Karnataka High Court
Lalithamma vs R. Kannan on 13 January, 1965
Equivalent citations: AIR 1966 Kant 178, AIR 1966 Mys 178
Author: N Pai
Bench: A N Pai, D Chandrasekhar
JUDGMENT Narayana Pai, J.

(1) This is an appeal against the dismissal of the appellant's Miscellaneous Petition No. 92 of 1959 on the file of the District Judge, Civil Station, Bangalore, for the dissolution of her marriage with the respondent.

(2) The appellant Lalithamma is the first wife of the respondent R. Kannan having been married to him on 14th February 1945. She is the daughter and only child of one Captain B.D. Naidu (P.W. 2) who had seen service in the Indian Army and was at the time of the marriage residing with his wife and daughter at a house called, 'Castle Grace' No. 3 Miller Road, High Grounds, Bangalore. The respondent was at the time of the marriage a medical student studying in Madras. He is the son of one Krishnaswamy Naidu, since deceased, who at the time of the marriage was a building contractor residing at Palani of Madurai District in the State of Madras. The marriage was solemnised at Tiruchanur in Chittoor District which was then part of the State of Madras and now part of the State of Andhra Pradesh.

(3) After marriage the respondent went back to Madras to complete his studies and the appellant during the period continued to live with her parents at Bangalore. After completing his examination, he came down to Bangalore for ceremonial consummation of the marriage. In that connection, he was at Bangalore for a period of at least one month, though his own pleadings would indicate that the said period might have been as long as two months.

(4) When the respondent left Bangalore on or about 20th May 1945 for his parents' place Palani, he went alone. There is some doubt whether he did or did not come to Bangalore to his father-in-law's place thereafter. But there is no and still continues to reside with her father P.W. 2 at Bangalore.

(5) There is some correspondent to which we shall make reference at a later stage regarding the respondent's and his parents' desire that the appellant should go over to Palani at least for a short period and the omission on the part of the appellant to comply with the request what ever may be the reasons therefor.

(6) It appears also from the evidence that it was a strong felt desire of P.W. 2 that his son-in-law, the respondent, should after completing his studies settle down in Bangalore for practising his profession. The appellant, as already stated, is his only child whereas the respondent is one among 3 or 4 sons of his father Krishnaswamy Naidu. That P.W. 2 B.D. Naidu did entertain such a strong desire is not only clear from some of the letters produced but is also not seriously disputed on behalf of the respondent. It is also clear both from the evidence given by the respondent orally at the trial and also from certain earlier letters of his addressed to his father-in-law that he, the respondent, did not like the idea of setting down in Bangalore. In actual event, he set up practice in Madurai and

continues to do so even now.

(7) There appear to have been some attempt made by common friends to reconcile the parties which, however, did not meet with success. The correspondence between the appellant father on the one hand and the respondent and his people on the other ceased some time to wards the end of 1945 whereafter there was no contact between the parties for a number of years.

(8) In September 1948, the respondent married the daughter of one Raja Naidu of Coimbatore D.W. 2. By the said marriage he now has two children living with him at Madurai.

(9) According to the appellant's case, even the fact of his second marriage was not made known either to her or to her father until the same was mentioned by the respondent for the first time in a letter dated 19-1-1955 addressed to his father-in-law B.D. Naidu P.W. 2.

(10) Thereafter notices were exchanged between the parties through lawyers. The appellant got issued to the respondent a notice through Mr. Narasaraju, Advocate-General of Andhra Pradesh claiming maintenance at the rate of Rs. 500 per month. This evoked a reply from the respondent through his lawyer Mr V.K. Menon in which the liability for payment of maintenance as claimed was repudiated.

(11) On 12-7-1959 the appellant presented a petition, out of which this appeal arises, claiming divorce under sub-section (2) of Section 13 of the Hindu Marriages Act of 1955(Central Act XXV of 1955) together with permanent alimony under section 25 of the said Act at Rs. 500 per month.

(12) The respondent in his counter statement dated 14-10-1959 questioned the jurisdiction of the Court of the District Judge, Civil Station, Bangalore, to entertain and dispose of the petition. On merits, he pleaded that, in the circumstances of the case, the appellant was not entitled either to a decree for divorce or to payment of alimony or maintenance.

(13) On the pleadings, the learned trial Judge framed the following four issues.

"1. Does the petitioner prove that he last resided together with the respondent within the jurisdiction of this Court? If not, does the petition lie to this Court.

2. Is the petitioner entitled to a divorce under S. 13(2)(i) of the Hindu Marriages Act, 1955?

3. Whether it is proved that the petitioner is not entitled to relief on any grounds set out in section 23 of the Act?

4. To what alimony, if any, is the petitioner entitled?".

(14) On the first issue, the District Judge held that the District Court at Civil Station, Bangalore, did not he the territorial jurisdiction to entertain and dispose of the petition for divorce. He, however, recorded findings on the other issues also. Under issue No. 2 he was of the opinion that by virtue of

the admitted second marriage contracted by the respondent, the appellant was entitled to seek divorce under Section 13(2)(1) of the Hindu Marriages Act but that there had been such improper delay on her part in instituting the proceedings as to operate as an absolute bar to the granting of the relief of divorce to which she would have been otherwise entitled. That is the common finding recorded on issues 2 and 3. On issue No. 4 he held that the conduct of the appellant was such as to disentitle her from claiming any alimony. He, however, examined the evidence relevant to the determination of the quantum and expressed the view that in the event of the appellant being entitled to receive alimony, it may be granted at the rate of Rs. 100 per month. In the light of these findings he dismissed the petition. Hence this appeal.

