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In my opinion, therefore, the charge of adultery against the wife is clearly proved. I think it unnecessary for counsel to go into the other charges which are contained in paragraph 18 of the petition, and in respect of which there was a particular order dispensing with any co-respondent. Nor is there any point of delay, because the husband swears that it was not till after his wife had brought this petition that he knew that she had gone with the co-respondent on this particular voyage to Marseilles.

On the cross-petition of the husband, there will accordingly be a decree *nisi* for the dissolution of the marriage. There will be an order for costs against the co-respondent as asked in prayer (*b*). The usual minimum period of six months will be fixed in the decree *nisi*.

Solicitors for petitioner: Messrs. *Sabnis & Goreyaonkar*.

Solicitors for respondent: Messrs. *Kanga & Sayani*.

G. G. N.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Marten.

1923.

February 26.

WILHELMINA CODD, PETITIONER *v.* BERTIE ELIJAH CODD, RESPONDENT*.

Indian Divorce Act (IV of 1869), section 16—Divorce—Order for security for wife's costs—Husband's failure to comply—Decree nisi *passed ex-parte—No appeal filed—Application for decree absolute—Whether husband can appear to show cause—Procedure to be followed in absence of a King's Proctor—Jurisdiction—Practice.*

Pending the hearing of two petitions, by the husband and the wife respectively, for divorce, the husband was ordered, on the wife's application, to give security for costs. The husband failing to give security, an order was made that the husband's petition should be set down on the board for dismissal and that his defence to the wife's petition be struck out and the wife's

* O. C. J. Suit No. 3542 of 1921.

petition be placed on the board for an *ex-parte* decree. At the trial, the husband's petition was dismissed for non-appearance, and a decree *nisi* was passed in the wife's petition. The husband did not appeal from the decree *nisi* or from the order for security for costs. Subsequently the wife applied that the decree *nisi* be made absolute. The husband appeared and tendered evidence to show that the wife had been guilty of adultery which disentitled her from obtaining a decree for divorce. A question having arisen whether the husband could, in the circumstances of the case, be heard,

Held, that, though the husband could not technically show cause, the Court had power, as there was no King's Proctor in India, to enquire into the truth of the allegations made by him and for that purpose to examine the wife and the witnesses named by the husband.

Harriette A. King v. *James S. King*[1], followed.

Per MARTEN, J.:—"As far as I can see, the English authorities do not strike out a husband's petition or strike out his defence to his wife's petition, merely because he has failed to give security. What they do.....is to stay the husband's petition, and as regards the wife's petition, to proceed against the husband for contempt, if he is proved to be able to pay but contumaciously refuses to do so."

PETITION for divorce.

On 17th April 1913, Wilhelmina Codd was married in Bombay to Bertie Elijah Codd, an Engine-driver in the employ of G. I. P. Railway Company. The parties lived together till the year 1917, a daughter having been born to them in March 1914.

The husband filed a petition for divorce against the wife (No. 2038 of 1921), on 19th May 1921 in which he alleged that the wife committed adultery with David Hassett (co-respondent No. 1) on divers occasions during 1919-20 and also with Hubert Hassett (co-respondent No. 2), as a result of which she had a miscarriage at Igatpuri in April 1920.

The wife denied the husband's allegation and stated that "in April 1920, she was ill for a short time but that was not due to any miscarriage".

[1] (1882) 6 Bom. 416.

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On 22nd August 1921, the wife filed a cross-petition for divorce (No. 3542 of 1921) in which she alleged cruelty and adultery on the part of the husband and prayed for alimony *pendente lite*. The husband in his defence denied all charges made against him and stated that he was "a working man without much means and that it was impossible for him to provide alimony and at the same time to take proceedings for divorce".

The husband was called upon by the wife to give security for her costs of defending his suit and he deposited Rs. 1,050 in Court. Costs were incurred by the wife in her application for adjournment of the husband's suit and also for the *de bene esse* examination of the witnesses on behalf of both the parties which lasted for two days. The wife's attorneys thereupon called upon the husband to give further security to the extent of Rs. 1,553 in the first suit and Rs. 500 in the wife's suit, and on the husband refusing to do so, two summonses were obtained against the husband, one in each suit for a deposit of further security. The summonses were made absolute by the Chamber Judge (Macleod, C. J.) on 3rd December 1921 and the husband was ordered to deposit Rs. 1,553 and Rs. 705 as security for the wife's costs in the two suits. The husband not having deposited the said amounts in Court, the wife's attorneys wrote to the husband's attorneys on 15th December 1922 that they would apply for an order that the husband's suit be placed on the board on a date to be appointed by the Court for dismissal and that his defence to the wife's suit be struck out. On 21st December 1921, the Chamber Judge made an order that the husband's suit be placed on the board for dismissal on 12th January 1922, that his defence to the wife's suit be struck out and that the wife's suit be also placed on board for *ex-parte*

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decree on the same date. There was no appearance on behalf of the husband on the day this order was made.

