Calcutta High Court
Noor Jehan Begum vs Eugene Tiscenko on 3 January, 1941
Equivalent citations: AIR 1941 Cal 582
Author: Edgley
JUDGMENT Edgley, J.

1. In this case a lady who describes herself as Noor Jehan Begum sues for a decree for the dissolution of her marriage with Eugene Tiscenko, a Russian subject, at present residing at Edinburgh in Great Britain. In the alternative, she asks for a declaration that her marriage with the defendant stands dissolved. The plaintiff's suit first appeared in the undefended list but, having regard to certain legal points of far-reaching importance which arise in connexion with this matter, I thought it desirable that the law relating to the case should be discussed in full, and I therefore asked Mr. S. M. Bose to appear as amicus curiae. He has been assisted by Mr. Clough and Mr. Das, and I am very grateful to these gentlemen for the help which they have given me in deciding this ease. In her plaint the plaintiff states that she is of Russian parentage and until recently was a Christian. She was born in Poland and, on 28th May 1931, was married in Berlin according to civil rites to the defendant, who is a Russian. She goes on to state that she lived with her husband at various places in Europe until June 1938, during which period her life with her husband was unhappy. The parties last resided in Rome whence the plaintiff came to Calcutta, while the defendant went to Great Britain in order to qualify himself for a British medical degree. The plaintiff arrived in Calcutta at the beginning of September 1938, where she has been residing ever since, and the defendant has not joined her. She states that her husband has not been maintaining her or her son since their arrival in India and she has been living partly on her own earnings and partly on help received from her mother from time to time. In para. 7 of her plaint she states that, on 27th June 1940, she of her own free will and after due deliberation embraced the Islamic faith and took the name of Noor Jehan. The conversion took place at the Nakoda Mosque at 19 Chowringhee Road, Calcutta. In para. 8 of the plaint the plaintiff states that upon her conversion as aforesaid she sent a message by telegram on 28th June 1940 to the defendant informing him of her conversion to Islam and calling upon him to accept the Islamic faith. The defendant however did not comply with the plaintiff's request and indignantly refused to embrace Islam. The defendant informed the plaintiff of that fact by a telegraphic message which was delivered to the plaintiff at her place of residence aforesaid on 2nd July 1940.

2. If it be the law that the plaintiff by reason of her conversion to Islam is entitled either to a decree for the dissolution of her marriage with the defendant on the ground that the latter has refused to adopt Islam, or a declaration to the effect that the marriage stands dissolved by reason of her conversion, it is of course, essential in the first place for her to satisfy the Court that her conversion is of a bona fide character. She has given evidence on this point, which indicates prima facie that her conversion was bona fide. It is unfortunate that it has not been possible for Mr. Bose to test this evidence by means of cross-examination as, in his capacity as amicus curiae, he has no instructions upon which such cross-examination could be based. In certain respects the plaintiff's testimony cannot be regarded as being very convincing in its nature, but in view of the fact that it stands unrebutted, I am not in a position to hold that she was not a bona fide convert to Islam. The plaintiff's suit must therefore be decided on the footing that she has been converted from Christianity to Islam, but the question must be examined whether the fact of her conversion coupled

with her husband's refusal to adopt her new faith, constitutes a ground sufficient in law to enable this Court to grant the plaintiff the relief which she seeks. At the outset I think it is desirable to formulate certain general principles relating to matrimonial suits, which appear to be firmly established according to private international law. Those principles have been concisely summarized by Sir John Beaumont C. J. in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 as follows:

Certain principles of law relevant to the determination of this question are, in my opinion, firmly established in the realm of private international law: (1) The forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the lex loci contractus, that is, the law of the place where the marriage ceremony is performed; (2) on marriage the wife automatically acquires the domicile of her husband; (3) the status of spouses and their rights and obligations arising under the marriage contract are governed by the lea domicilii, that is by the law of the country in which for the time being they are domiciled : see Harvey v. Farnie (1883) 8 AC 43 and Nachimson v. Nachimson (1930) LRP 217; (4) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract, and are governed by the lex domicilii : see Nachimson v. Nachimson (1930) L R P 217.

3. In addition to the four general principles formulated above, there is a fifth rule of general application, which has been stated by Sir Shadilal C. J. in Lee v. Lee ('24) 11 AIR 1924 Lah 513 at p. 157 in the following terms:

It is the duty of the Court before which an action of this description is brought to decide, in accordance with the rules of its own municipal law, whether it has jurisdiction to entertain the action. If the lex fori contains a definite rule governing jurisdiction over the case, that rule must be followed irrespective of the question whether it is in accordance with the corresponding rule of other countries or not, and whether the decree granted by the Court would or would not be recognized by the tribunals of a foreign country.

4. With regard to the prayer in the plaint, in which the plaintiff asks for a decree for the dissolution of her marriage, it was admitted by Mr. Majumdar during the course of his argument that this is not a case which comes within the matrimonial jurisdiction of this Court under Section 35 of the Letters Patent or in which this Court would have jurisdiction to dissolve the marriage either under the provisions of the Indian Divorce Act of 1869, as amended by Act 25 of 1926, or under those of the Indian and Colonial Divorce Jurisdiction Act of 1926, read in the light of the rules framed under Section 1(4) of that Act. The difficulty with which the plaintiff would be con-fronted in applying to this Court in its matrimonial jurisdiction for the dissolution of her marriage would be that she would have to show that she and her husband were domiciled in India or were British subjects domiciled in England or Scotland at the time of the presentation of her petition for divorce. Admittedly, however, the plaintiff and her husband are Russians who were married in Berlin according to civil rites on 20th May 1931. It follows therefore that they have a Russian domicile.

