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v.

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March 18

[RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.]

Hindu Law—Annulment of marriage on ground that respondent was at the time of marriage pregnant by some person other than petitioner—Satisfaction of court under s. 23—Nature of onus on husband in matrimonial cases—Whether court can act upon admissions of parties in proceedings under Hindu Marriage Act—Quantum of burden and its incidence—Difference —Value of medical opinion—Duration of pregnancy—Period of gestation—Substantial question of law—Concurrent finding of fact—Power of Court to remand a case—Inherent powers of court—Exercise of—Evidence Act, ss. 112, 114—Code of Civil Procedure, s. 107. Order 41, rr. 20, 23, 25—Constitution of India, Art. 133(1)—Hindu Marriage Act, 1955, ss. 12 and 23.

The appellant is a resident of Bombay while the father of respondent was a resident of Prantij in the former State of Baroda. They were betrothed in 1945 and their marriage was solemnised at Bombay according to Hindu rites on March 10, 1947. On August 27, 1947, respondent gave birth to a daughter after 5 months and 17 days of their marriage.

In April 1956, the appellant filed a petition for annulment of his marriage with respondent on the ground that the child had been conceived long prior to his marriage through someone else, the respondent was, at the time of marriage, pregnant by some one other than himself, that that fact was concealed from him and that ever since he had learnt about the birth of the child he had not cohabited with the respondent nor had he any relation with her whatsoever. The defence of respondent was that she conceived the baby as a result of sex relations with the appellant after their betrothel on being assured by him that that was permissible in their community, and that the parents of the appellant knew about the relations between the parties and also about her having conceived prior to her marriage. The trial court accepted the allegations of the appellant and held that the respondent was not pregnant by the appellant but by a person other than the appellant even before marriage. Respondent went in appeal to the High Court against the order of annulment passed by the trial court. The High Court was not satisfied with the findings of the trial court and remanded the case to the trial court after framing the following two new issues:—

1. Is it proved that the respondent was pregnant at the time of marriage?
2. Is it proved that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree?

Respondent further alleged that the child was the result of conception after the marriage. The trial court recorded additional evidence and came to the conclusion that the respondent

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was not pregnant at the time of marriage and that no sexual intercourse with the consent of appellant took place after the discovery by appellant of the grounds for a decree. These findings were submitted to the High Court which held that it was not proved that respondent was pregnant at the time of marriage and that it was proved that petitioner had marital intercourse with the respondent subsequent to his discovery of the existence of the grounds for the decree. The High Court allowed the appeal of respondent and dismissed the petition for annulment of marriage. Appellant came to this Court after obtaining a certificate of fitness from the High Court. Accepting the appeal,

Held (Mudholkar, J. dissenting). (i) The child born to respondent on August 27, 1947 was practically a mature child and weighed 4 lbs. in weight and therefore it could not have been the result of conception taking place on or after March 10, 1947. The child was conceived prior to March 10, 1947 and therefore respondent was pregnant at the time of marriage by some one other than appellant. Hence, appellant was entitled to annulment of his marriage.

(ii) The appellant did not have marital intercourse with respondent after he discovered that she had been pregnant by some one else at the time of marriage.

In divorce cases, the court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. However, where there is no room for supposing that parties are colluding decision can be based on the admission of the parties.

It is undesirable that the burden should be imposed on litigants in this class of cases, in which the substantial issue between the parties was whether the husband had at what was considered the relevant times any opportunity of intercourse with his wife and no question of an abnormal period of gestation had been raised until the trial and then only by the commissioner himself, of adducing medical evidence re: the period of gestation. However, that may be unavoidable where medical evidence in regard to the period is called by respondent and then the case becomes the battle-ground of experts.

(iii) The case of *Clark* v. *Clark* is not a good guide both on facts and law for the determination of the question about the legitimacy of the child of the respondent. In that case, delivery after 174 days of the conception was proved to be on account of the fact that the mother of the child fell a day before delivery.

It is not correct to add a lunar month to the ascertained period of gestation in cases of a known date of conception merely on the ground that when books speak of foetus of a certain number of months, that foetus might be due to a conception taking place on any day of the lunar month corresponding to the menstruation prior to the conception and the missperiod after conception.

Per Mudholkar, J. If the birth of an apparently normal child 171 or 186 days after conception is an impossible phenomenon and if its impossibility is notorious, then alone a court

can take notice of it and the question of drawing a presumption arises. All that can be said is that such an occurrence is at best unusual but it is a far cry to say that it is impossible. It is true that courts have taken notice of the fact that the normal period of gestation is 282 days but courts have also taken note of the fact that there are abnormal periods of gestation depending on various factors. It is not safe to base a conclusion as to the illegitimacy of a child and unchastity of its mother solely on the assumption that because its birth and condition at birth appeared to be normal, its period of gestation must have been normal, thus placing its date of conception at a point of time prior to the marriage of its parents.

When a court is called upon to decide a matter mainly, if not wholly, on the opinion of medical men, it must proceed warily. Medical opinion. even of men of great experience and deep knowledge, is after all generalisation founded upon the observation of particular instances, however numerous they may be. When the Court finds that in individual cases departure from the norm has in fact been observed by some experts and when again the experts themselves do not speak with the same voice, the need for circumspection by the court becomes all the more necessary. It may land itself into an error involving cruel consequences to innocent beings if it were to treat the medical opinion as decisive in each and every case. The responsibility for the decision of a point arising in a case is solely upon the court and while it is entitled to consider all the relevant materials before it, it would be failing in its duty if it acts blindly on such opinion and in disregard of other relevant materials placed before it.

Under the Hindu Marriage Act, 1955 and the Divorce Act, 1869, the condition for the grant of relief is the satisfaction of the court as to the existence of the grounds for granting the particular relief. The satisfaction as to the existence of the ground must be, as in a criminal proceeding beyond reasonable doubt and must necessarily be founded upon material which is relevant for consideration of the court which would of course include evidence adduced in the case. Although in the Indian Divorce Act, 1869 the words used are "satisfied on the evidence" while in the Hindu Marriage Act, the legislature has used the words "if the court is satisfied" their meaning is the same.

When the law places the burden of proof upon a party, it requires that party to adduce evidence in support of his allegations, unless he is relieved of the necessity to do so by reason of admissions made or the evidence adduced on behalf of his opponent. The law does not speak of the quantum of burden but only of its incidence and it would be mixing up the concepts of the incidence of the burden of proof with that of the discharge of the burden to say that in one case it is light and in another heavy.

Unless it is shown that important or relevant evidence has been overlooked or misconstrued, it is not in consonance with the practice of Supreme Court to re-examine a concurrent finding of fact, particularly when the findings are based on appreciation of evidence.

Case law referred to.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 166/1963. Appeal from the judgment and decree dated April 28, 1961 of the Bombay High Court in First Appeal No. 135 of 1958.

S. T. Desai, S. Singhvi, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the appellant.

Purushottam Trikamdas, M. H. Chhatrapati and *I. N. Shroff,* for the respondent.

March 18, 1964. The judgment of RAGHUBAR DAYAL and AYYANGAR, JJ. was delivered by RAGHUBAR DAYAL J. MUDHOLKAR J. delivered a dissenting Opinion.

Raghubar Dayal, J.

RAGHUBAR DAYAL, J.—This appeal, on a certificate granted by the Bombay High Court, arises out of a petition praying for the annulment of the petitioner-appellant's marriage with the respondent, under s. 12 of the Hindu Marriage Act, 1955 (Act XXV of 1955), hereinafter called the Act, on the ground that the respondent was, at the time of marriage, pregnant by some person other than the petitioner.

The facts leading to the proceedings are that the appellant and the respondent were betrothed sometime in June-July 1945 and were married on March 10, 1947. The appellant went abroad about the end of April 1947. A daughter was born to the respondent on August 27, 1947. The appellant returned to India some time in November 1947, but the parties did not live together thereafter.

The appellant instituted a suit, No. 34 of 1947-48, in the Court of the State of Baroda, at Baroda, for the declaration of nullity of the marriage. The suit was, however, dismissed on September 30, 1949 as the appellant failed to establish that he had his domicile in that State.

The Act came into force on May 18, 1955. The appellant took advantage of its provisions and on April 18, 1956 filed the petition for annulment of his marriage with the respondent.

The appellant alleged in his petition that on learning of the birth of the child on August 27, 1947, five months and seventeen days after the marriage, he felt surprised and suspected that the child had been conceived long prior to the marriage through someone else, that the respondent was, at the time of their marriage pregnant by someone other than himself, that this fact was concealed from him and that ever since he had learnt of the birth of the child he had not lived or cohabited with the respondent nor had any relations with her whatsoever.

The respondent, in her written statement, raised various defences. She admitted therein to have conceived the baby prior to the marriage, but alleged that she had conceived as a result of sex relations with the petitioner after their betrothal,

on being assured by him that that was permissible in their community. She further stated that her relations-in-law, viz., her father-in-law, mother-in-law and sister-in-law knew about such relations between the parties and about her having conceived prior to the marriage. She further alleged that she flatly refused to carry out abortion and that therefore, at the instance of the appellant, the marriage was performed in Bombay and not at her parents' place. She denied that the child born to her was by any person other than the appellant.

Due to her allegation about pre-marital sexual relations with the appellant and to her having conceived from such relations, she was required to furnish particulars about the time when, and the place or places where, the parties had sexual relations which she alleged to have led to her pregnancy. According to the particulars furnished by her, such sexual relations took place about or after Christmas, 1946, and again after about the middle of January 1947.

On the pleadings of the parties, six issues were framed, but those relevant for our purpose were:

1. Whether the respondent was at the time of the marriage pregnant by someone other than the petitioner as alleged in para 9 of the petition?
2. Whether at the time of the marriage the petitioner was ignorant of the aforesaid fact?
3. Whether the petitioner is entitled to have the marriage declared null and void?

The petitioner examined himself and his father. The respondent examined herself and one other witness. The documentary evidence adduced by the parties consisted mostly of letters written by the petitioner to the respondent and the respondent to the petitioner, since their betrothal, and letters written by other relations of the family to one another.

The trial Court did not accept the allegation of the respondent about the pre-marital sex relations with her husband and held that it was not established that she was pregnant by the petitioner. It also held that she was pregnant at the time of the marriage by some other person, that the petitioner did not know about her pregnancy at the time of the marriage and that he did not cohabit with her after knowing of her being pregnant by someone else at the time of marriage. On these findings, the petition for annulment of the marriage was allowed.

The respondent preferred an appeal to the High Court. The High Court agreed with the trial Court in its finding that the respondent had failed to establish that she was pregnant by the petitioner at the time of the marriage, as also regarding

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the petitioner knowing of her pregnancy at that time. The learned Judges however held that the petitioner had not proved to their satisfaction that the respondent was pregnant by someone other than the petitioner at the time of the marriage and that the petitioner was not the father of the child which was born and, considering that the trial Court had not framed an issue about there being no marital intercourse between the parties after the petitioner's knowing that the respondent had been pregnant at the time of the marriage, framed two issues and remitted them to the trial Court for recording findings. The two issues framed by the High Court were:

1. Is it proved that the respondent was pregnant at the time of the marriage?

2. Is it proved that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree?

Thereafter, the trial Court recorded further evidence. The petitioner, besides examining himself, examined Dr. Champaklal, husband of his sister, Madhuben, who was a midwife at the Prantij Municipal Dispensary, Maternity Ward, in 1947 and who attended at the respondent's confinement and two doctors, Dr. Ajinkya and Dr. Udani as experts. The respondent, for her part, examined Dr. Mehta as an expert witness, Kachrabhai, who was a compounder at the Pantij Municipal Dispensary in 1947, Khodidas a Doctor, and herself. Khodidas did not state anything material to the case. The trial Court, after considering the fresh evidence recorded by it, found that it was not proved that the respondent was pregnant at the time of marriage. This was on the first issue framed by the High Court. On the other issue it recorded a finding that it was proved that no sexual intercourse with the consent of the petitioner took place since the discovery by the petitioner of the existence of the grounds for a decree. These findings were then submitted to the High Court.

In the High Court, objections were filed by the parties to these findings. Patel and Gokhale JJ., heard the appeal and delivered separate judgments. They agreed with the trial Court that it was not proved that the respondent was pregnant at the time of marriage. Patel J., further held that it was proved that the petitioner had marital intercourse with the respondent subsequent to his discovery of the existence of the grounds for the decree. Gokhale J., expressed the view that the finding of the trial Court, on this point, appeared to be correct. In the result, the High Court allowed the respondent's appeal and dismissed the petition. It is against this judgment and decree of the High Court that the petitioner has

preferred this appeal on a certificate granted by the High Court, under Art. 133(1)(c) of the Constitution, as already mentioned.

Before dealing in detail with the contentions of the parties, we may set down the relevant provisions of the Act, quoting the various sections:

"12. (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

* * * * *

(b) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

* * * * *

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercouse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree."

"20. (1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence."

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"21. Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (V of 1908)."

"23(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

* * * * *

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted,

then, and in such a case, but not otherwise, the Court shall decree such relief accordingly."

"28. All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force;

Provided that there shall be no appeal on the subject of costs only."

It is to be seen that, according to the provisions set out above, statements contained in any petition could be referred to as evidence, the provisions of the Code of Civil Procedure apply to the proceedings under the Act and a Court has to pass a decree in the proceedings only when it is satisfied about certain matters specified in s. 23.

Two questions of law raised at the hearing of this appeal may now be disposed of as their determination will govern the consideration of the other matter on record with respect to the revelant points to be decided in the case. These are: (i) whether the High Court was right in remitting the two issues for a finding to the trial Court and (ii) what is the standard of proof required for the satisfaction of the Court before it can pass a decree in these proceedings.

The High Court had to remit the second issue for a finding as it was necessary for the determination of the case and

the trial Court had not framed a specific issue in regard to it. In the absence of such an issue, the parties could not be expected to have produced evidence directed to that point and therefore the High Court rightly remitted that issue for a finding.

The High Court remitted the first issue as it was of opinion that it was for the petitioner to prove to their satisfaction, beyond reasonable doubt, which he had failed to do, that the respondent was pregnant at the time of marriage. He had also to establish that the child could not possibly be born as a result of the petitioner's marital intercourse with the respondent after the marriage, the learned Judges holding that in these proceedings the Court could not base its decision on the mere admission of parties.

The High Court is certainly right in stating that the petitioner had, in order to succeed, to prove beyond reasonable doubt that the respondent was pregnant by someone else at the time of marriage. It is, however, not correct in law in holding that the Court, in these proceedings, could in no circumstances base its decision on an admission of the parties. On the facts of the present case, however, the decision did not rest on the admissions of the parties alone.

In *White* v. *White*(1) this Court construed the expression 'satisfied on the evidence' in s. 14 of the Divorce Act and said at p. 1420:

> "The important words requiring consideration are 'satisfied on the evidence'. These words imply that the duty of the Court is to pronounce a decree if satisfied that the case for the petitioner has been proved but dismiss the petition if not so satisfied. ...and it has been there held that the evidence must be clear and satisfactory beyond the mere balance of probabilities and conclusive in the sense that it will satisfy...the guarded discretion of a reasonable and just man."

It approved of the observations in *Preston Jones* v. *Preston Jones*(2) to the effect that it would be quite out of keeping with the anxious nature of the provisions to hold that the Court might be 'satisfied' in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. The Court further observed at p. 1421:

> "In a suit based on a matrimonial offence it is not necessary and it is indeed rarely possible to prove the issue by any direct evidence for in very few cases can such proof be obtainable."

(1) [1958] S.C.R. 1410. (2) [1951] A.C. 391, 417.

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It follows that what the Court has to see in these proceedings is whether the petitioner has proved beyond reasonable doubt that the respondent was pregnant by some one else at the time of marriage. The petitioner has to establish such facts and circumstances which would lead the Court either to believe that the respondent was pregnant at the time of marriage by someone else or to hold that a prudent man would, on those facts and circumstances, be completely satisfied that it was so.

It is true that in divorce cases under the Divorce Act of 1869, the Court usually does not decide merely on the basis of the admissions of the parties. This is a rule of prudence and not a requirement of law. That is because parties might make collusive statements admitting allegations against each other in order to gain the common object that both desire, for personal reasons. A decision on such admissions would be against public policy and is bound to affect not only the parties to the proceedings but also their issues, if any, and the general interest of the society. Where, however, there is no room for supposing that parties are colluding, there is no reason why admissions of parties should not be treated as evidence just as they are treated in other civil proceedings. The provisions of the Evidence Act and the Code of Civil Procedure provide for Courts accepting the admissions made by parties and requiring no further proof in support of the facts admitted.

Section 58 of the Evidence Act *inter alia* provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of O. VIII, C.P.C., provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability.

Both these provisions, however, vest discretion in the Court to require any fact so admitted to be proved otherwise than by such admission. Rule 6 of O. XII of the Code allows a party to apply to the Court at any stage of a suit for such judgment or order as upon the admissions of fact made either on the pleadings or otherwise he may be entitled to, and empowers the Court to make such order or give such judgment on the application as it may think just. There is therefore no good reason for the view that the Court cannot act upon the admissions of the parties in proceedings under the Act.

Section 23 of the Act requires the Court to be satisfied on certain matters before it is to pass a decree. The satisfaction of the Court is to be on the matter on record as it is on that matter that it has to conclude whether a certain fact has been proved or not. The satisfaction can be based on the admissions of the parties. It can be based on the evidence, oral or documentary, led in the case. The evidence may be direct or circumstantial.

In *Arnold* v. *Arnold*(1) Woodroffe J., said:

> "In the present case admissions have been proved. Doubtless, caution is required in cases of divorce to see that there is no collusion and an admission must be examined from this point of view. But if, as here, there is no reason to suspect collusion an admission may be as cogent evidence in these as in any other cases. In *Robinson v. Robinson* (1859 1 Sw. & Tr. 362), Sir Alexander Cockburn says:—"The Divorce Court is at liberty to act and is bound to act on any evidence legally admissible by which the fact of adultery is established. If, therefore, there is evidence not open to exception of admissions of adultery by the principal respondent, it would be the duty of the Court to act on these admissions although there might be a total absence of all other evidence to support them. The admission of a party charged with a criminal or wrongful act, has at all times and in all systems of jurisprudence been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it."

Reference may also be made to *Over* v. *Over*(2). It was a suit for dissolution of marriage. The respondent did not appear throughout the proceedings. The evidence originally consisted of affidavits by the petitioner and his son to prove the letters the respondent had written to the petitioner. Later, their statements were also recorded. The letters were held to be sufficient evidence of her having committed adultery. Sir Lallubhai Shah, Ag. C. J., observed at p. 255:

> "I have dealt with this case at some length in view of the difficulty which we have felt on account of there being no other corroborative evidence of the admissions of the wife. But, having regard to the

(1) I.L.R. 38 Cal. 907, 912. (2) 27 B.L.R. 251.

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circumstances, as disclosed in the evidence, I see no reason to doubt the genuineness of the admission made by the wife, and in the words of Cockburn C. J., it is our duty to act upon such admissions, although there might be a total absence of all other evidence to support them."

Marten J., said at p. 261:

"As already stated, I think that such a confession is admissible in evidence, and I agree that there is no rule of law which absolutely precludes the Court from acting upon it. But as a rule of prudence the practice of the Divorce Courts has been in general not to act upon such confessions, unless corroborated."

The aforesaid rule of prudence loses its importance when certain provisions of the Act enjoin upon the Court to be satisfied with respect to certain matters which would enable the Court to avoid passing a decree on collusive admissions. Section 12(2)(b) provides that no petition for the annulment of the marriage shall be entertained unless the Court be satisfied that the petitioner was at the time of marriage ignorant of the facts alleged and that no marital intercourse with the consent of the petitioner had taken place since his discovering the existence of the grounds for the decree. Such a finding necessarily implies that before reaching it the Court has satisfied itself that there had been no connivance of the petitioner in the coming into existence of the ground on which he seeks annulment of the marriage. Besides, section 23 also provides that the Court can pass a decree only if it is satisfied that any of the grounds for granting relief exists, that the petition is not presented or prosecuted in collusion with the respondent and that there was no legal ground on which the relief claimed could not be granted. In these circumstances, it would be placing undue restriction on the Court's power to determine the facts in issue on any particular type of evidence alone, specially when there be no such provision in the Act which would directly prohibit the Court from taking into account the admissions made by the parties in the proceedings.

We are of opinion that in proceedings under the Act the Court can arrive at the satisfaction contemplated by s. 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and that it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. Admissions are to be ignored on grounds of prudence only when the Court, in the circumstances of a case, is of opinion that the admissions of the parties may be collusive. If there be no ground for such a view, it would be proper for the Court to act on those admissions without forcing the parties to lead other evidence to

establish the facts admitted, unless of course the admissions are contradicted by the facts proved or a doubt is created by the proved facts as regards the correctness of the facts admitted.

The trial Court had recorded a finding on the basis of the statements of the respondent in the written statement, statements which were supported by her on oath when examined as a witness. Support for these statements was found from certain circumstances which the Court held established on the basis of the correspondence between the parties and certain oral evidence. The respondent's case that the child born to her on August 27, 1947 was begotten by the petitioner as they had intercourse at the relevant time sometime in December 1946 or January 1947, left no room for the Court to consider the new case that that child was conceived sometime after the marriage of the parties on March 10, 1947. In these circumstances, it was not really right for the High Court to remit an issue to the trial Court for recording a finding on the basis of such further evidence including expert evidence as be led by the parties on the question. In this connection, the remarks of Lord Simonds in *Preston Jones*' case[1] at p. 402, are very pertinent:

> "Your Lordships would, I think, regard it as undesirable that the burden should be imposed upon litigants in this class of case of adducing evidence of the character which in *Gaskill* v. *Gaskill* (1921 P. 425) Lord Birkenhead thought it expedient for the Attorney-General to ask for the assistance of the court. That may be unavoidable where medical evidence in regard to the period is called by the respondent; there is nothing to prevent a case becoming the battle-ground of experts. But I am dealing with such a case as that out of which this appeal arises, in which the substantial issue between the parties was whether the husband had at what was considered the relevant times any opportunity of intercourse with his wife and no question of an abnormal period of gestation had been raised until the trial and then only by the commissioner himself."

