Madras High Court
Agnes Sumathi Ammal vs D. Paul on 11 October, 1935
Equivalent citations: AIR 1936 Mad 324
Author: Mockett
ORDER Mockett, J.

1. This is a petition under the Indian Divorce Act by a wife against her husband. She prays for a decree for nullity of her marriage. It is conceded that the husband is a domiciled subject of H. H. the Maharaja of Mysore; that is to say, he is what is known as a Mysorean. The marriage was in the Mysore State, and the parties lived together in the Mysore State. It is axiomatic that the domicile of the wife is the domicile of the husband, and that the nationality of the wife is the nationality of the husband. Therefore the petitioner must be regarded as a domiciled subject of the Mysore State. Apart from the facts, the defence to this case is one of jurisdiction. The respondent says that this Court has no jurisdiction under the Indian Divorce Act to grant this decree. With regard to the facts, I have no difficulty whatever. The respondent has not gone into the witness box. The wife has gone into the box. I shall first deal with the medical aspect. She has told me, and I accept her story, that from the very beginning of her marriage the respondent had some sort of physical aversion to any marriage relations with her and that in fact no marriage relations with her took place although she apparently at least made some sort of advances to her husband.

2. That evidence is not contested. I did not think it right, although I could have accepted it uncorroborated, had I thought fit, to allow this case to be proved on the evidence of the wife alone, J.G. Wilson v. K.H. Wilson 1931 Lah 245 and cases cited therein, and so Mr. Coelho who appears for the petitioner, at my suggestion, has called a lady Doctor of high qualifications and she has told me that she has examined the petitioner and that as far as it is possible to say the petitioner is a virgin. I did not appoint a special board in this case as I thought it sufficient for the petitioner to call a Doctor of whom I approved and it is quite obvious that the evidence of Dr. Satur was such evidence as I could accept without any question. Therefore on the question as to whether this marriage was consummated I am definitely of opinion that it was not, and I am definitely of opinion that there was nothing on the part of the petitioner which led to that state of affairs. I am entitled to infer and I heard that the respondent is impotent quoad the petitioner. The only other question of fact is whether the petitioner was resident in Madras. 'Residence' means not residence for the purpose of invoking the divorce law but bona fide residence. There is ample authority for that proposition and it only requires stating. Now what are the facts ? The wife, the petitioner, lived with her husband for a short time only, and afterwards with her mother and father. The father died on 17th February 1934, and from the time of his death until November 1934 the petitioner continued to live with her mother at a place called Doddaballapur, about 24 miles from Bangalore.

3. In November 1934 she came to Madras with her mother. Her action in coming here has been strongly criticised by the learned Counsel for the respondent, which he is quite entitled to do. He suggests that it was a move in order to get the advantage of suing in this Court. But the petitioner's mother has told me-and I accept her evidence-that she herself was a Madrasee, and that being so what is more natural than that after the death of her husband, and after his properties, as she has told me, had been disposed of in the Mysore State, she should come back to Madras ? There is a

special reason for that because it appears that Mr. Asirvadam Pillai, an Honorary Magistrate in this City, who has given evidence and who lives at 'Gifford House, Kilpauk', had apparently offered them a house here, and there was very good reason to do that because his son had married the petitioner's sister. A combination of the above circumstances seems to me to lead to the most natural conclusion that these two women left alone, deliberately by the petitioner's husband and adventitiously by death of her father, should go back to the place where apparently the mother had been before and where she had kind friends. And I think it right to say that I can see no reason for criticising Mr. Asirvadam Pillai's behaviour at all; on the contrary he seems to have taken a most commendable attitude in coming to the rescue of these two women who, in the manner I have described, had found them-selves without the assistance of any of their menfolk. He seems to have given them a home in his house and generally has behaved, as one would hope, that most men would behave to women in some degree of distress. I, therefore, find that so far as the residence is concerned the petitioner is genuinely a resident in Madras and that from that point of view is entitled to invoke the jurisdiction of this Court.

4. So much for the facts. With regard to the law I am proposing to take time to consider the matter as a point of very great importance is raised. At this stage I only desire to say this: The respondent's attitude is, you cannot get this marriage annulled in Mysore State because there is no legislation there for that purpose; you cannot get this marriage annulled in Madras Presidency (or anywhere else) because the Madras High Court has no jurisdiction; and so, by inference, he says, you will remain married to me and unable to marry anybody else just as long as I live although I am not prepared to live with you on the terms that are usual between husband and wife. That is an attitude that he is entitled to take up if, it is the law. What I have to consider is whether it is the law, and, as I have already said, that is a point that I propose to consider and will deal with at a later date.

