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AND LUBY,
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must be read as a whole and if the Court was competent to try the suit, it was also competent to record the compromise. The particular clause of the compromise which is said to be objectionable runs thus :—

"That some of the plots within the aforesaid share which has been entered as riyati of some of the defendants as shown in the schedule attached to the petition, shall remain in their possession and that they, the defendants, shall retain possession over them as riyats on payment of rent."

It is said that this clause created a new tenancy and so the compromise required registration under section 17 of the Registration Act. The argument again presupposes that the compromise decree so far as this clause of the petition of compromise is concerned was without jurisdiction, but even if we assume this we could not accept the contention that it required registration. We find that the compromise was arrived at before the amendment of the Registration Act in the year 1929 and therefore under section 17, clause (vi), it was not necessary to register the decree passed on the basis of the compromise. It is true that section 17(2)(vi) must be read subject to clause (1)(d), but in our opinion the disputed clauses of the compromise did not amount to a lease or an agreement to lease but to a mere recognition of an existing right and therefore did not require registration. We think therefore that the judgment and the decree of the learned Judicial Commissioner should be set aside and as none of the other issues were pressed in this Court, we direct that the decree of the trial court is to be restored. The appellant will get his costs in all the courts.

Appeal allowed.

FULL BENCH.

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Before Courtney Terrell, C.J., Dharle and Agarwala, JJ.

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v.

GALLIMORE.*

October, 17.
November,
11.

Divorce Act, 1869 (Act IV of 1869), sections 7, 16 and 17—decree for dissolution passed by District Judge, if subject

* Matrimonial Reference no. 6 of 1932, made by F. G. Rowland, Esq., I.C.S., District Judge, Muzaffarpur, by his letter no. 95/M., dated the 19th November, 1932.

to confirmation by High Court—High Court, whether can act on reference by District Judge—petition by petitioner, if necessary.

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The petitioner (husband) petitioned the District Judge for dissolution of marriage under section 17 of the Indian Divorce Act and the Judge pronounced a decree for dissolution subject to confirmation by the High Court and forwarded the papers to the High Court. The petitioner took no steps to move the High Court to confirm the decree.

Held, that no application by the petitioner was necessary for the exercise of the jurisdiction of confirmation.

The procedure provided by section 17 of the Act is a new procedure which has no parallel in the English law and is specific in itself and contains no saving clause of any kind.

Forshaw v. Forshaw(1), *Culley v. Culley*(2) and *Pushong v. Pushong*(3), dissented from.

Guda William v. Guda Karunamma(4) and *Dare v. Dare*(5), followed.

The jurisdiction of the High Court to confirm the decree in a divorce action arises immediately upon a reference by the District Court and to complete the jurisdiction it is not necessary that there should be any personal appearance of the petitioner before the High Court.

Reference under section 17 of the Indian Divorce Act, 1869.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

The case was in the first instance heard by Terrell, C.J. and Varma, J. who referred it to a larger Bench.

K. K. Banerjee, for the reference: Sections 16

(1) (1909) I. L. R. 31 All. 511, F. B.

(2) (1868) I. L. R. 10 All. 559.

(3) (1934) A. I. R. (All.) 624, F. B.

(4) (1915) 29 Ind. Cas. 178, F. B.

(5) (1910) I. L. R. 34 Mad. 339, F. B.

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and 17 of the Divorce Act are independent of each other. The legislature has advisedly made a distinction between the procedure to be followed by the High Court in cases governed by section 16 and that of the District Court in cases under section 17. The provision of section 16 is a copy of the English rules of procedure; but they can be applied only to cases where a decree *nisi* has been passed under section 16, and they cannot be applicable to cases where a decree passed by the District Court comes up for *confirmation* by the High Court. The expressions "decree nisi" and "decree absolute" (which are borrowed from the English law) are used in section 16 only, and they have been intentionally omitted from section 17.

There is an express provision in section 16 for an application for making the decree absolute, but no such provision finds place in section 17. Again the High Court is given the power to dismiss a suit under section 16 if no such application is made, but there is no such power under section 17. Section 16 contemplates a step in the cause between the parties whereas section 17 contemplates only a ministerial act to be performed by the Court itself. By virtue of section 7 of the Act, English rules of procedure can be applied to cases in India so long as they are not opposed to any direct or express provision made in the Act. As a definite procedure is laid down in section 17 under which an application is not necessary, the English rules of procedure cannot be brought in. In *Culley v. Culley*(1) Edge, C.J. and Brodhurst, J., lost sight of the distinction between the languages of sections 16 and 17. They used the expressions "decree nisi" and "decree absolute"—expressions which do not find place in section 17—rather loosely. That is responsible for the wrong application of the English law to the case with which they were dealing—a case to which the provisions of section 17 ought to have been applied. The case of *Forshaw v.*

(1) (1888) I. L. R. 10 All. 559.

