MATRIMONIAL JURISDICTION.

Before Sanderson C. J., Woodroffe and Richardson JJ.

1921

April 25.

TURNER

v.

TURNER.*

Divorce—Re-marriage, validity of—Indian Divorce Act (IV of 1869), ss. 7, 57—Alimony.

A successful petitioner in a suit for dissolution of marriage entered into a second marriage, within six months from the decree for dissolution of marriage becoming absolute.

Held, that the second marriage was null and void.

Warter v. *Warter* (1) referred to.

Held, also, that the reputed wife was not entitled to any permanent alimony.

REFERENCE under section 20 of the Indian Divorce Act (IV of 1869) for confirmation of a decree of nullity of marriage passed by the District Judge of Darjeeling.

On 20th October 1884, J. J. Turner, the petitioner' was married to one Elizabeth Hefferam. In 1901, he applied to the District Judge of Allahabad and obtained a decree *nisi* on 20th May 1901. The decree was confirmed by the High Court on 15th February 1902. On 12th March 1902 Turner went through the ceremony of a second marriage at Allahabad with the present respondent. They lived as man and wife for 18 years. Then in 1920, the petitioner applied to the District Judge of Darjeeling for a declaration that his marriage with the respondent is null and void.

* Application in the matter of an Appeal in Matrimonial Suit No. 4 of 1920.

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The learned District Judge decreed the suit and declared the marriage a nullity and referred the matter to the High Court for confirmation under the Indian Divorce Act (IV of 1869), section 20.

Mr. R. N. Banerjee (with him *Mr. D. K. Basu* and *Babu Hemendra Nath Chatterjee*), for the petitioner. The marriage having been celebrated within six months of the decree absolute is void *ab initio;* Indian Divorce Act, s. 57: *Battie* v. *Brown* (1), *Jackson* v. *Jackson* (2). In *Warter* v. *Warter* (3) it was held that the prohibition of a marriage within six months of the decree was an integral part of the proceedings.

Mr. Chippendale (with him *Mr. J. M. Mukherjee*), for the respondent. The parties have lived together as man and wife for 18 years after a ceremony of marriage; it will be very hard and inequitable to declare the marriage as a nullity now. The respondent should get permanent alimony. The respondent can claim relief under section 7 of the Indian Divorce Act.

Mr. R. N. Banerjee, in reply. There is an express provision of law here and section 7 is not applicable: *Bailey* v. *Bailey* (4).

SANDERSON C. J. This is a reference under section 20 of the Indian Divorce Act by the District Judge of Darjeeling for the confirmation of a decree made by him on the application of one Mr. J. J. Turner. The application which Mr. Turner made to the learned Judge was that the Court should declare that the marriage of the petitioner with the respondent was null and void. The facts of this case are

(1) (1913) I. L. R. 38 Mad. 452.
(2) (1911) I. L. R. 34 All. 203.
(3) (1890) L. R. 15 P. D. 152.
(4) (1897) I. L. R. 30 Calc. 490n.

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as follows. It appears that the petitioner was lawfully married at Howrah by a licensed Baptist Minister of religion to one Elizabeth Hefferam on the 20th of October 1884. In 1901, he applied to the District Judge of Allahabad for dissolution of his marriage and he obtained a decree *nisi* on the 20th May 1901. This decree was confirmed by the High Court of the North-West Provinces on the 15th of February 1902. On 12th of March 1902, that is to say, before six months had elapsed after the date of the decree of confirmation, the petitioner went through the ceremony of marriage at Allahabad with the respondent and the ceremony was performed by a Baptist Minister. The petitioner and the respondent lived together for a considerable period and the petitioner treated the respondent as his wife for about 18 years. It was proved before the learned Judge and found by him as a fact that the petitioner's first wife was living at least up to 1911. The matter, in my judgment, depends upon three sections of the Divorce Act. Section 18, is the first section in Part VI of Act IV of 1869, which deals with nullity of marriage. That section provides, "Any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void."

Section 19 provides, "Such decree may be made "on any of the following grounds:— . . . . . "(4) That the former husband or wife of either party "was living at the time of the marriage, and the "marriage with such former husband or wife was "then in force." The material portion of section 57 which applies to this case provides as follows: "When six months after the date of an order of a "High Court confirming the decree for a dissolution "of marriage made by a District Judge have expired,