5. By the amendment of 1926 the provisions of the Indian Divorce Act as regards domicile have been brought into conformity with the law of England. Under Section 2 of Act 4 of 1869, as it stood before the amendment of 1926, it had been held that residence in India at the time of presenting the petition was sufficient to confer jurisdiction on the Indian Courts, provided the parties professed the Christian religion, and it was on that ground that in 1912 Fletcher J. granted a divorce to an Italian domiciled in Italy but resident in India in Francesco Giordano v. Flora Giordano ('13) 40 Cal 215, although that decree would have been invalid outside India. The English rule on this point is that the Court has no jurisdiction completely to dissolve the marriage tie unless the parties are domiciled within the jurisdiction of the Court at the time when the proceedings are commenced. The leading case on this point is that in Wilson v. Wilson (1895) 1895 AC 517 in which the Judicial Committee of the Privy Council came to the following conclusion (at p. 540):

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to International law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance in Wilson v. Wilson LR 2 P & D 442, which were obviously meant to refer, not to questions arising in regard to the mutual' rights of married persons, but to jurisdiction in the matter of divorce . It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction' is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views of laws respecting matrimonial obligations, and a different estiniato of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another.

6. The principle laid down in Wilson v. Wilson (1895) 1895 AC 517 was followed by Sir Henry Duke in Keyes v. Keyes (1921) LRP 204. In that case it was contended that the Courts in India were empowered to dissolve a marriage between parties domiciled in England but resident in India. Reliance was placed on the provisions of Section 2 of Act 4 of 1869, as it stood before the amendment of 1926, upon the practice of 50 years, under which Indian Courts had granted divorces to petitioners who were resident in India, and upon the dictum of Sir Lawrence Jenkins C. J. in Jogendra Nath Banerjee v. Elizabeth Banerjee ('99) 3 Cal WN 250 to the effect that "the Indian Legislature has not made domicile the test of the Court's authority to grant a divorce." The learned President pointed out that, in so far as it might have been decided in Niboyet v. Niboyet (1879) 4 PD 1, that jurisdiction in divorce could be held to depend upon the residence of the parties, the authority of that case had been destroyed by the judgment of the Privy Council in Wilson v. Wilson (1895) 1895 AC 517 and that; according to the law of England, apart from any express statutory provision which might exist, the jurisdiction to decree the dissolution of a marriage depended upon the domicile of the parties. He further held that the provisions of the Indian Councils Act "could not be deemed to warrant the making of laws by the Government of India to interfere with the status of subjects of the Crown not domiciled in India," and he adopted the principle laid down in (1895) A C 5176 as being conformable to international law and preferable to a principle which would involve

infringement of the rules of other communities. Although on the facts of that case the learned President granted the petitioner a decree for the dissolution of his marriage, the effect of his decision was to hold that the Indian Courts had no jurisdiction to decree the dissolution of marriage between parties not domiciled in India.

7. There was no appeal against Sir Henry Duke's decision in Keyes v. Keyes (1921) LRP 204 and, in view of the doubt which that decision had thrown upon the validity of decrees granted in the past by Courts in India in matrimonial suits, the Indian Divorce "Validating Act (11 and l2 Geo. v. Ch. 18) was enacted by the British Parliament in 1921 for the purpose of validating such decrees. The correct-ness of Sir Henry Duke's decision was questioned in India by a Bull Bench of the Lahore High Court in 1924 in Lee v. Lee ('24) 11 AIR 1924 Lah 513. in which that Court declined to follow the decision in Keyes v. Keyes (1921) LRP 204, and held that the Courts in this country had jurisdiction to grant decrees for the dissolution of marriages between parties who were admittedly domiciled in England if the petitioner resided in India at the time of presenting the petition. The learned Judges also held that, under the provisions of the Indian Councils Act of 1861, the Indian Legislature had power to confer such jurisdiction on the Indian Courts. The controversy was finally set at rest by the amendment in 1926 of the Divorce Act of 1869, which provided in Section 2, as amended, that:

Nothing hereinafter contained shall authorize' any Court to grant any relief under this Act except where the petitioner or respondent profess the Christian religion.

Or to make decrees of dissolution of a marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented.

8. The general principles in accordance with which the law in matrimonial suits must be administered under the provisions of the Indian Divorce Act are those which are followed by the English Courts and on this point no amendment was made in 1926 of Section 7, Indian Divorce Act, which is in the following terms:

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

Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.

9. Further, in order to enable certain British subjects not domiciled in India, to obtain relief in matrimonial causes in the Indian Courts, the Indian and Colonial Divorce Jurisdiction Act was passed in 1926, which conferred upon High Courts in this country power in certain cases with respect to the dissolution of marriages, the parties whereof are domiciled in England and Scotland. As regards non-British subjects, however, the law remains unchanged and it follows that, according

to the ordinary principles of private international law, a petitioner in this country with a foreign domicile, who wishes to obtain dissolution of his marriage must seek the appropriate relief in the Courts of the country in which he is domiciled. On this ground, therefore, this Court has no jurisdiction to make a decree for the dissolution of the plaintiff's marriage with her husband.

10. Mr. Majumdar, however, contends that his client is nevertheless entitled to a declaration to the effect that her marriage with her husband stands dissolved in accordance with the principles of Mahomedan law which she has now adopted as her own. He admits that such a declaration would not operate as a judgment in rem, having regard to the provisions of Section 43, Specific Belief Act, and he also admits that it would not possess any extra-territorial validity. He maintains, however, that, whatever the effect of such a decree might be, it is the duty of this Court to grant it under the municipal law of this country in accordance with the principle laid down by Sir Shadilal in Lee v. Lee ('24) 11 AIR 1924 Lah 513 to which I have already referred. He argues that the ordinary law relating to domicile can have no application in the present case because the plaintiff, by becoming a convert to Islam, is entitled to dissolve her marriage under the principles of Mahomedan law which is administered by this Court in connexion with a wide range of subjects including marriage and which must be regarded as the lex fori of British India. Mr. Majumdar contends that his client has observed the formalities required by Mahomedan law by presenting Islam to her husband, and as the latter has refused to adopt Islam as his religion, she is now entitled to bring this suit under Section 12, Letters Patent, to obtain a declaration under Section 42, Specific Belief Act, that her former marriage is dissolved.

