

(1945) 03 AHC CK 0022

Allahabad High Court

Case No: None

Capt. T.W. King

APPELLANT

Vs

Mrs. F.E. King and Another

RESPONDENT

Date of Decision: March 13, 1945

Acts Referred:

- Divorce Act, 1869 - Section 7
- Evidence Act, 1872 - Section 2

Citation: AIR 1945 All 190 : (1945) 15 AWR 390

Hon'ble Judges: Allsop, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Allsop, J.

This is a petition by Trevor William King for the dissolution of his marriage with Florence Elsie King. The parties are Christians domiciled in India, were married at Bombay on 26th June 1939 and last lived together at Bareilly in United Provinces. This Court, therefore, has jurisdiction under the provisions of the Divorce Act. In the petition as originally presented the petitioner alleged that the respondent had committed adultery with the co-respondent, Lance Corporal Robert Janes at 3, Lockhart Lines, Bareilly on 21st September 1943 and that at a hotel at the same place on 3rd and 4th and 6th and 7th January 1944. The petitioner later amended his petition on 3rd November 1944 and alleged that he had discovered that the respondent was pregnant as the result of intercourse with some other men and that she had been living a life of prostitution from August 1943, up to the date of the amendment. No other co-respondents were cited because the petitioner alleged that he was unable to discover the names of the men who had consorted with the respondent.

2. The respondent filed a combined written statement and counter-petition on 28th July 1944. She denied the charge of adultery with the co-respondent and alleged that the petitioner had himself been guilty of adultery, cruelty and desertion. It was asserted that the petitioner committed adultery with a woman doctor employed in the Army on various occasions from January 1944 onwards and with a woman called "Babs," whose surname was unknown to the respondent, on 17th, 18th and 19th June 1943. The respondent alleged that the petitioner was addicted to drink and that he had assaulted and injured her on many occasions, that he had made her an insufficient allowance when he was on active service in the Army, that he had used the foulest and filthiest language to her, that he had forced her to excessive sexual intercourse in a rough and unreasonable manner and when she had refused to submit had beaten her and threatened her with a revolver, that he had masturbated in her presence and that he had made three attempts to commit sodomy upon her in the period between the end of June and the middle of July 1943 and had ultimately succeeded in committing sodomy upon her by force at 9-30 A. M. on 13th July 1943. The respondent alleged that the petitioner had left his home and deserted her without reasonable cause on 12th August 1943, and, presumably in answer to the charge that she had given birth to a child as the result of intercourse with some man other than the petitioner, that the petitioner after leaving his home had been in the habit of breaking his way into the house and cohabiting with her against her will. The respondent also raised the point that the petition should be dismissed on ground of condonation, connivance and undue delay.

3. Before dealing with the specific questions which are in issue it will be convenient for me to describe the general course of the married life of the parties as it appears from the evidence. The parties were married, as I have already said, on 26th June 1939, at Bombay. One complaint that the respondent has against the petitioner is that he had no accommodation arranged for her after the marriage and she had to live with a friend for a week before they could secure a flat. The petitioner at that time was a school-master with a salary of Rs. 230 a month" which he augmented by giving private lessons which brought him in a further sum of Rs. 100 or Rs. 120 a month. It is admitted by both the petitioner and the respondent that they began to quarrel not long after the marriage. The petitioner found some letters which were part of a correspondence between his wife and an Inspector of Police. These letters roused his suspicions about the fidelity of his wife and the respondent has admitted in her evidence that she committed adultery with this man. She alleges that the petitioner connived at her conduct, but the nature of the letters does not suggest that this was so. They indicate that she had arranged secret meeting with her paramour. On the other hand, it is admitted by the petitioner that he condoned this adultery and the man was not cited as a co-respondent. The respondent has given evidence that the petitioner was grossly intemperate and that they had quarrels because of his conduct towards other women. She said that She slapped his face on one occasion because he had blown kisses to a school girl and on another occasion

they had quarrelled because he had visited a woman teacher employed in the school in which he was working and that he had treated this woman with familiarity on some other occasions. She found a letter from the woman asking the petitioner to visit her one evening. When he returned she asked him whether he had had a good time. He replied in the affirmative and this led to a quarrel with the result, according to the respondent that the petitioner gave her a black eye.

