BOMBAY HIGH COURT

Robasa Khanum

Vs

Khodadad Bomanji Irani

(Leonard Stone, Kt., C.J. Chagla, J.)

22.08.1946

JUDGMENT

Leonard Stone, Kt., C.J.

1. I have read the judgment which my learned brother is about to deliver and I am in entire agreement with it and have nothing to add.

Chagla, J.

2. This is an appeal from the judgment of Mr. Justice Blagden. The suit was filed by a Muslim woman against her Zoroastrian husband for dissolution of marriage. The parties were married in 1927 in Iran according to the Zoroastrian law. In the plaint as originally filed the only ground on which a decree for dissolution of marriage was sought was desertion of the plaintiff by the defendant. The plaint was subsequently amended and a further ground was alleged, namely, that the plaintiff had ceased to be a Zoroastrian and had become a Muslim and that the defendant had declined to become a Muslim and was still continuing to be a Zoroastrian. It was therefore submitted that the plaintiff's marriage with the defendant was dissolved and a declaration was sought to that effect. The suit proceeded ex parie before Mr. Justice Blagden, and the learned Judge dismissed the suit.

3. The plaintiff's allegation with regard to desertion may be briefly dealt with. The learned Judge who had the advantage of seeing the plaintiff in the witness-box has refused to believe her on this point and has come to the conclusion that the charge of desertion was not well-founded. We see no reason on this question of fact to take a different view from that taken by the learned Judge below.

4. The more difficult and the more interesting question that arises for determination is: what are the consequences of the plaintiff's conversion to Islam? Muslim law makes a distinction between conversion to Islam of one of the spouses talcing place in a country subject to the laws of Islam

and in a country where the law of Islam is not the law of the land. fIn the first ease, when one of the parties embraces Islam, he or she must offer Islam to the other spouse; and if the latter refuses to adopt Islam, then the Judge should separate the couple. In the latter case, after the lapse of a period of three months after the adoption of Islam by one of the parties, the marriage is automatically dissolved. It is not possible to take the view that India is a country subject to the laws of Islam. It is true that the Courts in British India administer the Muslim law as altered and amended by statute law to Muslim parties. But the Courts of Jaw do so pursuant to the directions contained in the laws of India. Complete religious neutrality obtains in our country and our Courts administer laws irrespective of the creed of the parties who appear before them. The Courts do not administer the laws of any particular community, but they administer such laws as are valid in British India. Muslim law is administered only in those cases where it happens to be the law of British India in eases where the parties are Muslims.

5. Therefore this country not being an Islamic country, according to the Muslim law, three months after the conversion of the plaintiff, if the defendant did not embrace Islam the marriage would stand dissolved. In this case there is no dispute that the plaintiff was converted to Islam, that the requisite period had passed and that the defendant has not adopted the religion of Islam.

6. It is clear that on the plaintiff's conversion to ilslam her personal law by which she is governed became the Muslim law and therefore, as far as her own personal law is concerned, it is undoubtedly true that she is entitled to have a declaration that her marriage stands dissolved. If this were to be a case in which Muslim law was to be administered, then, the case would present no difficulty whatsoever. But the difficulty arises because the defendant is a Zoroastrian and his personal law happens to be different from that of the plaintiff. Therefore we have here a case where there is a conflict between the personal laws of the two parties to the suit. The question of the domicile of the parties which would have a decisive bearing upon the question if the case were to be tried in English Courts does not help us here. It has been established that both the parties are domiciled in British India, but in British India there is no such thing as the law of domicile or a territorial law. In matrimonial matters there is no one law which applies to persons domiciled in British India; they are governed by their personal laws which differ from community to community. When the Supreme Court was established, this difficulty was foreseen, and by Clause 24 of the Charter it was provided that in the eases of Mahomedans or Gentoos (Hindus), their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahoraedans, and where the parties are Gentoos, by the laws and usages of the Qentoos, or by such laws and usages as the same would have been determined by if the suit had been brought and the action commenced in a native Court, and where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the

