Narayan Ganesh Dastane vs Sucheta Narayan Dastane on 19 March, 1975

Equivalent citations: 1975 AIR 1534, 1975 SCR (3) 967

Author: Y.V. Chandrachud

Bench: Y.V. Chandrachud, P.K. Goswami, N.L. Untwalia

PETITIONER:
NARAYAN GANESH DASTANE

Vs.

RESPONDENT:
SUCHETA NARAYAN DASTANE

DATE OF JUDGMENT19/03/1975

BENCH:
CHANDRACHUD, Y.V.
BENCH:
CHANDRACHUD, Y.V.
GOSWAMI, P.K.
UNTWALIA, N.L.

CITATION:
1975 AIR 1534 1975 SCR (3) 967
1975 SCC (2) 326
CITATOR INFO :
RF 1988 SC 121 (7,10)

ACT:
Hindu Marriage Act--Section 10(1)(b) and 23(1)(a)(b)--Meaning of cruelty--Burden of proof in matrimonial matters--Whether beyond reasonable doubt--Condonation--of cruelty--Whether sexual intercourse amounts to condonation--Whether condonation is conditional--Revival of cruelty.
Code of Civil Procedure--Section 100 and 103--Powers of High Court in second appeal.
Evidence Act--Section 3--Proof, meaning of.

HEADNOTE:
The appellant husband filed a petition for annulment of marriage on the round of fraud, for divorce on the ground of unsoundness of mind and for judicial separation on the

ground of cruelty. The appellant and respondent possess high educational qualifications and they were married in 1956. Two children were born of the marriage one in 1957 and the other in 1959.

The Trial Court rejected the contention of fraud and unsoundness of mind. It, however, held the wife guilty of cruelty and on that ground passed a decree for judicial separation. Both sides went in appeal to the District Court which dismissed the husband's appeal and allowed the wife's. The husband then filed a Second Appeal in the High Court. The High Court dismissed that appeal.

On appeal to this Court,

HELD (i) Normally this Court would not have gone into evidence especially as the High Court itself could not have gone into the evidence in second appeal. Section 100 of the C.P.C. restricts the jurisdiction of the High Court in second appeal to questions of law or to substantial errors or defects in the procedure which might possibly have produced error or defect in the decision of the case upon merits. The High Court came to the conclusion-that both the courts below had failed to apply the correct principles of law in determining the issue of cruelty. Accordingly the High Court proceeded to consider evidence for itself. Under s. 103 C.P.C. the High Court can determine any issue of fact if the evidence on the record is sufficient but if the High Court takes upon itself the duty of determining an issue of fact, its powers to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guess work. Normally this Court would have remanded the matter to the High Court for a fresh consideration of the evidence but since the proceedings were pending for 13 years the Court itself went into the evidence. [973 F-974 H]

(ii) The burden of proof in a matrimonial petition-must lie on the petitioner because ordinarily the burden lies on the party which affirms a fact, not on the party which denied it. This principle accords with commonsense, as it is much easier to prove a positive than a negative. The petitioner must, therefore. prove that the respondents had treated him with cruelty within; the meaning of r. 10(1)(b) of the Act. But the High Court was wrong in holding that the petitioner must prove his case beyond a reasonable doubt. The normal rule which governs civil proceedings is that a fact is said to be established if it is proved by preponderance of probabilities. Under s. 3 of the Evidence Act a act is said to be. proved when the court either believes it to exist or if considers its existence so probable that a prudent man ought, in the circumstances, to act upon the supposition

that it exists. The first step in this process to fix the probabilities. the second to weigh them. The impossible is weeded

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out in the first stage, the improbable in the second. Within the wide range, of probabilities the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like the status of parties demand closer scrutiny than those like the loan on a promissory note. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving enquiries into issues of quasi-criminal nature. It is wrong to import such considerations in trials of a purely civil nature. Neither s.10 nor s. 23 of the Hindu Marriage Act requires that the petitioner must prove his case beyond reasonable doubt S. 23 confers on the court the power to pass a decree if it is satisfied on the matters mentioned in Clauses (a) to (e) of that Section. Considering that proceedings under the Act are essentially of a civil nature the word 'satisfied' must mean satisfied on a preponderance of probabilities and not satisfied beyond a reasonable doubt. The society has a stake in the institution of marriage and, therefore, the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for- the dissolution of marriage, it has no bearing on the standard of proof in matrimonial cases. In England, a view was at one time taken that a petitioner in a matrimonial petition must establish his or her case beyond a reasonable doubt but the House of Lords in Blyth v. Blyth has held that the grounds of divorce or the bars to the divorce May be proved by a preponderance of probability. The High Court of Australia has also taken a similar view. [975 A-976 B]

(iii) On the question of condonation of cruelty, a specific provision of a specific enactment has to be interpreted, namely s. 10(1) (b) The enquiry, therefore, has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English Law, that the cruelty must be of such a character as to cause danger to life, limb or health or as to give rise to a reasonable apprehension of such a danger. It is risky to rely on English decisions in this field although awareness of foreign decisions can be a useful guide in interpreting our laws. The apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable. It is, however, wrong to import the concept of a reasonable man as known to the law of negligence for judging matrimonial relations. The

question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities but whether it would have that effect on the aggrieved spouse. That which may be cruel to one person may be laughed off by another and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances. The Court has to deal not with an ideal husband and an ideal wife but with the particular man and woman before it. The only rider is that of s. 23(1)(a) of the Act that the relief prayed for can be decreed only if the petitioner is not taking advantage of his own wrong. [977 D-G; 978 C-F; 979 A]

(iv) Acts like the tearing of the Mangal Sutra, locking out the husband when he is due to arrive from the office, rubbing of chilly powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. The conduct of wile amounts to cruelty within the meaning of s. 10(1) (b) of the Act. The threat that she would put an end to her own life or that she will set the house on fire, the threat that she will make the husband lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents are all of so grave an order as to 'imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation. [985 B-E]

(v) In any proceeding under the Act, whether defended or not, the relief prayed for can be decreed only if the petitioner has not condoned the cruelty. The wife did not take up the plea of condonation in her written statement. The Trial Court did not frame any issue of condonation. The District Court

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did not address itself on the question of condonation since it did not find the conduct of the wife to be cruel. The High Court held that the conduct of the wife was not cruel and in any case it was condoned. S. 23 (1) (b) casts obligation on the court to consider the question of condonation. Condonation means forgiveness of the matrimonial offence and restoration of spouses to the same position as he or she occupied before the matrimonial offence was committed. Cruelty generally does not consist of a single isolated act. It consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued coharbitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws. The evidence on condonation consists in this case in the fact that spouse led a normal sexual life despite the various acts of

cruelty. This is not a case where the spouse after separation indulge in stray acts of sexual intercourse in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation but if during cohabitation the spouses uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterised normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status way reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. Sex plays an important role in married life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouse led a normal sexual life even after serious acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse in circumstances as obtained here would raise a strong inference of condonation. That inference stands uncontradicted. the husband not having explained the circumstances In which became to lead and live a normal sexual life,

