Mrs. Avril Ellen Smith vs Reginald Frank Smith on 5 February, 1954

Equivalent citations: AIR1954ALL624, AIR 1954 ALLAHABAD 624

ORDER

Brij Mohan Lall, J.

1. This is a wife's petition for dissolution of her marriage with her husband (hereinafter described as respondent) on the ground of alleged adultery, cruelty and desertion.

2. The respondent pleads, inter alia, that he is a British subject domiciled in England and therefore this Court has no jurisdiction to pass a decree for dissolution of his marriage.

3. The petitioner's counsel contended, in the first place, that it was not admitted by his client that the respondent was domiciled in England and, in the alternative, that even if it was proved that the respondent's domicile was in England, the Courts in this country could give the petitioner a decree for dissolution of marriage which would be operative in India, though not in England. In support of this contention, he relied on the case of -- 'Mrs. Nan Greenwood v. L. V. Greenwood', AIR 1928 Oudh 218 (1) (A). In that case Pullan J. held that where neither party was proved to be domiciled in India, the Indian Courts could grant a petition for dissolution of marriage which would be valid for all purposes throughout India, although it might not be operative beyond the limits of this country.

4. The first point that arises for decision is whether the respondent is domiciled in England. If that is proved, the petitioner also will be deemed to be domiciled in that country, because the wife's domicile always follows that of her husband. The respondent came out to India about thirty years ago. He was formerly a Warrant Officer in the Army but later on he gave up that service and took up employment with the Railways. At the time of his marriage with the petitioner in 1950, he was a railway employee. The petitioner admits that the respondent "is registered as a British subject with the British High Commissioner". Further, she admits that he holds a British Passport. In 1948, i.e. before her marriage, the petitioner had taken a British Indian Passport. But when she got it renewed in 1953, i.e. after her marriage, her Passport was also renewed as a British Passport. She, however adds that her husband had told her that he had an intention to stay on in India and to make India his home.

I am not prepared to believe this portion of her statement. She had obviously made this statement with a view to prove the Indian domicile. On a consideration of the evidence on record, I have no hesitation in holding that the respondent, and consequently the petitioner, are both domiciled in England.

5. In my opinion, the preliminary objection taken by the respondent is well founded. The question of Indian High Court's jurisdiction over Christian couples domiciled in England has been engaging the attention of the Courts in India for a long time and has a history of its own. In the Indian Divorce Act (4 of 1869), as originally passed, jurisdiction was conferred on Courts in India to grant petitions for dissolution of marriage provided the petitioner professed Christianity, resided in India at the time of the presentation of the petition and (1) either the marriage was solemnised in India or (2) adultery was committed in India. Since the statute conferred jurisdiction on Indian Courts to pass decrees for dissolution of marriage on the fulfillment of the aforesaid conditions, irrespective of the domicile of the parties, the said Courts began to exercise this jurisdiction even in respect of couples domiciled outside India.

The English Courts, however, were of the opinion that, under the principles of international law, it was only the tribunal situate in the country of domicile which could dissolve the marriage. An argument was sometimes advanced in Indian Courts that residence in India gave a "matrimonial domicile" to the parties and, therefore, the Indian Courts could exercise jurisdiction so as to pass decree for dissolution of marriage which would be operative in India only. But such decrees created a very anomalous situation in so far as the parties ceased to be husband and wife within the limits of India but continued to be tied in matrimonial bondage in their own country. The matter came up before the Privy Council in the case of -- 'Le Mesurier v. Le Mesurier', 1895 AC 517 (B) wherein their Lordships remarked at p. 536 as follows:

> "When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that in either of these countries, there exists a recognised rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage."

6. It is true that that was a decision on appeal from Ceylon and there was no particular reference to the jurisdiction of Indian Courts. But, under Section 7, Indian Divorce Act, the Indian Courts are bound to follow principles and rules which 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. Therefore, if the English Courts could not act on the principle of matrimonial domicile, the Indian Courts also could not do so.

7. On p. 540, their Lordships of the Privy Council in the aforesaid case came to the conclusion that "according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

They concurred, without reservation, in the views expressed by -- 'Lord Penzance in Wilson v. Wilson', (1872) 2 P & D 435 (C) and deprecated "the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

8. The question came up again for decision before the President of the Probate Court in England in the case of -- 'Keyes v. Keyes and Gray', (1921) P 204 (D). In that case the parties had obtained a decree nisi from the High Court at Lahore which decree had subsequently been made absolute. Still

it was held by the aforesaid Court that the parties continued to be husband and wife and a fresh decree for divorce had to be granted. It was, further, held that the Courts in India had no jurisdiction to pass decrees for dissolution of marriage in respect of couples domiciled in England.

