CALCUTTA HIGH COURT

M. Barnard

Vs

G.H. Barnard

(Costello ,J.)

31.01.1928

JUDGMENT

Costello, J.

1. This is a petition by Margaret Barnard praying for a dissolution of her marriage with the respondent George Henry Barnard on the ground of his adultery with a woman unknown on 17th November 1927. The petitioner was married to the respondent on 18fch October 1917 according to the rights of the Christian Church at the Wesleyan Churoh at Jhansi. At the time of the marriage the respondent was domiciled in England and before her marriage the petitioner was also domiciled in England and after the marriage they retained their English domicile. It was duly averred in the petition that the respondent at the time of the presentation of the petition was domiciled in England. It may therefore be taken that when this petition was filed both the parties to the marriage were domiciled in England. Both the parties to the marriage profess the Christian religion. It appears from the evidence of the petitioner that after her marriage she and the respondent lived and cohabited together first of all at Jhansi and afterwards at No. 5, Carnac Street, Calcutta and finally at No. 9 Rawdon Street in Calcutta, and therefore the place where the parties last resided together was within the jurisdiction of this Court.

2. The suit was brought under the Statute 16 and 17, Geo. V. Ch. 40, which is the Indian and Colonial Divorce (Jurisdiction) Act, 1926, and accordingly the petition was in the form required by the rules made under that Act which form is similar to that of the petition for dissolution of marriage in use in England. The petitioner as required by Prov. (a), Section 1, Sub-section (1) of the Statute (16 and 17 Geo. V. Ch. 40) stated in para. 9 of her petition that in the interest of justice it is desirable that this suit should be determined in India inasmuch as the petitioner for want of sufficient means was prevented from taking proceedings in the Courts in England and the witnesses to the charge of adultery are in Calcutta.

3. So far as the facts of the case are concerned the petitioner has established to my satisfaction all the necessary formal averments in her petition and she has proved before me that the respondent has been guilty of adultery as alleged in para. 8 of the petition.

4. At the end of the first day's hearing I was some what dubious as to whether or not adultery on the part of the respondent has been sufficiently established. At that stage of the case the evidence merely came to this : that the respondent on the evening of 17th November 1927 had come to the Continental Hotel in Calcutta and had there entered in the Registration Book the names "Mr. and Mrs. Barnard" and the evidence of a clerk from the hotel indicated that the respondent stayed for the night at that hotel with a lady who was not the petitioner. The khansama from the hotel in question was called to say that on the next morning, somewhere about 9-30, he was summoned to room No. 77 (which was the number of the room set against the names of Mr. and Mrs. Barnard) and that there he found the respondent and a lady seated in the bed-room; both of them were however fully dressed. The khansama further stated that in pursuance of an order given to him by the respondent he served breakfast to the respondent and the lady in the bed-room in question.

5. Counsel for the petitioner-invited me to infer from those facts alone that the respondent had in fact committed adultery, but I was inclined to take the view that had the case stopped at that point the matter would have fallen within the decision of Lord Merivale in the case of *Farnham v. Farnham*[1]. There the learned President said: It was impossible to make a decree on the case as first presented to me. It came before the Court as if a married man who wished to he divorced had only to go to an hotel with a woman to achieve that end, and that, if he did so, the Court was of necessity obliged to grant a decree. If the Court were so to hold it would be the greatest possible encouragement to collusive proceedings. Divorce by consent is not part of the law in England.

6. In that case the learned President gave an opportunity to the petitioner in the case to call further evidence and following that precedent I allowed the petitioner in the present suit to be recalled on the second day's hearing in order to give additional evidence, and having heard that evidence of the petitioner I came to the same sort of conclusion as Lord Merivale finally arrived at in *Farnham v. Farnham*[2] and I was then fully satisfied that the joint presence of the respondent and the woman at the hotel was an incident in the course of a liaison and not a mere farce played for the purpose of obtaining the divorce.

