

## MATRIMONIAL JURISDICTION

Before Mr. Justice Harries

GOODALL (APPLICANT) *v.* GOODALL (OPPOSITE PARTY)\*

1937

November, 12

*Divorce Act (IV of 1869), section 37, proviso—Discharge, modification or suspension of order for alimony—Arrears of alimony already accrued due—Whether court can remit arrears—Jurisdiction—Discretion of court—Delay in applying.*

The language of the proviso to section 37 of the Indian Divorce Act suggests that the power of the court to discharge, modify or suspend payments of alimony relates to payments which are to become due in the future, and it is very doubtful whether the court has jurisdiction to remit arrears of alimony which have already accrued due under the decree.

The power given to the court under the proviso to section 37 is a discretionary one and the court should not exercise its discretion in favour of an applicant when there has been unreasonable delay.

Messrs. *Saila Nath Mukerji* and *Shri Ram*, for the applicant.

Mr. *O. M. Chiene*, for the opposite party.

HARRIES, J.:—This is an application by Mr. H. C. D. Goodall, who was the respondent in Matrimonial Suit No. 8 of 1932, for an order varying the order for alimony passed in that suit.

The applicant and the opposite party were husband and wife and on the 15th of December, 1932, this Court passed a decree *nisi* in favour of the opposite party and on the 4th of August, 1933, this decree *nisi* was made absolute. By the decree of this Court the applicant was, *inter alia*, ordered to pay a sum of Rs.50 per month as alimony to his wife and a sum of Rs.400-9 as costs of the suit. The payment of alimony has fallen into arrears and there is now due from the applicant to the opposite party a sum of Rs.1,300 or thereabouts under the decree to which I have referred. The opposite party re-married in May, 1937, and no question of alimony after that date

\*Application in Matrimonial Suit No. 8 of 1932.

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can possibly arise. The present application concerns this sum of Rs.1,300 or thereabouts which represents the arrears of alimony due under the decree of this Court for 26 months ending in May, 1937.

It appears that after the decree was made absolute in this Court the opposite party instituted a suit against the applicant in the court of the Additional Munsif of Agra for six years' arrears of maintenance up to the date when the matrimonial suit was instituted. The opposite party alleged that for six years prior to the institution of this civil suit the applicant had failed to maintain her and she accordingly claimed maintenance for that period. The suit was decreed by the learned Additional Munsif and as no appeal was preferred against this decree it has now become final. The amount of this decree was Rs.3,393 approximately and the applicant has been paying to the opposite party a sum of Rs.114-8 per month in discharge of this decree. The first instalment was actually paid in March, 1935, and that instalment amounted to Rs.108 but thereafter he has paid monthly instalments of Rs.114-8. When the applicant was compelled to discharge the decree passed against him by the learned Additional Munsif of Agra he stopped payment of the sum of Rs.50 per month due from him by way of alimony under the decree of this Court. His last payment of alimony under the decree of this Court was in the month of February, 1935. The alimony decreed under the order of this Court is therefore in arrears for a period of 26 months.

It may be pointed out that the applicant applied to this Court on the 5th of January, 1934, for an order setting aside the original order of this Court directing payment of Rs.50 per mensem as alimony. In that application the applicant alleged that he could not pay and that his wife was sufficiently well off to be able to maintain herself without any order for alimony. YOUNG, J., who heard the application was not satisfied that any case had

been made out for modification or alteration of the original order and consequently dismissed the application.

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In the present application it has been strenuously contended before me that since March, 1935, the wife's circumstances have materially changed. Since March, 1935, the applicant has been making monthly payments to her of Rs.114-8 in discharge of the decree for maintenance passed by the learned Additional Munsif of Agra. It is argued that since March, 1935, the wife has not required any sum over and above this monthly sum of Rs.114-8 for her maintenance and consequently it is contended that I should pass an order directing that the husband should not be liable to pay the arrears of alimony which have accumulated in the period between March, 1935, and May, 1937, when the opposite party re-married.

The application is made under section 37 of the Indian Divorce Act and there can be no doubt that this Court has jurisdiction in certain circumstances to discharge or modify or suspend an order for payment of alimony. Section 37 of the Indian Divorce Act gives the Court power to order permanent alimony and the proviso to the section reads as follows: "Provided that, if the husband afterwards from any cause becomes unable to make such payments it shall be lawful for the Court to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid and again to revive the same order wholly or in part as to the Court seems fit."

