
(1958) 10 BOM CK 0025
In the Bombay High Court
Case No : Appeal No. 135 of 1958

Sushila Mahendra Nanavati	Vs	APPELLANT
Mahendra Manital Nanavati		RESPONDENT

Date of Decision : 03-10-1958

Acts Referred:

Citation : (1958) 10 BOM CK 0025

Hon'ble Judges : Patel, J.;Gokhale, J.

Bench : Division Bench

Judgement

(1) The parties (petitioner Mahendra and respondent Sushila) were betrothed to each other in June or July 1945 and the marriage between the two took place on 10-3-1947 according to Hindu rites. After a few days of married life, the respondent went to her parent's place at Prantij and stayed there till the third week of April 1947. During her stay at Prantij she informed her husband that she had conceived. The petitioner was to leave for the U. S. A. for business and the respondent returned to Bombay about the end of April, 1947, before the petitioner left for the U. S. A. On or about 27-8-1947, respondent gave birth to a female child and the petitioner learnt about this in London where he was at that time. According to the petitioner, he was shocked when he learnt the news about a child having been born to him 5 months 17 days after marriage and he suspected that the child had been conceived prior to marriage through someone else other than the petitioner. after his return to India in November 1947, he filed a suit for dissolution of marriage in the Shahar nyayadhish Court of the Baroda State on the ground that the marriage was brought about by fraud and that the respondent had concealed from him the fact of her pregnancy from someone else. This suit was resisted by the respondent who contended that the child was born as a result of conception after marriage. The suit was thrown out by the Court at Baroda on the preliminary ground that the petitioner was not domiciled in the Baroda State and, therefore, the Court had no jurisdiction to entertain the suit. The Hindu Marriage Act, 1955, came into force on 18-5-1955 and the petitioner filed the present petition on 18-4-1956 for decree for nullity of

marriage under S. 12 of the Act on the ground

that respondent was at the time of marriage, pregnant by some person other than the petitioner. The respondent resisted the petition on the ground that she had submitted to the petitioner's demand for sexual relations before the marriage and as a result of such sexual relations the respondent had conceived through the petitioner. The trial court gave the petitioner a decree for nullity of marriage. The respondent wife appealed.

Patel, J.

(His Lordship after narrating the facts, proceeded:) Section 12 of the Act so far as is material to the present case is as follows:

12. (1) "Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely, (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-s (1) no petition for annulling a marriage (b) on the ground specified in clause (d) of sub-s. (1) shall be entertained unless the Court is satisfied,

(1) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(iii) that the marital intercourse with consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

Section 23 so far as relevant provides:

23. (1) "In my proceeding under this Act, whether defended or not, if the court is satisfied that (a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief,

x x x x x

(c) the petition is not presented or prosecuted in collusion with the respondent and

(d) there has not been any unnecessary or improper delay in instituting the proceedings, and

(c) there is no other legal ground why relief should not be granted, then and in such a case, but not otherwise, the Court shall decree such relief accordingly."

The issues that would arise would be:

(1) Whether the respondent was pregnant at the date of marriage.

- (2) If she was whether she was pregnant by some one other than the petitioner.
- (3) Whether the petitioner was at the time of marriage ignorant of the facts alleged.
- (4) Whether the marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

(2) Mr. Vimadalal has argued that in matrimonial suits, the Court must be satisfied that the petitioner has proved his case beyond reasonable doubt. He has relied upon a passage in the treatise by Rayden (7th Edition) at page 203 under the heading "Standard of Proof." The observations are :

"Adultery, desertion and cruelty must be proved beyond reasonable doubt when they operate by way of a bar to relief just as much as when they are relied on to found a right to relief". He has also relied on the observations in volume 12, Halsbury's Laws of England at paragraph 445. He has also relied upon the case of Ginesi v. Ginesi, (1948) 1 ALL ER 373. The ratio is:

"In a matrimonial case the same strict proof is required of adultery (which was regarded by the ecclesiastical courts as a "quasi-criminal offence") as is required in criminal case of a criminal offence properly so-called, namely that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact.