(15) The points for consideration in this appeal are the same as those set out in the issues framed by the trial Court and copied above.

(16) It will be convenient first to take up and dispose of the question of jurisdiction. The facts necessary therefor are few and except as to the interpretation of those facts, there is no controversy between the parties. Further, though the learned Judge has discussed the legal position by citing several decisions, the matter is now considerably clarified by two decisions of this Court reported in Clearance v. Raicheal, 1963(2) Mys LJ 122: (AIR 1964 Mys 67)(FB) and Saroja v. Emmanual, 1964(1) Mys LJ 114: (AIR 1965 Mys 12) the former of which is the decision of a Full Bench which dealt with a matter arising under the Indian Divorce Act and a ruling of the Supreme Court reported in Mt. Jagir Kaur v. Jaswant Singh, .

(17) The provision of the Hindu Marriages Act which dealt with the question of jurisdiction is section 19 which reads as follows:

"Every petition under this Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was soleminized or the husband and wife resides or last resided together."

(18) Upon admitted facts, the appellant has never lived anywhere with her husband except at her father's house at No. 3, Miller Road, Bangalore. It is also admitted that in connection with the consummation ceremony of the marriage between her and the respondent, the latter had come down to Bangalore and stayed at the same place, viz., her father's house. Whatever may be the exact length of stay, it could not have been less than about a month extending from 20th of May 1945. There is also no doubt about the purpose of his stay here which was to attend the ceremonial consummation of the marriage.

(19) These are the facts relied upon by the appellant in her petition as conferring jurisdiction on the Court of the District Judge, Civil Station, Bangalore, within the limits of whose territorial jurisdiction No. 3, Miller Road, lies.

(20) In paragraph 4 of her petition, the appellant states:

"As the respondent was to appear for the final Medical examination soon after at Madras from the place of marriage he went to Madras and after the examination he came to Bangalore and lived with the petitioner in her father's house aforesaid where both lived together as husband and wife for some time. During this period the consummation of the marriage also took place".

(21) Later in paragraph 12 of the petition setting out the cause of action and jurisdiction, this is what the appellant stated:

"The cause of action for this petition arose on and since 2-6-1955 the date of respondent's reply, at No. 3, Miller Road, High Grounds, Bangalore, where the petitioner and the respondent last resided together and which is within the jurisdiction of this Court".

(22) The allegations in paragraph 4 of the petition were traversed in paragraph 4 of the respondent's counter statement. He admits having come to No. 3 Miller road, Bangalore for the purpose of consummation ceremony, and after referring to certain matters as to what happened at the consummation ceremony to which we shall refer at a later stage, he concludes the paragraph with the following statement:

"The temporary stay of the respondent at Bangalore was in connection only with the consummation ceremony which ended in a fiasco as stated above. There was no intention on the part of the respondent to reside with the petitioner at Bangalore nor did the respondent reside with the petitioner at Bangalore as man and wife at any time".

In paragraph 5, he refers to his stay at Bangalore at two different places as follows:--

"Therefore, during the period of two months, the respondent stayed only casually and temporarily at Bangalore without the least intention of taking his residence at Bangalore..... Therefore, except for his casual visits to Bangalore during the two months stated above, the respondent has been and is permanently residing and practising (his profession as doctor) at Madurai. On the above admitted facts, the respondent submits that in no sense of the terms the respondent could be deemed to have last resided at Bangalore with the petitioner. In this light, the respondent further submits that this Hon'ble court has no jurisdiction to entertain or inquire into the above petition."

(23) On these facts the only question for examination is whether the appellant and the respondent can be said to have resided together at No. 3, Miller Road, Bangalore, during the portions of the months of April and May 1945 within the meaning of Section 19 of the Hindu Marriages Act, 1955.

(24) Both the cases of this court cited above dealt with the position as under Section 3 of the Indian Divorce Act, 1869. According to it, the Court having jurisdiction is the Court of the District Judge within the local limits of whose ordinary jurisdiction 'the husband and wife reside or last resided together'.

(25) In the case of 1963-2 Mys LJ 122 : (AIR 1964 Mys 67)(FB) cited above, it has been pointed out that although in cases where there had been residence together of the spouses of more permanent

character at one place and also a brief residence together at another place the Courts have taken the view that the former alone should be considered as the residence together for the purpose of deciding the question of jurisdiction, incases where there had been only one place where the parties stayed together, the word 'reside' has been interpreted not according to the strict connotation of permanent residence, Nittoor Sreenivasa Rau, C.J. observes:

"The word 'reside' connotes some degree of continuity of stay in a place and the words 'residing together' would consequently mean that the persons residing together should have continuously stayed together in the same dwelling for some time. There is no material in this case to show that the two parties were together at any time except during the marriage ceremony at the Church and at the dwelling where the marriage was intended to be consummated on the night of the marriage. Being together in such circumstances may not be regarded as 'residing together' in the ordinary sense of those words. The courts, however, have given a liberal construction to the term to obviate obvious hardships and even a brief period of stay together has been held to fulfill the requirements of the provision in cases where the residence together has been confined to one occasion".

(26) In 1964(1) Mys LJ 114: (AIR 1965 Mys 12) the facts were that both the husband and wife were Government employees, that in 1956 the wife was transferred to Tumkur and the husband to Mysore and that the wife was visiting the husband on and off during holidays and vacations in Mysore. The Court held that the parties must be held to have last resided together in Mysore for the purpose of S. 3 of the Indian Divorce Act.

