(1988) 08 CAL CK 0028

Calcutta High Court

Case No: A.O.D. No. 347 of 1981

Sachindra Nath Paul		APPELLANT
	Vs	
Sm. Kalpana Rani Paul		RESPONDENT

Date of Decision: Aug. 8, 1988

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 21
- Foreign Marriage Act, 1969 - Section 18, 18(1), 18(4)
- Hindu Marriage Act, 1955 - Section 1(2), 19, 19(iv)
- Special Marriage Act, 1954 - Section 31(1)(iv)
- Succession Act, 1925 - Section 15, 16

Citation: 93 CWN 404

Hon'ble Judges: Ajit Kumar Nayak, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Mihir Roy, for the Appellant;

Final Decision: Dismissed

Judgement

A.M. Bhattacharjee, J.

The matrimonial proceeding for divorce and, in the alternative, for judicial separation, which has given rise to this appeal, was initiated by the husband-appellant against the wife-respondent on the ground that the latter has deserted the former. The trial Judge framed three issues, the first relating to jurisdiction of the Court, the second relating to the alieged desertion and the third relating to the entitlement of the petitioner to the relief prayed, and having decided all the issues in the negative, dismissed the petition. The husband has come up in appeal, but the wife, though she contested the petition in the court below and with success, has not appeared before us in spite of being served. We have no doubt that the learned Judge was absolutely right in holding that the alleged desertion of the husband by the wife has not at all been proved. All that we get from the evidence on

record is that a rather affulent father of the respondent-wife, who was a national of and residing in the then East Pakistan, now Bangladesh, selected this appellant-husband, whose financial condition was rather strained, as his son-in-law and while giving his daughter in marriage in East Pakistanin 1963 according to Hindu rites, agreed to provide the appellant with the expenses and other help that would be necessary for the prosecution of his studies in Berhampore in West Bengal. While the case of the respondent-wife is that her father did all that he could do in the matter, the case of the appellant-husband is that his father-in-law did not do so and as as a result his stay in Berhampore and prosecution of his studies in the M.I.T. College there were very much uncomfortable and unsatisfactory, so much so, that he failed to pass the examination.

2. As held by the trial Judge, the evidence on record shows that the appellant, when he filed this petition, was without any regular sources of income and used to earn his living by cooking and private tuition and, having no place of his own to stay, used to live gratis at one Kamalini Sanyal''s place since 1968. and before that used to stay in the office room of the Berhampore Motor Institute. The trial Judge has also found during all these years, the husband did not at all care to enquire about the wife and her whereabouts. It appears that in the wake of the liberation war of Bangladesh, the father of the wife along with the daughter and other members of the family came to Berhampore; but they found the petitioner to be without any employment and without a place of his own as his residence. If under those circumstances, the father or even the wife, did not like that she would vagabondize with the husband and the father decided to take the daughter back to his home in Bangladesh so that she can have the bare necessities of life which the husband was not in a position to provide and the daughter also followed the father, she might have failed to maintain the very high standard of a Sati-Savitri of the days of yore which might have been expected in the hoary past, but can never be said to have deserted the husband within the meaning of the matrimonial laws.

3. It would be trite to say that one spouse does not desert the other merely by going or staying away and the mere factum of separation does not constitute desertion of one by the other. As has been pointed out by us rather recently in Kamal v. Kalyani (AIR 1988 Calcutta 111), on very high authorities, both judicial and textual, no amount of physical or factual separation would constitute desrtion, unlesss the requisite animus deserendi, i.e., intention to bring co-habitation permanently 10 an end also co-exists. Even if in a given case the factum of separation or withdrawal is likely to give rise to the impression that the same done with animus deserendi, the spouse claiming to be deserted and asking for relief on that ground must also show absence of any act or omission on his or her part giving the other spouse any reasonable cause for such withdrawal. Whether one refers to Halsbury (Laws of England 3rd Edition - Vol. 12; pages 453-454 or to Rauden (On Divorce - 13th Edition - Vol 1, pages 239, 144-245) or to the decisions of our Supreme Court in Bipin Chandra (AIR 1957 SC 176) or in Rohini Kumari (AIR 1972 SC 459), the law on the

point would appear to be to that effect with indisputable clarity. We are afraid that the husband in this case, who was not in a position to maintain his wife and to provide her with a place of residence, can not be said to have given no reasonable cause to the wife to stay with her father for her maintainance and support and, therefore, the charge of desertion levelled against her must fail on this ground also.