11. Declarations of this nature have been made by this Court in several ex parte cases. Such cases were those in Mt. Ayesha Bibee v. Bireshwar Ghosh ('29) 38 CWN clxxix and Chelimutnessa Bibi v. Surendra Nath Sen. Learned Counsel for the plaintiff cited both these cases as precedents which should be followed. Both of them relate to suits instituted by converts from Hinduism. They were undefended and the judgments consequently contain no discussion of the legal principles which should be applied with reference to these matters. I was informed that similar ex parte declarations have been granted in several other uncontested applications by converts from Hinduism but I was not referred to any case in which such a declaration had been made in favour of a convert from Christianity. The principle of Mahomedan law on which Mr. Majumdar relies is based on the following passage in chap. 5 of the Hedaya (Hamilton's Translation, 2nd Edn., p. 64):

Upon the conversion of one of the parties, the Magistrate is to require the other to embrace the faith, and must separate them in case of recusancy. When the wife becomes a convert to the faith, and her husband is an infidel, the Magistrate is to call upon the husband to embrace the faith also; if he accede, the woman continues his wife; but if he refuse, the Magistrate must separate them; and this separation with Hannefa and Mahammed is a divorce.

12. The relevant passage in Bailie's Digest, which is based on the Emperor Aurangzeb's Fatawa Alamgiri, is to be found at pp. 180 and 181 of the 2nd Edn. of that treatise. It is in the following terms:

When one of two spouses embraces the Musalman faith, Islam is to be presented to the other, and if the other adopt it, good and well; if not, they are to be separated. If the party is silent and says nothing, the Judge is to present Islam to him, time after time, till the completion of three by way of caution. And there is no difference between a discerning youth and one who is adult; so that a separation is to be made equally on the refusal of the former as of the latter, according to Aboo Hannefa and Mahammed...If the husband should embrace the faith and the wife refuse, the separation is not accounted repudiation; but, if the wife should embrace the faith, and the husband decline, and a separation is made in consequence, the separation is accounted a repudiation, according to Aboo Hannefa and Mahammed.

13. On the basis of the above-mentioned authorities Mr. Ameer Ali holds in his treatise on Mahomedan Law that, in a case in which the wife becomes a convert to Islam:

If the conversion takes place in a country subject to the laws of Islam, the faith will be offered for acceptance to the husband, and on his refusal the Judge will make a decree for separation or cancellation of the marriage. But if the wife were to become "a Musalman in a non-Islamic country, and the husband should also adopt the faith before the completion of three of "her terms," the marriage would remain subsisting, otherwise they would become separated on such completion without any decree or order of the Judge.

14. Even if the above-quoted rule has any application in the case of persons domiciled in an Islamic country it clearly cannot apply to Muslims with a foreign domicile. The learned author himself pointed out at p. 151 of the same volume that:

As long as a Musalman retains his original domicile, so long his status and his personal capacity to do certain legal acts remain subject to the Islamic law. The moment however he abandons the domicile of origin, or as soon as he acquires or adopts a new domicile, he ceases to be governed by the law of his nation. For example, an Indian Musalman, when he once takes up his abode permanently in England, or shows distinctly by some conduct on his part, that his stay in this country (i.e., England) is not in the nature of a sojourn, but that he has what is called an animus manendi, is subject thenceforward, in all matters relating to succession and personal status, to the English law. He ceases to be under the jurisdiction of the Musalman civil law. The moral and religious portions of the law remain binding upon his conscience, but his subjection to the jurisdiction of the English law has the effect of withdrawing him from the regime of the secular law of his own nation.

15. By applying this principle it follows that a woman, who is converted to Islam in a country in which Islamic law is in force, cannot disregard her domicile. If therefore she has a foreign domicile she cannot be allowed to dissolve a Christian marriage by observing the procedure prescribed for this purpose by the above-mentioned authorities. By the expression " Christian marriage " I must not be taken to mean a marriage celebrated in a Christian Church according to the formalities prescribed by any particular Christian sect. A Christian marriage may be celebrated with equal efficacy according to civil rites and is merely a marriage which precludes the possibility of a marriage with another person during the lifetime of the first spouse, unless the first marriage has

been duly dissolved by the lex fori of the country in which the parties to the marriage are domiciled. The implications of a Christian marriage have been clearly indicated in a well-known passage in the judgment of Lord Penzance in Hyde v. Hyde and Woodmansee (1866) LR 1 P 130 which is as follows:

Marriage has been well said to be something more than a contract, either religious or civil-to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that, it confers a status. The position or status of "husband" and 'wife' is a recognized one throughout Christendom; the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What then is the mature of this institution as understood in Christondom? Its incidence vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

16. The same idea is expressed in the judgment in Brinkley v. Attorney-General (1890) 15 PD 76 in which the learned President, after referring to the cases in Hyde v. Hyde and Woodmansee (1866) LR 1 P 130 and Bethel v. Hildyard (1888) 38 Ch D 220, made the following observations:

The principle which has been laid down by those oases is that a marriage which is not that of one man and one woman, to the exclusion of all others, though it may pass by the name of marriage, is not the status which the English law contemplates when dealing with the subject of marriage...Therefore, though throughout the judgments that have been given on this subject, the phrase 'Christian marriage,' 'marriage in Christendom' or some equivalent phrase, has been used, that has only been for convenience, to express the idea. But the idea which was to be expressed was this, that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned.

17. Although the present law of Russia may possibly provide parties to a marriage with facilities for its dissolution, which do not exist in English law, a marriage celebrated even in Soviet Russia is nevertheless in its essence a voluntary union for life of one man and one woman to the exclusion of all others and is therefore a marriage which is recognised by the English Courts. As pointed out by Lord Romer in Nachimson v. Nachimson (1930) LR P 217 at p. 239 in a passage in which he was discussing Lord Penzance's observations in Hyde v. Hyde and Woodmansee (1866) LR 1 p 130:

The only words in this definition that create any difficulty are the words 'for life,' Lord Penzance's judgment was given in the year 1866 at a time therefore when the Matrimonial Causes Act of 1857 had been in operation for several years, and at a time when in most Christian countries a marriage could 'be dissolved for various causes. It seems clear therefore that in deciding whether any particular union of one man and one woman is for life, the fact that the union is made dissoluble in certain events by the laws of the country where it is entered must be disregarded. This is in precise accordance with the statement made by Lord Brougham in Warrender v. Warrender (1835) 2 Cl & F 488 that dissolubility or indissolubility is not of the essence of the contract of marriage.

