Bombay High Court
Muncherji Cursetji Khambata vs Jessie Grant Khambata on 20 April, 1934
Equivalent citations: (1934) 36 BOMLR 1021
Author: Blackwell
Bench: Blackwell, Broomfield
JUDGMENT Blackwell, J.

1. In this case the petitioner sues for a divorce by reason of the respondent's alleged adultery and cruelty. Among other defences, the respondent pleads that a previous marriage of the petitioner with one Gulam Mahomed Ebrahim has never been dissolved or annulled by any Court of competent jurisdiction and is still subsisting. The question, whether the first marriage had been validly dissolved before the marriage in suit took place, was tried as a preliminary issue. The learned Chief Justice answered that issue in the affirmative, and this is an appeal from his decision.

2. The issue was tried upon an agreed statement of facts. From this it appears that on December 4, 1906, the petitioner, who was domiciled in Scotland, married at the General Registry Office in Edinburgh Gulam Mahomed Ebrahim, who was a Sunni Mahomedan domiciled in India (which includes not only British India, but the various Native States). In 1912, the petitioner became a convert to the Mahomedan religion, and continued to profess that religion up to the middle of April, 1923. Between the years 1914 and 1933 Gulam Mahomed Ebrahim permanently resided at Secunderabad, and is still permanently residing there. On June 27, 1922, Ebrahim pronounced talak against the petitioner in accordance with Mahomedan law. On April 10, 1923, the petitioner obtained a declaration from the District Court at Secunderabad that she was no longer the wife of Ebrahim. On April 24, 1923, the petitioner was married to the respondent under the Special Marriage Act (III of 1872).

3. In his judgment, the learned Chief Justice says that at the time of the marriage Ebrahim was domiciled in British India, and that in 1912, when the petitioner embraced the Mahomedan faith, both Ebrahim and the petitioner were domiciled in British India. There is no evidence as to this, and no evidence where Ebrahim was domiciled when he pronounced talak, or what his domicile of origin was, or whether that was ever changed. Mr. Engineer for the respondent says that Ebrahim at the time when he pronounced talak was domiciled in British India, but he admits that there is no evidence as to this. Mr. Carden Noad for the petitioner says that Ebrahim at the time when he pronounced talak was domiciled in Secunderabad, which is in a Native State; but he admits that the only evidence in support of this assertion is the statement in the agreed facts that between the years 1914 and 1933 Ebrahim was a permanent resident of Secunderabad. However, the parties have agreed that at all material times Ebrahim was domiciled either in British India or in Secunderabad, and have also agreed for the purposes of this suit and appeal that the law applicable in Secunderabad is the same as in British India. The appeal has accordingly been argued and decided upon that assumption.

4. It may here be mentioned that Secunderabad is a British Cantonment, but that it still remains part of the Hyderabad State and is the property of the Nizam see Hossain Ali Mirza v. Abid Ali Mirza (1893) I.L.R. 21 Cal. 177 and Ananta-padmanabhaswami v. Official Receiver of Secunderabad (1933)

L.R. 60 I.A. 167 : S.C. 35 Bom. L.R. 747. By virtue of the Indian (Foreign Jurisdiction) Order in Council 1902, which was made under the Foreign Jurisdiction Act, 1890, the Governor General in Council has applied to the Cantonment of Secunderabad various enactments, subject to any amendments to which the enactments are for the time being subject in British India. The notification, which is dated March 22, 1913, is to be found at p. 227 of Vol. I of Macpherson's British Enactments in force in Native States. Among the Acts applied are the Indian Divorce Act, IV of 1869, the Special Marriage Act, III of 1872, the Indian Christian Marriage Act, XV of 1872, and the Specific Relief-Act, I of 1877. As regards the Indian Divorce Act it appears from the notification that "District Court" in Section 3 of the Act means the First Assistant to the Resident at Hyderabad. The power of the Governor General in Council to apply Acts by notification in this manner is recognised by their Lordships of the Privy Council in Dattatraya Krishna Rao Kane v. Secretary of State for India (1930) L.R. 57 I.A. 318 : S.C. 33 Bom. L.R. 6.

5. There is no evidence as to what the law of Scotland is in reference to a marriage entered into in Scotland before a Registrar. The learned Chief Justice has assumed for the purposes of his judgment that the Scotch law is the same as the English law. Whether the law is the same or not, I do not know. Before us counsel for the respondent wished to argue that the law was not the same, and that the marriage in Scotland should be regarded as equivalent to a marriage in Mahomedan form, but, in the absence of evidence upon the subject, we declined to allow him to do so, and as the case was argued in the Court below upon the assumption that the law was the same, we have decided this appeal upon that assumption.

