PA'RSI MATRIMONIAL COURT.

Before Mr. Justice Jardine.

S. (THE WIFE) *v.* B. (THE HUSBAND.)*

1892. *July* 4.

Suit by wife for nullity—General and relative impotency—Impotency quoad hanc—Pársi Marriage Act XV of 1865, *Sec.* 28—*Construction.*

In March, 1882, the plaintiff and defendant, Pársis, were married according to the rites and ceremonies of their religion. In October, 1882, the plaintiff attained puberty, and for seventeen months from that time she lived with the defendant in his parents' house; but there was no consummation of the marriage. There was no physical defect in either plaintiff or defendant, nor any unwillingness in the plaintiff to consummate the marriage; but the defendant had always entertained such hatred and disgust for the plaintiff as to result, in the opinion of the medical experts, in an incurable impotency in the defendant *as regards the plaintiff.*

The delegates unanimously found, on the evidence, that the consummation of this marriage had from its commencement been impossible; because the defendant was from a physical cause, namely, impotency as regards the plaintiff, unable to effect consummation. They also found that there was no collusion or connivance between the parties.

Held, on this finding, that such impotency *quoad* the plaintiff must be regarded as one of the causes going to make consummation of a marriage impossible under section 28 of Act XV of 1865, there being nothing in the Act to suggest a contrary opinion.

The observations of Dr. Lushington and of Lord Watson in *G.* v. *M.*(1) as to impotency *quoad hanc*, and practical impossibility of consummation, approved and followed.

SUIT by a wife for nullity of her marriage on the ground of her husband's inability to consummate it.

The parties were married, with the consent of their respective parents, in accordance with the rites and ceremonies of the Pársi religion, in Bombay on 9th March, 1882, when the plaintiff was eleven and the defendant sixteen years of age. The plaintiff attained puberty in October, 1882, from which time down to the end of March, 1884, a period of seventeen months, they lived together in the defendant's father's house. The plaint, which was filed in January, 1892, alleged that "the defendant was by reason of his impotency legally incompetent to enter into the contract of marriage; that the defendant had continued unable

* Suit No. 1 of 1892.

(1) 10 Ap. Ca., 171.

1892

S. v. B.

to consummate the said marriage by reason of such impotency; that such impotency was incurable by art or skill; and that the plaintiff was ignorant, until recently, of the real reasons for the non-consummation of the said marriage." After denying collusion and connivance between the parties the plaintiff prayed for a declaration that the marriage was null and void.

The defendant in his written statement admitted the non-consummation of the marriage, but denied that it was owing to his impotency, as alleged in the plaint.

The issue, settled by the learned Judge (Birdwood, J.) for determination by the delegates of the Court as to the alleged impotency, ran, in the words of section 28 of the Pársi Marriage and Divorce Act, 1865, as follows :—

"Whether the consummation of such marriage has been and is from natural causes impossible?"

At the trial, the plaintiff and two of the medical experts, who had, under orders from the Court, personally inspected the defendant, were examined on this issue. At the conclusion of the evidence, the plaintiff's counsel admitted that the defendant was generally potent, but contended that he was not so as regards the plaintiff.

The learned Judge (Jardine, J.) having summed up the evidence, and directed them on the law of the subject, the delegates returned a unanimous finding on this issue, that the consummation had been and was from natural causes impossible; and they further stated that it was their opinion that "from the time of their marriage it was physically impossible for the defendant to have had intercourse with the plaintiff by reason of his impotency as regards her." They also found on another issue, that no collusion or connivance existed between the parties in respect of this suit.

The Court invited argument on the legal effect of these findings of the delegates.

Jardine for the plaintiff:—Though as regards other women the defendant may be potent, he is impotent *quoad* the plaintiff. The finding of the delegates on this point of fact brings the pre-

1892.

