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RAMSAY v. BOYLE.* [2nd April, 1903.]

Divorce—Divorce Act (IV of 1869) ss. 7, 11, 45—Parties—Intervention—Jurisdiction—Alleged adulteress, application by—Civil Procedure Code (Act XIV of 1882) s. 32.

In a wife's suit for divorce against the husband on the ground of incestuous adultery, the Court has no power under the Indian Divorce Act (IV of 1869) to allow the alleged adulteress to intervene. The words "all proceedings under this Act between party and party" in section 45 of the Act apply only to proceedings after the parties to the suit have been determined, and the parties can only be determined in accordance with the provisions of the Act.

S. 7 of the Act does not apply to procedure.

S. 32 of the Civil Procedure Code (Act XIV of 1882) cannot apply to the case of substitution, dismissal, or addition of parties in divorce proceedings.

Bell v. Bell (1), *Abbott* v. *Abbott* (2), and *Lowe* v. *Lowe* (3) referred to.

APPEAL by the applicant, Mrs. E. J. Ramsay, against the judgment and order of HENDERSON, J.

On the 9th of July 1902 Mrs. Ellen Thomas Boyle filed her petition, praying for an order that her marriage with the respondent, William McCormick Boyle, might be dissolved by reason of his incestuous adultery with her sister, Mrs. Edith Jane Ramsay. The respondent appeared in the proceedings and filed his answer denying that he ever committed adultery with the said Mrs. Ramsay. On the 18th of March 1903 the said Mrs. Ramsay made an application to Henderson J. for an order that she might be at liberty to intervene as a party respondent in the suit, to enter appearance and appear at the hearing in order to examine witnesses on her own behalf and cross-examine the witnesses who might be called by the petitioner, and to be heard by Counsel on her own behalf. His [490] Lordship delivered the following judgment dismissing the application :—

HENDERSON, J. This is an application by a lady for an order that she may be at liberty to intervene, as a party respondent, in this suit to enter appearance and appear at the hearing, in order to examine witnesses on her own behalf and cross-examine the witnesses who may be called by the petitioner, and to be heard by Counsel in the ordinary way. She offers to waive service of notice, and has, I understand, served a copy of the answer, which she proposes to file on the parties in order that the suit may proceed without any delay.

The applicant is the sister of the petitioner in the case, and the allegation is that the respondent committed adultery with her, and that the allegation is the ground upon which the petitioner seeks for dissolution of her marriage. The applicant in her petition and also in her proposed answer denies the allegation of adultery. It is not suggested that there is any collusion between the petitioner and the respondent, and I am satisfied that this application in made *bona fide* by the lady for the purpose of protecting herself against the very serious consequences which an adverse finding on the question of adultery may have upon her reputation and social position.

* Appeal from Original Civil No. 9 of 1903.

Appellate Bench : Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Rampini, and Mr. Justice Mitra.

(1) (1883) L. R. 8 P. D. 217. (2) (1869) 4 B. L. R. (O.C.) 51.
(3) [1899] P. 204.

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A similar applicaton was made to Mr. Justice Jenkins in the case of *Bailey* v. *Bailey** in Matrimonial suit No. 7 of 1896, on the 1st February 1897, and after argument the application was refused. It appears to me that there is no real difference between that case and the present application. As pointed out by Mr. Justice Jenkins, in England a [491] discretion is given to the Court under section 28 of 20-21 Vict. Chap. 85, to direct that a person with whom the husband is alleged in the petition of the wife to have committed adultery, "be made a respondent, but although the Indian Act follows the English Act, it is silent upon this point. It has been suggested before me that the reason for this omission in the Indian Act is that that Act contains a special provision in section 45 dealing with procedure which makes the Civil Procedure Code applicable here. Section 45 which deals with proceedings "between party and party" declares that "subject to the provisions contained in the Act, all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure." When the Indian Act was passed the Civil Procedure Code in force was Act VIII of 1859, and section 73 of [492] that Act directs that, if

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* BAILEY *v.* BAILEY.

Divorce—Parties—Alleged adulteress, application by.

In a wife's petition for dissolution of marriage by reason of the husband's adultery with one Mrs. Ollenbach, the latter applied and obtained this Rule calling upon the petitioner to show cause why she should not be allowed to intervene.

Mr. *Avetoom* on behalf of the applicant, Mrs Ollenbach.

