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*In re* PESTANJI & EDALJI S. KA'KA'.

in its civil, criminal, and insolvency jurisdictions—showing in many instances a painful absence of mercantile morality, and an utter recklessness with regard to the consequences which failure in speculations would ensure—I think I cannot do otherwise than mark with my severe displeasure the conduct of the insolvents in the present case, in hopes—I admit, but slight—that it may act as a warning to others, and at the same time show that to obtain a final discharge in the nature of a certificate is not a matter of course. I adjourn the grant of the certificate under Sec. 60 for a period of eighteen months.

Attorneys for the opposing creditors: *Acland, Prentis, & Bishop.*

Attorneys for the insolvents: *Hearn, Cleveland, & Peile.*

*Original Suit No.* 394 *of* 1870.

March 31.

JOHN G. .....*Petitioner.*
MARY ANNE G. .....*Respondent.*

*Dissolution of Marriage—Adultery of the Petitioner during Marriage—Discretion—Act IV. of* 1869, *Sec.* 14—*Indian Divorce Act.*

The Courts in India will adopt, as a guide in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by Sec. 14 of the Indian Divorce Act, the principles laid down in the English decisions with regard to the corresponding section in the English Act (20 & 21 Vict., c. 85, s. 31).

The discretion to be exercised under Sec. 14 of the Indian Divorce Act must be a regulated discretion. The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable, or that it has been more or less frequent. There must be special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner.

THIS was a petition for dissolution of marriage under the Indian Divorce Act (IV. of 1869). The petition (omitting the allegations with reference to the person who had in the first instance been joined as a co-respondent) showed—

That the petitioner was, on the 12th of October 1863, lawfully married to Mary Anne G., then Mary Anne C., spinster, at Puṇá, in the diocese of Bombay.

That from his said marriage the petitioner lived and cohabited with his said wife at Puṇá and at Deesa, and lastly at Puṇá, within the presidency of Bombay, and that the petitioner and his said wife had issue of their said marriage three children, of whom one son only survived, aged four years and four months.

That during the seven months immediately preceding the 30th day of June 1868 the petitioner was in Abyssinia on field service.

That since the said 30th day of June the said Mary Anne G. had been, and still was (as the petitioner was informed and believed), leading a life of prostitution, and then resided in a house at Puṇá in a locality which is a common resort of prostitutes.

That no collusion or connivance existed between the petitioner and his said wife for the purpose of obtaining a dissolution of their said marriage, or for any other purpose.

The petition prayed the court to decree a dissolution of the said marriage.

An office copy of the petition, with the summons, was, by Green, J. (who accepted the petition), directed to be served on the respondent and original co-respondent, to whom also notices were respectively given to file written statements.

The petition came on for hearing on the 20th of March 1871 before GREEN, J., when evidence was given of the facts detailed in the petition. The substance of the evidence is set forth in the judgment of the court.

*Macpherson* for the petitioner.

There was no appearance for the respondent.

*Cur. adv. vult.*

March 31st. GREEN, J.:—This is a petition, under Act IV of 1869 (the Indian Divorce Act), by a husband praying for dissolution of marriage with his wife. The petitioner alleges

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that he was married to the respondent within this presidency in the month of October 1863, and after such marriage cohabited with her, also within this presidency, and has had issue of such marriage—three children, of whom one has survived; that during the seven months immediately preceding the 30th of June 1868 he was absent from Bombay on military service; that since the 30th of June 1868 the respondent has been leading a life of prostitution, and now resides in a house in a locality which is the common resort of prostitutes; and that no collusion or connivance exists between him, the petitioner, and his said wife for the purpose of obtaining a dissolution of the said marriage, or for any other purpose.