4. The respondent has also stated that she became pregnant and that the petitioner forced her to take some pills to procure an abortion. She also charged him with unnatural sexual practices and it was during this period that she said that he had been guilty of forcing her to excessive sexual intercourse. It may be said at once that her allegations are inconsistent. If she was forced to excessive sexual intercourse and her health was breaking down, as she says, on that account, it is impossible that she should have engaged in an intrigue with another man as she has admitted that she did. There is no evidence other than her own statement that the petitioner used violence towards her and she has admitted that she also used physical force towards him. She was obviously not a meek and gentle woman who would submit to be bullied. It appears from the evidence that prohibition was in force in Bombay from some date not long after the marriage and it is unlikely that the petitioner with his small salary would have been able to procure enough liquor to indulge in continuous intemperance.

5. It may be that he drank more than he should on occasions, but I do not feel that I can accept the uncorroborated testimony of the respondent on this or on any other points. There can be no doubt that the parties were not happily married, but the allegations made by the respondent against the petitioner are not, in my judgment, sufficiently proved. The petitioner joined the Army in the month of October 1940 and the parties admit that they then decided to have a child as they hoped to be in a better financial position. The petitioner went to Poona for training and after a time was transferred to Bareilly. While he was in Poona the respondent was living with his people in Allahabad. The petitioner finished his training at Poona in May 1941 and came to Allahabad to take his wife to Bareilly. While he was in Allahabad he found some letters under his wife's pillow which suggested that she was on intimate terms with a sergeant whose Christian name was John but whose surname the petitioner says he could not discover. There was a quarrel about this intimacy, but the parties patched it up and went together to Bareilly where the child of the marriage was born. The petitioner went on active service from Bareilly in June 1942, and returned in June 1943. During that period the respondent continued to live in Bareilly. The petitioner made her an allotment of Rs. 220 a month and paid her house rent and her charges for electricity and taxes. While he was away he heard rumours that his wife was misconducting herself with non-commissioned officers and men in the Army. When he returned to Bareilly he found that his wife was living in a house without any furniture and that she did not have the usual number of servants. He made the necessary arrangements. Then in August he was sent to

Allahabad to collect some stores. While he was there he received a telegram from his Commanding Officer ordering him to return to Bareilly at once, When he got there, he was told that his wife had charged him with cruelty and with a failure to give her sufficient money to maintain her according to the standards which are expected of an officer's wife. His Commanding Officer directed him to stay at the mess and not to go to his own house. The next morning he and his Commanding Officer went to his wifes house. That was on 12th August. There was a conference between the two men and the respondent and the respondent's mother. In the conference charges were made against the petitioner with the result, according to him, that his Commanding Officer ordered him to go and live in the mess, and not to-stay in the house. The petitioner asserts that he, on his own accord, refused to live in the house with her any longer. It is admitted that the respondent had been to the Superintendent of Police and had made charges against the petitioner. From that time onwards the parties lived apart, she in the house and he in the mess. In January 1944, the petitioner left Bareilly with his Regiment which had been ordered on active service, but he had an accident on the way and broke his pelvis with the result that he was in hospital for a considerable time. He returned to Bareilly on 31st March 1944, and filed this petition on 26th April 1944.

