Bombay High Court
Mozelle Robin Solomon vs Lt. Col. R.J. Solomon on 3 February, 1968
Equivalent citations: (1979) 81 BOMLR 578
Author: Madon
Bench: Madon
JUDGMENT Madon, J.

1. This is a suit brought with leave granted by the Court under Clause 12 of the Letters Patent by a wife against her husband and the woman with whom she alleges he has committed adultery. In the plaint as originally filed the reliefs claimed by the plaintiff were for judicial separation on the ground of adultery committed by the husband, for custory of two of the children of the marriage who are still minors and for maintenance for the plaintiff and for all the four children of the marriage.

2. Both husband and wife belong to the Jewish community and profess the Jewish faith. They were married in Bombay on September 12, 1944 according to the Jewish law. In accordance with the custom amongst the Jews the parties executed a writing known as the Kethuba. These documents are usually in the Aramaic language. I have been shown the original of the document executed by the parties and, except for the signatures of the parties and the date which are in English, the document is in a script so unfamiliar to everyone in Court that I have no hesitation in presuming that this document must also be in the Aramaic language. The parties have, however, produced before me an agreed translation of an extract from this document. This extract has been admitted in evidence by me with consent of parties and marked Ex. A. According to this extract on September 12, 1944, being the day of the marriage, the groom, i.e. the first defendent, told his bride, the plaintiff, that he took her as his wife according to the law of Moses and Israel and that he, with the help of God, will honour, feed, clothe and look after her as the Jewish men have fed, clothed and given other requirements to their wives and that he was giving her an endowment of 100 silver pieces and 26 more of such pieces for the plaintiff's clothes and food. By this same document the plaintiff agreed to bring a dowry from her father's house to her husband of jewellery, gold, silver and clothes of the aggregate value of Rs. 1001/-. This document further recites that the stipulated dowry was received by the first defendant and that it became his property and that its future appreciation and depreciation would be on the first defendant's account. By this document the first defendant further agreed to add to that dowry a sum of Rs. 2001/- stating that "I take it upon myself to...". With these words the extract produced before me ends and we are left to wonder as to what further act it was which the first defendant took upon himself to do. Since the parties by mutual consent have not thought it fit to enlighten the Court upon this point by incorporating the rest of this passage in the extract Ex. A, I must take it that they do not consider it relevant to the decision of this suit.

3. Four children were born of this marriage, - three daughters, Rose, June and Esther, respectively aged 20, 18 and 3 years when this petition was filed, and a son named Joseph aged 5 years, at the same period of time.

4. The first defendant is serving in the Indian Army and his present rank is that of Lieutenant-Colonel. Till about December 1965 he was stationed at Mhow. In that month he was transferred to Gauhati and in April 1966 to Shillong.

5. The plaintiff's case is that about three years prior to the first defendant's transfer to Shillong disputes and differences arose between the plaintiff and the first defendant as a result of the first defendant's association with other women and his excessive addiction to drink. This, according to the plaintiff, led to frequent quarrels between the parties, in the course of several of which the first defendant beat the plaintiff severely. The plaintiff further alleges that in the latter half of 1965 the first defendant suggested to her that they should obtain a divorce by consent as is permissible amongst the Jews as also coerced her into signing an agreement to that, effect on August 14, 1965. Though in April 1966 the first defendant was transferred to Shillong from Gauhati he insisted that the plaintiff and the children should continue to live at Mhow on the ground that it would be to the benefit and make for the better education of the children. At the end of April 1966 the plaintiff accompanied by the three younger children went to Shillong during the school summer vacation, the eldest child Rose having gone to Bombay to learn shorthand and typing. When the schools reopened in July 1966 the plaintiff along with the two younger daughters June and Esther, returned to Mhow, leaving Joseph in the care of the first defendant. The first defendant, though he had promised to join the plaintiff in Mhow, on the pretext of his inability to get leave, did not do so. Thereafter the plaintiff received a letter dated September 20, 1966 from and first defendant, from which, the plaintiff alleges, she realised that the first defendant was not desirous of continuing his matrimonial relationship with her and that the reason why he had kept Joseph with him at Shillong was to deprive her of his custody. After some correspondence the plaintiff went to Shillong in December 1966 with both the children when the schools closed down again, this time for the Christmas Vacation. It is further alleged that on reaching Shillong in December 1966 the plaintiff discovered that the first defendant had developed an illicit intimacy with the second defendant and spent most of his time with her having kept her as his mistress. Things came to such a pass that on January 9, 1967 the first defendant instigated the second defendant, even though the plaintiff was herself residing in the house, to spend the night with him under the same roof as the plaintiff. The plaintiff objected. The first defendant thereupon informed the plaintiff that he had no objection to the plaintiff and the children residing in the house so long as the second defendant also stayed there. The plaintiff would not agree to this suggestion whereupon the first defendant asked her to leave the house latest by January 18, 1967. The plaintiff refused to accede to this unless provision was made for a separate establishment for herself and the children as also for their maintenance. The first defendant refused to agree to make any such provision and threatened to throw her forcibly out of the house. He beat her on the head with a bottle and the daughter June had to dress the plaintiff's injury. This compelled the plaintiff to leave the first defendant's house and she cams down to Bombay on January 28, 1967. Thereafter she filed this suit on July 27, 1967.

6. In his written statement the first defendant has denied the allegations, including those of cruelty and adultery, made against him by the plaintiff. He has alleged that the said agreement of August 14, 1966, to take a divorce by mutual consent, was signed by the plaintiff of her own free will and was binding upon her. He has also raised various technical defences. He has contended that no part of the cause of action has arisen within the limits of the ordinary original civil jurisdiction of this Court and as neither he nor the minor children of the marriage reside within these limits this Court has no jurisdiction to entertain or try this suit; that the suit is not maintainable as neither the concept of judicial seperation nor of custody of children nor of maintenance is known to the Jewish law; that by reason of the valuation put by the plaintiff the proper forum to try this suit is the Bombay City Civil

Court; that the plaintiff is not entitled to sue for maintenance of the children of the marriage who have attained the age of majority; and that the plaintiff is not entitled to sue in her own right for the maintenance of the children of marriage as there is no such provision known to the Jewish law, the last contention being raised by an amendment made in the written statement.

7. The second defendant, though she has caused an appearance to be filed through the same attorneys as those of the first defendant and is appearing at the hearing through the same counsel as the first defendant, has, however, not filed any written statement. This state of pleadings gives rise to a piquant and Gilbertian situation, in that in the case of an alleged adultery one of the parties thereto denies adultery while the other party is by the rules of pleadings deemed to have admitted adultery, because by reason of the judgment of a Division Bench of this High Court in Shriram Surajmal v. Shriram Jhunjhunwalla , the allegations in the plaint should be deemed to be admitted by the second defendant as she has not put in a written statement. I am, however, not called upon to pronounce on the effect of these pleadings at this stage as this judgment is confined only to the decision of the two issues set out by me later which have been tried as preliminary issues. At the appropriate moment, however, I may resolve this paradox by having recourse to the proviso to Rule 5 of Order VIII of the Code of Civil Procedure, 1908, which confers a discretion upon the Court to require any allegation of fact in the plaint not specifically denied in the written statement and therefore to be taken to be admitted to be proved otherwise than by such admission and require that the allegations of adultery should be proved by evidence against the second defendant also.

8. On the denials made and the contention raised in the written statement of the first defendant several issues arose for determination by the Court. Both parties intimated to me that they did not desire to lead any evidence on the issues of jurisdiction of the Court and the maintainability of this suit by a Jewish wife for judicial separation but would rely on admitted facts and on the authority of decided cases and text-books on the Jewish law. In view of this and as a decision adverse to the plaintiff on either of these issues would have been fatal to the suit resulting in its dismissal, I had indicated to the parties that I would try these issues as preliminary issues and had at their request adjourned the hearing of the suit to a date convenient to both learned counsel. At the adjourned hearing while the issues were being settled Mrs. Nanavati, learned counsel for the plaintiff, made an application to amend the plaint, which application was granted by me, and the plaint was thereupon amended. By these amendments the plaintiff asked for judicial separation on the grounds both of the first defendant's cruelty and adultery or either of them as the Court may on evidence find to have been proved. She also in the alternative prayed for divorce on the same grounds if the Court came to the conclusion that it had no jurisdiction to grant a decree for judicial separation under the Jewish law. She also revised the valuation clause in the plaint stating that her claim in the suit for the purposes of Court-fees was not capable of monetary valuation and a fixed Court-fee of Rs. 37.50 P. was payable thereon and that so far as the reliefs for judicial separation or in the alternative for divorce and for custody of the minor children of the marriage were concerned, she valued the same at Rs. 25.000/- for the purpose of jurisdiction. On the valuation clause being so amended Mr. Kothari, learned counsel for the defendants, with laudable frankness informed me that it was no more possible for him to contend that the suit could only be tried by the Bombay City Civil Court and that he therefore did not require that such an issue should be framed by the Court. Similarly, with equal laudable frankness Mrs. Nanavati, learned counsel for the plaintiff, intimated to me that

it was not possible for her to sustain the plaintiff's claim for maintenance for the two children of the marriage who have attained the age of majority and that accordingly she confined the claim for maintenance of children made in prayer (c) of the plaint to the maintenance of the two children of the marriage who are minors, viz. the daughter Esther and the son Joseph.

