Bombay High Court
Rachel Benjamin vs Benjamin Solomon Benjamin on 23 September, 1925
Equivalent citations: (1926) 28 BOMLR 328, 94 Ind Cas 59
Author: Crump
Bench: Crump
JUDGMENT Crump, J.

1. This is a suit between a husband and a wife of the Jewish persuasion. The wife, who is the plaintiff, seeks for relief against the defendant, the husband, on the ground of Cruelty and adultery. The facts which are admitted are as follows:-

2. The families of the parties live in Bombay. On August 12, 1918, there was an agreement in writing between the fathers of the two parties whereby each agreed to contribute Es. 10,000, the whole sum of Rs. 20,000 to be invested in the joint names of the two parties. This sum of Rs, 20,000 was appirently intended to be the wife's dowry (Ex. 7), That agreement is the starting point of the history of this ease and it is clear that the intention expressed in this writing was never departed from but that full effect was not given to it. Sometime in March 1919 War Bonds of the face value of Rs. 20,000 were purchased. To this sum plaintiffs father contributed Rs. 10,000 and the defendant Rs. 10,000. Bonds of the face value of Rs. 10,000 were bought in the name of plaintiff, and bonds of a similar value in the name of defendant. Plaintiff or her father kept the bonds in her name, and defendant kept the bonds in his name In May 1919.it was decided to sell the bonds as it was thought that the value would fall. The sale was through Messrs Forbes & Croft, and two cheques were issued by them, each cheque representing the sale proceeds of one of the two lots. The sale proceeds Rs. 20,000 were invested in piecegoods and the transactions resulted in a loss. From August to the end of October 1919 there was correspondence over this matter, and some settlement was effected. On November 4, 1919, the parties were married, At the time of the marriage a Kethuba was executed. Shortly after the marriage plaintiff's father, who was engaged in business in piecegoods, went to Basra. There he suffered a heavy loss. He returned about February 7, 1920. On February 15, 1920, plaintiff left defendant's house and complained to the Police that defendant had assaulted her. On February 17, 1920, she applied to the Chief Presidency Magistrate for an order for maintenance under Section 488 of the Code of Criminal Procedure. On February 19, 1920, the parties appeared before the Magistrate and the matter was compromised. Thereafter plaintiff returned to the defendant's house. On February 22, 1920, defendant produced the plaintiff's jewellery and plaintiff signed a receipt for it. On March 10,1920, plaintiff again left the defendant's house. She returned in April 1920 and remained until July 5, 1920. On that date she again left the defendant and on August 17, 1920, she wrote a letter to Mr. A. J. Raymond, at that time the elected Head of the Jewish Community in Bombay, asking for his intervention. On August 22, 1920, a son was born to plaintiff, and by the intervention of friends a reconciliation was effected. On August 28, 1920 plaintiff returned to the defendant's house and remained there till June 5,1921. On that day she again left the defendant. On June 6, 1921, plaintiff's father complained to the Police that defendant had assaulted plaintiff. On June 7, 1921, plaintiff filed a complaint to the Second Presidency Magistrate under Section 323 of the Indian Penal Code. On June 23,1921, the Magistrate dismissed the complaint for want of independent evidence. Correspondence followed but plaintiff declined to return to her husband. On May 16,1922, defendant went through the form of marriage with another woman. On

May 22, 1922, plaintiff complained to the Jewish Benevolent Society. A meeting was held on May 31, 1922, at which both parties were present. The consideration of the matter was referred to five 'Rabbis' This meeting was adjourned to June 7. On that day the five 'Rabbis' pronounced their decision which was in favour of plaintiff. Defendant refused to abide by it, and was excommunicated.

3. There are various matters of fact in dispute. These I shall deal with later. The plaintiff's case, put shortly, is that her husband cruelly ill-treated her, drove her out of the house, and contracted a second marriage which is invalid under the law by which the parties are governed. She contends (1) that the decision of the 'Rabbis' has dissolved the marriage, (2) that if that is not so then defendant should be compelled to give her a bill of divorcement, or alternatively that the Court should decree dissolution of the marriage. She claims various reliefs on the dissolution of the marriage of which the principal one is that defendant should be ordered to pay to her the sum of Rs. 25,555 specified in the Kethuba executed at the time of the marriage. The main defences are a denial of the allegation of ill-treatment and an assertion that the second marriage is valid; the plaintiff is not, therefore, entitled to a divorce in paise; the Court has no jurisdiction to entertain a suit of this nature between parties professing the Jewish faith.

