Bombay High Court
Nina Dalal vs Merwanji Pheeozshaw Dalal on 11 April, 1930
Equivalent citations: (1930) 32 BOMLR 1046
Author: K Amberson Marten
Bench: A Marten, Kt., Mirza, Broomfield
JUDGMENT Amberson Marten, Kt., C.J.

1. This appeal comes before us on the preliminary issue whether this High Court has jurisdiction to entertain the petition of the petitioner for restitution of conjugal rights. The learned trial Judge decided that issue in the negative feeling himself bound by a decision of the appellate Court in Nusserwanji Wadia v. Eleonora Wadia (1913) 15 Bom. L.R. 693, s.c. I.L.R. 38 Bom. 125. The petitioner now appeals, and as this is a Full Bench, we are not bound, as the learned Judge was, by that particular decision. So in effect this appeal is an appeal from the decision in Wadia v. Wadia. The sole ground on which it is contended by the respondent that the judgment should be upheld is that both parties to the petition are not Christians but only one, and that, consequently, the jurisdiction given or continued to this Court by the Indian Divorce Act 1869, as subsequently amended, does not apply.

2. As regards the facts, it is sufficient to say that the lady claims to be a Russian and a Christian who was married in Paris in June 1929 to the defendant, a Parsi, according to the law of France before the local mayor. A certificate of that marriage is annexed to the petition. She alleges that at her husband's invitation she subsequently came to Bombay, but has been neglected by him ; and accordingly she brings her petition for restitution of conjugal rights. Both parties at the date of the petition and previously were residing in Bombay, and so far as the evidence before us goes, are still residing in Bombay. So it is clear that at material dates they were residing within the jurisdiction of this High Court.

3. Now the petition, as I have already said, is one for the restitution of conjugal rights. That is based on Section 32 of the Indian Divorce Act of 1869 which runs :--

When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

4. Section 33:-

Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

5. So stopping there, one finds that the Court is given jurisdiction as regards any husband or wife, but nothing there is said as to whether they are to be Christians or otherwise. But there are certain limitations in that respect in the Act. They were originally in Section 2 of the Act, but this has been

subsequently amended by Act XXV of 1926 and Act XXX of 1927. The result is that Section 2 now runs as follows :-

Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner or respondent professes the Christian religion, or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented, or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition, or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.

6. Now stopping there, that section clearly limits the wide operation of Section 32 because the first condition renders it necessary for either the petitioner or the respondent to be a Christian. In other words, one of the parties must be a Christian, but there is nothing said there as to the necessity for both parties being Christians. It will also be observed that -we are not concerned with the second and third conditions, for they only apply to decrees for dissolution of marriage or for nullity of marriage. But we are concerned with the fourth condition, viz., that the petitioner must reside in India at the time of presenting the petition. That last condition, as I have already said, is satisfied.

7. I should have stated that when one turns to Section 10 dealing with dissolution of marriage, and Section 18 dealing with nullity of marriage, they both begin in substantially the same way as Section 32, namely, that any husband or any wife may present a petition. It would seem clear then referring once more to Section 2 that the legislature in saying that either the petitioner or the respondent must profess the Christian religion, equally intended that it should not be essential that both should profess the Christian religion. And if there was any doubt on the point, it is removed by the fact that the words " or respondent" have been added by the Act of 1927 to the old Section 2, which merely required the petitioner to be a Christian.

8. While I am on that point, it may be that the legislature made this alteration in Section 2 in view of the decision in Rex v. Hammersmith Superintendent Registrar of Marriages : Mir-Anwarvddin, Ex parte . There a Mahomedan was married to an English woman in a registry office in England, and afterwards claimed to divorce her by an ordinary talaknama. It was held that that form of divorce could not be recognised in England as dissolving a marriage solemnised there according to the laws of England. On the other hand the learned Judges referred to the contention of the Mahomedan husband that he could not get a divorce in India because he would not come within the provisions of the Indian Divorce Act as he would not be a Christian petitioner; nor could he get a divorce in England because he was not domiciled there. Therefore, his only remedy was a divorce under the law of his own community. As that too was denied him by the decision of the English Courts he would appear to have had a legitimate grievance. However that may be, the Indian legislature has since amended the Act so as to provide that in such a case either the petitioner or the respondent may be a Christian.

