(1936) 11 BOM CK 0022

Bombay High Court

Case No: None

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| Ratanshaw Dinshawji Chothia | | APPELLANT |
| | Vs | |
| Bamanji Dhanjibhai and Others | | RESPONDENT |

Date of Decision: Nov. 17, 1936

Acts Referred:

- Succession Act, 1925 - Section 5

Citation: AIR 1938 Bom 238

Hon'ble Judges: N.J. Wadia, J

Bench: Division Bench

Judgement

N.J. Wadia, J.

This appeal raises an interesting question with regard to succession to intestate property among Parsis. The appellant filed a suit for the administration of the estate of one Dorabji Merwanji and for partition and separate possession of his half share therein. Dorabji Merwanji died intestate in the year 1899. He was a resident of the Baroda State and had been married to one Hirabai whom he divorced by mutual fargats according to the custom alleged to prevail in the Baroda State. After this divorce he married a second wife, Manekbai, and on her death he married a third wife, Khurshedbai. Khurshedbai had a daughter Baimai by her former husband. At the time of his death Dorabji left behind him his third wife Khurshedbai and her daughter Baimai, Kuverbai, his daughter by his divorced wife Hirabai, the widow and four children of his brother, Dhanjibhai and a sister Bai Avabai.

2. The plaintiff''s case was that on Dorabji''s death his widow Khurshedbai got a half share in the property of her deceased husband according to Parsi law, that on Khurshedbai''s death that half share passed to her daughter Baimai, defendant 8 in the suit, and that Baimai had gifted this share to plaintiff by a gift-deed on 24th January 1928. Defendants 1 and 2, the sons of Dorabji''s brother, Dhanjibhai, and

defendant 4, Dhanjibhai''s widow, who were the principal contesting defendants in the suit, denied that there was any such custom of divorce by mutual fargats in Baroda as was alleged by the plaintiff; that even if such a custom of divorce was proved, it could not be recognized by British Indian Courts; that Hirabai was therefore not divorced according to law; that Khurshedbai, the third wife of Dorabji, could not therefore have been legally married to Dorabji and was not entitled to any share in his property on his death; and that her daughter Baimai could thus acquire no interest in Dorabji''s property and could not therefore pass any interest to the plaintiff. Defendants 1 and 2 claimed to be entitled to the property under a gift-deed in their favour passed by Kuverbai, the daughter of Dorabji by his first wife Hirabai. Several issues were framed by the trial Court but by consent of the parties certain issues 6,7,8,9 and 11 dealing with Hirabai''s divorce and the status of Khurshedbai were tried as preliminary issues. These issues were:

6.(a) Whether Hirabai had been divorced according to the Baroda law or the custom prevailing amongst the Parsis of the Baroda State.

(b) If so, whether that law or custom is opposed to the law of British India and if so,

(c) Whether it can be deemed to have put an end to the legal relationship between Hirabai and Dorabji so far as rights to the immovable property of Dorabji in British India are concerned.

7. (a) Whether Dorabji married Khurshedbai after that divorce.

(b) If so, whether that marriage was legal and can be recognized by a Court in British India for the purpose of determining the heirs to the estate of Dorabji in British India.

8. (a) Whether Baimai, defendant 8, is the daughter of Khurshedbai by her former husband and

(b) Whether she was the legal heir of Khurshedbai according to the law in force in British India.

9. If so, what share had she acquired in the property in dispute? and

11. If Issue 6 or Issue 7 is found in the negative, whether the plaintiff can be deemed to have acquired any interest in the suit property under the deed of gift relied on by him.

3. The real point to be decided in these preliminary issues was whether the divorce of Hirabai by mutual fargats or releases, if proved, could be deemed to be a legal divorce for the purpose of determining the succession to Dorabji''s immovable property in British India. In deciding this question the learned trial Judge, by consent of the defendants, assumed for the purposes of argument that Hirabai had been divorced according to Baroda law or the custom prevailing among the Parsis of the Baroda State, that Dorabji had married Khurshedbai after the divorce of Hirabai and

that defendant 8 Baimai was Khurshedbai''s daughter by her former husband. He held that u/s 5, Succession Act, in determining questions with regard to the succession to immovable property in British India the lex loci rei sites, that is in this case the law of British India, must apply, that the question of the right to the property of the plaintiff''s vendor Baimai must be decided according to the law applicable to Parsis in British India, and that according to that law Hirabai had not been validly divorced and Khurshedbai was not the legal wife of Dorabji and could not therefore be entitled to any share in his property ; and that being so, the plaintiff''s vendor Baimai was also not entitled to any share in the property, and the plaintiff had not therefore acquired any interest in the property under, the deed of gift relied on by him. On these grounds he dismissed the plaintiff''s suit and the decision was confirmed in appeal by the District Judge of Surat. Against this decree the plaintiff has come in second appeal.