4. It will be convenient to set out the issues which have been raised :-

1. Whether plaintiff is entitled be the payment of Rs. 25,555 as claimed in the plaint.

2. Whether plaintiff's father gave Rs, 10,000 to the defendant as part of plaintiff's dowry.

3. Whether plaintiff brought with her clothes, ornaments and wearing apparel of the value of Rs. 5,000 as alleged by her,

4. Whether plaintiff left behind her jewellery, ornaments, wedding presents and furniture as mentioned in Rs. G to the plaint.

5. Whether defendant ill-treated and molested the plaintiff as alleged in the plaint.

6. Whether plaintiff is entitled be any maintenance, and, if so, what,

7. Whether plaintiff is entitled to a declaration that her marriage with defendant is dissolved.

8. Whether plaintiff is entitled to a decree directing the defendant to give a divorce to the plaintiff.

9. Whether this Honourable Court has jurisdiction to grant a declaration and pass a decree as stated is the two preceding issues.

10. Whether plaintiff is entitled to a decree for dissolution of marriage.

11. Whether defendant was entitled according to Jewish law and custom to marry a second wife during the lifetime of plaintiff.

5. The case gives rise to a number of questions which are by no means easy to resolve in the absence of any authority.

6. I propose to deal first with the question of jurisdiction and the question of the law to be applied to the parties in this suit if the Court can entertain it.

7. In order to understand the question of jurisdiction it is necessary to approach it historically. Before the creation of the High Court there were two Courts: the Supreme Court exercising jurisdiction in the Town and Island of Bombay, and the Sadar Diwani Adalat exercising jurisdiction over the rest of the Bombay Presidency.

8. The Supreme Court had jurisdiction under the Charter of 1823. An examination of that Charter will show that the jurisdiction fell under four heads, viz., Common law, Equity, Ecclesiastical, and Admiralty. The Court was thus (1) a Court of Common law having the jurisdiction and authority of the Court of King's Bench ' as far as circumstances will admit;1 (2) a Court of Equity having power to administer justice ' as near as may be ' according to the rules and precedents of the High Court of Chancery; (3) a Court of Ecclesiastical jurisdiction having power to administer the Ecclesiastical Law ' as used and exercised in the Diocese of London in Great Britain;' and (4) a Court of Admiralty, The limits of the jurisdiction were the town and island of Bombay with certain exceptions which need not here be specified.

9. The Sadar Diwani Adalat was established in 1799 and sat in Bombay until 1820. In that year it was transferred to Surat. In 1827 it was re-transferred to Bombay. This Court was a Court of appellate jurisdiction to which appeals lay from the local Courts established by the Company in the interior of the Presidency.

10. In 1856, the case of Ardaseer Gursetjee v. Perozeboye (1856) 6 M. I.A. 348 came before the Privy Council on appeal from the Supreme Court. The plaintiff was a Parsi lady and she sued her husband, a Parsi, for restitution of conjugal rights. The suit was heard on the Ecclesiastical side of the Supreme Court. The defendant objected that the Court had no jurisdiction but the objection was over-ruled. On appeal the Privy Council upheld the objection, The importance of the case lies in this that it is well-known that this case was one of the matters taken into consideration in framing Clause 12 of the Letters Patent of the Bombay High Court, The case is further important as showing what the jurisdiction of the Supreme Court, and that of the Sadar Diwani Adalat, was in cases of this nature. The Privy Council held that the suit was not maintainable, and, put shortly, the ground of the decision was that it was impossible to apply the law of the Diocese of London, a Christian law, to persons professing the Zoroastrian religion. Their lordships approached the case as being strictly an Ecclesiastical proceeding, and having concluded that for this reason the suit could not be maintained, they proceed as follows (page 390) :-

But we should much regard if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees.) We do not pretend to know when may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them, Dab we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persona of this description. It may be that such laws and customs do not afford what we should deem, as bebween Christians an adequate relief; but it must be recollected when the parties themselves could have contracted for the discharge of no other duties and obligations than such as, for time out of mind, were incident to their own caste, nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages. Such remedies we conceive that the Supreme Court on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow. In suite commenced on the civil side, the peculiar difficulties which belong to the exercise Ecelesiastioal jurisdiction in some matrimonial cases would not arise. Proceedings might be oonducted on the civil side with such adaptation to the cir-cumstances of the case as justice might require, though on the Ecclesiastical side such modification would be wholly irreconcilable with Eoclesiastical law.

