Kerala High Court
Mrs. Hazel Arnone vs George Thomas Robert Arnone And ... on 10 August, 1965
Equivalent citations: AIR 1966 Ker 34
Author: M Menon
Bench: M Menon, M M Nair, V G Nambiyar
JUDGMENT M.S. Menon, C.J.

1. The petitioner is the wife of the first respondent She seeks a dissolution of her marriage under Section 10 of the Indian Divorce Act, 1869.

2. Under Section 10 a wife can present a petition praying that her marriage should be dissolved on the ground that, since the solemnization thereof, her husband Las been guilty of adultery coupled with desertion, without reasonable excuse for two years or upwards. The petition is based on that ground, and has been allowed by the District Court of Kozhi-kode, subject to confirmation by this Court of the decree for dissolution as required by Section 17 of the Act.

3. No witness has been examined in this ease. The only evidence in support of the petition is Ext. A-t, an affidavit of the petitioner dated 21-3-1964.

4. Section 47 of the Act provides that the statements contained in every petition under the Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints, and may at the hearing be referred to as evidence; and Section 51:

"The witnesses in ail proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness:

Provided that the parties shall be at liberty to verify their respective eases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed."

5. In Kishore Sahu v. SnehaprabJia Sahu. AIR 1943 Nag 185 (SB), the sufficiency of affidavit evidence in matters like this came up for consideration. A Special Bench of that Court consisting of Pollock, Vivian Bose and Digby, JJ. said:

'In our opinion, an important question of principle is involved here. Section 17, Divorce Act, provides that statements in the petition which have been duly verified may be referred to as evidence at the bearing, and the proviso to Section 51 stales that 'the parties shall be at liberty to verify their respective cases in whole or in part by affidavit.' The Act consequently enables facts to be proved by affidavit evidence, and in extreme cases, perhaps even by verified statements, (though we do not decide that). But so does the Code of Civil Procedure. In spite of that, however, affidavit evidence is rarely accepted in Courts of law on matters which require proof, except oil interlocutory

mailers or on subsidiary questions, and even then it is usual to require regular proof when there is contest. In our opinion the rule should he applied no less strictly in matrimonial case's.": and "It has always to be remembered that divorce proceedings and proceedings for nullity are not like ordinary civil suits in which the parties are litigating their own rights and seeking decrees of which they are indisputably entitled if the fads they allege are proved. There is no right of divorce No one is indisputably entitled to a decree of nullity. The Courts have a discretion in every case even when all the necessary Cads arc clearly proved. The slightest bad faith, any suspicion of collusion, the least want of candour, entitles the Court to stay/its hand. The State is vitally concerned in the institution of marriage and insists on strict proof and, a close investigation before it will permit the lie to be dissolved. Provision is made for a loosening up o!' the normal procedure to prevent injustice in extreme cases but such cases must be extreme and should be very rare, and always, adequate reasons for any departure from the normal should be given by the Court."

6. In Premchand Hira v. Bai Galal, AIR M)27 Horn 594, Marten, C. J., referred to the last portion of Section 47 which provides that the statements contained in the petitions may at the hearing be referred to as evidence, and said:

"Therefore technically, the learned Judge was entitled to refer to the allegations in the petition as evidence On the other hand, speaking for myself, I think the ordinary practice, which is followed in the English Divorce Court, viz., that the parties give viva voce evidence, should invariably be followed in every case unless there are some very good reasons to the contrary."

7. In Stones v. Stones. ILR 62 Cal 541. Coslello, J. was still more emphatic. He said:

"I say most emphatically that, in my opinion, it is altogether undesirable, and indeed contrary to established practice to accept evidence on affidavit -- especially evidence of the petitioner -- except as regards evidence other than that of the petitioner in some very exceptional circumstances, and not otherwise."

8. Section 7 of the Act, omitting the proviso thereto, reads as follows:

"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.' In England the court only allows the "fringe" of a case, not its substantial parts, to be proved by affidavit, and under the Matrimonial Causes Rules, 1957, the normal rule is that the witnesses at the trial of any matrimonial cause shall be examined orally and in open courts.

