REVISIONAL CIVIL

Before Mr. Justice R. L. Yorke

1938
April, 5

JANET LEONORA QUIEROS (MRS.) (PETITIONER) *v.* HERBERT PERCIVAL QUIEROS (RESPONDENT)*

Divorce Act (IV of 1869), section 37—Wife judicially separated from the husband allowed payment of monthly alimony—Court, whether has power on application by wife to substitute gross sum of money for monthly alimony—Wife, whether has absolute powers on money paid absolutely.

The Court has jurisdiction on an application by the wife, who has obtained judicial separation from her husband to substitute for the order of payment of monthly alimony, which is an order under the 4th paragraph of section 37, an order under the 3rd paragraph of that section to the husband to secure to the wife a gross sum of money. *B. Iswarayya* v. *Swarnam Iswarayya* (1), referred to.

On a reasonable reading of the 3rd paragraph of section 37 the correct interpretation is that the husband is to secure to the wife a gross sum of money which is to be at her disposal, in the same way as the annual sum of money, and the reading of the words "for any term not exceeding her own life" with the words "gross sum of money" entail such limitation on the words "gross sum of money" as render it impossible for the former words to be read with the latter. This section does therefore give a power to direct a money payment and that the gross sum of money should be paid absolutely to the judicially separated wife. *Miss Blanche Somerset Taylor* v *Charles George Bleach* (2), relied on. *B. Iswarayya* v. *Swarnam Iswarayya* (3), *Twentyman* v. *Twentyman* (4), *Edward Caston* v. *L. H. Caston* (5), and *Maharani of Burdwan* v. *Krishna Kamini Dasi* (6), referred to.

Messrs. *R. F. Bahadurji* and *Moti Lal Saksena*, for the petitioner.

Messrs. *Ram Bharose Lal* and *Murli Mahohar*, for the respondent.

*Civil Miscellaneous Application No. 53 of 1938, under section 37 of the Indian Divorce Act in Divorce Case No. 2 of 1931, dated the 27th of April, 1931.

(1) (1930) A.I.R., Mad., 154.
(2) (1914) I.L.R., 39 Bom., 182.
(3) (1931) A.I.R., P.C., 234.
(4) (1903) L.R., Pro. Dn., 82.
(5) (1899) I.L.R., 22 All., 270.
(6) (1887) I.L.R., 14 Cal., 365.

YORKE, J.,—On the 27th of April, 1931, a learned Judge of this Court granted the petitioner Mrs. Janet Leonora Quieros a decree for judicial separation and fixed her permanent alimony at Rs.118 per mensem. In that case the petitioner had asked for half the net income of the respondent by way of alimony, but the learned Judge after referring to the proposition that a court will not as a general rule give the wife more than one-third of the husband's income, no matter how gross his misconduct may have been, and after remarking that the amount which was already being paid came to one-third of the respondent's net income, fixed that amount which was already being paid as the permanent allowance.

The present application No. 53 of 1938 arises out of a change in the circumstances of the parties. It appears that towards the end of 1937, the respondent H. P. Quieros fell ill and he has now with effect from the 1st of February, 1938, been retired from the service of the East Indian Railway in which he was working as a store-keeper. He has therefore ceased to earn any monthly income but he had as an asset a sum which is slightly in doubt, but appears to amount to Rs.21,483 in his Provident Fund, and he was also entitled to a gratuity which is shown by papers on the record to amount to Rs.4,050. In view of this fact the petitioner Mrs. Quieros on the 20th of January, 1938, put in a petition in this Court under section 37 of the Indian Divorce Act praying that in view of the circumstances she be given a gross sum in place of the existing order for monthly payments and as a gross sum she asks for one-third of what the respondent gets from the Railway in the shape of provident fund and gratuity. In support of this prayer the applicant points out that both before and after the decree for judicial separation the respondent has been living with a Miss Maud Johnson by whom he had a child at the time of the suit and had since had other children.

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She further points out that there is a probability that after obtaining his provident fund and gratuity, the respondent will remove himself from the jurisdiction of this Court with a view to avoid payment of alimony, and in that case the petitioner will be left absolutely destitute.

On the same day on which she presented this application, the applicant applied by application No. 54 of 1938 for an injunction restraining the Agent of the East Indian Railway from paying any money to the respondent out of this provident fund and gratuity until the matter was disposed of. This application was accepted and an interim order of injunction was issued in the terms prayed for. In connection with this injunction an application No. 114 of 1938 was subsequently made to the Court by the respondent asking for a modification of the order, and on the 15th of February the injunction was modified so that it should hold good to the extent of only half of the amounts mentioned. The injunction is therefore still in force to that extent only.