9. Now I come to the crux of the present case, which is Section 4 of the Act. That runs as follows:-

The jurisdiction now exercised by the High Courts in respect of divorce mensa to tovo, and in all other causes, suits and matters matrimonial, shall he exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise : except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

10. Consequently, the respondent's argument runs that at that date, viz., 1869, the High Court had no power of granting ordinary divorces. They had only in effect the old jurisdiction of the English Ecclesiastical Courts which had come down to them from the days of the Supreme Court Charter of 1823. The argument; further goes that that jurisdiction which had been given or continued to them by the Letters Patent following on the High Courts Act of 1861 expressly limited the jurisdiction to matters matrimonial between subjects professing the Christian religion, thus Clause 35 of the Letters Patent of 1862 runs :-

And We do further ordain that the said High Court of Judicature at Bombay shall have jurisdiction in matters matrimonial between Our subjects professing the Christian religion, and that such jurisdiction shall extend to the local limits within which the Supreme Court now has ecclesiastical Jurisdiction.

11. By the amended Letters Patent of 1865 this local limit is omitted and the corresponding Clause 35 runs :-

And We do further ordain that the said High Court of Judicature at Bombay shall have jurisdiction within the Presidency of Bombay in matters Matrimonial between Our subjects professing the Christian religion :...

12. So, to continue the argument, it is urged, that as at the date of this Divorce Act of 1869 the High Court only had matrimonial jurisdiction between Christians, it was only that limited jurisdiction which was conferred or continued by the Divorce Act having regard to Section 4, and that as regards the words "subject to the provisions in this Act contained and not otherwise", they were merely words limiting that limited jurisdiction and ought not to be construed so as to operate as an extension of the jurisdiction of the High Court. It was accordingly pointed out that there are many subsequent provisions in the Divorce Act, e. g., in Sections 45 and 46, etc., as to procedure which would amply satisfy the words " subject to the provisions in this Act contained and not otherwise."

13. And I may hero refer to one other limitation, viz., Section 7, which says:-

Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

14. Now, I think, no question arises in the present case under Section 7. The effect of that section was very elaborately considered in Wilkinson v. Wilkinson on the question whether the High Court had power to grant a divorce between English subjects domiciled in England. The majority of that

bench came to the conclusion that this High Court had not the power, and that view was in effect adopted by the British and Indian legislatures, with the result that a special and limited jurisdiction was afterwards conferred by the British legislature on Indian High Courts as regards English subjects not domiciled in India by the Indian and Colonial Divorce Jurisdiction Act 1926. This Act also validated the past decrees of the various Indian High Courts where the parties had not been domiciled in India. Further, the Indian Legislature by Act XXV of 1926 enacted the second condition in Section 2, which I have already mentioned, viz., that the Indian Courts have no power to decree dissolution of marriage "except where the parties to the marriage are domiciled in India at the time when the petition is presented".

15. So we are thrown back for the purposes of the present case on merely Sections 2 and 4. I will now, having explained the Act, refer at once to the decision in Wadia v. Wadia which the learned Judge very properly thought he was bound to follow, notwithstanding that it is fairly clear from his judgment that, if he had been free to follow his own opinion, he would have arrived at a different conclusion.

16. In the case of Nusserwanji Wadia v. Eleonora Wadia the substance of the judgment is given by Sir Basil Scott in these words at p. 600 of the former report:-

The Indian Divorce Act of 1869... by Sections 10-17 conferred on the Indian Courts jurisdiction to grant decrees for divorce, that is dissolution, subject however to the limitations stated in Section 2. It would not apparently be necessary that both parties to a divorce petition should profess the Christian religion. Nor is this a necessity in the case of petitions for nullity provided for by Sections 18-21. But as regards the jurisdiction confirmed to the High Court by Section 4 (which includes suits for restitution) the powers of the Courts are still limited to Christian subjects within the Presidency.

