Madras High Court
Mahalingam Pillai vs Amsavalli on 3 January, 1956
Equivalent citations: (1956) 2 MLJ 289
Author: Ramaswami
JUDGMENT Ramaswami, J.

1. This is an appeal preferred against the order made by the learnt Subordinate Judge of Kumbakonam in O.P. No. 43 of 1953.

2. The facts are: The appellant-petitioner before us Mahalingam Pillai is the husband of the respondent Amsavalli. The appellant is a resident of Poundarigapuram village and the respondent is a resident of Abhishekamangalam village in Nannilam Taluk. The married life of this couple pawed short-lived. The case for the husband in a notice which he gave before filing this O.P. was that the respondent had left him to lead an openly immoral and improper life. In this petition his case was that she had eloped with one Saravana Pillai, P.W. 4, of Maruvancheri in Nannilam Taluk in January, 1952 and has been living with him as his concubine openly. The case for the wife was that this appellant has had incestuous relationship with his sister Gundu Achi and that on that account there were quarrels-and finally the petitioner beat her, removed her tali, branded and drove her away from his residence. The petitioner has come to Court on the foot of the allegations-setout above for dissolution of marriage under Section 5(1)(b) of Madras Act VI of 1919.

3. The learned Subordinate Judge held that the petitioner had not proved his case for dissolution of marriage and dismissed the petition. Hence this appeal.

4. In the lower Court the respondent applied that her husband might be directed to provide her with costs for defending the application and for alimony pendente lite. The learned Subordinate Judge without unfortunately being fully acquainted with the law on the subject directed the petitioner to pay Rs. 100 by way of costs and refused to provide for alimony pendente lite on the ground that a charge of unchastity has been made against the wife and had to be enquired into. It would appear that the petitioner has paid those costs to the wife. In appeal the wife applied once again for the appellant being directed to furnish her with a sum of Rs. 200 towards defending the appeal and alimony pendente lite at Rs. 30 per month during the pendency of the appeal. Basheer Ahmed Sayeed, J. directed the appellants to pay Rs. 100 towards costs for defending the appeal and Rs. 25 per month towards maintenance as alimony pendente lite during the pendency of the appeal. The petitioner who is said to have movable and immovable properties worth Rs. 9,500 has contumaciously refused to comply with this order apparently hoping that the wife who had lost recently her father, who has been supporting her till now, would give up her defence and enable him to have a walkover. The bearing of this-contumacious refusal to comply with the direction of Basheer Ahmed Sayeed, J.'s. order will be discussed presently.

5. Two points that arise for determination in this appeal are: Firstly, whether on the facts alleged a case of concubinage or prostitution or living in adultery has been made out; and secondly, what is the scope and extent of and the consequence of the contumacious non-compliance with the order of Basheer Ahmed Sayeed, J., regarding the payment of costs and alimony pendente lite.

6. Point 1: Under Section 5(1)(b) of Madras Act VI of 1949 a husband would be entitled to dissolution of marriage on the ground that the wife is the concubine of any other man or is leading the life of a prostitute. This Act has been repealed and superseded by the Central Act XXV of 1955, viz., the Hindu Marriage Act. Under Section 13 of Act XXV of 1955 the ground set out above as it stands will not be available because for divorce under Section 13 the only relevant ground in the circumstances of this case would be living in adultery and anything else would only be a ground for judicial separation under Section 10 of the said Act, where one of the grounds is that the other party, after the solemnization of the marriage had sexual intercourse with another person other than his or her spouse. I need not point out that in as much as an appeal is a continuation of the suit of petition and Act XXV of 1955 has replaced the local Act VI 1949, the appellant would be entitled also to invoke the benefits under the new Act provided there are materials, on record already and the other party is not taken by surprise and is given an opportunity to meet this additional ground.

7. The term "concubine" has long had a definite meaning, whether expressed in the language of India or of Europe. The persons decscribed by it had and have still, where it remains applicable, a recognised status below that of a wife and above that of a harlot: Naghubhai v. Monjhibhai (1926) 51 M.L.J. 577 : L.R. 53 I.A. 153 : A.I.R. 1926 P.C. 73 from two words "com" meaning "with" and "cubere" meaning "to lie" and connotes a single woman consenting to unlawfully cohabit with a man generally, as though the marriage relation existed between them, without any limit as to the duration of such illicit intercourse, and actually commencing cohabiting with him in pursuance of that understanding and becoming his concubine or as it is usually expressed in modern terms, his kept mistress, which amounts to the same thing. This is the meaning given in standard lexicons also. In the "New English Dictionary on Historical Principles" edited by James Murray, Volume II, page 777, the definition of a concubine is given as a woman who cohabits with a man without being his wife. A kept mistress. In Ballantine's "Law Dictionary", 1948 edition (The Lawyers' Co-operative Publishing Co., Rochester, New York) concubinage is defined as the state of a woman who sustains a relation involving continuous and regular illicit intercourse with a man to whom she is not a wife. Such a relation need not exist for any considerable period of time to constitute concubinage, but the relation which gives rise to the disreputable state of a woman indicated by the term, may like that of marriage, be contracted or assumed in a day as easily as in a year See Handerson v. People 124 Illinois. 607. Concubine is a woman who habitually assumes and exercises towards a man not her husband the rights and privileges which belong to the matrimonial relation, see 172 Ind. 134. The wife without a title. The concubine must not be confounded with the courtesan, or even with what is ordinarily called a mistress. Concubinage is the act or practice of cohabiting in sexual intercourse without the authority of law or legal marriage See Gauff v. Johnson 161 L. Ed. 975. In the American Jurisprudence, Volume 35 (Published by the Lawyers' Co-operative Publishing Co., Rochester, New York and Bancroft Whitney Co., San Francisco, California) Section 9, it is stated:

