
MEHMET DERVISH ALI, of Larnaca

Appellant—Claimant,

v.

LEMAN MEHMET DERVISH ALI, of Alamino now of Larnaca

Respondent—Defendant.

(Turkish Family Court Appeal No. 1/58)

1958
March 27,
May 29
—
MEHMET
D. ALI
v.
LEMAN M.
DERVISH ALI

Divorce—The Turkish Family (Marriage and Divorce) Law, 1951. Section 25 (f)—Judicial separation instead. Section 29. Discretion of the Court—Principles upon which such discretion should be exercised—Appeal—Principles upon which the Court of Appeal will interfere with such discretion.

The Appellant - husband sued his wife (the respondent) for divorce on the ground that, due to her fault, the conjugal relations had been so seriously strained that life together had become impossible or intolerable. Section 25 (f) of the Turkish Family (Marriage and Divorce) Law, 1951 provides :

“Section 25. Either party to a marriage can sue the other party for divorce on any of the following grounds:.... (f) where the conjugal relations are so seriously strained that life together has become impossible or intolerable :

Provided that, where the cause of such straining is mainly attributable to the fault of one party, only the other party can sue for divorce”.

The trial judge found as a fact that the conjugal relations between the parties due to the fault of the wife had reached the point where a life in common had become impossible or intolerable. But instead of granting a decree of divorce, the trial judge exercising his discretion under Section 29 granted a judicial separation for one year and a maintenance order in favour of the wife, on the ground that there were still prospects of reconciliation.

By Section 29 (*see post*) the Court has a discretion, notwithstanding that a party has sued for divorce and a ground of divorce has been established, to grant, in lieu of an order of divorce, a judicial separation, if, having regard to all the circumstances of the case, the Court is of opinion that reconciliation between husband and wife may be first tried. The learned judge came to the conclusion that there were still prospects

of reconciliation between the parties. He accordingly granted, in lieu of divorce, the separation and maintenance provisional orders referred to. From this decision the claimant appealed. The Respondent wife cross-appealed on the ground of insufficiency of evidence.

1958
March 27,
May 29
—
MEHMET
D. ALI
v.
LEMAN M.
DERVISH ALI

It was contended by the Appellant that the judge was wrong in granting judicial separation instead of divorce. (1) once he found that the conjugal relations were so seriously strained that life together became impossible or intolerable, and (2) in view of the past matrimonial history of the couple. Indeed, there had been a previous divorce and remarriage between the parties and, as it seems, attempts with a view of a reconciliation had proved abortive.

Held : (1) On the principles laid down in similar matters by the English authorities (see *Blunt v. Blunt* (1943) 2 All E.R. 76 at p. 78 and the Turkish authorities,—the latter regard as improper an order for separation in lieu of divorce only in cases where the ground of divorce is adultery or mental disease, (*post*),—it does not appear, regard being had to all the circumstances of the case, that the judge has exercised his discretion improperly.

(2) The Court of Appeal will not interfere with the exercise of such discretion unless it can be shown that the trial Court acted under a misapprehension of fact, in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant. Principles stated in *Blunt v. Blunt* (*supra*) at p. 79, *followed*.

(3) *On the cross-Appeal by the wife* : There was sufficient evidence before the trial judge to come to the conclusion to which he came.

Appeal dismissed.

Cross - Appeal dismissed.

Cases referred to :

Wickins v. Wickins (1918) P. 265.

Blunt v. Blunt (1943) 2 All E.R. 76 (H.L.).

Semle : An order of judicial separation in lieu of divorce is improper where the ground of divorce is adultery or mental disease.

Turkish authorities, post, considered.

Appeal and Cross-Appeal.

Appeal by the husband against the judgment of the Turkish Family Court of Larnaca (Djemal Munir, Judge) dated the 28th November 1957 (Action No. 38/57) whereby a judicial separation for one year and maintenance to the wife were granted in an action for divorce by the husband under Sect. 25 (f) of the Turkish Family (Marriage and Divorce) Law, 1951. Cross-appeal by the wife on the ground of insufficiency of evidence that she was at fault.

1958
March 27,
May 29

Kiamran Halil for the Appellant.
A. Frangos for the Respondent.

Cur. Adv. Vult.