In reply to the application No. 53, the respondent on the 18th of March, 1938, put in application No. 205 of 1938 in which he gave a history of the cirmumstances which had led to his retirement and put forward certain pleas in support of the view that he was in very reduced circumstances. He stated in paragraph 12 that he was willing to make any arrangement that might appear proper to this Court to secure the payment of the monthly amount that might be at any time payable to the petitioner. As regards the application for a lump sum, he pleaded in paragraph 13 that the petitioner was not entitled in law to a lump sum and that particularly in view of the special circumstances of the case, she was not so entitled. He further suggested that as the petitioner was 8 years older than him, she should not, in case the Court accepted the principle of granting her a lump sum, be held entitled to more than one-tenth of the amounts due to the respondent after deducting

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from them certain amounts of debts stated earlier. He summed up this application as a prayer in the first place for the dismissal of the petition, and in the second place for an order that the lump sum should be assessed at not more than one-tenth as aforesaid instead of one-third.

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In answer to this application the petitioner has put in a further application No. 257 of 1938 dated the 30th of March, 1938, which is mainly by way of argument. It contains the allegations that there is nothing to prevent the respondent himself from taking up work in future and nothing to prevent the lady with whom he has associated himself from working and earning his living. It is further contended that the respondent is clearly not entitled to any consideration by reason of size of his illegitimate family, and that the petitioner should not be in any way a sufferer by reason of debts incurred by the respondent in the past after the date of the decree. Further stress has been laid on the danger to the petitioner in case an order for payment of a lump sum by way of permanent alimony is not made and it is contended that the petitioner is entitled to receive at least one-third, if not one half, in the amount of the provident fund and gratuity. In support presumably of the claim of a larger sum, it is pointed out that the interest obtainable on one-third of the total amount so claimed by the respondent will hardly be sufficient to keep body and soul together.

Two main questions have been argued before me in connection with this petition. The first is whether at this stage on an application under section 37 of the Divorce Act, this Court has jurisdiction to substitute for the order of payment of monthly alimony, which is an order under the 4th paragraph of section 37, an order under the 3rd paragraph of that section to the husband to secure to the wife a gross sum of money. Section 37 of the Indian Divorce Act does not make it absolutely clear what the powers of the court are in the matter. It

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provides that "the High Court may, if it thinks fit, on any decree of judicial separation obtained by the wife (paragraph 1) order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any) to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties (paragraph 3). In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the court may think reasonable; (paragraph 4)." It is clear that what this Court did in 1931 was to apply the provisions of paragraph 4. It appears to me clear that the provisions of paragraph 3 and the provisions of paragraph 4 are alternatives at the discretion of the court, providing (1) for a gross sum of money, (2) for an annual sum of money and (3) for payment of monthly or weekly sums. These are merely alternative methods of protecting the successful petitioner, that is the wife. There is a further proviso to this section 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." This proviso in terms relates only to the provisions in paragraph 4 for monthly or weekly payments, and it does not in terms provide for any increase in the amount of the payments. It has, however, been held in *B. Iswarayya* v. (*Swarnam*) *Iswarayya* (1) that the section gives power to a court to enhance the alimoney which the court has ordered a husband to pay to a wife judicially separated from him. This decision was based on the view that when the wife applies for

(1) (1930) A.I.R., Mad., 154.

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additional alimony, she does not in effect want the original order to be touched; she wants a further decree for additional alimony. The court has thus held that a fresh application even could be made under section 37 for a further decree, and I would infer that if such a fresh application can be made with respect to an order falling under paragraph 4, there is nothing which deprives the court of power on such an application to pass an order within the terms of the third paragraph. This point was not pressed with much force, and in my opinion there can be no room for doubt that this Court has, on a fresh application by the wife, power to pass an order falling within the provisions of the third paragraph of section 37 of the Indian Divorce Act.

The second point which has been argued before me at considerable length is whether this Court can, applying the provisions of section 37 of the Act, direct payment of a lump sum to the petitioner. I have already quoted the terms of the third paragraph of this section. The section, as it stands, contains punctuation, and according to the punctuation of this paragraph, there is no room for doubt that the words "for any term not exceeding her own life" are to be read with the words "such annual sum of money" and cannot be read with the words "such gross sum of money." It follows that this paragraph provides that "the court may order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money . . . . as . . . . it thinks reasonable and for that purpose may cause a proper instrument to be executed by all necessary parties." It is contended for the applicant that this provision is wide enough to include a direction for payment to the wife of a gross sum of money, while for the opposite party it is contended that it provides only for the securing to the wife of a gross sum of money which gross sum of money she is not permitted to touch, but which must