(27) The decision of the Supreme Court in dealt with the question of jurisdiction on the basis of residence under sub-section (8) of Section 488 of the Code of Criminal Procedure which reads as follows:

"Proceedings under this section may be taken against any person in any District where he resides or is, or where he last resided with his wife, or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child".

Subba Rao J., who delivered the judgment of the Court, after referring to the fact that the meaning of the word 'reside' given in the Oxford Dictionary would include both a permanent dwelling as well as a temporary dwelling and stating that it would in all cases exclude a casual stay in or a flying visit to a particular place, made the following observations:

"In short, the meaning of the word would, in the ultimate analysis, depend upon the context and the purpose of a particular statute".

Thereafter, His Lordships referred to some decided cases bearing on the point and proceeded to state his conclusions in the following words:

"The decisions not he subject are legion and it would be futile to survey the entire field. Generally stated no decision goes so far as to hold that 'resides' in the sub-section means only domicile in the technical sense of that word. There is also a broad unanimity that it means something more than a

flying visit to or a casual stay in a particular place. They agree that there shall be animus manendi or an intention to stay for a period, the length of the period depending upon the circumstances of each case. Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case".

His Lordships then gave four illustrations, viz., those of a villager going to a neighbouring town either to attend a marriage or to make purchases and staying there in a hotel for a day or two, a tourist going from place to place and staying for a few days in each of the places he visits, a villager going from to a town for medical treatment and taking up a house and living there for about six months and a permanent resident of a town going to a city for higher education, taking a house and living there either alone or with his wife to complete his studies. He pointed out that the first two cases amounted only to casual or flying visits without any intention of living at the place either permanently or temporarily, and that in the last two illustrations, there was a clear animus manendi or an intention to reside for a specific period and that therefore in both the said cases the person in question may be said to have resided in those places.

(28) On these principles as settled by these decisions, the arguments before us have been directed towards determining whether there could or should be any difference in their application to the facts of this case because the said principles were stated with reference to statutes other than the one with which we are concerned. Whereas Mr. Karanth for the appellant argues that the words being identical, there could hardly be any reason for taking a different view or making a different approach to the question arising under Section 19 of the Hindu Marriages Act, Mr. Gundappa for the respondent has contended that special consideration--arising in the context of S. 3 of the Indian Divorce Act, viz., the possibility of there being no court having jurisdiction to grant relief to which parties may be undoubtedly entitled, do not arise in this case because under all circumstances there is no doubt or there can be no doubt as to the place of solemnization of the marriage.

(29) Although in majority of cases, the place of solemnization can be located in some part of the Union of India in respect of which a Civil Court functioning under the Code of Civil Procedure may be exercising territorial jurisdiction, the possibility of the said police falling outside the jurisdiction of any one of such courts cannot be wholly discounted. Even otherwise, that no difference in the approach itself is called for is clear from the decision of the Supreme Court cited above. That case dealt with a provision of law which clearly provided for a plurality of courts having jurisdiction. Nevertheless, their Lordships proceeding on the basis that a party in such a case has the liberty of choosing one among the several forums provided by the statute, pointed out that the matter should be looked upon from the point of view of the context and purposes of the particular statute. Dealing with S. 488(8) of the Code of Criminal Procedure, their Lordships pointed out that the circumstances of materiality were the anxiety of the law to minimise as far as possible the difficulties of a discarded wife who may be in a helpless position. We do not think that it can be contended that such or similar consideration are not available in the case of a wife seeking divorce on the ground set out in sub-section (2) of Section 13 of the Hindu Marriages Act as in this case. Further, the normal considerations applicable in cases where the existence of jurisdiction in a court is in question are

generally those which help to resolve the doubt in favour of the existence of jurisdiction rather than its absence because of the fundamental principle that it is the duty of courts to grant the relief sought of them and not lightly abdicate the jurisdiction which may be clearly vested in them by the law for the purpose of granting any such relief.

(30) Now, on the facts of this case there can be no doubt that the only place where the husband and wife were together after their marriage was No. 3 Miller Road, Bangalore. The fact that the husband alone has a permanent residence elsewhere in India is not a relevant circumstance at all. The residence necessary for the purpose of conferring jurisdiction under S. 19 of the Hindu Marriages Act is the residence of both the parties to the marriage.

(31) The respondent has sought to make out that his stay at No. 3, Miller Road, cannot be looked upon as amounting to residence for the purpose of S. 19 of the Act on the ground that, his stay there was no more than either a casual visit or a temporary visit.

(32) We find it difficult to accept the position that the visit of the husband to his wife's place at No.3, Miller Road, can rightly be described as casual. The word 'casual' actually means subject to or produced by chance or accidental or fortuitous,--all of which suggest the absence of any previously entertained object or intention. In the present case whether the consummation ceremony did or did not succeed in achieving the object, there can be no doubt that the principal, if not the sole, purpose of the husband's visit to No. 3 Miller Road, was for the purpose of ceremonial consummation of the marriage. The evidence also discloses that not only the respondent but also his parents had come specially for this ceremony and that as in the case of all pious Hindus an auspicious day was also selected. It is impossible to suggest that the consummation of the marriage is not a matter of sufficient importance. Indeed, the establishment of sexual relationship between his and wife to the exclusion of others is one of the principal objects of the relationship brought about by marriage. It has therefore to be held that the visit of the husband was not only not purposeless but actually one motivated by one of the most important objects sought to be achieved by the marriage. The stay for that purpose, whether temporary or not, must be held to be, in the light of the principles stated by their Lordships of the Supreme Court, a stay accompanied by animus manendi or intention to stay. Even if it may be described as a temporary stay and even if we accept the argument on behalf of the respondent that he had no intention of accepting the suggestion of his father--in-law and making Bangalore his permanent home, he cannot be right when he contends that he had no intention of making No. 3, Miller Road Bangalore, as his temporary abode for a specific purpose.

