ORIGINAL MATRIMONIAL.

Before Mr. Justice Mockett.

AGNES SUMATHI AMMAL, PETITIONER,

1935, August 6.

v.

D. PAUL, RESPONDENT.*

Indian Divorce Act (IV of 1869) sec. 2—Marriage in Mysore State—Parties, domiciled subjects of Mysore State—Nullity of marriage—Petition by wife in Madras—Petitioner, bona fide *resident of Madras—Jurisdiction.*

A petition was presented by a wife against her husband under the Indian Divorce Act to the Madras High Court in its Original Matrimonial Jurisdiction praying for a decree for nullity of her marriage. The petitioner and the respondent were married in Mysore State and they were domiciled subjects of the same but the petitioner was a *bona fide* resident of Madras at the time of the petition. On an objection taken to the jurisdiction of the Court,

held, that the Madras High Court had jurisdiction in respect of the same.

M. A. T. Coelho and *T. Krishnarajan* for petitioner.

K. Varadachari and *P. V. Srinivasachari* for respondent.

Cur. adv. vult.

JUDGMENT.

This is a petition under the Indian Divorce Act by a wife against her husband. She prays for a decree for nullity of her marriage. It is conceded that the husband is a domiciled subject of H.H. The Maharaja of Mysore; that is to say, he is what is known as a Mysorean. The marriage was in Mysore State, and the parties

* Original Matrimonial Suit No. 2 of 1935.

SUMATHI AMMAL v. PAUL.

lived together in Mysore State. It is axiomatic that the domicile of the wife is the domicile of the husband, and that the nationality of the wife is the nationality of the husband. Therefore the petitioner must be regarded as a domiciled subject of Mysore State. Apart from the facts, the defence to this case is one of jurisdiction. The respondent says that this Court has no jurisdiction under the Indian Divorce Act to grant the decree.

With regard to the facts, I have no difficulty whatever. The respondent has not gone into the witness-box. The wife has gone into the box. I shall first deal with the medical aspect. She has told me—and I accept her story—that from the very beginning of her marriage the respondent had some sort of physical aversion to any marriage relations with her and that in fact no marriage relations with her took place although she apparently at least made some sort of advances to her husband. That evidence is not contested. I did not think it right, although I could have accepted it uncorroborated, had I thought fit, to allow this case to be proved on the evidence of the wife alone [*Wilson* v. *Wilson*(1) and cases cited therein], and so Mr. Coelho who appears for the petitioner, at my suggestion, has called a lady of high qualifications and she has told me that she has examined the petitioner, and that, as far as it is possible to say, the petitioner is a virgin. I did not appoint a special board in this case as I thought it sufficient for the petitioner to call a doctor of whom I approved and it is quite obvious that the evidence of Dr. Satur was such evidence as I could accept

(1) A.I.R. 1931 Lah. 245.

without any question. Therefore, on the question as to whether this marriage was consummated, I am definitely of opinion that it was not, and I am definitely of opinion that there was nothing on the part of the petitioner which led to that state of affairs. I am entitled to infer and I find that the respondent is impotent *quoad* the petitioner.

The only other question of fact is whether the petitioner was resident in Madras. "Residence" means not residence for the purpose of invoking the divorce law but *bona fide* residence. There is ample authority for that proposition and it only requires stating. Now what are the facts? The wife, the petitioner, lived with her husband for a short time only, and afterwards with her mother and father. The father died on 17th February 1934, and from the time of his death until November 1934 the petitioner continued to live with her mother at a place called Doddaballapur, about twenty-four miles from Bangalore. In November 1934 she came to Madras with her mother. Her action in coming here has been strongly criticised by the learned Counsel for the respondent, which he is quite entitled to do. He suggests that it was a move in order to get the advantage of suing in this Court. But the petitioner's mother has told me—and I accept her evidence—that she herself was a Madrasee, and, that being so what is more natural than that after the death of her husband, and after his properties, as she has told me, had been disposed of in Mysore State, she should come back to Madras? There is a special reason for that because it appears that Mr. Asirvadam Pillai, an Honorary Magistrate in this city, who

