

Kamlabai Vs. Devram Sona Bodgujar

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Court : Mumbai

Decided On : Feb-15-1955

Reported in : AIR1955Bom300; (1955)57BOMLR568; ILR1955Bom749

Judge : Gajendragadkar and ;Shah, JJ.

Acts : Bombay Hindu Divorce Act, 1947 - Sections 3, 4, 5, 5(1), 5(2), 5(3), 12, 19 and 30; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 20; Consitution of India - Article 5; Government of India - Sections 99; Parsi Marriage and Divorce Act, 1865

Appeal No. : First Appeal No. 96 of 1954

Appellant : Kamlabai

Respondent : Devram Sona Bodgujar

Advocate for Def. : Y.V. Chandrachud, Adv.

Advocate for Pet/Ap. : R.B. Kotwal, Adv.

Judgement :

Gajendragadkar, J.

1. This appeal raises a short question under Section 5, Sub-section (3), Bombay Hindu Divorce Act, 22 of 1947. The plaintiff, who is a Hindu wife, brought a suit against her husband and prayed that the marriage between her and the defendant

should be dissolved on the ground that she had been deserted by her husband continuously for a period exceeding four years before the date of the suit and that on or about 18-3-1952, the defendant had married again another wife with whom he was living.

2. It appears that the father of the plaintiff originally belonged to Madhya Pradesh, but he came to the State of Bombay for maintenance and has been residing within the State of Bombay for several years before the institution of this suit. His place of residence during this period has been Amalner, where he is working as a millhand in a local mill. The marriage between the plaintiff and the defendant took place in Madhya Pradesh at Fopnar in or about 1945. The defendant has always been a resident of the village of Fopnar. Unfortunately, this marriage has turned out to be a failure right up from the start.

It appears that, when the plaintiff was married to the defendant, the defendant's sister was married to the plaintiff's brother. Soon after the marriage the defendant's sister died. Either because of this mishap or because of circumstances which are not apparent on the record, the plaintiff has never gone to the defendant and the defendant has never cared to persuade the plaintiff to join him. On 18-3-1952, the defendant has married another wife, and it is the plaintiff's case that she is entitled to claim divorce and alimony from the defendant because she has been deserted by her husband for the period prescribed by the statute and that she is entitled to the same relief also on the ground that her husband has married a second wife.

When the plaintiff applied to the learned District Judge at Dhulia under Section 5, Sub-section (3) for leave to sue her husband before the learned District Judge, her request was rejected. The learned District Judge held that in the present case he would have no jurisdiction to grant any relief to the plaintiff and so it would not be competent to him to grant her relief to sue her husband in his Court. It is this order which is challenged before us by Mr. Kotwal on behalf of the plaintiff, and that is the genesis of the short question which arises before us under Section 5, Sub-section (3).

3. Mr. Kotwal contends that the order passed by the learned District Judge refusing leave to the plaintiff to sue the defendant in his Court is plainly inconsistent with the provisions of the said sub-section. Section 5 of the Act deals with Courts in which suits under the Act can be instituted. Sub-section (1) provides that every suit under this Act shall be instituted in the Court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit. Sub-section (2) provides that, where the defendant shall at such time have left the State or his whereabouts are unknown, such suit shall be instituted in the Court at the place where the plaintiff and the defendant last resided together.

It would be noticed that under Sub-section (1) it would be open to the plaintiff to sue in the Court within whose jurisdiction the defendant resides. That would be the normal procedure to adopt in filing such suits. Where the defendant has left the State or his whereabouts are unknown, liberty is given to the plaintiff to sue in the Court at the place where the husband and wife last resided together. The present case does not fall under either of these two sub-sections.

Sub-section (3) provides that, in any case, whether the defendant resides in the State or not, such suit may be brought in the Court at the place where the plaintiff resides or at the place where the plaintiff and the defendant last resided together, if such Court, after recording its reasons, grants leave so to do. This sub-section is clearly intended to provide facilities for the institution of a suit under this Act to the plaintiff and the granting of such facilities is left to the discretion of the Court. The plaintiff may sue either at the place where the plaintiff himself or herself resides, or at the place where the husband and wife last resided together, and the forum can thus be chosen by the plaintiff whether or not the defendant resides in the State, provided of course that while granting leave the Court records its reasons for so doing.

