MATRIMONIAL JURISDICTION

Before Mr. Justice Allsop

1940
August 9,
September, 20

MASIH *v.* MASIH*

Divorce—Suit by husband—Liability to deposit costs of wife—Practice of English courts—Divorce Act (IV of 1869), *section 7—Poverty of husband—Stay of proceedings until payment of wife's costs ordered by the court.*

A husband suing for divorce under the Divorce Act, 1869, is liable to deposit a reasonable sum for the costs and expenses of the wife to enable her to defend herself upon the charge of adultery. This rule is acted upon by the Divorce Courts in England and should, according to section 7 of the Divorce Act, 1869, be followed in India.

Where the husband fails to pay the sum ordered by the court to be paid to the wife for her costs for defending the suit and pleads inability to do so on account of poverty, the court should stay proceedings in the suit until the payment is made.

Mr. *E. V. David,* for the petitioner.

Mr. *K. O. Carleton,* for the respondent.

ALLSOP, J.:—This is an application by a wife who is respondent to a petition for a decree for dissolution of marriage. She claims that her husband should deposit Rs.300 to cover her costs and expenses. Learned counsel for the petitioner has raised the point that a wife in India is not entitled to claim her costs from a husband who institutes proceedings against her for dissolution of marriage. He relies upon the ruling of the Calcutta High Court in the case of *Proby* v. *Proby* (1). The learned Judges in that case went back to the principles upon which the Ecclesiastical Court had based its view that a wife's costs should be paid by her husband and stated that the basis of the principle was that a wife's property passed absolutely into the hands of her husband upon marriage. The learned Judges said that a wife's property did not so pass under the provisions of the Indian Succession Act and therefore the principle should not apply. The matter may have been open to

*Matrimonial Suit No. 5 of 1940.

(1) (1879) I.L.R. 5 Cal. 357.

some doubt in the year 1879 when that decision was pronounced, but this Court is bound under the provisions of section 7 of the Indian Divorce Act to proceed upon the principles which are applied by the Courts in England at the present time. and there can be no doubt that the Divorce Court in England would now allow a wife costs from her husband to enable her to defend herself upon the charge of adultery, unless there were special reasons to the contrary. That is the principle which should be followed in this Court. The English rule has been enforced for the last seventy years although since the Married Women's Property Act was passed in 1870 the property of a wife does not pass to her husband upon marriage. The Bombay and the Madras High Courts do not accept the principle laid down in *Proby* v. *Proby* (1). I may refer to the cases of *Mayhew* v. *Mayhew* (2) and *Natall* v. *Natall* (3). A learned Judge of the Calcutta High Court himself doubted the correctness of the decision in *Proby* v. *Proby* (1) in the case of *Young* v. *Young* (4). I have no doubt that the applicant is entitled to reasonable costs from her husband. Learned counsel for the husband has argued that his client is a pauper and to compel him to pay costs would be tantamount to refusing him the relief which he seeks. It appears, however, that the petitioner has been able to pay his own costs of this petition and to engage counsel. It seems to me, therefore, that he should pay the reasonable costs of his wife. Learned counsel urges that an adulterous wife should not be able to escape a decree for dissolution of marriage merely by insisting upon the payment of costs which her husband cannot meet. On the other hand, we are not sure at this stage that the respondent has been guilty of adultery. It is surely wrong that a wife should be exposed to a charge of adultery and run the risk of being deprived of the support of her husband without being able to place her case fairly before the

(1) (1879) I.L.R. 5 Cal. 357.
(2) (1894) I.L.R. 19 Bom. 293.
(3) (1885) I.L.R. 9 Mad. 12.
(4) (1886) I.L.R. 23 Cal. 916.

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Court. If the husband seeks relief, it is just that he should enable his wife to defend herself when she has no means to support her own case. The claim is for Rs.300 but though, according to the rules of this Court, counsel's fee alone would be taxed at Rs.200 for the first day, still the parties are obviously in very poor circumstances and it is impossible to pass an order for the payment of a large sum. I direct that the applicant shall be paid by the petitioner a sum of Rs.50 to enable her to defend herself on the charges. The money shall be paid on or before the 29th of August, 1940. The case may be put up on the 30th of August, 1940.

ALLSOP, J.:—A husband who filed a petition in order to obtain a decree for dissolution of marriage was directed to pay a sum of Rs.50 to meet his wife's costs in defending herself. It is urged on his behalf that he has absolutely no means and that he cannot deposit the money. The question which arises is whether the petition should be allowed to proceed or should be adjourned till the money is paid into court. Learned counsel for the husband has referred me to the case of *Thomson* v. *Thomson* (1). That was a case in which a learned Judge said that he thought that it would be unreasonable to adjourn the hearing of the petition on the ground that the husband had not paid in the wife's costs, if it was shown that the husband had no means to enable him to do so, but, although this opinion was expressed, no order was passed in pursuance of it because the matter was referred to an officer of the court for an inquiry whether the allegation that the husband had no means was true or not. On the other side, I have been referred to the case of *Keane* v. *Keane* (2). There it was stated that it was the practice of the Ecclesiastical Court not to fix a date for the hearing of a matrimonial petition until the husband had paid in the costs which he was directed to pay on behalf of the wife. It seems to me that the petitioner

(1) (1887) I.L.R. 14 Cal. 580. (2) (1873) L.R. 3 P & D. 52.

in the case before me should be able to pay in a not very large sum of Rs.50 and I think it would be unjust to the wife to deprive her of the power of defending herself against allegations of adultery. I, therefore, direct that the case will stand out till the costs are paid.

MISCELLANEOUS CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

GANESHI LAL CHHAPPAN LAL (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

Income-tax Act (XI of 1922), *section* 13, *proviso—Scope—Discretion vested in Income-tax Officer—Must not act arbitrarily but exercise his judgment—"Income can not properly be deduced" from the method of accounting—Account books of* sarrafa *or bullion business—Giving no details of the ornaments purchased or of their sellers, thus no facilities for verification—Also showing excessively and unaccountably low profits—Notice—Income-tax Officer accepting the account books in respect of silver transactions and not accepting them in respect of gold transactions—Specific notice to assessee before doing so, unnecessary.*

The discretion which is vested in the Income-tax Officer by the proviso to section 13 of the Income-tax Act is not absolute. It is the duty of the Income-tax Officer, where there is a regular method of accounting, to consider whether the income, profits and gains can properly be deduced therefrom, and to proceed according to his judgment on this question. What the court has to consider is whether the Income-tax Officer exercised his judgment in arriving at the conclusion that the income, profits and gains were not properly deducible from the assessee's regularly kept books of account: if he did exercise his judgment and did not act arbitrarily, then, having regard to the language of the proviso, his discretion can not be interfered with.

The assessee was a *sarraf* or dealer in bullion, whose business was to purchase gold or silver ornaments, melt them down into bullion and sell it locally or in Bombay. His account books for the assessment year showed a reasonably fair profit from the transactions in silver but an excessively low profit of 0·2 per cent. on the gold transactions. The books appeared to be regularly kept, but the Income-tax

*Miscellaneous Case No. 295 of 1937.