Mrs. Chandramani Dubey And Anr. vs Rama Shankar Dubey And Ors. on 13 April, 1950

Equivalent citations: AIR1951ALL529, AIR 1951 ALLAHABAD 529

Author: Ghulam Hasan

Bench: Ghulam Hasan

JUDGMENT

Kidwai, J.

1. Dr. H. S. Dubey, formerly Medical Officer of Health at Lucknow, died on 31-10-1942. He was Brahman and had married a Brahman wife from whom he had two sons, the plaintiffs, Rama Shankar and Karuna Shankar, and two daughters, Shanti Devi and Kanti Shukla. Dr. Dubey's Brahman wife died in 1927 and, it is no longer disputed, he went through the ceremony of marriage under the Indian Christian Marriage Act (XV [15] of 1872) with Mrs. Chandramani Dubey, a Christian by religion. A son, Udai Shankar and a daughter, Kamni, were born of this union.

2. For some time after Dr. Dubey's death there were no disputes between the parties and, in two litigations, Mrs. Chandramani Dubey and the six children were all impleaded as his legal representatives without any objection by any of them. Later, however, relations became strained and, on 25-4-1944, the two plaintiffs, denying the factum of the marriage and alleging that, in any case, it was legally void and ineffectual, instituted the suit out of which this appeal arises for a declaration that they are the sole heirs of Dr. Dubey, and as such, the sole owners of the property mentioned in Lists A and B attached to the plaint. They also alleged that the property in the two lists which stood in the name of Mrs. Dubey was in fact acquired by Dr. Dubey and Mrs. Dubey was-only a benamidar.

3. Mrs. Chandramani Dubey and her children under guardianship were impleaded as defendants 1 to 3. Shanti Devi and Kanti Devi were defendants 4 and 5. They never appeared and the suit proceeded ex parte against them. Mrs. Chandramani Dubey, however, contested the suit on behalf of herself and of her two minor children. Subsequently Kamni died and she is no party to this appeal. In the written statement it is pleaded : (1) That a marriage took place between defendant 1 and Dr. Dubey according to the mode prescribed by the Christian Marriage Act and that it was a valid marriage. Defendant 2 was an heir of his father, and defendant 1 had, for her life, an interest equal to that of a son, while defendant 3 was entitled to maintenance. (2) That Dr. Dubey did not enter into any benami transactions in the name of Mrs. Chandramani Dubey and that he only left the properties entered at Nos. 1 to 4 and 8 of List A as well as a portion of the property mentioned at No. 5 of the same list. (3) That the mortgagee rights alleged to be benami in the name of defendant 1

were acquired in pursuance of an antenuptial agreement for the benefit of the said defendant. (4) That the plaintiffs are not in possession of items 3 and 5 of list A or of the property entered in list B and consequently a suit for a mere declaration in respect of these properties is not maintainable. (5) That the Hindu Law does not govern the marriage of defendant 1 with Dr. Dubey since the parties to it were not Hindus, but such a marriage is governed, under Section 3 (g), Oudh Laws Act, by the principles of justice, equity and good conscience. (6) That, in any case, the marriage was good and valid even according to Hindu law. (7) That, by custom, marriages between Hindus and Christians are permissible. (8) That decree having been passed against the defendants as representatives of Dr. Dubey, without any objection by the plaintiffs, the plaintiffs are estopped from challenging the heirship of defendants 1 and 2. (9) That the jewellery and gold mentioned in list A belong to defendant 1 and the Insurance Policies mentioned in list B were assigned to her.

4. The learned Civil Judge of Malihabad at Lucknow framed the following ten issues :

"(1) Was defendant 1 the legally wedded wife of Dr. H.S. Dubey ?

If not, (2) Whether the marriage has been validated by the doctrine of factum valet ?

(3) Is there any custom to validate the marriage of a Hindu with a Christian lady? If so, its effect.

(4) Are the plaintiffs estopped from denying the title of defendants 1 to 3 as heirs of Dr. H.S. Dubey?

(5) Whether Dr. H.S. Dubey was the full owner of the properties mentioned in lists A and B attached to the plaint ?

(6) Whether defendant 1 was the absolute owner of the money due under policies as alleged in paras 31, 42 and 43 of the written statement ?

(7) Is the suit for mere declaration not maintainable as alleged in para 16 of the written statement ?

(8) Were the shares mentioned at items 1 to 7 in list C (A) attached to the plaint exclusive property of defendant 1 ?

(9) Whether the mortgage consideration advanced by Dr. H.S. Dubey was intended to be a gift in favour of defendant 1 as alleged in paras 24 and 25 of the written statement ?

(10) To what relief, if any, are the plaintiffs entitled ?

5. Upon these issues, the learned Civil Judge found: (1) That a marriage took place between Dr. Dubey and defendant 1 under chap. V of the Indian Christian Marriage Act and not under chap. VI. (2) That a mistake was made when the marriage, was certified under Section 62 of that Act but this error is immaterial because of Section 77 of the Act. (3) That the marriage was one which the personal law of one of the parties, namely, Dr. Dubey, did not permit. Consequently, by reason of Section 88 of the Act, the marriage was not valid. (4) That there is no conflict of law since the

Christian Marriage Act, no less than the Hindu law, prohibits such a marriage. Consequently the decision must be according to the law and not according to any "principle of justice, equity and good conscience". (5) That the doctrine of factum valet has no application. (6) That no custom permitting marriages between a Christian and a Hindu is proved. (7) That there is no estoppel. (8) That, out of the Insurance Policies, the ones mentioned at Nos. 3, 4, 8 and 10 of list C (B) are the property of defendant 1 herself; while Nos. l, 2, 11 and 12 matured in the lifetime of Dr. Dubey and the money was paid over to him. The other five policies descend to the heirs of Dr. Dubey and defendant 1 holds the money due under them in trust for these heirs. (9) That, of the shares mentioned in list C (A), defendant 1 owns those entered at items 3 to 7 but not the rest. (10) That the mortgage was taken by Dr. Dubey for the benefit of defendant 1 and the money due under it (items 2 of list B) belongs to her. (11) That the jewellery, item 7 of list A, belonged to Dr. Dubey. (12) That the suit is bad under Section 42, Specific Relief Act, only in respect of two shops included in item 5 of list A in respect of which sarkhats had been executed by tenants in favour of defendant 1 before the institution of the suit.

