having returned a finding to the effect that tarwad debts had been discharged by the kanomdars to the extent of Rs. 695 from their private funds, the High Court delivered judgment as follows :—

JUDGMENT.—The finding being one of fact must be accepted. We, therefore, modify the decree of the Courts below by declaring the kanom by first defendant to defendants 2 to 4 to be invalid, but that these defendants have a charge on the property to the extent of Rs. 695 with interest thereon at 6 per cent. per annum from the several dates of payment particularized in the finding.

Plaintiffs must pay the costs of the defendants 2 to 4 on the issue sent for trial. In other respects, the appeal is dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, and Mr. Justice Shephard.

THAPITA PETER (PLAINTIFF), APPELLANT,

v.

THAPITA LAKSHMI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1893. Nov. 23. 1894. Jan. 26.

Divorce—Divorce Act IV of 1869, s. 7—Nature of the marriages contemplated by the Act—Monogamous marriage.

The petitioner and his wife married according to the rites of the Hindu religion. The wife subsequently left her husband and lived in adultery with another man. Both the husband and wife subsequently became Christians, but the wife continued to live in adultery. The husband sued under Act IV of 1869 for the dissolution of the marriage :

Held that, having regard to section 7, the marriages contemplated by the Act are those founded on the Christian principle of a union of one man and one woman to the exclusion of others, and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu law, a Hindu marriage not being a monogamous one. *Hyde* v. *Hyde*(1) and *Brinkley* v. *Attorney-General*(2) cited and followed. *Gobardhan Dass* v. *Jasadamoni Dassi*(3) dissented from.

CASE referred under section 17, Act IV of 1869, by G. T. Mackenzie District Judge of Kistna, for confirmation of his decree in original

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* Referred (Matrimonial) Case No. 5 of 1893.

(1) L.R., 1 P. & D., 130. (2) L.R., 15 P.D., 76. (3) I.L.R., 18 Calc.,

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suit No. 1 of 1893 declaring the marriage of the plaintiff with defendant No. 1 to be dissolved, subject to confirmation by the High Court.

The facts of the case appear sufficiently for the purposes of this report from the judgments delivered by the High Court.

The parties were not represented.

COLLINS, C.J.—Thapita Peter brought a suit against Thapita Lakshmi, his wife, alleging her adultery with Lunkapalli Gauth, and praying, therefore, that his marriage may be dissolved. The District Judge of Kistna granted a decree dissolving the marriage under the provisions of Act IV of 1869, and the decree now comes before the High Court for confirmation under section 17 of Act IV of 1869.

The petitioner and his wife were married according to the rites of the Hindu religion in 1879, petitioner and his wife being Hindus at that time. About a year after the marriage the petitioner's wife left him and has since been living in adultery with the second respondent. In 1882 the petitioner became a Christian, and about 1890 his wife and the second respondent also became Christians. The question to be decided is—can the Courts of this country pass a decree dissolving his marriage under Act IV of 1869.

Section 1 of the Act enables relief to be granted where the petitioner professes the Christian religion.

Section 7 directs that the Courts in India shall act and give relief in all suits and proceedings hereunder 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 acts and gives relief.

Divorce is unknown to the Hindu law, but it is clear that if Act IV of 1869 was intended to apply to Hindu marriages, the petitioner would be entitled to relief. Act XXI of 1866 has no application to this case. That Act provides a relief from the marriage tie when one of the parties becomes a Christian, the other still remaining a Hindu.

A Hindu marriage is not a monogamous one. The man may lawfully be the husband of many wives at the same time. It is therefore a ceremony inconsistent with marriage as understood in Christendom that the husband should have more than one wife.

The Act IV of 1869 applies to Hindu marriages; a case may

arise where a Hindu with more wives than one becomes a Christian and his wives also embrace Christianity. In that case could one of the wives sue her husband for a divorce because he continues to cohabit with one or more of his other wives, as the conversion of the parties to Christianity would not dissolve or make void the husband's previous marriages, or could the Christian husband sue for a divorce from one of his wives on the ground that she had committed adultery.