5. The respondent's counsel contends that this Court has no jurisdiction inasmuch as (1) the respondent was and is domiciled in Mysore State, (2) the marriage was in Mysore State, and (3) the petitioner and respondent have never resided in British India together. It is necessary therefore to consider the provisions of the Divorce Act 4 of 1869 as amended by Acts 20 of 1926 and 30 of 1927. The object of these last two Acts was to clarify the position in India owing to the uncertainty which had arisen with regard to the power of Indian Courts to dissolve marriages of persons not domiciled in India, a doubt which was brought to a head by the decision of the President of the Probate, Divorce and Admiralty Division in Keyes v. Keyes 1921 P. 204: and it will be seen that since the amending Statute of 1926 this Court has power only to dissolve marriages of persons domiciled in India at the time when the petition was presented. The Act followed on a conflict of judicial decisions in this country, of which Wilkinson v. Wilkinson 1923 47 Bom. 843, Lee v. Lee 1924 Lah 513 5 Lah 147, and Miller v. Miller 1925 52 Cal 566, are examples. The result now is that so far as the Statute Law in India relating to dissolution is concerned, it is in accord with the established rule of Private International Law, but so far as decrees for nullity are concerned, the Indian Statute still confers upon the Indian Courts jurisdiction under certain circumstances. This would appear also to be according to the rules of Private International Law as enunciated by Jeune, P in Roberts v. Brennan (1902) P 143, with this variation, that under the Indian Divorce Act it is the petitioner's residence which is material. I am, however, bound to point out that since the decision in Salvesan v. Administrator of Austrian Property (1927) AC 641, a decision of the House of Lords, and Inverclyda

v. Inverclyde (1931) P 29, it is open to argument whether according to Private International Law domicile is not essential to give a Court jurisdiction in suits for nullity based on grounds of impotence, as distinct from other grounds.

6. In other words, it would appear that the rule, as recognised at least in England, is that suits for nullity on grounds of impotence and suits for dissolution of marriage are, so far as jurisdiction is concerned, identical, i.e., that only a decree of the 'Forum Domicilli' will be recognised. This of course is only relevant if and when the recognition of this Court's decree of nullity by a foreign State arises. It is clear that under the Indian Divorce Act as amended, I have express jurisdiction conferred upon me to grant a decree for nullity which is unquestionably binding in British India even though the parties are domiciled elsewhere. Whether foreign Courts will recognise such a decree is of course another matter and will depend on whether the decision in Salvesan v. Administrator of Austrian Property (1927) AC 641 and Inverclyda v. Inverclyde (1931) P 29, is adopted as stating the rules of Private International Law. It is, however, contended on behalf of the respondent that the Divorce Act expressly or by implication excludes the petitioner from its operation. Section 2 of the Act reads as follows:

This Act shall extend to the whole of British India, and (so far only as regards British subject within the dominions hereinafter mentioned) to the dominions of Princes and States in India in alliance with Her Majesty. Nothing hereinafter contained shall authorize any Court to grant any relief under this Act, except where the petitioner (or respondent) professes the Christian religion, or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented, or to make decrees of nullity of marriage except where the marriage has been solemnised in India, and the petitioner is resident in India at the time of presenting the petition, or to grant any relief under this Act other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.

7. It should be noted that residence must be in Madras, not 'in British India.' It is conceded that the petitioner's husband is not a British subject but a subject of Mysore State. The petitioner, however, relies on that part of Section 2 which confers jurisdiction in suits for nullity when the marriage has been. solemnised in India and the petitioner is resident in India at the time of presenting the petition. Both those conditions are satisfied in this case. The respondent still contends that those words only apply to parties governed by the Act, which he contends does not apply to Indian subjects of the Mysore State. I agree that the wording of the Act is at the least difficult to interpret; but the principal Statute has, by amendment, deliberately introduced into it, the words "and the petitioner is resident in India." It must be noted also that the marriage need not be solemnised in British India, but simply " in India." Section 2 seems to mean this : that so far as a suit for dissolution is concerned, a domiciled British subject, but resident in Mysore State, can invoke this Court's jurisdiction, but that so far as a suit for nullity is concerned any person resident in India who has been married in India can bring a suit for nullity. In Roberts v. Brennan (1902) P 143, supra, the President held that it had power to annul the marriage of a domiciled Irishman; and I imagine that the object of the Indian Divorce Act was to enact rules of Private International Law as then generally recognized. I am told that there is no Court in Mysore which can dissolve or annul the marriage of

