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Before Mr. Justice Scott.

PESHOTAM HORMASJI DUSTOOR (*Plaintiff*) *v.* MEHERBAI (*Defendant*).* [25th September, 1888.]

Infant marriage amongst Parsis—Consent of father or guardian—Suit to declare an infant marriage null and void—High Court—Parsi Matrimonial Court—Jurisdiction—Act XV of 1865*—Letters Patent*, s. 12*—English law—Subsequent consent or repudiation—Adoption of Hindu practice by Parsis.*

In 1868 the plaintiff and defendant, then of the ages of seven and six years respectively, went through the ceremony of marriage in the presence of their respective parents and according to the rites of their religion. The formal consent on behalf of the plaintiff was not given by his father, but by his uncle, with whom he was living and by whom he had been adopted. Nineteen years afterwards the plaintiff filed this suit praying for a declaration that the pretended marriage was null and void, and did not create the *status* of husband and wife between the plaintiff and defendant. The defendant resisted the suit, and claimed to be the lawful wife of the plaintiff. The plaintiff and defendant never lived together as man and wife, nor was the marriage ever consummated.

Held, that under the circumstances the formal consent of the uncle and the tacit consent of the father were enough to satisy the requirements of s. 3 of Act XV of 1865, which requires the previous consent of the father or guardian to the marriage.

[303] *Held*, further, that such a suit not being in the category of suits relegated to a special Court by Act XV of 1865, the jurisdiction to try it remained in the High Court, to which it had been given by s. 12 of the Letters Patent.

Held, also, that the law to be applied was the English law, subject, however, to any well-established usage. That by the English law such a marriage would be an inchoate and imperfect marriage capable of repudiation by either party after arriving at years of discretion, but capable also of being made a valid and binding marriage by the consent of the parties thereto after they had arrived at such age.

Held, further, that the circumstances of the case showed that there had been such acquiescence in and acceptance of the marriage by the plaintiff after arriving at years of discretion as to render the marriage valid and binding on him, and incapable of subsequent repudiation. Consummation is the best proof of consent to a marriage, but is not the only proof.

And, *semble*, that—although the practice of infant marriages is one which finds no warrant in their own religious system—the Parsis in Western India have in the course of centuries so generally adopted such practice from their Hindu neighbours as to give such marriages amongst themselves all the validity they possess amongst Hindus, making them independent of any question of subsequent consent or non-consent by the parties thereto.

[F., 33 B. 509 (555, 556) = 11 Bom. L.R. 85 = 5 M.L.T. 301 = 2 Ind. Car. 701; R., 22 B. 430 (435); 33 B. 122 = 10 Bom. L.R. 417 (465).]

SUIT by a Parsi for declaration of nullity of marriage.

The plaint stated as follows:—

"1. The plaintiff was born on the 18th day of April, 1861. The defendant is younger than the plaintiff.

"2. On or about the 23rd day of June, 1868, a ceremony of marriage was performed by a Parsi priest between the plaintiff and the defendant while the plaintiff was only about seven years of age and the defendant was still younger. The defendant was then too young to be invested with the *kusti* and *sadra*, and the same were only formally placed upon her for the purpose of the marriage ceremony, and were subsequently taken off her.

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"3. The plaintiff's father, Nassarvanji Bezonji Dustoor, was living at the time of the said marriage ceremony. The consent of the plaintiff's said father was not given to the said marriage either previous or subsequent thereto. At the time of the said marriage the plaintiff had no guardian other than his said father. The plaintiff's uncle, Hormasji Bezonji Dustoor, purported to consent to the said marriage. The plaintiff submits that such consent does not satisfy the requirements of Act XV of 1865, s. 3.

"4. The plaintiff has never cohabited with the defendant, or lived with her as his wife, and has never ratified, but has on the contrary always repudiated the said marriage both on his reaching the age of puberty and subsequent thereto. The plaintiff before and on his attaining his age of majority in this respect protested against the said marriage being deemed to be binding upon him.

"5. The plaintiff attained his majority, within the meaning of Act IX of 1875, s. 2, on the 18th day of April, 1882.

[304] "6. The facts stated in the third paragraph hereof have only come to the knowledge of the plaintiff within the last few months.

