

costs of all proceedings in any manner it thinks fit. According to the applicant's contention, although the Court had full power to apportion costs, it had no power to issue execution in order that a successful party may get his costs given to him already by the Court.

In my opinion, therefore, there can be no doubt that the decision of the lower Court was right and that the Rule should be discharged with costs.

Rule discharged.

R. R.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Marten.

ROSE HILL, PETITIONER v. LUKE C. HILL, RESPONDENT⁵.

Indian Divorce Act (IV of 1869), sections 3 (9) and 15—Wife's petition for divorce—'Desertion,' meaning of—Cross-petition by husband—Whether foreigner can be added as co-respondent—Jurisdiction—Practice.

Generally, a guilty party in a matrimonial suit cannot obtain relief either by way of judicial separation or by way of divorce.

Otway v. Otway⁽¹⁾, followed.

The desertion required to be proved under section 10 of the Indian Divorce Act must be desertion within the meaning of section 3 (9) of that Act, viz., a wilful abstention by the husband against the wish of the wife.

Bai Kanbu v. Shiva Toya⁽²⁾, referred to.

A husband may, in his defence to the wife's petition, cross-petition for divorce against the wife on the ground of her adultery. A separate petition is not necessary.

N. v. N.⁽³⁾, followed.

A husband can in his petition for divorce add a foreigner as co-respondent.

Rayment v. Rayment⁽⁴⁾, referred to.

⁵O. C. J. Suit No. 1765 of 1922.

(1) (1883) 13 P. D. 141.

(2) [1913] P. 75.

(3) (1892) 17 Bom. 624.

(4) [1910] P. 271.

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BROACH
CITY
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January 16.

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PETITION for divorce by wife and cross-petition by husband.

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The petitioner, Rose Hill, was married to Luke C. Hill, the respondent, in Bombay, on 2nd June 1919. Both the parties were domiciled in British India, and lived together in Bombay after their marriage up to 27th June 1919, when the wife left the husband's protection alleging that the husband quarrelled with her and threatened her life. Later on, the husband took up employment as an Engine-driver on the East Indian Railway and went to live at Allahabad. The wife stated in her petition that she twice saw him at Allahabad but that he could not be reconciled with her and that it appeared to her that he would commit violence. In her petition for divorce, dated 22nd March 1922, she made specific charges of (1) desertion for a period extending over two years, (2) cruelty and (3) adultery. She also prayed for a decree for judicial separation in the event of the Court holding that she was not entitled to the relief by way of divorce. Maintenance was claimed *pendente lite* at the rate of Rs. 250 per month from 27th June 1919.

The husband filed a "written statement and cross-petition" in answer to the wife's petition, in which he denied the quarrel and threats, and alleged that his wife left him on 27th June 1919 without any justification and that for a time her whereabouts were unknown to him; and further that when she came to Allahabad in March 1920 he had offered her his protection but that she refused to stay with him there and returned to Bombay. He finally denied the allegations of cruelty and adultery.

Paragraphs 15 to 17 which were inserted in the husband's written statement by way of cross-petition were as follows:—

"15. Since the said petition was filed the petitioner on the cross-petition has learned that when the said petitioner disappeared on 27th June 1919 she

went to reside with the above-named co-respondent Nicola Kandelaft and lived with him as husband and wife in Bansilal House situate at Colaba in Bombay. The said Nicola was unmarried and no persons were living with him except the said petitioner.

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16. The said petitioner and co-respondent so lived together from 27th June 1919 till 8th December 1919 when they left together for Marseilles, along with a son (about 8 years old) of the said petitioner by her previous husband, by *S. S. Loyalty* and they engaged berths in the same cabin.

17. The petitioner on the cross-petition therefore says that the said petitioner committed adultery with the said co-respondent on diverse occasions between 27th June 1919 and 8th December 1919 the dates of which are unknown to the petitioner in the cross-petition, in Bansilal House in Bombay."

The husband accordingly prayed in his cross-petition (a) that the marriage between him and Rose Hill may be dissolved and (b) that the co-respondent, Nicola Kandelaft, may be ordered to pay the costs of the cross-petition.

Davar, for the wife.

Campbell, for the husband.

No appearance for the co-respondent in the husband's cross-petition.

Reference was made to the following authorities during argument:—

Bai Kanku v. Shiva Toya⁽¹⁾; *Ward v. Ward*⁽²⁾; *Sickert v. Sickert*⁽³⁾; *The Queen v. Leresche*⁽⁴⁾; *Thompson v. Thompson*⁽⁵⁾; *Williams v. Williams*⁽⁶⁾; *Rayment v. Rayment*⁽⁷⁾; *N. v. N.*⁽⁸⁾; *Otway v. Otway*⁽⁹⁾; Indian Divorce Act (IV of 1869), sections 3, sub-section (9), 14 and 15.

(1) (1892) 17 Bom. 624.

(5) (1858) 27 L.J., Pro. & Matri. 65.

(2) (1858) 27 L.J., Pro. & Matri. 63.

(6) (1878) 3 Cal. 688 at p. 691.

(3) [1899] P. 278.

(7) [1910] P. 271 at p. 284.

(4) [1891] 2 Q. B. 418.

(8) [1913] P. 75.

(9) (1888) 13 P. D. 141.

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MARTEN, J.—This suit consists of a petition for divorce by the wife against her husband on the ground of his alleged adultery, cruelty and desertion, and a cross-petition brought by the husband against the wife and a co-respondent named Nicola Kandelaft asking for a divorce on the ground of the wife's adultery.