The point to be decided is not without difficulty, but I think that if marriages celebrated according to Hindu rites were intended to be within the scope of the Act, express provision would have been made to meet the difficulties that must arise owing to the fact that the Hindu marriage is not a monogamous one. There are two English cases which serve to illustrate in what cases the English Divorce Court will give relief. In *Brinkley* v. *Attorney-General*(1), a British subject married a Japanese woman in Japan according to the forms required by the law of that country, and it was proved that by such a marriage the husband was precluded from marrying any other woman during the subsistence of the marriage. A declaration was granted by the President of the Probate Division declaring (under 21 and 22 Vic., cap. 93) that such marriage was a valid one. In the judgment the President says: "marriage must be that of one man and one woman to the "exclusion of all others. Throughout the judgments that have "been given on this subject the phrase 'Christian marriage,' "'marriage in Christendom' or some equivalent phrase has been "used: that has only been for convenience to express the idea. "But the idea that was to be expressed was this that the only "marriage recognized in Christian countries and in Christendom "is the marriage of the exclusive kind mentioned."

In *Hyde* v. *Hyde*(2), the petitioner, an English subject, married in Utah in the United States of America a Miss Hawkins according to the rites of the Mormons. At the time of the celebration of the marriage, polygamy was a part of the Mormon doctrine and was the common custom in Utah. The marriage was a valid marriage according to the *lex loci* and polygamy was then lawful in Utah. The petitioner and his wife were both single and the petitioner had never taken a second wife. The petitioner

(1) L.R., 15 P.D., 76. (2) L.R., 1 P. & D., 130.

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sometime after the marriage renounced Mormonism, was excommunicated, and his wife declared free to marry again. The wife did marry again and the petitioner then petitioned the Divorce Court for a dissolution of his marriage on account of his wife's adultery. The counsel for the petitioner argued, *inter alia*, that this was not a polygamous marriage, for both the parties were single at the time when it was contracted; but the Judge Ordinary observed that it would be extraordinary if a marriage in its essence polygamous should be treated as a good marriage by an English Court, and held that marriage as understood in Christendom may be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

By section 7 of Act IV of 1869 the High Court and District Courts *shall* act and give relief on principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief. It is clear to my mind that the Divorce Court would not grant the relief the petitioner prays for, on the ground that the marriage being a polygamous one cannot be recognized as a marriage by that Court; and, being also of opinion that Act IV of 1869 does not contemplate relief in cases where the parties have been married under the rites and ceremonies of Hindu law, I hold that the District Court had no jurisdiction to entertain this suit, and I would dismiss it. I am aware that the Judges of the Calcutta High Court have arrived at a different conclusion (see *Gobardhan Dass* v. *Jasadamoni Dassi*(1). Section 7 of Act IV of 1869 does not seem to have been specially brought to the notice of the Court, as the judgment is silent upon the principles and rules on which the Courts shall give relief. However, be that as it may, I am unable, with the greatest respect to the learned Judges, to agree with them, and therefore decline to follow the case in *Gobardhan Dass* v. *Jasadamoni Dassi*(1).

MUTTUSAMI AYYAR, J.—The question which it is necessary to determine in this suit is whether the plaintiff is entitled to a decree for divorce on the ground of his wife's adultery under Act IV of 1869. The facts which give rise to this question are shortly these. The plaintiff was born in 1862. In 1879 he married the first defendant by Hindu rites, both being then Hindus by religion. In 1880 the wife left her husband and commenced to live in

(1) I.L.R., 18 Calc., 252.

adultery with the second defendant, to whom she has since borne four children. In 1882 the plaintiff embraced Christianity, and about two years prior to this suit, which was brought in 1893, the defendants also became Christians. After her conversion to Christianity, the first defendant continued to live with the second defendant and repeat her adultery with him till date of suit. Upon these facts, it is clear that the plaintiff would be entitled to a decree for divorce if Act IV of 1869 applied to this case. The real question is whether the Act is applicable to a Hindu marriage after both parties to such marriage have become Christians.

In connection with a Hindu marriage, there are several legal incidents as to which no doubt can possibly exist. The first is that such marriage is in its nature *not* monogamous, and is not the voluntary union for life of one man with one woman to the exclusion of all others. It is true that as regards the Hindu wife, her union with her husband is a voluntary union for her life with one man to the exclusion of all others; but the Hindu husband may marry several wives at one and the same time, or may marry two or more wives during the lifetime of the first wife. The real point for consideration, therefore, is whether the Act is applicable to a Hindu marriage.

Another matter as to which there is also no doubt is that conversion to Christianity does not dissolve the prior Hindu marriage, and that the latter continues to be valid even after the parties to it become Christians for many purposes. So it was held in *Administrator-General of Madras* v. *Anandachari*(1) and in other cases to which it is hardly necessary to refer. Act XXI of 1866 is framed on the view that a marriage, though contracted by Hindu rites, is binding upon the parties to it even after they become Christians, and prescribes a procedure whereby a decree for dissolution of such marriage may be obtained in certain cases. That Act is applicable to cases in which the husband or the wife continues to be a Hindu by religion whilst the other has become a Christian.

