

whatever sum is decreed as maintenance charged upon it. I would, therefore, accept appeal No. 140 of 1928 and, setting aside the order of the District Judge, would dismiss the suit with costs throughout to the appellant defendant No. 1. I would dismiss appeal No. 626 of 1928 brought by *Mussammât Malan*, the plaintiff, with costs.

COLDSTREAM J.—I CONCUR.

*N. F. E.*

COLDSTREAM J.

*Appeal No. 140, accepted.*

### MATRIMONIAL REFERENCE.

*Before Addison, Johnstone and Abdul Qadir JJ.*

BINGE—Petitioner

*versus*

BINGE AND ANOTHER—Respondents.

Matrimonial Reference No. 19 of 1927.

*Indian Divorce Act, IV of 1869, sections 16, 17—Application for confirmation of decree of District Judge—withdrawn by petitioner—Court thereon ordering stay of proceedings—whether subsequent application for confirmation can be entertained.*

In 1928 the petitioner applied to the High Court for confirmation of the decree passed by the District Judge in 1927 for dissolution of marriage; but at the hearing in October 1928 the petitioner put in an application to the effect that his wife had agreed to come back to him, and he accordingly prayed that the case should be consigned to the record room. The order passed was that as the parties had settled their differences and counsel for petitioner withdrew the application for confirmation, all further proceedings in the suit "were stayed." On the 12th March 1931 the petitioner applied again to the High Court to confirm the decree of the District Judge on the ground that his wife had not come back to him and that the proceedings which had been stayed should be revived and the decree of the District Judge confirmed.

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*Held*, that under section 17 of the Divorce Act the High Court has full power to confirm or not to confirm the decree of the District Judge; and that the order of the High Court passed in October 1928, though in terms "staying" the proceedings, was in effect an order dismissing the suit.

*Lewis v. Lewis* (1), *Ousey v. Ousey* (2), *Troward v. Troward* (3), *Lewis v. Lewis* (4), Rattigan's Law of Divorce, page 126, and Annual Practice of the English Courts, 1931, page 2014, referred to.

*Culley v. Culley* (5), explained.

*And*, that the subsequent application for confirmation must therefore fail.

*Application under section 17 of Act IV of 1869: praying that the proceedings in the abovenoted matrimonial reference, which had been stayed on 19th October 1928, should be revived, and the decree of Mr. J. K. M. Tapp, District Judge, Lahore, dated the 15th October 1927, be confirmed.*

NORMAN EDMUNDS, for Petitioner.

*Nemo*, for Respondents.

ADDISON J.

ADDISON J.—The petitioner sued in the Court of the District Judge, Lahore, for the dissolution of his marriage with his wife, the respondent, on the ground of his wife's adultery and was granted on the 15th October 1927 a decree for the dissolution of the marriage under section 17 of the Indian Divorce Act subject to confirmation by the High Court. On the 24th June 1928 the petitioner applied to this Court for confirmation of the District Judge's decree. The case came on for hearing on the 19th October 1928. On that date the petitioner put in an application to

(1) 1892 Probate D. 212.

(3) 32 W. R. 864.

(2) (1875) 1 Probate D. 56.

(4) (1861) 4 L. T. 772.

(5) (1898) I. L. R. 10 All. 559.

the effect that his wife had agreed to come back to him and that he was willing to take her back and he accordingly prayed that the case should be consigned to the record room. The order passed was that as the parties had settled their differences and counsel for the petitioner withdrew the application for confirmation of the decree of the District Judge all further proceedings in the suit were stayed.

The petitioner has now again by application, dated the 12th March 1931, applied to this Court to confirm the decree of the District Judge, dated the 15th October 1927, on the ground that his wife had not come back to him and that the proceedings which had been stayed should be revived and the decree of the District Judge confirmed.