9. There is another line of cases which emphasises the need for corroborative evidence in divorce cases. A note appended to the rules under Section 02 of the Act in the Madras Civil Rules of Practice reads as follows:

"The attention of all District Judges is Invited to the fact that in several cases under the Indian Divorce Act, the High Court has had to refuse to confirm decree on the ground that there was no corroborative evidence. It is further pointed out that the fart that the other party does not appear is a reason for scrupulous adherence to the rule that in divorce, the court will not act on the uncorroborated testimony of the petitioner, husband or wife--vide copy of the judgment in Referred Case No. 8/22 on the file of the High Court, appended.

Judgment, This is a petition for divorce which comes before us under Section 17
marriage between the petitioner and the respondent. Under Section 7 of that
fixed rule of practice in the Divorce Court in England that the evidence of the husba
Page 28l).

To the same effect is the decision of the Full Bench of the Madras High Court in Joseph

10. The need for insisting on oral evidence given in open court and for corroboration

Kerala where there is no officer a pointed under Section 17-A of the Act. That sect

"The Government of the State within which any High Court exercises jurisdiction may appoint an officer who shall within the jurisdiction of the High Court in that State have the like right of showing cause why a decree for the dissolution of a marriage should not be made absolute or should not be confirmed, as the case may be as is exercisable in England by the Kings Proctor: and the said Government may make rules regulating the manner in which the right shall be exercised and all matters incidental to or consequential on any exercise of the right."

11. I am in complete agreement with the views expressed in the decisions mentioned above, and must, therefore, direct that the decree for dissolution of the marriage be set aside and that the case be sent hack to the District Court of Kozhikode for a fresh trial and proper disposal in accordance with the law. I do so; and further order that the petition be dealt with most expeditiously, and disposed of within six months from this date.

Gopalan Nambiyar, J.

12. The hearing of these references under Section 17 of the Indian Divorce Act IV of 1869 recalled to my mind the following observation of Chief Justice Marten in AIR 1937 Bom 594:

"This is another instance of the apparent difficulty of the mofussil Courts in appreciating the essentials for a valid decree under the Indian Divorce Act."

13. Observations, more or less to the same effect, had been made earlier by Couts-Trotter, J. (aa he then was) in AIR 1923 Mad 9. The learned Judge observed:

"This difficulty arises because people do not take the trouble in this country to get up divorce cases properly, and do not appreciate that the courts of this country are bound of themselves to guard

against the possibility of collusive litigants."

14. One serious defect committed by the trial Judge in the disposal of all the three petitions is that the matters were dealt with solely on the affidavits filed by the petitioners.

15. Section 47 of the Indian Divorce Act enacts that:

" .....

The statements contained in every petition under this Act ..... may at the hearing be referred as evidence."

16. Sections 51 and 52 of the Art read as follows:

"51. The witnesses m all proceeding before the court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, undshall be examined, and may be cross-examined and re-examined, like any other witness:

Provided that the parties shall he at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross examination may be re-examined orally as aforesaid by or on behalf of the parly by whom such affidavit was filed.

52. On any petition presented by a wife praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery, coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

17. Construing file above provisions it was stated by Marten. C. J., in AIR 1927 Bom 594. referred to supra, thai "the ordinary practice which is followed in the English Divorce Court, viz., that the parties give viva voce evidence should invariably be followed in every case unless there arc some very good reasons to the contrary."

18. The necessity for proof of the averments in the petition was pointed out as early as 1893, in Bai Kanku v. Shiva Toya, ILR 17 Bum 624 (FB) where it was observed:

"ft is impossible 10 confirm this decree without violating the principles applied hy the Courts to protect the bond of marriage. The decree is based entirely on admissions, no evidence having been recorded."

19. In AIR 1923 Mad 9 it was pointed out (hat there is a definite established practice in the Courts of Divorce and Matrimonial Causes ing England that the evidence of the husband and the wife alone is never to be accepted without corroboration either by evidence or at least by strong surrounding

circumstances, and it was stressed that it is absolutely essential that there should be corroboration,

20. The principle in ILR 17 Bom 624 (TB) was followed by the Lahore High Court in Alla Rakha v. Ml. Barkat Bibi, AIR 1930 Lah 771 (SB), Barkat v. Mt. Hakam Bibi, AIR 1931 Lah 1 (SB) and again in (Robert John) Twiss v. (Lily Mary) Twiss, AIR 1933 Lah 356 (1) (SB). '

21. In the Full Bench decision of the Nagpur High Court in AIR 1943 Nag 185 (SB) it was ruled on an analysis of Ss. 47 and 51 of the Indian Divorce Act that:

"..... .affidavit evidence is rarely accepted in courts of law on matters which require proof except on interlocutory matters or 'on subsidiary questions, and even then it is usual to require regular proof when there is contest. In our opinion the rule should be applied no less strictly in matrimonial cases."