S. v. B.

sent case within the apparent meaning of section 28 of the Act for purposes of the decree. Counsel cited *S.* v. *A. otherwise S.* [1]; *N.—R.* falsely called *M. E.* v. *M. E.* [2]; Browne on Divorce, (5th Ed.), p. 195.

Mánekshá for the defendant:—We only dispute the general impotency of the defendant; we cannot dispute his impotency as regards the plaintiff. The law on the subject is correctly stated by the plaintiff's counsel.

JARDINE, J.:—This suit is for nullity, and was brought by the wife on her allegation that the husband was unable to consummate the marriage because of his general impotency, I mean as to women in general. After the examination of the defendant by the medical inspectors, who found in him no apparent defect, this general imputation was abandoned, and, at the trial, the plaintiff's counsel limited her case to one imputing natural impotency only as regards copulation with her. This was the issue I left to the delegates, who found unanimously that the consummation of the marriage has been, and is, from natural causes impossible, because from the time of the marriage it was physically impossible for the defendant to have intercourse with the petitioner by reason of his impotency as regards her. The delegates also unanimously found that there was no collusion, nor connivance, between the parties.

These findings on the facts being clear and full, there is little need for me to discuss the questions of delay, sincerity, or physical inability, which as questions of fact I left to the delegates in my summing up of the evidence.

I am informed that as no suit for nullity of marriage on the ground of frigidity or impotence *versus hanc* has, since the creation of this Court, been filed here, there has been no occasion to interpret the law on this point. Moreover, so learned a writer as Bishop (section 335 *et seq.*) suggests doubts as to whether the ground alleged is sufficient, and remarks that the question arose in the celebrated case of the *Earl of Essex* [3], and may occur again. The matter is left obscure in Browne on Divorce

(1) 3 P. D., 72. (2) 2 Rob. Ec. Rep., 625.

(3) 2 Howell's State Trials, 786.

1892.

S. C. B.

(5th Ed.), p. 195. There appears also to be no case in any report of the Indian Courts on the subject. As every question relating to the law of marriage is of public importance, I invited argument on this.

I assent to the view, propounded by Mr. Jardine for the plaintiff, that the finding of the delegates on the facts brings the present case within the apparent meaning of section 28 of the Act, XV of 1865. That finding is that the consummation of *this* marriage has, from its commencement, been impossible, because the defendant is, from a physical cause, namely, impotency as regards *copula* with the plaintiff, unable to effect consummation. This cause may be regarded as a species of the causes defined in section 28. I find nothing in the rest of the Act to suggest any contrary opinion. The language used in section 28 may be contrasted with that found in section 54 of the Civil Code of New York, and compared with that in section 18 of Act IV of 1869.

Turning to the jurisprudence of England, on which this part of the marriage law of the Pársis is apparently based, I find such decisions and dicta as there are are in accordance with this view. The ancient cases are collected in Comyn's Digest, under the Title Baron and Feme C. 3, Impotentia, in support of the following statements of the law:—"A divorce for impotence or frigidity may be upon an universal impotence, as if he be an eunuch; or for a perpetual impotence, previous to the marriage *quoad hanc*, be it natural or accidental." One of these cases, that of the *Earl of Essex*, is of no great authority, on account of the manner in which the decision was obtained; but it, as also the case of *Morris* v. *Webber*[1], shows the authorities on the Canon Law which were appealed to. The writings of the Archbishop of Canterbury appended to the *Essex Trial*[2] appear to show that a decree of nullity for impotence merely *versus hanc* was almost unknown in England at that time. The case of *N.*———*R.*, *falsely called M.*———*E.* against *M.*———*E.*[3], also reported under the initials of A. and B.[4], is more modern being of the year 1853, and as distinctly in point as that of the

(1) 2 Leonard's Rep., 170; S. C. 1 Anderson, 185; and 5 Coke's Rep., 33 B.
(2) 2 Howell's State Trials, at p. 843. (3) 2 Rob. Ec. Rep., 625.
(4) 1 Spink's Rep., 12.