However, as evidence has been led by both the parties and the Courts below have considered it, we do not propose to decide the case on the basis of the evidence originally recorded and would content ourselves by simply stating our view that the High Court might well have decided the case on that basis without remitting the first issue to the trial Court.

We may now deal with some general aspects of the case. The petitioner has been consistent throughout. He took the

(1) (1951) A.C. 391.

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position that he was not the father of the child born to the respondent in August 1947 as the period of gestation between the date of marriage and the date of birth was too short for a mature child to be born. This does not mean that his case was as has been considered by the Court below that the child born was a fully mature child in the sense that it was born after the normal period of gestation of about 280 days. He could not have stated so positively as that could not be known to him. Even the doctors are probably not in a position to state that the child was born after a full period of gestation i.e., after 280 days. The petitioner's case was that the child born was not a child whose period of gestation was 171 days from the date of conception or who could be said to be a premature child, but was a child born after almost the full period of gestation. He steadily stuck to this position. His conduct and the conduct of his relations from the time they learnt of the respondent's giving birth to the child had been consistent with this view. The petitioner had no correspondence or connection with the respondent since he was informed of the birth of the child. His parents too did not enter into any correspondence with the respondent's parents. The petitioner's sister Sharda, however, appears to have written just one letter in acknowledgment of the respondent's sister's letter conveying the news of the birth of the child. She has not been examined as a witness. She appears to have written that letter when she was emotionally happy on the receipt of the news and had not given any thought to the matter. In 1948, the petitioner instituted a suit for the annulment of the marriage in the Court at Baroda and there too pleaded what he pleaded in the petition giving rise to this appeal. The respondent, however, put up a different case there. Any way, that suit was dismissed on the preliminary ground that the petitioner did not have the necessary domicile to institute a suit in that Court.

The respondent, on the other hand, has not been consistent. In her written statement filed in the Baroda Court she stated that she had become pregnant as a result of the sexual intercourse she had with the petitioner after marriage. The same line was not adopted in her written statement in this case, in which she admitted that she was pregnant at the time of the marriage, but stated that this was due to sexual intercourse with the petitioner prior to her marriage. She supported this statement vigorously on oath. Later, after the close of the petitioner's evidence, and practically of her statement in examination-in-chief, she wanted to change her case by an amendment of the written statement to what had been said in the Baroda Court. This was not allowed by the trial Court. The High Court too did not allow this formally, but in effect had that point tried by remitting an issue.

No good motive was suggested for the petitioner and his parents taking the view so firmly held by them about the child being not of the petitioner from the very moment they learnt of the birth of the child on August 27, 1947. Their attitude was not an attitude of mere suspicion in connection with which enquiries and observations could be made. The attitude was firm from the very beginning. They did not respond to letters from either the respondent or her father. What could be the motive for them to take such an attitude?

The respondent stated in her written statement:

> "The petitioner's father has stayed in Europe for a very long time and holds very advanced views so also the petitioner but this entirely false litigation has been put forward at the instance of the petitioner's mother who wants to sacrifice the respondent knowing full well the part played by her son the petitioner and the other members of the family."

Nothing like this was said in her written statement filed in the Court at Baroda.

In her deposition before the findings were called for on the issues, she stated that the relations between herself and her mother-in-law were not very cordial. She said in her deposition, after the remission of the issues, that

> "The parents of the petitioner were not on good terms with my parents as at the time of *pheramani* the petitioner's parents were not satisfied with the presents given by my parents."

This cause for bad relations has not been indicated in any of the letters by the respondent or by the petitioner. It was not stated in the written statement. We cannot take this to be a correct statement.

In her letter dated June 11, 1947 she merely stated:

> "...the nature of my mother-in-law had become peevish on account of ill-health and that I should not take anything to my heart. Respected papa used to advise me well and had also feelings for me...She (mother-in-law) would sometimes become peevish only and then she herself would feel sorry. Mamma would speak very highly of me before our neighbours."

The ordinary usual expressions of disapproval between mothers-in-law and daughters-in-law would not lead the relations-in-law to make such accusations against their daughter-in-law lightly, both on account of notions of family honour and on account of the natural love grand-parents would feel towards their grand-child.

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The respondent's letters prior to the marriage and subsequent thereto indicate her affection for the petitioner and her feeling of being bound by her husband's desires. But, in one respect at least, and for no good reasons, she ignored those desires. We refer to the direction by the petitioner in his letter dated June 22, 1947 asking her to destroy that particular letter and the letters received earlier. She did not do so. Why? She has not given any explanation for keeping those letters with her in spite of the directions of the husband to the contrary. It can be said, in the circumstances of the case, that she was retaining the letters for using them if possible in her defence when any accusation of her having gone wrong prior to the marriage be made against her.

It has been considered by the Court below that the respondent's letters to Sharda and her father's letters to Dr. Champaklal in July 1947 had been suppressed. It did not believe the statements of Dr. Champaklal that these letters could not be traced. These persons had no reason to retain those letters. Two letters of Sushila to Sharda have been produced and their production has been relied upon in support of the view that other letters had been deliberately suppressed. We do not agree with this view. There was reason to retain these two letters which were sent after the birth of the child and which must have been taken to be letters of some importance as written at a time when it had been realised that the respondent's relations-in-law felt that the child born was not of the petitioner.

The main question for determination in this case is whether the child born to the respondent on August 27, 1947 could be the child of the petitioner, who, on the finding of the Courts below which was accepted by learned counsel for the respondent before us, did not cohabit with the respondent earlier than March 10, 1947. Counting both the days, i.e., March 10 and August 27, the total period between those dates comes to 171 days. The child born to the respondent is said to have weighed 4 pounds, the delivery being said to be normal. The child survived and is said to be even now alive. It is not disputed that the usual period of gestation from the date of the first coitus is between 265 and 270 days and that delivery is expected in about 280 days from the first day of the mensturation period prior to a woman conceiving a child. We shall later be examining the point urged before us by learned counsel for the respondent, as regards the possibility of a living child being delivered after a gestation of this duration, but it is sufficient at this stage to point out that, if the delivery was normal, the child born also normal and alive, it was not suggested that it was possible in the course of nature for such a child being born unless the conception took place long before March 10, 1947.

In this connection, reference may again be made to what was said by Lord Simonds in *Preston-Jones'* case(1) at p. 402, when considering the question whether a normal child born 360 days after the last intercourse of a man and a woman was the child of that man or not. He said:

> "It would, I think, appear a fantastic suggestion to any ordinary man or woman that a normal child born 360 days after the last intercourse of a man and a woman was the child of that man and it is to me repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions."

Of similar effect is the observation of Lord Normand at p. 407, it being:

> "I have felt great doubt whether the House ought not to say that, though it is not possible to draw the line at an actual number of days, 360 days is too long a period, unless evidence of medical knowledge is adduced by the respondent to show the contrary."

Lord Morton of Henryton also said, at p. 413:

> "If a husband proves that a child has been born 360 days after he last had an opportunity of intercourse with his wife, and that the birth was a normal one, and if no expert evidence is called by either side, I am of opinion that the husband has proved his case beyond reasonable doubt."

In *W.* v. *W.* (*No.* 4) (2) a similar observation was made by Cairns, J. in proceedings on an application for ordering the wife and child to undergo blood-tests in order to furnish evidence that the child was not the petitioner's. The child was born 195 days after the marriage. He said:

> "The marriage was on October 7, 1961. The child was born on April 19, 1962. It is, therefore, obvious that the wife was pregnant at the time of the marriage."

We have then to see whether the evidence on the record is such which would justify the Court's holding against what it should normally hold on proof of the fact that the child was born after 171 days of the first coitus between the parties.

We shall consider the statements of the doctors relating to different matters when dealing with them. As doctors Ajinkia and Mehta do not agree on several points we have

(1) (1951) A.C. 391. (2) (1963) 2 All E.R. 386.

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to decide whose statement should be ordinarily preferred. We however consider that the Court should not leave the questions undecided merely because the two doctors differ, as has been done, practically, by the learned Judges of the High Court.

Dr. Ajinkia is undoubtedly an expert in the subject of obstetrics and gynaecology. He took a Master's degree in midwifery in London in 1937 and passed the F.R.C.S. examination in Edinburgh in 1939 in midwifery and gynaecology. He holds a diploma in child health of London University. He is a member of the Royal College of Obstetricians and Gynaecologists. He returned to India in 1939. He was attached to the Nair Hospital as a specialist. He was Professer of the Medical College at Agra and was in charge of the Department of Midwifery and Gynaecology from 1942 to 1944. Since 1949 he was attached to the J. J. Hospital as an Honorary Doctor for Midwifery and Gynaecology and later at the Wadia Maternity Hospital. He has three maternity homes with 60 beds in all. He can therefore be rightly called a specialist in midwifery and gynaecology, with an experience of over 20 years.

Dr. Mehta states that he has been practising as a Gynaecologist and Obstetrician since 1926. His qualifications, however, are much less than those of Dr. Ajinkia and his experience too, as an obstetrician and gynaecologist, is much less. He has passed the F.R.C.S. Examination in 1906 at Edinburgh. He was a Police Surgeon for about 10 years during which period he had no special means to acquire knowledge in midwifery, gynaecology or obstetrics. He was a doctor in the Army for 13 years from 1907 to 1920 and could not possibly have such experience during that period. He was an Associate Professor in Midwifery at Grant Medical College during 1928 to 1937. He states that as a professor he was concerned both with giving lectures to students and doing practical work of attending to cases and labour operations. During this period he was in charge of 6 beds at Motlibai Hospital. At the time of his deposition he was attached to the Parsee General Hospital and Parsee Lying-in Hospital for Women. He carried on private practice and had three consulting rooms. He states that most of his cases were gynaecology and midwifery.

Where Dr. Ajinkia and Dr. Mehta differ, we would prefer to rely on Dr. Ajinkia due to his superior qualifications and experience.

We do not consider it material that there exists some slight difference of opinion in matters, not of great significance, between what the doctors state and what is stated in certain well-recognized books on the subject, as the statements are on the basis of the theoretical knowledge as modified by

their actual experience and what is stated in books is based on conclusions derived from various reports by various doctors working in the field.

Certain facts were urged before the High Court in support of the petitioner's case. Mr. Desai, learned counsel for the petitioner, has again submitted them for our consideration. They are:

1. The child was born 171 days after marriage and has lived.
2. It was confirmed by about April 2, 1947, that the respondent was pregnant.
3. The appearance of the respondent's belly.
4. The symptoms of toxemia from which the respondent suffered.
5. Normal delivery.
6. Condition and weight of the child.

We shall first deal with points Nos. 2 to 4 which relate to the respondent's pregnancy and symptoms of its development at various periods. The relevant facts are to be determined mainly from the contents of the letters between the parties and between them and some other persons. Some letters make mention of the health of the respondent and the relevant letters in this respect are of the period April to August 1947. The parties were, as already stated, married on March 10, 1947. The respondent remained at the house of her relations-in-law till about March 27, when she returned to her father's place at village Prantij. The first letter from the petitioner to the respondent is dated March 31, 1947 and expresses the hope that she had reached her place hale and hearty.

The next letter from him is dated April 5. It refers to a letter received from the respondent and indicates that her letter had conveyed the news of her getting some fever and that she had gone to consult a doctor. Her letter might have also given some indication of her possibly being pregnant as the petitioner asked her to inform him about the opinion of the doctor. There is nothing in this letter to show that the respondent had informed the petitioner about her suffering from nausea. The petitioner's letter dated April 8, 1947 refers to the receipt of a letter from the respondent which probably intimated that she was definitely pregnant, according to the opinion of the doctor, as the letter contains an expression 'knowing that you are pregnant' and indicates the petitioner's desire that the child be removed.

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The respondent's letter dated April 13, 1947 states:

> "I am not keeping good health at present, I am still getting fever. I get vomits also...But fever does not leave me and I am not allowed to take food also. ...I am bed-ridden at present...Well and good if the child survives and it will be still better if it does not."

The petitioner's letter dated April 15 has nothing particular in this connection. On April 17, the parties wrote to each other. The petitioner's letter said:

> "I have been feeling very much anxious as your health is not remaining well. ... Write about your health. If you are not keeping good health and if you are not feeling disposed to come then you remain at your place. I won't take it ill at all."

The respondent's letter acknowledged the receipt of two letters of the petitioner, probably of April 8 and April 15, and said:

> "I am keeping well now. I have no fever for the last two days. I am allowed to take light food. I get two or three vomits in a day. But I am better than before. So, please do not worry. I will start on the 22nd and reach (there) on the 23rd."

Her letter of April 20, just intimates about her leaving for Bombay on April 22. She reached Bombay on April 23 and stayed there till the petitioner left for America on April 27.

According to the contents of these letters, the respondent suffered from morning sickness of a severe type. She had fever and several vomits in the day.

In her deposition she stated:

> "Before I left for Prantij for the first time after my marriage, I had nausea and vomiting. ...When I left for Prantij my health was ordinarily good. At Prantij I started vomiting. I consulted a lady doctor at Himatnagar. ... After I consulted the doctor at Himatnagar, I came to know that I was pregnant."

In cross-examination she stated:

> "I had a vomit on the day on which I left for Prantij from Bombay about 17 or 18 days after marriage. At the time when I had a vomit, I did not suspect or imagine that I was carrying.....I consulted the lady doctor at Himatnagar within two or three days after I reached Prantij. ... I told the lady

doctor at Himatnagar that I was feeling uneasiness. I was vomiting and I had no appetite. The lady doctor examined my body including my abdomen. ... As a result of the opinion given by the lady doctor at Himatnagar I intimated to the petitioner that I was pregnant."

It is contended for the petitioner that such a condition of the respondent could not be on account of pregnancy taking place on or after March 10, 1947. Morning sickness of such type does not ordinarily take place soon after conception and a doctor cannot, without a biological examination, definitely state that she was pregnant.

Re: morning sickness, Dr. Ajinkia stated that it occurred in the first and second month and expressed agreement with Modi's statement in his text book on Medical Jurisprudence that nausea or vomiting commences about the beginning of the second month and lasts generally till the end of the fourth month. It follows that the commencement of the morning sickness at the end of March or the beginning of April 1947 may be possible from the respondent's conceiving after marriage, but that the severe type of morning sickness, viz., fever and vomiting several times a day should have also developed so early after the conception is rather unlikely in view of what authorities state.

Williams in his 'Obstetrics' states at p. 275, 12th Edition:

"The so-called morning sickness of pregnancy, as the name implies, usually comes on in the earlier part of the day and passes off in a few hours, although it occasionally persists longer or may occur at other times. It usually appears about the end of the first month and disappears spontaneously six or eight weeks later, although some patients suffer from it for a longer period."

At p. 706 he states:

"Nausea and vomiting of mild degree constitute the most common disorder of the first trimester of pregnancy. About one half of pregnant women complain of some degree of nausea at this time, and, of these, perhaps one third experience some degree of vomiting. In the present era, however, it is uncommon for nausea and vomiting to progress to a serious extent, that is, to a stage in which systemic effects such as acetonuria and substantial weight loss are produced. ... and the condition is called hyperemesis gravidarum."

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He states at pp. 708 and 709:

> "The disease varies in degree of severity from nausea and morning sickness to the severe or pernicious type of vomiting which may have a fatal outcome. Usually the condition begins about the sixth week of gestation and abates around the twelfth week."
>
> "A small number of these patients develop persistent vomiting, lasting four to eight weeks or longer and resulting in a loss of body weight of 10 to 20 pounds or more. These patients vomit two, three, or more times a day and may be unable to retain any nourishment by mouth."
>
> "In the later stages of the disease—rarely seen today—a low-grade fever frequently develops. This seldom exceeds 101°F but may persist despite adequate hydration."

Dugald Baird states at p. 323 of the 7th Edition of the *Combined Text Book on Obstetrics and Gynaecology*:

> "Morning sickness occurs in about 50 per cent of women during the early weeks of pregnancy. In many cases there is only a feeling of nausea, with perhaps the ejection of a mouthful of fluid. In others, some partly digested food may be expelled. In graver cases vomiting may persist throughout the day, and apparently all the ingested food is returned. This latter type is a very serious condition and is described as hyperemesis gravidarum. It is extremely difficult to draw any hard and fast line between the more severe form of morning sickness and a condition which should be labelled as hyperemesis. As soon as a patient suffering from morning sickness feels nauseated and is sick later in the day, she must be regarded as a mild case of hyperemesis and treated accordingly."

The respondent does not state about fever and about several vomits in a day in her deposition, but such a condition was expressed in her letters. The respondent stated in cross-examination that when she went to Gamdevi, she continued to have vomiting, no appetite and uneasiness.

None of the letters written subsequent to April 17 by either party make any mention of this condition continuing. Champaklal was not questioned about such a condition of hers at Gamdevi. The petitioner was not questioned and the respondent does not state that she had nausea and vomiting when at Bombay between April 23 and 27. She did not have vomit or nausea so long as she was at Bombay in March, though she happened to state in examination in chief that

she had a vomit on the day she left. The petitioner was not questioned about it. It appears to be too good to be true that she suffered from morning sickness of such a type only for a short period of a little over two weeks. These can be two possibilities. Either she did not suffer from any such sickness during that period and just mentioned about it to build up her case regarding the development of pregnancy or that her pregnancy was of a longer period—at first she may have had ordinary morning sickness which usually consists of a feeling of nausea without any actual vomiting and could therefore be not known to others—and that the serious type of actual vomiting and fever developed later in the third or fourth month of pregnancy which would indicate that in April the pregnancy was about four months old and not one month.

We may refer to her first statement in Court. She then stated:

> "The petitioner's father and his sister might be suspicious prior to the marriage that I was pregnant because I was not keeping good health."

This may refer to her suffering from morning sickness prior to marriage.

Re: confirmation of pregnancy, Dr. Ajinkia deposed that it was not possible to confirm pregnancy by April 3, 1947 if a woman married on March 10, 1947 had conception subsequent to the wedding, except by performing some special biological test. Similar is the opinion of Dr. Mehta examined for the respondent.

The Court below attached no importance to the doctor's telling the respondent that she was pregnant about 3 weeks after she was married, by saying that what was conveyed to the respondent was not a definite diagnosis of pregnancy but only a suspicion about pregnancy as anybody would suspect after a woman's missing of the monthly course and suffering from morning sickness. It is not justified in so construing what the respondent stated in Court and what she appeared to have conveyed to the petitioner. The doctor's informing her definitely after examination of the body that she was pregnant again points to the fact that her pregnancy noticed in the first few days of April was of a longer duration than that of about 4 weeks.

From Bombay, the respondent went to Gamdevi where the petitioner's sister Sharda lived and spent a few weeks there.

Letters written in May are not of any importance. Her letter dated May 12, 1947 to the petitioner is on record. She

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expressed her intention to go to Bombay within a few days and to stay there for two months and stated:

> "Then, when my fifth month (of pregnancy) will be about to be over I will go to Prantij..."

There is nothing particular in this letter. She, however, did not stay at Bombay for two months but left for Prantij before June 4, 1947 for some reason which was possibly not true.

The petitioner wrote letters to her on May 2, 6 and 14. In his letter of May 2, he says that she must have told about her pregnancy to Sharda and that he himself had not told anyone about it. In his letter of May 6 he said:

> "You tell Sharda that you are pregnant so that Mama can know it. Consult Sharda about food and reading who will also guide you. So you should not become anxious at all. Convey to Champaklal through Sharda so that he may prescribe medicine for you, hence you may not have any trouble ahead."

In his letter of May 14, he said:

> "You must be taking good food and I think you must have consulted Champaklal."

In his letter dated May 31, he, for the first time, acknowledges receiving a letter from her. It must be the letter of May 12, as therein he refers to her intention to go to Bombay from Gamdevi. There is nothing particular in this letter either.

The petitioner's first letter to the respondent in June is dated June 3, 1947. It refers to the receipt of her air-mail letter from Bombay after a long time. It appears that letters of May 12 and May 24 were not sent by air-mail. Her sending a letter by air-mail on or about May 30 from Bombay indicates that she felt the urgency of communicating something to the petitioner. The contents of his letter dated June 3 indicate that she had mentioned what she had been suffering from and wanted to leave Bombay for her paternal home. The letter does not disclose what sort of sufferings there were. Probably they were due to domestic affairs, as it appears that the relations between the mother-in-law and the daughter-in-law were not good. He writes:

> "If you tell me that I may write a letter to revered mother and father or write a letter to your father to call you at Prantij."

Why this urgency? The conditions of living at Bombay could not have been intolerable. Parents-in-law would have taken good care of her troubles due to pregnancy. The urgency of her returning to Prantij could have been due to her feeling

that it would be difficult to keep her unduly advanced state of pregnancy a secret for any more appreciable time at Bombay.

The next letter of June 4 was written by the petitioner on receipt of the respondent's letter dated May 24. This letter too must have been from Bombay, as she appeared to have informed him about the adjoining neighbours talking about them. Again, it is not clear what was the talk. The talk might have had reference to their marital relations with particular refernce to her pregnant condition, as it is said in the letter:

> "Let people talk about me and you, but as long as we each have complete confidence over one another which is there to fear for us."

On June 11, the respondent wrote to the petitioner. It appears that she returned to Prantij from Bombay on or about June 4, as she said:

> "A week has passed since I came to Prantij".

She states that she told her mother-in-law that she wanted to go back to her paternal house, as she was not keeping good health. There is no reference in this letter to what type of bad health she was keeping. She makes a significant statement in this letter. It is:

> "She (namely the mother) asks me to take away the ornaments, take care of my health and to return in the 7th Month...I said I did not want to take ornaments because I would have to take care of them on my way."

