

(1929) 07 PAT CK 0036

In the Patna High Court

Mary Josephine Pompeii Connally

APPELLANT

Vs

James Sidney Osmond Conally

RESPONDENT

Date of Decision : 09-07-1929

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 1930 Patna 63 : 120 Ind. Cas. 465

Hon'ble Judges : Wort, J

Bench : Single Bench

Judgement

Wort, J.—This rule was granted to show cause why the judgment and decree pronounced by me, on the 10 th August, 1928, should not be reviewed on the ground of the discovery of new and important matter and evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the respondent at the trial. There is also an application before me to execute against the respondent the decree which I pronounced on that date granting the petitioner an order for restitution of conjugal rights.

2. It would first appear that in a case of this kind the only material dates would be those between the institution of the suit and the date upon which the decree was pronounced; but, having regard to the circumstances, of this case, that statement of the position cannot apply to this case.

3. It is important to mention some of the dates in the matter for the purpose of coming to a determination on the questions before me which are mixed questions of law and fact.

4. The parties were married on the 7th June, 1926. They were married at a Roman Catholic Church, the Church of St. Teresa in Calcutta professing as they did that faith. In August 1926, a suit by the respondent, the wife, was filed in this Court seeking a declaration that her marriage was null and void on the ground of impotence. There was an alternative prayer for a judicial separation based on allegations of cruelty. The suit was dismissed on the 24th February,

1927. In June 1928, this suit was commenced. The respondent, the wife, filed an answer but did not defend the suit for reasons which will presently appear. On the 10th August, 1928, I gave the petitioner a decree, as I have already indicated, ordering the respondent to cohabit with the petitioner, in other words giving him a decree for restitution of conjugal rights. It then appears that the wife went to her priest in Calcutta proposing to file a petition before the Ecclesiastical Court for a decree for nullity. In the events which happened a decree was pronounced but not on the grounds which were alleged or suggested by the petitioner in the first suit, and that decree was granted in these circumstances. The priest, Father Dandoy, who was deputed to make an investigation in regard to the matters in the suit, if such it may be called, noticed in the records of the suit which the wife had brought in 1926 for a decree for nullity, certain statements made by the husband as regards the relationship which is supposed to have existed as between her and her husband before marriage. Shortly stated the relationship was [that they were cousins. Incidentally I might mention that in the evidence of the respondent, the wife, there is also a statement as to the relationship of the i respective families. Having noticed these statements in the evidence, Father Dandoy proceeded to investigate the matter, and, as a result, came to the conclusion that the parties were related within the third degree of consanguinity, which, according to the evidence and his affidavit in this case, by the Cannon Law governs the parties was within the prohibited degree. The result, therefore, was that in his opinion the marriage was voidable and from the affidavit before me of the respondent it appears that the Ecclesiastical Court in due course pronounced a decree for nullity. That was on the 8th February, 1929. At this stage it appears that the applicant, that is the respondent in the suit before me, changed her Solicitors. It is not clear exactly what papers she then placed before her [new firm of Solicitors, being Messrs. Clarke Rawlins Ker and Co., of Calcutta. I think it sufficiently appears from the evidence that she did not place before them the papers relating to the suit before this Court. It also appears from her affidavit and evidence that she then proceeded to file a petition in the High Court of Judicature at Calcutta praying for the annulment of her marriage on the same ground which she has alleged before the Ecclesiastical Court. That suit was withdrawn before citation was served up on her husband.

5. Now on the 7th of May or about that date the respondent was served with a notice issued by this Court in what was known as the Matrimonial Execution Case No. 1 of 1929. She appears to have taken this notice to her Solicitors who, for the first time, became aware of the fact that this Court had pronounced a decree for restitution of conjugal rights. There was some delay after that date, but the next step in the proceedings was that she applied to this Court by Counsel for the rule which is the subject matter of this judgment.

6. It appears that the exact relationship of the parties is this. That their respective maternal grandmothers were the daughters of one Katherine Wallis by different fathers, that is to say, Katherine Wallis married a second time one

Simon Peters and the maternal grandmother of the respondent in this petition was her daughter, by that husband, whereas the maternal grandmother of the husband was the daughter of the same Katherine Wallis by M. J. Keys.

