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order to enable the plaintiff to consider his position in the light of the judgment. Accordingly, I deferred passing final orders on the Notice of Motion. To-day counsel for the plaintiff applies under O. XXIII, r. 1, for leave to withdraw the suit. This is opposed by counsel for defendant No. 6 on the ground that no formal application for that purpose is before the Court, and that he has received no notice of this application. I cannot deal with any such application now. Any right which the plaintiff may have to apply for withdrawal of the suit or to make any other application or to take any other proceeding to enforce any right which he may still have, in my opinion, will not be affected by the order which I make on the Notice of Motion for final decree for sale. The motion having been argued, and I having found that the application is barred by the law of limitation, I must dismiss the Notice of Motion with costs which I do. In view of two adjournments which were asked for by the plaintiff for his own convenience and which have necessitated further costs to defendant No. 6, I fix the costs of the Notice of Motion at Rs. 250.

Attorneys for plaintiff: Messrs. *Jhavery & Co.*

Attorneys for defendant No. 6: Messrs. *M. V. Gokhale & Co.*

B. K. D.

APPELLATE CIVIL.

Before Mr. Justice Divatia and Mr. Justice Wassoodew.

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NADIRSHAW JAMSHEDJI VACHHA (ORIGINAL DEFENDANT), APPELLANT *v.* MANEKBAI FORMERLY WIFE OF NADIRSHAW JAMSHEDJI VACHHA AND AT PRESENT WIFE OF RUSTOMJI M. KAPADIA (ORIGINAL PLAINTIFF), RESPONDENT.*

Parsi Marriage and Divorce Act (III of 1936), s. 40—Divorce—Personal order for permanent alimony—Remarriage by wife—Application for rescission of order—Whether remarriage by itself "a change in circumstances".

In granting a decree of divorce at the suit of a Parsi wife, a personal order for permanent alimony was passed against the husband by the Judge of the Parsi

*First Appeal No. 241 of 1936.

Chief Matrimonial Court, Bombay. There was no provision in the order that the amount of alimony should only be payable to the wife till her death or remarriage. Both parties having remarried, the husband made an application in 1935, that the order for alimony be varied by reducing the monthly amount. This was done. In 1936, the new Parsi Marriage and Divorce Act having come into force, the husband again applied by a Chamber summons for rescission of the order for alimony under s. 40 (2) of the Act. It appeared at the hearing that there had been no change in the circumstances of the parties between the order for reduction of alimony and the application for rescission.

Held, dismissing the summons, that the order could not be rescinded under the Act of 1936 merely because of the remarriage of the wife; the fact of remarriage by itself could not be regarded as "a change in circumstances" within the meaning of s. 40 (2) of the Act, although, in a proper case, it may be regarded as one of the circumstances under which the order for alimony may be varied or even rescinded.

An order for secured alimony made under s. 40 (1) (*a*) of the Parsi Marriage and Divorce Act, 1936, will cease to operate on the wife's remarriage; but in the case of a personal order under s. 40 (1) (*b*) of the Act, no such result will follow unless the order contains a provision that it shall cease to operate on her remarriage.

FIRST APPEAL against the order passed by B. J. Wadia J. on a chamber summons in Parsi Matrimonial Suit No. 5 of 1927.

Chamber Summons.

Manekbai (plaintiff) was married to Nadirshaw (defendant) in September 1915. On November 21, 1927, Manekbai filed a suit in the Parsi Chief Matrimonial Court at Bombay for dissolution of her marriage with Nadirshaw or in the alternative for judicial separation and alimony.

The Court (Davar J.) granted a decree for dissolution of marriage on January 31, 1928, and on July 6, 1928, made a personal order for permanent alimony awarding Rs. 85 per month.

On December 26, 1934, Manekbai remarried; and Nadirshaw also remarried in the same year and had children.

On March 6, 1935, Nadirshaw applied for reduction in the amount of permanent alimony. The Court (B. J. Wadia J.) reduced the alimony to Rs. 50 per month (38 Bom. L. R. 836).

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The new Parsi Marriage and Divorce Act, 1936, having come into force on June 22, 1936, Nadirshaw applied by a chamber summons, under the new Act, for rescission of the order for permanent alimony altogether.

