

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Ramesam.

DEVASAKAYAM (PLAINTIFF), APPELLANT,

1922,
October 16.

v.

DEVAMONY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Indian Divorce Act (IV of 1869), ss. 15 and 37—Suit by husband for divorce on the ground of adultery—Application by wife for maintenance—Power of Court to grant maintenance under the Act.

It is not competent to the Court dismissing, a husband's petition for dissolution of marriage, to award maintenance to the wife, under section 15 or 37 of the Indian Divorce Act.

Though the wife might have filed an application for divorce or judicial separation on the husband's petition, under section 15 of the Act, still in the absence of a decree for dissolution or judicial separation, no order for maintenance can be made under the Act.

APPEAL against the decree of P. C. LOBO, the acting District Judge of Madura, in Original Suit No. 16 of 1919.

The material facts appear from the Judgment.

K. U. Luke, Counsel for appellant.

C. Viraraghava Ayyar for respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—This is an appeal from the decree of KRISHNAN, J. the District Judge, Madura, in a suit brought by the plaintiff for dissolution of his marriage with his wife the first defendant on the ground of her adultery with the second defendant as the co-respondent. Both the first and second defendants deny the alleged adultery, the first

* Appeal Suit No. 296 of 1920.

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defendant also pleading that she was beaten and driven out of her house by her husband on more than one occasion.

The District Judge who tried the case after hearing the evidence came to the conclusion that plaintiff had failed to prove the adultery alleged and dismissed the suit. Further he passed an order granting permanent maintenance to the first defendant at the rate of Rs. 10 a month.

The learned Counsel for the appellant has placed the evidence in his client's favour before us and we have carefully considered that evidence. It consists of the oral evidence of five witnesses and after hearing that evidence we agree with the District Judge that it is unreliable for the reasons stated by the District Judge. We agree therefore with the District Judge in holding that the adultery is not proved ; the claim for dissolution of marriage must be rejected.

As regards the granting of alimony at the rate of Rs. 10 a month, the contention of the Counsel for the appellant is sound ; that it was an order that could not have been passed in this case. Permanent alimony can be granted under the Indian Divorce Act only under section 37. The circumstances justifying such a grant have not arisen here, the suit for dissolution of marriage having been dismissed. It is however argued for the respondent (the wife) that under section 15 of the Act it was open to the lower Court to grant maintenance on finding that the wife had been treated cruelly and had been driven out of the house. We do not think that section justifies this. It says, "In a suit instituted for dissolution of marriage," in certain cases, "the Court may give to the respondent on her application the same relief to which she would have been entitled in case she had presented a petition seeking such relief." It is

perfectly clear that this refers to a petition which could have been filed under the Indian Divorce Act. Thus she might, in answer to her husband's suit, claim if there are circumstances which justify such relief, decree for judicial separation or for dissolution of marriage. In case such a decree is passed at her instance, the Court would be in a position to act under section 37. It is not contended that a bare application for maintenance can be put in by the wife against the husband under the Indian Divorce Act. If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Criminal Procedure Code. The order therefore granting maintenance to the wife is *ultra vires*. It must therefore be set aside. In the result we vary the decree of the lower Court by striking out the order for maintenance and otherwise dismiss the appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnaun and Mr. Justice Ramesam.

T. S. N. MUHAMMAD ROWTHER (APPELLANT), DEFENDANT, 1922,
November 1.

v.

M. M. ABDUL REHMAN ROWTHER (RESPONDENT),
PLAINTIFF.*

Civil Procedure Code (Act V of 1908), sec. 11, explanation 4—Res judicata—Might and ought to have made a ground of attack—Previous suit for partition and recovery of possession, as co-purchaser under a common purchase with two others—Sale in name of one—Purchase held not to be joint—Subsequent suit by the same plaintiff as heir of the sole purchaser—Bar of res judicata—Ground of attack—Duty to join different grounds of title in one suit—Suit against trespasser in ejectment.

* Appeal No. 85 of 1921.