Supreme Court of India
Lila Gupta vs Laxmi Narain & Ors on 4 May, 1978
Equivalent citations: 1978 AIR 1351, 1978 SCR (3) 922
Author: D Desai
Bench: Desai, D.A.

PETITIONER:
LILA GUPTA

Vs.

RESPONDENT:
LAXMI NARAIN & ORS.

DATE OF JUDGMENT04/05/1978

BENCH:
DESAI, D.A.
BENCH:
DESAI, D.A.
CHANDRACHUD, Y.V. ((CJ)
PATHAK, R.S.

CITATION:
1978 AIR 1351 1978 SCR (3) 922
1978 SCC (3) 258
CITATOR INFO :
RF 1988 SC 535 (24)
R 1988 SC 839 (4)

ACT:
Hindu Marriage Act, 1955-s. 15, scope of--Whether a marriage contracted, in contravention of or in violation of the proviso to s. 15 of the Act is void of merely invalid not affecting the core of marriage and the parties are subject to a binding the of wedlock flowing from the marriage.

HEADNOTE:
The husband of the appellant-late Rajendra Kumar had earlier to the marriage with her, contracted a marriage with one Sarla Gupta. Both Rajendra Kumar and Sarla Gupta, filed suits against each other praying for a decree of divorce, which were decreed on April 8, 1963 granting the divorce. The marriagewith the appellant Lila Gupta was solemnised on May 25, 1963 i.e. after amonth and 17 days from the date of the decree divorce. Rajendra Kumar expired on May 7, 1965. Disputes arose in consolidation proceedings between the appellant claiming as widow of Rajendra. Kumar and respondents who were brothers and brothers' sons of Rajendra Kumar about succession to the Bhumidari rights in

respect of certain plots of land enjoyed by Rajendra Kumar in his life time, the latter challenging the status of the appellant to be the widow of Rajendra Kumar on the ground that her marriage with Rajendra Kumar was void having been contracted in violation of the provisions contained in the proviso to s. 15 of the Hindu Marriage Act, 1955. The final authority Deputy Director of Consolidation upheld the claim of the appellant and this decision was challenged by the respondents in six petitions filed under Article 227 of the Constitution in the High Court of Allahabad. The learned Single Judge before whom the petitions came up for hearing was of the opinion that the marriage of Rajendra kumar with the present appellant on May 25, 1963, being in con travention of the proviso to s. 15 was null and void and accordingly allowed the writ petitions. the division Bench dismissed the further appeals by the. appellant, confirmed the order of the learned single Judge and granted a certificate under Article 133(1)(c).

Allowing the appeals, the Court

HELD : (1) Examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for, treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to s. 15 of the Hindu Marriage Act, 1955 it cannot be said that such marriage would be void. In the instant case, as the marriage of the appellant, even though in contravention of the provisions of Section 15 is not void, she cannot be denied the status of wife and, therefore the widow of deceased Rajendra Kumar and in that capacity as an heir to him. [937 D-F]

(2)A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention or one of other condition prescribed for valid marriage is not void. These express provisions in the Act would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of a marriage being void though not covered by s. 11 such as in breach of proviso to S. 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it 'is so opposed to public policy as to make it punishable. [929 A-B, F-G]

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(3) While enacting the legislation the framers had in mind, the question of treating certain marriages void and provided for the same. It would, therefore be fair, to infer as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void while prescribing conditions for valid marriage in s. 5,

each of the six conditions was not considered as sacrosanct as to render marriage in breach of each of it void. Even where a marriage in breach of a certain condition is made punishable under s. 18 of the Act, yet the law does not treat it as void. The marriage in breach of the proviso is neither punishable nor does s. 11 treat it as void. It would not be fair to attribute the intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the marriage void. If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases validness had to be inferred by necessary implication. It would be all the more hazardous in the case of marriage laws to treat a marriage in breach of a certain condition void even though the law does not expressly provide for it. [930 D-E, G-H. 931 A]

In the Act there is a specific provision for treating certain marriages contracted in breach of certain conditions prescribed for valid marriage in the same Act as void and simultaneously no specific provision having been made for treating certain other marriages in breach of certain conditions as void. In this background even though the proviso is couched in prohibitory and negative language, in the absence of an express provision it is riot possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso. [931 D-E]

(5) Undoubtedly, the proviso opens with a prohibition that "It shall not be lawful" etc. It is not an absolute prohibition violation of which would render the Act a nullity. A person. whose marriage is dissolved by a decree of divorce suffers an incapacity for a period of one year for contracting second marriage. For such a person it shall not be lawful to contract a second marriage within a period of one year from the date of the decree of the Court of first instance. While granting a decree for divorce, the law interdicts and prohibits marriage for a period of one year from the date of the decree of divorce. The inhibition for a period does not indicate that such marriage would be void. While there is a disability for a time suffered by a party from contracting marriage, every such disability does not render the marriage void. [931 F-G]

(6)The interdict of law is that it shall not be lawful for a certain party to do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done therebymaking it unlawful without providing for consequence of the breach,it is not legitimate to say that such a thing when done is void becausethat would tantamount to saying that every unlawful act is void. [931 G-H, 932 A]

(7)Undoubtedly, where a prohibition is enacted in public interest its violation should not be treated lightly. A valid Hindu marriage subsists during the life time of either

party to the marriage until it is dissolved by a decree of divorce at the instance of either party to the marriage. A decree of divorce break-. the marriage tie. Incapacity for marriage of such persons whose marriage is dissolved by a decree of divorce for a period of one year was presumably enacted to allay apprehension that divorce was sought only for contracting another marriage or to avoid dispute about the parentage of children. There was some such time lag provided in comparable divorce laws and possibly such a proviso was, therefore, considered proper and that appears to be the purpose of object behind enacting the proviso to s. 15. It appears to be purely a regulatory measure for avoiding a possible confusion. If it was so sacrosanct that its violation would render the marriage void, it is riot possible to appreciate why the Parliament completely dropped it The proviso to s. 15 is deleted by s. 9 of the Marriage Laws (Amendment) Act, 1976. The net result is that now since the amendment parties whose marriage is dissolved by a decree of divorce can contract marriage soon thereafter provided of

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course the period of appeal has expired. This will reinforce the contention that such marriage is not void. The fact that neither spouse could until the time for appealing had expired, in no way affects the fall operation of the decree. It is a judgment in rem unless and until a court of appeal reversed it, the marriage for all purposes is at an end. [932 C-H, 933 A, E-F]

Chandra Mohini Srivastava v. Avinash Prasad Srivastava [1967] 1 SCR 864; Marsh v. Marsh, AIR 1945 PC 188 referred to.

