



Amol

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 311 OF 2014
IN
PARSI SUIT NO. 20 OF 2013

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ARMIN R. PANTHAKY,
Parsi, Indian Inhabitant residing at 'C'
Block, 2nd floor, Bhiwandiwalla
Terrace, Room No.49-52, J.S.S. Road,
Dhobi Talao, Mumbai – 400 002.

...APPELLANT
(ORIGINAL
DEFENDANT)

~ VERSUS ~

ROHINTON PANTHAKY,
Aged about 53 years, Occupation :
Retired, Parsi, Indian Inhabitant,
presently Residing at Athornan
Boarding Maddressa, Five Gardens,
Dadar, Mumbai – 400 014.

...RESPONDENT
(ORIGINAL
PLAINTIFF)

APPEARANCES

FOR THE APPELLANT

Ms Zenobia Shapoor Irani, with
Prashant Tikare.

FOR INTERVENORS (PARSI
PANCHAYAT)

Ms Sanober Nanavati, with Agnel
Carneiro, Gayatri Sathe i/b
M/s. Mulla & Mulla and
Craigie Blunt & Caroe.

IN REFERENCE

Adv Jamsheed K. Master.
Adv Abhijit Sarwate.

ANTI COMMISSION PRESENT **Ms Taubon F. Irani**, *with Disha Shetty*.

CORAM : M.S. Sonak, B.P.
Colabawalla &
R.I. Chagla, JJJ.

RESERVED ON : 25 September 2024

PRONOUNCED ON : 21 November 2024

JUDGMENT: -

1. Heard learned Counsel for the parties.
2. This reference arises in Appeal No. 311 of 2014, challenging the order dated 3 April 2014 made by the learned Parsi Chief Metropolitan Court, Mumbai (Hon'ble Justice G S Patel) in Parsi Suit No. 20 of 2013. By the order dated 3 April 2014, Patel J has held that under the Parsi Marriage and Divorce Act, 1936 ("PMDA"), there is nothing which denudes the Court from exercising its discretion to direct or allow the recording of evidence before a Court Commissioner in terms of Order XVIII Rule 4 of Civil Procedure Code, 1908 ("CPC").
3. By order dated 31 July 2014 in Appeal No. 311 of 2014 against Patel J's order, the Division Bench comprising Mohit S Shah, C J and M S Sonak J, made the following order of reference:

"Coram : Mohit S. Shah, C. J. & M. S. Sonak, J.

Notice for final disposal, returnable on 5 September 2014. Having regard to the importance of the questions

raised in this Appeal, it will be in the fitness of things that this Appeal is placed for hearing before the Full Bench.

It is clarified that we are not granting any ad-interim stay of the proceedings before the trial Court.”

4. Accordingly, the question that arises in this reference is whether anything in the provisions of the PMDA scheme denudes the Courts dealing with Parsi matrimonial suits and proceedings the discretion to direct or allow the recording of evidence before a Court Commissioner by resorting to the provisions in CPC, 1908, as amended from time to time.

5. Ms Sanober Nanavati, Ms Zenobia Irani, and Mr Jamsheed Master argued that evidence in suits or proceedings under the PMDA must, under all circumstances, be recorded before the Court in the presence of delegates (jury members). They submitted that the Court is completely denuded of its discretion to either direct or allow the recording of evidence before a Court Commissioner.

6. Mr Sarwate submitted that there was neither any express nor implied bar for recording evidence before a Court Commissioner. Accordingly, he defended Patel J's order dated 3 April 2014 based on the reasoning reflected therein and certain further contentions and precedents.

7. Ms Taubon Irani did not go so far as to urge that the Court be wholly denuded of its discretion to direct or allow the recording of evidence before a Court Commissioner.

However, she submitted that recording evidence in the Court in the presence of delegates must be the rule, and recording evidence before a Court Commissioner is only an exception. She submitted that discretion must be exercised judiciously, and sufficient safeguards must be provided before any evidence can be directed or allowed to be recorded before a Court Commissioner.

8. In support of their contentions that the Court has no discretion to direct or allow the recording of evidence before a Court Commissioner, Ms Nanavati, Ms Zenobia Irani and Mr Master submitted that PMDA, a special Act, would prevail over the CPC, a general Act. They submitted that Section 45 of PMDA, based on which CPC is sought to be made applicable, applies only in so far as the provisions of CPC are not excluded either expressly or by necessary implication. They submitted that Section 45 is an instance of “*legislation by incorporation*”, and therefore, only such of the provisions of CPC on the date of PMDA entering into force, i.e., 23 April 1936, would apply and not the provisions introduced by the 1976 or 2002 amendments to the CPC.

