

(1943) 05 CAL CK 0018
In the Calcutta High Court

Grace Isabel Stuedman

APPELLANT

Vs

Anneley Eliardo Beresford de Courey Wheeler

RESPONDENT

Date of Decision : 27-05-1943

Acts Referred:

Divorce Act, 1869 — Section 45, 7
Government of India Act, 1935 — Section 223

Citation : AIR 1945 Cal 75

Hon'ble Judges : Das, J

Bench : Division Bench

Judgement

Das, J.—In this suit the petitioner prayed for a decree declaring that the marriage in fact (but illegally) celebrated between her and the respondent was and is null and void. The respondent not having appeared after personal service of the writ of summons together with a certified copy of the petition this suit came up for hearing as an undefended suit on May 7th last. After hearing the evidence adduced before me I passed a decree on that date declaring that the marriage in question was null and void. Requisition for drawing up of the decree having been furnished a draft of the decree was prepared by the decree department and sent to the petitioner's solicitors for their approval. This draft was drawn up in the same form as such a decree in a suit for nullity of marriage is nowadays drawn up in England, namely in the form of a decree nisi. Mr. Barwell who appeared for the petitioner at the hearing mentioned the matter to me and contended that in a suit for nullity of marriage the Courts in India can only pass one plain and simple decree which is at once final and absolute, as the Indian Divorce Act 1869 does not contemplate or permit two decrees namely a decree nisi and a decree absolute, in such a suit. The matter appeared to me to be a difficult and complicated one and I directed the suit to be placed in my list for hearing arguments on the point. Accordingly the suit appeared on my list on 20th May last and the point was fully and exhaustively argued by Mr. Barwell. Nobody appeared for the respondent but I am satisfied that all relevant provisions and authorities have been brought to my notice by Mr. Barwell. In

view of the importance of the matter, however, I took time to consider my judgment.

2. The point now before me is whether a decree passed by this High Court in exercise of its matrimonial jurisdiction in favour of a petitioner in a suit for nullity instituted under the Indian Divorce Act 1869 should be in the form of a decree nisi to be followed by a decree absolute or whether such decree should be a plain and simple decree at once final and absolute. I gather from the learned Registrar, whom I have also consulted in the matter, that the practice of this High Court is to pass a decree nisi in a suit for nullity of marriage in the same way as a decree nisi in a suit for dissolution of marriage and that this practice is based on the modern English Practice adopted by this Court on the authority of the decision of Costello J. in *Henrietta Violet Wenkenbach v. Otto Guenter Wenkenbach* I. L. R. (1937) WB. 417. At the very end of the judgment in that case at p. 277 is to be found the following passage:

Mr. Bonnerjee and Mr. Westmacott both agree that following the English practice and as the law stands at present in India, the decree should be a decree nisi.

3. Mr. Barwell contended that it did not appear from the report that the point had been argued at all but that the Court passed a decree nisi only because learned Counsel agreed to that effect and he invited me to give a decision on the point on its merits. Seeing that one of the learned Counsel was the late Mr. R. C. Bonnerjee, whose vast experience and great learning in the law and practice relating to matrimonial causes were at all times unreservedly recognised and respected by the Bench and the Bar alike and that he was of opinion that the decree should be a decree nisi and that such opinion was adopted by a Judge of the eminence of Mr. Costello J., I should long hesitate before I should adopt a contrary view. Further I should be slow to upset a practice which has prevailed in this High Court for a number of years unless I am compelled to do so on a very careful consideration of the relevant provisions of the statutes applicable to the case and judicial decisions thereon. To have a correct appreciation of the jurisdiction and powers of this High Court in matters matrimonial, it is necessary to look back and trace them from their origin. Letters Patent granted by King George I to the United Company of Merchants of England trading to the East Indies in 1726 established the Mayor's Court at Fort William in Bengal. These Letters Patent were replaced by Letters Patent of 1753 granted by King-George II whereby various jurisdictions including ecclesiastical jurisdiction were conferred on that Court.