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be invested and only the interest thereof be available to the petitioner. Learned counsel for the petitioner relies on the Madras ruling reported in *Miss Blanche Somerset Taylor* v. *Charles George Bleach and another* (1), wherein the interpretation of these provisions of section 37 were carefully considered, and it was held that "in a suit for divorce brought by the wife, the District Judge had, under section 37, power to make the order for payment of a lump sum for the permanent maintenance of the wife," and it was further stated in the judgment of one of the two members of the Bench that "the plain meaning of the words of section 37 of the Indian Divorce Act is that the gross sum of money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life." On behalf of the respondent reliance is placed, first of all on section 7 of the Indian Divorce Act which provides that "subject to the provisions contained in this Act, the High Court and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." In this connection reliance was placed on the ruling reported in *B. Iswarayya* v. *Swarnam* (2). The learned counsel further relied on the case of *Twentyman* v. *Twentyman* (3) wherein the learned President of the Divorce Court, after referring to the cases of *Morris* v. *Morris*, *Kirk* v. *Kirk* and *Stanley* v. *Stanley*, decided that the court has no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance. This ruling was based on the provisions of section 32 of the Matrimonial Causes Act of 1857 which is for practical purposes indentical with

(1) (1914) I.L.R., 39 Bom., 182. (2) (1931) A.I.R., P.C., 234.
(3) (1903) L.R., Pro. Dn., 82.

section 37 of the Indian Divorce Act. The learned Judge pointed out that in the two previous cases quoted by him, the point in dispute did not appear to have been raised by counsel for the respondent and in one case at least the order for a lump sum was made by consent. He went on to say:

> "But, notwithstanding those decisions, having regard to the plain words of the Act and to the fact that the point has now been definitely raised and argued for the first time, I cannot say that I have power to make the order asked, although I should have been glad if I could have seen my way to do so."

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Earlier in the judgment he had remarked. "It was contended that the words in section 32, 'such gross sum of money' are not governed by the subsequent words, 'not exceeding her own life' and that these words apply only to the security." He went on to say, "I cannot so read the section; and I am led to the view I now hold by the observation that that applies both to the gross and to the annual sum of money mentioned in the section. With regard to the annual sum of money, it must be clearly a securing by settlement in the ordinary way; and when a gross sum is ordered, that must also be secured, and not paid over to the petitioner; and it can only be secured for some period not exceeding the lifetime of the petitioner".

It is important to note that the construction of this paragraph of section 32 of the Matrimonial Causes Act, is one which ultimately is based on the absence of punctuation in the section. The learned counsel for the respondent points out that a Full Bench of the Allahabad High Court in *Edward Caston* v. *L. H. Caston* (1) reprehended the action of the Judges in certain other cases in venturing to look at the stops, that is the punctuation. On the other hand one of the

(1) (1899) I.L.R., 22 All., 270.

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members of the Bench of the Bombay High Court remarked, in *Blanche Somerset Taylor* v. *Charles George Bleach* (1), that "with due deference to that Bench there would, however, appear to me no sufficient ground . . . for refusing the assistance of the punctuation where the sense might otherwise be doubtful in Acts of the regularly constituted Legislatures of India." For the contrary view that it is an error to rely on punctuation, reliance was placed on the Privy Council ruling reported in *The Maharani of Burdwan* v. *Krishna Kamini Dasi and others* (2), a case otherwise of an entirely different nature, in which their Lordships remarked that "they think that it is an error to rely on punctuation in construing Acts of the Legislature." For myself it would, I think, be almost sufficient to say that I do not find any sufficient reason for differing from the view taken by the Bombay High Court in the ruling reported in *Blanche Somerset Taylor* v. *Charles George Bleach* (1), to which I have referred above. But I am inclined to take the matter a little further because, with the greatest possible respect, I find it difficult to accept the view put forward by the learned President in the case of *Twentyman* v. *Twentyman* (3). For the purpose of argument, let the internal punctuation of paragraph 3 of this section be entirely omitted; we then have it that *prima facie* the paragraph gives the court power to direct that "the husband shall secure to the wife such gross sum of money or such annual sum of money for any term not exceeding her own life as it thinks reasonable." It is plain, I think, that any annual sum of money which is to be secured to the wife is at her disposal entirely. *Prima facie* therefore any gross sum of money which is to be secured to the wife should also be at her disposal entirely. The section does not make it necessary that an instrument should be executed but

(1) (1914) I.L.R., 39 Bom., 182. (2) (1887) I.L.R., 14 Cal., 365(372).
(3) (1903) L.R., Pro. Dn., 82.