7. I came to that conclusion because the petitioner produced and proved before me two letters written to her by the respondent whilst she was away in England from which it seemed quite clear that the respondent had committed adultery with a certain woman and that that woman had

had a child by him. The further evidence of the petitioner put an entirely different complexion upon the case from that which it bore after the first day's hearing and her evidence showed that the real facts were as follows: The petitioner had proceeded to England in the year 1923 expecting the respondent to follow her shortly afterwards which, however, he failed to do and thereafter owing apparently to financial stringency the petitioner was unable to return to India at the time she had intended but was obliged to remain on in England. It appears that letters from her husband as time went on became less and less frequent and he soon ceased to afford her any financial assistance whatever. Thereafter she received the first of the two letters to which I have already referred (dated 4th June 1925) in which her husband made definite confession of adultery and subsequently she received the second letter (which was dated 2nd September 1925) in which her husband informed her that the woman with whom he had been associating had given birth to a child. Apparently the petitioner made up her mind that it would be easier to prosecute divorce proceedings in India rather than in England, and accordingly she returned to this country in the latter part of the year 1926. For a time she stayed with her brother somewhere upcountry and then in the early part of 1947 she came down to Calcutta and instead of there and then commencing divorce proceedings against her husband she managed to effect a reconciliation with him and in fact not only forgave him for the misconduct which he had admitted but also in law condoned the adultery which had taken place by resuming cohabitation with her husband and living with him for some months at the address which I have already mentioned namely 9, Rawdon Street. Subsequently, however, she discovered that her husband was still associating and carrying on a correspondence with the woman with whom he had committed adultery and consequently the petitioner left the respondent and went to reside ones more with her brother up country. Towards the latter part of 1927 the petitioner came down to Calcutta, apparently because another brother of hers was ill, and she thereupon or soon after discovered that the respondent had stayed at the Continental Hotel with a woman on the night of 17th November as I have already described. It was clear to me from the evidence of the Hotel clerk that the lady with whom the respondent stayed on the night of the 17th was the same person with whom he had previously confessed to having committed adultery. It was manifest, therefore, as I have already stated, that the joint presence of the respondent and the lady at the Continental Hotel was part of an association of long standing and not a mere sporadic incident merely staged for the purpose of allowing the petitioner to institute divorce proceedings. Accordingly, so far as the facts of this case are concerned, no difficulty arises. I find as a fact that the respondent did commit adultery as set forth in the petition. I am also satisfied from the evidence of the petitioner that in the words of proviso (d), Sub-Clause 1, Section 1 of the Act of 1926 there was sufficient cause which prevented the petitioner from taking proceedings in the Court of the country in which she is domiciled, i.e., England, and I am satisfied that in the interest of justice that it is desirable that this suit should be determined in India.

8. The real question, however, which I have to determine in this case is whether or not on the proper construction of the statute (16 and 17 Geo. V.C. 40) read in conjunction with the existing law with regard to dissolution of marriage in India the petitioner is entitled to a decree for the dissolution of her marriage upon the ground of the respondent's adultery alone. No other ground was alleged in the petition and as far as the evidence goes it appears that the petitioner is not in a position to make a charge of any matrimonial offence against the respondent other than that of adultery. The whole question, therefore, is whether or not under the existing law it is sufficient for a wife petitioner domiciled in England to establish to the satisfaction of the Court in India the adultery of a respondent husband.

9. This question which I have to decide is of some public importance because apparently this is the first suit arising under the provisions of the Indian and Colonial Divorce (Jurisdiction) Act of 1926. The point for decision is a matter which may affect the matrimonial rights of all British subjects resident in India but domiciled in England or in Scotland. It is, therefore, to be regretted that a point of such far reaching effect should have arisen for decision in an undefended suit. Having regard to the importance of the matter I indicated that in my view the Advocate-General, as the authority appointed to give instructions to the Proctor under the provisions of the Act, ought to be represented at the hearing of this suit. Accordingly at the adjourned hearing Mr. R.C. Bannerjee appeared to represent the Advocate-General of Bengal in order that the other side of the case might be fully put before the Court. I have derived great assistance from Mr. Bannerjee as well as from Mr. Charles Bagram who appeared for the petitioner.