4. Then came the Regulating Act of 1773 (13 Geo. III C. 68). Section 13 of this Act authorised His Majesty by Charter or Letters Patent to establish a Supreme Court of Judicature at Fort William in Bengal with full power and authority to exercise and perform all Civil, Criminal, Admiralty and Ecclesiastical Jurisdiction and to form and establish such rules of practice and such rules for the process of the said Court and to do all such other things as should be found necessary for the administration of justice. It was further provided that the said new Charter

and the jurisdiction, powers and authorities to be thereby established should extend to all British subjects, who should reside in the Kingdoms or Provinces of Bengal, Bihar and Orissa. By Section 19 so much of the Charter of 1753 of George II as related to the establishment of the Mayor's Court at Calcutta or to the Civil, Criminal or Ecclesiastical Jurisdiction thereof was repealed.

5. This was followed by the Charter of 1774 establishing the Supreme Court of Judicature at Fort William in Bengal. By Clause 22 of this Charter the Supreme Court of Judicature was constituted as a Court of Ecclesiastical Jurisdiction with full power and authority to administer and execute within the said Province of Bengal" Bihar and Orissa and towards and upon British subjects there residing, the Ecclesiastical law "as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasions of the said provinces or the people shall admit and require." By Clause 36 the Mayor's Court of Calcutta and all its jurisdictions including ecclesiastical jurisdiction were abolished. Clause 38 of this Charter empowered the Supreme Court to frame rules of practice for the administration of Justice and the due exercise of the Civil, Criminal, Admiralty and Ecclesiastical Jurisdiction thereby created. It will be noticed that by this Charter the law to be administered by the Supreme Court in exercise of its Ecclesiastical Jurisdiction was rigidly fixed and limited to the Ecclesiastical law as the same was then, i. e., in 1774 used and exercised in the Diocese of London.

6. From the time that the Church of Rome became the Supreme Ecclesiastical Authority in England, the Ecclesiastical Courts applied the Canon law in matrimonial causes. Christiah marriage was indissoluble but divorce a mensa et thoro equivalent to our present day judicial separation was granted for certain causes; There developed in course of time a method of divorce a vinculo by Private Act of Parliament. This method continued up to 1857 when the Matrimonial Causes Act (20 & 21 vic., C. 85) came to be passed in that year. By this Act the jurisdiction then exercisable by Ecclesiastical Courts in England in respect of divorce a mensa at thoro, suits for nullity of marriage, suits for restitution of conjugal rights and in all causes, suits and matters matrimonial was taken away and vested in Her Majesty to be exercised in Her name in a Court of Record to be called "the Court of Divorce and Matrimonial Causes." Section 22 of this Act of 1857 was in the following terms:

22. In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

This Act, therefore, perpetuated the old ecclesiastical practice as to proceedings for nullity and judicial separation and introduced into England the practice of granting complete divorce by judicial process. The next important Act was the

Matrimonial Causes Act of 1860 (23 & 24 Vic., C. 144). Section 7 of this Act provided that every decree for a divorce should, in the first instance, be a decree nisi not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court should by general or special order from time to time direct. This section also gave liberty to any person to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court and also authorised Her Majesty's Proctor to intervene. In view of this legislation it would appear that prior to 1860 there used to be one decree in all matrimonial causes. While all these changes in matrimonial law and practice were being brought about in England, the Supreme Court in Calcutta was apparently rigidly fixed to the old ecclesiastical law that was used and exercised in the Diocese of London in 1774. In 1861 was passed what is commonly called the Indian High Courts Act (24 & 25 Vic. C., 104). Section 1 authorised Her Majesty by Letters Patent to establish High Courts at Calcutta, Bombay and Madras. By Section 8 of this Act, amongst other things, the Supreme Court, the Courts of Sadar Dewani Adawlat and Sadar Nijamat Adawlut at Calcutta were abolished. Section 9 of this Act provided that the High Courts to be established should have and exercise all such Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdictions, Original and Appellate and all such powers and authority for and in relation to the administration of justice as Her Majesty might by such Letters Patent grant and direct and that save as by such Letters Patent might be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Courts should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of abolition of such last mentioned Courts. The High Court, therefore, was to inherit all the jurisdictions and powers of the Supreme Court.

