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We think, therefore, that the first question should be answered in the affirmative assuming the case not to be governed by section 117 of the Transfer of Property Act. To the second question, *viz.*, whether the disclaimer contained in Exhibit 11 constituted a disclaimer of title, the only answer we can give to it is that it depends upon the construction of Exhibit 11 read in connexion with the evidence in the case.

The Full Bench having sent back the case to the Division Bench which had made the reference to the Full Bench for final disposal, the following judgment was given :—

Judgment.—The First Class Subordinate Judge A. P. has not found as to the nature of the defendant's tenure, and it, therefore, is impossible for us, having regard to the judgment of the Full Bench, to determine whether the statements in Exhibit 11 constitute a disclaimer of title such as to enable the plaintiffs to recover possession without notice to quit.

Under these circumstances we must reverse the decree of the lower appellate Court and remand the appeal for a fresh decision on the various points which arise, including the question as to the plaintiffs' right to recover rent for the years in dispute. Costs to follow the result.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, and Mr. Justice Fulton.

1895. *March* 12.

KYTE, PETITIONER, *v.* KYTE, RESPONDENT, AND COOKE, CO-RESPONDENT.*

Divorce—Husband and wife—Indian Divorce Act (IV of 1869*)—Jurisdiction of District Court—Place of marriage—Marriage by petitioner before decree of District Court confirmed by High Court—Ignorance of law—Damages against co-respondent—Practice.*

Under section 2 of the Indian Divorce Act (IV of 1869) a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties.

* Civil Reference, No. 9 of 1894.

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After the District Court had passed a decree for dissolution of marriage, but before the confirmation of the decree by the High Court, the petitioner, in ignorance of the law, married another woman, but he ceased to cohabit with the woman on discovering his mistake. Under the circumstances the High Court made the decree absolute, holding that under section 14 of the Indian Divorce Act (IV of 1869) it had a discretion to do so.

The decree having awarded damages against the co-respondent, and he not having appealed on the question of damages, it was contended that the High Court could only deal with that part of the decree which dissolved the marriage.

Held, under the Indian Divorce Act (IV of 1869), that the Court had the fullest power to deal with the case according as justice might require, including the award of damages by the Court below.

Ravenscroft v. *Ravenscroft*(1) followed.

THIS was a reference by W. H. Crowe, District Judge of Poona, submitting for confirmation his decree in Suit No. 2 of 1894 under section 17 of the Indian Divorce Act (IV of 1869).

Suit by the plaintiff for dissolution of his marriage on the ground of his wife's adultery with the co-respondent, or, in the alternative, for judicial separation on the ground of desertion. He also claimed damages from the co-respondent.

The respondent did not appear in the lower Court.

The co-respondent denied the adultery charged.

The Judge found that the alleged adultery with the co-respondent was proved; that the petitioner was entitled to a decree for dissolution of marriage, and that he was entitled to damages to the extent of Rs. 500 from the co-respondent. The following are extracts from his judgment:—

"This is a suit brought by petitioner C. J. Kyte for a dissolution of his marriage with K. Kyte on the ground of her adultery with the co-respondent T. C. Cooke. The fact of the adultery having been committed by the respondent is not disputed. She admits in her deposition that she was married on the 9th February, 1891; that she left her husband about four months after, that she returned to him subsequently for a few days at a time, and finally left him on the 15th October, 1891. She admits also that she was delivered of a child in the month of January, 1893, in Bombay. She denies that it is the child of the co-respondent, as she states other friends visited her and came up to her sitting-room after her shop was closed. The birth of the child fifteen months after the respondent left the petitioner is conclusive proof that adultery has been committed. The question now arising is whether it is proved that the respondent committed adultery with the co-respondent. * * * * * The

(1) L. R., 2 P. and M., 376.