9. In spite of these amendments made in the plaint the issue as to whether any part of the cause of action has arisen within the limits of the ordinary original civil jurisdiction of this Court continues to be a preliminary issue inasmuch as if this issue were decided against the plaintiff the suit would have to be dismissed. As regards the issue as to maintainability of this suit by a Jewish wife for judicial separation, it ceases to be a preliminary issue as a decision thereon adverse to the plaintiff would not dispose of the suit or any part of it but would have a bearing only on the relief to which the plaintiff would be entitled provided she succeeds in persuading me to accept the evidence led by her. It is, however, contended by Mrs. Nanavati, learned counsel for the plaintiff, that marriage is a part of the cause of action in a suit for divorce or judicial separation and that in such a suit unless the plaintiff proves that a valid marriage has taken place according to the law governing the parties, the plaintiff would not be entitled to any relief. In her submission a Jewish marriage is a contract and a suit for divorce or judicial separation by a Jewish wife being one which seeks for relief in respect of the breach of that contract by the other spouse, the making of the contract, i.e. the taking place of the marriage, is a part of the cause of action and the suit can therefore be filed at the place where the marriage took place. Mr. Kothari, learned counsel for the defendants, has, on the other hand, contended that a Jewish marriage is not a contract and that in any event in a suit for divorce or judicial seperation by a person professing the Jewish faith and belonging to the Jewish community marriage is not a part of the cause of action and assuming it is a part of the cause of action, it is certainly not such a material part of the cause of action as would entitle the Court to assume jurisdiction by granting leave under Clause 12 of the Letters Patent. As the determination of the question whether marriage is a part or a material part of the cause of action in a matrimonial suit between Jews involves an examination of the nature of a Jewish marriage, the rights and obligations of the parties thereto, the reliefs to which an aggrieved spouse in such a marriage would be entitled to and the right on the basis of which this relief can be claimed and involves the determination of the question whether judicial separation can be granted to a Jewish wife under the Jewish personal law, I have decided to try this issue also along with the issue of jurisdiction as a preliminary issue. I have, therefore, with the consent of parties framed and tried the following two issues as preliminary issues:-

(1) Whether any part of the cause of action has arisen within the limits of the ordinary original civil jurisdiction of this Honourable Court as alleged in paragraph 21 of the plaint?

(2) Whether the suit in respect of the relief for judicial separation is maintainable?

10. Both learned counsel have advanced arguments on these two issues on the basis of certain facts admitted by the parties and on the assumption that for the purposes of these issues only I should assume the other allegations in the plaint to be true. These admitted facts are that both the parties belong to the Jewish community and profess the Jewish faith; that their marriage took place in Bombay in accordance with the requirements of a marriage between Jews; that as is customary

amongst the Jews, on September 12, 1944, the day on which the marriage took place, a writing known as the Kethuba was executed by the parties. The effect of this writing formed, however, the subject-matter of considerable debate between two learned counsel.

11. Unlike Christians, Hindus and Parsis, there is no statutory law which governs marriages amongst the Jews. Unlike in the case of these three communities as also in the case of Muslim women, there is also no statute which provides for any matrimonial relief to an aggrieved party to a Jewish marriage. The nature and the incidence of a Jewish marriage and the matrimonial relief to which a Jewish husband or wife would be entitled must therefore be ascertained from their personal law.

12. In Rachal Benjamin v. Benjamin Solomon Benjamin , Crump, J., held that the High Court of Bombay had jurisdiction under Clause 12 of the Letters Patent to entertain suits for divorce between Jews, the law to be applied in such cases being the Jewish with such adaptation to the circumstances of the case as justice may require". Though the case before Crump, J., was a suit for divorce, the same principles would to my mind apply to a suit for judicial separation if that relief were available in a matrimonial suit between Jews. In spite of a discordant note sounded by the Calcutta High Court in Jacob v. Jacob [1944] I.L.R. 2 Cal. 201, where Das, J., sitting singly, doubted the correctness of the reasoning which led Crump, J., to assume jurisdiction, the case of Rachal Benjamin v. Benjamin Solomon Benjamin has always been taken in this High Court to lay down a correct proposition and has been followed all these years without demur and has been referred to with approval by our Court of Appeal in Robasa Khanun v. Khodadad Bomanji Irani . In Robasa Khaium's case the parties, both of whom professed the Zoroastrian faith, were married in Iran in accordance with the Zoroastrian rites. The wife was subsequently converted to Islam. After her conversion she called upon her husband to embrace Islam. On the husband declining to do so she filed a suit on the Original Side of this High Court for a declaration that owing to her conversion to Islam her marriage with the defendant stood dissolved. In that suit she also sought dissolution of the marriage on the ground of her desertion by the defendant, but on this aspect of the case her evidence was disbelieved by Blagden, J., before whom the suit was heard. Blagden, J., dismissed the suit and the wife went in appeal. The Appeal Court held that the law to be applied was not the Muslim personal law and that the case should be decided according to justice and right and that it was not in accordance with justice and right that on the conversion of one of the parties to the marriage to Islam it should be held that the marriage stood dissolved. The question as to the Court's jurisdiction to try the suit was also canvassed before the Appeal Court and the relevant portion of the judgment is as follows (at pp. 881, 882):

We might also consider another point which was debated at the Bar but which does not present much difficulty. Has the High Court the jurisdiction to try matrimonial suits on the Original Side? By Clause 42 of the Supreme Court Charter, 1823, the Supreme Court was constituted a Court of Ecclesiastical Jurisdiction; and by Clause 35 of the Letters Patent the High Court has been given Matrimonial Jurisdiction. But this jurisdiction is confined to cases where one of the parties professes the Christian religion and it is now regulated by the Indian Divorce Act and the Indian and Colonial Divorce Jurisdiction Act, 1926. A special Court is also set up for deciding matrimonial matters where parties are Parsis under the Parsi Marriage and Divorce Act. The Dissolution of Muslim Marriages Act (VIII of 1939) does not set up any special Court and presumably the cases

coming under that Act would be tried on the Original Side. But apart from special legislation and special jurisdiction, the High Courts in India have never refused to give redress in suits concerning matrimonial matters. As far back as 1856, the Privy Council, while holding that a suit for the restitution of conjugal rights could not be maintained on the Eeclesiastical side of the Supreme Court where the parties were Parsis, expressed the opinion that they 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, Ardeshir v. Peroxeboy [1856] 6 M.I.A. 348390. Clause 12 of the Letters Patent confers original jurisdiction upon the High Court to try suits of every description, and that expression is wide enough to include in it even matrimonial suits where parties cannot obtain relief by invoking the special Matrimonial Jurisdiction of the High Court. Mr. Justice Crump, in Benjamin v. Benjamin entertained a suit for divorce between Jews on the Original Side under Clause 12 of the Letters Patent. Mr. Justice Crump in that case has reviewed the cases in which the High Court in its original civil jurisdiction has exercised jurisdiction in matrimonial disputes.

We, therefore, hold that the Court has jurisdiction to entertain the suit on the Original Side.

In view of these authorities the issue as to the jurisdiction of the Court to try this suit would not have arisen in the present case if the defendants had, at the time of the commencement of the suit, dwelt within the limits of the ordinary original civil jurisdiction of this Court. As the defendants, however, did not dwell within such limits at the time when this suit was commenced, the plaintiff has been led to invoke the Court's jurisdiction under that part of Clause 12 of the Letters Patent which empowers the Bombay High Court to receive, try and determine in the exercise of its ordinary original civil jurisdiction suits of every description (other than for land or other immoveable property) if the cause of action shall have arisen in part within the limits of that jurisdiction provided leave of the Court has been first obtained.

13. As the answers to these questions depend upon what the Jewish law on the subject is, I will now turn to an ascertainment of the Jewish law so far as is material to this judgment. According to the Jews, their law has a divine origin. It was revealed by God in the wilderness of Sinai to Moses who transmitted it to the people and is to be found in the first five books of the Old Testament (namely, Genesis, Exodus, Leviticus, Numbers and Deuteronomy), commonly known by the Greek word "Pentateuch", meaning "the five rolls". The Jews call these five books (the Torah, meaning "The law" or, literally, "direction" or "guidance". In course of time enormous bodies of law and commentary came to compiled known as the Talmud, meaning "teaching" or "instruction", which interpreted, modified, expounded and adapted to changed times and circumstances the Scriptural Law. The Mishnah Talmud was reduced to writing in the second, the Palestinian Talmud in the fourth and the Babylonian Talmud in the sixth century. The Talmud consists of (1) the Mishnah, a systematic collection of religious - legal decisions developing the laws of the Old Testament and (2) the Gamara which is a supplementary commentary based on the Mishnah. The Mishnah states a law in a few lines while the Gamara is discursive being in the nature of a commentary on the Mishnah, giving the diverse opinions of leading rabbis on the Mishnah text, describing the circumstances which might require the law to be modified and giving illustrations. Orthodox tradition ascribes divine origin to the Talmud also holding that Moses had left to his people not only a Written Law in the Pentateuch but also an Oral Law which had been handed down and expanded from teacher to pupil and from

generation to generation. This traditional view takes the twelfth verse of the twenty-fourth chapter of the Book of Exodus for its Scriptural basis : -

And the Lord said unto Moses, Come up to me into the mount, and be there : and 1 will give thee tables of stone, and a law, and commandments which I have written; that thou mayest teach them.

