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V.H. Lopez Vs. E.J. Lopez

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Court : Kolkata

Decided On : Sep-08-1885

Reported in : (1885)ILR12Cal706

Judge : Richard Garth, C.J.,; Prinsep,; Wilson,; Pigot and; O'Kinealy, JJ.

Appellant : V.H. Lopez

Respondent : E.J. Lopez

Judgement :

Wilson, J.

1. The main question we have to answer upon this reference is, whether a marriage between a man and his deceased wife's sister, celebrated in Calcutta in the year 1877, is liable to be declared null and void, under Section 19 of the Indian Divorce Act, on the ground that the parties are within the prohibited degrees, both parties being domiciled in British India and resident in Calcutta, and both being Roman Catholics. It is not found whether either of the parties to this marriage is the descendant of English ancestors, or of European settlers in this country other than English, or of native converts to Christianity, or of mixed race; their names suggest a Portuguese origin. We are bound to presume every matter of fact in favour of the validity of a marriage, and therefore if there be rules as to the prohibited degrees which would invalidate a marriage between persons connected as these were, 'and if those rules be applicable to any one class of Christians, but

not to all Christian^, we must presume, in the absence of any proof that they did, that the parties did not belong to that class. In particular, we must presume, so far as that point is material, that they are not of British descent, or British in any other sense than that of being domiciled in British India.

2. The Divorce Act (IV of 1869) applies to all Christians, and Section 19 enacts that a decree declaring a marriage null and void may be made, amongst other grounds, on the ground 'that the parties are within the prohibited degrees of consanguinity (whether natural, or legal) or affinity.' We have to say what the prohibited degrees applicable to the marriage now in question are, whether those prohibited by the law of England or by some other rule.

3. It will be convenient to divide the inquiry into three parts: First, how would the matter have stood if it depended only upon, the history of British acquisitions in India, and the Christians of various classes affected thereby, in the absence of statutory enactment? Secondly, what was the effect of the legislation prior to the Divorce Act, and what was the state of the law when that Act was passed? thirdly, what is the effect of that Act upon the prohibited degrees?

4. The first branch of the question may be treated very shortly. The circumstances under which the British power became established in India, and the effect of those circumstances upon the laws applicable to the people of the country, have been often considered. It was authoritatively decided in The Advocate-General of Bengal v. Ranee Surnomoyee Dossee 9 Moore's I.A. 387 and in other cases, that these circumstances had not been such as to introduce English law generally into India. And it certainly could not be contended that any of the rules of English law as to the capacity to marry have ever become law for the people of India generally. If we limit the inquiry to Christians, we do not think it could be contended that the history of the British acquisitions has been such as, without more, to impose the English law of prohibited degrees upon all Christians in British India. It was held in Abraham v. Abraham 9 Moore's I.A. 195 that Hindus adopting Christianity do not necessarily change their laws of property, but may retain their old law, or adopt that of the class to which they attach themselves, or establish a customary law. And we think the same rule must be the correct one as to laws of marriage. But

their Lordships lay down the rule only as to 'matters with which Christianity has no concern.' And we do not suppose the law could permit native converts (if one can imagine their desiring such a thing) to choose for themselves some marriage law wholly repugnant to Christian ideas--converts from Hinduism, for instance, to retain their former right to marry more wives than one, or converts from Mahomedanism their former freedom of divorce. With regard to the English men and women who settled here and their descendants, other consideration would apply. With them we have nothing to do in the present case.

5. In examining the second branch of the inquiry, as to the effect of the legislation prior to the Divorce Act, it will be convenient to begin with the charter under which the Supreme Court was constituted in 1774. By the 22nd section of that Charter the Court 'shall be a Court of Ecclesiastical Jurisdiction, and shall have full power to administer and execute within and throughout the said provinces, districts, or countries called Bengal, Behar, and Orissa, and towards and upon our British subjects there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasions of the said provinces and people shall admit or require,' with power to entertain all suits belonging to the Ecclesiastical Courts. Like powers were given to the Bombay and Madras Courts by their Charters. These Courts had power to entertain suit's for nullity of marriage and (subject to the qualification contained in the above section) they were to decide them according to the law of England. The persons subject to the jurisdiction were British subjects residing in Bengal, Behar, and Orissa. There has been at various times much discussion as to the meaning of 'British subject' in the legislation of a hundred years ago. The general result may be stated with sufficient accuracy by saying that 'British subject' meant, not subject of the British Crown, but British subject of the Crown, as distinguished from native of India, whether subjects of the King of England or not, a class which would certainly not have included the parties to the present case. With their marriages the Supreme Court would deal under its Charter; its jurisdiction was personal on the one hand it extended to the whole province, on the other hand it was everywhere limited to British subjects.

