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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO. 30398 OF 2023
IN
PARSI SUIT NO. 2 OF 2018
WITH
PARSI SUIT NO. 2 OF 2018

Hormuz Kurush Mubarakai	...Applicant
<u>IN THE MATTER BETWEEN :</u>	
Scherezade Hormuz Mubarakai	...Plaintiff
<i>Versus</i>	
Hormuz Kurush Mubarakai	...Defendant

Ms. Parul K. Vedak a/w *Ms. Sanamjeet Kaur Kalsi, Ms. Prachi Kamble,*
for the Applicant/Defendant.

Ms. Taubon F. Irani a/w *Adv. Divya Sharma, Adv. Disha Shetty, for the*
Plaintiff.

CORAM: SOMASEKHAR SUNDARESAN, J.
PRONOUNCED ON: SEPTEMBER 23, 2026.

JUDGEMENT :

Context and Factual Background:

1. The captioned Parsi Matrimonial Suit i.e. Parsi Suit No. 2 of 2018 (“*Suit*”) is filed by Ms. Scherezade Hormuz Mubarakai (“*Wife*”) seeking dissolution of marriage contended to have been solemnised in Mumbai on November 20, 2010; grant of Rs. 5 crores towards permanent alimony;

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September 23, 2026

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interim maintenance of Rs. 1 Lakh per month pending hearing and disposal of the Suit; and costs.

2. Interim Application (L) No. 30398 of 2023 (“*Interim Application*”) is filed by Mr. Hormuz Kurush Mubarakai (“*Husband*”), seeking to invoke Order VII Rule 11 (d) of the Code of Civil Procedure, 1908 (“*CPC*”) to reject the Suit on the premise that the Suit is barred by law.

3. An event conducted on November 20, 2010 (“*November 2010 Event*”) lies at the heart of whether this Court has jurisdiction to try this Suit. The Wife contends that this was a “wedding ceremony” within the meaning of Section 3 of the Parsi Marriage and Divorce Act, 1936 (“*PMDA*”) while the Husband contends that this event was a “wedding reception” and did not entail the solemnisation rituals necessary to attract the jurisdiction of this Court.

Contentions of Parties:

4. In a nutshell, the grounds sought to be made by the Husband for rejection of the Suit can be classified under two specific heads:

A] *First*, that no marriage ceremony that purports to be subject matter of the Suit, took place in India within the territorial jurisdiction of this Court. According to the Husband, the November

2010 Event was a “*Tandoorasti*” ceremony entailing blessings of elders as is customary with Parsis who wed outside India and visit India thereafter to enable their relatives to wish them; and that no solemnisation of a marriage by way of an “*Ashirvad*” ceremony was performed in India. Therefore, it is contended, the jurisdiction of this Court under the PMDA is not at all attracted; and

B] *Second*, in addition, the parties have admittedly already undergone contested proceedings on divorce as well as division of assets and custody of their son. These proceedings took place in Perth, Western Australia, where the couple was married in a civil ceremony on August 22, 2010. Perth is where the couple has always resided and continued to reside after getting married and continue to live after getting divorced. Those proceedings in Perth led to a firm and final division of assets of the couple, custody of the child, and a final divorce decree. These outcomes are said to represent a clear and final adjudication of issues between the very same couple, and the principles of *res judicata* would mean that this Suit is barred by law.

5. In a nutshell, the Wife’s contentions may be summarised thus:

A] First, the November 2010 Event is essentially an “*Ashirvad*” ceremony and not a “*Tandoorasti*” ceremony. The jury’s opinion should not bind the Court and trial should be conducted to figure out whether as a matter of law, the November 2010 Event can be regarded as a valid marriage ceremony, and validity would require evidence to be led and trial to be conducted – and that is not a matter to be determined in the course of an Interim Application. The Husband is an Irani Zoroastrian, and the implications of the rituals of that sub-denomination are matters requiring evidence to be led and tested at trial; and

B] The Australian proceedings explicitly left these proceedings out of consideration for its implications on the adjudication in Australia, and on the face of it, principles of *res judicata* will not be attracted.

Procedural History:

6. To get to the bottom of the foundational question of fact, the parties have addressed my predecessor Benches in the matter on how to approach this question. Each party has been sanguine about its respective positions and agreed to subject the question to an assessment by the jury. A video of the November 2010 Event was in fact provided by none other than the Learned

Advocate for the Wife and that was marked into evidence. This was agreed to by Learned Advocate for the Husband. With the consent of the parties, Learned Single Judges of this Court have adopted this path before the proceedings reached the current stage. A brief outline of that path would be in order.

7. On August 29, 2024, a Learned Single Judge of this Court passed the following order:

“Since the Parsi Session has been fixed between 23rd September 2024 to 27th September 2024 and the issue involved in this Interim Application is with regard to whether the ceremony on 20th November 2010 was a marriage ceremony between the Plaintiff and the Defendant or merely a blessing ceremony involving consideration of the marriage rituals in Parsis, assistance of the delegates at the Parsi Session would become necessary, therefore list the Interim Application and the Suit during the Parsi Session scheduled between 23rd September 2024 to 27th September 2024.”