"7. The defendant now pretends and alleges that she has been validly married to the plaintiff, and that the plaintiff is her husband, and she puts herself forward as his wife, and threatens to sue him for maintenance in the Court of the Presidency Magistrate, as will appear from a letter, dated 26th November, 1887, which the defendant has caused to be written to the plaintiff through her attorneys, Messrs. Nanu and Hormasji, a copy of which is hereto annexed and marked A. The said pretensions and allegations have been only recently put forward by the defendant. The defendant is possessed of some property.

"8. The plaintiff prays judgment:—

"(*a*) That the said marriage ceremony may be declared not to have created the *status* of husband and wife between the plaintiff and the defendant, and that it may be declared that the plaintiff is not the husband of the defendant, and that the defendant is not the wife of the plaintiff, and that the said pretended marriage is null and void.

"(*b*) That the defendant may be restrained by injunction from putting herself forward as the wife of the plaintiff and from taking any proceedings against the plaintiff in the Magistrate's Court, or in any Court, as the wife of the plaintiff."

The following was the written statement put in by the defendant:—

"1. The defendant submits to this honourable Court whether it has jurisdiction to entertain this suit, and without prejudice to the question of jurisdiction the defendant makes the further defences following.

"2. The defendant is not aware of the date of the plaintiff's birth, and leaves him to prove the same.

"3. The defendant says that a valid ceremony of marriage was performed between the plaintiff and the defendant, and that she is the lawful wife of the plaintiff.

"4. The plaintiff when a baby was adopted by his uncle, Hormasji Bezonji Dustoor, and from the time of such adoption down to the time of his marriage with the defendant and thereafter the plaintiff lived with and was maintained by, the said Hormasji Bezonji Dustoor, and the care and custody of the plaintiff and the power of disposing of him in marriage was resigned by the plaintiff's natural father, Nassarvanji Bezonji Dustoor, into the hands of the said Hormasji Bezonji Bustoor, and the guardianship of the plaintiff was entrusted to the said Hormasji Bezonji

Dustoor by the said Nassarvanji Bezonji Dustoor, and such guardianship continued down to the time of the marriage aforesaid and thereafter, and the defendant submits that under the circumstances aforesaid the said Hormasji Bezonji Dustoor was the guardian of the plaintiff at the time of the said marriage within the meaning of the Parsi Marriage Act.

"5 The defendant further says that, by the customs and usages of the Paris, an adoptive father is the guardian of the adopted son, and has the power of disposing of the adopted son in marriage.

[305] "6. Without waiving the defences aforesaid, the defendant says, as a matter of fact, the plaintiff's natural father, Nassarvanji Bezonji Dustoor, consented to the said marriage of the plaintiff with the defendant. The said Nassarvanji Bezonji Dustoor was present at the marriage ceremony, and took an active part therein. The said ceremony was performed by two brothers of the said Nassarvanji Bezonji Dustoor.

"7. The marriage between the plaintiff and the defendant has always been recognized as valid by the plaintiff himself, by all the members of both families, and by the Parsi Community, and the plaintiff only recently repudiated the same as an invalid marriage.

"8. The marriage between the plaintiff and the defendant has not been consummated, but it is not true that the cause of the non-cohabitation aforesaid was that the plaintiff repudiated the marriage as alleged.

"9. The defendant denies that the plaintiff attained his majority on the 18th day of April, 1882, as alleged. She submits that he attained majority when he attained the age of sixteen years.

"10. The defendant says that it is not true that she now pretends and alleges that she had been validly married to the plaintiff as alleged in the seventh paragraph of the plaint. The defendant has always asserted and now asserts that she is the lawful wife of the plaintiff, and it is wholly untrue that she has only recently put forward her allegation to that effect, as stated in pragraph seventh of the plaint. It is not true that the defendant has any property.

"11. The defendant says that, save as aforesaid, she puts the plaintiff to strict proof of the allegations made in the plaint.

"12. The defendant says that the plaintiff is not entitled to the relief claimed, or any part thereof, and that this suit ought to be dismissed with costs."