Another statement of hers which is of some significance is:

> "My health has improved very much. Blood in my body has very much increased."

It appears that her excuse to her mother-in-law for going to her parents' house was not a true one. Her reference to improved health and increase of blood in the body seems to indicate that she was feeling the enlargement of her abdomen. The contents of this letter were interpreted in some such way by the petitioner who, in his letter dated June 22, wrote in the very second paragraph:

"I am asking you what is the month of your pregnancy". Such a question indicates that he probably felt surprised at this condition of her abdomen and having studied sex literature, as appears from his letters to her, he had his doubts how within such a short period of the marriage the respondent could have such an enlarged abdomen. This letter contains some very intimate details. The petitioner asked her to destroy it after she had read it and also to destroy his previous letters.

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Such a suspicion expressed in his letter makes the respondent write a very curt letter on July 2, 1947. In that letter she said:

> "How are you to know how many months I have advanced in pregnancy. I am really so very angry with you today that I cannot understand what I should do with such a man. Do you not yourself know that you ask me how many months I have advanced in pregnancy. Calculate (months) in your own mind only."

In between, the petitioner had written another letter to her on June 27, on receipt of her letter dated June 17. This letter also contains some significant statements:

> "Now belly appears big and I feel what kind of baby would be born...At present I appear very fat. I do not understand from where so much blood has come.....".

This letter was acknowledged by the petitioner by his letter dated June 27. In this letter again the petitioner wrote:

> "Please write how many months of pregnancy you have passed".

The letter was comparatively a very formal letter.

On June 28, 1947 the respondent writes to the petitioner in her letter:

> "I am keeping good health etc....Now I have to pass only five months...The belly gives the appearance of a big water pot and one becomes nervous to see it...A nurse comes to examine me every Sunday. I had once told her that something was moving in my belly and had asked her as to after how many months these movements must be starting. She said that my baby to be born would be very healthy because a child would make movements after the fourth month only if it was healthy. I am very much worried. If the child would be strong I myself would die. How then would it be born?...I go for a walk daily. I walk two miles—one mile while going and one while coming back".

It is clear from this correspondence which passed between the parties in the month of June that the respondent noticed her belly to have enlarged sufficiently between June 11 and June 17, i.e., between the 107th and 114th day, counting from March 10 and adding 14 days to the total, that she had felt the quickening of the foetus sometime before June 28 and that the petitioner had some doubts about her condition being compatible with conception having taken place on or after

March 10, 1947. Patel J., made an error in ignoring the letter of June 17, 1947 and in calculating the days upto June 28 to be 155 instead of 124. The respondent thus noticed the enlarged abdomen at the end of the 4th lunar month of pregnancy. She appears to have felt it before June 16 as she had spoken about it to the nurse on a Sunday. The Sundays previous, fell on June 23 and June 16. It appears that she did not speak on the 23rd as she did not say so in her letter of June 28 and said there: 'I had once told her'. She must have told the nurse latest on Sunday, June 16.

Two other statements in her letters also tend to indicate that her condition in the beginning of June had been such as probably gave rise to suspicions in the minds of persons about her pregnancy. These are her statement in the letter dated June 11 that her mother-in-law asked her to take away all ornaments. Ordinarily a mother-in-law would not have liked her daughter-in-law to take away all her ornaments when she be going to her maternal place for a few months. Such a request might have been on account of her suspecting that she was in a much more advanced stage of pregnancy, than would have been expected in a case of pregnancy subsequent to marriage. The other statement is in the petitioner's letter of June 4 referring to her letter of May 24 stating that adjoining neighbours talked about it. Why should neighbours talk about the petitioner and the respondent prior to May 24, 1947? The talk must have been in connection with her pregnancy and its stage. The relations between the husband and wife are of no concern to the other people, except when they provide matter for scandal. This means that her abdomen had enlarged noticeably by May 24 and therefore could indicate to people that her pregnancy was of a duration much larger than of about 74 days, which, on addition of 14 days, would be deemed to be pregnancy of 88 days, i.e., about 3 lunar months. None of the doctors examined in the case deposes that the enlargement of the abdomen would be of such an extent in 3 calendar months of pregnancy, the period being counted from the first day of the last menstruation previous to the conception.

Dr. Ajinkia states that there cannot be perceptible abdominal enlargement within 3 months and 7 days of pregnancy in ordinary cases and that such perceptible abdominal enlargement would be after the 4th month. He further states that when a woman is pregnant for the first time, the enlargement might not be visible as late as 5 months, and that a huge abdominal enlargement might occur within 3 months and 18 days of pregnancy in certain complications which, we may mention, do not appear to have occurred in the case of the respondent. On the other hand, Dr. Mehta states that the enlargement of the abdomen is manifest from the 4th month

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and in any event will be manifest in the 5th month, even if the pregnancy is for the first time. He did not agree with what Alan Brews states in his 'Manual of Obstetrics', 1957 Edition, p. 84:

> ".....enlargement of the abdomen usually does not become manifest to the patient until the uterus rises well above the pubes, and therefore seldom attracts attention until the close of the first half of pregnancy. A multigravida owing to the laxity of the abdominal wall, usually notices abdominal enlargement earlier than a primigravida."

We prefer to rely on Dr. Ajinkia's statement in this respect.

The respondent felt the quickening of the foetus before June 16, i.e., before the 112th day, or before the end of the fourth lunar month from the first day of the menstrual period prior to conception. That is too short a period.

Dr. Ajinkia stated that the perceptible foetal movement in a woman pregnant for the first time does not take place before the 20th week from the date of her conception and that the expectant mother begins to feel the movement of the child after the 20th week or end of the 7th month of pregnancy. He further stated that he would not consider it possible for a woman pregnant for the first time to have a marked perception of foetal movement by the 15th week of conception.

When referred to a statement in Modi's *Medical Jurisprudence* to the effect that the first perception of the foetal movement occurred at any time between the 14th and 18th week, Dr. Ajinkia expressed his disagreement and referred to statements in the text book of 'Obstetrics & Gynaecology' by Dugald Baird, and in Eden & Holland's 'Manual of Obstetrics'. In the former it is stated:

> "These are generally first felt about mid-term. The movements are often not felt by primigravidae till the end of the twentieth week while multiparae may recognize them as early as the end of the 16th week."

In the latter it is stated:

> "Definite history can be obtained. Quickening is usually found to occur between the 18th and 20th weeks. Multiparae from former experience, notice the movements earlier than women pregnant for the first time."

We are therefore of opinion that the statements by the respondent in her letters to the petitioner about the enlargement of her abdomen and the quickening of the foetus fits

in with her pregnancy being of a longer duration than one starting on or after March 10, 1947, or notionally starting 14 days earlier.

The only thing said against the pregnancy really having been of a greater duration is that the respondent had her body examined by Dr. Champaklal, husband of Sharda, sister of the petitioner, sometime in May 1947, when she was at Gamdevi. She states that she had some bleeding and therefore consulted Dr. Champaklal who examined her body including the abdomen. Dr. Champaklal denies having done so. The High Court has preferred the statement of the respondent to that Dr. Champaklal, as the petitioner himself had advised the respondent in his letters to consult Champaklal. There is nothing in the letters of the petitioner which he wrote to the respondent from USA in May 1947 which would indicate that she was to show her body to Champaklal. He simply advised her to consult him so that she may not have any trouble later on. This was a general advice and in view of her having suffered from morning sickness in the month of April. In none of the letters by her or by the petitioner in reply is any reference to her bleeding at Gamdevi and to her showing the body to Dr. Champaklal. Unless absolutely necessary, Dr. Champaklal would not have examined her abdomen and there is nothing on the record to establish anything so unusual in the condition of the respondent as to persuade Champaklal to examine the body of a close relation of his. We are not prepared to prefer her statement to that of Champaklal in this respect. It is true that Dr. Champaklal does not depose to have noticed anything unusual about her condition. But that does not mean that her pregnancy was not more advanced than what it would have been if the conception had taken place on March 10, or later. A male relation is not expected to notice such a condition. We do not therefore consider any non-observation by Champaklal of any such enlargement of the respondent's abdomen as would indicate her pregnancy to be from a date anterior to March 10, to affect adversely the inferences to be drawn from her own statements in her letters referred to above.

In her letter of January 8, 1948, to Sharda, written long after her delivery, for the first time the respondent mentioned that her body was examined by Dr. Champaklal and that if there had been any deceit in her heart she could not have shown her body to him. There is no mention of bleeding in this letter which was written over four months after the delivery of the child.

The respondent stated about her bleeding and being examined by Dr. Champaklal for the first time in her letter to the petitioner dated February 16, 1948, months after she

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was delivered of the child and the petitioner had in a way severed his connection with her. This belated statement is not sufficient to discredit Champaklal.

The respondent suffered from symptoms of toxemia. She had blood pressure, passed albumen in urine and had swellings on the body. According to Dr. Ajinkia, there are two types of toxemia, one appearing in the early months, i.e., between the 2nd and 3rd month of pregnancy, and the other from the 7th month onwards, and that in the first case there is severe vomiting, dehydration and jaundice which may result in death due to liver necrosis, while in the latter case there is swelling of the tissues due to water retention (oedema), rise of blood-pressure, passage of albumen in the urine, headache, disturbance of vision, sometimes culminating in fits. He further stated that oedema, high blood-pressure and passing of albumen in urine may take place in the 4th month of pregnancy in a case of chronic kidney disease suffered by a women previously, but not in other cases. There is no evidence in the present case that the respondent had suffered from any chronic kidney disease. Dr. Ajinkia stated that he would call it a severe type of toxemia, if a pregnant woman suffering from oedema all over the body, passing albumen in the urine and having high blood-pressure does not respond to treatment. In cross-examination he states that the first type of toxemia does not occur again and again during the period of pregnancy and that it does not appear after the third month, and that if the second type of toxemia appears in the early stage of pregnancy it can be concluded that the woman is suffering from chronic nephritis.

Dr. Mehta states in examination-in-chief that passage of albumen in urine and oedema usually occur at the second period of pregnancy which he described to be after the 3rd month and before the 7th month of pregnancy, but in cross-examination states that these can occur at any time and that it is not the case that these occur only in the last two or three months of pregnancy. When referred to a passage in Williams on 'Obstetrics', which contained the statement.

> "It is a disease of the last two or three months of gestation for the most part and rarely occurs prior to the twenty-fourth week. It is most often seen in young primigravidae. Pre-eclampsia is the fore-runner of prodromal stage of eclampsia. In other words, unless the pre-eclamptic process is checked by treatment or by delivery, it is more or less likely that eclampsia (convulsions and coma) will ensue."

he said that he agreed with what was stated there. He argeed with the statement in "Progress in Clinical Obstetrics and

Gynaecology" by Lews to the effect that the condition appears in between 3 and 10 per cent of pregnancies, generally later than the thirty second week. He also agreed with the statement in *British Obstetric and Gynaecological Practice* by Holland, II Edition, *P.* 256:

> "In the majority of cases of pre-eclampsia signs of the disease do not appear until after mid-term and in the majority not until after the thirtieth week of pregnancy."

He agreed with what was stated in Dugald Baird's *Combined Text Book of Obstetrics & Gynaecology,* 6th Edition, to the effect:

> "Sometime about the thirtieth week of pregnancy the patient, most commonly a primigravida, will be found to have some elevation of blood pressure and she may have noticed some puffiness of her ankles and hands. After the lapse of days or a week or two, the blood pressure may rise further and albumen, often not more than a trace, can be demonstrated in the urine. There may be a progressive rise in the blood-pressure and oedema becomes more marked. In severe cases the face, abdominal wall and libia are effected."

It is thus clear that this type of severe toxemia which results in increased blood-pressure, passing of ablumen in urine and swelling of the body appears in the later stages of pregnancy and not usually before the end of the 6th month, i.e., not during the period of 168 days of pregnancy, that is to say, not to take place before August 10, 1947 in the case of the respondent who was married on March 10, even if for the purpose of duration 14 days are added to the period following March 10.

The respondent stated in the examination-in-chief that when she went to Prantij from Bombay, which was about the 4th of June 1947, she had swelling on her feet, hands and face. In cross-examination she further stated that she had swelling over these parts and also high blood-pressure in June and that the passing of albumen and swelling of hands and feet continued till delivery but there was no high blood-pressure at the time of delivery. The Court below did not act on the statement of the respondent about her having the symptoms of toxemia in the month of June as none of the letters on record written in June makes reference to such a condition of hers. This is true, but that does not necessarily mean that she did not have such symptoms in the month of June. They might not have been very severe that month and the severity appeared in the month of July. Letters on record amply make out that she was suffering from a severe type

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of toxemia in July. It has been urged for the respondent in connection with her alleged toxemic condition in the month of June that her statement in her letter dated June 28 about her walking 2 miles a day is not compatible with her statement in Court and the suggestion for the petitioner that she was suffering from toxemia in the month of June. The statements of the respondent in her letters can be used against her as her admissions, but cannot be used in her favour accepting them to be correct statements. If she was pregnant at the time of marriage she must take such steps up to the time of delivery as to allay the suspicion that she had been really pregnant at the time of marriage. She may therefore be inclined to make wrong statements in her letters to prepare for any plausible explanation when the delivery took place before the expected time on the basis of her conception after marriage. There is therefore no reason not to believe her statement that she did have such trouble of a milder kind in the month of June. Severe trouble does not usually come at once. It develops from a mild stage.

By June 4, 1947, the duration of pregnancy, if due to coitus on or after March 10, can be at most 100 days, a little over $3\frac{1}{8}$ lunar months, and according to the medical opinion, toxemia in the form of blood-pressure, oedema and passing of albumen in urine does not occur after such a short period of pregnancy. It is to be concluded that by the end of May the duration of her pregnancy was of about 6 months. This fits in with the petitioner's contention that she was pregnant on March 10, when the marriage took place.

A brief reference to the correspondence which shows that she was suffering from toxemia from the month of June 1947 may be made now. The first letter in this connection is dated July 12, 1947. It is Champaklal's letter to Kodarlal, father of the respondent, and was written on receipt of the respondent's letter addressed to Sharda. The respondent must have written that letter on or about July 10. Champaklal expresses worry on having the news about her health. He states:

> "It is not a good sign if she has oedema on the legs and abdomen in passing the urine, and hence you keep Sushilabehn immediately under the treatment of a doctor either in Ahmedabad or at Bombay. Dr. Pandya at Ahmedabad is also a good doctor... continue the medicine as long as she advises. You can consult her and then inform us immediately."

Sharda had herself written to the respondent on July 13, 1947 suggesting that she should go to Bombay for consultation about her health. Champaklal again wrote to

Koderlal on July 20, after receipt of letter from him and stated:

> "The medicine prescribed by Dr. Pandya is proper and I am sure that there will be complete cure. Follow her advice as regards medicine and food directions. If she has given advice for her not taking salt do follow it and if advised to live entirely on fruits and milk do follow the same because if proper care is not taken for this disease there will be epileptic fits at the time of child birth and the case will be serious. Your doctor has warned you from now by examining the urine and it is good that you have taken a warning and you have taken good precautions from now and hence I am sure that she will definitely improve."

Champaklal's letter dated July 28, again on receipt of a letter from the respondent's father, asks the latter to inform him as to how the respondent's oedema stands.

On July 24, the respondent's father wrote to the petitioner's father stating therein:

> "My daughter Sushilaben was got examined by Miss Pandya and her opinion is that she is passing albumen in her urine and that she is suffering from blood pressure. Her health is good. This is all."

Manilal, the petitioner's father replies to this letter on July 27 and writes:

> "Very pleased to learn that Sushilabai has been 'shown' to the doctor and the medicine has been continued and that she is keeping good health. Very pleased to learn that you and the members of your family are keeping well. Here we all of us are keeping well, so much".
> With affection of Manilal's
>
> Jai Gopal."

The letter in a way, is a cold one. He has not stated what would have been both an expression of his feeling at the time and would also have been very polite in the circumstances. He expressed no concern and did not write that he be informed about the respondent's condition from time to time just as Champaklal happened to write in each of his letters. It is to be noted, however, that both Kodarlal and Manilal use language which could not have been correct factually. Kodarlal says 'her health is good' and Manilal expresses his pleasure on receipt of the letter.

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The respondent's letter dated July 2, 1947 was the only letter written to the petitioner in the month of July. No other letter is on the record and the petitioner states in his letter dated July 27 that he had not received any letter from her for a long time and was therefore very much worried.

The petitioner wrote to the respondent on August 6, 1947 stating that he was awaiting her letter and that Champaklal and Sharda had informed him that her health was very bad and she was not in a position to write a letter. He asks for further news of her health by wire.

It is his letter dated August 12, 1947 which makes a reference to the respondent's letter dated August 4 which he thought was received after about a month of her previous letter. Thus it is clear that for about a month between July 2 and August 4, 1947, the respondent's condition was such that she was not even able to write a letter. It was when her condition had become very bad that news of her ill-health was conveyed to Sharda by letter on or about July 10.

The last letter which the respondent writes to the petitioner is dated August 13. In this letter she writes:

> "As my health was very bad, a letter was sent to Shardaben and my father also wrote a letter to Champaklal. At that time he had written that Dr. (Miss) Pandya would be called in and treatment by her would be started; so we are taking her the treatment by her accordingly. We did not write to you for the simple reason that that would have caused you anxiety. The treatment is still continued. But there is no change. There are swellings all over my body and I am feeling extremely weak. Consequently, I have not even the strength to write a letter. We had consulted Miss Pandya and Dr. De Monte and Doctor Anklesaria at Ahmedabad. So according to them poison is passing in the urine and along with it there is also the blood-pressure and so it is likely that the case may be serious case of delivery and I might get convulsions at that time. That is why, right from now they have altogether stopped me from taking salt and they have also stopped me taking food, so as to avoid the rise of blood pressure. I am on the diet of mere milk and fruit. Also my medicines are continued. My dear, the exertions of writing even this much are causing a severe giddiness in my head and so I now stop."

As a post-script to this letter she had further written:

> "They are attending all right on me here. Possibly, they are going to take me to Ahmedabad or Bombay, for the delivery, because in a village like this, there is not sufficient equipment available."

The petitioner's letter dated August 25, 1947 makes reference to the letter from the respondent's sister dated August 17.

The respondent's letter dated August 13 is a very good synopsis of her condition and of the reasons for not informing the petitioner of her ill-health. It is clear from this letter that Shardaben was informed in about the first week of July only when her health had deteriorated to a large extent as she said in the letter that a letter was sent to Shardaben as her health was very bad. Kodarlal informed Manilal even later, on July 24. There is therefore no reason not to accept the respondent's statement on oath that she had suffered from blood-pressure, swellings and passing of albumen in the urine in the month of June and that she had oedema on her legs, ankle and feet when she left Bombay for Prantij on or about June 4, 1947.

The doctors who examined her and whose names are given in her letter dated August 13, have not been examined. No explanation has been given for not examining Dr. De Monte and Dr. Anklesaria. It is said that Miss Pandya refused to appear as a witness as she had not kept notes about the respondent's condition, remembered nothing about it and would not be able to depose anything in Court. We do not consider this to be a good explanation for not calling a relevant witness. Under the stress of oath and cross-examination Dr. Pandya might have recollected things which could have a bearing on the case. Madhuben, the nurse examined for the petitioner, deposed about the respondent's condition and that is not much different from what the respondent herself stated in Court and in her letters. Madhuben states in this connection:

> "About two months before the date of the delivery of the respondent I was called at the house of Sushilabai. At that time I had examined Sushilabai. At that time I noticed that there was swelling over the hands and feet of Sushilabai. I also noticed that Sushilabai was weak in her health and she had trouble about the passing of the urine. Her urine was examined. It was noticed that she was passing albumen in urine. At the

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time when I examined Sushilabai at her house, she had the 7th month. She was not taking proper food."

As the delivery took place on August 27, Madhuben was describing the respondent's condition in about the last week of June. She has been disbelieved for remembering this condition of the respondent as she was not expected to remember this after such a lapse of time. We see no reason to disbelieve her when the respondent herself admits her suffering from these symptoms of toxemia. If Madhuben concluded from these symptoms that the respondent was in the 7th month of her pregnancy, there is nothing to be surprised at that, as, according to the medical opinion already discussed, such symptoms do not appear before the 7th month. Madhuben deposes that she used to visit the respondent at intervals of 8 or 10 days during those two months. The respondent denies that Madhuben ever attended on her except at the time of her delivery. According to her, a lady doctor of Himatnagar used to look her up every Sunday. This lady doctor has not been examined. It is alleged that she had left the place and her address could not be known. The respondent said in her letter to the petitioner, dated June 28, 1947:

"A nurse comes to examine (me) every Sunday".

There is some dispute about the word 'nurse'. The original word in Gujarati was 'bai'. The correctness of the official translation of that word does not appear to be questioned before the trial Court or in the grounds of appeal to the High Court. We see no reason to disbelieve Madhuben's statement which, so far as the condition of the respondent goes, finds support from what the respondent herself states and also from the medical opinion about the stage of pregnancy when the symptoms observed by her occur.

The respondent's letter dated August 13, 1947 indicates the extreme severity of the toxemic condition she was in at that time. Doctors were contemplating the possibility of the respondent's suffering from convulsions at the time of delivery and therefore of moving her to Ahmedabad or Bombay where there was sufficient equipment to deal with a complicated case of delivery.

Now, we may consider the expected condition of the child, born after 171 days of conception, as a result of the respondent's suffering from mild toxemia for about a month and thereafter from severe toxemia for about 8 weeks prior to delivery.

With respect to the effects of toxemia from which a mother suffers, on the expected baby, Dr. Ajinkia states that if toxemia starts at the end of the 4th month of pregnancy

and in spite of the treatment there is no change in toxemia for a period of 7 weeks thereafter, the condition of the child delivered 169 days after the marriage would most probably be a still birth.