4. The learned counsel for the appellant has referred to a large number of cases both Indian and English in support of his contention that the question of divorce is not governed by the lex loci rei sitrn but has to be decided according to the law of domicile of the parties. He has relied on the English cases Harvey v. Farnie (1882) 8 A.C 43 and Salvosen (or Von Lorang) v. Administrator of Austrian Property (1927) A.C 641. In the first case it wasiheld that:

The English Courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion, or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England.

5. In Salvosen (or Von Lorang) v. Administrator of Austrian Property (1927) A.C 641 also it was held that:

Where the parties are domiciled in a foreign country a decree of nullity of marriage pronounced by a competent Court of that country will, in the absence of fraud or collusion, be recognized as binding and conclusive by the Courts of England and Scotland, unless it offends against British notions of substantial justice.

6. The same view was taken in Nachimson v. Nachimson (1930) L.R.P 217. In a recent case of this Court, J.G. Khambatta v. M.C. Khambatta AIR (1934) Bom 93 it was held, following the English decisions in Harvey v. Farnie (1882) 8 A.C 43 and Nachimson v. Nachimson (1930) L.R.P 217 that

the status of the spouses and their rights and obligations arising under the marriage contract are governed by the lex domicilii, that is, by the law of the country in which for the time being they are domiciled, and that the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract but arise out of, and are incidental in, such contract, and are

governed by the lex domicilli.

7. These cases however merely decide that the question of status is one to be decided according to the law of domicile, but they do not affect the further question, how the succession to immovable property is to be decided. Section 5, Succession Act, Sub-section (1), provides that succession to the immovable property in British India of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death. Sub-section (2) provides that succession to the moveable property of the person deceased is regulated by the law of the country in which such person had his domicile at the time of his death. This section is an exception to the ordinary law with regard to the status of parties. Even though status would ordinarily be deter, mined according to the law of domicile, and according to the decisions which have been referred to above such status would be recognized by British Courts, nevertheless Section 5 provides that for purposes of succession the law applicable will be that of British India. The learned District Judge has referred to the decisions in Birtwhistle v. Vardill (1835) 2 CI & P 571 and Fenton v. Livingstone (1859) 5 Jur 1183 in support of the view that the lex situs and not the lex domicilii governs succession to intestate moveable property according to the law of England. In Birtwhistle v. Vardill (1835) 2 CI & P 571 it was held
that a child, born in Scotland, of parents domiciled there who at the time of his birth were not married, but who afterwards intermarried in Scotland, could not take as heir the lands of his father in England.

8. In Fenton v. Livingstone (1859) 5 Jur 1183 it was held "that the lex loci rei sitm governs exclusively the tenure, title and descent of immovable property".

9. It is contended for the appellant that the principle of English law laid down in these cases is a peculiarity of the English law of real property and is not applicable to India. Section 5, Indian Succession Act, however is in my opinion based on the same principle and the provision made by it that succession to immovable property in British India of a person deceased shall be regulated by the law of British India applies to India the same principle that is enunciated in the two English cases quoted above, that in determining the question of succession to such property the status of the parties must be determined according to the law of British India. In Kershaji v. Kaikhusferu AIR (1929) Bom 478 it was held by this Court that "land in British India is governed by the law of British India as the lex loci and not by the law of domicile of the temporary owner". That was a case dealing with the question of an adoption made by Parsis domiciled in the Baroda State. It was found that the custom of adoption did prevail among the Parsis of Baroda State and it was held that such a custom could not prevail in British India as regards immovable property situated there since, according to the law applicable to Parsis in British India, such a custom was not recognized. It is clear that although for purposes of determining status the adoption made in the Baroda State, which was valid according to the law

of that State, would have been recognized, it was not recognized for the purpose of determining rights with regard to land in British India, and that the law held applicable was that of British India where the property was situated. The decision in this case is good authority for the view which the lower Courts have taken that for the purpose of determining rights to immovable property in British India the law applicable is that of British India. According to that law the divorce of Hirabai by mutual fargats was not a valid divorce. She therefore continued to be the wife of Dorabji. His subsequent marriage with Khurshedbai, the mother of the plaintiff''s donor, would not therefore be a legal marriage and could confer no rights upon Khurshedbai on the death of Dorabji. The plaintiff''s donor Baimai, defendant 8, could not therefore acquire any right to the property on the death of her mother, Khurshedbai, and the plaintiff himself therefore has not acquired any interest in the suit property. His suit was therefore rightly dismissed by the trial Court and this appeal must be dismissed.

10. The trial Court in dismissing the suit had awarded special costs to the respondents u/s 35-A, Civil P.C. on the ground that the plaintiff''s suit was vexatious. The learned District Judge has disallowed this order as regards special costs in favour of respondents 1, 2 and 4, and against that order the respondents have filed crossobjections. As the issues with regard to the facts were not gone into at all in the trial Court, it is difficult to say that the suit was a vexatious one. I therefore see no reason for differing from the view taken by the learned District Judge with regard to the special costs. The appeal and the crossobjections will both be dismissed with costs. Separate costs for respondent 8. Name of respondent 7 to be struck off.