## APPELLATE CIVIL.

*Before Tek Chand and Currie JJ.*

1930

*July 4*

KERSHAW (PLAINTIFF) Appellant,

*versus*

KERSHAW (DEFENDANT) Respondent.

**Civil Appeal No. 354 of 1930**

*Indian Divorce Act, IV of 1869, section 3 (3)—Jurisdiction—"Reside"—meaning of—whether includes casual residence by a party with abode elsewhere.*

The wife, petitioner, having lived and cohabited with her husband lastly in June 1924 at Allahabad, when they separated, instituted proceedings for dissolution of marriage in the Court of the District Judge, Lahore, in June 1929. It was admitted that the respondent had been residing at Lahore for some years, and was resident there at the time when the petition was presented. But it was found that the petitioner, after her separation from her husband, had lived with her father at Allahabad and Calcutta till April 1929, and that she came to Lahore in April 1929, apparently for the purpose of making inquiries about her husband and to collect evidence for a petition for divorce, and lived with a friend at Lahore as a paying guest during April, May and June, going back to Calcutta soon after presentation of the petition and returning again to a Hotel at Lahore, for 2 or 3 days at a time, for the subsequent hearings of the case.

*Held,* that on these facts the District Judge, Lahore, had no jurisdiction to entertain the petition.

*Held* also, that in cases under the Divorce Act, it is the duty of the Court, apart from any objection taken by one or other of the parties, to enquire into and set out in the judgment facts which show clearly that it possesses jurisdiction to pronounce a decree for dissolution of marriage.

*Held, further*, that in section 3 (3) of the Act, the word "together" governs only the words immediately preceding it, *viz.* "last resided," and not the word "reside."

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*Gale* v. *Gale* (1), *Borgonha v. Borgonha* (2), *Durand* v. *Durand* (3), and *Leadon* v. *Leadon* (4), followed.

Held also, that the word "reside" in section 3 of the Divorce Act, must be taken to have been used in its ordinary acceptance in which it conveys the idea, if not of permanence, at any rate, of some degree of continuance; and that a person who has an abode elsewhere but who comes to a place for a short period and with the fixed purpose of being within the jurisdiction of the Court cannot be said to "reside" there.

*Jogendra Nath Banerjee* v. *Elizabeth Banerjee* (5), *Flower* v. *Flower* (6), and *Manning* v. *Manning* (7), followed.

*Bright* v. *Bright* (8), and *Murphy* v. *Murphy* (9), distinguished.

*Mahomed Shuffli* v. *Lal Din Abdulla* (10), and *In the matter of De Momet* (11), referred to.

*First appeal from the decree of A. L. Gordon-Walker, Esq., District Judge, Lahore, dated the 27th of January 1930, dismissing the plaintiff's suit.*

JEREMY, for Appellant.

BEHARI LAL, for Respondent.

TEK CHAND J.—This is an appeal under section 55 of the Indian Divorce Act against the order of the District Judge, Lahore, dismissing the petition of the appellant, Mrs. Thelma Agnes Kershaw, for dissolution of her marriage with the respondent, Archibald Cyril Kershaw. TEK CHAND J.

The admitted facts are that the parties were lawfully married at the Roman Catholic Church, Roorkee, on the 31st of December 1915, and that thereafter they lived together and cohabited at

(1) 47 P. R. 1911 (F. B.).
(2) (1920) I. L. R. 44 Bom. 924.
(3) (1870) 14 W. R. 416.
(4) (1926) 94 I. C. 952.
(5) (1898) 3 Cal. W. N. 250, 252.
(6) (1910) I. L. R. 32 All. 203.
(7) (1871) L. R. 2 P. and D. 223.
(8) (1909) I. L. R. 36 Cal. 964.
(9) (1921) I. L. R. 45 Bom. 547.
(10) (1879) I. L. R. 3 Bom. 227, 229.
(11) (1894) I. L. R. 21 Cal. 634.

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Roorkee, Nasirabad, Muttra, Mesopotamia and lastly at Allahabad up to the first week of June 1924, when they separated. There is one child of this marriage, named Barbara (P. W. 12), born in 1917, who has been living all along with the appellant. At the time of their separation, a sum of Rs. 16,000 was in deposit in the Imperial Bank of India in the joint names of the parties and this sum was equally divided between them.

In the petition the appellant alleged that after their separation, in June 1924, the respondent had lived for a considerable time in adultery with one Mrs. Maitland (who had been passing under the name of Mrs. Kershaw) at 63, the Mall, Lahore, and that in September 1928 he had a daughter by the aforesaid Mrs. Maitland. She also alleged that the respondent had deserted her against her wishes and without reasonable excuse. On these grounds she claimed a decree for dissolution of the marriage.

The respondent raised a preliminary objection that the District Court at Lahore had no jurisdiction to try the case. On the merits he denied the allegations of adultery and desertion made in the petition, and retorted that the appellant herself had been guilty of adultery.

