

(1936) 01 BOM CK 0014
In the Bombay High Court
Case No : O.C.J. Suit No. 1558 of 1934

Freny Barjorji Engnieer

APPELLANT

Vs

Shapurji Kekobad Modi

RESPONDENT

Date of Decision : 17-01-1936

Acts Referred:

Majority Act, 1875 — Section 2

Parsi Marriage and Divorce Act, 1936 — Section 3

Citation : AIR 1937 Bom 392 : (1937) 39 BOMLR 486

Hon'ble Judges : B.J. Wadia, J

Bench : Single Bench

Judgement

B.J. Wadia, J.—Plaintiff has filed this suit against the defendant to recover 3. sum of Rs. 10,000 or such other sum as to the Court may seem adequate for damages for breach of promise of marriage, and a further sum of Rs. 426 for moneys spent and expenses incurred at the time of her betrothal with the defendant and subsequent thereto. Plaintiff was engaged to be married to the defendant on or about March 21, 1934, when she was about seventeen years old, and the suit was originally filed by her through her mother as next friend. Thereafter she attained the age of eighteen, and the next friend was discharged, and the plaint was re-declared by the plaintiff personally. Defendant denies liability on the ground that the agreement of marriage is void and unenforceable in law, as the plaintiff was admittedly a minor at the date of that agreement. He denies liability also on the ground that his consent to the agreement was obtained by certain false and fraudulent representations alleged by him in his written statement, and on the ground of the plaintiff's misconduct.

2. At the hearing certain issues were raised on behalf of the defendant of which the first two issues were argued as preliminary issues. They are, (1) whether the agreement referred to in the plaint is void and unenforceable, and (2) whether in any event the plaintiff can maintain this suit. It was argued by defendant's counsel that the agreement of marriage was between the plaintiff and the defendant, and that the agreement cannot be enforced by the plaintiff as it has

been authoritatively held by the Privy Council in *Mohori Bibee v. Dharmodas Ghose* ILR (1903) Cal. 539 : 5 Bom. L.R. 421. that a minor's contract is altogether void and not merely voidable at the minor's instance as was previously held by the various High Courts of India following the English law. It is a contract on which no action can lie and which cannot be subsequently ratified. To that the plaintiff's answer is that the contract of marriage was really made by the minor's mother as the natural guardian of the plaintiff on her behalf, that the guardian has power to enter into a contract on behalf of the minor so as to bind the minor, that the contract is for the benefit of the minor, and that under the circumstances it is enforceable by the minor herself. This is not quite clearly alleged in para. 1 of the plaint where it is stated that the plaintiff was duly engaged to be married according to the rites and ceremonies of the Parsi religion and customs. That might mean either that the plaintiff herself entered into the agreement, or that the agreement was made on her behalf by some one else with the defendant. The plaintiff's counsel applied for an amendment of para. 1 of the plaint in order to have it made clear that the plaintiff was engaged to be married to the defendant at the instance of the plaintiff's mother who made the necessary arrangements, and to make all consequential amendments in the plaint. Defendant's counsel does not object to such an amendment, and I, therefore, allow it; the amendment to be made at the plaintiff's own cost. Evidence, however, will have to be led on behalf of the plaintiff to prove that she was engaged to be married to the defendant at the instance of her mother in terms of the amended plaint.

3. My attention was drawn to the case of *Rose Fernandes v. Joseph Gonsalves* that a minor can maintain a suit for breach of promise of marriage, if the contract is made by the minor's guardian on her behalf and is for the minor's benefit. In that case the parties were Roman Catholics, the plaintiff being, a Goan and the defendant an East Indian. The learned Judge who tried the case came to his conclusion on a consideration of the customs and manners in this country, and the duties of parents as understood in the particular community in question, and he held that the contract of marriage was enforceable by the minor, though it had been made on the minor's behalf by her guardian. It was pointed out that the Goans and East Indians were originally converted from Hinduism to Christianity, but that they still followed the customs, manners and habits of their Hindu ancestors amongst whom marriage is considered to be the primary duty of parents, especially in the case of girls. He has expressed his opinion that the Indian Christians and Goans must be considered to be on the same footing as Hindus or Mahomedans and other communities in India, and I see no reason why amongst Parsis also such a contract, if it is proved to have been entered into by the guardian of the minor and is for the minor's benefit, should not be held to be enforceable at law. In fact, u/s 3 of the Parsi Marriage and Divorce Act of 1865 one of the requisites to the validity of a Parsi marriage is that, if the bridegroom or the bride is below the age of twenty-one, the consent of his or her father or guardian shall have been previously given to the marriage.