[985 G-987 B]

(vi) But condonation of a matrimonial offence is not to be likened to a Presidential pardon which once granted wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a further matrimonial offence either of the same variety as the one condoned or of any other variety. No matrimonial offence is erased by condonation. It is obscured but not obliterated. Condoned cruelty can, therefore, be revived. For revival of condonation it is not necessary that the conduct should be enough by itself to found a degree for judicial separation. The wife in not allowing the husband access to the children cannot be said to have revived the earlier cruelty since the children were of tender age and the only person who could escort them had left or had to leave the matrimonial home for good. The subsequent conduct of the wife has to be assessed in the context in which the husband behaved. The husband persistently accused the wife of insanity and refused to maintain her. In that context, the allegations made by the wife in her letter to the Government cannot revive the original cause of action, though it is true that more serious the original offence the less grave need be the subsequent act to constitute revival.

[987 C; 988 C-D, G-H; 991 E-H]

Held, dismissing the appeal,

That the wife was guilty of cruelty but the husband condoned it and the subsequent conduct of the wife was not such as to amount to revival of the original cause of action. [992 B-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2224 of 1970.

From the judgment and order dated the 19th February, 1969 of the Bombay High Court in Second Appeal No. 480 of 1968. V. M. Tarkunde, S. Bhandare, P. H. Parekh and Manju Jaitely, for the appellant.

V. S. Desai, S. B. Wad and Jayashree Wad, for the respondents.

The Judgment of the Court was delivered by CHANDRACHUD, J.-This is a matrimonial dispute arising out of a petition filed by the appellant for annulment of his marriage with the respondent or alternatively for divorce or for judicial separation. The annulment was sought on the- ground of fraud, divorce on the ground of unsoundness of mind and judicial separation on the ground of cruelty. The spouses possess high academic qualifications and each one claims a measure. of social respectability and cultural sophistry. The evidence shows some traces of these. But of this there need be no doubt,: the voluminous record which they have collectively built up in the case contains a fair reflection of their rancour and acrimony, The appellant, Dr. Narayan Ganesh Dastane, passed his M.Sc. in Agriculture from the Poona University. He was sent by the Government of India to Australia in the Colombo Plan Scheme. He obtained his Doctorate in Irrigation Research from an Australian University and returned to India in April, 1955. He worked for about 3 years as an Agricultural Research Officer and in October, 1958 he left Poona to take charge of a new post as an Assistant Professor of Agronomy in the 'Post-Graduate School, Pusa Institute, Delhi. At present be is said to be working on a foreign assignment. His father was a solicitor-cum lawyer practising in Poona. The respondent, Sucheta, comes from Nagpur but she spent her formative years mostly in Delhi. Her father was transferred to Delhi in 1949 as an Under Secretary in the Commerce Ministry of the Government of India and she came to Delhi along with the rest of the family. She passed her B.Sc. from the Delhi University in 1954 and spent a year in Japan where her father was attached to the Indian Embassy. After the rift in her marital relations, she obtained a Master's Degree in Social Work. She has done field work in Marriage Conciliation and Juvenile Delinquency. She is at present working in the Commerce and Industry Ministry, Delhi. In April, 1956 her parents arranged her marriage with the appellant. But before finalising the proposal, her father- B. R. Abhyankarwrote two letters to the appellant's father saying in the first of these that the respondent "had a little misfortune before going to Japan in that she had a bad attack of sunstroke which affected her mental condition for sometime". In the second letter which followed at an interval of two days, "cerebral malaria" was mentioned as an additional reason of the mental affectation. The letters stated that after a course of treatment at the Yeravada Mental Hospital, she was cured : "you find her as she is today". The respondent's father asked her appellant's father to discuss the matter, if necessary, with the doctors of the Mental Hospital or with one Dr. P. L. Deshmukh, a relative of the respondent's mother. The letter was written avowdely'in order that the appellant and his people "should not be in the dark about an important episode" in the life of the respondent, which "fortunately, had ended happily". Dr. Deshmukh confirmed what was stated in the letters and being

content with his assurance, the appellant and his father made no enqui-

ries with the Yeravada Mental Hospital. The marriage was performed at Poona on May 13, 1956. The appellant was then 27 and the respondent 21 years of age.

They lived at Arbhavi in District Belgaum from June to October, 1956. On November 1, 1956 the appellant was transferred to Poona where the two lived together till 1958. During this period a girl named Shubha was born to them on March 11, 1957. The respondent delivered in Delhi where ,her parents lived and returned to Poona in June, 1957 after an absence, normal on such occasions, of about 5 months. In October, 1958 the appellant took a job in the Pusa Institute of Delhi, On March 21, 1959 the second daughter, Vibha, was born. The respondent delivered at Poona where the appellant's parents lived and returned to Delhi in August, 1959. Her parents were living at this time in Djakarta, Indonesia.

In January, 1961, the respondent went to Poona to attend the marriage of the appellant's brother, a doctor-by profession, who has been given an adoption in the Lohokare family. A fortnight after the marriage, on February 27, 1961 the appellant who had also gone to Poona for the marriage got the respondent examined by Dr. seth, a Psychiatrist in charge of the Yeravada Mental Hospital. Dr. Seth probably wanted adequate data to make his diagnosis and suggested that he would like to have a few sittings exclusively with the respondent. For reasons good or bad, the respondent was averse to submit herself to any such scrutiny. Either she herself or both she and the appellant decided that she should stay for some time with a relative of bers, Mrs-. Gokhale. On the evening of the 27th, she packed her tit- bits and the appellant reached her to Mrs. Gokhale's house. There was no consultation thereafter with Dr. Seth. According to the appellant, she had promised to see Dr, Seth but she denies that she made any such promise. She believed that the appellant was building up a case that she was of unsound mind and she was being lured to walk into that trap. February 1961 was the last that they lived together-. But on the day of parting she was three months in the family way. The third child, again a girl, named Pratibha was born on August 19, 1961 when her parents were in the midst of a marital crisis.