9. The learned counsel submitted that since delegates are the final arbiters on facts in a Parsi matrimonial suit or proceedings, the recording of evidence before them is crucial so that they get to see the witnesses' demeanour. Besides, the Parsi suits must be heard in camera, not printed or published. These crucial requirements will be jettisoned if evidence is directed or allowed to be recorded before a Court Commissioner. Accordingly, they submitted that these special

provisions or peculiarities under the PMDA, either expressly or in any event, impliedly exclude CPC provisions permitting the recording of evidence to be recorded before a Court Commissioner.

10. Ms Irani, Ms Nanavati, and Mr Master referred to the difficulties in recording evidence before a court commissioner. They submitted that the Court Commissioner cannot rule on objections or declare witnesses hostile. They submitted that the Court Commissioner cannot question the witnesses either with or without the leave of the Court. They submitted that all this would render the new and the old Evidence Act provisions in this regard otiose. They submitted that their experience had shown that recording evidence before a Court Commissioner is time-consuming since the Court Commissioner, unlike the Court, has no control over the length of cross-examination and no power to rule on the objections. For all these reasons, they submitted that no recording of evidence before the Court Commissioner should be directed or allowed in suits or proceedings under the PMDA.

11. Mr Sarwate, as noted earlier, mainly relied upon the reasoning in Patel J's order dated 3 April 2014. He submitted that there was nothing in the provisions of PMDA to suggest any exclusion of the provisions of Order XVIII Rule 4 of CPC read with or without Order XXVI of CPC. He submitted that the advanced technology and larger goal of judicial efficiency can never be ignored if matrimonial matters under the PMDA are to be disposed of expeditiously and efficiently.

12. The rival contentions now fall for our determination.

13. At the very outset, we need to clarify that in this reference, we are only concerned with the issue of whether the Courts under PMDA are completely denuded from exercising their discretion to direct or allow a record of evidence before a Court Commissioner. If it is ultimately held that the Courts retain such discretion or that there is nothing in the provisions or scheme of PMDA that denude the Courts of such discretion, then whether such discretion should be at all exercised in a given case or the terms and conditions subject to which such discretion could be exercised, are issues that do not fall for our consideration in this reference. The discretion, if retained, will have to be judiciously exercised considering a range of factors relevant on a case-to-case basis.

14. Ms Nanavati, Ms Irani and Mr Master's contentions can be broadly divided into two categories. The first, where they urged that the Court is completely denuded of its discretion to direct or allow the recording of evidence before the Court Commissioner; and the second, where they referred to several reasons why the discretion for the recording of evidence before a Court Commissioner ought not to be exercised in suits and proceedings under the PMDA. We do not need to elaborately answer the second limb of their contentions in this reference because if we conclude that such discretion is vested in the Court, then the exercise of such discretion will depend upon a host of factors that would be peculiar to such cases and circumstances.

15. Therefore, in this reference, we are concerned with whether there is any express or implied bar to a Parsi matrimonial court directing or allowing the recording of evidence before a Court Commissioner in suits and proceedings under the PMDA.

16. In examining the above issue, a reference is necessary to the salient features and the peculiarities in the PMDA, based upon which it was urged that the Court is completely denuded of its discretion to direct or allow the recording of evidence before a Court Commissioner. The actual provisions have been quoted in Patel J's order dated 3 April 2014. Therefore, unless necessary, we do not propose to once again quote those provisions in this opinion.

17. The PMDA entered force on 23 April 1936. It is an Act to amend the law relating to marriage and divorce among Parsis. The PMDA mainly concerns marriages and divorces among Parsis and provides for the constitution and establishment of Parsi Matrimonial Courts in Calcutta, Madras, Bombay, and other places as the government deems appropriate.

18. Chapter III, which comprises Sections 18 to 29, is concerned with Parsi matrimonial Courts. Section 18 provides for the constitution of Special Courts under the PMDA. Section 19, among other things, provides that the Chief Justice of the High Court or such other Judge of the same Court, as the Chief Justice shall, from time to time appoint, shall be the judge of such matrimonial Court, and, in the trial

of cases under this Act, *he shall be aided by five delegates, except in regard to*

- (a) interlocutory applications and proceedings.
- (b) alimony and maintenance, both permanent as well as *pendente lite*;
- (c) custody, maintenance and education of children; and
- (d) all matters and proceedings **other than the regular hearing of cases.**

19. Chapter IV of PMDA, comprising Sections 30 to 48, concerns “*matrimonial suits*” and includes provisions for suits or nullity, execution, divorce, restitution, alimony, maintenance and disposal of joint property. Section 32 concerns grounds for divorce, and Section 32-B concerns divorce by mutual consent.

20. Section 43, which is a part of Chapter IV, provides that suits shall be tried in camera. Section 44 provides that notwithstanding anything contained in Sections 19 or Section 20, where in the case of trial in a Parsi matrimonial Court, not less than three delegates have attended throughout the proceedings, the trial shall not be invalidated by reason of the absence during any part thereof of the other delegates.