It is to be observed that this is not an application praying that the alimony to be paid in the future should be reduced or suspended but on the contrary it is an application praying that the amounts which have already accrued due under the decree should be wiped out. Though the Court has ample jurisdiction to discharge or modify or suspend an order for alimony in so far as it concerns future payments I am very doubtful whether

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this Court has jurisdiction to declare that a husband should not be liable to make good sums which have already accrued due by way of alimony under a decree. Counsel for the applicant has been compelled to go to the length of saying that even if his client had actually paid these arrears he would in the circumstances of this case be entitled to ask me to order the opposite party to refund or repay such amounts. In my view the language of the proviso to section 37 of the Indian Divorce Act suggests that the power of the Court to discharge, modify or suspend payments relates to payments which are to become due in the future. There is nothing in the language of the proviso to suggest that the Court has power to remit arrears. The arrears constitute sums which have accrued due under the decree and which can be recovered by execution proceedings. It is one thing to discharge or vary future payments, it is quite another thing to say that sums which have already accrued due under the decree should not be paid. There appears to be no authority upon the question, but if it was necessary to decide this point I should be inclined to hold that I have no jurisdiction to remit the arrears or to pass an order which would render the applicant not liable to make good these arrears in execution proceedings or otherwise.

Even if this Court has jurisdiction to pass an order remitting arrears I would not be inclined to pass such an order in this case. The applicant must have realised in the month of March, 1935, that he was bound to pay a very substantial sum per month to discharge the decree which had been passed against him in the court of the learned Additional Munsif of Agra. He however took no steps until the 4th of August, 1937, to move this Court to vary or discharge its order for payment of alimony. Even if the Court had jurisdiction to remit arrears I should only be inclined to exercise that jurisdiction if applications were made without undue delay. Here the applicant allowed the arrears to mount up to 26

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months and in my view it would not be reasonable or just to accede to the present application even if I had jurisdiction to do so. A court is not bound to pass any order for discharging or modifying or suspending an order for alimony. The proviso to section 37 of the Indian Divorce Act makes it clear that the Court may pass such an order as to it seems fit. The power given to this Court is a discretionary one and in my view the Court should not exercise its discretion in favour of an applicant when there has been unreasonable delay.

Further, I am not satisfied that the applicant has any case upon the merits. The learned Judge who passed the decree dissolving the marriage fixed the alimony at Rs.50 per month. A subsequent application to reduce that amount was dismissed by a learned Judge of this Court who did not accept the applicant's contention that the opposite party had sufficient means to maintain herself without any payment by way of alimony by her husband. The husband had, however, failed to maintain his wife for a period of six years prior to the institution of the matrimonial suit and in law he was liable to pay his wife maintenance for that period. A decree was passed against him for such maintenance and that decree is now being satisfied by monthly payments. It must be remembered that those monthly payments are in satisfaction of a liability which accrued before the matrimonial suit was ever instituted and what the husband is now contending is that payments which he has been called upon to make in discharge of his liability to maintain his wife prior to the matrimonial suit should relieve him from his liability to make payments for his wife's maintenance for the period after the institution of the matrimonial suit. Because he has now to pay monthly instalments in discharge of his liability to maintain his wife for the period before the suit he claims that he should not be compelled to make the payments ordered by this Court for her maintenance after the date of this suit. In short it appears to me that the husband is asking

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this Court to relieve him from his liability under the decree because he has been compelled by another court to make payments in discharge of an earlier liability which he had failed to discharge. His failure to maintain his wife before the suit was clearly unlawful and because he has now been made to discharge that liability such should not relieve him of his liability under the decree for alimony. The applicant has filed a statement showing his total income and total deductions made therefrom during the period March, 1935, to April, 1937. It appears to me that even after payment of the monthly instalments due under the decree for maintenance the applicant had ample funds to discharge his liability under the order of this Court for alimony . . . In my judgment it has not been established that the husband cannot pay the alimony due under the order of this Court and that being so this application must fail.

For the reasons which I have given this application is dismissed with costs.

## APPELLATE CIVIL

*Before Mr. Justice Niamat-ullah, Acting Chief Justice, and  
 Mr. Justice Verma*

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 November, 17

RAM KUMAR AND ANOTHER (PLAINTIFFS) v. MAHIPAL  
 SINGH AND OTHERS (DEFENDANTS)\*

*Transfer of Property Act (IV of 1882), sections 67, 68(a)—Anomalous mortgage—Usufructuary mortgage with power to recover the money after 25 years—Suit for sale—Transfer of Property Act, section 68(c)—Depriving mortgagee of his security—Stoppage of payment of rent to usufructuary mortgagee by mortgagor in possession of mortgaged sir land—Practice and pleading—New case raised for the first time in second appeal.*

A usufructuary mortgage of zamindari property including sir land was executed in 1884. Possession was delivered to the mortgagee but the sir land was either left in the possession of

\*Second Appeal No. 72 of 1936, from a decree of D. C. Hunter, Dist Jct Judge of Cawnpore, dated the 10th of October, 1935, modifying a decree of Manzoor Ahmad Khan, Second Civil Judge of Cawnpore, dated the 26th of November, 1934.