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acts of familiarity of the co-respondent and the daily intimacy deposed to, afford the strongest grounds for believing that adultery must have been committed. The petitioner under section 34 of the Divorce Act has claimed Rs. 5,000 as damages. It has also been contended that the petitioner is not entitled to any damages, as there is no proof that he has suffered any loss in reputation, comfort, happiness, &c., and that the parties had lived separate for so long a time, and further that there has been unjustifiable delay in bringing his petition. I do not find that there is any unreasonable delay in seeking the aid of this Court. The child was born in January, 1893, and the petition was filed within a year. The separation of the parties was due to the respondent leaving her husband's roof. There is nothing to show that he consented thereto. There is no doubt that the loss of the companionship of his wife must have caused the petitioner considerable mental pain and disturbance, and his domestic happiness has been destroyed. The measure of damages in these cases is the value of the wife. Looking at all the circumstances as disclosed by the correspondence between the petitioner and the respondent during the short period of their married union, I am of opinion that the sum of Rs. 500 will be an appropriate amount to be paid by the co-respondent to the petitioner, and I decree accordingly that the petitioner is entitled to a dissolution of his marriage with the respondent and to recover the sum of Rs. 500 from the co-respondent as damages. Costs on co-respondent. The decree is subject to the decision of the High Court."

The case came up for confirmation under section 17 before a Full Bench consisting of Sargent, C. J., and Jardine and Fulton, JJ.

Mahádeo V. Bhat appeared for the co-respondent:—There is no evidence produced to prove the marriage and the place where it took place. No issue was raised with respect to the fact of the marriage.

[FULTON, J.:—No one denied the marriage.]

Marriage must be proved. Non-denial or even mere admission of marriage would not do—*Bái Kanku* v. *Shiva Toya*(1).

[SARGENT, C. J.:—Strict proof of marriage is not necessary. The mere fact that people apply to a Court for divorce raises a presumption of marriage.]

This is not a case for damages. Damages are awarded "for the injury done to the husband in alienating his wife's affections, destroying the comfort he had from her company and raising children for him to support and provide for." See Mayne on Damages, p. 490. Here the evidence shows that the petitioner and his wife had not lived happily together before the co-respondent knew them. No damages should, therefore, be awarded.

(1) I. L. R., 17 Bom., 624.

The respondent, who appeared in person, being at this stage called on to state what she had to say, informed the Court that the petitioner had married a second wife since the decree, and she produced papers to support her statement. The petitioner's pleader, who was not aware of this fact, thereupon asked for time to inquire into the matter. The Court granted a fortnight's adjournment. The petitioner in the meanwhile filed an affidavit stating that he was ignorant that he could not re-marry before the confirmation of the decree by the High Court, and that as soon as he came to know that it was illegal for him to do so, he had ceased cohabiting with his second wife.

Mánekshâh J. Taleyárkhán for the petitioner:—The petitioner has filed an affidavit alleging complete ignorance of law forbidding him to marry again before the confirmation of the District Judge's decree by the High Court. He has ceased to cohabit with the woman whom he has married.

Under these circumstances the decree should be made absolute. It is within the discretion of the Court to do so—*Wickham* v. *Wickham*[1].

The question of damages cannot be gone into in this Court, as the co-respondent has not appealed against the award of damages (sections 17, 34, 39 and 55 of the Indian Divorce Act IV of 1869). There is no reason to interfere with the order of the lower Court. In England the damages are assessed by the jury, and they are not interfered with.

Mahádev V. Bhat in reply:—The order awarding damages is part and parcel of the decree for dissolution of marriage. This Court has to examine the decree as a whole. No appeal is necessary against the order for damages under the Divorce Act.

The judgment of the Full Bench was delivered by

JARDINE, J.:—The District Court took no evidence as to the place of the marriage of the petitioner and the respondent. It had, however, jurisdiction under section 2 of Act IV of 1869 to make a decree for dissolution upon being satisfied of the adultery being committed in India.

Two points of law arose at the hearing, which, following section 7 of the Act, we determined upon the practice of England. It was objected for the respondent that, since the District Court passed its decree, the petitioner went through a form of marriage

(1) 6 P. D., 11.

