IN THE PARSI CHIEF MATRIMONIAL COURT AT MUMBAI

NOTICE OF MOTION NO. 7 OF 2016
WITH
NOTICE OF MOTION NO. 1 OF 2017
IN
PARSI SUIT NO. 31 OF 1987

Mrs.Shireen Kersi Dubash .. Applicant

In the matter between :

Mr.Kersi Jal Dubash .. Plaintiff
Vs.
Mrs.Shireen Kersi Dubash .. Defendant

Mr.Karl Tamboly a/w. Mr.M.P. Bharucha and Ms.Amanda Rebello i/b Bharucha and Partners for plaintiff.

Ms.Taubon F. Irani for defendant/applicant.

CORAM : K.R.SHRIRAM, J.
DATE : 18TH APRIL, 2017

P.C.

NOTICE OF MOTION NO. 7 OF 2016

1 Ms.Irani for the applicant/defendant, at the outset, stated that the rejoinder after it was affirmed and copy served upon the advocate for the plaintiff, could not be filed in the registry since the same was misplaced and requested the Court to take on record a photocopy of the rejoinder. Mr.Tamboly for the plaintiff, in fairness, consented. Therefore, the photocopy of the rejoinder is taken on record.

2 Since the matter was taken up for hearing, Mr.Tamboly also stated, since new allegations and new documents have been brought on record in the rejoinder, instead of requesting the Court to adjourn the matter for filing a sur-rejoinder, the plaintiff would proceed on the basis of denials.

3 This notice of motion is taken out by the applicant to declare a decree dated 8th December 1987 drawn up on 13th February 1988 as null and void and set aside the same and condone a delay of 28 years and 288 days in taking out this notice of motion. The applicant also wants the registry be directed to investigate and inquire as to how the decree came to be issued.

4 On 20th February 1981, the applicant, who was the defendant in the suit, was married to the plaintiff as per Parsi religious rites rituals. The plaintiff and the applicant (hereinafter for convenience referred to as 'the defendant'), have one daughter Scheherezade born on 18th December 1982. She is over 34 years of age now.

On 28th September 1987, the plaintiff filed a Misc. Petition bearing No.531 of 1987 for custody of Scheherezade, who at that time, was a little short of 5 years of age. Subsequently, on 29th October 1987, the plaintiff filed suit no.31 of 1987 for a decree of divorce on the ground of desertion by the defendant. On 10th November 1987, the defendant filed Misc. Petition

No. 596 of 1987 for custody of Scheherezade. On 7th December 1987, the defendant filed a written statement and counterclaim and in the counterclaim sought restitution of conjugal rights. In the written statement, the defendant denied having deserted the plaintiff and on the contrary accused the plaintiff of having an extra marital affair with one Ms.Meher Phiroze Gorimar (hereinafter referred to as Meher). It is an admitted fact that the plaintiff, sometime in 1988, got remarried to Meher and from that marriage, there is also a son born in 1992.

5 From the court records, it appears that the defendant had filed another written statement dated 8th December 1987, just one day after the first written statement dated 7th December 1987 was filed in which the defendant has :

> (a) denied all the allegations made in the plaint but admitted that the parties have not being living or cohabiting together since December 1983; and
>
> (b) averred that a consent order has been agreed to be obtained between the parties in the custody petitions in respect of the minor Scheherezade and;
>
> (c) submitted to a decree in terms of prayer clause (a) of the plaint, the decree for divorce solely on the ground of desertion by the defendant.

Court records also indicate that parties had also entered into consent terms dated 8th December 1987 in Misc. Petition No.596 of 1987 (filed by the defendant) and order in terms of the consent terms was passed on 9th December 1987. By the same order dated 9th December 1987, Misc. Application No. 531 of 1987 filed by the plaintiff also came to be disposed.

6 The court records also indicate that the Advocates for the plaintiff submitted draft decree for divorce which, after carrying out various corrections, has been approved on 25th January, 1988 by Mr.D.H. Nanavati who was the Advocate of the defendant. The decree dated 8th December 1987 was drawn up and issued and from its docket, it appears that it was made ready on 13th February 1988. A praecipe dated 9th February 1989 from Mr.D.H.Nanavati who was the then Advocate for the defendant also has an endorsement acknowledging receipt from the Registry a certified copy of the decree dated 8th December 1987 and it appears that it was received by Mr.D.H.Nanavati/his clerk on 10th February 1989.

