

Eric George Day Vs. Constance Muriel Day

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SooperKanoon Citation : sooperkanoon.com/347136

Court : Mumbai

Decided On : Jul-10-1967

Reported in : (1974)76BOMLR127

Judge : Vimadalal, J.

Appeal No. : O.C.J. M.J. Suit No. 197 of 1967

Appellant : Eric George Day

Respondent : Constance Muriel Day

Disposition : Appeal dismissed

Judgement :

Vimadalal, J.

1. This is a petition filed by a husband under the Indian Divorce Act for a declaration of nullity of his marriage with the respondent, for a declaration that the respondent be presumed to be dead in law not having been heard or for more than eight years, as well as for a decree for divorce in favour of the petitioner.

2. The short facts necessary for the purpose of this judgment are that the petitioner is an Indian Christian and was married to the respondent at Nagpur on February 28, 1946 at a Protestant Church. It may be stated that the petitioner himself as well as both his parents are Catholics, but the respondent was a

Protestant. After the marriage, from July 1956 till about May 1958, the parties resided together in Bombay. In May 1958, the petitioner was transferred to the Madras branch of the firm in which he was serving, but as there was no proper accommodation available at Madras, the respondent remained behind in Bombay. The petitioner's case is that in November 1958 he was surprised to receive in Madras a letter dated November 15, 1958 from the respondent from Bombay (exh. 'D'), in which she stated that she was taking herself off the hands of the petitioner and had decided to be on her own. The petitioner's case is that he was so upset on receiving that letter that he left service and came to Bombay where he made all possible inquiries in order to trace the respondent but could not find her anywhere, and that he actually got a Public Notice published in the 'Free Press Journal', but there has been no trace of the respondent at any time till now. The petitioner has, therefore, filed the present petition for the reliefs already stated by me above.

3. There are affidavits (exh. 'A') proving substituted service upon the respondent, but she has neither filed a Written Statement, nor has she appeared to contest the hearing of this petition before me.

4. The petitioner has examined himself in support of his case and has deposed to the facts already stated by me above. It is unnecessary for me to repeat the same.

5. The petitioner's claim in the present petition is threefold--first, that he is entitled to a decree for divorce on the ground that the respondent has been continually absent for a period of over seven years and the petitioner has no reason to believe that she has been living within that time; secondly, that he is entitled to a decree of nullity of marriage on the ground that he and his parents being Catholics, his marriage which was performed in a Protestant Church is not valid under the Canon Law; and, thirdly, for a declaration that the respondent be presumed to be dead in law, not having been heard of for more than eight years.

6. In support of the first contention, Mr. Vakharia on behalf of the petitioner has relied upon Section 16(2) of the English Matrimonial Causes Act, 1950, which enacts that a decree for divorce can be granted if the petitioner alleges that reasonable grounds exist for supposing that the other party to the marriage is dead, and further provides that the fact that for a period of seven years or upwards

the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that the other party is dead, until the contrary is proved. Mr. Vakharia has contended that he is entitled to rely on these provisions of Section 16(2) of the English Matrimonial Causes Act, 1950, by reason of Section 7 of the Indian Divorce Act, which lays down that, subject to the provisions contained in the Indian Divorce Act, Courts must in all proceedings under the said Act

give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:

In support of his argument, Mr. Vakharia relied on the case of *Ramesh Saraiya v. Kusum. Madgaokar.* (1948) 5. Bom. L.R. 426. The question which arose in that case was whether an order for permanent alimony could be made after a decree of nullity had been passed under the Indian Divorce Act on the ground of the husband's impotency, in view of the fact that Section 37 of the Indian Divorce Act which provided for permanent alimony being granted in cases of dissolution of marriage and of judicial separation did not provide for the granting of permanent alimony in cases of nullity of marriage. Relying on the provisions of Section 7 of the Indian Divorce Act, their Lordships invoked the provisions of English law which enabled them to make an order for permanent alimony even in cases of nullity of marriage. Both Chagla C.J., as well as Tendolkar J. who constituted the Division Bench and delivered separate but concurring judgments, held (at pp. 433-434 and 440) that Section 7 of the Indian Divorce Act does not deal with procedural matters alone, but deals also with matters of substantive law and that, according to the principles and rules prevailing in England, even substantive law can be altered and modified under the said section, unless there is a clear negating of the same in express and unequivocal terms by any provision in the Indian Divorce Act itself. There are, however, observations which show in clear terms that though Section 7 does not deal with procedural matters alone, there is a distinction between the 'grounds' on which dissolution of marriage can be granted, and the principles and

rules on which 'reliefs' may be granted, as Chagla C.J. has stated (at p. 439), or between 'the creation of a cause of action' and the granting of 'reliefs', as Tendolkar J. has stated (at p. 441). Both the learned Judges have made it amply clear in their respective judgments that they did not propose to decide the question as to whether a ground for dissolution of marriage could be added by invoking the provisions of Section 7 of the Indian Divorce Act which was not in the Act itself but was to be found in the relevant provisions of English law. In his judgment, Tendolkar J. observed that he must resist the temptation of even expressing an opinion on that somewhat fascinating question, but proceeded to indicate what his opinion was in so far as he said (at p. 441):.Prima facie, with the qualification that I feel inclined to place on the interpretation of Section 7, viz. that it cannot be utilised for the purpose of inventing a cause of action for a litigant, I would be inclined to think that such grounds could not be introduced into India.