He has also relied upon Preston Jones v. Preston Jones. (1951) A. C. 391 : (1951) 1 ALL ER 124, Bater v. Bater 1950 2 ALL ER 458 and Galler v. Galler (1954) 1 ALL ER 536, cases which have accepted the standard therein laid down. The observations in 1948 1 ALL ER 373, received some criticism on the ground that these actions are civil actions in their nature and the standard of proof required was unduly hard. See Gowar v. Gowar, (1950) 1 ALL ER 804. At that time 1951 AC 391; 1951 1 ALL ER 124, was not decided by the House of Lords. In the case of (1954) 1 All ER 536, the question of standard, of proof in matrimonial cases has been considered and the law discussed. The following observations in the leading Judgment of Hodson, L. J. at page 540 are pertinent:

"I have used the language which I have because, since Fairman v. Fairman 1949 1 All ER 938 was decided, the much debated question whether the standard of proof in a divorce suit, which is a kind of civil action is the same as that in a criminal case, and whether the same rules apply, has been considered by the House of Lords in Preston-Jones v. Preston-Jones. Lord Mac Dermott said (1951) 1 All ER 124 :

".....I am unable to subscribe to the view which, though not propounded here has had its adherents. namely, that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt."

Lord Simonds expressly assented to and adopted the language of Lord Mac Dermott, who continued:

"The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be "satisfied" in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt v. Moncreiffe* (1874) LR 2 Sc 74 that the two jurisdictions are other than distinct. The true reason, as it seems to me why both accept the same general standard-proof beyond reasonable doubt-lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

It might appear from the passages which I have read from the judgment in (1949) 1 All. ER 938, that the analogy of criminal law was the ratio of that decision. But I think the result is the same by whichever road one travels. In divorce, as in crime, the Court has to be satisfied beyond reasonable doubt."

(3) The cases referred to above do take the view that there is no distinction to be drawn between the word "satisfied" accompanied by the words "beyond reasonable doubt."

(4) I may also refer to the case of *John Over Vs. Muriel A.I. Over*, where Sir Lallubhai Shah observes:

:I desire to make it clear that in divorce cases, great care and caution are necessary in dealing with the admissions of parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admission of a party as to adultery without any corroboration. Generally speaking, as a matter of prudence it is desirable to insist upon evidence corroborative of the admissions." Marten J., as he then was, observes at page 259 : (of Bom LR): (at p. 235 of AIR):

"No doubt S. 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. But that provision, in my opinion, does not override the express directions in Ss. 7, 12, 13 and 14 to which I have already alluded." This was under the Indian Divorce Act, 1869.

The reason of the rule is equally applicable here where the consequences to the woman are very serious. The words in the present Act (Hindu Marriage Act 1955) and the English Act are practically similar. Of course these cases of adultery. I think however that the same strict standard of proof must be required in cases like the present.

(5) Relying on this rule of strict proof, Mr. Vimadalal argues that the burden of the issue "whether the respondent at the time of marriage was pregnant by

some one other than the petitioner" is on the petitioner and in spite of the so-called admissions in the written statements, the petitioner was bound to prove it beyond reasonable doubt. According to him, he is bound to prove to the satisfaction of the Court that the respondent was pregnant at the time of marriage and secondly, that she was pregnant by some one other than the petitioner. Mr. Amin on the other hand contends very emphatically, relying on paragraph 9 of the judgment of the lower Court and paragraph 7, 8, 9, 10 and 11 of her written statement and her statement in court in her cross-examination that it is not open now to the respondent to urge that the petitioner was bound to prove that she was pregnant at the date of the marriage. He has contended that no party can be allowed to make out a case at variance with the pleadings. The party must be bound to its pleading for good or bad and has no right in appeal to make a case different and inconsistent from the one made out either in the plaint or in the statement. This, principle no doubt, is a correct principle and no exception can be taken to the same. But these proceedings are matrimonial proceedings and in matrimonial proceedings there can be no judgment by default or admission. I may refer to Rayden on Divorce at page 202 wherein the learned author states as follows:

