

CALCUTTA HIGH COURT

Noor Jehan Begum

Vs

Eugene Tiscenko

(Derbyshire ,C.J.)

19.12.1941

JUDGMENT

Derbyshire, C.J.

1. This is an appeal against the judgment of Edgley J., dated 3rd January 1941 ('41) 28 A.I.R. 1941 Cal. 582 dismissing the plaintiffs suit. The plaintiff asked for a declaration that her marriage with the defendant stands dissolved, alternatively a decree of dissolution of her marriage. The plaintiff-appellant, who sues as Noor Jehan Begum, was born in Poland. She married the defendant-respondent Eugene Tiscenko, a Russian subject (at present said to be residing at Edinburgh in Great Britain) on 20th May 1931, in Berlin according to civil rites. The parties lived together at various places in Europe until June 1938 and had one son Oleg. The plaintiff and the defendant last resided together In Rome from which place the plaintiff came to Calcutta while the defendant went to Edinburgh to qualify himself for a British Medical Degree. The plaintiff arrived in Calcutta on or about 1st September 1938 where she has resided ever since; the defendant has not joined her. The plaintiff states that her husband, the defendant, has not maintained her or her son since their arrival in India and that she has been living partly on her own earnings and partly on help received from her mother. The plaintiff further states that her married life with the defendant has been unhappy, and rinding whilst in Calcutta, relief and solace in the teachings of Islam on 27th June 1940, of her own free will and after due deliberation, embraced the Islamic faith and took the name of Noor Jehan. The conversion took place at the Nakoda Mosque at No. 19, Chowringhee Road in Calcutta. Upon her conversion, the plaintiff states that she sent a cable to her husband on 28th June 1940 informing him of her conversion to Islam and requested him also to accept the Islamic faith. The telegram reads as follows: To Tiscenko, 24, Montepelier Park, Edinburgh. Have become Mohamedan. Call upon you become Mohamedan. Wire consent or refusal 19, Chowringhee Calcutta.

From Tiscenko.

On 2nd July 1940 a telegraphic message from the defendant was delivered to the plaintiff at her place of residence in Calcutta which runs as follows: My religious convictions unshakable. I refuse absolutely change my faith as you have done. Oleg must remain Greek Orthodox. Tiscenko. The plaintiff brought the present proceedings on 5th August 1940; the plaint was served by post on the defendant in Edinburgh. In reply to the service the defendant wrote the following letter to the plaintiff:

24, Montepelier Park, Edinburgh 10 19-9-40. Dear Vera, I received the papers and was amazed on reading their contents. I hope you fully realise how much you have asked of me. The future will prove whether you do or not. For your sake and Oleg's I have acknowledged the receipt of the Writ and shall put forward no defence but I shall be glad to have your immediate assurance regarding costs. In this I trust you to fulfil your promise. I still hold all your correspondence. Yours sincerely, E. Tiscenko.

2. The suit first appeared in the undefended list and the learned Judge on 13th December 1940 pronounced a decree in her favour in Court, but the same day before the decree was drawn up and -signed withdrew it on a further consideration of the matter. The matter then came on for further shearing on 20th December 1940 when at the Judge's 'request Mr. S.M. Bose, a former standing counsel appeared as amicus curiae. After talking further evidence and hearing counsel for the plaintiff, and Mr. Bose, the learned Judge dismissed the plaintiff's suit. From that decision she now appeals. In these proceedings, Mr. S.M. Bose has again appeared as amicus curiae at the request of the Court, and the Court is deeply indebted to him for his assistance. The learned Judge has accepted the plaintiff's bona fides in the matter of conversion. Having regard to the legal view I take of our jurisdiction in this case I make no comment on this finding, nor on the actions of the plaintiff since 27th June. The proceedings are not brought under Clause 35 of the Letters Patent since the plaintiff does not profess the Christian religion. They apparently have been brought under Clause 12 of the Letters Patent, that is to say in the exercise of the Court's ordinary civil Jurisdiction. The first question is as the Court jurisdiction to grant the relief the plaintiff seeks? She is seeking relief either by way of a declaration that her marriage with the defendant stands dissolved or in the alternative a decree for dissolution of her marriage. She also seeks the custody of her child. In *Le Mesurier v. Le Mesurier* (1895) A.C. 517, an Englishman born and domiciled in England but living and working in Ceylon sought a dissolution of his marriage in a Court in Ceylon on the ground of the adultery of his wife. The wife contested the jurisdiction of the Court to entertain the proceedings. Eventually the matter came before the Privy Council. Lord Watson gave the judgment of the Board, and after reviewing all the then authorities and the pronouncement of several writers of authority on Private International law concluded with these words:

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in *Wilson v. Wilson* (1872) 2 P.& D. 4422 which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce : 'It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable therefore that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another'.

