1892.

J. G. SMITH v. LUDHA GHELLA DÁMODAR.

contrary. *Koegler* v. *The Coringa Oil Co.*(1) has no bearing upon the question. There one of the parties did not, in fact, appoint an arbitrator at all.

Attorneys for the plaintiffs:—Messrs. *R. S. Brown & Co.*

Attorneys for the defendant:—Messrs. *Bálkrishna and Perozeshaw.*

(1) I. L. R., 1 Calc., 42.

PÁRSI MATRIMONIAL COURT.

Before Mr. Justice Jardine.

1892. *July* 29.

HIRA'BA'I, PLAINTIFF, *v.* DHUNJIBHOY BOMANJI, DEFENDANT.*

Husband and wife—Párs Matrimonial Court—Act XV of 1865—*Suit by wife for judicial separation—Alimony—Alimony after decree dismissing wife's suit and pending appeal—Alimony pending petition for review of judgment—Practice in allotment of alimony.*

A wife sued her husband for judicial separation in the Párs Matrimonial Court. Alimony was granted to be by an order dated 11th July, 1891, which directed the defendant to pay alimony to her from the 15th April, 1891, "until the final decree herein be passed." On the 18th July, 1891, the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment, which was discharged on the 27th January, 1892, and on the 18th March, 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony "*pendente lite*" from the date of filing the suit, or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal.

Held—

(1) Dismissing the application, that the words "final decree herein," contained in the order of the 11th July, 1891, by which alimony was granted, meant the decree in the suit and not in the appeal.

(2) That the Párs Matrimonial Court constituted under Act XV of 1865 had no power to award alimony "*pendente lite*" after decree and pending appeal.

(3) An unsuccessful wife is not entitled to claim alimony after final decree and pending appeal, nor for the period during which she is seeking review of judgment.

Quære—whether the Court where a petition for review is pending before it has a discretion to allow continue alimony "*pendente lite*."

*Suit No. 4 of 1891.

The words, "during the suit," in section 33 of Act XV of 1865 include the period up to the making of a final or absolute decree.

Ellis v. *Ellis* (1) and *Dunn* v. *Dunn*(2) should guide the practice of the Pársi Matrimonial Court in allotment of alimony for the time following a decree *nisi*.

APPLICATION by a plaintiff, after dismissal of suit and pending appeal, for an order directing alimony to be paid from date of dismissal of suit until final disposal of appeal.

This was a suit, filed on the 24th March, 1891, by a wife against her husband for judicial separation. On the 11th May, 1891, she applied for alimony, which was granted by an order made on the 11th July, 1891. This order directed "that the defendant, Dhunjibhoy Bomanji, do pay to the plaintiff, Hirábái, as and by way of alimony *pendente lite*, the sum of Rs. 120 per mensem from the 13th April, 1891, until the final decree herein be passed."

On the 18th July, 1891, the suit was dismissed; after that date the defendant ceased to pay the plaintiff the alimony allowed by the above order.

The plaintiff obtained a rule *nisi* for review of judgment, which was discharged on the 27th January, 1892, and the review was refused.

On the 18th March, 1892, the plaintiff appealed against the decree dismissing the suit and the order refusing a review.

On the 28th June, 1892, the plaintiff presented a petition praying for an order directing the defendant to pay to her all the arrears of alimony *pendente lite* from the date of the filing of this suit, or so much thereof as had not been already paid, and that he should be directed to pay to her the sum already fixed as alimony *pendente lite*, being Rs. 120 per mensem, till the final disposal of the petitioner's appeal.

The matter now came on for argument.

Jardine (with *J. D. Nimuchwalla*) for defendant showed cause:—No alimony can now be granted. The suit was dismissed and is over. Section 36 of Act IV of 1869 gives alimony only "pending the suit." The word 'suit' there does not include appeal. A husband cannot be required to enable

(1) 8 P. D., 188. (2) 13 P. D., 91.

1892.

HIRÁBÁI v. DHUNJIBHOY BOMANJI.

his wife to obtain the judgment of a second Court. Further, this Court cannot deal with the question. If the application can be made at all it should be made to the Court of Appeal. The appeal is against the decree and the order refusing a review, but no appeal lies against such an order. As to the merits, the review was refused because the Court was of opinion that on the allegations the plaintiff had no case. This application is made at a very late period. The petition was dismissed so long ago as the 18th July, 1891; so there can be no pressing necessity —Macrae on Divorce, p. 3; *Wells* v. *Wells*(1).