7. To ascertain the marriage law for Christians not falling within the description of British subjects, and the tribunals to administer it, we must look in another direction. Side by side with the Supreme Court sitting in Calcutta, there were the Company's Courts in the Mofussil, and they also had jurisdiction in questions of marriage. Here in Bengal it is not necessary to go further back than 1793, and the group of Regulations of that year dealing with the various classes of Mofussil Courts. Regulation III of that year, dealing with Zilla and City Courts, says in Section 7: 'All natives and other persons, not British subjects, are amenable to the jurisdiction of the Zilla and City Courts'; and Section 8 empowers those Courts to take cognisance of 'all suits and complaints respecting the succession or right to real or personal property, land-rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries and generally of all suits of a civil nature in which the defendant may come within any of the description of persons mentioned in Section 7.' Similar provisions were made by other Regulations as to Courts of other grades. Many. changes were from time to time made in the organisation of the Civil Courts of the Company, but nothing was ever done, so far as we can learn, which narrowed the matrimonial jurisdiction of the Mofussil Courts generally, in respect either of persons or subject-matter. How carefully the Regulations were framed with respect to persons is very apparent from Section 17 of the Regulation, already mentioned, III of 1793. That section, in general terms, forbids the Zillah Court of the 24-Pergunnahs to entertain suits relating to land in Calcutta or against persons resident in Calcutta. If this had stood alone there would have been no express provisions for dealing with questions as to marriages between persons other than British subjects residing in Calcutta. Not being British subjects they would not be within the terms of the clause in the Supreme Court's Charter, which gave ecclesiastical jurisdiction; being resident in Calcutta they would not be subject to the Zillah Court. Accordingly Section 17 concludes with a proviso that 'the provisions contained in this section are not to be construed to extend to preclude the Court of Dewany Adawlut of the Zillah of the 24-Pergunnahs entertaining any suit concerning marriage or caste in which no money or other valuable thing may be demanded or decreed, although the cause of action shall have arisen, or the defendant may reside, or shall have resided at the time the suit commenced, within the limits of the town of Calcutta.'

8. The precise nature of the matrimonial jurisdiction conferred upon these Courts, whether it was co-extensive with that of the Ecclesiastical Court in England, or wider or narrower, we do not think it necessary to examine. What is essential is that they had authority to hear and decide suits relating to marriage, including of course questions as to the validity of marriage and therefore 'questions as to the capacity of persons to marry. The law to be applied by those Courts to cases of marriage not specifically provided for was ' justice, equity, and good conscience' (Section 21). In the case of Abraham v. Abraham already cited the Privy Council, speaking of the law of property to be applied to converts from Hinduism to Christianity, say that they think--This case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience.' We think the same principle applies equally, to questions of marriage amongst Christians other than British; and that equity and good conscience prescribed the referring of the decision to the usages of the class to which the parties belonged.

9. A series of Acts, beginning with Act XI of 1836 and ending with Act VI of 1843, put an end to the exemption of British subjects from the jurisdiction of the Mofussil Courts in all civil matters. The effect would seem to have been to give the Mofussil Courts a jurisdiction, in one sense concurrent with that of the Supreme Court, over questions of marriage between British Christian subjects in the Mofussil; but, be this as it may, it could not alter the law applicable to either class of Christians.

10. The next legislation bearing upon the question is in 1851, the Act 14 and 15 Vict., c. 40. That Act provided a new method of marrying in India for any Christians who chose to adopt it, marriage before a Marriage Registrar. The Registrar might by Section 2 issue the necessary certificate, 'provided no lawful impediment according to the law of England' were shown to his satisfaction; and one of the parties had under Section 6 to make a declaration that there was no impediment of

kindred or affinity. This is the first express reference to impediments of kindred or affinity in connection with Indian marriages, and the first mention of the English law in connection with Christian marriages, between any but British 11:42 AM 12/26/200711:42 AM 12/26/2007subjects in the narrower sense of the term.