3. In my opinion, this Court can do no other than exercise its jurisdiction in accordance with the principles so laid down. The wife's domicile is that of her husband. What the husband's domicile in this case is, is very difficult to say. He appears to have been born in a part of Bussia which probably was included in Poland after the War of 1914-18; was married in Germany; obtained a passport at Nancy in France; and lived in Borne until he went to Edinburgh in June 1938 with the intention of qualifying there in medicine, his wife coming to India. His wife says he intended to join her in India. As he contemplated taking a British medical degree it may be that he intended settling in some part of the British Empire, but at the time of these proceedings he was in Edinburgh and, as far as one can gather, has never been nearer India than Borne a matter of some six thousand miles away. Again the defendant is not within the jurisdiction of this Court and never has been. Beyond acknowledging the receipt of the plaint to the Sheriff and writing the letter of 19th September 1940, to his wife, the defendant has had no contact with Calcutta or dealings here. He has not entered appearance in this suit or taken any steps in these proceedings. I am unable to draw the inference that the defendant has submitted to the jurisdiction of this Court. Even if he had done so, it would not have availed the plaintiff because as Cozens-Hardy, M.R., said in *Harriman v. Harriman*¹ "The jurisdiction in matters of divorce is not affected by consent." Wherever Eugene Tiscenko, the plaintiff's husband is domiciled he is not domiciled in India, and never has been. As the plaintiff's domicile is that of her husband's she is not domiciled in India. As the parties are not domiciled in India, it is clear that we cannot entertain this suit either in respect of dissolution of marriage or a declaration that the marriage status of the parties has been changed. I therefore agree with the learned Judge that this Court has no jurisdiction to

entertain these proceedings. Had I thought that the question of jurisdiction was open to some doubt I should have been prepared to deal with the rest of the judgment appealed from; but in my view there is no doubt that we have no jurisdiction in this matter. The rest of the judgment appealed from deals with certain matters upon which my learned brothers and I myself experienced some difficulties and doubts in places, and must be regarded as obiter dicta. This appeal must be dismissed. No order as to costs.

Ameer Ali, J.

4. With regard to the first part of the case based on matrimonial jurisdiction as such dealt with in the learned Judge's judgment from pages 26 to 31 no question arises, nor has this part of the judgment been assailed. With regard to the second and main part of the case dealt with in the rest of the judgment, that is, the claim to a declaration as to status, I agree with my Lord the Chief Justice's view as to jurisdiction, i.e., that a Court has no jurisdiction under Section 42, Specific Relief Act, or, generally under Clause 12 of the Charter to grant a declaration of the nature sought against this defendant. I agree further with the reasons stated by my Lord, namely, that this is, in effect, though not in form, a decree dissolving marriage. One cannot declare the plaintiff's status without declaring the defendant's status and thus affecting the matrimonial relationship between the parties. The English Courts do not grant or recognise divorces where there is no domicile of the parties or, at any rate, of the husband. This convention is based upon a principle of quasi international law based on mutual toleration. The inference to be drawn from the decided cases relating to such declarations in India and the rulings of the Privy Council including *Sassoon v. Sassoon*² is that the same rule should be followed. The inference is negative; but in each of these cases the parties were domiciled and resident within the jurisdiction of the Courts.

