

Linton Vs. Guderian

Linton Vs. Guderian

SooperKanoon Citation : sooperkanoon.com/882075

Court : Kolkata

Decided On : Jul-31-1928

Reported in : AIR1929Cal599

Appellant : Linton

Respondent : Guderian

Judgement :

Rankin, C.J.

1. In this case, we have to deal with a husband's petition for divorce filed in this Court under the Indian Divorce Act, on 20th January 1928. The petitioner was apparently born in a part of Poland, which has been referred to as being at that time German Poland. It appears that when he was very young, only 2 or 3 years old, his family removed to Berlin and when the petitioner was about 27, namely, in 1912, he went to London. In 1914, he was married in London to the respondent. It appears that for a time he went to New York, and afterwards to Honolulu. In 1916, he went to New Zealand, where, apparently, his wife's people had some property or connexions. His evidence is that he had been endeavoring to do business in New Zealand in connexion with exportation of goods from Germany. But, as the political condition after the war was not favourable for that kind of business, he, in 1923, abandoned all hopes of continuing that business in New Zealand and accordingly he removed with his family from New Zealand to Berlin. He seems to have gone to Berlin in 1920 and gone back to New Zealand in 1921. He appears

to have abandoned definitely New Zealand and gone back to Germany in 1923. He went back to Germany with the idea that he would go to some, other part of the world and make his living in connexion with exportation of goods from Germany. According to him, in 1926, he made up his mind to go to India and take his wife and two children with him. As they were starting out from Europe, he learned of the possibility of business in Sweden and went to Stockholm-his wife and children going out to India meanwhile. Apparently he expected them to go to Colombo, but, in fact, they came to Calcutta and the wife was living in the Grand Hotel. The husband followed soon after and arrived there towards the end of November 1926. It appears that, when he left Europe, he had two agreements-one of which only is in evidence -one for the sale of German typewriters and other for the sale of motors, I understand, Swedish motors.

2. The agreements - both of them - were of a preliminary and temporary character, lasting only for one year. In this way, the petitioner came out to start life in business in India. To put the matter quite shortly, at the Grand Hotel at the end of November there was staying the co-respondent. It appears that he made acquaintance of the respondent in the hotel. Before very long, namely, by 10th January, one way or another, he took the respondent to his flat at the Galstaun Mansions and there misconduct occurred and from that time onward it would appear that these parties committed misconduct at various places. More than one visit to Darjeeling was made by them and it would appear that the respondent was constantly living with the co-respondent at his flat. This appears to have gone on for the best part of the year and at the time when the citation under this petition was served upon the wife in 1928, she was living with the co-respondent at Galstaun Mansions. The husband, it would appear, having come to the Grand Hotel at the end of 1926, had a quarrel with his wife, because, according to him, his wife's reference to the co-respondent made him suspicious. He says that he told his wife that she must leave the hotel, but she refused. He went away, taking with him both the children and it does not appear that until the time when these divorce proceedings were commenced, he saw anything of his wife. That matters little to our present purpose. He appears to have travelled about in India in the endeavour to open agencies for the sale of these German typewriters. He appears to have been ill and he had gone during the course of 1927 to Kashmir to recover.

It does not appear that he had any fixed abode in India. He had taken, I think, an office in Bombay and the evidence as to his living and conduct in India is within a very narrow compass. It would seem that, in February 1927, he had been expecting to go to Europe either to London or Berlin to settle about one of his agencies. He expected that this arrangement would take a substantial time. He thought it that would be a year or more before he could come back to India, in any event, and he wanted his wife to go back with him, but she was unwilling. In these circumstances, he brings his petition for divorce on the ground of adultery and he asks for damages against the co-respondent.

3. The first question that arises for decision in this case is whether or not this is a case in which the Courts in British India have any right to give a decree for dissolution of marriage. Upon the face of the amendment made in 1926 to Section 2, Divorce Act, nothing in the Divorce Act authorizes any Court to make a decree for dissolution of marriage, except where the parties to the marriage are domiciled in India at the time when the petition is presented. There appears to be a certain amount of confusion upon the subject. It seems to me necessary to point out that domicile in India at the time of the presentation of the petition is an absolutely necessary condition of jurisdiction so far as regards divorce. We are in no way concerned whether or not a person not domiciled in India is put to hardship for lack of facilities in obtaining divorce from British Indian Courts. It is manifest that, so long as the matrimonial laws of different countries vary widely, as they do, it is necessary that for every marriage there should be an ascertainable forum for the purpose of adjudicating upon the question of divorce. All countries do not take same view of international law. But the view of international law which obtains in England and in these Courts is that the power to grant divorce rests with the Court of the country in which the parties are domiciled at the date of the petition. Other countries may take different views of international law in that respect. But it is well settled now that that is the view upon which the English law proceeds and that view, for all purposes of this Court, is the law without exception or qualification by the command of the Indian Legislature.

