must have been used in the Agriculturists' Relief Act. We therefore hold that the appeal lay not to this Court but to the district court. We return the memorandum of appeal for presentation to the proper court.

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KEDAR NATH v. SHAM LAL

MATRIMONIAL JURISDICTION

Before Mr. Justice Harries

1937 *September*, 3

WOODWARD (RESPONDENT) *v.* WOODWARD (PETITIONER)*

Divorce Act (IV of 1869), section 40—Life Insurance policies of husband, payable to wife in case of husband's earlier death—Whether "settlements" coming under section 40—Guilty party's application for variation—Discretion of court.

A decree absolute for divorce was made on the wife's petition on the grounds of adultery and cruelty of the husband; alimony at Rs.70 per mensem was awarded to the wife, but the custody of the children, namely two boys, was given to the husband. Subsequently he made an application under section 40 of the Divorce Act, praying that the wife should be deprived of any interest which she might have under certain policies of life insurance which had been taken out by the husband, after marriage, on his own life and under which the amount would be payable to him on a certain future date but would be payable to the wife in case the insured died before that date. It was stated that the main object of the applicant was to benefit the two children, whose names he wished to substitute for that of his wife on the policies:

Held that even if the policies of life insurance did amount to "settlements" within the meaning of section 40 of the Divorce Act,—a question which it was not necessary in the present case to decide,—this was not a fit case in which the Court should exercise the discretionary power given by section 40, in favour of the husband who was the guilty party.

The power given to the court by section 40 of the Divorce Act is a discretionary one, and the orders, if any, which it makes are such orders as the court deems fit in the circumstances of the case. There may be special cases when it would be just and proper to make an order upon the application of a guilty party varying a settlement, but unless such special circumstances exist the *status quo* should remain undisturbed. The court should not, on the application of the guilty party, deprive an

*Application in Matrimonial Suit No. 13 of 1935.

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innocent party of any interest which he or she takes under a settlement, even though it be for the benefit of the children of the marriage, as the application in the present case purported to be.

Mr. *O. M. Chiene,* for the applicant.

Messrs. *Saila Nath Mukerji* and *Shri Rama,* for the opposite party.

HARRIES, J.:—This is an application by the respondent husband in Matrimonial Suit No. 13 of 1935, for an order varying certain settlements in favour of his wife.

The present applicant, Mr. Woodward, was married to the opposite party on the 16th of March 1924. On the 27th of September, 1927, Mr. Woodward took out three policies of insurance upon his life for Rs.2,000 each. By the terms of these policies the sums were to be paid to the policy-holder on the 15th of September, 1947, or, if the assured died before that date, the sums were to be paid, upon proof of death, to the opposite party. On the 31st of January, 1936, the opposite party obtained a decree *nisi* against the applicant and on the 7th of August, 1936, this decree was made absolute. The divorce proceedings were conducted in this Court; and it is clear that the wife obtained her divorce upon the grounds of adultery and cruelty. Permanent alimony at the rate of Rs.70 per mensem was awarded to the opposite party, but the custody of the two children of the marriage, namely two boys, was given to the father, the present applicant.

The present application is made under section 40 of the Indian Divorce Act, and it is contended that now that the marriage has been dissolved it is only just and equitable that the wife should be deprived of any interest which she might have under these three policies of insurance. Mr. *Chiene,* who has appeared on behalf of the applicant, has stated before me that the main object of the applicant is to benefit his two infant children, and that what he really wants is that the name of these two

infant children should be substituted in two policies instead of the name of the wife, and that the husband should only have the absolute right in one of the policies.

Mr. *Saila Nath Mukerji* on behalf of the opposite party, Mrs. Woodward, has contended in the first place that these policies do not amount to *post nuptial* settlements, or to settlements at all, and that in any event this is not a case in which a court should make any order varying the settlements, if such they be.