This traditional view may best be stated in these words ascribed to Rabbi Simeon ben Lakish, who lived in the third century : -

Tables' these are the Ten Words (namely, the Decalogue or the Ten Commandments) which are to be found, though in somewhat different language, both in Exodus XX and Deoteronomy; the 'Law' is the Scripture; 'and the commandment', that is the Mishnah: 'which I have written', these are the Prophets (namely, the 'Former Prophets' Joshua, Judges, Samuel, and Kings; and the Latter Prophets - Isaish, Jeremiah, Nzekiel and the twelve 'Minor Prophets') and Writings (namely, The Hagiographa consisting of (a) the poetical books - Psalms, Proverbs and Joh, (b) The five Mogilloth (or Rolls) -Song of Songs, Ruth, Lamentations, Ecclesiastes and Esther, and (c) the remaining books, Daniel, Ezra and Nehemiah, and Chronicles), to teach them', that is the Gamara -thus instructing us that all these were given to Moses from Sinai.

The Talmud came to be compiled after the conquest of Judaea by Titus in 70 A.D. in the reign of the Roman Emperor Vespasian. After the Roman conquest the Jews came to be dispersed over three continents. Through all their wanderings, through the long centuries of cruel persecution to which they were subjected, wherever chance or misfortune drove them-'Whether in the ghettos into which they were herded or in countries which treated them with a tolerable degree of liberality, the Jews took with them their law and their customs. The Rabbi might have ceased to be a civil judge and became only a spiritual guide and the preceptor of his congregation, but he continued to be the interpreter of the Law. To a people so widely scattered as the Jews the Talmud acted as a unifying force and enabled them to cling to their identity. To them it was, in the words of the great German poet Henrich Heine, 'a portable Fatherland'. It was their means of survival in the midst of oppression and the danger of annihilation.

14. The matrimonial law as contained in the Talmud developed during the period of the Second Temple and in the centuries immediately following its destruction. It is an interpretation and enlargement of the Mosaic laws. The enlargement consists partly in extended provisions made by analogy and deduction from the Biblical law; partly in the embodiment of those norms and usages which has been handed down by tradition from times immemorial and which had become a part of the law; and partly in new regulations enacted by the Sopherim (that is, the Scribes) and later religious and civil authorities to meet the exigencies of changed time and circumstances. The Talmud minutely defines and regulates the forms of concluding and dissolving marriage and the marital rights and duties as also deals with innumerable casuistical questions concerning the matrimonial relationship. Several of the regulations contained in the Talmud, however, underwent some modifications by the decisions of the Gaonim who, after the Talmudic period, flourished until the eleventh century as the heads of the Babylonian Academics.

15. The oppressive bulk of the Talmud can be judged from the fact that its English translation by M. L. Rodkinson extends to ten volumes. This and the manner in which the law has been treated in the Talmud in the form of discussions and controversies led in the middle ages to codified abstracts being prepared for practical use. The more important of these were: (1) Yad Hachezaka of Maimonides. in the twelfth century, and (2) the Sulchan Aruch of Rabbi Joseph Karo, in the sixteenth century. The fourth out of the fourteen books of the former and the third part, "Eben Ha-Ezer", of the latter deal with the matrimonial law of the Jews. It is the Eben Ha-Ezer of Sulchan Aruch which has obtained general authority in Judaism and it is in accordance with the rules and regulations laid down therein that the Jews resolve questions concerning marriage and matrimonial relations. That this is so has been accepted by B. J. Wadia, J., in David Sassoon Ezekiel v. Najia Noori Reuben . I am fortunately saved the formidable necessity of resorting to the English translations of any of these works for the purpose of ascertaining the law on the subject (a task rendered more formidable by the fact that these works in the English translation are not easily available), because both learned counsel are agreed that I should ascertain that law by taking the aid of passages from the Pentateuch and placing reliance upon two books to which they have referred me and a book to which I have referred them. Though a reference to the Pentatauch is a simple matter, since the Bible is the most easily available and the most widely translated book and is perhaps the best seller of all ages, any unqualified and unquestioning reliance upon any passage in the Pentateuch as containing rules of positive law and particularly rules of law to be applied to the present-day circumstances would be fraught with danger and lead to error, for in the Pentateuch positive law is intermingled with religious and moral precepts and ethical doctrines. This is equally true of the Talmud as also of any ancient system of jurisprudence. In Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma [1899] L.R. 26 I.A. 113 the Privy Council enjoined caution in the matter of consideration of old text books of the Hindu Law in these words (at p. 136): -

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion, and law in the Smritis : Rao Balwant Singh v. Kishori [1898] L.R. 25 Ind. A.P. 69... They then said : 'All these old text-books and commentaries are apt to mingle religious and moral considerations not being positive laws, with rules intended for positive laws....' They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality, and law, lest foreign lawyers, accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original lawgivers.

16. In the opinion of Das, J., in Jacob v. Jacob, (supra) with which I agree, these observations apply with equal force in the consideration of text books of the Jewish law. For the above reasons, though I may have occasion hereafter in this judgment to refer to some passages from the Pentateuch, I have not considered them, as I do not feel myself justified in considering them, as laying down any correct statement of the law as applicable to the Jews to-day except in so far as they have been accepted as such by authorities on the Jewish law. The two books to which both learned counsel have referred me are (1) Rev. Dr. M. Mielziner's book entitled "The Jewish Law of Marriage and Divorce in Ancient and Modern Times", second revised edition published in 1901 and (2) the fifth

volume headed Deuteronomy of the work entitled "The Pentateuch and Haftorahs, Hebrew Text, English Translation with Commentary" edited by Chief Rabbi J. H. Hertz. The commentary on the Deuteronomy by Chief Rabbi Hertz is not a book which seeks to or even claims to give any account or exposition of the Jewish law. It is a commentary on the Pentateuch and though this book contains much interesting information and makes instructive reading, it is what it professes to be - a commentary on the first five books of the Old Testament, the religious book of the Jews. Its basis is naturally therefore religious and ethical and not legal and in part its endeavour is to show how in most respects the Hebrew society, manners and customs were and are superior and more advanced than those of Christiandom. It is therefore not of any assistance in ascertaining what the Jewish law on any particular subject is. The book by Rev. Dr. Mielziner, who was the Professor of Talmudic Literature at the Hebrew Union College, on the other hand, in the words of Crump, J., in the case of Rachel Benjamin v. Benjamin Solomon Benjamin (supra).

Contains, so far as can be judged, a clear and accurate account of the law based on the original sources which are cited throughout.

The book to which I have referred both learned counsel is Part IV of "Jewish Code of Jurisprudence" by Rabbi J. L. Kadushin, published in 1921 by the Talmud Society. This part deals with the Talmudical law decisions on marriage, divorce, domestic relations and certain questions of law. Das, J., in Jacob v. Jacob (supra) described this work as "an authoritative book containing translations of verses taken from earlier books of accepted authority and grouped under different heads in the form of a comprehensive code of the Jewish law". B. J. Wadia, J., in David Sassoon Ezekiel v. Najia Noori Reuben (supra) referred to this work as also to Dr. Mielziner's book as works containing "very valuable expositions of the Hebrew Law". I therefore consider myself justified in relying upon the book by Rev. Dr. Mielziner and by Rabbi Kadushin as correctly expounding that branch of the Jewish law with which I am concerned in the present case.

17. I shall now proceed to examine the nature of a Jewish marriage and its incidents as appearing from these two books.

18. Since the eleventh century a Jewish marriage is monogamous. Prior thereto the Jewish law tolerated polygamy imposing certain restrictions on it but without expressly sanctioning it. In the beginning of the eleventh century the Rabbinical Synod at Worms under Rabbi Gershom ben Juda pronounced an express prohibition of polygamy which, though originally made for the Jews living in Germany and Northern France, came to be adopted by Jews residing in other places also. Chapter IX of Dr. Mielziner's book treats of the "qualifications to contract marriage" and chapters X and XI of "the form of concluding marriage". The same topics are treated in chapters I to LXVI of Part IV of Rabbi Kadushin's Jewish Code of Jurisprudence, Portions of the abovementioned chapters of Dr. Mielziner's book have been summarised by B. J. Wadia, J., in David Sassoon Ezekiel v. Najia Noori Reuben (supra) so far as they were relevant for the purposes of the case before him.