Although concubinage was in ancient times recognised in certain countries as a species of marriage, it is not so regarded in Christendom. Marriage differs from concubinage in that the intent in the former is to agree to assume the relationship of husband and wife, whereas intent in the latter is to assume no such relationship Tedder v. Tedder 108 S.C. 271.

8. Similar definitions are to be found in Bouvier's "Law Dictionary", Rawles Third Edition, page 579; Ramanatha Iyer's "Law Lexicon", (M.L.J. Publication) page 222; and Wharton's "Law Lexicon". An historical account of concubinage in the West and the East is to be found in Hasting's "Encyclopaedia of Religion and Ethics", Volume 3, pages 809 to 820 and "Encyclopaedia Brittannica," 13th Edition, Volume 5-6, page 841. The distinction between a wife and concubine and harlot is that a concubine is below that of a harlot and that in that status the woman lacks the permanent guarantees of married life is well brought out in the following quotation from Shakespeare in Doctor Johnson's Dictionary of English Language, Volume I, (1806):

I know I am too mean to be your Queen:

And yet too good to be your concubine.

But at the same time a concubine is to be distinguished from a harlot. The latter solicits to immorality, the former is reserved by one man. A concubine is affected to one man only although in an irregular union and occupies a recognised status below that of wife and above that of harlot.

9. This status of a concubine has a recognised position in Hindu Law and in fact entitles the woman to certain maintenance rights, provided she fulfils certain conditions like that she must be exclusively and continuously kept by her paramour and the connection should not be adulterous and she should maintain sexual fidelity towards her paramour. Such a woman is called a avaruddhastri and her right to maintenance from the estate of her paramour after his death is enjoined by two texts of Kartyayana and Narada and this is the subject-matter of a considerable amount of case-law. See Mitakshara, Ch. II S.I. Paras. 7, 28 N.R. Raghavachari, "Hindu Law", M.L.J. Publication, page 224, Section 209; Mayne on "Hindu Law and Usage", Eleventh Edition, page 815 and following; Appa Rao, "The Law of Maintenance and Alimony in British India", M.L.J., page 43; Naghubhai v. Mongkibhai (1926) 51 M.L.J. 577 : L.R. 53 I.A. 153 : A.I.R. 1926 (P.C.) 73, Bai Monghi bai v. Bai Naghubai (1922) I.L.R. 47 Bom. 401, Akku Pralhad v. Ganesh Pralhad I.L.R. (1945) Bom. 401, Shiva Kumari v. Udeya Pratap Singh A.I.R. 1947 All. 314, Ramamohana Rao v. Ragavamma (1941) 1 M.L.J. 471, Bhagavat Sastrulu v. Lakshmikantam (1940) 1 M.L.J. 60, Rama Raja Thevar v. Papammal (1925) 49 M.L.J. 348 : I.L.R. 48 Mad. 805, Ramanarasu v. Buchamma (1899) 10 M.L.J. 62 : I.L.R. 23 Mad. 282, Sikki v. Verikatasamy (1879) 8 M.H.C.R. 144.

10. Bearing these principles in mind, if we examine the evidence in this case, all the information we have about the relationship between this respondent and Sararvana Pillai is that the respondent was found on one occasion sweeping the house of that Saravana Pillai, who is living with his wife, daughters, sisters and niece. The contention that the respondent is the concubine of Saravana Pillai fails.

11. The openly immoral and improper life attributed in the petitioner's notice to the respondent cannot also be correlated to the second part of Section 5(1)(b) of Madras Act VI of 1949, viz., leading the life of a prostitute as was sought to be suggested. In its most general sense prostitution is the setting one's self to sale or devoting to infamous purposes what is in one's power. In its restricted and legal sense, it is the practice of a female offering her body to an indiscriminte intercourse with

men, as distinguished from sexual intercourse confined to one man, or as sometimes stated, common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire.

12. A prostitute is a female given to indiscriminate lewdness; a strumpet. Prostitute is the pa pple of prostitu ere meaning to place before, expose publicly; offer for sale and is derived from Prostatuere-ut-stature re, set up, place, offer for sale (Murray's "New English Dictionary on Historical Principles," Volume VII, page 1497). As a verb, its definition is to offer freely to a lewd use, or to indiscriminate lewdness. As an adjective, it means openly devoted to lewdness; sold to wickedness or infamous practices. A female may live in a state of illicit carnal intercourse with a man for years without becoming a prostitute.