On these pleadings the following issues were framed :—

1. Whether the respondent No. 1 has been guilty of adultery and desertion? O. P. Petitioner.

2. Whether the petitioner has been guilty of adultery and consequently disentitled to the relief sought? O. P. respondent 1.

3. Whether petitioner is entitled to the custody of the child? O. P. Petitioner.

4. Whether petitioner does not reside in Lahore and consequently this Court has no jurisdiction? O. P. respondent 1.

The learned District Judge held that the appellant did "not" reside at Lahore and, on this finding he sustained the plea of want of jurisdiction. On the merits he found that the respondent had been living in adultery with Mrs. Maitland who had borne him a child, but that it had not been established that the respondent had deserted the appellant. The counter-allegation made by the respondent, that the appellant herself was guilty of adultery, was held unproved. The learned Judge also expressed the opinion that in case a decree for dissolution of the marriage was passed the appellant should be given the custody of the child Barbara, but the respondent should have reasonable opportunity of seeing her. As the findings on the issues relating to jurisdiction and desertion were against the appellant, the petition has been dismissed, the parties being left to bear their own costs.

The first question requiring determination is whether the learned District Judge was in error in holding that he had no jurisdiction to entertain the petition. Mr. Jeremy for the appellant pointed out at the outset that the burden of proving issue No. 4 had been placed on the respondent and that he had led no evidence whatever to discharge it. He, therefore, contended that the plea of want of jurisdiction should have been overruled on this ground alone. In my opinion this contention is without force and must be rejected. In cases under the Divorce Act the question of jurisdiction is of paramount importance and does not fall to be determined purely on allocation of the *onus* of proof. In these cases, it is the duty

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of the Court, apart from any objection that might have been taken by one or other of the parties, to enquire into and set out in the judgment facts which show clearly that it possesses jurisdiction to pronounce a decree for dissolution of marriage, *Durand* v. *Durand* (1). It is, therefore, necessary to examine the matter independently of the form in which the issue was cast.

Under section 10, read with section 3 (3) of the Act, a petition for dissolution of marriage should be presented to the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife "*reside or last resided together.*" It is settled law that in this section the word "together" governs only the words immediately preceding it, *viz.* "last resided," and not the word "reside," *Gale* v. *Gale* (2), *Borgonha* v. *Borgonha* (3), *Durand* v. *Durand* (1), and *Leadon* v. *Leadon* (4). The Act, therefore, gives the petitioning spouse the choice of selecting his forum either as

(*a*) the district where the parties had "last resided together," or

(*b*) the district within the local limits of which both the husband and the wife, though living separately, "reside" at the date of the presentation of the petition.

It is common ground that the Lahore Court had no jurisdiction under (*a*), as admittedly the appellant and the respondent "last resided together" at Allahabad in June 1924. As to (*b*), it is conceded that the respondent has had a residence at Lahore for some

(1) (1870) 14 W. R. 416.
(2) 47 P. R. 1911 (F. B.).
(3) (1920) I. L. R. 44 Bom. 924.
(4) (1926) 94 I. C. 952.

years and was resident here on the 4th June 1929, when the petition was presented. The jurisdiction of the learned District Judge, therefore, depends on the short point whether the appellant also was "residing" at Lahore on that date.

Now it is admitted by the appellant that from June 1924, when she separated from the respondent, till April 1927 she lived with her father Mr. Foster (P. W. 2) first at Allahabad and then at Calcutta, and that during this period she was being maintained by her father and brother. She says that she came to Lahore in April 1929 to purchase a house for her father who wanted to settle here after retirement. From the date of her arrival till the institution of the suit, she lived as a paying guest with certain friends of hers, the Mackenzies, first at McLeod Road and later on at Hall Road. She states she saw some houses here but found none suitable. It is admitted that Mr. Foster was not due to retire until the end of 1930 and there is nothing to show why he should have sent his daughter about 20 months before to find a house for him. I have carefully read the appellant's statement and find it difficult to believe that she has correctly stated the object of her visit to Lahore. Equally incredible is the other reason given by Mr. Foster for his daughter's visit to Lahore that she came here for "change of air," in the month of April and stayed here for that purpose in May and June; a part of the year, when Lahore is perhaps at its worst.

After a careful examination of the evidence I have no doubt that the learned District Judge was right in holding that the appellant had heard that her husband was living in adultery with a woman at

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Lahore and she came here in April 1929 to make further enquiries and collect evidence for filing a petition for divorce. This view finds support from the fact that soon after the presentation of the petition she went back to Calcutta, and when she came to Lahore for the subsequent hearing of the case in August, October and November, on each occasion she put up for two or three days in the Braganza Hotel. On two of these occasions her father and daughter came with her and it was the former who paid the Hotel bill for her. It is stated that the appellant had to go back to Calcutta as her mother was suffering from cancer, but be that as it may, there can be no doubt that she came to Lahore on a casual visit without an idea of dwelling here for any appreciable length of time.