We have been led to make these observations, not merely by general considerations but more particularly by the case of Mihirwanjee Nuoshirwarjee v. Aman Baee (2 Borr. Bom. Sud. Dew. Rep. 209).

Then case shows then the Sudder Adawlut at Bombay will take cognizance of matrimonial suits between Parsees, and will afford them such relief as a due regard to their own laws and customs will allow; it also, proves, as indeed must be expected, that those laws and customs are wholly ad variance with the principles which govern the matrimonial law of the Diocese of London, and incompatible with the Ecolesiatical law, as in such oases is administered. One instance will suffice. It appears that, under many circumstances, the husband is permitted to take a second wife, the first being alive.

11. An examination of the case cited from Borrodaile shows that the Court had no doubt as to the jurisdiction to entertain a suit by a Parsi lady for a divorce from her buaband. The parties resided outside the jurisdiction of the Supreme Court.

12. Their lordships of the Privy Council, therefore, decided that the Supreme Court, in the exercise of its Ecclesiastical jurisdiction, could not entertain a suit between Parsis for restitution of conjugal rights. They suggested, but did not decide, that the Supreme Court on its civil side could deal with matrimonial disputes between parties other than Christains, applying to those cases the law of the parties with any necessary modifications. They tacitly at least approved of the practice of the Courts subordinate to the Sadar Diwani Adalat in dealing with such matters. It would be difficult to hold on this decision that the Supreme Court could not upon its civil side have entertained such a suit as that now before me, and it must follow that the law to be applied would have been the Jewish law.

13. Until 1861 there was no change in the constitution of the Courts. In that year the Act for establishing High Courts of Judicature was passed (24 & 25 Vic. c, 104). The Supreme Court and the

Sadar Diwani Adalat were abolished (s. 8). The jurisdiction of the High Court which took their place is defined by Section 9. That jurisdiction is two-fold.:-

1. Such as is prescribed by the Letters Patent to be issued under the Act.

2. All the jurisdiction vested in either of the Courts abolished by the Act, ' save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers of the Governor-General of India in Council.'

14. It is necessary for the present purpose to consider the original Letters Patent of 1862, It will be seen that the following jurisdictions are defined.-

(I) Civil Jurisdiction, Clauses 11 to 20.

(II) Admiralty and Vice.

Admiralty Jurisdiction, Clauses 31 & 32.

(III) Testamentary & Intestate Jurisdiction, Clauses 33 & 34.

(IV) Matrimonial Jurisdiction, Clause 35,

15. In Nusserwanjee Wadia v. Eleonora Wadia (1913) I.L.R. 38 Bom. 125 : s.

c. 15 Bom. L.R. 593 the appellate Court had recourse to the Despatch of the Secretary of State of May 14, 1862, forwarding the Letters Patent as an aid to the construction of this document. I am, therefore, entitled to refer to paras 17 and 33 of that Despatch. The first of these paragraphs explains the scope of Clause 12. " 17. The terms of Clause 12...are intended to include every description of case over which the Moffussil Courts have jurisdiction." Then there follows a reference to the decision of the Privy Council in Ardaseer Gursetjee v. Perozeboye (1856) 6 M. I. A 348 in the following words:-

Further, a decision of the Judicial Committee of the Privy council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court could administer a remedy in such cases on the Civil side. It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation. It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong, as are exercised by the Courts not established by Royal Charter, and thus to place the Court of first instance in the Presidency Towns, and in the interior of the country in this respect, as nearly as may be, on the same footing.

16. The scope of Clause 12, so far as concerns the matter before me, is thus clear. Apart from this commentary the words ' suits of every description' could hardly be more comprehensive.

17. As I shall show presently the cases whore Christian parties are concerned are specially provided for in the Letters Patent, and in the legislation undertaken in consequence thereof. Also the Parsees have now their own Matrimonial Tribunal constituted by a Special Act of the Legislature. In other communicate in this country divorce is possible by act of the parties themselves, or is practically unknown owing to the existence of polygamy. But none the less there are cases in the reports in which the High Court in its original civil jurisdiction has exercised jurisdiction in matrimonial disputes and has applied the law of the parties for the purpose of giving relief. In Dadaji Bhikaji v.