11. Then came the Charter Act of 1861, 24 and 25 Viet., c. 104, under which the High Courts were formed. By Section 9 of that Act each High Court was to have, amongst other things, such 'matrimonial jurisdiction' as might be granted by Letters Patent; and subject to the Letters Patent, and to the legislative powers of the Governor-General in Council, each High Court was to 'have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act.' The Supreme Courts were amongst the Courts abolished. The first Charter of this Court in 1862, by Section 35, gave the Court 'jurisdiction in matters matrimonial between our subjects professing the Christian religion,' and such jurisdiction was to 'extend to the local limits within which the Supreme Court now has ecclesiastical jurisdiction,' that is to say, Bengal, Behar, and Orissa. The present Charter of 1865 is substantially to the same effect; the Charters of the other High Courts are similar. The jurisdiction of the High Court in matters matrimonial was thus expressly extended to all Christian subjects of the Crown within the province; nothing is said about the matrimonial law to be administered.

12. It was strongly contended before us that the effect of this extension of the matrimonial jurisdiction of the High Courts, over all Christian subjects, was to make all Christian marriages thenceforth subject to the law administered by the Supreme Court, from which the jurisdiction was transferred, that is to say, the law of England, 'so far as the circumstances and occasions of the said provinces and people shall admit or require'; and that the only further question to be considered was, whether the English law of prohibited degrees was such as those circumstanced admitted of required--a question which might have been one of much difficulty. And if this had been the case of a new and exclusive jurisdiction established over persons not previously provided with a definite law and with tribunals to administer it, there would have been much force in the contention. But, as has been shown, the Regulations determined the law to be applied to non-

British Christian-marriages and provided tribunals to administer it, just as the Charter of the Supreme Court did for British Christians. In the High Court Charter the same section, Section 35, which gives this Court its matrimonial jurisdiction, contains a proviso, 'that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter' within the Presidency; and the words which occurred in the Supreme Court Charter, requiring the Court to administer the English ecclesiastical law, are omitted from our Charter. The conclusion seems clear that, in extending the matrimonial jurisdiction over new persons, it was not intended to alter the matrimonial law by which those persons were governed.

13. The next Act is one of the Indian Legislature, Act XXV of 1864. That Act dealt exhaustively with the modes in which Christian marriages could take place. These were : Marriages before a registrar, under 14 and 15 Vict. C. 40; by a clergyman of the Church of England, according to the rites, rules, ceremonies and customs of that church; by a clergyman of the Church of Scotland, according to the rites, rules, ceremonies and customs of that church; by a licensed minister, under the Act itself and by a person authorised to certify Native Christian marriages, under Part V of the Act. As to marriage by licensed ministers, the Act contained provisions as to legal impediments according to the law of England, exactly similar to those enforced by 14 and 15 Vict, c. 40, in the case of marriage before a Registrar. As to marriages of Native Christians, the certificate was only to be granted, provided 'the man and the woman shall not stand to each other within the prohibited degrees of consanguinity or affinity.'

14. Great stress was laid upon this Act and the 14 and 15 Vict., c. 40, during the argument, as showing that both the Imperial Parliament and the Indian Legislature intended that the English rules as to the prohibited degrees should be the law for, all Christians in India. We agree in thinking that those, Acts were almost certainly passed under the supposition that such was the law, and that this is probably why the rules of procedure in the case of certain modes of marriage were framed as they were. And any one who has studied the history of this subject outside this statute book will know that at that period this opinion was entertained and expressed by persons of high authority. But we can find nothing in those Acts

which can be said, either expressly or by reasonable inference, to enact or declare the law in this sense. Oh the contrary, Section 21 of 14 and 15 Vict., c. 40, expressly declares that the Act is not to invalidate any marriage which 'under the laws for the time being in force in India might have been there solemnized in case this Act had not been passed.' And, however strongly these Acts may seem to show an opinion that the English law as to the prohibited degrees was in force for all Christians in India, subsequent legislation may, with equal correctness, be said to indicate another view of the question.