6. As a result the learned Civil Judge decreed the suit and declared that the plaintiffs are the sole heirs of Dr. Dubey and are entitled to the property left by him excepting two shops (Kothris) of item 5 of list A in respect of which the suit was barred by s. 42, Specific Relief Act. Defendants 1 and 2 have appealed. There are no cross-objections.

7. In the appeal the principal question involved is the legality of the marriage between Dr. Dubey and defendant 1. The findings of the learned Civil Judge with regard to the property left by Dr. Dubey, in so far as they are against Mrs. Dubey, were also challenged.

8. One of the parties to the marriage being a Christian the marriage was celebrated under the Indian Christian Marriage Act by the then Deputy Commissioner of Lucknow, Mr. Acton, acting as Marriage Registrar. The factum, as distinct from the validity, of the marriage is no longer challenged. The determination of the validity of the marriage depends upon the construction to be placed upon the various provisions of the Indian Christian Marriage Act, particularly Section 88, which reads as follows :

> "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

9. Sir Iqbal Ahmad, for the appellants, contended that : (1) Once the factum of marriage performed under this Act is proved it is not necessary to prove that any other forms or ceremonies were performed. (2) The prohibition in Section 88 of the Act must, having regard to the other provisions of the Act, be limited to a prohibition consequent on the parties being related to each other within the prohibited degrees. (3) Even if the words of Section 88 are construed as embracing prohibitions other than those existing by reason of affinity or consanguinity, there is nothing in Hindu law which forbids a marriage between a Hindu and a non-Hindu.

10. On the other hand Mr. Niamatullah, for the respondents, urged : (1) That, in a marriage performed under the Indian Christian Marriage Act, it is necessary to perform also the ceremonies

required by the personal law of the parties. (2) That the words of Section 88 must be literally construed and they embrace within their scope every prohibition which the personal law of the parties lays down. (3) That the Hindu law, as established at the present day, does contain a prohibition against the marriage of a Hindu with a non-Hindu.

11. Before considering the points raised it will be as well to recapitulate briefly some of the rules relating to the interpretation of statutes. If the words used in a statute are so plain that, in the context in which they were placed, they can have only one meaning, no question of interpretation arises and that meaning must be given to them, however arbitrary or mischievous it may appear, to be and it is not open to the Court to refuse to give effect to it on the ground that the Legislature intended to do something else. If, however, the language used is capable of having more construction than one placed upon it, the problem becomes one of interpretation and the Court has to proceed to ascertain the intention of the Legislature.

12. In order to ascertain the intention of the Legislature, the whole of the enactment must be considered and, so far as possible a consistent meaning must be given to all its parts. Assistance may be derived from the previous state of legislation on the subject and from contemporaneous exposite. Proceedings in Legislature cannot be considered but, since the object of legislation -- the evil which the Legislature sought to remove or the state of affairs for which it felt it necessary to provide a law -- is a relevant consideration the statement of the "Objects and Reasons" has often been considered. Further, so far as possible, a rational construction must be placed upon each provision and, for this purpose words may be given a wider or a narrower meaning than that which they usually bear. Thus in Raghuraj Chandra v. Subhadra Kunwar, 55 I. A. 139: (A.I.R. (15) 1928 P. C. 87), the Privy Council refused to give to the word "brother" used in Section 22 (5), Oudh. Estates Act, its dictionary meaning and excluded from its scope the brother by natural guardian of a person who had been adopted into another family.

13. It must also be remembered that, in the present case, the validity of a marriage, the performance of which is admitted and the legitimacy of the offspring of that marriage are involved. Every presumption will, therefore, be made in favour of the validity of that marriage and of the legitimacy of the offspring. Here again, if the language of the statute is clear it must have effect given to it, even though this may result in avoiding a marriage or in bastardising the offspring of that marriage. If, however, the language is capable of having two interpretations given to it, that interpretation will be preferred which results in validating the marriage and upholding the legitimacy of the offspring.

14. In Inderan Valungypuly Taver v. Ramasawmy Pandia Talaver, 13 M. I. A. 141 : (3 Beng. L. R. 1 P. C.), the question involved was whether a marriage celebrated between a Sudra and a woman who was alleged to belong to no caste at all was valid and their Lordships say :

> "When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favour of there being a marriage in law. The zamindar according to the usages of his country and nation, on parting with his first wife, would be naturally desirous of marrying again, and having male issue. It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage, if it was known that

> that marriage was a marriage which was invalid in law."

15. It will be seen that the question involved in the case was whether there was a legal impediment to the marriage and not an impediment based on facts, though eventually their Lordships came to the conclusion that the fact upon which the contention was based, namely, a difference of caste, did not exist. The same principle has been accepted in a large number of cases decided by Indian High Courts but it is not necessary to refer to them because the same law has again been laid down in the recent case of Kashi Nath v. Bhagwan Das, (1947) 2 M. L. J. 301 : (A.I.R. (34) 1947 P. C. 168).

16. That this principle is not one merely of English law but also of Hindu law when it comes to determine such things as the interpretation of rules relating to prohibited degrees, is made clear by Sastri who says, in his Hindu Law, (7th Edn.), at p. 103:

> "The Golden rule of prohibited degrees--For Marriages to follow, therefore, in a case where the validity of a marriage is called into question on the ground of its being within the prohibited degrees, is to pronounce it valid if found to be celebrated in the presence, and with the assent, of the relations and the caste people, notwithstanding written texts of the law to the contrary, which must be taken to be recommendatory in character as appears from Manu's text on the subject....."

17. Again, at p. 136, Sastri discusses the questions of the validity of inter-caste marriage and sums up the position thus :

> "It should, however, be observed that these prohibitions appear to be of moral obligation only ; hence although marriage of an inferior man with a superior woman may be disapproved and condemned, still if such a marriage does in fact take place, the same must be regarded as valid as between the parties to it, and the issue legitimate. They may be excommunicated and excluded from inheritance of their relations, but, as between themselves, the relationship of husband and wife, and of parent and child, must be held legitimate and there must also be reciprocal heritable rights among themselves ... there being no authority for pronouncing the marriage to be invalid, however reprehensible the same may be represented to be."

