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whether publicly or privately owned, which at the time when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meetings held in private premises. But the place must be one which is open to the public as such. And this involves that the public cannot be prohibited from putting up flags in private houses first because those who put up the flags are owners or occupants of such houses and second because the public as such neither frequent nor visit private houses. It is a misuse of language to call house-owners who use their houses members of the public for the purpose of this section, and I have not been shown any instance of such a use of the section."

The convictions and sentences of the applicants in both the cases must therefore be set aside and no question of re-trial arises owing to the view that I have taken of the order under section 144, Cr. P. C.

The applications are accepted and the convictions and sentences of the applicants set aside.

Application accepted.

MISCELLANEOUS CIVIL

Before Mr. Justice R. L. Yorke

1939
December, 11

MRS. N. A. ALEXANDER (APPLICANT) v. M. S. JALIL AND ANOTHER (RESPONDENT-OPPOSITE-PARTY)*

Divorce—Indian Divorce Act (IV of 1869), *section* 16—*Civil Procedure Code (Act V of* 1908), *section* 151 *and Order XXXII, rule* 5—*Decree for dissolution of marriage made absolute—Application by third party for setting aside decree under section* 151, *C. P. C., maintainability of—Order XXXII, rule* 5, *applicability of.*

Where in a divorce suit both decree *nisi* and decree absolute for dissolution of marriage have been passed a third party cannot maintain an application to have the decree set aside under section 151, C. P. C.

*Civil Miscellaneous Application no. 161 of 1939, for setting aside the decree for dissolution of marriage passed in Divorce Case no. 9 of 1937, dated the 23rd November, 1938.

There is no provision under the Indian Divorce Act for a decree which has been made absolute being assailed by application in the manner in which a decree *nisi* can be assailed under section 16.

Order XXXII, rule 5 is not applicable except while the proceedings in a suit are still pending. Case law discussed.

Mr. *R. I. Wahid,* for applicant.

Mr. *M. L. Saxena,* for petitioner.

Mr. *Ghulam Imam,* for respondent.

YORKE, J.:—This is a civil miscellaneous application by Mrs. N. A. Alexander asking me to set aside a final decree for dissolution of marriage between M. S. Jalil and Mrs. M. P. Jalil, daughter of the applicant, on the allegation that throughout the proceedings both for decree *nisi* and decree absolute Mrs. M. P. Jalil respondent in the divorce suit was a minor, a fact which was not brought to the notice of the Court by the petitioner M. S. Jalil, with the result that no guardian *ad litem* was ever appointed on behalf of the respondent. No section of the Code of Civil Procedure was mentioned in this application, but learned Counsel has sought to argue it by relying on section 151 of that Code read with Order XXXII, rule 5.

It was at first found impossible to serve any notice on Mrs. M. P. Jalil who had been treated by the applicant as an opposite-party. She was ultimately served by notice in the newspapers, and on the date of argument put in an appearance and was represented by Counsel.

At an earlier stage on the 8th May, 1939, two issues were framed—"(1) Is this application maintainable by the applicant under section 151 of the Code of Civil Procedure on the facts stated therein? (2) Is the final decree of this Court, dated the 23rd November, 1938, a nullity for the reason that the respondent Mrs. M. P. Jalil was a minor and was not represented in the suit by a guardian *ad litem*?"

During my absence on leave the matter came up before BENNETT, J. who passed an order on the 11th September, in which he remarked that Mrs. M. P. Jalil would attain the age of 18 on the 15th September, 1939,

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and that in these circumstances he thought it desirable that notice should issue to her to elect on or before the next date of hearing whether she wishes to proceed with this application under Order XXXII, rule 12 of the Code of Civil Procedure. Mrs. M. P. Jalil has now appeared and states through her counsel that she does not wish to proceed with this application herself under the provisions of Order XXXII, rule 12. The application therefore stands before me purely as an application made by a third party relying on section 151 of the Code of Civil Procedure, which it is suggested may be read with rule 5 of Order XXXII. That rule provides that "Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit. (2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew or might reasonably have known, the fact of such minority, with costs to be paid by such pleader."

I am clearly of opinion that Order XXXII, rule 5 is not applicable except while the proceedings in a suit are still pending. That seems to me to follow from the whole scheme of the order and is clearly indicated by the wording of the large majority of the rules.

This being so, the sole question for decision is whether in the circumstances that now exist, namely that this Court has made not merely a decree *nisi* but also a decree absolute for dissolution of a marriage a third party can move this Court to set aside that decree absolute by applying the provisions of section 151 and whether this Court by the application of that section or any other section has jurisdiction to set aside its own decree. The wording of section 151 is as follows:

> "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such

orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

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No doubt the wording of the section is very wide and would seem to give very wide powers to the Court, but I am clear that the application of the sanction of which I am asked to approve goes far beyond the scope of the section. It is true that the section has been used for the purpose of setting aside an *ex parte* decree, but it is doubtful whether that use of the section was a proper use of it. Speaking generally once a final decree has been made, that decree can only be set aside by appeal. It is possible, of course, for a person affected by a decree to institute a suit to have it declared that that decree is not binding upon him either because it is vitiated by fraud or because it is in some other way defective, or in some subsequent suit a party may plead that a certain decree has no effect in his case because it is null and void, as for instance on the specific ground that at the time when the decree was passed the defendant was a minor or a lunatic and was not represented by a guardian *ad litem*. But neither of these methods of getting rid of the effect of a decree result in the setting aside of the decree. The decree still remains, though it may, as a result of those attacks, have lost its force.