"A decree must be refused even if the suit be not defended, where there is no jurisdiction to make it or in the absence of sufficient proof of the allegations put forward, for judgment by default is unknown in matrimonial cases; the jurisdiction of the Court is not affected by consent, the public interest does not allow it and no admission binds the Court; the analogy ordinary actions cannot be applied. The Court is obliged by statute to inquire into the existence of the facts to relief." Mr. Amin has pointed out that the cases referred to by the author were cases apparently of collusion or connivance. In the present case, he points out, the respondent's written statement, by distinct implication, admits the state of her being pregnant before the date of marriage and he says, she must be bound by these admission contained in her written statement. I may refer in this regard to the case of (1951) 1 ALL ER 124 wherein the case was somewhat peculiar. The husband was absent from the United Kingdom from 17-8-1945 to 9-2-1946. On 13-8-1946, the wife gave birth to a normal child. The husband therefore, brought a petition for the dissolution of the marriage on the ground of her adultery, the charge being based on the fact that a period of three hundred and sixty days elapsed between 17-8-1945 and 13-8-1946 from which it was alleged it followed that the child must have been conceived in adultery. The wife, it appears, adduced witnesses to speak to the visits paid to her by her husband in the late Autumn 1945, and there appears to be no doubt that the purpose in adducing them was to show that the husband and the wife were or might have been together on dates which would naturally account for the child's birth on 13-8-1946 and this evidence was disbelieved by the Commissioner. The argument advanced was that since the case had been conducted by the wife on the footing that the only question was whether the wife and the husband might have been together in October-November 1945, the other question should not be

open to the wife. Lord Normand observes at page 131, as follows :

"In divorce proceedings it is for the petitioner to prove the case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility, that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would in the circumstances of this case be unjust to the view to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born three hundred and sixty days after coitus and if that was what had, indeed happened the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth and might induce others closely connected with her to lend themselves to prevarication or worse." This Lordships then considered the other materials on record for the purpose of arriving at a decision as to whether the husband had proved his case beyond reasonable doubt. I may also mention that at the time when the respondent was in the witness box, an attempt was made to have the written statement amended to include the alternative case that she was not pregnant at the time of marriage. The learned Judge in exercise of his discretion refused to allow the amendment. He has taken a very strict view which indeed, would be justified in any civil suit. but it cannot be justified in matrimonial suits. Mr. Amin has urged that the Court below was right in refusing any amendment of the written statement and we ought not to interfere with that discretion. I think the case does not depend on the amendment of the written statement. We must be satisfied about the proof of the petitioner's case beyond any reasonable doubt and where a child has lived, we are of the view that S. 112 of the Indian Evidence Act also cannot be disregarded. Mr. Amin has argued that S. 112 of the Evidence Act can apply to a case where the legitimacy of the child is directly in issue and not to a case like the present where the proceedings are between the husband and the wife. A similar argument was advanced in the case of *Gaskill v. Gaskill* 1921 P. D. 425. Viscount Burkenhead L. C., considered the question of the burden and the presumption of law. He observed.

"It is true that the observations were made in reference to a legitimacy suit, but I cannot say that in the present case any different principle can apply otherwise it might happen that the mother would be condemned for adultery on evidence which would not disentitle the child to be declared to be the legitimate issue of her husband". (6) We are therefore, of the view that though the defendant has, in her written statement, stated that she was pregnant by the petitioner, we must require the petitioner to prove beyond reasonable doubt that she was so pregnant and that she was pregnant by some one other than the petitioner. We have therefore considered the evidence from that aspect also.

