

(1948) 12 MAD CK 0013
In the Madras High Court

Yvonme Gwendoline Marie Lewis

APPELLANT

Vs

Aloysius Lewis

RESPONDENT

Date of Decision : 06-12-1948

Acts Referred:

Divorce Act, 1869 — Section 7

Citation : (1949) 62 LW 332 : (1949) 1 MLJ 547

Judgement

1. This is an application u/s 7 of the Indian Divorce Act by the respondent in O.M.S. No. 17 of 1948 against her husband, the petitioner therein,

for an order directing him to pay to the applicant a sum of Rs. 300 in order to enable her to meet the expenses incidental to the defence of the suit.

Mr. Gopala Menon on behalf of the respondent herein has raised a series of objections. The first objection is that the application is not

maintainable under the Indian Divorce Act. Section 7 of that Act reads thus:

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.

This is followed by a proviso.

2. The applicant has relied on Rule 74 of the Matrimonial Causes Rules in force in England and contends that by the combined force of Section 7

of the Indian Divorce Act and Rule 74 of the English Rules, the applicant is entitled to an order for costs. Sub-rules (2) and (3) of Rule 74 of the

Matrimonial Causes Rules provide for the wife filing her bill of costs for taxation

as against her husband and asking for security for her costs of and incidental to the trial or hearing of the cause. Upon taxing the same the Registrar or taxing officer may order the husband to pay to> the wife or into Court her costs up to the setting down of the cause and to pay into Court or secure the costs of and incidental to the trial or hearing. Mr. Gopala Menon's contention is that the principles and rules on which the Matrimonial Court in England acts are not applicable en masse to divorce actions in this country as their applicability is made u/s 7 subject to the provisions of the Indian: Divorce Act and so long as there is no specific provision in the Indian Divorce Act. the gap cannot be filled by up invoking the application of one of the rules in the Matrimonial Causes Rules. Reliance for this purpose is placed on Section 16 and. Section 35 of the Indian Divorce Act which are the only two sections in that enactment dealing with costs and they do not cover a case of this description.

3. This question has come up for consideration in a series of decisions in the various High Courts in India. So far as this Court is concerned in a line

of cases headed by *Natal v. Natal* ILR (1885) Mad. 12 it has been held that a wife without property of her own was entitled to have provision

made by her husband for payment of her costs in the suit notwithstanding Section 4 of the Indian Succession Act, the principle being that as the

wife has no property of her own, the same reason for securing costs would apply, viz-, her inability otherwise to continue the proceedings and to

meet her husband on equal terms. This view has been adopted in the Bombay and Allahabad High Courts. It was pointed out in one of the

Bombay decisions, *Mayhew v. Mayhew* ILR (1894) Bom. 293 that the passing of the Married Women's Property Act in England made no

difference with regard to the securing of wife's costs and that having regard to Section 7 of the Indian Divorce Act, the practice prevailing in

England should be followed in India, viz., that unless the husband can show that costs should not be allowed, the wife will be entitled to her costs.

In a recent decision of the Allahabad High Court, *Taqub Masih v. Christina Masih* ILR (1940) All. 802, the case-law was reviewed and it was

held that a wife in India is entitled to claim her costs from a husband who institutes proceedings against her for dissolution of marriage on the

ground of adultery and the petition should be adjourned till the husband pays the

money in Court. In a decision of Reilly, J., in *Iswarayya v.*

Swarnam Iswarayya (1929) 58 M.L.J. 29, some doubt was cast upon the applicability of the statutory provisions and statutory rules of the English

law to cases arising under the Divorce Act. The learned Judge was of the view that the words "" principles and rules "" in Section 7 of the Indian Act

mean principles and rules of law, of evidence, of interpretation, of practice, and of procedure but not statutory provisions nor statutory rules and

this view was taken because of the expression found in the commencement of the section, viz., that the principles and rules were to be subject to

the provisions of the Act. This case went up in appeal to the Judicial Committee and Their Lordships" decision is reported as AIR 1931 234

(Privy Council) of the report, the Board observed:

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 Courts in England then acted and gave relief. It is therefore not irrelevant to

enquire how matters stood and stand in England in relation to this question.

Again we find the following passage at pages 785 and 786:

Their Lordships fully realise 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.

