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 v.
 THE CROWN.

BHIDE J.

necessary to pass any further order in this respect. The interview with a legal adviser may, however, for obvious reasons, be allowed in the presence, but not within the hearing, of a police officer.

I accept this petition to the extent of directing that the prisoner Dhruvdev shall be allowed reasonable opportunities for interviews with his legal adviser in the manner stated above so long as he remains in custody.

N. F. E.

Revision accepted in part.

MATRIMONIAL REFERENCE.

Before Addison, Abdul Qadir and Currie JJ.

ALLA RAKHA (PLAINTIFF) Petitioner

versus

MST. BARKAT BIBI (DEFENDANT) Respondent.

Matrimonial Reference No. 1 of 1930.

Indian Divorce Act, IV of 1869, sections 11-14—Alleged adulterer—a necessary party—but not the parents of the respondent—Necessity of recording evidence and coming to decision on points set out in the sections.

Held, that the provisions of the Indian Divorce Act must be strictly complied with; under section 11 of the Act the petitioner must make the alleged adulterer a co-respondent to the petition unless excused by the Court on certain grounds, and the father and mother of the respondent cannot be made parties.

Held also, that a decree for dissolution of marriage cannot be made merely on admissions and without recording evidence.

Bai Kamku v. Shiva Toya (1), followed.

And the matters set out in sections 12, 13 and 14 of the Act must be enquired into and considered.

Case referred by Bhagat Jagan Nath, District Judge, Sialkot, for confirmation of the decree passed by him on 12th December 1929.

MUHAMMAD AKBAR KHAN, for Petitioner.

Nemo, for Respondent.

The order of the High Court was delivered by—

ADDISON J.—Allah Rakha, an Indian Christian of Sialkot District, presented a petition to the District Judge of Sialkot, praying that his marriage with respondent 1, *Mussammât* Barkat Bibi, should be dissolved on the ground that she had committed adultery. He also joined respondents 2 and 3, her father and mother, on the ground that they did not send his wife to live with him. No adulterer was named, but it was said that she was leading an immoral and unchaste life in her parents' house. The District Judge examined the parties. The petitioner stated that his wife lived with him for six months after which she went to live with her parents. Thereafter she did not return to him. He alleged that she was leading an unchaste life. Respondent 1, his wife, admitted the marriage. There is no doubt as to this, the certificate being on the record. She admitted that when she went to live with her parents she became unchaste and had given birth to an illegitimate child. She, however, alleged that her husband was also immoral, though she had no objection to the dissolution of the marriage. Thereupon the petitioner was again examined by the District Judge and made a statement to the effect that he also might be of immoral character as alleged by his wife. Without more ado the District Judge proceeded to grant the plaintiff a decree for dissolution of his marriage with respondent No. 1, subject to confirmation by this Court.

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The petitioner has now moved this Court for confirmation of the decree.

It is obvious that the whole of the proceedings must be set aside. The District Judge has tried the petition as if it were an ordinary suit and apparently without any knowledge that it is governed by a special Act, namely, the Indian Divorce Act, IV of 1869, the provisions of which must be strictly complied with. Under section 11, the petitioner shall make the alleged adulterer or adulterers a co-respondent or co-respondents to the petition unless he is excused from doing so by the Court on certain grounds. The petitioner was not excused by the Court and the petition was thus not in proper form to begin with. Further, the names of the father and mother of the respondent should not have been allowed to remain in the petition and should have been struck off. In a suit for divorce they could not be made parties.

By section 7 of the Act Courts in India are required to 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. One of these principles is that a decree for dissolution of marriage cannot be made merely on admissions and without recording evidence; see in this connection *Bai Kanku v. Shiva Toya* (1).

Again, under section 12 it is for the Court to satisfy itself, so far as it reasonably can, not only as to the facts alleged but also whether or not the petitioner has been in any manner accessory to, or coniving at, the adultery or has condoned the same, and shall also enquire into any counter-charge which may

be made against the petitioner. The Court has taken no action under this section apparently not being aware of its duty in this connection. The Court in fact has treated the proceedings as a civil suit which could be compromised.

There are other matters which the Court must inquire into. They are given in sections 13 and 14. For example, the Court must find that the petition is not presented or prosecuted in collusion with the respondents. Other conditions are contained in the proviso to section 14. Under this proviso the Court shall not be bound to pronounce a decree declaring the marriage to be dissolved if it finds that the petitioner has during the marriage been guilty of adultery or if it finds that the petitioner has been guilty of unreasonable delay in presenting his petition *et cetera*. In the present case there has been delay, as to the reasons for which the Court has come to no finding, while the second statement of the petitioner is capable of the interpretation that he also has been guilty of adultery though the words he used are not definite and may be capable of being explained away. In Rattigan's Law of Divorce (India) a number of English cases have been cited at page 94 in which the petitioner was refused a decree for dissolution of his marriage on the ground that he himself had on a single occasion committed an act of adultery. This work is recommended to the District Judge for his guidance.

For the reasons given it will be apparent that there has been no trial of this case so far and that all the proceedings have been misconceived. We accordingly set aside the order of the District Judge dated the 12th of December 1929 and return the

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petition to him to be properly tried in accordance with the provisions of the Indian Divorce Act, some of which have been mentioned above. This order is *ex-parte*, the respondent not being present in this Court. There will be no order as to costs.

A. N. C.

Decree set aside.

Case remanded to District Judge.

MISCELLANEOUS CRIMINAL

Before Broadway and Bhide JJ.

DES RAJ—Petitioner

versus

THE CROWN—Respondent.

Criminal Miscellaneous No. 134 of 1930.

Government of India Act, section 72—Ordinance No. III of 1930—legality of—High Court—jurisdiction of—to determine whether intra vires—Emergency—Governor-General's declaration of existence of—whether final—Power of Governor-General to deprive accused of ordinary trial by Sessions Judge and of the right of appeal to the High Court.

The Lahore Conspiracy Case Ordinance was made and promulgated by the Governor-General on the 1st May 1930 under powers conferred on him by section 72 of the Government of India Act, as the result of which the petitioner and his co-accused, against whom committal proceedings before a Magistrate of the 1st class were pending, were placed before a Tribunal, constituted under the said Ordinance, for trial. The petitioner, in an application purporting to be made under sections 491 and 561-A of the Criminal Procedure Code, moved the High Court, to hold that the Ordinance was not covered by the terms of section 72 of the Government of India Act and "that the custody, in which the petitioner is, is unlawful, as also are the proceedings now being taken by the Tribunal which is an illegal body."

The following questions arose:—

- (1) Has this Court jurisdiction to examine the Ordinance in order to decide whether it was lawfully made and promulgated?

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 July 16.