under s. 28 can only be suits between landlord and tenant, the decision is appealable to the Court of appeal in the Small Causes Court, and there is no right to file a suit under s. 47 with regard to decrees passed under s. 28. These distinctions are well known, but I am surprised that a scope is left for any confusion to be caused between proceedings under Chapter VII and suits under s. 28. I do not understand what difficulty there is in numbering proceedings under Chapter VII as applications and suits under s. 28 as suits. Proceedings under Chapter VII by no stretch of imagination are suits and I see no reason why the practice of numbering them as suits should be continued in the Small Causes Court.

I would therefore set aside the order of the appellate Court of the Small Causes Court and restore the order passed by the trial Judge. There will be no order as to costs of this revision application. Opponents must pay the costs of both the Courts below.

Mr. Shah gives an undertaking to this Court on behalf of his clients that he will vacate and give possession of the premises on or before November 30, 1952, and will pay compensation as and when it falls due. On this undertaking Mr. Kania agrees not to execute the decree till November 30, 1952.

Rule absolute.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Rajadhyaksha and Mr. Justice Chainani.

1952
July 18

PRABHAKAR BHASKAR SHIDORE (ORIGINAL PLAINTIFF), APPELLANT *v.* USHA PRABHAKAR SHIDORE (ORIGINAL DEFENDANT), RESPONDENT.*

Bombay Hindu Divorce Act (Bom. XXII of 1947), ss. 2 (a), 5, 5A, 13—Suit for divorce filed in District Judge's Court—Bombay Matrimonial (Transfer of Cases) Act (Bom. XXVI of 1950), s. 4—District Judge transferring suit to Civil Judge after enactment of Bom. XXVI of 1950—Decree by Civil Judge—Appeal from decree—Forum of appeal—Appeal whether to High Court or to District Court—Bombay Civil Courts Act (Bom. XIV of 1869), ss. 8, 16, 17, 26.

In respect of suits under the Bombay Hindu Divorce Act, 1947, instituted prior to May 27, 1950, an appeal lies direct to the High

---

* First Appeal No. 576 of 1951.

1952

PRABHAKAR BHASKAR v. USHA PRABHAKAR

Rajadhyaksha J.

Court, whether the suit was tried by the District Judge himself or was transferred by him to a Civil Judge under s. 5A of the Act as amended. But in respect of suits filed after May 27, 1950, an appeal lies to the High Court if the decree appealed from is that of the District Judge and to the District Court if the decree is that of a Civil Judge to whom the suit has been transferred.

The right of appeal is not a mere matter of procedure; it is an important right which vests in the litigant at the time when he institutes a suit.

Raghunath Hanumant v. *Sadashiv*,[1] followed.
Colonial Sugar Refining Company v. *Irving*,[2] referred to.

FIRST APPEAL against the decision of H. K. Karmarkar, Esquire, Civil Judge, Senior Division, at Thana.

On August 4, 1949, Prabhakar (plaintiff) sued his wife Usha (defendant) for divorce under the Bombay Hindu Divorce Act 1947, on the ground that she had deserted him for a continuous period of over four years. The defendant denied desertion pleading there was reasonable cause for her staying away from the plaintiff.

The suit was originally instituted in the Court of the District Judge at Thana, but after the amendment of the Act on May 27, 1950, by the introduction of s. 5A, it was transferred to the Court of the Civil Judge (S.D.), at Thana on June 24, 1950.

The learned Judge held the desertion proved and granted a decree for divorce on February 5, 1951. At the same time he ordered the plaintiff to pay to the defendant Rs. 20 per month as maintenance as long as she remained chaste and unmarried. The defendant was given liberty to apply for a charge on plaintiff's property in respect of her maintenance.

The plaintiff appealed to the High Court against the order for payment of alimony.

R. N. Bhalerao, for the appellant.

V. B. Rege, for the respondent.

RAJADHYAKSHA J. This is an appeal filed by the original plaintiff against the decision of the suit filed by him for dissolution of his marriage with the defendant. The plaintiff sued for dissolution of his marriage on the ground that although they were married on May 11, 1944, his wife had deserted him for a continuous period of over four years. The suit was defended by the wife on the allegation that she had not deserted

(1) (1950) 52 Bom L. R. 871. (2) [1905] A. C. 369.

1952

PRABHAKAR BHASKAR *v.* USHA PRABHAKAR

Raja-dhyaksha J.

the plaintiff and that whenever she was away from her husband's house, there was reasonable cause which justified her in doing so.

