
(1945) 05 CAL CK 0008
In the Calcutta High Court

Sophy Auerbach

APPELLANT

Vs

Shivaprosad Agarwalla

RESPONDENT

Date of Decision : 25-05-1945

Acts Referred:

Limitation Act, 1963 — Section 23

Citation : AIR 1945 Cal 484

Hon'ble Judges : Lodge, J

Bench : Division Bench

Judgement

Lodge, J.—This is a suit for a declaration that the marriage of the plaintiff to the defendant is null and void, and for an injunction restraining the defendant from claiming the plaintiff as his wife. The material facts are no longer disputed. The plaintiff Sophie Auerbach was a British subject, a Jewess by the religion, domiciled in England. The defendant is a Hindu domiciled in British India. Some time before 14th April 1931, the defendant married a Hindu wife in India according to Hindu rites. That wife is still alive and is still the wife of the defendant according to Hindu law which is the personal law of the defendant.

2. On 14th April 1931 the plaintiff went through a form and ceremony of marriage with the defendant in accordance with the French laws at the Mairie du Luxembourg, VIth Arron dissement in Paris, France. Thereafter the defendant and the plaintiff lived together as man and wife, and three sons were born of the union, The plaintiff asserts that at the time of her marriage she was not aware that the defendant had already married a Hindu wife. The plaintiff now asserts that under the French law her marriage to the defendant is null and void, and she prays that the Court declare the said marriage to be a nullity. The plaintiff was converted to Christianity in the year 1943. The defendant contests the suit. He asserts that the marriage solemnised in Paris on 14th April 1931 is a valid marriage according to French laws. He further asserts that the plaintiff has known from before 14th April 1931 that the defendant has an Indian wife married according to Hindu rites; and that the suit is therefore barred by

limitation. The defendant also contended that this Court had no jurisdiction to try the suit. It may be noted that neither party has argued that the marriage in France is not valid on the ground that it is a union not recognised as a marriage by the personal law of the defendant and I have not been asked to consider whether the defendant, a Hindu, can according to Hindu law contract a valid marriage with the plaintiff by going through a ceremony before the French Authorities in Paris. At first the plaintiff wished to assert that she was not aware of the defendant's earlier marriage until some date within six years of the institution of the suit. But when the defendant applied for a commission to examine witnesses in Assam for the purpose of proving plaintiff's knowledge at an earlier date, the plaintiff admitted, for the purposes of this suit only, that she was aware of the previous marriage more than six years before the suit was instituted.

3. The question of jurisdiction was not pressed. The following issues were framed (1) Is the suit barred by limitation ? (2) Is the marriage solemnized on 14th April 1931 null and void according to French law? (3) To what relief is the plaintiff entitled?

Decision:

4. Issue 1 --Mr. Carden Noad for the plaintiff contended that there is no limitation in matrimonial matters: that if the Limitation Act does apply, then Section 23 of that Act is applicable ; and that even if Section 23, Limitation Act, is not applicable and if Article 120 of the Act is applicable, limitation will commence to run from the date when plaintiff came to know that under French law her marriage was a nullity. Mr. P. C. Ghosh for the defendant contended that Article 120, Limitation Act, was applicable, and that limitation began to run from the date of the marriage. The contention that the Limitation Act does not apply to this suit, is not in my opinion sustainable. This is not a suit in the matrimonial jurisdiction of the Court, but in its ordinary original civil jurisdiction. Section 3, Limitation Act, provides:

Subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by Schedule 1 shall be dismissed, although limitation has not been set up as a defence,

and the exception in Section 27 regarding matrimonial matters refers only to suits under the Divorce Act. This is not a suit under the Divorce Act, which Act has no application to the facts of the present case. Therefore, in my opinion, the Limitation Act is applicable. On the question whether Section 23 of the Act is applicable, a number of rulings was cited on each side. For the plaintiff," reliance was placed on, *Midnapore Zamindary Co. Ltd. Vs. Secretary of State*, , *Brajendra Kishore Rai v. Abdul Razac* ("16) 3 A. I. R. 1916 Cal. 751 and AIR 1930 270 (Privy Council) ; for the defendant on *Bai Shirinbai v. Kharshedji Nasarvanji* ("98) 22 Bom. Muhammad Fahimull Huq v. Jagat Ballav ("23) 10 A. I. R. 1923

Pat. 475. In I. L. R. (1939) Gal. 349, it was held that:

When the plaintiff remains in possession of land in spite of frequent and successive threats and attacks on his title made by the defendant, the plaintiff's title is not extinguished and he has the right to sue for a declaration of his title if the last threat or attack be within six years of the suit.