13. A woman is not a prostitute who indulges in illicit sexual intercourse with only one man; hence a man cannot be guilty of enticing a female away from her home for the purpose of prostitution, where the proof shows that he enticed her away for the purpose of having intercourse with her himself and not to induce her to have intercourse indiscriminately with other men. The most usual motive for indiscriminate sexual intercourse being the money paid therefor, prostitution is sometimes defined to be indiscriminate sexual commerce for gain. If, however, a woman submits to indiscriminate sexual intercouse, which she invites or solicits by word or act or any device, and without profit, she is as much a prostitute as one who does so solely for hire. Her vocation may be known from the manner in which she plies it and not from the pecuniary charges and compensation gained Emperor v. Lalya Babu Jadav (1929) 31 Bom. L.R. 521 : 1929 Bom. 266.

14. A public prostitute is a woman who is a prostitute by profession and whose trade is to let out her body on hire to all visitors or to all visicors of a specified class. When a woman rests content with one lover for years though she may have changed her lovers at intervals of some years, she is not a public prostitute Municipal Committee of Delhi v. Moti John (1930) 123 I.C. 536, Municipal Board, Etah v. Asghari John (1931) 139 I.C. 894, Moti John v. Municipal Committee, Delhi (1926) 93 I.C. 827.

15. In Ballantine's "Law Dictionary", which sets out the definition in terms of American case-law, prostitution in its most general sense is said to mean the setting of one's self for sale or of devoting to infamous purposes what is in one's power. But in its most restricted sense and as the term is used in criminal statutes, it is the practice of a female offering her body to an indiscriminate sexual intercourse with men. In some States lucri cmsa has been made an element of the offence and in others the commission of fornication for hire is statutory prostitution: See 42 Am. Jur. 260.

16. The French administrators arrange disorderly women under two heads, femmes debauchees and prostitutes. The former instead of being, as would at first sight appear, a generic term, seems to distinguish the numerous groups known as femmes galantes and filles clandestines, and corresponds with the kept mistress and more reserved class of prostitutes in the United Kingdom and United States of Amerka, like call-girls, etc. Over it, while a certain degree of self-respect is preserved, the police neither assert nor can maintain control.

17. Into the second class, which answers to the common street-walkers or night-walkers of the United Kingdom or the red-light district inhabitants of the United States of America the district in a city where houses of prostitution are situated advertise their character by red-lights and statutes providing for the abatement of houses of prostitution are known as Red-light Abatement Acts - the French authorities do their best to drive such of the first as they consider to have forfeited their independent position. It is held that the legally established and repeated exercise of fornication as a calling, combined with a public notoriety thereof, arrest in flagrante proved by witnesses other than the informer or the police agent, constitute the "prostitute". The prostitute has been more particularly described by French writers as the woman who abjures society, repudiates its laws, and forfeits all claims upon it, by adopting those habitudes scandaleuses hardiment ct constotnment publiques, through which she passes into cet etat de brutalite scandaleuse dont (sic) reprimer les exces.

18. This position has been tersely put by Dr. Samuel Johnson in his "Dictionary of the English Language," (1806), Vol. II, by defining a prostitute as a hireling; a mercenary who is set to sale. The same concept runs through the Sanskrit literature wherein these public women are called vannadasis, i.e., women living on their earnings or vanna, duritthi kumbhadasi (low woman), ganckaghara (house of ill-fame) and in Tamil literature as vilai mathu "woman whose services are purchased". Kalidasa in his "Meghaduta" mentions three classes panyastri, abhisarika and vesya see Ratilal v. Metha "Pre-Buddhist India," pages 296-7. The Sanskrit writers draw'a sharp distinction between a varinadasi or harlot bhujishia or kept mistress ovaruddha, secondary wife and swairini, an adulteress.

19. This is also the definition adopted in the Madras Suppression of Immoral Traffic Act, which defines prostitution in Section 4(e) as meaning promiscuous sexual intercourse for hire.

20. This is not the case here and therefore the contention of the appellant fails.

21. Therefore, we have got to see whether the acts complained of would even come under the term "living in adultery" constituting one of the grounds contemplated under Section 13 of Act XXV of 1955. The term "adultery" is derived from the French verb "adultereare" which stands for "ad altereare", viz., alter from other or change to something different, and hence getting corrupted. In fact till the 17th century the present word "adulterer" was only spelt as "adulter". In Funk and Wagnall's "New Standard Dictionary of the English Language" Volume II, the definition of "adultery" is given as the sexual intercourse of two persons either of whom is married to a third person 6 Ala. Rep. 684 : 22 Iowa Rep. 364. It is called a double adultery where both are married and single where only the woman is married. This restricted definition is not, however, that of divines or moralists because according to them any lewdness or unchaste act or thought as in violation of the 7th Commandment (Matt. V-27 III, Eccl.) constitutes prostitution. In the "Universal Dictionary of the English Language" by H.C. Wyld and the "Shorter Oxford Dictionary on Historical Principles", Volume I, preparedly Messrs. Little, Fowler and Coulson, it is pointed out that adultery consists of a breach by either sex of marriage vows and fidelity to the spouse and violation of the marrige bed, though extended meanings have been given as for instance by theologians who applied this term to unchastity and to marriages of which they disapproved (interpretative adultery). In Ballantine's

"Law Dictionary" and in I Am. Jur., Section 2 (page 681), the definition given is At common law adultery consists of sexual intercourse by men, married or single, with a married woman, not his wife. The same offence is recognised by the civil law. In most jurisdictions, however, the common law definition of adultery has been enlarged by statutes enacted so as to include sexual intercourse by a married person with some person not his or her husband or wife.

