(1936) 06 CAL CK 0027

Calcutta High Court

Case No: Suit No. 335 of 1936

Otto Guenter Wenckenbach		APPELLANT
	Vs	
Henrietta Violet Taylor		RESPONDENT

Date of Decision: June 20, 1936

Judgement

Costello, J.

I am satisfied that this suit has been wrongly framed and must be dismissed. If leave is necessary, I give leave to the Plaintiff to present a petition in the Matrimonial Jurisdiction petition. On the 20th of July, 1936, that is to say as recently as three or four days ago, the Respondent entered an appearance and through his Solicitor intimated that he has no objection to the case being disposed of at an early date. Furthermore, he instructed his Solicitor (so the latter has testified in the witness box) not to oppose the petition. The case, therefore, comes before me as an undefended suit and it is, therefore, all the more a matter for satisfaction that I have had the advantage of the assistance rendered by Mr. Westmacott and Mr. Clough. Mr. Clough addressed me at length upon the question of whether this Court has any jurisdiction at all in this matter. Under the provisions of the Indian Divorce Act of 1869 the Courts in India originally had taken upon themselves to grant decrees for dissolution of marriage. A large number of such decrees had been made in the course of the half century or so preceding the year 1921 when there came the case of Keyes v. Keyes [1921] P. D. 204, in which it was held that Divorce Courts in India had no jurisdiction to decree dissolution of a marriage between parties not domiciled in India, even though the marriage was celebrated in India, the parties were resident in India, and the acts of adultery relied on were committed within the jurisdiction of the Indian Court.

2. As a result of the decision in Keyes v. Keyes [1921] P. D. 204 the Indian Divorce Act of 1869 was amended and the Indian and Colonial Divorce Jurisdiction Act of 1926 was enacted by the Imperial Parliament. Prior to the amendment of the Indian Divorce Act which took place in 1926; sec. 2 contained these words:

Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except in cases where the Petitioner or Respondent professes the Christian religion and resides in India at the time of presenting the petition.

3. Mr. Clough argued that under the Act of 1869 as the Courts in India had no jurisdiction to grant decrees of dissolution of marriage, it became clear by the decision in the case of Keyes v. Keyes [1921] P. D. 204, that equally the Courts had no jurisdiction to make decrees of nullity of marriage. In support of his argument Mr. Clough referred to the case of Inverclyde (otherwise Tripp) v. Inverclyde [1931] P. D. 29, wherein it was held by Mr. Justice Bateson that a decree annulling a marriage on the ground of impotence was a judgment in rem altering the status of the parties and could be pronounced only by the Court of their domicil. A decree annulling a marriage on this ground dealt with a marriage which, till the date of the decree, was voidable only and not void. In substance it was a decree for the dissolution of that marriage and was thus distinguished from decrees annulling marriages for illegality or informality. Had the matter stopped there it would not have been open to Mr. Clough to contend, as he did, that it would necessarily follow from the decision in Inverclyde v. Inverclyde [1931] P. D. 29, that a decree annulling a marriage on the ground of some illegality or informality could only be made by a Court of the domicile of the parties. Mr. Clough was however able to refer me to another case reported in the same volume of the Probate Division-the care of Newbould v. Attorney-General [1931] P. D. 75-in which it was held by Lord Merrivale, who was then the President of the Probate Divorce, and Admiralty Division of the High Court of England, that
a final decree annulling a marriage on the ground of the incapacity of one of the parties to it to consummate it has retrospective operation, so that the effect of the decree amounts to a declaration that there is no marriage.

4. Mr. Clough argued from this that all decrees annulling marriages are in pari pasu. Whether a marriage is annulled on the ground of the incapacity of one of the parties or whether it is annulled on the ground of some illegality or irregularity, the position is that in the eye of the law there was from the very outset no marriage at all. Mr. Clough submitted, therefore, that if proceedings for nullity are brought on the ground of " incapacity " it is only the Court of the domicile of the parties which has jurisdiction of the matter and it is equally so in the case of proceedings for nullity brought on the ground of illegality or irregularity.

5. I entirely agree that if we were considering the present matter in proceedings based on the Indian Divorce Act of 1869, as it stood prior to the amendment of 1926, the argument of Mr. Clough would not only have had considerable force but might indeed have led to the conclusion that I had no jurisdiction to entertain the present petition or to grant the relief claimed by the Petitioner in these proceedings. I have, however, to consider this point in the light of the Indian Divorce Act of 1869 as it now stands, since the amendment made in sec. 2 in the year 1926, by the

Indian Divorce (Amendment) Act of that year. As a result of the amendment then made, sec. 2 of the principal Act now reads as follows:

That Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

Nothing hereinafter contained shall ''authorise any Court to grant any relief under this Act, except in cases where the Petitioner or Respondent professes the Christian religion

6. Then follows the part which is material for our present purpose:

or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented; or to make decrees of nullity of marriage except where the marriage has been solemnised in India, find the Petitioner is resident in India at the time of presenting the petition; or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the Petitioner resides in India at the time of presenting the petition.