On 12th January 1922, when the suits were called on, the husband did not appear and his petition was accordingly dismissed. The wife's suit which was undefended was proceeded with and a decree *nisi* was passed. The husband did not appeal from this decree. Six months after, the wife applied that the decree *nisi* be made absolute. The husband appeared and stated his reasons for not appearing on 12th January 1922 and prayed that the Court should hear his petition and also hear him in defence to the wife's petition. He further placed before the Court certain statements of his intended witnesses in support of his allegation that the wife was guilty of adultery which debarred her from obtaining relief by way of divorce. The wife's application for decree absolute was therefore adjourned, the Court intimating that the husband could not be heard in his own petition which was already dismissed, but that with regard to the wife's application for a decree absolute although the Court would not allow the husband to show cause under section 16 of the Indian Divorce Act it would, *suo moto*, examine the wife and the witnesses named by the husband, opportunity being given to the wife's counsel to cross-examine them. At the further hearing, the witnesses of the husband were examined by the Court and cross-examined by the wife's counsel. The Court also examined the wife and the husband.

Khan, for the wife.

The husband in person.

MARTEN, J.—[After setting out the facts the judgment proceeded:] The husband applied to the Court on the first hearing of the wife's application to make

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absolute the rule *nisi*, and he then put forward certain grounds why he had not been present at the trial in January, and why I should hear his own petition and hear him in defence to his wife's petition. But he had not appealed from the decree *nisi*, nor had he appealed from the Chamber Judge's order, and in view of limitation he was out of time with the remedies which might at one time have been open to him. Further, as far as this Court is concerned, there still remained unsatisfied the Chamber Judge's order for security for costs. Accordingly, technically he was in contempt, and he could not strictly speaking be heard, more especially, as there was a judgment against him on his own petition dismissing his petition, and another judgment against him on the wife's petition for a decree *nisi*.

Now, under these circumstances, the position of a Matrimonial Judge in this country is an unfortunate one. In England, there is a King's Proctor whose duty it is to investigate any charge of adultery brought against a petitioner, and if necessary to move the Court to set aside the decree *nisi*. In India we have no King's Proctor. There was an impression, which I at one time shared on information erroneously given to me, that either the Advocate-General or the Government Solicitor performed the functions of the King's Proctor in this country. That is wrong. Mr. Justice Bayley in *Harriette A. King* v. *James S. King*[1] went carefully into this matter, and he explained that the Legislature deliberately struck out the provisions about the King's Proctor, when it passed the Indian Divorce Act governing our jurisdiction in India.

But that case is of further importance, because to some degree the learned Judge had the same problem to deal with as I have here. In the first place, is the

(1) (1882) 6 Bom. 416.

husband entitled to appear having regard to the orders already standing against him? Mr. Justice Bayley considered he could not. He held that the solicitor to the respondent, who was in fact acting at the instance of the respondent, was not entitled to intervene or to show cause against the decree *nisi* being made absolute; that a respondent had no right to show cause, and that he could not do indirectly through another what he was not permitted to do himself. Then on a subsequent date counsel in that case asked to have the decree *nisi* made absolute on the ground that under the circumstances no person had really shown cause under section 16 of the Indian Divorce Act against the decree *nisi* being made absolute. The Court, however, refused the motion, and adjourned the case directing that the petitioner should attend personally on a day specified, in order that the matters alleged in the affidavits might be investigated.

At page 451 the learned Judge said:

"And I think further that, having regard to the fact that the Courts in India are without the assistance of a Queen's Proctor, they are bound to exercise, in cases like the present, more than ordinary caution. I consider that, in view of the allegations contained in these affidavits, the Court would be disregarding its plain and obvious duty if it now blindly made absolute the decree *nisi* which has been obtained in this case. I, therefore, am unable to do so at present. I am of opinion that further inquiry is necessary as to whether the petitioner has been guilty of adultery. That inquiry cannot be effectually made merely by requiring affidavits to be filed by the petitioner or on her behalf. Her simple denial would be of little value, and I think, therefore, that, for the proper investigation of this case as it now presents itself, it is indispensably necessary that the petitioner should in person be present in Court for examination, and I accordingly make an order to that effect, and adjourn the case to the 4th August next."