The learned trial Judge came to the conclusion that the defendant had deserted her husband for a continuous period of over four years, and that therefore the plaintiff was entitled to a decree for divorce. Accordingly the learned Judge passed a decree declaring that the defendant's marriage with the plaintiff was dissolved from the date of his judgment. In making that order, he directed that the plaintiff should pay a maintenance of Rs. 20 per month to the defendant so long as she remained chaste and unmarried. The defendant was also given liberty to make an application for an order for a charge on the plaintiff's property in respect of her claim for maintenance. Against that order the plaintiff has filed this appeal, and the only ground on which the appeal is sought to be supported is that the question of alimony was neither pleaded nor put in issue, and that therefore the trial Court's order making a provision for alimony was wrong.

A preliminary objection has, however, been taken by Mr. Rege, for the respondent wife, that an appeal does not lie to this Court and that it lies to the District Court of Thana. It is argued by Mr. Rege that as the decree under appeal is a decree of the Court of the Civil Judge, Senior Division, Thana, an appeal would lie to the District Court under the provisions of s. 8 of the Bombay Civil Courts Act of 1869.

Under s. 5 of the Bombay Hindu Divorce Act of 1947, every suit under the Act has to be instituted in the Court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit, and under clause (*a*) of s. 2, the "Court" means, outside Greater Bombay, "the Court of a District Judge". It is therefore clear that a suit under the Bombay Hindu Divorce Act must, outside Greater Bombay, be instituted in the Court of a District Judge. After the Act was passed in the year 1947, it was amended in the year 1950 by Bombay Act XXVI of 1950, by which a new section, s. 5A, was inserted. That new section enabled the District Judge to transfer any suit or proceeding instituted under the Act in the Court of the District Judge to the Court of an Assistant or a Civil Judge in the District. The present suit, although instituted on August, 1949, came to be transferred to the Court of the Civil Judge, Senior Division, Thana on

1952

PRABHAKAR BHASKAR
v.
USHA ... PRABHAKAR

Raja-dhyaksha J.

June 24, 1950. Thereafter it was numbered Suit No. 194 of 1950 of the Court of the Civil Judge, Senior Division, Thana. Sub-s. (2) of s. 5A says,

> "any suit or proceeding so transferred shall be heard and disposed of by the Court of the Assistant or Civil Judge, as the case may be, to which it is transferred, and such Court shall have all the powers and jurisdiction in respect thereof as if it had been originally instituted in that Court."

By virtue of this provision the present suit transferred to the Court of the Civil Judge, Senior Division, must be regarded as a suit originally instituted in that Court for the purpose of exercising the powers and jurisdiction in respect of the trial of that suit. Under s. 13 of the Act all decrees and orders made by the Court in any suit or proceeding under the Act may be appealed from under the law for the time being in force. As the decree for divorce was a decree of the Court of the Civil Judge, Senior Division, Thana, it has got to be appealed from as such. Section 8 of the Bombay Civil Courts Act, 1869, enacts that the District Court shall be the Court of appeal from all decrees or orders passed by the Subordinate Courts from which an appeal lies under any law for the time being in force, except in cases provided in ss. 16, 17 and 26. The present case is not covered either by s. 16 or 17. The only section that might possibly be applicable is s. 26. That section says that,

> "in all suits decided by a Civil Judge of which the amount or value of the subject matter exceeds Rs. 10,000, the appeal from his decision shall be direct to the High Court."

The present suit which was merely for the dissolution of the marriage between the plaintiff and the defendant is not a suit the amount or value of the subject-matter of which exceeds Rs. 10,000. Mr. Rege therefore, we think, is right in contending that under s. 8 of the Bombay Civil Courts Act, an appeal would lie to the District Court. It was argued by Mr. Bhalerao that the suit was originally instituted in the District Court, although it was subsequently transferred to the Court of the Civil Judge, Senior Division, Thana, and that therefore the Court where the suit was instituted must determine the Court to which an appeal would lie. We are not prepared to accept this contention. What is being appealed from is the decree of the trial Court and that decree is undoubtedly of the Court of the Civil Judge, Senior Division, Thana. An appeal must lie under s. 13 of the Hindu Divorce Act to the Court to which

1952

PRABHAKAR BHASKAR
v.
USHA PRABHAKAR.

Raja-dhyaksha J.

appeals would ordinarily lie from a decree of a Civil Judge, Senior Division. Section 13 says so in clear terms, although it must be noted that the word "Court" as used in that section does not have the technical meaning assigned to it under s. 2 (*1*) of the Act. As used in that section, it must mean "any Court of Civil jurisdiction.' Before s. 5A was inserted in the Act, the word "Court" as used in section 13 could have meant "the Court as defined in s. 2 (*a*), viz., the Court of a District Judge outside Greater Bombay. But after the insertion of s. 5A one would have to give to the word "Court" in section 13 its ordinary connotation. Otherwise, there would be no provision in the Act for an appeal from a decree of the Court of the Assistant Judge or a Civil Judge to which Court a suit may be transferred by the District Judge. It was also argued by Mr. Bhalerao that if the decree of the Civil Judge, Senior Division, was held to be appealable to the District Court, it would be possible for the District Judge to transfer some suits to a Civil Judge, Senior Division, and make an appeal from a decree of such Court appealable to his own Court and in other cases to try the suit himself and make an appeal lie to the High Court. We do not think this objection is substantial. We see no reason why if the decree under appeal is a decree of a Civil Judge, Senior Division, an appeal should not lie to the District Court merely because the suit as required by the Act was originally instituted in the District Court. We think that the governing consideration in all such cases should be what is the Court from the decree of which the appeal is sought to be preferred. If it was a decree of the District Court, an appeal would lie to the High Court. If it was a decree of a Civil Judge, Senior Division, the appeal would lie to the District Judge.