7. Pursuant to this Act, Letters Patent of 1862 were issued establishing this High Court. Clause 35 of these Letters Patent gave this High Court matrimonial jurisdiction on Christian subject within the local limits of the ecclesiastical jurisdiction of the Supreme Court. Clause 37 of this Charter ordained, *inter alia*, that the proceedings in matters matrimonial should be regulated by the rules of the Court for Divorce and Matrimonial Causes in England and that the proceedings in other civil suits should be regulated by Act 8 of 1859 and reserved to the Indian Legislature power to make laws relating to the Civil Procedure. It will thus be seen that the practice and procedure of the Matrimonial Court in England were directed to be followed by this High Court in matrimonial matters. These Letters Patent, however, were replaced by Letters Patent of 1865. By these Letters Patent of 1865 this High Court was continued. Clause 35 of these Letters Patent ordains that this High Court should have jurisdiction in matters matrimonial between Her Majesty's subjects professing the Christian

religion. Clause 37 of these Letters Patent provides as follows:

"And we do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdictions respectively: Provided always that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council and being Act No. 8 of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India."

It will be noticed that there is no reference in this Clause 37, Letters Patent of 1865 to the Rules of the Court for Divorce and Matrimonial Causes in England such as there was in the corresponding Clause 37, Letters Patent of 1862. I consider this change as indeed significant and showing in unmistakable terms that the intention was that the High Court should have its own rules of procedure in all civil cases including matrimonial causes untrammelled by the English law of procedure. Clause 44 of these Letters Patent as it originally stood declared that all provisions of these Letters Patent were to be subject to the legislative powers of the Governor-General in Council. This clause was amended in 1919 to bring it into conformity with the Government of India Act 1915. A year after the publication of these Letters Patent, the Matrimonial Causes Act of 1860 (29 & 30 Vic., C. 32) was passed in England. By Section 3 of this Act it was provided that no decree nisi for a divorce should be made absolute until after the expiration of six calendar months from the pronouncing thereof unless the Court should fix a shorter time.

8. To summarise the position up to 1866: In England all matters matrimonial were to be dealt with by the Court of Divorce and Matrimonial Causes. In accordance with the provisions of the Matrimonial Causes Acts I have mentioned, in a suit for dissolution of marriage there had to be passed a decree nisi to be made absolute after the expiration of six months. In all other matrimonial causes including suits for nullity of marriage the matter was still governed, u/s 22 of the Act of 1857, by the principles and rules of Ecclesiastical Courts and one decree had to be passed in such suit. In India this High Court inherited all the jurisdictions of the Supreme Court including its ecclesiastical jurisdiction and had to administer the ecclesiastical law as was used and exercised in 1774 in the Diocese of London; but under Clause 37, Letters Patent of 1865 the procedure was to be regulated by the Rules framed by the High Court conformably to the provisions of the CPC of 1859 and, subsequent modification thereof. The provisions of the Letters Patent, however, were subject to the powers of the Indian Legislature. It was in these circumstances the Indian Divorce Act of 1869 came to be passed amending the law relating to divorce and matrimonial causes in India. The 62 sections of this Act are grouped under different heads in 14

parts. Section 7 which is in Part II provided as follows:

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

9. The group of sections collected under Part III deals with proceedings for dissolution of marriage. Broadly speaking these sections adopt the principles of law administered by the Matrimonial Court of England under the Matrimonial Causes Acts. Section 14 authorises the Court under certain conditions to pronounce a decree declaring a marriage to be dissolved subject to the provisions of Sections 16 and 17. Section 16 provides that every decree for dissolution of marriage made by a High Court, not being a confirmation of decree of the District Court shall, in the first instance, be a decree nisi not to be made absolute till after the expiration of such time, not less than 6 months from the pronouncing thereof, as the High Court by general or special order from time to time directs and the section gives liberty to any person to show cause why the said decree should not be made absolute by reason of certain facts therein specified. Section 17 provides that every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court, provided that no decree shall be confirmed under this section till after the expiration of such time, not less than C months from the pronouncing thereof, as the High Court by general or special order from time to time directs. Section 17A which was inserted by Act 15 of 1927 provides for the appointment of an officer with like right of showing cause why a decree for dissolution of marriage should not be made absolute or should not be confirmed as is exercisable in England by the King's Proctor. Thus these sections adopting the principles and rules of the English Court provide for the passing of a decree nisi in a suit for dissolution of marriage, to be made absolute or to be confirmed after the expiration of six months as the case may be and for intervention by any party or the officer appointed u/s 17A in case of proceedings for dissolution of marriage.