18. It was held in Nachimson v. Nachimson (1930) L R P 217 that a marriage contracted between two Russians at Moscow, in 1924 was a valid marriage according to English law. It was pointed out at p. 225 of the report that:

Proceedings for the dissolution of the marriage are governed by the law of the domicile of the spouses at the time when they are instituted: see Bater v. Bater (1906) LRP 209 and Per Lord Haldane in Lord Advocate v. Jaffery (1921) 1 AC 146 at page 152.

19. On this point the following observations of Lord Romer are also important (p. 242 of the report):

As I understand Lord Brougham's observations in Warrender v. Warrender (1835) 2 Cl & F 488 the contract of marriage does not include the conditions of defeasance. If it be regarded as doing so, the difficulties pointed out by him, will at once arise, and a marriage effected by a man of English domicile in a country whose laws provide for dissolution on the ground of incompatibility of temper might, on that ground, have to be dissolved by the Courts of this country. But dissolubility or indissolubility of a marriage in truth depends upon the domicile of the parties to it at the time it is sought to dissolve it.

20. It is true, as pointed out by Mr. Majumdar, that we do not know what the present law of Russia is on the subject of divorce but it is nevertheless clear that, as the plaintiff must be deemed to have taken her husband's domicile and, as she has contract-ed a Christian marriage, her right to obtain the relief which she seeks must be decided in Russian Courts and does not depend in any way upon the personal law of her religion, even if it be assumed that such personal law forms part of the lex fori of the Indian Courts. But even if it be assumed that no question of domicile arises and the plaintiff is entitled to dissolve her marriage on the refusal of her husband to adopt Islam after its presentation to him, the question must be considered whether she has adopted the correct procedure for this purpose. According to her evidence she was converted to Islam at the Nakoda Mosque on 27th June 1940. On the following day she informed her husband by telegram that she had adopted Islam and called on him to adopt the same religion and communicate his consent or refusal to her by cable. On 2nd July 1940 she received a cable from her husband to the effect that his religious convictions were unshakable and that he absolutely refused to change his faith. On 14th November 1940 the plaintiff received a letter from her husband to the effect that he had received the papers which had been served on him in this suit and that he was amazed at their contents. He stated, however, that he did not propose to put forward any defence.

21. In my opinion it cannot be said that Islam was ever presented to the defendant as prescribed by the rules in the treatises on Mahomedan Law, which have been quoted above. In the first place, the authorities-do not appear to contemplate a case of conversion of the wife to Islam in an Islamic country while her husband is a foreigner domiciled in a foreign country. The main distinction which has been drawn by the Muslim jurists is between a conversion which takes place in an Islamic country where both parties to the marriage may be brought before the Kazi and a conversion Which takes place in a country which is not subject to the laws of Islam. In the former case it is laid down in the Hedaya that Islam is to be presented to the unconverted party by the Kazi and, on refusal to embrace the faith, the Kazi must pronounce a decree of divorce. In the latter case the dissolution of

the marriage takes place automatically after the completion of three of the wife's "terms" because "the requiring of the other party to embrace the faith is impracticable, as the authority of the Magistrate does not extend to a foreign land nor is it acknowledged there." In the present case the conversion has taken place in India. Even if it be assumed that India is an Islamic country it appears that there can be no lawful dissolution of the marital tie unless Islam has actually been presented; to the unconverted party by the Court acting as Kazi. The authorities envisage the actual physical presence of the parties before the Kazi and, in the absence of the unconverted party, it is difficult to see how Islam can be effectively presented to him. In my opinion a mere request by a cable from a convert to her husband asking him to em-brace Islam is not sufficient to constitute a valid offer of the faith to the unconverted party. In Baillie's Digest it is even stated that:

If the party is silent and says nothing, the Judge is to present Islam to him, time after time, till the completion of three, by way of caution.

22. The procedure which has been prescribed by the jurists is designed to ensure that the unconverted party fully understands the implications of a refusal to embrace Islam and it does not appear to be applicable when it is impossible to bring that party before the Kazi. In any case, it is the Kazi and not the convert who should present Islam to the unconverted party and it is for him in a suitable case to pronounce a decree dissolving the marriage. In this view of the case the proper procedure has not been followed, so the marriage between the plain. tiff and her husband must be regarded as still subsisting. Even if it can be held that there has been sufficient compliance with the procedure prescribed by the Muslim jurists, the question still requires consideration whether it is the law of India that a convert to Islam can obtain dissolution of his or her marriage by following this procedure, On this point Mr. Bose argues that the rules of Mahomedan law detailed in such treatises as the Hedaya and the Fatawa Alamgiri presuppose the existence of Mahomedan law as the law of the State and Islam as the State religion. He contends that these rules can only be enforced as the law of India, in a case in which one of the parties is a non-Muslim, in so far as they may be consistent with the principles of justice, equity and good conscience. He maintains that it cannot be regarded as just or equitable that the plaintiff should be allowed to dissolve her marriage, which contemplated a life-long union, merely on the ground that she had become a convert to Islam and that, according to the law of India, a Christian marriage can only be dissolved under the provisions of a statute of general application. He also argues that the recognition of the rule of Mahomedan law, which allows a convert to divorce an unconverted spouse on the refusal of the latter to adopt Islam, would be contrary to public policy, as such recognition would tend to encourage dissolution by a subterfuge of marriages intended to be indissoluble. Mr. Majumdar, on the other hand, maintains that the rules formulated by the Islamic jurists, which are under discussion, are still operative as part of the personal law of Muslims. He admits that, if that personal law conflicts with the personal law of some other community, the matter must be decided according to the rules of justice, equity and good conscience, but he maintains that the right of a woman who has been converted to Islam to obtain dissolution of her marriage with an unconverted spouse, has been recognised as the law of India by the Courts in this country and that such right can be supported as being both equitable and just.