Latham (Advocate-General), *Starling*, and *Telang*, for plaintiff:—The question raised here is as to the validity of infant mariages among Parsis. We contend that there was no marriage between the plaintiff and the defendant, and the Court should make the declaration asked for. As to the question of jurisdiction raised by the defendant, it is clear that, for such a suit as the present, this is the only Court that has jurisdiction. The Parsi Marriage Act XV of 1865, ss. 27 and 28, only deals with nullity of marriage arising from physical and mental incapacity; see *Ardaseer Cursetjee* v. *Perozeboye* (1). The Act does not deal with the question of infant marriages among Parsis. If such marriages were legal before that Act, they are legal still. Except as regards ceremonies, the English law of marriage applies to **[306]** Parsis—*Naoroji* v. *Rogers* (2); *Mancharsha* v. *Kamrunisa* (3); *Jivandas* v. *Framji Nanabhai* (4); *Mithibai* v. *L. N. Banaji* (5). The English doctrine as to coverture and as to the wife's equity to a settlement have frequently been applied in the case of

(1) 6 M. I. A. 348; and Perry's Or. Ca. 57.
(2) 4 B. H. C. R. O. C. J. 1.
(3) 5 B. H. C. R. A. C. J. 109—114.
(4) 7 B. H. C. R. O. C. J. 45 (47).
(5) 5 B. 506=6 B. 151.

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Parsis. By English law the age of consent to marriage is fourteen for males and twelve for females, "but if at the age of consent the husband and wife agree to continue together, they need not be married again"; 2 Stephen's Blackstone, 5th ed, p. 257, 10th ed. p. 262; see also 1 Phill, Eccl. Law, p. 713. The English law as to consent to marriage has been applied in England to Quakers and Jews—*The Queen* v. *Millis* (1); although on other points the law or usage of the community may apply—*Goldsmid* v. *Bromer* (2); *Ruding* v. *Smith* (3). The Letters Patent do not preserve to Parsis their marriage law and usage (if any), as is done in the case of Gentus and Mahomedans. We contend, therefore, that English law applies, and that, as there could not have been any consent in this case, there was no marriage. The religious books of the Parsis state the age of betrothal for girls to be the fifteenth year (4); see also History of the Parsis by Dossabhai Framji, Vol. I, pp. 169-170; and Geiger's Civilization of the East, Vol. I, pp. 50 and 60. As to the validity of infant marriages among Parsis, see the opinions expressed by Arnould and Newton, JJ., in the Parsi Law Commission Report made previously to the enactment of Act XV of 1865. The religious ceremony performed at Parsi marriages, called *ashirvad*, requires a free rational consent on the part of the contracting parties at the time of the marriage. There was none in this case and, therefore, no marriage.

Inverarity and *Viccaji*, for the defendant.—The English law has never been applied to Parsi marriages. They have been regulated exclusively by Parsi customs and usages, and the preamble to Act XV of 1865 shows that it was intended that **[307]** such usages should be recognized; see also ss. 3 and 4. The case of *Ardaseer Cursetjee* v. *Perozeboye* (5) is inconsistent with the idea that English law applies to Parsis. The Parsis seem to have had no special law of their own when they came to India in A.D. 717. They accordingly adopted Hindu customs, *inter alia*, as to marriage—*Homabaee* v. *Punjeabhaee Dosabhaee*(6); Morley's Digest, 301; 1 Strange's Hindu Law, Appendix C, p. 326; the Parsi Acts by S. S. Bengali, pp. 183, 189, 196, 203, 206, 231. Even assuming that English law is applicable to Parsis, the marriage in this case, which was performed while the parties were under the ages of fourteen and twelve, was only voidable, and the plaintiff was too late in repudiating it; see Eloirsley's Law of Domestic Relations, pp. 83 and 84. His letters, written in 1879 and 1885, admit the legality of the marriage. The plaintiff's father was present at the marriage; so there was an implied consent by him, as required by s. 3 of Act XV of 1865. They referred to *Smith* v. *Huson* (7); *Cope* v. *Burt*(8).

JUDGMENT.