22. In the light of the principles laid down in the above decisions, with which I am in agreement, the procedure adopted by the District Judge in acting merely on affidavits cannot be sustained.

23. In C. M. Reference No. 3 of 1964, it is seen that the wife's petition and affidavit referred lo two instances of adultery committed by the husband, one with an undisclosed Hindu Lady through whom the respondent begot a child for which he was staled to he paying maintenance, and the other with the 2nd respondent to the petition. Neither the name of the Hindu lady nor the particulars of misconduct with her were disclosed in the petition as would appear to be required by Section 10 of the Act; nor were the deficiencies made good in the affidavit.

24. The District Judge accepted the affidavit in proof of the allegations.

25. Whether an adulteress has a right to intervene or to be impleaded in similar circumstances, under the provisions of the Indian: Divorce Act, seems to be a matter of grave doubt. (See (l) Ramsav v. Boyle. ILK 30 Cal 489; (2) J. H. Rae v. L. C. Rap. 46 Cal WN 842; and (3) Dorothy Emma Stuart v. Vernon Reginald Stuart. AIR 1936 All 488. It seems unfair to accept the allegations of adultery against the undisclosed Hindu lady, as she is denied any opportunity lo defend herself against the allegations. Aw against this, it has been suggested that the remedy lies with the legislature and not with the courts. In similar circumstances, it was ruled in (AIR 1923 Mad 9 (FB), noticed supra) that evidence given against a co-respondent who was not a party to the suit ought not to have been admitted. These aspects which require careful consideration have apparently escaped notice of the: learned District Judge.

26. I agree wiih the Judgment of My Lord the Chief Justice.

Madhavan Nair, J.

27. I have perused the judgments of the learned Chief Justice and Mr. Justice Nambiyar, but feel compelled res pectfully to differ from their Lordships. I am afraid that the citations relied on in the above judgments prefer the practice in the English Courts to the enacted law of India. To me, the

enacted law is supreme, and considerations of expediency irrelevant wherever the Legislature has spoken. The rule pertinent is ;Fkk opua fg okpkuda (A texl must be accepted as it is and nhould be inlcrprek'd according lo its tenor).

28. Section 51 of the Indian Divorce Act (emoted in exlenso in the judgment of the learned Chief Justice) enacts:

". .... the parlies shall be at liberty lo verify their respective cases in whole or in part by affidavit . . . ..."

As its wording stands, this provision is nol subject to any condition. It confers a privilege on the parlies to prove their cases by affidavit. To me its signification is that parties in uncontested cases need not necessarily be examined viva voce but can--"shall be at liberty to"-prove their case "in whole" by an affidavit.

29. The provision in Section 4-6 of the English Matrimonial Causes Act, 1857, corresponding to S 51 of the Indian Divorce Act, 1869, was not so absolute The concession thereunder was subject to rules and regulations under the Act. as it read:

"46. Subject lo such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be bad shall be sworn and examined orally in open court: Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit.. . ."

And the rules framed under the Act provided:

"51 When the Judge Ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits such affidavits shall be filed in the registry within eight days from the lime when such direction was given, unless the Judge Ordinary shall otherwise direct.

52. Counter-affidavits as to any facts to he proved by affidavit may he filed within eight days from the filing of the affidavits which they are intended to answer."

Thus, in England, before a party in a matrimonial cause could file an affidavit in proof of his or her case. a "direction" to that effect had to he secured from the Judge Ordinary. In other words, in Kngland no affielavil evidence in a matrimonial cause could he given without a specific direction of the Court. It therefore became the invariable practice in the English Courts to move an application for permission to verify the case by affidavit; and on Such application it was open to the Court to allow it, or reject it, or allow it in part only Browne and Watts on Divorce cites Armitage v. Armitage (1858) 27 I..IP 50, Ling v. Ling and Croker, (1858) 27 LJP & M 58 and Ford v Ford. (1867)36 LJP & M 86 as instances in which the English Divorce Court allowed parties to verify their eases wholly hy affidavit, and Potts v. Potts (1858) 27 UP & M 59 and March v. March (1858) 28 UP & M 30 as instances where applications for permission to prove bv affidavit had been refused by the Court.