Mr. Kotwal argues that, if this sub-section is literally construed, it would clearly justify the claim for relief which the plaintiff had made before the learned District Judge. When a claim is made for leave under Section 5, Sub-section (3), it is no answer to the claim, says Mr. Kotwal, that the defendant did not reside or never resided in the State. Leave can be granted even where the defendant does not

reside in the State, and so Mr. Kotwal's contention is that the learned Judge was in error in not granting leave to the plaintiff solely on the ground that he would not be able to give relief to the plaintiff on the merits.

4. In dealing with the provisions ' of Section 5, it is necessary to bear in mind that the effect of these provisions is to amend the corresponding provisions contained in Section 20, Civil P. C. Under the provisions of Section 20, the suits to which the said section applies have to be instituted in a Court within the local limits of whose jurisdiction the defendant or each one of the defendants resides at the time of the commencement of the suit or carries on business or personally works for gain; or any of the defendants, where there are more than one, at the time of the commencement of the suit, actually; and voluntarily resides, or carries on business or personally 'works for gain; or the cause of action, wholly or in part, arises. It would be clear that the provisions of Sub-section (3) are intended to modify the procedural law which is laid down in Section 20 of the Code. Wherever the marriage may have taken place and wherever the defendant may be residing at the commencement of the suit, it would be open to the plaintiff to ask for leave to begin his or her action in the Court within whose jurisdiction the plaintiff himself or herself resides or within whose jurisdiction the husband and wife last resided together. Therefore, it may be conceded that on a literal construction of the provisions of Section 5, Sub-section (3), it may be that the plaintiff was entitled to make a request for leave to sue the defendant in the Court of the District Judge at Dhulia.

5. But, in my opinion, it would clearly be wrong to give effect to this literal construction of the provisions of Section 5, Sub-section (3), Section 5, Sub-section (3), undoubtedly enables the Court to grant leave for reasons to be recorded in the manner mentioned by the said sub-section. But when 'Section 5, provides for the institution of suits in certain specified Courts, it necessarily postulates that the suits to be filed in these Courts would and could be entertained by the respective Courts. In other words, it is clear that the whole scheme of the Act is to make provisions in respect of marriages amongst Hindus to which the Act applies. If the provisions of the Act do not apply to the marriage of the plaintiff, it would be idle for her to request the Court to grant her leave to sue the defendant; and leave, even if

it is granted, would be wholly ineffective if the marriage between the plaintiff and the defendant fails outside the provisions of this Act.

It is because the learned District Judge held that the marriage between the plaintiff and the defendant was outside the provisions of this Act and that the plaintiff was not entitled to claim any relief under any of the provisions of this Act against the defendant, that he refused to give leave to the plaintiff; and so the question of substance which we have to consider is whether the learned District Judge was right in holding that the provisions of the Bombay Hindu Divorce Act, 1947, did not apply to the marriage between the parties before him. If the answer to this question is in favour of the defendant, the learned District Judge was clearly right in refusing to grant leave to the plaintiff under Section 5, Sub-section (3).

6. The question as to whether the provisions of this Act will apply to the marriage between the parties in the present suit does not, in my opinion, present 'any difficulty. It would be platitudinous to say that the Bombay Legislature, when it enacted this Act in 1947, was fully conscious and must be deemed to have been fully conscious of its territorial limits within the meaning of Section 99, Government of India Act, 1935. It is perfectly true that in a sense the Bombay Legislature was sovereign in respect of the topics mentioned in the Provincial or Concurrent list and it was competent to the Bombay Legislature to legislate on the subject of marriage. But the territorial limits are inexorable and the Bombay Legislature could never have intended to legislate on the topic of marriage so as to make the provisions of its statute applicable to marriages outside the territorial limits of Bombay. It would, therefore, be obvious that the Bombay Hindu Divorce Act applies, and is intended to apply, only to marriages between Hindus where the parties to the marriage are and can be governed by the laws passed by the Bombay Legislature.

Mt. Kotwal contends, that in considering this matter, regard must be had to the fact that the plaintiff has always been a resident of the State of Bombay; and that no doubt is true. But, on the other hand, the defendant has never been a resident of Bombay and the marriage between the parties has taken place outside the limits of the State of Bombay. So far as the husband is concerned, he has never been

governed by the laws of the Bombay State; and so far as the marriage between the defendant and the plaintiff is concerned, since it did not take place within the limits of the Bombay State, but it took place within the limits of the Madhya Pradesh State, the marriage itself would not be governed by the provisions of this Act. Mr. Kotwal contends -- and perhaps may be, with some force -- that there cannot be two domiciles in respect of citizens of India, and he, therefore, resists the application of any principle which is based on considerations of domicile.