Dr. Mehta states that the effect of toxemia in the mother, speaking generally, is that the baby will be under-sized and feeble, though if toxemia be of a short duration, the baby may not be affected. He, however, states that toxemia starting at the end of the 4th month of pregnancy and showing no change in spite of treatment for a period of 7 weeks thereafter, would result either in the child's dying in the womb or in being delivered of on a premature date.

The respondent's suffering from toxemia for about $2\frac{1}{2}$ months at least prior to the delivery and from a very severe type of toxemia for about 7 weeks before the delivery, according to the medical opinion, would be an important factor in reducing the weight of the child born. There was nothing in the progress of the pregnancy of the respondent which could be conducive to the increase in weight of the foetus which would result from conception on or after March 10. A child born of a mother, who had so suffered from toxemia, after the full period of gestation can be 4 lbs. but a child born of such a mother after a period of 171 or 185 days of gestation cannot be 4 lbs. and will be less than 2 lbs. In fact, according to the medical opinion, the child born in such circumstances, should have been either dead already, or one which would die soon after delivery.

The High Court relied on the statement of Dr. Mehta that though such is the normal expectation, certain children may survive on account of their inherent vitality. We do not think that an extremely premature baby born of a mother who had suffered from severe toxemia has any chance of having such inherent vitality.

The delivery took place at the Prantij Municipal Dispensary, Maternity Ward. Madhuben, witness No. 2 for the petitioner, was working as a mid-wife at the hospital and had attended to the delivery of the respondent. She states that she had weighed the child and it weighed 4 or $4\frac{1}{2}$ pounds, that it was a mature child which was born after the expiry of the full period of gestation and that the child was a normal one. Her statement finds support from Exhibit K, one of the in-door case papers relating to the respondent at the hospital. Madhuben states that Kachrabhai, the compounder, made entries in this paper under her instructions.

Exhibit K, as printed, shows that the portion of the column under 'disease' was torn. We have seen the original and could clearly read the word 'normal' and the other word may be

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either 'labour', as stated by Madhuben, or 'delivery'. It records 'Female child, weight 4 pounds'. The details noted about the interval between the starting of the labour pains and the delivery do not indicate that there was anything abnormal.

Kacherabai, the compounder, was examined by the respondent as witness No. 2. According to him, a white paper known as 'the maternity card' is also prepared along with the brown paper, which Exhibit K is, and that the white paper which must have accompanied Exhibit K was missing from the record. A photo copy of the pro-forma white paper was taken on record. It requires entries about previous obstetric history and various other matters observed at the time of admission of a maternity case. There is no reason to suppose that the relevant white paper was removed from the records by the petitioner or by someone at his instance and that it contained matters which would show the entries in Exhibit K to be wrong or the statement of Madhuben to be inaccurate. Kacherabai states that all the records at the hospital remain in the custody of the Doctor, that they are kept under lock and key, that the key remains with the doctor or with him and that they were the only two responsible persons in the dispensary. He has also stated that in the file there were some other brown papers also for which there were no corresponding white papers and that he did not charge the petitioner with the removal of any white paper from this file and that it was no fault of the petitioner if any white paper was not on the file. He has also proved the entry with respect to the respondent's delivery in the Maternity Admission Register. The entry is Exhibit 15. It also mentions the weight of the child to be 4 lbs. It has a 'dash' in the column for 'conditions of the child'. Kacherabai states that this 'dash' meant that the condition was good. A 'dash' which is found in the column 'still born, miscarriage, abortion' cannot mean 'good'. 'Dash' in the column of 'condition of child' may mean 'good' as deposed to by Kacherabai. Any way, it must mean that there was nothing particular to note about the condition of the baby.

Gokhale J., accepted Mahuben's statement about the weight of the baby and its condition but did not accept the statement that the baby was born after a full period of gestation. He considered the delivery to be premature.

Patel J., considered Madhuben to be unreliable, assumed the weight of the baby to be 4 lbs. and accepted the respondent's statement about the condition of the baby and its being born premature.

Patel J. remarked, in meeting the submission for the petitioner that Madhuben was living at Vrindaban and was leading a pious life and had no reason to make untrue statements

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that sometimes such persons might be bigoted and narrow-minded. He did not believe her statement that the child was kept on glucose for two days in accordance with the practice followed in the Prantij Hospital, as normally mother's milk is available only after two days after the birth of the child. The statement is said to be contrary to those of most of the standard books referred to by the experts on behalf of the parties. Madhuben was not questioned about it and we have not been referred to any statement to the contrary in any book on the subject.

He did not rely on the entry about the condition of the child as the various entries in Exhibit 17 showed that the condition of children weighing 3 lbs. or 4 lbs. or 6 lbs. was similarly noted. The description of the condition of a child as good, need not have a necessary relation with the weight of the child born. It is to be noted that, according to the entries in the Maternity Admission Register, Exhibit 17, most of the children born in the Prantij Hospital weighed 4 lbs. or less. The condition of all the children could not have been such as to require special mention. It may, however, be pointed out that no entry in Exhibit 17 shows the weight of the child to be 6 lbs.

Patel J., suspected the genuineness of the entries in the hospital records as he mis-read Kacherabai's statement and so erroneously thought that the hurry with which the papers were produced by the Doctor raised some suspicion. Kacherabai, the compounder, examined for the respondent on May 7, 1950, stated:

> "Doctor has returned to Prantij yesterday. He had gone to attend some marriage about 3 or 4 days ago."

Patel J., however, happened to mis-read this statement and observed, in dealing with the question of normal delivery,

> "Keshavbhai (Kacherabai?), the witness of the respondent, the compounder, said that the doctor left only a day before his giving evidence, i.e. he left on the 6th. The hurry with which the papers were produced by the doctor may raise some suspicion."

The fact is that Dr. Modi who was attached to the Prantij Municipal Dispensary in May 1959 was present in Court on May 2, 1959 to produce the documents summoned from him. He was not in a position to be present in Court between 3rd and 6th May on account of a marriage which was to take place on May 4. He, therefore, filed an affidavit that day stating the facts and requesting the Court to excuse his absence from Monday, May 4, 1959, till the morning of Thurs-

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day, May 7, and expressing his readiness to leave the records in the custody of the Court or such other person as the Court directed.

The order sheet of the trial Court dated May 2, 1959 shows that the petitioner's counsel requested the Court to take the papers in its custody as the Doctor had come with the relevant papers. Counsel for the respondent had no objection. The records came in the custody of the Court in this way. Patel J., says:

> "The white paper in respect of the respondent is missing. The petitioner and his advisers had the first glimpse of the hospital record in connection with this case if any one had it and it is a mystery that the white paper should disappear."

The order sheet of May 2, 1959 shows that counsel for the petitioner had tendered in Court Entry No. 63 for the year 1947, i.e., Exhibit J. and indoor-case papers of the respondent, Exhibit K. It adds:

> "Shri Mehta says that Dr. Modi (the doctor at the Prantij Municipal Dispensary who produced Exs. J & K) does not know of his personal (knowledge) and he is producing the records (maintained) in the ordinary course of business. Mr. Shah (counsel for the respondent) has no objection."

It appears that Dr. Modi did not file in Court any white paper. There is no evidence that the petitioner had the first glimpse of the hospital record and this is clear from the learned Judge's using the expression 'if anyone had it'. The petitioner is not to blame for the missing of the white paper. When the learned Judge suspected the bonafides of Dr. Modi and the petitioner in connection with the missing of the white paper relating to the respondent's delivery and was to base a finding on such a suspicion, he should have summoned Dr. Modi and examined him in that connection and should not have left the matter by a mere observation: 'The doctor who produced it could not be cross-examined, as he produced the papers in a hurry'. We should, however, point out that what transpired when Exhibits J & K were produced gave no room for the comment made by the learned Judge.

Patel J., was further of opinion that it was not expected of Madhuben to remember the condition of the child after so many years of the event and because the respondent herself described the condition of the child very much differently and the latter could be expected to have better reasons for remembering its condition than the mid-wife. We may quote the statements of the respondent and Madhuben about the condition of the child. The respondent said:

> "The child born to me was a very weak one. It was a very small one. She was not in a position to cry at

the time of her birth. She did not cry for two days after her birth. Her eyes were closed. There were no hair on her head. She had no nails on her fingers and toes. She was not able to suck my milk. She was reddish in colour. As the baby was unable to suck my milk, milk was pumped out. That milk was thrown away. The baby was given glucose and brandy. 12 or 13 days after delivery the baby was able to feed from the breast."

Madhuben said:

"After the delivery Sushilabai appeared to be weak but the child was normal. It was crying. The movement of the limbs was normal. The eyes of the child were open and the child was taking glucose. The cries of the child indicated that the child was a healthy one."

"At the time of the delivery of Sushilabai, Dr. Chimanlal was not present. No other doctor or nurse was called at the time of Sushilabai's delivery. I alone attended to the delivery of Sushilabai."

Madhuben was not cross-examined regarding her statement about the condition of the child and the respondent's version about the condition of the child was not put to her. The only explanation suggested for this omission has been that the respondent herself was not present in Court that day and therefore could not have instructed the counsel in that regard. The explanation is feeble. The respondent was in Bombay on the day Madhuben was examined. She must have known that Madhuben had been summoned for evidence on that particular day and if she did not attend the Court that day it must have been with a purpose. A party has to give instructions to his counsel in good time and has not to put that off till the actual date of hearing.

Madhuben was questioned as to how she remembered these facts and stated that during the proceedings of the case at Baroda, somebody had made enquiries from her and therefore she was reminded of the respondent's delivery. This too must have happened in 1948. It appears to us that the reason for her remembering the details of the respondent's delivery could be the very fact which is the matter in issue in this case. The respondent belonged to a respectable family of the place which is not a large one. The date or at least the month of the marriage would be known in the locality. The delivery took place within an unusually short period of the marriage. It appears that people of the locality talked about it. In these circumstances, Madhuben could have recollected of this particular delivery when questioned about it.

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It is very difficult for a witness to state on oath why he remembers a certain fact which took place long ago and the witness therefore makes his best to answer it at the spur of the moment. We do not consider the long period lapsing between the delivery and Madhuben's statement in Court sufficient to justify ignoring her statement or consider her to be an unreliable witness when there is no reason for her to depose falsely, nor the fact that she stayed at the place of Manilal, father of the petitioner, in Bombay when she came to give evidence sufficient to discredit her. She went to Bombay from Vrindaban where she had been residing after she gave up service and had been living the life of a devotee.

It is true that a mother is not likely to forget the condition of the child born to her, but the value of the respondent's statement depends on her veracity. Both the trial Court and the High Court in their judgements held her to be an unreliable witness. Patel J., relies on her statement only so far as it is about the condition of the child. We do not consider her statement about the condition of the child born to her to be worth reliance. She describes this condition to be practically exactly what ought to be the condition of a child after a period of gestation amounting to 171 days. The description given by her exactly fits in with the details of the descriptions found in text books on obstetrics. She was examined after the doctors examined for the petitioner and for her had made their statements. Apart from this, she could know from other sources what condition a baby born after that period of gestation should have and could therefore mould her statement accordingly.

Before the remand of the issues by the High Court, it was not her case that the child was born prematurely or that its condition was such as would have been the condition of a child born after that period of gestation. If the condition described now was the real condition of the child born, there could have been no reason for her to think that her true story of having conceived by her husband after the marriage might not be accepted by the Court. She could have doubts about it only when the condition of the child did not fit in with the expected condition of a child born after that period of gestation. If the condition of the child was such as described by her, there was no reason why Madhuben would not have given instructions about the condition to the compounder, for noting in the Hospital records. That was not the normal condition of the child born, be it after the full expiry of the usual period of gestation or after almost the full period of gestation. There is no difference in the statements of the doctors examined in the case with respect to the care and attention necessary to be given to a baby born after such a period of gestation. The respondent was in the hospital till September 8,

1947. She states that great care was taken of the child, but if that extreme care was taken, there would have been some note about it in the hospital records and that itself would have been a very good reason for Madhuben to remember about the child's condition.

We see no reason why Madhuben be not believed when the available hospital records support her. She has no reason to depose falsely. In these circumstances, we are of opinion that Patel J., was in error in preferring the statement of the respondent to that of Madhuben.

The weight of a child born, is again a factor which tends to support the statement of Madhuben about the condition of the child and goes against the statement of the respondent. The child weighed 4 lbs. Again, there is no difference in the opinion of the doctors examined for the parties that the weight of a child born at about the 6th month of pregnancy would be about 2 pounds. Such a statement is borne out from what is noted in the various books on that subject. We see no reason to doubt the statement of Madhuben about the weight of that child. The entries in Exhibits K and 15 support it.

We do not see any reason to disbelieve the statement of Madhuben that the child was a mature child. The normal weight of a child born after the full period of gestation is said to be 6 to 7 pounds, according to Dr. Ajinkia and 5 to 7 pounds, according to Dr. Mehta, but the weight of a normal child depends upon various circumstances. In this connection, it is worth noticing that Exhibit 17 contains entries about 35 cases of births at the Prantij Hospital between December, 1942 and August 1952, about which Kacherabai was questioned by the respondent's counsel in the examination-in-chief. Out of these the majority of children weighed less than 4 lbs. Only one weighed 5 lbs., one 4 lbs. and 8 ounces, and twelve weighed 4 lbs. Only one out of them appears to have died. It can be taken that the normal weight of the children born at this hospital is about 4 lbs. It is too much to expect that all these were cases of premature deliveries. It should not therefore be a matter for surprise and for disbelieving Madhuben when she states that the child born to the respondent was a mature child born after the expiry of the full period of gestation. Of course, her statement cannot be taken to be literally correct. What it amounts to is that the child was born after practically the full period of gestation and was definitely not a child born in the 6th or 7th month of pregnancy.

There had been some difference of opinion between Dr. Ajinkia and Dr. Mehta examined for the petitioner and the respondent respectively, about the definition of 'normal labour' or 'normal delivery'. Both are agreed with what the

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expression 'labour' means. Dr. Ajinkia states that normal labour would mean a series of processes by which the mature or almost mature products of conception are expelled from the mother's body and referred to, in this connection, the definition of 'labour' in Williams' 'Obstetrics', 10th Edition, p. 324. Dr. Mehta agrees with the definition but would not associate maturity or almost maturity of the child with the expression 'normal labour' and would restrict that expression to mean labour during which no artificial means are used. He had to admit later that labour has connection with maturity. When questioned whether normal labour could be compatible with premature birth, Dr. Mehta stated in examination-in-chief:

> "It may be termed as a normal labour, but one specifies the term that it was a premature one."

We are inclined to prefer Dr. Ajinkia's view on this point. However, nothing much turns on it in view of our opinion about the weight of the child born and the weight being consistent with the weight of a child born after almost a full period of gestation, as would be discussed later.

We, therefore, accept as true the statement of Madhuben and hold that the child born to the respondent on August 27, 1947 was after normal labour and weighed 4 lbs. We also believe her statement that it was a mature child and had been born after almost a full period of gestation for reasons we now state.

We now deal with the question whether the child born after 171 days of marriage could survive and live for years, and if so, whether the respondent's child was born premature or after almost the full period of gestation and refer to what Dr. Ajinkia and Dr. Mehta had said in this connection

Dr. Ajinkia states that if special care is taken at the time of delivery and also in the treatment of a child prematurely born at the 28th week of conception, then it may survive. The special care he refers to is not just giving more attention to the baby by the relations, but of a particular type. He has described the special care to be taken in the process of delivery and the care required after the delivery. During the delivery the special care required is in regard to the following matters:

1. The labour should not be allowed to be prolonged.
2. As soon as the baby is delivered, its temperature should be maintained.
3. Oxygen should be given to the child, by special incubators.

4. Some respiratory and circulatory stimulants will also be required.
5. Baby will be required to be handled very gently.
6. Since its resistance to fight infection is low, all the care is taken to prevent infection.

The care required after delivery is in these respects:

1. Maintenance of warmth.
2. Maintenance of proper nourishment.
3. Prevention of Cyanotic attacks by giving oxygen.
4. Prevention of infection as stated before.

The respondent remained in the hospital for about 12 days till September 8. Madhuben does not state of any such care being taken either during the delivery or afterwards. In fact, the hospital did not have the requisite equipment. Madhuben has stated that abnormal cases of delivery were not attended to at the hospital.

Dr. Ajinkia further deposed that in his opinion even with the skilled care, a child born within the 7th calendar month cannot survive, and in this he is not fully supported by what Taylor states at p. 32 in his 'Principles & Practice of Medical Jurisprudence', 11th Edn., Vol. II:

> "In the absence of any skilled care Hunter's dictum on the unlikelihood of survival when born before the 7th calendar month remains as true as it was."

There cannot be any positive definite statement in these matters by any one including a doctor and especially when there have been exceptional cases of whatever veracity mentioned in medical books. Possibly there had been no such case in the personal experience of Dr. Ajinkia where a child born before the 7th calendar month survived in spite of the care given to the child presumably at the hospital.

Dr. Mehta states that he had not applied his mind to the question whether a child born after 169 or 171 days after conception would be born alive, but had applied his mind on the footing of 184 days counted from the first day of the last menstruation. He was not, therefore, in a position to challenge the statement of Dr. Ajinkia that a child born after 169 days from the date of conception would be born dead.

Williams, in his book on *Obstetrics*, states at p. 186 that at the end of the 6th month, the foetus weighs about 600 grams and a foetus born at this period would attempt to breath, but almost always perishes within a short time. He further states that in the 7th month the foetus attains a weight of about 1,000 grams and that a foetus born at this time moves its feet quite energetically and cries with a weak voice and as

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a rule it cannot be reared, but occasionally expert care is rewarded by a successful outcome. Williams, however, states that generally speaking the length affords a more accurate criterion of the age of the focus than its weight. The weight of the child, however, is a good index of the period of gestation, though it is not as good and accurate as the length of the child born. The baby's weight of 4 lbs. at birth is not consistent with its being born after a gestation period of 185 days. It is, therefore, reasonable to conclude that the child born to the respondent and weighing 4 lbs. was not a child born on the 6th or 7th month of pregnancy. This supports Dr. Ajinkia's statement.

Madhuben does not state that the child was weak. The respondent states so. We do not believe her. Reference to certain letters may be made in this connection.

The respondent's sister sent a letter to Sharda on August 27 or 28 to which Sharda replied on August 31. It appears from Sharda's letter that the respondent's sister's letter had said that the health of the respondent as well as of the baby was good. The sister's letter does not, in any way, convey the information that the baby was very weak and of such a condition as is now described by the respondent. On August 30, the respondent's father sent a telegram to the petitioner and said that both the respondent and the baby were well. On September 3, seven days after the birth of the child, Koderlal sends a letter to the petitioner. It is in this letter that he states:

> "After I had been to Marwar, our daughter Sushila has given birth to a daughter prematurely on 27th August 1947, at about 10 A.M. in the morning .....and the health of both is very well..... Intimation has been given to your father by wire and through letter but there is no reply from him."

This letter was written after the petitioner's parents had not responded in any way except by showing extreme indifference to the news of the birth of a grandchild. That, along with local gossip, must have put Koderlal on guard and even then he does not write anything with respect to the extremely weak condition of the child and simply states that the delivery was premature. Sushila also writes to Sharda on the same day, i.e., September 3. She was still in the hospital and ordinarily the mother of a baby 6 or 7 days old would not have written a letter to anyone. She writes in this letter:—

> "The health of myself and my baby is all right. The baby is very weak..... Two letters and a telegram about the birth of the baby were sent to the respected Mamma, but there is no reply at all from the respected Pappa. Hence, all here are

very much worried as to why there is no reply from the 'Vevai' (in-laws) even to the telegram. And as I did not keep good health, the baby was born prematurely before the full period which of course is a matter over which the Almighty has dispensation. I do not know what idea he (Pappa-Vevai) must be entertaining about me. To whom, but to you, can I write?..... A telegram was sent to London to your brother, informing him about the birth of the baby but God knows why there is no reply from him."

The contents of this letter tend to confirm what we have said in connection with the letter of the respondent's father to the petitioner. The respondent and her people had a definite feeling that the petitioner and his people were not responding to the communications probably on account of the idea that the child born was not the petitioner's child. The respondent indirectly gave expression to such a feeling by saying that she did not know what idea her father-in-law was entertaining about her. Any way, her letter does not state in what respect the baby was very weak. The expression that the baby was weak in no way conveys the idea that the baby's condition was such as has been now described by the respondent. For a baby of mature period, the respondent's child was certainly weak, but for a baby born after a period of about 6 months' gestation, the baby born was not weak at all.

The respondent sends a letter to the petitioner on December 22. 1947. She expresses her grievance at not being informed first of the petitioner's return to the country, and states:—

"No one can be a match for nature; God alone stands for truth. Please forgive my mistakes if any."

These expressions also make out that she was fully conscious by this time that the indifference of her husband towards her was on account of the feeling that the child born was not his. Still in this letter she does not give a full picture of the condition of the child born to her in order to impress the correctness of her implied statement that the child was really of the petitioner. That was the time when she and her people, could have placed facts and evidence in the form of either statements from the doctors or references to the doctors to whom the petitioner could refer for such information which could have supported the respondent's assertion.

When no reply was received to this letter, it was then that the respondent wrote a letter to Sharda on January 8, 1948 and over a month later to the petitioner on February 16, 1948.

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Reference has been made to these letters earlier in connection with the allegation that Champaklal had examined the respondent's body in May 1947.

In her letter to Sharda, she is more explicit than what she was in her letter to the petitioner on December 27. She said:

> "Hence I open out my heart to you this very day (and say) that I am absolutely innocent. I was in M.C. about ten days before the marriage ..... It did not occur to me, even in my dream, that an accusation of such a roguery would be brought against me..... To throw such an infamy on a person coming of a respectable family would indeed be the limit; Behen: You are kind and please think full well over this matter and bring it to end. ... As to whether it is your child or not, well, you may see it and satisfy yourself as to whether or not its appearance and features tally (with yours)."