(33) We hold therefore, disagreeing with the trial Judge, that the stay of the respondent at No. 3, Miller Road (the residence of the appellant) was of such a character s to clearly make out that the husband and wife did reside together at the place and that therefore the court of the District Judge, Civil Station, Bangalore, did have jurisdiction to entertain and dispose of the petition.

(34) On the merits of the case, there is one matter on which there has not been and cannot be any controversy either as to facts or as to law. That the respondent took the daughter of D.W.2 Raja Naidu as his second wife in 1948 when he had already taken the appellant as his first wife is not only not denied but actually admitted. He is living with his second wife and has had two children by her.

It is also clear that both the marriages were solemnized before the commencement of the Hindu Marriages Act of 1955. Both the wives are alive. Hence all the conditions set out in clause (i) of sub-section (2) of Section 13 of the Hindu Marriages Act are satisfied. That was also the view taken by the trial Judge who held that in the absence of special circumstances to which he made reference in his judgment, there can be no doubt that the appellant was entitled to a decree for divorce under the said provisions of the Hindu Marriages Act. Mr. Gundappa, learned counsel for the respondent, did not take up any difference stand in the argument before us in this appeal.

(35) The only question therefore is whether there did exist special circumstances which would disentitle the appellant from claiming divorce as she is prima facie entitled to under the aforesaid provisions of the Hindu Marriages Act.

(36) Before proceeding to discuss this question, it is necessary to point that there is a clearly discernible difference between the approach made to the case by the trial Judge and the manner in which the argument s for the respondent have been presented before us. According to the tenor of the Judgment of the trial Judge, the fact which operated as a bar against the grant of relief by way of divorce was what the Judge held to be unnecessary or improper delay within the meaning of clause (d) of Section 23(1) of the Act. So far as the claim for alimony under section 25 is concerned, the circumstance which, according to the learned Judge, disentitled the appellant from claiming any alimony; was only what he described as the conduct of the appellant. The exact opinion of the learned Judge, disentitled the appellant from claiming any alimony, was only what he described as the conduct of the appellant. The exact opinion of the learned Judge in this regard will be clear from the terms in which he recorded the finding on issue No. 4 which read as flows:

"The evidence on record and the documents produced in the case clearly go to show that the petitioner is an epileptic and that her father who is P.W. 2 in the case was not willing to send her away from Bangalore but wanted the respondent to come and live with him and practise at Bangalore. The petitioner has also made no attempts to go and join her husband. If really P.W. 2 was willing to send his daughter he could have written to the respondent to go over to Bangalore and take his wife. He has not done so. I am convinced from the evidence that the desertion, if any is on the part of the petitioner and not on the part of the respondent. This conduct on the part of the petitioner would in my view disentitle her from claiming alimony".

(37) Mr. Gundappa in his argument, however, stated that the appellant had claimed two reliefs under the Act, one for divorce under Section 25. Both these reliefs, according to him are subject to the provisions of section 23 of the Act. He relied particularly on clauses (a) and (d) of sub-section (1) of section 23. Those clauses read as follows:

"23(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that-

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) xx xx xx

(c) xx xx xx

(d)there has not been any unnecessary or improper delay in instituting the proceeding.....

(e) *** *** ** then, and in such a case, but not otherwise, the court shall decree such relief accordingly".

He contends that he can resist both the claims of the wife on the ground that she may in the circumstances of this case be shown to be taking advantage of her own wrong or disability for the purpose of the reliefs claimed by he besides being guilty of unnecessary or improper delay in instituting the proceedings.

(38) Section 25, which empowers a court exercising jurisdiction under the Act to make an order either at the time of passing any decree or at any time subsequent thereto, directing the respondent to pay maintenance to the applicant, enumerates the factors for which the court should have regard. They are the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties. It will be noticed, that apart from the property or income available to either the husband or the wife, the relevant factor is the conduct of the parties by which one may reasonably understand the conduct not merely of a wife who applies for or claims alimony but also of the husband in relation to their life together as husband and wife.

(39) It appears to us that the approach made by the trial Judge is more in accord with the scheme of the statute. The relief referred to in Section 23 is obviously one of the four principal reliefs which the statute provides viz., restitution of conjugal rights, judicial separation, declaration of nullity of the marriage and the dissolution of marriage. The adjudication of the Court which grants any one of these reliefs is referred to by the statute as a decree. Section 25 empowers the Court to make an order for payment of alimony on the passing of any decree or subsequent thereto. That the grounds for the grant of reliefs referred to in Section 23 mean grounds for granting any one of the four principal reliefs mentioned above is also apparent from reference to the particular provisions of sections 10 and 13 in clause (b) of sub-section (1) of Section 23. That it is so is also clear from the fact that that it is only upon or after making a decree that the question of granting alimony under Section 25 arises. Therefore, the grant of alimony itself being a consequences of a decree, the question whether any of the circumstances mentioned in Section 23 would operate as a bar would already have been considered by the Court before passing the decree.