an Indian Christian. It is difficult to suppose that the intention of the legislature was to leave the Indian Christians resident in India who are subjects of a foreign State without any remedy whatsoever. The whole object of the Act, as stated in the preamble, is " to amend the law relating to the divorce of persons professing the Christian religion." In two cases in England in Stallistoe v. Stallistoe 1913 P 46 and De Montaigne v. De Montaigne 1913 P 154, where the party before the Court had no apparent remedy, Judges of the Probate, Divorce and Admiralty Division assumed for themselves jurisdiction, the petitioner's position being, as stated in one of the cases, " intolerable." I do not think it is necessary for me to do that as I think that jurisdiction is ex-pressly given to me by the Act; and I am governed by the Act; not by rules of Private International Law.

8. I have only to add that I think it is clear from Section 3, Divorce Act, and Sections 3 and 4, Criminal P.C. that this High i Court is the proper tribunal for petitions 'emanating from the Mysore State. The result, therefore, will be, there will be a decree for nullity with costs.

9. A question has arisen as to whether "this decree should be nisi or absolute. It is unquestionably the practice in this High Court to make decrees of nullity nisi. This, however, appears contrary to the practice in the other High Courts and to the Act, and I think this is a matter of importance which should be finally determined. I, therefore, refer this point to a Bench for decision. I may say that I am not at all satisfied with my own judgment in O. M. S. No. 5 of 1934 on this point. The point I wish to refer will be whether a decree under the Indian Divorce Act for nullity will be a decree nisi or a decree absolute. I direct that the papers be placed before the Chief Justice.

JUDGMENT Stone, J.

10. The question that has been referred is whether a decree passed by the Court sitting for the disposal of matrimonial work of this High Court in a petition for nullity of marriage should be a decree nisi, or a decree absolute. It has been the practice in this High Court hitherto to make the decree in the first place a decree nisi. It would appear that the practice in the other High Courts, and in particular Bombay, has been different, those High Courts having in nullity suits made the decree absolute in the first place.

11. Section 16, Divorce Act, provides that a decree for a dissolution of marriage made by a High Court inter alia shall, in the first instance, be a decree nisi and shall not be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs. Provision is made for the intervention originally of any person, now, since the passing of Section 17-A, an officer exercising power similar to those of the King's Proctor. On the other hand, Section 18 enables a husband or wife to present a petition praying that the marriage might be declared null and void. Section 19 states the grounds upon which a decree of nullity may be granted and Section 20 makes it necessary in the case where a decree is passed by a District Judge for it to be subject to confirmation by the High Court and applies the provisions of Section 17, Clauses 1, 2, 3 and 4 to such decrees. Section 17, Clauses 1, 2, 3 or 4 are concerned with the confirmation of a decree for dissolution of marriage by a District Judge, and it has been a matter of debate in other High Courts as to what Clauses 1, 2, 3 and 4 include. The clauses are not numbered and there are in the section six paragraphs. The doubt has been as to

paras. 4 and 5, whether those are two clauses or one clause plus a proviso. A v. B (1899) 23 Bom 460, decides that the proviso is attached to Clause 4 and consequently Clause 4 includes para. 4 and para. 5. E. Caston v. L.H. Caston (1900) 22 All 270 and Cecil Samuel v. Margaret Sarah 1934 Lab. 636, decide that para. 4 is one clause and para. 5, that is, the proviso, is another clause. In my opinion, as a matter of construction it is not possible to regard a proviso as a clause, and I prefer to follow A v. B, (1899) 23 Bom 460. If that be so then, in the case of decrees for nullity of marriage as in the case of decrees for dissolution of marriage, where those decrees are passed by a District Judge, six months must elapse, between the passing of the decree and confirmation. On the other hand, if in the case of a petition for nullity, the proper decree to pass is an absolute decree in the first instance, then there is a difference where the suits are brought in this High Court, between the case where the suit is for dissolution of marriage and the case where the suit is for a declaration that the marriage is null and void. In the first case, there is the decree nisi in the first instance; in the other case the decree must be absolute in the first instance.