21. Sections 45, 46 and 47 are also a part of Chapter IV of PMDA. Section 45 provides that the provisions of the Civil Procedure Code, 1908 shall, so far as the same may be applicable, apply to proceedings in suits instituted under this Act, including proceedings in execution and orders subsequent

to decree. Section 46 provides that in suits under the PMDA, all questions of law and procedure shall be determined by the presiding judge, but the decision on facts shall be the decision of the majority of the delegates before the whom the case is tried. Provided that, where such delegates are equally divided in opinion, the decision on facts shall be the decision of the presiding judge.

22. Section 47 provides an appeal to the High Court on the ground of the matrimonial Court's decision being contrary to some law or usage having the force of law or of a substantial error called defect in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits, and no other ground.

23. In **Minoo Rustomji Shroff & Ors Vs Union of India & Ors**¹, this Court held that the expression "*regular hearing*" in Section 19(B) of PMDA means only a trial and not, for instance, a suit for divorce by mutual consent. Some decisions hold that no appeal lies against the decisions of Parsi Matrimonial Courts on questions of fact determined by the delegates. Even Patel J's order dated 3 April 2014 notes that under the PMDA, the delegates' verdict on facts is final, and no appeal lies from that verdict.

24. Section 45 of the PMDA provides that CPC shall apply to proceedings in suits instituted under the PMDA, including proceedings in execution and orders subsequent to the decree. The word used is "*shall*," and we agree with Patel J's

¹ 2005 4 Bom Case Reporter 147

reasoning that this word suggests a mandate. The legislature intended to bring some procedural uniformity to civil trials of every stripe.

25. Still, an argument was canvassed relying on the phrase “*so far as the same may be applicable*” in Section 45 of the PMDA. As discussed in this opinion, this phrase only suggests that the provisions of CPC may not apply where such provisions could be said to have been expressly or by necessary implication excluded either by the specific provisions of PMDA or the scheme of PMDA. For instance, under the CPC, an appeal generally lies on facts and law. However, considering the specific provisions in Section 47 of PMDA, an appeal under the said section will not lie against the delegates’ verdict on facts. To that extent, therefore, the provisions of CPC defining the powers of the appellate Court will be excluded or will not apply. However, the contention that there are any provisions in the PMDA which either expressly or impliedly exclude the application of the provisions in CPC for directing or allowing a record of evidence before a Court Commissioner cannot be accepted.

26. Patel J’s order dated 3 April 2014 notes, and we entirely agree, that there is nothing in the statutory mandate of having delegates and requiring them to aid the presiding judge that suggests a particular trial procedure and that alone, has to be followed to the exclusion of all other matters. The verdict of delegates, on facts, may be unassailable in appeal, but still, the delegates are only to aid the Judge and not themselves decide the matter entirely. The word “*aid*” must be construed

in its ordinary grammatical sense, meaning only to assist or help. It certainly cannot be read to suggest that the delegates present the judge with the final decision for the Court's *imprimatur*. The delegates' verdict does not end the trial, but the judge's decision does, and therein lies the difference.

27. The role of the delegates in a trial under the PMDA is crucial. However, by directing or allowing evidence to be recorded before a Court Commissioner, it is not as if the role of delegates would be significantly diluted or diluted to such an extent as would suggest any implied exclusion of the provisions of order XVIII Rule 4 of CPC or order XXVI of CPC to the suits and proceedings under the PMDA. As has been observed by Patel J in his order dated 3 April 2014, when exercising discretion, the Court can provide for adequate safeguards so that the role of the delegates is not significantly compromised.

28. Considerable public interest is involved in the procedural provisions permitting the record of evidence before Court Commissioners. This serves the larger goal of the expedition and enhances judicial efficiency without compromising the core principles of fairness. Therefore, to take the extreme view that the Courts are wholly denuded of their discretion to direct or permit the record of evidence before a Court Commissioner does not commend us. The construction of the provisions in Sections 18, 19, 43, 44 to 47 cannot lead to any inference of either express or implied exclusion of the provisions of the CPC applicable in this regard to suits and proceedings under the PMDA.

29. Order XVIII Rule 4 of CPC provides that in every case, the examination-in-chief of a witness shall be on affidavit, and copies thereof shall be supplied to the opposite party by the party who calls him for evidence. Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents, which are filed along with the affidavit, shall be subject to the orders of the Court. Admittedly, consistent with Order XVIII Rule 4 (1) provisions, examination-in-chief in Parsi suits and proceedings under the PMDA is on affidavit. No serious objection was raised to the applicability of Order XVIII Rule 4 (1) of CPC regarding the procedure for the record of examination-in-chief.