(8)To say that such provision continues the marriage tie even after the decree of divorce for the period of incapacity is to attribute a certain status to the parties whose marriage is already dissolved by divorce and for which there is' no legal mention. A decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. Each one becomes competent to contract another marriage as provided by s. 15. Merely because each one of them is prohibited from contracting a second marriage for a certain period it could not be said that despite them being a decree of divorce for certain purposes the first marriage subsists or is presumed to subsist. Some incident of marriage does survive the decree of divorce; say, liability to pay permanent alimony but on that account it cannot be said that the marriage subsists beyond the date of decree of divorce. Section 13 which provides for divorce terms says that a, marriage solemnised may on a petition presented by the husband or the wife be dissolved by a decree of divorce on one or more of the grounds mentioned in that section. The dissolution is complete once the decree is made, subject of course, to appeal. But a final decree of divorce in terms dissolves

the marriage. No incident of such dissolved marriage can bridge and bind the parties whose marriage is dissolved by divorce at a time posterior to the date of decree. [933 F-H, 934 A]

(9) An incapacity for second marriage for a certain period does not have effect of treating the former marriage as subsisting. During the period of incapacity the parties cannot be said to be the spouses within the meaning of cl. (i), sub-s. (1) of s. 5. The 'spouse' has been understood to connote a husband or a wife which term itself postulates a subsisting marriage. The 'spouse' in sub-section (1) of s. 5 cannot be interpreted to mean a former spouse because even after the divorce when a second marriage is contracted if the former spouse is living that would not Prohibit the parties from contracting the marriage within the meaning of (cl) (i), sub-s. (1) of s. 5 by its very context would not include within its meaning the expression 'former spouse'. [934 B-C]

(10)A mere glance at s. 15 of the Act and s. 57 of the Indian Divorce Act would clearly show that the provisions are not in pari materia. [935 E]

Warter v. Warter, [1890] 15 Probate Division 152;
Lattie v. G. E. Brown, AIR 1916 Madras 847;
Turner v. Turner, A.I.R. 1921 Cal. 517;
Jackson v. Jackson, ILR 34 Allahabad 203
Uma Charan Roy v. Smt. Kajal Roy , AIR 1971 Cal. 307 overhead.

explained;

J. 1

(11)Under the Mohammadan law after the divorce the traditional law did not permit a divorced wife to contract second marriage during the period of Iddat and in the past such marriage was considered void. The discernible public policy behind treating such marriage void was confusion about the parentage of the child, if the woman was pregnant at the time of divorce. The marriage was treated void interpreting a certain text of the Hanafi law. Recent trend, however, is that under the Mohmadan Law a marriage of a woman undergoing iddat is not void but merely irregular. [936 F-H]

If public policy behind prohibiting marriage of a woman undergoing iddat and persons who are prohibited from marrying for a period of one year from the date of the decree dissolving their marriage is the same, viz., to avoid confusion about the parentage of the child which may have been conceived or the divorce sought to be obtained only for contracting second marriage, then the same conclusion may follow that such regulatory prohibition if violated or contravened could not render the marriage void. [937 B-C]

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Muhammad Hayat v. Muhammad Nawaz, [1935] 17 L.R. Lah. 48 followed.

(12)Voidness of marriage unless statutorily Provided for is not to be inferred. A reference to Child Marriage Restraint Act would also show that the child Marriages Restraint Act

was enacted to carry forward the reformist movement of provision of the Child Marriage Restraint Act punishable, simultaneously it did not render the marriage void. [937 C-D]

Pathak, J (concurring) :

(1)No doubt. the question of the validity of a marriage deserves an especial care and the greatest caution must be exercised before a marriage is declared void. The contention that unless the statute specifically declares a marriage to be a nullity, it cannot be pronounced so by the Courts is not correct. The intrinsic evidence provided by the language of. the statute the context in which the provision finds place and the object intended to be served is of equal validity. [938 G-H, 939 A]

The argument that the proviso to s. 15 of the Hindu Marriage Act is directory and not mandatory because a marriage solemnised in violation of it has not been declared a nullity by the statue cannot be accepted. [939 F]

Catterall v. Sweetman, (1845) 9 Jur. 951, 954; Chichester v. Mure (falsely called Chichester), (1863)3, Sw. & Tr., 223; Rogers, otherwise Briscoe (falsely called Halmshaw) v. Halmshaw, (1864)3, Sw. & Tr. 509; explained and distinguished.

(i)A marriage performed in violation of the proviso to s. 15 of the Hindu Marriage Act is not void. [940 D]

(a)The object behind the restraint imposed by the proviso to s. 15 is to provide a disincentive to a hasty action for divorce by a husband anxious to marry another woman, and also the desire to avoid the possibility of confusion in parentage of the child by her husband under the earlier marriage. [939 G-H]

59th Report of Law Commission of India P. 29 referred to.

(b)A statutory provision may be construed as mandatory when the object underlying it would be defeated but for strict compliance with the pro"vision. No serious discouragement is provided by the proviso to s. 15 to a husband anxious to marry another woman, The impediment provided by the proviso to s. 15 is a temporary one and ceases on the expiration of the period of one year. The proviso proceeds on the assumption that the decree dissolving the marriage is a final decree, and merely attempts to postpone the remarriage. It does not take into account the defensibility of the decree in virtue of an appeal. The defensibility of the decree because an appeal has been provided is a matter with which the main provisions of s. 15 is concerned. Further evidence that the proviso to s. 15 is directory only is provided by its deletion altogether by Parliament by the Marriage Laws Reforms Act, 1976. [940 A-C]

Umacharan Roy v. Smt. Kajal Roy, AIR 1971 Cal. 307 disapproved.

(b)The intention to safeguard against a confusion in

parentage is perhaps based on the principle in Mahommedan Law which places a ban on marriage with a divorced or widowed woman before the completion of her iddat. A marriage performed during the period of Iddat is an irregular marriage only and not a void marriage. In the instant case, the marriage of Rajendra Kumar with the appellant is not void and she is entitled to be considered as his wife. [940 C-D & F]

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Mohammad Hayat v. Mahammad Nawaz, (1935) 17 L.R. 17 Lah. 48 applied.

