1896

BEEJRAJ v. BHYRO-PERSAUD.

AMEER ALI, J.—This is an application on summons for revival of a suit on the death of the plaintiff. The defendant's attorney contends that the applicants, not having obtained letters of administration, or a certificate under Act VII of 1889, are not entitled to ask that the suit may be revived as against them. In my opinion it is not necessary that either letters of administration, or a certificate under Act VII of 1889, should be obtained in order to entitle the applicants to ask that they may be permitted to proceed with this suit. They are members of a Mitakshara family, of which the deceased plaintiff was a managing member. As such, they had, jointly with the deceased, a subsisting interest in the subject-matter of the suit. It follows that, on the death of the plaintiff, his interest passed to them by survivorship, and not by succession. This view is in accordance with the decision of the Bombay High Court in the case of *Raghavendra Madhav* v. *Bhima* (1).

The present case, however, is unprovided for, except by section 372 of the Civil Procedure Code. The application, therefore, should have been in the form indicated in that section, namely, that the suit be continued by the applicants. I shall proceed under that section and make an order for the continuance of the suit by the applicants.

Attorney for the applicants: Mr. *Rutter*.

Attorney for the defendant: Babu *Ashutosh Dé*.

F. K. D.

MATRIMONIAL JURISDICTION.

Before Mr. Justice Ameer Ali.

THOMAS *v.* THOMAS. *

Divorce—Alimony—Alimony "Pendente Lite"—Jurisdiction—Application for Alimony after Decree Nisi.

1896
May 29.

The Court has jurisdiction to grant alimony *pendente lite* in a suit by the husband for dissolution of marriage on an application made by the wife after a decree *nisi* has been pronounced.

THIS was an application, after decree *nisi*, for alimony for the period prior to decree *nisi*, and for the costs of the suit.

* Suit No. 1 of 1895.

(1) I. L. R., 16 Bom., 349.

1896

THOMAS v. THOMAS.

In her petition the respondent Sarah Thomas set out that she was married to George Thomas on the 17th November 1873; that they lived together up to the 16th August 1894; that on the 9th January 1895 the said George Thomas filed a petition praying for dissolution of marriage and for other relief; that on the 6th May 1896 a decree *nisi* was made dissolving the said marriage; and that since the 16th August 1894 the said George Thomas did not pay for her support and that of her children. She asked for the sum of Rs. 3,294-4, being the amount which she had expended for the support and maintenance of herself and her children from the month of August 1894 up to the date of the decree *nisi*, and for the costs of the suit including the costs of this application.

Mr. *Avetoom* for the petitioner.

Mr. *Caspersz* for the respondent.

The following cases were cited in argument:—*Robinson* v *Robinson* (1), [His Lordship referred to *Ellis* v. *Ellis* (2), *Foden* v. *Foden* (3)], *Proby* v. *Proby* (4), and *Young* v. *Young* (5).

AMEER ALI, J.—The respondent in this case applies for alimony *pendente lite* for the time previous to the decree *nisi*. She states in her affidavit that from August 1894 the petitioner has not given her any maintenance, and that she has spent a considerable amount for the maintenance of herself and her children who were living with her. The facts stated in her affidavit have in various respects been contradicted by the petitioner, but when the application was made, I intimated that, if I decided the question of jurisdiction in favour of the respondent, I would refer the questions of fact to the Registrar; and counsel on both sides acquiesced in that course.

Mr. Avetoom, for the petitioner, objected that I had no jurisdiction to make the order relating to alimony prior to the decree *nisi*, on the ground that the action had ended. No case has been cited to show that I have no jurisdiction. I am clearly of opinion that I have jurisdiction. The wife could have applied for alimony after service of the citation on her; but she did not do so.

(1) 2 Lee., 593.
(2) L. R., 8 P. D., 188.
(3) L. R. (1894), P. D., 307.
(4) I. L. R., 5 Calc., 357.
(5) See *post*, p. 916

There is no provision precluding me from now making the order asked for.

In the case of *Foden* v. *Foden* (1), to which I referred in the course of the argument, an order granting alimony was made by Mr. Justice Jeune, on the application of the wife after the decree *nisi*. The case was appealed, and the very same ground now taken was taken by Mr. Inderwick, Q. C., before the Appeal Court. "There was," it was said, "no jurisdiction to make an order for alimony *pendente lite*. The decree *nisi* having been made, there was no longer any *lis pendens*." Lord Herschell, L. C., after stating the facts, stated the result arrived at as follows :—

"It was contended first that the Court had no jurisdiction to make the order ; and, secondly, that if there were jurisdiction, it was not a proper case for its exercise. First of all it was said that there was no pending suit, because a decree *nisi* had been made. That argument is, in my opinion, quite untenable. Till the decree *nisi* has been made absolute, the suit is clearly pending." The same opinion was expressed by Lindley and Davey, L. JJ.