It is, therefore, clear that even amongst Parsis parents are deemed to have a controlling hand in the matter of their children's marriage, and the consent of the father or guardian is necessary until the boy or the girl has completed the age of twenty-one years. I may also in this connection refer to the judgment of the Privy Council in (1910) L.R. 37 I.A. 152 (Privy Council) where it is stated as follows (p. 159) :?

Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts.

4. The common law doctrine there referred to is the one laid down in the leading case of *Tweddle v. Atkinson* (1861) 1 B. & S. 393 that a stranger to the consideration of a promise cannot maintain a suit on the contract. It has been held that under the English law a third party cannot sue on a contract made between the other parties even though made for his benefit, unless he was in the position of a cestui que trust under the fiction of a trust which made one of the real contracting parties a trustee for him. The case of *Tweddle v. Atkinson*, however, is not an authority in India.

5. Plaintiff's counsel also applied *ex majari cautela* to have the plaint amended by adding the plaintiff's mother as a co-plaintiff with her, the mother being willing and consenting to be added as such. The application is made under the terms of Order 1, Rule 10 (1), of the Civil Procedure Code, under which it is provided that where it is doubtful whether the suit has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just. I would have allowed this amendment if I thought that it was necessary to add the mother as co-plaintiff for the determination of the matters in dispute between the parties, but I do not think that it is strictly necessary, especially in view of the fact that the plaintiff has now attained majority. In any event the suit cannot be bad on the ground of non-joinder, and adding the mother as co-plaintiff, if necessary, would not in my opinion alter the nature of the cause of action. I hold that the agreement is enforceable in law, and by the plaintiff.

6. The next question is whether the suit as framed can be maintained. The plaintiff is admittedly eighteen years old and below twenty-one. It is provided by Section 2(a) of the Indian Majority Act that nothing in that Act which fixes the age of majority at eighteen shall affect the capacity of any person to act in the following matters, viz., marriage, dower, divorce and adoption. It has been held that the age of majority amongst Parsis for the purposes of the Parsi Marriage and Divorce Act is twenty-one : see *Sdrabji Cawasji Polishvala v. Buchmbai* ILR

(1894) Bom. 366 in which the Court ordered in a suit filed by the husband for divorce against his wife who was below the age of twenty-one that she should be represented by a guardian ad litem. The question for consideration is whether, if a Parsi boy or girl is not of the statutory age of majority for the purposes of the marriage, he or she can enter into an agreement to marry. I do not think that a promise to marry is strictly speaking an act in the matter of marriage within the meaning of Section 2 of the Indian Majority Act. The capacity to act in the matter of marriage must be confined to the marriage itself and acts arising out of the marriage, as in *Bat Shirinbai v. Kharshedji* ILR (1886) Bom. 430 but not to the betrothal which precedes it. It was argued that a betrothal was the first step in the marriage, and if a Parsi could not legally marry till twenty-one, how could he or she be betrothed for the purpose of marriage before that age? Betrothal is generally the first step towards a solemnization of the marriage, but it is not an essential part of the marriage, and is entirely independent of the marriage. Two Parsis over the age of twenty-one, and with the consent of the father or guardian when below the age of twenty-one, can get married without any betrothal at all. The effects of the two transactions are also different. The promise to marry is revocable; marriage is irrevocable, except that the law allows divorce or dissolution on certain restricted grounds. Amongst Parsis there is no doubt a statutory impediment to marriage contained in Section 3 of the Parsi Marriage and Divorce Act until the parties attain the age of twenty-one, but in my opinion that impediment must be strictly confined to the purpose for which it was intended. It is an impediment which interferes with the freedom of contracting of parties who are otherwise competent contract after attaining the age of eighteen, and I do not see why that impediment should be extended further.

7. In my opinion, therefore, the agreement of marriage is enforceable by the plaintiff. It was made on her behalf and for her benefit by her mother when she was below the age of eighteen, and having attained that age after the filing of the suit, the next friend is properly discharged, and she can maintain the suit in her own right.

8. It was lastly argued that the suit was not maintainable by the plaintiff, even though the contract was entered into by her mother for her personal benefit, as no claim to property was involved. It is true that the cases that are referred to are generally cases in which such claims are involved, but it does not necessarily follow that the benefit should be proprietary only. A personal benefit in the form of a good and valid marriage is as good a benefit as any other benefit involving a claim to property.

9. I will answer both the issues, Nos. 1 and 2, after recording the evidence. I order that the suit must now proceed on the merits.

10. [The suit ended in a consent decree on February 13, 1936, whereby the defendant agreed to pay to the plaintiff a sum of Rs. 2,500 in full settlement of her claim.]