PRIVY COUNCIL

B. Iswarayya

Vs.

Swarnam Iswarayya

Privy Council Appeal No. 39 of 1930
(Lord Russell Of Killowen, J. Sir George Lowndes and Sir Dinshah Mulla. JJ.)

26.06.1931

JUDGMENT

LORD RUSSELL OF KILLOWEN. J.

1. The principal question which is raised for decision by this appeal is whether, under the Divorce Act (No. 4 of 1869), the Court, having once made an order granting permanent alimony to a wife who has obtained a decree for judicial separation, has power to make a subsequent order increasing the amount of such alimony. In addition, some points of minor importance are involved, as will subsequently appear.

2. The respondent, having obtained a decree for judicial separation against her husband, the appellant, applied for permanent alimony under Section 37 of the Act. Upon that application an order was made on 1st February 1922, by which the husband was ordered to pay to the wife Rs. 120 a month for her life. An order was also made against him for the payment of Rs. 120 a month in respect of the four children of the marriage. The wife and children appealed. Pending the appeals, the means of the husband had apparently permanently improved ; for the High Court at Madras (while holding that they should not interfere with an order which was rightly made in the circumstances which existed at its date, and dismissing the appeals), used the following language :

> " In view of the increase in his pay and improved circumstances, and in view also of the greater age of the children, there are good grounds for giving them more. It will be open to the lady and children to go back to the learned Judge at Tanjore, and ask for an increase in the alimony, as from such date as they may be advised. "

3. The High Court's order dismissing these appeals is dated 28th January 1925. In the

following year two petitions were presented in the Court of the District Judge of East Tanjore, viz., a petition by the four children under Section 42 of the Act praying for a sum of not less than Rs. 300 a month for their maintenance ; and a petition by the wife praying for a sum of Rs. 260 a month for alimony.

4. The District Judge made one decree on the two applications. It is dated 8th March 1927, and orders the husband to pay to the wife at the rate of Rs. 310 per mensem (Rs. 30 for the eldest girl and Rs. 40 for each of the other three children-in all, Rs. 150 plus Rs. 160 to the wife) towards the maintenance and education of the children and for alimony. It further orders that the Rs. 150 be paid for the maintenance and education of the children until each of them attained the age of 21, or until the girls got married.

5. The husband appealed to the High Court against this decree. The learned Judges of the High Court were of opinion that since the children had all ceased to be minors within the meaning of the Act, no provision could be made for them ; but, on the other hand, they thought that, upon the facts of the case, the District Judge could and should have fixed the wife's alimony at Rs. 260 a month. In these circumstances, notwithstanding that the wife had not filed any appeal or objection, they ordered the husband to pay alimony to the wife at the rate above mentioned. This they did in purported exercise of the powers conferred by Order 41, Rule 33, Civil P. C. The decree is dated 15th February 1929, and it orders that the husband do pay to his wife Rs. 260 a month from 18th March 1926.

6. From this decree the husband appeals to His Majesty in Council, and contends that the appeal should succeed upon some or all of the following grounds:

> (1) That the Court, having by the order of 1st February 1922, fixed the wife's alimony at Rs. 120 a month, had no power to make any subsequent order increasing the amount of such alimony.
> (2) That the High Court had no power under Order 41, Rule 33, to vary the amount (Rs. 160 a month) which the lower Court had by its order of 8th March 1927, decreed in favour of the wife.
> (3) That in any event no sum beyond the Rs. 120 a month originally fixed was justified by the facts of the case.

7. In relation to this third point, their Lordships think that this case is eminently one in which they should adhere to their practice of not interfering in any question as to amount of alimony or maintenance, that being a matter with which the Courts in India are better qualified to deal.

8. The other two contentions however raise substantial questions for consideration.

9. The first point depends upon what is the true construction and effect of the Act, of which the relevant provisions may conveniently be set out.

Section 7 enacts ;

" Subject to, the provisions contained in this Act, the High Courts 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."

Section 37 provides :

" The High Court may, if it think fit, on any decree absolute declaring, a marriage to be dissolved, or any decree of judicial separation obtained by the wife, and the District Judge may if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved or on any decree of judicial separation obtained by the wife, 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.

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.

" Provided 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."

Section 45 provides :

" Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

10. The District Judge seems to have relied upon the provisions of Section 7 of the Act as enabling the Indian Courts to increase permanent alimony, by " taking the principles and rules of the English Courts as a guide." The High Court, on the other hand, considered that under section 37, upon its true construction, the power of the

Court was not confined to the making once and for all one single order for the payment of a weekly or monthly sum by way of permanent alimony to a wife.

11. With this opinion of the High Court their Lordships find themselves in agreement.

12. The first branch of Section 37 confers upon the Courts power to order a husband to secure to the wife a gross sum or an annual sum. That power arises in the High Court in either of two events, viz., a decree for dissolution, or a decree for judicial separation obtained by the wife. It arises in the District Judge in either of two events, viz., the confirmation of his decree for dissolution, or a decree for judicial separation obtained by the wife.

