

O.R. v O.R. ?

THE HIGH COURT

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1984 No. 609 SP

IN THE MATTER OF THE FAMILY HOME PROTECTION ACT 1976

AND IN THE MATTER OF THE FAMILY LAW (PROTECTION OF SPOUSES AND CHILDREN) ACT 1981

AND IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT 1976

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

AND IN THE MATTER OF A., B. AND C. INFANTS

BETWEEN/

O.R.

Plaintiff

and

O.R.

DEFENDANT

Judgment of Mr. Justice Murphy delivered the 3rd day of December, 1984.

The summons in this matter was issued on the 3rd of October; served on the 8th October and returned before the Master of the High Court on the 24th October, 1984. In accordance with the relevant High Court practice direction the summons was put in the Court list for the first motion day thereafter, that is to say, the 26th October, 1984. The practice direction then required:-

"That parties must on that occasion attend and submit such evidence

"or argument as they see fit as to whether the case is one appropriate for the High Court to exercise its jurisdiction under one or other of the above Acts or whether it is a case which should be remitted to the Circuit Court or District Court."

Mr. Shatter, Solicitor, whilst denying that any onus lay on the plaintiff to establish that it was an appropriate case to bring in the High Court argued as follows:-

1. The only jurisdiction of the High Court to remit an action to the Circuit Court or the District Court is that provided for in Order 49, Rule 7, of the Rules of the Superior Courts.

2. That Rule has no application unless one or other of the parties to the proceedings applies to the High Court to remit the proceedings.

As no application to remit had been brought by the defendant there was no jurisdiction vested in the Court to remit the proceedings.

3. Even if the Court were to dispense with a motion to remit it would not be appropriate to exercise that power because:-

(a) doubts might exist as to the constitutionality of so much of the above Acts as gave to the Circuit Court the power to bar a spouse from his/her home for an unlimited period or to grant custody of a child for a period which was unlimited. (This

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argument was referred to but not pressed.);

(b) proceedings should be remitted only "if the High Court should not consider the action or proceeding fit to be prosecuted in the High Court" (as the Rule expressly provides and as the Supreme Court has affirmed by an Order made in May, 1984 in matrimonial proceedings between M.T.T. and N.T.) and it could not be said the present proceedings were not fit to be so prosecuted;

(c) it was undersirable that the parties should be burdened with costs in relation to proceedings under the above mentioned Acts in the Circuit Court and additional costs in relation to further proceedings between the same parties instituted by the plaintiff herein as petitioner for a divorce a mensa et thoro in the High Court.

4. That the High Court practice direction hereinbefore referred to did not (nor, by implication, did the decision of Mr. Justice Gannon in R. and R. delivered on the 16th of February, 1984) affect or extend the jurisdiction of the High Court to remit proceedings to the Circuit Court or the District Court. The practice direction aforesaid was, or so the argument went, "a mere verbalisation of Order 49, Rule 7".

5. If and to the extent that the decision in R. and R. and the practice direction affected any change in law or procedure the change or alteration is only operative as and from the date on which the summons is listed before the Judge. Accordingly, as an interlocutory motion was brought before the proceedings were listed before the Judge that that step was unaffected by the new procedure and the Court having seisin of the matter to that extent should not exercise its discretion - if any discretion does exist - to remit it to the Circuit Court.

Whilst counsel for the defendant had relied on the decision in R. and R. and the practice direction at the stage when the interlocutory application was brought and argued then that it was not an appropriate matter for the Court to deal with, the problem which arose at the interlocutory stage was resolved or dealt with by different means. In fact the defendant gave an undertaking not to exercise violence towards his wife but did so on the express terms that he denied emphatically that he had ever been guilty of violence towards his wife and that the undertaking was without prejudice to his argument that the proceedings were not appropriate to be dealt with in the High Court. The motion did not proceed further at that

stage because insufficient notice had been given to the defendant and the Court declined to abridge the time having regard first to the difficulties which the defendant's counsel had in the time available to obtain the necessary instructions and secondly the attitude which the defendant took with regard to the alleged threat of violence.