[Emphasis Supplied]

8. On September 23, 2024, the case was stood over to September 25, 2024, on which date, the Wife’s Advocate provided a video of the November 2010 Event in a pen drive. The Learned Single Judge was pleased to permit such pen drive to be taken on record and to be viewed by the jury so that it could return a finding of fact on whether in their opinion, the ceremony comported

with an “*Ashirvad*” ceremony or constituted a “*Tandoorasti*” ceremony. The following extract from the order passed in this regard, is noteworthy:

- “1. Pursuant to earlier orders of this Court dated 29th August 2024 and 23rd September 2024, today when the matter is called out, Mrs.Taubon Irani, learned Counsel for the Plaintiff, submits that a viewing of the video of the ceremony would assist the Court as well as the delegates present in deciding whether the ceremony performed on 20th November 2010 at Mumbai between the Plaintiff and the Defendant was marriage ceremony between them or merely a blessing ceremony.
2. Mrs.Zenobia Irani, learned Counsel for the Applicant in the Interim Application (L) No.30398 of 2023 as well as for the Defendant in the suit, has no objection if the said video is exhibited before this Court as well as the delegates.
3. Mrs.Taubon Irani, accordingly tenders across the bar a pen drive which is taken on record and marked “X” for the purpose of identification. Under directions of this Court the said video has been played and viewed by this Court as well as the Hon’ble delegates.
4. After viewing the same, the delegates are unanimous that the ceremony that was performed between the Plaintiff and the Defendant on 20th November 2010 in Mumbai is not a marriage ceremony but is a Tandoorasti / blessing ceremony.
5. The learned Foreperson of the delegates has been requested by Court to file a statement of the delegates by tomorrow, after which Court will consider the Interim Application under Order VII Rule 11 of the Code of Civil Procedure, 1908.

[Emphasis Supplied]

9. On September 26, 2024, the following order was passed:

1. Pursuant to order dated 25th September 2024, today when the matter is called out, as requested, the learned Foreperson of the delegates has furnished a statement

of the delegates which has also been read out by Mr. Errick Elavia, the Foreperson, categorically stating that the video clip that was viewed on 25th September 2024 is not a marriage ceremony but only a blessing / Tandoorasti ceremony. The statement duly signed by the delegates is taken on record and marked “Y” for the purposes of identification.

2. *Both the learned counsel agree that the stage for the findings / opinion of the Jury in respect of the ceremony in question stands concluded, however, the matter be listed for arguments on the legal provisions of the Parsi Marriage and Divorce Act, 1936 and the Code of Civil Procedure, 1908.*

3. *Accordingly, list on 14th November 2024.*

4. *This Court appreciates the presence of the delegates elected to this Court in the trial of this Suit.*

[Emphasis Supplied]

10. The jury has not only recorded that the ceremony is not a marriage ceremony (*Ashirvad*) as followed by Parsi / Iranian Zoroastrians in India, but has also drawn the conclusion that the video entered into evidence was of a blessing ceremony (*Tandoorasti*) which has become a common practice among Zoroastrian couples who have married in another country. This is an emphatic finding on the community’s religious ritual as well as on what is customary now among overseas-resident Parsi couples conducting ceremonies in India after getting married abroad.

11. The statement of the jury marked “Y” for purposes of identification is extracted below:

We as members of Jury unanimously agree that the said ceremony shown on 25th September 2024 did not appear to be the complete marriage ceremony as followed by Parsi/ Irani Zoroastrians in India.

On asking other members of the Irani Zoroastrian residing in India the said video clip did not match their customs too. We noticed that an important part of every Parsi/ Irani marriage ceremony is the signing of a document by both the assenting parties as well as one witness from each side was missing from the video clip.

As mentioned by learned advocate Mrs. Taubon Irani some minor differences in marriage rituals are practiced by the Irani sect of Zoroastrians. However, signing of document for registration of marriage is a common and compulsory part of all rituals pertaining to the marriage ceremony in India. Every videographer captures that moment as it is an integral part of the function.

Hence, We conclude that the video clip shared was of Blessing ceremony which has become a common practice of Zoroastrian couples who have married in another country.

Dated this 26th day of September 2024.

[Emphasis Supplied]

12. It is apparent that the unanimous view expressed by the delegates is unequivocal and clear. The core missing element of the ceremony conducted in the November 2010 Event is the signature by the husband and wife with a witness from each side. The presence of the witnesses is an integral feature of the very statutory definition and meaning of a Parsi marriage as will be seen later in this judgement.

13. Eventually, after being part-heard before the next Learned Single Judge having roster in the matter, the captioned proceedings came up before me. By

consent a final hearing of the Interim Application was scheduled, after the Advocates informed me that the matter is ripe for hearing.

Analysis and Findings:

14. I have heard Ms. Parul Vedak, Learned Advocate on behalf of the Husband and Ms. Taubon Irani, Learned Advocate on behalf of the Wife. With their assistance, I have examined the material on record.

15. A core question of fact as to whether the November 2010 Event was an “*Ashirvad*” ceremony falls for consideration, and with that, the mixed question of fact and law, as to whether the Interim Application should be allowed, holding that the Suit is barred by any law by reason of there having been no marriage contracted in the jurisdiction of this Court, has to be answered. Indeed, the parties have also engaged with the question of whether by reason of the divorce between the parties having been granted in Perth, Western Australia, principles of *res judicata* would apply would also have to be considered.

Jurisdictional Fact Involved:

16. The PMDA applies to “marriages” (defined in Section 2(6) of the PMDA) between “Parsis” (defined in Section 2(7) of the PMDA) i.e. marriages between Parsi Zoroastrians. Section 3 of the PMDA, which defines requisites of a Parsi marriage reads thus:

3. *Requisites to validity of Parsi marriages.—*

(1) No marriage shall be valid if—

(a) *the contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I; or*

(b) such marriage is not solemnized according to the Parsi form of ceremony called “Ashirvad” by a priest in the presence of two Parsi witnesses other than such priest; or

(c) *in the case of any Parsi (whether such Parsi has changed his or her religion or domicile or not) who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age.*

(2) *Notwithstanding that a marriage is invalid under any of the provisions of subsection (1), any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.*

[Emphasis Supplied]

17. Both Ms. Irani and Ms. Vedak agree that for attracting the jurisdiction of this Court, the jurisdictional fact to be proven is that a Parsi marriage ought to have been validly solemnised according to the Parsi form of ceremony called “Ashirvad” and that such ceremony has been performed by a priest in Mumbai, in the presence of two Parsi witnesses other than such priest. What they differ on is whether the November 2010 Event was an “Ashirvad” ceremony or a “Tandoorast” ceremony.

18. Section 29 of the PMDA reads thus:

29. *Court in which suits to be brought.—*

(1) All suits instituted under this Act shall be brought in the Court within the limits of whose jurisdiction *the defendant resides at the time of the institution of the*

suit or where the marriage under this Act was solemnized.