The petition as originally filed (which was on the 18th of June 1870) named a third person as co-respondent, with whom it was alleged the respondent had, during the said period of seven months immediately preceding the 30th of June 1868, committed adultery. By an order made in chambers by Mr. Justice Bayley on the 14th of January 1871, with the consent of the co-respondent (who had appeared to the petition), it was ordered that the petition be amended by striking out the name of the co-respondent, with such portions of the petition as related to him or to his acts. The application for such order for the amendment of the petition was supported by an affidavit of the petitioner, that the persons from whom he derived the information on the ground of which the allegations in his petition affecting the co-respondent were made were not prepared to repeat on oath the statements they had made to the petitioner, and that the petitioner knew of no person with whom the adultery of the respondent had been committed, though he was prepared to prove the charges of prostitution and adultery against the respondent by himself, the petitioner, and other witnesses. The order was made under Sec. 11 of the Act, which provides that when a petition is presented by the husband the alleged adulterer is to be made a co-respondent, unless the petitioner is excused from so doing by the court on (amongst others) the following

grounds :—that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed.

At the hearing, which took place on the 20th of March instant, the respondent did not appear, and was not represented by counsel or otherwise. The marriage having been proved, the petitioner offered himself as a witness in support of the allegations of the petition, and produced certain letters written to him by the respondent in the course of last year. The petitioner deposes, and I see no reason to doubt his evidence, that on the day after his return, on the 30th of June 1868, from his absence on military service, the respondent, in answer to his inquiries, made certain statements which in my opinion constitute an admission that during such absence she had committed adultery with persons not named. The five letters of the respondent to the petitioner written during the course of the last year must, I think, be construed as an admission on her part that she had been unfaithful to her husband, and in them she asks his forgiveness and to be allowed to return to him. The foregoing evidence, however, though going to prove that before the 30th of June 1868 the respondent had been guilty of adultery, does not establish the allegation in the petition as amended, that since that date the respondent has been leading a life of prostitution. The evidence on which the latter allegation is sought to be proved is the evidence of the petitioner, and of an officer of the district court of the place where the respondent has been residing, and by whom the summons and petition were served on her. It may be observed that the petitioner would not in England till recently* have been a competent witness to prove his wife's adultery; but by Sec. 51 of the Indian Act "any party may offer himself or herself as a witness, and shall be examined and may be cross-examined and re-examined like any other witness." These two witnesses, however, the petitioner and the officer of the district court, depose that for some period (and which as to part of it must, I think, be taken to have preceded in

* See 32 & 33 Vict., c. 68, and 33 & 34 Vict., c. 49.

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time the institution of the suit, though as to this point the evidence of the petitioner is not by any means clear) the respondent has been living in a row or cluster of houses almost all occupied by prostitutes or kept women. If it had been necessary to decide the case on the question whether the respondent had been proved, according to the allegation of the petition, to have been leading a life of prostitution during the period between the 30th of June 1868 and the date of filing the petition, namely, the 18th day of June 1870, I should have felt great difficulty in coming to the conclusion that that allegation had been sufficiently established by the foregoing evidence. I cannot help believing that more direct and satisfactory evidence of the allegation might have been obtained than has been given, and in matters of so important a nature as a dissolution of marriage it is surely not an unreasonable requisition that persons seeking such relief must prove the facts on which their right to a decree is founded, by the best evidence which the circumstances of the case will admit of. I am of opinion, however, that at any rate enough has been established in evidence by the petitioner as would warrant him in asking the court, under Sec. 54, to adjourn the hearing and take further evidence.

But the chief difficulty I have felt is whether the petitioner is, as the phrase is, *rectus in curiâ*, or whether he has not by his conduct debarred himself from obtaining from the court a dissolution of his marriage with the respondent? By virtue of one of the provisos in Sec. 14 of the Act, the court shall not be bound to pronounce a decree dissolving a marriage on the ground of the adultery of the respondent, if it finds that the petitioner has during the marriage been guilty of adultery. In the present case the petitioner admitted, in answer to a question put by the court, that he had committed adultery since he had separated himself from the respondent, but added—with the intention, I suppose of excusing or palliating his act—that it was "over two years after turning her" (the respondent) "away." I should not have thought it proper for the Court, of its own motion, to put such a question, but having regard to certain allegations in letters of the