We think that this position is clear enough in respect of all suits filed after the Amending Act XXVI of 1950 came into force on May 27, 1950. But it has been contended by Mr. Bhalerao that the present suit was instituted on August 4, 1949. The suit could on that day be tried by the District Court only and under s. 13 the decree could have been appealed from, under the law for the time being in force, which provision at that time meant that the appeal lay to the High Court. He urged that the right of the litigant to appeal to a superior forum could not be taken away unless there were express words to that effect or such a result followed by necessary implication. We think that there is considerable force

1952

PRABHAKAR BHASKAR v. USHA PRABHAKAR

Raja-dhyaksha J.

in this submission. The right of appeal is not a mere matter of procedure, but the right to file an appeal to the higher forum is an important right which vests in the litigant at the time when he institutes a suit. When the present suit was filed in 1949, it could be filed only in the District Court and an appeal from the decision of the District Court could have lain to the High Court. Can it therefore be said that this right which the plaintiff had when he filed the suit had been taken away from him by an amendment made in the Bombay Hindu Divorce Act in the year 1950? A similar question arose in *Colonial Sugar Refining Company* v. *Irving*[1]. There the right which the plaintiff had of appealing to His Majesty-in-Council at the time when he instituted the suit was held not to have been taken away when, by the Australian Commonwealth Judiciary Act, 1903, the right of appeal to His Majesty-in-Council was abolished and all appeals had to be filed in the High Court of Australia. In that case Lord MacNaghten observed as follows (p. 372):—

> "To deprive a suit or in a pending action of an appeal to a superior Tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new Tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

A similar view was taken by this Court in *Raghunath Hanumant* v. *Sadashiv*.[2] In that case this Court had to consider the effect of the amendments made in the Bombay Civil Courts Act under which the jurisdiction of Civil Judges, Junior Division which, till the date of amendment extended to Rs. 5,000, was enlarged to Rs. 10,000. After the amendments came into force, a suit for Rs. 5,025 which was being tried by the Civil Judge, Senior Division, was decreed, and the question was: To what Court an appeal lay? Prior to the amendments, an appeal would undoubtedly have lain to the High Court. But an amendment of s. 26 of the Bombay Civil Courts Act made decrees in all suits decided by a Civil Judge, the amount or value of the subject-matter of which did not exceed Rs. 10,000, appealable to the District Court, and it was argued that after the amendment, an appeal lay to the District Court. This Court, however, held that in respect of suits, the subject-matter of which was more than Rs. 5,000, instituted before

(1) [1905] A. C. 369. (2) (1950) 52 Bom. L. R. 871.

the amendment came into force, the appeal lay direct to the High Court. It is quite true that this Court was then considering the effect of s. 6 of the Amending Act LIV of 1949, which provided for the continuance of the proceedings and for the disposal of appeals which had already been filed or appeals which might thereafter be filed in respect of suits decided prior to the amending Act. There was no specific provision made for appeals from decisions after the Act, in respect of suits the value of the subject-matter of which was between Rs. 5,000 and Rs. 10,000. The learned Judges came to the conclusion that in respect of such suits, the right of appeal which the litigant had when he filed the suit, viz., to the High Court, remained in tact in spite of the amendment of s. 26 of the Bombay Civil Courts Act. In the present case, the amending Act XXVI of 1950 enabled the District Judge to transfer the suits to the Court of an Assistant Judge or a Civil Judge. There is no independent provision made with regard to appeals and the provisions of s. 13 of the original Act stand. But there are observations made by Mr. Justice Gajendragadkar, which have a bearing on the right of a litigant as regards the forum of appeals. At page 872 of the Report, the learned Judge observed as follows:—

"The legal position with regard to the litigants' right to file an appeal is fairly well-settled. The amendments made by the present Act cannot be said to be merely procedural. If they had been merely procedural, they would obviously have been retrospective. But in so far as the of these amendments changes the forum of appeal in some cases it cannot be said that this change is a mere matter of procedure. It clearly touches a right which was in existence at the time when the Act was passed, and this right to file an appeal in a higher forum has been always regarded as an important right vesting in the litigants at the time when the suits or proceedings are instituted. There is no doubt that when the present suit was instituted the parties to the suit had a right to come to this Court in appeal against the decree that may ultimately be passed in the suit. If this right which had vested in the parties at the time when the suit was instituted is intended to be taken away by the present amending Act, such intention must appear clearly and unambiguously in the provisions of the Act."

