
(1937) 09 BOM CK 0029
In the Bombay High Court
Case No : First Appeal No. 241 of 1936

Nadirshaw Jamshedji Vachha	Vs	APPELLANT
Manekbai Nadirshaw Vachha		RESPONDENT

Date of Decision : 20-09-1937

Acts Referred:

Parsi Marriage and Divorce Act, 1936 — Section 40

Citation : AIR 1938 Bom 218 : (1938) 40 BOMLR 195

Hon'ble Judges : Wassoodew, J; Divatia, J

Bench : Division Bench

Judgement

Divatia, J.—This appeal is preferred against the decision of B. J. Wadia J. rejecting the application in the form of a chamber summons taken out by the defendant in a Parsi Matrimonial suit in Bombay for an order that the amount of permanent alimony of Rs. 85 per month awarded to his former wife, the plaintiff, by Mr. Justice Davar in 1928, and subsequently reduced to Rs. 50 per month by B. J. Wadia, J. in 1935, be altogether rescinded. The only ground on which the defendant-appellant prayed for this order was that after she was divorced from him, the wife had remarried in 1934, and the fact of remarriage itself was a sufficient reason, under the new Parsi Marriage and Divorce Act of 1936, for the rescission of the order of permanent alimony which was made under the previous Act of 1865 in which, however, there was no provision for; such rescission in the event of the wife's remarriage.

2. The appellant relied on Section 40 of the new Act which runs as follows :-

40. U) The Court may, if it shall think fit at the time of passing any decree under this Act or subsequently thereto on application made to it for purpose, order that the husband shall,-

(a) to the satisfaction of the Court, secure to the wife while she remains chaste and unmarried such gross sum or such monthly or periodical payment of money for a term not exceeding her life as, having regard to her own property, if any,

her husband's ability and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties and suspend the pronouncing of, its decree until such instruments shall have been duly executed, or,

(b) make such monthly payments to the wife for her maintenance and support as the Court may think reasonable.

In case any such order shall not be obeyed by her husband it may be enforced in the manner provided for the execution of decrees and orders under the Code of Civil Procedure, 1908, and further the husband may be sued by any person supplying the wife with necessaries during the time of such disobedience for the price of such necessaries.

(2) The Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just.

3. It is to be noted and it is conceded that the order of alimony passed by Davar J. was a personal order and not secured by any charge on the husband's property, and it would, therefore, fall under Clause (b) and not Clause (a) of Sub-section (1) of this section. The condition " while she; remains chaste and unmarried " which is known as " dum casta et sola" clause in English law is inserted in Clause (a) but not in Clause (b). The result would be that in the case of a secured alimony, the order would cease to operate on the wife's remarriage while in the case of a; personal order no such result would follow unless the order contained a provision that it was to cease to operate on her remarriage. Mr. Banaji for the appellant, however, contends that the absence of the words "while she remains chaste and unmarried" in Clause (b) of the new Act was only an oversight or an accidental omission on the part of the legislature and that in any case those words should be taken as implied in a personal order. The first contention appears to me to have some force, but the remedy for such oversight or omission clearly lies with the legislature and not with the Court which has to administer the law as it is. I am also unable to accede to the second contention. If those words appear expressly in Clause (a) and are not to be found in Clause (b), it is either accidental or intentional. If it is accidental, the remedy, as I said, lies with the legislature. If it is intentional, they cannot be taken as implied in Clause (b) but on the contrary purposely excluded.

4. It is next urged on behalf of the appellant that in any, case remarriage is a change in the circumstances of either party and that therefore the Court can, acting under Sub-section (2) of that section, rescind the order of alimony. Now, it is true that there was no provision in the preceding Act corresponding to this paragraph but it cannot be held to mean that the fact of remarriage is, by itself, a change in circumstances which entitles the previous husband in all cases to obtain an order of rescission of alimony. I agree with the learned Judge in holding that it may be regarded as one of the circumstances under which, in a

proper case, the order of alimony may be varied or even rescinded. That would depend on the circumstances of each case, and, as observed by the learned Judge, the circumstances of the wife's remarriage was in existence in 1935 when he reduced the alimony to Rs. 50 and that since then there is no change of circumstances between the parties. On that ground he has refused to vary or rescind the order. The appellant before us does not contend to have the order rescinded for change of any circumstances since 1935. The only question, therefore, is whether the original order of 1928 as varied in 1935 should be rescinded only because of the wife's remarriage, now that under the new Act of 1936 power of rescission is expressly given on a change of circumstances. I am unable to hold that the order must be rescinded even under the present Act merely because of the remarriage. It remains a matter of discretion and u/s 47 of the present Act, the appellate Court cannot interfere with the decision of the trial Court unless it is contrary to law or usage having the force of law or there is a substantial error or defect in the procedure. This contention, therefore, also fails.

5. The last contention is about the order of costs. The learned Judge, in dismissing the summons with costs, has made an order "Counsel certified" under which, we are told, costs have been taxed on the scale prevailing on the Original Side of the High Court. It is contended that this is erroneous because under the rules and Table of Fees enacted by the High Court for trial of cases in the Parsi Matrimonial Court of Bombay, there is provided a special scale of fees and it is laid down that those fees only shall be allowed in cases tried under Act XV of 1865, i.e. the former Parsi Marriage and Divorce Act. It is further contended that no new rules have been framed under the new Act of 1936 but that until then, by virtue of the provision in the General Clauses Act, those rules are still applicable to trials under the new Act. I think there is force in this contention. We are told that the practice has been to tax the costs on the Original Side scale notwithstanding the special scale. If that is so, I am unable to see how this practice is consistent with the rule that this special scale of fees only shall be allowed in Parsi Matrimonial cases. Our attention is drawn to the case of *Payne and Co. Vs. Pirojshah Nusserwanji Patel*, where at p. 933 Davar J. sitting on the Original Side has observed that if costs other than those provided in the scale are incurred by a solicitor on behalf of his client, i.e. the wife, in a Parsi Matrimonial suit, he can hold the husband liable for costs incurred, and in a regular suit on the Original Side to recover them, they can be granted to him on proper taxation even though they are not covered by the special scale of fees laid down, I do not think those observations are applicable to the present case and I see no reason why effect should not be given to the only scale provided in a Parsi Matrimonial suit, I am, therefore, of opinion that the costs should be taxed on the scale of fees specially prescribed under the rules.