4. The categorial case of the wife-respondent is that as the petitioner ''was without any employment and was not in a position to provide her with food and residence, it was he who suggested that she should stay with her father until he could acquire that capacity. She has consistently and systemetically asserted in her written statement as well as in her deposition that far from deserting the petitioner, she was all along and still is willing to live with him and has come all the way from Bangladesh to contest ''this suit and is now somehow maintaining herself by service as a cook in one Gopen Sana''s house during ail these years since she has entered appearance in this suit. As we have read the evidence, we find that far from being able to shake her in her stand in any way, no serious challenge has been thrown to her in her cross-examination in respect of these statements. We have, therefore, no hesitation to reject, in agreement with the trial Judge, the case of the petitioner-husband of his being deserted by the respondent as groundless.

5. The trial Judge having decreed the issue relating to desertion against the petitioner and having accordingly held the petitioner to be entitled to no relief, could have stopped at that and dismissed the petition on that ground alone. The learned Judge, however, thought it fit to go into the Issue relating to jurisdiction also and has held the petition under the Hindu Marriage Act, 1955 to be "not maintainable" solely on the ground that as the wife-respondent is a national of Bangladesh and thus not a citizen of India, the provisions of the Hindu Marriage Act of India cannot govern the proceeding. Jurisdiction of the Court and maintainability of a lis in such Court are two different aspects; for while the Court may have full jurisdiction in respect of the maters in dispute in a suit, the suit may still be not maintainable because of some, formal or substantial defect or other leagal bar. For the reasons stated hereinafter, we are of the view that the proceding giving rise to this appeal was maintainable under the law and the Court below had perfect jurisdiction to entertain the same and we take that view accepting the position, a found by the trial Judge, that the wife, though a Hindu, was and still is a foreign national, being the citizen of Balgladesh and the marriage. was celebrated according to Hindu rites in Bangladesh, then East Pakistan, but that the husband, also a Hindu, who has initiated the matrimonial proceeding in the District Court of Murshidabad in West Bengal, was is an Indian citizen with Indian domicile.

6. In England, in divorce matters, the sole jurisdictional test, since the leading decision of the Privy Council in 1895 in Le Mesufier v. Le Mesurier (1895 Appeal Cases 517) was firmly established to be the domicile of the husband at the time of the commencement of the proceeding and with such domicile the English Courts

used to be held to have jurisdiction over a foreigner as well as a British subject, nationality of the parties being never relevant. In Le Mesurier (supra), which, though a case from Cylone, was all along treated to have laid down the law for England, Lord Watson, speaking for the Board, observed 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". As pointed out by our Supreme Court in Satya v. Teja (AIR 1975 SC 105 at 113); later cases like the decisions of the House of Lords in Lord Advocate v. Jaffrey (1921 -1 Appeal Cases 146) and of the P. ivy Council in Attorney-General for Albert v. Cook (1925 Appeal Cases 444) continued to show faith in the dominance of the domicile principle. This position in law caused great hardship to the deserted wives for they had to seek the husband in his domicile to obtain dissolution recognizable in England and this required frequent legislative intervention and now, under the Divorce and Matrimonial Proceedings Act, 1973, the English Courts have been empowered to entertain, proceedings for dissolution of marriage or judicial separation if either of the parties to the marriage, whether the petitioner or the respondent, is domiciled in England at the time when the proceeding commences.

7. Be it noted that the old English Law that the wife''s domicile must and can not but follow that of the husband, commented upon by Lord Denning in the Court of Appeal in Formosa v. Formosa (1962 - 3 All England report 419 at 422) as the "last barbarous relic of a wife''s servitude", has now been laid at rest and a wife in England can not acquire a domicile separate from her husband. In India, however, the archaic English Rule, as would appear from Sections 15 and 16 of the Indian Succession Act, 1925, is still the law and though those Sections, and for the matter of that, the whole of Part II of the Act containing those Sections, do not, in terms, apply to a Hindu, Muslim, Buddhist, Sikh or Jain, the rule contained therein has still been accepted ro be law for all in India as it would be evident from the myriads of case-laws and also the relevant treatises on the point. Reference, for example, may be made to a Special Bench decision of this Court in Roseta Evelyn Attaulla v. Justin Attaulla (AIR 1953 Calcutta 530 at 534), which though dealing with Christian spouses, enunciated the law in general terms to the effect that '"'a wife takes the domicile of her husband upon her marriage". That this Special Bench decision must be taken to have laid down the general law in India would appear from the decision of the Jammu & Kashmir High Court in Prokash v. Shahni (AIR 1965 Jammu & Kashmir 83 at 85) where this law was applied to Muslims also treating this Special Bench decision as authority therefor. An earlier Division Bench decision of this Court in Rakeya v. Anil (52 Calcutta Weekly Notes 142 at 154) would also show that the rule that "wife''s domicile is also that of her husband" is of general application, to Hindus, Muslims and all other Indians. In fact, in Satya v. Teja (supra) also, the Supreme Court had to accept this position, but did so with this rider that the husband''s domicile must be bonafide and not designedly ad hoc. In passing we may note that the. observation of Mockett, J. in the order of reference in the Special Bench case of the Madras High