(2) When the defendant shall at such time have left the territories to which this Act extends such suit shall be brought in the Court at the place where the plaintiff and defendant last resided together.

(3) In any case, whether the defendant resides in the territories to which this Act extends or not, such suit may be brought in the Court at the place where the plaintiff resides or at the place where the plaintiff and the defendant last resided together, if such Court, after recording its reasons in writing, grants leave so to do.

[Emphasis Supplied]

19. The parties, for all purposes of the PMDA, reside in Perth, Western Australia. The only connecting factor of this marriage to this Court would be if the November 2010 Event were to be regarded as a ceremony solemnising marriage since that event took place in Mumbai. Save and except for this vital link, none of the other parameters are relevant and indeed, neither party has asserted that their place of residence is in the territorial jurisdiction of this Court.

20. Therefore, whether the ceremony in question was one or the other, poses a question of fact. On the answer to this question of fact would depend the question of law as to whether the jurisdiction of this Court has been attracted for this Suit to be maintainable.

Role of Delegates – Section 46 and Section 19:

21. Now, under Section 46 of the PMDA, questions of fact necessarily fall in the domain of the “jury” i.e. the five delegates who are selected under Section 27 of the PMDA from the panel of delegates appointed by the State Government under Section 24 of the PMDA, and aid the Court under Section 19 of the PMDA.

22. Section 46 of the PMDA, extracted below, is noteworthy:

46. Determination of questions of law and procedure and of fact.—

In suits under this Act all questions of law and procedure shall be determined by the presiding Judge; but the decision on the facts shall be the decision of the majority of the delegates before whom the case is tried:

Provided that, where such delegates are equally divided in opinion, the decision on the facts shall be the decision of the presiding Judge.

[Emphasis Supplied]

23. Section 46 regulates the devolution of powers between the Presiding Judge and the jury. All questions of law and procedure fall in the domain of the Presiding Judge while decisions on facts shall be the decision of the majority of the delegates “*before whom the case is tried*”.

24. The parties engaged with the Presiding Judge and agreed on the procedure, the approach had been agreed to subject the question of fact of what the November 2010 Event constituted, to trial by the jury. Evidence for

such trial of this question of fact was provided by the Wife and such evidence was agreed to be taken on board by the Husband. Whether the ceremony conducted at the November 2010 Event was an “*Ashirvad*” is squarely a *question of fact* that was presented to the jury by consent of the parties. The parties have always had consensus on this issue, and it is with their consent that the question of fact was subjected to trial by the jury and was presented to the jury. The jury has presented an unequivocal and unanimous view that the ceremony in question was not an “*Ashirvad*” ceremony which is what constitutes a ceremony of solemnisation of marriage. Instead, the jury is unanimously and firmly of the view that the ceremony was a “*Tandoorasti*” ceremony.

25. The aforesaid answer on a core question of fact would ordinarily firmly seal any doubt about how the question of fact has to be answered. The very scheme of the PMDA is to have questions of fact answered by the jury. It is only when the jury is split in its verdict that the Court would have a say in answering such questions of fact. However, in the peculiar factual matrix of this case, this analysis cannot be completed without dealing with one facet of the PMDA, which neither side has addressed. The Interim Application, although on the subject of rejection of the Suit is an “interlocutory application”. Therefore, the provisions of Section 19 of the PMDA become important and are reproduced below:

19. *Parsi Chief Matrimonial Courts.—*

The Court so constituted in each of the Presidency-towns shall be entitled the Parsi Chief Matrimonial Court of Calcutta, Madras or Bombay, as the case may be. The local limits of the jurisdiction of a Parsi Chief Matrimonial Court shall be coterminous with the local limits of the ordinary original civil jurisdiction of the High Court. 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.

[Emphasis Supplied]

26. It will be seen that the Court has to be aided by the jury in the trial of cases under the PMDA except in the case of interlocutory applications and proceedings (Clause (a) of the provision) and also in all matters and proceedings other than the regular hearing of cases (Clause (d) of the provision). In other words, under Section 19, which along with Section 46, stipulates the division of labour and the devolution of powers between the Presiding Judge and the jury, the Court is obliged to be aided by the jury in the trial of cases under the PMDA, but there is an exception for interlocutory applications and matters and proceedings other than the regular hearing of cases.

27. One may therefore argue that the Court must not be aided by the jury at all in consideration of the Interim Application, by operation of Clause (a) of Section 19 of the PMDA. An equally reasonable view of Section 19 can be that the Court is obliged to be aided by the jury in the trial of cases with the exception to such obligation being in the case of interlocutory applications. Therefore, when presented with a question of fact in the course of hearing an interlocutory application, the exceptions in Clauses (a) and (d) of Section 19 are arguably exceptions to be read as exceptions to the Court's obligation to take the aid of the jury rather than an obligation not to be aided by the jury. If seen in this light, a harmonious construction of Section 19 with Section 46 being possible, without rendering one or the other otiose and without treating the implications of one being repugnant to the other. It is settled law that if a construction that removes the scope for repugnancy is plausible, then bearing in mind the legislative policy objective, such a reconciliation that saves the full operation of both provisions would be the most appropriate means of reconciliation. By this interpretation, it would follow that the parties have not, by consent, conferred jurisdiction on the delegates where none exists, and instead, the aid of the delegates in answering the question of fact, which is also consistent with Section 46 of the PMDA, has been approved by my predecessors by consent of the parties.

28. It is in this context and considering that the procedure for conduct of the proceedings squarely falls in the domain of the Presiding Judge and the parties have had consensus on presenting evidence to the jury, that I have reconciled the implications of Section 19 of the PMDA harmoniously with Section 46, and applied it to the mixed question of fact and law falling for consideration here.

29. Whether the November 2010 Event was a marriage ceremony entails a question of jurisdictional fact. It is only if this question of fact is answered in the affirmative that this Court would even have jurisdiction to try the Suit. That question of fact has to be answered by the jury by reason of Section 46 of the PMDA.