6. Mr. Garden Noad contended that the declaration made by the District Court, Secunderabad, that the petitioner was no longer the wife of Ebrahim operated as a judgment in rent. He relied upon Section 41 of the Indian Evidence Act, under which a final decree of a competent Court in the exercise of matrimonial jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to such character, is relevant and conclusive proof that any legal character which it takes away from any such person ceased at the time from which such decree declared that it had ceased or should cease. There is no evidence that the District Court was exercising matrimonial jurisdiction, or that it had such jurisdiction, and from the notification earlier referred to, jurisdiction under the Indian Divorce Act of 1869 is to be exercised by the First Assistant to the Resident at Hyderabad. The prayer in the plaint in that suit is for a declaration that the plaintiff is no longer the wife of the defendant and the words used in the body of the plaint indicate that it was a suit brought under Section 42 of the Specific Relief Act. In my opinion, the District Court was not exercising matrimonial jurisdiction, and Section 41 of the Indian Evidence Act does not apply. The learned Chief Justice held that having regard to the terms of Section 43 of the Specific Relief Act (the illustration to which is in point), the declaration does not operate in rem. I agree with him.

7. Two points have been argued, namely, (1) whether the husband could have divorced his wife by talak while she remained a Christian, and (2) whether he could do so after she became a convert to Mahomedanism.

8. The contentions of the appellant upon the first point may be summarised as follows :- This was a Christian marriage, which is a voluntary union for life of one man to one woman to the exclusion of all others Hyde v. Hyde and Woodmansee (1866) L.R. 1 P. & D. 130 and Nachimson v. Nachimson [1930] P. 217. The English Courts have refused to recognise talak as applicable to Christian marriage Rex v. Hammersmith Superintendent Registrar of Marriages : Mir-Anwaruddin, Ex parte [1917] 1 K.B. 634 and the Courts in India, where the husband is domiciled, which alone have jurisdiction over the rights and obligations arising out of the marriage Nachimson v. Nachimson, above cited and Harvey v. Farnie (1880) 6 P.D. 35 on appeal (1882) 8 App Cas. 43, will apply the same principle to a Christian marriage. If this marriage had been entered into in India, it would have been void unless solemnised in accordance with the provisions of the Indian Christian Marriage Act (see Section 4 of Act XV of 1872). A marriage solemnised under this Act is essentially a monogamous marriage, involving an implied obligation not to marry another wife while that marriage subsists, and although a Mahomedan under his personal law is allowed four wives, he must be deemed to have abandoned his rights under that law by contracting marriage with a Christian, and would be guilty of bigamy if he married again while the first marriage subsisted. In any event a marriage solemnised under Act XV of 1872 is not a Mahomedan marriage, and cannot be dissolved by talak at the instance of the husband. The grounds upon which a Christian wife in India may divorce and be divorced are regulated by the Indian Divorce Act (IV of 1869). Those grounds being defined in that Act, she could not claim to divorce her Mahomedan husband and he could not claim to divorce her upon grounds applicable to a Mahomedan marriage. It is true that as he did not profess the Christian religion a Mahomedan husband could not have petitioned for a divorce against his wife under the Indian Divorce Act until by an amendment in 1926 the Court was given jurisdiction "where the petitioner or respondent professes the Christian religion ", but this was a casus omissus when the Act was passed in 1869, and as the grounds and the procedure upon which a Christian wife might be divorced were defined in that Act, divorce by talak would not apply to her.