10. Now, in order to ascertain what the present legal position is, it is perhaps desirable to consider for a moment the matter in its historical aspect. By the Divorce Act of 1869 (which is Act 4 of 1869), passed by the Indian Legislature on 26th February 1869, for the purpose of conferring on certain Courts jurisdiction in matters matrimonial, it was enacted that that Act should extend to the whole of British India and also to British subjects in dominions mentioned in the Act, that is, certain Dominions of Princes and States in India in alliance with the British Crown, but nothing in that Act contained authorized any Court to grant any relief under the Act except in the cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decrees of dissolution of a marriage except in the following cases:

(a) Where the marriage shall have been solemnized in India; and

(b) where the adultery, rape or unnatural crime complained of shall have been committed in India; or

(c) where the husband has since the solemnization of the marriage exchanged his profession of

Christianity for the profession of some other form of religion, or to make decrees of nullity of marriage except in cases where the marriage has been solemnized in India.

11. Accordingly under that Act the power to grant relief other than divorce was limited to cases where the petitioner professed the Christian religion and resided in India, and in cases of dissolution of marriage it was necessary that a marriage should have been solemnized in India or the matrimonial offence committed in India or that the husband should have exchanged Christianity for some other form of religion.

12. It is to be observed, therefore, that the basis of the jurisdiction conferred by the Act of 1869 was the residence of the petitioner at the time of presenting the petition, and upon that footing for a space of something like 50 or 60 years, apparently, decrees for dissolution of marriage were from time to time granted by the various High Courts in India. The validity of such decrees was, however, challenged in 1921 in the case of *Keyes v. Keyes and Gray*[3] and it was there decided by Sir Henry Duke, President of the Divorce Court in England, that the Courts in India had in fact no jurisdiction to make decrees for dissolution of marriage in the case of parties not domiciled in India, even though the marriage was celebrated in India and the parties were resident in India, and the acts of adultery relied on were committed within the jurisdiction of the Indian Courts. The learned President in the course of his judgment pointed out that Lord Westbury in the case of *Shand v. Gould*[4] stated it to be one of the rules generally observed by Christians and civilized states that questions of personal status depend on the law of the actual domicile of the party concerned, and the learned President came to the conclusion that the Indian Councils Act of 1861, which was then the statute empowering the Governor-General in Council in India to make laws and regulations, 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. In other words, the effect of the decision in *Keyes v. Keyes and Gray (1921) P. 204 (Supra)*(Supra)is that the power to decree a dissolution of marriage even in India must be based upon the domicile of the parties and not upon the question of residence only. The effect of *Keyes v. Keyes and Gray (1921) P. 204(supra)* was to invalidate a very large number of decrees for dissolution of marriage which had been made by the Indian Courts upon the footing of the residence of the parties. Accordingly it became necessary that an Act of Parliament should be passed in order to validate such decrees. Such an Act was passed in the year 1921 under the title of the Indian Divorce Act whereby it was enacted that any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act of 1869 was confirmed and made absolute under the provisions of that Act for dissolution of marriage, the parties to which at the time of the commencement of the proceedings were domiciled in the United Kingdom, and any order made by the Court in relation to any such decree was to be valid and to be deemed always to have been valid in all respects as though the.

parties to the marriage had been domiciled in India.

