MATRIMONIAL JURISDICTION.

Before Buckland J.

1931

Feb. 9, 26.

BANYARD

v.

BANYARD.*

Divorce—Charge of adultery in answer—Intervention of alleged adulterer—Indian (Non-domiciled Parties) Divorce Rules, 1927, r. 12 (2).

In a suit for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act, the husband, in his answer, charged the petitioner with adultery and asked for damages against the alleged adulterer. Thereupon, the respondent's attorneys served the alleged adulterer with a copy of the answer and a notice of the suit and charge requiring him to appear within ten days and informing him that he was entitled to apply within that time for leave to intervene.

Held that the appearance on behalf of the alleged adulterer should have been accepted and he should have been made a party to the suit without any application for leave to intervene.

APPLICATION.

Dorothy Banyard filed a petition under the Indian and Colonial Divorce Jurisdiction Act, 1926, for dissolution of her marriage with Edward Francis Banyard, on the ground of adultery with cruelty. The husband, by his answer, charged her with adultery with Eric Cecil Rowllings and claimed Rs. 20,000 as damages against him. The husband, by his answer, also prayed that the said Eric Cecil Rowllings be made a party to the suit. Thereafter, the respondent's attorneys served on Rowllings a copy of the answer and a notice, informing him of the suit, the respondent's charge of adultery and claim of Rs. 20,000 as damages and saying "You are hereby "required to appear in this suit within ten days from "date of service of this notice and you are entitled "within the time aforesaid to apply for leave "to intervene in the cause." Thereupon, Rowllings applied to Court for leave to intervene.

J. A. Clough for the applicant.

K. B. Bose for the respondent.

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BUCKLAND J. On Tuesday last, an application was made to me in chambers on behalf of one Eric Cecil Rowllings that leave might be granted to him to intervene in this suit, that he be made a party as co-respondent, that the cause title be amended, and that the applicant be given liberty to file an answer if so advised.

For reasons, into which I need not now enter, I adjourned the application into Court, and it now appears that the applicant was served with a notice, dated the 22nd January, 1931, calling upon him to appear in this suit within ten days from the date of service of the notice, and informing him that he was entitled within the time aforesaid to apply for leave to intervene in the cause. A notice in that form was entirely out of order from any point of view, and led to quite unnecessary difficulties.

The petition is a wife's petition for dissolution of marriage filed under the Indian and Colonial Divorce Jurisdiction Act on the ground of her husband's adultery. The respondent has filed an answer, in which he makes charges against the petitioner of adultery with the present applicant. In his answer, the respondent also asks that the applicant be made a party to the suit and that the cause title be amended. He claims damages amounting to Rs. 20,000 and prays that his marriage with the petitioner may be dissolved.

Now, by the Indian (Non-domiciled Parties) Divorce Rules, 1927, rule 12 (*2*), it is provided that, where the answer of a husband alleges adultery and prays for relief, a certified copy thereof shall be served upon the alleged adulterer together with a notice to appear in like manner as a petition. The second part of this rule provides what is to be done when the husband alleges adultery by his answer but claims no relief. In such a case, the alleged adulterer is not to be made a co-respondent, but a certified copy of the answer is to be served upon him together with a notice, as under rule 9, that he is entitled, within

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the time therein specified, to apply for leave to intervene in the suit. If he makes such application, he may be allowed to intervene, subject to such direction as shall then be given by the Court.

The difficulty in this matter has arisen from the form of the notice, which after quite correctly requiring the applicant to appear as the first part of the rule requires, then proceeds, notwithstanding that relief is claimed by the respondent husband, to treat the case as though it were within the second part of the rule and give the applicant notice that he is entitled, within the time specified by the notice, to apply for leave to intervene. That was entirely wrong and has led, as I have been informed, to the appearance on behalf of the applicant being refused and to his being informed that he should make an application to the Court.

The rule should be strictly followed, and, in a case such as this, the appearance on behalf of the alleged adulterer should be accepted, and he should, thereupon, be made a party to the suit and the cause title should be amended accordingly. In this case, as I have pointed out, the answer asks that the alleged adulterer should be made a party and that the cause title should be amended, but, where that course has not been adopted, proper steps should be taken to have the alleged adulterer made a party and the cause title amended.

The Indian (Non-domiciled Parties) Divorce Rules contain no rules on the subject, beyond those already mentioned. By rule 24, rules made under the Indian Divorce Act are made applicable to proceedings under the Act of 1926 and I may draw attention to Chapter XXXA, rule 16, which provides that any person, claiming to be added as a party or to have a party added to the suit or matter, shall apply to the Court by notice of motion. For the English practice in this respect reference may be made to *Kenworthy* v. *Kenworthy* (1).

(1) [1919] P. 65.

As to the amendment of the cause title, the rule suggests that, when relief is claimed, the alleged adulterer should be made a co-respondent. It does not say so, though it says that, where no relief is claimed, the alleged adulterer shall not be made a co-respondent. He must, undoubtedly, be made a party, but as to whether or not he should be described as "co-respondent," I have been referred to Form 29 on page 324 of the Tenth Edition of Brown and Watts on Divorce, where it appears that the person, alleged to have committed adultery with the wife, where such charge is made in the husband's answer to a wife's petition, is added by his name and presumably his address, but the term "co-respondent" is not used. I am unable to see that this is a matter of substance, though, since the question of costs may arise in connexion with the charges preferred by the respondent, it is essential that he should be made a party to the proceedings.

In order to avoid further delay and expense, the applicant has, by his counsel, expressed his willingness to treat the notice already served upon him as though it was not encumbered by the reference to the procedure laid down by the latter part of rule 12 (2). That being so, all that is necessary to be done now is to direct that appearance on his behalf shall be accepted. The applicant, whether described as "co-respondent" or not, is in the position of a co-respondent, and it will be open to him to file an answer within 15 days. Mr. Clough has invited my attention to rule 11, which says that a respondent or co-respondent or a woman, to whom leave to intervene has been granted, may file an answer, and has suggested that if his client is not styled "co-respondent" possibly his answer may not be accepted. I need hardly say that the rule is not intended to prevent people who are properly made parties to the proceedings from filing such pleadings as the nature of the case entitles them to file, and no

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such perversion of technicality could be allowed to prevail.

The petitioner has not appeared on this application, but I may nevertheless point out that, under rule 14 of the Divorce Rules made under the Indian Divorce Act, which apply where the matter is not covered by the Non-domiciled Divorce Rules, she should file a reply within 14 days from the filing of the answer.

The only matter left to be dealt with is that of the costs of this application. I have pointed out how this application came about and, so far as the applicant has been put to costs, which he would not otherwise have incurred, in particular the costs of this motion, though there may be other items, had notice been given in the proper form in the first instance, such costs should be paid by the respondent in any event.

Attorneys for applicant: *Leslie & Hinds.*

Attorneys for respondent: *Orr Dignam & Co.*

N. G.