12. At the time the Indian Divorce Act was passed the state of the law in England was as follows : In the case of dissolution, by the Act of 1860, Section 7, the decree was nisi and the period that had to elapse before it could be made absolute was three months. That period, by Section 3 of the Act of 1866, was extended to six months. But this gap between the passing of the decree and the making absolute of the decree did not exist in the case of a nullity suit; that is to say, where the petition was for a declaration that the marriage was null and void, a simple decree making that declaration was passed and a decree nisi was not required. By the Act of 1873, for the first time, Section 7 of the Act of 1860 and Section 3 of the Act of 1866 were extended to decrees in suits for nullity of marriage, in like manner as they applied in suits for divorce. It will thus be seen that the Indian Divorce-Act was passed at a time when the practice in England was to pass a decree nisi in the case of a suit for dissolution of marriage and a plain decree in the case of a suit for nullity of marriage. It wilt also be seen that after the passing of the Indian Divorce Act, by Statute in England that position was altered so as to-put the two classes of cases, as regards this point, on a parity. It is necessary now to refer to another section, and a very important one of the Indian Divorce: Act. Section 7 provides as follows:

Subject to the provisions contained in this Act the High 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 con-formable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.

13. Then follows a proviso. In Iswarayya v. Iswarayya 1930 58 MLJ 29, Reilly, J., made some remarks upon the meaning of the words 'principles and rules' in this section. His observations are at p. 31. I would observe that these observations are obiter. He says :.

The words 'principles and rules' in S-. 7, Indian Divorce Act, mean principles and rules of law, of evidence, of interpretation, of practice, and of procedure, but not statutory provisions nor statutory rules.

14. That case went to the Privy Council and I shall return to it later when considering what the Privy Council has had to say on this. At the moment I content myself with observing that those words

'principles and rules', are to be found in the English Divorce Act of 1857, Section 22, which provides as follows:

In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act.

15. I think it is a little unfortunate that a. term which is apposite when dealing with the principles and rules applied by the ecclesiastical Courts has been imported into a section which directs this High Court to act on principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. But I am satisfied that the Court for Divorce and Matrimonial Causes in England acts upon ¦ principles and rules which include statutory provisions. I myself find it difficult to see why a distinction should be drawn between those 'principles and rules' (which presumably mean principles and rules of law) which are derived from Statute and those which are derived from any other source. Such source clearly cannot be the principles and rules applied by the old ecclesiastical Courts, because such principles and rules would have become a closed body of principles and rules at the time when the old ecclesiastical Courts were replaced by the Court for Divorce and Matrimonial Causes and could not thereafter as principles and rules of the ecclesiastical Courts be extended, and, with respect, I find myself unable to agree with the last seven words of the citation above made from Reilly J's. judgment in Iswarayya v. Iswarayya 1930 58 MLJ 29. But subject to the deletion of the last seven words, I respectfully agree with his observations in that case. When the case came before the Privy Council reported as Iswarayya v. Iswarayya 1931 61 MLJ 367, the Judicial Committee at p. 375 made the following observations:

Their Lordships fully realise that an Indian Act does not fall to be construed in the light of statutes enacted by another Legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relevant jurisdiction of the ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. If it had been intended that the Courts in India acting under this Act should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms.

16. In that case the question was whether in the case of a decree for judicial separation the Courts in India had the power to increase permanent alimony or whether once the order directing permanent alimony had been passed, that exhausted the power of the Court. In other words whether the expression 'an order, excluded the idea of a series of orders. In the present case the question is whether the words 'a decree' excludes the possibility of a decree reasoned in two stages or including two stages, one a decree nisi the other a decree absolute. Lord Russel who delivered the judgment of the Board follows out the history of the law in England; but he only refers to this history after he has considered as a matter of construction the relevant section in the Indian Divorce Act: that is to say,

their Lordships first of all consider as a matter of construction what the true meaning of the relevant section of the Act is and then they consider the history of the matter as it was in England in order to see whether that in any way throws doubt on the correctness of the reading that they have given to the relevant section. They do this because they observe at p. 372 that:

Section 7 of the Act makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Courts in England acted and gave relief.

17. Their Lordships add:

It is therefore not irrelevant to enquire how matters stood and stand in England in relation to this question.

