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cases was the case of *Sahib Ram* v. *Kishen Singh* (1), where the majority of the Court held that the portion of the *abadi* or populated area of the village did not form part of the rights of a co-sharer, and the other case was that of *Hazari Lal* v. *Ugrah Rai* (2) in which it was held that *sir* land did not form an essential part of the zemíndári share of a co-sharer. Both these rulings, however, proceed upon a *ratio decidendi* which, as Pandit *Ajudhia Nath* has, I think, rightly pointed out, was practically overruled by the whole Court in *Niamat Ali* v. *Asmat Bibi* (3) to which I have referred, because there the Court held that grove-land does form part of the zemíndári rights. Here the road formed part of the zemíndári rights of the plaintiff, and his interest in such land was the right and possibility of making the land available to him for agricultural or other purposes, and his *status* is higher than that of an ordinary person maintaining an action with regard to what would otherwise be a public nuisance. So far as the plaintiff is concerned it is not merely a public nuisance, for he has suffered special injury.

For these reasons I concur in the order made by the learned Chief Justice.

Appeal dismissed.

MATRIMONIAL JURISDICTION.

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June 16.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

CULLEY (PLAINTIFF) *v.* CULLEY AND OTHERS (DEFENDANTS).*

Suit for dissolution of marriage—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute—Act IV of 1869 *(The Indian Divorce Act), ss.* 16, 17.

In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute. On the 2nd June, the case came before the Court, when an order

* Case for confirmation under s. 17 of the Indian Divorce Act (IV of 1869) of a decree *nisi* passed by the Judicial Commissioner of Oudh, dated 1st December, 1887.

(1) Weekly Notes, 1882, p. 192. (2) Weekly Notes, 1884, p. 103.
(3) I. L. R., 7 All., 626.

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was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one vakil, and he prayed the Court not to make the decree *nisi* absolute.

Held, by Edge, C. J., and Brodhurst, J., that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh.

Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect.

Held, by Mahmood, J., that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties.

Held, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. *Lewis v. Lewis* (1) referred to.

THE facts of this case are stated in the judgment of the Court.

Pandit *Sunder Lal*, for the petitioner, and the respondent.

EDGE, C. J.—In this case the petitioner Ernest Augustus Culley, brought this suit in the Court of the Judicial Commissioner of Oudh against his wife Elizabeth Anne Culley, who was the respondent, and two men as co-respondents. The petitioner, on the 1st December, 1887, obtained from the Judicial Commissioner a decree *nisi* and a decree for Rs. 100 damages against one of the co-respondents. The record was forwarded to this Court, this being the Court which has jurisdiction to make the decree absolute. The second of June of this year was the date fixed for the hearing of the application to make the decree absolute, that date being more than six months from the date of the decree *nisi*. The petitioner and the respondent forwarded through the Registrar of the Court of the Judicial Commissioner to this Court a joint petition in which they expressed their intention of living together again as man and wife and asked this Court not to make the decree absolute. The case came on before us on 2nd June, when we passed an order that the case should stand over for fourteen days to enable the petitioner

(1) 30, L. J. P., and M. 199.

to appear in person or by pleader. A telegram had been received which purports to come from the petitioner which stated that he intended to appear by a pleader out of respect to the Court. This morning, on the case being called on, Pandit *Sunder Lal* appeared for the petitioner and for the respondent, and on their behalf asked us not to make the decree *nisi* absolute. I would have had no difficulty as to the course to be pursued if it had not been for a doubt entertained by one of my brothers on the Bench. In my opinion, we should deal with this as with all other cases between private litigants, and this Court should not go out of its way and uninvited pass a decree without any motion being made to this Court. In fact, here the two parties who are the persons most interested in the matter, namely, the husband and wife, ask us, by holding our hand, not to dissolve the marriage which they are willing should continue. I cannot understand why they should be in a worse position by appearing before us with such a request than they would have been if they had gone on and cohabited after the passing of the decree *nisi* and brought that fact to the notice of the Court. The decree *nisi* does not dissolve the marriage till the decree has been made absolute, and, indeed, not until the time has elapsed for an appeal to the Privy Council, or, in the case of an appeal, until it has been decided, and until then the parties continue to be for all purposes man and wife. For instance, if the petitioner or respondent in this case, before the marriage was actually dissolved, should marry another person, he or she would be liable to be convicted of bigamy. If they came together after the decree *nisi* and cohabited before the marriage was absolutely dissolved, the petitioner, by cohabiting with the respondent, would, in my opinion, condone the adultery which was the basis of the decree *nisi*. It has been suggested that it is our duty to go on and consider the case on the merits, that is, on the evidence on the record of the Court below, and if satisfied with that evidence, to make the decree *nisi* absolute. That is, that although the wife has repented, and although the husband is willing to condone the adulterous acts of his wife and to take her back to live with him, we, as a Court of Justice, are bound, contrary to the wishes of the parties, to pass a decree dissolving the marriage between the parties, who are willing that the marriage state should continue. Reference has been