However on the hearing of the application pursuant to the practice direction counsel for the defendant, Miss Dunne, explained that the defendant's view at that stage was that the remission of either or both of the proceedings to the Circuit Court might result in additional expense and delay and accordingly was not in his interests. It was made clear that the defendant felt that under no circumstances should he be liable for the amount by which the High Court costs exceeded the Circuit Court costs but subject to that he was not expressly applying to have the matter remitted. It was for that reason that no motion had been issued.

To that extent it may be said that both parties are content that the proceedings should be litigated in the High Court.

It seems to me that the first question which I have to resolve is whether the discretion which I am called upon to exercise at this stage originates in the Rules of the Superior Courts or derives from some other

source.

Having regard to the interests of the particular parties to these proceedings and the attitude which they have adopted respectively I have not had the advantage of any argument or debate with regard to the alternative approaches to the problem. However, although this necessarily makes my task more difficult it does not seem to me that it would excuse me from deciding the issue which has far reaching effects for many potential litigants and not only those invoking the provisions of the various Acts relating to Family Law.

In his decision in R. and R. (delivered on the 16th February, 1984) Mr. Justice Gannon (in the penultimate page of the transcript of his judgment) expressed his conclusion as follows:-

"For these reasons I am of opinion that if and when and insofar as other courts of first instance established by law have jurisdiction in matters of Family Law and custody of children and maintenance of the nature under consideration in these proceedings it is competent for the High Court to decline to entertain applications for orders obtainable in such other courts or to remit to such other courts for hearing applications brought in the High Court which are within the jurisdiction of such other courts."

It seems to me to be clear beyond question that the learned Judge was recognising that there existed in the High Court in certain circumstances a power or discretion to decline to entertain certain matters and that such power or discretion was alternative to and independent from the right to remit in accordance with the Rules of the Superior Courts. Indeed in the concluding paragraph of his judgment the learned Judge made no reference to the well established power to remit but emphasised the existence of the alternative power in the following terms:-

"The High Court may accept or decline to accept for hearing in accordance with its own procedures claims for relief of the nature set out in the plaintiff's originating summons."

Indeed it seems to me that the practice direction already referred to was designed to provide just that procedure to which Mr. Justice Gannon was referring in the passage from his judgment quoted above. In accordance with that practice direction every summons claiming relief under the Acts in which this matter is entitled or any of them must be referred to the Court for the purpose of enabling the Court to decide on the evidence and argument submitted to it whether it is an appropriate case to be entertained by the High Court. That indeed is the matter that came before me and, as I say, I do not believe that I can excuse myself from the duty

of exercising that function on the grounds that both parties are content that the matter should remain in the High Court. Indeed if neither party submits any "evidence or arguments" - as the practice direction envisages - to satisfy the Court that the particular case possesses some special feature which would indicate that justice might not be done then it would be reasonable to infer that the matter did not possess any such feature.

Having regard to the fact that the Family Law (Maintenance of Spouses and Children) Act 1976 expressly provided (in Section 23 thereof) that the High Court, the Circuit Court (on appeal from the District Court) and the District Court should concurrently have jurisdiction to hear and determine proceedings under Sections 5, 6, 7 and 9 of that Act and subsequently the Family Law (Protection of Spouses and Children) Act 1981 defined the words "the Court" as used in that Act as meaning "the Circuit Court or the District Court" and then went on to provide in effect that the form of relief granted under Sections 5, 6, 7 and 9 of the 1976 Act might be granted by "the Court" with no reference to any express jurisdiction of the High Court to deal concurrently with those matters that indicated, as Mr. Justice Gannon has already pointed out in the R. and B.

case, a clear intention on the part of the Oireachtas that such applications should be made in the first instance to the Court of limited local jurisdiction.