17. Now, in the first place, it will be noted that the learned Chief Justice apparently accepts the view that as regards divorce suits and nullity suits it is sufficient within the meaning of Section 2 if there is only one party who is a Christian and not two. But in his judgment, if you get any other form of matrimonial suit like a restitution suit, then both parties must be Christians. The result at any rate is anomalous. Clearly, suits for divorce and nullity are far more important than suits for judicial separation or restitution of conjugal rights and so on, and for this reason that the former unlike the latter effect a change in the actual status of the respondent. It is for this reason that the English Courts after careful deliberation have adopted the view that it is essential for a divorce that the parties should be domiciled in England before the English Courts will grant relief, and that mere residence will not suffice. That is also the principle which has been now established in India. On the other hand, it is equally clear on the English authorities that the lesser remedy of, say, judicial separation will be granted by the English Courts provided only the parties are resident within the jurisdiction, although they may not be domiciled there. That is because it is felt that a comparatively temporary relief like that should be available to prevent, for instance, cruelty by a husband to his wife while living within the jurisdiction irrespective of where they are domiciled. This principle has been clearly established in the exhaustive judgment of Mr. Justice Gorell Barnes as he then was in Armytage v. Armytage [1898] P. 178. And it is referred to by their Lordships of the Privy Council in Le Mesurier v. Le Mesurier [1893] A. C. 517, 526-7, 531.

18. Then there is another comment to make on Sir Basil Scott's construction of the Act, and that is that the learned Judge does not appear to be correct in treating nullity suits as not falling within Section 4. It is clear that nullity suits Ml within the jurisdiction of the old Ecclesiastical Courts and, consequently, within the jurisdiction of the Supreme Court which was expressly given the old ecclesiastical jurisdiction by Clause 42 of the Supreme Court Charter 1823. And that jurisdiction of the Supreme Court passed to the High Court under the High Court Acts and Letters Patent already mentioned. In this connection we have been referred to the Matrimonial Causes Act 1857, Section 6, which specifically refers to this particular jurisdiction of the old Ecclesiastical Courts. It runs:-

As soon as this Act shall come into operation, all Jurisdiction now vested in or exerciseable by any Ecclesiastical Court or Person in England in respect of Divorces a Mensa et Thorn, Suits of Nullity of Marriage, Suits for Restitution of Conjugal Rights, or Jactitation of Marriage, and in all Causes, Suits, and Matters Matrimonial, except in respect of Marriage Licences, shall belong to and be vested in Her Majesty, and such Jurisdiction, together with the Jurisdiction conferred by this Act, shall be exercised in the Name of Her Majesty in a Court of Record to be called 'The Court for Divorce and Matrimonial Causes'.

19. Assuming, however, that the above statement re nullity suits was made per incuriam, we get this alleged result, viz., that for a divorce suit it is sufficient if one party is a Christian but in all other cases it is necessary under this Act that both parties should be Christians. For this I can see no reason whatever. And when I turn to Section 4 it seems to me that this anomalous result is entirely got rid of by the words "subject to the provisions in this Act contained and not otherwise". That to my mind clearly means that the old Ecclesiastical jurisdiction vested in this High Court is thenceforth to be exercised in accordance with the provisions of the Indian Divorce Act 1S69 and not otherwise.

20. Then as regards the argument that Section 4 was never intended to extend the jurisdiction, one answer is that this very section gives jurisdiction to the District Courts which, undoubtedly, they did not previously possess, viz., the same jurisdiction as the High Courts. And this is borne out by the preamble to that Act.

