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Butterfield Vs Butterfield

Court: Calcutta High Court

Date of Decision: July 21, 1922

Citation: AIR 1923 Cal 426 : 74 Ind. Cas. 250

Hon'ble Judges: Lancelot Sanderson, C.J; Richardson, J; John Woodroffe, J

Bench: Full Bench

Judgement

Lancelot Sanderson, C.J.
This is a case which was referred to us by the District Judge in which he made a decree nisi for the dissolution of

the marriage on the ground of adultery and desertion by the respondent. The petitioner was the wife. The learned District Judge further made an

order that, pending the final disposal of the case by the High Court, the petitioner would have the custody of the three children of the marriage. The

respondent was directed to pay a sum of Rs. 150 a month towards the maintenance of the three children from the date of the decree to the date of

final disposal of the case. The decree came before this Court for confirmation and it was necessary, in our judgment, to remand the case to the

lower Court for further findings, but, unfortunately, before the findings could be considered by this Court, the petitioner had died on the 6th August

1921. The question, therefore, arises what course this Court is to adopt. In my judgment, in consequence of the death of the petitioner, this Court

in these proceedings has no jurisdiction to make any order. A similar position was under consideration by the Court of Appeal in England in the

case of Stanhope v. Stanhope (1886) 11 P.D. 103 : 55 L.J.P. 36 : 54 L.T. 906 : 34 W.R. 446 : 50 J.P. 276. The head-note runs thus: ""A

husband who had obtained a decree nisi for dissolution of his marriage died before the time for making it absolute had arrived,"" and it was held

that the legal personal representative of the husband could not revive the suit for the purpose of applying to make the decree absolute."" Lord

Justice Bowen in giving the judgment said that ""a man can no more be divorced after his death than he can after his death be married or sentenced

to death. Marriage is a union of husband and wife for their joint lives unless it be dissolved sooner and the Court cannot dissolve a anion which has

already been determined."" Lord Justice Fry said: ""The only decree that could be asked for would be that the marriage should be dissolved or that it

should be deemed to have been dissolved from the date of the decree nisi. Neither alternative is possible. As regards the first, no power can

dissolve a marriage which has been already dissolved by the act pf God. As regards the second, the Court cannot pronounce a decree declaring

that the marriage was dissolved at an earlier date, because the Statute gives it no such power, but only authorises it to pronounce a decree

declaring such marriage to be dissolved."" The result is that, in my judgment, we have no jurisdiction to confirm this decree for dissolution of the

marriage.

2. With regard to the order which was made in respect of the custody of the children, it seeing to me that Section 44 of the Divorce Act (IV of

1869) is applicable. That provides that ""the High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage and

the District Court, after a decree for dissolution of marriage or of nullity of marriage has. been confirmed, may, upon application by petition for the

purpose, make from time to time all such orders and provision with respect to, the custody, maintenance and education of the minor children, the

marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been

made by such decree absolute or decree (as the case may be) or by such interim orders as afore-said."" It appears, therefore, that, inasmuch as we

have no jurisdiction to make the decree absolute for dissolution Of marriage, we have no jurisdiction in these proceedings to make any order as

regards the custody of the children.

John Woodroffe, J.

3. I agree.

Richardson, J.

4. I agree.