

(1977) 10 CAL CK 0009

In the Calcutta High Court

Case No : Civil Revision Case No. 3436 of 1974

Gour Gopal Roy

APPELLANT

Vs

Smt. Sipra Roy

RESPONDENT

Date of Decision : 05-10-1977

Acts Referred:

Hindu Marriage Act, 1955 — Section 1(2), 2

Citation : AIR 1978 Cal 163 : (1977) 2 ILR (Cal) 681

Hon'ble Judges : Sankar Prasad Mitra, C.J.;Sabyasachi Mukharji, J;S.K. Datta, J

Bench : Full Bench

Advocate : Jyotirmoyee Nag and Gunendra Chandra De, for the Appellant;
Paresh Nath Bhattacharjee, for the Respondent

Judgement

Sankar Prasad Mitra, C.J.—This reference has been made under the Second Proviso to Rule 1 of Chapter II of the Appellate Side Rules by a Division Bench consisting of Mr. Justice S. K. Datta and Mr. Justice H. N. Sen.

2. The point that arises for our decision is whether the Hindu Marriage Act, 1955 can be applied to a person, who is outside the territory to which the Act applies and is not of Indian domicile.

3. In the Rule before the Division Bench the petitioner Gour Gopal Roy, husband of the opposite party, Sm. Sipra Roy, had challenged an order of the learned Judge of the 9th Bench, City Civil Court, Calcutta in a Matrimonial action holding that the court had the jurisdiction to try the proceedings.

4. Sub-section (2) of Section 1 of the Hindu Marriage Act, 1955 provides as follows :

"It extends to the whole of India except the State of Jammu and Kashmir, an"d applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories."

5. The point for consideration of the Special Bench is about the scope and extent

of the operation of the Hindu Marriage Act, 1955. On an analysis of the relevant provisions of the Act particularly those of Sub-section (2) of Section 1 and of Section 2 it appears that the Act extends to the whole of India except Jammu and Kashmir. For our purposes in this reference, all persons to whom it applies who are within the said territory would come under the operation of the Act. An extraterritorial operation has also been provided for by including Hindus outside the said territory who are domiciled in the said territory.

6. The parties here are at variance on whether the Act would apply when one of the parties to the marriage is within the said territory while the other is not. It appears that the Act makes no provisions for such a contingency.

7. The contention of the petitioner was that he was living outside the said territory, namely, in London. He was not of Indian domicile but of Bangladesh domicile. In the circumstances, the City Civil Court had no jurisdiction to try the matrimonial action against him.

8. Before the City Civil Court, the learned lawyer appearing for the wife, did not dispute that the husband was of Bangladesh domicile and had Pakistani domicile prior to the emergence of Bangladesh. But before us various materials have been relied on which may lead to a different conclusion. For instance an affidavit has been filed by one Susen Nandi, affirmed on the 11th July, 1977 and various letters have also been shown to us. The purpose of relying on the said affidavit and the said letters appears to be that when the negotiations for marriage were going on, the husband had given the assurance that he would purchase a house in or near Calcutta; he would settle down in India and permanently reside here. It also appears that immediately after the marriage the wife applied for a passport and was given an Indian passport. We do not wish to express any opinion either on the value or credibility of these materials but if the facts, now stated before us, be found to be correct, it may be possible to conclude that at the time of marriage the husband had acquired Indian domicile and had continued to retain the domicile.

9. Domicile is a question of fact in which intention plays a vital role. In Cheshire's Private International Law, Eighth Edition at page 154 it is stated "to put it more precisely, the acquisition of a domicile of choice requires not only residence in a territory subject to a distinctive legal system, but also an intention by the propositus to remain there permanently. There must be the act and there must be the intention. It is, therefore, essential to ascertain what degree of permanency of residence must lie within the contemplation of the propositus. This is not difficult if the word permanent is used in its correct sense signifying the opposite of "temporary". According to the Shorter Oxford English Dictionary it means "lasting or designed to last indefinitely without change", and this indeed is the definition that most of the Judges have recognized when required to consider the nature of the intention necessary for a change of domicile"

10. The position, therefore, is that a domicile of choice is dependent on (a)

residence; and (b) intention of the person who resides. In the instant case there is an affidavit and there are also certain letters which tend to reveal an intention. As to how far that intention was put into practice or given effect to, we do not know. That is a matter which the trial court has to ascertain on the basis of evidence adduced before it.

11. The trial court is of opinion that it would be enough if one of the parties is of Indian domicile. The trial court on the basis of this finding has assumed jurisdiction. The trial court has relied on a decision of this Court reported in Prem Singh Vs. Sm. Dulari Bai and Another, . This decision does not support the view which the trial court has taken. In fact, it was not concerned with that problem at all. In these circumstances, the trial court's order dated 9th July, 1974 being Order No. 10 in Matrimonial Suit No. 167 of 1973 before the 9th Bench of the City Civil Court at Calcutta is set aside. The matter is remanded to the trial court for a decision on the question as to whether the husband had acquired the Indian domicile in the light of the legal propositions stated by us in this judgment.

12. The Rule is disposed of accordingly. There will be no order as to costs.

13. Let the records be sent back to the trial court forthwith.

14. In an attempt to effect a reconciliation by this Court learned Advocate appearing for the husband states that the husband will send the Air ticket from Calcutta to London and also a declaration that the husband will support her in London. The learned Advocate for the wife states before us that his client will go to London upon receipt of the Air ticket and the declaration and withdraw the suit before the trial court.

15. The husband's letter of September 19, 1977 and the wife's letter of the 28th September, 1977 have been produced before us by learned Advocate appearing for the wife.

16. Let these letters be kept on the record and sent to the trial court along with the records.

Sabyasachi Mukharji, J.

17. I agree.

S.K. Datta, J.

18. I agree.