(iii)The two tests sought to be employed in the construction of the proviso to s. 15, that is to say that a marriage although in violation of. the statute is not void because the legislature has not expressly declared it to be so and also because the legislature has made no provision for legitimating the offspring of such a marriage need to be viewed with caution. These are tests which could equally be invoked to the construction of the main provision of section 15. The conclusion that provision is directory and not mandatory does not necessarily follow. [940 G-H]

The main provision' of s. 15 provides that when a marriage has been dissolved by a decree of divorce, either party to the marriage may marry again, if there is no legal right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal having been presented has been dismissed. In other words, the right to remarriage shall not be exercised before the decree of divorce has reached finality. The English Law and the decisions of the Australian High Court and Indian High Courts which involved the application of s. 57 Indian Divorce Act indicate that a marriage solemnised before the expiry of the period of limitation for presenting an appeal or where an appeal has been presented, during the pendency of the appealmust be regarded as a void marriage. [941 A-B]

The main provision of s. 15 of the Hindu Marriage Act, which bears almost identical resemblance to the relevant statutory provisions in thecases 'mentioned above, would perhaps attract a similar conclusion in regard to its construction. At the lowest, there is good ground for saying that a contention that a marriage solemnised in violation of the main provision of s. 15 is a nullity cannot be summarily rejected. [942 E-F]

Chichester v. Mure (falsely called Chichester) (1863) 3, SW. & Tr., 223, Warter v. Warter, (1890) 15 P., 152; Le Mesurier v. Le Mesuricer, (1929) 46 T.L.R., 203; Doettcher v. Doettcher, (1949) Weekly Notes, 83; Miller v. Teale, (1954-55) 92 C.L.R. 406; Batt' v. G. E, A. Rou. 1916 Mad. 847; Turner v. , AIR 1921 Cal. 517; Jackson v. Jackson, ILR 34 All. 203; referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2585-2590/

69. From the Judgment and Order dated 6-5-1968 of the Allahabad High Court in Special Appeals Nos. 374-379 of 1967. S. N. Andley, Uma Dutta and Brij Bhushan for the Appellant.

V. S. Desai and Promod Swarup for Respondent No. 2 in C.A., Nos. 2585, 2586, 2588, 2589, 2590/69 and Lrs. Nos. 2, 6, 7 and 8 of Respondent No. 1 in all the appeals. The following Judgments of the Court were delivered by DESAI, J.-A very interesting and to some extent hitherto un-explored question under the Hindu Marriage Act, 1955, arises in this group of six appeals by certificate granted by the Allahabad High Court under Article 133 (1) (c) of. the Constitution. Appellant in all the appeals is the same person and a common question of law is raised in all these appeals and, therefore, they were heard together and are being disposed of by this common judgment. One Rajendra Kumar whose widow appellant Smt. Lila Gupta claims to be, had contracted a marriage with one Sarla Gupta. Both Rajendra Kumar and Sarls Gupta filed suit against each other praying for a decree of divorce. These suits ended in a decree of divorce on :April 8, 1963. Soon thereafter, on May 25, 1963, Rajendra Kumar contracted second marriage with appellant Smt. Lila Gupta. Unfortunately, Rajendra Kumar expired on May 7, 1965. Disputes arose 'in consolidation proceedings between the appellant claiming as widow of deceased Rajendra Kumar and Respondents who are brothers and brother's sons of Rajendra Kumar about succession to the Bhumidhar rights in respect of certain plots of land enjoyed by Rajendra Kumar in his life time, the latter challenging the status of the appellant to be the' widow of Rajendra Kumar on the ground that her marriage with Rajendra Kumar was void having been contracted in violation of the provision contained in the proviso to Section 15 of the Hindu Marriage Act, 1955 ('Act' for 'short). The final authority Deputy Director of Consolidation upheld the claim of the appellant and this decision was challenged by the Respondents in six petitions filed under Article 22, of the Constitution in the High Court of Allahabad. The learned single Judge before whom these petitions came up for hearing was lot the opinion that the marriage of Rajendra Kumar with the present appellant on May 25, 1963, being in contravention of the provision to s. 15 was null and void, and accordingly allowed the writ petitions 'and quashed the orders of the Settlement Officer (Consolidation) an(of the Deputy Director of Consolidation and restored the order of the Consolidation Officer. The appellant preferred six different appeals under the Letters Patent. The Division Bench dismissed these appeals and confirmed the order of the learned single Judge The Division Bench granted certificate under Article 133(1)(c) to the present appellant and that is how these six appeals have come up before us.

Even though the appeals were argued on a wider canvass, the short and narrow question which would go to the root of the matter is : Whether a marriage contracted in contravention of or violation of the proviso to s. 15 of the Act is void or merely invalid not affecting the core of marriage and the parties are subject to a binding tie of wedlock flowing from the marriage ?

At the outset it would be advantageous to have a clear picture of the scheme of the Act. Section 5 prescribes the conditions for a valid Hindu marriage that may be solemnised after the commencement of the Act. They are six in number. Condition No. (1) ensures monogamy. Condition No. (ii) refers to the mental capacity of one of the other person contracting the marriage and prohibits an idiot of 'lunatic from contracting the marriage. Condition (iii) prescribe,, minimum age for the bride and the bridegroom for contracting marriage. This condition incidentally provides for consent of the bride and the bridegroom to the marriage as the law treats them mature at a certain age, Condition (iv) forbids marriage of parties within the degrees of prohibited relationship unless the custom or usage. governing each of them permits of a marriage between the two, Condition No:

(v) is similar with this difference that it prohibits marriage between two sapient, Condition (vi) is a corollary to condition (iii) in that 'where the bride has not attained the minimum age as prescribed in condition (iii), the marriage will nonetheless be valid if the consent of her guardian has been obtained for the marriage. Section 6 specifies guardians in marriagewho would be competent to give consent as envisaged by S. 5 (vi)Section 11 is material. It provides that any marriage solemnisedafter the commencement of the Act shall be null and void and may ona petition presented by either party thereto be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of S.

5. Incidentally at this stage it may be noted that S. II does not render a marriage solemnised in violation of conditions (ii), (iii) and (vi) void, all of which prescribe personal incapacity for marriage. Section 18 provides that certain marriages shall be voidable and may be annulled a decree of nullity on any of the grounds mentioned in the section. Clause (h) of sub-s. (1) inter alia provides that the marriage in contravention of condition specified in clause (ii) of S. 5 will be voidable. Similarly, sub-clause

(c) provides that the consent of the petitioner or where consent of the guardian in marriage is required under S. 5 and such consent was obtained by force or fraud, the marriage shall be voidable. Section 13 provides for dissolution of marriage by divorce on any of the grounds mentioned in the section. Section 14 prohibits a petition for divorce being presented by any party to the marriage within a period of three years from the date of the marriage which period has been reduced to one year by S. 9 of the Marriage Laws (Amendment) Act, 1976. Then comes S. 15 as it stood at the relevant time, which is material for the purpose of this judgment and may be reproduced in extension.