4. Now, there are two parties to every marriage and the domicile of the parties, in practice, means the domicile of the husband. This is a rule of law which may or

may not be subject to exception. But it is evident that the rule that the wife's domicile follows that of the husband would be nearer to the actual fact than any other rule and it is necessary that one Court should be found which has jurisdiction over both the parties for the purpose of divorce. In these circumstances, it is very plain to me that this rule that the Courts will not, under the Divorce Act, entertain any application for divorce except it be first proved affirmatively to its satisfaction that the parties are domiciled in India is a rule which should never be departed from. I protest altogether against the doctrine which was urged before the learned Judge of the trial Court in this case and before us that, if the Court finds that the parties are of ambiguous domicile or nationality the Court will proceed to interfere with the domestic status of persons who are not domiciled in India. Any decree given by an Indian Court in respect of people who are not domiciled in India is a decree which, in the view of international law which this Court entertains, can be disregarded altogether in the country of the parties' domicile. To make orders which will effect that persons who in the country of their domicile are married are in India strangers is a most serious step and it is idle to talk of justice in connexion with any invitation to make orders of that sort. The main features of such an order would plainly be disorderly confusion of inheritance and rights on the part of the foreigners. The consequence would be that over the face of Europe the decrees of the Indian Courts would have to be regarded as nullities. I cannot, therefore, approve of the language in which the learned Judge has expressed his conclusion upon this question.

5. It appears to me that we have to find, as a fact, cold hard fact- one way or the other whether, in this case, the domicile of the husband at the time of the presentation of the petition is shown to have been in India. The learned Judge has stated that he is very dubious as to whether he ought to hold that the petitioner is domiciled in this country at all. He has said that the facts upon which he is asked to infer that the petitioner is possessed of Indian domicile are very slender indeed. He has said that he is disposed to take a somewhat lenient view of the evidence of the petitioner with regard to his intentions in the matter and that, in order to do justice in the matter, he feels that he ought to accept what the petitioner has said. He confesses that he is probably stretching the point in the petitioner's favour ; but he says that, having regard to all circumstances in this case, it is right that he

should take that view of the matter, and, accordingly, in order to conclude the point, he finds as a fact upon the evidence of the petitioner that he is domiciled in India. Upon this finding, both the parties, the co-respondent and the petitioner have, as it seems to me, a certain grievance. Mr. Westmacott for the co-respondent says that the learned Judge has found against his client, though it is evident from the judgment that the learned Judge has no great belief that this petitioner was domiciled in India. In like manner, the petitioner has, I think, a grievance in that, though the learned Judge believed his evidence as to his intentions, he expressed no great firmness in that belief. I collect from the learned Judge's judgment that generally speaking he regarded the evidence of the petitioner as worthy of credence and with that I go to the evidence to see whether, in my judgment, there is enough to entitle this Court to hold that, in January 1928, this man was domiciled in India.

6. It appears that this man was originally a Pole. He had been taken to Germany when very young. As a young man, he had gone to England and, after travelling in various parts, he, subsequently to his marriage, lived for several years in New Zealand. His prospects in New Zealand having ceased, he comes back to Berlin and there apparently he takes steps to get business connexions, upon the strength of which he could go somewhere else with regard to the export of German manufactures. He had never been in India in his life, nor had his wife either. He had no friends in Bombay, Calcutta or anywhere in India. He had a chance in this respect that he had an agreement for one year for the sale of German typewriters. Apparently, he had another agreement which has not been properly proved of an equally temporary character in connexion with Swedish motors. There appears to have been no office of either of these concerns in India. It was his business to do what he could to open agencies. He went about and, so far as we know, he opened agencies in Kashmir, Delhi, Calcutta, Bombay and, I think, Lucknow. One would naturally suppose that this man had come to India to see if he could make a living and that in coming to India, he had no occasion to make up his mind as to whether he would live and die in India. Like a large number of people, who come from parts of Europe he had to make his living and he proposed at the time to do so in India.

