Paul Engel Vs. Edith Engel

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Court : Mumbai

Decided On : Jun-18-1943

Reported in : AIR1944Bom15; (1943)45BOMLR921

Judge : Blagden, J.

Appeal No. : O.C.J. Suit No. 437 of 1943

Appellant : Paul Engel

Respondent : Edith Engel

Judgement :

Blagden, J.

1. The parties in this suit are respectively husband and wife, and the claim is by the husband for dissolution of marriage on the ground of the wife's adultery with a man whose identity is unknown to the husband and (because she refuses to disclose it) to the Court. The suit is not defended, and there is a satisfactory affidavit of service.

2. It is clearly proved that the wife did commit adultery in Bombay on the night of February 2 last, and I only took time to consider my judgment because I felt a little doubt as to the appropriate form of decree in view of the peculiar status of the parties.

3. They are by faith and race Jews. Their marriage took place at Vienna on March 4, 1936, at which date they were Austrian subjects.

4. Not long afterwards, their native land was over-run by the adjoining barbarians, and in the course of the subsequent persecution of their race they lost their nationality and have not subsequently acquired any other one.

5. They left Austria, and after sundry wanderings made their home in Bombay. The plaintiff (whose evidence I see not the slightest reason to doubt) tells me that his intention was and still is to make his home here. If after the war Central Europe should again become a place fit for Jews-or any other civilized people-to live in, he might, he says, go back there for a visit, but he has no idea of ever making his home in Austria again; and as he is a stateless person it is, anyhow, only his native land in a historical sense.

6. In these circumstances-if it be material (and as the whole cause of action arose in Bombay I do not think it is)-I have no doubt that the parties are domiciled here and, anyhow, that under Clause 12 of the Letters Patent I have jurisdiction in the suit. See Benjamin v. Benjamin I.L.R. (1925) 50 Bom. 369

7. Given that I have jurisdiction, the question of the right to relief depends on the personal law of the parties (see s.c. at p. 377). There, the Jewish plaintiff was the wife and she relied on cruelty, constructive desertion, and adultery. It is not an authority that a wife's adultery is alone, by XXth Century Jewish law, a ground for divorce at the suit of the husband.

8. It has always, however, been a ground for divorce in England amongst Christians, both by Ecclesiastical law and (since the Matrimonial Causes Act, 1857) in the Divorce Court and, later, the Divorce Division of the English High Court, though only under the recent reforms promoted by Mr. A.P. Herbert has the adultery alone of the husband been such a ground. I believe it is not uncommon for Jews to have recourse to the High Court in England for divorce, and I have a strong (though possibly mistaken) recollection of having acted more than once in such cases. They can, of course, only obtain relief on the grounds specified in the Matrimonial Causes Acts for the time being in force. It is well known that while

many Jewish families have lived in England for generations, there are always, in that country and modem times, a large number of Jews who are themselves emigrants from Europe, and, particularly, Central Europe. I know of no reason for assuming that the Jews who bring their matrimonial troubles to the High Court are exclusively of the former category. It would therefore seem that amongst Jews of European origin the same offences are recognised as grounds for divorce as are prescribed by the English Matrimonial Causes Acts. It would be very surprising if radically different standards were recognised by Jews, since (as the latter Acts are in the main codifying Acts) the law applicable to both Jews and English Christians is largely derived from the same fountain-head, namely the Old Testament-in the case of English Christians through the channel of the Canon law administered in England by the Ecclesiastical Courts before 1857. According to Deut. XXIV 1-3, the Mosaic law allowed unilateral divorce by a husband of a wife, without any judicial proceedings, if 'he hath found some uncleanness in her'; while he who married a woman once divorced would apparently also divorce her at any time by a 'Zet' or 'bill of divorcement' merely if 'he hate her', and I observe that Mrs. Engel (the defendant)' is a once-divorced woman. There can be little doubt that adultery would be considered 'some uncleanness' even in a wife not previously divorced, since its penalty was death (Lev. XX 10 : Deut. XXII 22) apparently by stoning (John 8, 4-5). It seems therefore that, by his own law, Mr. Engel would have got rid of his wife by giving her a bill of divorcement and turning her out of his house, at any rate when (as she did) she admitted her love for another man. That he adopted a more chivalrous course and has now proof of her actual adultery cannot diminish his rights, Assuming that Jewish law (about which I have no oral evidence) has been modified to some extent, there is still no reason to believe that it takes a less serious view of a wife's adultery than the law applicable to English Christians still does, both here and in England, especially as the contract of marriage among Jews was, originally, such a very one-sided bargain. I can, therefore, safely assume that adultery by a Jewish wife is a ground for divorce by the personal law applicable to Jews.