Court in Agnnes Sumathi Ammal (AIR 1936 Madras 324) to the effect that "it is axomatic that the domicile of the wife is the domicile of the husband and that nationality of the wife is the nationality of the husband" appeared to us to be rather startling because, if we may say with respect, the automatic unity or identity of the nationality of the husband and the wife is never the rule in our law.

8. We are afraid that the law, whether as contained in Sections 15 and 16 of the Succession Act or otherwise to the effect that "by marriage a woman acquires the domicile of her husband, if she had not the same domicile before" and that "a wife''s domicile during her marriage follows the domicile of her husband", is probably violatoive of both the Equality and the Liberty Clauses of our- Constitution. To provide that a married woman cannot acquire a separate domicile of her own during converture and is deprived of her separate domicile, if any, immediately on her marriage, but that marriage shall not affect the domicile of a married man in any way and he would be competent to go on changing his domicile as often as he would please with his wife automatically tacked or tugged thereto as a service dependent, may be branded as discriminatory against the married women on the ground of sex and to deprive them of their personal liberty by an unreasonable piece and process of law, thereby transgressing Articles 14, 15 and 21 of our Constitution. To say that the husband and the wife are one may not be unreasonable and may even be something desirable; but what is unreasonable is (to borrow from Lord Denning Formosa - supra) to provide that the husband is that one. But we, however, do not propose to decide the question as the vires or constitutionality of the rule relating to the identity of the wife''s domicile with that of the husband has not been raised before us.,

9. The reasons for which we hold this matrimonial proceeding initiated in Indian Court by a Indian Hindu husband domiciled in India against his Bangladesh Hindu wife residing in Bangladesh are as hereunder. Accepting that the wife is a national of Bangladesh, there is nothing in our CPC or in any other law to prevent an alien, even an alien enemy, from being sued. All the would emerge from Section S3 of the CPC is that while alien friends may always sue in Indian Courts, an alien enemy can do so only when residing in India with the permission of the Central Government. But nothing would preclude an alien, whether friend or enemy, from being sued in Indian Courts. The wife-respondent, though a Bangladesh national and, therefore, an alien friend, can very well be sued in an Indian Court, provided the Court is otherwise competent to entertain the suit.

10. There is clear evidence on record, and that is also the case of the parties in their respective pleadings, that they last resided together in the District of Murshidabad and, therefore, within the jurisdiction of the Court below. And that is good enough to invest the Court below with the requisite jurisdiction under our matrimonial laws. Further, as provided in Section 19(iv) of the Hindu Marriage Act and also Section 31(1)(iv) of the Special Marriage Act, even where, as here, the responded is residing

outside India at the time of the commencement of the proceedings, the Court within whose tenitorial jurisdiction the petitioner is residing, at the relevant time would have jurisdiction to entertain the proceeding. The Court below accordingly had perfect jurisdiction from this point of view also.

11. The matter may be looked into from yet another point of view. No doubt the wife-respondent is a foreign national; but as already pointed out, if an Indian Court has otherwise jurisdiction, the fact that the defendant to the lis is a foreigner does not affect its jurisdiction. The petitioner-husband has an Indian domicile and, therefore, the wife-respondent, even though foreigner, has and cannot but have the very same Indian domicile. And f both the parties are thus of India domicile, a Court in India, otherwise competent to entertain a material or any other judicial proceedings between them, can not cease to have that jurisdiction simply because the party sued is a foreign national. Whether such a foreign national, who has also no domicile in India, shall be bound by or can evade such judgment in his or her own country is a different matter. But foreign nationality of a defendant, by itself, cannot prevent an Indian Court from proceeding against such foreign national.