18. The first question to consider then in this background is whether, in the case of a marriage in which one of the contracting parties is a Christian any ceremony or ceremonies, and, if so, what, are required to be performed. The Indian Christian Marriage Act was passed, as its Preamble shows, "to consolidate and amend the law relating to the solemnisation in India of the marriages of persons professing the Christian faith."

It is, therefore, not only an amending but a consolidating Act and is thus intended to pro-vide a Code in itself. The enactments which it repeals--14 and 15 vict., C. 40 and Act v [5] of 1865 --were similar Codes.

19. Then Section 5 provides that marriage in which one or both the parties is, or are a Christian, or Christians, may be celebrated by persons who have received episcopal ordination "according to the rules, rites, ceremonies and customs of the Church of which he is a minister." It also provides for the solemnisation of a marriage by a Minister of Religion licensed under the Act or by, or in the presence of, a Marriage Registrar appointed under the Act. Nothing is said in the section about the rules or rites or ceremonies to be observed in such cases, but in the case of a marriage solemnised by the licensed Minister, Section 25 provides that the "marriage may be solemnised between the persons therein (in the certificate) described according to such form or ceremony as the Minister thinks fit." In the case of a marriage solemnised by, or in the presence of a Marriage Registrar, Section 51 provides that :

> "After the issue of the certificate the Marriage Registrar ..... marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates be solemnised between them, according to such form and ceremony as they think fit to adopt."

20. In both of the two last mentioned cases the presence of two witnesses, besides the Minister or Marriage Registrar, is made essential (vide Ss. 25 and 51) and in the case of a marriage celebrated by, or in the presence of the Marriage Registrar the two following declarations have also to be made by each of the parties :

> "I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D."

And each of the parties shall say to the other as follows, or to the like effect:

> "I call upon these persons here present to witness that I, A. B., do take the, C. D. to be my lawful wedded wife (or husband)."

21. Thus marriages under the Act may be divided, so far as ceremonies are concerned, into three categories : (1) If the marriage is celebrated by a person who has received episcopal ordination or by a clergyman of the Church of Scotland, all the rules, rites, ceremonies and customs of the Church to which the Minister belongs must be observed : (2) If the marriage is celebrated by a licensed Minister then the matter of ceremonies is left to his discretion ; (3) If the marriage is celebrated by the Registrar or by some one else in his presence, the choice of the ceremonies to be observed is left to the parties.

22. So far as the Christian partner to the marriage is concerned there can be no doubt that he, or she, will be bound by the marriage tie if only the rules, rites and ceremonies of the Church are performed as contemplated in the first alternative or if no ceremonies are performed other than the essential ones prescribed by the Act in the case of the last two alternatives. Marriage is not a contract which can be made to bind only one party and when the Legislature was enacting a consolidating Act relating to the solemnisation of marriage and contemplated also marriages in which persons other than Christians might be contracting parties, it would have enacted some

provision relating to the rules, rites, ceremonies and customs of that other person's religion and would not have left it to the discretion either of the licensed Minister, in one case, or of the parties to the marriage in the other, if it meant these rites, etc., to be a necessary part of the ceremony. In this connection it is a matter of much importance that Sections 5, 6 and 9 make it essential that the person who solemnises such a marriage is Christian or, at least, that a Christian Marriage Registrar is present.

23. Further Section 4 makes it clear that it is only marriage not solemnised in accordance with "the provisions of the next following section" that are void The next following section is 5 and, as has already been seen, it only requires rules, rites, ceremonies and customs to be observed in the case of marriages solemnised by persons episcopally ordained or by clergyman of the Church of Scotland. Thus the absence of ceremonies in marriages solemnised by the Marriage Registrar will not invalidate the marriage. The present marriage does not, therefore, fail by reason of the absence of the ceremonies required to be performed in the case of Hindu marriages.

24. The same view was expressed in In re Kolandavelue, 40 Mad. 1030: (A. I. R. (5) 1918 Mad. 601 : 18 Cr. L. J. 840 F. B.) and in P. P. Saldanha v. A. C. Saldanha, A. I. R. (17) 1930 Bom. 105 : (54 Bom. 288), Blackwell, J following that decision said at p. 111 of the report:

> "In my opinion it is impossible to suppose that the Legislature in an Act dealing with the forms of marriage of Christians could by Section 88 have intended to enable parties who had gone through a form of marriage permitted by the Act to rely upon a prohibition as to form imposed by their personal law so as to invalidate the marriage. The whole scheme of the Act of 1872, in my judgment, indicates that it is an Act dealing with the forms of solemnisation of marriage."

At a later place in the same judgment the learned Judge held that even if the Canon Law, which was the personal law of the parties, they being Catholics, prohibited them from going through the form of marriage before the Registrar, Section 88 did not cover such a prohibition and the marriage would be valid in spite of provisions of Section 88.

25. The case of Alfred Robert Jones v. Mt. Titli, 55 ALL. 185 : (A. I. R. (20) 1933 ALL. 122) (from which an appeal was filed and Titly v. Alfred Robert Jones, 56 ALL. 428 : (A. I. R. (21) 1934 ALL. 273, is the decision in appeal) was of a different nature since that marriage was performed by a person not authorised to solemnise marriages and the rules, rites, ceremonies and customs of the Church in which it was performed were not observed. That case, therefore, is not any authority for the proposition that in marriage performed by a Marriage Registrar any rites, customs are necessary.

26. I pass on to a consideration of the next question, namely, what is the meaning to be attached to Section 88, Christian Marriage Act? That section reads as follows :

> "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

27. The first question that requires consideration is what does the word "forbids" mean? is it equivalent to "not recognising as valid". We have next to consider whether the effect of this section is to incorporate all the prohibitions of the personal laws of both the parties to the marriage into the Act or only those to which Sir Iqbal Ahmad has referred as absolute prohibitions, such as the rules relating to prohibited degrees ?