Whether or not the Constitution of India permits a plea of dual citizenship and dual domicile to be raised, in dealing with questions of the application of laws passed by different States it would, we think, be permissible to take resort to the theory of domicile, though the different domiciles to which resort would be taken may, in a sense, be fictitious. In -- '*Shankar Vishnu v. Maneklal Haridas*', AIR 1940 Bom 362, a Division Bench of this Court had to consider a similar question. Beaumont C. J., who delivered the judgment of the Bench, observed that where questions arise as to whether incidents of a contract should be governed by the law of one country or of another, the general rule is that all the rights and incidents arising under the contract are governed by the law of the place where the contract was made; and where, therefore, the law of one Province of British India is distinct from the law of another province, the two provinces must be regarded, for the purposes of this rule, as analogous to foreign countries. The conflict of laws which posed this problem before the Division Bench in '*Shankar's case (A)*', arose from different laws in respect of the conciliation of debts due by the debtors mentioned in the two Acts and this Court held that the question as to which law applies to a particular transaction would have to be decided on the basis that the two Provinces which have passed somewhat conflicting laws are, for the purpose of deciding the application of the law to a particular transaction, in the position of foreign countries.

In my opinion, it would be permissible to apply this principle while deciding the question as to the law which governs the marriage between the parties before us. It cannot be disputed that on marriage the wife takes the domicile of her husband; and it is common ground that the husband has always been a resident of Madhya Pradesh and not of the State of Bombay. Therefore, it seems to me that the

learned District Judge was right in holding that the marriage between the plaintiff and the defendant could not claim the protection of the Bombay Hindu Divorce Act, 1947.

7. If that be so, it would serve no useful purpose whatever to grant leave to the plaintiff to sue in this State. When Section 5, Sub-section (3) provides for the granting of leave, to the plaintiff to sue at the place chosen by her, it postulates that the Court where the suit is intended or proposed to be filed has jurisdiction to deal with the merits of the dispute. In other words, Courts that are contemplated by Section 5 for the purpose of institution of suits under this Act must have inherent jurisdiction to deal with the disputes themselves; they must have inherent jurisdiction to pass appropriate orders & give effect to the several provisions of the Act. Where it appears that the substantive provisions of the Act do not apply to the marriage between the parties, it is no good invoking Section 5, Sub-section (3) and relying upon the literal construction of its provisions for the purpose of obtaining leave to bring a suit which must obviously be regarded as an infructuous and entirely misconceived suit. It has been observed by the Privy Council in -- '*Le Mesurier v. Le Mesurier*', 1895 AC 517, that (p. 528);

'....a decree of divorce a vinculo, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.'

If this principle is applied to the facts before us, in the light of the test laid down by Beaumont C. J. to which I have just referred, the answer unambiguously must be that the Court at Dhulia would have no jurisdiction to grant relief on the merits of the claim made by the plaintiff in the present suit.

8. Mr. Kotwal, however, contends that the mere fact that the marriage between the parties took place outside the limits of the Bombay State would, not mean that the marriage is not governed by the provisions of the Bombay Hindu Divorce Act. In the present case we are not dealing with a marriage between two Hindus who were normally residents of the State of Bombay but who chose to solemnise their marriage outside the limits of Bombay State. We are dealing with a marriage

between the plain-tiff, who is a resident of Bombay, and the defendant who was never a resident of Bombay. If this distinction is borne in mind, it would not be difficult to hold that the decision in -- 'Dorabji Rustomji Madon v. Jerbai', 16 Bom 136, on which Mr. Kotwal purports to rely, does not really assist his contention.

Birdwood J. had, in this case, to consider the question as to whether the provisions of the Parsi Marriage and Divorce Act, 15 of 1865, were applicable to the marriage between a Parsi husband and his Parsi wife, where the marriage between the parties had taken place at Akola in the Berar, which was a foreign country in those days. The statute with which the Court was concerned was an all-India statute. Even so, its provisions did not extend to the Berar and the argument urged before Bird-wood J. was that since the marriage itself had taken place outside the limits of India, the provisions of the Parsi Marriage and Divorce Act could not be invoked in respect of [his marriage.