Mr. *Dunne* on behalf of the petitioner for divorce

JENKINS, J. In this suit a lady seeks for the dissolution of her marriage with her husband, alleging that he has been guilty of adultery with the present applicant, who is no party to the suit. The purpose of this application is to ensure that the applicant should be added as a respondent, and in support of that contention I have been referred first to an English case of *Bell* v. *Bell* (1), where a similar application was made with success That case is obviously no authority here, for it is a decision on a section of the English Act which expressly provides that a lady is under such circumstances entitled to be added as a respondent. Indeed, so far as an inference can be drawn from the case, it is adverse to the respondent.

The Indian Act, which follows the English Act, is silent on this point, and that although the provision of the English Act is contained in a section which commences in the same terms as the 11th section of the Indian Act. But then, it is said, section 7 assists the applicant. That section is in these terms: "subject to the provisions contained in this Act, the High Court shall in all suits and proceedings here under Act X give relief on the principles and rules which, in the opinion of the said Court, are as nearly as may be conformable to the principles and the rules which the Court for divorce and matrimonial causes in England for the time being acts and gives relief." It appears to me clear the expression "rules and principles" does not apply in support of the applicant's contention here. They point rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters.

Then reliance is placed upon section 45, which provides that, subject to the provisions herein contained, all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure. It is said that that makes section 32 of the Code of Civil Procedure applicable, and that this is a case in which it can properly be said that the applicant ought to have been joined or that her presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. It is very properly admitted by Mr. Avetoom that even if his client were added, no relief could be obtained against her, and she could not even be made to pay costs, and it is difficult to see how her presence as a party can be treated as necessary except in the sense that it may enable her to be represented by Counsel who would cross-examine, if need be, the petitioner and her witnesses. That does not seem to me to be a purpose contemplated by section 32. It is unnecessary for me now to express an opinion whether the Court could not under section 165 or 171 require the lady to be examined as a witness in the case; but it is at any rate clear that, should a decree *nisi* be obtained, it will be within her power to take the necessary steps under section 16 of Act IV of 1869 to bring before the Court all evidence that might be necessary for an adjudication on the case. I therefore refuse the application. The applicant must pay the costs.

(1) (1883) L. R. 8 P. D. 217.

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it appear to the Court at any hearing that all the persons who may be entitled to, or who claim, some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties, the Court may direct that they should be made either plaintiffs or defendants, as the case may be. The present Code by section 32 enables the Court to order that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. These sections were considered by Mr. Justice Jenkins, and he was of opinion that they did not enable him to make the applicant before him a party respondent.

It has now been contended that the decision of Mr. Justice Jenkins is erroneous, and Mr. Hill has laid stress upon the words "persons . . . whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit," and he has contended that the applicant in this case is a person likely to be affected by the result, to use the wording of the Code of 1859,—or a person whose presence is necessary to enable the Court to adjudicate effectually and completely upon the question of the adultery. The effect of the words quoted from the present Code was also considered by Mr. Justice Jenkins, and in his judgment he says—"It is very properly admitted by Mr. Avetoom that even if his client were added, no relief could be obtained against her, and she could not even be made to pay costs, and it is difficult to see how her presence as a party can be treated as necessary, except in the sense that it may enable her to be represented by Counsel who would cross-examine, if need be, the petitioner and her witnesses, that does not seem to me to be a purpose contemplated by section 32."

Here, there is no such admission as was made by learned counsel in that case. On the contrary, Mr. Hill has argued that relief, though not pecuniary relief, is claimed against the lady, because the relief that is really sought by the petitioner is on the footing of her action, that is, on the footing of her having committed adultery with the respondent, and that irreparable damage must naturally accrue to her in the event of an adverse finding. There is no doubt that she is indirectly affected, and it may be, very seriously affected, by the determination of the issue in the suit, but I am unable to give effect to this argument. The question in this suit is, whether the respondent committed adultery with his sister-in-law, and it seems to me that that question can be effectually and completely adjudicated upon without the lady being added as a party. No doubt grievous hardship may arise in this country by the exclusion of ladies situated as the present applicant is from participation in the proceedings. If this case had been heard in England the Court would have had a discretion to allow the lady to appear, but I agree with Mr. Justice Jenkins that the law of this country allows no such discretion. If I had the power to grant this application, I would have been glad to have done so.

Holding the view I do, I think it is unnecessary for me to discuss the various cases quoted by Mr. Hill. The application must be dismissed with costs.