It is clear now, from this letter that she was fully conscious of the accusation against her, conveyed through silence if not through letters. Yet, in this letter, except for asserting her innocence, she does not come out with the facts about the condition of the baby and the extreme care taken by her. She wrote in similar strain to her husband on February 16, and stated in that letter:

> "I was keeping weak health and was suffering from blood-pressure and only on account of that the delivery has taken place earlier ..... It is, therefore only the feeling of revenge entertained by the persons who have poisoned your ears towards me and the members of my family. Further, if I were at fault and if I wanted to hide something from you then I would not have taken proper care of the child who was and is still weak due to its premature birth and consequently it would have died and I would have told (you) that there was something like mis-carriage. But as my conscience was clear and as I had trust in you I took proper care of it and brought about improvement in its health. .....It may well be that as you have not known me fully that you have got suspicious. But if you live with me you will be convinced that out of jealousy and revenge an absolutely false charge has been put on an innocent woman."

It is for the first time in this letter that something is said of taking proper care of the child who was weak. Even in this letter she had not given a description of the condition of the

child at the time of its birth, a condition which would have sufficed to convey the idea that the child born was really a child of about 6 months' pregnancy.

The letters of the respondent and her relations subsequent to the birth of the child do not bear out the respondent's statement about the condition of the child at the time of its birth and, therefore, do not in any way discredit the statement of Madhuben about the condition of the child born and its weight.

True that there had been instances of children born after a comparatively short period of gestation and that they had survived—a few for some years too. But such cases are few and it may be open to doubt whether the period of gestation reported was absolutely correct. In this connection we may refer to Table No. 2 at p. 560 of 'British Obstetric & Gynaecological Practice' by Holland & Bourne, II Edn., which relates to Total Consecutive Births, Male, Classified by Birth Weight & Gestation Time. It also mentions still births and neo-natal deaths among them. It appears from this table that out of 7.037 cases of births, there were 3 births i.e., .043 per cent with a gestation period between about 155 and 175 days, that all those three were cases of still births or neo-natal deaths and that the weight of each child was 1 lb. or so. There were 4 births i.e. .057 per cent with a gestation period between 170 and 185 days. All the four of them. were cases of still births and neo-natal deaths. Only one of them weighed 6 lbs. Two weighed 2 lbs. each and one weighed 1 lb. 13 i.e., .19 per cent were births with a period of gestation between 185 and 200 days. 12 of them were cases of still births and neo-natal deaths. Only two weighed 5 lbs. each, one of them surviving; one weighed 4 lbs. Three weighed 3 lbs. each. Six weighed 2 lbs. each and one weighed 1 lb.

Dr. Mehta states that a baby born 169 days after conception would weigh between 1½ and 2 lbs. A child whose weight at birth is 4 lbs. might in rare cases be a full term baby, but ordinarily it was taken to be a premature baby, according to him, and a 4 lbs. full-term baby was a rare occurrence.

The learned Judges considered the delivery premature on account of the respondent suffering from toxemia. We do not agree.

Dr. Ajinkia states that a premature delivery is one which takes place between the 28th week and the 40th week from the date of conception and that miscarriage means the expulsion of the product of conception before the 28th week of conception. He has also stated that the shorter the period of gestation, the more feeble would be the child and fewer would be the hours of its survival, while a child born out of miscarriage could not survive even with special care because it

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was not a viable child. By viable he meant that the child has been sufficiently developed to continue separate existence from the mother. He is emphatic that a child could not be viable even before the 28th week, say 25th or 26th week.

Dr. Mehta, on the other hand, states that a child is supposed to be normally viable about the 28th week, that there can be exceptions and a child might be viable before the 28th week and could be born alive and could survive. He said that he made this statement on the basis of knowledge which he had acquired from the standard books and referred to three cases mentioned in De Lee's Book.

Dr. Mehta has further stated with respect to premature deliveries that premature delivery could be before the 28th week. At first he stated that he could not say how long before such a delivery could be, but when pressed in cross-examination he stated that a 20 weeks' foetus, if ejected alive or dead from the body of a woman it would be a premature birth. He admitted that abortion was different from premature delivery and also stated that if the delivery took place before the 28th week it was termed either miscarriage or abortion, but added that if the child born was a viable child, then such a delivery would be called a premature delivery.

He could not contradict Dr. Ajinkia's statement that a child born after 169 days from the date of conception would be born dead.

We may refer to what is stated about premature termination of pregnancy in *British Obstetric Practice* by Holland, at pp. 559—561, 2nd Edition:

> "Premature termination of pregnancy may be defined as termination of the pregnancy after the twenty-eighth week (accepted date of viability of the foetus) and before the fortieth week, counting from the first day of the last menstrual period. On the other hand, most writers on the subject of prematurity tend to define the condition in terms of the weight of the baby rather than in terms of the maturity of the pregnancy. It was first laid down by the American Academy of Pediatrics in 1935 that a premature infant is one that weighs 5½ lb. (2,500 gm) or less, regardless of the period of gestation. This definition was accepted by the International Medical Committee of the League of Nations and has gained universal acceptance, in spite of its scientific inaccuracy. Most obstetricians have seen babies of less than 5½ lb. born after a gestation period of more than 280 days. Indeed, birth weight and duration of pregnancy are far from perfectly correlated. Infants weighing less than 5½ lb. at birth may even be post mature. This

is well shown in Table 2 constructed by Kane and Penrose from 7,037 live births from University College Hospital records. It is seen that 470 babies weighed less than 5½ lb., but that 111 (23.6 per cent.) of these under-weight babies were born at term or later, according to the ordinary method of calculation. The term immaturity has been suggested as an alternative in view of these discrepancies, but it has not received universal acceptance. There is, however, more than academic significance in the difference because maturity as such, irrespective of weight, is of the greatest importance in relation to foetal survival. A baby whose birth weight is 4 lb., if born at thirty-eight weeks stands a far better chance of survival, and is more likely to develop into a healthy child, both mentally and physically, than one of the same weight born a month earlier."

What has been said above about the viability of a child or its premature birth is with respect to a child born of a mother whose pregnancy progressed normally. The chances of survival of a baby born, of a mother who had suffered from severe toxemia for about two months prior to the delivery, are bound to be much less and would be further less if no special care is taken during delivery and thereafter. The weight of the respondent's baby, its condition at birth and its having lived as a mature child born after full period of gestation does, together with the other circumstances connected with the progress of the pregnancy, amply support the petitioner's case that the child born to the respondent could not be of the petitioner.

We have been referred to several cases in which the question about a child being conceived from the husband or not arose. Suffice it to say that cases fall into two categories. One where delivery takes place much more than 280 days after the husband had last opportunity to cohabit with his wife and the other where it takes place much earlier than 280 days from the first day of menstruation prior to conception. The first type of cases, to which reference need not be made, involve the determination of the question as to the period it took for a sperm to fertilize the ovum. Nothing precise about the period was known when cases prior to the decision of *Preston Jones'* case(1) came up for consideration. It was considered to vary much and so children born so long as 349 days after the known period of cohabitation were held to be legitimate, as not proved to be the results of adultery. No such question however arises in the other type of cases as the decision is to be given on the assumption that there had been fertilisation on the first day possible for the coitus between the husband and wife. The question to determine in such cases is

(1) (1951) A.C. 391.

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whether the short period of gestation would justify the conclusion that the child was born of conception from that coitus or was born as a result of some other sexual relations between the woman and someone prior to that coitus between the husband and wife. One such case was *Clark* v. *Clark*(1) on which much reliance has been placed by the Court below.

In this divorce case, on the petition of the husband there was no evidence of misconduct on the part of the wife and the only evidence of adultery was the fact of the birth of a child the period of gestation of which, assuming the husband to be the father, could not have exceeded 174 days. The child lived, and, at the date of the hearing was about 3 years old. The medical evidence was to the effect that a child of so short a period of foetal life would not survive for more than day or two. In view of the fact that the date of conception could be fixed very rarely, it was considered that the periods of gestation generally spoken of were notional periods and that therefore where the date of conception could be fixed and thus the actual period of gestation be ascertained, such period was comparable to the longer notional period and consequently a six months' child might be comparable to what was called a 7 months' child.

The facts of that case were very much different from the present case and must have naturally influenced the view that a six months' child be comparable to a 7 months' child. The Court considered the allegation of the husband who lived quite close to where the wife lived for about a year after the delivery, that the child when born was a fully developed 9 months' child, grotesque. The Court believed the evidence of the nurse with 30 years' experience that the child born was one of the two most extreme cases of premature births she had seen. The wife's mother deposed about the condition of the child which corresponded to a child born after 174 days of the conception. The Court believed the statement of the mother of the child. The lower limbs of the child were in irons even about 3 years after its birth. The delivery was hastened on account of an accident. The mother of the child had fallen a day earlier. The weight of the child, though noted as $3\frac{1}{2}$ lbs. was not more than $2\frac{1}{2}$ lbs., as the former weight included the weight of the towel.

The notional period of pregnancy is calculated from the first day of the menstruation preceding the conception and it is on this account that 14 days are added to the period of pregnancy from the actual date of conception. On the basis of notional calculation, the fully mature child is born after 280 days. On the basis of the date of conception, the child is born

(1) [1939] 2 All E.R. 59.

between 265 and 270 days. The development of the foetus undoubtedly depends on its age as counted from the date of conception and it is for this reason that the books on Obstetrics mostly deal with the development of the foetus on the basis of days or weeks after conception, for a period of about 2 months and thereafter they begin to note its development with respect to the end of the 3rd and consecutive months. This must be due to the fact that by that time a difference of about a fortnight in the period of gestation does not bring about a substantial difference in the description of the development of the foetus. After all, the entire knowledge with respect to the development of the foetus with respect to the period of gestation is based on a consideration of a large number of cases and then arriving at some generalized conclusion about the development of the foetus corresponding to its age from the date of conception. It would not therefore be very correct to add 1 lunar month to the ascertained period of gestation in cases of a known date of conception merely on the ground that when books speak of a foetus of a certain number of months that foetus might be due to a conception taking place on any day of the lunar month corresponding to the menstruation prior to the conception and the miss-period after conception.

In the present case, however, it is known that the earliest date for conception can be March 10, 1947. It is the statement of the respondent herself that about 10 days prior to the marriage she had her monthly course. It is clear therefore that the notional period of pregnancy in the present case cannot exceed the period from March 10 by more than 10 days. This means that the notional period of gestation of the respondent's child cannot be more than 181 days. We have, however, considered the case on the footing of 185 days which is equal to the period between March 10 and August 27 (both days inclusive) plus 14 days. There can therefore be no justification in the present case to consider that the respondent's child, though of 171 days' gestation after conception, if it be taken to be conceived on March 10, could be notionally equivalent to an age of 171 days plus 28 days, i.e., 199 days.

We are therefore of opinion that *Clark's* case(1) cannot be a good guide, both on facts and law, for the determination of the question before us about the legitimacy of the respondent's child.

It may be mentioned that *Clark's* case(1) was distinguished in *Guardianship of Infants Act,* 1886 & 1925. *In re. and In re. S. B. an Infant.*(2) *B.* v. *B.* where it was held that a period of 188 days is too short to be accepted in law as a period of gestation on the ground that in *Clark's* case(1) the child was

(1) [1939] 2 All E.R. 59. (2) 1949(1) Ch. 108.

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not held to be a fully developed nine months' child but was held, in view of the evidence of the experienced mid-wife, to be an extreme case of premature birth. It was said at p. 110:—

> "There is, as I have said, no such evidence of prematurity here, and it would be straining the facts to assume that the birth was the result of intercourse that took place only 188 days previously."

It is true that no allegation of any kind has been made about the respondent's general immorality or about her misconducting with someone at the time when the child born to her could be conceived. The mere fact that her character in general is not challenged does not suffice to rebut the conclusion arrived at from the various circumstances already discussed. The only question before us is whether on the evidence led it is possible for the petitioner to be the father of the child. The facts and matters we have set out earlier clearly establish that the conception—to produce a child of the type delivered —must have taken place before March 10, 1947, and if, as is now the case, the petitioner's first sexual contact with the respondent was on March 10, 1947, it follows that the respondent was pregnant by someone other than the petitioner at the time of her marriage.

The respondent, in her letter dated February 16, 1948 to her husband said:—

> "Further, you know that one has to insult wicked persons in order to remain chaste. Therefore those wicked persons who have been insulted are ready to take revenge. Hence it is only out of jealousy that they poison your ears."

If this statement is correct, it shows that persons in her village had evil eyes on her and that she had to reject their advances.

We may also now mention certain other circumstances on which the respondent relied to show that however unusual it might be, the child born to her was by the petitioner's marital intercourse with her after their wedding. They are:—

1. Reluctance of the respondent to meet even the petitioner before the marriage though the engagement continued for a period of two years and she loved him.
2. Suggestion to break off the engagement as late as January and February.
3. Reluctance to abort the child.
4. Symptoms of vomiting and nausea immediately after the miss of period.

5. The fact that Champaklal, the brother-in-law of the petitioner did not notice the pregnancy of the respondent which would be sure to have far advanced if the allegation were true, though she lived with him and was examined by him.
6. She stayed up to the end of May at Vile-Parle in the house of the petitioner's father and yet the pregnancy was not noticed.
7. The progress of pregnancy from the beginning which was consistent only with pregnancy by marriage.
8. The child being very weak and under-weight.
9. Sudden delivery.

The first circumstance can only indicate that she was moral and did not want to have any irregular connection with the petitioner prior to the marriage. The petitioner has not challenged her character. A good general character does not necessarily mean that nobody could have had sexual intercourse with her even by force, a possibility indicated by her letter just quoted.

The second circumstance urged is that if she had become pregnant, she could have accepted the suggestion of breaking off the engagement when the petitioner had been expressing his dissatisfaction at his engagement with her. She could not have been very independent about it. The engagement was brought about by the parents of the parties though, possibly, with the implied or express consent of theirs. Breaking off the engagement might have led to scandals. She wrote to the petitioner in her letter dated May, 15, 1946 that people asked her as to why marriage was not taking place. A betrothal period of about 2 years is ordinarily a long period, when the parties were of marriageable age. So this circumstance, again, is of no force.

The third circumstance about her reluctance to abort the child, again, is not of any value. Abortion, as suggested by the petitioner in his letters of April 5 and 8, too would have led to complications and scandal and it could not have been certain that the abortion would not disclose the longer age of the foetus than what it ought to have been if it was of a connection after the marriage.

We have already dealt with the symptoms of nausea and vomiting appearing immediately after the first miss of the period and ceasing suddenly about the middle of April and held that they appeared to be more consistent with the petitioner's case than with the respondent's.

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We have also dealt with the possibility of Champaklal's observing the stage of her pregnancy when she was at Gamdevi in the month of May and have held that he could not possibly have noticed it.

It is true that there is no evidence that her parents-in-law noticed during her stay at Bombay, from about the middle of May to June 4, that she was in an unduly advanced stage of pregnancy. Reference has already been made to the implication of the statement in her letter that her mother-in-law asked her to take all the ornaments with her when she was leaving for her paternal place on or about June 4.

We have also referred to a letter of her father-in-law expressing no surprise and showing coldness on his part on learning of her condition in the last week of July 1947 and to persons talking about her and the petitioner by May 24, 1947. It is therefore not possible to say that the advanced stage of pregnancy was not noticed when she was at Bombay in the month of May.

We have already dealt with the progress of the pregnancy and need not say anything more in that connection. It is not established that the child was very weak and was under-weight.

The last circumstance urged on behalf of the respondent is the fact of sudden delivery. The only circumstance alleged in this regard is that her father was not at Prantij on August 27. Koderlal stated in his letter to the petitioner on September 3 that after he had been to Marwar their daughter Sushila had given birth to a daughter. If this statement, as translated, is correct, it shows that Koderlal had returned from his visit to Marwar and not that the delivery took place when he was away from Prantij. The respondent's bare statement that her father was not in the village that day, therefore, does not suffice to lead to the conclusion that the delivery was sudden and that no arrangements had been made for the delivery and that the delivery did take place after six months of pregnancy. Further, a sudden delivery need not be a delivery of the six months' child. It may be a delivery sometime before the expected date. Even in such a case, no particular arrangements for the confinement might be made by the relations. We have already referred to the respondent's statement in her letter dated August 13, 1947 that the doctors were contemplating arrangements for the respondent's confinement in view of expected delivery, be it on account of the normally expected time of delivery approaching or of expecting an early delivery on account of the toxemic condition of the respondent. She said in that letter that they were going to take her to Ahmedabad or Bombay for the delivery since in a village like hers there was not sufficient equipment available. It cannot therefore be said that the delivery was so sudden as to bear out the

respondent's case that the delivery took place when she had just completed 6 months of pregnancy.

On the basis of the evidence discussed above and the probabilities of the case, we are of opinion that the child born to the respondent on August 27, 1947 was practically a mature child and weighed 4 lbs in weight and that therefore it could not have been the result of a conception taking place on or after March 10, 1947. It follows that it was conceived prior to March 10 and that therefore the respondent was pregnant at the time of marriage.

Lastly, we may refer to ss. 112 and 114 of the Evidence Act. Section 114 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to facts of the particular case. The conclusion we have arrived at about the child born to the respondent being not the child of the appellant, fits in with the presumption to be drawn in accordance with the provisions of this section. People in general consider that the child born, being of a gestation period of 185 days, cannot be a fairly mature baby and cannot survive like a normal child. Medical opinion, as it exists today and as is disclosed by text books on Obstetrics and Gynaecology, however, refer to some rare exceptions of live-births even with a gestation period of a few days less than 180 days. But we have not found it possible to accept the respondent's case of the conception having taken place from and after March 10, 1947 for several reasons which we have explained in detail at the relevant place. We should observe that in the case before us the earliest date on which conception through the husband could have taken place is fixed with certainty, a matter which could not be said of the freak cases referred to in medical literature, for in them the earliest date of conception was a matter of guess or inference. Besides, we have the feature in the present case, of evidence regarding the various phenomena and bodily changes attending on pregnancy at different stages of its course, and the combined effect of these does preclude any argument of a conception on or after March 10, 1947. Lastly, we have definite evidence, oral and documentary, of the condition of the child at birth which is wholly inconsistent with a gestation of less than six months' duration, assuming that a live birth and the child healthy enough to survive is possible with such short duration of pregnancy. In passing, we might add that we consider it probable that it was because the physical condition of the child at birth approximated to a normal mature child, that the respondent originally put forward a case of pre-marital intercourse with the husband—a story she could not sustain and which she ultimately abandoned.

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Section 112 of the Evidence Act provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The question of the legitimacy of the child born to the respondent does not directly arise in this case, though the conclusion we have reached is certain to affect the legitimacy of the respondent's daughter. However, the fact that she was born during the continuance of the valid marriage between the parties cannot be taken to be conclusive proof of her being a legitimate daughter of the appellant, as the various circumstances dealt with by us above, establish that she must have begotten sometime earlier than March 10, 1947, and as it has been found by the Courts below, and the finding has not been questioned here before us, that the appellant had no access to the respondent at the relevant time.

It has been found by the Courts below that the petitioner had no sexual intercourse with the respondent prior to marriage on March 10. This finding has not been challenged before us and appears to us to be well-founded. The only conclusion is that the respondent was pregnant at the time of marriage by someone other than the petitioner.

The next question to determine is whether the petitioner had marital intercourse with the respondent after he had discovered that she was pregnant at the time of marriage by someone other than himself. The trial Court found that the petitioner did not have such intercourse after he had discovered about the respondent being pregnant at the time of marriage. Patel J., did not agree with that finding. Gokhale J., considered the view of the trial Court to be correct.

The petitioner states that he discovered the respondent being pregnant at the time of marriage by another person when he learnt of her delivering the child on August 27, 1947 and when he felt that could not be his child. He has further stated that since his return from abroad he had no intercourse with her and that is not disputed. The respondent admits it. There is no evidence to the contrary either.

The last marital intercourse the petitioner had with his wife was at Bombay, before he left for abroad. That was between April 23 and 27. The question then is whether he could have known during those days about the respondent's being pregnant at the time of marriage. The respondent does not state at that time she had such ostensible symptoms which could have led the petitioner discover that she had been pregnant at the time of marriage. The opinion of the experts on

this point is not very decisive. Dr. Ajinkia has stated in cross-examination that ordinarily the petitioner should have been aware about the respondent's condition who was in advanced pregnancy when he had coitus with her on April 26 when the foetus would have been 157 days old on the assumption that it had started its life i.e., the ovum had fertilised on November 20, 1946. He however added that it would not be possible for the petitioner to detect that the respondent was pregnant if the coitus took place in darkness. He further stated that the woman who is pregnant for the first time has her abdominal tissues so tense that a non-medical person coming into contact by act of coitus might not be able to detect the enlargement of the abdomen. A husband, without having medical knowledge, can feel abdominal enlargement without any difficulty during coitus only when the pregnancy is advanced above 6 months.

Dr. Mehta, stated in examination-in-chief that a man having coitus with his wife 157 days after pregnancy begins, would immediately know about her being in a fairly advanced stage of pregnancy and added in answer to the Court's question that he would not know that she had been pregnant for 157 days but only know that she was merely pregnant. When asked by the respondent's counsel whether the husband would or would not have noticed the difference between $1\frac{1}{2}$ months' pregnancy and pregnancy of 5 months and 17 days he replied that the husband would not notice a pregnancy of $1\frac{1}{2}$ months' but would certainly notice $5\frac{1}{2}$ months' pregnancy.

We consider these statements to be of no help in coming to a finding on the point whether the petitioner could discover on April 26 that his wife was not only pregnant but was pregnant from some day much earlier than the tenth day of March 1947 when they were married. Neither of the two doctors was questioned as to whether the petitioner could have known that his wife's pregnancy was of more than $1\frac{1}{2}$ months' duration, and, unless the petitioner knew that, he could not be said to have discovered on April 26 that the respondent had been pregnant by someone else at the time of marriage, irrespective of the fact whether the coitus that night took place in darkness or in light.