Now in the case of suits under the Indian Divorce Act it is quite clear that there is a stage during which a decree *nisi* can be assailed and the Court which made that decree can reverse the decree *nisi* itself, that is under the provisions of section 16, which provides that a decree *nisi* shall not be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court, by general or special order from time to time, directs. During that period it is specifically provided that "any person shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree (*nisi*) should not be

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made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court." This enables a third party in India to approach the Court in the same manner as a Court is moved in England by the King's Proctor. There is no provision under the Indian Divorce Act for a decree which has been made absolute being assailed by application in the manner in which a decree *nisi* can be assailed under section 16. It may be the case that material facts have not been brought to the notice of this Court, and that throughout the proceedings in this Court right up to and including the decree absolute the defendant Mrs. M. P. Jalil was a minor, and that will necessarily affect the decree if the appointment of a guardian *ad litem* of the respondent was essential in a suit under the Indian Divorce Act, but that is not by itself any reason for the Court to assume a jurisdiction which it does not possess.

Learned counsel has sought to rely on three reported cases, none of them by any means on all fours with the present case. In *U. E. Maung* v. *P. A. R. P. Chettyar Firm* (1) it was held that "although a Court may have no power under section 151 to set aside an *ex parte* decree against a party to a suit unable to comply with the provisions of Order IX, rule 13, and the law of limitation, still a Court can under section 151 set aside an *ex parte* decree at the instance of a person not a party to the original suit under peculiar circumstances and make him a defendant and allow him to defend the suit. There is a clear distinction between a case in which an *ex parte* decree is set aside in order to allow a third person to be made a defendant and defend the original suit and a case where the third person who has made the application could not, even if successful, be made a defendant and allowed to defend the suit. The case quoted from *Rash Behari Mazumdar* v. *Kasum Kumari Guha and others* (2), appears to me to have no

(1) (1928) A.I.R., Rang., 273. (2) (1925) A.I.R., Cal., 1145.

application whatever to the circumstances of the present case. In *Samaresh Chakravarti and another* v. *Jalpaiguri Banking and Trading Corporation, Limited,* (1), a plaintiff who had obtained an *ex parte* decree received information that on the date of the suit the defendant was lunatic and that fact was confirmed by proceedings in lunacy and declaration to that effect. The defendant then died and the decree was sought to be executed against the legal representatives, against which the legal representatives, by an affidavit set up an objection that the decree was a nullity on account of the defendant's lunacy. The plaintiff thereupon took out a summons to the effect that the decree should be set aside and the suit after certain amendments in the plaint should be reconstituted as a suit against the legal representatives, and it was held that the order allowing such summons and amendment could not be made. Their Lordships seem to have taken the view that it was quite possible to make an order that the summons be treated as a memorandum of review. I do not think that it could by any means be possible for a third party to move an application in review. In any case this decision can be no support for the proposition put forward on behalf of the applicant that under section 151 a Court should make such an order as is sought at the instance of a third party.

On behalf of the respondent or opposite party Mr. M. S. Jalil's reliance has been placed on several rulings which seem to me to be of much clearer applicability. In *Lala Ajodhya Prasad* v. *Mst. Katori* (2) it was held by a Bench of the Allahabad High Court that a Court has no jurisdiction to set aside an *ex parte* decree, and order the whole case to be reopened at the instance of a person not in any way interested in the decision of the case and who has been expressly exempted from the decree. In that case certain persons who had been

(1) (1931) A.I.R., Cal., 168. (2) (1921) 61 I.C., 484.

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made *pro forma* defendants and had absented themselves from the hearing, made an application after the passing of a decree under Order XXXIV, rule 4, to set aside that decree on the ground that they had not been duly served with notice. The application was apparently under the provisions of Order IX, rule 13. The decree-holder thereupon applied to the court stating that these two persons had only been made *pro forma* defendants and that no relief was sought against them, and formally exempted them from the decree. By this act of the decree-holder the applicants became third parties not interested in the decision of the case, and Order IX, rule 13 ceased to be applicable to them. The trial court, however, having re-opened the case, it was held by the High Court that the trial court had no jurisdiction to make the order, it being an order which could clearly not have been made by the trial court by the application of any section except section 151.