30. Order XVIII Rule 4(2) provides that the evidence (cross-examination and the re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or the commissioner appointed by it. The proviso provides that the Court may consider taking into account such relevant factors as it thinks fit while appointing a commission under this sub-rule. Thus, discretion is vested in the Court on whether to direct or allow cross-examination and re-examination in the Court or before the Commissioner is appointed. Assume the Court decides to appoint a commissioner. In that case, the Court must consider taking into account "*such relevant factors as it thinks fit*". Thus, if deemed necessary, the Court could consider most of the factors referred to by the learned Counsel if it decides to

exercise its discretion for directing or allowing the recording of evidence before a Court Commissioner.

31. Order XVIII Rule 4(3) provides that the Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where the Commissioner records such evidence, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit. Order XVIII Rule 4(4) provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. Provided that any objection raised during the recording of the evidence before the Commissioner, shall be recorded by him and decided by the Court at the stage of arguments. The Commissioner is obligated to submit the report to the Court appointing the Commission within 60 days from the date of issue of the Commission unless the Court, for reasons to be recorded in writing, extends the time.

32. In **Salem Advocates Association Vs Union of India (I)**² and **(II)**³, the Hon'ble Supreme Court made it explicit that broad discretion was vested in the Court in appointing or not appointing the Commissioner. The Court observed that in suits of complexity involving questions of fraud, forgery, disputed testamentary dispositions, partnership actions, and so on, the Court may prefer to record the cross-examination to itself. In

² AIR 2003 SC 1819

³ AIR 2005 SC 3353

Salem (II), the Hon'ble Supreme Court acknowledged the legislative wisdom in giving greater importance to judicial time than to a Judge's observation of how a witness chooses to conduct himself in the witness box. In any event, Order XVIII Rule 4(4) provides for the Commissioner to record such remarks as it thinks material in respect of the demeanour of any witness while under examination.

33. In **Salem (I)**, the Hon'ble Supreme Court has held that under Order XVIII Rule 4(2) the Court has the power to direct either all evidence being recorded in the Court or all the evidence recorded by the Commissioner, or the evidence being recorded partly by the Commissioner and partly by the Court. Further, the Court referred to using the word "mechanically" in Order XVIII Rule 4(3) and held evidence can be recorded even with the help of electronic media, audio or video. The court observed that, in fact, whenever the Commissioner records evidence, it will be advisable that there should be simultaneously at least an audio recording of the statement of the witnesses to obviate any controversy at a later stage.

34. In the **Salem cases**, it is held that the Court must apply its mind to the facts of the case, nature of the allegations, nature of evidence, and the importance of particular witnesses for determining whether the witness shall be examined in Court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with circumspection, having regard to the facts and circumstances of the case. By clarifying that such orders were discretionary, the court refrained from laying down hard and fast rules

controlling the discretion of the Court to appoint the Commissioner to record the cross-examination and re-examination of witnesses.

35. The contention about the Court being deprived of the benefit of watching the demeanour of the witnesses when evidence is recorded before the Court Commissioner was considered by the Hon'ble Supreme Court but not accepted. The Court held that the will of the legislature, which has by amending the Code provided for recording of evidence by the Commissioner for saving the Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of witnesses. The court also referred to the provisions of Order XVIII Rule 4 and held that it would have the benefit of observations on the demeanour made by the Commissioner.

36. Order XXVI of the CPC also deals with the issue of commission to examine witnesses. This provides that the Court may issue a commission to examine witnesses exempted under the Code from attending Court or who are suffering from any sickness or infirmity unable to attend the Court. There are provisions for the issue of commission to persons resident beyond the local limits of its jurisdiction, persons who are about to leave such limits before the date on which they are required to be examined in the Court, persons who cannot, in the opinion of the Court attend without detriment to public service and so on.

37. Order XXVI Rule 4(A), which has been given an overriding effect, provides that the Court may, in the interest of justice or for the expeditious disposal of the case or any other reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within local limits of its jurisdiction and the evidence so recorded shall be read in evidence. Order XXVI Rule 5 empowers the Court to which application is made for the issue of commission for the examination of a person residing at any place not within India upon being satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

38. There can be varied situations where it is not possible or feasible for witnesses to depose before the Court in the presence of the delegates. To take an extreme view that the Court can, under no circumstances, direct or allow evidence to be recorded before a Court Commissioner would not be in the public interest or the quick, fair and efficient prosecution of a suit or proceeding under the PMDA. Critical evidence of, say, old or infirm witnesses may have to be forgone because such witnesses may not be able to attend the Court. Evidence of witnesses who live abroad or beyond the limits of the local jurisdiction of the Court may also have to be forgone, given the practical difficulties and costs involved in such an exercise.