1892.

S. v. B.

Earl and Countess of Essex. It is mentioned with approbation as regards other matters by Lord Selborne in *G.* v. *M.*(1). The judgment is that of Dr. Lushington, who points out that on the report of the medical gentlemen the averment of impotence was narrowed to *quoad hanc*, and that proof of such limited averment did not amount also to proof that the man was "necessarily impotent as to all women." "Who can tell," he asks, "the physical cause of that one failure, when the man is apparently without defect?" Dr. Lushington goes on to point out that the danger of sentences being incorrect as to the fact of impotency cannot be wholly guarded against, and then adds the following important consideration:—"An observation which must be apparent to all—that impotency *quoad hanc* is just as prejudicial to the individual female as universal impotence." I would add that this consideration seems not to have occurred to the Archbishop of Canterbury in his long and careful argumentation against sentences of *nullity propter maleficium versus hanc* in the *Essex case*(2).

Again, in *H. falsely called C.* v. *C.*(3) the fact of a man being *frigidus versus hanc* is incidentally mentioned in the judgment of the Judge ordinary as a known cause of non-consummation.

Where that is found to be the cause, I do not see any sufficient reason, in principle, for not giving relief. The grievance to the wife may be considerable when this is proved against the husband, even though, as said by Lord Watson in *G.* v. *M.*(4), he may "not be absolutely incapable of having sexual intercourse," yet "is not, in the ordinary sense of the term, *vir potens*," and thus "consummation becomes a practical impossibility." There is of course need of caution in dealing with evidence of this as of any other sort of impotency, to avoid such after events as in some of the old cases happened, when the person pronounced impotent had issue in a later marriage. But these considerations are usually, in a Court constituted like this, matters to which the attention of the delegates must be directed, being bound up with the other facts. The present case differs from all that I know of, in that the medical inspectors have deposed that the defend-

(1) 10 Ap. Ca., at p. 191.
(2) 2 Howell's State Trials, 786.
(3) 1 Swab. & Trist., at p. 615.
(4) 10 Ap. Ca., at p. 194.

1892.

S. v. B.

ant admitted to them abundant potency as to other women: in other respects the evidence resembles that given in *Greenstreet* v. *Cumyns*[1]. I put these admissions *literatim* before the delegates, and left it to them to say, whether, to use the words of Archbishop of Canterbury, the *non potuit* was for lack of love, or lack of ability. I think I am bound by their finding on the fact; and that section 28 of the Act includes the physical defect found.

I, therefore, pronounce sentence of nullity: the decree to be settled according to law and precedent.

Each party to pay her and his own costs.

Attorneys for the plaintiff:—Messrs. *Ardasir, Hormasji* and *Dinshá*.

Pleader for the defendant:—Mr. *Máneckshá J. Taleyarkhán*.

(1) 2 Phillimore 10.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891. September 10.

ISHVARDA'S JAGJIVANDA'S AND ANOTHER, LIQUIDATORS OF THE NAWAB OF BAILA MILL, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DHANJISHA NASARVA'NJI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Indian Companies' Act (VI of 1882), Sec. 136—Winding up—Proceeding with suit—Proceeding to enforce execution of decree—Sanction of the Court—Suit or other proceeding.

The language of section 136 of the Indian Companies' Act (VI of 1882) shows that proceedings in execution are regarded as distinct from the suit for the purpose of that section: therefore the leave given to proceed with a suit is not authority for proceedings taken in execution of the decree in the suit authorized.

THIS was an appeal from an order passed by Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Surat, in execution of a decree.

Dhanjisha Nasarvánji (respondent) had filed a suit against Ishvardás Jagjivandás and another (appellants), who were the liquidators of the Nawáb of Baila Mill. After the suit was filed the mill went into liquidation, and, therefore, Dhanjisha proceed-

* Appeal No. 62 of 1891.