The applicant, Mrs. Ramsay, appealed against the above judgment and order of Henderson, J., contending that her [493] presence before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon, and settle all the questions involved in the suit, and that the learned Judge was wrong in holding that the law in this country allowed no discretion to the Court to add her name as a party-respondent.

Mr *Hill* (Mr. *W. Gregory* with him) on behalf of the appellant. The Lower Court has held that it has no jurisdiction to allow the lady to intervene. Under the law in England she would be allowed: if the law is different in India, then the lady will have no chance of clearing her character. In s. 11 of the Indian Divorce Act some words have been omitted which appear in the corresponding section (s. 28) of the English Divorce Act (20 and 21 Vict. cap. 85). There being this omission in the Indian Act, it was held that the lady could not be made a party; but in s. 45 of the Act it is provided that all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure, which

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means not only proceedings between the parties already on record, but all persons who ought to be or are entitled to be made parties.

[MACLEAN, C. J. The only question is whether the Court has jurisdiction or not. Do you suggest we have power under s. 32 of the Code?]

'I put it on two grounds, *viz.*, s. 32 of the Code and also s. 7 of the Indian Divorce Act. It was unnecessary to give the power which the English Act does by s. 28 of that Act. The Indian Act gives a wider power. S. 32 of the present Procedure Code corresponding with s. 73 of Act VIII of 1859 is to be construed liberally: *Nga Tha Ya* v. *Mi Khan Mhaw* (1). The word "and" in s. 73 of the old Code has been read as meaning "or" in *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (2); see also Maxwell on the Interpretation of Statutes (3rd Edition), p. 331. By s. 7 of the Indian Divorce Act the law in this country is made to run on the same lines as the English law.

Modern legislation in England is careful to protect women against any slur on their chastity. The Slander of Women Act (1891), 54 and 55 Vict. c. 51, has abolished the need of showing special damage in case of "words which impute unchastity or [494] adultery to any woman or girl"—Pollock on Torts (6th Edition), p. 239. The law is similar in this country—Alexander on Torts (4th Edition), p. 260. But in the present case the lady will have no redress for the charges made against her, unless she is made a party.

Divorce proceedings are of a peculiar character: there may be collusion or connivance; there are no King's proctors in this country. The Court should have every help to come to the truth. There are two reasons why an alleged adulterer is made a party—(*a*) that he may protect himself, and (*b*) public policy which requires that divorces should not be lightly granted—*Fisher* v. *Keane* (3), *Carryer* v. *Carryer* (4), *Wheeler* v. *Wheeler and Rhodes* (5), *Jones* v. *Jones* (6), *Bell* v. *Bell* (7). S. 15 of the Indian Act corresponds with s. 2 of the English Act of 1866 (29 and 30 Vict., c. 32). In *Stevenson* v. *Stevenson* (8) Sale, J., in a wife's suit for divorce, allowed a person charged by the husband with committing adultery with his wife to intervene. That having been done in a wife's suit, must have been done under s. 32 of the Procedure Code. S. 45 and s. 7 of the Divorce Act give ample power, and unless the Court is actually debarred, it ought to struggle to make the applicant a party, so that she may not lose her character without being heard.

Mr. *Garth* on behalf of the petitioner respondent. The Indian Divorce Act was passed on the same lines as the English Act; but if s. 11 of the Indian Act be compared with s. 28 of the English Act, it will appear that the discretionary power given to the Court by the latter has been omitted in the former.

[MACLEAN, C. J. May it not be said that section 73 of the old Procedure Code (Act VIII of 1859), corresponding with section 32 of the Code of 1882, was incorporated into the Indian Divorce Act by section 45 of the Act?]

The language of s. 45 has nothing to do with the question of parties: it refers to the proceedings to be followed. There is a separate provision in the Act, *viz.*, s. 11, for adding parties by which the alleged adulterer is made a necessary party, [495] but a person in

(1) (1870) 5 B. L. R. 371, 379.
(2) (1868) 9 W. R. 309, 310.
(3) (1878) L. R. 11 Ch. D. 353.
(4) (1865) 34 L. J. Mat. 47.
(5) (1889) L. R. 14 P. D. 154, 156.
(6) (1896) P. 165, 169.
(7) (1883) L. R. 8 P. D. 217.
(8) (1899) 4 C. W. N. 506.

