Bombay High Court
Premchand Hira vs Bai Galal on 25 June, 1927
Equivalent citations: (1927) 29 BOMLR 1336
Author: K Amberson Marten
Bench: A Marten, Kt., Crump, Blackwell, Baker
JUDGMENT Amberson Marten, Kt., C.J.

1. This is another instance of the apparent difficulty of the mofussil Courts in appreciating the essentials for a valid decree under the Indian Divorce Act. In a case from Poona not long ago Walsh v. Walsh, (1926) 29 Bom, L.R. 308 we had to send the case back no less than twice for remands in order to have the essential evidence before the Court. In the present case from Nadiad, I regret that it is also necessary to send the case to the learned District Judge for a remand to determine essential points. I also regret that like several other divorce cases from the mofussil we have not had the benefit of the assistance of counsel, and that the time of no less than three Judges is occupied in doing work that should properly have been done in the trial Court.

2. Now in the first place the learned Judge here has never had the marriage proved properly. There is no certificate of marriage. There is a statement in the petition that the marriage was solemnized in a Salvation Army Hall. Whether that was a duly licensed place for the performance of Christian marriages, and whether the marriage was performed by a duly licensed person in pursuance of the requirements of the Indian Christian Marriage Act 1872, we do not know. But I do unhesitatingly say that in every divorce case that has hitherto come before me in this High Court-and I believe the same is true of the Divorce Court in England-one principal element is that the marriage should be proved strictly and that in general a certificate of marriage should be produced. The learned Judge will, therefore, take that course in the present ease, and he will he careful to see that the requirements of the Indian Christian Marriage Act 1872 have been carried out in this particular case. In this connection I would draw his attention to the fact that in her evidence before the Court the wife describes herself as a Hindu and that both parties have Hindu names. But under Section 4 of that Act it is essential to prove that one or both of the parties were Christians. Further, under Section 2 of the Indian Divorce Act 1869, it is essential to prove that the petitioner professed the Christian religion at the date of presenting the petition.

3. A further point which the learned Judge has not dealt with notwithstanding the directions that have from time to time been given by this Court, is as to the domicile of the parties. (See Hewson v. Hewson (1924) 26 Bom. L.R. 467). It was laid down by this Court in Wilkinson v. Wilkinson (1923) 25 Bom. L.R. 945 that the Indian Courts have no jurisdiction to dissolve the marriages of persons who are not domiciled in India. By the recent Indian Divorce (Amendment) Act 1926 this is now enacted as part of the statutory law of this country. Consequently, the learned Judge should record a finding, if it be the fact, that the parties were domiciled in India at the date of the presentation of the petition. Having regard to their names there should be no difficulty about that. So it is only a technical point in the present case.

4. What I have just said about domicile is irrespective of the Act which just has been passed by the English Parliament giving the Indian Courts a limited power to grant divorces where the parties are

not domiciled in India. But those new powers are confined to the High Court and are not given by the English Act to the District Courts. This High Court has not yet obtained a copy of this English Act, but from what has been announced as to its effect, it must be taken that it does not apply to the present case, which is brought in a District Court.

5. Then coming to the substance of the allegations, there is really no evidence worth the name. The husband has put in a petition. This he has not attempted to support by any independent evidence. His own evidence is confined to a denial that he has divorced his wife. The allegations in the petition including those as to the adultery of the wife must, therefore, be properly proved. It was apparently thought sufficient for the wife to go into the box, and to say that she lived with another man, and gave birth to a child by him. But we have already drawn attention more than once to the care required before accepting an admission of adultery by either spouse as sufficient by itself. (See Over v. Over (1924) 27 Bom. L.R. 251.)

6. There is one other technical difficulty that may arise owing to a recent decision of the House of Lords in Russell v. Russell [1924] A.C. 687 which, speaking generally, has ruled out evidence by either spouse as to non-access which would have the effect of bastardizing a child which was conceived during the time the marriage was in existence. That case has been considered by Mr. Justice Swift in Warren v. Warren [1925] P. 107, to which my brother Blackwell has drawn our attention. There it was held, in effect that the confession of a wife that she has committed adultery is admissible as evidence in a suit for divorce so long as she does not assert that the husband could have had no access at the time of conception. In the present case, however, the wife's evidence comes very nearly to making such an assertion, and if so, the case would not be within Warren v. Warren. Accordingly, it is desirable that independent corroborative evidence should be obtained to show that the respondent was living in adultery with the co-respondent. There, again, if that be the truth, there should be no difficulty in obtaining the proper evidence.