6. Before dealing with the charges made by the petitioner against the respondent I think I should deal with the counter-charges made by the respondent. I have already said that I cannot accept the uncorroborated evidence of the respondent about the petitioner's treatment of her in Bombay when they were first married and I may add that there is no evidence other than her own of any act of cruelty committed when they were together in Bareilly. The only witness produced by the respondent other than herself is her mother. Her evidence is almost entirely hearsay. She has said that she visited the petitioner and the respondent from time to time for a day or two and that they quarrelled in her presence and threw cups and other articles at each other, but the evidence does not suggest that there was violence only on the part of the petitioner. The petitioner has produced two servants, his orderly and an Aya who worked for the petitioner. According to them the respondent was a violent bad-tempered woman who was largely responsible for the quarrels between the parties. She has admitted that she herself assaulted the petitioner on one occasion at least and that she chased him round the house on another. It is undoubtedly true that the parties had violent quarrels, but it is not established, in my judgment, that the petitioner was more to blame than the respondent or was guilty of any such cruelty as would justify a decree for dissolution of marriage against him or would prevent him from obtaining a decree against the respondent.

7. As for the allegations of adultery there is really no evidence at all. The respondent has deposed that she saw the petitioner and the woman doctor on one occasion on the platform at the railway station at Bareilly, that they were both somewhat intoxicated and that they were walking arm in arm. Apart from that there is no evidence that the petitioner committed adultery with this woman. He has deposed

that she has since been married to an officer in his Regiment and I am satisfied that the allegation made by the respondent is untrue. There is also no evidence that the petitioner committed adultery with the woman called "Babs." He has deposed that his Battalion was first posted to Ranchi when they returned from active service and that they went from there to Bareilly in June. There is no evidence that he was with this woman on 17th, 18th and 19th June. The petitioner has himself deposed that he preceded his Regiment by one day only and that he spent a few hours at Gaya on 19th June at the house of this lady but that her husband was present at the time. It is true that the respondent has produced two letters written in very affectionate terms to the petitioner and signed "Babs," but they are not of such a nature that it can be deduced from them that the petitioner and this woman were carrying on an intrigue. The petitioner has deposed that he has known the woman, whose surname he is unwilling to disclose, for a number of years, that is since he was a young man of 19 or 20, that she is not happily married, although she has two children, and that the letters are what he described as "the outpourings of an anguished heart. They seem to me to be letters written by a woman who somewhat prides herself on her literary accomplishments and are not so much love letters as exercises in the art of writing letters of that kind. There is no evidence that the petitioner ever had any opportunity of meeting this woman during the time when he was married except for the few hours which he admittedly spent with her at Gaya on his way from Ranchi to Bareilly. There is no doubt that the respondent's allegation is based on an assumption based on the letters and is not justified by any real knowledge or any evidence. I hold that there is no proof of adultery on the part of the petitioner. There is also no evidence except the respondent's statement that the petitioner ever attempted to commit sodomy upon her. The evidence about the incident of 13th July when he is alleged to have forced her to allow him to commit sodomy upon her at 9-30 A.M. is unsupported by any corroborative evidence, medical or otherwise. The respondent alleged that the petitioner had been away that night, that he came in at 9 o'clock in the morning in a state of intoxication and that he discovered that she had found the letters from "Babs." They had a quarrel in the course of which he said that Babs was a woman whom he had loved for 12 years and that she was wonderful in every way whereas the respondent was rotten in every way. The respondent answered:

If she is so wonderful and I am so rotten, then please leave me alone. I am not to be treated as a bazar woman any longer and I will not come to your bed again.

Thereupon the petitioner threw "her down on the bed and committed sodomy upon her by force. She says that a woman who lived next door came in on hearing her cries and pulled the petitioner away. The woman has given evidence on commission but she has not corroborated the respondent's statement. The respondent says that she was going away with this woman when the petitioner tore all her clothes off so that she was naked before the servants. There is no evidence about this matter except the respondent's own and it seems extremely improbable that the petitioner

would be intoxicated at 9 o'clock in the morning and that he would attempt to commit an offence of this kind in broad day light in an Indian bungalow in which there are open doors on all sides. I cannot accept the respondent's uncorroborated evidence and I hold that this offence is not proved.