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Forshaw(¹) merely follows *Culley v. Culley*(²). In none of these cases, however, was it held that an application by the innocent party alone was necessary. It is only in *Pushong v. Pushong*(³) that such a proposition is laid down. The two earlier decisions, therefore, do not affect me inasmuch as in my case there is an application by the guilty party.

In the decisions of the Madras High Court—*Dare v. Dare*(⁴) and *Guda William v. Guda Karunamma*(⁵), which were not considered in the case of *Pushong v. Pushong*(³)—the learned Judges have pointed out the difference between sections 16 and 17. In *Guda William v. Guda Karunamma*(⁵) the decree was confirmed upon a reference made by the Head Clerk, there being no petition by the parties who were absent.

[Reference was also made to *Ousey v. Ousey*(⁶), *Lewis v. Lewis*(⁷) and *Rutter v. Rutter*(⁸).]

No one against the reference.

S.A.K.

Cur. adv. vult.

COURTNEY TERRELL, C.J.—This case comes before the Court under section 17 of the Indian Divorce Act. Charles Gallimore, the petitioner husband, petitioned for a dissolution of marriage from his wife Alice Gallimore before the District Judge and cited a certain person as co-respondent. The Judge heard the case upon the evidence and came to the conclusion—and we see no reason to differ from him—that the respondent had been guilty of adultery with the co-respondent. He pronounced a decree for dissolution, announcing that the decree

(1) (1909) I. L. R. 31 All. 511, F. B.

(2) (1888) I. L. R. 10 All. 559.

(3) (1934) A. I. R. (All.) 624, F. B.

(4) (1910) I. L. R. 34 Mad. 339, F. B.

(5) (1915) 29 Ind. Cas. 178, F. B.

(6) (1876) 1 P. Div. 56.

(7) (1892) P. Div. 212.

(8) (1921) P. Div. 421.

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would be subject to confirmation by the High Court. The papers were sent by the District Judge to the High Court in the ordinary course of affairs. The petitioner Charles Gallimore, however, has taken no steps to move the Court to confirm the decree which was granted to him. The decree was dated the 2nd of November, 1932, and we are now in the year 1935. The substantial point with which we have to deal, having satisfied ourselves that the procedure taken by the District Judge was a correct procedure and that his findings are not vitiated by any lack of the proper precautions to be taken in such circumstances, is as to whether in the absence of a specific application by the petitioner we are entitled to confirm the decree. The jurisdiction of the courts in divorce is a creation of the Indian Divorce Act which succeeded certain prior enactments. Section 7 of the Act states—

“ Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and give relief.”

Then follows a proviso with which we are not concerned. Two courses of procedure are open alternatively to a petitioner: he may either come to the High Court direct under section 16 of the Act and in that case the Court will in the first instance pronounce a decree *nisi*—that term having been derived from the English practice—which is not to be made absolute until after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs. The concluding paragraph of the section is as follows:

“ Whenever a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.”

The alternative procedure is provided by section 17, according to which the petitioner may proceed before the District Judge. There the words “ decree

nisi" are not used at all. The section opens with the words

"Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court."

Then the cases for confirmation are to be heard by not less than three Judges in the case of a High Court constituted as this High Court in fact is. The High Court has the power, if it is necessary, to direct further inquiry and further taking of evidence and when the result of such inquiry and additional evidence are certified to the High Court,

"the High Court shall thereupon make an order confirming the decree for dissolution of marriage",

or such other order as to the Court seems fit. Then there is a proviso that no decree shall be confirmed under this section until after the expiration of not less than six months from the pronouncing thereof. Certain doubts have apparently arisen as to whether in the event of such a reference by the District Judge himself of his order for confirmation, or in the case of an application by the respondent—but in either case without the application of the petitioner himself—the Court has power to confirm the decree. It cannot be denied that section 17 makes no such reservation in favour of the rights of the petitioner and there is nothing in the section itself which would suggest that the active motion of the petitioner is necessary before the Court can exercise its jurisdiction to confirm the decree. The whole idea that the active motion of the petitioner is necessary seems to have sprung from the English practice and from that part of section 7 which directs the Court to apply the principles and rules of the English Divorce Court; but such a conclusion cannot be arrived at without ignoring the opening words of that section

"Subject to the provisions contained in this Act".