There are many cases in which the Oireachtas has indicated a similar intention. An obvious example would be the Landlord and Tenant Act 1931 which conferred upon "the Court" far reaching and, perhaps by reference to then accepted concepts of contractual and property law, revolutionary powers enabling "the Court" to ensure security of tenure to a wide range of tenants of urban property. The Act defined "the Court" (see Section 5) as meaning the Circuit Court and made no express reference to any jurisdiction in the High Court to exercise similar powers. Again the Workmen's Compensation Act 1934 defined the tribunal which was to exercise and did exercise the important powers conferred by that Act as being "the Circuit Court". Whilst it might be said that the various Courts Acts have from time to time evinced an intent on the part of the legislature that claims in contract and tort for sums below a stipulated figure should be brought in a Court of limited jurisdiction rather than in the High Court, there is no doubt a distinction could be made between that type of case on the one hand and cases relating to the matrimonial legislation, the Landlord and Tenant Acts and the Workmen's Compensation Code where the legislation itself only contemplated

the exercise of the jurisdiction by the Circuit Court and not by the High Court.

Should then this Court give effect to the intention of the Oireachtas as expressed in legislation validly and constitutionally enacted?

I have no hesitation in answering that question in the affirmative. That answer might be justified shortly by saying that it is proper for one organ of the State set up under the Constitution to respect the actions and wishes of another such organ. More fully, however, it must be recognised that in accordance with Article 36 of the Constitution the Oireachtas is bound to enact legislation regulating in accordance with the law (among other things) the constitution and organisation of the Courts and the distribution, jurisdiction and business among the Courts. The enactment of legislation involves the consideration of and the selection from a variety of methods of providing for the needs of the persons affected by the legislation. The legislative process itself as ordained by the Constitution requires that the legislation should be considered by the elected representatives of the people and in practice the Oireachtas has available to it all the resources of the permanent administration in assessing the nature and extent of the problems to be resolved and the extent of the resources which could be made available for

that purpose. In connection with the legislation involved in the present application, I would readily assume that the appropriate research was undertaken to establish how, where, and at what cost, both financial and economic, matrimonial and family disputes might best be dealt with and the nature of the facilities which could and should be made available at different venues to deal with litigation touching on these matters. No doubt consideration has been given to the number of cases which are expected to arise; the sensitive nature of litigation relating to family matters; the need for court-room and ancillary facilities; provision of legal aid in different areas and the availability of psychiatric, counselling and other paramedical or supportive systems. It seems to me that the only circumstances in which the Court would be justified in departing from the procedure envisaged by the legislature would be where the High Court was satisfied that in the circumstances of a particular case there was a serious danger that justice would not be done if that Court declined to exercise the jurisdiction vested in it by the Constitution in relation to that particular case.

Whilst the point was made and emphasised that a petition had been presented on behalf of the wife in addition and prior to the proceedings brought under the various Acts in which this matter is entitled, no argument was addressed to the Court as to why this procedure was necessary in the present case or in what respect the facts alleged distinguished this case from any other unhappy matrimonial matter. The affidavit sworn by the plaintiff/wife in these proceedings on the 4th of October, 1984 shows that the marriage took place in February, 1966: that there are three children of the marriage: that difficulties existed from the early days of the marriage: that the husband engaged in long bouts of silence apparently interspersed with periods of verbal abuse directed towards the plaintiff. It is alleged that in 1981 the husband exercised physical violence towards the wife and since then - or perhaps earlier - has made inadequate financial provision for her and the family. Indeed the immediate background to the petition and the proceedings appears to have been the failure of the husband to procure or pay for an adequate supply of central heating oil or to arrange to have the television in the family home repaired. It is the wife's case that the amount required to support her and the children would be a sum of £201-87p per week over and above holidays, car repairs, house maintenance, house insurance, repairs and the

educational fees of her daughter which are £1138-00 per year. The sum so calculated is in addition to the provision of accommodation and the payment of tax. As against that need the plaintiff complains that in the five weeks next prior to the swearing of the affidavit she received the sum of £350-00 only. Whilst these allegations are serious and the concern of the wife entirely understandable it is unfortunate to have to recognise that complaints of that nature would not distinguish the present case from many others. I cannot see any question of fact or law - indeed, as I say, none has been adverted to - which would suggest that the failure of the High Court to accept and exercise jurisdiction in this case might result in a denial of justice.

In the circumstances it seems to me that the appropriate course is to decline to exercise the inherent or constitutional jurisdiction of the Court to determine the issues in this case and to leave the parties to pursue their remedies in those Courts on which the Oireachtas has expressly conferred jurisdiction.

Francis J. Kelly