The summons was heard by B. J. Wadia J. who dismissed it on July 24, 1936, delivering the following judgment :—

B. J. WADIA J. This is a chamber summons taken out by the defendant for an order that the amount of permanent alimony awarded to his former wife, the plaintiff in the suit, by Mr. Justice Davar on July 6, 1928, viz. Rs. 85 per month, which was subsequently reduced by me to Rs. 50 per month on March 29, 1935, be altogether rescinded under the provisions of s. 40 (2) of the Parsi Marriage and Divorce Act (III of 1936). Under that section the Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just. Under s. 52, the provisions of the Act have retrospective effect, as they are applicable to all suits to which the same are applicable, whether the circumstances relied on occurred before or after the passing of the Act, and whether any decree or order referred to was passed under the new Act or under the law in force before the passing of the new Act.

I have already pointed out before in my judgment on the reduction of the alimony from Rs. 85 to Rs. 50 per month that there is no provision in the order made by Davar J. that the amount of the alimony was payable to the plaintiff until her death or remarriage. It was a personal order in which no period of time was mentioned, and the payment would therefore ordinarily be a payment for life. The order was varied by me under the circumstances of the case, namely, that the plaintiff had remarried, and her second husband was an architect and earning about Rs. 90 per month, that in addition to that she herself was receiving a

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sum of about Rs. 36 per month out of a trust fund, and that the defendant had also remarried, and had a wife and a daughter to support. He was then earning Rs. 360 per month as an engine driver in the B. B. & C. I. Railway. Taking all the facts and circumstances into consideration I ordered the defendant to pay alimony to the plaintiff at the rate of Rs. 50 per month.

The defendant now prays that the order made by Davar J., and subsequently varied by me, should be altogether rescinded, and that no sum at all should now be paid to the plaintiff by way of alimony. His counsel's contention is that the very fact of the plaintiff's remarriage is in itself a change in her circumstances which empowers the Court to rescind the order of alimony altogether, irrespective of the position of the parties arising out of or following upon the remarriage. Defendant's counsel relied on a judgment of the Probate Division in *Ollier* v. *Ollier*[1] in which Swinfen Eady L. J. referred at p. 243 to a passage in the judgment in *Squire* v. *Squire*[2] but there the Court was only dealing with the practice of inserting in an order for alimony the clause known in English law as the "*dum casta et sola*" clause. The learned Judge seemed to be of opinion that the clause, namely that the alimony should be payable until remarriage, ought to be inserted, and if the Judge did not in the exercise of his discretion think fit to insert such a clause, the Appeal Court had a right to interfere with the exercise of the discretion, in a fit and proper case. In this case Mr. Justice Davar did not provide that his order was to enure for the plaintiff until her remarriage. There was, however, no appeal from that order, and it still stands as a personal order for payment of a fixed sum for alimony, subsequently varied by only reducing the monthly amount.

Counsel for the defendant further relied on the words in s. 40 (*1*) (*a*) under which it is provided that the Court

[1] [1914] P. 240.

[2] [1905] P. 4. at p. 9.

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can secure to the wife a gross sum or a monthly payment of money "while she remains chaste and unmarried" for her permanent alimony. These words "while she remains chaste and unmarried" were not to be found in section 34 of the old Act of 1865. It was argued that these words must be read also in s. 40 (*1*) (*b*), and in s. 40 (*2*). In my opinion, however, the three clauses of the section are independent clauses. There may have been very good reason why the legislature deliberately made the alimony which was secured to the wife depend upon her continued chastity or on her remaining unmarried. No such provision has been made in s. 40 (*1*) (*b*) nor in s. 40 (*2*). It was argued that the legislature must have intended to do so without saying it in so many words. I can only read the intention in the words of the section, and if the intention was as alleged, there was nothing to prevent the legislature from making its meaning clear and explicit. The only argument advanced by the defendant's counsel is that the very fact of the remarriage is sufficient for the Court to rescind the entire order. I do not accept this contention. The remarriage of the wife to whom alimony is payable is an element to be taken into consideration, but it does not follow that the remarriage, by itself, and without more, entitles the Court either to rescind or to modify the previous order. It all depends on the facts and circumstances of each case, and the existing circumstances of this case, since I last made my order in March, 1935, do not warrant a further interference. The parties do not appear to be in any better position now than they were in 1935. The plaintiff was then remarried, and so was the defendant. The plaintiff's second husband earned Rs. 90 a month, and she herself got Rs. 36 from the trust, and there is no allegation that their income has since increased. Counsel for the plaintiff stated that if at all the defendant was earning more now than he was earning in 1935, but with that I am not concerned.

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Taking all these facts and circumstances into consideration I am of opinion that no case has been made out why the order of Davar J., as subsequently varied by me, should be altogether rescinded. The defendant may be entitled to make such an application in the future under altered circumstances, but at present there is no ground for the rescission of the order. The summons must, therefore, be dismissed with costs.