23. It is obvious from their contents that the two main treatises of the Hanafi School, with which we are concerned in this case, namely the Hedaya and the Fatawa Alamgiri (Baillie), were compiled for use in Muslim States in which Islam was the State religion. The first of these treatises was composed by Sheik Burhan-ud-din Ali in the twelfth century. He was an eminent jurist and was born at Murghinan in Trans-oxiania about 1152 A. D. He probably compiled this work as a code of law for the use of Abbasid Caliphs whose' dynasty reigned at Baghdad from 750 to 1258 A. D. The Fatawa Alamgiri, on the other hand, was compiled in the seventeenth century under the orders of the Emperor Aurangzeb. If the provisions of the two above-mentioned authorities are examined it appears that it was the policy of the State in Islamic countries to encourage conversions to Islam and to treat apostacy with a degree of severity unknown elsewhere since mediaeval times. For instance, on the same page of the Hedaya (at p. 64), which contains the provision requiring Islam to be presented to an unconverted spouse, appears the following rule as regards the incapacity of apostates from marrying:

It is not lawful that an apostate marry any woman, whether she be a believer, an infidel, or an apostate, because an apostate is liable to be pat to death. Moreover his three days of grace are granted in order that he may reflect upon the errors which occasion his apostacy, and as marriage would interfere with such reflection, the law does not permit it to him.

24. Both this rule and the rule relating to converts to Islam are intended to form part of a general scheme for maintaining the integrity of Islam by preventing apostacy and encouraging conversions. It is not the policy of the State in the twentieth century to act as a proselytizing agency or to promote the interest of one form of religion to the detriment of another. On this ground, therefore, I am of opinion, that the rule upon which the plaintiff relies must be regarded as obsolete and opposed to public policy. But, in any case, can it be held that it is the law of India that a Christian marriage may be dissolved without the decree of a competent Court merely by adopting a procedure prescribed by the personal law of Islam? To justify such a proposition it would be necessary to show that such a procedure had been sanctioned under some statute of general application or that it formed part of the common law of the country, which the Courts would be bound to enforce having regard to the principles of justice, equity and good conscience. As far back as 1869 it was held by this Court in Shaik Koodrutoollah v, Mohinimohan Saha ('70) 4 Beng LR 134 that Mahomedan law as such is not the law of India and that such a law as administered by a Muslim Government is not necessarily the law which would be administered by the Courts of this country. In this connexion, Sir Barnes Peacock C. J. made the following observations (at p. 169 of the Report):

The Mahomedan law is not the law of British India. It is only the law so far as the laws of India have directed it to be observed. We are not bound by all the rules of the Mahomedan law which are in force under Mahomedan Governments nor by the law as laid down by Fatawa Alamgiri, the digest of Mahomedan law, prepared under the Emperor Aurangzeb. We are bound by Regn. 4 of 1793, except so far as that regulation has been modified by Regn. 7 of 1832. Section 15 of the former regulation enacts, "that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions.

25. The case cited was one in which a Muslim sought to deprive a Hindu of certain rights under a sale by asserting a right of pre-emption, which applies under the personal law of Muslims as regards sales between members of their community. It was held that, on grounds of justice, equity and good conscience, a Hindu could not be bound by any provision of the personal Mahomedan law with regard to this matter. It is reasonable that the same principle should apply in respect to marriages between Muslims and members of other communities as regards incidents affecting such marriages, which are not expressly covered by statute law : Budensa Rowthen v. Fatima Bibi ('14) 1 AIR 1914 Mad 192. The current statute which recognizes certain branches of the Mahomedan law as the lex fori of India is the Muslim Personal Law (Shariat) Application Act, 1937, (Act 26 of 1937). Section 2 of that Act is in the following terms:

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talak, zihar, lian, jhula and mubaraat, maintenance, dower, guardianship, gifts, trusts, and trust properties, and wakfs, (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

26. It will be seen that the provisions of this statute only apply where the parties are Muslims and, in so far as it relates to marriage, I think that it was probably only intended to affect marriages contracted in accordance with Mahomedan law. Any doubt' on this point which might possibly have arisen with reference to Section 5 of Act 26 of 1937, which empowered the District Judge on a petition by a Muslim married woman to dissolve her marriage on any ground recognized by the Muslim Personal Law, has now been set at rest by the repeal of that section by the Dissolution of Muslim Marriages Act of 1939, (Act 8 of 1939), as the latter Act by its terms only applies to women married under Muslim law. Act 26 of 1937, therefore, contains no provision which would have the effect of making the personal law of Muslims applicable to marriages between Muslims and non-Muslims. Mr. Majumdar argues that the common law relating to the matter under discussion is expressed in para. 74-A of Wilson's Digest of Anglo-Mahomedan Law (Edn. 5, p. 146), which is to the effect that:

If one of two married persons, not Muslim, embraces Islam, Islam is to be presented to the other; if he accepts, the marriage is not affected; if not, it is a ground for divorce.

27. The difficulties of accepting the correctness of the above-mentioned proposition, have been appreciated by Mr. Tyabji in his treatise on Mahomedan Law. He states in para. 194-A:

Where persons not governed by Mahomedan law, contract or celebrate a valid marriage in accordance with a system of law other than Mahomedan law, the marriage and its dissolution will be subject to the provisions of that other system of law . . . notwithstanding that one of the parties to the marriage has, after being so married, been converted to Islam.

28. Mr. Tyabji goes on to observe:

Section 194A often raises questions difficult to decide. Considerations of justice, equity and good conscience are not inapplicable. The law to be enforced may be that of the defendant (Section 8). Hence, no fixed rule governing every case can be laid down .... The rules of law that would be applied by the Courts in a Muslim State to a case where persons, who do not follow Islam, and who are married1 in accordance with their own non-Muslim law, are not enforceable in India inasmuch as, the law that prevails is not the law of Islam but the law of India, which may generally be said to be, that the personal law of the parties shall be enforced (Section 6). . .

