

MATRIMONIAL JURISDICTION.

Before Panckridge J.

RITCHSON

v.

RITCHSON.*

1937

Dec. 8.

Judicial Separation—Alimony—Security—Jurisdiction—Practice—Order, not drawn up and filed—Power of Court to vacate order—Indian Divorce Act (IV of 1869), s. 37.

The Court has only power to make an order under s. 37 of the Indian Divorce Act, 1869 "on any decree".

It, accordingly, cannot make an order for security against a husband on the application of the wife made four years after the date of a decree for judicial separation.

Under the section, the Court can either order the husband to secure to the wife a gross or annual sum or order him to pay to the wife a monthly or weekly sum for her maintenance.

There is no jurisdiction to direct the husband to furnish security for the performance of a payment order.

Shearn v. Shearn (1) followed.

Before an order is drawn up and filed, a Judge has power to vacate it if he thinks fit to do so.

Sarupchand Hukumchand v. Madhoram Raghumall (2) and *In re St. Nazaire Company* (3) relied on.

APPLICATION by the husband for an order vacating the previous order directing him to furnish security for regular payment of alimony to the wife.

The facts of the case appear fully from the judgment.

*Application in Matrimonial Suit No. 4 of 1933.

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(2) (1924) 28 C. W. N. 755.

(3) (1879) 12 Ch. D. 88.

Clough for the applicant. The Court had no jurisdiction to make the order made on July 5, 1937. Section 37 of the Indian Divorce Act is the only provision under which an order for security can be made. But such an order can only be made "on" the decree for judicial separation and not afterwards. An order for monthly or weekly payments cannot later be ordered to be secured. *Shearn v. Shearn* (1). The provisions of the Supreme Court of Judicature Act, 1925, are similar to those of s. 37 of the Indian Divorce Act.

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The order of July 5, 1937, has not yet been drawn up and may be vacated if sufficient cause is shewn. *Sarupchand Hukumchand v. Madhoram Raghumall* (2); *In re St. Nazaire Company* (3) and the notes to O. 28, r. 11 in the Yearly Practice.

R. C. Bonnerjee for the respondent. The petitioner wife does not ask for an order for security as contemplated in *Shearn v. Shearn* (1). She is merely asking that the husband should give security for the regular payment of the monthly sums ordered to be paid to her.

PANCKRIDGE J. This application comes before me in the following circumstances:—

On June 26, 1933, the wife, who is the petitioner in the proceedings, obtained a decree of judicial separation on account of her husband's adultery. At the time the decree was made the learned Judge who heard the petition made an order, clearly under the provisions of s. 37 of the Indian Divorce Act, that the husband should pay his wife a monthly sum of Rs. 100 for her maintenance. The husband has apparently regularly carried out the order and made payments punctually. The husband's occupation is that of a

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permanent way inspector on the East Indian Railway. He is domiciled in India, and in the early part of this year he applied for leave out of India, and his application was granted.

On April 5, 1937, the wife having come to know of the application for and the sanction of the husband's leave took out a notice out of motion asking that the alimony of Rs. 100 a month, payable under the order of June 26, 1933, should be secured in such manner as the Court thought proper. There was also a prayer that the husband should be restrained from withdrawing his Provident Fund from the railway.

On April 7, 1937, the husband's bankers Messrs. Thos. Cook & Sons wrote a letter informing the wife that they had been instructed to pay her Rs. 100 a month during the husband's absence.

The husband sailed for England on April 8, 1937, having instructed his solicitors to oppose the application for security. The application was adjourned from time to time and finally it was disposed of by me on July 5, 1937, when I directed that the husband should furnish security for the alimony payable under the order of June 26, 1933, to the satisfaction of the Registrar by November 15, 1937. I have no clear recollection of the matters urged on the husband's behalf on the application, but as far as I can remember no point of law was taken, but it was pointed out that the husband had regularly paid alimony since the date of the order, and an affidavit was put in where it was stated on oath that he intended to continue to pay, and that his purpose was to return to India at the conclusion of his leave and resume his employment. He returned to India in the first week of November, and on November 9, 1937, he took out a notice of motion. The notice is in the following form:—that the order dated July 5, 1937, so far as it relates to the furnishing of security by the applicant,

be set aside on his undertaking to pay alimony month by month regularly and that the applicant be exempted from furnishing security.

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The order of July 5, 1937, has not been drawn up or filed. The point urged by Mr. Clough on behalf of the husband is that the Court had no jurisdiction to make an order of the nature I made on the 5th July.

I have read s. 37 of the Indian Divorce Act, and it cannot be suggested that there is any other statutory enactment under which the order could be made and I have come to the conclusion that Mr. Clough's contention is correct. The provisions of the Indian Divorce Act and those of the Supreme Court of Judicature Consolidation Act, 1925, in which the English statute law as regards matrimonial matters is now to be found, are not in identical terms: but nonetheless I have been able to derive considerable assistance from the judgment of Hill J. in *Shearn v. Shearn* (1).