6. With this variation, the decision of the learned trial Judge is confirmed and the appeal is dismissed with costs.

Wassoodew, J.—The principal question of law argued in this appeal is whether a personal order for alimony passed against the husband in a suit by the wife u/s 34 of the old Parsi Marriage and Divorce Act (XV of 1865), which order by the retrospective operation of the provisions of the new Parsi Marriage and Divorce Act (III of 1936) is now referable to the provisions of Section 40(1) (b), is enforceable only on the condition *dum sola vixerit* in the absence of an express provision to that effect in the order itself. It will be noted that a change in the law has been effected by enacting Section 40(1) (a) in the new Act. The Legislature has made a distinction between an order for secured alimony or maintenance and a personal order for monthly pay-ment to a wife for her maintenance and support under els. (a) and (b) of Section 40(1) of Act III of 1936 respectively. The provision for the order for secured maintenance is thus made in Section 40(1) (a) :-

The Court may, if it shall think fit at the time of passing any decree under this Act or subsequently thereto on application made to it for the purpose, order that the husband shall, to the satisfaction of the Court, secure to the wife while she remains chaste and unmarried such gross sum on such monthly or periodical payment of money for a term not exceeding her life as, having regard to her own property, etc.

The *dum casta et sola* clause has been expressly added in the above order which I may describe as a securing order. It was not done in the old Section 34 providing for a similar order. There was apparently no express provision for a personal order under the old Act. The Legislature has now supplied the omission and has provided for a personal order in Clause (b) of Section 40(I) as follows :-

The Court may, if it shall think fit at the time of passing any decree under this Act...order that the husband shall make such monthly payments to the wife for her maintenance and support as the Court may think reasonable.

There can be no doubt that under Clause (b) the Court possesses a discretion to impose a condition *dum casta et sola*. Now whenever such a condition is imposed, there can be no question of the continuance of alimony upon remarriage of the wife, and there can then hardly be any necessity for rescission, for the order will cease to operate *proprio vigore*.

2. We are asked in this appeal to hold that the personal and unconditional order in this case has so ceased to operate upon the assumption that the Legislature in enacting Clause (b) of Section 40(I) has inadvertently omitted to state that the order shall be subject to the same condition as in Clause (a). The clause regarding chastity and remarriage was an addition in the new Act. The addition therefore was deliberate and intended to make a change in the law as regards the wife's right to demand alimony upon remarriage if it was secured by the order. When the Legislature effects a change of language by the addition of words which did not occur in the old statute and those words are necessary to convey a particular sense, the addition must be construed as intended to convey

that sense. Where a distinction such as this in language and conditions is observed in two clauses of the same section, the Legislature must be presumed to have intended by that language to curtail or enlarge, as the case may be, the Court's discretion in these matters,

3. The argument that the draftsman was following the English practice under which it is said the *dum sola* clause is uniformly attached to personal orders and that the omission was inadvertent, is not well-founded. The ordinary rule of construction is that " nothing is to be added to or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express"-(see Maxwell on the Interpretation of Statutes, 7th Edition, p. 12). There are several reasons for the Legislature's deliberately making the distinction. According to Rayden & Mortimer's Practice and Law in the Divorce Division (Third Edition, p. 388),

The condition *dum casta* is now rarely inserted in orders for the maintenance of an innocent wife, from the consideration that she should not be insulted by even the suggestion that she might become unchaste, but, in determining whether this condition should be attached, the conduct of the) wife, before as well as during the marriage, may be considered.

4. As regards condition as to remarriage the authors make the following statement upon the authorities of *Fisher v. Fisher* (1861) 2 Sw. & Tr. 410 and *Lister v. Lister* (1890) 15 P. D. 4 :-

With regard to the condition *dum sola* there is no uniform practice, nor does the contingency of the wife's remarriage receive in every case the consideration which it would seem to merit. In the early days of the Court it was considered that if a wife availed herself of the freedom conferred on her by the decree of divorce and married again it would be unreasonable to compel the former husband to maintain her, but it has since been laid down that the effect of the statutes is to leave an unfettered discretion in each case, and that it would be wrong to lay down any *prima facie* rule whether or not maintenance shall continue to be payable after the wife's remarriage. In deciding this matter every circumstance of the case, -conduct, social position, means, children, and the future of the wife-must be considered.

Therefore it is legitimate to presume that the legislature deliberately preserved the distinction between a securing order and a personal order.

5. In view of the above, the question of rescinding the personal order will in the first instance depend on the question whether the remarriage of the wife is a "change in the circumstances" within Clause (2) of Section 40. That clause provides that " the Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just." Remarriage, in my view, may be regarded as a change in the circumstances within the meaning of that clause. But that alone is not enough. In spite of it the Court has a

discretion whether on that account to rescind the order. That discretion has not been shown to have been unwisely exercised.

6. Therefore I agree with the order proposed.