5. In my opinion this case is of no assistance to the plaintiff. It concedes that Article 120 is applicable, and merely shows that each new threat or attack gives a new cause of action, if the earlier threats or attacks have failed. There is no similarity between the facts of that case and those of the present case. The claims of the defendant to marital rights were apparently conceded over a space of years. Therefore it cannot be suggested that they were repelled and were consequently unsuccessful, so as to make subsequent claims a new cause of action.

6. *Brajendra Kishore Rai v. Abdul Razac* ("16) 3 A. I. R. 1916 Cal. 751 the facts were very different. The subject-matter of dispute was land attached u/s 146, Criminal P. C. The Courts held that a suit for declaration of title instituted more than six years after the order of attachment u/s 146, Criminal P. C., was not time-barred, chiefly because any other decision would result in an impossible situation. The ease in AIR 1930 270 (Privy Council) merely decided that there can be no right to sue under Article 120

until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

7. In the present suit, it is obvious that the right to a declaration that the marriage was a nullity accrued at least as soon as the defendant claimed marital rights, and that there was a clear and unequivocal threat to infringe the plaintiff's rights by the defendant from that time.

8. In my opinion none of the cases relied on by the plaintiff assists her case. On the other hand, *Bai Shirinbai v. Kharshedji Nasarvanji* ("98) 22 Bom. 430, is very similar to the present one. It is true that that case was held to be not time-barred, but the judgment supports the view that a suit like present must be filed within six years of the marriage except in cases governed by Sections 6 and 18, Limitation Act. In *Muhammad Fahimull Huq v. Jagat Ballav* ("23) 10 A. I. R. 1923 Pat. 475 it was held definitely that Section 23, Limitation Act, has no application to a declaratory suit.

9. In my opinion, Section 23, Limitation Act, has no application to the present suit. If Section 23 is not applicable, it is conceded that Article 120 is the article to be applied : see also *Mohabharat Saha v. Abdul Hamid Khan* ("05) 1 C. L. J. 73. This article provides that the suit must be instituted within six years from the time "when the right to sue accrues." It seems to me obvious that the right to sue accrued as soon as the wedding ceremony was performed, or at all events as

soon as the defendant claimed marital rights; and it is admitted that that happened more than six years before the suit was instituted.

10. Mr. Carden Noad for plaintiff argued that plaintiff was ignorant of French law and came to know of her rights within six years before the institution of the suit. The plaintiff herself deposed that until December 1943 she was unaware that under French law her marriage was void. I have no reason to doubt the truth of her statement and I accept it as true. But the Limitation Act does not provide that limitation in this case begins to run from the date of her knowledge of her rights : *Reaz Ali Khan v. Government of India* ('73) 19 W. R. 269. There is no suggestion that she was kept out of knowledge by any fraud on the part of the defendant. In the circumstances I am of opinion that this suit is barred by limitation.

11. Issue 2 -- Mr. Oarden Noad argued that the marriage in Paris was a nullity under French Law by reason of the fact that defendant already had a wife living when he went through the form of marriage with the plaintiff, and that therefore the marriage was also a nullity under Indian law. Two questions arise for decision, viz., (a) Is the marriage a nullity under French law in the circumstances ? (b) If so, is the marriage also a nullity under the Indian law applicable to the parties ? English Matrimonial Courts regard as a valid marriage only "a voluntary union for life of one man and one woman, to the exclusion of all others"; and have held, that:

A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy is not a marriage as understood in Christendom": see *Hyde v. Hyde and Woodmansee* (1866) 1 P. & D. 130

12. But as the learned Judge observed:

All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

13. In *In re Bethell; Bethell v. Hildyard* (1888) 38 Ch. D. 220 it was held that where a man, domiciled in England went through a form of marriage in Africa with a woman of the Baralong tribe according to the customs of the tribe, among whom polygamy was allowed the marriage could not be recognized in England as a valid marriage, and the son of the marriage" could not be regarded as a child born in wedlock. On the other hand, in *Chetti v. Chetti* 1909 P. 67 it was held that a Hindu who contracted a marriage with an English woman in England in due form according to the laws of England could not repudiate the marriage on the ground of an incapacity under his own personal law, of a kind to which the Courts of England refuse recognition. In *R. v. Neguib* (1917) 1 K. B. 359 : 86 L. J. K. B. 709, the prisoner was convicted of bigamy, in that he married one woman in England in January 1903 and during the lifetime of that woman married another woman in England in 1914. In defence he pleaded that the marriage in 1903 was

void as he, an Egyptian Mahomedan, had previously in 1898 married an Egyptian woman in Egypt according to Mahomedan law. The trial Court held that the Egyptian marriage could not be recognized in England as a valid marriage as it was not a monogamous marriage, and that the marriage in 1903 in England was a valid marriage. The Court of Appeal however refused to deal with this question. From these cases, it appears that English Courts would not recognize defendant's Hindu marriage in India as a valid marriage, in that it was potentially polygamous, and would recognize the marriage in Paris as a valid marriage. In order to prove the French law on the subject, one Abhoy Charan Bandopadhyaya an advocate practising in Chandernagore French India was examined as a witness. This witness admitted that his experience was confined to practice in French India and that he had never appeared in a case in which a Hindu marriage was involved. He deposed that in French law polygamy is absolutely forbidden, and that bigamy is a crime when committed in France even by a foreigner whose personal law permits polygamy.