Counsel certified.

Liberty to apply.

Nadirshaw appealed against the order.

H. D. Banaji, with *Sahiar & Co.*, for the appellant.

J. S. Khergamwalla, with *Dorab & Co.*, for the respondent.

DIVATIA J. This appeal is preferred against the decision of B. J. Wadia J. rejecting the application in the form of a chamber summons taken out by the defendant in a Parsi Matrimonial suit in Bombay for an order that the amount of permanent alimony of Rs. 85 per month awarded to his former wife, the plaintiff, by Mr. Justice Davar in 1928, and subsequently reduced to Rs. 50 per month by B. J. Wadia, J. in 1935, be altogether rescinded. The only ground on which the defendant-appellant prayed for this order was that after she was divorced from him, the wife had remarried in 1934, and the fact of remarriage itself was a sufficient reason, under the new Parsi Marriage and Divorce Act of 1936, for the rescission of the order of permanent alimony which was made under the previous Act of 1865 in which, however, there was no provision for such rescission in the event of the wife's remarriage.

The appellant relied on s. 40 of the new Act which runs as follows :—

"40. (*1*) The Court may, if it shall think fit at the time of passing any decree under this Act or subsequently thereto on application made to it for purpose, order that the husband shall,—

(*a*) to the satisfaction of the Court, secure to the wife while she remains chaste and unmarried such gross sum or such monthly or periodical payment of money

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for a term not exceeding her life as, having regard to her own property, if any, her husband's ability and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties and suspend the pronouncing of its decree until such instruments shall have been duly executed, or,

(*b*) make such monthly payments to the wife for her maintenance and support as the Court may think reasonable.

In case any such order shall not be obeyed by her husband it may be enforced in the manner provided for the execution of decrees and orders under the Code of Civil Procedure, 1908, and further the husband may be sued by any person supplying the wife with necessaries during the time of such disobedience for the price of such necessaries.

(2) The Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just."

It is to be noted and it is conceded that the order of alimony passed by Davar J. was a personal order and not secured by any charge on the husband's property, and it would, therefore, fall under cl. (*b*) and not cl. (*a*) of sub-s. (*1*) of this section. The condition "while she remains chaste and unmarried" which is known as "*dum cata et sola*" clause in English law is inserted in cl. (*a*) but not in cl. (*b*). The result would be that in the case of a secured alimony, the order would cease to operate on the wife's remarriage while in the case of a personal order no such result would follow unless the order contained a provision that it was to cease to operate on her remarriage. Mr. Banaji for the appellant, however, contends that the absence of the words "while she remains chaste and unmarried" in cl. (*b*) of the new Act was only an oversight or an accidental omission on the part of the legislature and that in any case those words should be taken as implied in a personal order. The first contention appears to me to have some force, but the remedy for such oversight or omission clearly lies with the legislature and not with the Court which has to administer the law as it is. I am also unable to accede to the second contention. If those words appear expressly in cl. (*a*) and are not to be found in cl. (*b*),

it is either accidental or intentional. If it is accidental, the remedy, as I said, lies with the legislature. If it is intentional, they cannot be taken as implied in cl. (*b*) but on the contrary purposely excluded.

It is next urged on behalf of the appellant that in any case remarriage is a change in the circumstances of either party and that therefore the Court can, acting under subs. (*2*) of that section, rescind the order of alimony. Now, it is true that there was no provision in the preceding Act corresponding to this paragraph but it cannot be held to mean that the fact of remarriage is, by itself, a change in circumstances which entitles the previous husband in all cases to obtain an order of rescission of alimony. I agree with the learned Judge in holding that it may be regarded as one of the circumstances under which, in a proper case, the order of alimony may be varied or even rescinded. That would depend on the circumstances of each case, and, as observed by the learned Judge, the circumstances of the wife's remarriage was in existence in 1935 when he reduced the alimony to Rs. 50 and that since then there is no change of circumstances between the parties. On that ground he has refused to vary or rescind the order. The appellant before us does not contend to have the order rescinded for change of any circumstances since 1935. The only question, therefore, is whether the original order of 1928 as varied in 1935 should be rescinded only because of the wife's remarriage, now that under the new Act of 1936 power of rescission is expressly given on a change of circumstances. I am unable to hold that the order must be rescinded even under the present Act merely because of the remarriage. It remains a matter of discretion and under s. 47 of the present Act, the appellate Court cannot interfere with the decision of the trial Court unless it is contrary to law or usage having the force of law or there is a substantial error or defect in the procedure. This contention, therefore, also fails.