SCOTT, J.—The object of this suit is to test the validity of a Parsi infant marriage. The parties went through the ceremony of marriage in 1868, in the presence of their parents and according to the rites of their religion, when the plaintiff was seven years old and the defendant was six. Nineteen years afterwards the plaintiff files this suit, and prays for a declaration that the marriage was null, and never created the *status* of husband and wife. The defendant, on the other hand, submits that the

(1) 10 Cl. & Fin. 534.
(2) 1 Hagg. Consist. Rep. 324.
(3) 2 Hagg. Consist. Rep. 371 (385).
(4) See the Avesta translated by Bleeke, pp. 39, 113, 114, 118, 173.
(5) 6 M.I. A. 348.
(6) 5 W. R. C. R. P.C. 102.
(7) 1 Phill. 287 (297).
(8) 1 Hagg. Consist. Rep. 434.

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marriage was valid, the ceremony binding, and that she is the plaintiff's lawful wife. The issues raised were (1) whether this Court had jurisdiction to try the suit; (2) whether the plaintiff's father gave his consent either at the time of the marriage or subsequently; (3) whether the plaintiff repudiated the marriage on his reaching the age of puberty and subsequently; (4) and generally whether the marriage was valid.

The facts of the case are as follows:—The plaintiff, when an infant, was adopted by his uncle, Hormasji, and was brought up in Hormasji's house. His uncle's second wife, Awabai, was a **[308]** near relation—an aunt—of Meherbai, the defendant in the present suit. A marriage was arranged between the two children by Hormasji. The plaintiff's natural father was invited, and came to the ceremony, but only as a guest; and Hormasji, the adoptive father, conducted the whole proceedings. The real father, however, received a present at the time, and raised no objection to the marriage. The infant bride and bridegroom from this date both lived in Hormasji's house—not, of course, as man and wife, but seeing each other, playing together, leading the life of constant intercourse as children in the same house naturally do, down to 1872, when the plaintiff went to St. Xavier's College. He remained there till 1877, when he passed the Matriculation Examination. He still resided with his uncle; and his infant wife, Meherbai, also continued to live there. She went to school at this time. She said he assisted her in her study, and used to take her to school before he went to the college. In 1877, when the parties were sixteen and fifteen years old respectively, he next joined the College of Science at Poona, and on the occasion of his returning to Bombay for his first vacation, the uncle tried for the first time to bring them together as man and wife. Plaintiff, however, refused altogether to occupy one room with Meherbai, as his uncle proposed. There is no evidence, however, that he then tried in any way to repudiate the marriage altogether. The two continued to live, as before, apart, but in the same house. In 1880 the plaintiff passed as an engineer. In 1883 he had a bad illness, which necessitated his being in seclusion for some months. But he recovered, returned to his old home, and in 1884 he obtained engineering employment from the Bombay Municipality. All this time he continued to live in his uncle's house, and Meherbai lived there also, but they never lived together as man and wife. In 1887 the uncle died, and plaintiff went to live with his natural father, Nassarvanji. An attempt was made once more to bring the plaintiff and Meherbai together. Meherbai in furtherance of this object went to live with Nassarvanji. But plaintiff left and refused to return as long as Meherbai remained there. She then went to her mother's house. Finally, on a threat that Meherbai would obtain an order on him for maintenance, he filed this suit.

[309] I will deal with the minor issue of the father's consent first. No doubt, it is required by s. 3 of the Parsi Marriage Act and it was not formally given at the time of the marriage. But the uncle acting as father consented, and the natural father not only by his presence gave a tacit consent, but ever afterwards he has approved of the marriage, and treated it as valid. I think this objection cannot be sustained.

The next question, that of the jurisdiction of this Court over such a case, is one of considerable difficulty. No doubt the Parsis in India are, as a general rule, subject to English law. They brought no code of laws from Persia, and all ordinary disputes between Parsis are now regulated