9. The contentions of the respondent upon this point were shortly as follows :- A marriage in Scotland between a Mahomedan, who is domiciled in British India, and a Christian woman is not monogamous by the law of the husband's domicile applicable to Mahomedans. Even if the marriage had been solemnised in India under Act XV of 1872, the husband could still by his personal law have married as many as three other wives. If it had been intended by that Act to constitute a marriage under it monogamous, the Act would have so provided. By the Special Marriage Act (III of 1872), under which the marriage sought to be dissolved by the present suit was celebrated, " neither party must, at the time of the marriage, have a husband or wife living" (Section 2 (1)), every person married under the Act who, during the lifetime of his or her wife or husband, contracts any other marriage, is punishable for bigamy, "whatever may be the religion which he or she professed at the time of such second marriage" (Section 16), and the Indian Divorce Act is in terms made applicable to all marriages contracted under the Act (Section 17). There are no such provisions in Act XV of 1872, and the personal law of a Mahomedan husband marrying under that Act is not affected. The Indian Divorce Act of 1869 no doubt gave a Christian wife as petitioner rights of divorce against her Mahomedan husband, but it did not, until 1926, give any rights of divorce to him, and whatever may be the position since the Act was amended in 1926 by conferring rights of divorce upon the husband, the Act as it was originally framed did not in terms deprive him of his rights as a Mahomedan to divorce his wife by talak, and ought not to be treated as having done so by implication. Under

Section 10 of the Act a wife may present a petition for divorce upon the grounds (among others) that her husband has been guilty of bigamy with adultery, or of marriage with another woman with adultery. The Act, therefore, appears to contemplate that by his personal law a man who in India marries a Christian wife may marry another, and the Christian wife is for this reason given the right to petition for a divorce in such an event. A Mahomedan who married a kitabia, that is, a Jewess or a Christian, could always divorce her by talak, and he can do so still. A marriage between a Mahomedan and a Christian woman must of course be solemnised in India in accordance with the provisions of Act XV of 1872, or the marriage would be void. But it is a marriage recognised by Mahomedan law, by which no particular form of marriage is required, and it is not a monogamous marriage, and in dealing with the status of the parties and the rights and obligations arising out of the marriage, the Courts in India will apply the personal law of the Mahomedan husband. They will equally apply that law to a marriage between a Mahomedan and a Christian woman celebrated in Scotland, and will hold that the husband has a right to divorce by talak.

10. On these rival contentions, I incline to the opinion that the appellant 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 recognise a divorce by talak. If it had been necessary to decide this question, I should have taken further time to consider it. But, having regard to the conclusion at which I have arrived upon the second question, I do not think it necessary to decide the first, and I refrain from doing so.

11. The second question is, whether the husband could divorce his wife by talak, she being at the time a convert to the Mahomedan religion. This question has been discussed, but not decided. In Skinner v. Orde (1871) 14 M.I.A. 309, a case relating to the custody of a child, the issue of a Christian marriage, whose Christian father had died, the child's mother, the widow, lived and cohabited with one John Thomas John, who was already the husband in Christian marriage of a living Christian wife. They both became Mahomedans for the purpose, as it appeared, of giving legal effect to a Mahomedan marriage between them, but that marriage was not proved to have been duly celebrated. At p. 324 of the report, their Lordships of the Privy Council said:

It is suggested that this union was sanctified and legalized in this way-that the Widow became a Mahomedan, that John Thomas John became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the Widow, the Appellant.

The High Court expressed doubts of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

Skinner v. Skinner (1897) L.R. 25 I.A. 34 was a suit to obtain a widow's share under Mahomedan law in the estate of the deceased. The plaintiff and the deceased who were originally Mahomedans had been married in 1855 as professing Christians, and having reverted to Mahomedanism, they were married a second time according to Mahomedan law in nikah form. One of the issues in the suit was : Whether the deceased had divorced the plaintiff by a divorce according to Mahomedan law? The

District Judge answered that issue in the affirmative, but held as a matter of law that the regular Christian marriage celebrated between two persons domiciled in India, could not, upon the spouses subsequently embracing Mahomedanism be divorced by a Mahomedan divorce. The learned Judges of the Chief Court expressed no opinion on that finding of law, but held that there had been no Mahomedan divorce. After purporting to divorce the plaintiff, the deceased had lived with another woman as his wife until his decease. At the beginning of the litigation the plaintiff disputed that there had been any marriage between the deceased and that other woman, and disputed the legitimacy of their offspring, who were the appellants in the case, but that contention was abandoned. The deceased had made a will, by which he purported to exclude the plaintiff from a share in his estate, but the District Judge held that as the deceased continued to live as a Mahomedan and died professing that faith, he was bound by the provisions of the Mahomedan law, and the will was invalid, and a decree of partition was given to the plaintiff which assigned to her, as one of the two legal wives of the deceased, one half of the eighth share allotted to the widow, or widows, as the case may be, under the Mahomedan law of intestacy. In the course of their judgment, their Lordships of the Privy Council said (p. 40):

The decree made by the District Judge, and ultimately approved of by the Chief Court, is framed upon the footing that the personal status of Stuart Skinner, at the time of his death in 1886, was that of a Mahomedan, and that the rights of succession to his estate, including the right of his first wife, who had become and was then a Mahomedan, were governed by the rules of Mahomedan law.