13. The case of Keyes v. Keyes and Gray *(1921) P. 204 (Supra)*also in effect decided that if and in so far as it purported to confer jurisdiction to grant decrees for dissolution of marriage based on residence only the Divorce Act of 1869 was ultra vires the Indian Legislature under the powers conferred upon it by the Indian Councils. Act of 1861. The Indian Divorce Validating Act of 1921 remedied that defect, so far as decrees already made were concerned. Despite the decision of Keyes v. Keyes and Gray *(1921) P. 204 (Supra)*various Courts in India continued to make decrees for dissolution of marriage in the case of persons who were resident in India, but not domiciled in India, and to my mind there is no doubt that such decrees had no legal effect on the status of the parties at any rate outside India. One of such cases was that of Miller v. Miller which was decided by Mr. Justice Pearson in 1921. The head note of that case, is as follows:On a petition by the wife for dissolution of marriage it appearing that the husband was a. subject of the United States of America and domiciled in that; and that the marriage was celebrated and both parties resided in India up to January 1923, until which time the married., life lasted (when the husband had left for America where he since remained) proof was given of adultery and cruelty committed within the jurisdiction of the Court sufficient to entitle the petitioner to a decree nisi: Held : that the Court had jurisdiction to pass the decree. Semble : The result may be that the decree will hold good in India, but that everywhere else the parties will remain, still legally married.

14. Mr. Justice Pearson in the course of his judgment said this:Upon the question of jurisdiction, my attention has been drawn to the judgment of Sir Henry Duke in Keyes v. Keyes *(1921) P. 204 (Supra)*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.

That decision has since met with discussion in two reported cases in India, namely, *Wilkinson v. Wilkinson*[5] *and Lee v. Lee*[6] It has been pointed out that it would have been enough for the decision in Keyes v. Keyes *(1921) P. 204 (Supra)*to say that since *LeMesurier's case* [7]or at any rate since Bater v. Bater (1906) P. 209 the jurisdiction to decree dissolution of marriage depended according to English law upon the domicile of the parties and that as the domicile in Keyes v. Keyes *(1921) P. 204 (Supra)*was English, the English Courts would not recognise as valid in England a decree pronounced by a Court in India whose jurisdiction was baaed 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 wa3, therefore, as it appears to me, the extra-territorial invalidity 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.

15.Then Mr. Justice Pearson continues: But if that enquiry is to be made, th9n I think it is of great importance to recognize that in the case of Niboyet v. Niboyet (1878) 4 A.P. 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.

16. It may well be that the decision of Pearson, J., is right in so far as he says that the result may be that the decree will hold good in India, but that everywhere else the parties will remain still legally married.

17. With all respect to my learned brother I think there may be some doubt as to whether Miller v. Miller was rightly decided, but whether that was so or not is now quite immaterial, having regard to the provisions of Section 3 of the Statute 16 and 17 George V, Ch. 40, which provides that any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act of 1869 and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage, the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court under any such decree which, if the proceedings were commenced before the commencement of this Act, shall be valid and deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India. It is, therefore, quite clear that so far as decrees for the dissolution of marriage, the parties to which were domiciled in England or Scotland are concerned they are for all purposes to be regarded as valid.

18. It is, however, to be observed that the validating clause in the Act of 1926, only applies to decrees for the dissolution of marriage between persons domiciled in England and Scotland and therefore even at the present time, assuming the decision in Keyes v Keyes to have been correct (and apparently it was accepted as correct by the Imperial Legislature, seeing that it thought fit to pass the Validating Act of 1921) decrees for the dissolution of marriage pronounced by the Courts in India in regard to the marriage of persons who are not domiciled and resident in India or who are not domiciled in England or Scotland and resident in India as for example the parties in the case which has been referred to as the Cooch Behar case, would still not be valid. That case is reported in *Isharani Nirupoma v. Victor Nitendra Narayan*[8] where Gregory, J., did not

follow the decision in Keyes v. Keyes (1921) P. 204(supra). In my view, and with all possible respect to the learned Judge who decided that case, the decision was not in accordance with the law as it then stood or now stands. The next stage was this : having regard to the decision of Keyes v. Keyes (1921) P. 204, the Indian Legislature in 1926 passed an Act (being Act 25 of 1926) bringing the law in India, so far as jurisdiction in matrimonial suits is concerned, into line with that decision and by that Act, which is called the Indian Divorce (Amendment).Act of 1926, it is provided in Section 2: For paras. 2, 3 and 4, Section 2, Divorce Act the following shall be substituted namely : Nothing hereinafter contained shall authorize any Court to grant any relief under this Act except where the petitioner or respondent professes the Christian religion or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented, or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India and the petitioner is resident in India at the time of presenting the petition, or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.

