

(1993) 10 BOM CK 0024

In the Bombay High Court

Case No : M.J. Suit Lodging No's. 2072 with 2726 of 1993

Vincent Joseph Konath and etc.

APPELLANT

Vs

Jacintha Angela Vincent Konath and etc.

RESPONDENT

Date of Decision : 13-10-1993

Acts Referred:

Bombay High Court Rules — Rule 131
Divorce Act, 1869 — Section 2
Family Courts Act, 1984 — Section 7, 8
Foreign Marriage Act, 1969 — Section 18(1), 18(4)

Citation : AIR 1994 Bom 120 : (1994) 1 MhLj 477

Hon'ble Judges : D.R. Dhanuka, J

Bench : Single Bench

Advocate : C.J. Travasso and Gopal R. Hegde, for the Appellant; Mrs. S.D. Nanavati, Sr. Advocate, for the Respondent

Judgement

1. By his order dated 16th August 1993 the Prothonotary and Senior Master has made a reference to the Court presided by me while I was sitting as the Chamber Judge as contemplated under the first proviso to R. 13I of the Bombay High Court Rules (Original Side). The Reference remained part-heard when assignments changed. The material controversy concerning both the suits is identical. The basic facts concerning jurisdictional issue in both the suits are almost identical.

2. The Court is required to interpret Ss. 18(1) and 18(4) of the Foreign Marriage Act 1969 and S. 2 of the Indian Divorce Act, 1869 and consider as to whether this Honourable Court has jurisdiction to entertain this suit. The Prothonotary and Senior Master felt that the Family Court, Bombay appears to have jurisdiction to entertain the suits in question in view of the provisions contained in Ss. 7 and 8 of the Family Courts Act, 1984. The Prothonotary and Senior Master has referred the following three questions to this Court for its opinion and determination.

(1) Whether the Court having jurisdiction under the Indian Divorce Act, 1869, can dissolve a Christian Marriage not solemnised in India but in a foreign country between parties who are citizens of India and domiciled in India?

(2) If the answer to (1) is in the negative, whether the matrimonial relief sought herein by the Petitioner can be granted by the Court having jurisdiction to entertain and try suits and proceedings under the Special Marriage Act, 1954?

(3) If the answer to (2) is in the affirmative, whether the present petition may be returned to the Petitioner for presentation to the proper Court?

I answer question No. 1 in affirmative. This Court has jurisdiction to entertain the two suits as discussed below.

3. In view of the complexity of the problem raised by the reference and the sharp difference of opinion on the subject between the Prothonotary and Senior Master and the learned advocates for the plaintiffs in the two suits, the Court decided to appoint Mrs. S. D. Nanavati, Senior Advocate, of this Court as Amicus Curiae with a request to render assistance to the Court. Mrs. Nanavati has been good enough to accept the request of the Court and file written submissions on the questions involved in this reference after careful study of law points involved herein. I have heard the learned Counsel Mrs. S. D. Nanavati and the learned Counsels Shri C. J. Travasso for the petitioner in Suit Lodging No. 2072 of 1993 and Shri Gopal Hegde, learned Counsel for the petitioner in companion suit bearing lodging No. 2726 of 1993. I have gone through the order of reference made by the Prothonotary and Senior Master and the relevant statutory provisions.

4. I shall first summarise the facts of suit lodging No. 2072 of 1993. The petitioner and the respondent are Roman Catholic Christians domiciled in India. It is averred in the suit that the marriage was solemnised on 30th May, 1979 at Manama, Bahrain Island, Arabian Gulf. It is averred in paragraph 21 of the suit that the petitioner and the respondent are Indian nationals domiciled in Maharashtra and the petitioner and the respondent last resided together at Bombay. The averments made in the petition/plaint are presumed to be correct for the time being and for purpose of this reference.

5. In Suit Lodging No. 2726 of 1993 identical averments are to be found in paras. 1, 2 and 31 of the suit. The said averments are presumed to be correct for the time being and for the purpose of this reference.

6. Section 18(1) of the Foreign Marriage Act 1969 provides that the provisions of Chapter IV, V, VI and VII of the Special Marriage Act, 1954 shall apply in relation to marriages solemnized under the said Act and to any other marriage solemnized in a foreign country between the parties of whom one at least is a citizen of India as they apply for marriages solemnized under the Act. (Underlining is done to supply the emphasis)

7. In the instant cases, the marriage between the parties was solemnized in a foreign country. The parties were citizens of India. The marriage was not

solemnized in the manner prescribed under the Foreign Marriage Act, 1969. The Special Marriage Act, 1954 confers jurisdiction on Bombay City Civil Court in so far as Greater Bombay is concerned for purposes of dissolving the marriages governed by the Special Marriage Act, 1954 and for the purposes of granting other appropriate matrimonial reliefs. It is not disputed and it is not disputable that the jurisdiction of the Bombay City Civil Court at Bombay to grant matrimonial relief stands transferred to the Family Court, Bombay in respect of prescribed category of matters. The exclusive jurisdiction of the High Court to entertain specified category of matrimonial matters remains in tact and is not affected by the provisions contained in Family Courts Act.

8. Section 18(4) of the Foreign Marriage Act, 1969 reads as under:

"(4) Nothing contained in sub-sec. (1) shall authorise any Court to grant any relief under this Act in relation to any marriage in a foreign country not solemnized under it, if the grant of relief in respect of such marriage (whether on any of the grounds specified in the Special Marriage Act, 1954 or otherwise) is provided for under any other law for the time being in force."