Section 40 of the Indian Divorce Act is in these terms:

"The High Court, after a decree absolute for dissolution of marriage . . . may inquire into the existence of *ante nuptial* or *post nuptial* settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband, or the wife, or of the children (if any) of the marriage, or of both children and parents as to the court seems fit.

"Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children."

The High Court in this case has made a decree absolute, dissolving the marriage of the parties, and consequently it can inquire into the existence of any *post nuptial* settlement, and can make orders with reference to the application of the whole or any portion of the settled property, whether such settlement be for the benefit of the husband or the wife. It is to be observed, however, that the Court is not bound to make any order. The power given to the Court is a discretionary one, and the orders, if any, which it makes are such orders as the Court deems fit in the circumstances of the case. Clearly this section gives the Court a discretion, though of course such discretion must be exercised judicially.

In the present case it is unnecessary for me to decide whether or not these policies amount to a settlement within the meaning of section 40 of the Indian Divorce Act. The question arose in the case of *Gulbenkian* v. *Gulbenkian* (1). In that case policies similar in terms

(1) [1927] P. 237.

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to the present policies were considered, and HILL, J., did vary the terms of the policies. He, however, did not expressly hold that the policies amounted to a settlement. He held that the policies were capable of one of two constructions, namely that the wife had no rights at all under the policies, or that she had an equitable interest as a prospective *cestui que trust*. He accordingly held that if she had no rights under the policies no harm could be done by striking her name out of them; but on the other hand, if she had a right it could only be if the documents in question amounted to a settlement; and consequently he made the variations prayed for. The case of *Shamdas Gobindram* v. *Savitribai* (1) is an authority to the effect that a policy such as the present policies amounts to a gift in favour of the wife. If the policies in question amount to a gift, then clearly they cannot come under the provisions of section 40 of the Indian Divorce Act. However, I leave the matter open because I am satisfied that even if these policies do amount to *post nuptial* settlements, this is not a case in which I should exercise my discretion in favour of the husband.

As I have stated, the husband was found guilty of adultery and cruelty in the divorce proceedings. He is the guilty party, and he is now asking the Court to deprive the innocent wife of a benefit which was given to her during marriage. It is open to a guilty party to make an application under section 40; but in my view such applications should not readily be acceded to. There may be special cases when it would be just and proper to make an order upon the application of a guilty party varying a settlement, but unless such special circumstances exist the *status quo* should, in my opinion, remain undisturbed. This was clearly laid down in the case of *Thompson* v. *Thompson and Barras* (2). In that case the Judge Ordinary observed, while discussing the then English section which corresponds to the present

(1) A.I.R. 1937 Sind. 181. (2) (1862) 32 L.J. (P.M.) 39.

section 40 of the Indian Divorce Act: "I think that it would be a gross perversion of the meaning of the legislature if, at the prayer of an adulterous wife, the Court should deprive an innocent husband of any interest he takes under a settlement, even though it be for the benefit of the children of the marriage." In that case the applicant was the adulterous wife, but in my view the same principle must obtain where the application is made by the guilty husband. A grievous wrong has been done to the wife in this case, and in my view it is only just that she should be permitted to retain the benefits which she had received when she was the wife of the guilty husband. It is true that the husband is prepared in this case to give the children of the marriage the benefit of two of these policies, but as pointed out in the case of *Thompson* v. *Thompson and Barras* (1), the Court should not deprive an innocent party of any interest which he takes under a settlement, even though it be for the benefit of the children of the marriage. The conduct of the husband in this case wrecked the married life of the opposite party, and in my view she should not be made to suffer any more. All that she has been given by the Court is alimony at the rate of Rs.70 per mensem, and in my view she should not be deprived of the possible interest which she might obtain under these policies.

The result, therefore, is that I see no ground for varying the terms of these settlements, if they be settlements; and that being so, this application fails and is dismissed with costs.

(1) (1862) 32 L.J. (P.M.) 39.