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made to capital cases in which the Court has to consider even in the absence of the parties whether the capital conviction should be confirmed and the capital sentence carried out. That provision as to the confirming by the Court of capital convictions is one which has been made by statute for the protection of the subject as against the Crown. I cannot see how the duties of the Court in criminal cases can throw any light on the duties of the Court in civil actions "*inter partes.*" References have been made to the Ajmere Act with which I am not familiar. I understand from what has passed here that it is an Act which enables the judicial authorities in Ajmere to invoke the assistance of this Court on questions of law which may arise before it. Similar powers are given to the Judges of Small Cause Courts. In the Ajmere Act it is expressly provided that the parties need not appear. I assume the person who framed the Act thought there was a necessity for that provision. Even if these words were in the Act or not, I fail to see how the duties of the Court under the Ajmere Act references, Small Cause Court Act references, and references under the Stamp Act can apply. The object of those references is that this Court, as the highest judicial authority in these Provinces, should, when called on, assist those holding judicial offices in Ajmere or these Provinces by expressing the opinion of this Court when a difficulty arises. In looking at the Divorce Act, I find that by s. 16, in a case in which a High Court has itself passed a decree *nisi*, it provides that the High Court shall fix a time after the expiry of which the decree absolute may be made, and it is expressly provided that, if the petitioner does not apply within a reasonable time to make the decree absolute, the High Court may dismiss his suit. It would certainly be complimentary to the Courts of the District Judges, and hardly so to the High Court, to hold that in a case of a decree *nisi* having been passed by the High Court, the petitioner would have to make an application to make his decree absolute, whilst if he had gone to the District Court and got a decree *nisi*, he need take no further trouble, as the High Court, if merits appeared on the record, would be bound to make his decree absolute. I have no doubt but that we ought to accede to this application, and that it is an application which in the interests of justice and morals we should accede to. Suppose we make the decree absolute, what would be the effect

after the time had expired for presenting an appeal to the Privy Council? The parties having ceased to be man and wife could go next day and be re-married. In the meantime by passing a decree absolute here, we would be keeping these parties in suspense, and effect in the end no possible object, except that for a short time these persons, who wish to continue as man and wife, would cease to be man and wife. In my opinion, the only order we should pass is that we do not make absolute the decree of the 1st December, 1887.

BRODHURST, J.—I entirely concur.

MAHMOOD, J.—As the learned Chief Justice has referred in his judgment to certain difficulties which I suggested in the course of the argument of the learned Pandit, who appears on behalf of both the petitioner and the respondent, I must confess that, without concurring in all that has fallen from his lordship, as to the nature of a decree *nisi* in a divorce case and the rules applicable thereto, I am willing to adopt the conclusion at which he has arrived as to the order to be passed in this case. I am glad to be able to concur in that order, as it seems to me to be consistent with the general principles upon which the law of marriage should proceed. But since it was owing to my doubts that the learned Pandit had to be heard in support of the application of the 28th May, 1888, whereby the petitioner Ernest Augustus Culley and his wife Elizabeth Anne Culley, respondent, jointly pray that the decree *nisi* of the 1st December, 1887, be not confirmed, I am anxious to explain the difficulties of law which I have felt in the case, though I have out of deference to the learned Chief Justice and my brother Brodhurst concurred in the order which they have made.