7. It must also be shown in accordance with the requirements of Section 3 of the Act that the parties last resided together within the jurisdiction of the Nadiad Court. That, again, is not specifically stated by the husband, and in my opinion it is not sufficient merely for certain statements to be made in the petition which are not verified in the witness box.

8. Lastly, I notice that in the learned Judge's judgment he seems to have thought that the claim for damages would not lie because damages are not mentioned in Section 10 of the Indian Divorce Act 1869. That is so for the section dealing with damages is Section 34 and not Section 10; and in the face of those clear provisions of Section 34 it is idle to suggest that the case is governed by Section 10. In point of fact it is a well recognised remedy which is applied over and over again both here and in England, and the learned Judge certainly should not have overruled the question of damages on that particular ground.

9. I would, accordingly, remand this case to the District Court under Section 17 of the Act for further inquiries and additional evidence on inter alia the following points:-

1. The marriage must be proved in accordance with the requirements of the Indian Christian Marriage Act 1872. A certificate of marriage should be produced.

2. The petitioner must be shown to be a Christian and domiciled in India.

3. The spouses must be shown to have last resided together within the jurisdiction of the Nadiad Court.

4. The rest of the allegations in the petition should be proved, and some corroborative evidence of adultery is desirable apart from the wife's admission. (See Over v. Over (1924) 27 Bom. L.R. 251.)

10. In this connection it is the duty of the Court to guard against collusion under Section 12 of the Act. I would also draw the attention of the Court to the fact that under Section 7 of the Act, relief has to be given "on principles and rules which, in the opinion of the ...Courts, 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". The English Courts, as I have already pointed out, exercise this jurisdiction with care, and so far as I am concerned, I intend to do my best to see that the District Courts in this Presidency should also exercise this important jurisdiction with due care.

Blackwell, J.

11. I agree and desire to add a few words on two points only in this case. Having regard to Section 7 of the Indian Divorce Act IV of 1869, I think that the rule laid down by the House of Lords in Russell v. Russell [1924] A.C. 687 to the effect that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock, applies to divorce suits in India. In the present case the evidence given by the wife clearly pointed to the impossibility of access by her husband, for according to her evidence she had left her husband, alleging that he had divorced her, and then in fact had been living for a considerable period of time with another man. Her evidence, therefore, clearly intimates that there had been no possibility of access by her husband. Mr. Justice Swift in the English case of Warren v. Warren [1925] P. 107, to which my Lord ' the Chief Justice has referred, says at p. 112 :-"Her evidence (that is the wife's evidence) and proof of her conduct and statements are admissible unless and until it is sought to prove by these means non-access or non-intercourse". It follows that if her evidence involves allegations of non-access or non-intercourse by her husband in the course of a confession, or an admission made by her, the confession or the admission becomes inadmissible. It is, therefore, very essential that the learned Judge, when he deals with this case further, should be satisfied by independent evidence, which it ought to be quite possible for the petitioner to obtain, that his wife has been living in adultery with the corespondent. In the absence of such evidence-and if the confession of the wife alone is relied on---it seems to me that the evidence will be wholly insufficient.

12. The District Judge has not permitted the petitioner to proceed with his claim for damages upon the ground apparently that Section 10 of the Indian Divorce Act did not contemplate a claim for damages. But, as my Lord the Chief Justice has pointed out, under Section 34 of that Act a husband may claim damages. It does not, of course, follow that he will think it proper to give damages in this

particular case. It has been laid down in a case in England (Gibson v. Gibson and West (1906) 22 T.L.R. 361) that proof of adultery does not necessarily entitle a petitioner to damages. The measure of damages in such a case has been laid down in a Full Bench case, Freer v. Johnson (1923) 46 M.L.J. 282, F.B.. The head-note in that case is as follows:-

In a husband's suit for divorce on the ground of the wife's adultery with the co-respondent, the Court can, if the adultery is proved, award damages against the co-respondent. But the damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife.

