Edith Walsh Vs. Edward Walsh

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Court : Mumbai

Decided On : Sep-27-1926

Reported in : AIR1927Bom230; (1927)29BOMLR308; 101Ind.Cas.388

Judge : Amberson Marten, Kt., C.J., Fawcett and Percival, JJ.

Appeal No. : Civil Reference No. 11 of 1925

Appellant : Edith Walsh

Respondent : Edward Walsh

Judgement :

Amberson Marten, Kt., C.J.

1. This is one of those unfortunate cases which begins with a blunder, and continues to run a crooked course. When the case was last before us, we sent it down for a remand, first, on an issue as to domicile, and, secondly, on an issue whether the parties reside or last resided together within the meaning of Section 3 of the Indian Divorce Act 1869, so as to give jurisdiction to the District Court at Poona. This was because neither of these essential points had been determined by the Court at the previous hearing of the case.

2. Mr. Lawrence, the present District Judge, has now heard further evidence on these two issues. As regards the first issue, viz., that of domicile, we agree with him that the domicile of the parties is shown to have been Indian at the date of the

petition. As regards the second issue, the learned Judge has found that the parties last resided together at Kirkee within the meaning of Section 3. But when the evidence is looked into, it will be seen that it is of an extremely sketchy character. The wife appears to have lived with her mother at Kirkee, and the husband with his mother at Thana, and at the most the husband came for some week-end visits to his wife at Kirkee. The learned Judge further appears to have relied on the independent testimony of Thomas Dunn, Exhibit 26, that in 1924 the husband used to pay visits to his wife at Kirkee.

3. It appears, ho vever, to have been overlooked that this petition (which was presented on June 17, 1925) is founded on (1) adultery, and (2) desertion ; and that in paragraph 4 of the petition the petitioner pleads that since the year 1921 she has been deserted by her husband. Moreover, this desertion has been found proved by Mr. Davis, the predecessor of Mr. Lawrence, in his judgment, dated October 28, 1925, where he finds: 'There can be no possible doubt from the evidence on record that the respondent has without any reasonable cause deserted the petitioner for more than two years prior to this petition.'

4. Accordingly, on that basis the evidence of Thomas Dunn of what took place in 1924 would be irrelevant on the question of residence, except that in so far as it was accepted at all it would only go to show that the lady could not rely on her plea of desertion ; and that, accordingly, the petition, in so far as it was founded on a claim for divorce as opposed to judicial separation, would have to be dismissed. It is possible that if there was an earlier desertion, which was afterwards condoned, it might be revived by subsequent adultery on the part of her husband. But any finding in that respect must be clear and express, and there is nothing in the judgments before us to indicate that any such point was in the contemplation of any of the learned Judges.

5. On the evidence, therefore, at present before us, I am far from being satisfied that the petitioner has made out her case that the parties last resided together at Kirkee. The alternatives, therefore, are either to dismiss the petition or to send the case down for a further remand. On the whole, we are prepared to give one more chance to the petitioner to put this matter in order. We will, accordingly, send the

case back for a further remand on a further issue, viz., when did the parties last reside together at Kirkee, and in what manner did they so reside, and where in Kirkee ?

6. Speaking for myself, I wish to draw the particular attention of the District Judge to the necessity of probing the evidence that is given before him. In an ex parte case it is not enough for one of the parties to come forward and say something exactly following the terms of the Divorce Act. I think the proper course, if there is no cross-examining pleader, is for the District Judge to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner relies for the relief he claims. (See the judgment of Lord Sumner in Russell v. Russell [1924] A.C. 687 cited in Over v. Over (1924) 27 Bom. L.R. 251. I will also point out that the word 'reside' in Section 3 means what it says. 'Reside' does not mean sexual intercourse.

7. As to what residence will be sufficient to comply with the section, two cases which are on the border line are Bright v. Bright I.L.R. (1909) Cal. 964 a decision of Mr. Justice Fletcher, and Murphy v. Murphy : AIR1921 Bom211 , a decision of my own. But I repeat that those cases are to my mind extreme ones, and they are not to bo taken as a starting point for even a lesser amount of so-called residence. In the present case it is clear that the parties were married at Lucknow. Their child was born at Cawnpore, and it may be, therefore, that it was really at Cawnpore that the parties last resided together. It is not essential for residence that they should have a house of their own. It will be sufficient, I think, to find, the place where the parties both lived together. One humble test might be where did the husband keep his clothes And if his employment was such that he was constantly away travelling as a commercial traveller or otherwise, then it might bo that the place to which he normally returned and where his wife was living would be the place where they resided together. But, on the facts here, I find it impossible to accept on this evidence that in 1920 or 1921 they ever lived together in that sense at Kirkee.

8. I may also point out that if the District Court has in fact no jurisdiction, the High Court on its Original Side has a wider jurisdiction, because for the latter it is

sufficient that the parties reside or last resided together within the appellate jurisdiction or the ordinary jurisdiction of the High Court. Accordingly, if the parties are now living, one at Thana and the other at Kirkee, there would be jurisdiction on the Original Side of the High Court, supposing the decision in Borgonha v. Borgonha : (1920)22BOMLR361 , on the construction of Section 3, is correct. I mean that the word 'together' does not govern the word 'reside,' but only the words 'last resided'. Bat however that may be, I think it would be quite wrong for us to grant divorces unless the terms of the Act are clearly complied with, and no question of sympathy for the parties can be an excuse for our sanctioning irregular proceedings.

9. I would, accordingly, remand the case further for the determination of the issue I have above mentioned. But I warn the parties, speaking for myself, that this will be the last time we shall grant such a remand.

Fawcett, J.

10. I agree.

Percival, J.

11. I agree.