Under s. 37 of the Indian Divorce Act, the High Court may, if it thinks fit *inter alia*, on any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties. The power to make any order on the husband to secure a gross sum or annual income for the wife can only be exercised on the passing of the decree. There is a similar limitation on the powers of the Supreme Court in England with regard to decrees for dissolution. That limitation is noticed by Hill J. in his judgment in *Shearn v. Shearn* and he observes that the cases have shown that some latitude is allowed in determining whether the

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application is made "on the decree": but it has not been argued, and I conceive it could not be argued, that on a right interpretation of the word "on" the Court has power to order the husband to furnish security over four years after the decree for judicial separation. That by itself is in my opinion sufficient to vitiate the order I made on July 5. Had my attention been drawn to the words of the section I think I must have held that I was being asked to make an order which I had no jurisdiction to make at so late a stage. In addition to the power which the Court has to order that an annual income be secured, it has also the power under s. 37 to make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable, and it was obviously in exercise of that power that the original order of 1933 was made. There is, however, no power given by the section which enables the Court to compel the husband to secure such monthly or weekly payments. Under s. 190, sub-s. (2) of the Supreme Court of Judicature Consolidation Act, 1925, the Court is expressly given the power to make such order in addition to, or in substitution for the order for security made under sub-s. (1). I presume that the power of the Court in India is equally wide, but, as the judgment in *Shearn v. Shearn* (*supra*) points out, the two orders though they can be made simultaneously are essentially different. Under an order to secure, the husband, when he has furnished security, has no further liability, nor if his circumstances thereafter become less prosperous can he apply for the return of any portion of it. On the other hand both in India and in England the husband can have a payment order varied from time to time in accordance with his means.

It seems to me clear that the power given to the Court is that, when it has decided what in the circumstances is the proper sum for the maintenance of the wife, it can order the husband to secure part of that sum and can make a payment order for the

balance. What, however, the Court cannot do is what I through inadvertance did here, namely direct the performance by the husband of a payment order to be secured. I, therefore, am of opinion that the order I made on July 5 was wrong and one which I had no power to make.

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The question remains whether sitting here it is within my powers to correct what I consider to be the mistaken order that I made. Had the order been drawn up and filed I am of opinion that the only remedy open to the husband as far as my Court is concerned would have been to apply for a review of judgment, and indeed Mr. Clough suggested at one time that I should treat this application as one for a review. With regard to that suggestion it must be borne in mind that the form of the application does not observe the requirements as to applications for review set out in rules 34 to 38 of chap. XXXII of the Original Side Rules. That possibly is a technical matter which might be overcome by ingenuity. A more serious difficulty in the way of treating this application as an application for review is that it is as such barred by limitation. The period for an application for review is 20 days from the order which it is sought to review. It is no use for the husband to say that the order has not been drawn up, because it is now well settled that if a party who has obtained an order fails to apply to have it drawn up within four days of the making of the order, the party against whom it is made can so apply, and if he fails to apply, the period of limitation begins to run against him.

It is true that s. 5 of the Indian Limitation Act is applicable to review proceedings, but no proper application has been made to me to make an order under s. 5, and if such an application were before me I feel considerable doubt whether I should be justified in holding that the applicant had sufficient cause for

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not making the application within the time prescribed, or at least for not making it at a considerably earlier stage than this. However, it appears to me beyond question that before an order is drawn up and filed a Judge has power to vacate it if he thinks fit to do so.

In *Sarupchand Hukumchand v. Madhoram Raghumall* (1) it was suggested that a Judge had no power to vacate his order if it was one dismissing the suit. Buckland J. did not assent to that argument and vacated an order for dismissal made by him under chap. X, r. 36 of the Original Side Rules. It is clear from the judgment that it was not suggested that the Judge had no such power with regard to orders generally, but it was urged that an order of dismissal is in an exceptional position.

As to the powers of the Court generally there is abundant authority to be found in the Annual Practice and my attention has been drawn to the observations made by Jessel M. R. in the course of argument in *In re St. Nazaire Company* (2). That being so, I have discretion to vacate the order which I consider I should not have made.

I think it is true to say that the responsibility for not calling my attention to this aspect of the matter at the time of the original application falls on the husband, and I also am of opinion that he should have taken steps to vacate or vary the order at an earlier stage. At the same time I do not think this is a reason for permitting the wife to continue to have the benefit of an order that ought not to have been made. Moreover I cannot help bearing in mind the history of the case since the order. I should never have made an order for security had the husband not been proceeding on leave out of India, and had I not thought that there was at least a possibility that he would not return at the expiry of his leave, and that in consequence the wife might have difficulty in

(1) (1924) 28 C. W. N. 755,

(2) (1879) 12 Ch. D. 88.

obtaining payment of the amount. It now turns out that the husband is back to India and has resumed his employment, and in view of his past record in the matter I see no reason to suppose that he will not continue to make the periodical payments in the future as he has done in the past.

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In these circumstances I vacate my order of July 5 except as regards costs. I also direct that the husband should pay the costs of this application as he is responsible in my opinion for the trouble.

Application allowed.

Attorney for applicant: *R. K. Bose.*

Attorneys for respondent: *Mitter & Bural.*

S. M.