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in conformity with the laws of England. But in Parsi matrimonial matters a special Court has been created. The present case admittedly does not come within the jurisdiction of this special Court and it is therefore argued, that no Court whatever is competent to try such a suit. The special Court undoubtedly has no jurisdiction. It has only power to grant a decree of nullity of marriage; it has no power to deal with a case where there never was a marriage at all. As regards the total absence of any form, Sir Erskine Perry in 1843, as Judge of the late Supreme Court, laid down the broad principle that Parsis were subject to the ecclesiastical jurisdiction of the Court on disputes arising out of the marriage contract—*Porozeboye* v. *Ardaseer Cursetjee* (1). But the Privy Council reversed this decision (6 Moo. I. A., 348) and held that the ecclesiastical jurisdiction extended only to Christians in questions of the restitution of conjugal rights. Their Lordships, however, at the same time intimated that the Supreme Court on its civil side might possibly administer some kind of remedy for the violation of the duties and obligations arising out of the matrimonial union between Parsis. The High Court inherited all the powers of the Supreme Court, and was also specially empowered in the exercise of its ordinary original civil jurisdiction to "try suits of every description." Would not this wide jurisdiction cover such cases as are not within the jurisdiction of the special Parsi Court? It must be remembered that if this power is not **[310]** wide enough to cover the present cases, the parties would be practically without any remedy. They would be relegated to their *Panchayet forum*, which has long been without authority, even as a domestic tribunal, and now hardly exists at all. This was not the intention of Government when the High Courts were established. Sir C. Wood in his letter of May 14th, 1862, accompanying the Letters Patent constituting the High Court of Bombay, refers to the Privy Council's decision I have cited, and says the object of the charter was to do away with all such limitations and to invest the High Court with power to determine cases of every description and to apply a remedy to every wrong. I think, therefore, the words "to try suits of every description" comprise matrimonial suits, subject of course to the provisions of the Parsi Marriage Act, which assigns to a special tribunal most of the questions incident to the matrimonal contract, but not the questions involved in the present suit.

Assuming, then, that this Court has jurisdiction, the next question is, what *marriage law* must be applied? The requisites to the validity of a Parsi marriage are given in s. 3 of the Parsi Marriage Act. They are (1) a religious ceremony called *ashirvad*, (2) in the presence of two witnesses, and (3) if either party is under twenty-one, the consent of the father or guardian is required. The only reference to infant marriages is in s. 37, which says that no suit can be brought to enforce a marriage if at the date of the suit the husband is not over sixteen, or the wife not over fourteen. The validity of such a marriage, which has enured after those ages are reached, is not decided. I must then look to English law, which generally is, as I have already said, applicable to Parsis in Bombay. If the English common law of marriage, pure and simple, were to be applied, any infant marriage, even if validly celebrated, can be repudiated by either party when they come to years of discretion. "*Consensus non concubitus facet matrimonium*," but a woman cannot consent before twelve, nor a man before fourteen. It is an inchoate and imperfect

(1) Perry's Or. Ca. 57.

marriage, from which either of the parties at the age of consent may disagree. But if the husband and wife at the age of consent ever agree to the marriage, they cannot [311] afterwards disagree: (See Comyn's Digest, Vol. 11, p. 73; and Coke on Lyttleton, 33 A.). To this statement of the English law must be added the decision of the House of Lords in *The Queen* v. *Millis* (1). "By the common law of England it was essential to the constitution of a full and complete marriage that there must be some religious ceremony besides the civil contract." The Zoroastrian system would soem not to have contemplated marriage in infancy. The marriage ceremony of *ashirvad* includes a prayer (the *nikah*), or exhortation to the parties, which would be senseless if it were not addressed to persons capable of matrimonial union in every sense. The Zendavesta contains many passages which exclude the idea of infant marriage. For instance: "Let them betroth a sister or a daughter to a pure man after her fifteenth year." Again, the maiden who encounters the bridegroom is to be "marriageable." And certain maidens are required to be young women fit for marriage, different from maidens not yet sought by men. All this agrees with the opinion sent by the wise men of Persia, who two hundred years ago told their brethren in India that the age of marriage was fourteen for boys and ten for girls. But custom seems to have wandered from the pure doctrine of the Zendavesta; and the law, whether English or Persian, can only be applied subject to any well-established usage. When the Parsis settled in Western India eleven hundred and sixty years ago, they probably brought with them a system, both of law and custom, from Persia. But it was all unwritten and gradually fell into desuetude, and this mere handful of Persian strangers gradually and naturally adopted much of the law and usage that obtained in the Hindu community in whose midst they were forced to dwell. There is no doubt they adopted, amongst other things, the injurious practice of infant marriage. From the high level of education and civilization which the Parsi community of the present day has reached, these marriages are now discountenanced, but I have little doubt they were until lately common, nor can it be doubted cases still occur. The statistics given to me prove the existence of such marriages, though they also prove a strong current of [312] opinion and practice which will gradually restore the older and healthier system of adult marriage. But infant marriage still is practised and recognized. I do not rely only on the instances of which evidence was given in this case. Such instances were hardly enough to prove a well-established usage. But much more convincing testimony is to be found in the statistics given me, and again in the proceedings put in, which went on before the Parsi Law Commission, a Government Commission of 1862 which produced the Parsi Marriage Act. For instance, the Parsi Law Association in 1862 sent to the Commission eighty-five delegates, all of them leading Parsis, to ask that the *Panchayet* should have power to dissolve marriages contracted before puberty; and this was asked, said the delegates, in their petition "in consequence of the custom of marriages taking place during infancy amongst the Parsi community." This was refused: the Commission declined to insert either this provision or any explicit legislative sanction or prohibition of infant marriages. In short, the Commission acted as Government generally acts on matters of custom which appear to be injurious, but yet are admitted by the particular community.

