Regular Appeal No. 10 *of* 1866.

A'VA'BA'I, wife of Jámásji Jamshedji.....*Appellant.*
JA'MA'SJI JAMSHEDJI and another .....*Respondents.*

Act XV. of 1865——*Pársi Marriages*——*Bigamy*——*Divorce.*

A Pársi residing in Bombay, after the passing of Act XV. of 1865, but before it came into operation, contracted a second marriage, during the lifetime of his first wife, from whom he had not been divorced, and whom he, moreover, wilfully deserted for two years.

On appeal from an order by the Judge of the Pársi Chief Matrimonial Court, rejecting a plaint for divorce by the first wife, on the ground that the subject-matter of the plaint did not constitute a cause of action, under Sec. 30 of Act XV. of 1865, and Act VIII. of 1859, Sec. 32 :—

Held that the facts alleged in the plaint did not amount to "bigamy coupled with adultery," nor to "adultery coupled with wilful desertion," within the meaning of Sec. 30 of Act XV. of 1865 : as a second marriage contracted by a Pársi husband, during the lifetime of his first wife, was not unlawful before the Act came into operation; nor did the provisions of the Act in any way affect the validity or the consequences of such a marriage.

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THIS was an appeal from the decision of NEWTON, J., sitting as Judge of the Pársi Chief Matrimonial Court at Bombay, rejecting a plaint presented by the appellant, in which she prayed that the marriage celebrated between her and the male respondent in A.D. 1857 might be dissolved, and a divorce granted, on the ground that her husband had committed adultery with the female respondent, Kharshedbáí, and lived with her as husband and wife since the 30th of July 1865; and that he had, moreover, wilfully deserted the plaintiff for more than two years.

The order passed on the rejection of the plaint was as follows :—

"I am of opinion that the subject matter of this plaint does not constitute a cause of action. The suit is for a divorce on the ground of adultery coupled with desertion.

"The adultery is described as committed by marriage with another woman during the subsistence of the previous marriage with the plaintiff. The second marriage is thus by implication assumed to have been bigamous and void. I am unable to admit this assumption.

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"By Sec. 4 of the Pársi Marriage and Divorce Act, 1865, it is provided that no Pársi shall *after the commencement* of that Act contract any marriage in the lifetime of his wife, except after his lawful divorce from such wife; and that every marriage contracted contrary to the provision of this section shall be void.

"This Act did not commence and take effect till the 1st of September 1865 (Sec. 53); and, therefore, did not make void the alleged second marriage of the defendant, Jámásji, which is stated to have been contracted on the 30th of July 1865.

"Nor can I admit the existence of any other law, or of any custom having the force of law, at the date of the said second marriage, whereby that marriage was made a nullity, and the intercourse between the parties to it rendered adulterous.

"In the case of *Merwanji Nusherwanji* v. *Avabai*, and the other cases referred to in the report of that case (*a*), it was found that second marriages among Pársis (the first wife being alive) were not strictly allowed without sufficient cause; but that such second marriages had been very numerous among members of the Pársi community, without any former precedent of the rigid enforcement of the penalties of the law, if any such existed. No question has been raised as to the correctness of that decision; and although second marriages among Pársis during the lifetime of the first wife have been frequent down to the date on which Act XV. of 1865 came into operation, no proceedings have been taken in the interval against the parties contracting them as chargeable on that account with bigamy or adultery."

The appeal came on for hearing this day before COUCH, C.J., TUCKER and WARDEN, JJ.

Jehángir Merwánji, for the appellant.—The plaint discloses two causes of action: (1) Bigamy coupled with adultery; (2) adultery coupled with wilful desertion for two years or upwards. Either is sufficient, under Sec. 30 of the Act, to support a suit for divorce. The customs of the Bombay

(*a*) 2 Borr. 231.

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Pársis, which are quite distinct from those of the Mofussil, ought to govern the case, under Reg. IV. of 1827, Sec. XXVI., cl. 2.

COUCH, C.J.:—I am of opinion that the learned Judge was right in rejecting the plaint. There could be no adultery in the respondent's cohabiting with the second wife, if the marriage was not illegal. The second marriage in this case is alleged to have taken place on the 30th of July 1865, before Act XV. of 1865 commenced and took effect, which, by Sec. 53, was on the 1st of September 1865.

Now the preamble of the Act is—"Whereas the Pársi community has represented the necessity of defining and amending the law relating to marriage and divorce among Pársis; and whereas it is expedient that such law should be made conformable to the customs of the said community." And Sec. IV. enacts that "no Pársi shall after the commencement of this Act contract any marriage in the lifetime of his or her wife or husband, except after his or her lawful divorce from such wife or husband, by sentence of a court as hereinafter provided; and every marriage contracted contrary to the provisions of this section shall be void."

This shows what the state of the law with regard to marriages was among the Pársis, that the customs of the sect were such that such second marriages could not be set aside; and the opinion is strengthened by the case cited from Borrodaile by the learned Judge. It may be that that case was decided on customs and usages prevalent in the Mofussil; but it throws light upon the usages of the Pársis in Bombay.

Before Act XV. of 1865 came into operation, a Pársi contracting a second marriage in the lifetime of his or her wife or husband could not be punished under the Indian Penal Code. Sec. XXX. provides that "any husband may sue that his marriage may be dissolved, and a divorce granted, on the ground that his wife has since the celebration thereof been guilty of adultery; and any wife may sue that her marriage may be dissolved, and a divorce granted, on the

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ground that since the celebration thereof her husband has been guilty of adultery with a married, or fornication with an unmarried, woman, not being a prostitute, or of bigamy coupled with adultery, or of adultery coupled with cruelty, or of adultery coupled with wilful desertion for two years or upwards, or of rape, &c. But bigamy coupled with adultery must have reference to a marriage which was unlawful, and therefore bigamous. I do not see any reason why marriages contracted before the passing of the Act should be made subject to the consequences of the Act. When it was passed, nothing could have been further from the intention of the Legislature than to give a retrospective effect to it. Hence questions with reference to past marriages cannot be raised under this Act. They must be governed by the law which prevailed before it came into operation.

TUCKER and WARDEN, JJ., concurred.

Order affirmed.

Regular Appeal No. 19 *of* 1863.

ARDESHIR DHANJIBHA'I.....*Appellant.*
THE COLLECTOR OF SU'RAT .....*Respondent.*

Suit relating to land—sanad—destruction of document by party.

In a suit brought against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land—the only issue being, whether the land was the private property of the judgment debtors, or Government service land—the plaintiff alleged that the land had been granted in free *inám* by a *sanad*, which he petitioned the Mámlatdár of the parganá to search for, and send to the Collector; and, on a reference by the High Court, the District Judge found that "the Collector did destroy the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the Mámlatdár to search for" :—

Held that it was not competent for the defendant to say that the document was not such a one as could be legally admitted in evidence; and that the case came within the rule *omnia præsumuntur contra spoliatorem.*

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THIS was a regular appeal from the decision, in Original Suit No. 3 of 1863, of R. H. Pinhey, Acting Judge of the Súrat District, whose judgment was as follows :—