Later on in the same case, the learned Judge goes on to say: (p. 873):—

"We must bear in mind that the parties to the present suit had a right to come to this Court in appeal against the decree that would be passed in this suit. There is no doubt that Legislature can take away that right if they deem it proper to do so. But the right must be taken away expressly or by necessary implication. It must appear manifest on reading the provisions of the amending Act that there was no doubt

1952

PRABHAKAR BHASKAR *v.* USHA PRABHAKAR

Raja-dhyaksha J.

whatever that Legislature intended by the Amending Act to take away the parties' right in the matter of appeal."

When the present suit was instituted it could be instituted only in the District Court, and under s. 13 of the Act, as it then stood, the parties had a right to come to this Court in appeal. We do not think that by enabling the District Judge to transfer suits to the Court of an Assistant Judge or a Civil Judge, the Legislature intended that the existing rights of the parties, who had already filed suits in the Court of the District Judge, should be taken away. It was argued by Mr. Rege that under s. 26 of the Bombay Civil Courts Act there was a specific reference made to an appeal lying to the High Court in respect of suits the amount or value of the subject-matter of which exceeded Rs. 5,000, and that therefore it was held by this Court in the above-mentioned case that "the right to come to the High Court was not affected by the amendment made in 1949", whereas in the present case there is no specific reference made to the High Court in s. 13 of the Bombay Hindu Divorce Act, under which the decrees of the Courts are made appealable "under the law for the time being in force". He therefore argued that the parties had no vested right of coming to the High Court, but had merely a right of appealing to that tribunal to which an appeal would ordinarily lie. On the words of the section, the submission of Mr. Rege is undoubtedly correct. But when s. 13 of the Bombay Hindu Divorce Act enacted that an appeal shall lie "under the law for the time being in force", it, in effect, meant that the appeals would lie to the High Court, because suits could only be instituted in the District Court and appeals therefrom could lie only to the High Court. Although therefore the words "an appeal shall lie to the High Court" are not specifically mentioned therein, as they are in s. 26 of the Bombay Civil Courts Act, s. 13 read with s. 5 could only mean that an appeal in a divorce proceeding could before the insertion of the new s. 5A, lie only to the High Court. We therefore think that this existing right of the litigant, enabling him to file an appeal to the High Court, has not been affected by the subsequent amendment to the Act by which s. 5A was inserted. By the combined operation of s. 5A and s. 13, in respect of suits filed after May 27, 1950, (when the amending Act came into force), appeals from decrees passed by the Civil Judges in suits transferred to their Courts would no doubt lie to the District Court. After the amendment, it cannot be said that

a litigant had a vested right of appeal to the High Court. He knows when the suit is filed that if the suit is tried by the District Judge, an appeal would lie to the High Court and if the suit is tried by a Civil Judge, an appeal would lie to the District Court. We therefore, think that in respect of suits instituted prior to May 27, 1950, an appeal would lie direct to the High Court, whether the suit is tried by a Civil Judge, or a District Judge. But in respect of suits instituted after May 27, 1950, an appeal would lie to the High Court if the decree under appeal is that of the District Judge and to the District Court if the decree under appeal is that of a Civil Judge to whom the suit has been transferred. As the present suit was instituted before May 27, 1950, we are of the opinion that an appeal would lie to the High Court, and that the present appeal was properly instituted in this Court. The preliminary objection to the hearing of the present appeal must therefore be over-ruled.

On merits, the only point urged by Mr. Bhalerao is that the learned Judge awarded an alimony of Rs. 20 per month, although that question was not put in issue, and there is no material on which the learned Judge could come to the conclusion that Rs. 20 was a reasonable amount. We think that there is considerable justification in this submission. In written statement no prayer was made for any permanent alimony. Under s. 8 of the Bombay Hindu Divorce Act, an order can be made for alimony, having regard to the wife's own property, her husband's property and the conduct of the parties to the suit. We have no evidence as to whether the wife has any property of her own and what the extent of the property of her husband is. We therefore think it necessary to send down the following issue for a finding:

"What is the proper amount of alimony which may be awarded to the defendant, having regard to her own property, her husband's property and the conduct of the parties to the suit."

The parties will be entitled to lead evidence only on this issue, and the learned Judge will certify the finding on that issue to this Court after hearing the parties and recording the necessary evidence, within two months of the receipt of these papers in his Court.

Case remanded.

M. W. P.