In an earlier passage, their Lordships had expressed the opinion that upon the assumption on which it proceeds the Mahomedan law laid down by the District Judge appeared to be correct. In a later passage their Lordships said (p. 41):

One of the many peculiar features of this 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 domicil, 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. In the present case that question does not arise for decision, unless it is shewn that Stuart Skinner did, in fact, divorce Badshah Begum according to Mahomedan form.

12. Later their Lordships said (p. 41):

...having regard to the fact that the case has come before them in such a shape as to make an exhaustive argument from the Bar on both sides of the question impossible, they do not think it expedient to express any opinion as to the effect of a change of religion by the spouses, their domicil remaining the same, upon the rights of one or other of them which are incidental to marriage.

13. The case of Skinner v. Skinner is, in my opinion, instructive as showing how in India a man's right of disposition over property may be governed by the religion which he professes. Similarly, it is clear from Abraham v. Abraham (1863) M.I.A. 195, that if a Hindu becomes a convert to

Christianity, the Hindu law ceases to have any continuing obligatory force upon him, and that he may either renounce the old law by which he was bound as he renounced his old religion, or abide by the old law although he has renounced his old religion. In the course of their judgment in the case their Lordships of the Privy Council said (p. 244):

The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The argumentum at inconvenient cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should' it be regarded as non-existing in law? Their Lordships are of opinion, that it was competent to Matthew Abraham, though himself both by origin and actually in his youth a ' Native Christian', following the Hindu Laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged.

Again, in Mitar Sen Singh v. Maqbul Hasan Khan (1930) L.R. 57 I.A. 313 : S.C. Bom. L.R. 1 their Lordships of the Privy Council held that Section 1 of the Caste Disabilities Removal Act 1850, protected only the actual person who either renounces his religion, 'or has been excluded from the communion of any religion, or has been deprived of caste, and that where the property of a Mahomedan converted from Hinduism has passed according to Mahomedan law to his descendants, Hindu collaterals cannot claim by virtue of the Act to succeed under Hindu law. In the judgment their Lordships said (p. 317):

In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. It may, of course, work hardly to some extent upon expectant heirs, especially if the expectant heirs are the children and perhaps the unconverted children of the ancestor who does in fact change his religion, but, after all, it inflicts no more hardship in their case than in any other case 'where the ancestor has changed the law of succession, as, for instance, by acquiring a different domicil, and their Lordships do not find it necessary to consider any questions of hardship that may arise. They will certainly, in their Lordships' view, be outweighed by the immense difficulties that would follow if the wider view were to prevail.

14. These cases show that in India, personal status, rights and obligations, and questions of succession and inheritance, are frequently governed by religious creed, and that they may be affected by a change of religion as they might be affected by a change of domicile 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, if the law to be applied is then different by reason of the difference of religion. It is said for the appellant that as this question arises in a divorce suit brought under the Indian Divorce Act of 1869, and Section 7 of that Act enjoins the Court to " 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," the Court here ought to refuse to recognise the divorce by talak,

as that would not be recognised by the Divorce Court in England. But, in considering in a divorce suit in India the question whether a previous marriage of one of the parties is or is not still subsisting, it seems to me that the Court must apply the law in India applicable to that marriage at the time when that question arises.

15. There is, I think, no doubt that a Mahomedan could divorce a kitabia by talak under Mahomedan Law. In Ameer Ali's Mahommedan Law, 5th Edn., Vol. II, at p. 393, the following passage occurs:

But a Moslem can enter into a valid contract of marriage with a woman following any of the Scriptural faiths. All the legal consequences (save as regards the right of inheritance, the reason for which is to be found in another principle) which flow from an union between two Islamists, arise out of such marriage. Suppose, then, a Musulman wife abandons Islam and embraces Judaism or Christianity, there is no inherent vice in the continuance of the contract as a valid contract. It is only as a State offence that the ecclesiatical law pronounces against her a forfeiture of civil rights. But when that law is unenforceable, the union remains as valid as it would be were the wife a Jew or a Christian at the time of marriage.