39. The problems expressed by the learned Counsel can always be examined and, if found genuine, addressed by providing suitable safeguards and exercising discretion in the particular facts and circumstances of the case. However, if the

Court is denuded of its power of exercising discretion, then the comparative mischief and disservice would be much greater than by conceding or retaining the discretion in the Court. Ultimately, even Section 46 of the PMDA provides that all questions of law and procedure are to be determined by the Judge and not the delegates, who are only there to aid or assist the Judge, in deciding questions of fact.

40. In a given case, suitable orders can always be made permitting the delegates to attend the recording of evidence or to watch the recording of such evidence before a Court Commissioner through video conferencing and other technological facilities that may be available or appropriate. Suitable orders can be made depending upon the facts and circumstances of a given case to involve the delegates in recording the evidence before the Court Commissioner.

41. These are all matters in the realm of exercise of discretion and exercising discretion subject to suitable terms and conditions. However, on account of the difficulties expressed by the Counsel, we do not think that it would be in the interest of expeditious and efficient disposal of suits and proceedings under the PMDA to completely denude the Courts from exercising their discretion, to direct or allow the recording of evidence before a Court Commissioner. This would be like throwing the baby along with the bath water.

42. The Hon'ble Supreme Court rejects explicitly the demeanour argument in the **Salem cases**. The argument that the involvement of the delegates and the fact that the

delegates' verdict on facts is unassailable makes a difference also cannot be accepted. The reason in **Salem cases** will apply even in the present context. However, we agree that this special provision involving the delegates is one of the considerations the Court must consider when exercising discretion for directing or allowing the recording of evidence before a Court Commissioner.

43. All these matters will have to be decided by the Court on a case-to-case basis and depending upon the facts and circumstances of that particular case. It is neither necessary nor advisable to provide any uniform guidelines in this regard. Suffice to state that the discretion will have to be exercised judiciously and by taking into account all relevant factors, including the peculiar position arising out of the involvement of the delegates in suits and proceedings under the PMDA.

44. The judicial system is entrusted with the responsibility of dispensing justice swiftly and efficiently without compromising on the core values of fairness. In **Salem (II)**, the Hon'ble Supreme Court emphatically underscored the pressing need to preserve the scarce judicial time and resources. The Court highlighted that delays in judicial processes can undermine the public's confidence in the legal system and inflict undue hardships on the parties involved. Considering these observations, it becomes imperative for the Courts to adopt procedural mechanisms that ensure swift administration of justice, particularly in matrimonial matters where prolonged litigation can exacerbate emotional and financial strength.

45. The discretion to record evidence before a Court Commissioner serves a larger goal of expedition and judicial efficiency. By delegating the task of recording evidence to the Court Commissioner, the Court can expedite the trial process without compromising core principles. The final scrutiny of evidence remains within the Court's purview, ensuring that the integrity of the proceedings is preserved. Flexibility, successfully employed in other civil matters, is essential even for suits and proceedings under PMDA.

46. International jurisprudence supports procedural flexibility in the interest of efficiency. In **Williams Vs Florida**⁴, the US Supreme Court upheld the constitutionality of smaller jury size in criminal cases, emphasising that procedural efficiency does not necessarily undermine the fairness of a trial. Similarly, in **Maryland Vs Craig**⁵, the US Supreme Court upheld the use of video links for the testimony of a child witness as necessary to protect their wellbeing. The Court held that the accused's right to confront witnesses may be fundamental but was not absolute. It had to be balanced against the need to protect vulnerable witnesses from the trauma of in-person testimony.

47. In Singapore, the *Evidence (Civil Proceedings in Other Jurisdictions) Act* has paved the way for using technology to reduce procedural delays. The Act permits videoconferencing and other technological means to record evidence, particularly in cases involving witnesses in foreign jurisdictions.

⁴ 399 US 78 (1970)

⁵ 497 US 836 (1990)

Incorporating technology in civil proceedings has been instrumental in ensuring timely adjudication while maintaining the quality and fairness of the process. Singapore's approach reinforces the idea that procedural flexibility, when properly regulated, can enhance judicial efficiency without sacrificing fairness.

48. The principle of judicial efficiency has also been invoked to justify the intervention in personal and religious laws in other jurisdictions. In **Bruker Vs Marcovitz**⁶, the Supreme Court of Canada ruled that religious obligations could not be used as a defence to evade a civil duty, holding that fairness and public policy considerations must prevail over personal religious practices. This judgment demonstrates that where personal or religious laws impede the fair and efficient resolution of disputes, courts are empowered to prioritise the principles of justice.

49. In **Lina Joy Vs. Majlis Agama Islam**⁷, the Federal Court of Malaysia upheld the application of civil law over religious principles concerning individual rights, holding that religious practices must not compromise the administration of justice in civil matters. These cases reflect a growing global trend toward integrating efficient judicial practices, even in the context of personal or religious laws. This principle can be applied in the context of the PMDA to harmonise efficiency with community-based adjudication.