The additional rule made on 14th July, 1875. for uncontested cases did not elispense with the necessity of a direction of the Court to put in affidavit evidence in proof of such cases. That additional rule was:

"188. In an undefended cause when directions have been given that all or anv of the facts set forth in the petition he proved by affidavits, such affidavits may be filed in the registry at any lime upto 10 clear days before the cause is heard."

But the law under the Indian Divorce Act is quite different. The privilege of proving matrimnial causes by affidavit, allowed bv its Section 5t, is not suhject to any sanction of Court. The Section declares that the parlies "shall be at liberty to verify their respective cases in whole or in part by affidavit", and the sole condition attached thereto is the . liability of the deponent "to be cross-examined by or on behalf of the opposite party orally", which can arise only when the case is contested.

30. Section 47, Indian Divorce Act, enacts another rule of evidence, which has no parallel in the English Matrimonial Causes Act. 1857. ll provides:

"the statements contained in every petition under this Act may al the hearing he referred to as evidence.

Pleadings, however strictly they may have heen verified, are not allowed to be read as evidence in normal civil trials in Courts. In Ross & Co. v. Seriven, ILR 43 Cal 1001: (AIR 1917 Cal 269) (FB) it was contended that verified plaints constituted evidence in a suit, and Section 193 of the Indian Penal Code under which the false verification of a plaint was punishable as "giving false evidence" and Section 47 of the Indian Divorce Act which expressly allowed statements in verified petitions to be read as evidence were cited in support erf that contention: hut the learned Judges felt no compunction in unanimously repelling that contention. Sir Asutosh Mookerjee, J. observed:

"Reference has also been made to Section 47 of the Divorce Act which, I should have thought, was against the view put forward hy the respondents. If a verified plaint could always be treated as evidence, it was superfluous to make a special provision in the Divorce Act." In normal civil trials a distinction is always maintained between pleading and proof. Pleadings are not evidence; they are mere allegations of a party. The Indian Divorce Acl makes a deliberate deviation from that rule when it declares that the statements in petitions "may at the hearing be referred to as evidence."

31. The Indian Divorce Acf has thus made 'the mode of taking evidence' in Divorce proceedings simpler than that in England in two respects: namely, by allowing the parties to read the statements in their petitions as evidence and bv allowing them to verify their respective cases in whole bv affidavit. It is unfortunate that this aspect had been overlooked by many of the English Judges who came lo exercise jurisdiction under the Indiant Divorce Act in the High Courts in India --probably on account of their earlier training under the English Rules of Practice. That appears to be evident from the following observation of Marten. C. J. in AIR 1927 Bom 594 (599):

"Therefore, technically, the learned Judge was entitled to refer to the allegations in the petition as evidence. ..... I think the ordinary practice which is followed in the English Divorce Court, viz, that the parlies give viva voce evidence, should invariably be followed in every case unless there are some very good reasons io the contrary."

Viva voce evidence of parties is not insisted by the Indian Divorce Acl: and mi special reason is required under the Acl lo prove a case bv affidavit. To characterise a Judge following the express provision of the enacted law as technically' right and then to direct him not lo follow it in ordinary practice is, in my view, nothing but improving upon the legislation. And, when the Indian Divorce Acf expressly allows "the parlies lo verify"--in the context this word can only mean 'prove' -- "their respective cases in whole or in part by affidavit", for any learned Judge to direct "the practice, ... followed in English Divorce Court that parlies give viva voce evidence should invariably be followed in every case", I am afraid, is virtually to abrogate the legislation.