10. The group of Sections (18 to 21) under Part IV deals with proceedings for nullity of marriage. Section 18 authorises any husband or wife to present a petition to the District Court or to the High Court praying that his or her marriage may be declared null and void. Section 19 provides that such decree may be made on any of the grounds set out thereunder. Section 20 requires that every decree of nullity of marriage made by a District Judge shall be subject to the confirmation of the High Court and makes the provisions of Section 17 Clauses 1, 2, 3 and 4 apply mutatis mutandis to such decree. It will be noticed that these sections make no provision in so many words for the passing, in a suit for nullity of marriage, of a decree nisi to be made absolute after the expiration of a specified time, nor is there any provision for intervention by any person or any officer in such a suit. This was exactly the position in England in 1869 in regard

to suits for nullity of marriage. It is clear therefore that in 1869 these provisions of Part IV contemplated and intended one decree to be passed in a suit for nullity of marriage such as used to be done in England at that time. It is also clear that in 1869 the intention of the Legislature was to make a difference with regard to a decree in a suit for dissolution of marriage and a decree in a suit for nullity of marriage. This distinction is noticeable in various subsequent sections of the Act, e.g., Sections 40, 43, 44 and 57.

11. Sections 45 to 56 are grouped in Part XII under the heading "Procedure". Section 45 provides that subject to the provisions herein contained all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure: Section 62 which is to be found in Part XIV under the heading "Miscellaneous" empowers the High Court to make rules under the Act, subject to the proviso that such rules must be consistent with the provisions of the Act and the Code of Civil Procedure. It is clear, therefore, that by express provisions of the Act matters of procedure are to be regulated by the CPC and by rules made by the High Court consistently with the provision of the Act and the Code of Civil Procedure. These provisions are also in accordance with Clause (37), Letters Patent of 1865. Under the combined operations of the Letters Patent of 1865 and like Indian Divorce Act 1869, the position, so far as this High Court is concerned, is therefore as follows:

(a) This High Court has matrimonial jurisdiction which it has inherited from the Supreme Court.

(b) The substantive law to be applied by this High Court in exercise of its matrimonial jurisdiction is to be: (i) The provisions of the Indian Divorce Act. (ii) Subject to the provisions of the Indian Divorce Act the principles and rules on which the Court for Divorce and matrimonial causes in England acts and gives relief for the time being. (iii) Subject to the provisions of the Indian Divorce Act and the Matrimonial Causes Acts of England the principles and rules of ecclesiastical law as were used and exercised in the Diocese of London in 1774.

(c) The proceedings in matrimonial causes are to be regulated by the provisions of the CPC and the rules made by the High Court in conformity therewith.

12. Section 106, Government of India Act of 1915 and Section 223, Government of India Act 1935 have made no change in the position so far as the matrimonial jurisdiction vested in this High Court is concerned. While the Statute Law in India has thus remained practically what it was in 1869 the law in England has undergone considerable change since then. Thus, the Matrimonial Causes Act of 1873 (36 & 37 Vic., C. 31) extended the provisions of Section 7, Matrimonial Causes Act of 1860 (23 & 24 Vic., C. 144) and Section 3, Matrimonial Causes Act of 1866 (29 & 30 vic., C. 32) which required that a decree in a suit for dissolution of marriage should in the first instance be a decree nisi not to be made absolute till after the expiration of such period not less than six months as the High Court may direct, to suits for nullity of marriage. The provisions applicable to

matrimonial causes have since been consolidated and set out in Part VIII of the Supreme Court of Judicature (Consolidation) Act of 1925 (15 & 16 Geo. V, C. 49). Section 183 of this Act provides that every decree for a divorce or for nullity of marriage shall in the first instance be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof unless the Court fixes a shorter time. Liberty is also given by this section to any person to show cause why the decree should not be made absolute by reason of the facts stated therein. Thus in England since 1874 a decree in a suit for nullity has been placed on the same footing as a decree in a suit for dissolution of marriage, with the same provision for intervention by any person in both cases.