5. I desire, however, to make the following reservations : (1) This decision does not affect the jurisdiction of this Court in the ordinary case - a case not of status - where a part of the cause of action arises within the jurisdiction and leave has been granted. (2) I desire to reserve the general power of this Court to grant declarations of a matrimonial character in cases of non-Christian marriages. (3) I desire to distinguish the question of cause or ground for divorce from the question of jurisdiction. The English Courts do appear to recognize a decree of a foreign Court, with jurisdiction, made upon a ground not recognized by English law. (4) Lastly it appears that the English Court might recognize as good for India a divorce granted in India, without jurisdiction according to English principles, but where the Indian Courts have assumed jurisdiction. Those questions do not arise having regard to the fact that in this particular case the parties are domiciled without British India, and the defendant is non-resident. In these circumstances, I agree with my Lord the Chief Justice, that in this unusual case, jurisdiction, and

if not jurisdiction, discretion is an answer to the plaintiff's suit. It is therefore not necessary for this Court on appeal to discuss the several questions of substantive law on which the learned Judge, having invited argument, felt it his duty to rule. On the other hand, as one of the learned Judge's colleagues on the original side, who may at any time have to deal with the normal case and to whom the learned Judge's judgment will no doubt be cited, it is I think proper that, while expressing my appreciation of a statement of the law both exhaustive and elaborate, I should indicate the points on which I differ. With regard to jurisdiction, that is jurisdiction apart from divorce jurisdiction, the learned Judge's ruling is at p. 35, line 38. It appears to me to involve points of substantive law, e.g., the portion of the sentence "and does not depend in any way upon the personal law of her religion," that being a matter of "cause" rather than jurisdiction. Nevertheless, so far as it is a ruling on jurisdiction based on absence of domicil and residence, I agree with it. The three points of substantive law relied upon by the learned Judge are as follows : (1) The attraction or incidence of Moslem personal law to Moslems; (2) a point of Moslem procedure which becomes a point of substantive law; and lastly (3) obsolescence of Moslem personal law. With regard to the first point dealt with at pp. 33 and 34 the learned Judge has ruled that the domicile of the plaintiff prevents her acquiring, or prevents the attachment to her, of Moslem personal law. On this point I myself would desire to have further assistance before coming to the same opinion. The cases in *Bartlett v. Bartlett*³ and *Sassoon v. Sassoon* (1924) 1924 A.C. 1007 (Suupra) I should like discussed. The second point that of Moslem procedure, is one upon which I should have adopted the view expressed in the course of argument by my learned brother Syed Nasim Ali J. On the third point I desire to say a little more. The major portion of the learned Judge's judgment is adorned with the phrases "justice, equity and good conscience," "public policy," "lifelong union," "indissoluble union," "monogamous marriage" and "Christian marriage." It seems to me that he has used these phrases to indicate two concepts, for which for purposes of analysis I have adopted the following symbols PP. = public policy, MM. = monogamous marriage. The view put forward by Mr. S.M. Bose and accepted by the learned Judge is that the relevant Moslem personal law is obsolete having regard to P.P. This ruling does affect the normal case, which as I say any Judge on the original side may be called upon to consider, i.e., of persons domiciled in India.

6. I entirely agree that English Divorce law only recognizes for purposes of divorce a marriage which is a monogamous marriage. I cannot agree that this principle of M.M. is to be introduced into India for the purpose of vitiating any rule of personal law - Hindu, Mahomedan, Buddhist, as being inconsistent with P.P. It seems to me that the learned Judge by adopting this process has decided that there is no cause for divorce according to Moslem law, because Moslem law recognizes as marriages unions which are not marriages according to Probate and Divorce Division in England. I am unable to agree with this reasoning. I cannot see why any rule of

personal law in India is to be vitiated because it is inconsistent with the English legal conception of marriage for purposes of divorce. It seems to me, with respect, that the learned Judge having taken back at p. 37 to the Abbasid Caliphs has overlooked the system introduced and maintained by the Turkish para-mounts of India and their successors, the British. That policy, it so happens, has been described by Lord Hobhouse in *Parapano v. Hapaz*⁴ where the question was in a sense the opposite question; how far under Turkish rule the laws of the old Christian Church had been preserved by the Turkish Emperors for their Christian subjects. The view of the Court from which the appeal lay to the Judicial Committee was as follows: We feel that it is extremely improbable that the Ottoman Government should have consented to confer on its Christian subjects any larger privileges with regard to the legitimising of children than belong to its Moslem subjects.