22. Adultery is nowhere defined either in the English or Indian Divorce Act. But its meaning in Divorce Law is beyond doubt and is understood to mean the willing sexual intercourse between a husband or wife with one of the opposite sex while the marriage subsists Sexual commerce falling short of complete penetration may constitute adultery It is immaterial whether the marriage itself has been consummated or not. The act of intercourse must be voluntary but if it is involuntary, for example, rape, there can be no adultery. Rayden on "Divorce," Fifth edition (1949), page 89 (Para. 91),' Latery on "Divorce," Fourteenth edition, page 74 (Para. 148); Tolstoy "Divorce Law and Practice," Second edition, page 22; Phillips "Divorce Practice," Fourth edition, (1951), page 16; Rattigan on "Divorce" Second edition, page 100.

23. There is a distinction between "committing adultery and "living in adultery". Living in adultery means, following in a course of adulterous conduct more or less continuous; a single act of adultery cannot be considered as living in adultery. The words "living in adultery" used in Sub-section (4) of Section 488, Criminal Procedure Code and Section 13 of Act XXV of 1955, are merely an indication of the principle that occasional lapses from virtue are not a sufficient reason; either for refusing maintenance under Section 488 of the Code of Criminal Procedure, or for granting divorce under Act XXV of 1955, as distinguished from judicial separation. The question, therefore, for Courts to decide is whether there had been such adulterous conduct at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word "shortly" in a reasonable manner. Gantapalli v. Gantapalli (1897) 7 M.L.J. 303 : 20 Mad. 470 (F.B.), Parki v. Vishwandth (1909) 9 Cr.L.J. 390, Patala v. Patala (1907) 17 M.L.J. 279 : I.L.R. 30 Mad. 332 In re Fulchand (1927) 29 Cr.L.J. 314, Ram Autar v. Raghurai (1926) 27 Cr.L.J. 1190, Gopaldeo v. Ratni (1928) 30 Cr.L.J. 403, Ma Thein v. Mung Mya Khin (1936) 38 Cr.L.J. 646, Chettibai v. Naroomal (1938) 39 Cr.L.J. 847, Kallu v. Kaunsilia (1904) 26 All. 326, Nandan 181 A.W.N. 37, Jatindra v. Gouri Bala (1925) 26 Cr.L.J. 1184 Lakshmi Ambalam v. Audiammal (1937) 39 Cr.L.J. 228 and Kista Pillai v. Amirtkammal (1939) 39 Cr.L.J. 951.

24. This is also the American law on the subject. In 1 Am. Jur., Section 22 (page 690) it is stated thus:

Generally speaking, in order to constitute the offence of illicit cohabitation, it must appear that a man and woman not legally married to each other lived together and indulged in acts of sexual intercourse; single or merely occasional acts of illicit intercourse are not sufficient - at least where there is no pretence of cohabitation and the statute makes such a status or condition an element of the offence. Thus, single or occasional acts, unaccompanied by any pretence of living together, are insufficient to constitute the following offences; Living or cohabiting in adultery or fornication or in a state of adultery or fornication, living in a state of cohabitation and adultery; living in an open state of adultery or fornication, cohabiting together as husband and wife without being married,

unlawful cohabitation in adultery or fornication; living together and having carnal intercourse; living in open and notorious adultery; or lewd and lascivious association and cohabitation. The fact that clandestine acts of sexual intercourse are often repeated does not constitute unlawful cohabitation unless the parties openly and notoriously live together as paramour and concubine, habitually assuming and exercising towards each other rights and privileges which belong to the matrimonial relation. No continuance of illicit intercourse makes out the crime so long as it is secret but whenever secrecy is abandoned and the concubinage is open, the offence is complete. Authority is not lacking, however, for the statement that secret intercourse may constitute living in adultery. A single or occasional act of sexual intercourse, when accompanied by an intention, contemplation or understanding of the parties to continue in the intercourse as desire and opportunity may arise, may be sufficient to constitute illicit cohabitation or living together in adultery or fornication.

