1922

RAJENDRA NARAIN CHOWDHURY v. ABU NASOR AHIYA.

defendants and the relationship of landlord and tenant does not exist between the parties.

The appeal must, therefore, be allowed and the suit dismissed with costs in all Courts.

WALMSLEY J. I agree.

A S.M A. *Appeal allowed.*

MATRIMONIAL JURISDICTION.

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

1922

July 21.

BUTTERFIELD

v.

BUTTERFIELD.*

Divorce—Death of petitioner after Decree nisi and before confirmation by the High Court—Indian Divorce Act (IV of 1869), ss. 17, 44—Jurisdiction.

A wife, who had obtained from the District Judge of Darjeeling a decree *nisi* for dissolution of her marriage and also an order for the custody of the children of marriage, died before such decree had been confirmed by the High Court under section 17 of the Indian Divorce Act (IV of 1869):

Held, that in the circumstances, the Court had no jurisdiction in these proceedings to confirm the decree for dissolution of the marriage.

Held, further, that the Court had no jurisdiction in these proceedings to make any order as regards the custody of the children.

Stanhope v. *Stanhope* (1) followed.

THIS was a reference under section 17 of the Indian Divorce Act (IV of 1869) for confirmation of the decree of the District Judge of Darjeeling. The District Judge made a decree *nisi* for dissolution of marriage on the grounds of adultery and desertion by the

* Divorce suit No. 6 of 1920.

(1) (1886) 11 P. D. 103.

1922

BUTTERFIELD v. BUTTERFIELD.

respondent. The petitioner was the wife. A further order was made that pending the disposal of the case by the High Court, the petitioner would have the custody of the children of the marriage and the respondent was directed to pay a sum of Rs. 150 a month towards the maintenance of the children from the date of the decree to the date of the final disposal of the case. The decree *nisi* originally came before this Court for confirmation on 27th May 1921 when this Court remanded the case with directions to the District Judge to enquire further into the matter and to come to findings upon certain points which are mentioned in the following judgment of the Court delivered by Sanderson C.J.:

SANDERSON C.J. This is a case in which the decree made by the learned District Judge of Darjeeling has been referred to this Court for confirmation under section 17 of the Indian Divorce Act (IV of 1869). The learned Judge granted a decree for divorce to the petitioner on the ground of adultery and desertion of the petitioner's husband. There is no doubt about the adultery. With regard to the desertion the learned Judge said as follows:—"Petitioner has proved her marriage with respondent in 1912 "and co-habitation with him up to April 1918, in which month they were "living together in Darjeeling. She then discovered him misconducting "himself with her servant maid and on this occasion he admitted previous "misconduct with a Miss Sauboul in Calcutta after their marriage. Peti- "tioner left him immediately on this account and since then they have all "along lived separately. Collusion is denied. Adultery has been proved and "in the circumstances the husband's conduct amounts to desertion." Then the learned Judge referred to four cases and said in his judgment that he had referred to a text-book on the subject, in which these cases were cited, but that he had not been able to refer to the reports themselves. In my judgment, it is necessary for us to remand this matter to the learned Judge for further consideration. For the assistance of the learned Judge, as he had not an opportunity of referring to the reports of the cases which he mentions, I propose to read a passage out of a case which I think will be of assistance to him—it is the case of *Sickert* v. *Sickert* (1), and the judgment is a judgment of Mr. Gorell Barnes. He was there considering the question of desertion. The learned Judge said: "A wife is entitled to

(1) [1899] P. 278.

"obtain a divorce from her husband if he has been guilty of (*inter alia*) "adultery coupled with desertion without reasonable excuse for two years "or upwards." The provision in the Indian Divorce Act is this that a wife may present a petition to the District Court or to the High Court praying that her marriage may be dissolved on the ground, *inter alia*, of adultery coupled with desertion without reasonable excuse, for two years or upwards; so that in this respect there is practically no difference between the provision in the Indian Divorce Act and the rule obtaining in England. The learned Judge then proceeds as follows:—"In order to cons- "titute desertion there must be a cessation of cohabitation and an intention "on the part of the accused party to desert the other. In most cases of "desertion the guilty party actually leaves the other, but it is not always "or necessarily the guilty party who leaves the matrimonial home. In my "opinion, the party who intends bringing the cohabitation to an end, and "whose conduct in reality causes its termination, commits the act of deser- "tion. There is no substantial difference between the case of a husband "who intends to put an end to a state of cohabitation, and does so by "leaving his wife, and that of a husband who with the like intent obliges "his wife to separate from him.