(40) Hence, the only relief in this case with reference to which the provisions of Section 23 may be depended upon by the respondent is the relief of divorce. The only circumstance considered by the court below is the delay in instituting the proceedings which it held was unnecessary or improper. In addition, Mr. Gundappa contends that the appellant maybe said to be taking advantage of her wrong disability. But before he can rely upon that circumstance as a disabling circumstance, he must make out that the appellant is making use of either her own wrong or disability for the purpose of obtaining the relief of divorce.

(41) There is one sentence in paragraph 10 of the petition which is of some relevance to the present discussion. That sentence reads as follows:

"Both by reason of respondent having continually deserted petitioner for over 2 years prior to this date, in fact ever since he left Bangalore in 1945, and also by reason of his having taken a second wife and living with her, the petitioner is entitled to seek and obtain dissolution and divorce of the marriage from him and also to maintenance from him as mentioned below."

(42) If the desertion on the part of the respondent husband was one of the circumstances relied upon or which could be relied upon by the wife for the purposes of seeking divorce, then perhaps the question would have arisen whether she was also guilty of desertion as stated by the trial Judge and was or may be said to be taking advantage of her wrong for the purpose of obtaining the relief. It must be noticed, however, that desertion for a period exceeding two years is a ground not for divorce under Section 13 but for judicial separation under S. 10. That apparently was the reason why no reliance was placed by the appellant on desertion as constituting a ground for the relief of divorce, and no issue was raised on that point.

(43) The only ground therefore stated for the purpose of obtaining the relief of divorce is the fact of the respondent having married again before the commencement of the Hindu Marriages Act of 1955. For the purpose of obtaining that relief, it is unnecessary for her to depend upon or take advantage of any wrong or disability of her own; she has relied exclusively on an act of her husband, viz., his act in taking a second wife. Nevertheless, Mr. Gundappa has argued that the reasons which led the respondent to marry again can in the last analysis be traced back to some wrong or disability on the part of the appellant. Though the argument at first sight may appear to be attractive, we do not think we can give effect to it, because the right of the wife to obtain divorce under clause (i) of sub-section (2) of Section 13 is stated in terms which make any consideration of the wife's conduct quite immaterial. That part of the section reads as follows:

"A wife may also present a petition for the dissolution of her marriage by a decree of divorce to the ground.-

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner;

Provided that in either case the other wife is alive at the time of the presentation of the petition".

This provision for divorce on the mere fact of the existence of another wife at the commencement of the Act is directly related to or must be read in connection with one of the principal points in the policy of the statute, viz., the enforcement of the principle of monogamy. Section 5 of the Act sets out one of the conditions for a valid marriage to be that neither party should have a spouse living at the time of the marriage. Under S. 11, one of the grounds which makes a marriage totally void ab initio is the contravention of the condition for the validity of the marriage. The result therefore is that if the second marriage had taken place after the commencement of the Act, that marriage would

have been totally void; but because this condition of monogamy was for the first time introduced by this Act, bigamous marriages contracted before the commencement of the Act do not become ipso facto void, but continue to be valid. At the same time, the right is given to he wife to seek divorce under section 13(2)(i) of the Act. It will be noticed that in the case of a bigamous marriage contracted after the commencement of the Act, the invalidity of the second marriage does not to any extent depend upon any conduct or disability therefore, a husband who is the respondent in a wife's petition for divorce under S. 13(2)(i) cannot plead any conduct or disability on the part of his first wife as a bar to her claim for divorce on the ground of second marriage.

(44) As, however, the conduct of the wife is of relevance for the purpose of S. 25, we shall proceed to examine the evidence relating thereto. As a decision on the question of the alleged delay in the institution of the proceedings also depends upon a consideration of the effect of the evidence in the case, we shall take up the question of delay for consideration at a later stage.

(45) Shortly stated, the conduct on the part of the wife relied upon by the husband was the following : According to him, the consummation of the marriage never took place. He claims that the wife deliberately refused physical access to him and that the said conduct on the part of his wife must have occasioned by her being afflicted by epileptic fits. His further suggestion is that certain drugs consumed by her by way of treatment for epilepsy also have the effect of inhibiting, if not in due course destroying, the sexual urge. The exact picture of the position as presented by the respondent to the Court can be gathered from the following extract from his oral evidence:

"On the night of the nuptials I found the petitioner excited. I took (her) for prayer I found her nervous and trembling. Due to excitement the petitioner was not replying my questions. While seated beside me, she got up, went to the almirah and took some tablets from a bottle. I followed her and got the bottle and found it to b Gardinal (trade name for Phenobarbitione). I also found some bottles of peacocks Bromides. I asked her why she should take all these drugs particularly on that day. She confessed to me that she was liable to get attacks of giddiness and fits and she was taking these drugs for the said ailment. After a few minutes of conversation the petitioner was feeling sleepy. She begged me to leave her alone. She covered herself completely with a blanket. No sexual intercourse took place on that day. She was not willing to have intercourse that day. I never had sexual intercourse with her at any time. The marriage with her was not consummated. The petitioner never at any time desired to have sexual intercourse with me. Bromides in the long run depress the sexual urge. Epilepsy itself may produce dulling of senses from loss of memory."