19. By the Jewish law three requirements are necessary before parties can enter into a valid marriage, namely, (1) consent of the parties, (2) mental capacity, and (3) the legal age. No betrothal or marriage can take place without the consent of both parties and a marriage contracted without

consent is void even though the prescribed forms have been complied with. Since consent is absolutely requisite to the marriage contract, idiots and lunatics are not capable of contracting a valid marriage as they lack the capacity to give free consent to it. The legal age for contracting a valid marriage according to the Talmudical law is the age of puberty which is assumed to be the completed thirteenth year in males and the completed twelfth year in females and a marriage contracted by minors under that age is void, though in former times a minor daughter below the age of puberty was permitted to be given in marriage by her father or, if he was dead, by her mother or brother on the ground of the necessity of her having a protector in the helpless state in which she would be in the event of her father's death or poverty. The general rule, however, was that a man was prohibited from accepting betrothal for his minor daughter and it was equally forbidden to cause a male or female minor to marry. Kadushin, however, on the authority of Yebamoth states that a minor under the age of thirteen years and one day cannot marry and. does not mention a lower marrying age for females.

20. The fulfilment of the above requirements is, however, not in itself sufficient to bring about a valid marriage. In Talmudical law no contract can be formed by mere consent of parties but the consent has to be manifested by a certain legally established act or formality in order to make the consent valid and this applies equally to a marriage contract. It should be remembered that under our law also certain transactions have no validity unless particular formalities are complied with, such as signatures of the parties, attestation, registration, etc. The free consent of parties who have attained the legal age and possess the mental capacity to give such consent is thus not by itself sufficient to conclude a valid marriage in Jewish law. The marriage contract has to be formally brought about and concluded by the betrothal. The betrothal among the Jews is not the same as an engagement among many other communities where it is a contract between a man and a woman to marry each other at a future date and which contract can be dissolved at pleasure either by both parties or one, and, if broken wrongfully by one of the parties, it gives the other a cause of action to sue for damages for breach of promise. A betrothal among the Jews is the very initiation of marriage and the betrothed parties are in some respects regarded as married, though as yet not entitled to the exercise of marital rights nor under an obligation to fulfil the mutual duties of conjugal life until the marriage has been consummated by the nuptials. The effect of a valid betrothal in the Jewish law is that the betrothed woman cannot marry any other man and faithlessness on the part of the betrothed woman is treated as adultery. The betrothment, just as in the case of a marriage, can be dissolved only by death or a formal bill of divorcement.

21. The betrothal can take one or two forms, either of which gives legal validity to the marriage contract. One of these is termed "Kaseph" (i.e. money).The "Kaseph" called betrothal of "Kaseph Kiddushim", consists in the man giving to the woman, in the presence of two witnesses, a piece of money or any other object of equal value and since the middle ages a plain gold ring instead, accompanied by the words: "Be thou wedded (consecrated) to me", or "Be thou my betrothed", or "Be my wife", or "Be mine". The first formula is in general use. Later on to it were added the words "according to the law of Moses and Israel", the whole formula thus being "Be thou wedded (consecrated) to me according to the law of Moses and Israel". This formula, though generally spoken in Hebrew, is at times replaced by a corresponding formula in the vernacular. Rabbi Kadushin translates the Hebrew word for "consecrated" as meaning "betrothed" and not as

"wedded". The presence of parties at an act of betrothal, though regarded as proper, is not absolutely necessary and either party can be represented by agent appointed for the purpose. In such a case the formula of the betrothment has to be suitably altered. The presence, however, of two competent and qualified witnesses is an absolute requirement to give validity to the act of betrothal and without such witnesses the betrothal is invalid according to the Talmudical law. The other special formality or form of betrothal is termed "Sh'tar" (i.e., a written instrument) and consists in giving to the woman a written instrument containing the above formula, instead of a piece of money or its value or a ring, the other formalities observed being the same. The betrothal by Sh'tar is not so much in vogue, the form more prevalent being betrothal by Kaseph.

22. The ritual law of the Talmud requires that a benediction (termed "Berchat Kiddushin" or "Arusin") be pronounced at the betrothal. This benediction expresses the Lord's praise because of the regulation and sanctification of the matrimonial relation and alludes to the law that the betrothed parties are not permitted to enter upon the conjugal life before the nuptials. This benediction is not necessary to the legal validity of a betrothal and a betrothal concluded according to the prescribed forms is legally valid in all respects in spite of the omission to pronounce the betrothal benediction. Formerly a considerable time elapsed between the betrothal and the nuptials but since the sixteenth century it has become a general rule to combine the betrothal with the nuptials. The nuptials are termed "Chuppa" (which formerly denoted the bridal chamber and in later times the canopy under which the nuptials took place) or "Nissuin" (which means "taking", that is, taking the wife). The ceremonies of the nuptials in essence consist of the act of conducting the bride from her home to that of the bridegroom or to a place representing his home and the recital of certain benedictions. The act of conducting the wife from her home to that of the groom indicates that she is now placed under the matrimonial authority and that they now commence to live together as husband and wife, the marriage being then regarded as having been consummated though no actual marital intercourse had taken place. The nuptial benedictions are termed "Berchoth Nissu-in" and they refer to the divine origin of marriage and invoke God's blessing upon the bridal couple. As in the case of the benediction of the betrothal, the omission to pronounce the nuptial benedictions does not affect the legal validity of the marriage and a marriage is legally valid in all respects without the pronouncement of these benedictions. It is pertinent to note that according to the Talmudical law the presence of a rabbi or minister is not required at the betrothal or the nuptials and the prescribed benedictions can be pronounced by the bridegroom or any friend present.

23. It is also customary for the husband to execute before the nuptials an obligation in writing termed "Kethuba". I will consider later the purpose and the legal consequences of the Kethuba while dealing with the argument of Mrs. Nanavati, learned counsel for the Plaintiff, that the execution of the Kethuba shows that among the Jews marriage is a civil contract.

24. Marriage gives rise to certain rights and duties so far as both the husband and wife are concerned. These are set out in chapter XIII of Dr. Mielziner's book. The only Biblical injunction in this behalf is to be found in Exodus, XXI, 10, and that too in a case where the husband takes another wife, polygamy being permissible in those days. That verse provides: -

And if he takes him another wife; her food, her raiment, and her duty of marriage shall he not diminish.

On this came to be based the elaborate regulations of the Rabbinical Code relating to the husband's duties to his wife. They are divided by Dr. Mielziner into the following five headings: -

1. To furnish his wife with the necessaries of life, including-

(a) food; (b) clothing; (c) dwelling.

2. To have conjugal cohabitation with her.

3. To provide suitable medical care and nursing when she is sick.

4. To protect her and to ransom her in the eventuality of her falling into captivity.

5. To provide for her burial in case of her death.

The first and the third consist of the husband's duty to maintain his wife according to his station in life. The second is implied in the very nature of marriage. The second part of the fourth duty was expressly provided in the middle ages by reason of the frequent invasions by Bedouins in the oriental countries and the continual wars in Europe. It is not likely to be of any practical importance in the present age. The fifth and the last duty is not such as can ever arise for the consideration of the Courts in a suit filed by the wife. The husband's rights arising on marriage are that he becomes entitled to his wife's earnings and to whatever she gains by chance as also to the usufruct of the property brought by her as her portion and of the property received by her during coverture by inheritance, donation, legacy or otherwise except where it is donated to her on the express condition that it is to be for her own exclusive use. He also becomes her sole heir on her death except in certain cases. The husband's right to the wife's earnings is regarded as the consideration for his duty for supporting his wife. If, therefore, the wife of her own free will renounces her claim to be supported by him, her earnings are her own and are held by her free from her husband's claims. The wife's duties as mentioned by Dr. Mielziner consist in her taking the domicile of her husband, of following him where he goes to reside except into a foreign country where a different language is spoken and of managing the household. So far as the wife's rights are concerned, Dr. Mielziner states that "the rights of the wife are implied in the husband's duties, treated of above".

25. A Jewish marriage can be dissolved either by the death of one of the parties or by divorce. The principal passage concerning divorce in the Torah is to be found in Deuteronomy, xxiv 1, 2, and reads as follows in the authorised version:-

When a man hath taken a wife, and married her, and it comes to pass that she find no favour in his eyes, because he hath found some uncleanness in her; then let him write her a bill of divorcement, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man's wife.