respondent which the petitioner himself produced and put in evidence, I considered it right, especially in the absence of the respondent, to inquire as to their truth. On this admission a very serious question arises, whether the present is a proper case, even supposing the evidence to have satisfactorily established the allegations in the petition, for granting to the petitioner the decree he asks. The Act purports to amend the law relating to the divorce of persons professing the Christian religion, and Sec. 7 enacts that, subject to the provisions contained in the Act, the court shall, in all suits and proceedings thereunder, act and give relief on principles and rules which, in the opinion of such court, are as nearly as may be conformable to the principles and rules on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief. The words of the proviso in question in Sec. 14 of the Act are identical with those of one of the provisos in Sec. 31 of the English Divorce Act (20 & 21 Vict., c. 85). The latter proviso has been the subject of several decisions in the English Court for Divorce and Matrimonial Causes, and as the Indian Divorce Act of 1869 authorises relief to be granted under it only in cases where the petitioner professes the Christian religion, there is no reason that I can see for not adopting, as a guide in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by the Indian Act, the principles laid down in the English decisions with regard to the corresponding section in the English Act. The English Court for Divorce and Matrimonial Causes has recognised as authorities in this matter the decisions of the Ecclesiastical Courts. In the case of *Goode* v. *Goode and Hamson* (*a*), Sir Cresswell Cresswell expresses himself thus: "It seems plain to me that the Legislature confided to the judicial discretion of the Court all such matters as are described in the proviso (*i.e.*, in Sec. 31 of the English Act), and with reference to them it seems to place the Court in the same position when dealing with petitions for dissolution of marriage as the Ecclesiastical Court was in with regard to

(*a*) 2 Sw. & Tr. 258.

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suits for divorce *a mensâ et thoro*." Now it was well settled in the Ecclesiastical Court that, as a general rule, a divorce *a mensâ et thoro* on the ground of adultery would not be granted where the party suing had been guilty of a like violation of the marriage vow. As Lord Stowell says in *Beeby* v. *Beeby* (*b*): "But a plea in bar has been given—a plea of recrimination or *compensatio criminum*—a set-off of equal guilt on the part of the husband. The doctrine that this, if proved, is a valid plea in bar has its foundation in reason and propriety; it would be hard if a man could complain of the breach of a contract which he has violated, if he could complain of an injury when he is open to a charge of the same nature." It was argued that the offence of the husband had been condoned by the wife, and that such condonation prevented such offence from being effectually recriminated. As Lord Stowell did not consider that there had been condonation, it was not necessary to decide the question; but he rather indicates his opinion that even had there been condonation of the husband's offence, the fact of such offence would have prevented him from being *rectus in curiâ* so as to be entitled to a sentence of divorce. In *Anichini* v. *Anichini* (*c*), however, Dr. Lushington considered the point as not decided by Lord Stowell, and said that he could not go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife under any circumstances which could be supposed. The effect of Dr. Lushington's decision is stated thus by Sir Cresswell Cresswell in the case of *Goode* v. *Goode and Hamson*, above cited: "I apprehend, therefore, that the learned Judge did not mean to decide that condonation was a complete legal answer to the plea imputing adultery to the husband, but that in such cases the question is one to be dealt with by the Judge according to his discretion, taking into consideration the peculiar circumstances of each case." In the case before the court this question of condonation does not arise, as it is distinctly in evidence that conjugal cohabitation has never been resumed or continued

(*b*) 1 Hagg. Ec. Rep. 790. (*c*) 2 Curt. 210.

(and this alone, under Sec. 14 of the Indian Act, amounts to condonation of adultery) between the parties to the suit since the 30th of June 1868. The cases cited are, however, pertinent as illustrations of the strictness with which the principle has been maintained that relief is not given to one who is not *rectus in curiâ*, or, as it is sometimes expressed, does not come to the court with clean hands.

Among the cases in which the English Divorce Court has been called on to exercise the judicial discretion vested in it by Sec. 31 of the English Act (which is almost word for word identical with Sec. 14 of the Indian Act) are the following:—*Pearman* v. *Pearman* (*d*), *Lautour* v. *Lautour and Weston* (*e*), and *Morgan* v. *Morgan and Porter* (*f*). In *Pearman* v. *Pearman*, the jury having found that the wife (the respondent) had been guilty of adultery, and the husband (the petitioner) of cruelty towards his wife, the court considered that the cruelty of the petitioner (which is one of the cases mentioned in Sec. 31 in which the court may refrain from pronouncing a decree of dissolution of the marriage), not having caused the misconduct of the wife, but rather having been itself caused by her drunken habits, was not a ground for refusing the relief sought. However, in the only case which I am aware of in which Sec. 14 of the Indian Divorce Act has been considered by one of the High Courts of India, namely, *Gordon* v. *Gordon and Saran* (*g*), it appears to have been held that the court has discretion to refuse a decree for divorce where the petitioner has been guilty of cruelty, although the cruelty may have been condoned.