"This view of the law applicable to desertion has been taken in the "cases of *Dickinson* v. *Dickinson* (1) and *Koch* v. *Koch* (2). In the first of "these cases the husband brought to the house a woman with whom he had "immoral relations. The wife refused to admit her, but the husband "insisted. The wife remained a short time, and then told her husband that "either she or the woman must leave the house. The husband told her she "might do as she liked, but that the woman would remain. The wife there- "upon left, and never afterwards cohabited with her husband. Sir Charles "Butt held that the husband was guilty of deserting his wife. In the "second case, which was heard before myself, the husband was guilty of "immoral relations with a servant in the house. The husband refused to "break off these relations and to discharge the girl, and the wife thereupon "left the house; the husband continued to live for years with the servant. "I held the husband guilty of desertion." I think those two passages in the case may be of assistance to the learned Judge when he reconsiders this case and we remand it to the learned Judge with these observations in order that he may find, *first*, whether there was, in fact, *desertion*, having regard to the law laid down in the case which I have read, and *secondly*, inasmuch as there is some evidence that the husband on one occasion, at all events, struck his wife, we think it is necessary in this case that the learned Judge should come to a conclusion upon the question whether there was cruelty on the part of the husband towards his wife.

(1) (1889) 62 L. T. 330. (2) [1899] P. 221.

1922

BUTTERFIELD v. BUTTERFIELD.

There is an incidental point to which I desire to refer, namely, that the learned Judge has not found whether there was collusion between the parties. It is said that "collusion is denied." But, as I have said on several previous occasions in these cases, it is necessary for the Court to some to a definite finding of fact whether or not there was collusion between the parties.

With these remarks we remand the case to the learned Judge for rehearing.

WOODROFFE J. I agree.

RICHARDSON J. I agree.

The matter came on again before this Court on 6th December 1921 when this Court was informed that the petitioner was dead but it did not appear on which date she had died. The matter was again referred to the District Judge in order that he might enquire and report as to the date on which the petitioner had died and also that he might furnish such information as was within his power to give with regard to the position so far as it concerned the children of the marriage. From the enquiries made and information supplied by the District Judge, it appeared that the petitioner had died on 6th August 1921.

The case now came on for final disposal by this Court.

No one appeared on either side.

SANDERSON C.J. This is a case which was referred to us by the District Judge in which he made a decree *nisi* for the dissolution of the marriage on the ground of adultery and desertion by the respondent. The petitioner was the wife. The learned District Judge further made an order that pending the final disposal of the case by the High Court, the petitioner would have the custody of the three children of the marriage. The respondent was directed to pay a sum of Rs. 150 a month towards the maintenance of the

three children from the date of the decree to the date of final disposal of the case. The decree came before this Court for confirmation and it was necessary, in our judgment, to remand the case to the lower Court for further findings, but unfortunately before the findings could be considered by this Court, the petitioner had died on the 6th August 1921. The question, therefore, arises what course this Court is to adopt. In my judgment, in consequence of the death of the petitioner, this Court in these proceedings has no jurisdiction to make any order. A similar position was under consideration by the Court of Appeal in England in the case of *Stanhope* v. *Stanhope* (1). The headnote runs thus:—"A husband who had "obtained a decree *nisi* for desolution of his mar- "riage died before the time for making it absolute had "arrived," and it was held "that the legal personal "representative of the husband could not revive the "suit for the purpose of applying to make the decree "absolute." Lord Justice Bowen in giving the judgment said that "a man can no more be divorced after "his death than he can after his death be married or "sentenced to death. Marriage is a union of husband "and wife for their joint lives unless it be dissolved "sooner, and the Court cannot dissolve a union which "has already been determined." Lord Justice Fry said "the only decree that could be asked for would "be that the marriage should be dissolved, or that it "should be deemed to have been dissolved from the "date of the decree *nisi*. Neither alternative is pos- "sible. As regards the first, no power can dissolve a 'marriage which has been already dissolved by the "act of God. As regards the second, the Court cannot "pronounce a decree declaring that the marriage was "dissolved at an earlier date, because the statute gives

(1) (1886) 11 P. D. 103.

1922

BUTTERFIELD v. BUTTERFIELD.

SANDERSON C. J.

"it no such power, but only authorises it to pro- "nounce a decree declaring such marriage to be dis- "solved." The result is that, in my judgment, we have no jurisdiction to confirm this decree for dissolution of the marriage.

With regard to the order, which was made in respect of the custody of the children, it seems to me that section 44 of the Divorce Act (Act IV of 1869) is applicable. That provides that "the High Court, after "a decree absolute for dissolution of marriage or a "decree of nullity of marriage, and the District Court, "after a decree for dissolution of marriage or of nul- "lity of marriage has been confirmed, may, upon ap- "plication by petition for the purpose, make from time "to time all such orders and provision, with respect "to the custody, maintenance and education of the "minor children, the marriage of whose parents was "the subject of the decree, or for placing such children "under the protection of the said Court, as might have "been made by such decree absolute or decree (as the "case may be) or by such interim orders as aforesaid." It appears, therefore, that inasmuch as we have no jurisdiction to make the decree absolute for dissolution of marriage, we have no jurisdiction in these proceedings to make any order as regards the custody of the children.

WOODROFFE J. I agree.

RICHARDSON J. I agree.

A. P. B.