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with another woman. He has filed an affidavit, alleging *bonâ-fide* ignorance of the law, and that on discovering his mistake he ceased to cohabit with that woman. The question is whether the Court should refuse now to make the decree absolute. This is within its discretion—*Noble* v. *Noble*(1); *Wickham* v. *Wickham*(2). Looking at the publicity of the fact of the marriage, we give credence to the statement of the petitioner that he acted *bonâ fide*, believing that he had been released by law from his previous wife, and with an absence of any intention to commit adultery. The adultery ought not, therefore, to stand in the way of a decree absolute. Our discretion under section 14 of the Act is similar to that of the English Court under section 31 of 20 and 21 Vic., c. 85.

The other point of law was raised by Mr. Mánekshâh for the petitioner, to the effect that as the co-respondent had not appealed against the award of damages, this Court could only deal with the part of the decree which dissolves the marriage. Sections 17, 34, 39 and 55 of the Indian Act were referred to and compared with 20 and 21 Vic., c. 85, sec. 33, and 23 and 24 Vic., c. 144, sec. 7. We ruled—following the Judge Ordinary in *Ravenscroft* v. *Ravenscroft*(3)—that the intention of the Act of 1869 was to give the Court the fullest power to deal with the case according as justice might require, including the award of damages by the Court below.

The merits of the case are to be considered in two aspects. First as regards the respondent. There is evidence that in January, 1893, she gave birth to a child, which must have been conceived in adulterous intercourse, a fact substantially admitted. The decree for dissolution must, therefore, be made absolute.

Then we have to consider the case of adultery as regards the co-respondent. There is evidence of a long continued familiarity, extending over periods both before and after the birth of the child. The respondent deposed that during November and December, 1892, she lived in a hotel at Byculla under the name of Stewart. The manager and butler of the hotel depose to a man

(1) L. R., 1 P. and M., 691. (2) 6 P. D., 11.
(3) L. R., 2 P. and M., 376.

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paying her weekly visits under the name of Mr. Stewart; the butler identifies the co-respondent, and the manager thinks he is the same person. Cooke has not called his sister or other person to explain his frequent visits at Poona.

On the whole the conclusion of the District Judge is supported by the evidence; and the decree as against the co-respondent must be confirmed, and he must pay the petitioner's costs in this Court.

Decree made absolute.

NOTE.—Any marriage by one of the parties, the other living, before the expiration of six months from the date of the decree or before the time for appealing has expired, is null and void. See Macrae on the Indian Divorce Act.—Notes to section 57, p. 146.

ORIGINAL CIVIL.

Before Chief Justice Farran and Mr. Justice Starling.

1895. *August*

MOTI GULA'BCHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* MAHOMED MEHDI THA'RIA TOPAN (ORIGINAL DEFENDANT), RESPONDENT.*

Evidence—Burden of proof—Promissory notes—Proof of consideration—Suit by professional money-lender against a young man recently come of age—Presumption—Negotiable Instruments Act (XXVI of 1881), Secs. 44, 45 and 118—Evidence Act (I of 1872), Sec. 114, illustration (c).

Professional money-lenders sued a young man recently come of age to recover certain loans of money alleged to have been advanced by them to him on promissory notes. The defendant, who under the will of his father was entitled to a large property but had not yet come into possession of it, was of an extravagant and reckless character. He pleaded, as to part of the consideration for the notes, that he did not receive it, and as to a further part, that the consideration was immoral. In dealing with the case the Court laid down the following propositions, not as rules of law, but as guides in considering the evidence in such a case:—

1. That upon the above facts the ordinary presumption that a negotiable instrument has been executed for value received was so much weakened that the defendant's allegation that he had not received full consideration was sufficient to shift the burden of proof and to throw upon the money-lenders (the plaintiffs) the obligation of satisfying the Court that they had paid the consideration in full. That is the practical effect of illustration (*c*) to section 114 of the Evidence Act (I of 1872).

(2) Where the plaintiff, in answer to such a defence, affirmed that he had paid

* Suit No. 337 of 1894.