SUMATHI AMMAL v. PAUL.

has given evidence and who lives at "Gifford House", Kilpauk, had apparently offered them a home here, and there was very good reason to do so because his son had married the petitioner's sister. A combination of the above circumstances seems to me to lead to the most natural conclusion that these two women left alone, deliberately by the petitioner's husband and adventitiously by the death of her father, should go back to the place where apparently the mother had been before and where she had kind friends. And I think it right to say that I can see no reason for criticising Mr. Asirvadam Pillai's behaviour at all ; on the contrary, he seems to have taken a most commendable attitude in coming to the rescue of these two women who, in the manner I have described, had found themselves without the assistance of any of their men-folk. He seems to have given them a home in his house and generally has behaved as one would hope that most men would behave to women in some degree of distress. I therefore find that so far as the residence is concerned the petitioner is genuinely a resident in Madras and that from that point of view is entitled to invoke the jurisdiction of this Court.

So much for the facts. With regard to the law, I am proposing to take time to consider the matter as a point of very great importance is raised. At this stage I only desire to say this. The respondent's attitude is : you cannot get this marriage annulled in Mysore State because there is no legislation there for that purpose ; you cannot get this marriage annulled in the Madras Presidency (or anywhere else) because the Madras High Court has no jurisdiction ; and so, by inference, he says, you will remain married to me and

unable to marry anybody else just as long as I live although I am not prepared to live with you on the terms that are usual between husband and wife. That is an attitude that he is entitled to take up if it is the law. What I have to consider is whether it is the law, and, as I have already said, that is a point that I propose to consider and will deal with it at a later date.

The respondent's Counsel contends that this Court has no jurisdiction inasmuch as (i) the respondent was and is domiciled in Mysore State, (ii) the marriage was in Mysore State, and (iii) the petitioner and respondent have never resided in British India together. It is necessary therefore to consider the provisions of the Divorce Act IV of 1869 as amended by Acts XX of 1926 and XXX of 1927. The object of these last two Acts was to clarify the position in India owing to the uncertainty which had arisen with regard to the power of Indian Courts to dissolve marriages of persons not domiciled in India, a doubt which was brought to a head by the decision of the President of the Probate, Divorce and Admiralty Division in *Keyes* v. *Keyes and Gray*(1), and it will be seen that since the amending Statute of 1926 this Court has power only to dissolve marriages of persons domiciled in India at the time when the petition was presented. The Act followed on a conflict of judicial decisions in this country, of which *Wilkinson* v. *Wilkinson*(2), *Lee* v. *Lee*(3) and *Miller* v. *Miller*(4) are examples. The result now is that, so far as the statute law in India relating to dissolution is concerned, it is in accord with the established

(1) [1921] P. 204. (2) (1923) I.L.R. 47 Bom. 843.
(3) (1924) I.L.R. 5 Lah. 147 (F.B.). (4) (1924) I.L.R. 52 Cal. 566.

SUMATHI AMMAL v. PAUL.

rule of Private International Law, but so far as decrees for nullity are concerned the Indian Statute still confers upon the Indian Courts jurisdiction under certain circumstances. This would appear also to be according to the rules of Private International Law as enunciated by JEUNE P. in *Roberts* v. *Brenman*(1) with this variation that under the Indian Divorce Act it is the petitioner's residence which is material. I am however bound to point out that, since the decision in *Salvesen or von Lorang* v. *Administrator of Austrian Property*(2)—a decision of the House of Lords—and *Inverclyde* v. *Inverclyde*(3), it is open to argument whether according to Private International Law domicile is not essential to give a Court jurisdiction in suits for nullity based on grounds of impotence, as distinct from other grounds. In other words, it would appear that the rule, as recognized at least in England, is that suits for nullity on grounds of impotence and suits for dissolution of marriage are, so far as jurisdiction is concerned, identical, i.e., that only a decree of the *forum domicilii* will be recognized. This of course is only relevant if and when the recognition of this Court's decree of nullity by a Foreign State arises. It is clear that under the Indian Divorce Act as amended I have express jurisdiction conferred upon me to grant a decree for nullity which is unquestionably binding in British India even though the parties are domiciled elsewhere. Whether Foreign Courts will recognise such a decree is of course another matter and will depend on whether the decision in *Salvesen's* case and

(1) [1902] P. 143. (2) [1927] A.C. 641.
(3) [1931] P. 29.