14. The witness referred to the Civil Code and the Penal Code and to commentaries on those Codes by Dalloz and Marcel Planiol, which he said were accepted as authoritative in France. Article 147 of the Code Civil provides

on ne peut contracter un second mariage avant la dissolution du premier,"

and Article 340 of the Code Penal provides

quiconque étant engagé dans les liens de mariage en aura contracté un autre avant la dissolution du précédent sera puni de la peine des travaux forcés à temps.

15. These provisions have been translated as follows: Article 147 "One cannot contract a second marriage before the first one is dissolved" and

Article 340--whosoever being already bound by marriage, has contracted another marriage before the preceding marriage is dissolved, will be punished with forced labour.

16. These provisions do not by themselves indicate any material difference between English law and French law, nor do they indicate what will be regarded as a marriage in French law. The witness referred to Annotation 520 to Article 3, Civil Code and to Annotations 1 and 3 to Article 149 of that Code in the "Jurisprudence General Dalloz." Annotation 520 to Article 3 has been translated:

The stranger (? foreigner) bound by a first marriage could not although polygamy may be authorised by his personal statute (law) contract a second marriage in France, even with a woman of his own nationality.

17. Annotation 1 to Article 147 has been translated : "Bigamy is not only rejected (? forbidden) by Civil law; it is also classified among crimes." Annotation 3 to Article 147 has been translated:

This prohibition also touches (? affects equally) the stranger (? foreigner) whose-

personal statute (? law) allows polygamy and who, already bound by marriage would like to contract in France a second marriage even with a stranger of his own nationality.

18. The Witness also referred to an annotation to Article 340 in the Code Penal by E. Garcon which has been translated:

tranger (? foreigner), married a first time, either in France or abroad, who would marry in France a French woman or a foreign woman before the first union is dissolved, would commit in France the crime of bigamy... case 20th November 1928. It would not matter whether the personal statute of that stranger authorises polygamy.

19. In my opinion these quotations are of very little assistance. They shew that monogamy is insisted upon in France; that foreigners are equally liable with French men, to be convicted of bigamy if they marry a second wife in France during the lifetime of the first wife, whatever their own personal law may permit; and that the second marriage is a nullity. See also note 1015 in the "Traifce" elementaire de Droit Civil by Marcel Plaiul. The material question is whether a Hindu marriage celebrated in British India would be recognized by the French Courts as a valid marriage. The quotations given above are of no assistance in this matter. The witness however was questioned on this point and his evidence reads:

Q. 14.--And would that principle apply where the first marriage had been a Hindu marriage.

A. Surely, whether it is a Hindu or whatever marriage it might be it applies to everybody who marries under French law.

20. In cross-examination, the witness was asked:

Q. 27. -- Have you done any case in which a Hindu marriage was involved?

A. No, not up till now.

Q. 31. -- Do you know of any case in which the question of the validity of a Hindu marriage arose?

A. I do not know.

Q. 37.--Can you say of a single instance in which the matrimonial jurisdiction of the Courts in France has decided that a Hindu marriage will be recognized for the purpose of making a subsequent marriage void

A. Such a case never came here but....

Q. 39.--In Chandernagore can a Hindu marry more than one wife?

A. A Hindu can marry.

Q. 40.--A Mahomedan can marry?

A. Yes but not in the Mairie Office as it is done there. He can marry if he pleases. He can marry and then register afterwards.

Q. 41. -- And this is recognised in Chandernagore?

A. Surely.

Q. 42. -- Although they are polygamous ?

A. Yes."

21. There is nothing in this evidence to indicate that a Hindu marriage or a Mahomedan marriage which is not registered at the Mairie would be regarded as a valid marriage in French law; or that more than one such marriage can be registered and be regarded as valid at a time. There is therefore no evidence before me to show that the defendant's first Hindu marriage, which was celebrated in British India and was therefore presumably not registered at the Mairie, would be regarded by the Courts in France as a valid marriage.