Things had by then come to an impossible pass. And close relatives instead of offering wise counsel were fanning the fire of discord that was devouring the marriage. A gentleman called Gadre whose letter-head shows an "M.A. (Phil.) M.A. (Eco.) LL.B.", is a maternal uncle of the respondent. On-March 2, 1961 he had written to tile appellant's father a pseudonymous letter now proved to be his, full of malice and sadism. He wrote :

> "I on my part consider myself to be the father of 'Brahmadev ..... This is only the beginning. From the spark of your foolish and half-baked egoism, a big conflagration of family quarrels will break out and all will perish therein This image of the mental agony suffered by all your kith and' kin gives me extreme happiness..... You worthless person, who cherishes a desire to spit on my face, now behold that all the world is going to spit on your old cheeks.

> So why should I loose the opportunity of giving you a few severe slaps on your cheeks and of fisting your ear. It is my earnest desire that the father-in-law should beat your son with foot-ware in a public place."

On March 11, 1961 the appellant returned to Delhi all alone. Two days later the respondent followed him but she went straight to her parents' house in)Delhi. On the 15th, the appellant wrote a letter to the police asking for protection as he feared danger to his life from the respondent's parents and relatives. On the 19th, the respondent saw the appellant but that only gave to the parties one more chance to give vent to mutual dislike and distrust. After a brief meeting, she left the broken home for good. On the 20th, the appellant once again wrote to the police renewing his request for protection.

On March 23, 1961 the respondent wrote to the appellant com- plaining against his conduct and asking for money for the maintenance of herself and the daughters. On May 19, 1961 the respondent wrote a letter to the Secretary, Ministry of Food and Agriculture, saying that the appellant had deserted her, that he had treated her with extreme cruelty and asking that the Government should make separate provision for her maintenance. On March 25, her statement was recorded by an Assistant Superintendent of Police, in which she alleged desertion and ill-treatment by the appellant. Further statements were recorded by the police and the Food Ministry also followed up respondent's letter of May 19 but ultimately nothing came out of these complaints and cross-complaints.

As stated earlier, the third daughter, Pratibha, was born on August 19, 1961. On November 3, 1961 the appellant wrote to respondent's father complaining of respondent's conduct and expressing regret that not even a proper invitation was issued to him when the naming ceremony of the child was performed. On December 15, 1961 the appellant wrote to respondent's father stating that he had decided to go to the court for seeking separation from the respondent. The proceedings out of which this appeal arises were instituted on February 19, 1962.

The parties are Hindus but we do not propose, as is commonly done and as has been done in this case, to describe the respondent as a "Hindu wife in contrast to non-Hindu wives as if wotmen professing this or that particular religion are exclusively privileged in the matter of good sense, loyalty and conjugal kindness. Nor shall we refer to the appellant as a "Hindu husband" as if that species unfailingly projects the image of tyrant husbands. We propose to consider the evidence on its merits, remembering of course the peculiar habits, ideas, susceptibilities and expectations of persons belonging to the strata of society to which these two belong. All circumstances which constitute the ,occasion or setting for the conduct complained of have relevance but we think that no assumption can be made that respondent is the oppressed and appellant the oppressor. The evidence in any case ought to bear a secular examination.

The appellant asked for annulment of his marriage by a decree of nullity under section 12(1) (c) of 'The Hindu Marirage Act', 25 of 1955, ("The Act") on the ground that his consent to the marriage was obtained by fraud. Alternatively, he asked for divorce under section 13 (1) (iii) on the ground that the respondent was incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition. Alternatively, the appellant asked for

Judicial separation under section 10(1)

(b) on the ground that the respondent had treated him with such cruelty as to cause a reasonable apprehension in his mind that. it would be harmful or injurious for him to live with her.

The appellant alleged that prior to the marriage, the respondent was treated in the Yeravada Menfal Hospital for Schizophrenia but her father fraudulently represented that she was treated for sun-stroke and cerebral malaria. The trial court rejected this contention. It also rejected the contention that the respondent was of unsound mind.It,however, held that the respondent was guilty of cruelty and on that ground it passed a decree for judicial separation.

Both sides went in appeal to the District Court which dismissed the appellant's appeal and allowed the respondent's, with the result that the petition filed by the appellant stood wholly dismissed.

The appellant then filed Second Appeal No. 480 of 1968 in the Bombay High Court. A learned single Judge of that court dismissed that appeal by a judgment dated February 24, 1969. This Court granted to the appellant special leave to appeal, limited to the question of judicial separation on the ground of cruelty.

We are thus not concerned with the question whether the appellant's consent to the marriage was obtainede by fraud or whether the respondent bad been of unsound mind for the requisite period preceding the presentation of the petition. The decision-of the-High Court on those questions must be treated as final and can not be reopened.

In this appeal by special leave, against the judgment rendered by the High Court in Second Appeal, we would not have normally permitted the parties to take us through the evidence in the case. Sitting in Second Appeal, it was not open to the High Court itself to reappreciate evidence. Section 100 of the Code of Civil Procedure restricts the jurisdiction of the High Court in Second appeal to questions of law or to substantial errors or defects in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. But the High Court came to the conclusion that both the courts below had "failed to apply the correct principles of law in determining the issue of cruelty". Accordingly, the High Court proceeded to consider the evidence for itself and came to the conclusion independently that the appellant had failed to establish that the respondent had treat him with cruelty. A careful consideration of the evidence by the High Court ought to be enough assurance that the finding of fact is correct and it is not customary for this Court in appeals under Article 136 of the Constitution to go into minute details of evidence and weigh them one against the other, as if for the first time. Disconcertingly, this normal process is beset with practical difficulties.

In judging of the conduct of the respondent, the High Court assumed that the words of abuse or insult used by the respondent "could not have been addressed in vacuum.

Every abuse, insult, remark or retort must have been probably in exchange for remarks and rebukes from the husband..... a court is bound to consider the probabilities and infer, as I have done,

that they must have been in the context of the abuses, insults, rebukes and remarks made by the husband and without evidence on the record with respect to the conduct of the husband in response to which the wife behaved in a particular way on each occasion, it is difficult, if not impos- sible to draw inferences against the wife." We find this approach difficult to accept. Under section 103 of the Code of Civil Procedure, the High Court may, if the evidence on the record is sufficient, determine any issue of 'fact necessary for the disposal of the appeal which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100. But, if the High Court takes upon itself the duty to determine an issue of fact its power to appreciate evidence would be subject to the same restraining conditions to which the power of any court of facts is ordinarily subject. The limits of that power are not wider for the reason that the evidence is being appreciated by the High Court and not by the District Court. While appreciating ,evidence, inferences may and have to be drawn but courts of facts have to remind themselves of the line that divides an inference from guess- work. If it is proved, as the High Court thought it was, that the respondent had uttered words of abuse and insult, the High Court was entitled to infer that she had acted in retaliation, provided of course there was evidence, direct or circumstantial, to justify such an inference. But the High Court itself felt that there was no evidence on the record with regard to the conduct of the husband in response to which the wife could be said to have behaved in the particular manner. The High Court reacted to this situation by saying that since there was no evidence regarding the conduct of the husband, "it is difficult, if not impossible, to draw inferences against the wife". If there was no evidence that the husband had provoked the wife's utterances, no inference could be drawn against the husband. There was no question of drawing any inferences against the wife because, according to the High Court, it was established on the evidence that she had uttered the particular words of abuse and insult.