7. Before considering whether his domicile was changed or not, we have to see what is meant by change of domicile. In my judgment, we may take all the law that is required on this point from the decision of the House of Lords in the case of *Winans v. Attorney-General* [1904] A.C. 287. There can be no doubt that the whole burden of proving that the petitioner had made up his mind to come to India and treat it as his ultimate and permanent home is on him. As was pointed out in the case to which I have referred, it was necessary for him to satisfy the Court that he had a fixed and certain purpose.

A change of domicile is a serious matter-serious enough when the competition is between two domicile both within the ambit of one and the same kingdom or country-more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicile.

8. The question has been put in the language of Lord Cairns in this way:

Whether the person whose domicile was in question had 'determined' to make, and had, in fact, made the alleged domicile of choice 'his home with the intention of establishing himself and his family there, and ending his days in that country.'

9. In other words we have to ask whether the petitioner has satisfied us that he had not come to India to be a Pole or German making his living, but that he intended to come to British India to be domiciled there as being a person whose ultimate and permanent home was to be in India. In my judgment, the evidence in this case falls far short of what is required. We have here a husband who is anxious, I do not doubt, to obtain a decree for divorce and very anxious, it is plain, to obtain reparation from the respondent at the hand of the Court. In both these matters, the guilty wife is in agreement and her interest coincides with his. The evidence that they bring forward to induce this Court to believe that the petitioner was making India his permanent home consists mostly in saying 'yes' when the words 'permanent home' are put to them. They made the most unconvincing effort to explain the intention which they had arrived at when they set out for India. The case made is that, although they knew nothing of India, the man had read about India, that he was interested in Yoga philosophy, that his own country Poland or

Germany had not seen much of him and was of no great value to him as a place of residence, that he was seeking somewhere to make a permanent home and that before reaching India at all the petitioner decided that he was to be of Indian domicile. Accordingly, on this view, when he finally stepped on to the quay at Bombay, he became a person who was domiciled in India. It appears to me that the circumstance that they sold their house in Berlin and their furniture before they came out to India is small corroboration of so improbable a story. It appears to me that, on this evidence, the Court would find itself dispensing matrimonial justice to all sorts of people who have arrived in India very recently. It is most necessary in this case to find whether the story that the man's permanent home was to be in a country of which he knew nothing and in which he might be little successful is a story which is to be treated as proved by the evidence that these two highly interested parties have given to the Court. I cannot doubt that this is evidence which should be regarded as altogether insufficient. I think the petitioner may possibly have deceived himself into thinking that his intentions were different from what they really were. But I do not believe this story that he came to India with a fixed and settled resolution to be of Indian domicile so that his domicile of origin had been departed from the moment he arrived in India. Most unfortunately, he had hardly set foot in India before he suffered the very serious wrong with which we are now concerned. It appears that, in the beginning of 1927-within a couple of months of his arrival in this country-his wife was committing adultery with the co-respondent. It does not appear to me that throughout the year 1927 anything happened which strengthens his case to the effect that he had become of Indian domicile.

10. Stress has been laid upon certain words in a letter which has been put forward as showing the agreement between the owners of the typewriters and the petitioner where it is stated ' when he emigrates (or removes) himself to British India '-the German words being 'wenn sie nach British India ubersiedeln.' It does not seem to me that that adds very much to the evidence in this case. I come to the conclusion that this evidence critically looked at is not sufficient to entitle this Court to proceed to deal with the personal status of these parties on the basis that their domestic arrangements in the matter of divorce are subject to the jurisdiction of this Court.

11. The next question which arises is whether, if that be so, this petition can be allowed to stand as a petition for damages against the co-respondent under Section 34, Divorce Act. Now, cases have been cited to us, particularly the well known case of *Bernstein v. Bernstein* [1893] P. 292 to show that, in an ordinary case Where the English Court has jurisdiction-if the petitioner fails to make good his right to a decree for divorce, he will not be allowed to recover damages from the correspondent. The explanation of the clauses of the Matrimonial Causes Act of 1857 given by Lord Justice Lopes and other authorities makes it clear that the right to damages is a right which is subject to the same defences as the right to other matrimonial reliefs. In other words, if there has been condonation or connivance or collusion, the right to damages would be defeated equally with the right to a decree for divorce or judicial separation. So much seems to me clear and, in this country, we have an express direction that we are to act and give reliefs on principles and rules conformable to those of the English Divorce Act.