E. D. Reporter for plaintiff in support of the rule:—The order for alimony until final decree must include the decree in appeal. As to the English practice, *Lovedon* v. *Lovedon*(2); *Jones* v. *Jones*(3); *Nicholson* v. *Nicholson*(4), in which case the words "*pendente lite*" are defined as meaning while the rights of the parties are in contest; *Wilson* v. *Wilson*(5); Browne on Divorce, (5th Ed.), pp. 273, 379, 380. *Jones* v. *Jones*(3) decides that alimony continues unless the subsequent proceedings are vexatious and frivolous. The appeal in the case has been admitted by the Court, so it cannot be regarded as frivolous. As to delay, the records of the Court will show that the plaintiff has not been guilty of any delay.

JARDINE, J:—The plaintiff sued for a judicial separation in this Court, and on the 18th July, 1891, her suit was dismissed by Mr. Justice Birdwood. The suit was filed on the 24th March. On the 11th May she applied for alimony, and got an order from the Judge on the 11th July, directing the payment of alimony *pendente lite* "until the final decree herein be passed." On the 9th September the plaintiff applied for a review of judgment, and on the 27th January, 1892, the learned Judge, after a rule *nisi* and a hearing, refused to review, and ordered the plaintiff to pay the costs. The plaintiff appealed against the dismissal of the suit and the refusal to review; and her appeal was admit

(1) 3 S. and T., 542; S. C. 33 L. J., (P. M.,) 151.
(2) 1 Phil., 208.
(3) 41 L. J. (P. and M.), 53.
(4) 3 S. and T., 214.
(5) 3 Hagg., 329.

ted to the file of the High Court on the 18th March, 1892, and now awaits hearing and decision. It is admitted that the defendant has paid the alimony up to the date of dismissal of the suit.

On the 28th June last, the plaintiff made application to this Court to direct the defendant to pay her all the arrears of alimony, and to pay her at the same rate as alimony *pendente lite* till the final disposal of the appeal. Mr. Jardine, for the defendant, contends that the appeal is vexatious and frivolous, and that the plaintiff is guilty of laches and delay, and that the Court ought, therefore, if it has any power to order payment of alimony after the dismissal of the suit, to refuse to do so in its discretion. He also argues that this Court has no jurisdiction, and that the application ought to have been made to the High Court, which is seized of the appeal. Mr. Reporter, for the plaintiff, urges that the form of the Judge's order shows that he meant the alimony to continue till the Court of Appeal had determined the case.

In my opinion, the words "final decree herein" mean the decree in the suit and not in the appeal. In Rule 190 of the English Rules (quoted in Browne on Divorce, 5th Ed., p. 234) the words "final decree" are used in this sense, and the expression sometimes means the absolute decree as compared with the decree *nisi*, as in Cotton L. J.'s judgment in *Ellis* v. *Ellis*[1]. In section 44 of Act XV of 1865 a final decree is contrasted with an *interim* order.

It has been conceded in argument that the Court of Appeal has power to direct payment of alimony pending the appeal. As authorities on the practice in England and the right of the wife as a general rule, to alimony pending the appeal, Mr. Reporter cites *Lovedon* v. *Lovedon*[2] in the Court of Arches and *Jones* v. *Jones*[3], where it was affirmed by the Full Court. But no precedent in this Court, nor authority in any of the reports or text-books, has been cited to show that the alimony pending the appeal may be awarded by the Court whose decision has been appealed against.

(1) 8 P. D., 188. (2) 1 Phil., 208.

(3) L. R. 2 P. and D., 333; S. C. 41 L. J. (P. and M.), 53.

1892.

HIRÁBÁI v. BHUNJIBHOY BOMANJI.

Another contention for the plaintiff is that section 33 of Act XV of 1865 should be interpreted as if the word "suit" included appeal in regard to the provision of alimony *pendente lite*, where divorce or judicial separation is sought. It is urged that after an appeal is admitted, this Court and the High Court have co-ordinate powers to award alimony. I do not think this is the necessary or reasonable meaning. In no section of this Act does the word "suit" or "sue" necessarily take the meaning which includes appeal: such a meaning would conflict with sections 15 and 16 about jurisdiction and section 44 about the custody of children. It may be supposed that, if the Legislature had meant to empower this Court to award alimony after appeal made, it would have used as plain language as in section 36 of the Indian Divorce Act IV of 1869.