It was further held in *Perianayakam* v. *Pottukanni*(2), that a pariah who was converted to Christianity was not entitled to a decree for divorce on the ground of adultery committed by his wife before his conversion, and that the Court had no jurisdiction to entertain his petition under Act IV of 1869. The ground of

(1) I.L.R., 9 Mad., 466. (2) I.L.R., 14 Mad., 382.

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decision was that the Act applied only to Christian marriages. Having regard to the decision in *Brinkley* v. *Attorney-General*(1) the expression 'Christian marriages' must be taken to convey the idea, *not* that the parties must profess Christianity, but that the marriage must be of a kind recognized in Christian countries, viz., that the marriage must be that of one man and one woman for life to the exclusion of all others. That was a case in which the petitioner was a British subject with an Irish domicile of origin. When he temporarily resided in Japan, he married a Japanese woman in Japan according to the forms required by the law of that country. It was proved in that case that according to the law of Japan it was a valid marriage, and by that law the petitioner was also precluded from marrying any other woman during the subsistence of that marriage. The learned Judge recognized the Japanese marriage as valid under the Legitimacy Declaration Act (21 and 22 Vic., cap. 93) and explained the ground of decision in these terms: "This case is clear from the difficulties which arose "in the Mormon case and in the South African case, because in both "these cases there was an attempt to establish as a valid marriage "a marriage with another person than the first spouse. The prin- "ciple laid down by these cases is that a marriage which is not that "of one man and one woman to the exclusion of all others, though "it may pass by the name of marriage, is not the status which the "English law contemplates when dealing with the subject of marri- "age." But in this case, it has been proved by the law of Japan, "marriage does involve this idea, viz., that one man unites himself "to one woman to the exclusion of all others. Therefore, though "throughout the judgments which have been given on the subject, "the phrase Christian marriage, or marriage in Christendom or some "equivalent expression has been used, that has been used only for "the sake of convenience, and the idea which has to be expressed was "this—that the only marriage recognized in Christian countries "or in Christendom is the marriage of the exclusive kind." This decision is clear authority on the one hand for construing the expression 'Christian marriage' used in *Perianayakam* v. *Pottukanni*(2) in the sense indicated above, and on the other, for the opinion that the Court for Divorce and Matrimonial Causes in England gives relief in such causes subject to two conditions, viz.,

(1) L.R., 15 P.D., 76.

(2) I.L.R., 14 Mad., 382.

that the marriage is valid according to the *lex loci*, and that the idea of the union of one man and one woman to the exclusion of others is present in it, as in marriages between persons professing the Christian religion and thereby implies the status contemplated by the English law whilst dealing with the subject of marriage. Turning to the case before us, I do not think that the Act is applicable to it. In a Hindu marriage the idea of the exclusive union of one man and one woman for life is not present as in a marriage recognized by the Court for Divorce and Matrimonial Causes in England, and section 7 of Act IV of 1869 directs that we should give relief under Act IV of 1869 on principles and rules which may be conformable to the principles and rules by which that Court gives relief. The preamble of the Act states that it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and the second paragraph of section 2 declares that nothing herein contained shall authorize any Court to grant any relief under this Act, except in cases where the petitioner professes the Christian religion. These provisions render it probable that the marriage which the Act purported to deal with was marriage founded on the Christian principle. Again in section 2, clause 3, marriage with another woman is stated to mean marriage of any person being married during the life of the former wife, and it is provided by section 18 that a marriage may be declared null and void on the ground, *inter alia*, that the former wife was living at the time of the marriage and that the marriage with the former wife was then in force. Take for instance the case of a Hindu with two or more wives becoming Christians, and suing under the Act to have it declared that all his marriages but one are null and void. Are we to pass a decision in his favour? If so, which of his several marriages is to be declared null, and if we are to declare all marriages except the first null and void, are we not acting in contravention of the rule that conversion to Christianity does not dissolve prior marriages valid by the *lex loci*? If the legislature had intended to bring Hindu marriages within the scope of the Act, they would probably have inserted express provisions relating to questions which arise from their polygamous character. It is true that the plaintiff has married only one wife, though whilst a Hindu he was at liberty to have married several wives at the same time, and it may be suggested that the particular Hindu marriage now before us may be treated as monogamous in

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fact, entitling the plaintiff to the relief claimed. There are two objections to the adoption of this suggestion. The first is that what we have to consider is, the status consequent on a marriage as regulated by the *lex loci* or the legal conception of the marriage, and *not* whether the plaintiff in a given case has in fact married one wife or several wives. Another objection is that the suggestion is not the natural result of interpretation which can be put on the Act, though it may form an appropriate subject of legislation. I do not see my way to hold that Hindu marriages are marriages contemplated by the Act.