12. But what law the Court would have to apply, the Hindu Law of India of which the petitioner is a national, or the Hindu Law of Bangladesh of which the respondent is a national? It is true that u/s 1(2) of the Hindu Marriage Act, the Act would not apply to Hindus who "are outside the territories to which this Act extends" unless they are domiciled within those territories. And, therefore, the Act would not apply to the wife-respondent in this case, who was in Bangladesh at the commencement of this litigation, unless she was also domiciled in the Indian territories. But as already stated, the wife has automatically acquired Indian domicile immediately on her marriage with the petitioner-husband and, therefore, would clearly come within the provisions of Section 1(2) of the Hindu Marriage Act as one domiciled in India by operation of law, though otherwise outside India. The Division Bench decision of this Court in Prem Singh v. Dulari Bai (AIR 1973 Calcutta 425) has not decided, and in the facts and circumstances was not required to decide, this question at all. The Special Bench decision of this Court in Gour Gopal Roy v. Sipra Roy (AIR 1978 Calcutta 173), which has distinguished the Division Bench decision in Prem Singh (supra), appears to be an authority for the view that a husband residing in London and domiciled in Bangladesh could not be proceeded against under the Hindu Marriage Act by his wife in India. The narration of the facts in the judgment of the Special Bench decision, if we may say so with respect, appears to be somewhat obscure in respect of various pertinent matters. But we have no doubt that the question formulated in paragraph 2 of the judgment, namely, "whether the Hindu Marriage Act can be applied to a person who is outside the territory to which this Act applies and is not of Indian domicile", can admit of one and a negative answer only in view of the later portion of Section 1(2) of the Hindu Marriage Act whereunder the Act can apply to a Hindu outside India only when he or she is also domiciled in the territory to which this Act extends. But as already noted, the petitioner-husband in this case is an

Indian national having Indian domicile and since the wife, though a foreign national being a Bangladeshi Hindu, has and cannot but have such Indian domicile under the law, the said Special Bench decision should rather be treated as the authority for the view that the Hindu Marriage Act would apply to the case at hand, where both the spouses are domiciled in India, even though the respondent-spouse may not be a national thereof.

13. Reference in this connection may also be made to a single Judge decision of this Court in Ayesha v. Subodh (45 Calcutta Weekly Notes 439) where it has been pointed out (at 446) that where there is a difference in the law of a national of the country from that of a national of another country, and the parties have changed their domicile from one country to another, it is now well-established that in a case for divorce, the law of the domicile of the parties on the date of the institution of the legal proceeding in Court, is the law which the Court has to apply to the case. Though this decision in Ayesha v. Subodh (supra) has not been approved by a Division Bench in Rakeya v. Anil (supra, 52 Calcutta Weekly Notes 142) on some other point, the principle noted above has nevertheless been approved by the Division Bench and it has ruled (at 154, 155) that "a matrimonial suit is governed by the law of the domicile of the parties and must be brought in the court of their domicile" and that as "the wife''s domicile is always that of her husband, so that the law applicable to him at the time by reason of his domicile applies to her as well". These observations in Ayesha (supra) and in Rakeya (supra) are then clear authorities of this Court for the view that since the petitioner-husband-in the case at hand and also the respondent as the wife of the petitioner are domiciled in India and consequently the matrimonial proceeding has got to be instituted in Indian Court, the proceeding is also to be governed by the Indian law and since both the parties are Hindus, the law to be applied would be the Hindu Marriage Act of 1955.

14. We would have to come to the same conclusion because of the provisions of the Foreign Marriage Act, 1969 which would obviously apply to this case as the marriage in the case at hand was celebrated in a foreign country, i.e., the then Pakistan and now Bangladesh. Section 18(1) of the Foreign Marriage Act, 1969 provides that "in relation to marriages solemnized under this Act", as well as "to any other marriage solemnized in a foreign country between the parties of whom one at least is a citizen of India", "the provisions of Chapter IV, V, VI and VII and the Special Marriage Act, 1954 shall apply". As a result, all the provisions of Chapter VI of the Special Marriage Act, 1954 relating to Divorce etc. and of Chapter VII relating to Jurisdiction and Procedure shall ordinarily apply to and govern all marriage taking place in a foreign country, howsoever solemnized, provided one of the spouses is a citizen of India. But sub-section (4) of Section 18 of the Foreign Marriage Act, however, provides that if the marriage is not one solemnized under the provisions of this Foreign Marriage Act, but is sole-nnized otherwise in a foreign country, "nothing" in Section 18(1) of the Foreign Marriage Act", i.e., in accordance with the provisions of Chapters IV, V, VI and VII of the Special Marriage Act, "in relation to any marriage