7 It is the case of the defendant that since the defendant was not having an independent house for herself and the child (now 34 years old) of the defendant and she was being rebuked and chastised to find one because of space constraints and since the plaintiff did not let her daughter reside in the plaintiff's residence, which according to the defendant, is the matrimonial home and the plaintiff was instead residing with Meher and one Farhad, this application has been filed. The child Scheherezade, I am informed, is well

settled and living in London. I am informed by Mr. Tamboly that Farhad is the son of the plaintiff and Meher. It is also stated in the affidavit in support, when defendant approached an Advocate to inquire whether she has any recourse to law to enable her to possess a home for herself and her child (34 years old Scheherezade) through the plaintiff, this advocate, who is different from Mr.D.H. Nanavati as Mr.D.H. Nanavati expired some time in the year 2011, in response inquired of the defendant's legal position as to her marital status. It is also stated by defendant, since she was unaware of her marital status, as she possessed no documents at that point of time pertaining to any divorce proceedings, the defendant preferred an application on 28th July 2014 for a certified copy of the entire proceedings of Suit No.31 of 1987. In the affidavit in support, it is stated that the defendant, however, recalled that the plaintiff had stepped into the witness box on the right hand side facing the jury in Court No.46 of this Court during the Parsi Matrimonial Session on 8th December 1987 before His Lordship the Hon'ble Mr. Justice Suresh J. and the plaintiff had admitted to his adultery with Meher and his subsequent desertion of the plaintiff and the daughter. In other words, the defendant says, Justice Suresh (as he then was) was the Judge to whom Parsi Matrimonial matters were assigned.

8 Ms.Irani submitted that the order dated 9th December 1987 when

miscellaneous petition was disposed by filing consent terms expressly mentioned that the Judge was Justice H.Suresh and therefore, Justice Guttal could not have disposed the matter as reflected in the drawn up decree.

9 It is also stated that in affidavit in support that the defendant received, in response to her application for certified copy, copy of the suit dated 29th October 1987, written statement dated 8th December 1987, Vakalatnama filed on behalf her behalf dated 8th December 1987, an affidavit of service filed on her behalf dated 4th December 1987 and a drawn up decree for Divorce dated 13th February 1988.

It should be noted that the written statement dated 8th December 1987 is the second written statement by which defendant had consented for decree of divorce on ground of desertion whereas the original written statement and the counterclaim is dated 7th December 1987. The Vakalatnama is also of D.H. Nanavati and Co.

10 Having seen the Divorce Decree, the defendant has approached this Court stating that the decree has been obtained by fraud because she never consented for any divorce and all the while the defendant was insisting on restitution of conjugal rights with the plaintiff. The defendant has relied on various correspondence, which according to the defendant, were written by

Mr.D.H.Nanavati to Mulla and Mulla and Craigie Blunt & Caroe who where the advocates for the plaintiff.

11 Mr.Tamboly submitted that the entire application smacks of dishonesty because the only reason, which is quite obvious from the application, is that the defendant wants to extort money from the plaintiff. Mr.Tamboly pointed out that after almost 29 years having passed, it is difficult to believe that the defendant did not know what was her marital status or the status of the suit that was filed against her and what was the status of the counterclaim that she had filed in response but merely enjoying her life away from the plaintiff. Mr.Tamboly also pointed out that there is no explanation whatsoever in the affidavit in support of the notice of motion as to what was the defendant doing for 27 years until 2014 when she applied for certified copies. Mr.Tamboly also pointed out that the defendant was always aware that the divorce decree has been passed and has still chosen to approach this court making false statements in the affidavit in support. It was also submitted by Mr.Tamboly that the application, in any event, is grossly barred by limitation since three years prescribed under Article 137 in the Schedule to the Limitation Act commenced from the date on which the right to apply accrued and the right to apply ought to have accrued in 1987 when the decree of divorce was passed. Mr. Tamboly, in the alternative

submitted, the three years would have commenced in 1989 when Mr.D.H.Nanavati applied for a certified copy of the divorce decree.

