Calcutta High Court
Sachindranath Chatterjee vs Sm. Nilima Chatterjee on 16 May, 1969
Equivalent citations: AIR 1970 Cal 38, 74 CWN 168
Author: B Mukherji
Bench: B Mukherji, S Datta
JUDGMENT Bijayesh Mukherji, J.

1. The appellant in this case is Dr. Sachindra Nath Chatterjee, M.B. and D.T.M. (Calcutta), D.M.R. (Madras), D.M.R.T. (England), and Reader, Radiotherapy, Medical College, Calcutta, and the respondent is his wife, Sm. Nilima Chatterjee; they are referred to hereinafter as simply Sachindra and Nilima.

2. Sachindra is now about fifty-five and Nilima fifty years of age.

3. The appeal is brought from a Judgment and decree dated December 16, 1964, of a learned Additional District Judge, Alipore, dismissing Sachindra's petition dated January 19. 1962, for divorce on the ground of Nilima's adultery: just the ground under Section 13, Sub-section (1), Clause (i), of the Hindu Marriage Act 25 of 1955, or, in the alternative, for Judicial separation on the ground of "severe cruelty and tremendous torture" by her.: just the ground under Section 10, Subsection (1), Clause (b), thereof.

4. Sachindra and Nilima, Hindus both, and domiciled in India too, were married In accordance with Hindu rites, some thirty-two years ago from today, to be exact, on Asarh 14,1344 B.S., corresponding to June 28, 1937, in the town of Barisal, now in East Pakistan. Sachindra, then an M.Sc. student, was about twenty-three and Nilima, then or thereabouts a matriculate, eighteen years of age.

5. Nilima's father had died long before her marriage. She was, therefore, brought up by her mother's father, Chandrakanta Chakrabarti, a practising muktear of the Barisal courts at the relevant time. Indeed, in his house at Barisal the marriage was solemnized.

6. The ceremony of marriage over, Nilima moved, as usual, to Sachindra's ancestral home at Bakal, also In the district of Barisal or Backarganj, as it is called, and continued living there, broken by periodic visits to her grandfather Chandrakanta's place. Sachindra was with her too at Bakal, but only for thirteen days, after which he returned to Calcutta, as indeed he had to, leaving Nilima behind, with a view to prosecuting Ms studies. Prosecute that he did on return to Calcutta But soon enough the course he was in, did undergo a change. A change, because he discontinued reading for M.Sc., and, in 1938, got into the medical college instead. There he had continued until 1944 when he passed the M.B. examination. Having graduated so, he worked there as house physician and house surgeon until 1946's end or thereabouts. Then, he took to studies again --this time for the D.T.M. course --until April 1947, and, in due course, obtained the diploma he was working for. But there he did not rest. From July 1947 to June 1948 he was in Madras, "doing" the D.M.R. course, and succeeded in getting this diploma as well.

7. Passing by, for the time being, still another feather in his cap --a D.M.R.T.--which he earned In England, after having stayed and toiled there from March 1956 to February 1958 or thereabouts, it is time now to notice, in the barest outline, how the connubial relation developed between the two spouses, Sachindra having left Nilima, his newly wedded wife, at Bakal, only thirteen days after the marriage. While in the medical college --and Sachindra was there, first as a student from 1938 to 1944, and then as a house physician and the like until 1946's end --he did visit Nilima at Bakal, but only once or twice a year, and that too for not more than eight to ten days at a time. Nilima in turn, did come from Bakal to Sachindra's Calcutta residence at 4D Mohanlal Street (shortened hereafter into "4D") in the northern part of the town and so close to a well known park of the locality the Deshabandhu Park. Such visits, however, by her to Sachindra here in Calcutta were very few, only three or four, and for short duration as well on each occasion. Only in July 1948 she was "permanently shifted" to "4D" --an address which bulks large in this matrimonial litigation, so unpleasant and unfortunate.

8. There were three children of the marriage --two daughters and a son --when Nilima had shifted so, and at last found her normal abode with the husband, some eleven years after her wedding. The children are --

1. Khana, a daughter, twenty-six or twenty-seven years of age, on March 24, 1964, when Sachindra was giving evidence at the trial, and, therefore, born in or about 1938. 1937 the year of birth cannot possibly be, her parents having been married only on June 28, 1937.