13. Then follows the branch of the section which is applicable here. It commences with the words, : "In every such case the Court may....." These words should their Lordships think, be interpreted in relation to a District Judge thus:.

> " The District Judge on the confirmation of any decree of his declaring a marriage to be dissolved or any decree of judicial separation obtained by the wife may...."

14. The power which is then conferred is a power to make an order on the husband to pay to the wife monthly or weakly sums for her maintenance and support. The amount thereof is made to depend upon the Court's opinion of what is reasonable, an opinion which must obviously depend upon facts, which may vary from time to time. A power of this nature is prima facie not one which ought to be exercisable ones and once only; and unless the wording of the Act is such as to indicate beyond doubt that once the power in favour of the wife has been exercised it is spent and gone for ever, their Lordships think that the section should be construed in such a way as will keep the power on foot.

15. It was however urged that the wording of the Act compelled the adoption of the stricter view, reliance being placed upon (a) the use in this part of the section of the singular noun " an order," as contrasted with the phrase in the earlier part " may..... order," and the words which occur in other sections giving the Court power to make orders ' from time to time ,' : and (b) the insertion in the section of the express proviso in favour of the husband.

16. In their Lordships' opinion these features relevant though they be to the appellant's contention, are insufficient to sustain it. The words " the Court may make an order " do not seem to differ materially from such words as " the Court may order " or " the

Court may make any order," or " the Court may make such order.....as the Court thinks just " and do not of themselves necessarily mean " the Court may make one order and no more" nor do they necessarily acquire this meaning simply because in other parts of the Act and in other connexions the words " from time to time " have been inserted. The express proviso while it may be said to suggest the exclusion of a power to increase in favour of the wife is certainly not conclusive. Indeed, its insertion in the section might well be accounted for on the following ground, viz., that but for its presence, is might have been argued that husbands could not be applicants to the Court under a section the sole object of which was to benefit wives.

17. In the result their Lordships are of opinion that upon the true construction of Section 37 where a decree of judicial separation has been obtained by the wife, and the District Judge has made an order on the husband for payment to the wife of a monthly or a weekly sum by way of permanent alimony, there is still power in the Court to make an order or orders for the payment of larger sums by the husband if the circumstances are such as to justify an increase in the amount of the alimony.

18. So far, their Lordships have dealt with this portion of the case simply upon the true construction of Section 37 as it stands, and apart from any historical consideration of the matter. They think it right, however to add some observations from another point of view, confirmatory of the opinion which they have formed as to construction.

> Section 7 of the Act (which occurs under the heading "Jurisdiction") makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Court in England then acted and gave relief. It is therefore not irrelevant to inquire how matters stood and stand in England in relation to this question.

19. By the Matrimonial Causes Act, 1857, a new Court of record was established, to which was transferred the jurisdiction in matters matrimonial then vested in Ecclesiastical Courts in England. A decree for a judicial separation was substituted for the old decree for a divorce a mensa et thoro, and the new Court was given power in certain cases to decree the dissolution of a marriage. section 22 provided that in all proceedings (other than proceedings to dissolve any marriage) the Court should proceed and act and give relief on the principles and rules of the Ecclesiastical Courts, but

> "subject to the provisions herein contained and to the rules and orders under this Act."

Provision was made by Section 32 for the maintenance of the wife after dissolution of the marriage. This particular question had not arisen before the Ecclesiastical Courts, for the jurisdiction to dissolve the marriage was new. The Ecclesiastical Courts had not been concerned with making provision for a woman who had ceased to be a wife. By Section 32 the Court was given power on a decree for dissolution to order the husband to secure by deed to the wife a gross sum or an annual sum, and to suspend the pronouncing of its decree until the deed had been executed. This provision (which it will be observed took the form of a secured sum) is strictly not alimony, though inaccurately so called in the marginal note to the section, but permanent maintenance. Under that section there was no power to make any subsequent order. The section, by its terms, pointed to one order in relation to one deed, pending the execution of which the dissolution decree could be suspended. Further, it will be observed that the section could have no effective operation against a husband who had no property on which the payment of a gross or annual sum could be secured, but who, nevertheless, was in a position to make a monthly or weekly payment to the wife during their joint lives. To remedy this defect the Matrimonial Causes Act of 1866 was passed, section 1 of which provides in relation to a decree of dissolution :

"In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable : Provided always, that if the husband shall afterwards from any cause become 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 may seem fit."