7. Lord Hobhouse after quoting the introduction to the Hedaya, said this: If any inference may be drawn from the policy of one set of Mahomedan conquerers to that of another, the policy of the conquerers of India is at variance with what the learned Judges think to be probable. During the period of their rule, as at the present time, there has been such wide liberty for each religious community to follow its own laws in private affairs, that it may almost be said that territorial law has not existed there except for matters of Supreme Government.

8. Then at page 171: There is nothing improbable in supposing that when Mahomedans conquered territories inhabited by people of another creed supported by strong religious organizations, they smoothed their way by leaving important local and personal usages to a great extent undisturbed.

9. The policy of the succeeding paramounts for India, the British, has been exactly the same. They "smoothed their way." Hence Charters, Proclamations of the Queen, Government of India Act and so forth leaving the personal law of each community intact. Hence, as Lord Hobhouse points out, there is hardly a territorial law, or law of domicile in India. It seems to me, therefore, that, having no one personal law or law of the domicile or territorial law, there can be no one public policy or one good conscience. What is the good conscience of one is the bad conscience of another. It follows that we have our own problems within India: conflicts, so to speak, of private international law between group and group, community and community for which we have adopted the misbegotten word "communal." Those problems, juridically, no less than politically can only be solved by applying principles of mutual consideration. Hence statutory rules such as my learned brother, Syed Nasim Ali J. preferred to, somewhat difficult to find, and sometimes difficult to apply. Eules failing, there remains, as the better part of judicial valour "discretion," ; Section 42, Specific Belief Act.

Nasim Ali, J.

10. I agree with my Lord the Chief Justice that this appeal should be dismissed. The plaintiff-appellant is a Christian of Russian parentage. She was born in Poland. Defendant-respondent is a Russian Christian. Plaintiff was married to defendant in Berlin. Defendant never came to this country. He is residing at present in Edinburgh in Great Britain. Plaintiff is residing within the local limits of the ordinary original civil jurisdiction of this Court since September 1938. On 27th June 1940, she became a convert to Islam. The next day she sent a message by telegram to the defendant informing him of her conversion to Islam and calling upon him to embrace Islam. On 2nd July 1940, the defendant informed the plaintiff by a telegraphic message that he was not willing to embrace Islam, On 4th August 1940, plaintiff raised the present suit on the original side of this Court for a declaration that her marriage with the defendant has been dissolved under the Muslim law. She also prayed in the alternative for a decree dissolving her marriage with the defendant. The summons of the suit was thereafter served on the defendant in Edinburgh. On 19th September 1940, he wrote a letter to the plaintiff acknowledging the receipt of the writ and stating that he would put forward no defence. On 3rd January 1941, Edgley J. heard the suit ex parte and dismissed the suit on the following grounds:

(1) That the plaintiff and the defendant have a Russian domicile. (2) That the plaintiff can obtain dissolution of her marriage with the defendant only in the Courts of Russia. (3) That the plaintiff not being domiciled in India cannot be allowed to dissolve a Christian marriage by observing the procedure prescribed for this purpose by the Muslim law. (4) That even if it be assumed that the plaintiff is entitled to dissolve her marriage on the refusal of her husband to embrace Islam after it was presented to him she has not adopted the correct procedure under the Muslim law inasmuch as Islam was not presented to the defendant by the Court acting as Kazi as required by Islamic law. (5) That Islamic law relating to converts to Islam is opposed to public policy and is to be regarded as obsolete in this country.

11. On 17th February 1941, plaintiff filed the present appeal. Mr. Banerjee appearing on behalf of the plaintiff-appellant did not press the plaintiff's prayer in the plaint for a decree dissolving her marriage with the defendant. He confined his arguments to-the plaintiff's prayer for a declaration that her marriage with the defendant was dissolved on account of her conversion to Islam and the refusal of her husband to embrace Islam. The only point for determination in this appeal, therefore, is whether the Court should declare under Section 42, Specific Belief Act, that the marriage of the plaintiff with the defendant has been dissolved. Under Section 42, Specific Relief Act, the Court has power to declare that the plaintiff is entitled to a certain "legal character." The words "legal character" have not been defined in the Specific Belief Act. These words, in my opinion, are wide enough to include the status of a person. In order to entitle the