The approach of the High Court is thus erroneous and its findings are vitiated. We would have normally remanded the matter to the High Court for a fresh consideration of the evidence but this proceeding has been pending for 13 years and we thought that rather than delay the decision any further, we should undertake for ourselves the task which the High Court thought it should undertake under section 103 of the Code. That makes it necessary to consider the evidence in the case.

But before doing so, it is necessary to clear the ground of certain misconceptions, especially as they would appear to have influenced the judgment of the High Court. First, as to the nature of burden of Proof which rests on a petitioner in a matrimonial petition under the Act. Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it., This principle accords with commonsense as it is so much earlier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10 (1) (b) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt ? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order Lo judge whether the burden has been discharged ?

The normal rule which governs civil proceedings is that a fact can be said to be estabilshed if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact issaid to be proved when the court either believes it to exist or considersits existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where. the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"(1) ; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear" (2). But whether the issue is one of cruelty or of a loan on a promote, the test to apply is whether on a preponderance of robabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so' nicely balanced that a reasonable, (1) Per Dixon,J.in Wright v.Wright (1948)77 C.L.R.191at p.

210. (2) Blyth v. Blyth, [1966] 1 A.E.R. 524 at 536.

not a vascillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses

(a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence". Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance.

To mar' or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender.]But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases.

In England, a view was at one time taken that the petitioner in a matrimonial petition must establish his case beyond a reasonable doubt but in Blyth v. Blyth(P), the House of Lords held by a majority that so far as the grounds of divorce or the bars to divorce like connivance or condonation are concerned, "the case; like any civil case, may be proved by a preponderance of probability". The High Court of Austraila in Wright v. Wright (2) , has also taken the view that "the civil and not the criminal standard of persuasion applies to matrimonial causes, including issues of adultery". The High Court was therefore in error in holding that the petitioner must establish the charge of cruelty "beyond reasonable doubt". The High Court adds that "This must be in accordance with the law of evidence", but we are not clear as to the implications of this observation. Then, as regards the meaning of "Cruelty". The High Court on this question begins with the decision in Moonshee Bazloor Rubeem v. Shamsoonnissa Begum(3), where the Privy Council observed:

> "The Mohomedan law, on a question of what is legal cruelty between Man and Wife, would probably not differ materially from our own of which one of the most recent exposition is the following :- 'There must be actual violence (1) [1966] A.E.R. 524 at 536.
>
> (2) 1948, 77 C.L.R. 191 at 210.
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> (3) 11 Moore's Indian Appeals 551.

of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it'."

The High Court then refers to the decisions of some of the Indian Courts to illustrate "The march of the Indian Courts with the Englishs Courts" and cites the following passage from D. Tolstoy's "The Law and Practice of Divorce and Matrimonial Causes" (Sixth Ed., p. 61):

> "Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."

The High Court concludes that "Having regard to these principles and the entire evidence in the case, in my judgment, I find that none of the acts complained of against the respondent can he considered to be so sufficiently grave and weighty as to be described as cruel according to the matrimonial law."

An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, section 10(1) (b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :

> "10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-
>
> (b) has treated the petitioner with such cruelty as to cause areasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;"

The inquiry therefore has to be whether the conduct charged a,.- cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law, that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other. The risk of relying on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton(1), says :

> "Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health."

(1) [1940] P. 187.

If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties shows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under section 10(1) (b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent.

One other matter which needs to be clarified is that though under section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours to finish the day's work and some one may want to get up

early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person com- plaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse,. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circums- tances may be extreme cruelty under another set of circumstances."(1) The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them over- look or gloss over mutual faults and failures. As said by Lord Reid in his speech in Gollins v. Gollins (2).

> "In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make bout them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

We must therefore try and understand this Dr. Dastane and his wife Sucheta as nature has made them and as they have shaped their lives.

(1) American Jurisprudence, 2nd Ed., Vol. 24, p. 206. (2) [1963] 2 A.E.R. 966,970.

The only rider is the interdict of section 23 (1) (a) of the Act that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise. We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty but the simple trivialities which can truly be described as the reasonable, wear and tear of married life have to be ignored. It is in the context of such trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage. We will therefore have regard only to grave and weighty incidents and consider these to find what place they occupy on the marriage canvas. The spouses parted company on February 27, 1961, the appellant filed his petition on February 19, 1962 and the trial began in September, 1964. The 3-1/2 years' separation must naturally have created many more misunderstandings and further embitterment. In such an atmosphere, truth is a common casualty and therefore we consider it safer not to accept the bare word of the appellant either as to what the respondent said or did or as to the genesis of some of the more serious incidents. The evidence of the respondent too would be open to the same criticism but the explanation of her words and deeds, particularly of what she put in cold print, must come from her oral word and that has to be examined with care.

The married life of these spouses is well-documented, almost incredibly documented. They have reduced to writing what crossed their minds and the letters which they have written to each other bear evidence of the pass to which the marriage had come. Some of these were habitually written as the first thing in the morning like a morning cup (if tea while some were written in the silence of mid-night soon after the echo of harsh words had died down. To think that this young couple could indulge in such an orgy of furious letter-writing is to have to deal with a problem out of the ordinary for it is seldom that a husband and wife, while sharing a common home, adopt the written word as a means of expression or communication.