He then refers to extract from various standard text books dealing with the inhibitory effect of epilepsy and the drugs taken for epilepsy on the following night also the petitioner (appellant before us) took the same tablets and evinced no desire for sexual intercourse. He proceeds to state as follows:

"When I insisted she said that she was likely to get fits if she submitted. I did not like to use physical force, soon I found her fast asleep. About the middle of the night I heard a shreik. I got up and put on the lights and found her to be having epileptic fits.

(46) During the attack she bit her tongue. He states that that kind of attack repeated thrice that night. Thereafter the parents of the applicant aggregated her from him and he was not permitted even to see her.

(47) The appellant did not get into the box but denied in her petition the allegations made against her by or on behalf of the respondent in his lawyer's notice Ex.P-21.

(48) Hence the truth or otherwise of what happened on the two nights when, according to the evidence of the respondent, he was in the same room as his wife, has to be ascertained on the probabilities suggested by the other evidence in the case.

(49) Mr. Gundappa, learned counsel for the respondent, has contended that because the appellant has deliberately refrained from giving evidence at the trial contradicting the testimony on oath given by the respondent, we should necessarily start with some presumption or at any rate inclination in favour of the truth of the evidence given by the respondent. Apart from the fact that a statement made by a witness need not necessarily be true because no other witness contradicts it, there is one circumstance which cannot be lost sight of, viz., that the respondent was deposing in favour of his own case. Even for an assessment of the truth or acceptability of the oral evidence given by him, it is necessary for us to derive support from other evidence placed on record relating to his previous statement and previous conduct, and general probabilities suggested by the entire evidence.

(50) The respondent has no doubt examined other witnesses, at least two of whom depose to some facts which tend to probabilities his case. One of them is his younger brother and the other the husband of his father's brother's daughter. Their evidence also has to be assessed in the same way as the of the respondent himself.

(After discussing the evidence, the judgment continues as under:) (51-85) This detailed discussion of the correspondence that has passed between the parties contains sufficient material to cast serious doubt on the truth of the statements made by the respondent in his oral evidence regarding the alleged epilepsy and the consequent disability from which his wife was suffering. Every one of the statements he had made in his earlier letter contradicts his evidence in Court. Throughout, his grounds was against his father-in-law who he thought, was the sole reason why his wife did not or could not join him.

(86) Before proceeding to discuss the evidence of other witnesses, we must refer to one other document relied upon by the respondent which is an unsigned post card (Ex. D. 16), said to have been written by the respondent's father to his son D.W. 3. That document contains reference to a disease in the following sentence.

"It has been decided to make arrangements for second marriage, if the disease is true."

We have had the original Tamil text read out to us & are satisfied that the translation is correct. That the disease referred to therein could have epilepsy now depend to is difficult of acceptance because it might well be the sickness which even the respondent did not believe was of a nature to prevent

normal married life being led by them.

(87) The other oral evidence tending to probabilities the case sought to be made out by the respondent is that of a brother-in-law of his, Govindarajulu examined on commission as D.W. 5.

(88) The former was, according to his evidence, present at the time the marriage was celebrated at Tiruchnur. He states that while performing 'Homam' fumes cause out, that P.W. 2 stated that the appellant was unwell and could not stand the fumes and that therefore the whole ceremony was finished within 15 minutes. He also states that the appellant was removed to a room where an electric fan was switched on for her benefit and that P.W. 2 expressed the view that if Homam had continued for another 10 minutes, his daughter would have swooned.

(89) Soundararajan was present at the time of the betrothal ceremony same days before the marriage. He noticed some excitement in the girl when she was seated in the presence of the invitees and he heard a sound like "Huyehaye" (apparently some deep singing--which, however the witness was careful to say was not gasping) when the girl prostrated before the invitees.

(90) Now neither what D.W. 1 has stated about the Homam nor the peculiar excitement of the appellant at the betrothal ceremony spoken to by Soundararajan had been put to P.W. 2 when he was in the box. Apart from that, if the detailed description of the disease and its consequence given by the respondent himself on oath have became difficult of acceptance for the reasons already discussed by us, the above details given by these two witnesses have to be looked upon as mere unbelievable embellishments to an unacceptable case.

(91) There is, however, one strong argument addressed on behalf of the respondent in support of his contention that there is a hardly anything in the evidence to discard or not to accept the case sought to be made by him, that is based on the omission on the part of the appellant to submit herself to medical examination sought by the respondent in I.A. No. IX filed by him and also her omission to come to the Court herself and depose as a witness in support of her case.

(92) The learned trial Judge appears to have been considerably impressed by this argument and if we are not far mistaken, his conclusion in favour or the case of epilepsy as stated by the respondent rests largely, if not solely, upon the impression created on his mind by the said circumstance. He observes in his judgment that the petitioner's (appellant's) counsel before him had undertaken to produce her but failed to do so. The reference to the undertaking is contained in paragraph 5 of the learned Judge's order in I.A. IX. after stating that the appellant (petitioner before him) having refused to submit himself to medical examination, she cannot be compelled to undergo any such examination, he proceeded to deal with the alternative prayer that she should be asked to appear before Court to verify the truth or otherwise of an injury on her tongue. The learned Judge observed in the said paragraph 5 of his order as follows:

"So far as the direction for her appearance in Court is concerned, the petitioner's counsel has absolutely no objection to direct her to appear in Court on the next day of hearing. Since the petitioner's counsel undertakes to produce her in Court on the next day of hearing, I dismiss I.A. IX

but without costs."

In the final judgment in the main case itself, however, he observes:

"The learned counsel for the petitioner who undertook to produce her did not produce her."

