
(1937) 07 BOM CK 0012

In the Bombay High Court

Case No : Matrimonial Suit No. 24 of 1936

Shavaksha Bomanji Balsara

APPELLANT

Vs

Meherbai Shavaksha Balsara

RESPONDENT

Date of Decision : 28-07-1937

Acts Referred:

Parsi Marriage and Divorce Act, 1936 — Section 2(2)

Citation : AIR 1938 Bom 195 : (1938) 40 BOMLR 50

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

Bench : Single Bench

Judgement

B.J. Wadia, J.—This is an application for execution under Order XXI,. Rule 11(2), of the Civil Procedure Code, taken out by the defendant against her husband the plaintiff who was ordered to pay Rs. 200 to his wife by the order dated March 12, 1937, and a further sum of Rs. 195 by the order dated April 7, 1937. The mode in which the assistance of the Court is required in execution is by arrest and imprisonment of the plaintiff, as he failed, to pay the amount. The order dated March 12, 1937, has been stayed pending the hearing of Civil Revision Application No. 208 of 1937.

2. With regard to the order of April 7, 1937, the plaintiff through his counsel-now contends that the order was without jurisdiction on the ground that it was not passed by the Matrimonial Court constituted of the presiding Matrimonial Judge and the delegates, but by the Judge sitting alone. The order was made u/s 39 of the Parsi Marriage and Divorce Act which provides that if the wife shall not have an independent income sufficient for her support and the necessary expenses of the suit, the Court, on the application of the wife, may order the husband to pay her monthly or weekly during the suit such sum not exceeding one-fifth of her husband's net income as the Court, considering the circumstances of the parties, shall think reasonable. It was argued; that it was for the Court to make the order, and the word, " Court", is defined u/s 2(2) as meaning a Court constituted under the: Parsi Marriage and Divorce Act, unless there is anything repugnant in

the subject or context. The defendant's contention is that in execution a party cannot go behind the Court's order, but the plaintiff contends that the order itself is a nullity, being without jurisdiction, The constitution of the Court is laid down in s. 18 which provides that for the purpose of hearing suits under this Act a special Court shall be constituted, among other places, in Bombay. Section 19 provides that the Court so constituted shall consist of the Chief Justice of the High Court or such other Judge of the High Court as the Chief Justice shall from time to time appoint as the Judge of the Matrimonial Court, and that in the trial of cases under the Act the Judge shall be aided by seven delegates. u/s 24 the local Government appoints persons as delegates " to aid in the adjudication of cases " arising under the Act. The functions of the Judge and the delegates are laid down in Section 46- u/s 45 the provisions of the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings in suits instituted under the Act, including proceedings in execution and orders subsequent to decree. Section 46 provides that in suits under the Act all questions of law and procedure shall be determined by the presiding Judge ; but the decision on the facts shall be the decision of the majority of the delegates before whom the case is tried.

3. There is thus a distinct cleavage of functions between the presiding Judge of the Court and the delegates who are appointed to aid him in the adjudication of cases. It seems that a little confusion has crept into the Act by the use of the word " Court" promiscuously throughout the Act. For instance, u/s 29(3) it is "the Court" which grants the leave to sue after recording its reasons in writing, but it was clearly not the intention of the legislature that the Court which would grant the leave was to be a Court constituted of both the Judge and the delegates. The granting of leave is a question of law, or rather a mixed question of law and fact, and the delegates have no voice in matters of law. u/s 33 it is provided that in every suit for divorce on the ground of adultery, the plaintiff shall, unless " the Court " shall otherwise order, make the person with whom the adultery is alleged to have been committed a co-defendant. This is clearly a matter of procedure which the Judge alone has to determine, and yet the word used is " Court". u/s 35 (e) a decree in a suit u/s 30, 31, 32 or 34 cannot be pronounced unless the Court is inter alia satisfied that there is no "legal ground" why relief should" not be granted. The determination of such " legal ground " is entirely a question of law which is for the presiding Judge alone, but the word used is " Court ". Section 39 refers to an application pendente lite by the wife made in a suit under the Act. The delegates are appointed to aid in the adjudication of suits, that is suits for a declaration of nullity of marriage, or for divorce, or for judicial separation, or for restitution of conjugal rights. Counsel argued that a case includes a part of the case, and therefore also includes interlocutory applications. That may be so generally; but I do not agree that interlocutory applications under the Parsi Marriage and Divorce Act are to be dealt with by the delegates. u/s 40 the Court may, at the time of passing a decree on application, order that the husband shall, to the satisfaction of the Court, secure to the wife her maintenance under certain circumstances. I do not

think that by the satisfaction of the Court the legislature intended the satisfaction also of the delegates. u/s 47 an appeal lies inter alia where the decision of the Court is contrary to law or usage. If the word " Court " includes the delegates, it would mean that the decision of the delegates might also be contrary to law, whereas questions of law are entirely outside their purview. u/s 52 the Court may allow proceedings to be amended if necessary. An amendment is a matter of procedure which is for the Judge, and yet the word " Court" is used, though it cannot include the delegates. I have dealt with most of the relevant sections. As I have said before, the word " Court" is promiscuously used throughout the Act, but under the cleavage of functions which I have referred to, the word must be read in its context in order to determine whether it includes both the Judge and the delegates or the Judge sitting alone.

4. It has been a long standing practice under the old Act, and the practice also under the new Act, for all these interlocutory matters to be dealt with by the Parsi Matrimonial Judge sitting alone, but I concede that because the practice is of long standing it need not necessarily be correct. The practice, however, is correct in the view I take of the provisions of the Act.

5. As to the application itself, the defendant seeks to enforce execution of the order of April last by the arrest and imprisonment of the judgment-debtor. My attention is drawn to Act XXI of 1936, under which Order XXI, Rule 40, of the Code, has been amended. That section requires the Court to take evidence as to the ability of the judgment-debtor to pay before committing him to prison. Some evidence has already been taken for the purposes of the application u/s 39, but it has not been taken for the purposes of this application in execution. I, therefore, adjourn the notice in order to hear the necessary evidence on both sides. I order the plaintiff to pay the defendant's costs of to-day's hearing before me.