Section 33 of Act XV of 1865 empowers this Court to order the husband to pay alimony "during the suit." It is the practice here to pass a decree *nisi* in the first instance upon a sentence of divorce. Since the Court was erected, there had been six sentences of nullity before I passed such a sentence in *S.* v. *B.* [1]. In four of these cases the Court proceeded by decree *nisi*, possibly influenced by an amending Act of Parliament, which so far assimilates the English procedure in nullity to that in divorce: I followed these precedents in *S.* v. *B*[1]. I am informed by the Clerk of the Court that there has been only one successful suit for judicial separation (No. 3 of 1870): there the first decree made was a decree *nisi* to be made absolute after three months.

As, in the present case, I have had to consider the practice, I may now state my view that the words "during the suit" may be taken to include the period up to the making of a final or absolute decree. This view will make our practice conform to that of England. In *Hulse* v. *Tavernor*[2], the Judge Ordinary says: "The two decrees are the beginning and ending of the same Act, the one inchoate, and the other perfecting, or complete; a space of time being interposed to admit of enquiry." The same view was taken in *Norman* v. *Villars*[3]. The matter

(1) L. R., 16 Bom., 639. (2) L. R., 2 P. and D., at p. 261.
(3) 2 Ex. D., 359.

settled by two decisions in the Court of Appeal. In *Ellis* v. *Ellis*[1], a decree *nisi* had been obtained by a wife, and was not appealed against. It was held, overruling *Latham* v. *Latham*[2], that the Judge Ordinary has power to order alimony *pendente lite* notwithstanding a decree *nisi* has been made for dissolution of marriage. The reason given is as follows :—"Until the final decree the Court can make no permanent provisi[illegible]or the wife; therefore, it seems reasonable that it should hav[illegible]ver to make some temporary provision." The case of *Ellis* v. *Ellis* has been distinguished from cases where the guilt of the wife has been established. In *Dunn* v. *Dunn*[3], Cotton, L. J., says: "*Ellis* v. *Ellis* was an entirely different case. The wife there took the proceeding against her husband, and she had in no way forfeited her rights against him. The case was one where it would be proper ultimately to grant permanent alimony, and we thought it reasonable that in the meantime she should have intermediate alimony."

The Indian Divorce Act IV of 1869, section 36, in cases where a decree *nisi* has been pronounced, leaves less discretion to the Judge than the law of England. It provides no rule in cases of judicial separation; but as to suits for dissolution or nullity, it says that the alimony pending the suit shall continue until the decree is made absolute or confirmed. Mr. Macrae, at page 111 of his edition of that Act, considers that the Indian rule is based on *Wells* v. *Wells*[4], but the judgment in *Dunn* v. *Dunn* shows that *Wells* v. *Wells* did not lay down a binding rule about the period between decree *nisi* and decree absolute. Cotton, L.J., says:—

"In *Wells* v. *Wells* there was no motion for a new trial; in the present case the motion for a new trial has been refused. We do not find on enquiry that *Wells* v. *Wells* has been treated in the Divorce Court as establishing such a general rule as is contended for—that, although the wife has been found guilty, the alimony must go on till the case is finally disposed of. Until adultery has been proved against the wife, she is entitled to

(1) 8 P. D., at p. 189.
(2) 2 Swab. & Trist., 299.
(3) 13 P. D., at p. 93.
(4) 3 Swab and Trist., 542.

1892.

HIRA'BA'I v. DHUNJIBHOY BOMANJI.

support, and the Court gives her alimony *pendente lite*. But, when her adultery has been proved, though she is still a wife she has lost that right. Ought not the alimony then to stop at the verdict? * * The reasonable rule then appears to be that on the jury finding the wife guilty of adultery her right to alimony ceases, subject to this—that if the Judge thinks it reasonable so to do, he can continue it. Thus, for instance, he may think it not improbable that the wife will obtain a new trial, and succeed ultimately in establishing her innocence; in such a case he might well think it reasonable that the alimony should be continued. To hold that alimony continues as a matter of right till an application for a new trial is disposed of, would encourage frivolous applications for new trials."

Lindley and Bowen, L.JJ., concurred, and the former remarks: "It seems anomalous that the right should continue when a jury has found her guilty. If the verdict is against her, the onus must lie upon her to show that the alimony ought to be continued. The Judge ought to have power to give it to her, but I think it would be wrong to hold that without further order it continues after an adverse verdict." I may here state, that as section 33 of the Act I have to administer (Act XV of 1865) does not limit the Judge's discretion as section 36 of the Indian Divorce Act does, I am of opinion that *Ellis* v. *Ellis* and *Dunn* v. *Dunn* should guide the practice in allotment of alimony for the time following a decree *nisi*.