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the position of the applicant is not. The issue in this case is whether the respondent Boyle committed adultery. The applicant will not be legally affected by the decision in this suit; she may be socially and indirectly injured. But a party likely to be indirectly injured is not a necessary party—*Moser* v. *Marsden* (1). In *Bell* v. *Bell* (2) the Court, acting under s. 28 of the English act, described the application as "an unusual application." [MACLEAN, C. J. Under what authority did Sale, J. in *Stevenson* v. *Stevenson* (3) allow the alleged adulterer to intervene?] His Lordship acted under s. 15 read with s. 11 of the Divorce Act, and not under s. 45.

[RAMPINI, J. I refer you to the words "act and give relief" in section 7 of the Indian Divorce Act.] It has been held in *Abbott* v. *Abbott* (4) that s. 7 applies to the general rules for the guidance of the Court and not to points of procedure.

[MITRA, J. The Court has to decide whether there is connivance or collusion before making decree *nisi*. The applicant would be allowed to come in after decree *nisi*; why should not she be allowed to come in before: she is interested in the result?]

The Legislature has thought fit not to give the discretionary power which there is under the English Act. Mr. Hill's arguments would be very good arguments in the Council Chamber of the Legislature, but not here.

Mr. *Hill* in reply. Mr. Garth takes a very light view of the decision in this suit upon the reputation of the applicant. The case of *Moser* v. *Marsden* (1) deals with patents: a divorce suit is very different from other suits, as pointed out by Gorell Barnes, J. in *Jones* v. *Jones* (5).

[MACLEAN, C. J. What do you say to Mr. Garth's argument on section 45 of the Act?]

A liberal construction should be put upon that section, as was pointed out by Norman, J. in *Nga Tha Ya* v. *Mi Khan Mhaw* (6) with regard to section 73 of the Procedure Code of 1859. A similar application was made by a lady in *Connemara* v. *Connemara* (7).

[496] MACLEAN, C. J. In this case the petitioner, Mrs. Boyle, filed a petition for divorce against her husband, on the ground of incestuous adultery with her sister, Mrs. Ramsay, the present appellant. In the Court below Mrs. Ramsay applied that she might be at liberty to intervene in the proceedings as a party respondent, to enter appearance and appear at the hearing, to examine witnesses on her own behalf, to cross-examine the witnesses who might be called for the petitioner, and to be heard by Counsel.

Mr. Justice Henderson, following a decision of Mr. Justice Jenkins in an unreported case of *Bailey* v. *Bailey* (8), held that he had no power to grant the application, and dismissed it with costs. Hence the present appeal.

The first question is, whether the Court has power to grant the application; and, secondly, if it has that power whether it ought to have exercised it. It is clear that under the Indian Divorce Act (Act IV of 1869) no such power is expressly given, and in this respect—a very important respect—it differs from the English Divorce Act (20 and 21 Vic.

(1) (1892) 1 Ch. 487.
(2) (1883) L. R. 8 P. D. 217.
(3) (1899) 4 C. W. N. 506.
(4) (1869) 4 B. L. R. (O. C.) 51.
(5) (1896) P. 165, 169.
(6) (1870) 5 B. L. R. 371, 379.
(7) (1892) P. 102.
(8) See *ante* p. 490 (note).

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Chap. 85), though in a great measure the Indian Act is moulded upon the English Act. Under section 28 of the latter Act, upon every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent. No such discretionary power is vested in the Court under the Indian Act, and it is not for us to say why it was excluded by the Legislature from that Act. In *Bell v. Bell* (1) the Court acted under that section, though the late Lord Hannen, whose experience in those matters was almost unrivalled, said that it was "an unusual application."

We start, then, with the extremely important feature that no power to allow such intervention is directly given by the Indian Divorce Act. Whence, then, arises the power? It is contended that it is indirectly given by the combined effect of section 45 of that Act and section 32 of the Civil Procedure Code. At the time of the passing of the Indian Divorce Act the Code of Civil Procedure then in force was Act VIII of 1859, and **[497]** section 73 was the section which provided for making persons not before the Court parties to the suit. That section is now represented by section 32 of the present Code of Civil Procedure. There is, however, much force in Mr. Garth's argument that the words—"All proceedings under this Act between party and party" in section 45 apply only to proceedings after the parties to the suit have been determined, and that the parties can only be determined in accordance with the provision of that particular statute and especially of sections 10 and 11. If his argument be well founded—and I am disposed to think that it is—section 32 of the Code cannot assist the present appellant inasmuch as it would not apply to the case of substitution, dismissal, or addition of parties in divorce proceedings.