13. I think the District Judge should consider whether the wife, according to such evidence as the petitioner may give, was in the past a good wife and took good care of his house and children, That is an element for consideration. See the English case of Keyse v. Keyse (1886) 11 P.D. 100. On the other hand, if she were a worthless wife, always out of the house and not attending to her duties, the petitioner may not be entitled to any damages at all. Those are considerations to which the District Judge should direct his attention. But having regard to the fact that he has not permitted the petitioner to go into the question of damages, I think he should do so upon the further hearing.

Baker, J.

14. I agree and have nothing to add.

Amberson Marten, Kt., C.J.

15. There will be further a question (5) added as to what damages, if any, the petitioner ought to recover under Section 34 of the Indian Divorce Act. The learned Judge has really never applied his mind to that particular section.

16. As regards what my brother Blackwell has just said about the effect of the decision of the House of Lords in Russell v. Russell [1924] A.C. 687 I should like to reserve my final opinion until the matter has been argued before me by counsel, and in particular as to whether there is any difference in India arising from the provisions of the Indian Evidence Act. But I entirely agree, as I have already said, that the proper way to avoid the difficulty altogether is to prove otherwise than by the evidence of the wife that she has been living in adultery with the co-respondent. And I may point out that when this Court's judgment in Hewson v. Hewson (1924) 26 Bom. L.R. 467 was given, the decision of the House of Lords overruling the Court of Appeal in Russell v. Russell had not been given, and consequently the contrary opinion of the Court of Appeal [1924] P. 1 was then the guiding authority.

17. On remand, the certificate of marriage between the parties was produced, and the petitioner and his witness Parshottam. were examined. The learned Judge found issues Nos. 1 to 3 in the affirmative; he found also that Galal had committed adultery with Jetha in May 1922, but it was

condoned by the petitioner as he lived with her. The learned Judge was of opinion that the condonation was fatal to the claim, since there was no allegation in the petition of adultery committed in and after August 1922. No finding was recorded as to the claim for damages.

18. The above findings were certified to the High Court.

19. The reference was further considered by Marten C.J. and Crump and Blackwell JJ.

20. There was no appearance on either side.

21. When the Indian Divorce Act was framed, it was probably not contemplated that the time of no less than three Judges of this High Court would be occupied in hearing these applications for confirmation of divorce decrees but without any appearance either by the parties themselves or by their pleaders. In effect, therefore, it is left to three Judges to treat the case as if it was a brief at the bar and to have valuable time, which ought to be spent on other duties, occupied in doing counsel's work.

22. In this Court's previous judgment on remand of January 17, 1927, this Court was obliged to point out several omissions that had been made in disposing of this case in the trial Court. The learned Judge has now heard further evidence, and has recorded findings on certain of the points that were sent back on remand. We have now a certificate of the marriage, and we respectfully agree with the learned Judge that the marriage has now been proved. This was a marriage between native Christians, and it is sufficient to refer to Sections 60 and 61 of the Indian Christian Marriage Act 1872. The latter section makes a particular certificate conclusive proof of the performance of the marriage. We have that certificate in the present case in the evidence now before us. Similarly it is now shown that the parties are domiciled in India. We also agree with the learned Judge in thinking that the adultery has now been properly proved, and that there is proper corroborative evidence.

23. In his original judgment the learned Judge was prepared to pass a decree nisi in favour of the petitioner, but having regard to the evidence on remand he has now come to the conclusion that the petitioner's case must fail because the adultery alleged in the petition, viz., adultery taking place "from about" or "on or about" May 15, 1922, was condoned by reason of the fact that the husband and wife afterwards lived together as such and that consequently there was condonation within the meaning of Section 14 of the Indian Divorce Act. But unfortunately the learned Judge has failed to appreciate the true doctrine of condonation and to give effect to Section 7 of the Act which requires the Court in all proceedings thereunder to act and give relief on principles and rules "which, in the opinion of the said Courts, 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". Now it is a clear proposition of English divorce law that condonation is not absolute, but is only conditional, and that if there is a subsequent matrimonial offence, then the condonation goes, and the original offence is revived. In Palmer v. Palmer (1860) 2 Sw. & Tr. 61, the head-note runs :-

All condonation is conditional on no offence of which the Matrimonial Court can take cognizance being in future perpetrated. Cruelty once condoned may be so revived by subsequent adultery as to

form, coupled with that adultery, ground for a sentence of dissolutionn.