> "15. When a marriage has been dissolved by decree of divorce and either there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again; Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance".

The substantive part of s. 15 enables divorced persons to marry gain. The proviso prescribes a time limit within which such divorced persons cannot contract marriage and the time prescribed is a period one year from the date of the decree in the Court of the first instance. Section 16 confers status of legitimacy on a child who but for, the provision would be treated illegitimate. If a marriage is annulled a decree of nullity, the legal consequence would be that in the eye law there was no marriage at all even though the parties contracting marriage might have gone through some form of marriage but as were not bound by a valid binding wedlock, the child conceived begotten before the decree of nullity would nonetheless be illegitimate. The law steps in and provides that such child shall be legitimates principle discernible is that innocent person shall not 'suffer.

Section 17 provides for punishment for bigamy. Section 18 prescribes punishment for contravention of some of the conditions prescribed for valid marriage in s. 5. Contravention of conditions (iii), (IV), (v) and (vi) of s. 5 is made punishable under s. 18.

A comprehensive review of the relevant provisions of the Act unmistakably manifests the legislative thrust that every marriage solemnised in contravention of one or other condition prescribed for valid marriage is not void. Section 5 prescribes six conditions for valid marriage. Section 11 renders marriage solemnised in contravention of conditions (i), (iv) and (v) of s. 5 only, void. Two incontrovertible propositions emerge from a combined reading of ss. 5 and 11 and other provisions of the Act, that the Act specifies conditions for valid marriage and a marriage contracted in breach of some but not all of them renders the marriage void. The statute thus prescribes conditions for valid marriage and also does not leave it to inference that each one of such conditions is mandatory and a contravention, violation or breach of any one of them would be treated as a breach of a prerequisite for a valid marriage rendering it void. The law while prescribing conditions for valid marriage simultaneously prescribes that breach of some of the conditions but not all would render the marriage void. Simultaneously, the Act is conspicuously silent on the effect on a marriage solemnised in contravention or breach of the time bound prohibition enacted is. 15. A further aspect that stares into the face is that while a marriage solemnised in contravention of clauses (iii), (iv), (v) and (vi) of s. 5 is made penal, a marriage in contravention of the prohibition prescribed by the proviso does not attract any penalty. The Act is suggestively silent on the question as to what is the effect on the marriage contracted by two persons one or both of whom were incapacitated from contracting marriage at the time when it was contracted in view of the fact that a period of one year had not elapsed since the dissolution of their earlier marriage by a decree of divorce granted by the Court of first instance. Such a marriage is not expressly declared void nor made punishable though marriages in breach of conditions Nos. (i), (iv) and (v) are expressly declared void and marriages in breach of conditions Nos. (iii), (iv),

(v) and (vi) of s. 5 are specifically made punishable by s.

18. These express provisions would show that Parliament was aware about treating any specific marriage void and only specific marriages punishable. This express provision prima facie would go a long way to negative any suggestion of marriage being void though not covered by s. 1 1 such as in breach of proviso to s. 15 as being void by necessary implication. The net effect of it is that at any rate Parliament did not think fit to treat such marriage void or that it is so opposed to public policy

as to make it punishable.

Parliament while providing that a marriage in contravention of conditions (i), (iv) and (v) would be ab initio void which would mean that the parties did not acquire the status of husband and wife comprehensively provided for its impact on a child born of such marriage. If any child is born to them before the marriage is annulled by a decree of nullity, indisputably such a child would be illegitimate but s. 16 confers the status of legitimacy on such children. A child born to parties who had gone through a form of marriage which is either void under s. 11 or voidable under S. 12, before the decree is made would be illegitimate, the law nonetheless treats it as legitimate even if the marriage is annulled by a decree of nullity and such child shall always be deemed to be a legitimate child notwithstanding the decree of nullity. Therefore, the Parliament was conscious of the fact that in view of the provisions contained in ss. 11 and 12 and its legal consequence a situation is bound to arise where a child begotten or conceived while the marriage was subsisting would be illegitimate if annulled because such marriage would be ab initio void. Look at the impact of a marriage in violation of proviso to S. 15 on child born of such marriage. Section 16 does not come to its rescue. If the marriage is to be void as contended the child would be illegitimate. A status of legitimacy is not conferred by any provision of the Act on a child begotten or conceived to a woman who had contracted marriage and the marriage was in contravention of the proviso to S. 15. No intelligible explanation is offered for such a gross discriminatory treatment. The thrust of these provisions would assist in deciding whether the marriage in contravention of provisions to s. 15 is void as was contended on behalf of the respondents.

Did the framers of law intend that a marriage contracted in violation of the provision contained in the proviso to s. 15 to be void ? While enacting the legislation, the framers had in mind the question of treating certain marriages void and provided for the same. It would, therefore, be fair to infer as legislative exposition that a marriage in breach of other conditions the legislature did not intend to treat as void. While prescribing conditions for valid marriage in s. 5 each of the six conditions was not considered so sacrosanct as to render marriage in breach of each of. it void. This becomes manifest from a combined reading of ss. 5 and 1 1 of the Act. if the provision in the proviso is interpreted to mean personal incapacity for marriage, for a certain period and, therefore, the marriage during that period was by a person who had not the requisite capacity to contract the marriage and hence void, the same consequence must follow where there is breach of condition (iii) of s. 5 which also provides for personal incapacity to contract marriage for a certain period. When minimum age of the bride and the bridegroom for a valid marriage is prescribed in condition (iii) of S. 5 it would only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now, before attaining the minimum age if a marriage is contracted S. 11 does not render it void even though s. 18 makes it punishable. Therefore, even where a marriage in that reach of a certaincondition is made punishable yet the law does not treat it as void. The marriage in breach of the proviso is neither punishable nordoes s. 11 treat it void. Would it then be fair to attribute an intention to the legislature that by necessary implication in casting the proviso in the negative expression, the prohibition was absolute and the breach of it would render the. marriage void ? If void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication. It would be, all the more hazardous in the case

of marriage laws to treat a marriage in breach of a certain condition void even though the law does not expressly provide for it. Craies on Statute Law, 6th Edn., pages 263 and 264 may be referred to with advantage "The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it (emphasis supplied). From this examination of these Acts, I draw two conclusions. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity unless such nullity was declared in the Act. Secondly, that, viewing the successive marriage Acts, it appears that. prohibitory words, without a declaration of nullity, were not considered by the legis- lature to create a nullity".