21. An alternative argument was advanced to us in reply by Mr. Desai for the appellant, to the effect that the wide words of Clause 35 of the Letters Patent of 1865, viz., that the High Court shall have jurisdiction in matters matrimonial was sufficient to give jurisdiction in divorce. Consequently, Section 4 applied to divorce as well as all other matrimonial cases. Therefore, in divorce cases as well as in all other cases, it was only necessary, as far as Section 2 was concerned, to have one party a Christian and not both. However, in the view I take, that contention is not correct. So far as I am aware, there is no instance of this High Court having ever exercised any such alleged power of divorce between Christians prior to the Act of 1869. And, as my brother Broomfield has pointed out, if- the power existed one would have expected it to be mentioned in Section 4 before the words "divorce a memed toro", which in ordinary language is not a divorce at all, viz., a divorce a vinoulo but is a judicial separation, and which incidentally has been abolished by Section 22 and a decree for judicial separation substituted.

22. Sir Basil Scott relied on the decision of the Privy Council in Ardaseer Cursetjee v. Perozeboye (1856) 6 M. I. A. 348 that under the Ecclesiasticai jurisdiction conferred by the Supreme Court Charter, the Supreme Court had no jurisdiction to grant any matrimonial relief where both parties were Parsis. But that is quite different from the present case, where one of the parties is not a Parsi, and where we have to consider the effect of the Act of 1869 as subsequently amended, which Act was not in force at the date of the decision in Ardaseer Cursetjee v. Perozeboye.

23. There is one other case I should like to refer to, viz., Chetti v. Chetti [1909] P. 67 There a Hindu had married an English woman at a registry office in London, and she subsequently presented a petition for judicial separation on the ground of desertion. It was contended by the husband that by his personal law, viz.. Hindu law, he "had no power to marry outside his caste, and therefore the marriage was illegal, and therefore a petition for separation would not lie. The English Court held that the marriage having been solemnized in London was valid under English law, and declined to consider any personal incapacity of the husband under his personal law. They accordingly entertained the petition, and eventually passed an order thereon and dealt with the custody of the child of the marriage. On the question of religion the President during the course of the argument said :- "We are not now dealing with a religious marriage. This was a marriage before a registrar." Then at the top of p. 72 he said :- "But I could not be expected in every case to inquire what the religion of the parties to the marriage was."

24. Therefore, we have there a case where the English Court entertained a petition for judicial separation although the husband was a non-Christian, and where, moreover, by the laws of his own community, marriage was not confined to the union of one man with one woman for life as is the law in England. On the other hand, in the present case, monogamy has been established by the Legislature, as regards Parais. Therefore, in that respect, Parsi law is now the same as that prevailing in England.

25. I have now dealt with the more material Joints in the case, and the result which I have arrived at is that the Indian Divorce Act intended it to be sufficient for one party to profess the Christian religion, and did not require that both parties should do so., Consequently, in my judgment, and with all respect to those who took a contrary view, the decision in Nusserwanji Wadia v. Eleonora Wadia on this particular point was wrong and ought to be overruled. In saying this, I notice that although the husband in that case was represented by such distinguished lawyers as Sir Thomas Strangman, Mr. Inverarity and Sir Chimanlal Setalvad, this particular point of construction on which the appeal was eventually decided in their client's favour does not appear to have been even argued by them either on the original hearing before Sir Norman Macleod whose judgment was reversed, or in the appellate Court afterwards.

26. Under these circumstances it follows that I would reverse the judgment of the trial Judge in the present case, and direct the preliminary issue in question to be answered in the affirmative, and the case to be remanded to be dealt with according to law.

Mirza, J.