13. The question is whether this High Court is to follow and adopt this change as regards decree nisi in the case of a decree to be passed by it in a suit for nullity. This practice of making a decree nisi in a suit for nullity is certainly not any part of the ecclesiastical law that was used and exercised in the Diocese in London in 1774 nor is this practice enjoined or permitted by the sections collected in Part IV, Indian Divorce Act, or the CPC or the rules framed by the High Court. The only way by which this new practice can be introduced in this Court is by applying the provisions of Section 7, Indian Divorce Act, which I have already quoted at length. It will be noticed that the main provisions of that section are "subject to the provisions contained in this Act."

14. Mr. Barwell contended that Section 7 provides for adoption of substantive matrimonial law of England as applied by the Courts of Divorce and Matrimonial Causes, but not the adjective or procedural law. He referred me to the language of Section 7 of our Act and the language of Section 22, English Matrimonial Causes Act of 1857 and contended that the significant word "proceed" which is to be found in Section 22, English Act of 1857 has been omitted from Section 7, Indian Act of 1869. From this circumstance Mr. Barwell wanted me to conclude that the meaning and intention of Section 7 of our Act of 1869 was not to adopt the law of procedure for the time being prevailing in England. While agreeing with Mr. Barwell that the omission of the word "proceed" is somewhat significant I would not be prepared to go further and uphold Mr. Barwell's contention on this circumstance alone. But on a careful and anxious consideration of other matters also adverted to by Mr. Barwell in his able and learned argument to which I shall presently refer I find myself in agreement with his general contention on this point.

15. My reasons are as follows : (a) Under Clause 37, Letters Patent of 1865, and the provisions of Sections 45 and 62 of our Act of 1869, matters of procedure in matrimonial causes in this Court are to be regulated by the CPC and the Rules made by the High Court. The passing of the decree in a suit, the form and contents of the decree and other cognate matters fall within the domain of the law of procedure and are therefore to be regulated by the CPC and the Rules made by the High Court. The CPC in certain cases provides for the passing of two decrees, e. g., in mortgage suits, administrative suits, partition suits, in suits for

mesne profits, partnership suits and account suits. In all other cases the Code provides for one decree to be passed. The Divorce Act, 1869, expressly provides for passing of a decree nisi in a suit for dissolution of marriage to be made absolute later on. Therefore passing of one decree in all matrimonial suits other than a suit for dissolution of marriage is obligatory on this Court.

16. (b) Further, on a careful consideration of the judicial decisions of high authority on Section 7, Divorce Act, I find myself in agreement with Mr. Barwell that the words "principles and rules" in Section 7 do not include the law of procedure prevailing in England for the time being. Thus, in 4 Beng. In Abbott v. Abbott 4 Beng. L. R. 51 which was decided in the very year in which the Divorce Act had been passed, Mcpherson J. observed that all the procedure under the Divorce Act is, by Section 45, to be regulated by Act VIII of 1859 and that Section 7, Divorce Act, applies not to points of procedure, but to the general principles and rules on which the Court is to act and give relief. Again in the case of Bailey v. Bailey (1897) 8 P. D. 217 which was decided in 1897 but was reported in the foot-note in (1897) 8 P. D. 217 Jenkins J. held that the expression "principles and rules" does not apply to procedure but points rather to the rules and principles on which the Court deals with the matrimonial causes in requiring a certain degree of evidence, and other cognate matters. This decision was followed by Henderson J. and his decision was upheld by the Court on appeal in Ramsay v. Boyle 30 WB. 489. It was definitely held there that Section 7 of the Act does not apply to matters of procedure. The same view was adopted by the Bombay High Court in A (husband) v. B (wife) 22 Bom. 612 where Farran C. J. observed as follows:

The principles and rules here referred to, are not, we think mere rules of procedure including rules which regulate appeals which are laid down in the subsequent Sections (45 and 55) of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief -- rules of quasi-substantive rather than mere adjective law. Exactly the same language was used in giving the Matrimonial Court in England jurisdiction to deal with cases over which the Ecclesiastical Courts had theretofore such jurisdiction, Sections 20 and 21 Vict., Ch. 85, Section 22. The above was the view taken in 4 Beng. L. R. (O. C.) 51 in Abbott v. Abbott 4 Beng. L. R. 51 and is, we think, the correct view."