In the Act under discussion there is a specific provision for 'treating certain marriages contracted in breach of certain conditions prescribed for valid marriage in the same Act as void and simultaneously no specific provision have been made for treating certain other marriages in breach of certain conditions as void. In this background even though the proviso is couched in prohibitory and negative language, in the absence of an express provision it is not possible to infer nullity in respect of a marriage contracted by a person under incapacity prescribed by the proviso. Undoubtedly, the proviso opens with a prohibition that : 'It shall not be lawful' etc. Is it an absolute prohibition violation of which would render the act a nullity ? A person whose marriage is dissolved by a decree of divorce suffers an incapacity for a period of one year for contracting- second marriage. For such a person it shall not be lawful to contract a second marriage within a period of one year from the date of the decree of the Court of first instance, While granting a decree for divorce, the law interdicts and prohibits a marriage for a period of one year from the date at the decree of divorce. Does the inhibition for a period indicate that such marriage would be void ? While there is a disability for a time suffered by a party from contracting marriage, every such disability does not render the marriage void. A submission that the proviso is directory or at any rate not mandatory and decision bearing on the point need not detain us because the interdict of law is that it shall not be lawful for a certain party lo do a certain thing which would mean that if that act is done it would be unlawful. But whenever a statute prohibits a certain thing being done thereby making it unlawful without providing for consequence of the breach, it is not legitimate to say that such a thing when done is void because that would tantamount to saying that every unlawful act is void. As pointed out earlier, it would be all the more inadvisable in the field of marriage laws. Consequences of treating a marriage void are so serious and far reaching and are likely to affect innocent persons such as children born during the period anterior to the date of the decree annulling the marriage that it has always been considered not safe to treat a marriage void unless the law so enacts or the inference of the marriage being treated void is either inescapable or irresistible. Therefore, even though the proviso is couched in a language prohibiting a certain thing being done, that by itself is not sufficient to treat the marriage contracted in contravention of it as void.

Undoubtedly, where a prohibition is enacting in public interest its violation should not be treated lightly. That necessitates examination of the object and purpose behind enacting the proviso. Till recent past a valid Hindu marriage among the twice born class in which customary divorce was not

permissible could only be broken by the death of either party. Subsequently the concept of divorce was introduced. Therefore, a valid Hindu marriage subsists during the life time of either party to the marriage until it is dissolved by a decree of divorce at the instance of either party to the marriage. A decree of divorce breaks the marriage tie. Incapacity for marriage of such persons whose marriage is dissolved by a decree of divorce for a period of one year was presumably enacted to allay apprehension that divorce was sought only for contracting another marriage or to avoid dispute about the parentage of children. At the time of the divorce the wife may be pregnant. She may give birth to a child after the decree. If a marriage is contracted soon after the divorce a question might arise as to who is the father of the child viz., the former husband or the husband of the second marriage. There was some such time lag provided in comparable divorce, laws and possibly such a proviso was, therefore, considered proper and that appears to be the purpose or object behind enacting the proviso to S. 15. Is such public policy of paramount consideration as to render the marriage in breach of it void ? It appears to be purely a regulatory measure for avoiding a possible confusion. If it was so sacrosanct that its violation would render the marriage void, it is not possible to appreciate why the Parliament completely dropped it. The proviso to s. 15 is deleted by S. 9 of the Marriage Laws (Amendment) Act, 1976. The net result is that now since the amendment parties whose marriage is dissolved by a decree of divorce can contract marriage soon thereafter provided of course the period of appeal has expired. This will reinforce the contention that such marriage is not void. But we would like to reaffirm the warning voiced in Chandra Mohini Srivastava v. Avinash Prasad Srivastava & Anr.(1), In that case the decree of divorce was (1) [1967] 1 SCR 864.

granted by the High Court reversing the dismissal of the petition of the husband by the trial Court. Soon thereafter, the husband contracted second marriage. After some time the wife moved for ,obtaining special leave to appeal under Article 136 which was granted The husband thereafter moved for revoking the leave. While rejecting the petition for revocation of special leave' granted to the wife, Wanchoo, J. (as he then was), speaking for the Court, observed that even though it may not have been unlawful for- the husband to have married immediately after the High Court's decree for no appeal as of right lies from the decree of the High Court to this Court, still it was for the respondent to make sure whether an application for special leave had been filed in this Court and he could not, by marrying immediately after the High Court's decree, deprive the wife of the chance of presenting a special leave, petition to this Court. If a person does so, he takes a risk and could not ask the Court to revoke the special leave on that ground. But apart from the caution, any marriage now contracted by a person whose marriage is dissolved by a decree of divorce soon, after the decree, if otherwise valid under s. 5, would not attract any other consequence. This deletion clearly negatives any suggestion of any Important public policy behind the prohibition enacted in the proviso which, if contravened, would lead to the only consequences of, rendering the marriage void. In contract it would be profitable to refer to Marsh v. Marsh.(1). The statute prohibited marriage by parties whose marriage was dissolved by a decree of divorce during the period of limitation prescribed for appeal. The contention was that such marriage in violation of a statutory prohibition is void. Negativing this contention it was held that the decree absolute was a valid decree and it dissolved the marriage, from the moment it was pronounced and at the date when the appeal by the intervener abated, it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired, in no way affect,, the full operation of the decree. It is a judgment in rem and unless and until a court of appeal reversed it, the marriage for all purposes is at an end.

To say that such provision continues the marriage tie even after the decree of divorce for the period of incapacity is to attribute a certain status to the parties whose marriage is already dissolved by divorce and for which there is no legal sanction. A decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. Each one becomes competent to contract another marriage as provided by s. 15. Merely because each one of them is prohibited from contracting a second marriage for a certain period it could not be said that despite there being a decree of divorce for certain purposes the first manage subsists or is presumed to subsist. Some incident of marriage does survive the decree of divorce; say, liability to pay permanent alimony but on that account it cannot be said that the marriage subsists beyond the date of decree of divorce. Section 13 which pro- vides for divorce in terms says, that a marriage solemnised may on (1) AIR 1945 PC 188.