This case is governed by the Indian Divorce Act (IV of 1869), and s. 7 of that enactment expressly lays down that so far as possible the 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." This being so, the principles of the English law of marriage and divorce cannot be lost sight of in such cases, and so far as I know those princi-

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ples, I have no hesitation in saying that, because that law does not recognise marriage as a simple civil contract, as some other systems take it to be, therefore proceedings in the Divorce Court cannot be regarded as an ordinary civil litigation wherein private rights only are concerned, and wherein it rests with the parties to deal with their rights as they like by mutual consent or otherwise. For instance, a litigation such as this which aimed at dissolution of a valid marriage is not dependent for its results on the wishes of either the husband or the wife, nor can a decree for dissolution of marriage be passed even if the co-respondent agrees with the husband and the wife that such should be the case. The notions of the English Ecclesiastical law are the foundation of this rule, and not only has that rule been adhered to by the Court in England ever since dissolution of marriage (that is, divorce *a vinculo*) was made lawful in that country, but express provisions for the intervention of third parties have been made by the English legislature, and the principles of that legislation have in the main been imported into this country by the Indian Divorce Act which governs this case. In England, not only any person may intervene in a divorce suit, but the Queen's Proctor, an especial officer appointed for the purpose, has especial duties assigned to him for intervention in such litigation in order to pervent the parties from securing by mutual consent or otherwise such results as would be opposed to the English law of marriage and divorce. That the same principles are recognised by the Indian Divorce Act seems to me to be apparent from the provisions of s. 12 and the second paragraph of s. 16 of the same enactment, and the rest of the Act is consistent with this interpretation.

Now it being an undoubted proposition of the English law of divorce and of the Indian Divorce Act that the mutual consent of the parties to a litigation which aims at obtaining a decree *nisi* cannot by dint of such mutual agreement or compromise secure such a decree, it occurred to me as a difficult question, whether in a converse case the mutual consent of the parties can undo the effects of a decree *nisi* which one of them has already obtained. In other words, I entertain serious doubts whether such a decree can be nullified by consent of the parties to such a decree.

To this question no express answer is furnished by the Indian Divorce Act. S. 16 of the enactment provides that every decree for dissolution of marriage shall be in the first instance a decree *nisi*, not to be made absolute till after the expiration of six months or more, within which period any person may intervene in the cause, and the section goes on to provide *inter alia* that "whenever a decree *nisi* has been made, and the petitioner fails within a reasonable time to move to have such a decree made absolute, the High Court may dismiss the suit." This last provision no doubt supports the view that a petitioner who has obtained a decree *nisi* might by inaction prevent that decree from being made absolute, the result of which might be the dismissal of the suit. But it must in the first place be remembered that the provision of the law in this behalf is not imperative, and in the next place that it is easy to conceive cases in which the Court would in the exercise of its discretion be justified in making the decree absolute, notwithstanding the absence of any motion on behalf of the petitioner to obtain that result. There are, I believe, English cases to support this view, but I consider it unnecessary to pursue the subject further, because under the Indian Divorce Act, the provision which I have quoted is limited to decrees *nisi* passed by the High Court.

That that provision is not applicable to decrees *nisi* passed by District Judges is clear from the terms of s. 17 of the Act, in which no such provision as that I have quoted finds place, and the distinction is all the more noticeable because the last part of the section contains provisions for intervention of third persons, "during the progress of the suit in the Court of the District Judge," whilst the provisions of the second paragraph of s. 16, applicable to decrees *nisi* passed by the High Court, prescribe the period of intervention to be the interval between the date of the decree *nisi* and the date of its being made absolute. What the exact reasons for this distinction may be it is unnecessary for me to contemplate, for I must take the law as it stands, and interpreting it by well recognised rules of construing statutes, I cannot but hold that the effect of the enactment is, that whilst in the case of decrees *nisi* passed by a High Court the power of intervention may be exercised after passing of the decree *nisi*, and the suit for dissolution of marriage itself possibly defeated by reason of the successful petitioner not moving to

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have the decree made absolute, no such provisions exist in respect of decrees *nisi* passed by District Judge, and that in lieu thereof power is given by the last part of s. 17 to intervene "during the progress of the suit in the Court of the District Judge;" and that that power does not exist after the District Judge has passed a decree *nisi* for dissolution of marriage. I have therefore no doubt that our Indian Divorce Act confers no power of intervention in respect of decrees *nisi* passed by a District Judge *after* such decree has been passed; nor can such decree *nisi* be set aside or the suit dismissed merely because the holder of the decree does not move this Court to have the decree made absolute.