24. There is another case on the question of cruelty in Moss v. Moss [1916] P. 155, a decision of the Court of Appeal, where a similar decision was arrived at as regards subsequent acts of cruelty. Then in Cramp v. Cramp and Freeman [1920] P. 158, Mr. Justice McCardie reviewed the law, and the head-note thus states the view he took:-

Condonation, as applied to matrimonial offences, though frequently defined as conditional forgiveness, is not forgiveness in the ordinary sense, but would be more properly defined as conditional reinstatement of the offending spouse. It is always subject to the condition that the offence must not recur.

25. The case is not on all fours with the present case as regards the facts; but as regards the law it reviews and re-states well-established propositions.

26. It is true that the present petition does not expressly plead revivor. But in Braddock v. Braddock (1910) 27 T.L.R. 94, where revivor of the previous misconduct had not been specifically pleaded, the President of the Divorce Court nevertheless pronounced a decree nisi, although he added "some day, however, the question of whether 'revival' should be pleaded or not might have to be seriously considered". We think, however, in the present case-particularly having regard to the fact that we are dealing with a mofussil case, and with people in humble circumstances-that it is unnecessary to insist on the pleadings being amended. My brother Blackwell has also pointed out that the existing pleadings may be wide enough to cover not only adultery before this act of condonation, but also adultery afterwards. In that view of the case it would be also open for the petitioner to obtain a decree. The learned Judge felt embarrassed because the petitioner's pleader did not amend his petition, but in a case like the present, one remedy might have been for the Judge to direct the petition to be amended so as to put the main materials before the Court in a strictly technical fashion. However that may be, in my judgment, it is sufficient for the petitioner to rest his case on the original adultery pleaded, inasmuch as there was a subsequent matrimonial offence with the same adulterer after the date of the alleged condonation I draw attention to the fact that it was the same adulterer, because there is authority for questioning whether adultery with another man would revive the original offence. In that respect Bernstein v. Bernstein [1892] P. 375, [1893] P. 292, a decision of the Court of Appeal, may be referred to. (See also Halsbury, Vol. XVI, p pp. 490-1).

27. There is one small point that I wish to mention. In my judgment on remand, in stating that the petitioner should have been examined in detail in support of his allegations I perhaps did the learned Judge unwittingly an injustice. That was because 1 had overlooked the final sentence of Section 47. it only shows the difficulty of, in effect, having to do the work of both counsel and Judge. That sentence provides that the statements contained in the petitions may at the hearing be referred to as evidence. Therefore, technically, the learned Judge was entitled to refer to the allegations in the petition as evidence. On the other hand, speaking for myself, 1 think the ordinary practice, which is followed in the English Divorce Court, viz., that the parties give viva voce evidence, should invariably bo followed in every case unless there are some very good reasons to the contrary.

28. We think, therefore, that on the evidence now before us there should be a decree absolute for dissolution of the marriage. There remains the question of damages. As pointed out in the previous judgment, the learned Judge originally held that no damages ought to be granted against the co-respondent because they are not mentioned in Section 10 of the Act. We, however, pointed out that the relevant section is not Section 10, but Section 34 which clearly provides for damages. We, therefore, directed the learned Judge to record a finding as to damages. The learned Judge has not done so having regard to his findings as to condonation. But with great respect to the learned Judge, in my opinion it was his duty to record findings to all the questions sent on remand and not to omit certain answers because of the view he took of the law. The law was for this appellate Court finally to decide. However, under all the circumstances we do not propose to send the case back for a second remand. There is evidence here by the petitioner as to the damages he has sustained by the co-respondent's conduct, and we think we have power to award them. He says his wife was a good wife to him, that they lived happily together, and that this lasted some ten or eleven years. Then the co-respondent formed an improper acquaintance with the wife; he took her away; the husband got the wife back again and gave her another chance for some two or three months, and then the corespondent abducted the wife a second time, and has been living with her ever since. It is clearly, therefore, a case where the co-respondent has deliberately broken up the home. Under those circumstances we think it is a ease where damages should be awarded, and having regard to all the circumstances of the case, and the condition in life of the parties, and in particular to the loss which we think the husband has suffered, we think a sum of Rs. 300 would be a proper sum to award as damages.

29. Therefore, the order I would pass would be to pass a decree absolute for the dissolution of the marriage, and to award a sum of Rs 300 as damages against the co-respondent. He must also pay the costs of the proceedings throughout.

Crump, J.

30. I agree.

Blackwell, J.

31. I agree.