a petition presented by the husband or the wife be dissolved by a decree of divorce on one or more of the grounds mentioned in that section. The dissolution is complete once the decree is made, subject of course, to appeal. But a final decree of divorce in terms dissolves the marriage. No, incident of such dissolved marriage can bridge and bind the parties whose marriage is dissolved by divorce at a time posterior to the date of decree. An incapacity for second marriage for a certain period does not have effect of treating the former marriage as subsisting. During the period of incapacity the parties cannot be said to be the spouses within the, meaning of cl. (i), sub-s. (1) of s. 5. The word 'spouse' has been understood to connote a husband or a wife which term itself postulates a subsisting marriage. The word 'spouse' in sub-section (1) of s. 5 cannot be interpreted to mean a former spouse because even after the divorce when a second marriage is contracted if the former spouse is living that would not prohibit the parties from contracting the marriage- within the meaning of cl. (i) of sub-s. (1) of s. 5. The expression 'spouse' in cl. (i), sub-s. (1) of s. 5 by its very context would not include within its meaning the expression 'former spouse'.. It was, however, said that an identical provision in s. 57 of the Indian Divorce Act, 1869, has been consistently interpreted to mean that a marriage contracted during the period prescribed in the fifth paragraph of s. 57 after a decree dissolving the marriage would be void. The Indian Divorce Act provides for the divorce of persons professing Christian religion. Section 57 provides for liberty to parties whose marriage is dissolved by a decree of divorce to marry again. Section 57 reads as under :

> "57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, or when any such appeal has been dismissed. or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :
>
> Provided that no appeal to the Supreme Court has been presented against any such order or decree.

> When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death."

We would presently examine the scheme of s. 57 to appreciate the contention that the section is in pari materia with s. 15 of the Act. Section 57 grants liberty to the parties whose marriage is dissolved by a decree of divorce to marry, but prohibits them from marrying again within the prescribed period. The question in terms raised was whether a marriage during the period of prohibition was void. Undoubtedly, consistently such marriage has been held to be void following-the earliest decision in Warter v. Warter(1). In that case the matter came before the court on a petition for probate of a will made by one Colonel Henry De Grey Warter who had contracted marriage with one Mrs. Tayloe on February 3, 1880, whose former marriage, with Mr. Tayloe was dissolved by a decree absolute of November 27, 1879. He made his will on February 6, 1880. Subsequently on legal advice both of them went through a second form of marriage on April 2, 1881.' The contention was that by the second marriage the Will was revoked and that is how the validity of the first marriage was put in issue. Upholding the contention it was held that Mrs. Tayloe could only contract a valid second marriage by showing that the incapacity arising from her previous marriage had been effectually removed by the proceedings taken under that law. This could not be done, as the Indian law, like the English law, does not completely dissolve the tie of marriage until the lapse of a specific time after the decree. The prescribed period was held as ,in integral part of the proceedings by which alone both parties could be released from their incapacity to contract a fresh marriage. Thus the previous marriage was held to be void and of no consequence in law. This decision in Warter v. Warter was followed in J. S. Battie v. G. E. Brown ;(2) Turner v. Turner;(3) Jackson v. Jackson(4). If provision contained in s. 15 along with its proviso was in pari materia with s. 57 of tile Indian Divorce Act, it would have become necessary for us to examine the correctness of the ratio in aforementioned decisions. But a mere glance at s. 15 of the Act and s. 57 of the , Indian Divorce Act would clearly show that the provisions are not in pari materia. Under the Indian Divorce Act a decree nisi has to be passed and unless confirmed by High Court it is not effective and in the proceedings for confirmation, the decree nisi can be questioned. No such requirement is to be found under the Act. Further, under s. 15 the period of one year is to be computed from the date of decree of the Court of first instance which means. that a decree of divorce is made by the Court of first instance while under s. 57 of the Indian Divorce Act the period of six months is to be computed from the date of an order of the High Court confirming the decree for dissolution of a marriage made by a District Judge or when an appeal has been preferred in the appellate jurisdiction of the High Court when the appeal is dismissed and the parties even cannot marry if ,in appeal has been presented to the Supreme Court. Under s. 15 if the decree of divorce is granted not by the Court of first instance but by the appellate Court the proviso would not be attracted. There is thus a mate-

(1) [1 890] 1 5 4Probate Division 152.

(2) AIR 1916 Madras 847.

(3) AIR 1921 Cal. 517.

(4) ILR 34 Allahabad [203.

9 36 rial difference in respect of the starting point of the period under s, 57. If thus apart from the scheme of the two statutes, the relevant provisions are so materially different, the decisions interpreting s. 57 cannot be bodily followed-to hold that the same consequences should follow if the proviso is contravened.

It was, however, said that apart from the decisions under the Indian Divorce Act the decision of the Calcutta High Court in Uma Charan Roy v. Smt. Kajal Roy,(") on a correct interpretation of the proviso of S. 15 lays down that the marriage in breach of the proviso is void. It is a decision of the Division Bench and both the members constituting the Bench have written separate but concurring judgments. The question came before the Court on a petition made by one Smt. Kajal Roy for annulment of her marriage with Uma Charan Roy alleging that the latter contracted the marriage within a period of one year from the date of dissolution of his marriage with one Sushma and, therefore, it was in contravention of the proviso to S. 15 and the marriage was void. S. K. Chakravarti, J. in paragraph 12 has observed that : "as already pointed out the marriage is null and void even if Kajal bad acquiesced in it". We minutely went through the earlier paragraphs of the judgment but except referring to the decisions under the Indian Divorce Act there is no discussion or reasoning or analysis which led the learned Judge to come to the conclusion that marriage in contravention of S. 15 is null and void. Salil Kumar Datta, J. in his judgment, after referring to the decisions under the Indian Divorce Act, merely observed that the principles enunciated in those decisions should also be made applicable to the marriages under Hindu Marriage Act with which he was concerned. The learned judge resorted to a fiction observing that the former marriage despite the decreeof divorce subsists for a period at least of one year from the dateof such decree in the Court of the first instance. No attempt ismade to scan and analyse the scheme of Indian Divorce Act and more particularly the provision contained in S. 57, nor before accepting the decision under s. 57 an attempt was made to compare the two provisions. With respect, it is difficult to accept this reasoning and, therefore, it is not possible to accept the aforementioned decision as laying down the correct law.

If a reference to the parallel provisions in the Indian Divorce Act is helpful and of some assistance, it would also be profitable to look slightly in another direction. Under the Mohammedan law after the divorce the traditional law did root permit a divorced wife to contract second marriage during the period of Iddat and in the past such marriage was considered void. The discernible public policy behind treating such marriage void was confusion about the parentage of the child if the woman was pregnant at the time of divorce. The marriage was treated void interpreting a certain text of the Hanafi Law. Recent trend of decisions quoted in Mulla's Principles of Mahomedan Law, 17th Edn., edited by M. Hidayatullah, former Chief Justice of India, clearly bear out the proposition that under the Mohammedan law a marriage of a woman undergoing iddat is not void but merely irregular. At page 252 it is stated as under (1) AIR 1971 Cal. 307.