8. It is unfortunate that the evidence of the petitioner's Commanding Officer is not available owing to the exigencies of the war, but in my judgment it is not established that the petitioner deserted the respondent or left her without sufficient cause. There is no doubt that the respondent had complained about the petitioner to the Superintendent of Police and to his Commanding Officer and that she had made such serious charges that the petitioner was ordered back to Bareilly by telegram. The petitioner asserts that it was his Commanding Officer who ordered him to leave the house and I think that this is not an improbable story in view of the fact that the petitioner had been charged with cruelty and violence, but even if this story is not entirely true, there can be no doubt that the petitioner had the gravest provocation and that he was justified in the belief that it was impossible for him to live in any peace with the respondent. Considering the amount of his salary the allowance, which he gave to the respondent was not unreasonable. There was no necessity that she should live apparently in abject poverty. She has alleged that she was put to a great deal of expense because her child was suffering from a serious form of eczema. She complained that the child did not receive satisfactory treatment at the British General Hospital and that she had to take her to an American Mission Hospital. It is common knowledge that the 14th British General Hospital at that time stationed at Bareilly had a staff of eminent medical practitioners. The co-respondent, who has appeared to answer to the charge of adultery has denied it, and has given evidence that he was employed as an orderly in the hospital and that there were no drugs which were suitable for the treatment of this skin disease. Even if this is an accurate statement it would not appear that treatment at an American Mission Hospital would be so expensive as to cause the respondent considerable inconvenience and it would have always been open to her to suggest that the bills should be sent to her husband, who, as a Military Officer, would have been bound to pay them. In my judgment, it cannot be said that the respondent had any serious cause of complaint upon the ground that the petitioner was not supporting her according to his means. The parties appear to have lived without any serious disagreement during the period when they were first together in Bareilly and it is difficult to believe that the petitioner on his return from active service began immediately to behave so badly that the respondent was justified in making complaints against him to the police and to his Commanding Officer. He continued his allowance to the respondent after he left the house and the respondent's allegation that he used to force his way into the house in order to cohabit with her is scarcely consistent with her allegation that he deserted her. In my judgment the respondent has failed to prove her allegations about matrimonial offences against the petitioner. She seems to have expected to live in greater affluence than the

circumstances justified and to have resented the fact that she was unable to do so.

9. As for the petitioner's allegations, the first definite one is that the respondent committed adultery with the co-respondent on 21st September. His story is that he was passing his house when he saw a man and a man's bicycle in his wife's sitting room. He went back to his mess and fetched a brother officer who unfortunately has also not been able to give evidence owing to the exigencies of the war. They went to the back of the respondent's house and peeped in through the glass panes of the door or window. They saw the respondent and the co-respondent sitting on a sofa and embracing each other. After a time the light in the room was extinguished. A little later they attempted to get into the house, but all the doors were bolted from inside and they failed to do so. Eventually the Aya who was with the child in the bedroom next-door to the sitting room called to the respondent that the petitioner was at the house. There was then a scene. The respondent refused to allow the petitioner into the house and he refused to go away. Two women from next-door, Mrs. Collis and her daughter, Mrs. Acton, came to the house on hearing the respondent's cries. Ultimately the respondent opened the door and came out armed with a knife and chased the petitioner to the gate; the co-respondent took the opportunity of coming out of the house and running away. The petitioner's brother officer who had gone to the back of the house to prevent the co-respondent from escaping came round to the front and the respondent slapped his face and accused him of trespassing. Mrs. Collis and Mrs. Acton have given evidence to corroborate the statement of the petitioner. Another witness to the incident is an Aya who was employed by the respondent. The co-respondent originally denied that this incident had taken place, but eventually it appeared that this was due to the fact that the petitioner had made the mistake about the date. The co-respondent ultimately admitted that the incident had taken place not on 21st but on 28th September. The respondent has also admitted the greater part of the story although she has denied the fact that the co-respondent was there. In these circumstances there cannot be the slightest doubt that the respondent and the co-respondent were together in the respondent's room and there is no reason for disbelieving the statement of the petitioner that they were embracing each other and that they put out the light and were together in darkness for a considerable time before the petitioner and his brother officer attempted to get into the house. In these circumstances, I think, it must be held that adultery was committed. It has been argued on behalf of the respondent that the petitioner should be held to have connived at adultery on this occasion, because he did not make his presence known immediately. In my judgment there is no force in this contention. It might have been justified if this had been the first occasion on which the petitioner had any reason to suppose that his wife was unfaithful to him, but considering all the evidence I am satisfied that the petitioner had every reason to suppose that his wife was guilty of misbehaviour and that this was an occasion when he was expecting to verify his suspicions. There is no reason to suppose that he was at this stage a complacent