30. On a separate note, it is also contended by Ms. Irani on behalf of the Wife that CPC would not apply at all and no application under Order VII, Rule 11 can be filed in proceedings under the PMDA. The opening provisions of Section 45 of the PMDA is invoked, and that reads thus:

45. Provisions of Civil Procedure Code to apply to suits under the Act.— The provisions of the Code of Civil Procedure, 1908 (5 of 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:

Provided that the presiding Judge shall read out to the delegates the relevant sections of this Act, and may, if he considers it necessary so to do, explain the same:

Provided further that a verbatim record shall be made of what the presiding Judge

read out or explains to the delegates.

[Emphasis Supplied]

31. Ms. Irani would contend that in Parsi matrimonial cases, what is filed is a “Petition” and not a “Plaint”. Therefore, it is contended that CPC would be inapplicable in such proceedings. In reliance upon Section 45 and the aforesaid distinction between “Petitions” and “Plaints” that Ms. Irani contends that seeking dismissal of the Suit alleging that there had been no marriage in India, is not tenable under the PMDA.

32. Section 45 of the PMDA, as a matter of fact, makes CPC applicable to Suits instituted under the PMDA as far as applicable (*mutatis mutandis*). Therefore, the foundational first principles of not wasting the time and resources of the Court and of the litigants in the absence of a jurisdictional fact would apply to proceedings under the PMDA. Whether the instrument of setting the proceedings in motion is titled a “Plaint” or a “Petition” would be irrelevant. Section 45 makes the CPC applicable as far as possible, and therefore, a party that is desirous of contending that it is being vexed with proceedings that are barred in law, is entitled to seek a rejection or dismissal of the proceedings. The parties have engaged on matters of procedure with the predecessor Presiding Judges, who have directed a course of action in terms of the devolution of power in them under Section 46 of the PMDA. That

procedure has entailed marking the video recording of the November 2010 Event into evidence and getting the jury to answer the question of fact.

33. It was at the Wife's instance that the video of the event was taken into evidence. The jury has since spoken. In my view, the preliminary issue framed by consent has been subjected to a procedure stipulated by the predecessor Presiding Judges, and if it is apparent to the Court that the proceedings are without jurisdiction by reason of how the question of fact has been answered by the delegates in accordance with the procedure approved by the Court by consent of the parties, the consequences would follow.

34. This is precisely where one has to examine the scope of adjudication of the present Interim Application, and the peculiar nature of it, also bearing in mind that CPC would apply only as far as applicable (*mutatis mutandis*), and giving primacy to the special legislation status of the PMDA when reconciling it with incongruities arising from CPC and the law declared therein.

35. Admittedly, no facet of procedure has been aided by the delegates. It is after the due process for conduct of the trial was agreed by the parties that the question of getting the delegates to give their view on this question of fact was taken. Such a decision is squarely in the domain of the predecessor Presiding Judges, and the parties engaged in that process. The aid of the jury was to

answer the question of fact as to whether the November 2010 Event was an “*Ashirvad*” ceremony and nothing else.

36. If the Wife’s current contentions, after agreeing the procedure of subjecting the question of fact to the aid of the delegates, that the delegates have no say in the matter, were to be accepted, it would fly in the teeth of the provisions of Section 46 of the PMDA, apart from resulting in abuse of process of the Court. It is not as if the jury has been asked to read the pleadings and return its view. Instead, as a matter of procedure, it was agreed that the video recording and that too, one provided by the Wife would be marked into evidence and the jury would be called upon to examine it and return its findings on what the ceremony constituted. That process having been done, it is the question of fact that has been answered by the jury on the basis of the evidence led by and agreed to by the parties.

37. It is in this peculiar factual matrix that with the aid of the answer returned by the delegates unanimously, that the Suit deserves to be dismissed. I have separately dealt with the facet of *res judicata* later in this judgement, where I have not accepted the Husband’s contention, because the Australian proceedings explicitly left the captioned proceedings out of its zone of consideration leaving it to the parties to deal with it on merits.

38. I have given my anxious consideration to the various contentions presented by Ms. Irani to assail the finding that November 2010 Event was not a *Tandoorasti* ceremony but actually an *Ashirvad* ceremony. I have applied my mind to the assessment of whether this question could even be considered as a question of law, since, arguably, the meaning of the term “*Ashirvad*” has implications for the question of law as to whether the jurisdiction of this Court is attracted, which questions combine to constitute the mixed question of fact and law. I have considered the objections in the following paragraphs.

39. *First*, Ms. Irani would contend on the Wife’s behalf that “*Ashirvad*” means blessings and admittedly the ceremony is one of blessing the couple. I am afraid this is a simplistic objection. Such a proposition, based purely on the etymology of the term, would hardly need any evidence led by the Wife to be admitted into evidence. The parties had consensus on having the jury examine the question only because it was a question of fact. If all that was needed to appreciate the ingredients of a Parsi marriage is the etymology of the word in Sanskrit and Persian, the Court only has to reach out to a dictionary. This is completely contrary to the very scheme of the PMDA. A jury comprising Parsi Zoroastrians is an integral feature of the PMDA only to preserve and protect the Parsi community’s rituals, customs and beliefs, from the beliefs and notions of the wider society. The scope of such preservation is also restricted by design only to marriages between Parsis solemnised in India.

This is precisely why there had been consensus on the delegates examining the evidence provided by the Wife and giving their answer. The jury has spoken and in the absence of any perversity, it would be inappropriate for this Court to disregard the conclusion of the jury on what is, in essence, an answer on the community's custom.

40. *Second*, Ms. Irani submits that jury has only expressed its "opinion" and this is not a "verdict". The jury's opinion is its "decision" on the point of whether the ceremony in question would partake the character of *Ashirvad* or of *Tandoorasti*. The verdict on the Interim Application would indeed be that of the Court, but such verdict would need to be informed and aided by the answer given by the jury on the question of fact as to whether the ceremony was one or the other. In the absence of any basis to undermine the decision of the jury, it would not be appropriate to overreach the answer returned by the jury.