18. Under the Act of 1857 provision was made for the maintenance of the wife after the dissolution of the marriage. That was a new provision. It gave the Court power to order the husband to secure by deed a gross sum to the wife and to suspend pronouncing of its decree until the deed had been executed. That provision is permanent maintenance. Under that section no power was conferred on the Court to make a subsequent order. It was only effective against the husband who had property to secure. To remedy that defect the Act of 1866 was passed, which empowered the Court to make an order directing the husband to pay periodically a sum to the wife for maintenance and support. Thus at the time of the passing of the Indian Divorce Act, in the case of a decree for dissolution of marriage the Court had power to direct the securing of a gross sum or an annual sum and had a further power to order periodical payments and to modify in favour of the husband such order for periodical payments, but no power enabling the wife to apply to have the periodical payments increased.

19. The wife had not that power to apply for an increase until 1907. So far as regards maintenance in the case of dissolution. Now as regards permanent alimony. In the case of maintenance the old ecclesiastical Courts had no power to grant it at all.

20. In the case of permanent alimony the ecclesiastical Courts had the power and could order variations from time to time for increasing or reducing. The Act of 1857 dealing with restitution of conjugal rights or judicial separation provided that the Court might make 'any order' for alimony which shall be deemed just. It did not provide for 'orders' but 'any order.' Notwithstanding that on the face of it looked as though only one order could be made: the power of the Court to make orders from time to varying the alimony was not doubted and was the practice of the Courts. This was not in virtue of Section 22 which applied the principles and rules of the ecclesiastical Courts because if on a true construction of Section 17 'any order' had meant one order and one only, then the ecclesiastical Courts' powers of making orders from time to time could not have been imported without going contrary to the express provisions of the Act of 1857. When the Indian Divorce Act was passed this question of maintenance and alimony were put together in one section and that section-S. 37-provides as follows:

The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife... order that the husband shall, to the satisfaction of the Court, secure to the wife, such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties. In every such case the Court may make an order on the husband for payment to the wife, of such monthly or weekly sums for her maintenance and support as the Court may think reasonable; provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

21. That is to say, the section is dealing both with decrees for dissolution, where permanent maintenance is the normal order, and with decrees for judicial separation, where permanent alimony is granted, under the same section. And it enables the Court (1) to make an order on the husband to secure, and (2) to make an order on the husband to pay. Now if there is power in the Court to increase a permanent alimony, it would appear, at any rate, to be arguable that there is a power to increase the amount of permanent maintenance. If this were so, then the section gives the Courts in India in 1869 a power which the Courts in England only obtained in 1907. That question was left expressly open by the Judicial Committee who decided that upon the true construction of Section 37 a Court which has made an order on a husband for payment to his wife of monthly or weekly sums for maintenance and support has power to make subsequent orders on the husband for payment of increased amounts. The importance of that case from the present point of view is, in my opinion, as follows: Since in 1869 the Courts in England had power to vary orders for permanent alimony, and as Section 7 in their Lordships' opinion makes it apparent that the Indian Legislature desired matrimonial causes in this country to follow the English practice so far as that practice did not conflict with the provisions of the Act, had the legislature had it in mind to stop Indian Courts following this particular kind of English practice then existing in 1869, they would have put words in Section 37 which would have made it impossible without violating the provisions of the Indian Divorce Act to follow the English practice on this point.

22. In the present case at the time of the passing of the Indian Divorce Act there was no practice or procedure in England in the case of nullity suits where a decree nisi was first pronounced and then a decree absolute and the Indian Divorce Act is entirely silent on the point. It does not provide that the decree that shall be passed in a nullity suit shall be a decree absolute. Indeed in my opinion the term 'decree absolute' has only a relative meaning. It is a term that is used in contradistinction to a decree nisi. Ordinary decrees passed by Courts which are called decrees simplicitor are decrees absolute. But there is no need to use the word 'absolute' unless you are distinguishing that decree from another kind of decree. One has the same sort of decrees in this Court in the case of mortgage suits where one has a preliminary decree and a final decree. But in such suits I do not think there can be any doubt that the final decree is the decree. When, therefore, the Indian Divorce Act in Section 19 speaks of 'such decree,' it is not defining the nature of the decree, it is not stating in what form the decree shall first of all be drafted, it is empowering the Court to pass a decree. If the decree in question must be in all cases an unconditional, absolute decree, then it would be proper to

construe Section 19 somewhat as follows: "Such decree which shall be a decree absolute in all cases may be made on any of the following grounds." But in fact the section leaves out the words which shall be a decree absolute in all cases.' It doubtless leaves out those words because it is following the English practice which as regards nullity suits makes no distinction between decrees nisi and absolute. But in England thereafter owing to statutory changes this distinction between decrees nisi and absolute is made.