The bulk of the correspondence is by the wife who seems to have a flair for letter-writing. She writes in some style and as true as "The style is the man", her letters furnish a clue to her personality. They are a queer mixture of confessions and opprobrious accusations. It is strange that almost every one connected with this couple his a penchant for writing. The wife, apart from her voluminous letters, has written an autobiographical account of her unfortunate experiences in the Yeravada Hospital, calling it "Mee Antaralat Tarangat Asta" ("while I was floating in space"). The husband's father idealised the Shiva-Parvati relationship in a book called : "Gauriharachai Goad Kahani"

> ("The sweet story of Gaurihar"). Quite a few of the wifes relatives including a. younger sister of hers and of course her maternal uncle have set their pen to paper touching some aspect or the other of her married life. Perhaps, it was unfortunate that the promised millennium that did not come began with a letter. That was the letter of April 25, 1956 which the wife's lather wrote to the husband's father while the marriage negotiations were in progress. The marriage took place on May 13, 1956.
>
> Nothing deserving any serious notice happened till August, 1959 except that the letters Exs. 556, 238, 243 and 244 show that quite frequently the respondent used to get into fits of temper and say things for which She would express regret later. In the letter Ex. 556 dated November 23, 1956 she admits to having behaved "very badly"; in Ek. 238 dated March 26, 1959 she admits that she was behaving like an "evil star" and had harassed the appellant; in Ex. 243 dated May 5, 1959 she says that she was aware of her "lack of sense" and asks for forgiveness for having insulted the appellant, his parents, his sister and her husband; and in Ex. 244 dated May 22, 1959 she entreats the appellant that he should not feel guilty for the insults hurled by her at his parents.
>
> The period from August 1959 to March 1960 was quite critical and the correspondence covering that period shows that an innate lack of self-control had driven the respondent to inexorable conduct. By the letter. Ex. 256 dated February 16, 1960 the appellant complained to the respondent's father who was then in Indonesia that the respondent kept on abusing him, his parent and sister and that he was extremely unhappy. The appellant says in the letter that differences between a husband and wife were understandable but that it was impossible to tolerate the respondent constantly accusing him and his relatives of wickedness. The appellant complains that the respondent used to say that the book written by his father should

be burnt to ashes, that the appellant should apply the ashes to his forehead, that the whole Dastane family was utterly mean and that she wished that his family may be utterly ruined. The appellant was gravely hurt at the respondent's allegation that his father's 'Sanad' bad been once forfeited. The appellant tells the respondent's father that if he so desired he could ask her whether anything stated in the letter was untrue and that he had conveyed to her what be was stating in the letter. It may be stated that the respondent admits that the appellant had shown her this letter before it was posted to her father. On March 21. 1960 the respondent wrote a letter (Ex. 519) to the appellant's parents admitting the truth of the allegations made by the appellant in Ex. 256. On June 23, 1960 the respondent made a noting in her own hand stating that she had accused the appellant of being a person with a beggarly luck, that she had said that the food eaten at his house, instead of being digested would cause worms in the stomach and that she had given a threat :

"murder shall be avenged with murder".

During June 1, 1960 to December 15, 1960 the marital relations were subjected to a stress and strain which ultimately wrecked the marriage. In about September, 1960 the appellants father probably offered to mediate and asked the appellant and the respondent to submit to him their respective complaints in writing. The appellant's bill of complaints is at Ex. 426 dated October 23, 1960. The letter much too long to be reproduced, contains a sorry tale. The gist of the more important of the appellant's grievances in regard to the period prior to June, 1960 is this : (1)' The respondent used to describe the appellant's mother as a boorish woman; (2) On the day of 'Paksha' (the day oil which oblations are offered to ancestors) she used to abuse the ancestors of the appellant; (3) She tore off the 'Mangal- Sutra'; (4) She beat the daughter Shubha while she was running a high temperature of 104'; (5) One night she started behaving as if she was 'possessed'. She tore off the Mangal-Sutra once again and said that she will not put it on again; and (6) She used to switch on the light at midnight and sit by the husband's bedside nagging him through the night, as a result he literally prostrated himself before her on several occasions.

The gist of the incidents from May to October, 1960 which the appellant describes as 'a period of utmost misery' is this. (1) The respondent would indulge in every sort of harassment and would blurt out anything that came to her mind; (2) One day while a student of the appellant called Godse was sitting in the outer room she shouted : "You are not a man at all"; (3) In the heat of anger she used to say that she would pour kerosene on her body and would set fire to herself and the house; (4) She used to lock out the appellant when he was due to return from the office. On four or five occasions he had to go back to the office without taking any food; (5) For the sheer sake of harassing him she would hide his shoes, watch, keys and other things. The letter Ex. 426 concludes by saying : , "She is a hard headed, arrogant, merciless, thoughtless, unbalanced girl devoid of sense of duty. Her ideas about a husband are : He is a dog tied at doorstep who is supposed to come and go at her beck and call whenever ordered. She behaves with the relatives of her husband as if they were her servants.

When I see her besides herself with fury, I feel afraid that she may kill me at any moment. I have become weary of her nature of beating the daughters, scolding and managing me every night uttering abuses and insults." Most of these incidents are otherwise, supported, some by the admissions of the respondent herself, and for their proof we do not have to accept the bare word of the appellant.

On July 18, 1960 the respondent wrote a letter (Ex. 274) to the appellant admitting that within the bearing of a visitor she had beaten the daughter Shubha severely. When the appellant protested she retorted that if it was a matter of his prestige, be should not have procreated the children. She has also admitted in this letter that in relation to her daughters she bad said that there will be world deluge be- cause of the birth of those "ghosts". On or about July 20. 1960 she wrote another letter (Ex. 275) to the appellant admitting that she had described him as "a monster in a human body", that she had and that be'should not have procreated children. that he should "Pickle them and preserve them in a jar" and that she had given a threat that she would see to it that he loses his job and then she would publish the news in the Poona newspapers. On December 15, 1960 the appellant wrote a letter (Ex. 285) to the respondent's father complaining of the strange and cruel behaviour not only of the respondent but of her mother. He says that the respondent's mother used to threaten him that since she was the wife of an Under Secretary she knew many important persons and could get him dismissed from service, that she used to pry into his correspondence in his absence and that she even went to the length of saying that the respondent ought to care more for her parents because she could easily get another husband but not another pair of parents.

The respondent then went to Poona for the appellant's brother's marriage, where she was examined by Dr. Seth of the Yeravada Hospital and the spouses parted company on February 27, 1961.

The correspondence subsequent to February 27, 1961 shall have to be considered later in a different,, though a highly important, context. Some of those letters clearly bear the stamp of being written under legal advice. The parties had fallen out for good and the domestic war having ended inconclusively they were evidently preparing ground for a legal battle.