He made this observation with reference to the evidence of Dr. Venkatasubba Rao as P.W. 1 to the effect that the state of health of the appellant was such that she could come to Court and give evidence as a witness and that of her own father to the effect that she was so dejected and depressed after the death of her mother that she was not in a position to come to Court. He depended upon these circumstances for the following conclusion.

"In these circumstances it must be presumed that the petitioner has a scar on her tongue and that is why she is shy to appear before a Court."

(93) Mr. Gundappa, learned counsel for the respondent before us, while supporting the learned Judge's line of reasoning, wants us to draw an adverse inference larger than what the trial Judge himself was willing to do.

(94) We must observe that there is an apparent contradiction between the evidence of Dr. Venkatasubba Rao P.W. 1 and B.D. Naidu P.W. 2. The doctor himself had no doubt that the appellant could come to court to evidence. The father stated:

"Myself, my wife and my daughter were the only intention of our house. My wife died 9 or 10 months ago. The separation from her husband and her loneliness affected my daughter. After my wife's death, she completely broke down. She is not in a position to come and give evidence in Court. P.W. 1 last visited my house on the day of my wife's death."

An attempt has been made to reconcile the evidence of the doctor with that of P.W. 2 by explaining that the condition to which P.W. 2 refers came about after the death of the appellant's mother, which Dr. Venkatasubba Rao had no occasion to witness because his last visit was on the date of the mother's death.

(95) Assuming for a moment that the appellant could have come to Court or should have made an attempt to come to Court, the point for consideration is what effect her failure to do so has on the appreciation of other evidence placed on record.

(96) From what we have already stated while discussing the evidence, the main case which the respondent wanted to make out was that the appellant was a victim of epilepsy. So far as matters on which he could speak on his own personal knowledge are concerned, they arbitration limited to the happenings on the two nights which he spent with his wife. According to his other evidence, he was totally segregated from his wife thereafter. So the only thing which the appellant herself could contradict as a competent witness was what happened on the said two nights. If the evidence of the respondent regarding the events of those nights has been found to be unreliable or not readily

acceptable for the reasons already discussed by us, we do not think our opinion should be different for reason only of the fact that the appellant did not get into the box and deny every thing that the respondent has stated. If, on the other hand, the presence of the appellant before Court was necessary for the Court itself to make an assessment of her state of health, the highest that the Court could have directly witnessed would be her state of health at the time of the trial. That was not a relevant factor for the disposal of the case. The respondent explains or justifies his entire conduct towards his wife on the basis of her state of health and conduct immediately after the marriage or at any rate during the years 1945 and 1948. The evidence relating to those circumstances was not the type of evidence the value of which would have been enhanced or belittled by the absence or presence of the appellant as a witness before Court.

(97) So far as the appellant herself is concerned, all the facts which she had to prove to obtain the relief under Section 13(2) of the Hindu Marriages Act have not only been not denied but also admitted by the respondent. It was unnecessary therefore, for her to get into the box to speak to those facts.

(98) In the circumstances of the case therefore, it appears to us that the omission on the part of the appellant either to give evidence or at least appear before Court in person makes no difference to either the appreciation of the evidence on record or the disposal of the case itself on merits.

(99) We have advisedly refrained from making any comments on the allegations and counter-allegations made in the lawyers' notices Exs. P-20 and 21, both for the reason that the texts thereof were drafted by lawyers on advice and also for the reason that they cannot be of much evidentiary value in view of the litigation undoubtedly in contemplation at that time.

(100) Our opinion therefore on the examination of the entire evidence, both oral and documentary, is that there is nothing in the conduct of the appellant which could be described as blameworthy. In actual event, it appears to us that she was a victim of what may well be described as excessive pride and self-opinionated conduct of her father and her husband. That the husband himself was not willing to place any blame on her is clear from the letters addressed by him.

(101) The learned trial Judge has expressed the categorical opinion that desertion, if any, was really on the part of the wife rather than on the part of the husband. We have found it difficult to appreciate this opinion of the Trial Judge. Even on the admissions and express statements of the respondent the appellant was very much under the influence of her father. The respondent, apart from being himself a man and fully qualified to exercise his own profession and stand on his own legs and therefore in s position to take independent action, had, in our opinion, a larger share of the responsibility for placing their married life on proper lines than the wife in the circumstances mentioned above. If with that much of independence available to him he decided after careful deliberations to go in for a second marriage and cur off all relations with his first wife we do not think he could be heard to say that his wife the appellant has deserted him.

(102)The same reason, viz., the peculiarly helpless position in which the appellant was placed by her father & her husband is also available to her in explanation of the alleged delay in instituting

proceedings.

(103) In dealing with the question of delay, on thing that has to be taken note of at the commencement is that the right to seek divorce on the ground of second marriage became available to women only on 18-5-1955 on which date the Hindu Marriages Act came into force. The petition in this case was filed in July 1959. The explanation for this delay has been given in the petition, viz., that the petitioner had to depend upon her father and that her father's health was by no means good during the period subsequent to May 1955. It has been pointed out by the learned counsel for the respondent that there is no clear evidence let in by the appellant to explain this. But for the reasons already stated by us, the clearest inference available from the evidence which shows that the appellant was clearly in an helpless position is in itself a sufficiently acceptable explanation.

(104) Apart from that, the delay which operates as a bar to the grant of relief under S. 23 is delay which could be described as either unnecessary or improper. Cases have held that these expressions have the same meaning as the expression 'culpable delay' used in English decisions. It really means the delay for which some blame can be attached to the party guilty of delay.