Again, at p. 499 of the same volume, in dealing with the question of talak, it is said:

The iddat of a free woman, Moslemah or kitabia, is three full terms, but of one who is too young or too old three months, counted by days; in other words, ninety days.

I think it is clear from these passages that in the opinion of the author a Mahomedan could divorce a kitdbia by talak. It may well be that the husband's right of pronouncing talak against a Christian wife was taken away when the principles upon which the Courts in England would act became applicable in India to a Christian wife, but if a Christian wife renounces Christianity by adopting another religion, as the petitioner did in this case, those grounds and that procedure cease to apply as between her and her Mahomedan husband, and I can see no reason why his personal law should not then apply to the marriage. Otherwise, no system of law would apply as regards divorce, and the marriage tie would remain indissoluble.

16. There are certain observations made by the learned Chief Justice in his judgment with which, with respect, I do not agree. In one passage he says:

If the Courts of the domicile allow to the husband more than one wife, and the right to divorce any wife at his pleasure, and if the Courts of the country where the contract was made do not recognise as marriage any union but that of one man to one woman to the exclusion of all others, then the logical result must be that the contract has conferred upon the parties the status of marriage in their own country, but not in the country where the marriage took place; not that the parties have acquired the status of marriage and the rights incidental thereto under the law of the latter country, to which as married persons they have never been subject.

In my opinion, no such result follows. If parties are married according to the forms of the lex loci contractus, it cannot, in my view, be suggested that that is not a valid marriage in the country where

the marriage took place, whatever the status and the rights incidental to the marriage may be in the country of the husband's domicile. Again, the learned Chief Justice suggests that in the case of a marriage between husband and wife to whose respective communities marriage does not denote the same thing, a case of ambiguity arises, and evidence as to the true intention of the parties would be admissible. With respect, I do not agree. Lord Brougham in Warrender v. Warrender (1835) 2 Cl. & F. 488 said (p. 530):

But when the Courts of one country consider the laws of another in which any contract has been made, or is alleged to have been made, in construing its meaning, or ascertaining its existence, they can hardly be said to act from courtesy, ex comitate; for it is of the essence of the subject-matter to ascertain the meaning of the parties and that they did solemnly bind themselves; and it is clear that you must presume them to have intended what the law of the country sanctions or supposes; it is equally clear that their adopting the forms and solemnities which that law prescribes, shows their intention to bind themselves, nay more, is the only safe criterion of their having entertained such an intention.

So far, therefore, as the lex loci contractus is concerned, neither of the parties could, in my opinion, be heard to say that he or she intended a marriage of a character other than that which the law of that country permits. So far as the law of the husband's domicile is concerned, that governs the marriage status by operation of law, regardless of the intention of the parties, and the status might be altered by a change of domicile. In my opinion, therefore, evidence of intention was in the present case inadmissible.

17. For the reasons above given, I think that the marriage between the petitioner and Gulam Mahomed Ebrahim was validly dissolved by talak before the marriage in suit took place. In my opinion, the preliminary issue was rightly decided, and this appeal must be dismissed with costs.

Broomfield, J.

18. The learned Chief Justice has set out certain principles which he takes to be firmly established in the realm of private international law: (1) the forms necessary to constitute a valid marriage and the construction of the marrriage contract depend on the lex loci contractus; (2) on marriage the wife automatically acquires the domicile of her husband ; (3) the status of the spouses and their rights and obligations arising under the marriage contract are governed by the lex domicilii, that is, by the law of the country in which for the time being they are domiciled; (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.

19. These propositions have not been challenged. The first and the third follow the language of Lawrence L.J. in Nachimson v. Nachimson [1930] P. 217, 232. The fourth was decided in Harvey v. Farnie (1882) 8 App. Cas. 43, and is the basis of the decision in Nachimson's case. The second is axiomatic, but is subject to the qualification mentioned by Lord Reading in Rex v. Hammersmith Superintendent Registrar of Marriages : Mir-Anwaruddin, ex parte [1917] 1 K.B. 634, 643, namely, that the wife does not acquire the husband's religion along with his domicile and does not become

subject to the law of his religion, except in so far as it is part of the law of his domicile.