In regard to the conduct of the respondent as reflected in her admissions, two contentions raised on her behalf must be considered. It is urged in the first place that the various letters containing admissions were written by her under coercion. There is no substance in this contention. In her written statement, the respondent alleged that the appellant's parents had coerced her into writing the letters. At the trial she shifted her ground and said that the coercion proceeded from the appellant himself. That apart, at a time when the marriage had gone asunder and the respondent sent to the appellant formal letters resembling a lawyer's notice, some of them by registered post, no alle- gation was made that the appellant or his parents had obtained written admissions from her. Attention may be drawn in this behalf to the letters Exs. 299 and 314 dated March 23 and May 6, 1961 or to the elaborate complaint Ex. 318 dated May 19, 1961 which she made to the Secretary to Government of India, Ministry of Food and Agriculture. Prior to that on September 23, 1960 she had drawn up a list of her complaints (Ex. 424) which begins by saying : "He has oppressed me in numerous ways like the following." But she does not speak therein of any admission or writing having been obtained from her. Further, letters like Exs. 271 and 272 dated respectively June 23 and

July 10, 1960 which besides containing admissions on her part also contain allegations against the appellant could certainly not have been obtained by coercion. Finally, considering that the respondent was always surrounded by a group of relatives who had assumed the role of marriage-counsellors, it is unlikely that any attempt to coerce her into making admissions would have been allowed to escape unrecorded. After all, the group here consists of greedy letter-writers. The second contention regarding the admissions of the respondent is founded on the provisions of section 23(1)(a) of the Act under which the court cannot decree relief unless it is satisfied that "the petitioner is not in any way taking advantage of his own wrong'. The fulfilment of the conditions mentioned in, section 23(1) is so imperative that the legislature has taken the care to provide that "then, and in such a case, but not otherwise, the court shall decree such relief accordingly". It is urged that the appellant is a bigoted and egocentric person who demanded of his wife an impossibly rigid standard of behaviour and the wife's conduct must be excused as being in selfdefence. In other words, the husband is said to have provoked the wife to say and act the way she did and he cannot be permitted to take advantage of his own wrong. The appellant, it is true, seems a stickler for domestic discipline and these so-called perfectionists can be quite difficult to live with. On September 22, 1957 the respondent made a memorandum (Ex.

379) of the instructions given by the appellant, which makes interesting reading:

> "Special instructions given by my husband.
>
> (1) On rising up in the morning, to look in the minor. (2) Not to fill milk vessel or tea cup to the brim. (3) Not to serve meals in brass plates cups and vessels. (4) To preserve carefully the letters received and if addresses of anybody are given therein to note down the same in the note book of addresses.
>
> (5)After serving the first course during meals, not to repeatedly ask 'what do you want?' but to inform at the beginning of the meals how much and which are the courses. (6)As far as possible not to dip the fingers in any utensils.
>
> (7) Not to do any work with one hand.
>
> (8) To keep Chi. Shuba six feet away from the primus stove and Shegari.
>
> (9) To regularly apply to her 'Kajal' and give her tomato juice, Dodascloin etc. To make her do physical exercise, to take her for a walk and not to lose temper with her for a year.
>
> (10) To give him his musts and the things he requires when he starts to go outside.
>
> (11) Not to talk much.
>
> (12) Not to finish work somehow or the other; for example to write letters in good hand writing, to take a good paper, to write straight and legibly in a line. (13) Not to

> make exaggerations in letters. (14) To show imagination in every work. Not to note down the milk purchased on the calendar."

Now, this was utterly tactless but one cannot say that it called for any attack in self-defence. The appellant was then 28 and the respondent 22 years of age. In that early- morning flush of the marriage' young men and women do entertain lavish expectations of each other do not and as years roll by they see the folly of. their ways. But we think that the wife was really offended by the instructions given by the appellant. The plea of self-defence seems a clear after-thought which took birth when there was a fundamental failure of faith and understanding. Reliance was then placed on certain letters to show that the husband wanted to assert his will at any cost, leaving the wife no option but to retaliate. We see no substance in this grievance either. The, plea in the written statement is one of the denial of conduct alleged and not of provocation. Secondly, there are letters on the record by which the wife and her relatives had from time to time complimented the husband and his parents for their warmth, patience and understanding.

Counsel for the respondent laid great emphasis on the letter, Ex. 244 dated May 22, 1959 written by her to the appellant in which she refers to some "unutterable question"

> put by him to her. It is urged that the appellant was pestering her with a demand for divorce and the "unutterable question" was the one by which he asked for divorce. No such inference can in our opinion be raised. The respondent has not produced the letter to which Ex. 244 is reply; in the written statement there is hardly a suggestion that the appellant was asking her for a divorce; and the appellant was not asked in his evidence any explanation in regard to the "unutterable question".

These defences to the charge of cruelty must accordingly be rejected. However, learned counsel for the respondent is right in stressing the warning given by Denning L.J., in Kaslefsky v. Kaslefsky that : "If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread especially in undefended cases. The temp- tation must be resisted test we slip into a state of affairs where the institution of marriage itself is imperilled." But we think that t1o hold in this case that the wife's conduct does not amount to cruelty is to close for ever the door of cruelty so as to totally prevent any access thereto. This is not a case of mere austerity of temper, petulance of manners, rudeness of language or a want of civil attention to the needs of the husband and the household. Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner. But the respondent is the mercy of her inflexible temper. She delights in causing misery to her husband and his relation-, and she willingly suffers the calculated insults which her relatives hurled at him and his parents :

> the false accusation that, "the pleader's Sanad of that old bag of your father was forfeited"; "I want to see the ruination of the whole Dastane dynasty", "burn (1)[1950] 2 A.E.R. 398,403.

the book written by your father and apply the ashes to your forehead"; "you are not a man" conveying that the children were not his; "you are a monster in a human body. "I will make you lose your job and publish it in the Poona newspapers"-these and similar outbursts are not the ordinary wear and tear of married life but they became, by their regularity a menace to the peace and well-being of the household. Acts like the tearing of the Mangal-Sutra, locking out the husband when he is due to return from the office, rubbing chillie powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him are acts which tend to destroy the legitimate ends and objects of matrimony. Assuming that there was some justification for occasional sallies or show of temper, the pattern of behaviour which the respondent generally adopted was grossly excessive. The conduct of the respondent clearly amounts to cruelty within the meaning of section 10(1) (b) of the Act. Under that provision, the relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end of her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the, persistent abuses and insults hurled at the appellant and his parents are all of so grave an order as to imperil the appellant's sense of personal safety. mental, happiness, job satisfaction and reputation. Her once-too-frequent. apologies do not reflect genuine contrition but were merely impromptu device to tide over a crisis temporarily. The next question for consideration is whether the appellant had at any time condoned the respondent's cruelty. Under section 23(1) (b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty".

The respondent did not take up the plea in her written statement that the appellant bad condoned her cruelty. Probably influenced by that omission, the trial court did not frame any issue on condonation. While granting a decree of judicial separation on the ground of cruelty, the learned Joint Civil Judge, Junior Division, Poona, did not address himself to the question of condonation. In appeal, the learned Extra Assistant Judge, Poona, having found that the conduct of the respondent did not amount to cruelty, the question of condonation did not arise. The High Court in Second Appeal confirmed the finding of the 1st Appellate Court on the issue of cruelty and it further held that in any case the alleged cruelty was condoned by the appellant. The condonation, according to the High Court, consisted in the circumstance that the spouses co-habited till February 27, 1961 and a child was born to them in August, 1961.