20. Accordingly, in 1869 the position under the English Acts in relation to making provision for the permanent maintenance of a wife after a dissolution decree stood thus : there was power to order such provision in the form of securing a gross sum or an annual sum; there was a further power to order such provision in the form of ordering payment by the husband of monthly or weekly sums : there was power in the husband to apply for a modification in his favour of this last mentioned order; there was no power in the wife to apply for any increase in the provision made for her. Such a power was conferred upon the wife for the first time by the Matrimonial Causes Act, 1907. This Act, which was passed for the purpose of extending the power of providing

permanent maintenance to cases of nullity, repealed Section 32 of the Act of 1857, and Section 1 of the Act of 1866, but re-enacted their provisions in one comprehensive section. This section (S. 1) applied to all cases of decrees for dissolution or nullity of marriage, and contained a provision that where the Court had made an order on the husband for payment of monthly or weekly sums,

> "and the Court is satisfied that the means of the husband have increased, the Court may, if it thinks fit, increase the amount payable under the order."

21. The position in England as regards permanent alimony (properly so called) stood and stands upon a different footing. The Ecclesiastical Courts had and exercised power to order variations in the amount of alimony from time to time, either by way of increase or reduction.

> "Where there is a material alteration of circumstances a change in the rate of alimony may be made. If the faculties are improved the wife's allowance ought to be increased, and if the husband is lapsus facultatibus, the wife's allowance ought to be reduced :" (*De Blaquiere v. De Blaquiere 3 Haggard Eccl Rep 322., at p. 329.*
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> Section 17 of the Act of 1857 enacted that application for restitution of conjugal rights or for judicial separation might be made by petition to the Court or to a Judge of Assize as therein mentioned, who
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> "may decree such restitution of conjugal right or judicial separation accordingly, and where the application is by the wife may make an; order for alimony which shall be deemed just."

22. It will be noted that in this section the power given is to make "any order" not "to make from time to time any order," or to make any order or orders. On the face of the section the power is to make one order. Nevertheless, it has never been doubted that the Court had power, and the Court has always exercised a power to increase or reduce the amount of permanent alimony, where the altered circumstances of the case required it. This can only be upon the footing that the words in section 17 "may make any order for alimony which shall be deemed just" did not restrict the power of the Court to the making of one order and one order only. The Court could not have obtained the revisional power of the Ecclesiastical Courts by virtue of Section 22 of the Act of 1857, if "any order" in Section 17 meant, one single order only; because Section 22 only operates "subject to the provisions herein contained."

23. Thus in 1869 the position in England in regard to permanent alimony was this, that before 1857 the Ecclesiastical Courts, and subsequently the Court established in that

year, possessed and exercised in favour of a wife who had obtained a decree for judicial separation and an order for permanent alimony, a power in proper circumstances to increase the amount of that alimony. This position, which continues to the present time, now rests on Section 190(4). Supreme Court of Judicature (Consolidation) Act 1925 which provides :

> (4) "Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the Court may make such order for alimony as the Court thinks just."

24. Their Lordships fully realize that an Indian Act does not fall to be construed in the light of statutes enacted by another legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relevant jurisdiction of the Ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms.

25. The matter is no doubt complicated by the fact that Section 37 of the Indian Act includes both the case of a decree for dissolution and the case of a decree for judicial separation obtained by a wife. It enables the Court in each such case to make an order on the husband to secure and (2) to make an order on the husband to pay. It may be that if under the section, there is power to increase the amount of permanent alimony to be paid to a wife who has obtained a decree for judicial separation, there is also power to increase the amount of permanent maintenance ordered to be paid on a decree for dissolution. In other words, the section may have conferred upon the Courts in India a power which the Court in England did not enjoy until the year 1907. Their Lordships express no opinion as to this. The point does not now arise; and if the Act of 1869 is ever amended, it may never arise. All that their Lordships now decide is that upon the true construction of Section 37 a Court which has made an order on a husband for payment to his wife (who has obtained a decree for judicial separation) of monthly or weekly sums for her maintenance and support, has power to make subsequent orders on the husband for payment of increased amounts.

26. The only other point which remains for consideration is that which arises under the

Code of Civil Procedure. Order 41 relates to appeals, and Rule 33, thereof is (so far as material) in the following terms:

> "The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favor of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection."

27. None of the authorities cited in argument appear to their Lordships to resemble the circumstances of the present case. There was here no reason why the wife should appeal from the order which the District Judge had made; there was every reason why she should be satisfied therewith. On the other hand, once the appellate Court felt constrained to cut out all payments to the wife for the maintenance and education of the children; it was open to that Court to take the view that complete justice could not be done unless the amount ordered to be paid to the wife for alimony was increased. The Appellate Court in fact took that view; and their Lordships are not prepared to say either that the view could not properly be taken, or that effect could not be given thereto by exercising the powers conferred upon an appellate Court under Order 41, Rule 33.

28. For the reasons appearing in this judgment their Lordships are of opinion that this appeal should be dismissed with costs and they will humbly advise His Majesty accordingly.

Appeal dismissed.