28. Section 88 is not a detached provision and must be considered along with the other provisions of the Act in the light of the object of enactment in order to arrive at its true meaning. The Act provides not only for the marriages, both parties to which are Christians but also for marriages only one of the parties to which is a Christian. This, however, does not take us very far because, even if a few instances in which such marriages are possible are shown to exist, that would be sufficient justification for the Act. There can be no doubt that a Christian woman whose personal law is the English law can legally marry Muslim man without any impediment either from her own law or from the law of the husband Further Christians may marry persons professing none of the recognised religions. The contention that Section 4 should have contained an exception excluding the possibility of a marriage between a Christian and a Hindu if it was meant to prohibit such a marriage, also has no force because, if Mr. Niamat Ullah's contention is correct, Section 88 does operate as such an exception.

30. Nevertheless it appears from a consideration of the decided cases --although the exact point which we are called upon to consider has not yet been decided--that the scope of Section 88 is not so wide as that for which Mr. Niamat Ullah contends. Before considering these authorities it will be of great assistance if the previous law on the subject is considered since Act XV [15] of 1872 is only the last of a series of enactments relating to the subject.

31. The first Act to which reference may be made is the English Statute, 14 and 15 vict. chap. 40 which was also passed to provide for the solemnisation of marriages one, or both parties, to which was, or were, a Christian, or Christians.

32. Section 2 of the Statute required the person who was to celebrate the marriage to issue a certificate of notice having been given is asked to do so (sic) "provided no lawful impediment according to the law of England be shown to the' satisfaction of the Marriage Registrar why such certificate shall not Issue ....."

33. Section 6, then provided: "Before any certificate as aforesaid shall be issued by Marriage Registrar, one of the parties intending marriage, shall appear personally before such Marriage ^Registrar, and shall make oath, or shall make his or tier solemn declaration instead of oath, that he or she believeth that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage. . ."

34. Section 23 is very important. It reads as follows:

> "All marriages solemnised under the Act shall be good and valid in law to all intents and purposes."

35. The only prohibition that this Act contained was to marriages to which an impediment existed under the English law. Further it lays emphasis on prohibitions of affinity or kindred although it does not indicate by what law the impediment of affinity or kindred is to be judged. Finally it validates all marriages under the Act. Since the Act does not contain any reference to any impediment created by the personal law of the parties other than the English law, it would follow that a marriage was valid even if it infringed those impediments. Indeed the provision was too wide in its scope because it might well validate a marriage which the Statute itself did not recognise, once the ceremony of marriage had been gone through.

36. The first Act which the Indian Legislature passed on the subject was Act v [5] of 1852 but that has no relevancy to the question involved in this appeal since it only provided the procedure and the machinery for carrying out the provisions of 14 and 15 Vict. C. 40.

37. Then came Act XXV [25] of 1864 which left the provisions of 14 and 15 vict. C. 40 and of Act v [5] of 1852 unaffected but made further provision for the solemnisation of marriages "between persons one of whom is a person, or both of whom are persons, professing the Christian religion". Sections 1 and 2 and 5 read together rendered a marriage celebrated otherwise than according to the provisions of the Act void. Section 13 contained conditions for the issue of a certificate of notice which were exactly the same as those contained in Section II and VI of 14 and 15 vict. C. 40.

38. By Part V of this Act a separate procedure was laid down for marriages, both parties to which were "native Christians" since the said Statute, 14 and 15 vict. C. 40, and the said Act v [5] of 1852 of the Governor-General of India in Council are found not to be suitable. Section 42 dispensed with the preliminaries of notice and certificate of notices and required only that conditions contained in it should be fulfilled These conditions were:

1. "The man should be more than 16 years of age and the woman more than 13.

2. "The man and the woman shall not stand to each other within the prohibited degrees of consanguinity or affinity".

3. "Neither of the parties shall have a husband or wife living".

4. Each of the parties shall make a declaration (of which the form is given) accepting the other as his husband or wife and,

5. "The declaration must be made between 6 in the morning and 7 in the evening"

39. Section 46, then provides: "All marriages performed between native Christians as aforesaid in accordance with the provisions of Section 42 of this part, shall be good and valid to all intents and purposes."

40. It is to be noticed that this Act contains no provision corresponding to Section 23 of 14 and 16 Vict. C. 40 no doubt because that Act still continued to apply to all persons other than native

Christians.

41. This Act was repealed by Act V [5] of 1865, which, however, did not affect the operation of 14 and 15 vict. C. 40 and Act V [5] of 1852. Important changes were introduced by this Act but the relevant provisions are substantially the same as those of Act XXV [25] of 1864 and need not be repeated. The reason for the enactment of this law is thus stated in V. H. Lopez v. E. J. Lopez. 12 Cal. 706 at p. 727 (F. B.) by Wilson J. delivering the judgment of the Full Bench:

> "Under the Act of 1864, obviously a clergyman of the Church of Borne could only celebrate a marriage either as a licensed minister, or as a person licensed to certify under Part V. The Roman Catholic clergy objected to this Act, as we learn from the objects and reasons of the amending Act, upon certain points connected with registration, and the hours for celebrating marriages. We learn from the speech of the member who had charge of the amending bill that they objected also to their clergy having to be licensed by the State and to the provisions as to prohibited degrees. On the latter point it was urged that there were classes of Christians in Southern India who were compelled by social circumstances to marry within the degrees prohibited by English law ; to remove the latter grievance was one of the objects of the fresh legislation. Act (V [5] of 1865) was accordingly passed, and it makes two material changes. It puts all Episcopally-ordained clergymen, including, of course, those of the Church of Borne, on the same footing with the clergy of the Churches of England and Scotland, and it excluded Roman Catholics from Part V. The effect was to allow Roman Catholics to have their marriages solemnised by their own clergy according to the rites of their Church, nothing being said one way or the other about prohibited degrees."

42. While this Act was still in force two more enactments were passed which have an important bearing on this case. They were the "Native Converts Marriage Dissolution Act" (Act XXI [21] of 1866) and the Indian Divorce Act (Act IV [4] of 1869) both of which are still in force. The first of these Acts applies to all persons domiciled in British India who are Christians, Muslims or Jews.