That was a much stronger case than the present, because there the action was for nullity of marriage. Here there is no question that the marriage was valid. The reasoning in that case, therefore, applies more forcibly to this case.

I think the wife is entitled to alimony from the date of the service of the citation. As the petitioner says he has made various payments to his wife, and as he also alleges that she has a considerable sum in her hands belonging to him, I refer it to the Registrar to enquire into the facts alleged by the parties, and to report what, if any, alimony under the circumstances that may be established should, in his opinion, be given to the wife prior to the decree *nisi*, commencing from the date of the service of the citation. He will also consider what provision should be made as to the payment of any alimony, having regard to the fact that the petitioner is in receipt of a monthly income.

As to so much of the application as asks for the general costs of this suit, I must follow the decisions of this Court in *Proby* v.

(1) L. R. (1894), P. D., 307.

1896

THOMAS v. THOMAS.

Proby (1) and *Young* v. *Young* (2), and the cases referred to at p. 427 of Mr. Belchambers' Book of Practice. No special circumstances have been made out, and I must refuse that part of the application.

(1) I. L. R., 5 Calc., 357.

(2) YOUNG *v.* YOUNG.*

1886 *Jany.* 12.

This was a suit No. 6 of 1885 under Act IV of 1869. The following judgment is from a note taken by the Clerk of the Court in the Court Minute Book, and is not signed by the Judge.

PIGOT, J.—The petitioner asks for an order for the respondent to pay the petitioner such alimony as the Court may think fit and also a sum for costs.

Practically there is no question as to the right to the order as regards alimony, and although as regards the amount of alimony to be given in proportion to her husband's income, Mr. Apear contended that, under the circumstances, a less proportion than has been usually granted should be allowed, I do not think the circumstances are such as to lead to this conclusion. Having regard to the amount of income of her husband, and of his reversionary interest, Rs. 100 per month should be allowed to the petitioner for alimony.

As regards the payment of a sum of money according to the old practice to meet the costs of the petitioner, Mr. Apear relied on *Proby* v. *Proby* (3) decided in this Court, in which, upon an application such as this, the Court held that section 4 of the Indian Succession Act, which applied in that case, the domicile of the parties being in India, completely altered the law previously existing with regard to the wife's costs, and refused the order, there being no special circumstances alleged to make the order applied for. It is contended that in this case the marriage was after the Married Woman's Property Act in England.

I think the respondent's contention is right. I think I am bound by the principle of the decision in *Proby* v. *Proby* (3). That case lays down that the principle and foundation of the former practice was the absolute right which the law gave the husband over the wife's personal estate and income of her real estate. That is the reason assigned in several of the cases for the existence of the old rule. Were the matter not concluded by authority, I should give

* Taken from Court Minute Book. Judgment delivered by Pigot, J. Suit No. 6 of 1885.

(3) I. L. R., 5 Calc., 357.

The costs of this application will be reserved till after the enquiry.

Solicitor for the petitioner.—Babu *U. L. Bose.*

Solicitor for the respondent.—Mr. *E. J. Fink.*

effect to another consideration not referred to, that, inasmuch as the wife, in discharge of her duties as mistress of the household, is wholly occupied, it is impossible for her to acquire any property, and I should have thought that consideration might be fairly used to influence the Court in determining whether in cases such as these, the wife might not be entitled to obtain the necessary costs from the husband apart from any question of right to her property. But upon the authorities I have no right to give any force to that consideration, even if it has any validity.

I therefore refuse the order applying for costs, but in doing so must guard myself from expressing any opinion as to this question, whether the costs incurred in the suit are or are not necessaries supplied to the wife. It has been held that a solicitor is entitled to recover from the husband costs in excess of the taxed costs recovered by her, such being claimable as necessaries supplied to the wife. That was a case in which the Married Woman's Property Act did not apply, and in refusing the order on the authority of *Proby* v. *Proby* (1) I desire to guard myself from laying down that costs so incurred are not necessaries.

The respondent must pay the costs of this application, as it was necessary to make it under any circumstances.

F. K. D.

(1) I. L. R., 5 Calc., 357.