Birdwood J. rejected this contention and held that the jurisdiction of the Court was not barred merely by the circumstance that the parties were married at Akola. In fact, Section 30 of the Act expressly provided that its provisions would apply to marriages wherever they were celebrated. Besides, it is necessary to remember that the parties to the marriage were both domiciled within the territorial jurisdiction of this Court at the time of the marriage and were still so domiciled at the time of the suit and the adultery complained of was also committed within the jurisdiction of this Court. In other words, the parties to the marriage were residing in a territory which was within the territorial jurisdiction of the Court, and it is clear that in terms the parties to the marriage were governed by the provisions of the Act, and that the cause of action had accrued within the territorial limits of the Court itself.

The only fact on which reliance was placed for excluding the application of the provisions of the said Act was that the marriage had taken place outside the limits of India; and the answer to the plea was provided by the terms of Section 30 itself. It was the case of a marriage which otherwise was governed by the provisions of the Act and the decision merely said that the fact that the marriage took place at a place outside the limits of India, cannot succeed in excluding the application of the provisions of the said Act. In my opinion, this decision cannot afford any assistance

to Mr. Kotwal in the contention which he has raised before us.

9. Therefore, we must hold that the marriage between the parties is entirely outside the provisions of this Act and so the learned District Judge was right in refusing leave to the plaintiff to sue the defendant in his Court.

10. Mr. Kotwal has no doubt drawn our attention ,to the hardship from which the plaintiff would suffer on the view that we are disposed to take. Mr. Kotwal points out that the plaintiff has always been a resident of the State of Bombay and, as such, she is entitled to claim the benefit of the Act. That no doubt is one aspect of the matter. But there is another aspect of this matter which cannot be ignored. The husband was never governed by the provisions of this Act and the marriage that took place between die parties in Madhya Pradesh was a marriage which must be deemed to have been solemnised under the provisions of the ordinary personal law applicable to the parties in Madhya Pradesh. That is not to deny that the plaintiff may have to suffer some hardship. But such hardships in rare cases are the inevitable consequence of provincial legislation in regard to a subject which is all-India in character.

The Bombay Legislature may well claim to have taken long strides in the matter of legislation for social reform. But where social reform is intended to be made in personal law governing Hindus all over the Union of India, until legislation on an all-India basis is undertaken, cases of such hardship cannot perhaps be avoided. Therefore, however much we may sympathise with the hardship of the plaintiff to which Mr. Kotwal invited our attention we do not see how it would be possible to hold that in circumstances of this case the marriage between the plaintiff and the defendant can attract the provisions of the Act. If that be so, it would serve no useful purpose whatever to grant leave to the plaintiff to sue in the Court of the District Judge at Dhulia.

11. The order passed by the learned District Judge must, therefore, be confirmed, and the appeal dismissed. There would be no order as to costs.

Shah, J.

12. This appeal raises a question of some importance as to the jurisdiction of the Courts in the State of Bombay to grant decrees for dissolution of marriage under the Bombay Hindu Divorce Act of 1947, when the marriage has been solemnised outside the State of Bombay and the husband is domiciled at a place not within the Bombay State. It is not disputed that the marriage between the plaintiff and the defendant took place at a village Called Fopnar in Madhya Pradesh. The defendant, who is the husband, has always lived at Fopnar and is domiciled in Madhya Pradesh. The father of the plaintiff was originally a resident of Madhya Pradesh, but has migrated to the Bombay State - and for the last several years has been residing at Amalner in the East Khandesh District. The marriage having taken place at Fonnar, and the defendant being a resident of Madhya Pradesh, the domicile of the plaintiff must follow the domicile of the husband, and the law which governs the parties in their matrimonial relations is the law prevailing in Madhya Pradesh. But the plaintiff has filed this suit relying upon the provisions of the Bombay Hindu Divorce Act, 1947, which in terms is extended to the whole of the State of Bombay but not elsewhere.

13. The plaintiff claims that because she resides within the State of Bombay she is entitled, relying upon the provisions of Section 5, Sub-section (3), Bombay Hindu Divorce Act, 1947, to file a suit against the defendant for a decree for dissolution of marriage even though the defendant is not a resident of the State of Bombay and under the law of domicile of the defendant a decree for divorce cannot be granted by the Courts. The learned trial Judge refused to grant permission to the plaintiff to file the suit because in his view the marriage between the plaintiff and the defendant was not governed by the law of the State of Bombay.