In *Lautour* v. *Lautour and Weston*, the petitioner had in 1838 obtained a decree from the Ecclesiastical Court of divorce *a mensâ et thoro* on the ground of the adultery of his wife, the respondent. In April 1859 he filed a petition in the Divorce Court for dissolution of his marriage, and on the 18th of April 1861 a decree *nisi* for dissolution of the marriage was pronounced. On the 6th of June 1861 Her

(*d*) 1 Sw. & Tr. 601. (*e*) 2 *Ibid.* 521. (*f*) L. Rep. I. Pr. & D. 644.
(*g*) 3 Beng. L. Rep., O. C. J. 136.

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Majesty's proctor intervened, and pleaded (amongst other things) that divers material facts respecting the conduct of the petitioner and respondent had not been brought before the court, and that at the time of presenting his petition, and for many years previous, the petitioner had been living in adultery. The adultery so pleaded appears to have been continuous and habitual, but to have been subsequent in time to the adultery and elopement of the wife. The truth of the matter pleaded was not controverted. The Judge Ordinary says: "I am asked to put a construction on Sec. 31 of the statute, and to say by what rule I am to be guided in the exercise of the discretionary power given me by that section. The only rule that I can give is that I will form a judgment, according to the best of my ability, of the circumstances of each case that is brought before me, endeavouring, so far as I can, to act upon the principles which have been recognised in the Ecclesiastical Court, and which have guided that court in former times when it decided questions of this sort." With reference to the argument urged on behalf of the petitioner, that his adultery was subsequent to that of his wife, and that it was only after obtaining a divorce *a mensâ et thoro* from her that he formed the connection with the other woman, with whom he had lived faithfully, and by whom he had had issue, the Judge Ordinary, after stating that he did not entertain a moment's doubt that the petitioner was not to be deemed a person for whose benefit the Act was passed, observes as follows:—"I presume the Legislature introduced the clause giving a discretionary power to the court in order to meet the case of some temporary lapse from purity of conduct on the part of a married man which might have happened years before, and might have been, as Dr. Lushington expressed it, comparatively venial." And again: "I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman because his wife has deserted him." The decree *nisi* was reversed, and the petition dismissed, with costs of the Queen's proctor intervening.

In *Morgan* v. *Morgan and Porter*, the petitioner (the hus-

band) sought dissolution of his marriage on the ground of the respondent's adultery with the co-respondent, which occurred between August 1866 and January 1868. The respondent pleaded the adultery of the petitioner in 1856, 1857, and 1858, and the jury found that both the respondent and the petitioner had committed adultery. Lord Penzance, the Judge Ordinary, in his judgment defines three classes of cases in which the court has recognised the propriety of exercising the discretionary power given by Sec. 31 of the Act to decree dissolution of the marriage, notwithstanding that the petitioner has been guilty of adultery. The first class consists of such cases as the following:—where the petitioner had married again, believing, contrary to the fact, that his wife was dead, and the adultery recriminated was intercourse with such second wife before the petitioner knew that the first wife was still alive. The second class consists of cases such as the following:—where the adultery recriminated was caused by the acts and conduct of the respondent, as when the adultery alleged against the complainant (who was the wife) was proved to have been the result of the respondent (the husband) having by threats and violence forced his wife to lead an immoral life. The third class consists of cases such as *Anichini* v. *Anichini*, where the petitioner had committed adultery to the knowledge of the respondent, who had long since pardoned and condoned it. The learned Judge considers that besides these three classes there may be, and probably are, others in which the discretion may fitly be exercised in favour of a petitioner. But he says: "In cases where the adultery complained of has no special circumstances attending it, and no special features placing it in some category capable of distinct statement and recognition, there would, I think, be great mischief in this court assuming to itself a right to grant or withhold a divorce upon the mere footing of the petitioner's adultery being, under the whole circumstances of each case, more or less pardonable or capable of excuse. A loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon to intrust to any court, still more so to a single Judge. Its exercise is likely

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to be the refuge of vagueness in decision, and the harbour of half-formed thought." He refused to grant a decree, considering that the mere lapse of time (about twelve years) since the occurrence of the petitioner's adultery was not enough to justify the exercise of the court's discretion in his favour.

