

(2000) 07 BOM CK 0061
In the Bombay High Court
Case No : Suit No. 21 of 2000

Yasmin Rao Karkaria

APPELLANT

Vs

Cyrus Edul Karkaria

RESPONDENT

Date of Decision : 26-07-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 19 Rule 1
Parsi Marriage and Divorce Act, 1936 — Section 32B

Citation : (2000) 4 ALLMR 627 : (2001) 1 BomCR 571 : (2001) 3 BOMLR 279 :
(2001) 1 MhLj 422

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Mehar K. Master, for the Appellant;

Judgement

D. G. Deshpande, J.—The suit is filed by both wife - plaintiff No. 1 and husband - plaintiff No. 2 for divorce by mutual consent u/s 32B of the Parsi Marriage and Divorce Act, 1936. The matter was on board today under caption "Mutual consent matters". Both the plaintiff No. 1 and plaintiff No. 2 are residing in United States and the plaint which was filed in this Court on 13th July, 2000 has been signed by both the plaintiffs and it was presented by the Constituted Attorney, who is an Advocate. The original Power of Attorney duly signed and attested by both the parties is filed on record. It is notarised by Notary Public in U.S.A.

2. Counsel representing both the plaintiffs also tendered today affidavit of the wife-plaintiff No. 1 and the husband-plaintiff No. 2. Both these affidavits are also notarised before the Notary Public in U.S.A., and each of the affidavit is accompanied by letter written by the plaintiff No. 1 and plaintiff No. 2 explaining difficulty in coming to India for the purpose of giving evidence. Both of them have however stated in the affidavits why they have filed this suit for divorce by mutual consent, and affidavits being accepted and taken on record in lieu of their oral evidence. Both of them have stated that they have already obtained divorce

by the Family Judge of the Probate and Family Court Department and Judgment of decree nisi was granted as on 3.4.2000 and it became decree absolute on 21.7.2000.

3. Counsel for the plaintiffs also furnished draft issues, copies of which were given to the delegates in advance, who were selected amongst the delegates present. Copies of affidavit of plaintiff Nos. 1 and 2 were also given to the delegates and after going through those affidavits, the Foreman of the delegates communicated their findings on the issues as under:

(1)

Whether the plaintiff Nos. 1 and 2 were married on 4.2.1997 according to Parsi Zoroastrian rites, customs and ceremonies in Bombay under the Parsi Marriage & Divorce Act III of 1936 as amended?

Affirmative

(2)

Whether the parties have lived separate and apart since November, 1998?

Affirmative

(3)

Whether the consent of the plaintiff No. 1 and plaintiff No. 2 has been obtained by force fraud and/ or coercion?

Negative

(4)

Whether there is any delay or any other lawful cause for not granting the reliefs as prayed?

Negative

(5)

Whether the plaintiff Nos. 1 and 2 are entitled to a Decree of Divorce under the Parsi Marriage and Divorce Act III of 1936 as amended?

Affirmative but even though this issue is left to the discretion of the Court.

(6) What order? As per the final order.

4. Both the plaintiffs have stated on oath in their affidavits that they were married on 4.2.1997. Exhibit "A" of the plaint is the certified copy of marriage certificate. That there are no issues of the marriage and that they have been living separately since November, 1998 and that they have signed the plaint and affidavits voluntarily, without any force, fraud, coercion or undue influence.

5. The question that was raised by me to the counsel for the plaintiffs is whether

filing a suit by Constituted Attorney and deciding the suit on the basis of the affidavits only without requiring the parties to appear before the Court is permissible.

6. It was found that Order VI Rule 14 of the C.P.C. permits pleadings to be signed by a person duly authorised by the plaintiffs where the party himself is unable to sign the pleadings. In the instant case the plaint has been signed by both the plaintiffs and the presentation has been made by the Constituted Attorney, who is an Advocate and who gets the power under the Power of Attorney. original of which Is filed.

7. Second question whether evidence in the form of affidavit for finally deciding the case on merits can be accepted. In that regard my attention was drawn to Rule 12 of Appendix IV which are rules framed by this Court for Parsi Chief Matrimonial Court and Rule 12 provides that in respect of any application under the Act or under the Rules, the Judge may receive in evidence and act upon affidavits which are duly sworn and filed. Apart from this C.P.C. also provides for accepting evidence by way of affidavit as per the provisions of Order XIX-Rule 1 which lays down "Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable.

8. It will be therefore clear that the provisions of Order XIX Rule 1 of the C.P.C. and Rule 12 of the Original Side Rules of Appendix IV empowers the Court to receive affidavit by way of evidence.

9. Therefore, institution of the suit by Constituted Attorney for persons who are abroad, and dispensing with the recording of evidence of parties personally by accepting the affidavits is permissible, both under the C.P.C. as well as Rules made under the Parsi Marriage and Divorce Act, 1936.

10. Considering this legal position and considering the findings on issue Nos. 1 to 4 given by the delegates and also considering the fact that Plaintiff Nos. 1 and 2 have already obtained divorce from a competent Court in U.S.A., my findings on issue No. 5 is in the affirmative and therefore I pass the following order :

ORDER

11. Marriage of the plaintiff No. 1 with plaintiff No. 2 is dissolved by decree of divorce u/s 32B of the Parsi Marriage and Divorce Act, 1936. Suit disposed of. No order as to costs.