26. Rabbi Hertz uses the words "unseemly thing" for "uncleanness" in his translation. The interpretation of the expression "some uncleanness' used in the above passage as the ground for divorce led to a cleavage between the schools of Shammai and Hillel, which flourished in the last century of the Second Jewish Commonwealth. The school of Shammai maintained that the expression "some uncleanness" was used in an ethical sense and consequently the husband's right of divorce could only arise in the case of a marital delinquency or unchastity on the part of the wife, while the school of Hillel construed that expression to relate to any thing offensive and displeasing and permitted divorce for any cause that might disturb the domestic peace on the ground that such a cause entailed a rupture of domestic harmony resulting in a daily violation of one of the main purposes of marriage, viz. companionship. The opinion of the school of Hillel prevailed over that of the school of Shammai though divorce was morally disapproved by the Rabbis in general. (See Mielziner pp. 116, 118-119; and Hertz's Deuterenomy, p. 314). In the eleventh century Rabbi Gershom ben Juda passed the law which prohibited divorcing a wife against her will except in certain cases which constitute the grounds on which a husband can obtain divorce. Though the Mosaic law did not make any mention of a right of divorce in the wife in case she was the complaining party, this omission was supplied by the traditional law which provides for the cases in which a wronged wife could obtain divorce.

27. According to the Rabbinical law there are four kinds of divorce:- (1) divorce by mutual agreement of the parties; in this case the wife becomes entitled to receive the amount of the dowry fixed in the Kethuba; (2) divorce upon the petition of a husband made to a Court, in which case the wife as the guilty party forfeits her dowry; (3) divorce on the petition of a wife made to Court, in which case the wife becomes entitled to receive her dowry; and (4) divorce enforced by the Court without petition of either party where, for example, the wife was found guilty of adultery or a marriage had been contracted which though formally binding is regarded as voidable on account of being against a Biblical or Rabbinical law prohibiting such a marriage. In all these four cases divorce was effected by the husband giving a bill of divorcement or a "get" to the wife and in a case where a divorce was enforced by the Court at the instance of a wife or without petition of either parties, the Court compelled the husband to give the wife a bill of divorcement.

28. Since this is a suit by a wife for judicial separation and in the alternative for divorce I am not concerned with the grounds on which a Jewish husband can obtain divorce. The grounds on which a Jewish wife can obtain divorce are set out at pages 123 and 124 of Dr. Mielziner's book. They are: -

1. On account of loathsome chronic diseases which the husband contracted after marriage.

2. On account of a disgusting trade, in which he engaged after marriage, the same being of such a nature as to render cohabitation with him intolerable.

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.

4. On account of his change of religion.

5. On account of his notorious dissoluteness of morals,

6. On account of wasting his property and refusing to support her.

7. On account of having committed a crime, compelling him to flee from the country.

8. On account of his physical impotence, if admitted by him; and, according to some authorities, also on account of his persistent refusal of matrimonial intercourse.

The third ground is compendiously described in modern matrimonial law by the term "cruelty", though the second part of the ground, viz. turning the wife out of doors, would also be tantamount to the husband deserting the wife. Cruelty to wife was not tolerated and the Sulchan Aruch described it as the duty of the Beth Din (Jewish National Council) to punish a wife-beater, to excommunicate him and, if this be of no avail, to compel him to divorce his wife with full Kethuba (Eben Hoezer, cliv. 3), The fifth ground would include husband's adultery. Adultery was considered an abomination in the sight of God and was regarded not only as a matrimonial offence but as a crime. The Seventh Commandment prohibited it It was a capital offence, the punishment being death of the guilty party by stoning. When the Rabbinical Courts had no more power to enforce their orders or to mete out punishment, the adulterous party was prohibited from marrying his or her partner in adultery. In Rachel Benjamin v. Benjamin Solomon Benjamin Crump, J., held that a Jew could not lawfully contract a second marriage except in certain cases and that, apart from these exceptional cases, a Jew marrying for the second time was guilty of adultery.

29. Before I state the conclusion which I have reached as to the nature of a Jewish marriage; from the above examination of its requirements and the form necessary for concluding it and its incidence, I will deal with certain arguments advanced by learned counsel at the Bar.

30. Mrs. Nanavati, learned counsel for the plaintiff, has urged that the Kethuba executed by the parties at the time of marriage shows that amongst the Jews marriage is a contract. Dr. Mielziner thus states the purpose of the Kethuba at pages 85-86 of his book:-

In order to protect the wife in the event of her becoming widowed or divorced, it was established by the Jewish Law that, before the nuptials, the husband was tot make out an obligation in writing, which entitled her to receive a certain sum from his estate in the case of his death or in the case of her divorcement, This obligation was termed Kethuba (the marriage deed).

So far as the subsequent history of the Kethuba is concerned, Dr. Mielziner summarises it thus at pages 88-89: -

From the time when the husband's right of divorcing his wife against her will was restricted by the generally adopted decree of the Synod of R. Gershom (eleventh century), the Kethuba lost its former importance. Nevertheless, it was retained as an ancient custom, and looked upon as a kind of formal marriage settlement.

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.

In Lindo v. Belisario [1795] I Haqq. 216 the Consistory Court of London, on the authority of the answers given by Beth Din in England to whom certain questions were submitted for their answers, held that the execution of a Kethuba was customary but was not essential to the validity of a Jewish marriage. In Joshua v. Arakie [1940] I.L.R. 40 Cal. 266, a Division Bench of the Calcutta High Court held that the Kethuba was a necessary but formal incident of the marriage contract and ceremonial in Calcutta between those of the Jewish faith and created no right in favour of a Jewish widow to recover the sum mentioned therein from her deceased husband's estate. In Rachel Benjamin v. Benjamin Solomon Benjamin (supra), Crump, J., did not believe that the parties before him intended that the Kethuba executed by them should be acted upon and negatived the wife's claim for recovery of the amount mentioned therein. Turning now to an examination of the language of Ex. A before me or even to. the form of the Kethuba given in Dr. Mielziner's book at pages 87-88, it will be apparent that the Kethuba can throw no light as to the true nature of a marriage in the Jewish law. The declaration contained in the Kethuba that the husband takes the bride as his wife according to the law of Moses and Israel does not in any way carry the matter further and it still remains to be ascertained from that law what the legal nature of such a marriage is. Similarly the husband's undertaking to honour, feed, clothe and look after his wife as Jews have done does not also show that the obligations which a husband undertakes towards his wife in a Jewish marriage consists merely of such of them as he has expressly contracted to by the Kethuba. The Kethuba's real purpose seems to be what Dr. Mielziner has set out above, viz. a contractual protection for the wife entitling her to receive a particular sum of money in certain eventualities.

31. I turn now to the arguments of Mr. Kothari, learned counsel for the Defendants. Mr. Kothari submitted first of all that a Jewish marriage is a religious sacrament. In support of this argument he has pointed out that the Bible enjoins marriage. He has also relied upon what is stated in a chapter in Dr. Mielzifler's book, viz. Chapter III headed "Legal View of Marriage", and to two passages in the Note headed "Marriage" at page 310 of the Commentary on Deuteronomy by Rabbi Hertz. I have already mentioned above the caution required in referring to any passage from the Old Testament as laying down a positive rule of law. The fact that the Old Testament commands human beings to enter into matrimony cannot in any way be indicative of the true nature of marriage in the Jewish law. The Bible contains rules of positive law as well as teachings and doctrines. The chapters of the Pentateuch which lay down the laws as given by Dr. Mielziner at page 14 of his book are Exodus xx-xxiii, xxv-xxxi, xxxiv and xxxv, Leviticus i-viii, xi-xxv, xxvii; Number v-x, xviii, xix; xxvii-xxx. The rules of law contained therein are with some modifications repeated in Deuteronomy iv-xxvi. The other books and chapters are stated by Dr. Mielziner to contain ethical teachings only, but even in those chapters which are said to contain law, the legal part is blended with ethical doctrines and principles as can be seen from a perusal of them and as is also pointed out by Dr. Mielziner, One ought not to overlook the fact that the concept of family and consequently of marriage from which a family springs are of fundamental importance to the preservation of the fabric of any society. This human relationship more than any other, therefore, must necessarily form the subject-matter of ethical teachings and doctrines. All ancient systems of law claimed to possess in addition to the

sanction of the State a supernatural sanction for their enforcement. Thus just as the Jews believed that their law was revealed to Moses by God, the Babylonians believed that the Sun God had given their Code to Hammurabi and the Egyptians believed that their law came from Thoth. In the same way the ancient Hindus believed their law to be divinely revealed, the Shruti including the Vedas, being taken to be the revelation of the Deity and the Smritis as the recollections of the Rishis who received such revelations and the Muslims believed the Quoranic law to be partly divine revelation and partly laid down by the Prophet under divine inspiration. The fact that the Bible enjoins marriage cannot, therefore, be indicative of its nature in the Jewish law.