The law of Islam on this head may be divided in the first instance under: (1) the law that has to be enforced by a Muslim Government; (2) the law that has to be observed by an individual Muslim, whereever he be. The first is for the guidance of a Muslim Sovereign-the policy that he must observe towards his non-Muslim subjects- ....

With reference to the second head mentioned above, where persons, who have married under a non-Muslim system of law, adopt Islam, the rules contained in the texts of Islam are again not applicable. The reason is that the Muslim texts contemplate a State religion, which does not exist in India.

The law of every religion being enforced in India on a footing of equality, the rules that are applicable in India to converts to Islam from another religion, who were married prior to their conversion, may be somewhat different from the rules that would be applied to such converts in a Muslim State.

29. A case to which Mr. Majumdar attaches much importance in support of his contention is that in In re Ram Kumari ('91) 18 cal 264. In that case a woman named Ram Kumari had been convicted of bigamy on the ground that, while the marriage with her first husband was subsisting, she had married again. The main defence which she put forward was that her Hindu marriage was dissolved by reason of her conversion to Islam. In their judgments Macpherson and Banerjee JJ. referred to the rules contained in the Hedaya and Baillie's Digest, which require the presentation of Islam to the unconverted spouse and found as a fact that the second marriage had taken place without any notice to the former husband. On p. 270 the learned Judges observed:

But we cannot hold that British India is a foreign country within the meaning and intention of the above rules, so that a Hindu marriage would here become dissolved by the conversion of the wife to Islam, on the expiration of a certain interval without any notice to the husband.

30. They also held on p. 271 that:

A sacred and solemn relation like marriage cannot we think be regarded as terminated simply by the change of faith of either spouse without notice to the other, or the intervention of a Court of justice.

31. They therefore found that the first marriage of the petitioner was not dissolved by reason of her change of faith according to the Hindu law or the Mahomedan law, and that her second marriage was in consequence void.

32. In re Ram Kumari ('91) 18 Cal 264 was decided ex parte and, although it was assumed that the first marriage might have been dissolved by the petitioner by giving proper notice to her husband after her conversion, no reasons for this assumption were stated in the judgment beyond a reference to the Hedaya and Baillie's Digest. Moreover, having regard to the nature of Ram Kumari's defence, the question was not even in issue, whether by giving such a notice, she could have dissolved the marriage with her first husband. On the finding of fact contained in the judgment no question arose as to what would have been She legal position if Islam had been presented to the first husband in accordance with the prescribed procedure. It follows, therefore, that this case merely decided that Ram Kumari had committed bigamy and that a marriage cannot be terminated by a change of faith of either spouse. In my view any observations which the judgment may contain in support of the proposition formulated in para. 74-A of Wilson's Digest must be regarded as obiter dicta. I think, therefore, that, in some of the subsequent cases such as that in Mahatab-un-Nissa v. Rifaqatullah , too much weight has been attached to the decision in In re Ram Kumari ('91) 18 Cal 264, and it is of small value to the plaintiff in the present case for the purpose of supporting the proposition on which she relies, namely, that she is entitled to dissolve her marriage by the mere operation of the law of her religion.

33. The question of the extent to which the personal law of Muslims can operate to dissolve a Christian marriage according to the law of England came under review in Rex v. Hammersmith Registrar of Marriages; Ex parte Mir Anwaruddin (1917) 1 K B 634. The petitioner Dr. Anwaruddin who was actually domiciled in India had contracted a marriage in England. He maintained that he had divorced his wife by talak and applied to the High Court of Justice in England for a mandamus to the Registrar of Marriages at Hammersmith to compel the latter to issue a certificate and license which would enable him to contract a second marriage during the lifetime of his first wife. In his judgment Lord Reading observed:

Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by mere operation of the laws of the religion of the husband and without decree of a Court of law.

The law of his religion is the applicant's personal law; it is not the general law applicable to all who are domiciled in India. It is not a law peculiar to India but to Mahomedans wherever they may be domiciled. It is recognized by the Courts of India as stated by Sir Gorell Barnes, President in Venugopal Chetti v. Venngopal Chetti (1909) LRP 67. But the applicant is seeking to travel a very long way and over a hitherto unbridgeable gulf when he claims that the marriage he contracted with Ruby Hudd is dissolved in this country by the operation of the law of his religion. An English woman or a woman domiciled in England who married in England a. person domiciled in Scotland, Ireland or India, or elsewhere out of the realm of England, acquires by the status of marriage the domicil of the husband and is subject to the law of that domicil, but she does not acquire his religion or become subject to the laws of his religion except in so far as they are the law of his domicile and then to that extent only.

34. The learned Chief Justice, was, therefore, of opinion that the rule should be discharged. The judgments of Darling and Bray JJ. were to the same effect and the former actually held that Dr.

Anwaruddin had "made a marriage, as he was legally entitled to do, to which talak has no application." The matter was then taken to the Court of appeal which upheld the decision of the Divisional Court. The Lords Justices were of the same opinion as Darling J. In this connexion Swinfin Eady L. J. stated:

Now under these circumstances the marriage which was celebrated between the appellant and Ruby Hudd on 17th March 1913, has not been dissolved by any Court of competent jurisdiction (the appellant says there is none), and it is not a marriage in the Mahomedan sense which can be dissolved in the Mahomedan manner. No question arises that according to the Mahomedan law, if a member of that persuasion has taken several wives (within the limit allowed) and has entered into a union of that kind with those ladies according to his law, he may terminate that union by a writing of divorce and such a union is so terminated, The appellant has adduced evidence to make it clear that the husband has that right without assigning any reason; where to him, and him alone, it seems good to put her away, in those circumstances he can do it; but it is quite impossible to hold that such a writing of divorce could dissolve a marriage contracted here in England with an English woman, although the husband is a Mahomedan.