17. The observation of Reilly J. in D. Iswarayya v. S. Iswarayya A. I. R. 1930 Mad. 154 that

the words "principles and rules" in Section 7, Divorce Act mean principles and rules of law, of evidence, of interpretation, of practice and of procedure but not statutory provisions nor statutory rules

was characterised as obiter by Stone J. in Agnes Sumathi Ammal Vs. D. Paul, . The case before Reilly J. dealt with the question whether the Courts in India had power to increase permanent alimony after having once made an order for

alimony. As pointed out by Mr. Barwell, in substance this case dealt with what may be called substantive law relating to substantive rights of the wife and not with mere matters of procedure and consequently when the case came before the Judicial Committee in (1931) LXI MLJ 367 (Privy Council) , their Lordships applying Section 7 of the Act held that the rule of the English law introduced by subsequent statutes giving power to the Court to increase or decrease the amount of alimony from time to time was to be followed by the Court in India. Viewed in this light, the decision in 58 I. A. 330 does not militate against but rather supports the point raised by Mr. Barwell. Stone J., however, only disagreed with the last seven words in the observation of Reilly J. quoted above but appears to have agreed with the rest of that observation of Reilly J. In fact he went further than Reilly J. With the utmost respect to both the learned Judges I do not find myself in agreement with any portion of the observations of Reilly J. quoted above except that the words "principles and rules" in Section 7, Divorce Act, mean principles and rules of law. I prefer to follow the rulings of this Court to which I have already referred. I shall deal with the decision in Agnes Sumathi Ammal Vs. D. Paul, in greater detail later on.

18. (c) Even if the words "principles and rules" in Section 7 of our Act brings within its ambit the law of procedure, yet in my opinion, the modern English practice of passing a decree nisi in a nullity suit cannot be introduced in our practice. The CPC has been adopted by Section 45, Divorce Act. This Section 45 is an express provision of our Act and consequently the main provision of Section 7, Divorce Act is subject to Section 45. The English practice of passing a decree nisi in a nullity suit introduced in England by the Matrimonial Causes Act of 1873 is clearly repugnant to what I conceive to be clearly enjoined, by the CPC and the latter Code being expressly directed to be followed by this Court by Section 45 of our Act, Section 7 must give way to Section 45.

19. (d) Apart from the considerations of Clause 37, Letters Patent, and Section 45 of the Act and of the provisions of the CPC to which I have adverted, I also find further and other difficulties in adopting the modern English practice of passing a decree nisi in a suit for nullity. It will be remembered that in 1869 there was no practice of passing a decree nisi in any matrimonial cause except in a suit for dissolution of marriage. The Indian Divorce Act admittedly embodied the law as it then was in England. Therefore in 1869 the group of sections collected in part IV under the heading " nullity of marriage " clearly contemplated and meant one decree in a suit for nullity of marriage. If that was the plain intent and meaning of those sections in 1869, as it must have been, then by necessary implication those sections, in 1869, excluded the idea of two decrees being passed in a nullity suit. It is true that the object of Section 7 of the Act was to provide for a certain amount of elasticity and adaptability by the use of the words "for the time being" in that section as opposed to the rigidity of the words "as the same is now used and exercised in the Diocese of London" to be found in Clause 22 of the Charter of 1774 which established the Supreme Court; but I cannot think that this circumstance can alter the meaning of the sections in Part IV of

the Act. Sections which meant and. contemplated one decree in 1869 cannot mean and contemplate two decrees in 1874. If therefore those sections continue to-mean and contemplate one decree as they did in 1869, then introduction of the modern English practice will lead to absurdity, for the modern practice will require two decrees when the sections in Part IV will insist on one decree. The two things cannot stand together as they are repugnant to each other. Therefore the meaning and intent of those sections in Part IV must prevail, because Section 7 is subject to other provisions of the Act. For this reason also I should not, by the application of Section 7, introduce any rule of law or procedure which will violate or run counter to the plain meaning of the other sections or the necessary implication thereof.

