Bombay High Court
Wilhelmina Codd vs Bertie Elijah Codd on 26 February, 1923
Equivalent citations: (1923) 25 BOMLR 339, 84 Ind Cas 71
Author: Marten
Bench: Marten
JUDGMENT Marten, J.

1. 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 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 coats. 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.

2. 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 (1882) I.L.R. 6 Bom. 416 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.

3. 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 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.

4. 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 oases 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.

5. What subsequently happened in that particular case I do not know. It was however approved in Stephen v. Stephen (1880) I.L.R. 17 Cal. 570.

6. Following out what I understand to be Mr. Justice Bayley's views 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 rue by the husband. I have also heard the examination and crossexamination 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.

7. 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 today 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.

8. 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 (1903) A.C. 395 and Burnaby v. Baillie (1889) 42 Ch. D. 282, 297). 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 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.

9. His Lordship here discussed evidence and went on. 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 the 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.

10. 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 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.

11. 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.

12. 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 Suits Nos. 1418 and 2915 of 1922 to point out that, 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, 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.

13. Here we are dealing with, as I have frequently pointed out before, railway employees, whose salaries are between Rs. 300 to 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 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.

14. 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.