20. But, though these propositions in themselves are not open to question, the application of them and even the meaning of them in some respects are by no means free from difficulty. Take the question, whether a man, who has contracted a marriage with one woman, is entitled to marry a second wife, the first marriage still subsisting. That might be described as a matter of the construction of the contract. It might be regarded as an essential term and condition of the contract that the marriage was to be a monogamous one, or not so. If it is a matter of the construction of the contract, it will depend on the lex loci contractus, and if the marriage was contracted in England or in any other country which does not recognise polygamy, it would seem to follow from proposition (1) that the husband would have no right to take a second wife. On the other hand, this might also be described as a question of the status of the spouses and of the rights and obligations arising under the marriage contract, in which case the law of domicile will apply under proposition (3), and a Mahomedan domiciled in a country which recognises the Mahomedan law will be entitled to take other wives, no matter where or in what form he married the first, assuming at any rate that no difficulty arises by reason of difference of religion between the spouses.

21. The learned Chief Justice appears to take the view that the question of the number of wives a man may have, as well as his right to divorce his wife or wives, depends simply on the law of his domicile and that the lex loci contractus has nothing to do with the matter. He says:

Once it be established that a man and woman have entered into a valid marriage contract, that is, have contracted to become husband and wife, it is for the Courts of the country in which they elect to make their home, and not for the Courts of the country in which they may chance to have been married, to determine the status which attaches to the marriage, and the rights which flow therefrom. If the Courts of the domicile allow to the husband more than one wife, and the right to divorce any wife at his pleasure, and if the Courts of the country where the contract was made do not recognise as marriage any union but that of one man to one woman to the exclusion of all others, then the logical result must be that the contract has conferred upon the parties the status of marriage in their own country, but not in the country where the marriage took place; not that the parties have acquired the status of marriage and the rights incidental thereto under the law of the latter country, to which as married persons they have never been subject.

22. In the authorities, which have been cited to us, dicta may be found which appear prima facie to support this view. I may mention the observations of Lord Brougham in Warrender v. Warrender (1835) 2 Cl. & F. 488, quoted and relied upon by all the Judges in Nachimson's case, the observations of Lord Campbell in Brook v. Brook (1861) 9 H.L.C. 193, and those of Lord Reading in Mir-Anwaruddin's case at p. 641. But all such pronouncements to the effect that it is the law of the domicile which governs "the contract and all its incidents and the rights of the parties to it," "the essentials of the contract," "the consequences of the matrimonial relation", and so on, must, I should think, be read subject to the English law conception of what marriage is, that being accepted as fundamental in all the cases. I find nothing in the judgments of these eminent Judges which goes so far as to justify the inference that they would for a moment have countenanced the idea of a Christian marriage contracted in England or Scotland being treated as a polygamous one in some

other part of the world. There is a passage in Lord Brougham's judgment (cited in Nachimson's case at p. 237) which suggests the contrary (p. 531):

If indeed there go two things under one and the same name in different countries-if that which is called marriage is of a different nature in each-there maybe some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted.

And if it be objected that this is an old case, and that the ideas of English Judges as to the extent of the operation of the lex domicilii have developed since then, I may point out that in Salvesen or Von Lorang v. Administrator of Austrian Property [1927] A.C. 641 Lord Haldane suggested that it might be going too far to assert that questions as to what married status implies and how far rights or acts are affected by it are all recognised in England as referable only to the law of the domicile. The ratio decidendi of Mr. Justice Darling, as he then was, and of the Court of Appeal in Mir-Anwaruddin's case, undoubtedly, was that the nature of the marriage relationship, the question, whether a marriage is of the Christian kind or of some other kind, depends on the lex loci contractus (p. 647):

The status acquired by Ruby Hudd on her marriage with Dr. Mir-Anwaruddin is inconsistent with his claim that she became his wife during his pleasure and not for life, and that she became merely one of four possible wives.

That implies that for the purpose of determining the nature of the marriage which results from the contract the law of the domicile is irrelevant.

23. In Mir-Anwaruddin's case it was held as a fact that the parties intended, or that it must be presumed that they intended, a marriage in the Christian sense. In many of the cases importance has been attached to this question of intention (though usually, I think, for the purpose of determining whether a marriage not contracted in England was a Christian marriage and therefore to be recognised in England). The learned Chief Justice has suggested that the present case can be distinguished in that respect, because at the hearing before him the petitioner gave evidence that when she married Ebrahim she knew he was a Mahomedan and intended to be a wife according to his law. Assuming that intention is relevant at all on a point of this kind, the matter could hardly be determined by a statement made by the petitioner herself twenty-seven years after the event in support of the case she is now interested to set up. On the materials before us, I think, the reasonable presumption is that the parties intended a marriage as understood by the law to which in the transaction they purported to conform.