9. This decision was followed by the Bombay High Court in -- 'Alfred Wilkinson v. Grace Emily Norah Wilkinson', AIR 1923 Bom 321 (FB) (E) and by the Rangoon High Court in -- 'Mr. A. H. D. Jones v. Mrs. K. Jones', AIR 1923 Rang 223 (F).

10. The matter came up before the Lahore High Court also, but it refused to accept that decision as authority and adhered to the view that the Indian Courts had jurisdiction to pass decrees for dissolution of marriage in respect of couples domiciled in England.

11. To put an end to this unsatisfactory state of affairs, the legislature intervened and passed the Indian Divorce (Amendment) Act (25 of 1926). The relevant clause of Section 2, as amended, runs as follows :

> "Nothing hereinafter contained shall authorise any Court ..... to make decrees for dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented."

After this amendment it became clear beyond doubt that the Indian Courts could not grant a decree for dissolution of marriage if the parties were domiciled outside India. The Indian Law was thus brought in conformity with the view expressed by the Privy Council and the Probate Court in England. But it was, at the same time, realised that, in some cases, a party might, because of poverty or other causes, find it difficult to take a journey to England simply to get his or her marriage dissolved. To provide facilities in such cases the British Parliament passed the Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo V. C. 40). By means of this Act, the Indian Courts were given jurisdiction, subject to certain limitations to pass decrees for dissolution of marriage in cases where the parties were domiciled in England or Scotland. The limitations were directed mainly to ensure that the practice and procedure to be followed in such cases would be in accordance with the law prevalent in England.

The result, therefore, was that, while the jurisdiction of Indian Courts to pass a decree for dissolution of marriage in the case of a couple domiciled in England was completely taken away under the Indian Divorce Act, the said jurisdiction was conferred on Indian Courts under the Indian and Colonial Divorce Jurisdiction Act. This state of affairs continued for about two decades till the grant of Independence to India. On 15-8-1947, the Indian Independence Act (10 and 11 Geo. VI C. 13) came into force. By Section 17(1) of this Act the jurisdiction of Indian Courts to pass decree for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act in petitions presented after the aforesaid date was completely taken away. The Indian Independence Act was repealed on 26-1-1950, When the Constitution came into force,

12. If the jurisdiction conferred on a Court by a certain Act is sought to be taken away, not by amending that Act, but by passing a subsequent Act, and the subsequent Act is later on repealed, the

ban so placed on jurisdiction by the subsequent Act is thereby removed and the jurisdiction of the Courts rebounds to its original size. This would have ordinarily been the effect of the repeal of the Indian Independence Act. But one finds that the same ban was re-imposed by Article 225 of the Constitution, of which the relevant portion runs, as follows:

> "Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution."

By this Article the power of the High Courts has been kept confined within the limits which existed immediately before the commencement of the Constitution. Since the Indian High Courts, by virtue of Section 17(1), Indian Independence Act, had ceased to exercise jurisdiction to grant decrees for dissolution of marriages of couples domiciled outside India, the same ban continued even after the coming into force of the Constitution. But for this provision, yet another question could have arisen, viz., how far the Indian Courts could after Independence, exercise jurisdiction conferred by the Parliament of another country. But this question does not now arise.

13. The position, therefore, is that the Indian Courts have now jurisdiction neither under the Indian Divorce Act nor under the Indian and Colonial Divorce Jurisdiction Act to pass decrees for dissolution of marriages of couples domiciled outside India. In the circumstances, I am not prepared to follow the decision of the Oudh Chief Court, cited above, in which Pullan J. took the view that the Indian Courts could pass decrees which would be operative within the limits of India. This decision was given in 1927, i.e. after the amendment of the Indian Divorce Act which had taken place in 1926. Pullan J. remarks that "the Indian Courts are authorised under the Divorce Act to grant petition, which will be valid for all purposes throughout British India, in any case where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in India."

The learned Judge has not referred to the provisions of the Indian Divorce Act which conferred such jurisdiction on the Indian Courts. He was obviously thinking of law as it stood before amendment. After the amendment the jurisdiction under the Indian Divorce Act had been completely taken away by the amendment introduced in Section 2. Therefore, I am, with utmost respect to the learned Judge responsible for this decision, unable to follow it.

14. Before bringing this discussion to a close, reference may also be made to the Indian Matrimonial Causes (War Marriages) Act (XL of 1948). Although the respondent, was, at one time, a Warrant Officer in the Army, this Act does not apply to the present case because (1) the respondent had ceased to belong to the Army before his marriage and (2) the marriage was not solemnised during the "war period" which term has been defined to mean the period commencing from 3-9-1939 and

ending with 31-3-1946. Therefore, this Act also cannot be invoked in her favour by the petitioner.

15. In the circumstances, I have come to the conclusion that this Court has no jurisdiction to entertain this petition. It is accordingly dismissed. The respondent was not represented by any counsel and was not present on the date of final hearing. I, therefore, make no order as to costs.