(1) 10 Cl. & Fin. 534.

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It is difficult to conceive stronger proof of the prevalence of the usage than this petition which emanated from the great majority of the Parsi community. They have, no doubt, been very common until recently, and, as a rule—almost a universal rule, the present case being the only known exception—these infant marriages have been carried out by the parties. The question has never been before raised, whether either of the parties could legally repudiate the contract on reaching the age of discretion. If the English law is applicable, they could be then repudiated. But English law is only applicable subject to well-established usage; and I very much doubt whether these marriages, which are an established fact in the Parsi community, are of such an inchoate probational character as to allow of repudiation. The Parsis have, no doubt, insensibly adopted them from the Hindus around them, and such marriages amongst Hindus are certainly not probational. But, as a matter of fact, I do not think, on the evidence, the plaintiff did repudiate this [313] marriage until long after the time he could have done so under any system of law which admits of such repudiation. On the contrary, his conduct was rather that of acquiescence than of repudiation. Consummation of marriage is the best proof of consent to such a marriage, but it is not the only proof. Consent may be inferred from conduct, though there has been no consummation. No doubt the plaintiff grumbled about the marriage. But he never denied its validity. Though he refused to treat Meherbai as his wife, he never repudiated the marriage till long after he had arrived at an age when he could have done so. When his adoptive father died, the plaintiff, then twenty-five years old, gave her the keys of the house and some money. It was not till he was twnety-six years old that he actually, in terms, repudiated. All his family, all her family, all the family of his adoptive father, treated the marriage as valid. The failure of her father to sign at the marriage is not fatal, as the father shewed his consent in other ways. The plaintiff's letters alone put him out of Court. Thus in Ex. I, written at the age of nineteen to his uncle, he speaks of the defendant as "her whom the law could never disunite." Such a sentence is wholly inconsistent with any actual repudiation, or even with any idea that repudiation was possible. Thus, at the age of nineteen there was no repudiation. Again, take Ex. B, written from his adoptive father to the plaintiff in 1885, which appeals to plaintiff at the age of twenty-four "not to lose your youth in vain," nor to cause your "wife's youth also to be lost in vain." This, again, is quite incompatible with any repudiation having taken place. It only refers to the disinclination to live as married people should live, and asks him to give proper conjugal rights to his wife. Even at this date, 1885, the plaintiff replies complaining of the sinful laws which do not declare such marriages null. There was then, no repudiation by writing up to 1885. There was none by word of mouth proved. Meherbai, who gave her evidence very well, denied anything of the kind. The plaintiff's conduct was not equivalent to repudiation. His writings up to 1887, admit the marriage. Consequently, even supposing repudiation of such a marriage legally possible, I do not think there was in this case a [314] repudiation in reasonable time, and the plaintiff has lost any right he possessed by his delay. This Court cannot, therefore, grant the declaration prayed. The suit must be dismissed with costs.

Attorneys for the plaintiff:—Messrs. *Wadia and Ghandy.*

Attorneys for the defendant:—Messrs. *Nanu and Hormasji.*