43. Sections 4 and 5 of Act XXI [21] of 1866 permit a husband or wife who has been converted to Christianity and had in consequence been deserted by the other spouse for a space of over six months to sue for restitution of conjugal rights. When the respondent appears he or she shall "be asked whether he or she refuses to cohabit with the petitioner, and, if so what is the ground of such refusal." (Section 18.)

44. Sections 16 and 17 then provide that if, on the evidence adduced before him, the Judge is, after the interrogation required by Section 13, satisfied that the desertion is by reason of a change of religion, he shall adjourn the case for a year, during the course of which the parties shall have a reasonable opportunity of meeting in the presence of suitable witnesses "with a view to ascertaining whether or not the respondent freely and voluntarily persists in such refusal." Thereafter the case is to be taken up again and the respondent is to be interrogated. If the respondent "again refuses to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the

petitioner."

It is only after this that the marriage of the parties shall be dissolved by a decree of the Judge : vide Sections 16 and 17.

45. Section 34 provides :

> "Nothing contained in this Act shall be taken to render invalid any marriage of a Native convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church."

46. Thus Act XXI [21] of 1866 did not recognise the ipso facto termination of the marriage of a Hindu if one party to the marriage became a Christian and it was only if there was persistent refusal to cohabit by the spouse who had not been converted that the marriage could be dissolved. This was not merely the effect of the Act but also of the Hindu law, according to which marriage is indissoluble and the conversion of one of the parties to another religion does not terminate the marriage : vide In re Millard, 10 Mad. 218, Thapita Peter v. Thapita Lakshmi, 17 Mad. 235 (F. B.), (at page 239, judgment of Muttusami " Ayyar J.), Emperor v. Lazar, 30 Mad. 550 : (6 Cr. L. J. 338) and In the matter of Ram Kumari, 18 Cal. 264, which was a case of a conversion of the wife to Islam.

47. Thus, at the time when the enactments were passed, there was nothing in the law which could prevent a Hindu being the lawful spouse of a Christian or a Muslim.

48. Then came the Indian Divorce Act (Act IV [4] of 1869), which was an Act to amend "the law relating to the divorce of persons professing the Christian religion, and to confer upon certain Courts jurisdiction in matters matrimonial."

When the Act was passed it was stipulated in Section 2 that relief could only be granted under the Act if the petitioner was a Christian. By Act XXX [30] of 1927 relief has become available under Act IV [4] in those cases also in which the respondent is a Christian. Thus the Act now applies when either party is a Christian, but; in judging the intention of the Legislature in 1869, we must leave the amendment out of consideration. Both amended and un-amended Section 2 clearly show that the Act did not lay down the law relating to divorce only in case both the parties were Christians but also in cases in which one only of the parties was a Christian. If, therefore, a Christian who-had been married under the provisions of 14 and 15 vict. C. 40 or Act V [5] of 1865 to a non-Christian sued for divorce or desired a decree of nullity of marriage he could only proceed under Act IV [4] of 1869. If he sued for a decree of nullity of marriage he could only be granted relief on one of the grounds mentioned in Section 19. These grounds are :

> "(1) That the respondent was impotent at the time of the marriage and at the time of the institution of the suit ;
>
> (2) That the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity ;

> (3) That either party was a lunatic or an idiot at the time of the marriage ;
>
> (4) That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force :
>
> Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud."

49. It is important to notice that difference of religion is not one of the grounds justifying the annulling of the marriage. Ground (2) is one of the grounds which are specifically mentioned in the Act v [5] of 1865 as being an impediment to a marriage and by Section 21, Divorce Act, the offspring of Such a marriage is not legitimised. Yet a decree of nullity of marriage has to be obtained. Similarly the other grounds including those contained in the proviso, are such as go to the root of the marriage and yet a decree of annulment has to be obtained, but a Christian party cannot get his marriage annulled on the ground that the marriage is void owing to the fact that the personal law of the other party forbids such a marriage by reason of a difference in religious beliefs.

50. This is rot all : the Christian spouse may apply under Section 32 of the Act "for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."

As to what is meant by the words "there is no legal ground" is explained in Section 33 which reads:

> "Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage."

51. Thus, a plea that the marriage is void by reason of a difference of religion not being among the grounds mentioned in Section 19, cannot be set up as a defence in a proceeding for restitution of conjugal rights and a Christian husband could obtain such a decree against his Hindu wife, or a Christian wife against her Hindu husband. This could not be unless the Legislature ignored all distinctions of religion and recognised the validity of a marriage in spite of such distinctions.

52. When, therefore, Act XV [15] of 1872 came to be passed, this was the established law. While the previous enactments relating to the Solemnisation of Christian Marriages have been repealed by that Act, Act XXI [21] of 1866 and Act IV [4] of 1869 (with some modifications which are immaterial) continued to be still law.

53. Act xv [15] of 1872 is also an Act to provide for the solemnisation not only of marriages both parties to which are Christians but also marriages to which only one of the parties is a Christian. It lays down the procedure which has to be followed in such cases and I have already held that no ceremonies are required other than those specifically required by the Act or, in case the marriage is

celebrated by an Episcopally ordained person or a clergyman of the Church of Scotland, the rules, rites, ceremonies and customs of the Church of which he is a minister. Thus under the Act, none of the things which go to constitute a marriage a sacrament, as distinguished from a civil contract, are required to be performed and if both the parties are Christians, they need not perform these ceremonies which make marriage a sacrament by getting it solemnised by a Marriage Registrar. In such circumstances prima facie prohibitions regarding marriage based on a difference of religious beliefs between the contracting parties did not seem to have any place.

54. Act XV [15] of 1872 has made considerable departures from the previous enactments. While the previous enactments stipulated that the licensed minister should not issue a certificate of notice if any "lawful impediment according to the law of England" was established, the new Act simply says (Section 17):

> "provided .... that no lawful impediment be shown to his satisfaction why such certificate should not issue."

(See also Section 41).

55. Sections 18 and 42 still require a solemn affirmation to be made by one of the parties personally before the minister or the registrar "that he or she believes that there is not any lawful impediment of kindred or affinity, or other lawful hindrance, to the said marriage."