Rukmabai (1886) I.L.R. 10 Bom 301 a decree for restitution of conjugal rights was made as between Hindus. In that case Sargent C.J. said (p. 310): " It was not attempted to be denied that, since the expression of opinion by the Privy Council in Ardaseer Cursetjee v. Perozeboye, 'the Civil Courts of this country should afford remedies for the evils incidental to married life', suits for the restitution of conjugal rights had frequently been entertained by the Civil Courts in the case of natives, whether Hindus or Mahomedans." In a later case, A. v. B. (1896) I.L.R. 21 Bom. 77, a suit for divorce by a Mahomedan lady against her husband was entertained without objection. It may be observed that the fact that the legislature has made provision from a very early time for the administration of Hindu law between Hindus and Mahomedan law between Mahomedans does not affect the question of jurisdiction. What law is applicable is a different question.

18. It would appear from the decision of the Privy Council that in dealing with matrimonial disputes the law to be applied was the law of the parties. That being so in the case of the Supreme Court, the same rule applied to the High Court by virtue of Clause 18 of the Letters Patent of 1862 and Clause 19 of the Amended Letters Patent of 1865. Whebher that would be so in other matters it is unnecessary to consider. The case of Mahomedans and Hindus was provided for in the Charter of 1823, but as regards inhabitants of Bombay it has been held that the English Common Law is applicable: see Naoroji Beramji v. Bogers (1867) 4 B.H.C.R. (O.C.J.) I. (Parsis); Lopes v. Lopea (1867-68) 5 B. H. C. R. (O. C.J.) 172 (Portuguese). In the case last cited, Westropp C.J. recognised that questions of matrimonial law formed an exception to the general rule (p. 190). Section 112 of the Government of India Act 1915 was cited in argument but it is open to doubt whether the words used cover a suit such as this. If the Court has jurisdiction it must, in the absence of any statute, apply either the English law or the law of the parties. In my opinion the law of the parties, here the Jewish law, is applicable. That appears to be the result of the cases. The history of the legislation upon this question is dealt with in Chap. IV of Ilbert's Government of India (3rd. Edn.), and at p. 359 the learned author sums up the case as to " the law applicable to persons neither Hindus nor Mahomedans " and arrives at the same conclusion.

19. Reliance has been placed on Clause 35 of the Letters Patent as limiting the jurisdiction in matrimonial disputes to cases where the parties are Christians. There are, however, no expressions limiting the jurisdiction which the Supreme Court possessed 'on its Civil Side.' The scope of this clause is confined to proceedings between Christians, It was intended to replace in a wider and more modern form the Ecclesiastical jurisdiction of the Supreme Court. The scope of the clause and of the proviso is explained in para 33 of the Despatch. The intention was that legislation should be undertaken to deal more completely with matrimonial disputes between Christians, and it is well known that after a prolonged delay due to the difficulty of determining whether residence or council

should be the test, the legislature selected the former alternative, and enacted the Indian Divorce Act of 1869. I find nothing here which touches the case of persons other than Christians, or in any way trenches upon the jurisdiction conferred by Clause 12.