41. *Third*, Ms. Irani would contend that the priests who conducted the November 2010 Event are priests of the Husband's family and therefore their view would need to be discounted. Ms. Irani would point to the penal provisions of Sections 12 and 13 of the PMDA to point out that the priests have a statutory obligation to be truthful and not to be partisan. When approached on behalf of the Wife by Ms. Irani by a letter dated March 17, 2017, asking

them to issue a certificate of marriage so that the marriage could be registered, the priests stated by a letter dated March 23, 2017 that they had not performed an *Ashirvad* ceremony and that they had only performed a *Tandoorasti* ceremony.

42. After the jury's view, Ms. Irani would present a counter-view from another priest to contend that the photographs appended to the Complaint would show various men holding candles around the couple and that under the customs of the Irani Zoroastrian community to which the Husband belongs, such an act is part of an *Ashirvad* ceremony. The PMDA does not make any differentiation in rituals of sub-denominations. This being a community question, the question of fact is preserved for being answered by the communal jury. Ms. Irani indeed provided a video to buttress her point and sought that the video be marked into evidence, and after examining the video, the jury has arrived at a unanimous decision that the November 2010 Event was not an *Ashirvad* ceremony but was a *Tandoorasti* ceremony. In the absence of any specific differentiation being made in the PMDA or in case law shown by Ms. Irani about how a materially different standard should be applied if one of the spouses were to be Irani Zoroastrian, there is no basis for the Court to second-guess the answer given by the jury. The competing views on what the ceremony was, has been answered by the jury.

43. I am unable to sit in judgement over the jury's unanimous view that the ceremony was not an *Ashirvad* ceremony. It is also nobody's case that the priest who has made the statement about the Irani Zoroastrian element has seen any part of the videography of the November 2010 Event that was not part of what the jury was shown. The Wife has not sought that the jury be reconvened, and instead the parties pressed for a final hearing. If the ceremony was not an *Ashirvad* ceremony, a fundamental requisite of a Parsi marriage would not have been met. This is also a reason why the nomenclature given to the invitation card is not relevant because the necessary ingredients of the jurisdictional fact is the conduct of an *Ashirvad* ceremony, which the jury has found upon a review of a video recording of the November 2010 Event to not have taken place.

44. The question of fact is whether any marriage ceremony within the meaning of the PMDA at all took place within the territorial jurisdiction of this Court. Evidently, the couple was wedded in Perth, Western Australia in August 2010, although by a civil marriage. The couple visited India in November 2010 and the ceremony that is clearly held to be a Tandoorasti ceremony was conducted in the territorial jurisdiction of this Court. Ms. Vedak's submission must therefore be accepted: the ceremony having been firmly found not to constitute a ceremony of solemnisation of a Parsi marriage

within the jurisdiction of this Court, this Court would not have jurisdiction in the matter.

45. Fourth, Ms. Irani would contend that video evidence is unreliable. She would point to the language in the jury's statement to indicate that the video is not a complete footage of what transpired at the ceremony. This has to be stated to be rejected since it was Ms. Irani who provided the video on behalf of the wife for consideration by the jury and this Court. That video has been examined to return a decision. Indeed, the Wife must be presumed to have put her best foot forward when the video was presented, without editing from it anything that would help her case. The very evidence led by the Wife cannot be called into question by the Wife after the appreciation of the evidence turned out to not support her case.

46. Fifth, Ms. Irani would rely on Section 17 of the PMDA to indicate that formal irregularity would not invalidate a marriage. Merely because a certificate was not issued for a marriage, or because it was not sent to the Registrar or that it was defective or incorrect, the marriage would not be invalid. Therefore, she would contend that the trial should run its full course and eventually a decision may be taken as to whether the ceremony that took place was a marriage ceremony within this Court's territorial jurisdiction. I am afraid this is not a valid objection inasmuch as the parties agreed to the

question as to what the November 2010 Event constituted, as a preliminary question of fact and it was the Wife who provided the video in support of the trial of the question.

47. Not only is the contention that the finding is one of a formal irregularity misconceived – it is a substantial issue and not a matter of form – but also the contention that there cannot be a mini trial at this stage does not fit the factual matrix in this case since by consent of the parties, the predecessor Benches of this Court adopted the procedure of framing the preliminary question of what the November 2010 Event constituted, and subjecting it to review by the jury.

48. Before closing the discussion in this issue, it would be important to touch upon an important differentiating facet and nuance. Indeed, when considering an application under Order VII, Rule 11 of the CPC, one must look only at the Complaint and the annexures that the Complaint relies upon. However, in the facts of this case, the parties had consensus that the Court must answer a preliminary question as to a jurisdictional fact, namely, whether the November 2010 Event constituted an Ashirvad or a Tandoorasti ceremony. Therefore, it is apparent to me that the parties had consensus that this is a preliminary issue that got framed at the threshold and by consent, the evidence in this regard was led.

49. After having consented to and having invited a trial of a preliminary issue, and after fully participating in such trial of a preliminary issue, it would not be open to either party to then contend that evidence ought not to have been examined and that the exercise wrongly constitutes a “mini trial” at the stage of an Order VII, Rule 11 application. Therefore, the principle of estoppel and the bar on a party approbating and reprobating, would become applicable in the peculiar factual matrix of this case.

Res Judicata Contention:

50. Against this backdrop, it is also important to examine the contention of *res judicata* raised on behalf of the Husband, the principles therefor, flowing from Section 13 of the CPC.

51. Before extracting and dealing with these provisions, it is noteworthy that the application for a marriage certificate in India was made by the Wife with the priests in 2017, which is seven years after the event. It is a matter of record, as seen from the Plaint itself, that the parties had a civil marriage in Perth in August 2010. The Wife has lived in Australia since the age of 12 and is an Australian citizen. The parties separated in March 2013 and resumed living together in an identified jointly-occupied property in February 2014, and the Husband moved out in January 2015, all in Perth. The parties acquired two

immovable properties and a café in Perth. Both the parties have only worked and lived in Australia after marriage.