32. The same apprehension holds good when I read the observation of Costello, J. in ILR 62 Cal 541: "I say most emphatically that ......it is altogether undesirable..... .to accept evidence as affidavit especially evidence of the petitioner. As the expression "parties" in the Proviso to Section 51 of the Indian Divorce Act must necessarily include the petitioner, the above direction of the learned Judge is nothing hut a condemnation of the wisdom in the enacted law. In England, the Judges could impose conditions on the privilege of giving affidavit evidence because the concession of that privilege had been made subject to rules and regulations and the rules provided that affidavits in proof of facts could be given only when the Judge directed so. To follow their example in India, where the concession of the Privilege of proving ' cases in whole by affidavit" is unconditioned and absolute, is, in my opinion, to overrule the mandate of the Indian Legislature'.

33. The observations in AW 1943 Nat-185 do not appeal to me better. They follow the same pattern as those referred to above. The learned Judges say "The Act consequently enables facts to be proved by affidavit evidence and in extreme cases perhaps even by verified statements. But so does the Code of Civil Procedure." I am not aware of any provision in the Code of Civil Procedure thai allowed verified statements to be read as evidence, except when they amount to admissions of allegations of the opponent party. The learned Judges continue "In spite of that however affidavit evidence is rarely accepted in Courts of law on matters which require proof, exce.pl on interlocutory mallers or on subsidiary questions". Whatever be the practice elsewhere that gave rise to the above observation, I may, without fear of contradiction, say that the practice in this State and even in this High Court is to accept the sworn testimony in affidavits as Rood evidence in every ex parte proceedings, whether in disposal of suits, original petitions or other motions. Their Lordships then directed that the rule insisting on viva voce evidence "should be applied no less strictly in matrimonial cases". 1 wonder if alfidavit evidence is undesirable in matrimonial cases wherelse can the enunciation in Section 51 of the Indian Divorce Act be operative at all. Their Lordships think "The State is vitally concerned in the institution of marriage and insists on strict proof and a close investigation before it will permit the lie to be dissolved". In my opinion, the State's concent in the affair is what is echoed or declared in the concerned statutes. The kind of proof and investigation contemplated by the State in Divorce proceed ings is expressed in Sections 47 and 51 of the Indian Divorce Act. I am afraid to go behind the Slate's recorded voice and assume its secret desires to be as

one may conceive as desirable is to substitute oneself for the Stale. Further, 1 am not aware of the Stale's greater concern in marital relations than in other relations -like employer and employee, landlord and tenant -- among its citizens, where no Court has so far gone to understand the State's concern beyond its expression in its enactments. The very fact that the State has so far been indifferent to frame rules contemplated in Section 17A of the Act (quoted in extenso by the learned Chief Justice) shows that it is not interested in any proof or investigation beyond what is already directed in the other sections of the Act.

34. I am afraid that the error (pointed out above) came to be because the learned Judges, for whom my respect is next only to that I have for the law, thought Section 7 of the Indian Divorce Act to be an absolute warrant for adopting the English practices to Divorce proceedings in India. That appears evident in the following citations also.

In AIR 1923 Mad 9. Schwabe, C. J., with the concurrence of Coutts-Trotlei, .1. and Kumaraswami Sastri, J., has observed:

"By Section 7 of the Indian Divorce Act of 1869, 'the High Courts and District Courts shall, in all suits and proceedings he minder act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly us may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the lime being ads and gives relief.' In this ease the learned Judges expressed the view that, as she was ex parte and he saw no reason to disbelieve the petitioner's evidence, a decree should be granted. Thai is absolutely contrary to the princi ples and rules on which the Court of Divorce and Matrimonial causes in England acts. There is a definite established practice there that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong sur rounding circumstances, and the reason for that rule, is that but for it. there would be nothing easier than a collusive divorce, there would be no necessity for the respondent to appeal and this petitioner need only go into the witness-box and say that the respondent com mitted adultery. It must be understood that it is absolutely essential that there should he corroboration."

Likewise in AIR 1930 Lab 771 it is observed:

"By Section 7 of the Act courts in India are required In give relief on principles and rules which arc as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England Cur the lime being acts and gives relief. One of these principles is thay a decree for dissolution of marriage cannot be made merely on admission and without recording evidence The Court (below) in fact has treated the proceedings as a civil suit which could be compromised."