If Section 18(4) of the Foreign Marriage Act 1969 is held to be applicable to the suits herein, Section 18(1) of the Act shall not be applicable. Section 18(4) of the Act continues non-obstante clause. The basic question arising for consideration of the Court is as to whether this Court sitting on the Original Side has jurisdiction to grant relief of dissolution of marriage under the Indian Divorce Act, 1869 even if the marriage is celebrated outside India. The Prothonotary and Senior Master appears to be of the tentative view that the Indian Divorce Act, 1869 can be invoked to dissolve the marriage where the petitioner or the respondent professes the Christian religion and the parties to the marriage are domiciled in India only if such marriage was performed in India. The learned Counsel for the petitioner in Suit Lodging No. 2072 of 1993 contended before the Prothonotary and Senior Master that the Indian Divorce Act, 1869 is applicable for the purpose of seeking decree of dissolution of marriage even where the marriage had been performed outside India provided the jurisdictional conditions specified in S. 2 of the Act were satisfied. The learned Counsel for the two petitioners submitted that the jurisdictional conditions prescribed by S. 2 of Indian Divorce Act, 1869 are satisfied in this case in view of the averments made in the plaint/petition.

9. Section 2 of the Indian Divorce Act, 1869 provides that the Court shall have jurisdiction to grant relief under the Act where the petitioner and the respondent professes Christian religion and where the parties to the marriage are domiciled in India at the time when the petition is presented. Section 2 of the Act nowhere specifies that the said Act can be invoked by the party seeking dissolution of marriage only if the marriage is solemnized in India and cannot do so if the marriage is performed out of India. The question before the Court is as to whether the above referred restriction on jurisdiction of Indian Courts to dissolve the marriage can be spelt out by necessary implication. The answer is in negative.

10. Mrs. Nanavati, the learned counsel appointed as amicus curiae by the Court, has submitted with considerable force that Section 2 of the Act read with the statutory form No. 1 appended to the Act clearly shows that the Indian Divorce Act, 1869 empowers the Indian Courts to dissolve the marriage even where the marriage is solemnised out of India. The foot note appended to statutory form No. 1 reads as under :--

"(a) If the marriage was solemnised out of India, the adultery must be shown to have been committed in India."

In contrast, the learned Counsel Mrs. Nanavati has invited attention of the Court to the later part of Section 2 of the Indian Divorce Act, 1869 in so far as it makes provisions for making of decrees of nullity of marriage. In contrast, the later part of Section 2 of the Act in terms provides that the Indian Courts shall be entitled to pass decree of nullity of marriage only where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition. No such jurisdictional condition is prescribed in case of proceedings for dissolution of marriage. If this part of S. 2 of the Indian Divorce Act is considered along with the statutory form No. 4 appended to the Act and compared with the earlier part of the Section, read with statutory Form No. I, it shall become clear that Mrs. Nanavati is completely right in her submission to the effect that Indian Divorce Act can be invoked for dissolution of marriage even where marriage is performed out of India. Shri Travasso, learned counsel for the petitioner in suit lodging No. 2072 of 1993 and Mr. Hegde, learned counsel for the petitioner in suit lodging No. 2726 of 1993 support the above-referred interpretation of S. 18(4) of the Foreign Marriage Act, 1969 and S. 2 of the Indian Divorce Act, 1869. I am in complete agreement with the submissions made by all the three learned Counsel. I hold that the Indian Divorce Act, 1869 can be invoked to dissolve the marriage herein even though the marriage was performed out of India. In this view of the matter S. 18(4) of Foreign Marriage Act, 1969 is applicable and not Section 18(1) thereof. I hold that this Court has exclusive jurisdiction to entertain the two suits under Indian Divorce Act, 1869.

11. In this view of the matter, I direct the Prothonotary & Senior Master to take on file lodging No. 2072 of 1993 as well as the Suit filed by Wilfred Anthony Rebello i.e. M. J. Suit Lodging No. 2726 of 1993.

12. It must be stated for the sake of clarification that the Family Court has no jurisdiction to entertain such suits which fall exclusively within the jurisdiction of this Court. I have expressed this opinion in my order dated 20th August, 1993 passed in the case of Iffat Ahmed Abdullah v. Ahmed/ Abdulla alias Bipin Khosla (Plaint Lodging No. 1712 of 1993). While expressing this view, I have interpreted and applied the ratio of the Division Bench judgment of our High Court in the case of Kanak Vinod Mehta Vs. Vinod Dulerai Mehta, and taken the view that the Family Court has no concurrent jurisdiction with the High Court to hear the matters which lie exclusively within the jurisdiction of this Court. According to the abovereferred Division Bench judgment, the High Court sitting on the Original

Side cannot be considered as a District Court within the meaning of the said expression used in the Family Courts Act, 1984.

13. Mrs. Nanavati, the learned Counsel appointed by the Court as Amicus Curie has also referred to the judgment of this Court in the case of *Nina Dalai v. Merwanji Pherozshah Dalai*, AIR 1930 Bom 385, where this Court in fact exercised jurisdiction to entertain the suit for restitution of conjugal rights instituted by a Christian lady against her Parsi husband even though the marriage was performed at Paris. This case is cited as a precedent to assist the Court. In this case, the question of jurisdiction was not raised by the parties presumably because it was considered inarguable. I need not discuss the other cases cited by the learned Counsel on either side in view of the explicit provisions on the subject contained in S. 2 of the Indian Divorce Act, 1869 read with the statutory forms appended thereto.

14. I cannot part with this reference without expressing my gratitude to Mrs. Nanavati the learned Sr. Counsel who was appointed by this Court as amicus curie and also to learned counsel Mr. Travasso and Mr. Hegde for their careful study of the subject and the assistance rendered to this Court.

15. Order accordingly.