19. It is, therefore, abundantly clear that under the Indian Divorce (Amendment) Act of 1926, in order to found jurisdiction to grant relief, the parties must be domiciled in India at the time when the petition is presented, and in order to determine in which Court the proceedings should be taken, they must also be resident in India by reason of the provisions of Section 3 of the Act of 1869.

20. The Act with which we are concerned in the present suit, however, extends the jurisdiction of the Courts in India in that it confers upon them by Section 1, Sub-section (1), jurisdiction to make a decree for dissolution of marriage (and as incident thereto make any order as to damages, alimony or maintenance, custody of children, and costs) in cases where the parties to the marriage are British subjects domiciled in England or in Scotland, in any case where a Court in India would have such jurisdiction if the parties to the marriage were domiciled in India. With regard to the latter part. of that section the Courts in India, as I have already stated, will have such jurisdiction where the parties to the marriage are domiciled in India and resident within the jurisdiction of one or other of the Courts in India as set forth in Section 3 of the Act of 1869. Now it has from time to time been argued that Section 7 of the Act of 1869 is sufficiently wide in its scope to enable the Courts in India to grant relief and even to make decrees for the dissolution of marriage upon any ground which from time to time would be sufficient in England. The marginal note of that section is "the Court to act on principles of English Divorce Court." In my view, however, Section 7 has no real application in a matter of this kind in that it cannot be read as interfering with or extending the grounds for dissolution of marriage as set forth; in Section 10

of the Act of 1869 and I am off opinion that Section 7, which says that subject to the provisions contained in this Act; the High 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 can only have reference to matters of machinery and questions of procedure and the amount of proof required in matters of this kind. That is apparently the view taken by Pearson, J., in the case to which I have already referred Miller v. Miller . the learned Judge says; 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 specially mentioned in the Act.

21. A similar view was taken by Crump, J., in *Wilkinson v. Wilkinson*[9]. There is moreover the opinion of Sir Lawrence Jenkins, Bailey v. Bailey (1903) 30 Cal. 490 n., as an authority for saying that the language of Section 7 of the Act of 1869 points rather to the rules and principles on which the Court should deal with matrimonial causes in the way requiring a certain degree of evidence and other cognate matters. Pearson, J., referred also to Ramsay v. Boyle (1903) 30 Cal. 489. My own view of the matter is that Section 7 has no sort of application to the present suit. In my opinion it cannot be said that there is anything like sufficient virtue in Clause 7 of the Act of 1869 to import into Indian Divorce Jurisprudence any fresh ground for relief other than those set forth in Section 10. It is quite clear to my mind that under the Indian Act of 1869 (and the extending Act of 1872) the only grounds on which marriage may be dissolved are those set forth in Section 10 of the Act of 1869. If the petitioner therefore in the present suit is entitled to the relief which she seeks solely on the ground of her husband's adultery her right to such relief must in my opinion be derived entirely from the provisions of the Indian Colonial and Divorce Jurisdiction Act of 1926 itself. That Act has to a large degree introduced a new principle into the administration of law in that it has conferred a jurisdiction on the Courts of one country that is to say, India, to grant a decree for dissolution of marriage in the case of persons who are domiciled in another country or rather in either one of two countries England or Scotland. I have no doubt that the word "jurisdiction" as used in the main part of Sub-section 1, Section 1 of the Act refers solely to the question of the High Courts in India having authority and the right to entertain and to try suits between British subjects in certain circumstances. The main part of the section does not in fact affect the question one way or the other as to what are the grounds upon which relief can be granted. If the first part of Section 1, Sub-section 1, stood alone and no proviso had been added the only grounds of relief would have been those set forth in Section 10 of the Act of 1869 unless it could be successfully argued that by virtue of Section 7 of the Act of 1869 other grounds might be added. I have already dealt with that aspect of the matter and I am clearly and

definitely of opinion that Section 7 does not affect this question one way or the other. That section, as I have already stated, is concerned in matters of procedure only and not substantive law at all.