defendant. The same provision, with this difference that it; applied to all communities instead of being confined to Hindus and Muslims, found a place in the Government of India Act, 1915, Section 112; and in the Government of India Act of 1935, Section 223 provides that the law to be administered in the High Court shall be the same as was administered before the Act came into force. It has been urged by Mr. Forbes on behalf of the respondent that in this case we should apply the law of the defendant because the case falls within the classes of cases enumerated in Section 112 of the Government of India Act of 1915, It is contended that marriage is a contract, that parties entered into the contract of marriage, that one party is seeking to repudiate the contract and that as the two parties belong to different communities their rights should be administered according to the law of the defendant. We find it difficult to accept this contention. It is difficult to believe that Parliament wanted to include matrimonial matters in the compendious expression "matters of contract and dealing between party and party." If Parliament intended to invest the High Court with matrimonial jurisdiction, Parliament would have made use of a more appropriate expression. Therefore in our opinion it is not possible to obtain any guidance as to the law which we should administer from Section 112 of the Government of India Act of 1915. Mr. Justice Crump in Benjamin v. Benjamin (1925) 28 Bom. L.R. 328 also expressed a doubt whether the words used in Section 112 of the Government of India Act of 1915 cover a matrimonial suit.

7. Clause 28 of the Charter of the Supreme Court contains a general direction that the Courts should give judgment according to justice and right; and Clause 19 of the Letters Patent provides that the High Court, in the exercise of its ordinary original civil jurisdiction, should apply to each case such law or equity as would have applied by the High Court if the Letters Patent had not been passed, Therefore in cases which do not fall within the ambit of Section 112 of the Government of India Act of 1915, and where there is no other statutory provision, the Court can only decide the case according to justice and right.

8. If parties appearing before the Court were governed by the same personal law, it would be easy to say what justice and right was according to which the ease should be decided. Ordinarily it would be according to the personal law of the parties. But a serious difficulty arises when the plaintiff and the defendant have different personal laws and there is a conflict between those personal laws. "We have here a Muslim wife according to whose personal law conversion to Islam, if the other spouse does not embrace the same religion, automatically dissolves the marriage. We have a Zoroastrian husband according to whose personal law such conversion does not bring about the same result. The Privy Council in *Waghela Rajsanji v. Shekh Masludin*[1] expressed the opinion that if there was no rule of 'Indian law which could be applied to a particular case, then it should be decided by equity and good conscience, and they interpreted equity and good conscience to mean the rules of English law if found applicable to Indian society

and circumstances. And the same view was confirmed by their Lordships of the Privy Council in *Muhammad Baza v. Abbas Bandi Bibi*[2] But there is no rule of English law which can be made applicable to a suit for divorce by a Muslim wife against her Zoroastrian husband. The English law only deals and can only deal with Christian marriages and with grounds for dissolving a Christian marriage. Therefore we must decide according to justice and right, or equity and good conscience independently of any provisions of the English law. We must do substantial justice between the parties and in doing so hope that we have vindicated the principles of justice and right or equity and good conscience.

9. It is impossible to accept the contention of Mr. Peerbhoy that justice and right requires that we should apply Muslim law in deciding this case. It is difficult to see why the conversion of one party to a marriage should necessarily afford a ground for its dissolution. The bond that keeps a man and woman happy in marriage is not exclusively the bond of religion. There are many other ties which make it possible for a husband and wife to live happily and contentedly together. It would indeed be a startling proposition to lay down that although two persons may want to continue to live in a married state and disagree as to the-religion they should profess, their marriage must be automatically dissolved. Mr. Peerbhoy has urged that it is rarely possible for two persons of different communities to be happily united in wedlock. If conversion of one of the spouses leads to unhappiness, then the ground for dissolution of marriage would not be the conversion but the resultant unhappiness. Under Muslim law, apostasy from Islam of either party to a marriage operates as a complete and immediate dissolution of the marriage. But Section 4 of the Dissolution of Muslim Marriages Act (VIII of 1939) provides that the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage. This is a very clear and emphatic indication that the Indian legislature has departed from the rigour of the ancient Muslim law and has taken the more modern view that there is nothing to prevent a happy marriage notwithstanding the fact that the two parties to it professed different religions.