In this connection, we may again refer to what Williams says in his 'Obstetrics', 12th Edition, at p. 270:—

> "It should also be borne in mind that the abdomen changes its shape materially according as the woman is in the upright or horizontal position, being much less prominent when she is lying down."

We may also say that the mere fact that the petitioner alleges that the respondent gave birth to the child after a full

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period of gestation, does not actually mean that the child was born after such a period. The petitioner could not have known when the child was conceived. By that statement he simply expresses his view, based on the fact that a fairly mature child was born on August 27, 1947 though the marriage had taken place on March 10.

The fact that the child born to the respondent was a mature baby does not mean that it was conceived on November 20, 1946. We have already indicated that the weight of the child and the surrounding circumstances could only indicate that the child was born after almost the usual period of gestation, though it could not be said that it must have been conceived 280 days earlier.

We therefore hold that the petitioner did not have marital intercourse with the respondent after he had discovered that she had been pregnant by someone else at the time of marriage.

We have already said that there is no collusion between the parties. The petitioner filed the petition within time. There is no legal ground which would justify refusing the petitioner a decree for declaring the marriage between the parties to be null and void.

We therefore allow the appeal, set aside the decree of the Court below and annul the marriage between the parties by a decree of nullity. We direct the parties to bear their own costs throughout.

Mudholkar, J.

MUDHOLKAR, J—I regret my inability to agree with the judgment proposed by my brother, Raghubar Dayal, J.

The appeal arises out of a petition for divorce instituted by the appellant on April 18, 1956 in the City Civil Court of Bombay against his wife, the respondent under s.12(1) (d) of the Hindu Marriage Act, 1955. The petition was decreed by the City Civil Court, but on appeal, the High Court dismissed it.

Certain broad facts which are not in dispute are briefly these: The appellant is a resident of Bombay, while the respondent's father was a resident of Prantij in the former State of Baroda. They were betrothed to each other in June or July, 1945, and their marriage was celebrated at Bombay according to Hindu rites on March 10, 1947. Thereafter, the couple lived together as husband and wife for a short while, and the respondent then went to her parents' house at Prantij where she stayed till the third week of April, 1947. During her stay there she wrote to her husband informing him that she was in the family way. The appellant was to leave for the United States in connection with the family business, and, therefore, the respondent returned to Bombay towards the end of April of

that year. The husband and wife admittedly had martial relations during this visit of the respondent to Bombay. After the appellant's departure for the United States, the respondent stayed with the appellant's father for a few days, and thereafter at Gamdevi in the hous of the appellant's sister, Sharda and her husband. She stayed there for about four weeks, and then again returned to her father-in-law's house at Vile Parle. From the correspondence between the parties, it appears that the respondent and her mother-in-law were not getting on well, and the appellant, therefore, advised her to arrange for her return to her father's house as early as she could manage it. In pursuance of this, the respondent returned to her father's house along with some one who had been sent by her father to fetch her. There was considerable correspondence between the parties subsequent to this until August 27, 1947, on which date the respondent gave birth to a female child at Prantij. Information about this was communicated telegraphically as well as by a letter to the appellant's father and also to the appellant himself. According to the appellant, he was shocked when he learnt that the child was born to the respondent only 5 months and 17 days after their marriage, and he suspected that this child had been conceived before the marriage through some one else.

After his return to India in November, 1947 he instituted a suit in a Baroda Court for the annulment of the marriage under the Baroda State Divorce Act, but that suit, which was defended on merits by the respondent, was dismissed by the Baroda Court on the ground of want of jurisdiction. The Hindu Marriage Act, 1955 came into force on May 18, 1955. Under this Act, it was competent to a person, though married prior to the commencement of the Act, to apply for divorce upon certain grounds including those set out in s.12((1)(d) within one year of the commencement of the Act. Availing himself of this provision, the appellant preferred a petition, out of which this appeal arises.

In the petition the appellant made allegations against the respondent to the effect that the child born to her was conceived by her through a person other than himself, and that she was actually in the family way before the marriage, of which fact he was not aware at that time. In her written statement the respondent denied these allegations. She stated that after their betrothal she succumbed to the entreaties and representations made by the appellant and permitted him to have sex relations with her, and that as a result of this, she had conceived from him. She further averred that the appellant, his sister and her husband were all aware of this before the marriage, and thus no fraud had been practised upon the appellant and the members of his family by her. It may be mentioned that such a plea was not taken by the respondent in the written

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statement which she had filed in the proceedings, which had been instituted in the Baroda Court. In her evidence, however, she has confined her averment only to having had sex relations with the appellant before the marriage, and stated that she was not aware at the time of the marriage that she was pregnant. She added that she came to know of her pregnancy only when she started vomiting, which was after her return to Prantij subsequent to the marriage. She has not repeated in her evidence the allegations that the appellant or any members of the family were aware of the fact of her pregnancy before the marriage.

Upon the pleadings of the parties, the City Civil Court raised the following six issues:—

"(1) Whether the Respondent at the time of the marriage was pregnant by some one other than the Petitioner as alleged in para 9 of the Petition?

(2) Whether at the time of the marriage the petitioner was ignorant of the aforesaid fact?

(3) Whether the petition is not maintainable for the reasons alleged in para 2 of written statement?

(4) Whether the Petitioner's claim in the petition is barred by the Law of Limitation for the reasons alleged in paras 3 and 4 of the written statement?

(5) Whether the Petitioner is entitled to have the marriage declared null and void?

(6) To what relief the petitioner is entitled?"

The Court answered issues (1), (2) and (5) in the affirmative, and issues 3 and 4 in negative, and granted a decree to the appellant in terms of the prayer in the plaint.

When the matter went up in appeal before the High Court, the two learned Judges. Gokhale and Patel, JJ. who heard it did not feel satisfied that the appellant had proved that the respondent was pregnant by some one other than the appellant, and that the appellant was not the father of the child which was born to the respondent. In his judgment, Patel, J. observed:—

"The question then is whether we should dismiss the petition on this ground. As mentioned before the evidence is not decisive of the pregnancy of the respondent before her marriage. The effect of a decree of nullity might be very serious to the child who is living and who is now 10 years old as also to the respondents."

Gokhale, J. expressed his agreement generally with the view taken by Patel, J, and after pointing out the necessity of obtaining on record expert evidence, said that the case should be sent down to the trial Court to record a finding as to whether

it was proved that the respondent was pregnant at the time of marriage. Accordingly, the following two issues were framed by the High Court and the case was remitted to the City Civil Court for recording a finding:—

"1. Is it proved that the respondent was pregnant at the time of the marriage?

2. Is it proved that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree?".

It may be mentioned that Mr. Amin, who appeared for the present appellant, contended that a great injustice would be done to him if these issues were required to be determined now. His objection was, however, overruled by the Court, Patel, J. pointing out that it would be the respondent who would be in greater difficulty, as her father was dead, and the Munim who was attending to the affairs of the family was dead, and the doctor, who attended on her during her pregnancy, was also dead. After the matter went back to the trial Court, five additional witnesses were examined by the appellant, including his brother-in-law, who is a doctor and a Gynaecologist, Dr. Ajinkya and a pediatrician Dr. Udani. The respondent examined herself as well as Dr. Mehta, a Gynaecologist and two other witnesses. Upon a consideration of the additional evidence, the High Court allowed the appeal.

Before us, the first point urged by Mr. S. T. Desai appearing for the appellant is that the High Court was in error in ordering the recording of fresh evidence. It is indeed surprising that the High Court which has correctly stated the legal position obtaining in divorce petitions, should have, upon its considered view that the evidence already adduced by the appellant was not sufficient to justify a passing of decree for annulment of marriage, sent down, despite the opposition of Mr. Amin on behalf of the appellant, two issues for recording fresh findings by the City Court after permitting the parties to adduce additional evidence. It may be mentioned that the High Court thought that it was doing so to afford to the respondent, whose whole life was at stake, as observed by Patel, J., an opportunity to defend her honour and chastity. This question, however, did not really arise, if, in fact, the High Court felt that the appellant had not discharged the burden which the law had placed upon him to satisfy the Court beyond doubt that the respondent was pregnant by a person other than himself before the marriage, and that he was not aware of it. The two issues sent down for retrial by the High Court would seem to suggest that these essential points had been missed by the trial Court. I have quoted *in extenso* the

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issues framed by the trial Court, and issues (1), (2) and (5) seem to cover both the additional issues settled by the High Court. No doubt, the first issue reads thus:

"Whether the respondent at the time of the marriage was pregnant by some one other than the petitioner as alleged in para 9 of the Petition?".

This itself consists of two parts, the first being whether the respondent was pregnant at the time of the marriage, and the second being whether she was pregnant through a person other than the appellant. The fifth issue is undoubtedly couched in general terms, but it certainly includes the content of the second additional issue. The High Court was itself cognisant of this because after reproducing (see judgment of Patel, J.) the terms of s.23(1) it has set out what, according to it, would be the issues which would arise. Section 23(1) so far as relevant reads as follows:—

> "In any proceeding under this Act, whether defended or not, if the court is satisfied that
>
> (a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief,
>
> (b) the petition is not presented or prosecuted in collusion with the respondent,
>
> (c) there has not been any unnecessary or improper delay in instituting the proceedings, and
>
> (d) there is no other legal ground why relief should not be granted, then and in such a case, but not otherwise, the Court shall decree such relief accordingly."

The issues which would arise, therefore, would be, as pointed out by Patel, J. the following:—

> "(1) Whether the respondent was pregnant at the date of marriage.
>
> (2) If she was whether she was pregnant by some one other than the petitioner.
>
> (3) Whether the petitioner was at the time of marriage ignorant of the facts alleged.
>
> (4) Whether marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree."

That the trial Court was itself aware of this, would be clear from paragraph 43 of its judgment. It has dealt with the argument of Mr. Shah on behalf of the respondent that the

condition precedent laid down in s.12(2)(b)(iii) was not complied with by the appellant. I, therefore, agree with Mr. Desai that the remission of the issues was wholly unjustified and should not have been allowed. The effect of this, however, would be that the entire evidence adduced thereafter including the evidence upon which Mr. Desai has placed such strong reliance before us will have to be completely left out of consideration.

No doubt, an appellate Court has the power under s.107 of the Civil Procedure Code to remand a case or to frame issues and refer them for trial, or to take additional evidence or require such evidence to be taken. But the exercise of these powers is regulated by the provisions of O.41, rr. 23 to 25 and 27. Under r.23, an appellate Court has the power to remand a case where the suit has been disposed of by the trial Court upon a preliminary point and its decision is reversed by the appellate Court. Rule 24 provides that where the evidence upon the record is sufficient to enable the appellate Court to pronounce judgment, it may do so and may proceed wholly upon the ground other than that on which the appellate Court proceeds. For this purpose it can also re-settle the issues if it finds it necessary so to do. A power to frame additional issues is conferred by r.25, which reads as follows:—

> "Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;
>
> and such Court shall proceed to try such issue and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor."

Rule 27 deals with production of additional evidence in the appellate Court and prescribes the conditions upon which additional evidence can be allowed to be adduced in the appellate Court.

Rule 25 circumscribes the powers of the appellate Court to frame an issue and refer the same for trial to the Court below, if need be by taking additional evidence, and permits it to adopt this course only if (a) the trial Court had omitted to frame an issue, (b) try an issue or (c) to determine any question of fact which appears to the appellate Court essential to the right decision of the suit upon the merits. In this case, the High Court has purported to exercise its powers

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upon the ground that proper issues were not framed by the trial Court. I have already indicated above that the content of the two additional issues framed by the High Court is to be found in three of the issues raised by the City Civil Court. Therefore, there was no scope for the exercise of the High Court of its power under r. 25. No doubt, the High Court has made no reference to r. 25 when it framed the additional issues and sent them down for a finding; but its action must be referable to r. 25, because that is the provision of law which deals with the question of remitting issues for trial to the trial Court. I may add that in view of the express provisions of this rule the High Court could not have had recourse to inherent powers, because it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code.

Upon this view it would, therefore, follow that this appeal must be decided only on the basis of the evidence which was before the City Civil Court prior to the interlocutory judgement of the Hight Court remitting to it two issues for findings, leaving altogether out of consideration the evidence subsequently brought on record by the parties.

Before I deal with that evidence, it would be desirable to set out in brief the requirements of the law in a petition of this kind. The appellant had sought annulment of his marriage with the respondent upon the ground that she was pregnant by a person other than himself before the marriage, and that he was not aware of this fact. The law of divorce in India, is broadly speaking, modelled on the law of England. It will, therefore, be useful to refer to the decisions of the Courts in England. In *Ginesi* v. *Ginesi*(1), it was said that in matrimonial cases the same strict proof of adultery is required as in criminal cases, and that the matrimonial offence must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact. This decision was criticised in *Gower* v. *Gower*(2). *Ginesi* v. *Ginesi*(1) was actually followed in *Fairman* v. *Fairman* (3), where it was observed that when a witness gives evidence in matrimonial proceedings that he or she has committed adultery with a party to those proceedings that evidence must be treated with the same circumspection as the evidence of an accomplice in a criminal case.

The view taken in *Ginesi's* case(1) has also been accepted in *Preston-Jones* v. *Preston-Jones*(4) and *Galler* v. *Galler*(5). In the first of these two cases, which is a decision of the House of Lords, it was established by evidence that during the period between 186 and 360 days before the birth of the child

(1) (1948) 1 All E.R. 373. (2) (1939) 1 All E.R. 804.
(3) L.R. 1949 P. 341. (4) 1951 A.C. 393.
(5) (1954) 1 All E.R. 536.

to the wife the husband had been continuously absent abroad and that there had been no opportunity for intercourse between them. The child was normally delivered, and appeared a normal, healthy and full-time child. It was contended on behalf of the husband that in these circumstances the child must be deemed to have been born of adulterous intercourse by the wife with some one else. With the exception of Lord Oaksey, the view of the House of Lords was that the onus of proof on the husband in a case of this kind did not extend to establishing the scientific impossibility of his being the father of the child. Lord Simonds, Lord Oaksey and Lord Mac Dermott were of the view that in the case of an interval of 360 days between intercourse with her husband and the birth of a child the court cannot, in the absence of further evidence, regard adultery by the wife as established. Lord Normand was *dubitante*, and Lord Morton of Henryton dissented from this view. In the course of his speech, Lord Simonds observed:—

"The result of a finding of adultery in such a case as this is in effect to bastardize the child. That is a matter in which from time out of mind strict proof has been required. But that does not mean that a degree of proof is demanded such as in a scientific enquiry would justify the conclusion that such and such an event is impossible. In this context at least no higher proof of a fact is demanded than that it is established beyond all reasonable doubt; see *Head* v. *Head*(1). The utmost that a court of law can demand is that it should be established beyond all reasonable doubt that a child conceived so many days after a particular coitus cannot be the result of that coitus." He then added that since writing his opinion he had had the advantage of reading that of Lord MacDermott and he concurred in what Lord MacDermott had to say.

It would be convenient now to refer to the observations of Lord MacDermott. At page 417 of the Report are his relevant observations:—

> "The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Lord Stowell, when Sir William Scott, described in *Loveden* v. *Loveden*(2) as 'the guarded discretion of a reasonable and just man'; but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required.....I am unable to subscribe to the view which, though not propounded here, has its adherents, namely, that on

(1) Sim and S. 150. (2) (1810) 2 Hag. Con., 13.

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its true construction the word 'satisfied' is capable of connoting something less than proof beyond 'reasonable doubt'. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be 'satisfied', in respect of a ground for dissolution, with something less than proof beyond reasonable doubt."

After saying that he did not base his conclusion as to the appropriate standard of proof on any analogy drawn from criminal law since the two jurisdictions are distinct, he observed:—

> "The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

Lord Oaksey, after pointing out that the only thing suggested against the wife was that her child was born 360 days after her husband had access to her, observed:—

> "In such circumstances the law, as I understand it, has always been that the onus upon the husband in a divorce petition for adultery is as heavy as the onus which rests upon the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle upon which this rule of proof depends is that it is better that many criminals should be acquitted than that one innocent person should be convicted. But the onus in such a case as the present, is not founded solely upon such considerations but upon the interest of the child and the interest of the State in matters of legitimacy, since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child."

One of the decisions relied upon before the House of Lords was *Gaskill* v. *Gaskill*(1), in which the birth of the child had taken place after an interval of 331 days between it and

(1) (1921) p. 425.

the coitus with the husband. Lord Birkenhead, L.C., who tried the case sitting as a judge of first instance, said, in regard to the wife:—

> "I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child. The expert evidence renders it manifest that there is no such impossibility. In these circumstances I accept the evidence of the respondent, and find that she has not committed adultery, and accordingly I dismiss the petition."

Referring to this decision, Lord Morton of Henryton observed in *Preston-Jones* v. *Preston-Jones*(1):—

> "My Lords, in the case of *Gaskill* v. *Gaskill*(2) the birth was far from being a normal one, but I think that Lord Birkenhead placed too heavy a burden of proof upon the husband. It is not the law to-day, in my view, and with all respect to Lord Birkenhead I do not think it was the law in 1921, that a husband is bound to prove that he cannot possibly be the father of the child; and I do not think that the case of *Morris* v. *Davis*(3), cited by Lord Birkenhead, established the strict rule which he laid down."

He then referred to *Wood* v. *Wood*(4), in which the interval was 346 days and *Hadlum* v. *Hadlum*(5), where the interval was 349 days, and observed:—

> "But I think that the cases of *Gaskill*(2), *Wood*(4) and *Hadlum*(5) put an unwarranted and increasing burden upon a husband who seeks to prove his wife's adultery."

On the other hand, he expressed his agreement with the view of Ormerod, J., in *M-T* v. *M-T*(6), where the interval was 340 days, and acting upon the medical evidence to the effect that the husband could not have been the father of the child, the learned Judge without saying anything about the burden of proof granted a decree to the husband.

In *Galler* v. *Galler*(7), Hodson L.J. has observed at p. 540:—

> "I have used the language which I have, because, since *Fairman* v. *Fairman*(8) was decided, the much debated question whether the standard of proof in a divorce suit, which is a kind of civil action, is the same as that in a criminal case, and whether the

(1) (1951) A.C. 391.
(2) (1921) P. 425.
(3) 5 Cl. & F. 163.
(4) (1947) P. 103.
(5) (1949) P. 197.
(6) (1949) P. 331.
(7) (1954) 1 All E.R. 536.
(8) L.R. (1949) P. 341.

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case rules apply, has been considered by the House of Lords in *Preston-Jones* v. *Preston-Jones*(1)."

and has quoted with approval the opinions expressed by Lord Simonds and Lord MacDermott. He then observed:—

> "It might appear from the passages which I have read from the judgment in *Fairman* v. *Fairman*(2) that the anology of criminal law was the ratio of that decision, but I think the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt."

A similar view has been expressed by Sir Lallubhai Shah, J., in *John Over* v. *Murial A.I. Over*(3). The learned Judge has said:—

> "I desire to make it clear that in divorce cases, great care and caution are necessary in dealing with the admissions of parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admissions of party as to adultery without any corroboration. Generally speaking, as a matter of prudence it is desirable to insist upon evidence corroborative of the admissions."

Martin, J.. has observed in the same case at p. 259:—

> "No doubt section 15 provides that subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure. But that provision, in my opinion, does not override the express directions in ss. 7, 12, 13 and 14 to which I have already alluded." (The provisions referred to are those of the Indian Divorce Act, 1869).

Indeed, in *White* v. *White*(4), which was a case under the Indian Divorce Act, 1869, this Court has held that the words "satisfied on the evidence" in s.14 of the Act implied that it is the duty of the Court to pronounce a decree only when it is satisfied that the case has been proved beyond reasonable doubt as to the commission of a matrimonial offence. After pointing out that the evidence must be clear and satisfactory beyond the mere balance of probabilities, this Court had said that the rule laid down in *Preston-Jones* v. *Preston-Jones*(1) should be followed by the Courts while dealing with cases under s. 7 of the Indian Divorce Act, 1869, Section 23(1) of the Hindu Marriage Act, 1955 which deals with the powers of the Court in a proceeding under the Act also provides that the Court shall decree the relief claimed by the petitioner, whether the petition is defended or not, if the Court is

(1) (1951) A.C. 391.
(2) L.R. (1949) P. 341.
(3) 27 Bom. L.R. 251.
(4) 1958 [S.C.R.] 1410.

satisfied that any of the grounds for granting relief exists and certain other conditions are satisfied. Thus, under the Indian Divorce Act, 1869 as well as under Hindu Marriage Act, the condition for the grant of a relief is the satisfaction of the Court as to the existence of the grounds for granting the particular relief. The satisfaction must necessarily be founded upon material which is relevant for the consideration of the Court, and this would include the evidence adduced in the case. Therefore, though in the former Act the words used are "satisfied on the evidence" and the legislature has said in the latter Act "if the court is satisfied", the meaning is the same. In my judgment, what the Court has said in *White's* case(1) about the applicability of the rule in *Preston-Jones* v. *Preston-Jones*(2) must also apply to a case under the Hindu Marriage Act.

Now, let us consider the evidence which was originally tendered at the trial of the proceedings before the City Civil Court. In support of his case, the appellant examined himself and his father. The gist of his evidence, when he was examined in chief, is that he did not see the respondent between the date of the betrothal and his marriage either at Bombay or at any other place, i.e., between November 1, 1946 and March 10, 1947, that he did not know at the date of the marriage that the respondent was pregnant, that he and the respondent lived together for 10 or 12 days at Vile Parle after the marriage, that during this period she did not disclose to him that she had been pregnant prior to the marriage, that he left for U.S.A. in the last week of April, 1947, that the respondent who had gone to Prantij in the meanwhile returned to Bombay only a day prior to his departure, that he was aware before he left for U.S.A. that the respondent had become pregnant, and that he did not disclose this fact to any one, because he was not sure whether she was pregnant or not. He further stated that he returned to India towards the end of the year 1947 and that he only learnt 10 to 15 days prior to his departure to India and while he was in London, of the birth of a child to the respondent, and that he was shocked at the news and began to suspect her. He denied having made any demand upon the respondent for having pre-marital sex relations or had said to her that betrothal was as good as marriage and that the marriage ceremony was merely a legal formality for "legalising children". In his cross-examination, he admitted that he had seen the respondent before the marriage on three occasions, two of which were subsequent to the betrothal. He denied a suggestion made to him in cross-examination that he visited Ahmedabad where his father owns a house, on many occasions between November, 1946 and March, 1947. He also denied having

(1) [1958] S.C.R. 1410. (2) [1951] A.C. 391.