7. The amendment of sec. 2 was, as I have already stated, obviously made as a consequence of the decision in the case of Keyes v. Keyes [1921] J. D. 204 and the Legislature at the time when the amendment was made must have fully considered that decision and the implications of the judgment therein given. In other words, the amendment of sec. 2 was made in the light of the decision in the case of Keyes v. Keyes [1921] J. D. 204. It seems to have been the intention of the Legislature to make it clear that Courts in India are not empowered to pronounce decrees of dissolution of marriage, except in cases where the parties to the marriage are domiciled in India at the time when the petition is presented, but at the same time to indicate that as regards decrees of nullity of marriage the only conditions necessary are that the marriage should have been " solemnized in India " and the Petitioner should be resident in India, at the time when the petition is presented. It seems to me that the juxtaposition of the two paragraphs in sec. 2 which I have just read and the contradistinction therein contained indicate that it was the intention of the Legislature to permit the Courts in this country to make decrees of nullity of marriage even though the parties presenting the petition are not domiciled in India. The present Petitioner happened to marry as her first husband a man who was domiciled in England. Her domicile as a consequence became an English domicile. But the marriage which she now seeks to have annulled was solemnized in India and the Petitioner is resident in India and was so at the time when she presented the petition.

8. Mr. Clough has suggested that the Legislature in this country has no power to pass any enactment which affects the rights-at any rate the matrimonial rights-of persons not domiciled in this country. That, said Mr. Clough, is the underlying

principle of the decision in the case of Keyes v. Keyes [1921] P. D. 204. As to whether that is so or not I do not feel called upon to express any opinion in the present proceedings. It seems to me that I am bound to act, so far as these proceedings are concerned, upon the assumption that the Legislature intended, what it seems to say in sec. 2 as regards decrees of nullity of marriage and I must assume that the amending Act of 1926 was lawfully passed by the Indian Legislature. In these circumstances, I feel obliged to hold that under the law in India as it stands to-day I have jurisdiction to deal with this case.

9. I have now to consider whether the Petitioner is entitled to the relief which she seeks. Mr. Westmacott has conceded that he is not in a position to do otherwise than agree with the contention put forward by Mr. Bannerjee, on behalf of the Petitioner, that the effect of sub-sec. (2) of sec. 1 of the Indian and Colonial Divorce Jurisdiction Act of 1926 is to bring it about that no decree for dissolution of marriage, made under the jurisdiction conferred upon Courts in India by that Act, can have any force or effect, either in India or anywhere else, unless and until that decree is registered in the manner provided for in sub-sec. 3. The Petitioner herself has given evidence that when she first obtained the decree absolute in the suit brought by her against her first husband Alfred Taylor (that decree absolute, as I have stated, being obtained on the 7th July, 1930), the Petitioner was ignorant of the fact that that decree, although a decree absolute, did not have the effect of permitting her to re-marry in August, 1930. The Petitioner has stated that she was unaware that there was any necessity to have the decree registered in England. It is true that later on she discovered that there was the provision in the Act of 1926, requiring registration, but she then thought it was not worth while incurring the expense of effecting such registration,-apparently not realising at that time that the absence of registration meant that the marriage between her and Alfred Taylor was-at any rate to a limited extent-still in force. It is provided by sec. 19 of the Indian Divorce Act 1869 that decrees of nullity of marriage may be made on any of the grounds set forth in the section, one of such grounds being:- [Sec. 19 (4)] -
that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

10. Evidence has been placed before me to show that at the time when the marriage between the Petitioner and Otto Guenter Wenkenbach took place on the 2nd of August, 1930, the former husband of the Petitioner, that is to say, Alfred Taylor was still living. A daughter of the Petitioner and Alfred Taylor went into the witness box and testified that she had seen and spoken with her father in England in the year 1931. It is clear therefore that he was living at the time when the marriage of the 2nd of August, 1930. took place. One of the conditions laid down in sec. 19 (4) is therefore fulfilled; as to that there can be no question. The Petitioner says that the other condition is also fulfilled; namely, that the marriage with her former husband, Alfred Taylor, was " then in force," that is to say, was still in force on the 2nd of