9. The plaintiff has, therefore, established his right to relief and the remaining question is the form it should take. This may depend either on the personal law of the parties or on the lex fori.

10. If I were to apply the former, it might be incumbent on me to order Mrs. Engel to be stoned, which order if carried out would certainly and effectively dissolve the plaintiff's marriage. But I am not asked to do so, and obviously could not do so even if I were. Apart from any other reason against such a course, the Penal Code of this country already provides another and less drastic punishment for adultery.

11. The law which I am to apply must, therefore, be the lex fori. But what is the lex fori I ought to follow, by analogy, either the statute applicable here to English Christians and make a decree nisi, or the general law applicable to ordinary suits and grant the plaintiff absolutely the relief to which I am sure he is entitled. It was assumed, without argument, in Benjamin v. Benjamin I.L.R. (1925) 50 Bom. 369 that the former was correct, though for some reason Crump J. prescribed less than the usual period before the decree could be made absolute. No doubt there was some special reason for this, but it does not appear from the report. Nor, in any case, does it appear that the point, taken here by Mr. Forbes, that the latter view is correct, was ever argued before Crump J. I do not therefore think that I am bound by this decision as to the form of relief.

12. When there is no statute applicable here the Letters Patent require me to decide according to 'justice equity and good conscience' which has long been held, in general, to mean 'English law so far as it is applicable to the conditions of life in India.' Influenced-and perhaps prejudiced-by some experience of divorce work in England and knowledge of cases where gross injustice would have resulted but for the practice of making only a decree nisi in the first instance, I was at first rather reluctant to make a decree absolute at once. But I must bear in mind that the law which, both in England and amongst Christians here, requires this to be done is entirely the creature of statute. Before 1857 'divorce e mensa et thoro' was known only to the Ecclesiastical Courts and dissolution of marriage (or divorce e vinculo conjugii) was not a form of judicial relief at all but could be obtained only by Act of Parliament, I should be very reductant to apply the purely statute law of England to this country when the Legislature has not done so, for the latter omission is presumably intentional. For example there exists, or did till a few years ago, a statutory rule in England that cigarettes may be sold after 8 p.m., while tobacco may not. It could not be held that this, under the 'justice equity and

good conscience' clause, is part of the law of Bombay, since those competent to legislate for Bombay have had the sense to spare us any such ludicrous enactment.

13. I think that Mr. Forbes, for the plaintiff, is right when he points out that I have no power by statute if, for example, a debt is proved before me to pass a money judgment which is not to be enforceable unless for six months nobody shows cause against it, and (since no statute provides for it) no power to make a decree nisi in this case. I am not enforced in this opinion by the practice of this Court in the case of Parsis since its duties are there laid down by statute : but I aw powerfully enforced by the fact that a decree absolute is made at once in the case of Mahomedans. Moreover, I do not think that any irreparable injustice can result if I have been misled as to the facts, since if the plaintiff has presented a false case to the Court-and I do not for a moment suggest that he has done so-the defendant, even if the time for appeal has passed, could always commence a suit to set aside my decree on the ground that it has been obtained by fraud.

14. I therefore decree that the plaintiff's marriage with the defendant be, and that it hereby is, dissolved.