I have mentioned this in order to show why during the course of the argument of the learned Pandit I was unable to accept the contention that any provisions of s. 16 of the Act relating to decrees *nisi* passed by High Courts, are to be imported into s. 17 which relates to decrees *nisi* passed by District Judges; for if I could accept the contention, there is no reason why the provisions of s. 17 should not be imported into s. 16, and thus the two sections, being mixed up into one, present inconsistency of statutory provisions in one and the same statute. I am inclined to think that cases which come up to this Court under s. 17 of the Act for confirmation of decrees *nisi* are in the nature of references, which must be disposed of whether the parties appear before the Court or not, for whatever order the High Court may make in the case, there is no such provision as that contained in s. 16, enabling the Court to dismiss the petitioner's suit merely upon the ground that the party interested fails to appear when the case comes on for hearing for confirmation of a decree *nisi* passed by a District Judge. The distinction which exists in this respect lends support to this interpretation, and I cannot help holding that we should have been bound to dispose of the case even if the petitioner had never appeared before us. This view is consistent with the principle upon which many other provisions of the Indian statute-book, to some of which the learned Chief Justice has referred, proceed in respect of references made to the High Court, such references being often from remote districts.

In this case, however, no such question directly arises, because two of the parties to the District Judge's decree *nisi* have appeared,

though somewhat anomalously by one and the same pleader, and I have referred to the possible effects of the absence of the parties only because it was suggested in the course of the argument that it was entirely within the choice of the parties whether or not the decree *nisi* should be made absolute by our confirming it. I have already said enough to show that proceedings in a Divorce Court are *quasi*-criminal, that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties; and the distinction is fully recognised by the English law.—Browne on Divorce and Matrimonial Causes, 3rd *Ed.* p. 218.

Is there then any power in the Court to set aside a decree *nisi* by any procedure other than that of intervention by a third party? The English Divorce Court [*vide Stoate* v. *Stoate*, (1)] and the Indian Court [*vide Willis* v. *Willis*, (2)] are agreed that the right of intervention is limited to persons other than the parties to the decree, and I have already shown that under the Indian Divorce Act such right of intervention is limited to the period of "the progress of the suit in the Court of the District Judge," that is, before the decree *nisi* is passed, and does not exist thereafter. Is there then any other power in the parties to prevent a District Judge's decree *nisi* from being confirmed by this Court under s. 17 of the Divorce Act, either by compromise or otherwise?

This is the direct question in the case, nad it is one which is far from being free from doubt and difficulty. Here the husband and wife in their joint application to this Court state "that your petitioners subsequent to the passing of the decree *nisi* in the above suit have come to terms, and have resolved that on the petitioner leaving the military service two years hence or thereabouts they will live together again as man and wife, and have arranged that meantime the respondent shall go to England, there to remain with the petitioner's father and mother," and it is upon this ground that they pray that the District Judge's decree *nisi* of the 1st December, 1887, be not confirmed.

It will be observed that in this statement there is no allegation that the parties had already resumed co-habitation, or that there

(1) 30 L. J. P. and M. 173. (2) 4 B. L. R., O. C. 52.

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had been any kind of condonation by the petitioner who had obtained the decree *nisi* from the District Judge on the 1st December, 1887. The recital in the petition amounts to nothing more than the expression of a deliberate intention on the part of the husband and wife to co-habit after the lapse of two years if certain conditions were fulfilled.

Is such an application entertainable under the Indian Divorce Act, as a reason for not confirming the District Judge's decree *nisi* of the 1st December, 1887? Pandit *Sunder Lal* has argued that under s. 45 of the Act all the rules of the Code of Civil Procedure are rendered applicable to proceedings of this nature, and that the provisions of s. 375 of that Code entitle the parties to enter into any compromise as to the final adjudication of this Court in respect of the District Judge's decree *nisi* of the 1st December, 1887.

I am of opinion that this contention is entirely unsound, because in the first place the terms of s. 45 of the Indian Divorce Act itself render the application of the Civil Procedure Code subject to the provisions of the Divorce Act, and in the next place the very nature of the provisions of s. 375 of the Code militates against the very nature of proceedings in the Divorce Court as I have already shown. That section therefore has no application to this case, for it furnishes no guide in respect of matrimonial causes. We have, therefore, to fall back upon the provisions of the Indian Divorce Act itself in deciding whether the application now made can be granted. But as I have already said that Act contains no express provisions upon the subject, beyond the general provisions of s. 7 of that enactment requiring us to act on principles of the practice of the English Divorce Court.