But even if it were otherwise, the present case does not fall within section 32. The real issue between the parties in the case is whether the husband has committed adultery with the present appellant, and it would be difficult to say that her presence before the Court is necessary, in order to enable the Court effectually and completely to adjudicate upon and settle that issue.

Nor do I think that section 7 of the Indian Divorce Act, which, according to the case of *Abbott* v. *Abbott* (2), does not apply to procedure, can assist the appellant. It would be an odd result if the power of making a respondent the person with whom the husband is alleged to have committed adultery, and which is expressly given in the English Act, but is not inserted in the Indian Act, could be said to have been given by implication by section 7 of the latter Act. I cannot accept this view.

The appellant, no doubt, may be very seriously affected by an adverse determination of the issue I have referred to, and she may consider and properly consider it a hardship that she is not allowed to come in to defend herself; but the law does not give us any discretion in the matter, nor any power to accede to her application. There is every force in the terse and pointed observation of Lord Lindley in the case of *Lowe* v. *Lowe* (3), where His Lordship says in a case analogous in principle to the present "that a most grievous injustice is done to a person whose conduct is being investigated under the publicity of modern times where

(1) (1883) L. R. 8 P. D. 217.
(2) (1869) 4 B L. R. (O. C.) 51.
(3) (1899) P. 204.

he is not able to say a word [498] in his defence. That, however, is a question for the Legislature—not for us."

The appeal must be dismissed with costs.

RAMPINI, J. I agree.

MITRA, J. I agree.

Attorneys for the applicant : *Messrs. Sanderson & Co.*

Attorneys for the petitioner : *Messrs. Leslie and Hinds.*

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APPELLATE CIVIL.

KIRON CHUNDER ROY *v.* NAIMUDDI TALUKDAR.* [30th March, 1903].

"*Lease of land*'—*Revenue sale Law* (*Act XI of* 1859) *s.* 37, *cl.* 4—'*Permanent building.*'

The word 'lease' in sub-s. 4 of s. 37 of Act XI of 1859 does not mean a lease from the zemindar only.

[**Dist.** 9 C. W. N. 852 ; 23 I. C. 917 ; **Ref.** 12 C. W. N. 1029 ; 19 C. W. N. 240 ; 46 Cal. 700=23 C. W. N. 315=50 I. C. 406 ; 7 I. C. 327.]

SECOND APPEAL by the plaintiffs, Kiron Chunder Roy and others.

This appeal arose out of an action brought by the plaintiffs to recover *khas* possession of two plots of land on a declaration of their zemindari right thereto, and non-existence of any under-tenure of the defendants. The allegation of the plaintiffs was that on the 10th January 1888, Zemindari No. 3842 was sold for arrears of Government revenue and was purchased by the plaintiff No. 1 and Upendra Chunder Roy in the name of one Kali Krishna Bose ; that they took possession of the property ; that a deed of release having been executed by the *benamdar* in their favour, their servant went to take rent and *kabuliats* from the [499] *karsha* raiyats, but was opposed by the defendants ; that they having purchased the zemindari free of incumbrances, the defendants, under-tenure, if any, could not stand as against them. The defence of some of the defendants was, that the plaintiffs had no cause of action against them, they having no under-tenure in the disputed land. And that of the others was, *inter alia* that the plaintiffs had no cause of action and right of suit ; that a part of plot No. 1 was the *karsha* of Runjit Khan, a maternal uncle of the defendants, which was held by them for a long time, and that the remaining portion of the said plot was held and enjoyed by them as *khamar*, from time immemorial, by cultivating the same and by dwelling thereon.

The Court of First Instance decreed the plaintiffs' suit in part and declared that the plaintiffs were entitled to get *khas* possession of that part of plot No. 1 on which the garden and tanks did not stand, and of the whole of plot No. 2. The material portion of his judgment was as follows :—

"From the evidence on both sides it has been proved that on plot No. 1 there is a garden, tank and homestead. The homestead, that is, the dwelling-house, must according to section 37, Act XI of 1859, be a permanent building. As, according to defendant No. 25, some tin sheds and cottages formed that dwelling-house, they do not come under the dwelling-house, which is protected from removal under that section. The lease of the land on which those tin sheds and cottages stand are not therefore legally protected from avoidance.

* Appeal from Appellate Decree No. 1828 of 1900, against the decree of A. Goodeve, Officiating District Judge of Jessore, dated the 25th of May 1900, reversing the judgment and decree of Debendra Lal Shome, Subordinate Judge of Khulna, dated the 2nd of March 1900.