⁶ 2007 SCC 54

⁷ (2007) MYFC 6

50. The role of demeanour in assessing witness credibility was earlier significantly emphasised. Courts worldwide had stressed the importance of physical presence, allowing the trier of fact to observe a witness's body language, tone, and mannerisms. In **Mattox Vs United States**⁸, the U.S. Supreme Court underscored that face-to-face confrontation with witnesses allows juries and judges to evaluate demeanour as an essential aspect of truth-seeking.

51. The traditional belief is that physical presence offers psychological and physical cues to assess a witness's credibility. It was argued that in-person testimony enables the court to perceive nuances such as hesitation, nervousness, or confidence, which may reflect the veracity of the witness. The physical act of giving evidence in court is said to compel truthfulness and reinforce the solemnity of the proceedings. This notion had been considered crucial in matrimonial disputes, where questions of fact—often involving sensitive and deeply personal matters—are at the heart of the adjudication process.

52. However, the weight attributed to demeanour in credibility assessments has increasingly been scrutinised. Scholars, notably **Jeremy Blumenthal**, have critiqued the over-reliance on non-verbal cues, suggesting that they often lead to unreliable conclusions⁹. Blumenthal argues that psychological research consistently shows that humans, including judges

⁸ 156 U.S. 237 (1895)

⁹ Jeremy Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72(4) NEBRASKA LAW REVIEW 1157 (1993).

and jurors, are not adept at detecting deception based on demeanour. Non-verbal cues such as nervousness or fidgeting, often perceived as signs of dishonesty, can be misleading and influenced by various factors unrelated to truthfulness, including cultural differences, personal anxiety, or the inherent stress of legal proceedings.

53. Technological advancements have provided courts with viable alternatives to live testimony, mitigating logistical and emotional challenges while maintaining key elements of fairness. In **State of Maharashtra Vs Dr. Praful B. Desai & Anr¹⁰**, the Court held that video conferencing and real-time video links could effectively substitute in-person testimony without infringing on a defendant's rights. The judgment recognised that while physical presence may offer certain benefits, technology ensures that testimony can still be delivered transparently and reliably, preserving the essential function of the trial process.

54. **Vanessa Munro's** research further substantiates this argument, revealing that jurors' ability to assess credibility does not significantly differ when testimony is delivered live versus pre-recorded or via video link¹¹. **Munro's** studies on pre-recorded evidence in trials, particularly in cases involving vulnerable witnesses, indicate that the perceived advantages of observing demeanour in live testimony are overstated. The integrity of the testimony remains intact, and jurors can still

¹⁰ 2003(4) SCC 601

¹¹ Munro, Vanessa (2018) The impact of the use of pre-recorded evidence on juror decision-making : an evidence review. Edinburgh: Scottish Government. (Crime and Justice).

evaluate the substance of the evidence effectively without the undue influence of potentially misleading non-verbal cues.

55. Empirical research has consistently debunked the notion that body language is a reliable indicator of truthfulness. Studies have shown that factfinders, whether judges or juries, are often overconfident in their ability to read non-verbal cues, leading to erroneous conclusions. This research supports the view that while demeanour may have some relevance, its importance has been exaggerated, particularly in modern-day trials where efficiency and fairness must be balanced.

56. In “**The Business of Judging**”, Lord Tom Bingham writes that the current tendency is, on the whole, to distrust a witness's demeanour as a reliable pointer to his honesty. He quotes passages from the extra-judicial utterances of three very experienced trial judges, i.e. Lord Devlin and Mr Justice MacKenna, in a passage which Lord Devlin later adopted as his own:

“I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight

in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part, I rely on these considerations as little as I can help.”

Third, Lord Justice Browne:

57. *“So the main job of the judge of first instance is to decide the facts. How does he do it? When there is a conflict of evidence between witnesses, some judges believe that they can tell whether a witness is telling the truth by looking at him and listening to him. I seldom believed that....”*

58. The modern judicial landscape has seen an increasing acceptance of technological alternatives that preserve the narrative integrity of witness testimony while addressing the limitations of live court appearances. Using video conferencing, pre-recorded depositions, and real-time video links allows the court to maintain procedural fairness without requiring the physical presence of the witness. These alternatives have been particularly effective in mitigating delays, reducing emotional trauma for witnesses, and ensuring a smoother administration of justice. Importantly, they allow courts to focus on the content and consistency of the testimony rather than overemphasising demeanour, which may be misleading.

59. Therefore, while demeanour's significance in assessing witness credibility has its place in legal tradition, its importance must be re-evaluated considering technological advancements and empirical research. The judiciary's focus

must evolve to embrace tools that enhance the efficiency of proceedings while preserving fairness and the core principles of justice.