In *Perumal Moopan* v. *M. K. Venkatachariar* (1) it was held by a single Judge of the Madras High Court that "the language of section 151 of the Civil Procedure Code is wide and refers to inherent powers of a Court to make such orders as may be necessary for the sake of justice. A stranger to a litigation, however, cannot intervene after a suit or a proceeding is disposed off, and claim the protection of section 151 of the Code or appeal to the inherent powers of the Court to do justice." The matter was discussed at some length in *Neelaveni* v. *Narayana Reddi* (2), in which it was held by a Full Bench of the same High Court that "a Court has no power, apart from the provisions of Order IX, rule 13, of the Code of Civil Procedure to set aside an *ex parte* decree passed by itself;". In this case one of the learned Judges remarked, "moreover, I am clear that section 151 must be construed not as empowering a Court to exercise power which it never possessed, but as preserv-

(1) (1922) 68 I.C., 910. (2) (1919) I.L.R., 43 Mad., 94.

ing to it those powers which it has been in the habit of exercising and which by an oversight or by failure to specify have not been particularized in the statute. Section 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of Justice is competent to exercise and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided for in the Code." It has never been held, so far as I am aware, that a Court has an inherent power to set aside at the instance of a stranger, a decree which has been passed by it. The power to set aside such a decree at the instance of the party directly affected is contained in Order IX, rule 13. Section 151 cannot, in my opinion, be invoked for the purpose of enabling a Court to set aside an *ex parte* decree at the instance of a stranger. It follows that, in my opinion, the only possible finding on issue 1 is that this application is not maintainable by the applicant under section 151 of the Code of Civil Procedure on the facts stated therein.

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In these circumstances the question set out in the second issue framed by me, namely: "Is the final decree of this Court, dated the 23rd November, 1938, a nullity for the reason that the respondent Mrs. M. P. Jalil was a minor and was not represented in the suit by a guardian *ad litem*?" does not really arise for decision. Learned counsel for the respondent Mr. Jalil has contended that it was not necessary under the rules of the Code followed in England in Divorce suits for a minor respondent to be represented by a guardian *ad litem*. He refers to a passage in Rattigan on Divorce, (Second edition), page 521, in which it is said, "It will be noticed that under rule 108" (of the Rules and Regulations of the English Divorce Court) "it is not necessary for a minor co-respondnet to elect a guardian or to have a guardian assigned to him for the purpose of conduct-

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ing his defence. But in view of the wide terms of Order XXXII, rule 5, clause (2), Civil Procedure Code, it is submitted that a co-respondent who is a minor must in suits under the Indian Divorce Act be represented by a guardian *ad litem*. Moreover a co-respondent is a 'defendant', and Order XXXIII, rule 3 of the Code is as applicable to him as to a respondent." On page 519 it is remarked, "Section 49 of the Divorce Act makes no provision for the case of a minor respondent or co-respondent." Section 49 provides that a minor petitioner shall sue by his or her next friend to be approved by the Court. The Commentator, however, goes on to refer to Order XXXII, rule 3, and it is quite clear that he is of the opinion that a guardian *ad litem* must be appointed for a minor respondent. At the top of page 521 he remarks, "The effect of this section" [referring to Order XXXII, rule 5(2)] "is that no order by which a minor may in any way be concerned or affected can legally be made without his being represented by a next friend or guardian for the suit (*Amichand Talakchand* v. *Collector of Sholapur* (1)." Learned counsel suggests that section 7 which provides that the Courts are to act on the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts an gives relief, would bring in the application of the passage quoted from page 521 referring to the election of a guardian by a minor co-respondent. It does not appear to me that section 7 has any application in the matter at all. That section merely relates to the principles and rules which are to guide the Court in acting and giving relief in suits and proceedings under the Indian Divorce Act. Section 45 provides that "Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure." That Code requires that a guardian *ad litem* should be appointed for a minor defendant. It would *prima*

(1) (1888) I.L.R., 13 Bom., 234.

facie appear to follow that where no guardian *ad litem* had been appointed the decree is a nullity, but this is not the stage at which such a declaration can be given, nor as I have already said can such a declaration be made on a mere application by a third party. It may be wise for the petitioner Mr. M. S. Jalil to act in future on the supposition that the decree which he has obtained is a nullity, but the question whether it really is or is not a nullity is one which could only arise for decision in some future case in which the nullity or otherwise of the decree *nisi* and final decree for dissolution of the marriage is a matter in issue, as it might be for example in a criminal court in which Mr. Jalil was charged with bigamy or in a civil suit in which other matters depend on the validity or otherwise of the decree. I do not think it would be proper to make a pronouncement on that question on a miscellaneous application of this kind by a third party who is entitled to no relief in this application and no such decision.

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On my findings above I hold that there is no force whatever in the present application which accordingly fails and is dismissed with costs. The only certificate of pleader's fees incurred by either of the respondents on the record is that of Mr. Saxena representing Mr. Jalil for Rs.85 which is by no means unreasonable, and is accordingly admitted under the provisions of rule XI, Chapter XIX of the Chief Court Rules for taxation as pleader's fee.

Special costs were asked on behalf of the respondent Mr. Jalil, but I find no ground for awarding any special costs in this case.

Application dismissed.