

(1937) 03 BOM CK 0025

In the Bombay High Court

Case No : Parsi Matrimonial Suit No. 25 of 1936

Phiroze BomanShaw Pothiwalla

APPELLANT

Vs

Shirinbai Phiroze Pothiwalla

RESPONDENT

Date of Decision : 30-03-1937

Acts Referred:

General Clauses Act, 1897 — Section 6(c)

Parsi Marriage and Divorce Act, 1865 — Section 32(b)

Citation : AIR 1938 Bom 65 : (1937) 39 BOMLR 1146 : 173 Ind. Cas. 395

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.J. Wadia, J.—Plaintiff has filed this suit against his wife to have his marriage dissolved on the ground that at the time of the marriage she was of unsound mind and has been habitually so up to the date of the institution of the suit, or in the alternative to have the marriage declared null and void on the same ground, but under the provisions of Section 27 of the old Parsi Marriage and Divorce Act of 1865. In the body of the plaint it is stated that the plaintiff will in the further alternative ask for a decree for judicial separation; but there is no prayer for judicial separation. The written statement was put in by the wife through her father as guardian ad litem, and the issues were settled in chambers in the ordinary course. The plaint was admitted by me provisionally, as I felt some doubt at the time about the suit being maintainable. Two issues were tried as preliminary issues, namely, issue (2) whether the plaint discloses any cause of action as regards the reliefs for nullity and judicial separation, and (3) whether the claim made and all the reliefs sought in the suit are barred by the law of limitation.

2. The plaintiff has made three claims in the plaint, but he prays only for dissolution of the marriage, or in the alternative, for a declaration of nullity. With regard to the prayer for dissolution of marriage, the appropriate provision in the

Act of 1936 is Section 32(b), under which it is provided that the plaintiff may sue the defendant for divorce on the ground that the defendant at the time of the marriage was of unsound mind and has been habitually so upto the date of the suit: provided that divorce shall not be granted on this ground, unless the plaintiff (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage. The conditions laid down in the proviso are cumulative, so that before the suit can lie, plaintiff must show that he was ignorant of his wife's unsoundness of mind at the date of the marriage, and secondly, that the suit has been brought within three years, not from the date of his knowledge of the wife's unsoundness of mind, but within three years from the date of the marriage. The defendant has put in a written statement, denying that she was of unsound mind at the date of her marriage, or that even if she was the plaintiff was ignorant of it. Assuming even that under the first condition the plaintiff was so ignorant, the second condition is clearly against the plaintiff, for the suit is filed more than three years after the date of the marriage, the parties having been married in 1925. It is admitted that the plaintiff can sue only for divorce on the ground of his wife's unsoundness of mind under the new Act of 1936, and I do not understand how it can be argued that only the first part of Section 32(b) applies, and that the proviso does not apply, in this case. u/s 27 of the old Act the only relief which the plaintiff could claim on the ground of his wife's unsoundness of mind was a declaration that the marriage was null and void upon proof that: the lunacy or habitual unsoundness of mind existed at the time of the marriage and was continuous. That relief is now done away with under the new Act which only gives to the plaintiff the right to have the marriage dissolved on the ground of unsoundness of mind, provided the suit is brought within three years from the date of the marriage. The claim for dissolution of the marriage is, therefore, time-barred.

3. The alternative prayer is to have the marriage declared null and void. As I have said before, the plaintiff cannot ask for that relief on the ground of his wife's unsoundness of mind under the new Act. Counsel for the plaintiff thereupon argued that he could fall back upon the provisions of Section 27 of the old Act. Under the old Act also there was a proviso that no suit could be brought u/s 27, if the plaintiff should at the time of the marriage have known that the respondent was a lunatic or of habitually unsound mind. Assuming, again, that the plaintiff did not know of such unsoundness at the date of the marriage, two questions still arise : (a) whether the old Section 27 can now apply, and (b) even if it does, whether the suit is barred by limitation. u/s 53 of the new Act the old Act of 1865 is entirely repealed. It is laid down inter alia in Section 52 of the new Act that the provisions of the Act shall apply to all suits to which the same are applicable, whether the circumstances relied on occurred before or after the passing of the Act. The circumstances relied on by the plaintiff are (1) that he and his wife were married in 1925 (2) that she was then of unsound mind, and (3) that her unsoundness of mind has continued upto the date of the suit. The suit was filed in December, 1936, after the new Act was passed. If any cause of

