

MATRIMONIAL JURISDICTION.

Before Panckridge J.

SAMUEL

v.

SAMUEL.*

1929

Sept. 5.

Judicial separation—Suit for, between Jews—Wife's application for costs of suit—Code of Civil Procedure (Act V of 1908), s. 35, O. XXV—Indian Divorce Act (IV of 1869), s. 9—Letters Patent, 1865, cls. 12, 35.

Where, in a wife's suit for judicial separation from the husband, the parties being members of the Jewish community and professing the Jewish religion, there was an application by the plaintiff, asking that the defendant be ordered to pay to her a sum of Rs. 1,500 or such other sum as the Court may direct on account of and towards the costs of the suit,

held that the applicant was not entitled to this order. The practice of the Calcutta High Court, in a proceeding under the Divorce Act, cannot apply to this suit, it being a suit under clause 12 of the Letters Patent. The language of section 35 of the Civil Procedure Code does not give the Court power to direct the defendant to put the plaintiff in funds for the purpose of the litigation or even to secure the plaintiff's costs. The cases contemplated under Order XXV of the said Code are not analogous to the present case.

Benjamin v. Benjamin (1) referred to.

The facts are stated fully in the judgment.

Mr. J. C. Hazra and *Mr. Ispahani*, for the plaintiff.

Mr. S. C. Bose, for the defendant.

Cur. adv. vult.

PANCKRIDGE J. This is a summons taken out by the plaintiff asking that the defendant be ordered to pay to the plaintiff a sum of Rs. 1,500 or such other sum as the Court may direct on account of and towards the costs of the suit.

The parties are wife and husband, are members of the Jewish community, and profess the Jewish religion. The plaintiff wife seeks in this suit to

*Matrimonial Suit, No. 922 of 1929.

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obtain a judicial separation from the husband. The suit was instituted on May 13th, 1929, and on May 21st, Mr. Justice Costello made an order for alimony and the payment of Rs. 300 on account of the plaintiff's costs of the suit.

It is conceded that the question of the power of the Court to make such an order was not raised on that occasion. There is a recent decision of the Bombay High Court, *Benjamin v. Benjamin* (1), to the effect that the High Court has power to grant a decree *nisi* for the dissolution of a marriage between Jews. The Court, however, in that case made it clear that the decree asked for and made was made in the exercise of the Ordinary Original Civil Jurisdiction conferred by clause 12 of the Letters Patent and not by virtue of the jurisdiction conferred by clause 35, which is limited to "matters matrimonial between Our subjects "professing the Christian religion."

It is further clear that the Indian Divorce Act, 1869, has no application to a case like the present, for relief under that Act can, under the provisions of section 2, only be granted in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition.

It is said on behalf of the defendant that the present case is distinguishable from *Benjamin v. Benjamin* (1) inasmuch as here the plaintiff is not asking for dissolution, but for judicial separation, a relief which, it is argued, is unknown to Jewish law, and that the suit is, therefore, not maintainable.

I do not think it necessary to decide this question, because, even on the assumption that the suit is maintainable, I have come to the conclusion that I ought not to make the order asked for. It seems that it is customary for the Divorce Division of the High Court of Justice to direct a respondent husband to secure the costs of a petitioner wife. In making such an order the Court is following the practice of the old

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Ecclesiastical Courts; whether that practice was based on the fact that at common law a wife's property passed to her husband on marriage need not be considered, for the Court has continued to make the order in spite of the change in the law made by the Married Women's Property Act, 1882.

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Similarly, this Court has, to my knowledge, frequently made such an order in proceedings under the Indian Divorce Act, and in so doing it has followed the English principle as it is required to do under section 9 of the Act. But neither the practice of the English Court, nor the practice of this Court in proceedings under the Divorce Act, can apply to suits under clause 12 of the Letters Patent, the procedure in which is laid down by the Civil Procedure Code. The power of the Court to order the payment of costs as the Court in its discretion thinks proper is conferred on it by section 35 of the Code. The language is wide, but, in my opinion, it does not give the Court power to direct the defendant to put the plaintiff in funds for the purposes of the litigation or even to secure the plaintiff's costs.

Of course, it is not uncommon for the Court, in cases where it is exercising its discretion in favour of a litigant, to make the payment of his opponent's costs a condition of such exercise. Such a condition is frequently imposed when adjournments are granted or orders made for the examination of witnesses on commission.

Again, the Court has a discretion specifically given by Order XXV to direct a plaintiff to secure a defendant's costs in cases where the conditions prescribed by the order are satisfied. Such cases, however, are not analogous to the case now before me. With regard to the costs already incurred some of them have been dealt with on the applications that have been made.

With regard to those, in respect of which no order has been made, and future costs, I do not think I have

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the power in a civil suit to order the payment of them or direct the defendant to provide for their payment in the manner prayed.

It has been suggested that a wife's costs in proceedings *bonâ fide* instituted against her husband are "necessaries" for which she is entitled to pledge his credit. Even if this view is correct, it only means that the wife's attorney has a cause of action against her husband for his charges and does not justify the order asked for in the summons.

The application is dismissed.

In the circumstances, I make no order as to costs beyond granting a certificate for counsel.

Attorney for the plaintiff: *C. C. Ghose.*

Attorneys for the defendant: *Mitter & Mitter.*

Suit dismissed.

O. U. A.