(His Lordship then dealt with other issues not material for the purposes of this report and proceeded :)

(7) It would appear from Mody's treatise on Medical Jurisprudence and Toxicology, 12th Edition P. 305 where he observes as follows:

"It has been observed that in women whose intermenstrual period is shorter than the usual time pregnancy has terminated at the eighth or ninth lunar month or even earlier, the child having attained full development. Sindey H. Waddy describes a case in which a woman aged 30 years, gave birth to a full-time daughter after gestation of 210 days - ten times three weeks - which was her normal inter menstrual period. The child cried lustily at birth, had a good crop of hair, was well coated with vernix caseosa, measured twenty inches in length and weighed seven pounds. The finger and toe nails were fully developed and the child sucked vigorously on being put to the breast." In the same volume at page 307 we find the following observations:

"Hubbard records a case where an infant born at the beginning of the seventh month of pregnancy weighed allow 15 ounces, and at the age of six weeks was in good health and weighed 323/4 ounces" . He has given several illustrations where children were born after 6 1/2 months of gestation period and have lived. One cannot overlook also the case of Clark v. Clark (1939) 2 All ER 59, where a child was born after a period of gestation which could not have exceeded 174 days on the assumption that the husband was the father of the child. The child lived and at the date of the hearing, it was about 3 years old. The medical evidence was to the effect that a child of so short a period of foetal life would not survive for more than a day or two. It was held "where the date of conception can be fixed and the actual period of gestation is ascertained, this ascertained period is comparable to the longer notional period, and for this reason what is in fact a six month's child may be comparable to what is called a seven-month's child. Therefore, when one reduces the actual facts of this case to the same terms as those upon which the theories and the tables are based, it is utterly impossible to say, that there is anything extravagantly improbable about this being a viable child". These remarks are equally applicable to the present case. We are, therefore. prima facie not satisfied that the petitioner has proved to our satisfaction that the respondent was pregnant by some one other than the petitioner and that the petitioner was not the father of the child which was born. (The rest of the judgment of Patel J., is committed as it is not material for the report.)

Gokhale, J.

(His Lordship first stated the facts. Then after discussing certain issues not material for the purposes of this report, proceeded:)

(8) But the question is whether the finding that there was no premarital sex relations between the parties, as alleged by the respondent, would be decisive of the suit, Mr. Vimadlal's argument was that it could not be decisive of the suit because the Court must be satisfied that the petitioner had established that the respondent was pregnant at the time of marriage by someone other than the

petitioner and he contends that this being a matrimonial action, the Court's conscience must be satisfied on this issue and, if there is any doubt, its benefit must go to the respondent. In this connection, Mr. Vimadalal pointed out that in certain English cases adultery has been described in the Divorce Division as a "quasi-criminal offence," s for instance in (1948) P. 179 at P. 181. It was conceded that this description was condemned in later English cases, such as in (1950) 1. All ER 804. In Halsbury's ; Laws of England, third edition, volume 12, at page 233, it is stated that a petition for divorce is a civil and not a criminal proceeding. At page 237, paragraph 445, it is also stated that

"the onus of proof is on the person who alleges adultery, for there is a presumption of innocence. Adultery must be proved to the satisfaction of the Court, That is, beyond reasonable doubt; the evidence need not reach certainty, but it must carry a high degree of probability". In Rayden on Divorce, seventh edition, to which also attention was drawn, at page 133 it is stated that

"the burden of proof is throughout on the person alleging adultery there being a presumption of innocence. a suit for divorce is a civil and not a criminal proceeding, but the same strict proof is required of adultery as is required in a criminal case before an accused person is found guilty; that is, the tribunal must be satisfied on proof beyond all reasonable doubt." Reliance was also placed on a passage at page 202 of the same book where it is stated:

"A decree must be refused, even if the suit be not defended, where there is no jurisdiction to make it, or in the absence of sufficient proof of the allegations put forward, for judgment by default us ybjbiwb ub natrunibuak cases : the jurisdiction of the Court is not affected by consent, the public interest does not affected by consent, the public interest does not allow it, and no admission binds the Court; the analogy of ordinary actions cannot be applied." Mr. Amin however argues that this is not a case of a collusion or connivance. The respondent admitted conception at the time of marriage and set up a false case of pre-marital sexual relations, which in the face of her discrepant testimony and the correspondence, cannot be accepted by any Court of law; and he contends that once her case as set out in the written statement is held not proved, a decree in favour of the petitioner must follow and was rightly granted by the trial Court. In this connection, he strongly relied on the fact that in her written statement in paragraph 7, the respondent had made out a case that she had submitted to the petitioner's demands for sex relations after the betrothal on certain representations made by the petitioner and that there were sex relations between them before marriage as a result of which relations the respondent conceived thought the petitioner. Mr. Amin pointed out that this statement has been repeated several times in the written statement had on the basis of this written statement and the particulars furnished by the respondent on 10-9-1956 the parties went to trial and the learned trial Judge, in paragraph 9 of his judgment has clearly pointed out how the controversy between the parties narrowed down to the question whether the petitioner had pre-marital sex

relations with the respondent and whether the latter conceived as a result of those relations.

(9) In this connection, it may be mentioned that while the respondent was giving evidence an application was made to the trial Judge for an amendment of the written statement, in which an alternative case was sought to be introduced, viz., that the respondent conceived through the petitioner after marriage. This application for amendment was refused by the learned trial judge on two grounds: firstly, that the respondent was trying to make out a new defence which was totally inconsistent with the defence which she had taken in her written statement and secondly if this case had been pleaded by the respondent originally the petitioner would have led evidence of expert witnesses such as doctors to prove that the conception could not have taken place after marriage, having regard to the date of birth of the child and the other circumstances of the case. Mr. Vimadalal contends that this amendment was wrongly refused by the learned trial Judge and should be allowed, if necessary, by this Court at the appellate stage.

(10) In this connection, reliance was placed on 27 Bom L. R. 251 : John Over Vs. Muriel A.I. Over, , where it was held that the Court will not grant a decree on the petition by a husband on the ground of the wife's adultery, where the allegation of adultery rests only on the admission made by the wife in her letters, unless it is satisfied that "all reasonable ground for suspicion is removed" and that there is no collusion between the husband and the wife. In this case, Sir Lallubhai shah, Acting Chief Justice, observed that the question whether in a given case the Court should consider the admissions of the wife as to adultery sufficient must necessarily depend upon the circumstances of that case, and the fact that admissions are accepted as sufficient in one case can afford no reason whatever for accepting them in another case. the learned Judge pointed out that the general considerations which would and should guide the Court in this matter are indicated in the judgment of Cockburn C. J. in Robinson v. Robinson and Lane (1958) 1 Sw. Tr. 362. In that case, Cockburn C. J. pointed out that though the admissions of a wife. unsupported by corroborative proof. should be received with the utmost circumspection and caution because of danger of collusion and other sinister motive which might lead to the making of such admission, nevertheless, if after looking at the evidence with all the distrust and vigilance with which it ought to be regarded the Court comes to conclusion that the evidence is trustworthy and amounts to a clear, distinct and unequivocal admission of adultery, the Court should have no hesitation to act upon such evidence and afford the injured party the redress sought for.