12. It is said, however, that the English cases oblige us to hold that this petition as a petition for damages must be dismissed, if by reason of lack of jurisdiction we are unable to grant a decree for divorce. That seems to me to be an entirely different proposition and I am not of opinion that there is any authority for it or that it is correct. If by reason of the death of the wife between the decree nisi and the decree absolute no ultimate decree for divorce can be given, it has been decided *Monsell v. Monsell* [1902] P. 34 that nevertheless the judgment for damages may take effect. There can be no doubt that the causes of action to use the common law expression against the co-respondent for damages and against the wife for divorce are different and distinct, although, upon a true construction of the Divorce Act, the same defences are open to these claims. But I am not of opinion, in view of the plain terms of Section 34, which says that the husband may claim damages in a petition limited to such object only, that it can be right in a case of this character to say that, because the Court has no jurisdiction to grant a decree for divorce, it cannot treat this petition as a petition for damages alone and award damages upon it. It is quite clear, however, that the damages suffered by the petitioner will be different according as he is getting a decree for divorce or is not to get a decree for divorce. It is quite clear that, upon this basis, the question of damages must be reviewed and has to be regarded upon other facts. It will be

necessary no doubt to take account of the real position of the petitioner in view of the finding that this Court has no jurisdiction to grant him a decree for divorce.

13. So far, I have not said anything about one of the defences taken by the co-respondent-the appellant before us - I mean the defence that, in this case, there has been collusion between the petitioner and the respondent. I have no doubt that, if there has been collusion that is an equally good answer to the claim for damages as to the other form of relief; and, in this Court Mr. Westmacott for the co-respondent, has argued that there is evidence of collusion which disentitles the petitioner to get any relief at all. He has relied not so much upon any suggestion that this petition was brought or initiated under or by virtue of any agreement between the petitioner and his wife, or upon any suggestion of the adultery being caused or induced by any connivance on the part of the husband, but upon certain matters which took place in the course of the prosecution of this suit. He says that counsel for the petitioner knew that the solicitors for the respondent had subpoenaed the co-respondent. He says that the petitioner only called himself and the caretaker of the Galstaun Mansions evidently relying upon the wife's evidence to prove the fact of adultery. He says that, in the wife's answers, there are some irrelevant matters volunteered with the sole object of assisting the petitioner-such as the fact she was pregnant by the co-respondent. He says too that in the wife's answers there is an endeavour to prove the case against the co-respondent. He has applied to us to let him introduce additional evidence upon this point, because he says that, in the bills of costs which have been rendered by the attorneys, it can be seen that the wife's attorneys were furnishing certain documents to the husband's attorneys- documents showing that the co-respondent was guilty of adultery on other occasions; and it is said that, in these bills of costs, one would find other suspicious matters, namely, the fact, amongst others, that the petitioner, before he had taken a copy of the co-respondent's answer, was asking for an early date to be fixed for the hearing of the case. We have to consider whether or not this is a case in which we ought to refuse all reliefs to the petitioner on the ground that collusion between the petitioner and the respondent has been made out. Here, again, if I were satisfied that collusion between the petitioner and the respondent had been made out I would regard it as my clear duty to refuse all relief to the petitioner. But I am not of opinion that this is a case in which there has

been more than a certain amount of purely mechanical assistance given by one set of advisers to another. I do not think that it vitiates all the proceedings because the attorneys for . the wife gave the attorneys for the husband copies of certain documents which they had got. I think that the fact that the learned Counsel got to know that the attorneys for the wife subpoenaed the co-respondent is a very narrow ground for supposing that any collusion had taken place.