August, 1930. Looking at the language of sec. 1 (2) of the Indian and Colonial Divorce Jurisdiction Act of 1926, although the drafting of that sub-section is open to criticism, one can only come to the conclusion that the law is that no decree made by virtue of the jurisdiction conferred on a High Court in India under the Indian and Colonial Divorce (Jurisdiction) Act of 1926 has any force or effect, either in India or elsewhere, unless and until it has been registered in the High Court in England. The position of a husband or s wife who has obtained a decree under the Act of 1926 as regards capacity, i.e., legal capacity-to remarry, seems to be entirely analogous to that of a husband or wife who has obtained a decree for dissolution of marriage under the Indian Divorce Act of 1369, but six months have not elapsed from the obtaining of such decree. The marriage of the parties to the suit brought under the Act of 1869 is not dissolved for all purposes, even by the making of a decree absolute, because by sec. 57 of the Act of 1869 it is provided:

When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the nigh Court in its Appellate jurisdiction, or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death: Provided that no appeal to Her Majesty in Council has been presented against any such order or decree. When such appeal has been dismissed or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death.

11. It follows that where there has been, a decree for dissolution of marriage made under the Act of 1869 and that decree has been made absolute, at least a further six months must elapse before there can be a fresh marriage, and if before the expiry of that six months either of the parties goes through a ceremony of marriage, the second marriage will be null and void. In this connection I would refer to the case of Jackson v. Jackson I. L. R. 34 All. 203 (1912), in which it was definitely held that where the successful Petitioner in a suit for dissolution of marriage had entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute, the second marriage was void. Mr. Justice Chamier in his judgment at page 204 said:

The Petitioner claims to be entitled to a declaration that her marriage with the Respondent is null and void. Sec. 19 of the Indian Divorce Act provides that such a declaration may be made at the instance of a wife on the ground that the former wife of the husband was living at the time of the marriage, and the marriage with such former wife was then in force. Sec. 57 of the Act provides that when six months after the date of a High Court dissolving a marriage have expired, and no appeal has

been presented against such decree to the High Court in its appellate jurisdiction or when any such appeal has been dismissed, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death. Provided that no appeal to His Majesty in Council has been presented against any such decree. There is no appeal to His Majesty in Council against a decree nisi for dissolution of a marriage (see sec. 56): therefore there can be no doubt that the ''decree of a High Court dissolving a marriage'' referred to in sec. 67 is the decree absolute not the decree nisi. The section was construed in this way by Sir James Hannen in the case of Warter v. Warter L. R. 15 P. D. 152 (1890), where one Taylor had obtained in the Calcutta High Court a decree absolute for dissolution of his marriage on the 27th of November, 1879 and the divorced wife was married to Colonel Warter on the 3rd February, 1880, Three days later Colonel Warter made a Will in favour of his wife. In April 1881, on the advice of a Solicitor Colonel and Mrs. Warter were remarried at a Registry Office. Colonel Warter having died without re executing his Will for making another the question arose whether the marriage of April 1881, revoked the Will. It was held that the marriage of February, 1880, was null and void, and therefore the marriage of April 1881, was valid and revoked the Will.

12. Then Mr. Justice Chamier quoted from the judgment of Sir James Hannen where he said, at page 155 of the report of Warter v. Warter L. R. 15 P. D. 152 (1890):

It was contended that as this marriage was celebrated in England the parties were freed from the restraint imposed by the Indian Divorce Act. I am of opinion that this is not the case Mrs. Taylor was subject to the Indian Law of Divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian Law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. This is an integral part of the proceedings by which alone both the parties can be released from their incapacity to contract a fresh marriage.....

13. A decision similar to that of the Allahabad High Court was given in Madras in the case of Battle v. Brown (falsely called Battle) I. L. R. 38 Mad. 452 (1913). The head-note in that case is as follows:

Sec. 57 of the Divorce Act (IV of 1869), expressly prohibits re-marriage within six months of the making of the decree absolute. The Indian law does not completely dissolve the tie of marriage until the lapse of a specified time after a decree of dissolution and the marriage is still in force within the meaning of sec. 19 (4) so as to give the Court jurisdiction under sec. 19 to pronounce a decree of nullity regarding such prohibited marriage. Jackson V. Jackson I. L. R. 34 All. 203 (1912), followed Chichester v. Mure 32 L. J. (P. M, Adm.) 146 (1863) and Warter v. Warter L. R. 15 P D. 152 at p. 155 (1890), referred to.

14. It seems to me that the position of the present Petitioner, she having obtained a decree under the Indian and Colonial Divorce Jurisdiction Act of 1926, but without registering or causing to be registered that decree in the High Court in England, is precisely the same as that of a person who obtains a decree under the Act of 1869 and then remarries before the expiry of six months from the date of the decree being made absolute. In that view of the matter it follows that as regards the re-marriage of the present, Petitioner on the 2nd August, 1930, it must be held that that marriage was null and void on the grounds set out in sec. 19 (4) of the Indian Divorce Act of 1869.