32. In Chapter III of Dr. Mielziner's book headed "Legal View of Marriage" Dr. Mielziner refers to the two extreme views as to marriage in general, one being that of Blackstone and modern law writers that marriage is a contract and the other that of the Roman Catholic Church which holds marriage to be a sacrament and as such indissoluble. He then proceeds:-

Between these two extreme views stands that of the Jewish law. The act of concluding marriage is there certainly also considered as a contract, which requires the consent of both parties and the performance of certain formalities, similar to other contracts, and which, under certain circumstances, can be dissolved. But, inasmuch as marriage concerns a relation which is based on morality and implies the most sacred duties, it is more than a mere civil contract. In such a contract, the mutual duties and rights emanate from the optional agreement of the contracting parties, while those who enter upon the state of married life must submit to the reciprocal duties which have been imposed by religion and morality. Adultery is not merely infidelity toward the conjugal partner, but a violation of a divine order, a crime which cannot be condoned by the offended party; it invalidates the very foundation of that marriage, so as to make its continuation absolutely impossible.

That certain reciprocal duties emanating from the state of married life are enjoined by law and cannot be the subject-matter of the free contracting will of the parties to the marriage is not a test for holding a Jewish marriage to be a religious sacrament. In other classes of contracts too, even in our law, the law imposes certain terms and conditions as legal incidents of such contract. If the parties to a marriage were allowed to fix the incidents of their married life just as they pleased, it would bring chaos into family life and weaken the social structure. Mr. Kothari has also placed considerable emphasis on what follows immediately after the passage from Dr. Mielziner's book quoted above, viz.

The higher nature of the marriage contract is also indicated by the peculiar and significant term used in the Jewish Law for this contract. It is called Kiddushin - "consecration", from the Hebrew word Kaddesh--to consecrate, to set apart as holy and inviolable.

On the basis of this passage, Mr. Kothari has argued that in the Jewish law marriage is considered a religious sacrament. The answer to this is contained in the rest of the same paragraph which reads as follows: -

The idea connected with this term is, however, quite different from that of sacrament in the Catholic Church, as will be seen from the following definition given by the rabbis: "The act of contracting

marriage is termed Kiddushin, since by this act the wife is set apart for her husband, and rendered inviolable and inapproachable in respect to any other man.

The passages in the note on Marriage in the commentary by Rabbi Hertz relied upon by Mr. Kothari are:-

Its Meaning. Marriage is that relationship between man and woman under whose shadow alone there can be true reverence for the mystery, dignity and secredness of life. Scripture represents marriage not meraly as a Mosaic ordinance, but as part of the scheme of Creation, intended for all humanity. Its sacredness thus goes back to the very birth of man.

They do less than justice to this Divine institution who view it in no other light than as a civil contract. There is a vital difference between a marriage and a contract. In a contract the mutual rights and obligations are the result of an agreement, and their selection and formulation may flow from the momentary whim of the parties. In the marriage relation, however, such rights and obligations are high above the arbitrary will of both husband and wife; they are determined and imposed by Religion as well as by the Civil Law. The failure of the contract view to bring out this higher sphere of duty and conscience which is of the very essence of marriage, led a philosopher like Hegel to denounce that view as a 'Schaendlichkeit'.

Its purpose. The purpose of marriage is twofold-(a) posterity, and (b) companionship.

I have already pointed out that this commentary is not intended to be a book on the Jewish law. Rabbi Hertz's concept of marriage as also that of the German philosopher Hegel referred to by him with approval embody the ideal ethical concept of marriage and has nothing to do with the nature of marriage in the Jewish law. The fact that the purpose of marriage is stated to be twofold, viz. posterity and companionship, cannot go to prove that amongst the Jews marriage is regarded as a religious sacrament because in a way posterity and companionship are the two principal purposes of marriage in any community.

33. In my opinion the nature of a Jewish marriage as to whether it is a contract or a religious sacrament is to be ascertained from the requirements and forms necessary for concluding it and its incidents. An important factor is that for a Jewish marriage to be valid in law neither any religious ceremony nor the presence of a Rabbi or a minister is necessary. It is brought about only by the free contracting will of two parties legally competent to give their consent. This consent is to be manifested by a particular established act or formalities just as in the case of any other contract in the Jewish law. A marriage which is a religious sacrament is indissoluble except by the death of one of the parties thereto as in the case of a Roman Catholic marriage or a Hindu marriage and it cannot be dissolved by divorce though in both these cases the legislature has stepped in and permitted this to be done. The Muslim law which considers marriage as a purely civil contract permits it to be dissolved by divorce. A Jewish marriage, as we have seen above, can be dissolved by mutual consent of parties just as the parties may by mutual consent put an end to any other contract. Thus the incidents of a Jewish marriage are the same as those of a contract, though the main incidence of such contract, viz. the mutual rights and obligations of the parties thereto, are provided for by law as

is also the case with certain other classes of contracts. From this the conclusion which I have reached is that a Jewish marriage is a contract and not a religious sacrament.

34. The next question which arises for consideration is whether the only relief which a Jewish wife is entitled to is divorce or whether she can obtain judicial separation. According to Mrs. Nanavati, learned counsel for the plaintiff, a wife of particularly fine sensibilities and delicacy of feeling, even though wronged by her husband, may not want the marriage tie dissolved irrevocably by a divorce but may wish to leave the door open for reconciliation. A Jewish wife may believe in the sanctity of contract including the contract of marriage and if her husband commits a breach of that contract so far as the obligations to be performed by him thereunder are concerned, she may none the less be willing, provided he mends his ways, that this contract should last as it was originally hopefully intended to last, namely, till dissolved by death of either party. To compel such a wife to put an end to this contract irrevocably by obtaining a divorce would be to compel her to forfeit for ever any chances that may arise in the future of reconciliation. Mrs. Nanavati has therefore argued that the proper relief to be granted to a wife so circumstance should be the relief by way of judicial separation and that neither the Jewish law nor our law is so heartless as to deny it to her.

35. Mr. Kothari, learned counsel for the defendants, has, however, disputed the correctness of this position as canvassed by Mrs. Nanavati, He has submitted that the relief of judicial separation is a creation of statute and is available only if a statute applicable to the parties so provides, for example, the Indian Divorce Act, 1869 the Parsi Marriage and Divorce Act, 1936; the Special Marriage Act, 1954 or the Hindu Marriage Act, 1955. Mr. Kothari's argument in substance amounts to this, that if the plaintiff was married under the Special Marriage Act, or if the plaintiff was a Christian or a Parsi or a Hindu, by reason of the particular statute governing the matrimonial affairs of these communities, she would have been able to obtain the relief of judicial separation, but being of the Jewish faith and belonging to the Jewish community she must necessarily rest content only with suing for divorce. In brief, according to Mr. Kothari, the plaintiff, assuming her case to be true, has only the alternatives open to her, either she must seek divorce or let her husband beat her cruelly and flaunt his mistress to her face under the matrimonial roof and if unable to stand that treatment she must leave that roof and fend for herself.

36. I shall now proceed to examine which of these rival contentions represents the correct legal position. To do so, it is, however, necessary first to understand the scope and nature of the two reliefs of divorce and judicial separation. Divorce as known historically to the English law was of two distinct types; (a) absolute or a vinculo mattrimonu and (b) limited or 8 mense et tharo. This limited form of divorce is the one which we now call judicial separation. The difference between the two is that a decree for divorce has the effect of dissolving the marriage and putting an end to the marital tie thus making the separation between the parties absolute both in fact and in law. A decree for judicial separation is, however, not one of final irrevocability but is one for legal separation and does not of itself result in dissolution of the marriage tie. It is on the contrary an affirmance of the marriage though it has the effect of suspending as it were the matrimonial and certain mutual rights and obligations to be performed by the parties thereto. The separation is not absolute and final and the marriage tie continues to subsist. There is always a locus penitentiae and the parties may at any time resume cohabitation if they so desire, but till this is done the party against whom judicial

separation is decreed cannot enforce his or her matrimonial rights against the other and if the party against whom the decree is passed is the husband, the decree very often compels him to carry out his obligation of supporting and maintaining his wife. Thus the real difference between these two decrees is that while the decree for judicial separation leaves the door open for future reconciliation, the decree for divorce from the very nature of such a decree cannot and does not do so. A decree for judicial separation is in substance the converse of a decree for restitution of conjugal rights. In a suit for restitution of conjugal rights the plaintiff's case is that the defendant has failed to carry out his or her matrimonial obligations and the plaintiff wants that the defendant should carry them out and be compelled by a decree of the Court specifically to do so. The decree for restitution of conjugal rights, therefore, affirms the marriage as also seeks to enforce it. It may be that by reason of the repugnance of the law to compel an unwilling woman to submit to her husband's will, such a decree may not now be executable as such but may have the consequence under certain matrimonial Acts, where such a decree is not complied with, of furnishing a ground for divorce or judicial separation. Neither that fact, nor the extended humanity of the law in modern times in not permitting such a decree to be enforced can, however, alter the true nature of a decree for restitution or conjugal rights. The decree for judicial separation, though it also affirms the marriage tie, suspends certain matrimonial obligations. It is really a converse aspect of the same cause of action which affords relief by way of restitution of conjugal rights. In either of these actions the aggrieved party's complaint is that the other party has committed a breach of the matrimonial obligations; but while in an action for restitution of conjugal rights, the plaintiff seeks to compel the other party to perform such obligations, in an action for judicial separation the plaintiff seeks to prohibit the other party from seeking to enforce the matrimonial rights against the plaintiff.