(11) In (1951) All. ER 124 it was observed by Lord Mac Dermott at page 138:

"..... I am unable to subscribe to the view which, though not propounded here, has had its adherents namely that on its true construction the word "satisfied" is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves status of the parties and the public

interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be "satisfied" in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in (1874) LR 2 Sc. and Div. 374: 30 LT 649, that the jurisdictions are other than distinct. The true reason, as it seems to me why both accept the same general standard - proof beyond reasonable doubt - lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned." In this case, Lord Normand in his judgment (P. 131) observed that in divorce proceedings it was for the petitioner to prove the case whether the action was defended or not, and though the putting forward, of a false defence may destroy the respondent's credibility, that in itself did not establish the truth of the petitioner's case. In this case, the House of Lords was concerned with the interpretation of the word "satisfied" in S. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 as amended by S. 4 of the matrimonial Causes Act, 1937, (now S. 4 (1) of the Matrimonial Causes Act, 1950). In a later English case (1954) 1 All ER 536 Hodson L. J. who delivered the Judgment of the court of Appeal observed that the English Courts have taken the view that there was no distinction to be drawn between the word "satisfied" and stated that in divorce, as in crime, the Court has to be satisfied beyond reasonable doubt.

(12) These principles in my opinion, would apply with all the greater force to cases under the Hindu Marriage Act 1955. Section 12 of this Act refers to voidable marriages and provides, in so far as it is material :

"(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable; and may be annulled by a decree of nullity on any of the following grounds, namely:-

.....

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

Under sub-s. (2)(b) of S. 12-

"Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage.....

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the Court is satisfied-

(I) that the petitioner was at the time of the marriage ignorant of the facts alleged:

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree."

Now, this Act has repealed the Bombay Hindu Divorce Act (22 of 1947). The Act came into force on 18th May 1955 and under s. 12(2)(b)(ii) both marriages solemnized before the commencement of the Act as well as after the commencement of the Act are affected. as regards marriages solemnised after the commencement of the Act, the proceedings have to be instituted within one year from the date of the marriage, so that in the case of marriages solemnized after 18th May 1955, the marriages would not be challenged under this section, after the expiry of one year from the date of the marriage. In the case of marriages solemnized before the Act, however, all the marriages would seem to be open to challenge, the only limitation provided being that the proceedings have to be instituted in these cases within one year of 18th May 1955. In my opinion, there can be no doubt in view of these provisions and the effect. It was intended to have on marriages solemnized before the commencement of the Act, a very grave and serious onus would lie on the person instituting proceedings with a view to having a decree of nullity of marriage under s. 12 of the Act.

(13) Under S. 23 of this Act, in so far as it is material it is provided:

"(1) In any proceedings under this Act, whether defended or not if the Court is satisfied that-

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and x x x x

(d) there has not been any unnecessary or improper delay in instituting the proceeding,

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise the court shall decree such relief accordingly."

In my judgment the satisfaction which the Court has to arrive at in proceedings under this Act must be satisfaction beyond all reasonable doubt. It is necessary therefore, to state some of the circumstances under which this petition came to be filed.

(14) As I have already stated, the petitioner filed on 13th march 1948 Suit No. 34 of 1947-48 under the Baroda Hindu Marriage and divorce Act on the ground that the respondent had become pregnant before his marriage with her and that he was not aware of it and the respondent had concealed the fact of her being so