20. (e) Clause 37, Letters Patent of 1865 having expressly changed the language employed in Clause 37, Letters Patent of 1862 which had introduced the practice of the English matrimonial Courts, I find it difficult to conceive that the Indian Legislature by Section 7, Divorce Act, intended to go back to the position that had been created by the Letters Patent of 1862.

21. (f) The observations that have been made in different judicial decisions as to the form of a decree in a suit for nullity also point to the same conclusion. The first case to which I need refer is the case in A (wife) v. B (husband) 23 Bom 460. The question there was whether a decree of nullity of marriage made by a District Judge could be confirmed by the High Court before the expiration of 6 months from the pronouncing thereof and therefore strictly speaking the case is not in point. But there are observations in that case which support Mr. Harwell's contention. Thus Parsons A. C. J. observed as follows at page 462:

No doubt a difference is thus made between decrees for nullity passed by a High Court and those passed by a District Judge. The former are made absolute at once, the latter have to be confirmed by the High Court after a lapse of six months' time. No argument, however, can be based on this difference. Decrees for dissolution of marriage passed by a High Court are delayed in order to allow persons to intervene as provided by Section 16, but there is no provision allowing of intervention in the case of decree of nullity passed by a High Court. They may, therefore, be made absolute at once. In the case of decrees passed by a District Judge for dissolution, there is no provision made for any intervention, but yet they have to wait for six months before they can be confirmed. There is no reason, therefore, why decrees for nullity should not wait the same time.

22. The fact that at the time the Act was passed, decrees for nullity were made absolute at once under English law gives us no assistance. All we can say about this is that the Legislature adopted the English law in the case of decrees passed by a High Court and disregarded it in the case of decrees passed by a District Court, for which latter decrees a different procedure was expressly provided. For this reason we cannot u/s 7 apply the law that since 1873 has been in force in England, under which the Courts there have a discretion to shorten the period of six months for which decrees of nullity have ordinarily to wait (Section 36, Vic. C.

31)." In the above observations in so far as they relate to a decree in a suit for nullity passed by the High Court the learned Acting Chief Justice merely states the practice adopted by the Bombay High Court of making one absolute decree in such a suit, assumes the correctness of such practice and proceeds to discuss the point in issue in the light of this practice. The point I am now considering was not the exact point in issue in that case and therefore these observations are not of very great assistance in determining whether such practice is the correct one although I agree that it is so. Before leaving this case I should refer to the following passage in the judgment of Ranade J. at page 464:

Then again Section 7 of the Act, directs that the principles and rules followed by English Divorce Courts shall govern, as far as may be, the Courts here in dispensing relief. The English enactments did not at first direct that decrees even in suits for dissolution of marriage should be made decrees nisi, but only allowed appeal within three months (S. 55 of 20 & 21 Vic., C. 85). Such appeal was allowed in cases of nullity decrees also by Section 17 of 21 and 22 Vic., C. 108. Later on, Section 7 of 23 and 24 Vic., C.144 provided that every decree for divorce should in the first instance be a decree nisi, not to be made absolute till after three months had expired, and Section 3 of 29 and 30 Vic., C. 32, extended this period to six months. In 1873 the same period was provided for in respect of nullity decrees. It is thus clear that both on grounds of strict construction, and general reasoning as well as analogy with the corresponding provisions of English law, the principles of which are obligatory on Courts in India u/s 7, it must be held that Clause 4 of Section 17 with the proviso applies to nullity decrees sent up for confirmation u/s 20, and that no order of confirmation can be passed till after six months have expired.

23. In so far as the above observations of the learned Judge seem to imply that Section 7 of our Act, attracts all changes in the English law and that the English practice of passing a decree nisi in a nullity suit should be introduced here u/s 7, I respectfully disagree with the same. The considerations and the authorities I have referred to above were not discussed in that case. The case in *Edward Caston v. L. H. Caston* (1900) 22 All. 270 (F. B.) was also concerned with the question whether a decree of nullity of marriage made by a District Judge could be confirmed by the High Court before the expiration of six months from the pronouncing thereof and therefore this case is also not strictly in point. Mr. Barwell, however, relied on the following observations of Strachey C. J. at pp. 277 and 278:

Further, in regard to suits tried by the High Court in its original jurisdiction, whereas u/s 16 a decree for dissolution must in the first instance, be a decree nisi, not to be made absolute for at least six months, during which period any person may show cause why the decree should not be made absolute by reason of collusion, or concealment of material facts ; on the other hand, a decree for nullity u/s 18 is made absolute at once, and there is no provision for intervention.