Mr.Tamboly also relied on Section 17(1)(a) of the Limitation Act to submit that even assuming for the sake of arguments that a fraud was played by the plaintiff, still Section 17(1)(a), prescribes that the period of limitation shall begin to run once the fraud or the mistake was discovered or the mistake or the fraud could, with reasonable diligence, have been discovered. Mr.Tamboly submitted that since Mr.Nanavati himself had applied for a certified copy, the question of any fraud does not arise and in any event knowledge of Mr.Nanavati should be knowledge of the defendant and three years would have begun in 1989.

12 Both counsel relied on judgement of the Apex Court in ***S.P. Chengalvaraya Naidu (Dead) by L.Rs. Vs. Jagannath (Dead) by L.Rs. & Ors.***[1] to submit that where any party plays a fraud, they should be dealt with sternly and summarily thrown out.

Ms.Irani submitted that if there is a fraud, there is no limitation and relied on a judgment by the Apex Court in ***Buaurao Dagdu Paralkar Vs. State of Maharashtra & Ors.***[2]. Ms. Irani, however, when asked by the Court, could not point out the specific paragraph where the Apex Court held

1 (1994) 1 SCC
2 (2005) 7 SCC 605

that no limitation shall apply.

In my view, Section 17 of the Limitation Act is very clear that even if there is a fraud, the limitation will begin to run from the date on which it was discovered.

13 In ***Sneh Gupta Vs. Devi Sarup & Ors.[3],*** the Apex Court has relied upon **State of Rajasthan Vs. D.R. Laxmi [(1996) 4 SCC 445]**, in which the Court has observed as under :-

> *"10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner."*

14 This court has personally perused the records and proceedings. It is true that the defendant had filed a written statement and counterclaim on 7th December 1987. On record there is a written statement duly declared before the Associate of this Court on 8th December 1987. Though, in the affidavit in support, the defendant has stated that she received a certified copy of this written statement, dated 8th December 1987, the defendant has conveniently chosen not to even deal with the said written statement in the affidavit in support or annex a copy thereof to the affidavit in support but when the plaintiff filed a copy of the said written statement with the

3 2009 SCC 194

affidavit in reply, in the rejoinder, the defendant denied having declared any such written statement dated 8th December 1987. In my view, the defendant should have, at the first instance, stated this fact and with the affidavit in support itself should have filed a copy of the written statement. The defendant should have made a positive statement that such a written statement dated 8th December, 1987 was never filed by her. It does appear that the defendant chose to suppress this written statement since in the said written statement, the defendant's consent for grant of decree of divorce on the ground of desertion by the plaintiff has been recorded. Moreover, records and proceedings also indicate that Mr.D.H.Nanavati, who was the Advocate for the defendant, had even approved the draft of the drawn up divorce decree and himself had applied for certified copy of the drawn up divorce decree and even collected the same.

15 I have also considered the Parsi Suit Register from Suit Nos.23/1986 (9.10.1986) until 13/1977 (29.3.1997). It is noted therein by the then Parsi Registrar that His Lordship Justice P.M. Guttal (as he then was) was the Judge who disposed the matter and the date of disposal was 8th December 1987. In fact, the register also shows that Justice Guttal was the Judge hearing the Parsi Matrimonial matters even on 7th December 1987 and also on 8th December 1987.

The photocopy of the relevant pages of the register is taken on record and marked 'X' for identification.

16 Therefore, the defendant's statement that the plaintiff stepped into the witness box and admitted his infidelity before Justice Suresh in Court Room No.46 on 8th December 1987 cannot be believed. Possibly both plaintiff and defendant would have stepped into the witness box on 8th December 1987 and would have consented for grant of divorce.

17 I must also add, I don't find any order dated 8th December 1987 of Justice Guttal in the records and proceedings. Perhaps it is misplaced. An order can be misplaced only if it was there and I would believe it was there, or else the registry would not have drawn up the decree.