9 37 "A marriage with a woman before completion of her iddat is irregular, not void. The Lahore, High Court at one time treated such marriages as void [Jhandu v. Mst. Hussain Bibi, (1923) 4 Lah. 1921; but in a later decision held that such a marriage is irregular and the children legitimate

[Muhammad Hayat v. Muhammad Nawaz, (1935) 17 Lah. 48]".

In support of this proposition, Muhammad Hayat v. Muhammad Navaz,(1) is relied upon. If public policy behind prohibiting marriage of a woman undergoing iddat and persons who are prohibited from marrying for a period of one year from the date of the decree dissolving their marriage is the same, viz., to avoid confusion about the parentage of the child which may have been conceived or the divorce sought to be obtained only for contracting second marriage, then the same conclusion may follow that such regulatory prohibition if violated or contravened would not render the marriage void.

Similarly, a reference to Child Marriage Restraint Act would also show that the Child Marriage Restraint Act was enacted to carry forward the reformist movement of prohibiting child marriages and while it made marriage in contravention of the provisions of the Child Marriage Restraint Act punishable, simultaneously it did not render the marriage void. It would thus appear that voidness of marriage unless statutorily provided for is not to be readily inferred. Thus, examining the matter from all possible angles and keeping in view the fact that the scheme of the Act provides for treating certain marriages void and simultaneously some marriages which are made punishable yet not void and no consequences having been provided for in respect of the marriage in contravention of the proviso to s. 15, it cannot be said that such marriage would be void. The appellant was denied the status of the wife of Rajendra Kumar and, therefore, his widow, and an heir to him on his death on the only ground that her marriage with Rajendra Kumar was void, being in contravention of the proviso to s.

15. As her marriage, even though in contravention of the provisions of s. 15, is not void, she cannot be denied the status of wife and, therefore, the widow of deceased Rajendra Kumar and in that capacity as an heir to him. These appeals are accordingly allowed and the decision of the High Court in Special Appeals Nos. 374, 375, 376, 377, 378 and 379 of 1967 is set aside as also the decision of the High Court before the learned single judge in Civil Misc. Writ Petitions Nos. 4083, 4084, 4085, 4086, 4087, 4088 of 1966 is quashed and set aside and the writ petitions are dismissed. The respondents shall pay the, costs of the ap- pellant in this Court in one set.

PATHAK, J.-I agree that the appeals should be allowed, but I would prefer to rest the decision on the reasons which I now set forth. The facts have already been set out by my brother Desai.

(1) (1 835) 17 Lah. 48.

9329 SCI/78 The question is whether a remarriage solemnised before the expiry of the period of one year specified in the proviso to Section 15 of the Hindu Marriage Act is a void marriage or merely irregular. Section 15 of the Hindu Marriage Act provides :

> "15. When a marriage has been dissolved by a decree of divorce and either there is no legal right of appeal against the decree or, if there is such a right of appeal, the time appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the,

> marriage to marry Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the Court of the first instance."

It is urged on behalf of the appellant that the proviso to Section 15 is directory in nature, and therefore a marriage effected in violation of the time-period specified there is not void. The principal argument in support of the submission is that whenever the statute intends to treat a marriage as a nullity it specifically so provides. We have been referred to the observations of Dr. Lushington in Catterall v. Sweetman(1) "The words in this section are negative words, and are clearly prohibitory of the marriage being had without the, prescribed requisites, but whether the marriage itself is void . . . is a question of very great difficulty. IL is to be recollected that there are no words in the Act rendering the marriage void, and I have sought in vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it..... From this examination of these Acts I draw two conclusions First, that there never appears to have beer, a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity, unless such nullity was declared in the Act. Secondly, that, viewing, the successive marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create, a nullity."

It is contended that the question whether a marriage is a nullity invites particular considerations, and the ordinary norms of construction will not suffice. I find it difficult to dispute that the question of the validity of a marriage deserves an especial care, and the greatest caution must be exercised before a marriage is declared void. But I do not find it possible to admit that unless the statute specifically declares a marriage to be a nullity, it cannot be pronounced so by the courts. To my mind, the intrinsic evidence provided by the language of the statute, the context in which the provision finds place,. and the (1)(18 4) 9 Jur. 951, 954.

object intended to be served is of equal validity. Dr. Lushington relied on the absence of any decision laying down that the nullity of a marriage could be inferred by statutory construction. It was not long after that his observations were considered in Chichester v. Mure (falsely called Chichester) (1) by a Court consisting of Williams, J. and Channell, B. Williams, J., who delivered the judgment of the Court, noted the argument of counsel "that the statute contained no words nullifying,-that is, expressly declaring a marriage contracted and celebrated within the prohibited time null and void; 'and that in construing a statute which relates to a contract of marriage, a different rule of construction ought to prevail from that which might properly enough be applied to statutes relating to a subject-matter other than a contract of marriage; and that, in construing a statute relating to a contract of marriage, it is not enough to invalidate the marriage to show a disregard of enactments merely negative and prohibitory, but the marriage must be held good, unless there are words expressly declaring that it shall be null and void." The,learned Judges pointed out that Catterall (supra) was distinguishable and the observations of Dr. Lushington must be read in relation to the facts of the case before him. It was a case where a marriage, if good before the Act under consideration was passed would not be rendered void by the statute, but if not good before would not be aided by_it, and where the object of the statute was not to make any marriage void that would have been valid without its aid. The validity of the marriage was to be judged in law

independently of the statute. It was in that content that Dr. Lushington observed that there was no provision in the Act which expressly nullified the marriage. Having dealt with those observations, the learned Judges then said :

> "It is, however, quite a different question, whether, in construing a' statute which gives the very right to contract at all, we are then to hold that the marriage is good, notwith- standing a disregard of words negative and prohibitory, which relate to the very capacity to contract, because there are no words expressly nullifying the contract."

Notwithstanding that there was no express ion nullifying the marriage, the Court held the marriage void. Chichester (supra) was followed in Rogers, otherwise Briscoe (falsely called Halmshaw v. Halmshaw(2). To my mind, the argument that the proviso to Section 15 is directory and mandatory because a marriage solemnised 'in violation of it has not been declared a nullity by the statute does not carry conviction.