It may be noted here that Section 7 of the Indian Divorce. Act is not absolute but is expressly made "subject to the provisions contained in this Ad." Section 45 of the Ad directs: "Subject to the provisions herein contained, all proceedings under this Act belween party and party shall be regulated bv the Code of Civil Procedure", and the Code of Civil Procedure recognises in Order XXIII Rule 3 all lawful compromises and directs the Courts "Where it is proved to the satisfaction of

the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise. .. . the Court shall order such agreement, compromise ..... recorded and shall pass a decree in accordance therewith so far as it relates to the suit". There is no provision in the Indian Divorce Act to repel compromises. Order Xll, Rule 6 C. P. C. provides:

"Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to ..... and the Court may upon such application make such order, or give such judgment, an the Court may think just."

The rules of the C. p. C. arc pertinent in Divorce proceedings under Section 45 of the Act. Of course, Section 12 of the Indian Divorce Act instructs Courts to see that proceedings before it are not vitiated by collusion between the parties. There is no such provision in the Code of Civil Procedure, though a decree affected by collusion or fraud is void, under Section 44 of the Evidence Act But to say that a decision, accepting a compromise or admission of parties, can never be made under the Indian Divorce Act is far from saving that collusion would not be tolerated in such proceedings. Collusion is an agreement or bargain lietween the parties for a dishonest purpose in the presentation or prosecution of proceedings in Court; a compromise is an adjustment of dispute by mutual concussions; and an admission is a statement by one party that a fact asserted by the opposite party is true. There is nothing in the Indian Divorce Act which precludes acceptance of a compromise or an admission, provided the Court feels that the same is not vitiated bv any collusion. The rule laid in absolute terms against decisions based on compromises or admissions in AIR 1030 Lah 771 and AIR 1023 Mad 9, I am afraid, is against the provisions of the Indian Divoive Act.

35. I may here point out that the observation in AIR 1930 Lah 771 against compromise In divorce proceedings is not warranted bv the English practice either. The rule in English Court is stated in Rayden on Divorce (6th Edition, page 442) thus:

"The Court does not discourage the settlement of differences and an agreement to compromise entered into is valid and may be made no order of Court even In the Queen's Bench Division or may be enforced in the Chancery Division. But if a suit has been allowed to he dismissed In consideration of an agreement to secure money to a petitioning husband such an agreement being against public policy will not he enforced."

And the learned author cites Rowley v. Rowley, (1866) 3 Sw & Tr 338 as an instance where the House of Lords recognised a compromise; Stanes v. Stancs, (1877) 8 P. D. 42 where Sir James Hannen remarked that compromises were binding on suitors in divorce; Sterbini v. Sterbini (1870) 39 LJ (P & M) 82 where an agreement to withdraw from suit for dissolution, for good consideration. In the absence of fraud or duress, was held valid; Willis v. Will is, 1928 P 10 where a compromise that contained term that custody of one of the children should be given to the petitioner's brother, who subsequently refused to undertake it, was held still binding; and Harl v. Hart, (1881) 16 Ch D 670 where a compromise made in the Divorce Court was enforced in a fresh suit in the Chancery Division.

36. 1 am tempted to point out here another anomalous principle, imported into our case-law, that seems to persist even though it has been abrogated in the land of its origin. In Sweeney v. Sweeney, ILR 62 Cal 1080 (FB) Costello, J., with the concurrence of Mahim Chandra Rhose, J., and Hcnderson, J., adopted the rule in Russel v. Russel, 1824 AC 687 that "neither a husband nor a wife is permitted, with the object or possible result of proving that a child horn to the wife during wedlock is not the child of the husband, to give evidence showing or tending to show that they did not have sexual relations with each other at the time when the child could have been conceived" as applicable in India, "not only to cases in which the legitimacy of the child is directly in issue, hut also to proceedings Instituted in consequence of adultery, where the fact of the wife's adultery is sought to be established by proof that she has given birth to a child of which the husband is not the father", with the further observation "The rule excludes evidence by the husband of non-access and also of any facts, from which non-access might indirectly be presumed. The fact of non-access can, however, be proved by evidence aliunde."