56. In Part VI which deals with the marriage of "Native Christians" exclusively Section 60 directs that every marriage -solemnised under that part shall be certified if the following conditions exist: (1) The man is over 16 years and the woman over 13 years of age. (2) "Neither of the persons intending to be married shall have a wife or husband living". (3) Each of the parties, in the presence of the person licensed to solemnise the marriage and two other persons makes a declaration (the form of which is given) accepting the other as husband or wife.

57. It will be seen that, in the case of marriages not covered by Part VI, it is not laid down, how the existence or absence of an impediment is to be determined. In the earlier Acts the English law was the guide but not so under this Act. Some provision had accordingly to be made somewhere and that was the reason for the enactment of Section 88. Further in the case of a marriage between two Native Christians no mention is made of prohibited degrees. That too is covered by Section 88.

58. In V.H. Lopez v. E.J. Lopez, 12 Cal. 706 (F. B.) Wilson, J. after an elaborate survey of the law says of Act xv [15] of 1872:

> "That Act repeals both the 14 and 15 Vict-C. 40 and Act V [5] of 1865. It re-enacts the provisions of these Acts about marriages before licensed ministers with this exception : Under the earlier Acts the registrar or the minister had to satisfy himself that there was no 'lawful impediment according to the law of England', and one of the parties had to declare that there was no 'impediment of kindred or affinity : Under the new Act the words 'according to the law of England" are left out, the minister or registrar

> is to fee, satisfied that there is no 'lawful impediment', and the same declaration as before is required. In Part VI the Act or 1872 re-enacts the former provisions about marriages of Native Christians omitting all reference to the prohibited degrees. But Section 88 says : 'Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into. There can be no doubt as to the object of the changes made by this Act: the object clearly was to secure that there should toe nothing in the rules as to the celebration of Christian marriage tending to indicate, or suggest that any particular rule as to prohibited degrees applied to any particular marriage."

59. In P.P. Saldanha v. A.G. Saldanha, (A. I. R. (17) 1930 Bom. 105 : 54 Bom. 288) the question of the interpretation of Section 88 arose directly but the same question as arises in this case did not arise then. In that case two Roman Catholics had been married before the Marriage Registrar and the question was whether such a marriage was valid having regard to Section 88, since it was not in accordance with ceremonies of the Church and was, therefore, forbidden by the Canon law. The learned Judges held that Section 88 does not deal with forms of marriage and that consequently the marriage was not void. They, however, proceeded to consider the case on the assumption that Section 88 did cover the case and they held that even then the marriage was not void. Blackwell J. said, at p. 112 of the report :

> "In the absence of evidence that a civil marriage which the law of the land permits is expressly forbidden by Canon law, I hold that the prohibition which the appellant seeks to rely upon has not been established."

60. In Gnanasoundari v. Nallathambi, A. I. R. (32) 1945 Mad. 516 : (47 Cr. L. J. 421), a Roman Catholic married a Protestant in a Protestant Church and he cohabited with her and had two children. Thereafter the wife executed a deed of release in his favour and he married a Roman Catholic in a Roman Catholic Church under the provisions of Section 5 of Act XV [15] of 1872. He was, thereupon, prosecuted for bigamy and he pleaded that his personal law -- the Conon law of the Church of Rome --forbids the marriage of a Roman Catholic with a Protestant without a dispensation and forbids absolutely the marriage of a Catholic with a Protestant in a Protestant Church. He consequently pleaded that, no dispensation having been obtained, his first marriage was void and he was not guilty of bigamy by contracting the second marriage. It was contended on his behalf that the personal law contemplated in Section 88 is that part of the personal law which relates to impediments which prohibit the marriage absolutely. On the other side it was contended that the words "personal law applicable to either of the parties" could not bear the restricted meaning sought to be placed upon the words by the accused. The learned Judge held that :

> "The words "nothing in this Act shall be deemed to validate any marriage" presuppose that the marriage is not merely forbidden by the personal law of a party but that it is, according to that personal law, a nullity. Is then the impediment under the Canon law to the marriage of a Catholic and a Protestant without a dispensation an impediment , covered by the expression "personal law" in Section 88, and does the impediment, according to the Canon law, render a "marriage between a Catholic and

a protestant no marriage at all ?

> "A Christian or Christians can only contract a legal marriage in India under the provisions of Indian Christian Marriage Act. All the provisions of the Act apply to Christians of all denominations except Part VI, which deals with the marriage of Native Christians and which it is stated "shall not apply to marriages between Roman Catholics" except "so much of Sections 62 and 63, as are referred to in Section 64. Section 88 is the last section of the Act and appears in Part VIII which is headed "miscellaneous." Now it would certainly be surprising, having regard to the scheme of the Act and the position of Section 88 in it, if the provisions of Section 88 should make it impossible for a Catholic and a Protestant to marry at all except in accordance with the provisions of Canon law. This cannot have been contemplated by the Legislature, and the difficulty is obviated if an interpretation is put on the section which, in my opinion, does no violence to the words used, namely, that, as the marriage to attract the provisions of Section 88 must be a nullity according to personal law of a party, that part of the personal law of the parties only is contemplated by the section which relates to absolute impediments to any marriage at all between the parties, even marriage according to the rites of their own churches impediments such as prohibited degrees of consanguinity or affinity "

61. It is true that about the same time a learned Judge of the Calcutta High Court, in the exercise of original jurisdiction, held in Claudia Jude v. Lanclot Jude, A. I. R. (36) 1949 Cal. 563 : (I. L. R. (1945) 2 Cal. 462), that the marriage of a Roman Catholic with a person who is unbaptised is absolutely forbidden by Canon law and cannot, therefore, be held to he valid by reason of Section 88, Christain Marriage Act. If this reasoning had been followed in Gnanasoundari v. Nallathambi, A. I. R. (32) 1945 Mad. 516:(47 Cr. L. J. 421), the marriage in that case would also have been held void. In the Calcutta case the various difficulties in the way of this construction which are noticed in the Madras case are not considered. According to the construction placed by Lodge J. no Roman Catholic can marry any person who is not a Christian. If this had really been the intention of the Legislature, we should have expected S. 4 of the Act to contain an exception in somewhat similar terms to Section 65 which would make it impossible for a Roman Catholic to marry a person who was not a Christian under the provisions of the Act. This is an exception which as never been incorporated in any of the Acts relating to Christian marriages and it cannot be read into the Act merely by implication. Subsequent to this case the Calcutta High Court held in Captain A. C. Smyth v. Mrs. Hannah Smyth, Cr. Revn. No. 1093 of 1948:(A. I. R. (38) 1951 Cal. 293) that :

> "The prohibition referred to in Section 88 must be an absolute impediment or a total incapacity according to the personal law and not an impediment or incapacity which is dependent upon the (act that marriage is a sacrament or on the form of the marriage."