pregnant from him and his parents. that suit was resisted by the respondent on the ground that she had become pregnant as a result of sexual intercourse that she had with the petitioner after her marriage with him in March 1947. That suit came to be dismissed as already stated, on the ground that the petitioner was not domiciled in Baroda and therefore the court had no jurisdiction to entertain the suit and the Baroda Hindu code was not applicable to the parties. Nothing was done, and perhaps nothing could be done by the petitioner till the Hindu Marriage Act, 1955, came into force. But even then the petitioner waited till 18th April 1956, that is to say 11 months after the commencement of this Act, before he filed the present petition. The petition contains not a few untruthful statements. It was stated by the petitioner in para 3 of the petition that the parties were betrothed some time in the beginning of 1946. But there is no dispute now that the betrothal took place some time in June or July 1945. he further stated in the same paragraph that it was at the request of the respondent's father that the marriage was performed in Bombay on the 10th March 1947 contrary to the convention of the community that the marriage should be performed at Prantij whereas the correspondence clearly discloses that the bride's family was anxious to have the marriage performed at Prantij but it was the desire of the petitioner's family that it should be performed at Bombay. In paragraph 4 it is stated that within 5 or 6 days of the marriage the respondent insisted on going back to her parents' place at Prantij on the pretext that she had to perform certain religious ceremonies and to offer Pooja to the family deity at Prantij. There is no evidence on the point and this has not been even put to the respondent in her evidence. In para 5 it is stated that the respondent had shown marked unwillingness to stay at Gandevi where the petitioner's married sister shardaben lived with her husband one Dr. Champaklal and that the petitioner's father had made an appointment in Bombay with Dr. Purandare for consultation after the respondent's return from Gandevi, but the respondent successfully evaded the appointment by suddenly coming down to Vileparle and leaving for Prantij. No evidence has been produced in support of this statement. The petitioner has denied in his evidence that he know that the respondent was pregnant at the time of marriage. In her evidence in examination-in-chief the respondent has also stated that she did not know at the time of marriage that she was pregnant. No objection was taken to this statement, but what is more, cross-examination was pursued on this point and she repeated in her cross-examination that she did not know prior to her marriage that she was pregnant though she stated that the statements contained in the written statement were true and that she had given instructions to her legal advisers for preparing the written statement. In my view, the respondent's written statement does not contain an unqualified admission that she was pregnant at the time of her marriage. It is well settled that admissions must be read as a whole. In *Motabhoy Mulla Essabhoy v. Mulji Haridas* 42 Ind App 103 : AIR 1915 PC 2 it was held by the Privy Council that though it was permissible to accept part and to reject part of witness's testimony an admission in pleading cannot be so dissected if it is made subject to a condition; it must either be accepted subject

to the condition or not accepted at all. Mr. Amin contended that in paragraph 7 and the other paragraph of the written statement there is an unequivocal admission by the respondent that she was pregnant at the time of marriage. I am not prepared to accept that contention. The defence set up by the respondent was that on entreaties and representations made to the respondent by the petitioner there were sex relations between the petitioner and the respondent before marriage and as a result of such sex relations the respondent conceived through the petitioner and that statement cannot in my opinion, be dissected so as to establish an unequivocal admission on the part of the respondent that she was pregnant at the time of marriage. It is nobody's case that there were signs of pregnancy at the time of marriage. The petitioner has denied any knowledge of respondent's pregnancy at the time of marriage and the respondent has also stated that she did not know that she was pregnant at the time of marriage. It is undisputed that Dr. Champaklal, the husband of Shardaben, had examined the respondent in the month of May 1947. He was not examined by the petitioner and a grievance was made about that in the trial Court on behalf of the respondent; but the learned trial Judge was of the view that because of the admission made by the respondent in her written statement there was no necessity for the petitioner to examine any medical expert to prove the fact that she was carrying at the time of marriage. But it was to be remembered that the frame of issue No. 1 was in accordance with provisions of S. 12 of the Hindu Marriage Act, 1955, namely "whether the respondent was at the time of the marriage pregnant by someone other than the petitioner as alleged in para 9 of the petition." The wording of the issue was not changed in spite of the so-called admission made by the respondent in her written statement and despite the particulars furnished by her. an application for amendment of the written statement to enable the respondent to set up an alternative case that the respondent conceived through the petitioner after marriage was rejected. But Mr. Amin contends that that was rightly rejected because the respondent could not be allowed to make a new case inconsistent with her admissions in the written statement. Mr. Amin argues that under O. 8 R. 5 of the Civil Procedure Code, it is well settled that both the plaintiff as well as the defendant must be held bound by the statement of facts in their respective pleadings. That undoubtedly is so. But under the proviso to O. 8, R. 5, the Court may, in its discretion, require any fact admitted to be proved otherwise than by such admission. The proviso to S. 58 of the Evidence Act is also to the same effect and in 27 Bom LR 251 : John Over Vs. Muriel A.I. Over, , which has been already referred to above, Mr. Justice Marten (as he then was) held that S. 58 of the Evidence Act has in general no application to divorce cases.