This being so, I think the case of *Lewis* v. *Lewis* (1) furnishes a state of things closely similar to the facts of this case, and I may quote from the judgment of Sir C. Cresswell in that case to indicate its application to this case. The learned Judge Ordinary, after stating that the petitioner being entitled to a dissolution of her marriage, a decree *nisi* was pronounced, and when the motion to make it absolute came on, the husband interposed and stated that he and his wife had *made up their differences* and had *renewed matri-*

(1) 30 L. J., P. and M., 199.

monial cohabitation, and therefore applied to have the petition dismissed, and it appeared from an affidavit of the clerk of the petitioner's attorney that she did not desire to take any further proceedings in the matter, went on to say :—"I doubt much whether after a decree *nisi* has been pronounced I can dismiss the petition at the instance of either of the parties to the suit; but if the petitioner either by her attorney or in person applies to the Court, I will at the desire of both parties make an order that no further proceedings be taken in the cause. All proceedings in the case will then be stayed. I doubt whether the Court has power to dismiss a petition for dissolution of marriage after a decree *nisi* has been pronounced, except in the manner pointed out by the 23 and 24 Vic., C. 144, s. 7, namely, at the instance of the Queen's Proctor or of a third person."

This case is to my mind an authority for the proposition that even cohabitation of the husband and wife after one of them has obtained a decree *nisi* for dissolution of marriage will not *ipso facto* nullify such decree, and that, even where the husband and wife (that is, petitioner and respondent) agree, such decree cannot be set aside, and that all that their mutual agreement can achieve is that further proceedings in the cause would be stayed.

The English law of marriage and divorce, as reproduced in the Indian Divorce Act, has placed the matrimonial contract upon a footing so vastly different to that upon which ordinary civil contracts are placed, that it would be wrong to say that only private rights of the parties concerned in a matrimonial dispute are involved in the litigation which arises out of those disputes, or that the law as it stands leaves it open to the parties to settle such disputes by mutual agreement or compromise. The legislature itself has recognised the distinctions in passing the Indian Divorce Act, and it was because of those distinctions that I felt the difficulties which I have mentioned and which rendered it necessary for Pandit *Sunder Lal* to occupy the time of the Court in supporting the joint application of the husband and wife to prevent the decree *nisi* being confirmed by us.

But though these difficulties have occurred to me, the liberal interpretation which the learned Chief Justice has put upon the

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Indian Divorce Act is so consistent with the general principles upon which the matrimonial law in civilized countries should proceed that I have willingly adopted the order which he has made. That order, as I understand it, is that we should desist from confirming the decree *nisi* and prevent it from being made absolute under the peculiar circumstances of this case. I do not understand the order to set aside the decree *nisi*; and I may respectfully add that if I had not so understood it I should probably have been unable to concur in it. As the order has been made its practical effect is virtually the same as that indicated by Sir C. Cresswell in *Lewis* v. *Lewis* (1), that is to say, staying further proceedings relative to the confirmation of the District Judge's decree *nisi* of the 1st December, 1887, by our not confirming it.

NOTE—As to whether or not an application for a decree absolute according to the practice in the English Divorce Court, is a step in the cause, see Ousey and Ousey *v.* Atkinson, L. R. 1 P. Div. 56 and Brown, on the Law and Practice in Divorce and Matrimonial Causes, 4th Ed., p. 325.

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June 21.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

KUDHAI (DEFENDANT) *v.* SHEO DAYAL AND OTHERS (PLAINTIFFS).*

Execution of decree—Joint decree—Decree for possession of immoveable property—Purchase by judgment-debtor of rights of some of the joint decree-holders—Decree extinguished pro tanto—Validity of sale and extent of rights purchased to be determined by Court executing the decree—Civil Procedure Code, s. 244 (c).

Where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee, and is not applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property.

Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within the purview of clause

* Second Appeal No. 961 of 1887 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 19th March, 1887, reversing a decree of Maulvi Jaffar Husain, Munsif of Meerut, dated the 11th January, 1887.

(1) 30 L. J., P. and M. 199.