

Proby Vs. Proby

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Court : Kolkata

Decided On : Jun-12-1879

Reported in : (1880)ILR5Cal357

Judge : Pontifex and ;Wilson, JJ.

Appellant : Proby

Respondent : Proby

Judgement :

Pontifex, J.

1. The petitioner has instituted proceedings praying for a judicial separation from her husband. She is now scarcely more than 18 years of age; she was married on the 15th of February last, and her husband attained the age of 21 on the 17th of May. They lived together only until the 17th of April, when the petitioner separated herself from her husband; and she alleges cruelty on the part of her husband as the ground on which she claims a judicial separation.

2. Within four days from the service on her husband of her petition, she served him with notice of her present application for an order directing him to pay her such alimony during the pendency of her suit as this Court might think fit, and also to pay into Court such sum as might be deemed sufficient to pay her costs of and incidental to, this suit.

3. The application for alimony the husband does not resist, but he opposes the application so far as it asks that he should provide for the petitioner's estimated costs of suit.

4. This part of the petitioner's application is grounded on the long established practice of the Ecclesiastical Courts in England, which is still followed by the English Divorce Court, and which was followed by this Court in the case of *Broadhead v. Broadhead* (5 B.L.R., App., 9), in which case the husband was the petitioner.

5. That practice was, that in suits for judicial separation the husband was ordered to deposit in Court a sum of money to meet the estimated costs, of the wife in the suit, and which should be a security to her proctor whatever might be the result of the suit.

6. It has been urged on behalf of the petitioner, that as Section 7 of the Indian Divorce Act (No. IV of 1869) enacts that this Court should act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the English Divorce Court acts and gives relief; and as that Court in suits for judicial separation is to proceed and act on principles and rules as nearly as possible conformable to those on which the Ecclesiastical Courts had theretofore acted and given relief, therefore we are bound to follow the ancient practice, and to direct the husband in this case to deposit the estimated costs of the petitioner in this suit.

7. The foundation of the practice which prevailed in the Ecclesiastical Court was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate and to the income of her real estate, leaving her destitute of all means to conduct her case.

8. But that state of the law has been completely altered in India by the 4th section of the Indian Succession Act, to which these parties are subject, and which enacts that 'no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.'

9. The foundation of the practice of the Ecclesiastical Courts having been displaced with respect to persons subject to the Indian Succession Act, we think that the practice itself ought no longer, as a general rule, to be followed.

10. Indeed, in the Ecclesiastical Courts the rule was not an absolute one, but was subject to exceptions, as in the cases where the wife had separate property of her own, or where it was proved that the husband had no means of his own.

11. And in the English Divorce Court, at least since the publication of the rules and orders of 1865, there has been a discretion to refuse the wife her costs, even in a case where a deposit of estimated costs had been made by the husband under the order of the Court--Jones v. Jones (L.R., 3 Prob. and Div., 333).

12. Therefore, without saying that this Court will, under no circumstances, order a husband to give security for his wife's costs, for cases of settlement, or particular circumstances might justify it, we are of opinion that it should be done under special circumstances only, and as upon the affidavits no special circumstances appear to us to exist in this case, we must refuse that part of this application which asks that the husband may be ordered to deposit the estimated costs of the petitioner.

13. With respect to the question of alimony pending the suit, there must be a reference to the Registrar to inquire and report upon the amount of income which the husband is entitled to. As the husband admits his liability to provide alimony, there will be no costs of this application.