The above observations also like those of Parsons A. C. J. in *A (wife) v. B*

(husband) 23 Bom 460 merely state the practice of the Allahabad High Court of passing one absolute decree in a suit for nullity and the point really in issue in that case is tested in the light of this practice. This case also does not help very much on the question whether such practice is the proper practice. In *Wilson v. K. H. Wilson* A. I. R. 1931 Lah. 245, Tapp J. allowed the appeal and passed a decree for nullity and expressly stated that the decree would be an absolute one. Mr. Bar-well relied on this case in support of his contention. No reasons having been given this decision is not of any great assistance except as showing the practice of the Lahore High Court. In *C. Samuel v. M. S. N. Samuel* A. I. R. 1934 Lah. 636, the same question of time for confirmation of a decree of nullity passed by a District Judge arose and the Special Bench of the Lahore High Court followed the Allahabad decision. There are observations, however, in this case recognising that the Indian Divorce Act makes a distinction between decrees for dissolution, of marriage and decrees for annulling a marriage.

24. The last case is the case in *Agnes Sumathi Ammal Vs. D. Paul*, to which I have already referred. In this case the question that is now before me was also precisely in point. Stone and Mockett JJ. held that the proper form of a decree to be passed in the first instance in a suit for a declaration of nullity of marriage filed on the Original Side of the Madras High Court was that of a decree nisi and not a decree absolute. Wadsworth J. expressed a contrary opinion. Stone J. took the view that Section 7, Indian Divorce Act, enabled the Madras High Court to adopt the change brought about by the English Matrimonial Causes Acts. He regarded the words "principles and rules" in Section 7 as embracing all principles and rules of law, of evidence, of interpretations, and practice and procedure including all provisions and Statutes and rules made in England from time to time. The learned Judge read the observations of the Judicial Committee in (1931) LXI MLJ 367 (Privy Council) as supporting his views. As I have already explained the last mentioned case does not support the very broad general proposition assumed by Stone J. The provisions of the Letters Patent of 1865 or of Section 45, Indian Divorce Act or the CPC or the considerations and difficulties I have discussed above do not appear to have been adverted to by his Lordship. Mockett J. also took the same view of Section 7. With the utmost respect I cannot agree with those learned Judges. I respectfully agree with the conclusion arrived at by Wadsworth J. for reasons stated by him as also for the other reasons stated by me above. It is needless to repeat my reasons.

25. In my opinion, therefore, the decree to be passed by this High Court in exercise of its matrimonial jurisdiction in a suit for nullity of marriage filed under the Indian Divorce Act must be one plain, simple, absolute decree as would be passed in a suit for declaration of nullity of marriage between non-Christian persons u/s 45, Specific Relief Act. Notwithstanding the great eminence of the learned Judge and of learned Counsel who were concerned with the case reported in 41 C.W.N. 268, and with the utmost respect to them, the practice introduced by them does not appear to me to be the correct practice under the law prevailing in this country. I accordingly direct that one simple decree

declaring the marriage to be null and void be drawn up in this case. Before leaving the case I cannot but refer to the following observations of Ranade J. in 23 Bom. 460 at pp. 463-64:

Quite apart from the requirements of a strict legal construction, it may be noted that the reasons of expediency, which suggest that such confirmation should not be made in the case of decrees for the dissolution of marriage till after six months have expired, hold equally good in the case of nullity decrees. The interests of children have to be safeguarded equally in either case. In the case of decrees declaring marriage null on the ground of bigamy, for instance, the status of the children, as legitimate or bastard, may often be involved in the confirmation of such decrees more seriously even than in the case of decrees for the dissolution of marriage. There is equal room for collusion in both cases. The same safeguards are, therefore, needed in the one case as in the other.

I fully agree with the reasons of expediency mentioned by his Lordship but those are matters for the Legislature. I do not think these reasons can or should weigh with the Court in construing a statute. It is for the Legislature to remedy the defect in our law and bring it into line with the English law.