7. The question which I have to determine is, whether the matter which came to light by reason of the investigation of Father Dandoy was a matter of evidence which, after the exercise of due diligence, was not within the respondent's knowledge. It is clear that if it is the Cannon Law as is stated by the Jesuit Father who deposes in an affidavit before me, then the relationship between the parties, such as it was, was a bar to the marriage and would be a ground as was the fact to make the Ecclesiastical Court give a declaration that the marriage was void. As I said, at first sight it would appear that in a case of this kind the only material dates which have to be considered are those between June, 1928 when the suit was filed and the 10th of August, 1928, when this Court pronounced the decree for restitution of conjugal rights. The peculiar circumstances which are present in this case prevent my holding that those dates are the only material dates. The facts on this point are these.

8. The husband seems to have first become acquainted with the family of the respondent in 1921. At his very first appearance, according to the evidence of the lady, who went into the witness box and was cross-examined on her affidavit, he asserted that there was the relationship of cousins between them, that is to say their respective fathers were cousins. If that were the fact, of course the husband and the wife would be second cousins. The wife who went into the witness box emphasised the fact which she alleged that she never accepted this statement of the husband. I frankly do not accept that evidence. She appears to have written two letters, amongst others, one on the 21st February, 1926, and one on the 24th February, 1926. These letters were put to her in cross-examination and she states that she "had been at Mass, that she had taken the golden opportunity of asking one of the Parish Priests if there was any hitch and he said no; it has all been done away with and so "keep your mind at ease and do not mention the purport of my letters to Mrs. Os." The lady explained that Mrs. Os. was Mrs. O'Sullivan, who is her aunt. A similar statement to that which I have referred appears in the letter of the 24th February, 1926. I might say that these letters are just the sort of letters that a girl would write to one to whom she was engaged and to whom she was about to be married. There is nothing in the statements which she need be ashamed of in any way; but I do not accept her statements or her explanation in regard to those statements which she made in those letters. She asserted that she was merely bluffing her husband in making those statements; she also asserted that they had reference only to the fact that her aunt Mrs. O'Sullivan was anxious to marry her to her son, that is to say, Mrs. O'Sullivan's son. As I have already stated I do not accept her statements made in the witness box for a moment. She appears to be under a misapprehension that the statements in her letters were in some way damaging, whereas as a matter of fact it was one of the main points in support of her case. Letters were also put to her which were written by her mother about four

months before the date of the letters she herself had written; in one case it was two months before; and the mother in the later letter, that is the one dated X'mas 1925, signed herself "Your affectionate cousin." The letter was written to the mother of the petitioner, the husband. From the affidavits and from these letters and also from the statements made by the lady herself in the witness-box, it is perfectly clear to me that this question of relationship had been in a mild way agitated from the very moment that their friendship commenced. She now asserts that she did not believe it and the reason was, according to the learned Counsel who appeared for her in this Court, that they attempted to trace their relationship through their respective fathers. The father of the respondent was a William Connally and the father of the petitioner was a James Connally. It is not a matter of surprise to know that they were unable to show any relationship by reason of the fact that there were no records of the ancestry of these men, either William or James Connally. The names of course would suggest some relationship but there was nothing else. In this connection however, it is important to notice that the respondent, the wife, in her evidence stated in answer to the Court in the suit of 1926 "He is related to me in this way, his grandfather and my father's father were two brothers; his dad and my father were first cousins." Slating the relationship in a vague way that statement would be sufficient though not strictly legal and accurate inasmuch as the grandfathers could only be said to be cousins-in-law in the circumstances inasmuch as they had married two step-sisters. But the fact remains that such inquiries as the parties made brought no result, and, as I have already stated, I accept the statement in the letters written by the lady in spite of the evidence which she gives in the witness box. The statement which I accept and which I think is clearly indicated by the passage which I have read is that this matter became important to the parties when they were about to be married and it may very well be, and it was suggested by the lady herself, that her aunt was causing mischief probably by suggesting that the relationship was such that it was a bar to the marriage and, therefore, the inquiries which the lady made assured her, according to her letters, that there was no bar. But the matter does not rest there. In the affidavit which is described as the counter-affidavit filed by the husband in answer to the wife's application for a rule to show cause why the judgment pronounced by me should not be reviewed, various statements of considerable importance are made in regard to this matter. In para 4 the petitioner states:

9. At the time when the marriage was solemnised there was no just cause or impediment at all nor is there any even now to the said marriage either in Cannon Law or by the Civil Law of the land. The petitioner and the opposite party were fully aware of their respective positions and had made thorough enquiries from Ecclesiastical Authorities and thereafter had made the necessary declaration after which the marriage was duly solemnised and consummated afterwards."