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expressed his desire to see the respondent. He, however, admitted that he had written to her suggesting that she should come to Bombay where his sister was residing, and that he made this suggestion immediately after the betrothal had taken place.

A number of letters written by the appellant to the respondent in which he had suggested that they should meet and come in closer contact with each other were put to him, and he admitted them. He admitted having stated in his letter dated July 11, 1945 that the object of betrothal two years prior to marriage was that both should come in contact with each other so that they might be "accommodative to each other and not for the sake of betrothal." He was asked to explain what he meant by this and his explanation was "I meant that I and the respondent should try to know each other by writing letters and by knowing the views of each other. By the word 'Sugan' used in that sentence (which is in Gujarathi), he said that I meant that the marriage life may be smoothened after (*sic*) each other." He admitted that in one of her letters the respondent had stated that her father was objecting to her coming into contact with the appellant before marriage. He has admitted in his cross-examination that after he came to know that the respondent had conceived he had written to her that she should arrange for an abortion. In cross-examination, the following questions were put to him:—

> "Q. In the letter dated 17th April 1947, you have stated 'I had already told you from the beginning but you did not pay any attention to my say.' What do you mean by that sentence?
>
> A. (The witness refers to the letter dated 17th April 1947 written by him to the respondent part of Ex No. 3 and gives the answer after reading the same). By that sentence I meant to convey that I had told the respondent after the marriage when I had sexual intercourse with her that we should not have a child and for that purpose we should take precautions but in spite thereof no precautions were taken and therefore I had stated what is written in my letter dated 17th April 1947 part of Ex. No. 3."

He has also made admissions to the effect that he had suggested abortion to the respondent several times. According to him, she also expressed a similar desire. I have already pointed out that the appellant had said that he wanted to keep the fact of respondent's pregnancy a secret, though he knew about it before his departure to U.S.A. He had to admit that he had suggested to the respondent that she should intimate the fact to his sister, Sharada. In that letter he had also said "Explain

all things to my sister Sharada". According to him, however, what he meant was that she should explain to Sharada" in connection with the posting of the letters to be written by Sharada to me." That is all his evidence. There is nothing in the evidence of his father, which has any bearing upon the Question of the respondent's pregnancy before the marriage.

In her evidence, the respondent has reiterated her denial of having conceived from a person other than the appellant. She has, however, deposed to the fact that she had visited Bombay before the marriage about the Christmas days in the year 1946 and stayed in the house of Ramanlal, Witness No. 2 for the respondent, who is a friend of her father. According to her, the appellant used to visit his house and take her from there either to her father-in-law's house or to pictures or to some hotel. Then she has deposed, "On those occasions I had sexual intercourse with the petitioner. I agreed to submit to the sexual intercourse by the petitioner because he threatened to break off the betrothal if I refused to permit him to have sexual intercourse. Prior to the date of my marriage with the petitioner, I had no sexual intercourse with any man other than the petitioner." She has further said categorically in her evidence that she did not know at the time of her marriage that she was pregnant and that she became aware of this after the marriage only when she started vomiting. This was after she had returned to Prantij from Vile Parle. She has also stated in her evidence, "After I went to Prantij after my visit to Bombay in Christmas 1946, I had monthly course. After I left for Prantij after my visit to Bombay in January 1947 and before the marriage I had monthly course. But on those occasions the bleeding was less." She was cross-examined at length with regard to her story that she had sex relations with the appellant before the marriage, and after asserting once again that she had met the appellant in Bombay in December 1946 or January 1947 she said in answer to the next question:—

> "It is not true that prior to the marriage I knew that I was pregnant. It is not true that I deliberately suppressed the fact of my pregnancy from the petitioner and performed marriage with him. It is not true that I was not pregnant as a result of the sexual intercourse with the petitioner prior to the marriage."

And then in answer to the question "Before 10th March 1947 Mahendra, the petitioner, his sister Sharada and his father did not know that you were pregnant?", her answer, after certain hesitation was:—

> "It is not true that the petitioner, his sister Sharadaben and his father did not know that I was pregnant

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prior to the marriage. According to me the petitioner, his father and his sister knew prior to our marriage that I was pregnant."

In the letter dated January 8, 1948 written by her to the appellant's sister she had stated "I am innocent", and in cross-examination, she was asked as to what was the necessity for her to write that in her letter if the child which was born to her was conceived from the appellant, her answer was:—

> "We came to know that a scandal was raised by my father-in-law and mother-in-law at Vile Parle and that is why I had written to my sister-in-law that I was innocent. The scandal which I have referred to in my earlier answer was that the baby born to me was premature and was not the child of the petitioner."

She was then asked why she did not inform the appellant's sister, Sharadaben, that she had pre-marital sexual intercourse with the appellant, her answer was that she did not do so in obedience to an injunction from her husband. It may be mentioned that in the letter of January 8, 1948 the respondent had stated that she had her menstrual period 10 days prior to the marriage. The question put to her in cross-examination was whether she stated this in her letter with the object of showing that she had no sexual intercourse with any one before the marriage and her answer was:—

> "Even if the woman is pregnant she would be in monthly course. It is not true that the object of my writing the aforesaid statement in my letter was as you suggest."

When again pressed to state what was the object in saying "I am innocent" in that letter, she answered:

> "By saying that I was innocent, I meant to suggest that the scandal which was spread about the child being not of the petitioner was a false scandal."

When asked why she did not write in that letter that this child was conceived as a result of the sex relations she had with the appellant in December 1946 and January 1947, her answer was that the appellant knew the fact and knew that he was the father of the child. When asked why she had then described the child as premature in that letter, her answer was that that was because the child was weak. Eventually, however, she admitted that the child born to her was premature. The only other witness examined was Ramanlal, with whom the respondent claims to have stayed during her visit to Bombay in December 1946-January, 1947. He supports her statement in that regard as well as the other statement that during her stay there the appellant used to visit her and take her out.

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That is all the evidence in the case, and the question is whether upon this evidence it was open to a Court to make a decree under s. 23 of the Hindu Marriage Act annulling the marriage upon the ground that the respondent had conceived from a person other than the appellant before her marriage and that the appellant was not aware of this fact at the time of the marriage. It is contended on behalf of the appellant that the respondent has admitted both in her pleading and in her evidence in the Court that she had had pre-marital sex relations and that this admission by her should be construed against her. An admission in a pleading must be taken as a whole, and, therefore, if we are to act upon that admission, then that part of it which is to the effect that she had such sex relations with the appellant and not anyone else must also be regarded. No doubt, what applies to an admission in the pleading would not apply to statements made by a witness in evidence. It seems to me, however, that the defence taken by the respondent of having had pre-marital sex relations with the appellant as well as the evidence given by her in the Court was false. Had there been any truth in this, she would certainly have taken that defence in the earlier suit, which was filed in the Baroda Court. Apparently, faced with the fact that the child was born to her only five and half months after her marriage she and her advisers found themselves in a difficult situation.

For, having regard to the generally accepted notions of people regarding the normal period of gestation it would be difficult to convince any one of the fact that the child was legitimate, particularly in view of the fact that it has in fact survived and so would be presumed to have been normal. It may be because of this that she and her advisers thought of an obviously false defence. Would this, however, make any difference either in the incidence or the discharge of the burden which the law casts upon the petitioner in a proceeding like this, of establishing affirmatively the existence of the ground relied upon by him? I would say with Lord Normand that apart from the objection of principle, it would in the circumstances of this case be unjust to the respondent to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that an apparently normal child may be born 171 days after coitus (or even 186 days as contended by Mr. Purshottam Trikamdas) and would survive, and if that was what had happened in this case, then in the words of Lord Normand "the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication

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or worse." I would, therefore, wholly leave out of account the false defence set up by the respondent. Even if the appellant's evidence is believed completely, the facts which can be said to have been established by him are only these: (a) that the child was born 171 or 186 days after the marriage; (b) that he never had pre-marital intercourse with the respondent; and (c) that he was not aware of her pregnancy before the marriage. Can it be said that this evidence justifies the conclusion that the child must have been conceived before the marriage, and since, if the appellant's statement is believed, it could not be conceived from him, but from some one else? It was urged by Mr. Desai, apparently on the strength of an observation made in one of the speeches in *Preston-Janes'* case(1) that where the period of gestation deducible in respect of a child deviates markedly from the normal, the burden on the husband who denies being its father of establishing the matrimonial offence alleged by him against his wife is a very light one. With respect I would say that the argument is untenable. When the law places the burden of proof upon a party it requires that party to adduce evidence in support of his allegation, unless he is relieved of the necessity to do so by reason of admissions made by or in the evidence adduced on behalf of his opponent. The law does not speak of the quantum of burden but only of its incidence and to my mind it is mixing up the concepts of the incidence of burden of proof with that of the discharge of the burden to say that in one case it is light and in another heavy. Looked at that way, the argument would amount, in effect, to be that the appellant has fully discharged the burden of proving his wife's pre-marital conception because, admittedly, the child was born only 171 or at most 186 days after the marriage. While it would be relevant to bear in mind the fact that the child was born within 171 or 186 days of the marriage for deciding the question whether the conception was pre-marital, other relevant factors and circumstances cannot be excluded. For, it cannot be assumed that the delivery was normal, the child was born at the end of the full period, that it was a normal and mature child, that the mother maintained normal health throughout the period and so on. Again, there is no evidence whatsoever that the respondent was a woman of loose character. On the other hand, such little evidence as there is bearing on the point would show that the respondent was a member of a family which had strong ideas regarding association between betrothed couples and was herself reluctant even to meet the appellant during the long period of their betrothal. There is nothing in the evidence to indicate that the respondent could have had an opportunity of coming in contact with male persons at Prantij, where she lived before her marriage.

(1) [1951] A.C. 391.

The second thing is that if as contended on behalf of the appellant, the respondent's delivery was after the full period of gestation, her pregnancy must have been of about four months' duration at the time of the marriage. If that were so, it is difficult to believe that this fact would not come to the notice of the female relatives of the appellant or the appellant himself, or of Dr. Champaklal the appellant's brother-in-law who has been found by the High Court to have examined her. Moreover, had that been so, she would not have shown readiness to break off her engagement till as late as in February, 1947 and thus taken the risk of becoming an unmarried mother. The third thing is that if the respondent's nausea started three weeks after returning to Prantij, how could it be related to a pregnancy of five months' duration? Fourthly, if the respondent had her menstrual period 10 days before the marriage, then despite what she herself says, how could she be said to be pregnant at that time? Indeed, the progress of the pregnancy as appearing from the evidence which was not challenged before us is consistent only with post-marital conception. There is also the circumstance that despite exhortation by the appellant she refrained from having an abortion, which is more consistent with the pregnancy being post-marital than pre-marital. As against this, all that is relied upon on behalf of the appellant is the circumstance that it would be against the generally accepted notions of mankind to hold that a normal child would be delivered after 171 or 186 days after conception. Can it reasonably be said that this circumstance is sufficient in itself to outweigh the other circumstances taken cumulatively?

At the stage with which I am dealing, there was no medical evidence in the case. But it was said that the live birth of a child 171 or 186 days after conception is impossible and it must be presumed that the child was conceived before marriage and further that such a presumption can be competently drawn even in a proceeding of this nature. If the birth of an apparently normal child 171 or 186 days after conception is an impossible phenomenon and if its impossibility is notorious, then alone a Court can take notice of it and the question of drawing a presumption would arise. All that can be said is that such an occurrence can at best be said to be unusual; but it is a far cry to say that it would be impossible. No doubt, courts have taken notice of the fact that the normal period of gestation is 280 days, but the courts have also taken notice of the fact that there are abnormal periods of gestation depending upon various factors. It would appear from the medical evidence in this case that one of such factors is a short cycle of menstruation. Another is that where the mother is suffering from oedema and high blood pressure and passing albumen in her urine the period of gestation of the child will be shortened (see evidence of Dr. B. S. Mehta).

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There may also be other factors which have not been brought out in the evidence or which may not have yet come to the notice of obstetricians. Therefore, while the courts ought in cases which largely turn upon medical evidence, to have regard to the existing state of medical knowledge they should not overlook the fact that there is still a good deal which is not known. So when a court is called upon to decide a matter like the one before us mainly, if not wholly, on the opinion of medical men it must proceed warily. Medical opinion even of men of great experience and deep knowledge is after all a generalisation founded upon the observation of particular instances, however numerous they may be. When further the Court finds that in individual cases departure from the norm has in fact been observed by some experts and when again the experts themselves do not speak with the same voice the need for circumspection by the court becomes all the more necessary. It may land itself into an error involving cruel consequences to innocent beings if it were to treat the medical opinion as decisive in each and every case. The responsibility for the decision of a point arising in a case is solely upon the court and while it is entitled, nay bound, to consider all the relevant material before it, it would be failing in its duty if instead, it acts blindly on such opinion and in disregard of other relevant materials placed before it.

Initially no attempt was ever made before the City Civil Court to adduce any scientific evidence i.e., evidence of experts, and in the absence of such evidence, can it be said that there was anything else of which the City Civil Court ought to have taken judicial notice? Should it have drawn any presumption? The only relevant provisions regarding presumption are ss. 112 and 114 of the Evidence Act. Section 112 reads thus:

> "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

It refers to the upper limit of the duration of pregnancy for the purpose of determining the legitimacy of a child but not to the lower limit. Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, etc., in their relation to facts of the particular case. The question would then be whether from the circumstance that the child was born five and half months or so after the marriage it could be presumed to have been conceived before the

marriage, regard being had to the common course of natural events. If the only fact known was that the child was born on August 27, 1947 and nothing else was known, it would be open to the Court to presume that it was conceived so many days prior to its birth. If, however, in addition to this there was evidence to show that the mother was suffering from eclempsis or that the child was weak and premature such a presumption would not arise. In this case, there is evidence of both these facts. This consists of the testimony of the respondent herself and of her letter to the appellant, Ex. 6 dated August 13, 1947 and of that to Sharadaben, Ex. F dated September 3, 1947 produced by the appellant. This is further supported by the letters Ex. 11 written by Dr. Champaklal to the respondent's father on July 12, 1947 and September 20, 1947. It would, therefore, not be legitimate to raise the presumption that the child was born after the normal period of gestation and must, therefore, have been conceived before the marriage.

Such was the material before the City Civil Court at the conclusion of the trial and before High Court when it first heard the appeal. This material is insufficient for discharging the burden placed on the petitioner by s. 23 of the Act. On the basis of this material, no Court could reasonably come to a finding that the respondent was pregnant at the time of her marriage and that, therefore, the appellant was entitled to the annulment of the marriage. As already pointed out by me, this is what the High Court itself felt, and having formed this view, it is a matter of surprise to me that the High Court should have proceeded to frame additional issues and send them down for findings to the City Civil Court. The only thing the High Court could properly do was to allow the appeal and dismiss the appellant's petition for annulment of the marriage. Now, the High Court has, after receipt of the additional evidence and the fresh findings of the City Civil Court accepted one of those findings and dismissed the appellant's petition. If, therefore, I am right in my view that the letting in of the additional evidence for which the appellant had not even asked, was not permissible by law, then upon my view that the evidence originally adduced in the proceedings is inadequate for the purpose of granting the relief under s. 23 of the Act, the appeal must be dismissed. I would accordingly dismiss it with costs in this Court, and direct that the appellant shall pay the respondent's costs in the High Court as well as in the City Civil Court.

This really ends the matter, but as my learned brother Raghubar Dayal J., has considered the medical and other evidence in great detail, I should at least make a brief reference to it, even though, in my view, it has been illegally admitted. I will only refer to the evidence of those witnesses

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upon whose statements reliance was placed before us by one party or the other. One is Madhuben, who claims to have been working in the Prantij Municipal Dispensary from 1939 to 1955. She said that she attended to the delivery of the respondent, and that she had examined her two months before the date of delivery, when she noticed swelling all over her hands and feet. She also says that the respondent had advanced seven months in the pregnancy when she first examined her and that the weight of the child which was born was 4 to 4½ lbs. According to her, it was a mature-child born after the full period of gestation. Her evidence was discarded not only by the High Court but also by the City Civil Court on the ground that she was deposing to these facts 12 years after the delivery is supposed to have occurred, and deposed without reference to any records made by her. No doubt, the Hospital Indoor case paper, Ex. K. was produced by a witness, Kacharabai, also examined at that stage; but in the absence of a white paper, which is normally a part of this particular record, it loses its value. It is true that there was no cross-examination on behalf of the respondent regarding Madhuben's statement that she had examined the respondent two months before the delivery, but it seems to me that from the fact that she deposed 12 years after the event and the further fact that she had to attend to at least 150 labour cases every year—a total of 2,400 cases during the time she worked in the hospital—her evidence cannot be regarded otherwise than as artificial. Indeed, she had long ceased to be in the service of the hospital, and had even left Prantij, before she was summoned as a witness in the case. According to her, she was contacted by some bania and it is obvious that she has been induced to speak to facts which would assist the appellant in this case. Her evidence was rightly rejected by the courts below.

The next witness is the appellant himself. He has stated in his evidence that his case was that the child born to the respondent was born after the expiration of the full period of gestation, and that the respondent must have conceived somewhere in November or December, 1946. He has, however, admitted that when he had sex relations with the respondent, her clothes used to be removed, though he said that lights used to be switched off in the room in which they slept. We cannot lose sight of the fact that in Bombay after sunset the streets are well illuminated and since the windows are usually kept open the light coming from outside is sufficient to illuminate the rooms adjacent to the streets. They therefore are not totally dark even at night. Apart from that, the appellant has admitted that he did not feel anything abnormal when he came in contact with her. If her pregnancy had actually advanced to four months, in the normal course it would have been possible for him to notice her condition.

Then there is the evidence of Dr. Ajinkya. He has deposed to a large number of things, and the only points which it is necessary to mention are: (a) the normal period of gestation is 280 days, which period is calculated from the first day of the last menstrual period; (b) where the hospital record shows that the woman delivered of a child has normal labour and the child weighed 4 lbs and is living, it must have been conceived 270 days before the date of birth; (c) if a child is born within 169 days from the date of marriage it would not be of sufficient maturity to survive; (d) confirmation of a pregnancy within three weeks of conception is possible only by a biological test; (e) abdominal enlargement would be perceptible after the fourth month of pregnancy; (f) viability is described as the critical period of maturity and that this period is the 28th week of conception and explained that the viable period is called critical period because it denotes the development of the child's tissues to the extent that it can have independent existence from its mother only after that and not before; and (g) a child born after the 28th week from conception would survive when special care and treatment is given to it. He has then described the special care which has to be taken in regard to such child. The following passage from Taylor's *Principles and Practice of Medical Jurisprudence*, Vol 2, 11th Edn. p. 32 was put to him:

> "It was the opinion of William Hunter that few children born before 7th calendar month (or 210 days) are capable of living to manhood, but with advances in methods of Neonatal Resuscitation and maintenance, this dictum has gradually receded into history. It remains, nevertheless, that the less mature the infant the less likely is it to survive and the critical period of maturation appears to be somewhere between the 5th and 6th month. In the absence of any skilled care, Hunter's dictum on the likelihood of survival when born before the 7th calendar month remains as true as it was."

According to him, this dictum was not wholly true, and what was attributed to Hunter was really the opinion of the author.

I may mention here that Dr. Mehta has agreed with the above quotation from Taylor's book. Now, since the month of pregnancy is a lunar month the respondent's child which was born 26 weeks and four days after the marriage could be said to be one born in the 7th month. The fact that such a child has survived its birth is no significant evidence of maturity. Taylor points out that though infants born before the seventh month of pregnancy are less likely to survive *they commonly do so.* The following cases of survival of less mature infants are referred to in this connection:

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Bernardi described the survival of a 1 lb. 9 oz. infant in 1951, and Nanayakkara, in the same year, recorded a birth at 1 lb. 4 oz. which survived.

MacDonald reported the survival of a 14 in. long 2 lb. 7 oz. infant—thought to be a gestation of 6 to 6¼ months—that, six months later, weighed 5 lb. 6½ oz.

"The considerable experience of Victoria Crosse in problems of prematurity resulted in the publication of the following table, emphasising the high mortality of prematurity:

Weight of Infant (lb)		*Percentage leaving Hospital*
0.2	...	3
2-3	...	27
3-4	...	60
4-5	...	78
5-5½	...	94

The author then refers to a case attended by Barker in which a female child born 22 weeks after intercourse was observed by him to have attained the age of 11. Similarly the author refers to a case from America when a child born 192 days after intercourse was found alive at the time of report which was 16 months after its birth. In the well known Kinghorm case the doubt cast on the legitimacy of a child born 174 days after the marriage between the parents was found not to have been substantiated.