27. With great respect I have arrived at the same conclusion that the construction put on Section 4 of the Indian Divorce Act, 1869, in the case of Nusserwanji Wadia v. Eleonora Wadia with regard to the jurisdiction of this Court in cases relating to restitution of conjugal rights is not correct. The contention that Section 4 only confirms the jurisdiction which the High Court already exercised at the date of the enactment of the Indian Divorce Act seems to overlook the fact that the section itself provides that the jurisdiction in matters matrimonial exercised by the High Court until then was subject to the provisions contained in the Act. There is nothing in the language of Section 32 of the Indian Divorce Act to indicate that it was subject to the provisions that both parties in cases for restitution of conjugal rights should be of the Christian faith. Section 2 of the Act, as it stood at the date of the decision in Wadia v. Wadia, provided that if the petitioner alone professed the Christian faith the provisions of the Act would be applicable to him. Since the date of the decision in Wadia v. Wadia the legislature has made its intention quite clear by providing in an amending Act, viz., Act XXX of 1927, that as long as either the petitioner or the respondent professed the Christian religion the provisions of the Act would be applicable. I agree with the order perposed by my Lord the Chief Justice.

Broomfield, J.

28. The trial Court in deciding that it had no jurisdiction to entertain the petition followed with some reluctance the decision of this Court in Wadia v. Wadia, and what this Bench has to decide is whether that case, in which it was decided that the High Court had no jurisdiction to grant a decree for restitution of conjugal rights against a respondent who is not a Christian or who is not within its jurisdiction, was correctly decided. I agree with the learned Chief Justice that our answer ought to be that Wadia v. Wadia was not correctly decided and that it should be overruled.

29. The Indian Divorce Act of 1869, as a matter of history, was passed in consequence of a despatch of the Secretary of State of May 14, 1862, from which it appears that it was intended that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England; and it is provided in Section 7 of the Act that "Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceeding*) hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable' to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." As the learned Chief Justice has pointed out, in circumstances corresponding to those in the present case, the Courts in England would grant relief to the petitioner: see Chetti v. Chetti [1909] P. 67,

30. Sir Basil Scott's reasoning in Wadia v. Wadia was on these lines. He pointed out first that under Section 10 and the following sections of the Act the Court has jurisdiction to grant decrees for dissolution of marriage, but that is subject to the limitation contained in Section 2, which does not require that both parties should be Christians. Apparently, he considered that the same would apply in the case of proceedings for nullity, but that appears to have been a slip, because the High Court's existing jurisdiction included jurisdiction to grant a decree for nullity and its powers in that respect therefore must be governed by Section 4. Section 32 is the section of the Act which empowers the Courts to decree restitution of conjugal rights. As regards this, Sir Basil Scott held that there was

another limitation besides the limitation laid down in Section 2, Section 4 confirms in the case of the High Courts and confers on the District Courts the jurisdiction which was formerly exercised by the High Courts in respect of divorce a mensa et toro and in all other cases, suits and matters* matrimonial, and directed that this jurisdiction should be exercised by such Courts and by the District Courts "subject to the provisions in this Act contained and not otherwise." Sir Basil Scott's view was that this section did no more than confirm the already existing jurisdiction of the High Court in matrimonial matters, and he held that so far as that jurisdiction was concerned it must be limited to cases where both parties were Christians. lie took this view by reason of Clause 35 of the Letters Patent, which according to him gave effect to the decision in Ardaseer Gursetjee v. Perozeboye (1856) 6 M. I. A. 348.

31. The decision in Wadia v. Wadia was based on certain other grounds. It was held to be barred in the alternative by virtue of Section 7 of the Act, because in that case the respondent was in England and not within the jurisdiction. In the case before us both parties are resident, if not domiciled, here, so that particular point does not arise. There was a further point in Wadia v. Wadia, namely, that Sir Basil Scott was not prepared to hold in the circumstances of that case that the petitioner was even residing in India within the meaning of Section 2 of the Act. In that respect also the present case can be distinguished.