not solemnized under it", i.e., not solemnized under the Foreign Marriage Act, but solemnized otherwise in a foreign country where one of the spouses is an Indian citizen, "if the grant of relief in Respect of such marriage, whether on any of the grounds specified in the Special Marriage Act, 1954, or otherwise" "is provided for under any other law for the time being in force". Therefore, u/s 18(1) of the Foreign Marriage Act, the matters relating to dissolution of marriage in the case at hand would have been governed" by the provisions of the Special Marriage Act, 1954 only if the relief prayed therein is not available under any other law. As we have already noted, both the parties have Indian domicile and are Hindu by religion, and the court below had jurisdiction to entertain the dispute under the provisions of Section 19 of the Hindu Marriage Act and the mere fact of the defendant being a foreign national would not prevent the operation of the Indian Hindu Law. And relief for dissolution of marriage on the ground of desertion being available under the Hindu Marriage Act, the same would apply to the case at hand u/s 18(4) of the Foreign Marriage Act, 1969 and not the Special Marriage Act of 1954, which would have otherwise applied to the case u/s 18(1) of the Foreign Marriage Act.

15. One word before we conclude. The petitioner-husband is admittedly domiciled in India and the wife also has and must be deemed to have the same domicile because of the rule of the Unity of Domicile of the spouses. As already indicated, because of the rules of Private International Law as enunciated in the decisions of this Court in Ayesha (supra) and in Rakeya (supra), the matrimonial proceedings must be brought in the Indian Court and has in fact been brought in the District Court in West Bengal within whose jurisdiction the parties last resided together. If such a court finds no lex loci to be applicable ex proprio vigore then, as pointed out by the Privy Council as early as in 1887 in Waghela Rajsanji v. Sheikh Masludin (ILR 11 Bombay 551 at 561), the matter must be decided according to equity and good conscience". That is also what has thereafter been expressly provided in almost all the Civil Courts Acts in India, as in Section 37(2) of the Bengal, Agra & Assam Civil Courts Act of 1887 and therefore, as provided therein, where a court finds a lis but not the lex, "the court shall act according to justice, equity and good conscience". If, as pointed out by the Privy Council in Waghela Rajsanji (supra), "equity and good conscience" for the then British-Indian Courts were "to mean the rule of English Law if found applicable to Indian society and circumstances", then we would like to think that the Courts under the aforesaid Section 37(2) of the Bengal Civil Courts Act can apply the principles of any Indian Statute to any matter before it, not covered by any specific law proprio vigore, if such principles appear to it to be otherwise applicable as embodiment of the principles of "justice, equity and good conscience". That is what we also find to have been held by the Calcutta High Court in Ayesha (supra) and in Rakeya (supra) and also by the Bombay High Court in Robsana Khanum v. Khodabad Bomanji (AIR 1947 Bombay 272). We would, therefore, think that even assuming the Court below found the Hindu Marriage Act of 1955 not to be applicable in terms to the case at hand and also could not find any other Indian law to be directly applicable, it could

have, since the parties before it were Hindus engaged in a matrimonial litigation, applied the principles of the Hindu Marriage Act in exercise of his jurisdiction u/s 37(2) of the Bengal Civil Courts Acts, of 1887. It can not be, and in fact it has not been, disputed that the provisions of the Hindu Marriage Act, so far they go, providing for divorce on the grounds of desertion and some other grounds, are just and equitable and accord with good conscience and have been sought to be enacted in conformity with the felt necessities of the time and our present society. But, as we have already indicated hereinbefore, since the petitioner-appellant in this case has failed to prove his case of alleged desertion by the wife-respondent, we must dismiss the appeal, even though we hold that the provisions of Hindu Marriage Act, 1955 would have applied to this case. We accordingly dismiss the appeal, affirm the judgment of the court ''below, but, in the circumstances, make no order as to costs.

Ajit Kumar Nayak, J.

I agree.