The matter came to be considered in a subsequent decision of a Full Bench of this Court in *Sumathi Ammal v. Paul* (1935) 70 M.L.J. 321. The

majority of the Full Bench consisting of Stone and Mockett, JJ. (Wadsworth, J., dissenting), held following the latest amendment of the statutory

rules in England, the proper form of a decree to be passed in the first instance in a suit for a declaration of nullity of marriage filed on the Original

Side of the High Court was that of a decree nisi and not a decree absolute. In that decision, the whole history of the legislation terminating in the

Indian Divorce Act was set out and reference was made to the decisions of this Court and of the Judicial Committee in AIR 1931 234 (Privy

Council) and it was significantly pointed out that the words " principles and rules " occurring in Section 7 of the Indian Divorce Act were found in

the English Act of 1857, Section 22, which, in the same terms as Section 7, had provided that :

the Court shall proceed and act and give relief on principles and rules, which in the opinion of the said Court, shall be as nearly as may be

conformable to the principles and rules on which the ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions

herein, contained, and to the rules and orders under this Act.

It was held that by the majority in the Full Bench case that a distinction cannot be drawn between those principles and rules which are derived from

statute and those which are derived from any other source. The result was that according to the view of the Full Bench the words included not only

principles and rules of law, etc., but also statutory provisions and statutory rules in force and in application in the Courts for divorce or matrimonial

causes in England. I must here point out before leaving this part of the case that the Calcutta High Court had once taken a different view with

regard to this matter although in one of the decisions in *Broadhead v. Broadhead* (1870) 5 Beng. L.R. App.9, Phear, J., held on being satisfied

that the wife had no separate property and means of paying the costs of a divorce suit, that she was entitled to an order for security for costs in

spite of the fact that the parties were governed by Section 4 of the Indian Succession Act. The latest decision of that Court in *Forrester v.*

Forrester ILR (1930) Cal. 1350 ultimately resolved the question into one of the discretion of the Court holding however that the matter was

entirely within the jurisdiction of the Court. Having regard to this array of authority, which has now become more or less uniform, it has to be held

that there is no substance in the objection that the application is not maintainable u/s 7 of the Indian Divorce Act.

4. The next substantial objection put forward is that even under Rule 74 of the Matrimonial Causes Rules, the authority which should deal with the matter is the Registrar or the taxing officer and against an adverse order, the party aggrieved would have a right of appeal to the Court and as such no application would directly lie to the Court the remedy of the present applicant being to file her bill of costs before the Registrar. That is no doubt the procedure in England; but from the various cases decided in the Indian High Courts with regard to this matter, I find that applications which were made directly to the Court were entertained, as a matter of uniform practice.

5. On the merits two contentions were put forward; that the wife has no right to a remedy of this kind but that the relief was entirely within the discretion of the Court and having regard to the circumstance that in India unlike in England before the Married Women's Property Act came into force, a woman has independent status and right to own and deal with property on her own, being feme sole in the eye of the law. Even this aspect of the matter has been considered in most of the decisions cited above and in spite of the circumstance that a woman has certain rights under the Indian Succession Act, in a case where the husband charges her with adultery and seeks dissolution of the marriage, it has been held that if she is found to have no means to defend the suit, she is entitled to an order against her husband for payment of her costs to enable her to arrange for her defence.

6. Turning to the actual facts of the case, it is pointed out that ever since 1942 when she is said to have been discarded, the applicant has been able to get on without asking for any maintenance from her husband and that this shows that she has some independent means of livelihood. It is also urged that in a letter which she addressed to the husband she assured him that he need not give her any maintenance. These grounds are, in my opinion, of no avail. With regard to her having been able to get on without any maintenance all this time, she explains that she was employed as a governess for a considerable portion of the time but latterly she has been discharged and she has fallen on the hands of her father who himself has very little income for subsistence. It is not contended that she has any property or any independent source of income. With reference to the letter, it

is alleged that it was extorted under coercion and the facts have been vividly set out by her in her reply affidavit. The circumstance that she has her father and her brothers on whose charity she has to depend and the argument that the means of the husband himself are of a precarious nature are not material as the consideration of the question rests upon the principle that the husband having brought an action for dissolution on a charge of adultery, he must enable the wife, if she has no means whatever, to meet the charge on equal terms. The applicant is, in my opinion, entitled to an order against her husband for the payment of the costs up to the setting down of the cause and incidental to the trial or hearing of the case. A sum of Rs. 300 has been asked but no details have been furnished. I think having regard to the nature of the case and the amount of evidence that may be necessary, a sum of Rs. 100 ought to be sufficient. Time for payment one month. The respondent should pay the applicant the costs of this application.