15. Under the Act of 1864 obviously a clergyman of the Church of Rome could only celebrate a marriage either as a licensed minister, or as a person licensed to certify under Part V. The Roman Catholic clergy objected to this Act, as we learn from the objects and reasons of the amending Act, upon certain points connected with registration, and the hours for celebrating marriages. We learn from the speech of the member who had charge of the amending Bill that they objected also to their clergy having to be licensed by the State, and to the provisions as to prohibited degrees. On the latter point it was urged that there were classes of Christians in Southern India who were compelled by social circumstances to marry within the degrees prohibited by English law; to remove the latter grievance was one of the objects of the fresh legislation. Act V of 1865 was accordingly passed, and it made two material changes. It put all especially ordained clergymen, including of course those of the Church of Rome, on the same footing with the clergy of the Churches of England and Scotland, and it excluded Roman Catholics from Part V. The effect was to allow Roman Catholics to have their marriages solemnized by their own clergy, according to the rites of their church, nothing being said one way or the other about prohibited degrees; and to prevent Native Roman Catholics from marrying under Part V. This Act had certainly no tendency to impose the English law on persons not previously subject, to it; the object was to avoid doing so.

16. This was the state of legislation bearing upon the question prior to the passing of the Divorce Act in 1869. And we think that up to that time the English prohibited degrees had never become law for Christians in India generally.

17. The Divorce Act applies to all Christians, whether Native or European. Section 4 says that: 'The jurisdiction now exercised by the High Courts in respect of divorce a memo, et there, and in all other causes, suits, and matters matrimonial, shall be exercised by such Courts and by the District Courts, subject to the provisions in this Act contained and not otherwise; except so far as relates to the granting of marriage licenses, which may be granted as if this Act had not been passed.' Section 7 says that: 'Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings thereunder, act and 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.' The Act then proceeds to deal with a number of subjects, of which the most important are dissolution of marriage, nullity of marriage, judicial separation, protection orders, restitution of conjugal rights, settlements, and the custody of children. Dealing with nullity of marriage, Section 18 says that 'any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void'; and Section 19 says that--'such a decree may be made,' amongst other grounds, on the ground 'that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity.' The words in brackets, 'whether natural or legal,' qualifying the word 'consanguinity 'point, apparently, to consanguinity by adoption, so as to prevent a Native Christian, who has been adopted, on the one hand from marrying, say, the daughter of his adoptive father, and, on the other hand, from marrying a woman too nearly related to him by birth.

18. It seems convenient here, before considering the construction of the Divorce Act, to refer to the subsequent Act of 1872. That Act repeals both the 14 and 15 Vict., c. 40, and Act V of 1865. It re-enacts the provisions of these Acts about marriages before registrars, and marriages before licensed ministers, with this exception: Under the earlier Acts the registrar or the minister had to satisfy himself that there was no 'lawful impediment according to the law of England,' and one of the parties had to declare that there was no 'impediment of kindred or affinity'; under the new Act the words 'according to the law of England' are left out, the minister or registrar is to be satisfied that there is no 'lawful impediment', and the

same declaration as before is required. In Part VI the Act of 1872 re-enacts the former provisions about marriages of Native Christians, omitting all reference to the prohibited degrees. But Section 88 says: '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.' There can be no doubt as to the object of the changes made by this Act; the object clearly was to secure that there should be nothing in the rules as to the celebration of Christian marriage tending to indicate, or suggest, that any particular rule as to prohibited degrees applied to any particular marriage.

20. We now come to the third branch of the inquiry, what the prohibited degrees, mentioned in Section 19 of the Divorce Act, are. Those words, or similar words, were, as has been seen, used in the 14 and 15 Vict., c. 40, and in the Acts of 1864 and 1865; and there are no doubt strong reasons for saying that, in the Acts prior to the Divorce Act, the words 'the prohibited degrees' meant those prohibited by the, law of England. And the consideration then arises that if certain words are used in a certain sense in a series of Acts, the same sense ought ordinarily to be given to the same words in a subsequent Act dealing with 'the same subject. This is a rule of construction not lightly to be departed from; and it must be admitted that Section 7 of the Divorce Act, referring to English law, adds some force to the contention that the language of the Divorce Act is the language of the English law.

21. But there are reasons on the other side of much greater weight tending to show that, whatever may have been the meaning of the prohibited degrees in the earlier Acts, they mean, in the Divorce Act, not the degrees prohibited by the law of England, but the degrees prohibited by the law applicable to the parties to the marriage. The Divorce Act and the Acts of 1864 and 1865 are in pari materia in the sense that they both deal with marriage; but they deal With it from different points of view, and for different purposes, the earlier Acts treating primarily of the form of marriage, the Divorce Act of its dissolution and kindred subjects. And in Section 19 of the Divorce Act itself we find the words 'consanguinity whether natural or legal.' These words seem to refer to relationship by adoption, an idea unknown to the law of England; they therefore tend to negative the view that the language of the section is the language of the English law.