(15) Mr. Amin argued that we should not allow any amendment at the stage of this appeal because his client would be placed at a great disadvantage if the case were to be sent down now. Now, it is to be remembered that the petition itself has been filed nine years after the marriage, though undoubtedly the petitioner was entitled to file it before 18th May 1956 under S. 12(2)(b)(ii) of the Hindu

Marriage Act. It appears from the evidence that the father of the respondent as well as the doctor who treated her at Prantij are dead. Therefore, the hardship, if any would not be only on the petitioner but also on the respondent. Mr. Amin further contended that the Court must take into consideration the fact that the child was born to the respondent 170 days after the marriage and he argued that medically it would be improbable that the child would live if it was born within such a short period after conception, if the conception took place after marriage. He also drew our attention to the fact that a Notice of Motion was taken by the petitioner offering to have a blood-test taken with a view to ascertaining whether the child was a legitimate child, but the same was refused on behalf of the respondent. As against this, our attention was drawn to the case of (1939) 2 All ER 59, in which the husband claimed divorce on the ground of wife's adultery, the only evidence of adultery being the fact of the birth of the child, the period of gestation of which could not have exceeded 174 days, if the husband was assumed to be the father. In that case the child lived, and, at the date of hearing, was about three years old and it was held, on the basis of the medical evidence on the record, that the husband had not discharged the burden of proof in respect of the adultery, and it was sufficiently proved that the child was conceived in wedlock. Reliance was also placed on Dr. Modi's Medical Jurisprudence and Toxicology, twelfth edition, page 307, and Taylor's Principles and Practice of Medical Jurisprudence, eleventh edition, Volume II, page 34, in both of which cases have been given as to the earliest period at which a child may be born. It is the case of the respondent that the child born to her was prematurely born. It is not necessary at this stage to go into this question since no expert evidence was led on this point.

(16) I, therefore, agree that the case should be sent down to the trial Court to record a finding as to whether it was proved that the respondent was pregnant at the time of marriage. It could be open to both the sides to lead such oral and other evidence including expert evidence as they think fit. In the view we have taken, it is not necessary, I think to grant any formal amendment of the written statement.

(17) It is also somewhat unfortunate that no specific issue was framed in the trial Court under S. 12(2)(b)(iii) of the Hindu Marriage Act requiring the petitioner to prove that there was no marital intercourse with his consent since the discovery by him of the existence of the ground for a decree of nullity, as alleged by him. It appears that the learned trial Judge allowed the respondent's learned Advocate to argue that the petitioner as a reasonable man should have known that the wife must have been pregnant by some other person as soon as he came to know from the respondent's letter in April 1947 that she was pregnant, as is apparent from his letter dated 5th April 1947 which advised her an abortion and the petitioner should not have had sexual intercourse with her at the end of April 1947 before his departure for America, about which intercourse there is no dispute though there is a dispute as to the number of days they lived as husband and wife. This argument was allowed under the general issue No. 5

framed by the trial Court, which was whether the petitioner was entitled to have the marriage declared null and void. In our judgment a specific issue as contemplated under S. 12(2)(b)(iii) should have been framed and if that had been framed the non-examination of Dr. Champaklal, the petitioner's sister's husband, who seems to have examined the respondent in May 1947 at Gandevi would have assumed some significance. Similarly, the non-production of respondent's letters referred to in the petitioner's letters dated 5th and 8th April 1947 would have some relevance in case this issue had been framed. It is not necessary, however, for us to express any opinion on this question at this stage as we propose to remit to the trial Court that issue also for a finding. On that issue also both the parties will be allowed to lead such evidence as they wish to produce.

(18) I agree therefore, with the order proposed by my learned brother.

(19) Case remanded.