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only gives power to cause an instrument to be executed, and therefore I should suppose that in the case of the securing of a gross sum of money, the court may compel the husband to secure it to the lady either by the execution of an instrument or by direct payment in the form of cash. Looking at the matter from another point of view, if we are to suppose that by the words "secure to the wife a gross sum of money" what is realy meant is not that the wife shall get the gross sum of money as she gets the annual sum of money, but that she is only to get the interest from a gross sum of money, we have to import into the section by implication a whole series of provisions which are not found there, and which could, as I should suppose, only be imported by some words, for example in brackets, providing that the gross sum of money is not to be available to the wife as such but only in the form of interest. (I disregard for the moment the view expressed by some Judges in English cases that brackets are highly objectionable.) To my mind then on a reasonable reading of this third paragraph of section 37, the correct interpretation is that the husband is to secure to the wife a gross sum of money which is to be at her disposal, in the same way as the annual sum of money, and the reading of the words "for any term not exceeding her own life" with the words "gross sum of money" entail such limitations on the words "gross sum of money" as render it impossible for the former words to be read with the latter. I would therefore have no hesitation in holding that in the present case the section does give a power to direct a money payment as was held by the Bombay High Court in the case to which I have referred earlier. It is noteworthy that the conclusion of the Bombay High Court was reached after a careful consideration of the English cases including *Twentyman* v. *Twentyman* (1), and I am not satisfied that by reason

(1) (1903) I.L.R. Pro. Dn., 82.

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of the Privy Council ruling referred to on behalf of the respondent any different approach to the matter has become necessary.

There remains only the question what amount should the court order to be paid to the petitioner out of the amouns which are due to the respondent by way of provident fund and gratuity. The amount claimed by the petitioner is one-third of the total amount free of all deductions. For the respondent the suggestion put forward is that the maximum amount which should be given is one-tenth and that this one-tenth should be calculated on the net amount coming in to the respondent after payment of outstanding bills. The gross amount due to the respondent appears to be Rs.25,533 and the amounts which the respondent asks me to deduct are Rs.3,300 due to various creditors including the Oudh Rohilkhand Railway European Co-operative Society whose dues amount to Rs.1,902-8. Rs.500 which has been ordered to be paid to the petitioner under the order, dated the 30th of March, 1938. Rs.600 due to counsel, *vide* the certificates on the record and some other small items making up a sum of Rs.4,439 in all, and leaving as a balance available for investment a sum of Rs.21,094. It is difficult to apply any principle in this matter. It is contended, of course, for the petitioner that those debts are due to the extravagance of the respondent, and that she should not be a sufferer thereby. It is remarked that the respondent ought to have cut his coat according to his cloth and that for example the amount paid to counsel by way of fees is a very large sum for a man who is in the situation of the respondent. With that contention I am bound to agree. I further agree that the respondent cannot possibly be held entitled to any consideration by reason of the increase of his illegitimate family. In the case quoted in agreement which came before the courts in England, those courts refused to take into consideration even the existence of a family by a former marriage.

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I think that the most reasonable method of disposing of the present application will be to fix a round sum. After a full consideration of the circumstances, I direct the respondent to pay to the petitioner a sum of Rs.7,500 out of the amount which comes into his hands. This will not include the amount of Rs.500 which has been ordered to be paid under the previous order.

I make no order as to costs because in that sum of Rs.500 a sufficient provision has been made to enable the petitioner to pay the necessary court-fees for these applications and some amount towards the fees of her counsel. For the purpose of the decree only the counsel's fee is fixed at Rs.250 under paragraph XI, Chapter XIX of the Chief Court Rules.

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FULL BENCH

Before Mr. Justice G. H. Thomas, Acting Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton

MUSAMMAT RAGHURAI (PLAINTIFF-APPELLANT) v. BINDRA PRASAD AND OTHERS (DEFENDANTS-RESPONDENTS)*

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Wajib-ul-arz—*Construction of documents—"Lawalad", whether means "sonless" or "issueless"—Language of one document, how far to be relied upon in construction of other document—Same word used in several places in the same document, whether to be given the same meaning everywhere.*

Where the *wajib-ul-arz* contained the following provisions: "In our family except a male offspring daughters and daughters' children are excluded from inheritance. The share is divided according to the number of wives and not according to the number of *aulad*. If out of the brothers born of the same mother, any one dies *lawalad* then only the uterine brothers will be entitled to the share of the deceased and not

*Second Civil Appeal No. 316 of 1935, against the decree of Mr. Qadeer Hasan, Civil Judge of Sitapur, dated the 15th of August, 1935, confirming the decree of Mr. Hjran Kumar Ghoshal, Munsif of Sitapur, dated the 26th of March, 1935.