37. In support of his argument that the relief by way of judicial separation is and can only be a creature of statute Mr. Kothari has invited my attention to various statutes dealing with the matrimonial affairs of communities other than the Jews and in particular to the Indian Divorce Act, 1881, the Parsi Marriage and Divorce Act, 1936, and the Hindu Marriage Act 1955. He has pointed out that under each of these three Acts the grounds on which a decree for judicial separation can be asked for are somewhat different; that under each of these Acts the consequences of a decree for judicial separation are different; and that this fact would show that unless and until the grounds on which such relief can be obtained are specified by statute and the consequences flowing from such relief prescribed by statute, such relief cannot be available. The fact that statutes dealing with matrimonial rights and obligations of other communities may provide for different grounds on which a decree for judicial separation can be obtained and for different consequences flowing therefrom cannot be a ground for holding that a party to a Jewish marriage can in no circumstance obtain this relief in the absence of a statute providing the grounds on which the Jews can obtain such relief. The question that then arises for determination is whether in the absence of any statute enabling persons professing the Jewish faith to obtain a decree for judicial separation, a party to a Jewish marriage can do so and, if so, on what grounds. Since the decree for judicial separation is the lesser of the two reliefs of divorce and of judicial separation, it should follow that in any of these cases where the Court may hold that there is a breach of the matrimonial obligations on the part of the husband of such a nature as to entitle the wife to the relief of divorce at the hands of the Court, the relief by way of a decree for judicial separation would also be available unless there is any bar in law in granting it. If we analyse the grounds on which a Jewish wife can ask for divorce and which I

have set out above, it will be noticed that they fall under two distinct categories, one in which the husband refuses or fails to discharge his matrimonial obligations towards the wife and the other in which it has become impossible for him to do so. This would generally also be the case if we analyse the grounds for divorce provided under any matrimonial statute. I have already set out above the obligations and duties which a Jewish husband owes to his wife and the grounds which entitle a Jewish wife to obtain divorce from, her husband. From these it will be seen, for example, that the husband's cruelty or adultery or his refusal to support the wife would fall under the first of the above the categories, viz. his refusal or failure to discharge his matrimonial obligations towards his wife, while his having contracted a loathsome chronic disease after marriage would fall under the second category, namely, it becoming impossible for him to discharge his matrimonial obligations.

38. The concept of a wife becoming entitled in certain circumstances to reside separately from her husband and at the same time to be maintained by him is recognized by the Jewish law. In Chapter LXX, paragraph 14, at page 413 of Part IV of Rabbi Kadushin's Jewish Code of Jurisprudence it is stated:

If the woman leaves her husband's house and moves into another house, if she has good reasons for same on account of bad neighbourhood or strife between her and her husband, she is entitled to support. If she is not capable of giving sufficient reasons for leaving her husband's home, she loses the right of support, because it is not the duty of (he husband to support his wife, except when she lives with him, because she is bound to serve him (Ketuboth 103).

Again in Chapter LXXX, paragraph 17, at page 426 of the same book it is stated: -

If a woman, because of a quarrel, leaves her husband's house and refuses to return unless her husband will come to call for her, she does not thereby lose her right to support, because she is ready to return, and not deny him any of his privileges, but is ashamed to return of her own accord because she left without his permission (Tur).

The above passages will show that the Jewish law not only recognizes but enforces a wife's right to reside separately from her husband and at the same time to be provided for and maintained by him in certain circumstances. This relief given to the wife by the Jewish law is in substance the same as the relief by way of judicial separation known to our law. It is also pertinent to note that the later part of the first of the two passages set out above by me would show that the wife loses the right to this relief, that is, the right to reside separately from her husband and at the same time to be maintained by him, only if she cannot assign sufficient reason for leaving her husband's home and that this right is not confined only to the two specific cases referred to in the earlier part of that passage, namely, on account of bad neighbourhood or strife between her and her husband. On a proper reading of the whole of this passage it would appear that these two specific cases are mentioned merely by way of illustrations. There can be no reason more proper for a wife to leave her husband's house than a reason which would justify her in obtaining divorce from him. From this it would follow that a ground which entitles a Jewish wife to obtain divorce would also entitle her to reside separately from her husband and at the sarnie time be maintained by him, that is to say, to obtain judicial separation from him.

39. Mr. Kothari, learned counsel for the defendants, has, however, argued on the basis of the above passages that the only decree I can pass in favour of the plaintiff, if I find her case proved, is a decree declaring that she is entitled to reside separately from the first defendant and directing; the first defendant to provide her with maintenance, but I cannot pass a decree for judicial separation because a relief so described is not to be found in any of the text books on the Jewish law which have been cited before me. He has submitted that if I were to pass a decree for judicial separation the result would be to leave the future rights of the parties inter se undefined and leave this couple to spend the rest of their lives in a state of helpless bewilderment because there is no statutory provision with respect to the Jews as to whether a spouse who has obtained a decree for judicial separation can on the strength of it sue for and obtain divorce or whether such a spouse can inherit to the other, unlike, for example, Section 24 of the Indian Divorce Act, 1869, which specifically provides that in the case of a judicial separation the wife's after-acquired property in case she dies intestate would go as the same would have gone if her husband had been then dead. In Mr. Kothari's submission this position would give rise in the future to a number of interesting legal questions between the parties, but the mere fact that certain interesting legal questions may arise in the future is no reason why a particular relief to which a party is entitled in law should be denied to her, for interesting legal questions will continue to arise much to the satisfaction of the legal profession. The picture which Mr. Kothari has painted in such pathetic terms of the uncertain future of this couple were I to grant a decree for judicial separation does not also appear to me to be a correct one. I am not called upon to-day to decide any question of inheritance to either party, but I have no doubt that the Jewish law of inheritance will provide an answer at the appropriate time. I also fail to see why and when a decree for judicial separation has been passed, either or both parties should have any right to obtain a decree for divorce thereafter. Such a ground for divorce was not known in English law until introduced by legislation. In our law also this particular ground for divorce is the creation of different statutes and is subject to different conditions laid down by each of these statutes. A Parsi spouse who obtains a decree for judicial separation may three years thereafter sue for divorce provided the parties have not had marital intercourse in the meantime. The Parsi Marriage and Divorce Act, 1936, confers this right only on the party obtaining the decree for judicial separation. The Hindu Marriage Act, 1955, however, confers that right only two years after the passing of a decree for judicial separation, provided that there has been no resumption of cohabitation. The Special Marriage Act, 1954, also confers such a right on the party in whose favour a decree for judicial separation has been passed, the period provided therein being two years. The Indian Divorce Act, 1869, confers no such right on either spouse. The fact, therefore, that the Plaintiff or the First Defendant after a decree for judicial separation has been passed may be thereafter unable to obtain a decree for divorce is to my mind no ground for denying this relief to the plaintiff if she succeeds in proving the allegations made by her. It also seems to me that the apprehensions of Mr. Kothari in this behalf are not well-founded. Merely because a decree for judicial separation has been passed in the case of Jewish marriage it does not necessarily follow that the parties must contrary to their will continue to stay married but judicially separated until the death of one of them. The Jewish law recognizes divorces by mutual consent and the parties may, if they so desire, even after a decrees for separation, obtain a divorce by mutual consent. Further a decree for judicial separation cannot be a charter to both parties or either of them to commit matrimonial offences in the future and, therefore, if after a decree for judicial separation is passed, the wife or the husband commits a fresh matrimonial offence which would entitle the other party to go to Court and ask for a decree for

divorce, he or she can do so and the mere fact that earlier on some other ground a decree for judicial separation has been passed cannot bar that right.

40. The relief to be granted to parties is to a large measure a part of the procedural law. As pointed out in Salmond on Jurisprudence, 12th edition, page 126, Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained.... So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the mode and conditions of the application of the one to the other.

Thus the substantive law in this case defines the rights of the wife and the remedy which she has of either seeking divorce or of residing separately from her husband and at the same time being maintained by him. The procedural law must mould the mode of this remedy and in the context of modern law it can only be by a decree for judicial separation. Our Courts are not bound to grant reliefs in the identical form in which the former Rabbinical Courts did. Crump, J., in Rachel Benjamin v. Benjamin Solomon Benjamin (supra) while considering the form of the decree for divorce to be passed in favour of the wife after he had held adultery, cruelty and constructive desertion, on the part of the husband proved, said (at pp. 344-345) :

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 Frieldander (p. 488) and Chapter XVI of Mielziner's work lead to the same conclusion... In this case...the remedies of the Rabbinical Code are ineffectual. The Courts must, in the words of the Privy Council (in Ardaseer Cursetjee v. Perozeboye) [1836] 6 M.I.A. 348, 391, "administer remedies as 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. Belisario) [1795] I Haqq. 216 in order to determine such question as whether a sufficient cause for divorce exists (see also Sassan 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.