plaintiff to bring a suit under Section 42, Specific Belief Act, it is not necessary that the defendant should actually deny the plaintiff's legal character. If the defendant is interested to deny the plaintiff's legal character plaintiff may come to Court for a declaration that; he or she is entitled to the legal character. If the claim which may be set up by the defendant is a hindrance to the plaintiff in the exercise of his or her rights or will expose him or her to liability if he or she disregards it he or she may come to Court for a declaration that the claim which may be so set up by the defendant is not well founded. Plaintiff has brought the present suit against the defendant because the latter is interested to deny the validity of the dissolution of her marriage with him under the Muslim law. The power of the Court, however, to make the declaration is discretionary and will be used with caution. If the declaration sought for is useful and is sufficient to put a stop to the dispute between the parties the Court should make the declaration (Daniel's Chancery Practice, Edn. 8, Vol. 1, p. 689.)

12. When the jurisdiction of the Court is exercised according to the rules of international law, its decree should be respected by the tribunals of every civilised country : *Le Mesurier v. Le Mesurier*⁵ In such a case the decree is useful and will put a stop to the dispute between the parties. Where the Court of a country in which the spouses are domiciled is bound by the municipal law of that country as in 1924 A.C. 1007 to acknowledge the validity of divorce good according to the religious law of the person concerned it is bound to make a declaration that the marriage has been dissolved. No statute law was placed before us by the learned Counsel for the appellant by which the Courts in this country are bound to acknowledge the validity of divorce according to the religious law of the plaintiff in a suit who is not domiciled in this country. A defendant in a suit may be a citizen, native or naturalised or a foreigner. "In regard to the former, while within the territory of their birth or of their adopted allegiance, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot Decontrolled; and it ought to be respected everywhere But as to citizens of a country domiciled abroad, the extent of jurisdiction which may be lawfully exercised over them in personam is not so clear upon acknowledged principles. It is true that nations generally assert a claim to regulate the, rights and duties and obligations and acts of their own citizens, wherever they may be domiciled. And so far as these rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the sovereign power of their own country, either for enforcement or for protection or for remedy, there may be no just ground to exclude this claim.... But when such rights, duties, obligations, and acts come under the consideration of ether countries, and specially of the foreign country where such citizens are domiciled, the duty of recognizing and enforcing such a claim of sovereignty Is neither clear, nor generally admitted. The most that can be said is, that it may be admitted ex comitate gentium. But it may also be denied ex justitia gentium, whenever it is deemed injurious to the interests of such foreign nations, or subversive of their own policy or

institutions." (Story's Conflict of Laws, Edn. 7, pp. 682-683.)

13. Much reliance was placed by the learned Counsel for the appellant upon the letter written by the defendant to the plaintiff after he was served with summons of this suit in which he said that he would not put forward any defence in this suit. This, however, does not appear to me to amount to submission of the defendant to the jurisdiction of this Court. Plaintiff is not domiciled in this country. The defendant is a non-resident foreigner. He has not in any way submitted himself to the jurisdiction of this Court, I am therefore of opinion that the declaration sought for by the plaintiff in the present suit will not put a stop to the dispute in this case. I do not therefore consider this to be a fit case in which the Court in its discretion should pass a decree under Section 42, Specific Belief Act, declaring that the marriage of the plaintiff with the defendant has been dissolved. In this view of the matter, the questions whether the effect of the conversion of the plaintiff to Islam and the refusal of the defendant to embrace Islam is the dissolution of the marriage of the plaintiff with the defendant, whether the plaintiff has adopted the correct procedure under the Muslim law while she presented Islam to the defendant, whether the Muslim law relating to converts to Islam is opposed to public policy and is to be regarded as obsolete in this country, do not arise for determination in this case and I express no opinion on these questions. If the learned Judge intended to lay down that his decisions on these questions would also apply to converts to Islam domiciled in this country he went beyond the scope of the present suit inasmuch as the decision on the law relating to the rights of converts to Islam domiciled in this country was not necessary for the disposal of the present suit.

Cases Referred.

1(1909) L.R.P. 1233 at p. 131

2(1924) 1924 A.C. 1007

3(1925) 1925 A.C. 377

4(1894) 1894 A.C. 165 at page 169

5(1895) 1895 A.C. 5171 at p. 527