In these days of high speed travel facilities it is difficult to convince by witnesses that the couple hud no opportunity to meet at all throughout the possible period of conception, which may be as long as 80 days when one remembers that according to English decision: birth of a child may be after 280 to 360 days after the last intercourse (vide 1951 AC 391 at p. 402). The best evidence of non-access can only be that of the couple concerned, and if that be shut out as inadmissible on the authority of 1924 AC 687 the result, I am afraid, can only he a travesty of justice. Luckily for England, the rule in 1924 AC 687 has been overruled by legislation; but the Kull Bench ruling in 1LR 62 Cal 1080 seems still haunting the Indian case-law.

37. The true rule appears to be what Shadi Lal, C. J., with the "full" concurrence of the four English Judges who sat with him, has pointed out in Lee v. Lee, AIR 1824 Lah 513 (FR). thus:

"The section (7 of the Indian Divorce Act) as its wording indicates, Is merely a residuary section, and it seems to me that the Legislature, after making express provisions for various matters relating to matrimonial causes intended by means of this section to apply the English Law to such matters of miscellaneous character as were not expressly dealt with by the Act. 1 do not, however, wish to dilate upon the question, because 1 consider that the opening words of 8. 7 'subject to provisions contained in this Act' expressly save the rules contained in the Act (which) by reason of the words quoted above, remain unaffected by any principle or rule observed bv the English Court."

38. My Lord, the Chief Justice has observed above that the English Court "allows only the 'fringe' of a case, not its substantial parts, to be proved by affidavit" and agreeing with that practice has declared the judgment of the Court below based on affidavit evidence, bad. Rayden on Divorce (6th Edition, page 426) shows that the above observation is baSed on two ancient rulings: Adams v. Adams and Guest, (1873) 29 LT 699, and (1858) 1 Sw & Tr 180. But, as pointed out by me above that rule in England came to be because, under the English procedure, leave of the Court has to be taken on a special motion before affidavit evidence can be Riven in matrimonial causes. 1 wonder, with all respect to the learned Chief Justice, how the same principle can he invoked here when the Indian Divorce Act allows parties "liberty to verify their respective cases in whole or in part by affidavit" without a direction from the Court. In the light of the provisions of Section 51 and the opening

words of Section 45 of the Indian Divorce Act, I do not think even Section 30, or Order XIX, Rule 1, C. p. C. would empower a Court to confine affidavit evidence to fringes of a case dehors its substantial parts. The expression "case in whole" in Section 51 denotes, in my view, not fringes only, nor substantial parts only, hut both and the entirely of the case. This High Court has, by unanimous Full Benches in several cases,-- I am aware of at least three in which I was a party: C. M. Ref. No. 3 of 1958, dated 26-6-1961 (Ker) by Ansari, C. J., Raghavan, .1. and Madhavan Nair, J.; C. M. Ref. No. 4 of 1962, dated 12-8-1963 (Ker) by M. Section Menon, C J-. Velu Pillai, J. and Madhavan Nair, J.: and C. M. Ref. No. 4 of 1963 dated 9-7-1964 (Ker) by M Section Menon, C. ,1., Velu Pillai, J., and Madhavan Nair, J.,--may be in other cases also-accepted and confirmed judgments based on ex parte affidavit evidence. The practice so far followed in this Court, I am certain, is in accordance with the law laid down in the Indian Divorce Act. (see no reason to deviate from the principle followed in those decisions which were by unanimous Benches of Three Judges; and 1 cannot appreciate the propriety of overruling them here by a majority in another Bench of three Judges.

39. The petition here is by a wife for dissolution of her marriage with the 1st respondent on the ground of the latter's living in adullery with the 2nd respondent coupled with desertion of the petitioner for about eleven years. Though both the respondents have been personally served, they did not enter appearance in the case. The petitioner has duly verified her statements in the petition and has sworn an affidavit proving her averments in the petition. The District Judge has 'accepted the affidavit in proof of her case' and decreed dissolution of the marriage. The fact that she made a reference to a past adulterous relation of the 1st respondent with an unknown lady does not militate against her definite case of his living in adultery with the 2nd respondent for over five years. Even though the decree has been pending consideration in this Court for over six months the respondents have not entered appearance to contest the case. In the circumstances, 1 do not see any illegality or impropriety in the proceedings, or the way the cause of justice would be advanced by a remit of the case for a fresh trial. I would, therefore, uphold the judgment of the District Judge and confirm his decree.

40. However, as the majority of the Bench have set sside the decree and directed remit of the case for fresh trial, effect may he given thereto.