The procedure instituted by section 17 of the Act is a new procedure which has no parallel in the English law and is specific in itself and contains no saving clause of any kind applying any principles existing

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in any other country. The matter has been the subject of divergent opinions. On the one hand, there is a series of decisions of the High Court of Allahabad; on the other hand, there is a corresponding series of decisions in the opposite direction by the High Court of Madras, and in my opinion the view of the High Court of Madras is distinctly to be preferred, and that Court has decided that no application by the petitioner is necessary for the exercise of the jurisdiction of confirmation. It is not necessary to go through all the Allahabad decisions. I will refer, however, to two only. The earlier case is a Full Bench decision of that High Court: *Forshaw v. Forshaw*(1). In that case the petitioner did not appear and the learned Judges seem to have feared that it was possible that the differences between the petitioner and the respondent might have been composed. They refer to an earlier case of *Culley v. Culley*(2) which they followed and decided that it was necessary to have a motion before the Court before the jurisdiction could be exercised. Later on, the petition for confirmation was in fact made by the husband and the Court confirmed the decree. But the case was not argued at any length, nor does anyone appear to have pointed out to the learned Judges, first of all, the nature of section 7 of the Act applying the principles of the English law only to those cases in respect of which specific provision was not made by the Act, and, secondly, the attention of the learned Judges does not seem to have been drawn to the difference between sections 16 and 17 of the Act. There was a subsequent case before the Full Bench of the High Court, which is *Pushong v. Pushong*(3), which came before Young, Thom and Bennett, JJ. Once again the nature of section 7 and the difference between sections 16 and 17 do not seem to have been presented to the Court nor indeed was the decision of

(1) (1909) I. L. R. 31 All. 511, F. B.

(2) (1888) I. L. R. 10 All. 559.

(3) (1934) A. I. R. (All.) 624, F. B.

the High Court of Madras, to which I shall refer in a moment, brought to the attention of the Judges. They appear to have taken the matter as beyond dispute and as being settled by a matter of practice, and simply stated that it was contrary to principle that a marriage should be dissolved on the motion of the guilty party. They do not seem to have considered the question as to whether or not even if there should have been no motion before the Court, the Court itself had no jurisdiction to deal with the decree made by the District Judge when reported by the District Judge to them. With these decisions of the Allahabad High Court I respectfully disagree, and I turn now to the decision of the Full Bench of the Madras High Court consisting of Sir John Wallis, C.J. and Ayling and Sadasiva Aiyar, JJ. In that case—*Guda William v. Guda Karunamma*⁽¹⁾—the Chief Justice and Ayling, J. held that the jurisdiction of the High Court to confirm the decree in a divorce arises immediately upon a reference by the District Court and to complete the jurisdiction it is not necessary that there should be any personal appearance of the petitioner before the High Court. Sadasiva Aiyar, J. appears to have differed from that point of view and seems to have treated the decree of the district court as a "decree nisi", requiring a subsequent decree absolute. There is no report of the argument which took place, but the dissentient learned Judge's attention does not seem to have been called to the fact that the term 'decree nisi' is not used in section 17, whereas it is used in the case of section 16. Further, differing from the other learned Judges he seems to have the idea that some principle which is binding upon the Indian Courts imports the idea borrowed from England that the guilty party cannot himself petition. A petition is not necessary at all for the exercise of the jurisdiction; and if the law be, as Sir John Wallis says and I venture to agree, that the jurisdiction arises immediately upon a reference,

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then the mere fact that the guilty party may also have applied for confirmation of the decree does not destroy the jurisdiction which arises in any case. This decision follows an earlier Full Bench case of *Dare v. Dare*(1). In that earlier case the reasoning of the Allahabad High Court was expressly dissented from and the difference between sections 16 and 17 of the Act was discussed. It was pointed out that under section 17 it was inaccurate to speak of the decree of the District Judge as a decree *nisi*.

In the case before us there is no ground, having regard to the length of time which has taken place since the decree and the fact that a citation by advertisement in the newspapers was directed upon the petitioner, to believe that any reconciliation between the parties either has taken place or is likely to take place, and there is no ground for refusing the confirmation of the decree. The fact that the guilty wife has put in a petition for confirmation of the decree is, in my opinion, immaterial to the question of the exercise of our jurisdiction which, as Sir John Wallis says, arose immediately upon the reference by the District Judge.

I would, therefore, confirm the decree.

DHAVLE, J.—I agree.

AGARWALA, J.—I agree.

Decree confirmed.

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APPELLATE CIVIL.

October, 24.

Before Macpherson and Khaja Mohamad Noor, JJ.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

MAHARAJADHIRAJA KAMESHWAR SINGH
 BAHADUR.*

Ferries Act, 1885 (Act I B.C. of 1885), sections 6 and 17—Regulation for the management of ferries (1816)—Regulation XIX of 1816—Regulation for rescinding the Regulation

* Appeal from Original Decree no. 169 of 1931, from a decision of Babu Gopal Chandra De, Subordinate Judge of Purnea, dated the 7th September, 1931.

(1) (1910) I. L. R. 34 Mad. 339, F. B.