

(1878) 02 CAL CK 0013

Calcutta High Court

Case No: None

Wood

APPELLANT

Vs

Wood

RESPONDENT

Date of Decision: Feb. 11, 1878

Hon'ble Judges: Richard Garth, C.J; Markby, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

In this case the parties were married in September 1856, the petitioner being then about 15 years of age. They lived together, in Calcutta, for some years after the marriage, but had no children. In October 1864, the petitioner discovered that the respondent had committed adultery with her ayah. She did not on this account withdraw from cohabitation with the respondent, but from that time the respondent treated her with neglect. About this time she began to support herself by teaching in a school, and in 1869, in consequence of his constant absence until a late hour at night, she ceased to have sexual intercourse with him. They continued, however, to live together, and there is no reason to suppose that the husband was desirous of renewing the intercourse. On the contrary, she states, and this is not denied, that at this time her husband wholly neglected her. During this time also the respondent contributed nothing to the support of the petitioner, and frequently made demands for money upon her for his own purposes. They became involved, and in 1871, were obliged to give up the house in Circular Road, in which they then resided. The petitioner then proposed that they should take a smaller house, which they could have done; but the respondent refused to sign any lease, and it was then, under the pressure of pecuniary difficulties, that they arranged that she should go to his mother's house until they could find means to provide a home. Whilst he was at his mother's house, she visited him twice, but he treated her with the greatest indifference. When the house in Circular Road was given up, the wife had retained sundry articles of furniture with a view to the possibility of their living together again, but the husband had them sold, and the proceeds were spent by him. He

afterwards left his mother's house, and refused to tell his wife where he was going. In 1872, without any communication with his wife, he left Calcutta for Madras, where he has since resided, and has been guilty of frequent acts of adultery. He has occasionally visited Calcutta, and she once saw him, but only in public. On this occasion she did not speak to him, nor he to her. From 1869 down to the present time, the petitioner has resided in Calcutta, and the respondent has contributed nothing to her support.

2. There being no doubt as to the adultery, the only question is as to the desertion. The learned Judge of the Court below thought that he was compelled, upon the authority of the case of *Fitzgerald v. Fitzgerald* L.R. 1 P. and D. 694 to hold that in this case there had been no desertion, because the separation in 1871 was assented to by the wife.

3. Now we do not for a moment dispute the proposition that either where the separation is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion; nor, until husband and wife have again cohabited, can subsequent conduct transform what was a voluntary separation into desertion by the husband. But we think this is not a case of that kind. In the case of *Fitzgerald v. Fitzgerald* L.R. 1 P. and D. 694 upon which the learned Judge relied, the separation took place by the act of the wife alone, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse; and intercourse was not merely suspended by her, but put an end to. It is upon these grounds that Lord Penzance considered the desertion in that case to be the act of the wife. But here the case is wholly different. The wife, notwithstanding the gross misconduct of her husband, continued to live with him for seven years, during the latter years struggling, by her own earnings, to keep up a house for herself and him, whilst he did nothing, even when at last she was compelled by their debts, and his refusal to enable her to take a smaller house, to separate from him, she did all she could to prevent an entire separation, and to make it practicable for them to live together again. But she was thwarted in these attempts by her husband; he sold the little furniture she had; he repelled her visits; and at last he refused to let her know where he was to be found. No doubt, after he left Calcutta for Madras, she made no further attempt to go to him or to induce him to return. But we think she had done, not only all that any woman could be reasonably expected to do, but from a legal point of view, enough to show that the separation was neither brought about by her, nor in accordance with her wishes. It may indeed be true that the Respondent would have been perfectly willing to go on living with the petitioner, if she could have earned enough money for them both, whilst he remained in idleness; and as long as she could do tills, she was also willing, in spite of his misconduct, to live with him, even upon these terms. But we think it is clear from his conduct, immediately after they gave up house in 1871, and subsequently, that when he found his wife could not support him, he was desirous to be rid of her altogether. After they had been compelled by difficulties of his own

creating to live apart, lie was bound to keep up with her such intercourse as the nature of the case admitted; but this, in our opinion, he distinctly refused to do.

4. When the case was being argued, we were disposed to think, that the petitioner having for two years withdrawn from conjugal intercourse with the respondent, she could not afterwards complain that her husband had deserted her; but it is clear that this withdrawal was brought about entirely by the husband's misconduct, and that it was a matter to which he on Ms part was wholly indifferent.

5. We cannot find any authority that a withdrawal under such circumstances disentitles a wife to charge her husband with desertion.

6. We think, therefore, that we ought to grant a decree nisi for a dissolution of the marriage, instead of a judicial separation, and that the petitioner should have costs in both Courts on scale 2.