In David Sassoon Ezekiel v. Najia Noori Reuben, (supra) the plaintiff filed a suit alleging that the contract of betrothal entered into between her and the defendant was void on the ground that it was conditional and the conditions had not been fulfilled and prayed that the defendant should be ordered to execute a bill of divorcement in her favour. B. J. Wadia, J., after finding in favour of the plaintiff, ordered the defendant to execute such a bill of divorcement in favour of the plaintiff within a week by taking such necessary steps and doing all such things as might be necessary in that behalf according to the directions of the Jewish Conciliation Committee which, he said he understood, arranged for formalities of a divorce amongst the Jews in Bombay. In appeal Beaumont, C. J., held

that under the Jewish law such a bill of divorcement could only be delivered by the husband to the wife of his own free will and where the husband is compelled by an order of the Court to hand over such a bill of divorcement he can hardly be said to do so of his own free will and that as the betrothal was void, all that was necessary was that instead of the order to execute the bill of divorcement there should be granted an injunction to restrain the defendant from asserting in any manner whether by writing, word or act that he was married or betrothed to the plaintiff or that she was in any way bound to him. Mirsa, J., in a separate judgment held that as the betrothal had become void there was no need for a bill of divorcement and therefore if the Court declared such betrothal to be null and void it was superfluous to insist upon a bill of divorcement from the defendant. In Paul Engel v. Edith Engel , Blagden, J., also had the occasion to consider the form of relief to be granted to a husband who had succeeded in establishing his wife's adultery. He held that the question of the right to relief depended on the personal law of the parties. He rejected, in his own inimitable style, both on moral and legal grounds, even a suggestion that he should be invited to apply the personal law of the parties because then, as he stated, It might be incumbent on me to order Mrs. Engel to be stoned, which order if carried out would certainly and effectively dissolve the plaintiff's marriage.

He came to the conclusion that in such cases what he had to apply was the lex fori. He dissented from Crump, J., as to the form which such a decree should take on the ground that it was assumed, without argument, in Benjamin v. Benjamin (supra) that the correct position was for a decree nisi to be granted on the analogy of the statute applicable to English Christians. He held that when there was no statute applicable, the Letters Patent required the Court to decide according to "justice equity and good conscience" which meant "English law so far as it is applicable to the conditions of life in India". He therefore declined to pass a decree nisi in the first instance on the ground that such a decree is a creature of statute both in England and in the case of Christians in India and passed a final decree for divorce in favour of the plaintiff.

41. In view of this I am not compelled to grant to the plaintiff, if she succeeds in proving her case, relief only in such form as the Rabbinical Courts would have done. I must, in the words of the Privy Council in Ardaseer Cursetjee v. Perozeboye (supra), administer a remedy "as approaching to them as the circumstances will allow". As I have pointed out the relief which entitles the Jewish wife to reside separately from her husband and not render him his conjugal rights though at the same time being maintained by him is in substance and for all practical and effective purposes the same as the relief of judicial separation as known to our law. I therefore hold that there is no legal impediment in the way of the plaintiff in obtaining a decree for judicial separation if she succeeds in establishing the allegations made by her in the plaint.

42. This brings me to the main question before me, namely, as to the jurisdiction of this Court. As I have pointed out above, I permitted arguments to be advanced on the second issue inasmuch as it was canvassed before me that a marriage cannot form part of the cause of action in a suit for divorce or judicial separation by a wife professing the Jewish faith and belonging to the Jewish community. It therefore became necessary for me to consider the nature of Jewish marriage and the reliefs to which a Jewish spouse aggrieved in matrimonial life became entitled to and the right on the basis of which she became entitled to such reliefs. As the answer to these questions would have also resulted in answering the second issue as to the maintainability of this suit for judicial separation I. as I have

mentioned above, also decided to try that issue as a preliminary issue.

43. We have seen that that the mutual rights and obligations of the parties to a Jewish marriage and the reliefs which the Jewish law provided and which our law now recognizes are those which flow from the taking place of a Jewish marriage.

44. A Jewish marriage, as I have held above, is a contract. The grounds which entitled a wife to obtain divorce and which would fall in the category of a or refusal by the husband to perform his matrimonial obligations would amount to a breach of that contract by the husband and of his obligations under that contract. The grounds which would entitle a wife to obtain divorce and which would fall under the other category, namely, of the impossibility on the part of the husband to perform the marriage obligations, would be analogous to discharge of the contract of marriage by frustration. Even if I am wrong and a Jewish marriage were not a contract, the very right of the plaintiff to come to Court to seek a matrimonial relief is based upon the failure or refusal of the defendant to carry out the obligations undertaken by the defendant by reason of the fact of marriage or by reason of his incapacity to carry out these obligations. Unless, therefore, a plaintiff in such a suit proves that he or she was validly married to the defendant under the Jewish law, such a plaintiff would not be able to succeed in the suit. Mr, Kothari, learned counsel for the Defendant, has, however, contended that though in such cases marriage may be said to be a part of the cause of action, it cannot be said to be such a material part of the cause of action as would entitle the Court to assume jurisdiction by granting leave under clause XII of the Letters Patent. To support this contention of his, Mr. Kothari has invited my attention to the Indian Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936. Under the Indian Divorce Act it is only the residence or the last residence together of the parties which confers jurisdiction on the Court and under the Parsi Marriage and Divorce Act it is again residence which confers jurisdiction upon the Parsi Matrimonial Court. Under neither of these statutes a Court within whose jurisdiction the marriage took place has any jurisdiction to entertain a matrimonial action. As against this Mr. Kothari himself has frankly pointed out to me that under the Hindu Marriage Act, 1955, a petition can also be filed in the Court within the local limits of whose jurisdiction marriage was solemnized and I may point out that the position under the Special Marriage Act, 1954, is the same as under the Hindu Marriage Act.

45. I am not able to accept the above contention of Mr. Kothari. A consideration of the special jurisdiction conferred by particular matrimonial statutes is irrelevant to the determination of the question before me, namely, whether the plaintiff can file this particular case in the Bombay High Court by leave granted under Clause XII. Here the plaintiff is not bringing her action under any statute conferring special jurisdiction upon particular courts. She has filed her suit under Clause XII of the Letters Patent and in the terms of that clause she relies upon the fact of the marriage having taken place at Bombay as constituting a part of her cause of action entitling her to the reliefs which she is seeking. The phrase "cause of action" means the bundle of all facts essential and necessary to be proved by the plaintiff for the purpose of succeeding in the litigation. The Court has to find out not only what is the primary object and purpose of the suit but to consider the whole nature of the suit by referring to the necessary reliefs claimed in the suit. (See Manalal Rikhbaji v. Mohanlal Harilal Reithi .) The plaintiff in the present suit is seeking relief on the basis of the breach of his

matrimonial obligations by the first defendant. The first step in claiming the relief sought by her is for her to aver in her plaint and to prove that there was a valid marriage between her and the first defendant according to the law by which the parties are governed, viz. the Jewish law. Thus the fact of marriage is a fact essential and necessary to be proved by the plaintiff for the purpose of succeeding in the present suit and it would, therefore, form a part, and a material part, of her cause of action. In K. Vajrayelu Mudatiar v. Rajalakshmi Ammal , it was held that a suit for separate maintenance by a Hindu wife against her husband can be instituted in the place where the parties were married as marriage forms part of the cause of action in such a suit. It may be noted that one of the reliefs claimed by the plaintiff in the present suit is alimony or maintenance. In Nizamuddin v. Hasani it was held that a Mohammedan marriage was not a sacrament but a civil contract and a suit for restitution of conjugal rights was truly speaking a suit for enforcement of certain obligations arising out of that contract and therefore such a suit could be instituted by virtue of Clause (c) of Section 20 of the Code of Civil Procedure, 1908, at any place where the cause of action arose wholly or in part and, accordingly, such a suit could be instituted at the place where the contract of marriage was entered into, that is, where the marriage took place. As I have pointed out above, the right to matrimonial reliefs including those of restitution of conjugal rights and judicial separation flow very much from the same complaint, namely, the breach by the defendant of the one or the other of the matrimonial obligations to be performed by him. It may also be noted that the Madras case was a case of a Hindu marriage which is a sacrament, while the Madhya Pradesh case was a case of a Mohammedan marriage which is a civil contract. I am, therefore, fortified in the conclusion I have reached that whether a Jewish marriage be a civil contract or a religious sacrament, the right of a spouse in such a marriage to seek relief on the ground of a matrimonial wrong committed by the other spouse arises from the breach of the matrimonial obligations flowing from the fact that a valid marriage between the parties has taken place and marriage would, therefore, be not only a part but a material part of the cause of action in such a suit. I therefore hold that the leave under Clause XII of the Letters Patent was rightly granted and this Court has jurisdiction to entertain this suit.

46. I will deal with the question of the costs of the trial of these two issues at the conclusion of the trial of this suit. This suit will stand adjourned for the trial of the remaining issues to March 25, 1968.