

ORDER SHEET
HIGH COURT OF SINDH, KARACHI

Divorce Petition No. 01 of 2018

Date	Order with signature of Judge
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Present:
Mr. Justice Muhammad Ali Mazhar

Ms.Khushnum Hormazd MuncherjiPlaintiff

Versus

Hormazd Rusi MuncherjiDefendant

Date of hearing: 06.04.2018.

Khawja Shoaib Mansoor, Advocate for the Plaintiff.

Hormazd Rusi Muncherji, defendant appeared in person.

Muhammad Ali Mazhar, J. This petition has been brought for dissolution of marriage under Section 32 of Parsi Marriage and Divorce Act, 1936.

2. In the beginning, I would like to give attention to an important fact that the provisions contained under the Parsi Marriage and Divorce Act, 1936 unequivocally demonstrate that the proceedings initiated under this Act are to be registered as a Suit but instead of filing the suit, the Divorce Petition has been filed and the office has also marked number as 'Divorce Petition' rather than the Suit. In order to examine and reconcile this anomaly and discrepancy, I have examined Sindh Chief Court Rules (O.S) (SSCR). Under these Rules, Chapter XXIII is on the subject of Matrimonial Jurisdiction and Part I of this Chapter is germane to the Rules under the Indian Divorce Act, 1869. Rules 421 to 433 are meant and premeditated to the

proceedings governing under the Indian Divorce Act, 1869 whereas Part II of the same Chapter is pertinent to the Rules under the Parsi Marriage and Divorce Act, 1936. In this Part, Rules 434 to 447 are designed and constructed to prescribe the procedure akin to Parsi Marriage and Divorce Act, 1936. The provisions laid down in the Indian Divorce Act, 1869 elucidating and augmenting that for the purposes of Divorce, petition has to be filed but in the Rules framed in the latter fragment under the Parsi Marriage and Divorce Act, 1936, instead of the word “petition”, the rules mentions the word “plaint”. By virtue of Adaptation of Central Acts and Ordinance Order 1949, the word ‘Indian’ was omitted and Divorce Act, 1869 was adapted and extended to the whole of Pakistan, which is only applicable to the Divorce of a person professing Christian religion. In this Act it is provided that for the purposes of dissolution of marriage petition may be filed by the husband or wife and every such petition shall state as distinctly as the nature of the case permits the facts on which claim to have such marriage dissolved is founded. Keeping in view the provisions of Parsi Marriage and Divorce Act, 1936 read with Rules 434 to 441, the lis ought to be registered as suit in which decree is also required to be passed for the dissolution of marriage thereafter under Rule 446 of SCCR (O.S), the Registrar (O.S) has to transmit certified copy of decree to the Registrar of Marriages. Rule 447 provides that in all other respects the practice and procedure of the court shall be regulated by the provisions of the Code. Here Code means the Civil Procedure Code, 1908 as provided in Clause 3 of Rule 3 (Definitions) of SCCR (O.S) (on the original side). In view of the above scenario, office is directed to convert this Divorce Petition No.1 of 2018 into suit. The **“petitioner”** and **“respondent”** wherever used in the memo of **petition** shall be corrected by the office in red ink as **“plaintiff”** and **“defendant”** and

wherever the word “**petition**” is used the word ‘**suit**’ shall corrected accordingly. The office is also directed to assign suit number.

3. The epigrammatic facts put forward in the plaint are that the plaintiff was married to the defendant on 08.04.2000. The marriage was consummated and out of wedlock, Rhea H. Muncherji (daughter) was born on 30.12.2004 who is residing with the plaintiff. The defendant started ignoring the plaintiff and withdrawn from all marital obligations. The plaintiff tried level best to lead a happy matrimonial life but connubial bond was not amiable and convivial due to which the plaintiff and the defendant have been living separately for last seven (7) years and now both wish to culminate the matrimonial ties and agree that marriage may be dissolved under Section 32 of Parsi Marriage and Divorce Act, 1936. The plaintiff further avowed that the plaintiff and the defendant deeply love their only child henceforth they have decided to administer and cope with joint custody of their daughter.

4. Heard the arguments. A minute survey of the provisions contained under the Parsi Marriage and Divorce Act, 1936 expounds and explicates number of grounds for divorce predominantly depicted under Section 32 of the Act. The plaintiff has applied for divorce on the ground that the defendant has deserted her for last seven years. Under Section 31, also a stipulation for dissolution has been laid down if a husband or wife shall have been continuously absent for the space of seven years and shall not have been heard of as being alive within that time.

5. While trying the proceedings under this Act, appointment of delegates is indispensable and de rigeur to aid in the adjudication of cases arising under this Act after giving local

Parsis an opportunity of expressing their opinion. The delegates perform identical to jury and the case is decided by majority decision. The jury delegates adjudicate a divorce petition based on their personal perception of societal and communal canons, moral principles and consciences. Section 24 of the aforesaid Act is germane to the appointment of delegates. It is envisioned under sub-section (2) that the persons so appointed shall be the Parsis and their names shall be published in the Official Gazette. On 15.02.2018, the learned counsel for the plaintiff submitted a copy of Notification dated 10.05.2017 issued by the Home Department, Government of Sindh for the appointment of delegates. The plaintiff and the defendant by consent agreed to issue notice to the delegates. Accordingly five delegates attended the court proceedings as follows:-

1. Mr. Aspi Sethna
2. Mr. Soli R. Parakh
3. Mrs. Pouruchisty Sidhwa
4. Mrs. Zarin Shroff
5. Mr. Yazdyar Haveliwala

6. Consistent with Section 46, all questions of law and procedure are required to be determined by the Presiding Judge but the decision on the facts shall be the decision of majority of the delegates before whom the case is tried provided that where such delegates are equally divided in opinion, the decision on the facts shall be the decision of the Presiding Judge. Under the letters of the law the provision of CPC are applicable so far as the same may be applied to the proceedings in suits instituted under this Act including the proceedings in execution and orders subsequent to the decree.