22. There are two reasons of a broader kind, and of much greater importance. The English law of prohibited degrees, as has been shown, was not applicable to Christians generally when the Divorce Act was passed; the application of the English rules to all Christians would be a most momentous change in the marriage law of the large majority of Christians in India, such as we ought not to hold to have been made, unless the intention of the Legislature to make the change has been expressed in unmistakable language; and that has certainly not been done.

23. And the Acts of 1865 and 1872 show clearly that during the period between those two dates, it was the settled purpose arid policy of the Legislature not to extend the English rules as to prohibited degrees, by legislation, to persons not already governed by them, but to leave them under the law to which on other grounds they might, be found subject. The Divorce Act was passed in the middle of this period, and we know, as matter of history, that it was under discussion in and before 1865. To construe the Divorce Act as applying the English law to all Christians in India would, therefore, be to attribute to the Legislature, an intention directly in conflict with what we know to have been their settled purpose at the time when the Act was prepared and passed.

24. The result is that in our opinion the prohibited degrees for the parties to this marriage were not the degrees prohibited by the law of England, but these prohibited by the customary law of the class to which they belong, that is to say, the law of the Roman Catholic church as applied in this country.

25. There is one other point to which we think it right to refer. Section 5 of the Act of 1872 enacts, as did the Act of 1865, that 'marriage may be solemnized in India (1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister.' It was argued that the words 'rites, rules, ceremonies and customs' here used include rules as to capacity to marry, and make those rules in each case depend upon the law of the church whose minister performs the marriage. That argument would lead by a short process to the same conclusion at which we have arrived upon this reference. The construction of those words is difficult; we are not prepared to express all unanimous opinion

upon it; and it is unnecessary that we should deal with it.

26. With this statement of our opinion the case must go back to the Division Bench to be considered.

Wilson, J.

27. We have now to decide this appeal in accordance with the law laid down by the Full Bench, that the validity of the marriage in question is to be determined by. the law of the Church of Rome.

28. It is clear in this case that the parties intended to become husband and wife, and that a ceremony of marriage was performed between them by a clergyman competent to perform a valid marriage. But the woman being the sister of the deceased wife of the man, it is clear upon the evidence that, according to the rule of the Church of Rome, a dispensation from the proper Ecclesiastical authority was necessary to its validity, while without such dispensation it would be invalid.

29. If in such a case the burden of proving a dispensation lay upon the appellant, who supports the marriage, we should have no hesitation in saying it was not proved. If the burden of proof was the other way, and the point was one to be decided upon the balance of evidence, we might probably have come to the same conclusion. But the presumption in favour of everything necessary to give validity to a marriage is one of very exceptional strength. The law on the subject was fully considered by the House of Lords in the case of Piers v. Piers 2 H.L.C. 331. The question in that case was as to the validity of a marriage. The parties had intended to become husband and wife, and a ceremony of marriage had bean performed between them by a clergyman qualified1 to marry them. The validity of the marriage in the place where it was performed depended upon whether a special license had been previously obtained from the Bishop of the diocese. The evidence against the issue of any such license was at least as strong as in the present case; but it was held that the presumption must prevail, the Lord Chancellor, Lord Cottenham, cites and adopts the language of Lord Lyndhurst in an earlier ease, that the evidence to rebut the presumption must be 'strong, distinct, satisfactory and conclusive.' Lord Brougham says that it must be 'clear,

distinct and satisfactory.' Lord Campbell used similar expressions, and added, as his opinion 'that a presumption of this sort, in favour of a marriage, can only be negatived by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested, to support the validity of the marriage; but you must show that this is most highly improbable and that it is not reasonably possible.

30. Following the principle laid down in that case, we think we are bound to presume in the present case that the dispensation had been obtained which was necessary to remove the obstacle to this marriage on the ground of affinity.

31. We accordingly hold that the marriage was not liable to be annulled on the ground that this parties to it were within the prohibited degrees.

32. The decree of the Court of First Instance will be set aside, and the case will go back for the trial of the other issues arising in it.

33. The appellant will have her costs of this appeal and also her costs in the Court below of the trial of the issues which have been tried.

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