20. But the "main argument for the defence and it is this which has made it necessary for me to examine the matter at some length -rests upon the decision of the Appeal Court in Nusserwanjee Wadia v. Eleonora Wadia (1913) I.L.R. 38 Bom. 125. It is necessary to examine that case carefully in order to understand what was the question before the Court. The plaintiff, a Christian lady, was married to the defendant, a Parsee, at the marriage Register Office in the District of Kensington in the county of London. She came to Bombay and sued the defendant under the matrimonial jurisdiction of the High Court, which is strictly speaking the jurisdiction conferred by Clause 35 of the Letters Patent. There is no other matrimonial jurisdiction to nomine, and it is limited to cases arising between Christians. In the trial Court an issue was raised and the argument turned on the interpretation of Section 2 of the Indian Divorce Act, 1869, viz., whether the 'residence' of the petitioner justified the requirements of that section. The Court held upon that narrow point that there was jurisdiction. The case went on appeal. An examination of the judgment will show that the Court first consider-ed the provisions of the Indian Divorce Act, and then pointed out that the High Court had such matrimonial jurisdiction as was conferred by the Letters Patent, or as was exercised by the Supreme Court. The ecclesiastical jurisdiction of the Supreme Court could not be exercised between Parsis (Ardaseer Gursetjee v. Perozeboye): Clause 35 of the Letters Patent only gave matrimonial jurisdiction between Christians. The Indian Divorce Act, 1869, was enacted to supplement Clause 35 of the Letters Patent, and Section 4 limited the jurisdiction to decree restitution of conjugal rights to cases between Christians, Therefore it was held that the Court had no jurisdiction where the defendant was a Parsi. The true effect of that decision is that in the exercise of the matrimonial jurisdiction conferred by Clause 35 of the Letters Patent, or the Indian Divorce Act, 1869, the High Court had no jurisdiction to give a decree for restitution of conjugal rights in a case where the plaintiff is a Christian and the defendant a Parsi, No case is an authority except upon its own facts. Here the parties are Jews and the question is whether Clause 12 of the Letters Patent gives this Court jurisdiction to entertain a suit arising out of matrimonial disputes between Jews. The decision of the Appeal Court does not touch the true construction of Clause 12. The arguments of counsel in the Appeal Court are somewhat more fully act out in the report of the ca se at 15 Bom. L. E. p. 594. The only reference made to Clause 12 of the Letters Patent was for the purpose of illustrating the meaning of the word " resides." The case proceeded solely on the basis that the suit was one in the exercise of the " matrimonial jurisdiction " conferred by Clause 35 of the Letters Patent or by the Indian Divorce Act 1869. It follows that nothing was there decided which is in any way relevant to the question now before me. I reach this conclusion the more readily as it avoids the position which the Privy Council deprecated so strongly in Ardaseer Oursetjee v. Perozeboye, when their lordships said(p, 3^0): "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them." Those words are as applicable to Jews as to litigants of any other persuasion, and, as I have endeavoured to show, Clause 12 of the Letters Patent was deliberately intended to remove the difficulty. I hold, therefore, that I have jurisdiction to entertain this suit, and that in deciding it the Jewish law must be applied "with such adaptations to the circumstances of the case as justice may require.

21. It may further be pointed out that the Courts outside Bombay exercise jurisdiction in matrimonial disputes between persons who are not Christiana, and that the jurisdiction, so far as I know, has never been questioned (cf. Abdul v. Hussenbi, (1904) 6 Bom. L.R. 728 Bai Hansa v. Abdalla, (1906) 7 Bom. L.R. 684), and it would be highly anomalous were it necessary to hold that the High Court had no jurisdiction in such matters as between members of those communities living in the city of Bombay.

22. [His lordship after discussing the evidence in the case continued :]-If the whole history of the case is considered and the evidence of the principal parties, the truth in my opinion lies on the side of the plaintiff'. Defendant, as he says in his affidavit already alluded to, regarded himself as entitled to receive Rs. 10,000 from plaintiff's father, and his disappointment in this matter appears to have prejudiced him against the plaintiff, Possibly it is true that she was inclined to support her father in this matter. But, whatever the provocation, he was not justified in beating her and turning her out of the house and in retaining her property as he appears to have done, I would add here, with reference to a somewhat obscure charge made by plaintiff, that defendant was anxious to explain this matter, but it appeared to me unnecessary to go into unsavoury details in the absence of any more definite statement, especially as no corroboration was possible.

23. After June 5, the parties lived apart. Neither took any definite action either by process of law, or by any application to the leaders of the community. In May 1922, defendant determined to marry another woman. On May 8, 1922, he wrote to Mr. Raymond setting out his version of the matter and asking for permission to marry a second wife " according to our Jewish laws." In para 11 of the written statement the defendant states that " he married another wife with the permission of the President of the Jewish Benevolent Society." In his evidence he says: " Mr. Raymond sent me oral permission to marry a second wife, His statement about that is untrue. I applied for permission in writing. It was not necessary to get a reply in writing. I only applied in order to get the loan of the canopy and other articles (articles belonging to the synagogue used at marriages), It was only a formality." Upon this point defendant called one witness Benjamin Salem, the caretaker of the synagogue. He says he took the letter to Mr. Raymond, and that defendant told him to tell Mr. Raymond that if he did not get permission he would marry outside the synagogue. Mr. Raymond said : " We cannot prevent him doing that." Mr. Raymond says : " It is false that defendant applied to me for permission to marry again and that I gave that permission. It is impossible. It would be against the wishes of the community and against our religion." This witness is independent and reliable. His memory as to the particulars of the case is not very clear, but his statement set out above depends not on memory alone, but on the stronger ground that he could not have done what is alleged. Defendant's own witness corroborates him, for what Mr. Raymond said to this witness amounts to a plain refusal of the permission applied for. I have set this matter out at some length as it illustrates the value to be attached to defendant's evidence. First, he sets out this permission as a defence; then when Mr. Raymond appears and contradicts him, he endeavours to change his ground, and to represent that it was after all only a formality and the words used by Mr. Raymond amounted to a permission. I am not now dealing with the legality of this second marriage, though on that point too the admission in the written statement is somewhat awkward, and defendant may therefore have been all the more ready to explain it away.