It follows logically from the fact that an unsuccessful wife is not as of right entitled to claim alimony up to decree absolute, that she is not entitled to claim it after final decree—I mean pending appeal—nor for the period in which she is seeking review of judgment. *Wells* v. *Wells*, on which Mr. Jardine relies, is authority in England for holding that when the lower Court has declared its final judgment on the case it has no power to allot alimony *pendente lite*. What is said there about the divorce of a wife may well apply to her suit for judicial separation. "Where the cause is tried before the Court itself, that final conclusion will have been reached when the Court declares its judgment on the facts, for in this Court such judgment is

final. And if an appeal carries the case forward, it also carries it into another Court competent to allot alimony, if it pleases." The discretion to allot can be better exercised by the Court where the appeal is pending than by the Original Court. As Lord Penzance says in *Jones* v. *Jones*, in the report in 41 L. J., Prob. 53: "If there was fair ground for an appeal, it would be reasonable that alimony should be paid, but if a wife in all cases were entitled to alimony during the appeal, great evil might result. A wife found guilty of adultery might appeal for the sole purpose of getting alimony." Now it is obvious that the Judge of the Court appealed from cannot properly exercise the judicial discretion indicated in this remark. I am of opinion that I have no power to allot alimony *pendente lite* after this Court has passed final judgment on the case.

It is, however, argued that the time taken up in the review proceedings ought to be excepted from this ruling, on the analogy of *Nicholson* v. *Nicholson* (1), where on granting a new trial the Judge Ordinary said that the alimony *pendente lite* remained in force. Now, as pointed out in Macrae, p. 167, there is some resemblance between the reasons for, and procedure in new trial and review. I am not prepared to say that this Court, while a petition for review is still pending before it, may not have a discretion to allot or continue alimony *pendente lite*. I can well imagine cases to which the reasoning in *Dunn* v. *Dunn* may justly apply, where the Judge thinks that the wife may be ultimately successful. But no motion for continuing the alimony was made to Mr. Justice Birdwood: the present claim is made after that learned Judge had finally refused the review with costs, and after he had ceased to be Judge of this Court. The reasoning in *Wells* v. *Wells* clearly shows that I should refrain from interference, especially as the wife has appealed against the order refusing to review. There the Judge Ordinary laid down that "such alimony can only be allowed, if paid or enforced, while the question of a new trial is still open." The judgment of this Court being final, so far as this Court is concerned, I refuse alimony for the period of the review proceedings.

(1) 3 Swab and Trist., 214.

1892.

HIRÁBÁI v. DHUNJIBHOY BOMANJI.

To grant it on an application made so late, the husband having no notice of it before, and, therefore, no special reason for getting the review matter determined speedily, would encourage frivolous endeavours to spin out litigation at the husband's expense. Alimony is given *pendente lite* for the husband's protection, to prevent the wife using the husband's credit, but the course taken since the dismissal of the suit has left him without this protection. The basis of the wife's application is that she is without means. I ask, as in *Noblett* v. *Noblett* (1), if the plaintiff was in such a state, why did she not apply earlier?" See, too, *Twisleton* v. *Twisleton*(2). I must refuse to allot alimony during the review proceedings on the ground of delay. I now dismiss the application with costs.

(1) L. R. 1 P. and D., 651. (2) L. R. 2 P. and D., 339.

ORIGINAL CIVIL.

Before Mr. Justice Bayley, (Acting Chief Justice), and Mr. Justice Farran.

1892. *September* 2.

FRÁMJI MÁNEKJI PUNJÁJI AND ANOTHER, (PLAINTIFFS), *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, (DEFENDANT).*

Abkári (Bombay) Act V of 1878, *Sec.* 55—*Construction*—"*Or*" *read* "*nor*"—*Order of confiscation.*

Section 55 of the Bombay Ábkári Act V of 1878 provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated, or without hearing any person who claims a right thereto, and the evidence, if any, which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November, 1891, and an order of confiscation was made on the 17th November, 1891. The order was made after hearing the plaintiffs.

Held, that under the provisions of the Ábkári Act, section 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure.

REFERENCE from the Bombay Court of Small Causes, under section 69 of the Presidency Small Cause Courts Act (XV of 1882).

* Small Cause Court Suit, No. 5724 of 1892.