2. Reba, also called Krishna, another daughter, twenty-one or twenty-two years of age on the same date, and, therefore, born in 1942 or 1943, going by Sachindra's evidence. Reba, however, says, on cross-examination, her precise date of birth to be July 2, 1943. It does not matter which.

3. Parma, a son, aged eighteen on March, 24, 1964, as spoken to by Sachindra in his evidence, and, therefore, born in or about 1946.

9. Naturally, these three children of the marriage were "permanently shifted" too, along with their mother, from Bakal to "4D" in July 1948, when they were not even in their teens, having been no more than about ten, five and two years of age respectively.

10. There is another issue of the marriage yet: a boy Chanchal by name, aged fourteen on March 24, 1964, as is the evidence on that date of Sachindra. That makes the year of his birth 1950 or thereabouts.

11. More, to Dr. Shantipada Ganguli, an LMF in the beginning, but later an M.B.B.S., thanks to the condensed course, Khana, the first-born, was married on July 1, 1955, when she was some seventeen years of age. What is still more, Dr. Ganguli, now Reader and Head of the Department of Radiology in the College of Medical Science, Varanasi, had his early training on the subject in the chambers of his father-in-law, Sachindra, who did not stop at that, but had sent him to England, bearing all his expenses, so that he could qualify himself for B.M.R.D. (London), which he did.

12. Prom the little that goes before, one should have thought: here was a happy home, the usual wear and tear of a married life notwithstanding. And a married life which is above wear and tear must be rare indeed. Then, on January 19, 1962, when the two spouses were in their forties, Sachindra having been forty-eight and Nilima forty-three years old, married for about a quarter of century, with passions necessarily in a state of greater composure, blessed with four children, the oldest of whom was about twenty-four and the youngest twelve years of age, having in addition the gift of a grandchild, the child of Khana and Dr. Ganguli, referred to by both Sachindra and Nilima in a common letter bearing date March 3, 1959, to Dr. Ganguli, then in London, exhibits A (3) and A(4) as "Dadubhal", a term by which a grandchild is petted by his grandparents, Sachindra informing his son-in-law of the stay of Khana and her child with them at "4D" (which is in Shambazar) for about a week with a view to restoring "Dadubhai's" health, gone down for sometime past, and when the male spouse Sachindra had earned name and fame, as also lucre, in his profession as a radiologist, the marriage, one should have thought again, was brought to a high pitch of success. But, on that very day, namely, on January 19, 1962, Sachindra raised his action for divorce or judicial separation -- an action we are now adjudicating in appeal. Why such action? Sachindra answers it in one way, and Nilima answers it, as is only to be expected, in a way exactly the opposite. But both rest their answers on a common event which is as uncommon as breathtaking.

13. And that uncommonly common event (as alleged) came into view on January 28, 1961, when Reba alias Krishna, whose acquaintance we have just made, and who was then a little less than eighteen years of age, lodged a complaint before the police that her father, Sachindra, had attempted to commit rape on her nearly a year back namely, on March 10, 1960. Sachindra, twenty-three years old on June 28, 1937, the date of his marriage, was forty-six or thereabouts on March 10, 1960. It was in sober truth a most astounding complaint, leading to Sachindra's arrest three days later, that is to say, on January 31, 1961, and his production before the magistrate on the day following, when he was enlarged on bail. On April 5, 1961, his house at "4D" was searched. That very day, Nilima left "4D". Investigation of the complaint completed, a charge-sheet was submitted against Sachindra under Section 376 of the Penal Code for the offence of rape on his daughter Reba alias Krishna on March 10, 1960, not merely an attempt to commit rape. In due course, he was committed to the court of session, where he stood his trial thereunder and was acquitted on December 23, 1961.

14. Such is the event --that there was a prosecution as above culminating in Sachindra's acquittal is not in the realm of controversy --upon which each party relies in its own way. What Sachindra says comes to this: "My wife is a nymphomaniac, more or less. I have been putting up with her sexual lapses ever since July 1941. But the one on January 1, 1961, broke me, and I gave out, I would go to law with her for divorce. That led her to bolster against me the false and agonizing prosecution she did, through Reba, with a view to forestalling my action for divorce and forcing me 'with the assistance of the police to agree to the terms dictated by her'. Hence this matrimonial cause by me on January 19, 1962, only twenty-seven days after my acquittal --a cause which I could not have very well initiated during the continuance of the criminal case against me on a most heinous charge, and a false charge at that." What Nilima says comes to this: "Nothing of the nymphomania in me, but satyriasis, so to say, in my husband who used to revel in sexual intercourse with all sorts of women, sparing not even his near relations of all degrees. Such a one, so difficult to get on with, encouraged and emboldened by the failure of the prosecution against him, true though it was, has raised this

matrimonial cause, falsely charging me with adultery over the years."