24. On May 16, 1922, defendant went through a form of marriage with another woman. On May 22, plaintiff wrote to the Jewish Benevolent Society (Exh. Q.) setting out her case and asking for an investigation. There is no doubt that the second marriage made the breach irreparable, and was the cause of this action on the part of the plaintiff.

25. A word of explanation is now necessary as to the position and functions of the Jewish Benevolent Society. This Society has been in existence for many years and is regarded as the governing body in the community. It appears that the head of the community is elected, and is President of the Committee of the Society. There are some eight or nine members of the committee who are also elected by the community. This committee has no legal constitution and no legal powers save such as it may possess by the custom of the community. In this case it is clear from what has already been said that both parties recognised the Society as competent to consider matrimonial disputes, but it would be impossible on the evidence in the case to hold that the Society, or its committee, has power to divorce husband and wife. The practice is to give notice to the parties and to hear them and to refer the dispute to persons skilled in Jewish law. That was the course followed in this case. A meeting was summoned for May 31, of which defendant had notice. The parties were heard, and the case was referred to five learned men, who were then present. On that point Mr. Raymond's memory appears to be defective. The evidence of the secretary of the Society, Mr. Reuben, of Ibrahim Moses Samuel who signed the decision or resolution, and of plaintiff, leaves no room for doubt that the five learned men who pronounced the decision were present at the meeting of May 31. I am unable in the face of the evidence to believe defendant's statement that he did not receive fair treatment. On June 7, 1922, the decision was pronounced (Exh. F.). There appears to have been some attempt to settle matters after that date. Finally, as defendant would not accept the decision he was formally excommunicated.

26. It is now necessary to consider the facts so stated in the light of the Jewish law. At the outset a difficulty arises owing to the uncertain state of that law which is due in a measure to historical causes. The subjugation of Judaea in the reign of the Emperor Vespasian brought about the political annihilation of the Jewish nation. From that date no Jewish State has existed and there has been no government based on Jewish law which could secure uniformity of practice, and bring about the removal of that which has become obsolete. The Jews are now widely dispersed, and while the principles of modern Judaism have modified many provisions of the Rabbinical Code in order to make them conform to the requirements of the laws of the countries in which the Jews live, the more conservative Jews regard all the norms of the Rabbinical Code as ever binding and unchangeable. The Jews in Bombay come mainly from Baghdad, and it is improbable that they regard the Jewish law in precisely the same light as the Jews living in England or in America. It is plain that the custom of the community must be considered on points where there is room for doubt. In the present case I have been referred to a work entitled, " The Jewish Law of Marriage and Divorce by the Revd. Dr. Mielziner." It contains, so far as can be judged, a clear and accurate account of the law based upon the original sources which are cited throughout. That law is founded on the Mosaic and Talmudic law, and it is agreed in this case that; in the sixteenth century that law was codified in a work styled " Shulchan Aruch" of which the third part "Eben Ha-Ezer" contains the matrimonial law. Translations of portion of this book have been put in by either party and the substance of much of it is reproduced by Mielziner. In addition to these authorities there is the

evidence of witnesses as to the customs of the Jews in Bombay.

27. At the outset the question arises 'whether the proceedings which I have discussed could bring about a dissolution of the marriage. The decision of the Privy Council in Sasson v. Sasson [1924] A. C. 1007 shows that there may be a Jewish body competent to give a divorce. In that case the divorce was pronounced by the Grand Rabbinat at Alexandria. But in this case I am unable to hold that there has been a divorce. The decision or award (Exh. F) does not purport to have that effect, and the one witness from among those who signed it is emphatic that there has been no divorce. In terms it directs the husband to give a bill of divorcement to his wife, which under the Rabbinical law was essential to the dissolution of a marriage. How far that is so now I shall consider later. It is further clear that the leaders of the community treated the parties as being still husband and wife. I need not discuss the point further, for Mr, Maneksha wisely conceded that it was difficult to argue that the marriage had been dissolved. I will only point to Mr, Raymond's statement that there are no "Rabbis" in the strict sense of the word in Bombay. What is precisely necessary to constitute a Rabbi is a question which cannot be answered on the materials before me.