Before us, the question of condonation was argued by both the sides. It is urged on behalf of the appellant that there is no evidence of condonation while the argument of the respondent is that condonation is implicit in the act of co-habitation and is proved by the fact that on February 27, 1961 when the spouses parted, the respondent was about 3 months pregnant. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course,

necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration(1). The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued co-habitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's Acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during co-habitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterises normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well magine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfilment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingre-

1. The Law and Practice of Divorce and Matrimonial Causes by D. Tolstoy sixth Ed., p. 75.

dient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

But condonation of a matrimonial offence is not to be likened to a full Presidential Pardon under Article 72 of the Constitution which, once granted, wipes out the guilt beyond the possibility of revival. Condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety.

> "No matrimonial offence is erased by condonation. It is obscured but not obliterated" (1). Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence(2). Condoned cruelty can therefore be revived, say, by desertion or adultery."

Section 23 (1) (b) of the Act, it may be urged, speaks of condonation but not of its revival and therefore the English doctrine of revival should not be imported into matters arising under the Act. Apparently, this argument may seem to receive some support from the circumstances that under the English law, until the passing of the Divorce Reform Act, 1969 which while abolishing the traditional bars to relief introduces defences in the nature of bars, at least one matrimonial offence, namely, adultery could not be revived if once condoned (3). But a closer examination of such an argument would reveal its weakness. The doctrine of condonation was established by the old ecclesiastical courts in Great Britain and was adopted by the English Courts from the canon law. 'Condonation' is a technical word which means and implies a conditional waiver of the right of the injured spouse to take matrimonial proceedings. It is not 'forgiveness' as commonly understood (4). In England condoned adultery could not be received because of the express provision contained in section 3 of the Matrimonial Causes Act, 1963 which was later incorporated into section 42(3) of the Matrimonial Causes Act, 1965. In the absence of any such provision in the Act governing the charge of cruelty, the word 'condonation' must receive the meaning which it has borne for centuries in the world of law("). 'Condonation' under section 23 (1) (b) therefore means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed. (1) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., Vol I, p. 305, ("Condonation").

(2) See Halsbury's Laws of England, 3rd Ed., Vol. 12, p. 3061.

(3) See Rayden on Divorce, 11th Ed. (1971) pp. 11, 12, 23, 68, 2403.

(4) See Words and Phrases Legally Defined (Butterworths) 1969 Ed., p. 306 and the Cases cited therein. (5) See Ferrers vs Ferrers (1791) 1 Hag. Con 130 at pp. 130, 131.

It therefore becomes necessary to consider the appellant's argument that even on the assumption that the appellant had condoned the cruelty, the respondent by her subsequent conduct forfeited the conditional forgiveness, thereby reviving the original cause of action for judicial separation on the ground of cruelty. It is alleged that the respondent treated the appellant with cruelty during their brief meeting on March 19, 1961, that she refused to allow to the appellant any access to the children, that on May 19, 1961 she wrote a letter (Ex. 318) to the Secretary to the Government of India, Ministry of Food and Agriculture, New Delhi, containing false and malicious accusations against the appellant and his parents and that she deserted the appellant and asked the Government to provide her with separate maintenance.

These facts, if proved, shall have to be approached and evaluated differently from the facts which were alleged to constitute cruelty prior to its condonation. The incidents on which the appellant relied to establish the charge of cruelty had to be grave and weighty. And we found them to be so. In

regard to the respondent's conduct subsequent to condonation, it is necessary to bear in mind that such conduct may not be enough by itself to found a decree for judicial separation and yet it may be enough to revive the condoned offence. For example, gross familiarities short of adultery(1) or desertion for less than the statutory period (2) may be enough to revive a condoned offence. The incident of March 19, 1961 is too trifling to deserve any notice. That incident is described by the appellant himself in the complaint (Ex. 295) which he made to the police on March 20, 1961. He says therein that on the 19th morning, the respondent went to his house with some relatives, that those relatives-instigated her against him, that they entered his house though he asked them not to do so and that she took away certain household articles with her. As shown by her letter (Ex. 294) dated the 19th itself, the articles which she took away were some petty odds and ends like a do]], a slate, a baby hold-all, two pillows, a bundle of clothes and a baby-cart. The police complaint made by the appellant betrays some hypersensitivity.

As regards the children, it does seem that ever since February 27, the appellant was denied a chance to meet them. His letters Exs. 307. 309 and 342 dated April 20, April 21 and November 23, 1961 respectively contain the grievance that the children were deliberately not allowed to see him., From his point of view the grievance could be real but then the children, Shubha and Vibha, were just 4 and 2 years of age in February, 1961 when their parents parted company. Children of such tender age need a great amount of looking after and they could not have been sent to meet their father unescorted. The one person who could so escort them was the mother who bad left or bad to leave the matrimonial home for good. The appellant's going to the house of the respondent's parents where he was living was in the circumstances an impracticable proposition. Thus, the wall that divided the parents denied to the appellant access to his children.

(1) Halsbury's Law-, of England, 3rd Ed., Vol. 12, p. 306, para 609.

(2) Beard vs. Beard [1945] 2 A.E.R. 306.

The allegations made by the respondent in her letter to the Government, Ex. 318 dated May 19, 1961 require a close consideration. It is a long letter, quite an epistle, in tune with the, respondent's proclivity as a letter-writer. By that letter, she asked the Government to provide separate maintenance for herself and the children. The allegations contained in the letter to which the appellant's counsel has taken strong exception are these : (1) During the period that she lived with the appellant, she was subjected to great harassment as well as mental and physical torture; (2) The appellant had driven her out of the house on February 27, 1961; (3) The appellant had deserted her and had declar- ed that he will not have any connection with her and that he will not render any financial help for the maintenance of herself and the children. He also refused to give medical help to her in her advanced stage of pregnancy; (4) The appellant had denied to her even the barest necessities of life like food and clothing; (5) The parents of (he appellant were wicked persons and much of her suffering was due to the influence which they had on the appellant; (6) The appellant used to threaten her that he would divorce her, drive her out of the house and even do away with her life, (7) The plan to get her examined by Dr. Seth of the Peravada Mental Hospital was an insincere wicked and evil move engineered by the appellant, his brother and his father, (8) On her refusal to submit to the medical examination any further, she was driven out of the house with the children

after being deprived of the valuables on her person and in her possession; and (9) The appellant had subjected her to such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious for her to live with him.