MEHMET
D. ALI
v.
LEMAN M.
DERVISH ALI

The facts sufficiently appear in the judgment of the Court, delivered by :

ZEKIA, J.: The appellant in this case applied to the Turkish Family Court of Larnaca to obtain divorce from his wife, the respondent, under section 25, sub-section (f) of the Turkish Family (Marriage and Divorce) Law, 1951, that is on the ground that the conjugal relations between the litigants were so seriously strained that life together had become impossible or intolerable. The learned Judge heard evidence in this case and found as a fact from the evidence before him and the surrounding circumstances that the conjugal relations between the claimant and the defendant wife due to the fault of the latter had reached the point where a life in common had become impossible or intolerable. But instead of granting a decree of divorce, the Court exercised its discretion under section 29 of the Law of 1951 and granted a judicial separation for a year and also ordered the claimant to pay £5 per month to his wife for maintenance until they are reconciled or determined their future rights after the expiration of the order. From this decision of the Family Court Judge the claimant appealed and the respondent cross-appealed. The appellant contends that the trial Judge was wrong in granting judicial separation instead of divorce once the conjugal relations were found to be so seriously strained that life together was impossible. This is more so when the past history of the married life of the couple is taken into account. There was divorce and remarriage between the parties earlier and the prospects of reconciliation had already been tried more than once before the filing of the present petition and any further attempt in this direction was necessarily abortive. It was complained that the award of £5 for monthly maintenance was excessive. The cross-appeal on the other hand alleged that there was no corroboration of the evidence of the claimant on whose evidence the trial Court acted in this case and therefore the trial judge was wrong in finding that there was evidence to support a ground of

divorce against respondent and consequently the order for judicial separation could not stand.

Section 29 of the Turkish Family (Marriage and Divorce) Law, 1951 reads :—

“Notwithstanding that a party has sued for divorce and a ground of divorce has been established, the Court may, in lieu of an order of divorce, grant a judicial separation if, having regard to all the circumstances of the case, the Court is of opinion that reconciliation between husband and wife may be first tried”.

What is the nature of the discretion vested in the Family Court Judge, and when the exercise of such a discretion can be questioned by an Appeal Court, is stated in the quotation from the following authorities :—

“... where Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this court, (*i.e.* the Appeal Court), ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the judge of the Divorce Division than the legislature has thought fit to impose ...”. (1)

It appears that the House of Lords (2) approved four and added another one making it five as relevant considerations by which the trial Court might be properly guided in the exercise of their discretion in this matter. These are :—

- (a) The position and interest of any children of the marriage;
- (b) The interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;
- (c) The question whether, if the marriage is not dissolved,

(1) *Wickins v. Wickins* (1918) P. 265 at p. 272, per Swinfen Eady, M.A., approved by *Blunt v. Blunt* (1943) 2 All E.R. 76, at p. 78.

(2) *Blunt v. Blunt* (*supra*) at p. 78.

1958
March 27,
May 29

MEHMET
D. ALI
v.
LEMAM M.
DERVISH ALI

1958
March 27,
May 29

MEHMET
D. ALI
v.
LEMAN M.
DERVISH ALI

there is a prospect of reconciliation between husband and wife;

- (d) The interest of the petitioner and in particular the interest that the petitioner should be able to remarry and live respectably; and
- (e) The interest of the community at large to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

As to the second point, that is, when a Court of Appeal will interfere with the exercise of discretion of the divorce court, the following may be quoted from *Blunt v. Blunt*, already referred to, at page 79 :—

“If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court’s discretion will have been exercised on wrong or inadequate materials. But, as was recently pointed out in this House in another connection in *Charles Osenton & Co. v Johnston* (1942) A.C. 130, 138; (1941) 2 All E.R., 245, at p. 250 :— “The appellate Tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations... then the reversal of the order on appeal may be justified”.

The Turkish Authorities dealing with the same point seem to be in line with the Authorities cited. They regard

only as improper an order of separation in lieu of divorce where the ground of divorce is adultery or mental disease⁽¹⁾.

The fact that in the past the petitioner divorced his wife under the Sheri law and again married her after a reconciliation is not sufficient ground for interfering with the discretion of the judge who believes that there are prospects of reconciliation for the second or third time. The appeal is therefore dismissed.

Coming to the cross-appeal we are of opinion that there was sufficient evidence before the trial judge to come to the conclusion to which he came and the evidence of the husband is not altogether uncorroborated. Apart from the evidence of the claimant there is evidence that she unnecessarily and gravely insulted her husband in a Court of Law and that she accused him of having illicit relations with another woman which accusation she admitted in the trial as being false and further it has been established that the husband had to live in a separate room from her and was obliged to get his meals elsewhere than the conjugal house. These are some instances which go to support the evidence of the husband that the wife is to be blamed for the strained relations between them. We are of opinion therefore that the cross-appeal also fails. Each party to bear his own costs.

*Appeal and Cross-Appeal dismissed.
No order as to costs.*

1958
March 27,
May 29

MEHMET
D. ALI
v.
LEMAN M.
DERVISH ALI

(1) See page 212 Turk Medeni Hukuku volume 2 by Dr. Hifsi Veldet and also page 88 Boşanma -- Ayrılık by Dr. Zâhid Çandarlı and Dr. Osman Berwi.