10. We might also point out that the plaintiff and the defendant were married according to the Zoroastrian rites. They entered into a solemn pact that the ^marriage would be monogamous and could only be dissolved according to the tenets of the Zoroastrian religion. It would be patently contrary to justice and right that one party to a solemn pact should be allowed to repudiate it by a unilateral act. It would be tantamount to permitting the wife to force a divorce upon her husband although he may not want it and although the marriage vows which both of them have taken would not permit it. We might also point out that the Shariat Act (Act XXVI of 1937) provides that the rule of decision in the various cases enumerated in Section 2 which includes marriage and dissolution of marriage shall be the Muslim personal law only where the parties are Muslims; it does not provide that the Muslim personal law shall apply when only one of the parties is a

Muslim.

11. As far as we can see from the cases cited at the Bar, only two High Courts have had occasion to consider this question-the High Court of Calcutta and the High Court of Madras. There have been several conflicting decisions of the Calcutta High Court which we shall briefly review. Mr. Justice Panckridge in an ex parte case made a declaration that the marriage of a Hindu woman who had been converted to Islam stood dissolved. He followed an iinreported decision of Buckland J. to the same effect. (See Musst. *Ayesha Bibi v. Bireshwar Ghosh Mazumdar*[3] clxxix). But the judgment contains no reasons which led the learned Judge to come to that conclusion. In *Haripada Boy v. Krishna Benode*[4] the husband, a Hindu, filed a suit for the restitution of conjugal rights against his wife who had been converted to Islam. It seems that she had obtained an ex parte decree for dissolution of her marriage on the ground of her conversion. The husband's suit for the restitution of conjugal rights had been dismissed by the two lower Courts and the matter came in second appeal before the High Court. It was not necessary to decide whether conversion led to dissolution of marriage because the Court expressly decided the appeal on the ground that as the ex parte decree had not been challenged, a suit for the restitution of conjugal rights could not be maintained. In Noor Jehan v. Eugene Tiscenko the wife sued her husband who was a Russian subject for a declaration that her marriage stood dissolved on the ground of her conversion to Islam. Mr. Justice Edg'ley who tried the suit refused to apply the rule of Muslim law stating (p. 594) that it was not the law of India that a marriage which had been duly celebrated according to the lex loci contradus and contemplated a lifelong union, could be dissolved by having recourse to some provision of the personal religious law of one of the parties to the marriage in a case in which the parties belonged to different religious communities. He went to the length of saying that the rule of Mahomedan law, on which the plaintiff relied, must be regarded as obsolete and contrary to public policy. Mr. Justice Edgley dismissed the suit and there was an appeal from his decision. In *Noor Jehan Begum v. Eugene Tiseenho*[5] *a* bench consisting of Derbyshire C.J. and Ameer Ali and Nasim Ali JJ. confirmed the decision of Mr. Justice Edgley on the ground that as the husband was domiciled in Russia and as the wife took the domicile of her husband, the Court had no jurisdiction to entertain a suit for dissolution of their marriage. It is not necessary for us to go. to the same length as Mr. Justice Edgley went and say that the particular rule of Muslim law on which the plaintiff is relying is obsolete and contrary to public policy, but it is sufficient for us to agree with Mr. Justice Edgley that that rule of Muslim law does not apply where only one of the parties to the suit is a Muslim. Them in Musstt. *Ayesha Bihi v. Subodh Chakravarty*[6] Mr. Justice Ormorid had a similar case before him, We agree with Mr. Justice Ormond in his conclusion that the law to be administered in cases like the one before him and the one before us is to administer justice and right; but, with respect, we entirely disagree with him when he comes to the conclusion that justice and right demands that

