long as his wife did not give up her bad habits he could not receive her in his house. The learned District Judge found that, from the time of her release in 1927, the petitioner did not take the slightest trouble either to maintain his wife or look after her and give her his protection, and that, by that neglect, he

> " allowed her to fall into temptation with other men. Even then the petitioner waited until the end of the year 1936 before he filed this petition for divorce . . . . . I am of opinion ",

the learned District Judge went on,

> " that the Petitioner, the Reverend U Po Tun, absolutely neglected his wife on account of the fact that she had been sent to jail for criminal breach of trust and forgery and allowed her to remain at the mercy of the world without offering any kind of maintenance. Besides, there has been undue delay in spite of the explanation of the Petitioner that he had to apply for permission to the Methodist Clergymen in England and collect evidence. It seems that he has taken about 9 or 10 years to do so. Therefore the petition will stand dismissed."

In effect, the learned District Judge found that the petitioner had been guilty (*a*) of unreasonable delay

in presenting his petition; (*b*) of having, without reasonable excuse, deserted his wife before the adultery complained of, and (*c*) of such wilful neglect of his wife as had conduced to the adultery. The pronouncement of a decree of dissolution of marriage therefore became a matter of the discretion of the Court instead of a matter of right for the petitioner. The fact that the learned District Judge arrived at the conclusions on this point which he did did not necessarily debar the plaintiff from obtaining relief; it was for the Judge then to consider which way he would exercise his discretion. Unfortunately the learned District Judge does not appear to have considered that matter. Having found the above-mentioned three facts against the petitioner, he said "*Therefore* the petition will stand dismissed." It is clear that he read the opening words of the proviso to section 14 of the Divorce Act as if it read

"Provided that the Court shall be bound not to pronounce such decree if . . . . . ",

instead of the actual words, which are :

"Provided that the Court shall not be bound to pronounce such decree if . . . . . ."

He read the word "not" in the wrong place.

The petitioner, being aggrieved, appealed to this Court. His main grounds of appeal are that the learned District Judge erred in holding (*a*) that it was the petitioner's duty to enquire from the Jail Authorities as to his wife's whereabouts on her release, and (*b*) that she fell into temptation as a result of being neglected by the petitioner after her release; further, that his wife never replied to the letter in which the petitioner said that he could not have her back so long as she did not give up her bad habits; also, that there was a reasonable explanation of such delay as there

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was in presenting the petition ; and, finally, that in any event the petitioner had reasonable excuse for neglecting his wife and had just and sufficient cause for living apart from her. In the eleventh ground of appeal it is said that "the trial court erred in not exercising its discretion in favour of appellant and granting him a divorce."

I will first deal with the question of the delay in the presentation of the petition. The petitioner's own evidence is that the first he knew of his wife's adultery was when he learnt that she had given birth to a child which he knew could not possibly be his. He says he didn't know of that event until 1933. The petition was presented in September 1936. He had, he says, first of all to obtain permission from the Methodist Clergymen's Conference in England to file his petition, and he was not granted that permission until about January 1936. No doubt he, being a Methodist Minister, would have to obtain such permission, and no doubt it took some time to obtain. Presumably the petitioner would have got his evidence together before applying for that permission, and therefore it may well be that he was not ready to make his application to England till, say, 1934. I have no reason to doubt his word when he says that he did not obtain that permission until January 1936. There was then some, but not, in my opinion, too much delay till September 1936. It is, perhaps, somewhat unfortunate that the learned District Judge did not examine the petitioner more thoroughly on this part of the case, but it is quite clear that the learned Judge was wrong in saying that it took the petitioner nine or ten years to obtain the necessary permission and to collect his evidence. It can be no more than three or three and a half years, according to the month in 1933 (which is unspecified) in which the petitioner first knew of his wife's adultery. A period

of nine or ten years takes us back to the time of the wife's release from jail, which is not the proper date from which to start, having regard to the petitioner's evidence as to the date of his first knowledge of his wife's adultery. I think that in all the circumstances of this case the delay in the presentation of the petition was not unreasonable.

I will now consider the learned District Judge's findings as to the petitioner's desertion and neglect of his wife. I think there was ample evidence, largely to be found in the petitioner's own admissions, that he did desert his wife before the adultery complained of, and that there was no reasonable excuse for his doing so. Not only was there ample evidence to support the learned District Judge's finding on that point but in my judgment the finding of the Court below was the only possible one upon the evidence. In *Williamson* v. *Williamson and Bates* (1), a case to which I myself called attention during the argument before us and which is a very similar case to the present one, Sir James Hannen held that

> "the conviction and imprisonment of a husband or wife for an offence against the criminal law is no justification to the other party for refusing to live with him or her. However painful it may be for a respectable man to have a wife who has been convicted of felony, such conviction does not justify him in deserting her."

Mr. Williams, on behalf of the appellant, called our attention to the case of *Swaine* v. *Swaine* (2), wherein it was held that the *dicta* of Judges in England cannot be regarded as laying down principles or rules of practice by which the discretion of a Judge in any other case is fettered or limited. But that ruling in *Swaine* v. *Swaine* (2) does not affect this part of the present

(1) (1882) 7 P.D. 76. (2) (1932) I.L.R. 10 Ran. 299.