18 One more point which requires to be noted is that in the praecipe dated 18th July 2014 for certified copy filed by the defendant to the Registrar, Parsi Chief Matrimonial Court , the defendant has stated as under :

> *"Be pleased to furnish certified copy of Entire Suit <u>a/w. Decree passed in the above mentioned suit. The Defendant is unable to recollect the date of passing of the Decree.</u> The Defendant is ready and willing to bear the necessary charges for the same."*

19 Therefore, the defendant was aware that there was a decree passed in the suit since the defendant has asked for certified copy of the decree passed in the suit and also stated that she is unable recollect the date of the decree. Therefore, I have no doubt that the defendant was aware that such a decree dated 8th December, 1987 has been passed in the suit and after almost 27 years, to allege the decree to be fraudulent or has been obtained by fraud etc. smacks of utter dishonesty on the part of the defendant. In the affidavits filed by the defendant in support and in rejoinder, there is nothing mentioned as to why the defendant did not, from 1987 to to 2014, make any inquiry about this matter. There is no explanation for the delay.

20 A further observation on defendant's conduct has to be made. After a prolonged period of more than 27 years, the defendant in 2014 approached the Court for setting aside the divorce decree. The defendant has relied on correspondence of her advocate Mr.D.H.Nanavati with Mulla and Mulla to fortify her case. The timing raises questions on her motive because Mr.Nanavati expired in circa 2011. If the defendant had a bona-fide cause, she would have approached Mr.Nanavati in his lifetime and persuaded him to remedy the alleged wrong done to her, rather than relying on his correspondence three years after his demise and 27 years after it was allegedly written. In any event, these correspondence even if accepted does

not change the situation.

21 It is also to be noted that the written statement dated 8th December 1987 refers to consent terms being filed in Misc. Petition and the consent terms were filed in Misc. Petition No.596 of 1987 on 8th December 1987. One of the clauses of the consent terms was that within a period of 15 days of signing of the consent terms, the plaintiff (i.e., the respondent in the Misc. Petition No.596 of 1987) was ordered to invest a sum of Rs.2 lakhs, keeping in mind the best interest and security of then minor daughter Scheherezade, subsequent to the divorce. Ms.Irani, on instructions, also admitted that the defendant has received all amounts payable under the said consent terms.

22 Mr. Tamboly also submitted that the defendant cannot pretend to be naive because they came to know from High Court website that defendant was pursuing three separate writ petitions between 1999 to 2013 in this Court against her erstwhile employer Air India. Ms.Irani, on instructions, stated that it was correct that the defendant had filed and was pursuing three separate Writ Petitions against Air India during that period.

Therefore, it is difficult for me to accept that defendant is so naive and did not know what happened between 1987 to 2014 in the present suit or her counterclaim.

23 Having considered the records and proceedings of Suit No.31 of 1987 and having heard the counsel, I cannot accept that any fraud has been played by plaintiff. The written statement dated 8th December 1987 has been declared by the defendant before an Associate of this Court. This written statement, it should be noted, in paragraph 2 specifically refers to the consent order that has been agreed to be obtained between the parties in the custody petition in respect of Scheherezade and on 9th December 1987, admittedly a consent order on the two Miscellaneous Applications have been obtained. The documents also indicate that Mr.D.H.Nanavati who was the Advocate on record for the defendant had approved the draft of the drawn up divorce decree and had also applied for certified copy of the drawn up decree and has collected the same. The defendant has not mentioned anywhere as to why she did not ask Mr.Nanavati until 2011, the status of her matter when she was pursuing three writ petitions in this Court between 1999 and 2013.

24 It is also to be noted that the plaintiff has got remarried in 1988 and has got a son who is now about 24 or 25 years old. Great prejudice will be caused not only to the plaintiff but also to his present wife Meher and son Farhad, if we accept the defendant's submissions, because, suddenly his

present wife Meher will be deemed to have been living in an adulterous relationship for almost 29 years and the legitimate son would suddenly become illegitimate. Even assuming the defendant is a victim of fraud (which certainly she is not), her application is grossly barred by limitation.

25 Looking into the overall facts and circumstances, it is quite obvious that the applicant/defendant was aware about the decree of divorce passed by this Court and lived with it for all these years and this application is a dishonest application.

26 In the circumstances, in my view, there is no merit in the application filed by the defendant and it requires to be dismissed with costs. Notice of motion dismissed with costs in the sum of Rs.1,50,000/-. This amount to be paid within four weeks from today by way of cheque drawn in favour of the advocates on record for the plaintiff.

(K.R. SHRIRAM, J.)