62. The case of Venugopal Chetti v Venugopal Chetti, L. R. 1909 p. 67 also does not support the respondent's pleas although the trial Court has relied upon it. In that case Sir Gorrel Barnes made it clear that he was not concerned with the validity of a marriage between a Hindu and a Christian in

India since the marriage in question had been celebrated in England and it was valid according to the laws of England. He, no doubt, referred to Section 88 of the Indian Christian Marriage Act but he did not discuss it, nor was it necessary for him to do so.

63. A consideration of the authorities on the subject as well as the various enactments relating to it leads to the conclusion that Section 88 has regard only to such prohibitions of the personal law as make the marriage intrinsically bad and does not relate to prohibitions, such as those relating to a difference of religion, which are not absolute but which may be remedied at the will of the parties. Further the word "forbids" must be strictly construed and cannot be read as equivalent to the expression "does not recognise." It indicates a specific injunction.

64. Coming now to a consideration of the last contention in respect of this point, it appears that there is no rule forbidding the marriage of a Hindu with a non-Hindu. A marriage between a Hindu and non-Hindu does not seem to have been contemplated by the Hindu law-givers. No doubt this was so because at the time when Manu and his successors expounded the law there was no such distinction as Hindu and non-Hindu. The utmost that was possible was to class the Sudras as a category by themselves and as distinct from the class of the twice-born who were, to use modern phraseology, Hindus proper and marriages between the twice-born and Sudra woman were not forbidden in the earlier days. Even subsequent writers do not give expression to any absolute prohibition against the marriage of a Hindu with a non-Hindu. The only textbook writer who mentions this subject is Ganapatti Iyer who says at p. 404 (s. 565):

> "Again the Hindu law of marriage contemplates that the parties to a marriage should be Hindus. The restrictions imposed by the Hindu texts to be referred to later on will indeed show that even when the parties are Hindus they should be of the same caste in order that the marriage may be valid. That being so, a marriage between a Hindu and a non-Hindu such as Christian, Mohammadan etc., cannot possibly be recognised by the Hindu law. But it. such cases where only one of the parties to a marriage or other transaction is a Hindu, the Hindu law can obviously have no application. There is a conflict of laws and different considerations should guide Courts in such cases. One party is no doubt governed by the Hindu law but the other party is not governed by such law but by his own law. If according to the personal laws of both parties, such a marriage is prohibited or permitted, no difficulty can arise. If, however, the personal law of one prohibits the marriage but there is no such prohibition according to the personal law of the other there is real conflict of laws and we have to see whether there is any governing principle applicable to such cases."

65. The learned author then discusses the case of Venugopal Chetti v. Venugopal Chetti, (L. R. 1909 P. 67) and says about it :

> "Now, although the respondent was a caste Hindu, i.e., a Vysia by caste, according to the custom of usage apart from the law laid down in the Smritis, he would be regarded as an outcaste by reason of his going to England and it is very doubtful whether the prohibition in the Smritis as regards marrying out of caste would apply

to him at all."

66. The law thus expounded does not indicate ah absolute prohibition within the meaning of that word as used in the authorities to which reference has already been made.

67. The learned counsel of neither of the parties was able to refer to any authority bearing expressly on this point. Each side referred to inter-caste marriages, the appellant contending that they were allowed and the respondent that, in the present (Kali) age they are forbidden. No doubt although, all the old law-givers, Manu, Yajnavalkya and Vijnnaneswara, recognise the validity of inter-caste marriage, the balance of modern authorities is in favour of the latter view but the passage from Sastri's Hindu Law which has already been quoted indicates that even now such marriages may be recognised as valid and Mulla in his Hindu Law, para. 435, too expresses a doubt as to the correctness of the Allahabad decision in Padam Kumari v. Saraj Kumari, 28 ALL. 458 : (3 A. L. J. 209) that intercaste marriages are not allowed. Moreover in Kashi Nath v. Bhagwan Das, (1947) 2 M. L. J. 301 : (A. I. R. (84) 1947 P. C. 168) their Lordships avoid expressing any opinion on the validity of inter-caste marriages to which they refer as a "difficult question." Further the latest enactment on this subject, the Hindu Marriages Validity Act (Act XXI [21] of 1949) once more recognises the validity of inter-caste marriages. In this Act the word Hindu is defined as including Sikhs and Jains and Section 3 reads as follows :

> "Notwithstanding anything contained in any other law for the time being in force or in any text, rule or interpretation of Hindu Law or in any custom or usage, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to different religions, castes, sub castes or sects."

68. Further reference has already been made in an earlier part of this judgment to numerous authorities and to enactments according to which a Hindu marriage is not dissolved by reason of the fact that one of the parties has become a Christian. In Gladys Sainapatti v. Sainapatti, A. I. R. (19) 1932 Lah. 116 : (136 I. C. 262), and Mrs. Ailean Anandrao Ghitna-vis v. A. S. Chitnavis, A. I. R. (27) 1940 Nag. 195 : (I. L. R. (1941) Nag. 260 S. B.) marriages between a Hindu and a Christian woman celebrated in England was recognised as valid in India and a divorce was granted on the ground of the husband's re-marriage in India according to Hindu rites. These authorities clearly establish the proposition that there is no rule of Hindu law which forbids the subsistence of a marriage, one of the parties to which is a non-Hindu that is to say that the Hindu law does not refuse to recognise a conjugal union merely by reason of a difference of religion.