Inverclyde v. *Inverclyde*(1) is adopted as stating the rules of Private International Law.

It is however contended on behalf of the respondent that the Divorce Act expressly or by implication excludes the petitioner from its operation. Section 2 of the Act reads as follows :

" This Act shall extend to the whole of British India, and (so far only as regards British subjects within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty.

Nothing hereinafter contained shall authorise any Court to grant any relief under this Act, except where the petitioner (or respondent) professes the Christian religion,

or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

or to make decrees of nullity of marriage except where the marriage has been solemnised in India, and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition."

It should be noted that residence must be " in India " not " in British India". It is conceded that the petitioner's husband is not a British subject but a subject of Mysore State. The petitioner however relies on that part of section 2 which confers jurisdiction in suits for nullity when the marriage has been solemnised in India and the petitioner is resident in India at the time of presenting the petition. Both those conditions are satisfied in this case. The respondent still contends that those words only apply to parties governed by the Act, which he contends does not apply to Indian subjects of Mysore State. I agree

(1) [1931] P. 29.

SUMATHI AMMAL v. PAUL.

that the wording of the Act is at the least difficult to interpret; but the principal statute has by amendment deliberately introduced into it the words "and the petitioner is resident in India". It must be noted also that the marriage need not be solemnised in British India but simply "in India". Section 2 seems to mean this, that so far as a suit for dissolution is concerned a domiciled British subject but resident in Mysore State can invoke this Court's jurisdiction, but that so far as a suit for nullity is concerned any person resident in India who has been married in India can bring a suit for nullity. In *Roberts* v. *Brennan*(1) the President held that it (the Court) had power to annul the marriage of a domiciled Irishman; and I imagine that the object of the Indian Divorce Act was to enact rules of Private International Law as then generally recognized. I am told that there is no Court in Mysore which can dissolve or annul the marriage of an Indian Christian. It is difficult to suppose that the intention of the Legislature was to leave the Indian Christians resident in India who are subjects of a Foreign State without any remedy whatsoever. The whole object of the Act, as stated in the preamble, is "to amend the law relating to the divorce of persons professing the Christian religion". In two cases in England, *Stathatos* v. *Stathatos*(2) and *DeMontaigu* v. *DeMontaigu*(3), where the party before the Court had no apparent remedy, Judges of the Probate, Divorce and Admiralty Division assumed for themselves jurisdiction, the petitioner's position being, as stated in one of the cases, "intolerable."

(1) [1902] P. 143.

(2) [1913] P. 46.

(3) [1913] P. 154.

I do not think it is necessary for me to do that as I think that jurisdiction is expressly given me by the Act—and I am governed by the Act—not by rules of Private International Law.

I have only to add that I think it is clear from section 3 of the Indian Divorce Act and sections 3 and 4 of the Criminal Procedure Code that this High Court is the proper tribunal for petitions emanating from Mysore State.

The result therefore will be, there will be a decree for nullity with costs.

A question has arisen as to whether this decree should be *nisi* or absolute. It is unquestionably the practice in this High Court to make decrees of nullity *nisi*. This however appears contrary to the practice in the other High Courts and to the Act, and I think this is a matter of importance which should be finally determined. I therefore refer this point to a Bench for decision. I may say that I am not at all satisfied with my own judgment in Original Matrimonial Suit No. 5 of 1934 on this point. The point I wish to refer is whether a decree under the Indian Divorce Act for nullity should be a decree *nisi* or a decree absolute.

I direct that the papers be placed before the Chief Justice.

[The Judgment of the Full Bench on this point is reported at page 518 *et seq.*]

G.R.