On these facts, can it be said that the appellant was "residing" at Lahore at the time of the presentation of the petition? The word "reside" has not been defined in the Indian Divorce Act and it is admitted that it does not possess any technical meaning. As observed by Jenkyns J. in *Jogendra Nath Banerjee* v. *Elizabeth Banerjee* (1), it must be taken to have been used in its ordinary acceptation in which it conveys "the idea, if not of permanence, at any rate of some degree of continuance * * * The degree of continuance is not capable of precise definition, but I take it, that to serve as a foundation for this important branch of the Court's jurisdiction, * * * the residence to which the Act points must be something more than occupation during occasional and casual visits within the local limits of the Court, more especially where there is a residence outside those limits marked with a considerable

(1) (1898) 3 Cal. W. N. 250, 252.

measure of continuance." The same view was taken in *Flower* v. *Flower* (1), where it was held that a mere temporary sojourn in a place, there being no intention of remaining there, will not amount to "residence" in that place within the meaning of section 3 of the Indian Divorce Act, 1869, so as to give jurisdiction under the Act to the Court within the local limits of whose jurisdiction such place is situated. Similarly it has been laid down in the English Divorce Court that in order to bring a case within its jurisdiction, "the residence of the petitioner must be *bona fide* and not casual or as a traveller." *Manning* v. *Manning* (2).

Of the rulings cited for the appellant, none appears to me to be in point, the facts in each of them being materially different. In *Bright* v. *Bright* (3), it was found that neither the husband nor the wife had any permanent residence anywhere and that both of them had *last lived together* in a hotel at Calcutta for about a fortnight. On these facts, Fletcher J. held, though not without hesitation, that he had jurisdiction to entertain a petition for divorce by the husband. This case was followed in *Murphy* v. *Murphy* (4), where also emphasis was laid on the fact that neither party had a permanent residence. It was found that the husband had been employed in the Army and had been on active service for a long time during the War, mostly in Mesopotamia. About a year before making the application he had come to Bombay on leave, where he was joined by his wife and both had *last lived together* for the greater portion of a month at the Taj Mahal Hotel. These facts were held sufficient—and I venture to

(1) (1910) I. L. R. 32 All. 203.
(2) (1871) L. R. 2 P. and D. 223.
(3) (1909) I. L. R. 36 Cal. 964.
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*think rightly—to confer* jurisdiction on the Bombay Court under section 3 (3) of the Act.

Besides the Divorce Act, the word "reside" occurs in several other statutes in force in India and has been the subject of judicial interpretation in a large number of rulings. It is, however, unnecessary to review them here, as it is beyond dispute that the Legislature has not used the word in one and the same sense in all enactments. It is clear that its meaning varies according to the circumstances to which it is applicable and the context in which it is found; and as observed by Sargent J. in *Mahomed Shuffli* v. *Lal Din Abdulla* (1), "the word 'residence' may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature to have been in framing the particular provision in which the word is used." If, however, any assistance can be derived from the cases decided under other statutes, reference may usefully be made to the case of *De Momet* (2), where a question of jurisdiction arose in connection with the provisions of the Insolvent Act (11 and 12 Vic., c. 21). Sale J., while remarking that he could not go "to the length of holding that residence under section 5 must be a permanent residence," held that the object of the Legislature was to extend the benefit of the Act to *bona fide* residents within the jurisdiction at the time of the filing of the petition. "The term is used", observed the learned Judge, "to distinguish the position of such persons from that of a person who *merely comes in and uses his presence within the jurisdiction as the means of obtaining the benefit of the Act*, and it has also the effect of ex-

(1) (1879) I. L. R. 3 Bom. 227, 229. (2) (1894) I. L. R. 21 Cal. 634.

cluding persons merely in the position of visitors. The cases show, moreover, that great stress is laid upon the fact as to whether or not the person said to reside within the jurisdiction had at the time any other residence elsewhere."

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It seems to me that similar considerations would govern the decision of the question under the Divorce Act, and I have no doubt that a person who has an abode elsewhere but who comes to a place for a short period and with the fixed purpose of being within the jurisdiction of the Court, cannot be said to " reside " there, [cf. *Coombes* v. *Coombes* (1)].

Applying this test to the case before us, I have no doubt whatever that the appellant did not "reside" within the territorial limits of the jurisdiction of the District Court at Lahore on the date when she presented the petition for dissolution of her marriage with the respondent. The facts show unmistakably that though physically present here on that date, she had a clear *animus revertendi* to the place where she had been dwelling with her parents. On this finding, it must be held that the learned District Judge had no jurisdiction to entertain and try the petition.

The appeal fails and I would dismiss it with costs. And in doing so I wish to make it clear that I should not be taken to have either endorsed, or dissented from, the findings of the learned Judge on the merits, which are matters for determination by the Court possessing jurisdiction to try this cause under the Act.

CURRIE J.

CURRIE J.—I concur.

*N. F. E.*

*Appeal dismissed.*

(1) (1902) 1 L. B. R. 222.