25. Adultery may be proved in various ways. Direct proof is very rare and even if produced the Court will look upon it with disfavour, as it is highly improbable that any person could be a witness to such acts, as they are generally performed with the utmost of secrecy Simon Lakra v. Bakla I.L.R. (1932) 11 Pat. 627 : 140 I.C. 561, Phillips v. Emperor A.I.R. 1935 Oudh 506 : 158 I.C. 6 (2). In fact direct evidence would clearly be required to be corroborated by circumstantial evidence, Kelly v. Kelly 5 Ben L.R. 72, Davidson v. Davidson (1921) 62 I.C. 782. Adultery is as a general rule proved by presumptive proof based upon (a) circumstantial evidence; (inform)(b) evidence of non-access and the birth of children; Russel v. Russel (1924) A.C. 687, P. v. P. (1911) 12 I.C. 946. Howe v. Howe (1913) 25 M.L.J. 594 : 38 Mad. 466, (c) contracting venereal disease; (d) by evidence of visits to houses of ill-repute; (e) decrees and admissions made in previous proceedings; and (f) confessions and admissions of the parties which should be generally corroborated though in exceptional circumstances even if uncorroborated may be acted upon. Robinson v. Robinson 29 L.J.P. 178 at 191, Ower V. Ower (1924) 49 I.C. 305, Smith v. Smith (1917) 49 I.C. 305, Glancy v. Glancy (1915) 31 I.C. 264 Hill v. Hill A.I.R. 1923 Bom. 284 Arnold v. Arnold (1911) I.L.R. 38 Cal. 907.

26. The burden of proving misconduct lies heavily on the party alleging it. The petitioner must show that on or between the dates specified in the petition the respondent was guilty of misconduct. The same strict proof is required of adultery as required in a criminal case before an accused person is found guilty, i.e., the tribunal, must be satisfied of the matrimonial guilt beyond reasonable doubt, Ginesi v. Ginesi (1948) 1 All. E.R. 373 Churchman v. Churchman (1945) 2 All. E.R. 190, Blunt v. Park Lane Hotel Ltd. L.R. (1942) 2 K.B. 253 253 : (1942) 2 All. E.R. 187 Reasonable doubt, explained in Miller v. Minister of Pensions (1947) 2 All. E.R. 373. This will be a matter of proof upon evidence which need not be direct, but must, at all events, be of such character as would lead the guarded discretion of a reasonable and just man to the conclusion that no inference other than that of misconduct can be derived from it. The evidence must be clear and cogent both as to inclination, opportunity and conduct, so as to lead to the irresistible inference that the offence has been committed. Lovedon v. Lovedon 2 Hagg. (Con.) 2 (Per Lord Stowell) Watson v. Watson (1925) 94 I.C. 528, Kallan v. Kallan 1933 Lah. 728, Gibbs v. Gibbs (1933) I.L.R. 55 All. 597 : 143 I.C. 890, Phillips v. Emperor A.I.R. 1935 Oudh 506 : 158 I.C. 6 (2), Burrows v. Burrows A.I.R. 1937 Lah. 395, D'Cruz v. D'Cruz (1926) 98 I.C. 1019 (Oudh), Hearsey v. Hearsey A.I.R. 1931 Oudh 259 Gopi v. Hiriya A.I.R. 1935 Nag. 49 and Davidson v. Davidson (1921) 62 I.C. 782.

27. The American case-law on the subject summarised in 17 Am. Jur., Section 397 (pages 344, 345-702) is the same.

It is a fundamental rule that it is not necessary to prove the direct fact of adultery. The fact may be sufficiently proved by circumstances or by circumstantial evidence from which adultery may be inferred as a necessary conclusion. Since adultery is committed in secret, it is seldom susceptible of proof except by circumstances which, however, are sufficient whenever they would lead the guarded discretion of a reasonable and just man to a conclusion of guilt. The Courts must, perforce, take such evidence as the nature of the case permits - circumstantial, direct, or positive and bring to bear upon it the experiences and observations of life, thus weighing it with prudence and care and giving effect to its just preponderance. Still, it has been said in weighing the effect of such evidence that it must be so clear and strong as to carry conviction of the truth of the charge and if it does no more than raise a suspicion of chastity, it is insufficient, and that the circumstances must lead to it not only by a fair inference, but as a necessary conclusion. When, however, adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, together with comparatively slight circumstances showing guilt, may be sufficient to justify the inference that criminal intercourse has actually taken place.

28. The standard of proof in India to reiterate is also the same. There must be clear proof of adultery. The mere fact that the husband considers the conduct of the wife open to suspicion is not sufficient. The mere fact that a Panchayat of the community condemned the wife's conduct is not a ground for the Judge to base his finding on the evidence before him, whether the wife was living in adultery. Though direct evidence of adultery may not be possible from the nature of the offence, there must be some evidence showing opportunity and desire to commit the offence or access. Mere hole-and-corner tattle or bazaar gossip will not prove adultery. In general we require corroboration to confirm the testimony of the applicant regarding the material facts in issue and corroboration is, as a rule, demanded in regard to alleged admissions and confessions. A decree for dissolution of marriage cannot be granted merely on the ground that the respondent does not oppose the petition. The Courts are bound of themselves to guard against the collusive litigant and to see that there has been no delay, condonation or connivance. Nor can a decree for dissolution of marriage be made merely on admissions without recording evidence: Soundara Rajeswari, In re 2 Weir 647, Jodhan v. Kulwant (1948) 49 Cr.L.J. 323 (Pat.), Joseph v. Ramamma (1922) 43 M.L.J. 441 : 45 Mad. 982, Iriss v. Iriss A.I.R. 1933 Lah. 356, Hall v. Hall A.I.R. 1933 Sind 70. Thomas v. Thomas , Dwarka Bai v. Naiman Mathews , Ramachandra v. Saraswati , White v. White A.I.R. 1954 Pat. 560, Galler v. Galler (1954) All. E.R. 536, I Am. Jur., Section 62-63, Manchanda's "Law and Practice of Divorce" (1945), Eastern Law House, page 47, and foll.