What subsequently happened in that particular case I do not know. It was however approved in *Stephen* v. *Stephen*[1].

[1] (1890) 17 Cal. 570.

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Following out what I understand to be Mr. Justice Bayley's view as to what is right, I have endeavoured to carry out the inquiry which he has indicated. For that purpose I have first of all examined the petitioner on the allegations made in the proofs furnished to me by the husband. I have also heard the examination and cross-examination of such witnesses as the husband wished to be called, and I have also heard, as far as the wife is concerned, the evidence of Mr. David Hassett against whom allegations of misconduct with the wife were made by the husband... It now remains for me to decide whether or no the decree *nisi* should be made absolute.

That solely depends on this point as to whether the wife has been guilty of adultery. I am not trying the husband's petition. I cannot. That petition for divorce has been dismissed. It is not before me to-day and I cannot try it. Nor, as I will presently explain, is it essential for the Court to find with what particular man the wife committed adultery. And for this reason. The case is an extremely peculiar one in this respect, viz., that both husband and wife agree that no marital relations had existed between them for a long time before April 1920, which is the material date in this case.

The law as a general proposition lays down that in certain cases it will not allow evidence to be given by husband or wife as to whether or no they have had sexual intercourse. For instance, the law will not allow a married parent to bastardise his alleged child by stating that there was no sexual intercourse between the spouses. But on the other hand it is open to one of them to say that, by reason of absence abroad or for some other reason, there could have been no access between the parties during particular periods.

(See Halsbury, Vol. II, para 725; *The Poulett Peerage*[1] and *Burnaby* v. *Baillie*[2].) Therefore if a woman had a child during that period, it must have been by some father other than her husband. And where, as here, it is the part of the common story of the husband and wife that there was no sexual intercourse between them after a certain date, and therefore no access in fact, I think I must take that as being admissible for the purposes of the case which I have to try. No objection to it has been raised.

[His Lordship then discussed the evidence and proceeded:] My finding, therefore, is that the lady was guilty of adultery which resulted in that miscarriage, and that accordingly, being a guilty party, she is not entitled to relief by the Court. Of course the Court has in these cases a discretion to grant relief to a guilty party. But that discretion has to be exercised with exceptional care, and speaking generally, it is not open to a petitioner to bring a petition and deny that she has committed adultery, and then, after it is proved that she has committed adultery, to turn round and ask the Court to condone it and grant her a divorce. Therefore, even if any express application for the exercise of my discretion had been made to me, I should not have granted it, under all the circumstances of the case. In fact no such application was made to me.

I think, however, in fairness to the husband, that I ought to say this. I very much doubt, if it was open to me to re-hear the whole case against him, whether these charges of adultery and cruelty would be substantiated against him. It is only fair to say that he has made a favourable impression on my mind. He does not look to me to be a man who would commit cruelty, nor certainly, as far as the general allegations of misconduct are brought against him, does he look

(1) [1903] A. C. 395. (2) (1889) 42 Ch. D. 282 at p. 297.

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the sort of man who would run after every other woman he saw, such as was described to me in the evidence on the previous hearing.

The case, therefore, is left in this very unsatisfactory position that the petitions of both parties are dismissed, and they are left to make the best they can of this unhappy situation.

I can only hope that these Chamber orders for security for costs will be reconsidered in the future. I had occasion in another case of *Rodger* v. *Rodger*[1] to point out that, as far as I can see, the English authorities do not strike out a husband's petition, or

(1) Suits Nos. 1418 and 2915 of 1922. Judgment was delivered on January 12, 1923.