32. As regards the first and the main argument on which the decision in Wadia v. Wadia was based, Mr. Setalvad has supported it on these lines. He urged that it was not a case of the old jurisdiction being taken away by the Indian Divorce Act and something else substituted for it, but a case of the old jurisdiction being reserved or confirmed. If the intention of the legislature had been to abrogate Clause 35 of the Letters Patent nothing would have been easier than to say so. It would have been quite easy to frame Section 1 in such a way as to make the whole matrimonial jurisdiction obviously dependent on the Act itself. Moreover, as was pointed out by the learned Chief Justice, there is at any rate one matter, namely, jactitation of marriage, which was within the jurisdiction of the Courts before the Divorce Act and in respect of which no powers have been conferred by that Act. It would seem to follow from that that it would be going too far to say that the Divorce Act abrogates Clause 35 of the Letters Patent altogether. It is, however, not necessary for the petitioner's argument to go that length.

33. Then Mr. Setalvad contended that as Section 4 merely confirmed the old jurisdiction, and as that old jurisdiction, as fixed by Clause 35 of the Letters Patent* was to be exercised as between Christians only, then Section 4 must simply mean that the jurisdiction in matrimonial matters as between Christians is to be exercised in accordance with the provisions of the Act. As he pointed out there are certain other limitations imposed by the Act, for instance, under Sections 32, 33, 45, 51, etc., and it would according to this argument give an intelligible meaning to Section 4 to suppose that the words "subject to the provisions in this Act contained, and not otherwise" have reference to these other limitations, whereas, it was suggested, the language of Section 4 is not appropriate for an enlargement of the jurisdiction.

34. On the other hand, Mr. Setalvad had to admit that as a matter of fact the jurisdiction of the Courts has been greatly enlarged by the Indian Divorce Act, because the Act granted the power to

divorce which was not possessed before. Mr. Setalvad could not also deny that there appears to be no reason in justice or policy why both parties should need to be Christians in the case of suits for judicial separation or for restitution when it is clearly sufficient under the Act that one party should be a Christian in the case of a petition for divorce. Moreover, his argument involves a finding that Section 4 is independent of Section 2 of the Act. That is clearly the weak point in the case, because according to Section 4 the jurisdiction is to be exercised "subject to the provisions in this Act contained and not otherwise," and there would seem to be no reason why Section 2 should be excluded. In respect of divorce at any rate, the Act of 1869 does, undoubtedly, override the provisions of Clause 35 of the Letters Patent. For in respect of divorce it is admittedly not necessary that both parties should be Christians. That being so, the question is whether it is necessary or reasonable to hold, that Section 4 of the Act is still subject to the limitations of Clause 35 of the Letters Patent. In my opinion it is neither necessary nor reasonable to take that view. According to the marginal heading to Section 2 the Act fixes the " extent of power to grant relief generally." The marginal heading of Section 4 is "Matrimonial jurisdiction of High Courts to be exercised subject to Act." From its position in the Act this section appears to be intended rather to alter the law as to the Courts by which jurisdiction may be exercised than to impose a limitation additional to and inconsistent with that contained in Section 2. As was pointed out to us by Mr. O'Gorman, there is nothing in the frame of the Act, nothing in the language of Section 10 or Section 18, for instance, as compared with the language of Section 32, to support the view that proceedings under the latter section are subject to any further limitation as regards jurisdiction than proceedings for divorce. It is, moreover, obvious that there is no reason why there should be any such distinction between the relief provided by Section 32 and the relief provided by those other sections. Clause 44 of the Letters Patent makes it perfectly clear that all the provisions of the Letters Patent are subject to the legislative powers of the Governor General in Council. It was, therefore, clearly within the powers of the legislature to enact the Indian Divorce Act in such a way as to remove the limitation contained in Clause 35 of the Letters Patent. It is open to us to hold that that was the intention of the legislature, and as both justice and expediency are in favour of it I agree that that is the view this Court ought to take.

35. Per Curiam. Appeal allowed. Order of the lower Court discharged. Answer preliminary issue in the affirmative. Remand suit to be dealt with according to law. Respondent to pay petitioner's costs of this appeal and of the preliminary issue in any event, and also of the notice of motion.