10. In para. 11 there is this statement:

That even before the marriage the petitioner and her mother had full knowledge of the fact that the petitioner and the opposite party were connected and every enquiry was made by the petitioner and her mother themselves from the Ecclesiastical Authorities in Calcutta with due diligence and care and they had completely satisfied themselves that there was no relationship within the prohibited degrees and that there was no hitch or impediment.

11. This is the affidavit of the petitioner the husband who was anxious to show cause against the rule. First of all it emphasises the statement which I have already made as to what, in my judgment, is the effects of the evidence of the respondent, namely, that this or some sort of relationship was suggested that full inquiries were made and that the result of those inquiries showed that no impediment existed. I can only accept the evidence of both the parties here in coming to that conclusion. In this connection I must mention that in the affidavits before me there is a statement to the effect that there was no dispensation by the Church regarding this matter. I must assume, therefore, that when it is stated that inquiries were made and no impediment was found, they meant thereby that no relationship existed which would prohibit the marriage, and I would also add that the minds of the Parties were, therefore, put at rest so far as any question of relationship existed. It is for the reason of this finding that I have stated that I come to the Conclusion that we have to look in this case not only at that period between the institution of the petition and the decree in the suit for restitution of conjugal rights but at other periods in the history of the unhappy relations between these two parties. But if I had to consider only the period between June and August 1928, I should have to come definitely to the conclusion that the applicant who supports this rule does not come within the provisions of Order XLVII, Rule 1 of the Civil Procedure Code. But, having regard to what I have already found to be the facts, I have come to the conclusion that the parties or one of them was excused during the conduct of the case for the restitution of conjugal rights which came on before me from investigating this question which had already been, so far as they were concerned, set at rest. In my judgment, therefore, quite shortly the applicant who supports this rule does come within Order XLVII, Rule 1. It is to be noticed that the language of the rule is "from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge." If the diligence had been exercised, it is perfectly clear that from one view of Order XLVII, Rule 1 and a determination of the meaning of the words "due diligence" in this case as in every other case, the evidence which is now before me could have been found from the statement of the fact that it was found. But it is perfectly obvious that that cannot be the test otherwise there could not be a case which would come within the Order and the rule. In my judgment, perhaps, it is only right to say that a case of this kind coming under Order XLVII, Rule I must be judged on the peculiar circumstances of each case, and in the circumstances of this case, I would hold that the evidence which was not at the disposal of the respondent could not be found and could not be brought before the Court after the exercise

of due diligence.

12. There then remains the question of whether the applicant called to her aid Section 5 of the Limitation Act. It is agreed by learned Counsel that whatever article of the Limitation Act applies the application is hopelessly out of time.

13. The question before me is whether the applicant has satisfied the Court that she had sufficient cause for not making her application within the period prescribed. It is important to notice what the facts were. She was advised not to defend the suit for restitution of conjugal rights for the simple reason that it could not be enforced, that is to say, that the decree could not be executed against her; and excepting considerations which might be applicable in the case of a wife who has separate estate, that advice was substantially correct; and it seems difficult to understand why such a suit now is possible in India having regard to the fact that in the majority of cases such a decree must of necessity be infructuous. I might add incidentally that since the recent legislation in England such a suit has almost become a dead letter but that is by the way. Advice was tendered which had, as its result, as I have already stated, namely, that although the respondent put in an answer to the petition for restitution of conjugal rights she did not appear by Counsel in Court. She then proceeded to bring an application before the Ecclesiastical Court. Her next step, as I have already stated, was to bring a suit in the High Court at Calcutta. That was withdrawn, and it was not until the 7th May of this year that her Solicitors discovered for the first time that there was a decree for restitution of conjugal rights outstanding against her which made the suit in the Calcutta High Court an absurdity. If this question depended upon whether or no she had been badly advised by her legal advisers, there could only be one answer to the application applying the provisions of Section 5 of the Limitation Act and that would be that there was not sufficient cause within that section. But strange to relate she was inactive for the simple reason that she had had from her Solicitors, then acting for her, the correct advice. They had stated that, so far as her person was concerned, the decree for restitution of conjugal rights could not be executed by committing her to prison for contempt of Court, and as she thought that she had no estate, or as it appears that she has no estate which could be attached, the decree, according to her view, was harmless. As I have already stated, it was on the 7th of May and not before that her Solicitors were in a position to advise her in regard to the possibility of filing an application to this Court for review of the judgment and decree pronounced by me.

