CaptaIn David Aberneathy Greenwood Vs. Gladys Hildred Greenwood (Otherwise Dee)

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SooperKanoon Citation : sooperkanoon.com/792460

Court : Chennai

Decided On : Jul-30-1945

Reported in : AIR1946Mad65; (1945)2MLJ389

Appellant : CaptaIn David Aberneathy Greenwood

Respondent : Gladys Hildred Greenwood (Otherwise Dee)

Judgement :

Alfred Henry Lionel Leach, C.J.

1. This case is unparalleled and it raises an important question of law. The appellant was married to the respondent on the 9th June, 1933, at All Souls Church, Coimbatore. The appellant had been previously married, but he had not heard of his first wife for over seven years and consequently presumed her to be dead. The appeal arises out of a petition filed by the respondent on the Original Side of this Court under the Indian Divorce Act for a declaration that her marriage with the appellant was null and void because his first wife was still alive. She failed to prove this fact, but maintained that she was entitled to rely on the presumption stated in Section 107 of the. Indian Evidence Act, which says that when the question is whether a person is alive or dead, and it is shown that the person was alive within 30 years, the burden of proving the person to be dead is on him who affirms it. In other words, she maintained that all she had to prove was that the

appellant's first wife was alive within 30 years of the petition and if the appellant failed to prove affirmatively that his first wife was dead on the 9th June, 1933, she was entitled to the declaration. The learned Judge accepted this argument and as there was no evidence on the record that the first wife was dead when the second marriage took place he granted her petition. The appellant says that the respondent cannot be given the relief sought by her unless she proves positively that his first wife was alive on the date of the second marriage.

2. Before dealing with the question of law involved, we will state the facts in some detail. The. appellant's first marriage was to one Mary Rachel Greenwood and look place at the Roman Catholic Church, Agra Cantonment, on the 10th September, 1913. On the 12th July, 1914, a son was born to this union. On the 20th January, 1920, the wife left her husband and took the boy with her; but in the month of November of the following year she handed over the child to him at Bellary where he was employed as the superintendent of the local jail. From then until the middle of 1923, they corresponded, but the correspondence then ceased. In 1924, the appellant took the boy to England, and placed him in a school there. In 1927, the boy was taken seriously ill and the appellant tried to get in touch with his wife but all his letters were returned and he failed to discover whether she was alive or dead.

3. Not having heard anything of his first wife after 1923 the appellant in 1933, presumed her to be dead and he proposed marriage to the respondent. The respondent is an Anglo-Indian and, being then 20 years of age, was a major. The appellant disclosed to her and to her father the fact of his previous marriage and the subsequent events. The priest whose duty it would be to marry them in the absence of lawful impediment was consulted and at his suggestion the appellant made further enquiries with the view to ascertaining whether his first wife was alive. The enquiries failed to produce any information with regard to her, and the respondent and her father being satisfied that the first wife had not been heard of for over seven years, the respondent agreed to marry the appellant. The marriage ceremony was duly performed and the respondent has borne to the appellant two children, a boy and a girl, both of whom are alive.

4. The appellant avers that the respondent filed the petition for the declaration of nullity of the marriage because she intended to marry an army officer with whom he alleges she is living in adultery. If the respondent's marriage to the appellant is a nullity, the question of her intimacy with another man will not be a factor in the case; but the Court can inquire into the, respondent's motive in instituting these proceedings. In her petition she asked for an order giving her the custody of the children and the appellant was prepared to resist this application on the ground that she was living in adultery. Realising that this question would have to be investigated if she persisted in her application for the custody of the children, she abandoned that part of her case and asked that the custody be given to her father. These facts do support the appellant's contention that the respondent's petition has been filed with an ulterior object. The appellant vigorously opposed the petition, realising that if it were granted it would involve a declaration of the illegitimacy of his children by the respondent.

5. In the course of the hearing the respondent produced four letters dated the 18th May, 1925, the 10th June, 1925, the 10th September, 1925, and the 8th January, 1926, respectively, which she says were written by the first wife to the appellant. She has also produced a letter which she says the first wife wrote to the respondent's father on the 3rd September, 1934, that is, after the respondent's marriage to the appellant. The appellant says that these letters are forgeries. The learned Judge refused to have regard to them because there was no evidence proving that they are in the handwriting of the first wife. This being the case, the learned Judge was quite right in ignoring them. Without proof that they were written by the first wife the Court cannot, in view of the appellant's denial of their authenticity, have any regard to them. We may add that the appeal has proceeded on the basis that there is no evidence that the first wife was alive on the 9th June, 1933.