The ratio of the decision in Ramesh Saraiya's case, therefore, is that Section 7 only enables the Court to grant relief which the Court in England could grant under similar circumstances. It may further be pointed out that in their judgments both Chagla C.J., as well as Tendolkar J. said (at pp. 439 and 441) that the relief which they were proceeding to grant in that case was only 'incidental' to the decree of nullity which had already been passed in favour of the wife in that case. The question that arose in the said case, therefore, was merely one of granting a relief not provided for in the Indian Divorce Act, which was in the nature of 'incidental' relief. It is in the light of those facts that the observations of both the learned Judges must be understood. In my opinion, a proper reading of the decision in Ramesh Saraiya's case, far from supporting Mr. Vakharia's argument, is against the petitioner's case on this point. I agree with the view indicated by Tendolkar J. to which I have referred, namely, that Section 7 cannot be utilised for the purpose of inventing a cause of action for a litigant and that a ground of divorce which does not exist in the Act cannot be introduced by invoking the provisions of that section. In my opinion, to do so would be clearly contrary to the provisions of Section 10 of the Indian Divorce Act which lays down certain specific grounds on which a decree for divorce can be granted, and would also be contrary to the plain language of Section 7 of the said Act itself which does not warrant the introduction of any new ground of divorce in the Indian Divorce Act by reason of its provisions but merely

provides that, in the matter of granting relief, the principles and rules followed by English Courts should be followed. In the case of *Friecttander v. Fried-Lander* (1948) 51 Bom. L.R. 129. Weston J. observed that the construction placed upon Section 7 in Ramesh Saraiya's case would render much of the remainder of the Indian Divorce Act surplusage, but, I am afraid, a proper reading of the decision in Ramesh. Saraiya's case which is¹ strictly limited to the granting of incidental relief in appropriate cases by reason of the provisions of Section 7 of the Indian Divorce Act would not lead to any such startling result. I, therefore, reject Mr. Vakharia's argument on this point and hold that a decree for divorce cannot be granted on the ground relied upon by the petitioner.

7. As far as the second part of the petitioner's case is concerned, the provisions of Sections 18 and 19 of the Indian Divorce Act which relate to decrees of nullity of marriage are specific and do not leave any room for introducing any other ground for granting relief by way of nullity of marriage. Section 18 provides that any husband or wife may present a petition praying that his or her marriage may be declared null and void, and Section 19 lays down the grounds on which that declaration can be granted, namely, (1) that the respondent is impotent, (2) that the parties¹ are within the prohibited degrees of consanguinity or affinity, (3) that either party was a lunatic or idiot at the time of the marriage, and (4) that the former husband or wife of either party was living at the time of the marriage. There is, therefore, no scope for granting a decree of nullity of marriage in the present case on the ground that the marriage of the petitioner who was a Catholic, in a Protestant Church, was not in accordance with the provisions of Canon Law. I express no opinion on the question as to whether the petitioner would be entitled to such relief in an appropriate civil proceeding. I am concerned in the present case with a petition filed under the Indian Divorce Act, and there can be no doubt that the petitioner is not entitled to a declaration of nullity of marriage on that ground in the present proceedings.

8. The third part of the petitioner's case, in which he seeks positive relief by way of a declaration that the respondent be presumed to be dead, appears to be based on the provisions of Section 108 of the Evidence Act. In my opinion, however, Sections 107 and 108 of the Evidence Act which merely lay down rules of

evidence cannot furnish a cause of action. As laid down in the case of Narayan v. Shriniwas (1905) 8 Bom. L.R. 226, Section 108, according to its terms, does not require that the Court shall hold a person dead at the expiration of the period of seven years specified therein, but merely lays down a rule with regard to the shifting of the onus of proof. Reference may also be made in this connection to the decision of the Madras High Court in the case of Greenwood v. Greenwood A.I.R [1946] . Mad. 65, in which it was observed that the provisions of Section 107 of the Evidence Act cannot be invoked in proceedings for nullity of marriage under Section 19(4) of the Indian Divorce Act, as the very nature of the relief sought, demanded positive proof on the part of the party concerned that his wife was alive on the material date. This decision would show that the provisions of Section 107 of the Evidence Act which lay down a presumption that a person who was alive within thirty years continues to be alive cannot be availed of in proceedings under the Divorce Act. It would, therefore, follow that the provisions of Section 108, which engraft a proviso to Section 107 to the effect that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it, would also not apply to proceedings under the Indian Divorce Act.

9. In the result, I dismiss the petition. I, however, make no order with regard to costs.