

(1948) 08 BOM CK 0010
In the Bombay High Court
Case No : Suit No. 1193 2. 193

Ralph Hugh Friedlander

APPELLANT

Vs

Kathleen Marjorie Friedlander

RESPONDENT

Date of Decision : 30-08-1948

Acts Referred:

Divorce Act, 1869 — Section 62, 7

Citation : AIR 1949 Bom 173 : (1949) 51 BOMLR 129

Hon'ble Judges : Weston, J

Bench : Single Bench

Judgement

Weston, J.—This matter raises a question as to the validity of a part of one of the Rules framed in the year 1929 by this Court u/s 62 of the Indian Divorce Act, 1879. The impugned rule is Rule 928 appearing at page 220 of the printed Rules of this Court, and the material part of it is as follows :-

The High Court shall not entertain an application for the modification or discharge of an order "for alimony, maintenance or the custody of children, unless the person on whose petition the decree was pronounced is at the time the application is made resident in India.

2. The facts of the present matter shortly are these. On June 30, 1933, on petition of the present opponent, to whom it will be convenient to refer as the wife, a decree absolute for dissolution of marriage was passed by this Court under the Indian Divorce Act against the present applicant, to whom I will refer as the husband. By later order made on July 14, 1933, the husband was ordered to pay permanent alimony to the wife of an amount of Rs. 75 a month, and a further sum of Rs. 25 a month as maintenance of the daughter of the marriage until this daughter should attain the age of 18 years. Custody of the daughter was with the wife. I am informed that the husband was not represented when the order of July 14, 1933, was made, and no "dum sola" clause appears in the order. It is not disputed that the wife had left India before the application for alimony and maintenance was filed, that sometime afterwards she re-married

and has since lived with her second husband in England. The present applicant, the prior husband, has also remarried and still along has remained in India. In the year 1942 he made an application for setting aside the order of alimony and maintenance, made in the year 1933, on the ground that he was no longer able to pay, as in addition to his second wife he was now required to support his destitute parents, while his first wife's husband was in a position to support her, and also on the ground that the order of July 14, 1933, was void as it was made in contravention of Section 2 of the Indian Divorce Act which provides, inter alia, that no relief shall be granted under the Act other than a decree for dissolution of marriage or of nullity of marriage, except when the petitioner resides in India at the time of presenting the petition. This application was opposed by the wife, who admitted that her present husband was in a position to support her and was supporting her, but who claimed that the maintenance awarded for the daughter was inadequate and that she devoted all she received under the order to the maintenance to the daughter.

3. The application was dismissed on February 21, 1944. Rule 928 was then relied upon by the husband in support of his argument u/s 2 of the Act. In my order I expressed doubt as to the validity of Rule 928, but held the order of July 14, 1933, to be valid notwithstanding Section 2 of the Act, on the basis that an order for alimony and maintenance must be regarded as incidental to the decree for dissolution of marriage, which could be granted u/s 2, even though the wife had already left India when the original petition was filed. I declined to consider modification of the order in view of the wife's statement that she devoted all she received to the daughter's increasing expenditure, but said it would be open to the husband to ask that the order be revised when the daughter attained the age of 18 years.

4. The present application made on February 10, 1948, now asks for such review as the daughter attained the age of 18 years in March 1947. The order for payment of Rs. 25 a month for the daughter of course has lapsed under the terms of the order itself, and the question is whether the order for alimony can and should be reviewed. Any modification of the order is opposed on behalf of the wife. It is claimed that certain expenses still have to be met for the daughter which the wife proposes to meet from the alimony payable to her. She claims therefore that this should not be reduced. In her turn she now relies upon Rule 928 and claims that in her absence from India the order cannot be varied.

5. In England doubts as to the power to vary a maintenance order were settled by the decisions in *Turk v. Turk* : *Duffy v. Duffy* [1931] P 116 in 1931 and *Bennei v. Bennet* [1939] P. 274 and the power is now provided by Section 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, and this power is not affected by the circumstance that the wife may no longer be resident in England. Section 37 of the Indian Divorce Act provides in terms for discharge or variation of orders of maintenance. u/s 2 of the Indian Act the Court has jurisdiction to grant a decree for dissolution of marriage even when the petitioner

is not resident in India when the petition is presented, and if, as I have held in earlier proceedings, the section does not bar the making of incidental orders for alimony or maintenance in such circumstances, it is difficult to understand that present residence can affect the power to discharge or vary such orders expressly given by Section 37.

6. Comparison of Rule 928 with Rule 22 of the Indian (Non-Domiciled Parties) Divorce Rules, 1927, framed by the Secretary of State in Council of India u/s 1(4) of the Indian and Colonial Divorce Jurisdiction Act, 1926, suggested that Rule 928 was based upon this rule rather than upon considerations arising from Section 2 of the Indian Divorce Act. Reference to the original draft of the rules made by this Court in the year 1929 has confirmed this, for I find that the original draft of 928 was identical in wording with Rule 22 of the Secretary of State's Rules, and that Rule 928 and the other rules then framed were framed with the expressed intention of being in conformity with the rules framed by the Secretary of State under the Indian and Colonial Divorce Jurisdiction Act.