60. In balancing expediency with fairness, ensuring that procedural innovations do not dilute the substantive safeguards envisioned under the PMDA is critical. The role of the delegates, as prescribed by the statute, remains central to resolving marital disputes within the Parsi community. However, allowing the recording of evidence by a commissioner, with the subsequent involvement of delegates in reviewing and assessing the evidence, preserves both the statutory role of the delegates and the goal of swift justice. The interplay between the CPC and the PMDA is not one of conflict but complementarity, allowing the court to promote timely justice without undermining the traditional safeguards enshrined in the Act.

61. Therefore, the discretion to record evidence before a commissioner, coupled with the continued involvement of delegates in deliberating on the evidence, serves the dual purpose of efficiency and fairness. Modern safeguards, such as video recordings and technological interventions, ensure that the testimony is preserved with integrity, allowing the court to expedite proceedings while adhering to the statutory mandates of the PMDA.

62. The evolving role of technology in the administration of justice supports a broader, more progressive view of legal processes. As courts worldwide have increasingly recognised,

integrating modern technological tools can enhance efficiency while safeguarding the rights and interests of all parties. In the context of Parsi matrimonial disputes, using commissioners to record evidence, if necessary, supplemented by technological advancements such as video recordings and remote testimony, offers a viable path forward. It allows for the expeditious resolution of disputes while preserving the essential role of the delegates and maintaining the integrity of the trial process.

63. Patel J's Order strikes a careful balance between the need for procedural flexibility and the imperative of preserving the fairness and integrity of Parsi matrimonial trials. The discretion granted to the court under the CPC when applied in harmony with the PMDA, ensures that the unique community-oriented elements of the Act are respected while adapting to the practical realities of modern litigation. In this regard, we emphasise that the application of Order XVIII, Rule 4 and Order XXVI Rule 1 of CPC serves the interests of both expediency and justice, allowing courts to avoid unnecessary delays without compromising the fundamental principles of fairness that underlie matrimonial proceedings. We unreservedly approve Patel J's order.

64. The argument that section 45 of the PMDA is an instance of legislation by incorporation, and therefore, the provisions of recording evidence before a court commissioner introduced much after the PMDA entered into force on 23 April 1936, cannot be accepted for several reasons discussed hereafter.

65. The provisions of Order XXVI CPC, as obtained on 23 April 1936, did provide for the appointment of a Court Commissioner to record evidence in a Suit, though not in as expansive terms as the 2002 amendment in CPC. Besides, on the construction of Section 45 of PMDA, we are satisfied that this is an instance of *legislation by reference* and not *legislation by incorporation*. Therefore, even the amended provisions of the CPC would apply, not merely the provisions the CPC contained when the PMDA entered into force in 1936.

66. Recently, in **Insolvency and Bankruptcy Board of India Vs. Satyanarayan Bankatlal Malu and Others**¹², the Hon'ble Supreme Court, after an exhaustive survey of the precedents on the subject, explained that the effect of incorporation means bodily lifting of the provisions of one enactment and making it part of another, so much so that the repeal of the former leaves the latter wholly untouched. However, in the case of legislation by reference, the amendment or repeal of the provisions referred to in the subsequent act will also bear the effect of amendment or repeal of the said provisions.

67. The Court quoted Lord Esher M. R. in **Re. Wood's Estate** in¹³ p. 615: -

“... If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have

¹² (2024) 6 SCC 508

¹³ (1886) LR 31 Ch D 607

these clauses in the later Act, you have no occasion to refer to the former Act at all.”

68. The court also quoted Brett, L.J., in **Clarke Vs. Bradlaugh**¹⁴, in p. 69:-

“... there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third statute does not affect the second.”

69. In **Girnar Traders (3) Vs State of Maharashtra**¹⁵, the Hon’ble Supreme Court has explained the tests for determining whether the provision is an instance of *legislation by incorporation* or *legislation by reference*. One of the tests is where there is a general reference in the Act in question to some earlier Act, but no specific mention is made of the provisions of the former Act. In such a situation, the provision is generally regarded as an instance of *legislation by reference*. The Court held that the general reference, ordinarily, will imply the exclusion of specific references, and this is precisely the fine line of distinction between the two legislations. The Court explained that both are referential legislations, one merely by way of reference and the other by incorporation. Section 45 of PMDA, as noted earlier, generally refers to the provisions of the CPC, 1908, but not any specific provisions.

¹⁴ 1881 8 QBD 69

¹⁵ (2011) 3 SCC 1

70. The CPC, 1908, contains primarily procedural provisions that complement or supplement the provisions of PMDA. CPC and PMDA provisions can coexist and operate without conflict, except where the conflict is expressed or compellingly implied. The expression “*so far as the same may be applicable*”, far from excluding the application of CPC, evinces a clear legislative intent of harmonious construction of the provisions of PMDA and CPC, 1908.