24. 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 a 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. The

position under the law of the domicile applicable to the parties would have been precisely the same. Neither in British India nor in Secunderabad, where the parties resided after they came to India, could they have been married except under the Indian Christian Marriage Act (XV of 1872). Section 4 of that Act provides that every marriage between persons one or both of whom is or are a Christian or Christians which is not solemnised under the provisions of the Act shall be void. There are no provisions corresponding to Sections 15 and 16 of the Special Marriage Act (III of 1872) making punishable for bigamy any person getting married under the Act, being already married, or marrying again, being already married under the Act. But this may have been thought to be unnecessary. The Act was passed to consolidate and amend the law relating to the solemnisation in India of the marriages of persons professing the Christian religion. One of the parties is required to make a declaration that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the marriage : Section 18. In the case of Native Christians (converts and the descendants of converts, who might have non-Christian wives) it is expressly provided as a necessary condition for marriage under the Act that neither party shall have a wife or husband still living : Section 60. The Act has been held to apply only to marriage in the Christian sense : Emperor v. Maha Ram (1918) I.L.R. 40 All. 393. The Indian Divorce Act, which necessarily applies to marriages contracted under the Christian Marriage Act, makes the subsistence of a former marriage a ground for a petition for nullity : Section 19 ; and allows the wife to petition for divorce on the grounds, inter alia, that the husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman, or has been guilty of bigamy with adultery or of marriage with another woman with adultery. The Indian Divorce Act, it has been held, is not concerned with any marriages except those founded on the Christian principle of a union of one man and one woman to the exclusion of others : Thapita Peter v. Thapita Lakshmi (1894) I.L.R. 17 Mad. 235 F.B. The basis of the decision was Section 7 of the Act, which directs that the Courts in India shall 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 acts and gives relief. The Calcutta High Court has held, on. the other hand, that a Hindu convert to Christianity can sue under the Indian Divorce Act for dissolution of his Hindu marriage : Gobardhan Dass v. Jasadamoni Dassi (1891) I.L.R. 18 Cal. 252. But our own High Court has followed the Madras case : Magania v. Premsingh .

25. 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. According to him the Court is not concerned with any question of monogamy or polygamy in this case. Divorce has nothing to do with the marriage contract. The authorities clearly show that the dissolution of a marriage, and the determination of the manner in which a marriage may be dissolved, are matters for the lex. domicilii. Therefore, he says, all that the Court has to consider in the present case is, whether the lex domicilii permits the husband to divorce his. wife by talak.

26. I quite agree that that is the point to be decided, though I cannot agree that the nature of the marriage which the parties contracted is irrelevant. It is certainly an initial difficulty in Mr. Carden Noad's way that he cannot show that the law of the domicile ever has permitted a Christian marriage

to be dissolved by talak in any recorded case. The point arose in Skinner v. Skinner (1867) L.R. 25 I.A. 34, but was left undecided in view of the fact that the talak had not been proved. That was a case in which, as in the case before us, the parties were both Mahomedans at the material time. But Mr. Carden Noad has not based his case solely, or principally even, upon the petitioner's conversion to Mahomedanism. His argument was this. The Indian Divorce Act must be looked at as it stood before the amendment of 1927, by which the words "or the respondent" were added after the word "petitioner" in Section 2. That is to say, only one party, the Christian party, to a marriage between a Christian and a non-Christian, could exercise the right of divorce. A Christian husband could divorce his wife, on the grounds laid down in the Act, whether she were Christian or not. A Christian wife could divorce her husband, whether Christian or not. A non-Christian husband was given no rights of divorce under the Act. Therefore, as no rights were given to him, no rights can be said to have been taken away by mere implication; it cannot have been intended that he should be left with no law applicable to him at all. He must have been able to fall back upon his personal law, and if he was a Mahomedan, he must have his Mahomedan right of divorcing his wife by talak.