28. It is, therefore, necessary to consider whether plaintiff has made out causes which under the Jewish law entitle her to claim a divorce. The causes alleged are two : (1) that she was beaten and turned out of the house; and (2) that her husband is living in adultery. The second of these raises the question of the legality of the second marriage, and it is here that the Rabbinical law is undoubtedly obscure and opposed to the more enlightened practice of modern Judaism. The matter is discusssed in Chapter IV of Mielziner's work. Upon that statement of the law it would be difficult to hold that the second marriage was in all times and circumstances invalid. But it is clear from the translations of the "Eben Ha-Ezer," which have been put in (Exh. Z), that this rule is recognized that in every city the custom of which prohibits marrying a second wife a man cannot marry a second wife. This appears to be an expression of the Talmudic law. "The law of the country is the binding law" (see Mielziner, p. 23). Some discussion has arisen as to the correct scope of this rule. It was argued for the defendant that "the law of the country" means the laws enacted or enforced by the Government of the country in which the Jew is for the time being living, while for plaintiff it was suggested that it means the faw which the Jews follow by virtue of any local custom. I have no doubt that the former interpretation is correct. That is the light in which Mielziner interprets it But, it is further argued that the law of British India makes polygamy lawful, and, therefore, it is lawful to Jews. That argument; is based on a fallacy. There is no such thing as "the law of the country" upon this matter in India. In this country there are in force side by side systems of law which are polygamous, monogamous, and even polyandrous. As I have already said there are two systems of law which can conceivably be applied here, the English law. and the law of this particular community. The English law undoubtedly requires monogamy but it is in no sense the law of the country. In my opinion it is the law of the community which must prevail and that is "the law of the country", being the law which the Courts will apply. The question, therefore, is whether these Jews follow the Rabbinical law upon this point or whether they are by custom monogamous. Upon that point the evidence is necessarily oral.

29. The witnesses upon the point show no signs of bias, nor have they any visible motive for favouring the plaintiff.

Mr. Raymond says second marriages are not recognised in their community. I mean of course the taking of a second wife by a husband during the life-time of his first) wife. Mr. Reuben, the secretary of the Jewish Benevolent, Society, gives evidence to the same effect. Saleh Moses Gubbay says that the custom both in Baghdad and in Bombay forbids such marriages. He states that he himself was betrothed in Baghdad and was unable to marry in Bombay while that betrothal was undissolved. (See Mielziner, p.76 as to the binding effect of a betrothal in Jewish law.) The evidence of Ibrahim Moses Samuel is equally emphatic. Mr. Reuben, Examiner in Hebrew in the Bombay University, states that in three cases a second wife is allowed : (1) where there has been no issue for ten years; (2) where the first wife is in such a state of health as to prevent access; and (3) adultery. Though this witness belongs to the Beni Israel community, he is no doubt entitled to be considered an expert on Jewish law. The exceptions which he admits are recognised in very similar terms by the other witnesses. Three cases in which Jews in Bombay have taken a second wife at e mentioned in the evidence, but it is not possible to say that they do not fall within one or other of the exceptions. Indeed there is positive evidence that in one at least of these cases the first wife had become insane. In my opinion the evidence of Ibrahim Moses Samuel is correct when he says "we follow the rule laid down by Rabbi Gherson." The explanation of this statement will be found at page 30 of Mielziner's work. The whole of the Chapter entitled "Monogamy and Polygamy" is instructive upon this matter. Reference may also be made to p, 483 of "The Jewish Religion (M. Friedlander)." The author speaks of "The abolition of polygamy by Rabbenu Gershom (eleventh century)." The evidence here is in accordance with the opinion expressed by these authors, and I fee] little doubt that the community, with which I am concerned, is generally speaking monogamous. It is unnecessary to consider the exceptions to the rule for this case is plainly not one of them.

30. The other ground is made out by the evidence in the case. Among "the wife's causes for divorce" Mielziner gives at p. 123 as No. 3 "on account of repeated ill-treatment received from her husband, as for beating her, or turning her out of doors, or prohibiting her from visiting her parental home " The Eben-Ha-Ezer is cited as an authority for this proposition.