23. In my opinion that statutory change imports a new principle or rule which the Matrimonial Courts in England must follow and owing to Section 7 as a consequence the Matrimonial Courts in this country must follow the change also, unless there as a provision in the Indian Divorce Act :to the contrary. In my opinion, there is no provision to the contrary; there is no provision on the point at all. All that is said is that such decree may be made, leaving it at large as to the nature of the decree. That in my opinion is not a provision which forbids the Court to make a decree conditional if it thinks fit. It is direction directing the Court to pass the proper kind of decree. The Court is further directed by Section 7 in considering what is the proper kind of decree to look at the kinds of decrees that are passed in Courts in England according to the principles and rules which they from time to time apply. If the Court looked at the decree that the Courts in England were passing in nullity suits in 1867, they would have seen a decree that was not a decree nisi. If they had looked at the kinds of decrees that the English Courts were passing in 1874, they would have seen that the decree was a decree nisi. Immediately they see the change, in my opinion, owing to the section and owing to the fact that there is no provision to the contrary, they must follow the change. Quite different considerations apply of course where there is a provision to the contrary. For instance, in England the law and the practice of the Courts, as a consequence of the change in the law, has been changed as regards the question of cruelty. We in India cannot follow that change because there is an express provision in the Indian Divorce Act requiring as one of the grounds on which a dissolution of marriage may be decreed the need to prove cruelty. We, therefore, cannot follow the English change because there is a provision to the contrary. Had there not been a provision to the contrary, we would have followed even that important change. In my opinion therefore the decree that should be passed in nullity as well as in divorce cases should be in the first place a decree nisi. I have arrived at this conclusion without in the least considering the question of what is desirable from the point of view of the parties and the children to those or of later marriages. But I do, on that point very strongly stress the observations of Ranade, J., in A v. B, (1899) 23 Bom 460 starting from the words "quite apart from the requirements of strict legal construction."

24. I also think that it is desirable to lean if at all in such matters on the side of caution. It would be lamentable if the High Court by passing decrees absolute should be the cause, the very indirect cause, of parties getting married before they were lawfully entitled to and in my humble opinion it is desirable that the legislature should place beyond conjecture what the position on this point is by either making provision that will exclude English practice or by making provision that shall adopt the English practice on the question of granting decrees nisi in suits for nullity of marriage. It may be that large numbers of people are not involved. It may be that the actual litigants are not worthy of much consideration. But in these matrimonial oases it is the children of the disrupted or of future marriages whose interests should be very carefully guarded and it is, in my opinion, undesirable that there should be any doubt about the kind of decree that should be passed or the period that should

expire before the parties are free to contract a lawful marriage.

Mockett, J.

25. I have had the advantage of reading the judgment of my learned brother Stone, J., and I am in agreement with him as to the answer we should give to this reference. I also agree with the reasons which are contained in his judgment and I would be content to express my concurrence if it were not for the fact that my learned brother Wads-worth, J., takes a different view. It seems to me clear that the intention of Section 7, Divorce Act, was to prevent the principles and rules on which the Indian Courts were to give relief from being rigidly fixed and that, as has been stated by my learned brother Stone, J., the 'principles and rules' must include principles of law. The decision of the Privy Council in Iswarayya v. Iswarayya 1931 61 MLJ 367, supports this view. I observe that in Wilkinson v. Wilkinson 1923 47 Bom 843, this is the view of Martin, J.; Section 7 is an unusual provision in a statute and requires careful examination. It is to be operated 'subject to the provisions contained in the Act' and the meaning of those words has often been discussed. One meaning must be beyond doubt, and that is that the Court cannot give any relief which is contrary to the provisions in the Act. As an example this Court cannot follow the English Courts in giving the very much more extended relief which they have within the last ten years been enabled to give by statute. I refer especially to the powers of the English Courts to grant dissolution of marriage to a wife on proof of adultery alone. It would be impossible by any process of reasoning to hold that an Indian Court could give such relief, because Section 10 specifically states the grounds on which a wife can present a petition for dissolution and it is therein stated that adultery must be coupled with cruelty or with desertion. Mr. Coelho's argument really amounts to very much the same thing with regard to the powers of this Court to grant a decree nisi in the case of a decree for nullity. But Section 16 states that a decree for a dissolution of marriage made by a High Court shall, in the first instance, be a decree nisi. It is silent with regard to decrees for nullity. I think that the effect of Section 17 is as held in A v. B, (1899) 23 Bom 460, namely, that a decree of nullity passed by a District Judge cannot be confirmed before the expiration of six months from the pronouncing thereof. I share Stone, J's. preference for this decision to that of the High Court of Allahabad reported in E. Caston v. L.H. Caston (1900) 22 All 270 and of Lahore in Cecil Samuel v. Margaret Sarah 1934 Lah 636 .