Now, there is no doubt as to the rule of International law which applies to the Courts in the exercise of jurisdiction to dissolve marriages between spouses domiciled in another country. In 1895 AC 517, the Privy Council, in deciding an appeal from the Supreme Court of Ceylon, observed that (p. 528):

'.... a decree of divorce a vineulo, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses

were amenable, claim extra-territorial authority.' .

That rule is not challenged before us. But it is contended that the rule can only apply to those cases where the domicile of the parties is in a foreign country. It is urged that, where the dispute is sought to be litigated in a Court of the country in which the parties are domiciled, the rule enunciated by the Privy Council in 'Le Mesurier's case (B)', will have no application, even though the personal law applicable in the place where the parties are domiciled is different from the personal law applicable in the area in which the Court is functioning. In other words, it is urged that when the Bombay Hindu Divorce Act, 1947, has conferred jurisdiction upon the Courts functioning in the State of Bombay to grant relief in certain specified circumstances for divorce or dissolution, of marriage, which may not be granted by Courts functioning in other parts of the country, exercise of that jurisdiction is not conditioned by the parties having a domicile within the territory over which the Legislature of the State of Bombay has authority to legislate.

Now, it is true that by Sections 3 and 4, Bombay Hindu Divorce Act jurisdiction is conferred upon Courts in the State of Bombay to pass decrees for divorce and judicial separation in respect of marriages between parties who are Hindus within the meaning of the Act. There is also no express provision in the Act which prohibits the Courts from granting decrees for dissolution of marriage on the ground that the parties have a domicile outside the State of Bombay. But the Bombay Hindu Divorce Act is a special legislation which applies to a certain class and though legislation has been enacted by a Legislature, which, within its domain supreme in respect of certain matters, is not competent to legislate beyond the limits of the Bombay State.

The Bombay Legislature is obviously not competent to enact laws having force outside the State. If the argument advanced on behalf of the plaintiff, that the Courts in the State of Bombay have, irrespective of the question of the defendant's domicile, jurisdiction to dissolve the marriage because the plaintiff is resident within the limits of the State of Bombay, is accepted, we would have the anomalous result that the marriage between the plaintiff and the defendant would be dissolved within the State of Bombay, but not dissolved outside the State, and

especially in Madhya Pradesh where the defendant has his domicile.

In my judgment, in order that a Court authorised under the Bombay Hindu Divorce Act, 1947, can pass a decree for dissolution of marriage, it must be established that the spouses are amenable to the matrimonial jurisdiction of the Court. In this case, it cannot be said that the plaintiff and the defendant are amenable to the jurisdiction of the Courts in the Bombay State which exercise jurisdiction peculiar to those Courts under a statute which has no extra-territorial operation.

Strictly speaking, the rules of private international law apply when there is conflict of laws of different sovereign States. But there is authority for the proposition that where the law in one province in India is different from the law in another province, the two provinces must be regarded as analogous to two sovereign, states : AIR1940 Bom362 .

14. Strong reliance was sought to be placed by the plaintiff upon Section 5(3) of the Act in support of the plea that the District Court has jurisdiction to hear the suit. In my judgment, that provision only confers territorial jurisdiction upon certain Courts and is intended only to amend Section 20, Civil P. C., which, but for that provision, would have applied by the operation of Section 12 of the Act to suits filed for divorce or for judicial separation. Under the Civil Procedure Code, except where the suit relates to land or is one of the suits mentioned in Section 19, a suit can be filed either at the place where the defendant or one of the defendants resides, or where the cause of action or a part of the cause of action arises. But the Legislature has enabled a spouse to file a suit, even if the defendant has left the State or his whereabouts are not known, in the Court of the place where the spouses have last resided together; and in other cases, with the leave of the Court, whether the defendant has resided in the State or not, in the Court within the jurisdiction of which the plaintiff is residing, or at the place where the plaintiff and the defendant had last resided together. Section 5(3) of the Act does not confer upon the Courts jurisdiction over all marriages irrespective of the domicile of the husband. Jurisdiction conferred by Section 5 of the Act is only territorial in character. When the Court is otherwise competent to try the suit, the territorial jurisdiction of the Court will be determined by Section 5.

15. Appeal dismissed.

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