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The last contention is about the order of costs. The learned Judge, in dismissing the summons with costs, has made an order "Counsel certified" under which, we are told, costs have been taxed on the scale prevailing on the Original Side of the High Court. It is contended that this is erroneous because under the rules and Table of Fees enacted by the High Court for trial of cases in the Parsi Matrimonial Court of Bombay, there is provided a special scale of fees and it is laid down that those fees only shall be allowed in cases tried under Act XV of 1865, i.e. the former Parsi Marriage and Divorce Act. It is further contended that no new rules have been framed under the new Act of 1936 but that until then, by virtue of the provision in the General Clauses Act, those rules are still applicable to trials under the new Act. I think there is force in this contention. We are told that the practice has been to tax the costs on the Original Side scale notwithstanding the special scale. If that is so, I am unable to see how this practice is consistent with the rule that this special scale of fees only shall be allowed in Parsi Matrimonial cases. Our attention is drawn to the case of *Payne & Co.*, v. *Pirojshah*,[1] where at p. 933 Davar J. sitting on the Original Side has observed that if costs other than those provided in the scale are incurred by a solicitor on behalf of his client, i.e. the wife, in a Parsi Matrimonial suit, he can hold the husband liable for costs incurred, and in a regular suit on the Original Side to recover them, they can be granted to him on proper taxation even though they are not covered by the special scale of fees laid down. I do not think those observations are applicable to the present case and I see no reason why effect should not be given to the only scale provided in a Parsi Matrimonial suit. I am, therefore, of opinion that the costs should be taxed on the scale of fees specially prescribed under the rules.

[1] (1911) 13 Bom. L. R. 920.

With this variation, the decision of the learned trial Judge is confirmed and the appeal is dismissed with costs.

WASSOODEW J. The principal question of law argued in this appeal is whether a personal order for alimony passed against the husband in a suit by the wife under s. 34 of the old Parsi Marriage and Divorce Act (XV of 1865), which order by the retrospective operation of the provisions of the new Parsi Marriage and Divorce Act (III of 1936) is now referable to the provisions of s. 40 (*1*) (*b*), is enforceable only on the condition *dum sola vixerit* in the absence of an express provision to that effect in the order itself. It will be noted that a change in the law has been effected by enacting s. 40 (1) (*a*) in the new Act. The Legislature has made a distinction between an order for secured alimony or maintenance and a personal order for monthly payment to a wife for her maintenance and support under cls. (*a*) and (*b*) of s. 40 (*1*) of Act III of 1936 respectively. The provision for the order for secured maintenance is thus made in s. 40 (*1*) (*a*) :—

"The Court may, if it shall think fit at the time of passing any decree under this Act or subsequently thereto on application made to it for the purpose, order that the husband shall, to the satisfaction of the Court, secure to the wife while she remains chaste and unmarried such gross sum on such monthly or periodical payment of money for a term not exceeding her life as, having regard to her own property, etc."

The *dum casta et sola* clause has been expressly added in the above order which I may describe as a securing order. It was not done in the old s. 34 providing for a similar order. There was apparently no express provision for a personal order under the old Act. The Legislature has now supplied the omission and has provided for a personal order in cl. (*b*) of s. 40 (*1*) as follows :—

"The Court may, if it shall think fit at the time of passing any decree under this Act . . . order that the husband shall make such monthly payments to the wife for her maintenance and support as the Court may think reasonable."

There can be no doubt that under cl. (*b*) the Court possesses a discretion to impose a condition *dum casta et sola.*

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Now whenever such a condition is imposed, there can be no question of the continuance of alimony upon remarriage of the wife, and there can then hardly be any necessity for rescission; for, the order will cease to operate *proprio vigore*.

We are asked in this appeal to hold that the personal and unconditional order in this case has so ceased to operate upon the assumption that the Legislature in enacting cl. (*b*) of s. 40 (*1*) has inadvertently omitted to state that the order shall be subject to the same condition as in cl. (*a*). The clause regarding chastity and remarriage was an addition in the new Act. The addition therefore was deliberate and intended to make a change in the law as regards the wife's right to demand alimony upon remarriage if it was secured by the order. When the Legislature effects a change of language by the addition of words which did not occur in the old statute and those words are necessary to convey a particular sense, the addition must be construed as intended to convey that sense. Where a distinction such as this in language and conditions is observed in two clauses of the same section, the Legislature must be presumed to have intended by that language to curtail or enlarge, as the case may be, the Court's discretion in these matters.

