

Prajakta Vartak

**BEFORE THE PARSI CHIEF MATRIMONIAL COURT AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

PARSI SUIT NO.23 OF 2021

Rohinton Minoo Surty	..Plaintiff No.1
And	
Kashmira Rohinton Surty	..Plaintiff No.2

Ms. Armaity Khushrushahi with Ms. Nerissa Almeida for Plaintiff No.1.
Ms. Lipsa Unadkat and Ms. Sanaya Dadachanji i/b. M/s. Manilal Kher
Ambalal & Co. for Plaintiff No.2.

CORAM : G.S. KULKARNI, J.
DATE : FEBRUARY 18, 2022.

ORAL JUDGMENT :

1. This is a suit for divorce by mutual consent filed under Section 32B of the Parsi Marriage and Divorce Act, 1936 (for short, “**1936 Act**”) whereby plaintiff no.1 Rohinton Minoo Surty and plaintiff no.2 Kashmira Rohinton Surty are before the Court praying that the marriage solemnized between them on 21 December, 2004 at Dadyseth Atasbehram, Dadyseth Agiary Lane, Fanaswadi, Mumbai – 400 002 be dissolved and a decree of divorce be pronounced under the provisions of Section 32B of the 1936 Act.

2. The relevant facts as stated by the parties are:- Plaintiff no.1, who was a divorcee, got married to plaintiff no.2, then a spinster (nee Kashmira Aspi Dadachanji). Their marriage was initially registered under the Special Marriage Act, 1954 by the Marriage Officer, Thane on

24 September, 2004. However, as desired by the plaintiffs, parents and relatives, a marriage ceremony of the plaintiffs according to the Parsi Zoroastrian rites and customs, was performed on 21 December, 2004 at Dadyseth Atasbehram, Dadyseth Agiary Lane, Fanaswadi, Mumbai – 400 002. Such marriage was registered by the Registrar of Parsi Marriages, High Court, Bombay on 22 December, 2004. The Certificate of Marriage is annexed at **Exhibit “A”** to the plaint. There is no dispute on this document. As set out in paragraph 3 of the plaint, after the plaintiffs marriage the plaintiffs were residing in different foreign countries.

3. There are no children born from the marriage. The plaintiffs have stated that within few years of their marriage, there were temperamental issues between the plaintiffs, which caused serious differences between them. This resulted into the plaintiffs ceasing to co-habit. In paragraph 5 of the plaint, the plaintiffs have stated that they have not cohabited as husband and wife since 18 March, 2018. They have also stated that there is an irretrievable breakdown of their marriage and no purpose would be served by continuance of the marriage which has broken down irretrievably. This, despite innumerable efforts having been made by the plaintiffs as well as their family members and friends to bring about a reconciliation. The plaintiffs have also stated that as per the Parsi matrimonial law, the

plaintiffs being married as per the “aashirwaad” ceremony, it is imperative that the marriage is dissolved under the 1936 Act.

4. However, there is a peculiarity as set out by the plaintiffs in paragraph 9 of the plaint and as briefly noted above, that prior to the plaintiffs getting married as per the Parsi Zoroastrian rites and customs on 21 December, 2004, as per the procedure under the Special Marriage Act, their marriage was registered under the Special Marriage Act. This marriage came to be registered by the Marriage Officer on 24 September, 2004. As the plaintiffs decided to part ways by dissolving their marriage in a manner known to law, they had applied for a decree of divorce by mutual consent before the Family Court at Thane, by filing proceedings under Section 28 of the Special Marriage Act, 1954. The Family Court at Thane considering the plaintiffs’ plea granted a decree of divorce by mutual consent on 06 January, 2022 in the proceedings of PF No. 701 of 2021. Accordingly, the plaintiffs marriage as registered under the Special Marriage Act on 24 September, 2004 has stood dissolved.

5. In the aforesaid circumstances, the plaintiffs have filed the present proceedings now praying for annulment of their marriage as registered under the 1936 Act, on 22 December, 2004. It is contended that in the absence of the present suit being decreed, the record of marriages being

maintained under 1936 Act would continue to depict that the plaintiffs' marriage subsists, although their marriage stands already annulled under the Special Marriage Act. The plaintiffs contend that in any case the plaintiffs having married as per the Parsi Zoroastrian rites and their marriage being lawfully registered under the 1936 Act, it would be required to be annulled by a decree of divorce by mutual consent as per the provisions of Section 32B of the 1936 Act.

6. On the prior listing of the suit, this Court on 02 December, 2021 had recorded evidence of the plaintiffs by accepting their affidavits in lieu of examination-in-chief. The evidence of plaintiff no.2 and that of plaintiff no.1 are marked as P-1 and P-2. In an order passed on the same day (02 December, 2021), this Court recorded that the parties had arrived at Consent Terms (Exhibit D). The Court also observed that the parties had complied with their respective obligations as contained in paragraph 5 of the Consent Terms, partially, inasmuch as, amounts as agreed between the parties were transferred by plaintiff no.1 to plaintiff no.2 via electronic transfer, hence, there was no occasion to deposit any money with the Prothonotary and Senior Master or the Registrar of the Chief Parsi Matrimonial Court. Also the other compliances as agreed have stood satisfied. The plaintiffs confirmed having executed the Consent Terms and the modified Consent Terms. The Consent Terms

(marked "X") and modified consent terms (marked "X-1) were accordingly taken on record.