35. The observations of Bankes L. J. on this point were as follows:

Therefore, it is, in my opinion, sufficient to dispose of this appeal to say that there is no evidence of any personal law applicable to the appellant, which gives him the right to put away a wife, whom he has married by Christian marriage, by a writing of divorce. But I am prepared to go further if the marriage of 1913 is to be treated as a Christian marriage, and adopt the language of Lord Brougham, which has already been referred to in Warrender v. Warrender (1835) 2 Cl & F 488 where he says that the suggestion that the marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing in pais to separate, would be absurd.

36. It is, of course, true that Rex v. Hammersmith Registrar of Marriages; Ex parte Mir Anwaruddin (1917) 1 KB 634 did not decide that a Court in India could not decree that a Christian marriage might be dissolved in India by the process of talak and the question whether the English Courts would recognize an Indian decree based on a talak was left open. The decision was that in England dissolution of a Christian marriage by such process and without a decree of a competent Court of the country of the husband's domicile could not be recognized and that, according to the English law, a marriage contracted in England could not be dissolved by means of a writing of divorce delivered in accordance with the provisions of the personal law of the Muslim husband. In Rex v. Hammersmith Registrar of Marriages; Ex parte Mir Anwaruddin (1917) 1 K B 634 no question arose as to what the position would have been if the wife had become a Muslim after her marriage. It is, of course, just conceivable that such a contingency might have affected the decision. In 1897 the Judicial Committee of the Privy Council had been conscious of the difficulties which might result from such a situation as is shown by their observations in Robert Skinner v. Charlotte Skinner ('98) 25 IA 34 which are to the following effect:

One of the many peculiar features of the suit arises from the circumstance that, in the case of spouses resident in India, their personal status, and what is frequently termed the status of the

marriage, is not solely dependent upon domicile, but involves the element of religious creed. Whether a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance, and it may be, of nicety.

37. A similar question relating to the application of the personal Mahomedan law for the purpose of dissolving a Christian marriage was considered by the Bombay High Court in 1981 in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5. In that case it was held that a Muslim who had contracted a Christian marriage in Scotland might divorce his wife by talak after his return to India if his wife in the meantime had embraced the Muslim faith. This question arose in connexion with a petition for the dissolution of a marriage which had been celebrated under the provisions of the Special Marriage Act, 1872, Section 17 of which requires that marriages under that Act shall be dissolved in the manner provided in the Indian Divorce Act and for the causes therein mentioned. The respondent argued his marriage with the petitioner was a nullity as her previous marriage with a Muslim husband was still subsisting. The petitioner however maintained that her previous husband had divorced her by pronouncing a talak in accordance with Mahomedan law.

38. Speaking for myself I doubt whether the case in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 was correctly decided. It may of course be argued that in this country the policy of the State is not to interfere with the freedom of religion and with the personal law of the many communities in India, in so far as such personal law may not be inconsistent with the general law of the land or have the effect of depriving the members of other communities of rights to which they may be entitled under their own personal law. On this basis it might be urged that there could be no valid reason why a Christian or a Hindu should not by his own voluntary act make himself subject to the personal religious law of another community. In this connexion, after discussing the various Indian decisions on the subject, Blackwell J. observed in his judgment in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 (at p. 296):

It has been argued for the appellant that the status imposed by operation of law upon persons who marry in Christian form, cannot be altered by the voluntary act of the parties. But if a change of domicile, which is a voluntary act, may result in a change of status by reason of the application of a different system of law, it is difficult to see why a change of religion, the domicile remaining unchanged, may not also result in a change of status, it the law to be applied is then different by reason of the difference of religion.

39. On the other hand, it might be argued with considerable force that the decision in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 rejects certain fundamental principles relating to the status of the par-ties to a Christian marriage, which have been adopted in England in such cases as Hyde v. Hyde and Woodmansee (1866) LR 1 P 130, Rex v. Hammersmith Registrar of Marriages; Ex parte Mir Anwaruddin (1917) 1 K B 634 and the case in Brinkley v. Attorney-General (1890) 15 P D 76 which have already been cited. In this connexion, it might be urged that, in the exercise of their matrimonial jurisdiction which was expressly invoked in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 Courts in this country are enjoined by Section 7, Indian Divorce Act of 1869, to observe the principles which would

be followed in matrimonial suits in England.

40. Further, a Christian marriage is essentially monogamous in its character and indisoluble except under the provisions of a law of general application: Emperor v. Mt. Ruri ('19) 6 AIR 1919 Lah 389. The State in statutes applicable to India has designedly restricted the grounds upon which the marital tie in such a marriage may be dissolved, namely by the provisions of the Indian and Colonial Divorce Jurisdiction Act of 1926 and the Indian Divorce Act of 1869. The latter Act is applicable when either the petitioner or the respondent professes the Christian religion and entitles the wife to present a petition for the dissolution of her marriage on the ground that, since the solemnization thereof, her husband has exchanged the profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman. But it does not allow either the wife or the husband to sue for divorce merely on the ground that the other party to the marriage has adopted another faith, presumably because it is the policy of the State to recognize complete freedom of religion even in connexion with marriages, and a change of religion does not in itself interfere with the monogamous character of a Christian marriage. Even as regards Hindu marriages which are ordinarily indissoluble, the State has prescribed certain limited conditions under which such marriages may be dissolved under the Indian Converts Marriage Dissolution Act of 1866. It appears to be an anomaly that the Legislature has not provided some method by which a Christian marriage celebrated abroad by persons domiciled in India may be dissolved on suitable grounds if both parties to the marriage have been converted to Islam. At the same time, if it were the policy of the State to enlarge the grounds upon which marriages might be dissolved, it would be for the Legislature to intervene, but I do not think that by adopting the procedure prescribed in the personal law of a particular community, it is permissible to dissolve a marriage which at the time of its celebration contemplated a monogamous and indissoluble union. A marriage such as that which was under discussion in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 could only have been celebrated in India under the provisions of the Christian Marriage Act of 1872. A marriage under this Act, in my view, contemplates a monogamous union and cannot, I think, be dissolved by having recourse to the provisions of a personal law inapplicable to such marriages. Further there can be no doubt, if two persons, who were married under the Special Marriage Act of 1872, subsequently became converted to Islam, the marriage could only be dissolved under the provisions of the Indian Divorce Act. The general policy of the Legislature seems, therefore, to be that a Christian marriage can only be dissolved under the provisions of a statute of general application to such marriages and not by means of a procedure prescribed by the personal law of any particular community. In these circumstances I incline to the view that the point decided in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 requires further consideration.