26. We therefore have the position that a decree for nullity is in a sense 'nisi' if passed by a District Judge, i.e. it must be confirmed, but absolute if passed' by the High Court, that is to say, if Mr. Coelho's argument is correct. I will not reiterate the history of legislation in this matter: it is sufficient only to say that in 1869, when the Indian Divorce-Act was passed, decrees for nullity in England were decrees absolute. The Matrimonial Causes Act of 1873 enacted that decrees for nullity should be nisi as before had been decrees for dissolution. Section 7 obviously contemplates that the principles and rules of the Indian Divorce Act should be subject to change and development because the words 'principles and rules on which the Court... acts' are qualified by the words 'for the time being.' This must surely contemplate statutory rules. It seems to me that the whole object of Section 7 is to keep the practice of the Indian Divorce Court as nearly as possible in line with that of the English Court: otherwise, this exceptional, but most useful, provision loses much of its force. I personally would give the widest possible interpretation to it but always having in mind that it must be subject to the provisions of the Act. There is no provision in the Act that a. decree for nullity

should be nisi or absolute: the Act is silent. It does not seem to me that the suspension of a decree for a period of months by the Court passing it is in conflict with the Act. There is nothing repugnant to me about this notion as there would be, for instance, if an Indian Court granted a decree for dissolution of marriage to a wife on proof of adultery alone which would be in direct conflict with the Act.

27. That there are two sorts of decrees in matrimonial suits-decrees nisi and decrees absolute-is almost but not wholly peculiar to the matrimonial practice.. Stone, J. has referred to decrees in mortgage suits. My view is that the express object of Section 7 was to enable this Court to keep pace with the. practice in England. That it is desirable I have not the least doubt, and I too respectfully agree with the views of Ranade, J., reported in A v. B, (1899) 23 Bom 460 at p. 463. I would add that we have not elaborate machinery here for the provision of Medical Boards and I think the possibility of collusion in nullity cases must be kept in mind. With regard to the decision of the Judicial Committee in Iswarayya v. Iswarayya 1931 61 MLJ 367, I would add this. It would appear that, although Section 37, Divorce Act, is silent with regard to the power of the Court to vary alimony, nevertheless their Lordships held that, because in England Courts had power to do so, so also had the Indian Courts. It is in connexion with this decision that I stress the words 'for the time being' in Section 7 which, as I have already indicated, seem to contemplate that the Indian Courts should as far as possible follow the English Courts. For the above reasons, I would answer the reference by saying that a decree for nullity passed by this High Court should, in the first instance, be a decree nisi.

Wadsworth, J.

28. The question referred to this Bench is whether the proper form of decree in a suit for a declaration of nullity of marriage, filed on the original side of the High Court, should be that of a decree nisi or a decree absolute. We are informed that the practice of this Court in the past has been to treat a decree under Section 19, Indian Divorce Act, as a decree nisi. But naturally the number of cases would be very small, and actual cases of this Court have not been cited before us. The present English rule is that a decree in a nullity suit should be a decree nisi, just like the decree in a divorce suit. But this has not always been the case. Until 1873 the English law provided for a decree absolute in nullity cases. It is suggested that the practical arguments in favour of making the decree in divorce cases a decree nisi, apply with equal force to decrees in nullity cases. But I am not quite sure that this is correct. It must be remembered that the petitioner's own misconduct would not be a ground for refusing or rescinding a decree for nullity in a proper case, for instance, a case in which the respondent was already married at the time of his marriage to the petitioner, so that in such cases questions of collusion are much less likely to arise, and it does seem that in the vast majority of cases, the grounds on which a nullity decree is granted are not such as are likely to be affected by facts coming to light after the decree. I am therefore inclined to think that there is no very strong case based on practical considerations for introducing the decree nisi into the nullity procedure.