69. It may also be noticed that the evidence of P. W. 5 Rama Shanker himself establishes that all the members of the family accepted the validity of the marriage. (After quoting the evidence of P. W. 5 and D. w. 15 the judgment proceeds :)

70. Further, as has already been pointed out even after the death of Dr. Dubey, the appellants were treated as heirs jointly with respondents 1 and 2 and were brought on the record of pending proceedings as such. In these circumstances the second of the two principles from Sastri's Hindu

law which I have quoted earlier would be applicable and the case would also be covered by the scope of the decision in Muthusami Mudaliar v. Masilamani, 33 Mad. 342 : (5 I. C. 42), in which Sankaran Nair J., delivering the judgment of the Court said, at p. 355 of the report :

> "where, therefore, a caste accepts a marriage as valid and treats the parties as members of the caste, it would be, it appears to me, an unjustifiable interference for the Courts to declare these marriages null and void."

71. As a result of a consideration of these various authorities I have come to the conclusion that the marriage between appellant l Mrs. Chandramani Dubey, and the late Dr. H.S. Dubey was valid.

72. Coming now to a consideration of the various items of property claimed by Mrs. Chandramani Dubey as her exclusive property I do not see any reason to interfere with the decision of the learned Civil Judge.

73. The first item is jewellery and gold deposited with the Imperial Bank at Ajmer as security for a debt taken by Dr. Dubey. This is item 7 of annexure A. As the learned civil Judge points out P. W. 5, Rama Shanker could not be expected to give a detailed description of these ornaments but if they were her property Mrs. Dubey should certainly have been able to give some description, but the description that she gives is very vague. Further, she admits that some of the ornaments belonged to the plaintiffs' mother. It is hardly likely that Dr. Dubey would have made a present of them to his second wife, although he might have allowed her to use them. Again Mrs. Dubey states that prior to their being pledged with the Imperial Bank, the ornaments had been deposited for safe custody and were deliverable either to Dr. or Mrs. Dubey or the survivor. This negatives a gift of the jewels to Mrs. Dubey, since Dr. Dubey retained the dominion over them : vide Guran Ditta, v. T. Ram Ditta, 55 I. A. 235 : (A. I. R. (15) 1928 P. C. 172) and Pushkar Nath v. Shambhu Nath, (A. I. R. (30) 1943 Lah. 321 at p. 323 : (212 I. C. 494) upheld in appeal in Shambhu Nath v. Pushkar Nath, 71 I. A. 197 : (A. I. R. (32) 1945 P. C. 10).

74. The next items of property which Mrs. Dubey claims are items 1 to 2 of List C (A), i.e. 30 shares of the Badaun Electric Supply Co., and 50 shares of Industrial and Prudential Assurance Company Ltd. These shares stand in the name of Dr Dubey and there was no transfer of them to the name of Mrs. Dubey. All that was done was that the shares were deposited in a bank and were directed to be delivered to Dr Dubey or Mrs. Dubey or the survivor. This is not sufficient to indicate a gift. The shares continued to be in the name of Dr. Dubey and must be treated as his property.

75. The last series of items are the Insurance Policies mentioned at Nos. 5, 6, 7, 9 and 13 annexure C (B). Mrs. Dubey is neither the beneficiary nor the nominee under them nor were they assigned to her. They were assigned to the Allahabad Bank which was directed to hand over the proceeds when they were realised either to Dr Dubey or to Mrs. Dubey or the survivor. For the same reason as I have given with regard to the jewellery this cannot amount to a gift of the policies to Mrs. Dubey and the money due under them remains that of her husband and is inheritable by his heirs.

76. The result is that I would partly allow this appeal and while upholding the decision of the learned Civil Judge with regard to the items of property held to belong to Dr. Dubey dismiss the suit for a declaration that the plaintiffs are the sole heirs of the late Dr. H.S. Dubey and as such the sole owners of the property held to belong to Dr. Dubey.

77. In the circumstances of the case the appellants are entitled to get from the respondents 1 and 2 three-quarters of their costs of both the Courts.

78. Ghulam Hasan J. -- I have seen the judgment prepared by my learned brother and concur in the view taken by him upon the principal question arising in the case, namely the validity of the defendant's marriage. I also agree with his view in respect to other questions arising in the case. It is scarcely necessary to cover the same ground over again in view of the exhaustive treatment of the subject by my learned brother. I would only like to add that a plain commonsense reading of Section 88, Indian Christian Marriage Act, upon which the whole argument of the plaintiffs rests shows that the Act did not propose to validate marriages which were forbidden by the personal law of either of the parties to the marriage. The word "forbid" is a strong word. It means "to command (a person or persons) not to do, have, use, on indulge in (something), or not to enter (a place) ; to prohibit." (See Oxford New English Dictionary Vol. IV p. 416.) The factum of marriage being admitted, the burden of showing that the marriage was not valid rested upon the plaintiffs. In order to succeed the plaintiffs will have to point to some distinct and specific provision of the Hindu law which prohibits the marriage of a Hindu with a Christian. Any analogy from the texts of the Hindu Law or from judicial decisions showing that certain marriages are not recognised or approved by the Hindu law will afford no assistance in construing Section 88. As the ancient Hindu law givers never contemplated the marriage of a Hindu with a non-Hindu, it follows there could be no injunctions of that law upon the subject and a fortiori no sanction or prohibition of such a marriage. The history of legislation in India extending over a century shows trends which far from placing any restrictions upon inter-communal and mixed marriages have on the contrary inclined towards removing or softening the rigour of restrictions imposed by he personal law of the communities. The numerous Acts referred to in the judgment of my learned brother furnish ample evidence of this tendency. Unless, therefore, an express prohibition of an unambiguous character to be found in the Hindu law can be shown to exist, I should for my part be extremely chary of characterising such marriages as forbidden by the Hindu law and therefore null and void. The use of the word "forbid" in Section 88 would seem to imply an absolute and insurmountable impediment, such as the prohibition founded upon consanguinity, affinity and the like. Of such prohibition we have found no positive trace in the Hindu law, at least none has been brought to our notice.

79. I agree in the order proposed by my learned brother.