22. As it would not in my opinion be regarded as a valid marriage by the English Courts and as there is no evidence to show that the French Courts would take a different view from the English Courts on this matter, I hold that the defendant's first Hindu marriage would not be regarded by the Courts in France as a valid marriage. If that is so there was no bar in French law to the defendant going through a form of marriage with the plaintiff in April 1931. I am therefore of opinion that it has not been proved that the marriage in Paris in 1931 of the plaintiff and defendant is void under French law.

23. Assuming however that the marriage is void under French law, does it follow that it is void under Indian law ? It must be remembered that the Court is not exercising matrimonial jurisdiction in the present suit, but is exercising in its Ordinary Original Civil Jurisdiction powers conferred by the Specific Relief Act. The material question is not whether the marriage in Paris in 1931 is void according to French law or according to English law, but whether it is void according to the Indian law applicable to these parties.

24. The question therefore arises--What is the Indian law applicable to these parties ? Can a Hindu domiciled in India contract a valid marriage with a Jewess ? and if so, how is the marriage to be contracted and what forms and ceremonies are required ? This question has not been argued before me: and it is a question on which English decisions throw no light. In England there is essentially one marriage law for everybody: and the only marriage recognized by the Courts (for most purposes) is a voluntary union for life of one man and one woman to the exclusion of all others. But that is not the case in India. The relationship recognized as a valid marriage varies according as the parties to the marriage are Hindus, Mahomedans, Christians, Parsees, Jews, etc. For example, a Hindu marriage requires particular rites "and ceremonies: a Hindu male may legally marry, in Hindu marriage as many wives as he chooses; the Hindu marriage cannot be dissolved by the Courts or by the parties thereto. A

Mahomedan marriage requires certain formalities, but they are not rites and ceremonies in the same sense as the formalities in a Hindu marriage: a Mahomedan male may legally marry, in Mahomedan marriage, as many as four wives but not more : the Mahomedan husband may dissolve the marriage at his pleasure. A Christian marriage does not require any particular ceremony but it must be solemnised in Church or before a Registrar: a Christian male may legally marry, in Christian marriage, only one wife: the marriage may be dissolved by the Courts but not by the parties thereto. There are other forms of marriage recognized in India, peculiar to different communities; and there is also a form of civil marriage under the Special Marriage Act. A Mahomedan male may contract a valid Mahomedan marriage with a Mahomedan female or even with certain non-Mahomedan females. The Indian Christian Marriage Act seems to contemplate that a Christian marriage can be solemnised when only one of the parties thereto is a Christian, provided that the marriage is not contrary to the personal law of either party.

25. It does not even necessarily follow that because one of the parties to a marriage in India belongs to a particular community, the marriage is therefore the form of marriage recognized by that community. For example, there is reason to believe that a Mahomedan male domiciled in India can contract a valid Mahomedan marriage with a Christian female domiciled in India but that he cannot contract a valid Christian marriage with her, at least if she is a Roman Catholic Christian. Whether there can be mixed marriage in the case of other communities will depend upon their personal laws.

26. It is clear from the above that "marriage" as recognised by the Courts in India is not the simple relationship recognised by the Courts in England nor is it the same for different individuals in the country, nor is it necessarily always the same for the same "individual. In these circumstances it becomes meaningless to speak of a *lex domicilii* a *lex loci celebrationis* or a *lex loci contractus* in connexion with Indian marriages in general.

27. The determining factor in most cases is the personal law of the parties. Such being the case, I see no reason why the principles recognised in England in connexion with Christian marriages should be applied in India to marriages which are not Christian marriages. In my opinion in order to determine whether any particular marriage is valid in India or not, an Indian Court will have to consider the personal law of the parties and determine, whether the two individuals can contract a valid marriage, and if so, what formalities and ceremonies are requisite in their case. It does not seem by any means clear to me that a Hindu man domiciled in India could not contract a Hindu marriage with a Hindu woman in England--or that a Mohammadan. man domiciled in India could not contract a Mohammadan marriage with a Mohammadan woman in England, which would be held to be valid in India but invalid in England. If J this be so, it follows that the fact that English Courts or French Courts might not recognise a particular marriage as valid if relevant, which I doubt" is not conclusive as to its validity in

India.

28. The validity of the marriage must depend-on the personal law of the parties. But as stated above no arguments on this aspect of the case have been placed before me and no attempt has been made to show that a marriage in Paris between a Hindu man domiciled in India and a foreign woman, which is void under the French law is necessarily also void under the Indian law applicable to the parties. Therefore even if I had been of opinion that the marriage in Paris in 1931 was void under French law I should not have felt justified in granting the declaration prayed for. In the result therefore this suit is dismissed. I make no order as to costs.