MARTEN, J.:—[After setting out facts the judgment proceeded:] It would appear that our practice as to ordering security is really taken from the English practice following on sections 7 and 34 of the Indian Divorce Act. But when one comes to the English Divorce Rules and in particular to Rule 158 (see Brown & Watts, 9th Edn., pp. 650 and 530), and also to the actual decisions of the Court, such as *Mayhew* v. *Mayhew*[1] and *Grinham* v. *Grinham*[2], it will be found that as reported they contain no such provision as I have seen in other orders made in this Court purporting to shut out the party not paying the security from being heard in his defence, or providing that his petition is to be dismissed in the event of non-payment. The remedy in the case of a husband respondent appears to be attachment for contempt of Court if he can pay but won't [See Halsbury, Vol. XVI, pp. 584, 585, note (*p*).] The remedy in the case of a husband petitioner in the event of non-payment is that his petition is stayed. Accordingly on general principles I shall follow in this case what I believe to be the practice in England and I shall not follow the form of order which I have seen in other cases and in particular in a recent case of *Codd* v. *Codd*[3] which is still pending before me. I think there is great force in Mr. Campbell's argument that probably those Chamber orders have been adopted by a mistaken application of Order XXV, Rules 1 and 2 of the Civil Procedure Code which apply only to cases where security for costs is required from, say, foreign plaintiffs and which have nothing whatever to do with matrimonial cases where quite different considerations apply.

(1) (1894) 19 Bom. 293. (2) [1916] P 1.
(3) (1923) 47 Bom. 664.

strike out his defence to his wife's petition, merely because he has failed to give security. What they do, as far as I can see, and as far as counsel's researches have so far been brought before me, is to stay the husband's petition, and as regards the wife's petition, to proceed against the husband for contempt, if he is proved to be able to pay but contumaciously refuses to do so.

Here we are dealing, as I have frequently pointed out before, with railway employees, whose salaries are between Rs. 300 and Rs. 400 a month, and who cannot be expected to find security for costs to the extent of thousands of rupees. So that these railway employees are feeling the same grievance and hardship

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But that still leaves one with the grounds on which the Court grants security for a wife's costs at all. The principle must, I think, be this that no person shall be deprived in this Court of having his case heard merely by reason of want of means. Accordingly the Court requires the husband to put his wife in funds to have either her own petition or her defence to his petition heard by the Court. But if in this country that salutary rule is to be twisted so that it becomes an engine of oppression against the husband and operates so that, though the wife may be heard, the husband cannot be for want of funds, then it seems to me that this is an entirely erroneous application of the real principle involved. Our object should be that both A and B should be heard, not that merely A or merely B should be heard and the other denied a hearing.

Then naturally in applying that principle, one has to consider the means of the parties involved. Unfortunately in this Court I am getting a considerable number of extremely troublesome cases, where the parties are employees in one or other of our railway companies and where their means are naturally limited. Speaking for myself, I am very distressed to see men squandering or being forced to pay away what are practically their life's savings in litigation of this painful character or for a matter of that in any litigation. I think the Courts should be very careful not to make oppressive orders against a husband, whether he is an innocent husband or a guilty husband, which have the effect of merely driving him into bankruptcy and causing utter ruin whatever the results of the case may be.

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which existed in England up to a few years ago when, as a result of strong representations, the procedure rules were altered by the Rule Authorities, with the approval of the Bar Council, so as to enable poor persons to obtain professional assistance in divorce cases on financial terms which they are in a position to comply with.

In the result I will rescind the decree *nisi* and dismiss the wife's petition. There will be no order for costs on either side.

Solicitors for the petitioner: Messrs. *Mirza and Mirza.*

Petition dismissed.

G. G. N.

ORIGINAL CIVIL.

1923.

February 26.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.

THE BOMBAY SIZING AND STORES SUPPLYING CO., APPELLANTS AND DEFENDANTS *v.* V. B. KUSUMGAR & CO., RESPONDENTS AND PLAINTIFFS*.

Civil Procedure Code (Act V 1908), Order XLI, Rule 27 and Order XLVII, Rule 1—Additional evidence—Appellate Court's power to take such evidence —Practice.

An application to the appeal Court for further evidence to be taken on the ground that it has recently been discovered, whether it is made before the appeal is heard, or before judgment is given, does not come within the provisions of Order XLI, Rule 27 of the Civil Procedure Code, 1908.

The words "or for any substantial cause" in sub-rule 1 (*b*) of the above rule do not give the Court jurisdiction to entertain an application for recording further evidence on the grounds which would enable an application to be entertained under Order XLVII, Rule 1.

Kessaeji Issur v. *Great Indian Peninsula Railway*(1), referred to.

*O. C. J. Appeal No. 87 of 1922 : Suit No. 1280 of 1919.

(1) (1907) L. R. 34 I. A. 115 ; 31 Bom. 381.