52. Proceedings were initiated by the Wife in February 2016, initially only in relation to parenting orders, and later for financial relief in June 2016, after the Husband's counter was filed seeking financial reliefs. The Wife sought a marriage certificate in India in 2017 and instituted the captioned Parsi Matrimonial Suit in January 2018.

53. The parties have only resided in Australia after their marriage and throughout their short-lived married life. Proceedings for division of assets; for custody of their child; and for divorce, were all pursued in Perth. These proceedings led to: (i) a final order on division of assets dated March 13, 2020 ("***Assets Order***"), in proceedings commenced in February 2016 after the separation and before the formal divorce, the claim for alteration of property interests having first been raised by the Husband in his response dated April 21, 2016; (ii) an order on parenting arrangements dated September 19, 2019 ("***Custody Order***"), passed by consent during the pendency of the proceedings for division of assets, by which a final order was made for the child to live with the Wife while detailed interim orders were made as to parental responsibility and the Husband's time with the child, and which was subsequently modified by a further parenting order dated September 18, 2023; and (iii) a final order

of divorce dated July 5, 2021 to take effect on August 6, 2021 (“**Divorce Order**”), passed after the aforesaid two orders.

54. The Assets Order was preceded by reasons for judgement delivered on the same day in *Mehta and Mubarakai [2020] FCWA 37 (O’Brien J)*, annexed to the Interim Application as Exhibit “D-1”. Since both sides have addressed the effect of those reasons on the plea of *res judicata*, the material paragraphs are extracted below:

17 The wife commenced proceedings on 22 February 2016 seeking parenting orders only. The husband filed a response on 21 April 2016, seeking parenting orders, and orders for the alteration of property interests. The wife filed a reply on 17 June 2016 setting out the financial relief she sought.

19 On 12 January 2018 the wife commenced proceedings in the Parsi Chief Matrimonial Court at Bombay (“the Indian proceedings”). In the document filed to initiate those proceedings she sought a dissolution of the marriage, a lump sum by way of “permanent alimony”, orders for interim maintenance and litigation costs, and “any other and further relief [the court] deems fit and proper in the interest of justice.” In the same document, she disclosed to the Parsi Court the proceedings on foot in this court.

20 Counsel for the wife advised that the amount sought in the Indian proceedings by way of “permanent alimony” was in excess of AUD \$1 million.

216 Additionally, and as already noted, while I am unable to make positive findings as to the ownership by the husband of property overseas, let alone the value of that property, I accept the submissions of counsel for the wife to the effect that I should infer that at the very least the husband has available to him undisclosed financial resources overseas.

217 The impact of that inference on the just and equitable division of the identified

property available to the parties in Australia, however, is in my view reduced by the fact that the wife continues to have on foot financial proceedings in India, in which she seeks the payment of an amount equivalent to not less than \$1 million from the husband. That is so, as any higher adjustment based on nondisclosure and the inferences arising from it could only be based on the premise that further recovery by the wife of any entitlement based on overseas property or resources is at best highly unlikely.

218 In the absence of any useful evidence on the point, I am unable to reach any informed view as to the basis in Indian law for the wife's claim, its legal merits, or its practical prospects of success. I am also unable to make any finding as to the impact on those matters, if any, of the conclusion of the financial proceedings between the parties in this court. It was open to the wife, bearing in mind that the solicitor instructed by her in the Indian proceedings gave evidence, to adduce evidence in relation to those matters if she chose to do so. It is also reasonable to infer that she could, if she chose, have instructed that same solicitor to conduct at least basic enquiries in the nature of title searches and the like to support her contention that the husband owns real property in India, and to adduce evidence accordingly. She did neither.

229 The proposed outcome will see the husband retaining property and superannuation which, after deduction of all liabilities for which he is to retain responsibility, has a value of \$223,566. He will also, of course, retain the use and benefit of whatever property and resources he may have overseas, subject only to any steps the wife might successfully take against him in the Indian proceedings.

[Emphasis Supplied]

55. In this case, both parties have actively participated in the proceedings in Australia. The Wife was represented by experienced counsel at the trial in Perth, while the Husband was self-represented only at the stage of the hearing. Evidence about the captioned proceedings was led orally by telephone by Ms.

Irani, as to the status of the proceedings commenced by her in the Parsi Court at Bombay, but no evidence was led on the Husband's Indian assets. The Court in Perth made it clear that it was unable to return positive findings as to the ownership of property outside Australia, let alone the value of such property. At the least, the Court found it tenable to infer that the Husband had available to him undisclosed financial resources outside Australia.

56. However, the Court held that the adversity of the inference was reduced by the fact that the Wife continued financial proceedings in India, seeking the equivalent of at least AUD 1 million. The only premise that could be drawn by the Australian court was that at best any further recovery based on overseas property of the Husband was unlikely. This was because of the sheer absence of any useful evidence led by the Wife to indicate the basis of the claim in India, its legal merits or its practical potential for success. Therefore, the impact of the captioned Suit was left out of consideration in the Australian proceedings. It was pertinently noted that at least basic enquires in the nature of title searches and the like to support the contention that Husband really owned property in India, could have been made but was not made.

57. To cut a long story short, the Australian decision left out of consideration any Indian assets of the Husband, leaving him to retain the use and benefit of any such unascertained property that he may have in India,

subject only to any steps the Wife might successfully take against him in the captioned Parsi Matrimonial Suit. Therefore, it would not be possible to hold that any Indian asset forms part of the adjudication in Australia. Instead, the Australian Court left it open to the Wife to pursue the Indian proceedings on merits, despite having commented adversely on the absence of any evidence being brought to bear about Indian assets.