Now in the present case I am willing to believe that the petitioner was not aware of the legal bearing of the fact of his own adultery, and I cannot suppose it was ever communicated by him to his legal advisers, or that they were aware of it till it was admitted by him in answer to a question by the court. The concealment of such a material fact, bearing on the question of the exercise of the court's discretionary jurisdiction, would, in my opinion, if intentional and conscious, have in itself gone far to deter the court from granting the relief prayed. I cannot, however, discover any ground for regarding this legal ignorance of the petitioner—supposing it to have existed—nor the fact (if true) that only one act of adultery has been committed by the petitioner, nor the fact that it took place after his separation from the respondent, as being such "special circumstances attending the adultery, or special features placing it in some category capable of distinct statement and recognition," as to make the case a proper one for granting the relief prayed. In *Lautour* v. *Lautour and Weston* the petitioner's adultery was committed after his wife had committed adultery and had eloped from him, and indeed after he had obtained a decree of divorce *Ɓamensâ et thoro* from his wife on the ground of her adultery, and yet the court held that he had by his own conduct prevented the court from exercising its discretion in his favour. Except in this respect, that in the present case the adultery of the petitioner appears to have been occasional or perhaps singular, whereas in *Lautour* v. *Lautour* it had been continuous and habitual, I do not see any distinction between the two cases. It would be impossible to lay down any satisfactory principle of decision derived from a consideration of the greater or less number of acts of adultery committed by the petitioner as to say that one, three, or five acts should not bar the remedy, but that ten, fifteen, or twenty should.

Feeling as I do that to grant a decree of dissolution in the present case would be to go beyond what has been done in any case that I have been able to find or am aware of, I must refuse to make the decree prayed, and dismiss the petition. I think I ought, in conclusion, to express my obligation to the learned counsel for the petitioner (who did all that the facts of the case allowed in support of his client's cause) for the assistance he has afforded to the Court in the consideration of the present case. 187.1 JOHN G. *v.* MARY ANNE G.

Attorney for the petitioner : *J. Cleary.*

## PIRBHA'I KHIMJI v. THE BOMBAY, BARODA, AND CENTRAL INDIA RAILWAY COMPANY. April 1.

*Removal of Cause from Small Cause Court*—Certiorari—*Reasons for Removal—Purposes of Justice—Inability of Small Cause Court to issue Commission—Superintendence of Small Cause Court by High Court—Act IX. of* 1850, *Sec.* 54—*Letters Patent of High Court, Cl.* 13.

The Bombay Court of Small Causes is subject to the superintendence of the High Court within the meaning of Cl. 13 of the Letters Patent of the High Court, and the latter has, therefore, power, for purposes of justice, to remove a case from the Small Cause Court, and itself to try and determine such case.

The inability of the Small Cause Court to issue a commission to examine for the defence witnesses residing outside its jurisdiction, though not in general, may under peculiar circumstances be a good ground for granting an order to remove a case from the Small Cause Court into the High Court.

Terms upon which such order will be granted.

ON the 16th of March 1871 *McCulloch* moved before GREEN, J., for a rule *nisi* for a writ of *certiorari*, or for an order under Cl. 13 of the Amended Letters Patent of the High Court (1865) calling upon Pirbhái Khimji to show cause why the proceedings in the Court of Small Causes of Bombay in Suit No. 4350 of 1871 should not be removed into the High Court.

The rule was moved for upon the affidavit of Charles Albert Winter, a partner in the firm of Messrs. Keir, Prescot, and Winter. The affidavit stated that on the 24th of August 1870 a suit, No. 18,758, was instituted in the Court of Small