

MATRIMONIAL JURISDICTION.

*Before Mr. Justice Pugh.*PHILLIPS *v.* PHILLIPS.*1910
April 26.*Divorce—Attachment before judgment—Divorce Act (IV of 1869) ss. 7, 45—Civil Procedure Code (Act V of 1908), o. XXXVIII, rr. 5, 6—Relief.*

An order for attachment before judgment will not be made in divorce proceedings.

Attachment before judgment being a matter of relief and not of procedure, is governed by s. 7 of the Divorce Act and the principles and rules of the English Divorce Court, and not by s. 45 of the Divorce Act and the Civil Procedure Code.

Order XXXVIII, rules 5 and 6, have no application in divorce proceedings.

APPLICATION.

On the 20th April 1910, Carr Lazarus Phillips, a colliery proprietor, filed a petition for the dissolution of his marriage with the respondent, Elizabeth Phillips, on the ground of her adultery with the co-respondent, George William Hyde Batho, a member of the firm of Messrs. Simpson & Co., merchants of Calcutta, praying for the sum of Rs. 1,50,000 as damages against the co-respondent.

It was alleged by the petitioner that on the 31st May 1909 the respondent admitted misconduct with the co-respondent, whereupon he turned her out of the house, but that subsequently, in the month of October 1909, he forgave his wife and took her back. In the month of February 1910, on receiving an anonymous information that the respondent was in the habit of secretly meeting the co-respondent, the petitioner questioned the respondent, who denied the truth of the information. The petitioner thereupon instituted enquiries, but before their completion the respondent left India for England, sailing from Bombay for Marseilles on the 12th March 1910. The co-respondent also left Bombay on the 22nd March, and met the

*Application in Original Civil Suit (Matrimonial) No. 9 of 1910.

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respondent in London in April. Shortly after respondent's departure, the petitioner obtained information that the respondent and co-respondent had frequently, between the 12th January and the end of February 1910, met at 25, Ezra Mansions, which had been reserved by the co-respondent under the name of "Goodall;" and the petitioner charged the respondent with adultery on those occasions.

On the 21st April 1910 the petitioner applied for an order "to restrain the co-respondent from realising his share in the assets of the firm of Simpson & Co., and from selling his shares in the Calcutta Landing and Shipping Company, Limited, and from receiving and removing the sale proceeds of any such shares as may have been sold" on the following materials:—It was alleged that prior to the co-respondent's departure from India, he had despatched a telegram to the respondent, informing her that he was following her, and requesting her to wait for him at Marseilles. The petitioner wired to the respondent on the 6th April, that the co-respondent's telegram had come to his knowledge, and thereupon further telegrams passed between husband and wife. On some date subsequent to the 6th April, the co-respondent cabled to Messrs. Simpson & Co. in Calcutta, intimating that he had severed his connection with the firm, and instructing them to sell all his shares in the Calcutta Landing and Shipping Company, Limited, and to remit the proceeds to him. The shares were being offered in the market for sale. The petitioner contended that the co-respondent had left Calcutta and was endeavouring to dispose of his property and realise and remove his assets with intent to defeat, obstruct, and delay any decree for damages and costs which may be passed against him in the divorce suit.

The application, which was treated as an application for attachment before judgment of the co-respondent's property, was made on the 21st April 1910 by Mr. Knight before PUGH J., and was refused.

On the 26th April 1910, Mr. Hill, on behalf of the petitioner, applied before PUGH J. for a review of his order of the 21st April.

Mr. Hill, for the petitioner. It is true I cannot produce any direct authority where an order for attachment before judgment was made in a divorce proceeding. But on principle, there is nothing to prevent such an order being made. It is expressly provided under section 45 of the Divorce Act that all proceedings in divorce shall be regulated by the Code of Civil Procedure. Hence the portions of the Code (order XXXVIII, rules 5 and 6) which deal with attachment before judgment, become applicable to divorce proceedings. The co-respondent's intent to obstruct or delay execution may be directly inferred from the allegations in the petition. Section 7 of the Divorce Act, which introduces the principles and rules of practice of the English Courts, can have no application to this matter. Section 7 relates only to relief. Section 45 exclusively regulates procedure. An attachment before judgment is clearly a matter of procedure and not of relief.