29. Bearing these principles in mind if we examine the facts of this case we find that apart from the fact that the wife has been living away from the husband for the justifiable cause indicated by her and not considered unfounded by the lower Court in that the husband had incestuous relations with Gundu Achi and that the P.W's. saw on one occasion the respondent sweeping the house of a family man who has got into the box and denied the allegations imputed to him and who was believed by the lower Court we have no other acceptable evidence to prove living in adultery. The accusation fails.

30. Point 2: Alimony is a compound of two words alere mourish and money a suffix which forms nn., f., aa., mn., and vbs., (from F.L. alumonier. nutriement) meaning nourishment or maintenance. It connotes the allowance made to the wife out of her husband's estate for her support, either during a matrimonial suit or at its termination when she proves herself entitled to a separate maintenance. The first is called temporary alimony or alimony pendente lite and the latter permanent alimony.

31. The allowance of temporary alimony is not regarded as a matter of right; but is a matter within the discretion of the Court. Such discretion, however, is not arbitrary but judicial in character, controlled by more or less well-established principles of law.

32. In practice, however, allowance is usually granted almost as a matter of course upon proof of marriage and the pendency of a suit for divorce. The general rule is that the wife is a privileged suitor in divorce cases; if she is without an income competent for her support and the maintenance of the suit, the Court, except in certain well-defined exceptions which will be referred to presently, will allow her alimony pendente lite and money to carry on her suit without enquiry into the merits and determine in advance the ultimate outcome of the suit. (17 Am. Jur., Section 531 page 432).

33. This alimony pendente lite which is the subject-matter of consideration here is provided for in the Madras Act VI of 1949, under Section 5, Clause (7) viz., that where any petition has been presented by or against any wife, if she has no independent income sufficient for her maintenance and the necessary expenses of prosecuting or defending the petition, the Court may, on the application of the wife, order the husband to pay her (i) a sum to meet such expenses and (ii) every month until the petition is finally disposed of, such sum as the Court, considering the circumstances of the parties, shall think reasonable for her maintenance. The Hindu Marriage Act XXV of 1955 superseding this local Act provides under Section 24 for alimony pendente lite, with this difference viz., that not only the wife but also the husband is entitled to maintenance pendente lite and expenses of the proceedings. The said section states:

Where in any proceedings under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife or the husband order....

Section 36 of the Special Marriage Act, 1954, corresponding to Section 6 of the Bombay Divorce Act, 1947, Section 36 of the Indian Divorce Act, 1869, and Section 39 of the Parsi Marriage and Divorce Act, 1936, empowers the Court to grant alimony to the wife only during the pendency of the proceedings under the Acton the foot that the wife is entitled to separate maintenance by the husband and that that right should not be lost to her merely because proceeding under this Act is instituted by her husband against her. The general rule is that so long as the wife is in law a wife she should be maintained by her husband unless she has property or income. In estimating the independent and sufficient income of the wife derived from the property, service, occupation and other sources, the income of the wife's parents or other relations cannot be considered. The principle is a wife is not allowed to improve her financial position merely by taking proceedings. The necessary expenses of the proceeding mean the Court costs, costs of the witnesses pleader's fees, solicitor's and counsel's costs. The amount of the maintenance of the wife will depend upon the

status of the parties, the amount necessary to keep the wife in the same comfort and position she enjoyed in the husband's home, the property of the husband, the average net income of the husband during the preceding three years, the deductions allowable to the husband R. v. R. (1890) I.L.R. 14 M. 88 at 94, Lobo v. Lobo A.I.R. 1939 C. 753 and the maintenance of the children Hardinge v. Hardinge (1911) 11 I.C. 813 (17 Am. Jur., Section 535 page 433: Section 45 page 439 : ibid Section 546). The tendency of the Courts in modern times is to deprecate any strict mathematical proportions in the allotment of alimony. Under the Indian Divorce Act the usual alimony is one-fifth of the joint net income. As a general rule the Court will not give the wife more than one third of the husband's income however gross the misconduct of the husband has been Queros v. Queros A.I.R. 1931 Oudh 365. But if the income of the husband is large or subject to fluctuations, the Court need not necessarily observe the one-fifth ratio and may award less. The Court should also consider in the case of small fortunes the minimum income upon which the wife can exist. R. v. R. (1890) I.L.R. 14 M. 88 at 94. The payment of alimony pendente lite commences from the date of service of the petition on the husband and not from the date of the return of the citation and where no summons has been served, from the time the husband entered appearance and will cease to be operative after the decree. Hardinge v. Hardinge (1911) 11 I.C. 813 (17 Am. Jur., Section 535 page 433: Section 45 page 439: ibid Section 546), M. v. M. L.R. (1928) P. 123.