On the wife's petition being called on and after I had read the two petitions, I asked counsel for the wife whether he was in a position to put his client into the box to deny the accusations against her which had been made in the husband's petition. They included in particular an allegation that the wife had travelled with the co-respondent in the same cabin from Bombay to Marseilles by the steamer *Loyalty* in December 1919 and that the only other occupant of that cabin was a small boy aged eight or thereabouts. Mr. Davar admitted that his client had travelled on that steamer and, after consulting his client, he told the Court that he was not in a position to call his client to contest the husband's allegation against her in that respect.

There then remained the allegations which she made against the husband on the ground of his desertion and cruelty. As regards the question of desertion, counsel for the husband took the point that the desertion required to be proved under the Act was desertion within the meaning of section 3, sub-section (9), viz., an abandonment against the wish of the person charging it. He pointed out that here the wife left of her own wish and not of her husband's wish. Moreover, it was clear from certain correspondence which took place almost immediately, between her pleader and her husband and from a letter written by the husband to the wife that it was in no way his wish that she should leave the house in this way. I should explain that the marriage took place on June 2 and that the wife left her husband on June 27. On putting

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this to counsel for the wife and asking him whether he wished for leave to amend, counsel after consulting his client said that the real reason for leaving him was something different from what was stated in the pleadings, and that he had no objection to his client's petition being dismissed.

However, as the lady had charged cruelty I also considered whether there was any ground open to her there. This raised another point on the authorities, viz., that, speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of a divorce. The leading case on that point is *Otway v. Otway*⁽¹⁾. Similarly as regards the point I have mentioned about the desertion, viz., that it must be a wilful abstention by the husband against the wish of the wife, I may refer, so far as our own Courts are concerned, to *Bai Kanku v. Shiva Toya*⁽²⁾.

However, at this stage of the argument counsel for the wife intimated that he was not in a position to controvert the propositions which had been advanced by counsel for the respondent and accordingly the petition could be dismissed. I accordingly directed the wife's petition to be dismissed and made no order as to costs, the husband not asking me to make any order for costs, nor the wife's counsel either.

That left me with the husband's petition for divorce. On that, counsel appears for the wife but does not defend the suit. I may, however, say at once that I am satisfied there is no collusion or anything of that sort on the evidence before me. There is one technical point, and that is that the cross-petition has been brought not by a separate petition on a separate document, but by a further statement added to the original

(1) (1888) 13 P. D. 141.

(2) (1892) 17 Bom. 624.

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defence to the wife's petition. However, section 15 of the Indian Divorce Act assists the husband in this respect. There is also a decision of Sir Samuel Evans in *N. v. N.* ⁽¹⁾ in which the point raised was whether a husband who had objected successfully to his wife obtaining a divorce on the ground of want of jurisdiction having regard to the domicile of the parties, could afterwards in answering his wife's amended petition for a judicial separation put in an answer claiming damages. The English Registrar considered that a separate document was necessary, but the learned President ruled otherwise, and further held that there was a sufficient service of the cross-petition on the wife by the fact that the husband had given a copy of his answer to the wife's solicitors. As far as the question of service is concerned, as we have counsel appearing for the wife, there is no difficulty on that point as regards her. And there is an affidavit proving service by registered post on the co-respondent in accordance with the practice of this Court.

I should mention one word as regards the co-respondent. What his precise nationality or domicile is seems to be open to some doubt. He can hardly be a British subject, and at the date of this petition he was apparently living in Paris. A point has been raised as to whether there is jurisdiction in the Court to add a foreigner as co-respondent. That matter was considered by Sir Samuel Evans in *Rayment v. Rayment* ⁽²⁾, and he came to the conclusion that the Court had that jurisdiction. As a matter of common sense that decision must be right. It would seem absurd to hold that a wife can commit adultery with impunity, provided she is only careful enough to select a foreigner to consort with. When one remembers that as far

⁽¹⁾ [1913] P. 75.

⁽²⁾ [1910] P. 271.

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as the English Courts are concerned, Scotsmen and Irishmen are considered foreigners, such absurdity becomes all the more apparent.

, therefore, consider that there is ample jurisdiction in this Court to add a foreigner as co-respondent. Of course that point is entirely different from the question whether our High Court has jurisdiction to grant a divorce where the parties are domiciled in England or elsewhere abroad. But the facts here are perfectly clear that the petitioner was and is domiciled in India; he was born in India; he has lived all his life in India; and the marriage was in Bombay. The wife moreover is still living in Bombay according to her own petition. Therefore the matrimonial domicile was and is clearly Indian, and so this Court is in no way affected by the recent decision in England on the jurisdiction of the Indian Courts.

I think I have now disposed of the several technical points that were raised on this petition, and it remains to consider whether the charge against the wife has been proved. Counsel for the wife admitted yesterday that she was on this boat with the co-respondent, and that they occupied the same cabin. But quite apart from admissions of counsel, an official in the steamship company, that owned this particular steamer, has been called. He produced the original passenger tickets issued to the co-respondent and the respondent. He also produced a passenger register showing the passengers, who eventually travelled by this boat. Having regard to the peculiar name of the co-respondent and the name of the wife and the fact that her son by her former marriage is named Jules, I think the identity of the persons named in these records is clearly established as being that of the wife and the co-respondent.

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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. *Subnis & Goreyan-
kar*.

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

G. G. N.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Marten.

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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.