14. Having examined carefully each of the grounds set forth as evidence of collusion by Mr. Westmacott, I can only say that, in my opinion, they fall far short of proving any open or secret agreement between the husband and the wife. I quite agree that collusion may be sufficient if it is collusion in prosecution of a perfectly true case. I do not think it necessary here to examine the authorities which have been brought to our notice, because I am not of opinion that this judgment can be based upon any view of the law to the effect that, if the case is true, collusion does not matter: *Churchward v. Churchward* [1895] P. 7. I am quite satisfied that there might be collusion in the mere prosecution as distinct from the initiation of a true case ; but I am not of opinion that mere furnishing of documents or, as in *Harris v. Harris* [1862] 31 L.J. Pr. (n.s.) 160, mere furnishing of photographs or that kind of small assistance between the attorneys does amount to collusion in the sense with which we are concerned. I see nothing in this case which is contrary to good faith. I see nothing which appears to me to take the colour of an attempt to concert a case and put it forward before the Court. I am, therefore, of opinion, looking at the facts of this particular case that the word 'co-operation' used in the learned Judge's judgment is too strong (as the learned Judge himself appears to have thought) and the learned Judge's finding that there was no collusion is one which should be supported. It is quite true that in this case both the parties the husband and the wife had the same interest. Both desired to get a divorce. Both desired that the correspondent should be made to pay heavily, if possible, for his conduct. That common object would not justify collusion between the parties. But it is very necessary in such a case as this to be careful before imputing collusion between the parties from ordinary acts which a solicitor would naturally regard as inoffensive and unobjectionable.

15. The next question which arises is whether this petition for divorce is to be amended by asking for damages alone or by asking for judicial separation and damages. As to that, I propose that both the husband and the wife shall be given time to consider the position. We are not going to ask them to make any decision as to this on this afternoon or even tomorrow. This decree will not be drawn up until they have had at least a fortnight from to-day to consider the position Subject to that the result of this judgment is that the question of damages must be gone into over again. It will not be necessary to take evidence over again, but it will not be right that this question should be entered into again until it is known whether these parties are or are not going to be separated. I do not think it will be fair to the learned Judge who tried this case or to either of the parties that the question of damages which has been dealt with by the trial Judge on one hypothesis should go back to him to be dealt with by him again on another. This case should, in my opinion, be sent back to the original side to another Judge to assess the damages against the correspondent in the light of the present position. The learned Judge who will now deal with this matter will deal with it, completely independently of the findings of the learned trial Judge. He is given power to take further evidence on any point, if he thinks it desirable.

16. As regards the costs of this appeal, am of opinion that each party must pay its own costs. The order of the Court below as regards the costs of the trial will stand.

17. The sum of Rs. 12,500 which has been paid in Court by the co-respondent will remain in Court, subject to his right to withdraw it on giving security to the satisfaction of the Registrar.

Page, J.

18. I agree. As we are differing from the decision of the learned trial Judge, and having regard to the arguments that have been presented to us, I desire to add a few words upon the issue of jurisdiction.

19. It is not pretended that the domicile of origin of the parties was in India. Now, Lord Lindley in *Winans v. Attorney-General* [1904] A.C. 287 observed:

I take it to be clearly settled by the Lauderdale Peerage Case [1885] 10 A.C. 692, Udny v. Udny [1859] 1 H.L. (Sc.) 441, Bell v. Kennedy [1868] 1 H.L. (Sc.) 307 that the burden of proof in all inquiries of this nature lies upon those who assert that a domicil of origin has been lost, and that some other domicil has been acquired. Further, I take it to be clearly settled that no person who is sui juris can change his domicil without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose.

20. Lord Macnaghten in the same case, stated that:

such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote Lord West-bury again, 'a fixed and settled purpose,' 'And' says his Lordship [1863] 1 H.L. Sc. 321 'unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues.' So heavy is the burden cast upon those who seek to shew that the domicil of origin has been superseded by a domicile of choice

21. Now, in my opinion the evidence in this case is inconsistent with the existence of an intention on the petitioner's part at the time when he presented the petition, to reside and establish himself in India for the rest of his days. Indeed, to my mind, the reasonable conclusion to be drawn from the evidence is that the petitioner had come to India to earn a living, and intended to remain in India so long as an opportunity to obtain a livelihood in this country was open to him ; that he had formed no intention to settle in any one place rather than in another, and that he realised that his movements in the future might well be as uncertain as his wanderings in the past.

22. On the issue of collusion I would add that the object which the legislature had in mind in insisting that there should be no collusion between the parties to a

matrimonial petition was : 'to compel the parties to come into the Court of divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect ; to oblige them so to act as enable the Court to be in a position to do justice between the parties Butler v. Butler [1890] 15 P.D. 66, per Lopes, L. J.'

23. In my opinion, having regard to the authorities, the evidence in this case does not disclose such facts as would have disentitled the petitioner to a decree for divorce on the ground of collusion of the Court has jurisdiction to grant him such relief.

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