Viewed in isolation, these allegations present a different and a somewhat distorted picture. For their proper assessment and understanding, it is necessary to consider the context in which those allegations came to be made. We will, for that purpose, refer to a few letters. On March 7, 1961 the respondent's mother's aunt, Mrs. Gokhale wrote a letter (Ex. 644) to the respondent's mother. The letter has some bearing on the events which happened in the wake of the separation which took place on February 27, 1961. It shows that the grievance of the respondent and her relatives was not so much that a psychiatrist was consulted as that the consultation was arranged without any prior intimation to the respondent. The letter shows that the appellant's brother Dr. Lohokare, and his brother-in-law Deolalkar, expressed regret that the respondent should have been got examined by a psychiatrist without previous intimation to any of her relatives. The letter speaks of a possible compromise between the husband and wife and it sets out the terms which the respondent's relatives wanted to place before the appellant. The terms were that the respondent would stay at her parents' place until her delivery but she would visit the appellant off and on; that the children would be free to visit the appellant; and that in case the appellant desired that the respondent should live with him, he should arrange that Dr. Lohokare's mother should stay with them in Delhi for a few days. The last term of the proposed compromise Was that instead of digging the past the husband and wife should live in peace and happiness. The letter bears mostly the handwritting of the respondent herself and the significance of that circumstance is that it was evidently written with her knowledge and consent. Two things are clear from the letter : one, that the respondent did not want to leave the appellant and two, that she did not either want to prevent the children from seeing the appellant. The letter was written by one close relative of the respondent to another in the ordinary course of events and was not, so to say,, prepared in order to create evidence or to supply a possible defence. It reflects a genuine attitude, not a makebelieve pose and the feelings expressed therein were shared by the, respondent whose handwriting the letter bears. This letter must be read along with the letter Ex. 304 which the respondent sent to the appellant on April 18, 1961. She writes :

> "I was sorry to hear that you are unwell and need treatment. I would always like never to fail in my wifely duty of looking after you, particularly when you are ailing, but you will, no doubt, agree that even for this, it will not be possible for me to join you in the house out of which you have turned me at your father's instance. 'This is, therefore, just to keep you informed that if you come to 7/6 East Patel Nagar, I shall be able to nurse you properly and my parents will ever be most willing to afford the necessary facilities under their care to let me carry out this proposal of mine."

There is no question that the respondent had no animus to desert the appellant and as stated by her or on her behalf more than once, the appellant had on February 27, 1961 reached her to Mrs. Gokhale's house in Poona, may be in the hope that she will cooperate with Dr. Seth in the psychiatric exploration. She did not leave the house of her own volition.

But the appellant had worked himself up to believe that the respondent had gone off her mind. On March 15, 1961 he made a complaint (Ex. 292) to the Delhi Police which begins with the recital that the respondent was in the Mental Hospital before marriage and that she needed treatment from a psychiatrist. He did say that the respondent was "a very loving and affectionate person" but he qualified it by say- ing : "when excited, she appears to be a very dangerous woman, with confused thinking".

On April 20, 1961 the appellant wrote a letter (Ex. 305) to the respondent charging her once again of being in an "unsound state of mind". The appellant declared by that letter that he will not be liable for any expenses incurred by her during her stay in her parents' house. On the same date he wrote a letter (Ex. 307) to the respondent's father reminding him that he, the appellant, had accepted a girl "who had returned from the Mental Hospital". On April 21, 1961 he wrote it letter (Ex. 309) to the Director of Social Welfare, Delhi Administration, in which he took especial care to declare that the respondent "was in the Poona Mental Hospital as a lunatic before the marriage". The relevance of these reiterations regarding the so-called insanity of the respondent, particularly in the last letter, seems only this, that the appellant was preparing ground for a decree of divorce or of annulment of marriage. He was surely not so naive as to believe that the Director of Social Welfare could arrange to "give complete physical and mental rest" to the respondent. Obviously, the appellant was anxious to disseminate the information as widely as possible that the respondent was of unsound mind.

On May 6, 1961 the respondent sent a reply (Ex. 314) to the appellant's letter, Ex. 305, dated April 20, 1961. She expressed her willingness to go back to Poona as desired by him, if he could make satisfactory arrangements for her stay there. But she asserted that as a wife she was entitled to live with him and there was no purpose in her living at Poona "so many miles away from Delhi, without your shelter". In regard to the appellant's resolve that he will not bear the expenses incurred by her, she stated that not a pie remitted by him will be illspent and that, whatever amount he would send her will be, accounted for fully. It is in this background that on May 19, 1961 the respondent wrote the letter Ex. 318 to the Government. When asked by the Government to offer his explanation, the appellant by his reply Ex. 323 dated July 19, 1961 stated that the respondent needed mental treatment, that she may have written the letter Ex. 318 in a "madman's frenzy" and that her father had "demoralised" her. In his letter Ex. 342 dated November 23 , 1961 to the respondent's father, he described the respondent as "'your schizophrenic daughter". Considered in this context, the allegations made by the respondent in her letter Ex. 318 cannot revive the original cause of action. These allegations were provoked by the appellant by his persistent and purposeful accusation, repeated times without number, that the respondent was of unsound mind. He snatched every chance and wasted no oppor- tunity to describe her as a mad woman which, for the purposes of this appeal, we must assume to be wrong and unfounded. He has been denied leave to appeal to this Court from the finding of the High Court that his allegation that the respondent was of unsound mind is baseless. He also protested that he was not liable to maintain the respondent. It is difficult in these circumstances to accept the appellant's argument either that the respondent deserted him or that she treated him with cruelty after her earlier conduct was condoned by him.

It is true that the more serious the original offence, the less grave need be the subsequent acts to constitute a revival(1) and in cases of cruelty, "very slight fresh evidence is needed to show a

resumption of the cruelty. for cruelty of character is bound to show itself in conduct and behaviour, day in and day out, night in and night out". But the conduct of the respondent after condonation cannot be viewed apart from the conduct of the appellant after condonation. Condonation is conditional forgiveness but the grant of such forgiveness does not give (1) Cooper vs. Cooper (1950) W.N. 200 (H.L.) (2) Per Scott L. J. in Batram vs. Batram (1944) p. 59 at p.

60. to the condoning spouse a charter to malign the other spouse. If this were so, the condoned spouse would be required mutely to submit to the cruelty of the other spouse without relief or remedy. The respondent ought not to have described the appellant's parents as "wicked" but that perhaps is the only allegation in the letter Ex. 318 to which exception may be taken. We find ourselves unable to rely on that solitary circumstance to allow the revival of condoned cruelty.

We therefore hold that the respondent was guilty of cruelty but the appellant condoned it and the subsequent conduct of the respondent is not such as to amount to a revival of the original cause of action. Accordingly, we dismiss the appeal and direct the appellant to pay the costs of the respondent.

P. H. P. Appeal dismissed.