7. With the greatest respect to the learned Judges responsible for Rule 928, it does not seem to have been considered that, at least and so far as decrees for dissolution or nullity of marriage are concerned, jurisdiction of the Indian Courts is fundamentally different under the two Acts, the Indian and Colonial Divorce Jurisdiction Act and the Indian Divorce Act. Under each Act such jurisdiction is based upon domicile, English under the one, and Indian under the other; and as a person -can have only one domicile at a particular time, jurisdiction under the two Acts in these matters is mutually exclusive. It is also to be noticed that although the Indian Divorce Act applies in terms where the petitioner or the respondent professes the Christian religion, the Act also applies by reason of Section 17 of the Special Marriage Act to marriages under that Act when neither of the parties professes the Christian religion. Where jurisdiction exists under the Indian Divorce Act in a particular case to grant a decree of dissolution of marriage, clearly no jurisdiction exists in that case at the same time under the Indian and Colonial Divorce Jurisdiction Act, nor could jurisdiction exist in the Courts in England, for there also jurisdiction depends upon domicile. Also no English or other foreign Court can have jurisdiction to vary any order made by an Indian Court under the Indian Divorce Act" although some independent order in separate proceedings consequent upon change of domicile might be made. On the other hand in cases falling under the Indian and Colonial Act the English Courts have concurrent jurisdiction. The jurisdiction of the Indian Courts under the Indian and Colonial Act is really of the nature of delegated jurisdiction. By Section 1(2) of the Indian and Colonial Divorce Act a decree made under the Act must be registered in the High Court in England (or in the books of Council Session in Scotland) and by Section 1(3) of the same Act, where a decree is so registered, proceedings under it may be taken as if it is a decree made by the High Court of England (or the Court of Session in Scotland). Then follow three provisos to Section 1(3). The second gives to the Court of Session power to vary or discharge an order of alimony. The third saves proceedings taken in India

under the decree. The first proviso is akin to Rule 928 and Rule 22 of the Secretary of State's Rules and is as follows :

(1) The High Court in England or the Court of Session in Scotland shall not, unless the Court for special reasons sees fit so to do, entertain any application for the modification or discharge of any such order if and so long as the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India.

Section 1(a) of the same Act confers power upon the Secretary of State in Council of India to make rules, and states that these rules shall provide for matters there set out in a number of clauses. Of these Clause (e) is as follows

(e) for limiting cases in which applications for the modification or discharge of an order may be entertained by the Court to cases where at the time the application is made the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India.

Rule 22 of the Secretary of State's Rules clearly was framed under this Clause. The effect of this rule and the first proviso to Section 1(3) set out above is that an application for modification or discharge of an order of alimony made under a decree for dissolution of marriage granted by an Indian Court under the Indian and Colonial Act must be made to the Indian Court, if at the time the application is made the person on whose petition the decree was pronounced is resident in India, and to the High Court in England (or the Court of Session in Scotland) if at the time the application is made the person on whose petition the decree was pronounced is resident anywhere outside India.

8. There is, however, no counterpart to Rule 928 of this Court, and its effect, if valid, would be that if the person on whose petition the decree was pronounced leaves India, no Court has jurisdiction to modify or discharge an order for alimony or for maintenance or for custody of children made under the Indian Divorce Act.

9. As already stated express power to discharge or modify orders of alimony is granted by Section 37 of the Indian Divorce Act, and Section 44 of that Act provides expressly that from time to time orders may be made for custody, maintenance and education of minor children, the marriage of whose parents was the subject of the decree. It is an illustration sufficiently striking of the effect of Rule 928 that if a person to whom custody of minor children has been awarded leaves India and abandons the children in India the Court might be powerless to act.

10. It is true that in the rules framed by the Secretary of State under the Indian and Colonial Act there is reference to the Indian Divorce Act and that in the Indian Divorce Act there is reference to the practice of the Divorce Courts in England. In Rule 22 of the Secretary of State's Rules it is provided that:

Proceedings relating to alimony, maintenance, custody of children, and to the

payment, application or settlement of damages assessed by the Court shall be conducted in accordance with, the provisions of the Indian Divorce Act, 1869, and of the rules made there under.

and that part of Rule 22 earlier referred to follows as a proviso.

11. Conversely Section 7 of the Indian Divorce Act enjoins that Courts shall act and give relief in all suits and proceedings under the Act on principles and rules which 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. It has been held recently by this Court in appeal *Ramesh Ramanlal Saraiya Vs. Kusum Madgaokar*, that this section does not apply only to matters of procedure and operates to give jurisdiction to order alimony following a decree of nullity of marriage, although no provision for alimony in such circumstances is made in the Act. This construction of Section 7 would seem to make much of the remainder of the Act surplusage. But even so the fundamental difference of jurisdiction under the Indian and Colonial Act and under the Indian Act remains unaffected. Rules, made u/s 62 of the Indian Divorce Act must be consistent with the provisions of the Act, and any rule which deprives a person of a remedy which exists under the Act is to that extent ultra vires. On these considerations I hold that the material part of Rule 928, namely, that contained in its first paragraph as set out at the beginning of this judgment is ultra vires the rule making power of this Court u/s 62 of the Act, and is, therefore, of no effect. I hold, therefore, that I have jurisdiction to modify or discharge the order for alimony in this case, notwithstanding the fact that the wife on whose petition the decree was pronounced is resident outside India.

12. On the merits of the application it appears that the incomes of the husband and of the wife's second husband are of about the same order. There is no reason to doubt the husband's assertion that he has now to support his parents. At the same time the daughter, although she has attained the age of 18 years, is said still to be a dependent, as she has not finished her education, and I think some amount should continue to be paid to the wife to be devoted to the daughter. Considering all the circumstances I think it will be proper to substitute for the order of July 14, 1933, an order directing that the husband from the date of this application shall pay to the wife an amount of Rs. 25 only a month and that this payment shall be continued until the daughter has attained the age of 21 years.

13. The husband applicant must bear the costs of the wife in this present proceeding. Counsel certified.