22. Mr. Bagram has invited me to say that the terms of the proviso to Section 1, Sub-section 1 of the Act of 1926 are sufficiently definite to enable the petitioner herein to obtain a decree for dissolution of her marriage. That proviso is as follows: provided that (a) the grounds on which a decree for the dissolution of such a marriage may be granted by any such Court shall be those on which such a decree might be granted by High Court in England according to the law for the time being in force in England.

23. Now the law for the time being in force in England with regard to dissolution of marriage is contained in Section 176 of the Supreme Court of Judicature (Consolidation) Act of 1925. That section really reenacts the material provisions of the Matrimonial Causes Act of 1857 and the Matrimonial Causes Act of 1923 which latter Act for the first time conferred upon a woman the right to obtain a dissolution of her marriage on the ground of her husband's adultery alone. Section 176 of the Act of 1925 reads as follows:A petition for divorce may be presented to the High Court (in this part of this Act referred to as the Court) by a husband on the ground that his wife has since the celebration of the marriage been guilty of adultery and (b) by a wife on the ground of her husband has since the celebration of the marriage been guilty of rape, or of sodomy or bestiality or that he has since the celebration of the marriage and since the seventh day of July nineteen hundred and twenty three been guilty of adultery; provided that nothing in this Act shall affect the right of a wife to present a petition for divorce on any ground on which she might, if the Matrimonial Causes Act, 1923, had not passed, have presented such a petition.

24. If therefore there is no adultery available or provable as having been committed since 17th July 1923 a wife can still petition for divorce on the ground of adultery coupled with cruelty or desertion just as she could have done if the Act of 1923 had not been passed. That section (Section 176) as I have said sets out what the law is at the present time in force in England with regard to the grounds on which a decree for dissolution of marriage may be granted. It was argued and argued very cogently by Mr. Bagram that the whole scheme of the Act, the Indian and Colonial Jurisdiction Act of 1926, is to assimilate the law in India with that of England so far as regards British subjects resident in India but not domiciled there bat domiciled in England or Scotland and therefore seeing that divorce jurisdiction has been conferred on the High Courts in India where the parties are domiciled in England or Scotland it is only reasonable to suppose that the Imperial Legislature intended that that jurisdiction should be exercised on exactly the same grounds as the jurisdiction of the High Court in England would be exercised in similar circumstances. In support of that view of the matter Mr. Bagram pointed out that by Section 1,

Sub-section 4 of the Act of 1926 it is provided that the proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State in Council of India with the concurrence of the Lord Chancellor and those rules shall provide for certain matters as set forth in that subsection. The Indian and Colonial Divorce Jurisdiction Act, 1926 was passed on 15th December 1926, and rules under that Act (as provided for in Section 1, Sub-section 4) were published in the Gazette of India on 20th August 1927. Amongst the matters provided for in the rules as required by Sub-section 4, Section 1, are these : (a) for petitions being heard before a Judge or one of the two or more Judges of the Court nominated for the purpose by the Chief Justice of the Court with the approval of the Lord Chancellor of England : (b) for the decree or order made by such a Judge being subject to appeal to two Judges of the Court similarly nominated without prejudice, however, to any right or ultimate appeal to His Majesty in Council; (c) for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland; and then (g) for conferring on such official as may be appointed for the purpose within the jurisdiction of each High Court the like right of showing cause why a decree should not be made absolute as is exercisable in England by the King's Proctor. Suits of this character, i.e., suits for dissolution of marriage brought by a British subject who is not domiciled in India are to be tried by a Judge nominated for that purpose by the Chief Justice and approved by the Lord-Chancellor in England.