It would be convenient to quote here two passages from the article by J. H. Peel at p. 557 onwards of *British Obstetric Practice* (22nd edn.) on "Duration of Pregnancy and its variations". He begins by saying that the problem of the exact duration of pregnancy has not yet been solved that this is due to a large number of variable factors. He points out that the common method of calculating the date of delivery ignores all the variables. Dealing with premature termination of pregnancy he says:

> "Premature termination of pregnancy may be defined as termination of the pregnancy after the twenty-eighth week (accepted date of viability of the foetus) and before the fortieth week, counting from the first day of the last menstrual period. On the other hand, most writers on the subject of prematurity tend to define the condition in terms of the weight of the baby rather than in terms of the maturity of the pregnancy. It was first laid down by the American Academy of Pediatrics in 1935 that a premature infant is one that weighs 5½ lbs.

or less, regardless of the period of gestation. This definition was accepted by the International Medical Committee of the League of Nations and has gained universal acceptance, in spite of its scientific inaccuracy. Most obstetricians have seen babies of less than 5½ lbs. born after a gestation period of more than 280 days. Indeed, birth weight and duration of pregnancy are far from perfectly correlated. Infants weighing less than 5½ lb. at birth may even be postmature. This is well shown in Table 2 constructed by Kane and Penrose from 7,037 live births from University College Hospital records. It is seen that 470 babies weighed less than 5½ lb., but that 111 (23.6 per cent) of these underweight babies were born at term or later, according to the ordinary method of calculation. The term immaturity has been suggested as an alternative in view of these discrepancies, but it has not received universal acceptance. There is, however, more than academic significance in the difference, because maturity as such, irrespective of weight, is of the greatest importance in relation to foetal survival. A baby whose birth weight is 4 lb., if born at thirty-eight weeks stands a far better chance of survival, and is more likely to develop into a healthy child, both mentally and physically than one of the same weight born a month earlier."

I am not reproducing the table constructed by Kane and Penrose but I may only mention that the table shows a few cases of deliveries in which the duration of pregnancy was 177 days, though they ended either in still births or neonatal deaths. The conditions associated with premature labour are many and varied and Peel has classified them thus:

"(1) Maternal causes. (a) Pre-existing (b) Complications of Pregnancy.

(2) Foetal and Placental causes.

(3) Idiopathic causes."

He has then dealt with these causations of premature labour but I would content myself by quoting a portion of what he has said regarding 'Idiopathic causes'. This is what he says:

"In about 50 per cent of premature labours no definite cause can be found. Thus Sandifer (1944), analysing premature births at Queen Charlottee's Hospital, found no definite cause in 372 out of a total of 681 spontaneous premature labours.

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.....The incidence of prematurity is without doubt correlated with nutrition dependent upon social status."

What does all this show? It brings out the fact that while the natural phenomenon of human birth follows a general pattern it does not do so invariably. There are variations in it. A few have been recorded but in the nature of things the observations cannot be exhaustive, bearing in mind the fact that every minute a new human is being born in this world—or may be even more than one. Section 45 of the Indian Evidence Act makes the opinion of scientists relevant when the court has to decide a point of science. But it does not make the opinions conclusive. Therefore, while the courts ought to pay due regard to the existing knowledge of scientists it does not necessarily follow that the opinions expressed by scientists must be always accepted without scrutiny. Every phenomenon is the result of numerous factors and where all such factors are known to science an opinion of an expert concerning the particular phenomenon ought ordinarily to be accepted. But when all the factors which come into play in a phenomenon are not known, an uncritical acceptance of an expert's opinion would be a dangerous thing. Medical scientists do not lay claim to a knowledge of every factor involved in human birth. One of the factors they have to contend with is the operation of the life principle. The mystery of its behaviour has yet to be unravelled and, therefore, if an expert makes a dogmatic assertion about any matter concerning child-birth dismissing contrary opinions based upon the observations of departures from the so-called norm with supersilious disdain as Dr. Ajinkya has done or is unable to give a satisfactory explanation for the departure from the normal observed by other scientists, I would put aside his opinion on the ground that his whole approach is unscientific.

In this evidence Dr. Ajinkya has further deposed about toxaemia in pregnancy, enlargement of abdomen, weight of the child born after the full period of gestation. When he was asked the question: "If toxaemia starts at the end of 4th month of pregnancy and in spite of the treatment, there is no change in toxaemia for a period of seven weeks thereafter what would be the condition of the child born 169 days after marriage?" His answer was, "most probably it would be a still birth." From this last statement of the witness it would appear that if, when the respondent's toxaemia as evidenced by vomiting and nausea started, she was in the fourth month of pregnancy and not in the second month of pregnancy the child delivered by her on August 27, 1947 would be still born but in fact it was alive and is now 16 years of age.

The following passage from Mody's *Medical Jurisprudence and Toxicology*, 12th edn. p. 305 was put to him:

> "It has been observed in women whose intermenstrual period is shorter than the usual time, pregnancy has terminated in the 8th or 9th month *or even earlier* the child having attained full development." (Italics are mine).

Dr. Ajinkya, however, expressed disagreement with it. According to him, the weight of the child born in the 5th or 6th month after the marriage would be 2½ lbs. and the child would not survive, whereas here the evidence, if accepted, is that the weight of the child was 4 to 4½ lbs. In the table constructed by Kane and Penrose three cases have been recorded in which the infant born in the 7th month of pregnancy weighed between 5 and 6 lbs. Dr. Ajinkya's opinion cannot, therefore, be accepted. He also said that if a pregnant woman is suffering from oedema all over the body, is passing albumen in the urine, has high blood pressure and does not respond to treatment, it would be a severe type of toxaemia and the child born to her would be still-born. If this opinion is accepted, then considering it along with the fact that the child born to the respondent is still alive, the evidence of Madhuben that the respondent was suffering from eclempsia and therefore she had to attend on her for two months before the delivery stands falsified. The witness has also said that the period of gestation is usually counted in lunar months, meaning a month of 28 days and that as doctors do not know the date of the fruitful coitus, they calculate the period of gestation from the first day of the last menstruation of the woman. As regards nausea during pregnancy, he said that morning sickness occurs in the 1st or 2nd month and has expressed agreement with the following passage from Mody's Text Book:

> "Nausea or vomiting usually as a sign of pregnancy, most frequently occurs soon after the woman rises from bed in the morning. It commences about the beginning of the second month and lasts generally till the end of the fourth month. It may, however, commence soon after conception."

Another passage from Mody was also put to him. A passage from Taylor, Vol. 2, 6th ed. at p. 152 was read out to him. It runs as follows:—

> "It would be in the highest degree unjust to impute illegitimacy to offspring, or a want of chastity to parents merely from the fact of a six months child being born living and surviving its birth. There are, indeed, no justifiable medical grounds for

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adopting such an opinion—a fact clearly brought out by the answer to a question put to the principal medical witness in favour of the alleged antenuptial conception. He admitted that he had himself seen the case of a six months child who had survived for several days. He could not assign any reason why, if after such a period of gestation it is possible to prolong life for days, it should not be possible to extend it to months."

His only answer was that he was aware of this case, and observed: "If such speculation can take you away from truth in one direction, it may also take you away from truth in the other direction." In re-examination, the following passage from Taylor's Book, 2nd Vol. 10th ed. at p. 37 was shown to him:

> "On the other hand, when a child is born with the full signs of maturity, at or under seven months, from possible access of the husband, then there is a strong presumption that it is illegitimate."

He expressed agreement with this passage.

The evidence of this witness no doubt contains certain statements, which support the appellant but I agree with the view of Mr. Justice Patel that the witness though undoubtedly a leading obstetrician and gynaecologist, appears to have fenced while answering questions which tended to throw doubt on some of the opinions expressed by him. His evidence, however, also shows that if the respondent was in the fourth month of pregnancy at the time of the marriage her nausea would not have started soon after her return to Prantij. In fact, her nausea could have started much earlier, and even at the time of the marriage she should have been suffering from it. There is no evidence whatsoever to the effect that she had any such nausea at the time of the marriage. It is not disputed by the appellant that she was suffering from nausea from the time deposed to by her and for a considerable period thereafter. She could, therefore, not have been in the fourth month of pregnancy towards the end of April, 1947. For, according to Dr. Ajinkya nausea starts in the first or second month of pregnancy or again in the seventh month of pregnancy. Therefore, upon this part of Dr. Ajinkya's opinion, the appellant's definite case that the pregnancy commenced in November or December, 1946 falls to the ground. No doubt, the opinions of this witness regarding viability of a child born after five and half months and the weight of such child at birth and the impossibility of its survival support the appellant's contention. But these are matters upon which there is divergence amongst experts. I have

already referred to a passage from Taylor which was brought to the notice of this witness with which he disagreed. This passage as well as that in Peel's article show that abnormal cases do occur. Dr. Mehta's opinions run counter to Dr. Ajinkya's on certain crucial points. He has spoken not merely from his own observations as an obstetrician but on the strength of the findings of other scientists. In this state of affairs can the court say that the appellant has discharged the burden which the law has cast upon him to prove that the respondent was pregnant at the time of the marriage? It is not enough for him to throw a doubt. He has to establish the fact affirmatively.

No doubt the appellant has examined Dr. Udani, a Pediatrician, but even his evidence does not take the matter any further. Therefore, I am referring to those passages in his evidence on which reliance was placed at the hearing and would only say this that what I have said about Dr. Ajinkya's evidence on similar matters applies equally to Dr. Udani's evidence. According to him, a child born 5 months and 17 days after conception would die immediately after birth, though very often it would be a case of miscarriage. The weight of such a child, according to him, would be 1½ to 2 lbs. He has agreed with Dr. Ajinkya regarding the normal period of gestation as well as the period after which a baby becomes viable. He has admitted in his cross-examination that where the weight of a child at birth is 4 lbs. it would definitely be an indication of premature birth. The following question was put to him in cross-examination:

> "You were asked by the counsel for the petitioner a little while ago that you could call certain signs as signs of maturity. Now, as a responsible doctor, I take it that you can do so on the assumption that such symptoms are reliably established or found?"

His answer was:

> "All the signs and symtoms must be established before I can opine on them.
>
> If a baby can take the breast feed well by 3rd day of its life and that baby cries well, even though such a child may according to international definition be a premature one, none-the-less it is a fairly well-developed child as far as functions are concerned. So far as its functions are concerned it is a matured child. This is particularly true if the mother of the child has the disease like Toxaemia then that baby even if born between 36 and 40th week of pregnancy, that baby will be under-weight but it will be a matured child in function."

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Mr. Vimadalal objected to the last part of the answer given by the witness on the ground that it was volunteered by him. Even, however, if this is taken into account, it makes no difference, because there is no positive evidence to show that the respondent was suffering from toxaemia right till the termination of the pregnancy. When asked whether in his experience or knowledge he has come across any case in which a child born 26 weeks and four days had survived, his answer was:

> "I have seen two babies surviving between 27th and 28th weeks. One in London and one in Boston. But in these cases exceptional care was required both for delivery as well as for bringing it up."

This answer to some extent, goes against the opinion of Dr. Ajinkya, though he has qualified it by adding that in most cases such child would be still-born and that in exceptional cases it would survive if special care and attention is paid to it.

There remains the evidence of Dr. Mehta who was examined as a witness on behalf of the respondent. He has also deposed that the period of gestation is counted from the first day of the last menstruation, and in this connection, he relied upon the following passage from *British Obstetric and Gynaecological Practice* by Sir Eardley Holland and Aleck Bourne, 1955 ed.:

> "According to Naegele's rule, which is almost universally employed, seven days are added to the first day of the last menstrual period and nine months added, in order to arrive at the expected date of delivery. This is really a simple way of adding 280 days of the first day to the last menstrual period, because experience has shown that this is the average duration of pregnancy."

He also agreed with the following passage from Dougald Baird's *Combined Text Book of Obstetrics and Gynaecology*, 6th ed:

> "It has long been known that the length of gestation in the human is almost ten lunar months (280 days) if calculated from the first day of the last menstrual period."

According to him, a four pound full term baby that is one born 280 days after the first day of the last menstrual period, is a rare occurrence. He was asked the question:

"Doctor, if a woman suffers from swelling, i.e. oedema, high blood pressure and passing of albumen in urine, would that have any effect on the period of delivery?", and his

answer was that the child would be premature. He further deposed that oedema, high blood pressure and passage of albumen in urine occur in the second period of pregnancy, but that it might occur earlier if the woman had some trouble with the kidneys or high blood pressure. By the second period of pregnancy, he meant after the third month of pregnancy and before the seventh month of pregnancy. He further stated that nausea in pregnancy usually occurs at the time of the second missed period, but it might occur before or about the time of the first missed period. While he agreed with the other medical witnesses examined in this case that the child is supposed to be normal and viable after 28 weeks, he said that there are some exceptions to this and that a child born earlier than the 28th week may be born alive and can survive. He stated that his statement is based upon the following two passages in De Lee's book:

> "De Lee delivered a viable child one hundred and eighty-two days after the day of conception and Green Hill delivered a baby one hundred and ninety-one days after the beginning of the last menses and one hundred and seventy-six days after the last coitus. The baby weighed 735 gms (1 pound 10 ounces) and survived. The child is now normal in every way..."

The French law recognizes the legitimacy of a child born one hundred and eighty days after marriage and "three hundred days after the death of the husband, the German law one hundred and eighty one and three hundred and two days, respectively."

He then said the he was familiar with the case of *Cark* v. *Clark*,(1) which is also referred to in Taylor's *Medical Jurisprudence*, 2nd vol. 10th ed. at p. 36. Referring to it, he said:

> "I agree with the proposition at page 35 of Taylor. It is as follows:—
>
> 'Hence it is established that the children born at the 7th or even at the 6th month may be reared.'
>
> I believe the expression month used by the author is Lunar Month. It also agree with the proposition of Taylor at the same page which runs as under—
>
> 'It would be in the highest degree unjust to impute illegitimacy to offspring or a want of chastity

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to the parents merely from the fact of a six months child being born living and surviving its birth'."

He has also deposed about various matters such as normal labour, calculation of period and so on but it is not necessary to refer to that part of the evidence.

Mr. Desai referring to the opinion of the witness regarding the mode of confirmation of pregnancy within three weeks or so of conception said that the respondent's admission in a letter of 3rd April, 1947 that her pregnancy was confirmed that day by a doctor who had apparently not performed a biological test would show that conception must have taken place long before the date of marriage. The letter was not produced by the appellant and so we do not know what exactly she had said in it. Apart from that it is quite possible that the doctor whom the respondent consulted, as she was having nausea may have tentatively opined that it was probably due to the fact that she had conceived. The opinion of that doctor cannot be placed higher than that.

Relying upon the admissions made by the respondent in the evidence that there was swelling on her hands and feet in the month of June it was argued that she must have then been in the 7th month of pregnancy because according to Dr. Ajinkya this kind of toxaemia appears after the 7th month of pregnancy. It is to be remembered that she was deposing about this 12 years after the occurrence and as there was no reference to such an important matter in her letters of the 14th June and 2nd July, but only in a subsequent letter, she appears to have made a mistake about the month while deposing in court. In fact she first complained about the swellings and high blood pressure only in her letter of the 13th August. Again even according to Dr. Ajinkya a pregnant woman may develop such troubles in the 4th month if she were suffering from chronic kidney trouble. There is no evidence about her suffering from such trouble but the possibility of her having such trouble has not been ruled out. Dr. Mehta has also said that while swellings and high blood pressure usually occur in the second period of pregnancy, he stated that this period would be after the 3rd and before the 7th month of pregnancy and supported his view by reference to a passage at p. 225 from the 'British Obstetric and Gynaecological Practice'. In this state of evidence, it would not be reasonably safe to conclude that the respondent was in the 7th month of pregnancy in the month of June.

No doubt Dr. Ajinkya has said that there would be a perceptible abdominal enlargement in ordinary cases after the 4th month and the respondent has remarked in her letter

of the 28th June that her abdomen had the appearance of a big water pot. But that was nothing more than innocent exaggeration and ought not to be taken literally.

A good deal of argument was advanced on the footing that the delivery of the respondent being normal, the birth of a premature baby cannot be regarded as a 'normal delivery' in the medical parlance. Apart from the fact that Dr. Ajinkya and Dr. Mehta have given different meanings to the expression 'normal delivery', there is no reliable evidence to the effect that the birth of a child to the respondent was regarded as normal delivery. As already observed, Madhuben's evidence is false and artificial and the hospital records consisting of indoor case papers are incomplete. It would also appear that the column of 'disease' is torn and attempts to reconstruct it seem to have been made. Moreover it would seem that entries used to be made in the hospital papers mechanically without reference to actualities. On these grounds the entry regarding the weight of the child at birth—stated as 4 lbs—cannot be accepted at its face value. Even accepting it, there is unanimity of opinion amongst all the three experts examined in this case that this would be the weight of a premature baby and not that of a mature one. Considered along with the circumstances that the delivery was sudden and the respondent was then in a poor state of health the appellant's case that the baby was a full term one and, therefore, illegitimate stands disproved.

All that I would say is that the medical evidence adduced in this case for establishing that the respondent had conceived before the marriage can in no sense be regarded as of a definite or conclusive nature. Indeed, in the case of *Clark* v. *Clark*(1), if the husband was assumed to be the father, the pregnancy could not have exceeded 174 days, and the child which was born, was alive at the hearing and was three years old. The medical evidence was to the effect that a child of so short a period of foetal life would not survive for more than a day or two. At the same time, the medical witnesses agreed that only rarely could the date of conception be fixed, and that the periods of gestation generally spoken of were notional periods. There was no evidence of misconduct on the part of the wife, and the only evidence of adultery was the fact of the birth of a child, the period of gestation of which could not have exceeded 174 days. The Court held that the husband had not discharged the burden of proof in respect of the adultery and that it was sufficiently proved that the child was conceived in wedlock. It was further held that "where the date of conception can be fixed, and the actual period of gestation is

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ascertained, this ascertained period is comparable to the longer notional period, and for this reason what is in fact a six month child may be comparable to what is called a seven months child."

To sum up, the substance of the medical evidence led on behalf of the appellant is that the normal period of gestation of a child is 280 days, that a child born 180 days after the last menstruation is not likely to be born alive or if born alive it will survive only if special care is taken, that such a case would not be that of normal delivery and its weight would be 1½ to 2 lbs. With the aid of the evidence of Madhuben the appellant has sought to establish that the delivery was a normal one, that the respondent appeared to have delivered at full term and the child born was a normal one. He has further sought to prove with the aid of the hospital papers that the child weighed four lbs. or so and was found to be normal one. Madhuben's evidence has been rejected by both courts of fact and for very good reasons. The hospital papers cannot be relied upon in the absence of the white paper. Besides, a look at the hospital records would suggest that entries therein were made in a casual manner regardless of actualities. Thus all that we are left with is the evidence of the experts and the case records in text books. There is no unanimity amongst the three experts and even the text books refer to abnormal cases. Bearing in mind that the normal period of gestation evolved by the obstetricians is a generalisation deduced from particulars it cannot be regarded as an inflexible law of nature from which there can be no deviation. Indeed, reputed obstetricians have recorded cases where the period of gestation was found to be shorter in cases of mothers whose menstrual cycles were of three weeks. Again where toxaemia of pregnancy is found to be considerable the development of a child in the womb has been found to take place more rapidly than in normal pregnancies. There may be conceivably other factors contributing to the shortening of the period of gestation and a more rapid development of a child in the womb than that which medical science has so far been able to notice. In these circumstances it would not be reasonably safe to base a conclusion as to the illegitimacy of a child and unchastity of its mother solely on the assumption that because its birth and condition at birth appeared to be normal its period of gestation must have been normal, thus placing its date of conception at a point of time prior to the marriage of its parents.

Thus, even if the additional evidence is taken into consideration, the appellant stands on no stronger grounds.

It has also to be remembered that on the question as to whether the respondent was pregnant before her marriage not only the High Court but also the City Civil Court has come to the conclusion that she was not. We have thus concurrent findings of fact on this crucial question. It is settled law that this Court does not interfere with such a finding merely on the ground that another view of the evidence adduced in the case commends itself to this Court. The appeal has come before us by a certificate granted by the High Court under Art. 133(1)(b) of the Constitution. One of the requirements of cl. (1) of Art. 133 is that in a case other than the one referred to in sub-cl. (c) the appeal must involve a substantial question of law where the judgment appealed from affirms the decision of the Court immediately below. No doubt, strictly speaking, the judgment of the High Court cannot be regarded as judgment of affirmance of the City Civil Court because initially the City Civil Court had granted a decree for annulment of marriage to the appellant. Substantially, however, the decree of the High Court must be regarded as one of affirmance if we take into consideration the fact that the High Court had affirmed the finding rendered by the City Civil Court on the additional issue framed by the High Court in regard to the question whether the respondent was pregnant at the time of the marriage. No doubt, technically, the High Courts' decision is not one of affirmance because it has reversed the decree of the City Civil Court. But we must have regard to the substance of the matter. It is true that the City Civil Court had originally granted a decree but the basis of that decree disappeared after it gave a contrary finding to the one rendered by it earlier on the crucial fact concerning the respondent's pregnancy before her marriage. The High Court having accepted that finding there can be no escape from the position that we have here a case where upon the crucial question of fact, there are concurrent findings. Unless it is shown that a concurrent finding is vitiated by an error of law or procedure or unless it is shown that important or relevant evidence has been overlooked or misconstrued it would not be in consonance with the practice of this Court to re-examine that finding, particularly when, as here, the findings are based upon an appreciation of evidence. The Privy Council firmly adhered to this rule and this Court has accepted the Privy Council's practice in this regard. There are numerous decisions on the point but I may refer only to the following as instances of cases in which this Court has refused to disturb concurrent findings of fact: *Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayak Gosavi & ors.*(1); *Gherulal Parakh* v. *Mahadeodas Maiya & ors.*(2); *Bhinka & others* v.

(1) [1960] 1 S.C.R. 733 (2) [1959] Supp. 2 S.C.R. 406.

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Charan Singh(1); and *Shamrao Bhagwanrao Deshmukh* v. *Dominion of India*(2). No case has been brought to our notice in which this Court or the Privy Council has re-appreciated evidence in an appeal by special leave or disturbed a pure finding of fact concurrently made by the courts below. To do so now would be to ignore all precedents.

As already held by me the appeal must be dismissed with costs.

(1) [1959] Supp. 2 S.C.R. 798.

(2) A.I.R. 1955 S.C. 249.