As for the argument that it is hard that the legislature should have intended to place Hindu husbands who become Christians at a disadvantage, I am not prepared to attach much weight to it. Divorce affects the wife as well as the husband, and no such thing as divorce is known to the Hindu law. Thus wives other than the first might justly complain if their marriages were declared invalid by reason of their conversion as polygamous and their intercourse with their husbands characterised as adulterous, since divorce was not in their contemplation as a possible incident of their marriages when they were contracted. Possibly on this ground the legislature did not intend to include such marriages in the Act. However this may be, I am aware of no decided case in India which is on all fours with this case except the one reported in *Gobardhan Dass* v. *Jasadamoni Dassi*(1), wherein the difficulties that arise from considering the Act to be applicable to a marriage such as the one before us are not considered and explained. The point decided in the matter of *Ram Kumari*(2) is that a Hindu wife who first embraces Mahomedanism and then marries a Mahomedan husband without notice to her Hindu husband is guilty of bigamy, and it is not therefore a case in point. Relying, therefore, on the English decision already cited and on the construction of Act IV of 1869, I hold that the Act is not applicable to Hindu marriages.

SHEPHARD, J.—This is a suit by the husband for the divorce of his wife on the ground of her adultery. At the date of their marriage the parties were Hindus, and the Judge finds that the marriage was solemnized according to Hindu custom. Since that date both husband and wife have become Christians.

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(1) I.L.R., 18 Calc., 252. (2) I.L.R., 18 Calc., 264.

The question is whether the marriage being a marriage of Hindus according to the Hindu rites is of such a character as to entitle the husband to a decree of dissolution of it under the provisions of Act IV of 1869.

The authorities are conflicting: on the one hand, the decision of the High Court of Bengal, *Gobardhan Dass* v. *Jasadamoni Dassi*(1); on the other hand, a decision of the North-West Provinces High Court, *Moola* v. *Nundy*(2), and one of this Court in which I took part. The facts in this latter case differ materially from those with which we have now to deal.

The Act distinctly requires that any person seeking for relief under it shall, at the time when his or her petition is presented, profess the Christian religion. The Act does not require in terms that the parties or either of them shall have been Christians at the time of the solemnization of the marriage. There are provisions in the Act which presuppose Christianity as the religion of the parties at the time of the marriage, but it cannot be said that adherence to that religion at that time is made a condition precedent to the obtaining of relief under the Act. It by no means follows that the provisions of the Act can be made applicable to any marriage between non-Christians, although it may be a marriage which, according to the law governing them, is valid and legal. In applying the provisions of the Act, section 7 directs that the Court shall act and give relief on principles and rules which 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 my opinion the direction given in this section has to be kept in view by the Court when considering whether a given marriage should be recognized as such for the purposes of the Act. The question then is whether on a petition for divorce by the husband a marriage of Hindus according to Hindu ritual could be recognized by the English Divorce Court. Now, in order to satisfy the English Divorce Court, while it is not necessary to prove that the marriage was celebrated with any specifically Christian ceremonies, or even that both the parties were Christians, it is necessary to show that the union was a union for life of one man with one woman to the exclusion of others. That is what is meant by a

(1) I.L.R., 18 Calc., 252. (2) 4 N.-W.P., 109.

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Christian marriage or a marriage in Christendom. See *Hyde* v. *Hyde*(1) and *Brinkley* v. *Attorney-General*(2).

This definition of marriage clearly excludes from the category of marriage as understood for the purposes of the Divorce Court alliances such as the one which took place between the parties to the present suit, for according to Hindu law and custom, by which at the time they were governed, it was permissible to the husband to take a second wife. As far as he was concerned the marriage did not possess that character of exclusiveness which the law of Christendom presupposes in the institution of marriage.

It may be suggested that although the husband might, as a Hindu, have contracted a second marriage, he did not in fact do so and could not lawfully have done so after he became a Christian. It may be said that in consequence of the conversion of the parties to Christianity the marriage has come to acquire the necessary character of exclusiveness which it did not possess before.

