
(1897) 09 CAL CK 0008
In the Calcutta High Court

K. M. Butt

APPELLANT

Vs

F. C. K. Butt

RESPONDENT

Date of Decision : 06-09-1897

Acts Referred:

Divorce Act, 1869 — Section 7

Citation : (1898) ILR (Cal) 222

Hon'ble Judges : Ameer Ali, J

Bench : Single Bench

Judgement

Ameer Ali, J.—This was a wife's petition for dissolution of her marriage on the ground of the respondent's cruelty and adultery. A commission was taken out to examine witnesses in England, and the result of their evidence is that the petitioner is satisfied that the charge of adultery brought by her against the husband was wholly unfounded. She therefore applied to withdraw the suit, and by consent an order was made to that effect on the 2nd September instant. I, however, reserved for consideration the question of the principle on which the petitioner's costs to be paid by the respondent should be taxed. On her side it has been argued that the costs should be taxed as between attorney and client. On the respondent's side it has been urged that they should be taxed as between party and party. So far as can be gathered from the reports this is the first case in which the question has been expressly raised in this country, and as it involves a principle of some importance it is necessary that it should be carefully and fully considered.

2. The Indian cases cited at the bar do not afford much assistance. In the case before MACPHERSON, J., in P. v. P. (1872) 9 B. L.R. Ap. 6 the prayer was that the petitioner, who was the attorney for the wife, should have his costs taxed as between attorney and client. The learned Judge, after dealing with the facts and circumstances of the case, made the following order:

3. " Therefore, although I shall order the petitioner's costs to be taxed and to be paid by the respondent to her attorney (he being substantially entitled to such an

order), her attorney must personally bear his own costs of this application. The petitioner's costs will be taxed on scale 2."

4. There is in the ordering part no reference to the prayer in the petition that the costs should be taxed as between attorney and client. The inference is that that portion of the prayer was not acceded to.

5. In *Natall v. Natall* (1885) ILR 9 Mad. 12, it was directed that the costs of the wife should be taxed as between attorney and client, but it does not appear that the point was argued or considered.

6. The Indian Divorce Act (section 7) provides : " That 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."

7. Section 35 deals with the question of costs, but does not lay down any rule regarding the mode in which the costs of the wife should be taxed. Section 45 declares 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."

8. Under these circumstances I must, having regard to the provisions of Section 7 of the Act, look for guidance to the English cases.

9. Mr. Garth for the petitioner has contended that as the husband has to pay the wife's costs, it follows that he must pay what she is liable for to her attorney, and he has referred to *Robertson v. Robertson* (1881) L. R. 6 P. D. 119. This was an appeal from the judgment of the Divorce Court, and one of the questions raised was whether the costs of the wife payable by the husband were not to exceed the amount paid into Court or secured by him. It was held that such costs were not limited to the amount paid into Court or secured by the husband, and the conclusion come to is thus expressed by the Master of the Rolls at p. 123:

10. " It appears to me, therefore, that when the defence is fairly and reasonably conducted the solicitor ought to be paid in full his costs, that is his costs properly incurred."

11. In *Otway v. Otway* (1888) L. R. 13 P. D. 141 a similar question came up for consideration. In that case the wife was found guilty of adultery, and the question was whether the husband was liable to pay the costs reasonably incurred by her in the Appellate Court, and it was held that he was No question as to the mode of taxation was considered or decided in either of those two cases.

12. The cases cited for the respondent bear more directly on the question. In *Stocken v. Pattrick* (1873) 29 L. T. (N. S.) 507 the solicitor brought an action at

common law for the recovery of his costs from the husband, and Chief Baron KELLY, in dealing with the questions raised before him expressed himself in terms which clearly indicate the principle on which I ought to act in this Court. The husband, who was the defendant in that action had taken various objections to the suit of the solicitor, and in dealing with one of them, the Chief Baron says at p. 509:

13. " Then there is another defence set up on behalf of the defendant which Mr. Griffiths argued with much earnestness and considerable ability. He says, and says truly, that where a suit of this nature is instituted by a wife against her husband, it must be carried on through the medium of an attorney, and the attorney may, under certain circumstances, call for his costs from day to day. That is the rule in the Divorce Court having jurisdiction over causes of this nature, and no doubt he is entitled to claim his costs from day to day. Moreover, if the suit is proceeded with and the result is a decree, he may claim the costs in that suit, if the suit has terminated in favour of the wife. No doubt it is in the discretion or judgment of the Court to allow them and decree to the wife the costs of the suit; but whether the plaintiff shall recover and so be held entitled to the costs of suit, or whether, as it may be, the suit may be found against her and no costs are allowed,-if the costs are allowed, no doubt the attorney may obtain these costs, but only costs between party and party, and they have nothing to do with the costs as between attorney and client any more than in any action of debt in this Court. The attorney may recover those costs. He is nevertheless entitled to sue his client on whose behalf he has carried on the suit for the extra costs between attorney and client, and recover them subject to the deduction of any money he may have received on account."

14. This shows that in the Matrimonial Court the wife's costs are taxable as between party and party, and that the attorney may recover the rest of the costs in an action at law against the husband.

15. Another case *Ottaway v. Hamilton* (1878) L. R. 3 C. P. D. 393 bears still more distinctly on the subject. There also the wife's attorney had brought an action for his extra costs not covered by the taxation in the Matrimonial Court. The nature of the claim is thus stated by the Judge in the first Court: " The costs of the wife against the defendant as between party and party had been taxed upon the application of the wife, but the costs for which the plaintiff sued defendant in this action had been disallowed, and the plaintiff sought to recover them as costs which would be properly allowed as between attorney and client, and as such being necessities supplied to the wife." And holding that they were necessities the Judge decreed the plaintiff's claim.

16. On appeal by the defendant, Lord Justice Bramwell observed as follows: " I cannot see that because the plaintiff has obtained from the Divorce Division such sums as are allowed upon taxation, he is to be debarred from recovering the extra costs by an action against the husband."

17. The rule applied to taxation in the Divorce Division is indicated here, but it is more clearly expressed in Lord Justice Thesiger's judgment at p. 401. He says:

18. " I now come to the question whether, under the Divorce Acts, taxation is the only remedy which the wife or the solicitor appointed by her has for the recovery of extra costs. If it could have been established that these statutes provide for the taxation of a wife's costs against her husband as between solicitor and client, there would have been great force in the argument that the remedy to be adopted is the use of the process of the Divorce Division to obtain payment of them. At all events the contention would have been well founded that where a wife, or a solicitor employed by her, applies to the Divorce Division to tax the costs, there would be such an election as to prevent either of them suing subsequently in an action at law." Then, after referring to Section 51 of the Matrimonial Causes Act, 20 and 21 Vict., Chapter 85, he proceeds: "These words seem to confer only the power of giving costs as between party and party, and in many cases the jurisdiction of the Court ought to be thus confined, for it has to deal, not only with husband and wife, but also with other parties, at least where the husband is the petitioner."

19. I may here observe that the power over costs contained in the CPC is given to the Matrimonial Jurisdiction of this Court by Section 45 of the Indian Divorce Act, and that this section is thus in effect similar to Section 51 of the Matrimonial Causes Act, and points to the same conclusion.

20. Lord Justice Thesiger also refers to *Allen v. Allen and D'Arcy* (1860) 2 Sw. & Tr. 107 as showing that the Matrimonial Courts tax the costs of the wife payable by the husband between party and party.

21. In this case it was taken for granted that the wife's costs are taxed as between party and party, but the Judge Ordinary pointed out that in applying the rule a liberal construction should be put upon it. He says: " This taxation must certainly be reviewed. The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled, but I apprehend that I must adopt, as far as I can, the principles on which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those Courts was as between party and party; but that term had a very different construction from that put upon it in Common Law Courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs." He then proceeds to state the grounds on which a liberal construction should be put on the rule.

22. The result is, that I must follow the English rule, which seems clear. It will be open to the attorney of the wife to sue the husband for those costs which may not be allowed as between party and party. My direction is that the petitioner's costs, including the costs of this application, be taxed as between party and party, but liberally according at [to ?] the meaning put upon the scale in *Allen v. Allen* (1860) 2 Sw. & Tr. 1071. The conclusion at which I have arrived is, I find, in

accordance with the practice followed in this Court. Mr. Belchambers, the Taxing Officer, has at my request furnished a note, in which he says: " The wife's costs in a matrimonial suit are taxed as between party and party on a liberal scale, full costs properly incurred being allowed." See note at pp. 291 and 292, Belchambers" " Rules and Orders."