7. According to Section 20 of the Act, the Judge of principal court of original civil jurisdiction shall be the Judge of matrimonial court and in the trial of cases under this Act, he

shall be aided by seven delegates. Nevertheless Section 44 of the Act interconnected and concomitant to the validity of trial but this made conspicuous that where in the case of a trial in a Parsi Matrimonial Court not less than five delegates have attended throughout the proceedings, the trial shall not be invalid by reason of the absence during any part thereof of the other delegates.

8. At original side, this court is exercising jurisdiction of district court, therefore, the suit for dissolution of marriage has been instituted here rightly. In the case of **Muhammad Naved Aslam vs. Mst.Aisha Siddiqui**, reported in **2011 CLC 1176, (authored by me)** it was held that by means of paragraph 5 of the Establishment of West Pakistan High Court Order, 1955, the original civil and criminal jurisdiction of the Bench at Karachi was defined with certain parameters while under section 7 of Sindh Civil Courts Ordinance, 1962 the pecuniary jurisdiction of District Judge has been fixed excepting in the Karachi Districts. The simple reading and comparison of both the provisions lead to a conclusion that while exercising powers on original side, this court is in fact exercising jurisdiction for the civil district of Karachi as was exercisable immediately before the commencement of establishment of West Pakistan High Court Order by the Chief Court of Sindh under Section 8 of the Sindh Courts Act 1926. The Karachi Bench of Sindh High Court is functioning or exercising the powers and performing the duties as the Principal Civil Court of original jurisdiction in the civil district of Karachi.

9. In definition clause provided under Section 2 of the Act, the expression “**desert**” together with its grammatical variations and cognate expressions, means to desert the other party to a marriage without reasonable cause and without the consent, or

against the will of such party. Whereas the word “**Parsi**” means a **Parsi Zoroastrian**. Right now, I would like to quote an excerpt of a judgment **authored by me** in the case of **Kandawalla Trust vs. Public at Large, reported in SBLR 2014 Sindh 26**, congregating and converging that “**Zoroastrianism** is an ancient pre-Islamic religion of Iran. The descendants of Zoroastrian Iranian (Persian) immigrants are known as Parsis, or Parsees. The religion is called Parsiism. Founded by the Iranian prophet and reformer Zoroaster in the 6th century BC, the religion contains both monotheistic and dualistic features”.

10. For the ease of reference, the grounds for divorce postulated under Section 32 of the Parsi Marriage and Divorce Act, 1936 are reproduced as under:-

32. Grounds for divorce. Any married person may sue for divorce on any one or more of the following grounds, namely:-

(a) that the marriage has not been consummated within one year after its solemnization owing to the willful refusal of the defendant to consummate it;

(b) that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit Provided that divorce shall not be granted on this ground, unless the plaintiff (1) was ignorant of the fact at the time of the marriage, and (2) has filed the suit within three years from the date of the marriage;

(c) that the defendant was at the time of marriage pregnant by some person other than the plaintiff:

Provided that divorce shall not be granted on this ground, unless (1) the plaintiff was at the time of the marriage ignorant of the fact alleged, (2) the suit has been filed within two years of the date of marriage, and (3) marital intercourse has not taken place after the plaintiff came to know of the fact;

(d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact;

(e) that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution;

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years (i) after the infliction of the grievous

hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution;

(f) that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Pakistan Penal Code, XLV of 1860:

Provided that divorce shall not be granted on this ground, unless the defendant has prior to the filing of the suit undergone at least one year's imprisonment out of the said period;

(g) that the defendant has deserted the plaintiff for at least three years;

(h) that a decree or order for judicial separation has been passed against the defendant, or an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for three years or more since such decree or order;

(i) that the defendant has failed to comply with a decree for restitution of conjugal rights for a year or more; and

(j) that the defendant has ceased to be a Parsi:

Provided that divorce shall not be granted on this ground if the suit has been filed more than two years after the plaintiff came to know of the fact.

11. Dissolution of marriage is cancelation of legal duties and responsibilities of marriage thus dissolving the bonds of matrimony between the married couples. On the date of hearing, both the plaintiff and the defendant come to an understanding that their marriage may be dissolved as they are no longer aspire to tie up and fasten in the matrimonial ties. The delegates also unanimously expressed their opinion that the marriage may be dissolved on the ground of desertion.

12. Now I would like to engage in the niceties of the provision contained under Section 49 of the Act which encompasses and exemplifies custody of children. The exactitudes of this provision bestows ample powers to this court to pass interim orders and make provisions in the final decree with respect to the custody, maintenance and the education of children under the age of sixteen years. However in paragraph No.7 of the petition, it is contended that the plaintiff and defendant both have decided to have the joint custody of their daughter and in response to this particular avowal, the defendant has filed an

affidavit duly verified by Identity Section Management System (ISMS) department of this court in which he has shown full agreement and consensus to this clause hence no orders are required to be passed keeping in view the consensus between the parties. Neither any issue of alimony pendente-lite, permanent alimony, payment of alimony to wife or her trustee or disposal of joint property or settlement of wife property for the benefit of children raised in the plaint as envisaged under Sections 39, 40, 41, 42 and 50 nor any counter claim has been lodged by the defendant for any relief as provided under Section 37 of the Act.

13. In the wake of above discussion, the marriage between the parties is dissolved. The suit is decreed accordingly. Office is directed to dispatch copy of decree for registration to the Registrar of Marriages appointed under Section 7 of the Parsi Marriage and Divorce Act, 1936. The Registrar shall enter the same in a register to be kept by him for this purpose.

Judge