husband who was willing to condone or connive at his wife's adultery.

10. As for the other two allegations about the hotel it has been established by the evidence of the manager of a small hotel near the railway station at Bareilly that the respondent stayed for two nights on two different occasions at the hotel giving her name as Mrs. Janes. The evidence is corroborated by the production of the hotel register itself. The manager says that a man visited the respondent during the day on one of these occasions and apparently spent several hours with her. The respondent's explanation that she gave her name as Janes because the hotel was not one which would ordinarily be occupied by an officer's wife and because her child's second name, that is, Jane, suggested this false name to her is not satisfactory. There is no reason why the respondent should have lived at a hotel at all. Her explanation is that it was difficult to get a conveyance from her house to the railway station and she spent the night near the station for that reason as she had to leave by train in the morning. It is difficult to believe that she could not arrange for a conveyance, but even if it was not easy to get a conveyance early in the morning there is no reason why she should not have returned to her house when she came back to Bareilly on the second occasion. It must be admitted that there is no very definite evidence against the respondent and the co-respondent that they committed adultery on the occasion when the respondent stayed at this hotel but the circumstances do give rise to the conclusion that they must have done so. There is no other satisfactory reason why the respondent should have lived at this hotel which is ordinarily used only by Indians and that she should have lived there under the name of the co-respondent. However, even if it can be said that it is not proved that adultery was committed on these occasions I have no doubt that it was committed at 3, Lockhart Lines, towards the end of September.

11. It cannot be said that there is any definite evidence that the respondent was living the life of a prostitute. There is certainly evidence that she was consorting with a number of men, but I think that the petitioner could have discovered the names of these men and should have impleaded them as co-respondents if he wished to rely upon the fact of adultery between them and the respondent. There is evidence that the respondent used to be visited on week-ends by a non-commissioned officer from Shahjahanpur whose Christian name was John and that she also was visited from time to time by an American whose name and number have subsequently been disclosed but who has not been impleaded. There is the evidence of the Aya that the respondent once went to Lucknow and spent a night with an Indian Viceroy's commissioned officer. The evidence is detailed, but it cannot be said that it is the evidence of a very reliable witness and the name of the man has been disclosed so that I do not think I am entitled to take the evidence into consideration as he has not been impleaded as a co-respondent.

12. The contention that the petition should be dismissed on ground of condonation, connivance and delay cannot be sustained. It is very clear that the parties are on the

worst of terms and that this case has been contested in the most bitter manner. There is not the slightest reason for suggesting that the parties were in collusion. The conduct of the petitioner does not suggest that he condoned his wife's adultery or connived at it. As for delay the petitioner filed this petition within a few days after his final return to Bareilly at the end of March 1944. It is true that he did not take steps to institute a petition immediately after the incident in September 1943, but he has explained that he was at that time very busy because his Battalion was under orders to go on active service and in any case he was entitled to take some time for consideration before he filed his petition. There remains the question of the respondent's pregnancy after the petitioner left her in August 1943. It has been admitted that she gave birth to a child which must have been conceived after the petitioner left her. Her allegation that he used to break into the house and cohabit with her is not supported by any evidence other than her own and it is a most improbable story. She had close neighbours. There were Mrs. Acton and Mrs. Collis on one side of the house and at one time a man called Barker " lived on the other side. Mrs. Acton and Mrs. Collis have not supported the respondent's allegation on this point, although she says that she used to call for help when the petitioner forced his way into the house. Mr. Barker was examined on commission and he says that he never knew that the petitioner had broken into the house. He says that the respondent on one occasion showed him some broken bottles in her verandah and said that they had been thrown at the house. I cannot believe the respondent's allegation about the visits of the petitioner.