6. The appellant says that the Court is not entitled to have regard to Section 107 of the Indian Evidence Act because of the provisions of Section 108. The latter section reads as follows :;

Provided 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.

7. The appellant says that as his first wife had not been heard of for seven years when he married the respondent, the burden of proving that his first wife is alive is shifted to the respondent, which means that so far as this case is concerned Section 108 overrides Section 107. The learned Judge held that Section 108 did not apply because the appellant was not a person who would naturally have heard of his first wife if she had been alive. Her parents were dead. Her only brother was a prisoner of war in Malaya and therefore without means of communication. His first wife had left him in 1920 and correspondence with her had ceased in 1923. In these circumstances the learned Judge considered that the requirements of the section had not been fulfilled. We are not altogether convinced that this is a proper way of looking at the question. His first wife had borne him a son and for the latter's sake she might have written to him as she had done up to the middle of 1923. At the same time we do not propose to base our decision on the effect of Section 108 in this case. We will assume that the learned Judge was here right.

8. We will now pass on to consider the appellant's contention that in order to succeed the respondent must prove by positive evidence that His first wife was alive on the date of the second marriage. It must be borne in mind that the Divorce Court exercises a peculiar jurisdiction. In Hyman v. Hyman, Huges v. Hughes (1929) P. 1 Scrutton, L.J., said that the Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie, and the terms on which it should be dissolved-, involve far wider considerations than the will or consent of the parties to the marriage. The Divorce Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties; nor does it readily act on uncorroborated confessions. Scrutton, L.J., went on to say:

When the full Court of Appeal in Harriman v. Harriman (1909) P. 123 discussed the effect of estoppel of the parties on the jurisdiction of the Court, Lord Cozens-

Hardy said : 'The jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied': See Fletcher Moulton, L.J. (1909) P. 142 and Farwell, L.J. (1909) P. 144. In the King's Bench Division, if default is made in delivering defence, the plaintiff is entitled to judgment on the allegations in the statement of claim, which are taken to be admitted without proof. In the Divorce Division the petitioner must prove his case, though the respondent does not defend. Many agreements between husband and wife will not be recognised as being contrary to public policy. An agreement to separate in three years' time; an agreement not to take divorce proceedings for future adultery, will not be enforced or recognised by the Court. Collusive or condoned adultery will not be a foundation for a petition for divorce. The alteration of the status of marriage involves considerations far beyond the private agreement of the parties.

9. These observations apply equally to divorce and nullity proceedings in India.

10. In England there is no such presumption as that allowed by Section 107 of the Indian Evidence Act, and therefore under English Law the respondent would undoubtedly have to prove that the appellant's first wife was alive on the 9th June, 1933, in order to get a decree of nullity. The question then is whether Section 107 applies to a petition for a declaration of nullity under the Indian Divorce Act. In our judgment it does not, by reason of the provisions of Sections 7 and 19 (4) of the Indian Divorce Act. Section 7 of that Act states that the Courts shall in all suits and proceedings thereunder act and give relief on principles and rules which, in their opinion, 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. Section 19(4) indicates in plain language that a decree for nullity can only be given on proof of the fact that the former husband or wife was living at the time of the second marriage. There is no room left here for the application of Section 107 of the Indian Evidence Act. The Indian Divorce Act governs these proceedings and Section 107 of the Evidence Act must be ignored as it is in conflict. It would indeed be a lamentable situation if parties could marry under the circumstances and with the knowledge with which the parties to this case were

married and then one of them could have the marriage declared null and void on a mere presumption, especially when it involved the issue of the marriage being regarded as illegitimate. Fortunately the provisions of the Indian Divorce Act preclude the operation of Section 107 of the Indian Evidence Act in such a case and consequently we are not called upon to decide whether the section could be invoked had the Indian Divorce Act been silent on the question. We may, however, add that there appears to be substance in the argument of the learned Counsel for the appellant that the very nature of the relief sought demanded positive proof on the part of the respondent that the appellant's first wife was alive on the 9th June, 1933.

11. The appeal is allowed and the respondent's petition dismissed.