58. In this view of the matter, the decree of the foreign court having left the Indian assets out, it cannot be conclusively stated that the discovery and claim on Indian assets forms subject matter of what was adjudicated in Australia. Therefore, one must now apply to the aforesaid factual matrix, Section 13 of the CPC, which reads thus:

13. When foreign judgment not conclusive .-

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- (a) where it has not been pronounced by a Court of competent jurisdiction;*
- (b) where it has not been given on the merits of the case;*
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;*
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice;*
- (e) where it has been obtained by fraud;*

(f) where it sustains a claim founded on a breach of any law in force in India.

[Emphasis Supplied]

59. The matter of divorce in the marriage between the same parties has been dealt with in Australia, with participation by both parties. The marriage that the Australian Court was dealing with was the civil marriage between the parties. The Australian Court left out of its assessment the merits of the potential prospects of the captioned Parsi Matrimonial Suit, in the absence of any evidence being led on its potential prospects, and indeed any evidence on any assets really owned by the Husband in India. Therefore, from the perspective of Section 13 of the CPC, which is a facet of *res judicata* and comity of courts, it cannot be said that whether there was a Parsi marriage ceremony conducted in India and whether there are any assets in India, are facets covered by the adjudication in Perth, Australia. Therefore, from the perspective of Section 13 of CPC, it cannot be contended that principles of *res judicata* as flowing from Section 13 of CPC can be said to be attracted to the facts of this case. If anything, the proceedings in India were indeed noticed in the proceedings in Australia, and for reasons set out, the merits, relevance and prospects of the Indian proceedings were left out completely in the Australian adjudication.

60. If there is any unresolved issue over any assets said to be held in India over which a claim may validly be made by the Wife, the issue really boils

down to whether the captioned Parsi Matrimonial Suit constitutes the valid avenue for resolving those elements of the dispute. It is in that context that the analysis of whether this Court has jurisdiction in view of the finding of the jury that no Parsi marriage ceremony took place has to run independent of the Husband's contentions on *res judicata*. I am not persuaded to accept the contentions of *res judicata* based on the Australian proceedings as raised by Ms. Vedak, particularly in view of the explicit findings in Australia that it noticed the Indian proceedings and was keeping the Indian proceedings completely out of consideration.

Case Law Analysis:

61. The Husband relies on Bhaurao Lokhande¹ to contend that a marriage that is not conducted ceremonially in the manner personal law stipulates is no marriage at all, and that the term "solemnize" means "to celebrate the marriage with proper ceremonies and in due form". Merely going through some ceremonies with the intention that the parties be taken to be married does not make them ceremonies stipulated by law or approved by established custom. Such marriage ceremony, if not valid under applicable law, "is no marriage in the eye of law". Reliance is also placed on Dolly Rani² which

¹ *Bhaurao Shankar Lokhande & Anr. v. State of Maharashtra & Anr.*, 1965 (2) SCR 837, decided on February 1, 1965.

² *Dolly Rani v. Manish Kumar Chanchal*, Transfer Petition (C) No. 2043 of 2023, 2024 INSC 355, decided on April 19, 2024

applies the same reasoning to Section 7 of the Hindu Marriage Act, 1955, and adds that a mere registration leading to issue of a certificate in the absence of the requisite ceremony confers no legitimacy because registration under Section 8 “is only to confirm that the parties have undergone a valid marriage ceremony”. Both these judgements were decided on evidence — Bhaurao after a criminal trial, Dolly Rani on an admitted state of facts in an application under Article 142 of the Constitution — neither was a case of rejection at the threshold. Both address validity, whereas the question in this Suit is whether any ceremony of solemnisation at all took place within the jurisdiction of this Court.

62. The Husband also relies on *R. Viswanathan*³ for the proposition that Section 13 of the Code of Civil Procedure, 1908 “incorporates a branch of the principle of res judicata” and extends it to judgments of foreign courts competent in the international sense. In view of my findings on facts in the context of Section 13 of the CPC, this judgement does not need any further analysis.

63. Reliance is also placed by the Husband on *Sharmishtha*⁴, which holds that a foreign divorce decree needs no confirmation in India provided it

³ *R. Viswanathan v. Rukn-ul-Mulk Syed Abdul Wajid*, Civil Appeals Nos. 277 to 283 of 1958, decided May 4, 1962, [1963] 3 SCR 22.

⁴ *Sharmishtha v. Sujoy Mitra*, C.R.P. No. 120 of 2008, 2008:DHC:4412, order dated August 4, 2008.

satisfies Section 13, and that a second divorce petition is not maintainable where one has already been obtained abroad. In that case, the wife had accepted notice, appeared in Pennsylvania, and expressly acknowledged the decree's validity and did not dispute the husband's status as a divorcee. In the instant case, it is nobody's case that the Wife did not participate in the proceedings that led to the divorce as well. In fact, the parenting and financial proceedings were but in the context of the culmination in divorce. What the Australian Court declined to form a view on is the financial claims made in India on assets alleged to be owned by the Husband outside Australia.

64. The Wife relies on *Bhau Ram*⁵, *P. V. Guru Raj Reddy*⁶ and *Central Provident Fund Commissioner*⁷ for the settled rule that rejection is a drastic power exercisable only on the averments in the plaint read as a whole, and that the defendant's written statement or application is wholly immaterial at that stage. *Shobha Tomar*⁸ goes further and is the most direct of these citations, holding that an application under Order VII, Rule 11 is not maintainable in matrimonial proceedings at all and that Family Courts are "well advised to reject such applications". However, *Shobha Tomar* turns on

⁵ *Bhau Ram v. Janak Singh*, Supreme Court, decided July 20, 2012, paragraphs 6, 8 and 9.

⁶ *P. V. Guru Raj Reddy Rep. by GPA Laxmi Narayan Reddy & Anr. v. P. Neeradha Reddy & Ors.*, Supreme Court, decided February 13, 2015, paragraph 5.

⁷ *Central Provident Fund Commissioner & Ors. v. Lala J. R. Education Society & Ors.*, Civil Appeal No. 9840 of 2016, decided September 26, 2016, paragraphs 3 and 5, [MANU/SC/1161/2016](#)

⁸ *Shobha Tomar v. B. S. Tomar*, Rajasthan High Court, [Civil Writ Petition No. 3136 of 2018, decided May 2, 2018](#), paragraphs 4 to 7.