71. Therefore, so long as nothing in the PMDA expressly or impliedly bars the recording of evidence before a court commissioner by resorting to the provisions of Order XVIII Rule 4 or Order XXVI Rule 1 of CPC, the court cannot, based on a strained construction of section 45 of PMDA, be denuded of its discretion to direct or allow such recording.

72. The contention about PMDA being a Special Act that would prevail over CPC, a General Act, is based on the legal principle of statutory interpretation expressed in the maxims of *generalia specialibus non derogant* and *generaliabus specialia derogant*. They mean that general things do not derogate from special things; if a special provision is made on a certain matter, that matter is excluded from the general provision.

73. But for these principles to apply, the relative nature of the general or special provisions have to be determined with reference to the area and extent of their application either

generally or specially in particular situations (See **Collector of Central Excise Jaipur Vs Raghuwar (India) Limited**¹⁶. Besides, a general law cannot defeat the provisions of a special law to the extent to which they are in conflict; otherwise, an effort has to be made to reconcile the two provisions by a homogenous reading. What, therefore, needs to be seen and appreciated is whether there is any conflict or inconsistency between the general and a special law for the former to yield to the latter. The two enactments must be inconsistent for the principle expressed in the two maxims to apply. In the absence of any conflict or inconsistency, which is irreconcilable, the above two maxims cannot be used. (see **Shah Niwaz Khan & Ors Vs State of Nagaland & Ors**¹⁷)

74. Though PMDA may be a Special Act dealing with Parsi marriages and divorces, nothing in this Act suggests any wholesale exclusion of the provisions in CPC or conflict or inconsistency. Instead, as noted above, Section 45 of PMDA provides that the provisions of CPC shall, so far as the same may be applicable, apply to proceedings in suits instituted under PMDA, including proceedings in execution and orders subsequent to decree. The two provisos to Section 45 do not detract from the primary provision regarding the applicability of CPC to proceedings and suits instituted under PMDA. There

¹⁶ AIR 2000 SC 2027

¹⁷ 2023 11 SCC 376

is nothing in Sections 18, 19, and 43 to 47 of PMDA or under the scheme of PMDA to suggest any wholesale exclusion of CPC provisions or, for that matter, any serious conflict or inconsistency, except to the extent expressly or by necessary implication, specified.

75. The two maxims only suggest that if a special provision is made on a particular matter in a Special Act, then that matter is excluded from the general provision, either under the same or a different Act dealing with that matter. For instance, Section 47 of PMDA restricts the jurisdiction of the appellate Court, which restrictions find no place in the CPC. To that extent, therefore, the general provisions defining the powers of the appeal Court will have to yield to the special provisions contained in Section 47 of the PMDA.

76. However, this is different from saying that the provisions of CPC generally stand excluded in their application to suits and proceedings under the PMDA. Such a construction would militate against the express provisions of Section 45 of the PMDA, which provides they “shall”, and not merely “may”, apply to proceedings and suits under the PMDA. The expression “*so far as applicable*” suggests that, particularly in procedural matters, PMDA must have an exclusion, either in specific terms or by necessary implication, if any of the provisions of CPC are not intended to apply. Further, section 46 of PMDA provides that the presiding judge

shall decide all questions of law and procedure. This would include the procedure of recording evidence.

77. None of the provisions relied upon by the learned Counsel or others, either expressly or by necessary implication, exclude the provisions of Order XVIII Rule 4(2) or Order XXVI Rule 1 of CPC. It was admitted that affidavits in lieu of examination in chief are routinely allowed and accepted in suits and proceedings under the PMDA. This is in pursuance of the 2002 amendment to CPC. In fact, in all matters where there are no express or implied exclusionary provisions, the CPC governs the procedure in suits and proceedings in PMDA. As noted earlier, the legislature intended to bring about some procedural uniformity to civil trials of every stripe. Where the legislature intended to make any departure, the legislature has made so either expressly or by necessary implication.

78. For all the above reasons, we answer this reference by holding that the Courts under the PMDA have the discretion of directing or allowing evidence to be recorded before a Court Commissioner, and it is not compulsory, in every case, that evidence must only be recorded in the presence of the delegates.

79. Typically, after answering the issue referred, the matter is sent to the referral bench for disposal. However, in this case, the referral order dated 31 July 2014 states that “*it will*

be in the fitness of things that this Appeal is placed for hearing before the Full Bench.”

80. Accordingly, now that we have entirely agreed with the reasoning in the order appealed, we could have dismissed the appeal. Still, we direct that the appeal be placed before the appropriate Bench for disposal of the appeal.

81. We thank the learned counsel for the valuable assistance they rendered to us in this matter.

82. The registry to do the needful in the matter at the earliest.

(R.I. Chagla, J) (B.P. Colabawalla, J) (M.S. Sonak, J)