25. The Lord Chancellor is to have some say with regard to the Judge who shall exercise jurisdiction under this Act personally by reason of the fact that it was intended that a portion of the jurisdiction of the High Court in England with regard to matrimonial causes should be transferred to or at any rate exercised in India Further it is clearly an innovation that machinery should be instituted in this Court for setting up the office of a (King's) Proctor's department in order to ensure that some sort of scrutiny will take place after a decree has been obtained. I mention these matters solely by Way of illustration as showing that no doubt the whole scheme of this Act is to assimilate the position of British subjects in India to that of British subjects in England or Scotland. I think Mr. Bagram rightly says that the Act was designed to place British subjects in India for all purposes in the same position as they would be as if they were bringing suits for divorce in England. That view is strengthened by Prov. (c), Sub-section 4, Section 1, which provides: for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland.

26. Further there is this aspect of the matter. It would seam on the face of it somewhat unlikely that the Imperial Legislature intended one law to apply and the wife petitioner to be clothed with one set of rights so long as she is in England and yet to lose a portion of those rights as soon as

she came back to resume residence in India. Looking at the matter broadly therefore I think Mr. Bagram is right in his contention that this Act was designed and intended to pat British subjects on the same footing in India as they would be if they were actually resident as well as domiciled in England. The only doubt which is cast upon the matter arises from the fact that under the provisions of Section 1, Sub-section 1, British subjects domiciled in Scotland and resident in India would or might be in a different position from British subjects resident in India and domiciled in England. I have not had before me any evidence as to what the law with regard to divorce in Scotland is or with regard to the grounds upon which dissolution of marriage can be obtained in that country. I do not feel that I am entitled to take any judicial notice of or to use my own knowledge as to the law of Scotland with regard to the dissolution of marriage. But I may put the matter in this way that upon the assumption that there are in Scotland grounds for divorce different from those obtaining in India it follows that under Section 1, Sub-section 1, a Scotch woman resident in India but domiciled in Scotland may have entirely different rights from an English woman resident in India but domiciled in England, because it is clear that British subjects proceeding under this statute and bringing suits under, the terms of Sub-section 1 of Section 1 of the Act if they have any rights other than those conferred by Section 10, Divorce Act 1869, can only have such rights as existing according to the law for the time being in force in England.

27. I have already stated by reference to Section 176, Judicature Act 1925, what the law is at the present time in England. What I have to decide is whether or not that law is imported into India and made available to the petitioner in the present suit by reason of the provisions of Section 1(i) of the Act of 1926, and in particular by reason of the provisions, or rather the terms of the various provisos therein set forth. It is to be observed that by proviso (c) no such Court (that is, no High Court in India) shall grant any, relief under this Act except in the cases where the petitioner resides in India at the time of presenting the petition and the place where the parties married, or resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or adultery or crime complained of was committed in India. The petitioner in the present suit fulfils all the requirements of that proviso because, as I have already stated, she was residing in India at the time of presenting the petition, the place where the parties (i.e., where the petitioner and her husband (the respondent) last resided together) was in Calcutta, the marriage, was solemnised, as I have said, at Jhansi, and the adultery complained of was committed in Calcutta, so that the petitioner in this suit is within the terms of the provisos.

28. Mr. Bannerjee in a very able and full argument upon this matter pointed out to me that it is unlikely that the Imperial Legislature should have introduced what in effect is a new cause of suit

- a new ground for obtaining a decree for dissolution of marriage - into the law in India without making a definite and perfectly clear and express provision to that effect. He argued, and in my view there is considerable degree of force in the argument, that it is improbable that the Imperial Legislature which apparently for the first time in history, confers a direct jurisdiction upon the Courts in India with regard to a particular matter, would have extended the grounds upon which decrees for dissolution can be obtained simply by means of a number of provisos to a sub-section, and Mr. Bannerjee put forward for the consideration of the Court the contention that the proviso contained in Clause A was inserted merely for the purpose of excluding the petitioner who is a British subject not domiciled in India from obtaining a decree on a ground which would not be sufficient for obtaining a decree in England as for example, the ground set out in para. 2, Section 10 of the Act of 1869, which provides that any wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground that since the solemnization thereof the husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman.

