SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

In Re: Kolandaivelu and anr.

In Re: Kolandaivelu and anr.

SooperKanoon Citation : sooperkanoon.com/796488

Court : Chennai

Decided On : Apr-17-1916

Reported in : (1917)ILR40Mad1030

Judge : John Wallis, C.J., ;Oldfield and ;Kumaraswami Sastriyar, JJ.

Appellant : In Re: Kolandaivelu and anr.

Judgement :

1. We are of opinion that the decisions in Madras High Court, Appellate Side Proceedings, 21st March 1871 (1871) 6 M.H.C.R Appx. xx and Queen-Empress v. Yohan I.L.R. (1894) Mad. 391 which were accepted in Queen-Empress v. Paul I.L.R. (1897) Mad. 12 were rightly decided. In our opinion the Act was intended to apply to the marriages of all Christians in India, including marriages where only one of the parties is a Christian. Section 4 expressly says that:

any marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

and Section 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. Offences under the section may vary very widely in gravity, and it has been considered necessary, as in England, to provide a very heavy maximum sentence which would be wholly

inapplicable in such a case as the present, but that does not show that cases such as the present do not come within the section. Nor does the use of the word 'solemnize' which is referred to in the Order of Reference of Napier, J., give rise in our opinion to such an inference. That word which is now invariably used in this connexion has a history which may usefully be referred to The general law of the medieval Church, which regarded marriage as a sacrament as well a contract, did not regard the presence of a priest in orders as essential to the validity of the marriage. The parties might themselves enter into the contract, and the issue born of the marriage would be legitimate, though such, a marriage was regarded as clandestine and irregular as contrasted with a marriage in facie ecclesiae, and did not carry with it all the incidents of such a marriage. Bracton in a passage cited in Beg. v. Millis (1844) 10 CL & F. 534 whilst upholding the validity of such clandestine marriages, says that they did not confer on the wife a right to dower. On the other hand he says that a wife married in facie ecclesiae was entitled to dower propter solemnitatem which we may translate 'because of the solemnization of the marriage' or 'the performance of the marriage in solemn form' A solemnized marriage is thus a marriage effected in a solemn and regular manner, as opposed to an irregular and clandestine marriage. The question whether there was a stricter rule in England requiring the presence of a priest in orders arose in the great case of Reg. v. Millis (1844) 10 CL & F. 534 and was answered in the affirmative in accordance with the view of the Irish Court owing to the Lords being equally divided. To put an end so far as it could to clandestine marriages, the Council of Trent decreed that in future all marriages must be celebrated coram parocho, that is, in the presence of the parish priest, and also in the presence of witnesses. Its decrees were not received in England or Scotland, but Lord Hardwicke's Act, which was passed in 1754 with the same object, put an end to clandestine marriages in England by requiring all marriages to be celebrated in the Parish Church. This was considered a hardship by Roman Catholics and nonconformists, and in 1837 they were allowed to be married at their own places of worship if the marriage was attended by the Registrar, and provision was also made for the solemnization of marriages before the Registrar himself.

2. As regards Christian marriages in India it was held by Sir Erskine Perry in Maclean v. Cristall (1849) P.O.C. 175 that the rule in Reg. v. Millis (1844) 10 CL &

F. 534 as to the presence of a priest in orders, had never been applicable in India. The Legislature however considered it necessary to legislate in India on the same lines as in England against irregular and clandestine marriages among Christians and dealt with the subject in Acts XXV of 1864, V of 1865, and XV of 1872 the Act now in force. Under that Act all marriages of Christians including marriages where only one of the parties is a Christian, must be performed, on pain of nullity, in one of the prescribed forms. The Act makes no distinction between Native Christians and other Christians, except that by Section 9 it provides for the issue of licences to perform marriages between Native Christians to Christians who are not ministers of religion to meet the case of an insufficiency of ministers of religion, and that it directs that the registers of the marriages of Native Christians shall be kept separately from the registers of other Christian marriages, a provision dictated by administrative convenience. The provisions of Section 9 have no bearing on the question now before us as they only apply where both the parties are Native Christians, as expressly declared by Act II of 1892; and therefore marriages of Christians with persons who are not Christians must be solemnized in one of the other manners provided in the Act. The general effect of the Act is as already stated to require that every marriage where one of the parties is a Christian, must as a condition of validity be solemnized in one of the prescribed forms, excluding the form prescribed by Section 9 unless both the parties are Native Christians. The Act however is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage, As pointed out in Lopez v. Lopez I.L.R. (1885) Calc. 607 where the history of this legislation is carefully examined, it requires one of the parties to the proposed marriage to make a declaration that there is no impediment of kindred or affinity or other lawful hindrance, and also requires that the Minister of religion or Registrar should be satisfied that there is no lawful impediment; but it provides in Section 88 that:

nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

3. We answer the question in the affirmative.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com