14. The question of the proper construction of Section 5 of the Limitation Act has been discussed at considerable length by Lord Dunedin in the Judicial Committee of the Privy Council in the case of *Brij Indar Singh v. Kanshi Ram* 42 Ind. Cas. 43 : 45 C. 94 : 33 M.L.J. 486 : 22 M.L.T. 362 : 6 L.W. 592 : 126 P.W.R. 1917 : 15 A.L.J. 777 : 19 B. L.R. 866 : 3 P.L.W. 313 : 26 C.L.J. 572 : 10 P.R. 1917 : (1917) M.W.N. 811 : 22 C.W.N. 169 : 127 P.L.R. 1917 : 44 I.A. 218 (P.C.). It is hardly an authority which will assist me in this case; but Lord Dunedin points out that so

far as the High Courts in India are concerned, they have laid down the rule governing the discretion of the Judges to be exercised u/s 5 of the Limitation Act. It is pointed out in the first place that it is a matter of discretion, but Lord Dunedin on page 105 Page of 45 C.-[Ed.] of the report says:

The learned Judge says that each case depends on its own circumstances. This is true. But he seems to treat this truism as if it was destructive of the idea that there can be a general rule. There is no inconsistency in the position. There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule.

15. I quote this case (it is a leading case on the matter) not, as I have already stated, that it is an authority in this particular case but because the matter which was then under discussion by the learned Member of the Judicial Committee of the Privy Council was in regard to the application of the rule in the case of a review of a judgment and that rule is expressed in these words:

If a party presents an application, for review of judgment within the ordinary period limited for appealing, the time occupied by the Court in disposing of such application will not be reckoned among the days limited for appealing, but will be added thereto, and a memorandum of appeal represented within such extended period will be received as presented within time.

16. I quote that passage to show that in the circumstances of this case the proposition which is laid down as being a rule which has been brought into existence by the decisions of various] High Courts in India does not apply to this particular case, The question which I have to determine is whether there is sufficient cause shown in the circumstances of this case. I have already stated that the wife the respondent was going from one Court to another endeavouring to get what she thought to be her rights in regard to this matter. The fact that she went to the Ecclesiastical Court whose decree from the point of view of the general law of the land was useless to her in my judgment makes no difference, She was informed, as I have already stated, that so far as her personal status was concerned by the Cannon Law which, on one view of the law at any rate, a Civil Court in this country recognised, she then, as I have already indicated, proceeded to enforce the decree which she had obtained in the Ecclesiastical Court by a suit or petition before the High Court in Calcutta, which was infructuous for very obvious reasons. I could not hold, therefore, in these circumstances that the applicant in support of this rule was a parson who was resting on her rights. But on the other hand I should have to hold that she was endeavouring to the best of her ability to seek redress as she thought she had at her disposal in the various Courts in which-she presented petitions, In my judgment, therefore, the provisions of Section 5 of the Limitation Act should be extended to this applicant. Consequently I must hold that this application for a rule nisi to show cause why the judgment and decree of this Court dated the 10th August, 1928, should not be reviewed must be made absolute.

17. The issue at the new trial as a result of this rule will be whether the parties to the marriage were within such degree of consanguinity as to make the marriage between them voidable in law.

18. There will be no costs in this application.

19. I might add that this issue is subject to the arguments of the parties.

20. In the circumstances no order could reasonably be passed on the application for execution; but in addition I should like to add that, having regard to the evidence placed before me to make an order for executing the decree against the wife assuming for the moment that I could attach her property if she possessed any, the evidence which is brought to the notice of this Court is such that I should not be in a position to say that she was possessed of any separate estate. In these circumstances that application must be dismissed.