34. In regard to alimony pending appeal, inasmuch as the order for payment of alimony pendente lite comes to an end with the passing of the decree in the O.P., and even though the appeal is a continuation of the proceeding, still the wife, or the husband will have to move the appellate Court for alimony during the pendency of the appeal. Hirabai v. Dhunijbhai (1893) I.L.R. 17 Bom. 147, Devasahayam v. Devamony A.I.R. 1923 Mad. 211 : (1922) I.L.R. 46 Mad. 133. The appellate Court can exercise the powers of the original Court and it can pass the necessary order (see Section 107 of the Code of Civil Procedure) or continue the order passed by the lower Court till the disposal of the appeal unless the conduct of the party is unreasonable and vexatious or the findings of the lower Court show that the appeal is only an engine of oppression Noronha v. Noronha (1948) 50 Bom. L.R. 471 at 478, Jones v. Jones (1872) 2 P. & D. 333 : 17 Am. Jur. Section 557, or the party is living in adultery during the pendency of the appeal or if the appeal is on a question of law. But if the wife is the respondent in the appeal, she is entitled to alimony pendente lite almost as a matter of course till the final disposal of the appeal. The appellate Court cannot ordinarily increase the alimony unless any circumstances have been shown which would justify such an increase. Nagle v. Nagle A.I.R. 1933 Lah. 5.

35. It need not be added that alimony pendente lite can be provided for in all proceedings like judicial separation, for a decree of nullity of marriage and divorce and even when they are filed in the proper form.

36. I need not add also that as a general rule the wife will be considered, for the purpose of allotting such alimony, innocent of any charge or counter-charge preferred against her by her husband on the foot that we have to presume her innocent until proved to be guilty; secondly that the Court has to satisfy itself before accepting the charges as made out that they are not affected by connivance, condonation and collusion. Burchell v. Burchell A.I.R. 1919 Sind 63, Welton v. Welton L.R. (1927) P. 162, Bullock v. Bullock L.R. (1942) P. 134. Therefore, when the wife enters appearance and denies

the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence and to obtain such assistance from counsel as is reasonable under the circumstances. It is only if the husband is able to substantiate that the wife is being supported by the corespondent and does not need his support a woman cannot claim to have two protectors at the same time or the wife clearly admits living1 in adultery or there is a prior decision binding on the parties in which the wife's adultery has been clearly found there will be a bar to alimony Gordon v. Gordon (1869) 3 Beg. L.R. App. 13, Garlinge v. Garlinge (1922) 44 All. 745 (F.B.) Noblett v. Noblett (1869) 1 P. & D. 651, Madan v. Madan 37 L.J.P. 10 : 17 L.T. 326, Smith v. Smith 4 S. & T. 228 : 32 L.J.P. and M. 91. The law encourages a thorough defence of divorce actions See 17 Am. Jur. Section 172.

37. It is on the foot of these principles that Basheer Ahmed Sayeed, J., made the order regarding alimony pendente lite set out above and corrected the error into which the learned sub-Judge had fallen in refusing to grant permanent alimony.

38. The enforcement of the order granting alimony pendente lite is the last point remaining for our consideration. The methods of enforcing payment of alimony pendente lite in England are: (1) Ordinary execution after Judge's summons ; (2) writ of fieri facias or digit; (3) the Writ of sequestration; (4) receivership by way of equitable execution with or without an injunction; (5) charging order or garnishee; (6) stay of proceedings or suspension of decree absolute until the husband purges his contempt, which however, is not now as a rule punishable by attachment. The amount of arrears recoverable is entirely at the discretion of the Court and generally limited to one year.

39. As the order of the Divorce Court for alimony or maintenance is not a final judgment on which action for debt can be maintained, the relief will have to be worked out only in the Divorce Court and not in the King's Bench Division or Chancery Division. Robins v. Robins L.R. (1907) 2 K.B. 13, Re Heddarwick L.R. (1933) Ch. 669, Capron v. Capron L.R. (1927) P. 243, Gordon v. Gordon L.R. (1946) P. 99, Findlay v. Findlay L.R. (1947) P. 122, Lucas v. Lucas L.R. (1943) P. 68, Campbells v. Campbell L.R. (1927) P. 68, Kerr v. Kerr (1897) I.L.R. 29 B. 439, Fanshawe v. Fanshawe L.R. (1927) P. 238, Leadis v. Leadis L.R. (1921) P. 299, Phillips Divorce Practice, Fourth edition, 1951, page 284 and followed; D. Tolstoy Divorce Law and Practice, second edition, page 263; Rayden on Divorce, Fifth edition, page 272; Latey on Divorce, Fourteenth edition, page 238 and following.

40. The American Law on the subject is summarised in 17 Am. Jur., Sections 560 and 561 (page 446) as follows:

Section 560 - In a divorce suit by the husband, where he is in default in paying alimony pendente lite, the trial Court may in its discretion refuse to proceed with the cause on the merits until the order for alimony is complied with. Even though the husband is not subject to commitment for contempt because of financial inability to comply with the order of an allowance pendente lite his suit may be abated until he is able to do so.