31. It would thus appear that under the Jewish law the plaintiff is entitled to a divorce, and it may be noted that the result would be the same under English law as it now stands. The question of procedure remains. Under the strict Rabbinical Code a ritual " get" or "bill of divorcement," executed by the husband, would have been necessary, but in modern times this is not insisted upon and a marriage can be dissolved by the Courts of the State. This is clearly recognised by Friedlander, p. 488) and Chapter XVI of Mielziner's work leads to the same conclusion. It will be observed that the award or decision made at the instance of the Jewish Benevolent Society in this case takes the form of a direction to the husband to divorce his wife. The only possible sanction is excommunication. In this case that has failed and the remedies of the Rabbinical Code are ineffectual. The Court must, in the words of the Privy Council, " administer remedies as nearly approaching to them as the circumstances will allow." The plaintiff prays the Court to dissolve the marriage, and there is, in my opinion, no valid reason why the Court should refuse to do so. I do not know that the practice of the English Courts is of much assistance in determining the powers of this Court. The jurisdiction rests on a different basis, but as a guide to the appropriate order to be made in such a case, that practice is most valuable. It appears that in matrimonial causes between Jews the Courts in England apply the Jewish laws (Lindo v. Beliaario (1795) 1 Hagg. 216) in order to

determine such questions as whether a sufficient cause for divorce exists (see also Sasson v. Sasson [1924] A. C.1007), but in granting relief the form of decree customary in cases between Christians is made (Joseph (otherwise King) v. Joseph (1909) 100 L. T. 864), There must, therefore, I think be a decree nisi for dissolution of marriage, not to be made absolute for a period of three months from this date.

32. It cannot be doubted that the Court has power to order permanent alimony. The defendant is bound to make provision for his wife after divorce and for his child. Nor can it be doubted that the wife is entitled to the custody of the child. But the nature and amount of this provision cannot be determined unless and until the decree is made absolute. But there is one matter which has been fully argued which may be determined here and now, and that is the wife's claim to be paid the sum specified in the Kethuba. This document is invariably executed at a Jewish marriage. A bound volume is kept at the synagogue containing printed forms in Hebrew and English with blank spaces for the amounts and the names of the parties. The sum in this case is Rs. 25,555 plus "200 silver Zuz," The language of the document is archaic and formal. The history of the Kethuba is given by Mielziner at page 85 of his book. The conclusion of the matter is stated thus (p. 89): " As the wife, in our days, is sufficiently protected by the civil laws of the country, and in many cases also by special marriage settlements made in a more legal form, the Kethuba is generally regarded as an unnecessary, useless formality, and is almost entirely dispensed with." The same view of the Kethuba was taken by the Calcutta High Court in Moselle Joshua v. Sophie Arakie, (1911) I.L.R. 38 Cal. 708 : (1912)1. L.R. 40 Cal, 268 but the question of the wife's rights on divorce are left undecided in the judgment of the learned Chief Justice, The Kethuba is, however, said to be "a survival which is now a mere formality and nothing more." I have already shown that in this case the Kethuba does not represent any real transaction, and I do not believe that the parties intended that it should be acted upon. Therefore the claim based upon it must fail.

33. In concluding this judgment I must express my obligation to counsel for the assistance I have received in dealing with a matter which is necessarily difficult in the absence of any cases bearing directly upon the questions in issue. I cannot but feel that in spite of that assistance there is much which I could have wished to deal with more fully than has been possible in the absence of authority. I would finally suggest for the consideration of the Jewish community whether they would not be well advised to place upon a more satisfactory basis the adjustment of their matrimonial disputes. This could be done either by the establishment of a 'bethdin' such as is found in Jeruselem and Baghdad, and, I believe, in London, or by special legislation similar to the Parsi Marriage Act. The community is enlightened and progressive, and should appreciate the benefit of certainty as to the law and procedure upon these matters which must vitally affect domestic life among them.

34. One further question remains and that is as to the value of the plaintiffs property in the hands of the defendant. I have given my reasons for holding that defendant has retained this property and there is thus a presumption against him. The evidence of his one witness-a reliable witness no doubt-that plaintiff on one occasion was wearing a valuable ring-is plainly of no value. The plaintiff' swears that her jewellery was worth Rs. 3500. This is by no means improbable in view of the position of the parties. There is no evidence to the contrary. The details of the property not returned are shown by her in Ex. K. The total value is Rs. 4,557-12-0. I accept this figure. No order can,

however, be made until the decree is made absolute.

35. The determination of issue No. 6 must await the confirmation of the decree.

36. There must be a decree nisi for divorce not to be made absolute until the expiry of three months from this date.