(105) Many cases have been cited before us and passages from Text books read out to us to show that even in English Courts have progressively liberlised their ideas about what are 'culpable delay' in seeking reliefs in matrimonial cases and that delay is regarded as culpable only if certain circumstances exist which might cause prejudice either to the other party to the proceedings or the children of the marriage or the interest of the society at large. For the disposal of this case, however, it is unnecessary to make any detailed reference to all these cases. It is enough to refer to one of the relevant consideration of a general nature set out by Viscount Simon, L.C., in Blunt v. Blunt, 1943(2) All ER 76,at page 78, in the following terms:

".....the interest of the community at large, to be judged by maintaining a true balance between and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

(106) In this case, there is hardly any doubt that the respondent himself considered that his relations with his first wife had been irrevocably broken down so long as in 1945. He had no intention of resuming or resuscitating the relationship at any time after 1948 in which year he contracted his second marriage. Further, the respondent himself has presented to the District Court at Chittoor in March 1960 a petition for declaration of nullity of the marriage. There is no doubt therefore that matrimonial union be the parties is this case is one that must be taken to have broken done long ago and that no interest of the society at large would sub-serve any purpose by maintaining such relationship. There are no children by the marriage. The respondent in the matter of his life as a marriage man is not going to suffer any prejudice by the grant of divorce.

(107) We cannot therefore, agree with the trial Judge's opinion that there has been any such improper delay as to operate as a bar to the appellant being granted the relief of divorce.

(108) Our findings already expressed are sufficient answer to the contention that there is something blameworthy in the conduct of the appellant to disentitled her from receiving alimony under Section 25 consequence upon a decree for divorce.

(109) There only remains to determine the quantum of alimony which may be regarded as just in the circumstances of the case.

(110) On the side of the appellant there is no direct evidence or any evidence at all regarding the probable income of the respondent. The appellant relies only on the statement made by the respondent himself in his letter Ex.P-18 dated 19-1-1955 wherein he stated that he was earning as much as Rs.2000 a month as a private medical practitioner. The oral evidence of P.W.2 is also to the effect that he has no personal knowledge of the exact extent of the respondent's earnings and that what he has stated is based upon some information conveyed to him by some persons whom he is unable to name.

(111) The respondents himself has given evidence on the topic. His suggestion that the figure "Rs. 2000" set out in Ex.P-18 is a typographical error for "Rs. 200" may or may not be readily acceptable. But having regard to the mode in which and that purpose with which he was writing the letter Ex. P-18, we think it is a reasonable argument to say that the respondent might be taken to indulge in boastful exaggeration of his own importance.

(112) That he was willing to go out of India for a net salary of Rs. 400 per month in 1946 may or not be true; but even if true, it is of little assistance in determining his income today. That he has been fairly successful and is in a position to lead a confortable life and provide similar life to his aged mother, his second wife and two children by her admits of no doubt. While stating his income could only be Rs. 400 a month, he has admitted that he has moved his clinic from a building with a rent of Rs. 90 per month to another building paying a higher rent of Rs. 150 and that he has built for himself rent of Rs. 150 and that he has built for himself a house on a long-term loan basis with a co-operative society paying Rs. 90 per month in reduction of the loan. In all his letters in which he informed the appellant to come and stay with him, he has held out in unmistakable terms the assurance that he is in a position to maintain her in a confortable status befitting his own success in life.

(113) Although this is all the material we have for determining the income of the respondent and although whatever estimate we might make cannot completely be free from an element of guess work, it is necessary that a figure even on the basis of estimation should be arrived at by us.

(114) Having regard to all the circumstances and the admitted position that the respondent has been a successful medical practitioner in a large city like Madurai, and making allowance for some exaggeration in Ex. P-18 and some attempt to depress the figures in his oral evidence, we think that the reasonable estimate of the respondent's income may be determined at about Rs. 15,000 per year or at any rate not less than Rs. 1,000 per month on an average.

(115) The appellant has admittedly no independent means of her own. There is no doubt a possibility of her inheriting some property which now belongs to her father. But the property and income of the wife which can be taken into account under the Hindu Marriages Act is the property and income which is exclusively that of the wife. It is not proper to take into account the possibility of the wife inheriting property from her relations like the father.

(116) It has, however, been suggested that we might take into account the fact that her father, who at all time had special affection for her and who has all these years given her shelter and assistance, may be expected to see that his daughter is not left in utter destitution. We do not think that these considerations are at all relevant. What the father has done is really something which the respondent should have done as husband. He cannot be permitted to take advantage of that fact to reduce his responsibility or liability for maintenance.

(117) In all the circumstances therefore, we determine the permanent alimony payable to the appellant under Section 25 in the sum of Rs. 200 per month, effective from today, viz., 13-1-1965, the payment for each month being payable before the expiry of the first ten days of the month.

(118) In the result, we allow the appeal, set aside the order made by the lower Court and grant a decree dissolving the marriage of the appellant with the respondent under Sub-section 2(i) of Section 13 of the Hindu Marriages Act of 1955, and make a further direction that the respondent do pay to the appellant from to-day 13-1-1965 till her death or remarriage whichever event happens earlier, alimony in the sum of Rs. 200 per month, the amount being payable every month before the expiry of the first ten days of that month.

(119) The appellant will have her costs of this appeal from the respondent. Advocate's fee Rs. 250.

(120) Appeal allowed.