Section 561.- There are numerous dicta and a few decisions to the effect that where a wife brings suit for a divorce and the defendant fails to comply with an order of the Court awarding alimony pendente lite, the Court has the power by reason of the defendant's contempt, to strike out his answer and proceed with the cause as though none had ever been interposed. According to some decisions this mode of punishment can only be resorted to where the husband has purposely absconded from the jurisdiction in order to avoid the process of the Court and cannot be punished for contempt in any other manner. A majority of the authorities hold that, as a rule, a Court has no power, when the defendant in a divorce action is in contempt in disobeying an order to pay alimony, to strike out his answer or otherwise prevent him from interposing a defence on the merits, for such a course not only deprives the defendant of his say in Court, but it ignores the public interest in the preservation of the marriage relation. The mere fact that the privilege of cross-examining the plaintiff's witnesses was accorded to the defendant's counsel is not sufficient. The denial to a party, in such a case, of the right to be heard in his own defence is in legal effect a recall of the notice or citation to him and consequently, is a denial of due process of law within the meaning of the Federal and State Constitutions. While matters of favour or grace, such as the right to appear and file an answer after the expiration of the time fixed by law, may be refused to a defendant for failure to comply with an order granting a temporary allowance, still a denial of the right to defend on account of such disobedience and contempt is a denial of due process of law, and a Judgment for the plaintiff pro confesso in such a case is rendered without jurisdiction and may be attacked collaterally. Furthermore, the interest of the public in the preservation of marriage relation forbids that the right of defence be denied him simply because of his refusal to pay alimony pendente lite.

41. In India the Divorce Act, 1869, is silent as to mode of enforcement of decrees and orders for payment of alimony pendente lite and must therefore he enforced according to the provisions of the Code of Civil Procedure for the execution of decrees. It cannot be enforced by strict proceedings in contempt. White v. White (1927) 32 C.W.N. 179, Contra Leadis v. Leadis L.R. (1921) Pro. 299. But under the Indian Divorce Act, by reason of Section 7 which makes the reliefs to be granted as conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being gives relief, the Court can if the husband is the petitioner stay the proceedings Yorkule v. Christima A.I.R. 1941 All. 93 or suspend or refuse to make a decree absolute Until the alimony pendente lite ordered is paid or grant injunction or appoint receiver. Some decisions however have gone to the extent of saying that where the husband is the respondent his defence should not be struck out but he should be proceeded against for contempt Codd v. Codd A.I.R. 1924 Bom. 132 : (1923) I.L.R. 47 Bom. 664 : 25 Bom. L.R. 339, Tarasingh v. Jalpal Singh I.L.R. (1946) 1 Cal. 604 at 605. But as the order for payment of alimony pendente lite does not create a legal debt but it is only a liability to pay, it is, purely a personal allowance and the right to alimony cannot be alienated or attached Campbell v. Campbell L.R. (1922) P. 187, Smith v. Smith L.R. (1922) P. 191, Watkins v. Watkins L.R. (1896) P. 191, Wallas Ltd. v. Lagge L.R. (1923) 2 K.B. 240.

42. The Parsi Marriage and Divorce Act provides in Section 45 that in case such order shall not be obeyed by her husband, it may be enforced in the manner provided for the execution of decrees and orders under the Code of Civil Procedure, 1908. Therefore, such orders can be executed by the wife as provided for in the Code of Civil Procedure and the Rules framed by the High Courts reproduced

in Appendix B of Wadia and Kapadia's. The Parsi Divorce arid Marriage Act (India Act III of 1936) varying and modifying some of the provisions of the Civil Procedure Code for the purpose of regulating the proceedings in suits and executions under this Act.

43. The Special Marriage Act, 1954 in Section 39, the Hindu Marriage Act in Section 28 and the Madras Act VI of 1949 in Section 5, provide that all orders made by the Court shall be enforced in the like manner as the decrees and orders of Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the law for the time being in force. Sections 36 to 74 and Order 21 of the Code of Civil Procedure provide for the execution of decrees and orders. Therefore, the orders granting alimony pendente lite could not only be executed by the wife but when these payments are made a condition precedent for the taking up of the trial of the petition or of the hearing of the appeal and these orders are not complied with, the petition or the appeal can be dismissed. See Chaudhari: The Special Marriage Act of 1954, Ramdhari Singh v. Rambrosa Singh .

44. Bearing these principles in mind, if we examine the facts of this case we find, that the order of Basheer Ahmed Sayeed, J., directing the husband to pay alimony pendente lite has been contumaciously disobeyed. On account of the fact, however, that this payment has not been made a condition precedent for the hearing of the appeal, the appeal cannot be straightway dismissed and an opportunity should be given to the husband either to pay up or in the alternative the appeal would stand dismissed by a fixed date after the expiry of a reasonable time given to him to comply with the order. This question does not arise here because the husband has not only not printed or typed the papers but has also shown no inclination to vigorously prosecute the appeal which on the merits is wholly devoid of any substance.

45. In the result this appeal is dismissed with costs.