"or when six months after the date of any decree of "a High Court dissolving a marriage have expired, and "no appeal has been presented against such decree to "the High Court in its appellate jurisdiction, or when "any such appeal has been dismissed, or when in the "result of any such appeal any marriage is declared to "be dissolved, but not sooner, it shall be lawful for "the respective parties to the marriage to marry again, "as if the prior marriage had been dissolved by "death." (This appears in Part XIII of the Act which is headed "Re-marriage.") Then there are two paragraphs which deal with an appeal to His Majesty in Council. As I have already said, the petitioner's former wife was living until 1911. Therefore, she was living at the time of the petitioner's marriage with the respondent and the first part of section 19, sub-section (*4*) applies; and, the only question we have to consider is whether the marriage with the former wife was then in force. The decree *nisi* had been passed on the 20th of May 1901, and the order confirming the decree was passed on the 15th February 1902, and the second marriage, if I may so call it, was solemnised on the 12th of March 1902, and, therefore six months had not expired from the order of the High Court confirming the decree. In *Warter* v. *Warter* (1), the learned President said this, "Mrs. Taylor was "subject to the Indian law of divorce, and she "could only contract a valid second marriage by "showing that the incapacity arising from her previ- "ous marriage had been effectually removed by the "proceedings taken under that law. This could not "be done, as the Indian law, like our own, does not "completely dissolve the tie of marriage until the "lapse of a specified time after the decree. This is

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"an integral part of the proceedings by which alone "both the parties can be released from their incapa- "city to contract a fresh marriage." In my judgment, therefore, by reason of the provisions of section 57 and of the fact that the time specified by section 57 had not elapsed from the date of the order of the High Court confirming the decree *nisi*, the marriage with the petitioner's former wife was in force on the 12th March 1902, the date on which the petitioner went through the form of marriage with the respondent. Consequently, in my judgment, the decision at which the learned Judge arrived was right, *viz.*, that the marriage between the petitioner and the respondent was null and void. The circumstances of the case, as at present before us, are such as to create a great hardship upon the respondent, who has my sincere sympathy, but that cannot induce me to disregard the plain provisions of the Act.

The only other question that I have to deal with is the question of alimony. The learned vakil has asked this Court to make an order that the petitioner should provide a certain amount of alimony to the respondent. In my judgment, we have no jurisdiction to make such an order. The part of the Act which deals with the matter is Part IX. Section 36 deals with alimony *pendente lite* and provides, "In any "suit under this Act whether it be instituted by a "husband or a wife, and whether or not she has "obtained an order of protection, the wife may present "a petition for alimony pending the suit," and, the section provides that "Such petition shall be served "on the husband; and the Court, on being satisfied "of the truth of the statements therein contained, "may make such order on the husband for payment "to the wife of alimony pending the suit as it may "deem just." That section, therefore, provides that in

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any suit under this Act such an order may be made when the Court in its discretion thinks it right so to do. Then section 37 deals with the power to order permanent alimony. The first clause of the section deals with the power of the High Court when a suit is instituted in the High Court. It is perhaps advisable to read it for the purpose of showing that it was intended by the Legislature to give the High Court power to make an order for permanent alimony only when a marriage is dissolved or a judicial separation is obtained by the wife, provided the High Court thinks fit. That clause runs as follows: "The High "Court may, if it think fit, on any decree absolute "declaring a marriage to be dissolved, or on any decree "of judicial separation obtained by the wife, ... "order that the husband shall, to the satisfaction of the "Court, secure to the wife such gross sum of money ". . . . as . . . . it thinks reasonable." Then the next clause is the clause which would apply to this case which was instituted in the Court of the District Judge. It provides that "the District Judge may, "if he thinks fit, on the confirmation of any decree "of his declaring a marriage to be dissolved, or on "any decree of judicial separation obtained by the "wife, order that the husband shall, to the satisfaction "of the Court, secure to the wife such gross sum of "money . . . . . as . . . . . . it thinks reasonable". As was pointed out by my learned brother Mr. Justice Woodroffe during the course of the argument "Section 36 gives the Court power to make "an order for alimony *pendente lite* in any suit under "this Act," but section 37 limits the power of the Court to make an order for permanent alimony to cases in which a decree has been made declaring a marriage to be dissolved or where a decree for judicial separation has been obtained by the wife. The section

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omits to give such power to the Court where the decree, as in this case, declares the marriage null and void *ab initio* on the grounds mentioned in section 19 (*4*). For these reasons in my judgment this Court has no power to make an order in this case that the petitioner should provide alimony for the defendant. There is a further reason why this Court could not make the order for alimony, *viz.*, that even if section 37 applied to this case, it would be the District Judge and not this Court, to whom the application should be made.

For these reasons, in my judgment, the decree of the learned District Judge must be confirmed.

WOODROFFE J. I also regret that I am unable to accede to the respondent's contention; for, on the materials before us, it appears to me that it is a very hard case. But a long and careful examination of the law satisfies me that there is no way out of the conclusion that the decree by the District Judge must be confirmed and the application for permanent alimony refused. However, as the learned Chief Justice said at the conclusion of the argument, nothing which we here state in our judgment is any bar to the exercise of the right to any other remedy, by way of damages or otherwise, which the respondent may possess against the petitioner. I should like to add also that in my opinion where a Minister, licensed to solemnise marriages, is made aware that there has been a previous marriage, which has been dissolved, he should require that the decree absolute should be produced before him so that he may see whether the period of six months prescribed by law has elapsed.

RICHARDSON J. I entirely agree.

N. G.