7. It is in the above circumstances, the suit is listed today. I have heard learned Counsel for the parties. I have also perused the plaint, exhibits as also the evidence of the parties as placed on record.

8. The marriage between the plaintiffs was solemnized after the commencement of the Parsi Marriage & Divorce (Amendment) Act, 1988 and was accordingly, registered under the 1936 Act. The evidence, as also averments in the plaint, clearly set out, that the plaintiffs are living separately with effect from 18 March 2018 which is for a period of more than one year and that they have not been able to live together for the reasons which are stated in the plaint. The consent of none of the parties is obtained by force, fraud or coercion.

9. On a perusal of the averments as made in the plaint and on examination of the evidence of the parties and on hearing learned Counsel for the parties, I am satisfied that the marriage solemnized between the parties under the 1936 Act deserves to be annulled by consent as prayed for, by granting a decree of divorce by mutual consent under Section 32B of the 1936 Act, as all the necessary requirements of the said provision are satisfied.

10. Before parting, a peculiar feature of this case also needs to be

stated. At the first blush, an impression is created to the effect, as a decree of divorce by mutual consent has already been granted by a competent Court under the Special Marriage Act, was there a need for a second decree of divorce to be obtained *qua* the marriage between the parties ? It, however, appears that the scheme of the legislations in question is such that the parties are under an obligation to adopt such course of action to have dual proceedings. As noted above, the Special Marriage Act under Section 28 provides for “divorce by mutual consent”.

The said provision reads thus:-

“28. Divorce by mutual consent.— (1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.”

11. Notably Section 42 of the Special Marriage Act which is the “saving provision” provides that nothing contained in the Special Marriage Act shall affect the validity of any marriage not solemnized under its provisions, nor shall the said Act be deemed directly or

indirectly to affect the validity of any mode of contracting marriage.

Section 42 needs to be extracted which reads thus:-

“42. Saving.— Nothing contained in this Act shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage.”

12. From a perusal of the said provision, it clearly appears that although there was a marriage of the plaintiffs solemnized under the Special Marriage Act and there was a decree of divorce by mutual consent as obtained by them under the said Act, however, considering the provisions of Section 42, such a decree would not have any effect on the validity of the plaintiffs' marriage which was solemnized under the 1936 Act. It is for such reason, and rightly so, the parties were required to move this Court by the present proceedings under the 1936 Act.

13. In so far as the 1936 Act is concerned, considering the scheme of such Act, it was also imperative for the plaintiffs to approach this Court by the present proceedings and to seek annulment of their marriage. This is clear from the provisions of Section 52 of the 1936 Act which provide for “applicability of provisions of the Act”. Section 52 needs to be noted which reads thus:-

“52. Applicability of provisions of the Act.— (1) The provisions of this Act shall apply to all suits to which the same are applicable whether the circumstances relied on occurred before or after the passing of this Act, and whether any decree or order referred to was passed under this Act or under the law

in force before the passing of this Act, and where any proceedings are pending in any Court at the time of the commencement of this Act, the Court shall allow such amendment of the pleadings as may be necessary as the result of the coming into operation of this Act.

(2) A Parsi who has contracted a marriage under the Parsi Marriage and Divorce Act, 1865 (15 of 1865), or under this Act, even though such Parsi may change his or her religion or domicile, so long as his or her wife or husband is alive and so long as such Parsi has not been lawfully divorced from such wife or husband or such marriage has not lawfully been declared null and void or dissolved under the decree of a competent Court under either of the said Acts, shall remain bound by the provisions of this Act.”

(Emphasis supplied)

14. Thus, from a plain reading of Sub-Section (2) of Section 52 of the 1936 Act, it is clear that a Parsi who had contracted marriage either under the 1865 Act or under the 1936 Act, so long as a Parsi is not lawfully divorced from such wife or husband or such marriage was not lawfully declared null and void or dissolved under the decree of a competent Court, under either the 1865 Act or under the 1936 Act, they shall remain bound by the provisions of the Act. It is for this reason the plaintiffs have appropriately filed the present proceedings despite a pre-existing nullity of their marriage under the Special Marriage Act. Certainly this has led the parties to resort to two independent proceedings under the said two enactments for annulment of their marriage by mutual consent, as there is no provision under these legislations which would bring about an effect, that if a marriage between the same couple is annulled under a competent law as enacted by the Parliament, it can as well be of a legal effect in the corresponding

enactment. In the absence of such specific provision, the regime of the provisions as noted above under the Special Marriage Act and the 1936 Act would continue to operate, of course, with some hardship to the parties when they find themselves in a peculiar situation of their marriage being registered under both the said enactments.

15. In the aforesaid circumstances, the suit is decreed in terms of the following prayers as made in the plaint :-

“(a) that the marriage solemnized between the Plaintiff No.1 and the Plaintiff No.2 on 21st December 2004 at Dadyseth Atasbehram, Dadyseth Agiary Lane, Fanaswadi, Mumbai – 400002, be dissolved under Section 32-B of the Parsi Marriage and Divorce Act, 1936 and decree of divorce be passed in their favour.”

16. The consent terms and the modified consent terms shall form a part of the decree. The undertaking as recorded in paragraph 6 of the Consent Terms stands accepted.

17. The learned Prothonotary & Senior Master of this Court is directed to draw a Decree of Divorce by mutual consent within a period of two weeks from today.

18. The suit stands disposed of. No costs.

[G.S. KULKARNI, J.]

corrected as per speaking to minutes order dated 02.03.2022.