(1874) 03 CAL CK 0007

Calcutta High Court

Case No: None

E.L. Gasper — APPELLANT

Vs

W. Gonsalves — RESPONDENT

Date of Decision: March 21, 1874

Judgement

Pontifex, J.

The defendant has not appeared at the hearing, and, therefore, I am under the disadvantage of not having heard any argument in defence of the marriage. The plaintiff"s Counsel claimed a declaratory decree under s. 15, Act VIII of 1859. This suit, however, is clearly a matrimonial suit. It would, in my opinion, be moat unadvisable for me, sitting as a Court of first instance, to make any decree disturbing this marriage, unless I was very clearly convinced that the Court had jurisdiction to do so. But I am more than doubtful whether this Court has jurisdiction to entertain this suit under the law as it now stands. The Indian Divorce Act (IV of 1869) by a. 4 enacts that the matrimonial jurisdiction of this Court shall be exercised subject to the provisions in that Act contained, and not otherwise. Now that section, I am of opinion, takes away all matrimonial jurisdiction from this Court other than what is to be found in the four corners of the Act. S. 18 enacts in general terms that "any husband or wife may present a petition to the Court, praying that his or her marriage may be declared null and void." But s. 19 enacts that the decree on such petition "may be made" on any one of four grounds which are stated in that section. None of the four grounds there stated includes the ground on which the plaintiff seeks to rest the decree she asks for in the present suit. If s. 4 did not stand in the way, it might perhaps be argued that the language of s. 18 did not necessarily exclude the Court from making a decree on any other sufficient ground than those mentioned in that section. I do not think it can be so argued when s. 4 has expressly confined the matrimonial jurisdiction of the Court to the provisions in the Act contained. It further seems to me that the exception contained in the last clause of s. 19, preserving the jurisdiction of the Court in cases of force or fraud, shows that the Legislature intended that the four grounds mentioned in s. 19 should be exhaustive, and should not be construed as being by way of example only. On the ground, therefore, that the Court has no jurisdiction to entertain this

suit, I feel bound to make a decree dismissing it.

2. In this view of the case it is not necessary for me to express any opinion on the validity or invalidity of the marriage. But although I express no considered opinion upon that question, it may perhaps be as well to point out that in the English cases which were cited--Scrimshire v. Scrimshire 2 Hagg. Cons. Rep., 395 and Kent v. Burgess 11 Sim., 361--the marriages were invalid according to the law of the domicile of the parties, and consequently were invalid altogether, unless valid by the law of the place of celebration. It is true that in Scrimshire v. Scrimshire 2 Hagg. Cons. Rep., 395 the latter part of the judgment does lay down formally that the marriage must comply with the law of the place of celebration. But the former part of the judgment found that the marriage was invalid according to the law of the domicile of the parties. That under certain circumstances a marriage may be good by the law of the parties" domicile, though bad by the law of the place of celebration, is not altogether without authority. In Ruding v. Smith 2 Hagg. Cons. Rep., 371, Lord Stowell, after having the case of Scrimshire v. Scrimshire (sic)uoted before him, makes these remarks at p. 389:--"Suppose, the Dutch law had thought fit to fix the age of majority at a still more advanced period than thirty, at which it then stood--at forty--it might surely be a question in an English Court whether & Dutch marriage of two British subjects not absolutely domiciled in Holland, should be invalidated in England upon that account; or, in other words, whether a protection, intended for the rights of Dutch parents, given to them by the Dutch law, should operate to the annulling a marriage of British subjects, upon the ground of protecting rights which do not belong, in any such extent, to parents living in England, and of which the law of England could take no notice, but for the severe purpose of this disqualification?" Again, at the bottom of page 390, he says:--"It is true, indeed, that English decisions have established this rule that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else; but they have not, converso, established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England." It was not necessary for the purpose of deciding the case of Ruding V. Smith 2 Hagg. Cons. Rep., 371 that Lord Stowell should make those observations, but, coming from him, those remarks seem to me to be of very great force. The parties in this suit had an Indian domicile at the time of the celebration of the marriage, and I am not prepared to say that the marriage, solemnized at Chandernagore, was invalid according to the law of the parties" domicile in 1855. As at present advised, it appears to me that a marriage per verba de presenti in facie ecclesiae, that is, in the presence of an episcopally ordained priest (which was good by the common law) would have been sufficient according to the law of the domicile in the year 1855. Indeed, there is authority for this position in the (sic) of Lautour v. Teesdale 8 Taunt., 830. So that even if I considered that I had jurisdiction to entertain this suit, I should hesitate very long before I would make a decree, in an undefended suit, which would disturb a marriage acquiesced in by the parties for a period of twelve years, and which, in the words of the first marriage Statute of Henry VIII, was "a marriage contract, and solemnized in the face of the church, and consummate with bodily

knowledge and fruit of children" 32 Hen. VIII, c. 38.