29. It seems obvious that seeing that the provisions of the Act of 1869 were applicable only to British subjects professing the Christian religion, that provision was intended to safeguard a Christian wife from finding herself in the unfortunate and invidious position of having a husband who changed his religion merely for the purpose possibly of adopting some other religion which permits or countenances polygamy, which recognized polygamy so as to enable him to take to himself a second wife, and thereby act in derogation of the original wife's position. As I have already stated, Mr. Bannerjee argued that the proviso in (a) of Section 1(i) of the Act of 1926 is solely designed to shut out that ground for a dissolution of marriage. I think that argument would have had more force had the word "only" appeared after the word "shall" in the third line of the proviso, which would have made the proviso read as follows: The grounds on which a decree for dissolution of such a marriage may be granted by any such Court shall only be those on which such a decree might be granted by the High Court in India according to the law for the time being in force in England; and even so, I am not at all sure that it would have seriously affected the contention put forward by Mr. Bagram on behalf of the petitioner.

30. Looking at the whole scheme of this Act having regard, as I have already said, to the fact that it provides that rules should be made thereunder containing the provisions to which I have already referred and having regard to the fact that such rules have already been made on the same lines as the English rules which are The Matrimonial Causes Rules, 1924, I think I ought to come to the conclusion that the contention of the petitioner is well founded, and that it was the intention of the Imperial Legislature to put as far as possible a British subject, domiciled in England or Scotland resident in India, upon the same footing for the purpose of obtaining a

dissolution of marriage as he or she would be if they were bringing such suit not in India, but in England or Scotland as the case might be. One is fortified in that view by the terms of Prov. (d) of (1) which seems to imply, or rather more than imply, that it is in no sense a question of the ground of relief which is to determine the form in which the suit is brought, but the question of whether or not the petitioner can reasonably bring the suit in England, and whether it is in the interests of justice that the matter should be determined in India. It seems to me it would work great hardship to a wife petitioner if the Court were bound to say: It is true that there is a sufficient cause for preventing you from taking proceedings in the Courts of the country in which you are domiciled, and it is in the interests of justice, desirable, that the suit should be determined in India, but despite all that because the suit is to be determined in India, you have less rights in the way of obtaining disolution of your marriage than if you had started instituting the suit in the country of your domicile.

31. Having heard the very full and able argument of both counsel in this matter, and having considered the question very carefully, I have come to the conclusion that the words in Prov. (a) of Section 1(1) are intended to mean that the grounds on which a decree for the dissolution of marriage of a British subject domiciled in England may be granted by a High Court in India shall be those on which such a decree might be granted by the Divorce Court in England, according to the law for the time being in force in England, i.e., at the present time, according to the law laid down in Section 176, Supreme Court of Judicature (Consolidation) Act of 1925. That being the case the petitioner in this suit having established to the satisfaction of the Court the adultery of the respondent, and the Court being satisfied as to the other matters referred to in Prov. C and D of Section 1(1) the petitioner is entitled to the relief which she claims in this suit.

32. I accordingly pronounce a decree for dissolution of marriage of the petitioner and respondent. There will be the usual decree nisi with costs against the respondent and also an order that the respondent shall pay to the petitioner alimony at the rate of Rs. 250 per mensem pending further order.

Cases Referred.

1(1925) 41 T.L.R. 543
2(1925) 41 A.L.T. 543
3(1921) P. 204
4(1868) 3 H.L. 55
5A.I.R. 1923 Bom. 321
6A.I.R. 1924 Lah. 513
7(1895) A.C. 517
8A.I.R. 1926 Cal. 871
9A.I.R. 1923 Bom. 321