27. This argument is ingenious, but, in my opinion, not convincing. It does; not get rid of the difficulty that the Courts of this country in applying the Indian Divorce Act have to apply English rules and principles so far as may be. The English authorities on which the learned Chief Justice's proposition (4) is based do not really lay down more than this, that any form of divorce may be recognised which is allowed by the law of the domicile in respect of a marriage in the Christian sense. 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. The Indian Divorce Act was passed to amend the law relating to the divorce of persons professing the Christian religion. It purports to be, and one would expect that it was intended to be, complete in that respect. The grounds on which marriage may be dissolved by the Court are set out in Section 10. If the legislature had intended that other grounds and other methods of obtaining divorce should be available to the parties, one would have expected a proviso-saving the operation of the personal law. It is no doubt a remarkable fact that before the amendment in 1927, the non-Christian party to a mixed marriage had no right to petition for divorce under the Act, and, therefore, no right of divorce at all, unless he or she could fall back on the personal law. But, on the whole, it seems easier to regard this as a casus omissus than to suppose that the legislature, in dealing with marriages according to the Christian conception, left it open for such marriages to be affected by the personal law of one of the parties, and that not expressly but by mere implication. 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 the Indian Divorce Act. But she did not remain a Christian, and the question is, whether her abandonment of Christianity and adoption of the religion professed by her husband from the beginning gave him the right to divorce her according to the law of that religion. That question admittedly has to be determined by the law of the domicile. The difficulty is to discover what is the law of the domicile as to the effect of a change of religion in such a case, and it can hardly be said that the position is altogether free from doubt, even after the further argument which we thought it desirable to have on this part of the case. But, on the whole, I am of opinion that the better view is that the law of the domicile admits the right of the Mahomedan husband to

divorce his wife by talak in the circumstances of this case. It is clear, of course, that the petitioner's conversion left the marriage still subsisting. It is equally clear that as the result of it all rights of divorce appropriate to a Christian marriage were lost. The husband never possessed any such rights. The wife ceased to possess them by ceasing to profess the Christian religion. In view of the decision in Skinner v. Skinner, cited by my learned brother, it is at least a possible view that the husband became entitled to take an additional wife or wives in accordance with the law of his own religion. But, even if we assume that it remained a monogamous marriage, there is nothing inconsistent with the Mahomedan law in that. A Muham-madan wife may stipulate for the right to divorce her husband if he marries again : see Mulla's Principles of Mahomedan Law, 10th Edn., para. 233, and cases there referred to. Presumably the husband would have the right of divorce by talak nevertheless. It is difficult to see why he should not have that right in the present case also, there being no method of divorce open to either party, except under the Mahomedan law. It is recognised that the law of the religion is a part of the law of the domicile, and change of religion does affect legal rights in some respects, e.g., as regards property and succession : see Abraham v. Abraham (1863) M.I.A. 195, 238, Raj Bahadur v. Bishen Dayal (1882) I.L.R. 4 All. 343 347, and the other cases discussed by my learned brother. In the peculiar circumstances of the present case, I think, it is open to this Court to apply the law of the parties' religion in the matter of divorce, since it does not appear that there is anything in the law of the domicile as expounded by the Courts of this country to prevent it, and on the other hand justice and common sense appear to require it.

28. The learned Counsel for the appellant has naturally relied strongly on Mir-Anwaruddin's case. But there the question for decision was, whether a declaration of divorcement made by a Mahomedan, who had married an English woman before a Marriage Registrar in England, had the effect in England of dissolving the marriage so as to entitle him to marry again in England. Moreover, the wife in that case remained a Christian. In the Court of first instance, Reading C.J. and Bray J. expressed the opinion that English Courts would recognise no divorce except by judicial decree. That ground of decision, however, does not seem to have been relied upon by the Court of Appeal. It must be said to be at least doubtful whether that is still the law even in England : see Nachimson v. Nachimson [1930] P. 217 232 and Sasson v. Sasson [1924] A.C. 1007. In any case it is difficult to see why the Courts in India should limit themselves by, such a rule, where the law of the domicile (as in the case of Mahomedan Law) does not ordinarily provide for the dissolution of marriage by decree of Court.

29. Mr. Engineer's other main ground of appeal is that talak only applies in the case of a Mahomedan marriage. The answer to that seems to me to be that this was a Mahomedan marriage, though not an ordinary one. It was validly contracted according to Mahomedan law, which recognises the lex loci contractus as to forms and ceremonies: Ameer Ali's Mahommedan Law, Vol. II, p. 155. It was a marriage consistent with Mahommedan law, even on the footing that the husband by marrying a Christian woman according to the Christian law had debarred himself from marrying another wife.

30. For these reasons, I hold that the learned Chief Justice's finding as to the validity of the divorce of the petitioner by her Mahomedan husband should be upheld. As to the other matters, which have been the subject of argument, I agree with my learned brother and have nothing to add.