29. It seems to me clear that the Divorce Act as drafted contemplated that the decree for nullity should be a decree absolute. A decree absolute is the ordinary form of decree in civil proceedings unless the law for some special reason prescribes a preliminary decree or a decree nisi. The Divorce

Act was modelled upon the existing English law and practice, and it is significant that in 1869 when the Indian Act came into force, the English law prescribed an absolute decree in nullity cases and a decree nisi in divorce cases. This fact strengthens the inference which would naturally be drawn from the terms of Section 19 that the Legislature intended a similar procedure to be followed in India. Ch. 3, Divorce Act, which deals with decrees for dissolution of marriage makes express provision that the decree in such cases shall be a decree nisi which is ordinarily not to be confirmed until six months after its pronouncement. The absence of a similar provision from Ch. 4 relating to nullity-decrees is to my mind a clear indication that in the latter class of cases, the ordinary form of decree, that is to say a decree absolute, was contemplated.

30. An argument in favour of the decree nisi procedure might be based on Section 20 of the Act which provides that a decree for nullity passed by the District Judge shall be subject to confirmation by the High Court, and that the provisions of Section 17, Clauses 1 to 3 and 4 shall, mutatis mutandis, apply to such decrees. There is a difference of judicial opinion on the question whether this section makes the proviso to Section 17 prescribing a six months' period for confirmation of decrees of District Judges for nullity applicable. Even assuming that it does, I do not think that the mere fact that the legislature prescribes confirmation after a period of six months for a District Judge's decree for nullity is sufficient reason for holding that a similar rule should be applied to decrees passed on the original side of the High Court with reference to which no such provision has been enacted. I am therefore definitely of opinion that Ch. 4, Divorce Act, does not provide for, nor contemplate a decree nisi in a nullity suit. It remains to be considered whether by virtue of Section 7, Divorce Act, the English procedure for a decree nisi in nullity suits can be made applicable in India. Section 7 says that subject to the provisions contained in this Act, the Courts shall give relief on principles and rules which are as nearly as may be conformable to the principles and rules observed in England. In Iswarayya v. Iswarayya 1930 58 MLJ 29, it was held that the term "principles and rules" in Section 7 does not refer to or include statutory provisions or statutory rules. And a similar view was taken in the case of Isharani Nirupoma Devi v. Nitendra Narain 1926 53 Cal 282 at p. 290. The authority of the dictum in the former case may be taken to have been somewhat shaken by the observations of the Privy Council in the appeal from that decision reported at Iswarayya v. Iswarayya 1931 61 MLJ 367. The passage at p. 375 containing Lord Russel's observations on this subject is quoted in my learned brother Stone, J's judgment and I will not repeat it. But I do not think that these observations can be taken as a warrant for the view that the English law as laid down by statute can, by virtue of Section 7, be imported into India so as to confer powers or impose restrictions on the Court, which powers or restrictions would, if the legislature had intended then to be in force, necessarily have been embodied in the Indian Statute. It is to be remarked that Section 7 is always "subject to the provisions contained in this Act" and if it was the intention of the legislature, as according to my reading of the Act, it must have been, to prescribe in this Act one form of procedure for decrees for dissolution of marriage, and another form for decrees for nullity, it is in my opinion and with all respect to my learned brothers who have taken a different view, an error to use Section 7 as authority for doing away with this distinction which is embodied in the Indian Statute, in order to make the Indian procedure conform to that laid down by statute in England.

31. I may point out that both the Allahabad and the Bombay High Courts have held that decrees of the High Court for nullity under Section 19, Divorce Act, are decrees absolute : vide E. Caston v. L.H. Caston (1900) 22 All 270 at p. 278 and A v. B, (1899) 23 Bom 460. I would therefore decide this reference by holding that the terms of the Divorce Act contemplate a decree absolute in cases of nullity and that to introduce the practice prescribed by the English law whereby a decree nisi is pronounced in such cases would be to introduce a provision which is contrary to the provisions of the Indian Act and therefore not admissible with reference to the terms of Section 7.

32. ORDER - In accordance with the Full Bench judgment that has been delivered in this matter, the decree of nullity in this case will be nisi.