action can be based on these circumstances, it can be only for dissolution of the marriage u/s 32(ft), as the provisions of Section 32(b) would apply to these circumstances by virtue of Section 52 of the Act. Counsel, however, contended that the plaintiff could also sue for a declaration of nullity, and he relied on Section 6(c) of the General Clauses Act of 1897. It is provided by Section 6 that where the General Clauses Act or any Act of the Governor General in Council or Regulation made after the commencement of the General Clauses Act repeals any enactment hitherto made, then unless a different intention appears, the repeal shall not affect any right which accrued to the plaintiff under the enactment so repealed. It was, therefore, argued that the plaintiff's right to sue for nullity on the ground of his wife's unsoundness of mind under the old Act of 1865 was not affected by the new Act of 1936. The provisions of Section 6 of the General Clauses Act are, however, subject to the appearance of a different intention. That intention must be gathered from the words of Section 52 of the new Act. Section 52 is not very happily worded, but it seems to me that the provisions of the new Act will apply to this suit, though the circumstances relied on by the plaintiff occurred before the passing of the Act. In my opinion the legislature has done away with the relief of declaration of nullity of marriage on the ground of unsoundness of mind, and substituted in its place the relief of dissolution of marriage, provided the two conditions laid down in the proviso to Section 32(6) are fulfilled. It might be a hardship upon the plaintiff that his right of action should now be barred, and that he should be prevented from proving after more than three years from the date of the marriage that his wife was of unsound mind at the date of the marriage and was habitually so upto the date of the suit; but he is himself to blame for this result by not having taken the proper proceedings in time. According to para. 8 of the plaint the defendant's father requested the plaintiff in February, 1928, to take custody of the child of the marriage, as the defendant was unable to look after her owing to her mental unsoundness, and the plaintiff accordingly did so. If he did not know of such unsoundness at the date of his marriage, he certainly knew of it in February, 1928; and as that unsoundness was continuous, he could have brought his suit under the old Act for a declaration of nullity. A question was raised whether, u/s 27 of the old Act, a suit filed more than six years after the cause of action arose would have been barred under Article 120 of the Indian Limitation Act. Counsel relied on the judgment of the appeal Court in *Bed Shirinbai v. Kharskedji* ILR (1896) Bom. 430 in which Article 120 was applied in a suit for declaration of nullity of marriage on the ground of the marriage being an infant marriage. There was no time-limit for a suit u/s 27 of the old Act. It was provided u/s 32 of the old Act that in a suit for divorce or judicial separation the Court has to be satisfied that there has been no unnecessary or improper delay in the institution of the suit. That provision did not apply to a suit for a declaration of nullity of marriage on the ground of unsoundness of mind u/s 27. Does it therefore follow that such a suit under the old Act could have been brought at any time after the husband came to know of his wife's unsoundness of mind, provided that he did not know of it at the date of the marriage? There is considerable force in the

contention raised by the defendant's counsel that such a suit, under the old Act, would be governed by the provisions of the Indian Limitation Act which applies to all suits generally, unless any kind of suit is particularly exempted from its provisions. It is not however, necessary to pursue this point any further, because I have already said that Section 27 of the old Act does not apply to the facts stated in the case, and it is, therefore, an entirely academic question for the Court to consider within what time a suit u/s 27 could have been brought. In my opinion the suit, in so far as it prays for dissolution of marriage, is barred u/s 32(f) of the new Act, and in so far as it claims a declaration of nullity of marriage, it is not maintainable.

4. The last relief claimed is one for judicial separation. There is no prayer to that effect. Counsel for the plaintiff argued that no prayer was necessary, nor was even any amendment of the plaint necessary if the Court could on the evidence come to the conclusion that the plaintiff had made out a case for judicial separation. He relied on the provisions of Order VII, Rule 7, of the Civil Procedure Code. In my opinion that rule does not cover this case at all. All that is there provided is that it is no longer necessary for a plaintiff specifically to claim a general relief in a suit, the relief which is described as "such further and other relief as the nature of the case may require." A relief claiming judicial separation is not a general relief. It was open however to the plaintiff to have applied for an amendment of the Plaint, and I would have been willing to entertain the application, if I was of opinion that the claim for judicial separation could now be entertained. u/s 34 of the new Act there are four grounds on which any married person can under the Act sue for judicial separation, namely (a) on any of the grounds on which the plaintiff could have filed a suit for divorce, or (b) on the ground that the defendant had been guilty of such cruelty to the plaintiff and/or the children of the marriage as to render it in the judgment of the Court improper to compel him to live with her, or (c) on the ground that the defendant had used such personal violence as also to render it improper for husband and wife to live together, or (d) the defendant had behaved in such a way towards the plaintiff also as to render it in the judgment of the Court improper for them to live together. In the first place none of these grounds is alleged in the plaint. Assuming, however, that on an amendment of the plaint the plaintiff had asked for judicial separation on the ground on which he asks for divorce, namely, that the defendant at the time of the marriage was of unsound mind and had been habitually so upto the date of the suit, the suit for judicial separation would have been barred under the proviso to Section 32(f). I do not think that it is open to the plaintiff to rely in respect of his claim for judicial separation on a portion only of Section 32(b), and ignore the proviso. If the plaintiff was entitled to sue for judicial separation on the ground laid down in Section 32(6) of the new Act, the entire provision would be applicable, and as the suit was filed more than three years from the date of the marriage, the relief for judicial separation would also be barred. Even if the proviso did not apply, the plaintiff would still have to show u/s 35 that he had filed a suit for judicial separation without unnecessary or

improper delay, and the delay after 1928, when, as stated in the plaint, the plaintiff knew of his wife's mental unsound-ness, cannot be considered either necessary or proper for the filing of the suit. In any event, therefore, the suit for judicial separation would have been barred, and I thought it unnecessary to consider the question of an amendment.

5. In the result, issue 2 must be decided in the negative, and issue 3 in the affirmative.

6. The suit must, therefore, be dismissed with costs. Plaintiff to pay the defendant's costs of the suit taxed as between party and party on the Original Side scale on the footing of one counsel being employed for the trial of these issues.