13. There may be some question whether the rule in *Russell v. Russell* 1924 A.C. 687 applies to the petitioner's evidence. My own view which I have expressed in [Ernest Lionel Doutre Vs. Anne Ruth Doutre](#), is that this rule does not apply in India because it is a rule of evidence and all proceedings in India are governed by the rules in the Evidence Act. u/s 1, Evidence Act, the Act applies to all judicial proceedings in or before any Court. u/s 2, Evidence Act, all rules of evidence not contained in any statute, Act or Regulation in force in any part of British India were repealed. The repeal of Section 2 under a subsequent Amending and Repealing Act makes no difference because its repeal does not have the effect of re-enacting the rules which it repealed. The rule in 1921 A.C. 687 was a rule of the English common law which was in force previous to the year 1777 and if it applied to India it was repealed by Section 2, Evidence Act. In 1924 A.C. 687 the question was whether the rule applied to cases of divorce. One reason given by the Lord Chancellor for so applying it was that the failure to apply it would involve the Courts in a glaring absurdity. If it was held in divorce proceedings that there had been no access and that the child must be illegitimate, the child might institute proceedings for a declaration of legitimacy in which the evidence of non-access would be inadmissible and the Courts would be afforded not the agreeable prospect of holding in one year that the infant was illegitimate and in the next that it was legitimate. There is no rule in the Evidence Act which would exclude evidence of non-access by a husband or a wife in proceedings

in which the legitimacy of a child was directly in issue and if the evidence were excluded in this country in divorce proceedings we should be faced with the same not agreeable prospect of coming to inconsistent decisions in two succeeding cases. It was held by the Madras High Court in [Mayandi Asari \(dead\) and Others Vs. Sami Asari alias Muthusami Asari being minor represented by his next friend Ganapathi Asari and Another](#), on the basis of the provisions of the Evidence Act that evidence of non-access by a husband or a wife was admissible in India. A contrary view in divorce cases has been expressed by the Calcutta High Court in the case in *Sweeney v. Sweeney* (35) 62 Cal. 1080 "but the learned Judges did not give any reason for importing a rule of English law into India in the face of the provisions of Section 2, Evidence Act. The Bombay High Court has also held in [Premchand Hira Vs. Bai Galal](#), that the rule in *Russell v. Russell* 1924 A.C. 687 does apply. Blackwell J. relied on the provisions of Section 7, Divorce Act. In my judgment the provisions of that section refer to the rules and principles peculiar to the law of divorce applicable in England and not to the rules of the other branches of law such as the rules of evidence which are governed in India by the provisions of the Evidence Act. Having regard to the evidence which has been produced in the case I have no doubt that the petitioner did not have access to the respondent at the time when the respondent's second child was conceived and that the birth of this child is proof of adultery committed by the respondent.

14. The result of my findings is that the petitioner should obtain the redress which he seeks. A decree nisi for dissolution of marriage will be drawn up in favour of the petitioner against the respondent. The respondent's counter petition is dismissed. The petitioner has not asked for any damages and costs against the co-respondent as he considers that would not be recoverable. In view of the facts that the child of the marriage, a girl, is only about three years of age and that the petitioner is for the time being in the Army, I direct that the child shall remain in the custody of the respondent till the decree is made absolute at which stage final orders will be passed. The petitioner will continue paying the amount which he at present pays towards the maintenance of the child and as alimony for the respondent till the decree is made absolute.