It seems to me that this petition must be dismissed. I was a member of the Bench which passed the order, dated the 19th October 1928, to the effect that the petitioner withdrew his application for confirmation of the decree of the District Judge and that all further proceedings in the suit were, therefore, stayed. It was meant that this order should finally dispose of the suit and it was not intended that the suit should be again allowed to be revived. The suit was not dismissed because of a note at page 126 of Rattigan's Law of Divorce to the effect that the High Court could not set aside a decree *nisi* passed by a District Judge but would, in cases where there had been a reconciliation between the parties after the decree *nisi*, make an order staying all proceedings in the cause, this being the practice of the English Divorce Courts. The reference given is *Culley v. Culley* (1). I find, however, that this proposition was not laid down in *Culley v. Culley* (1). Two Judges

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held that where the parties had come together after the decree of the District Judge the Court should accede to the prayer of the petitioner and should not make absolute the decree passed by the subordinate Court. Such an order obviously amounted to a dismissal of the suit. It was only Mahmood J. who stated that the English practice as laid down in *Lewis v. Lewis* (1), was to stay proceedings in such cases as it was doubted whether a decree *nisi* once passed could be set aside and the petition dismissed. This, however, is not the present rule in English Law. Section 7 of the Indian Divorce Act is to the effect that, subject to the provisions of the Act, Courts in India shall act and give relief on principles and rules which in the opinion of the Indian Courts are, as nearly as may be, conformable to the principles and rules on which a Court for Divorce and Matrimonial Causes in England acts and gives relief. In the Annual Practice of the English Courts, 1931, at page 2014, it is laid down that where a petitioner has obtained a decree *nisi* she must have it made absolute or the petition will be dismissed in spite of the decree *nisi* having been obtained. The reference given is *Lewis v. Lewis* (2). In that case the petitioner did not apply for more than a year to have the decree made absolute and it was held that she could not be allowed to do this and that she must apply within a week or the original petition would be dismissed. Further in *Ousey v. Ousey* (3) it was held that an application for a decree absolute was a material step in the cause and if the petitioner failed to take it within a reasonable time he could be called upon to show cause why the decree *nisi* should not be

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(1) 30 L. J. (P. M. & A.) 199=4 Law Times 772. (2) 1892 Probate D. 212.

(3) (1875) 1 Probate D. 56.

revoked and the petition dismissed for want of prosecution. The first case *Lewis v. Lewis* (1) was not followed. *Troward v. Troward* (2), was a case where the parties came together again after the decree *nisi* had been passed and on the wife's application the decree *nisi* was rescinded on proof that notice had been given to the husband. It is true that in section 16 of the Indian Divorce Act which applies to decrees *nisi* passed in the High Court there is a clause to the effect that if the petitioner fails within a reasonable time to move to have the decree *nisi* made absolute the High Court may dismiss the suit, while in section 17, which deals with decrees passed by District Judges, there is no such specific clause. Still under section 17 the High Court has full power to confirm or not to confirm the decree *nisi*, and an order not confirming it would amount to an order dismissing the suit. There was thus no need to have any specific clause in section 17. This is pointed out at page 562 of the report in *Culley v. Culley* (3) by Edge C. J. who delivered the leading judgment in that case. The proper order, therefore, which should have been passed by this Court on the 19th October 1928 was an order refusing to confirm the decree of the District Judge and dismissing the suit. It was merely by an oversight as shown above that the order was expressed in the terms that all further proceedings in the suit were stayed. This, however, must be looked upon as a final order barring all further proceedings in the suit brought in the Court of the District Judge, Lahore.

This is also clear from the request of the petitioner in his application to the Judges to consign the case to the record room, while it is noted in the order

(1) 30 L. J. (P. M. & A.) 199=4 Law Times 772. (2) 32 W. R. 861.

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that counsel withdrew the application for confirmation. This shows that the petitioner understood that the suit was to be finally disposed of.

In any case it would not be proper at this length of time to re-open these proceedings. Of course, the petitioner will be entitled to petition again on proper grounds for the dissolution of his marriage with his wife and the order of the Bench, dated the 19th October 1928 will not be a bar to his doing so.

For the reasons given I would dismiss the petition in question.

JOHNSTONE J.

JOHNSTONE J.—I agree.

ABDUL QADIR J.

ABDUL QADIR J.—I agree.

N. F. E.

*Petition dismissed.*