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PUGH J. In this case an application is made to me to re-consider, either by way of review or as a fresh application with the same object as the former, an order that I made declining to order an attachment before judgment in a divorce proceeding. The application was made at 4-30 P. M. at the rising of the Court, and I then dealt with the matter in a somewhat cursory way, and I refused the application on the simple ground that I never knew of an attachment before judgment in a divorce case. Learned counsel who now appears does not suggest that such an order has ever been made before in divorce proceedings. He argues that the point is one of first impression, and he contends that on principle he is entitled to the order. The argument is founded on section 45 of the Divorce Act, which provides that proceedings under this Act shall be regulated by the Code of Civil Procedure, and he wishes to eliminate from my consideration section 7, which provides that in all suits and proceedings under this Act the High Courts and District Courts shall 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 of the

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Divorce Court in England. It is practically admitted that if section 7 were to apply and bring in English rules and English practice, there would be no warrant for such an application; but Mr. Hill contends that section 45 exclusively regulates procedure: section 7 only relates to relief. He contends that this application is one of procedure only and not of relief, and that to attach a respondent's property before you have got any decree for damages, when it is uncertain whether you will get any damages, is a matter of procedure and not of relief. I would differ with regard to that. I think it is purely a matter of relief to ask to be allowed to seize a man's property without having a decree on the off-chance that you may get a decree hereafter, and it seems to me to have nothing whatever to do with procedure. The way in which a decree is executed, after you have obtained it, is a matter of procedure; but to give one man a right to come to Court before he gets a decree is to confer a right upon him, and that is not procedure. It seems to me that it cannot be successfully contended that by section 45 of the Divorce Act the Civil Procedure Code is to be applied, wholesale to the Court when exercising divorce jurisdiction. If this were to be the case, it might also be contended that you could have a Receiver appointed to take charge of the wife, or an injunction against the co-respondent from visiting the wife pending a divorce case. Of course, a petitioner could not have a Receiver of the wife, because she is herself a party to the suit, but offhand, I do not see why, if the Code applied, he should not apply for an injunction. There is much in the Code of Civil Procedure which deals with substantive law and not procedure, and I think these portions of the Civil Procedure Code, order XXXVIII, rules 5 and 6, have no application in divorce proceedings. It is contended that I must infer an intention to defeat and delay the execution of a decree in this suit, from the fact that it was not until the respondent had met the co-respondent in London, when he could have heard of these proceedings, that the orders came out from England to dispose of certain shares. It is suggested that it follows from this that he must be disposing of these shares with intent to

defeat or delay the execution of any decree that may be passed against him. No doubt it may have that effect, but it may be equally consistent with a resolve to make a home with the respondent in England, or elsewhere out of India, and not to return to this country. I am not satisfied as to which of these intents may be in the co-respondent's mind, and therefore I do not find the facts proved, which are essential to support an order. There would be one advantage from this application if it were successful, and that is, the Court would have it in its power to compel the co-respondent to make a settlement of any damages which might be awarded on the lady. That is practically the only result that could happen, and the co-respondent and the respondent appear to have taken matters into their own hands by practically going off together. I do not really think that this application is dictated by any particular desire on the part of the petitioner in that way: I think it is dictated by the usual and very natural annoyance and irritation which a man feels when another man runs away with his wife. I notice from the petition, the petitioner is described as a colliery proprietor, and one cannot eliminate from one's mind the knowledge that he is, as a matter of fact, a very rich man. The question of costs cannot be of any possible moment to him one way or the other. If he is anxious to provide for his wife's future, or make a provision for her, he can well afford to do so. I, therefore, decline to alter my former order, or to make a fresh order. I would add, that in the observations I have made with regard to the respondent and co-respondent, it must not be taken that I come to any finding as to the actions of the respondent or co-respondent; they may of course have a complete answer. I am only dealing with the case as it is put before me in argument by the petitioner.

Application refused.

Attorneys for the petitioner: *Leslie & Hinds.*

J. C.

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