15. Mr. Westmacott has pointed out that it is by no means clear what the position is under the provisions of the latter part of sec. 1, sub-sec. (3) of the Indian and Colonial Divorce Jurisdiction Act of 1926. Those provisions say that upon such registration, i.e., the registration contemplated by the two foregoing sub-sections the decree shall, as from the date of the registration, have the same force and effect and proceeding? may be taken there under as if it had been made on the date on which it was made by the High Court in England or the Court of Sessions in Scotland, as the case may be.

16. Mr. Westmacott has suggested that it seems doubtful whether, if and when registration takes place, such registration really does have a retrospective effect, or whether the provisions of sub-sec. (3) only mean that upon registration, a decree previously made shall take effect as from the date of such registration and not on any date antecedent thereto. I am bound to say that the wording of sub-sec. (3) is extremely ambiguous and, as Mr. Westmacott has pointed out, if it is the fact that the effect of the registration would be to complete the decree absolute for all purposes as from the date on which it was originally made there might ensue the fantastic result that a second marriage which at one moment was invalid owing to the lack of registration might suddenly become valid by reason of subsequent registration. For example, in the present case (as Mr. Westmacott pointed out) the position might be, that if the marriage of the 2nd of August, 1930, is to-day declared to be null and void because the decree absolute, of the 7th of July, 1930, had never been registered, tomorrow or the day-after, or at some date in future the marriage of the 2nd August, 1930, might all of a sudden become valid by reason of the decree absolute of the 7th July, 1930, being registered as required by sec. 1, sub-sec. (2) with effect in retrospect. One has only to consider the endless complications which might arise if that were the real position. The question is by no means merely academic because it has already been held-in the case of Wilkins v. Wilkins [1932] L. J. Rep. 35, that where a decree absolute of divorce has been granted in India under the Indian and Colonial Divorce Jurisdiction Act, 1926, cither party may, on production of the necessary certificate, secure the registration of such decree in the High Court in England. That case started as an application made by a husband, who had been the Respondent in a Divorce Suit in India, to have the decree absolute registered in the High Court in England. The application was referred by the

Registrar to the President, Lord Merrivale, who directed that the decree should be registered, and observed:

if some person with a real interest in the cause, who is not meddling comes forward to this Court and applies for the registration of a decree, on satisfactory evidence of the interest of that party the decree should be registered.

17. That certainly means that a husband who has been divorced by his wife under the Indian and Colonial Divorce Jurisdiction Act of 1926, in a suit where the decree absolute obtained by the wife has not been registered may, at any time, take steps to register that decree or cause it to be registered. The decision also seems to mean that a person other than a husband, if such person has a real interest in the case, might equally well cause the decree absolute to be registered. That seems a very unsatisfactory state of things as it puts into the hands of a spiteful person much power for mischief or at any rate power to give rise to complications and possible hardship. In the present instance-Mr. Westmacott said-upon the supposition that the second marriage is, at the present time, null and void, if the provisions of sub-sec. (3) mean that the registration has a retrospective effect, it might be possible for Alfred Taylor, if he were so minded, to register the decree absolute which was made on the 7th July, 1930, and thereby re-establish and validate the marriage between his former wife and the present Respondent, Otto Guenter Wenkenbach. Mr. Westmacott further suggested that the provisions with regard to registration as they now stand might operate against the interests of public morality in that a person who had obtained a decree for dissolution of marriage might abstain from registering that decree in order to have, what Mr. Westmacott described as a trial run, in a second marriage while retaining a means of escape there from in the shape of a possible subsequent registration of the decree which had purported to dissolve the first marriage.

18. I have said enough to indicate that it is obviously desirable that the matter should be clarified by further legislative enactment. No doubt it is all to the good that a decree made by a High Court in India under the provisions of the Indian and Colonial Divorce Jurisdiction Act, 1926, should be registered in the High Court in England but this present case reveals that the only satisfactory method would be to make it incumbent upon the Court pronouncing the decree to direct that steps be taken by an officer of the Court to have that decree registered in England as soon as convenient after the decree was pronounced. Having regard to what seems to be the plain provisions of sec. 1, sub-sec. (2), I hold that I have no option but to pronounce a decree declaring that by reason of those provisions the marriage of the 2nd of August, 1930, between the Petitioner Henrietta Violet Taylor and the Respondent Otto Guenter Wenkenbach is null and void. Mr. Bonnerjee and Mr. Westmacott both agree that following the English practice and as the law stands at present in India, the decree should be a decree nisi. The Petitioner is entitled to her costs.