Section 21 of the Family Courts Act, 1984, not on Section 45 of the Parsi Marriage and Divorce Act, 1936, whose language (“so far as the same may be applicable”) is different. Moreover, ***Central Provident Fund Commissioner***, as quoted in the Plaintiff’s own Written Notes, itself contains the distinction that “rejection of a plaint on institutional grounds is different from dismissal of a suit at pre-trial stage on the grounds of maintainability. For dismissal on a preliminary issue, the Court is entitled and liable to look into the entire documents including those furnished by the defendant.” In my view, this judgement supports, rather than undermines, the reasoning that by consent, in the Interim Application filed under Order VII, Rule 11 of the CPC, the parties engaged in a trial of a preliminary issue of determining a jurisdictional fact.

65. The Wife also relies on ***Rohinton Minoo Surty***⁹, to contend that a decree dissolving a marriage under a different enactment does not dissolve the Parsi marriage, which must be separately annulled under the PMDA. The Court accepted that the scheme obliges parties to take “dual proceedings”, and rejected the suggestion that a second decree was unnecessary. The reasoning, however, rests on two planks that will need testing against these facts. Paragraph 12 turns on Section 42 of the Special Marriage Act, 1954, which contains an express saving provision that does not have a parallel being

⁹ *Rohinton Minoo Surty & Anr., Parsi Suit No. 23 of 2021, Bombay High Court, judgment dated February 18, 2022, paragraphs 10 to 14.*

pressed into service as a matter of the law governing the Australian Divorce Order. Moreover, ***Rohinton Minoo Surty***, proceeds entirely on an undisputed *Ashirvad* ceremony performed and followed by a due registration under the PMDA. In the present Suit this very jurisdictional fact was framed as a preliminary issue and has been answered unanimously by the jury adverse to the Wife by holding that the November 2010 Event is not an *Ashirvad* marriage ceremony conducted in Mumbai. Put differently, ***Rohinton Minoo Surty*** can be useful to defend against the contention that a foreign divorce ends the matter (the point on *res judicata*) but is not relevant to answering the core foundational question of whether there was a marriage ceremony under the PMDA for dissolution by way of a Parsi Matrimonial Suit to fall within this Court's jurisdiction.

Summary of Conclusions:

66. To summarise my findings:

A] By consent, the question of what the November 2010 Event constituted was framed as a preliminary question of jurisdictional fact and tried at the threshold on a video tendered by the Wife by the predecessor Presiding Judges. Having invited that course and participated in it, neither party may now complain of a “mini trial”;

B] Section 45 makes the CPC applicable to suits under the PMDA so far as the same may be applicable. Whether the instrument is styled a

“Plaint” or a “Petition” is immaterial, and the objection to the maintainability of the Interim Application is rejected;

C] Neither side addressed Section 19 of the PMDA. Read with Section 46, the exceptions in Clauses (a) and (d) of Section 19 of the PMDA, in my opinion, qualify the Court’s obligation to be aided by the delegates; they do not forbid their aid when a question of fact has to necessarily be answered. The parties have therefore conferred no jurisdiction that the delegates lacked;

D] The delegates were asked one question of fact and nothing else. Law and procedure have remained with the Presiding Judge, as Section 46 requires;

E] The delegates’ unanimous answer, on the Wife’s own evidence, is that the November 2010 Event was a *Tandoorasti* and not an *Ashirvad* ceremony. That is an answer upon the community’s ritual, and absent perversity on its face this Court must not sit in judgement over it;

F] None of the five objections to that answer survives: etymology would render the scheme of the jury for questions of fact redundant; the distinction between “opinion” and “verdict” is misconceived – with the aid of the jury’s answer on the question of fact, the mixed question of fact and law are answered to indicate that the jurisdictional fact of a Parsi marriage has not been established; the video cannot be impeached by the party who tendered it; Section 17 addresses formal irregularity and not the absence of the ceremony; and the second priest’s counter-view came after the jury had spoken, on no wider material, and with no application to reconvene it;

G] Section 3 read with Section 29 of the PMDA, therefore, denies this Court jurisdiction. The parties reside in Perth, and the sole connecting factor was the solemnisation ceremony said to have been conducted in Mumbai. If the November 2010 Event is not a solemnisation ceremony, then that connecting jurisdictional fact is missing. Therefore, the Suit is barred within the meaning of Order VII, Rule 11(d) of the CPC;

H] The plea of *res judicata* can rest only on Section 13 of the CPC, and by reason of how the foreign court dealt with the pendency of this Suit, the contention of *res judicata* fails. The Family Court of Western Australia expressly noticed this Parsi Matrimonial Suit, and formed no view upon it, and left the Husband's properties outside Australia (alleged Indian properties) subject to the outcome in the Parsi Matrimonial Suit. Therefore, there is no comprehensive and complete overlap between the Australian judgements and what is covered by the captioned proceedings;

I] It is unnecessary to compare the two jurisdictions on the basis of the grounds of dissolution of marriage, or to consider whether a civil marriage dissolved abroad leaves a communal marriage subsisting in India, or whether two marriages between the same couple could be contracted in sequence. Since it is found that no "Parsi Marriage" took place at the November 2010 Event, that question is in any event moot. Nothing more is decided. None of the Wife's financial claims is adjudicated; and no view is expressed upon what other avenue, if any, that may remain open to her;

K] The finding upon the jurisdictional fact being dispositive, the

Interim Application succeeds, and the rejection of the plea of *res judicata* does not affect that outcome.

67. In the result, the *Interim Application is allowed* and the *Suit is dismissed* because of the vital jurisdictional fact not having been found to be in existence, posing a bar in law to proceed with trial.

68. In the peculiar facts of the case, and considering the nature of conduct of the respective parties in the course of their divorce proceedings between India and Australia, I am persuaded that costs need not follow the event.

69. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]