Similar arguments were used in the arguments in *Hyde* v. *Hyde*(1) and considered by Lord Penzance. It was proved in that case that the petitioner's marriage in Utah would, if valid in Utah, be recognized as valid by the Supreme Court of the United States, and it had been argued that the matrimonial law of England might properly be applied to the first of a series of Mormon marriages. Lord Penzance deals with this argument and points out the inconsistencies that might result if it were adopted.

In the present case it is true that the petitioner had married only one wife. Let it be supposed, however, that either when he married the respondent he already had a wife living, or that after so marrying her he had taken a second wife.

In the first case there can be no doubt that the marriage of the respondent could not be recognized, at least for the purposes of the Divorce Act, whether or not the first wife were still alive when the suit was brought.

Nor, it is conceived, could the second wife come into Court to ask that her marriage be declared void on the ground that her husband's former wife was alive at the date of the marriage, for section 19 of the Act relates to cases in which the marriage is void *ab initio*, and in the case supposed the marriage would not have been so void. In the other case supposed, the first wife, if she is

(1) L.R., 1 P. & D., 130. (2) L.R., 15 P.D., 76.

to be deemed the legal wife for all the purposes of the Act, would under section 10 be entitled to treat her husband's second marriage as bigamous and on the strength of it to seek dissolution of her marriage on the ground of a connection which, at the time it was formed, was perfectly lawful.

No doubt it is true that persons who have married as Hindus and subsequently become Christians subject themselves to the law prevailing among Christians, so that the husband may be convicted of bigamy if he goes through a form of marriage with another woman. In re *Millard*(1). In the matter of *Ram Kumari*(2); see minute of Sir H. Maine. Ceasing to be a Hindu or Mahomedan as the case may be and becoming a Christian he sacrifices the liberty which heretofore he had according to the law of his birth—certainly the liberty of taking another wife and presumably the liberty of divorce, which if he had been Mahomedan, the Mahomedan law gave him. See *Lopez* v. *Lopez*(3).

It does not, however, follow that the convert is, in compensation for his sacrifice, entitled to a relief under the Act or to any divorce except under the provisions of Act XXI of 1866.

Any argument founded on the circumstance that the Hindu or Mahomedan marriage is, for some purposes, recognized after the parties became Christians really proves too much, for I conceive that the second of two wives married at the same time would, if she survived the first and became a Christian with her husband, be recognized as his lawful wife and her children would be legitimate; see Mayne's Hindu Law, para. 55. What would become of the second wife if both being alive, either or both of them became Christians with the husband it would be difficult to say. Assuming that the second wife only survived, I apprehend, as already observed, that there is no doubt that her marriage contracted in the lifetime of another wife would not be recognized for the purposes of the Act.

Again if a marriage, according to the Hindu custom, may be dissolved under the Act, it may also be declared null and void for any of the reasons mentioned in section 19. One of the reasons there specified is that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity. Those

(1) I.L.R., 10 Mad., 218. (2) I.L.R., 18 Calc., 269.
(3) I.L.R., 12 Calc., 706.

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words, which, excepting the bracketed words, are to be found in the Marriage Act, s. 48, are words habitually used in connection with Christian marriages, although it may be correct to hold that they do not involve the application of English rules to all Christians (see *Lopez* v. *Lopez*(1)). If it be right to hold that the liberty of choice possessed by Hindus adopting Christianity extends to the law relating to marriage (*Lopez* v. *Lopez*(1)) the Court might have to apply either the rules of Hindu law or the English rules of prohibited degrees in determining whether a marriage was valid or not. It would be a strange consequence if the Court constituted to administer the law in matters matrimonial to persons professing the Christian religion had to declare void a marriage which according to Christian usage was valid or to declare void a marriage which was valid according to the law governing the parties at the time of its solemnization.

The origin of the jurisdiction must not be lost sight of. As the English Divorce Court exercises the jurisdiction originally vested in the Ecclesiastical Court, so the jurisdiction exercised by the Supreme Court sitting on the ecclesiastical side is extended under certain conditions to the District Courts. See *Lopez* v. *Lopez*(1). There is no reason whatever for holding that this matrimonial jurisdiction, for which a new forum was thus created, was intended to be enlarged, so as to include marriages which would not come within the scope of the English Act. See *Ardaseer Cursetjee* v. *Perozeboye*(2) as to the law before the Act.

In the present case, there being no evidence of any marriage except a marriage according to Hindu rites, I am of opinion that the Act does not apply, and that the District Court had no jurisdiction to decree dissolution.

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(1) I.L.R., 12 Calc., 706.

(2) 10 Moore's P.C., 375.