

# **BOMBAY HIGH COURT**

Hirabai Ramchandra

Vs.

Ramchandra Rawoo

Civil Revn. Appln. No. 1410 of 1956

(Dixit and Tendolkar, JJ.)

10.08.1956. 22.02.1957

## **JUDGMENT**

### **Tendolkar, J.**

1. This is a civil revision application against an order of Judge Mehta of the City Civil Court allowing an amendment of the plaint in a matrimonial cause. The petition was originally filed for judicial separation by reason of desertion by the defendant, who is the wife of the plaintiff, for four years under the Hindu Marriage Act, 1955. The amendment that was applied for was for a divorce on the ground of desertion under the Bombay Hindu Divorce Act, 1947, alleging that the wife had deserted the husband from August 1949.

2. Now, under the Hindu Marriage Act, 1955, only judicial separation can be obtained on the ground of desertion and not divorce; and what is urged before us by Mr. Kadam is that the learned Judge erred in granting leave to amend the petition to the husband, because, according to him, the petitioner not having availed himself of the provisions of the Bombay Hindu Divorce Act before it was repealed by the Hindu Marriage Act, 1955, he should not be allowed to do so now. This argument appeals to us to ignore both the specific provisions of the Hindu Marriage Act, 1955, and the provisions of the General Clauses Act, which provide for the saving of vested rights upon the repeal of a statute. The Hindu Marriage Act, 1955, in Section 29, Sub-Section (2), provides: "Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of the Act." There can be no doubt that the right to obtain a divorce on the ground of desertion was conferred by a special enactment, namely, the Bombay Hindu Divorce Act, 1947. If the period prescribed by the Bombay Act as requisite period of desertion in order to entitle a party to a right of divorce was completed before that Act was repealed, quite obviously there was a vested right in the party aggrieved to apply for a divorce; and he could have waited for presenting his petition for divorce for the period of

limitation that is allowed to him under the law of limitation. The same is the position when one looks to the provisions of the General Clauses Act, Section 6, sub-Clause (c), which enacts that a repeal shall not affect any right already acquired or any remedy in respect of such right. The argument of Mr. Kadam, however, is that, in order that the right of the petitioner to obtain a divorce under the Bombay Act should become vested, he ought to have done something under the Act to take advantage of the provisions of that Act. Such a contention appears to me to be opposed to the inherent concept of a vested right. It is not necessary for the purpose of holding that a right is vested that the party in whom the right is vested should have taken any steps to enforce that right. The law allows him the normal period of limitation to enforce his right and he may choose to wait until the very last date of that period of limitation. That does not affect the question as to whether the right is or is not vested. Of course, there may be cases where the right is in its nature such that, if not availed of during the time when it could be availed of, there can be said to exist no vested right; and such a case was the case before their Lordships of the 'Privy Council in *Abbott v. Minister for Lands*<sup>1</sup>, on which Mr. Kadam has placed reliance. In that case, the appellant had purchased 40 acres of Crown land in 1871. Under Section 22 of the Crown Lands Alienation Act, 1861, holders in fee simple of lands granted by the Crown were entitled to make conditional purchases of adjoining lands subject to conditions mentioned in the said section. The appellant had made five such purchases before the Act of 1861 was repealed by the Crown Lands Act of 1884; but the lands that he had acquired by way of conditional purchase were less than the total acreage allowed under Section 22 of the repealed Act. In 1892 the appellant made an application, therefore, for an additional conditional purchase of adjoining lands which he would have been entitled to make under the provisions of Section 22 of the repealed Act. This application was rejected. It was contended on his behalf that he had an accrued right to make conditional purchases of adjoining lands under Section 22 of the Act of 1861 and such right was saved by the new Act; and what their Lordships of the Judicial Committee decided was that, although the power to take advantage of Section 22 may be termed a right, it was not an accrued right. The Lord Chancellor, in his judgment, pointed out that the appellant could have taken advantage of Section 22 before the repeal of the Act of 1861; but having failed to do so, it was no longer open to him to take advantage of that Act; and in this context the Lord Chancellor observed (at p. 431):- "They think that the mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment". We are not dealing with any such situation in the present context. There was nothing that a party to a marriage was called upon to do in order to acquire the right under the Bombay Hindu Divorce Act to a divorce on the ground of desertion by the spouse for the period prescribed by the Bombay Hindu Divorce Act. When that period of desertion was over, the right accrued to the party concerned; it was open to him to proceed to enforce it within the period allowed to him by law; and if he did not do so until the time that the Bombay Hindu Divorce Act was repealed by the Hindu Marriage Act, 1955, it still remained a vested right which was capable of being enforced after the repeal of the Act. The learned Judge was, therefore, obviously right in allowing the amendment.

3. Mr. Kadam has also attempted to argue that, even if that were the correct view of the law, a question may well arise as to whether the City Civil Court had jurisdiction to grant divorce in respect of a right to divorce which arose under the Bombay Hindu Divorce Act, 1947. Assuming such a question of jurisdiction arises in the petition, it is a question that the City Civil Court will have to determine in the ordinary way as one of the issues in the petition; and, in any event, that is not a question that has been raised before us or

<sup>1</sup>1895 AC 425

could have been at this raised before us in this civil revision application.

4. The result, therefore, is that the civil revision application fails and the rule will be discharged. No order as to costs.

Rule discharged.