41. In any case, however, it cannot be the law that a convert to another faith by reason of such conversion should be placed in a position to impose his newly acquired personal religious law upon a person who prefers to retain his own original faith. Marriage according to the principal Indian communities no less than in Europe confers a definite status on the spouses and such status can only be altered by having recourse to the provisions of a law of general application or to a personal law to which both parties to the marriage are subject, which has been adopted as the lex fori of this country. The rule upon which the plaintiff relies is not such a law. To hold otherwise could not only

result in serious inconveniences but would be contrary to the principles of justice, equity and good con-science. Two points were argued in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 namely (1) whether the husband could divorce his wife by talak while she remained a Christian and (2) whether he could do so after she became a convert to Islam. Although on the facts of the case it was only necessary to come to a final decision on the second point, the observations of the learned Judges contained a clear indication that they would not have been prepared to answer the first question in the affirmative. Upon this point Sir John Beaumont C. J. had stated in the Court of first instance:

So long as the petitioner remained a Christian, the position was, in my view, not free from doubt. A Mahomedan husband may claim that by the law applicable to him he is entitled to divorce his wife by talak; the wife, being a Christian, may affirm that, though by marriage she acquired the domicile of her husband, she did not acquire his religion, and that by the law of his domicile applicable to Christians, she is not liable to be divorced by talak.

42. When the matter came before the appeal Court, Blackwell J. observed at pp. 292-293:

On these rival contentions, I incline to the opinion that the applicant is right, As at present advised, I think that the marriage in Scotland was a monogamous marriage, and that a Court in India should, so long as the wife remains a Christian, hold that the grounds upon which such a marriage can be dissolved are laid down in the Indian Divorce Act of 1869, and should refuse to recognize a divorce by talak.

43. The views of Broomfield J. were to the effect that:

The reasonable presumption is that the parties intended a marriage as understood by the law to which in the transaction they purported to conform. It appears to me that on the whole the better view is that the meaning of the marriage relation, the status of the parties in that sense, is to be determined by the lex loci contractus, as being a matter of construction of the contract, and that in the present case the effect of the marriage in Scotland was to make the parties man and wife in the Christian sense and not in the Mahomedan sense. In that case, and to that extent, the lex domicilii would be irrelevant. But so long as we are merely considering what kind of marriage it must be taken to have been, it seems that it would make no difference at all whether we were to apply the lex loci contractus or the lex domicilii.

44. The learned Judge then proceeded to discuss the relevant provisions of the Christian Marriage Act, Act 15 of 1872, and those of the Indian Divorce Act of 1869.

45. He expresses the view that:

Even if the law of the domicile were to be applied, therefore, there can be little doubt, in my opinion, that the marriage, which these parties contracted, must be regarded as a marriage in the Christian sense, a monogamous marriage. It did not seem to me that the learned Counsel for the petitioner seriously disputed this position.

46. He then pointed out with reference to certain authorities cited in the judgment of Sir John Beaumont C. J. that:

It would I think be straining these authorities to an unreasonable extent to hold that they afford any sanction for the view that a marriage of that description may be dissolved by a form of divorce provided or allowed by the law of the domicile in respect of a different kind of marriage.

47. He went on to say that:

If it were necessary to decide the matter, I should certainly not be prepared to hold that Gulam Mahomed Ebrahim could have legally divorced the petitioner by talak, if she had remained a Christian, governed by and entitled to the protection of the Indian Divorce Act.

48. I agree generally with the observations made by the learned Judges in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 on the first of the two points which arose for decision in that case, and by applying the principles on which they are based, I must hold that it is not the law of India that a marriage which has been duly celebrated according to the lex loci contractus and contemplated a lifelong union, can be dissolved by having recourse to some provision of the personal religious law of one of the parties to the marriage in a case in which the parties belong to different religious communities. In a case such as that with which we are now dealing, even if it is held, as argued by Mr. Majumdar that no question of domicile arises the matter must be decided either according to the principles of justice, equity and good conscience, or according to the provisions of the general law of the State which may be applicable to such matters. In my view there is no equity in the rule which the plaintiff seeks to apply. It conflicts with the most fundamental principles of English law, which are followed in India in matrimonial cases. It is unsupported by the provision of any statute and does not form part of the common law.

49. I do not think that the decision in John Jiban Chandra Dutta v. Abinash Chandra Sen , to which Mr. Majumdar has referred, is of any assistance to him. It was merely held in that case that an Indian Christian who had been converted to Islam might legally contract a second marriage while his marriage to his Christian wife was still subsisting. I question the correctness of the decision in this case as I consider that a marriage solemnized under the provisions of the Indian Christian Marriage Act is essentially a monogamous union: vide the observations of Broomfield J. in Muncherji Kursetji Khambatta v. Jessie Grant Khambata ('35) 22 AIR 1935 Bom 5 at pp. 303, 304. In any event, however, John Jiban Chandra Dutta v. Abinash Chandra Sen is no authority for the proposition that a Christian marriage can be dissolved by having recourse to the personal religious law of the convert. In fact Henderson J., expressly said that "it might be difficult to say whether Dukhiram could have divorced Sudhakina by talak."

50. On the facts of the present case I must decide that the plaintiff, if she is at all entitled to a dissolution of her marriage, can only obtain it according to the lex fori of her husband's domicile. The rule of Mahomedan law, on which she relies, must be regarded as obsolete and contrary to public policy. Even if it were still in force, she has not observed the proper procedure prescribed thereby and, in any event, she would not be entitled to have recourse to it for the purpose of

obtaining a dissolution of a Christian marriage. In view of the above considerations the plaintiff's suit must be dismissed.