But the appellant is entitled to succeed in her contention on another ,ground. The object behind the restraint imposed by the proviso to Section 15 is to provide a disincentive to a hasty action for divorce, by a husband anxious to marry another woman, and also the desire to avoid the possibility of confusion in parentage where the wife has become pregnant by her husband under the earlier marriage(s). A (1) (1 863) 3, Sw. & Tr., 223.

(2) (1864) 3, Sw. & Tr. 509.

(3) 59th Report or the Law Commission of India : P. 29 para 2.32.

statutory provision may be construed as mandatory when the object underlying it would be defeated but for strict compliance with the provision. It does not seem to me that any very serious discouragement is provided by the proviso to Section- 15 to a husband anxious to marry another woman. It is also worthy of note that the impediment to the remarriage provided by the proviso to Section 15 is a temporary one and ceases on the expiration of the period of one year. The proviso proceeds on the assumption that the decree dissolving the marriage is a final decree, and merely attempts to postpone the re-marriage. It does not take into account the defensibility of the decree in virtue of an appeal. The defensibility of the decree because an appeal has been provided is a matter with which the main provision of Section 15 is concerned. So far as the intention to safeguard against a confusion in parentage is concerned, one is reminded of the principle in Mahommedan Law which places a ban on marriage with a divorced or widowed woman before the completion of her Iddat. It has now been held in Muhammad Hayat v. Muhammad Nawaz,(1)overruling the earlier view on the point, that a marriage performedduring the period of Iddat is an irregular marriage only and not a void marriage. Further evidence that the proviso to Section 15is directory only is provided by its deletion altogether by Parliamentby the Marriage Laws Reforms Act, 1976. Accordingly, I am unable to endorse the view taken by the Calcutta High Court in Uma Charan Roy v. Smt. Kajal Roy.(2) In my opinion, a marriage performed in violation of the proviso to Section 15 of the Hindu Marriage Act is not void.

It has also been urged on behalf of the appellant that if Parliament intended that a marriage in violation of the proviso to Section 15 should be a nullity, it would have made express provision for legitimating the offspring of such a marriage. The absence of such a provision, it is said, points to the conclusion that the proviso to Section 15 is 'directory. I refrain from expressing any opinion on the validity of that argument, when the appellant succeeds on the considerations to which I have adverted. I hold that the marriage of Rajendra Kumar with the appellant is not void, and she is entitled to be considered as his wife.

At this stage, it is appropriate to mention that the two tests sought to be employed in the construction of the proviso to Section 15, that is to say that a marriage, although in violation of the statute, is not void because the legislature has not expressly declared it to be so, and also because. the legislature has made no provision for legitimating the offspring of such a marriage, need to be viewed with caution. These are tests which could equally be invoked to the construction of the main provision of Section

15. And, as I shall endeavour to show, the conclusion that that provision is, directory and not mandatory does not necessarily follow.

(1)(193 5) 17 L.R. Lah. 48.

(2)A.I.R. 1971 Cal. 307.

The main provision of Section 15 provides that when a marriage has been dissolved by a decree of divorce, either party to the marriage may marry again, if there is no legal right of appeal against the decree ,or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal having been presented has been dismissed. In other words, the right to remarriage shall not be exercised before the decree of divorce has reached finality. Similar provision is contained in the English statutes. The Courts in England have consistently taken the view that the right to remarry pertains to the capacity of the parties to enter into marriage, and when a limitation in point of time is placed on the exercise of the right it is regarded as a qualification of the right itself. and a remarriage effected in violation of the time limitation has been held to be a void marriage. See, Chichester (supra).

In India, among the earliest enactments relevant to our purpose is the Indian Divorce Act 1869, Section 57 of which provides :

> "57. When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction.
>
> or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, but not sooner, it shall be lawful for the

> respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :
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> Provided that no appeal to the Supreme Court has been presented against any such order or decree.
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> When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death."

The section was construed in Warter v. Warter,(1) which in turn influenced the decision in Le Mesurier v. Le Mesurier(2) and Boettcher v. Boettcher(3). These cases were considered with approval by the High Court of Australia in Miller v. Teale(4). In India, Warter (supra) has been followed in J. S. Battie v. G. E. Brown,(5) Turner v.Turner(6) and Jackson v. Jackson,(7) cases which involved the (1) (1 890) 15 Pr bate Division., 152.

(2) (1929) 46 T.L.R., 203.

(3) (1949) Weekly Notes, 83.

(4) (1954-55) 92 C.L.R., 406.

(5) A.I.R. 1916 Madras, 847.

(6) A.I.R. 1921 Cal., 517.

(7) I.L.R. 34 Allahabad, 203.

application of Section 57 of the Indian Divorce Act. Judicial opinion, appearing from those decisions, seems to be that a marriage solemnised before the expiry of the period of limitation for presenting an appeal or, where an appeal has been presented, during the pendency of that appeal must be regraded as a void marriage. The law in this regard was precisely stated in Miller (supra), where Dixon, C.J. pointed out .lm15 " In English Law a restraint on remarriage so as to allow time for appealing appears to be regarded as designed to give a provisional or tentative character to the decree dissolving the marriage so that it does not yet take effect in all respects. It is regarded as ancillary to the provision of the law which for a comparatively brief time makes the decree absolute for dissolution contingently defensible in the event of appeal. It is as if there is a rasidual incapacity to remarry arising out of the previous marriage and not yet removed by the process provided for dissolving it."

In the same case, Kitto, J. said " Whatever'be the law by which a person's general capa- city to marry is to be determined according to the rules applied by the English Courts, if he is a divorced person those Courts will recognize an incapacity to remarry which is imposed upon him by the law of the country in which his former marriage was dissolved, provided that the incapacity is imposed

incidentally to the provision of a right of appeal against the judgment of dissolution." The main provision of Section 15 of the Hindu Marriage Act, which, bears almost identical resemblance to the relevant statutory provisions in the cases mentioned above, would perhaps attract a similar conclusion in regard to its construction. At the lowest, there is good ground for saying that a contention that a marriage solemnised in violation of the main', provision of Section 15 is a nullity cannot be summarily rejected. The question which arises before us in this case does not directly involve the construction of the main provision of Section 15 and, therefore, I refrain from expressing any opinion on the validity of such a marriage.

The appeals are allowed, the judgment of the Division Bench of the High Court in Special Appeals Nos. 374 to 379 of 1967 as well as of the learned single Judge in Writ Petitions Nos. 4083 to 4088 of 1966 are set aside and the writ petitions are dismissed. The respondent shall pay the costs of the appellant in this Court in one set.

S. R. Appeals allowed.
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