

R Vs. R

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Court : Chennai

Decided On : Aug-28-1890

Reported in : (1891)ILR14Mad88

Judge : Arthur J.H. Collins, Kt., C.J. and ;Shephard, J.

Appellant : R

Respondent : R

Judgement :

1. This is an appeal against an order made by Best, J., dismissing an application for increase of alimony pendente lite and adjourning the final disposal of the suit until the first Monday in March 1891.

2. It was objected at the outset that no appeal lay against the latter part of the order, because it was an order made under the provision of the Civil Procedure Code, for which no appeal is provided; and a preliminary objection to be noticed hereafter was also taken to the maintenance of the appeal so far as the amount of the alimony was concerned.

3. With regard to the so-called adjournment of the suit, we are of opinion that the order is not one made under Section 156 of the Code, cited by the learned Counsel. It was simply an order made at settlement of issues, fixing the day on which the final hearing was to take place and is only exceptional on account of the distance of the date to which the hearing was postponed. Although we think that

an appeal does lie against such order as against every other order of a single Judge, except in matters where the right of appeal is curtailed by legislation subsequent to the Letters Patent, and, although we also think that this order was an unusual one, we do not think it necessary in this case to vary it; for we learn from Mr. Justice Best that the understanding on which the trial of the case was allowed to be postponed for so long a time was that in the meanwhile the parties should obtain such evidence as might be required by commission or otherwise and put themselves in a position to have the case disposed of on the day fixed.

4. As regards the appeal concerning the amount allowed for alimony, it was at first objected that, although Best, J., might have enhanced it in consequence of the increased pay to which the respondent has recently, and since the passing of the original order of the 26th November 1889, become entitled, he could not otherwise modify the order passed on that day by Handley, J. It was also contended that the original order of the 26th November was practically an order passed by consent, and that anyhow the time for appealing against it had long since passed away. The Advocate-General, who appeared for the petitioner, explained, however, that the figures were not examined, as it was then expected that the case would be amicably settled. After some discussion, however, these objections were withdrawn, and Mr. Wedderburn consented to have the whole question of the amount of alimony inquired into de novo and in the peculiar circumstances of the case we allowed that course to be adopted.

5. The order of Handley, J., by which the sum of Rs. 135 a month was made payable to the petitioner, was framed upon the supposition that, in calculating the nett income of a husband as required by Section 36 of the Divorce Act, there should be deducted, from his monthly receipts, all sums expended on his children or in liquidation of his debts.

6. The average salary, the only source of the respondent's income, for the last three years before the date of Handley, J.'s order was about Rs. 1,600 per mensem after deducting income-tax and the contribution to pension and annuity fund. This sum reduced by the amounts claimed to be deducted on account of the respondent's children and debts, becomes a sum of Rs. 610 a month only, and it is

this smaller sum which has been taken to represent the average nett income of the respondent for the purpose of charging alimony against him. In our opinion it is an entire mistake to suppose that the phrase 'nett income' in the Act has any other meaning than that which it ordinarily bears. The cases cited, while they show that in allotting alimony, allowance may be made for children that have to be maintained by the husband or instalments of debts that have to be paid, have no bearing on the question of what constitutes a man's 'nett income.' Ordinarily with an official drawing a fixed salary and having no other means, that expression would be taken to mean the amount of his salary minus deductions on account of income-tax, charges for a pension fund, and the like; and, in our judgment, that is the sense in which nett income is to be understood in dealing with a case under the Divorce Act.

7. It is then contended that in allotting alimony on the average amount of nett income, viz., Rs. 1,600, the respondent is at least entitled to have the charges of maintenance of his children and the monthly instalments of debts payable by him taken into consideration. On the other hand it is contended that inasmuch as the respondent's salary has increased since the date of the original order, that increase of salary ought to be taken into consideration. We do not think it is by any means clear that the Court has power to increase or diminish an allotment of alimony made pendente lite on account of change of circumstances; and no case has been cited in which such power has been exercised in favour of the wife. But, however that may be, we do not in the present case feel justified in taking into account any income other than that which was received during the three years next before the making of the original application. The average nett income from that period being Rs. 1,600, the maximum alimony which under the Act we could allot would be about Rs. 330. To deduct the full amount claimed by the respondent on account of the children and on account of the debts and then to calculate the one-fifth on the residue would leave the petitioner a sum plainly insufficient to maintain her in the decent comfort to which she is entitled. Granting that enough must be left to the husband to provide, among other things, for the maintenance of his children, we think that the sum required for such maintenance must be calculated with reference to the means of the parties and, although the three children aged, respectively, 14, 11 and 8 in the present case appear to have cost

at the rate of 120 each per annum, we think that that expenditure is, under the circumstances, excessive. And with regard to the debts said to be payable by instalments, we observe that the creditor is the respondent's step-father and that he has security for his debt. We have, on the other hand, to consider what sum is necessary to keep a lady in the petitioner's position in reasonable comfort. It seems to be admitted, and, in our minds, there is no doubt, that the least sum on which such a person having no other means can live in Madras, is between Rs. 200 and Rs. 250 a month. And it is to be observed that Mr. Wedderburn stated, at the hearing that the respondent was willing to allow his wife Rs. 222 a month. Although we have power to grant as much as one-fifth of the respondent's nett income, we resolve to take into consideration the expenses the respondent is put to in maintaining his children and also any arrangement he may have made for liquidating his debts. It has been contended, on behalf of the respondent, that any increase of the alimony should not refer back to the date of the original order and we think there is force in this contention.

8. Taking all the circumstances into consideration, we order that in substitution for the order of Handley, J., the respondent do pay to Messrs. Barclay and Morgan, the Solicitors of the appellant the sum of Rs. 240 per month, the first payment to be due on the 5th August 1890 and to be made within seven days from this date and the subsequent payments to be made on the 5th of each succeeding month. It has been alleged, on behalf of the petitioner, that the respondent improperly made a deduction from the sum he was ordered to pay as alimony. Although strictly speaking he was not justified in making such deduction, yet, as it appears that it was only made to pay a bill, which otherwise the appellant would have had to pay, we decline to make any order on this part of the case.

9. Their Lordships next proceeded to consider the question of the costs incurred in the matter and ordered that they be paid by the respondent.