conversion from Hinduism to Islam should put an end to the marriage. In passing we may observe that the learned Judge has taken the same view of Section 112 of the Government of India Act of 1915 as we have done earlier in this judgment. In the same volume of the Calcutta Weekly Notes is also reported a decision of another single Judge of the same High Court, Mr. Justice Lodge, and that learned Judge has dissented from the view taken by Mr. Justice Ormond (*Sayed Khaioon v. M, Obediah*[7]). The learned Judge took the view that India was not a Mahomedan country and the Mahomedan law was not the law of the land. The learned Judge further observed that he could find no authority for the view that a marriage solemnized according to one persona law could be dissolved according to another personal law simply because one of the two parties had changed his or her religion. He held that it could not be just and right to grant a declaration of dissolution of marriage on the ground of conversion of one of the parties to the marriage to Islam. With respect, we entirely agree with the decision of that learned Judge.

12. The Madras High Court has held in *Budansa Bowther v. Fattna Bi*[8] that when a Hindu married woman was converted to Islam and during the lifetime of her Hindu husband married a Mahomedan and had several children by the second marriage, the second marriage was illegal and the children who were born of this union were illegitimate. The Court held that where a conflict occurs between persons belonging to different religions, it must apply the rules of justice, equity and good conscience. The Court further held that in testing whether the first marriage of a Hindu woman with a Hindu husband was subsisting or not at the time of her second marriage with a Muslim after she became a convert to Islam, the principles of Hindu law should be applied; but in testing the validity of her second marriage, the principles of Mahomedan law should be applied.

13. We might also consider another point which was debated at the Bar but which does not present much difficulty. Has the High Court the jurisdiction to try matrimonial suits on the Original Side ? By Clause 42 of the Supreme Court Charter, 1823, the Supreme Court was constituted a Court of Ecclesiastical Jurisdiction; and by Clause 35 of the Letters Patent the High Court has been giver. Matrimonial Jurisdiction. But this jurisdiction is confined to cases where one of the parties professes the Christian religion and it is now regulated by the Indian Divorce Act and the Indian and Colonial Divorce Jurisdiction Act, 1926. A special Court is also set up for deciding matrimonial matters where parties are Parsis under the Parsi Marriage and Divorce Act. The Dissolution of Muslim Marriages Act (VIII of 1939) does not set up any special Court and presumably the cases coming under that Act would be tried on the Original Side. But apart from special legislation and special jurisdiction, the High Courts in India have never refused to give redress in suits concerning matrimonial matters. As far back as 1856, the Privy Council, while holding that a suit for the restitution of conjugal rights could not be maintained on the

Ecclesiastical side of the Supreme Court where the parties were Parsis, expressed the opinion that they should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life. (*Ardaseer Cursetjee v. Perozeboye*[9]). Clause 12 of the Letters Patent confers original jurisdiction upon the High Court to try suits of every description, and that expression is wide enough to include in it even matrimonial suits where parties cannot obtain relief by invoking the special Matrimonial Jurisdiction of the High Court. Mr. Justice Crump in *Benjamin v. Benjamin* [10]entertained a suit for divorce between: Jews on the Original Side under Clause 12 of the Letters Patent, Mr. Justice Crump in that case lias reviewed the cases in which the High Court in its original civil jurisdiction has exercised jurisdiction in matrimonial disputes.

14. We, therefore, hold that the Court has jurisdiction to entertain the suit on the Original Side. We further hold that the law which must be applied is not the Muslim personal law, but we must decide the case according to justice and right. We further hold that it is not in accordance with justice and right that on the conversion of one of the parties to the marriage to Islam it should be held that the marriage stands dissolved.

15. The appeal, therefore, fails and must be dismissed with costs.

Cases Referred.

1(1887) L.R. 14 I. A. 89, 98
2(1932) L.R. 59 I. A. 286, 246 : s.c. 34 Bom. L.R. 1048
3(1929) 83 C. W.N
4[1989] A. I. R. Cal. 480
5[1942] 2 Cal. 165
6(1945) 49 C. W. N. 439
7(1945) 49 C. W. N. 745
8(1913) 26 M. L. J. 260
9(1850) 6 M. I. A. 348, 390
10(1925) 28 Bom. L.R. 828