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case. I have not yet reached the point where the exercise of discretion has to be considered. It is only where the *dicta* of Judges in England explain the tests which they would respectively apply in exercising their discretion to grant or refuse a divorce in the particular cases before them that it must be borne in mind that they are, to use the words of the Master of the Rolls in *Wickins* v. *Wickins* (1), "merely illustrations of matters to which the Court will have regard in coming to a judicial determination on the matter", namely, as to how it will exercise its discretion. In my judgment, Sir James Hannen laid down in *Williamson* v. *Williamson and Bates* (2) a definite proposition of law; the passage which I have quoted was not dealing with the way in which he would exercise his discretion in that particular case. It was a general proposition of law. In my view it is still sound law, and in my judgment the learned District Judge was quite right in holding that the petitioner had deserted his wife without reasonable excuse.

Then comes the question as to whether the petitioner's neglect of his wife was such as to conduce to her adultery. This is a more difficult question. The petitioner's third ground of appeal is that the learned District Judge erred in holding "that his neglect had allowed her to fall into temptation when there is evidence that respondent No. 1 was employed as a midwife in the Bassein Municipality after her release from jail and was able to maintain herself." I feel the force of that contention very strongly, for not only was the wife earning her own livelihood but she was also living with her parents. Reluctant as I always am to disturb on appeal findings of fact arrived at by the Court who had the opportunity of seeing as well as of

(1) (1918) P. 265, 272. (2) (1882) 7 P.D. 76.

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hearing the witnesses, yet in this case I feel that the petitioner's neglect of his wife was not such as to conduce to her adultery. I wish to stress the fact that in arriving at that conclusion I am deciding a question of fact upon the particular facts of this particular case and I have not come to that conclusion because in *Williamson* v. *Williamson and Bates* (1) Sir James Hannen further held that the husband's refusal to resume cohabitation with his wife when she asked him to live with her again could not be said to have conduced to her adultery. In that part of his judgment Sir James Hannen is not stating a general proposition of law nor, incidentally, is he uttering a *dictum* as to how he will exercise his discretion. He is deciding an issue of fact on the particular evidence in that case, and therefore that part of his judgment does not help us. My conclusion is based entirely upon the particular facts of this case.

I therefore disturb the first and third of the learned District Judge's findings and uphold the second. As a finding adverse to the petitioner of any one of the three facts was sufficient to make the granting of a decree a matter of discretion and not of right, it follows that it still remains to be considered whether or not the petitioner should be granted a decree despite the fact that he has, as is now established, deserted his wife without reasonable excuse.

As I have already pointed out, the learned District Judge never addressed himself to the question as to the way in which he should exercise his discretion; even if he had done so, he would have been exercising it after finding three facts adversely to the petitioner, and, as only one fact is now established adversely to the petitioner, the discretion would have now to be

(1) (1882) 7 P.D. 76.

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exercised all over again in the light of the new findings of fact. The question, therefore, now is: Shall we decide how the discretion is to be exercised, or shall we send it back to the District Judge to do so in the light of the facts and circumstances appearing in the judgments of this Court? Section 55 of the Divorce Act provides that appeals from a refusal of a District Judge to grant a decree for dissolution of marriage may be appealed from in the like manner as a decree of a District Court made in the exercise of its original civil jurisdiction may be appealed from under the laws, rules and orders for the time being in force. Order 41, rule 24, of the Code of Civil Procedure provides that where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may finally determine the suit. In my judgment the section and the rule between them give this Court, sitting on appeal, power, when the case falls within the proviso to section 14, to say whether or not a decree for dissolution of marriage should be passed, if we are of opinion that the evidence upon the record is sufficient to enable us to do so. In some cases, where the exercise of a discretion under section 14 is concerned, it may well be that the Appellate Court will think that it is desirable that the discretion should be exercised by the Judge who saw the petitioner in the witness-box. But I do not think that that is necessary here. In my judgment we have all the necessary materials before us to enable us to say whether or not a decree should be pronounced.

How, then, are we to exercise it in the present case? It must be borne in mind that the petitioner has been guilty neither of unreasonable delay in presenting his petition nor of such wilful neglect as has conduced to his wife's adultery. The only finding against him is that he deserted his wife without reasonable excuse. As

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I have already pointed out on the other part of the case, the first respondent was living with her parents and earning her own livelihood, and I have already held that the petitioner's neglect was not such as to conduce to her adultery. I am of opinion that, although he deserted his wife without reasonable excuse, even for the length of time which he did, yet in all the circumstances of this case it would be proper that a decree of dissolution of marriage should be pronounced, and I would exercise my discretion in the petitioner's favour accordingly.

MYA BU, J.—Upon the merits of this particular case I agree with my learned Brother in his findings on the evidence regarding the points arising for the determination by the Court, and in his conclusions on the points of law involved in the case, and that a decree for dissolution of marriage should be pronounced.

[Their Lordships then considered whether, when the High Court on the appellate side passes a decree for dissolution of marriage in an appeal from an order of the District Judge dismissing the petition, the decree should be a decree *nisi* such as is mentioned in section 16, or a decree such as is mentioned in section 17 of the Divorce Act, and they referred that question to a Full Bench.

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Apl. 8.

The Full Bench (Civil Reference No. 13 of 1937) decided that in such a case, having regard to the terms of s. 16 of the Divorce Act, there should be a decree *nisi* under that section. The Appellate Court thereupon passed a decree *nisi* in favour of the appellant.]