

Miller Vs. Miller

Miller Vs. Miller

SooperKanoon Citation : sooperkanoon.com/882876

Court : Kolkata

Decided On : Dec-17-1924

Reported in : AIR1925Cal874

Appellant : Miller

Respondent : Miller

Judgement :

Pearson, J.

1. This is a wife's petition for divorce. It is not defended. The marriage took place before a marriage Registrar in Bombay in November 1922. The husband was a subject of the United States of America and domiciled in that country: the wife before marriage had her domicile in India, where her family had been for several generations. The married life only lasted until January 1923, when the husband sent the wife back to her relations and himself left for America, where he has since remained.

2. Proof has been given of adultery and cruelty sufficient to entitle the petitioner to a decree nisi. Upon the question of jurisdiction, my attention has been drawn to the judgment of Sir Henry Duke in *Keyes v. Keyes* [1921] P. 204, which decided that the Courts administering the divorce law in India have no jurisdiction to decree dissolution of a marriage between parties not domiciled in India: it also decided that the East India Councils Act of 1861 does not warrant the making of a law to

empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction.

3. That decision has since met with discussion in two reported cases in India, namely, *Wilkinson v. Wilkinson* A.I.R. 1923 Bom. 821 and *Lee v. Lea* A.I.R. 1924 Lah, 513. It has been pointed out that it would have been enough for the decision in *Keyes v. Keyes* [1921] P. 204 to say that since *Lemesurier's case* [1895] A.C. 517 or at any rate since *Bater v. Bater* [1906] P. 209 the jurisdiction to decree dissolution of marriage depends according to English law upon the domicile of the parties, and that as the domicile in *Keyes v. Keyes* [1921] P. 204 was English, the English Courts would not recognise as valid in England a decree pronounced by a Court in India whose jurisdiction was based on a principle—that of the residence of the parties at the time not accepted according to English Law as conferring jurisdiction. That this is so appears, I think, from the language used in an early part of the judgment, where the learned President says (at p. 211): 'The petitioner has brought this suit to determine the validity, at any rate in England, of the decree made at his instance in India.' It was, therefore, as it appears to me, the extra-territorial validity of the Indian decree that was in question in the suit, and that question was sufficiently and completely answered by the decision above set out, so that it was not necessary to go further to the extent of enquiring whether the powers conferred by the East India Councils Act, 1861, had been exceeded in the enactment of the Indian Divorce Act, 1869. But if that enquiry is to be made, then I think it is of great importance to recognise that in the case of *Niboyet v. Niboyet* [1878] 4 P.D. 1 in 1878 the Court of Appeal did accept residence and not domicile to found the jurisdiction, and that that decision remained good at any rate until *Lemesurier's case* [1895] A.C. 517 in 1895. It cannot, therefore, be successfully urged that at the time of the Indian Councils Act in 1861 or at the time of the passing of the Indian Divorce Act, 1869, the jurisdiction to entertain a suit for dissolution was recognised in the English law at that time as depending upon domicile and not upon residence, and that, for that reason, the Legislature went beyond its powers in making the jurisdiction under the Indian Divorce Act dependant upon residence.

4. In *Wilkinson v. Wilkinson* A.I.R. 1923 Bom. 821 it recognised that there has been this change in the view taken by the Courts in England, but the majority came to their decision upon a view of the effect of Section 7 of the Indian Divorce Act. Thus Marten, J. says that Section 7, which he regards as 'the dominating clause in the Act' was intended to ensure some uniformity between the Indian and the English Courts, and to provide for such changes. That is because under Section 7 'subject to the provisions contained in this Act' the High Courts and District Courts shall in all suits and proceedings hereunder 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.' With this view of Marten, J. I am, with great respect, unable to agree. The operation of Section 7 (as is emphasised in *Lee v. Lee* A.I.R. 1924 Lah, 513) is qualified by the opening words 'subject to the provisions contained in this Act.' It would, therefore, seem to be the case that the provisions of Section 2 are not controlled by those of Section 7. If that is so, Section 2 must be construed as it stands, and in so far as it adopts residence as the basis of jurisdiction, that is a provision of the Act to which accordingly Section 7 is subject, so that, whatever may be the nature of the principles and rules referred to in Section 7, they are not intended to affect that provision. It is a matter which stands apart, not one of the things liable under Section 7 to be dealt with from time to time differently according to any alteration in the view that might be taken by the Courts in England for the time being. It is unnecessary perhaps to discuss the question whether, in any event, the 'principles and rules' referred to in Section 7 would include the question of residence as a basis of jurisdiction or whether that section is not designed rather as a residuary section to provide for matters that may not be otherwise specifically mentioned in the Act-which is the opinion of Crump, J. in *Wilkinson v. Wilkinson* A.I.R. 1923 Bom. 821. There is, however, the authority of Sir Lawrence Jenkins sitting as a Judge of this Court in *Bailey v. Bailey* [1897] 30 Cal. 490 (note) that the expression points rather to the rules and principles on which the Court deals with those matrimonial causes in requiring a certain degree of evidence and other cognate matters; See also *Ramsay v. Boyle* [1908] 30 Cal. 489. The decision of Fletcher, J. in *Giordano v. Giordano* [1912] 40 Cal. 215 is an instance of a case where a

divorce was granted between foreign subjects not domiciled in India and is in petitioner's favour, and I take it that the powers of this Court under the Indian Divorce Act of 1869 should not necessarily be read as limited to British subjects only under clause 35 of the Letters Patent of the Court in 1865, having regard to clause 44 of the same, by which the provisions of the Letters Patent are subject to the legislative powers of the Governor-General in Council.

5. I think, therefore, the Court has jurisdiction to pass the decree. The result may be that the decree will hold good in India, but that every where else the parties will remain still legally married. This I must mention, that they may not be misled into assuming that the decree will be recognised as valid universally and more particularly under the law of the domicile.

6. The petitioner is entitled to a decree nisi, with costs on scale No. 1.

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