The argument that the draftsman was following the English practice under which it is said the *dum sola* clause is uniformly attached to personal orders and that the omission was inadvertent, is not well-founded. The ordinary rule of construction is that " nothing is to be added to or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express "—(see Maxwell on the Interpretation of Statutes, 7th Edition, p. 12). There are several reasons for the Legislature's deliberately making the distinction. According to Rayden

& Mortimer's Practice and Law in the Divorce Division (Third Edition, p. 388).

"The condition *dum casta* is now rarely inserted in orders for the maintenance of an innocent wife, from the consideration that she should not be insulted by even the suggestion that she might become unchaste, but, in determining whether this condition should be attached, the conduct of the wife, before as well as during the marriage, may be considered."

As regards condition as to remarriage the authors make the following statement upon the authorities of *Fisher* v. *Fisher*[1] and *Lister* v. *Lister*[2] (p. 388) :—

"With regard to the condition *dum sola* there is no uniform practice, nor does the contingency of the wife's remarriage receive in every case the consideration which it would seem to merit. In the early days of the Court it was considered that if a wife availed herself of the freedom conferred on her by the decree of divorce and married again it would be unreasonable to compel the former husband to maintain her, but it has since been laid down that the effect of the statutes is to leave an unfettered discretion in each case, and that it would be wrong to lay down any *prima facie* rule whether or not maintenance shall continue to be payable after the wife's remarriage. In deciding this matter every circumstance of the case—conduct, social position, means, children, and the future of the wife—must be considered."

Therefore it is legitimate to presume that the legislature deliberately preserved the distinction between a securing order and a personal order.

In view of the above, the question of rescinding the personal order will in the first instance depend on the question whether the remarriage of the wife is a "change in the circumstances" within cl. (2) of s. 40. That clause provides that "the Court, if satisfied that there is a change in the circumstances of either party at any time, may at the instance of either party vary, modify or rescind such order in such manner as the Court may deem just". Remarriage, in my view, may be regarded as a change in the circumstances within the meaning of that clause. But that alone is not enough. In spite of it the Court has a discretion whether on that account to rescind the order.

[1] (1861) 2. Sw. & Tr. 410, at p. 414. [2] (1890) 15 P. D. 4.

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That discretion has not been shown to have been unwisely exercised.

Therefore I agree with the order proposed.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar and Mr. Justice Sen.

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MOHANLAL KHUBCHAND, HEIR OF THE DECEASED CHHAGANLAL LAXMICHAND AND OTHERS, (HEIR OF ORIGINAL DEFENDANT NO. 1 AND DEFENDANTS NOS. 3 TO 10), APPELLANTS *v.* JAGJIVAN ANANDRAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Widow—Alienation without justifying cause—Reversioner's suit to recover from alienee possession and mesne profits—Sale not ab initio *void—Possession of alienee wrongful when reversioner elects to treat sale as nullity—Mesne profits prior to suit cannot be awarded.*

It is beyond dispute that wrongful possession of a defendant is the foundation for a claim to mesne profits.

A Hindu widow is not a tenant for life, but she is the owner of the property inherited by her from her husband, subject to certain restrictions on alienation and subject to its devolving upon the next heir of her husband upon her death. The whole estate is for the time vested in her and she represents it completely.

Moniram Kolita v. *Kerry Kolitany*,[1] *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2] and *Janaki Ammal* v. *Narayanasami Aiyer*,[3] referred to.

It is difficult to accept the contention that a sale by a Hindu widow is *ab initio* void or a nullity.

It is open to a reversioner to elect to treat it as a nullity, and this he can do by instituting a suit to recover possession of the property. It is from that time that the sale becomes wrongful, and the possession of an alienee wrongful. Accordingly the possession of an alienee from a Hindu widow is not wrongful at any time *anterior* to the exercise of the election, even if the alienation is found to be made without a justifying cause.

Raja Modhu Sudan Singh v. *Rooke*,[4] relied on.

*First Appeal No. 229 of 1934.

[1] (1879) L. R. 7 I. A. 115, at p. 154, s.c. 5 Cal. 776.
[2] (1907) L. R. 34 I. A. 87, s. c. 34 Cal. 329.
[3] (1916) L. R. 43 I. A. 207, s. c. 39 Mad. 634.
[4] (1897) L. R. 24 I. A. 164, s. c. 25 Cal. 1.