15. The acts of adultery charged by Sachindra and denied by Nilima resolve themselves into four heads:

I. An affair with Gopal, none else than Sachindra's nephew (his eldest brother Jitendra's son), at or about Barrackpore at 7 p.m. in July 1941.

II. An affair with Umakanta, a servant and cook combined, at "4D", at 10-30 p.m. in July 1955, hereinafter referred to as the first Umakanta affair.

III. An affair with the same man Umakanta at "4D" again at or about 11-30 a.m. in July 1959. referred to hereinafter as the second Umakanta affair.

IV. An affair with one Narayan Chakraborty, the night-watchman of the clinic on the ground floor of "4D", between 5.30 and 6 p.m., on January I, 1961, a Sunday, hereinafter referred to as the Narayan affair. This is the one, Sachindra says, that broke him and made him give out his determination to sue for divorce.

16. Upon proof or disproof of such fourfold charge hang the fortunes of this painful litigatipn. But one difficulty must be got out of the way first. That is about the standard of proof obtaining in this class of case, a subject on which we have had the advantage of hearing a fascinating address from Mr. Gouri Mitter, the learned counsel for Sachindra, the appellant.

17. To the statute law first Since, however, we have been referred to decisions. Indian and English, and some of the English cases refer to Australian authority, we reproduce below alongside one another the material excerpts from the relevant provisions of the connected statutes:

Hindu Marriage Act 25 of 1955.

Matrimonial Causes Act 1950 (14 Geo. 6, c. 25) Victorian (Marriage) Act 1928 (Australia).

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

(a) any of the grounds for granting relief exists ....

(b) where the ground of the petition is the ground specified in ... in clause (i) of sub-section (1) of section 18. the petitioner has not in any manner ... condoned the act or acts complained of ... ...

... ...

... ...

then in such a case, but not otherwise, the Court shall declare such relief accordingly.

4. (2). If the Court is satisfied on the evidence that

(a) the case for the petition has been proved; and

(b) where the ground of the petition is adultery the petitioner has not in any manner condoned the adultery ... the Court shall pronounce a decree of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition ...

80. Upon any petition for dissolution of marriage it shall be the duty of the Court to satisfy itself, so far as it reasonably can, as to the facts alleged.

83. ... subject to the provisions of this Act, the Court, if it is satisfied, that the case of the petitioner is established, shall pronounce a decree fox dissolution of marriage.

18. In the realm of statutes, it only remains to be noticed that not materially different from the Victorian (Marriage) Act 1928 is the South Australian Act the Matrimonial Causes Act 1929-41, the thirteenth section of which bears inter alia:

". . . .the court upon being satisfied as to the existence of any ground shall make the order or the order nisi claimed as the case may be."

19. Such being the plain provisions of each statute --and they cannot be plainer --all that the court has to ask itself is whether or not it is satisfied if the ground for granting relief exists, if the charge of adultery uncondoned has been proved. Parliament has used a simple word "satisfied". Give this word its normal and natural meaning which is: "to be convinced." "To be convinced" in turn means "to be free from doubt". That is plain common sense too. If I entertain a doubt about a fact existing, sure enough, I am not convinced about it: I am not satisfied about it either. So. had the question of standard of proof come up before us as res integra, we would have proved and conned the whole of the evidence in this case, and having done so, would have come to either of the two following conclusions:

A. We are satisfied, the ground for granting relief to Sachindra exists, and we, therefore, grant him the relief he prays the court for.

B. We are satisfied, the ground for granting relief to Sachindra does not exist, and we, therefore, refuse the relief he prays us for.

20. But the matter does not appear to be that easy now, in view of a respectable body of decisions which cluster round the subject An embellishment, in the form of an adverbial qualification, beyond reasonable doubt, has been added to the simple word "satisfied". A gloss as that, it would seem at first sight, means so much, changing as it does the very colour of the proceeding. An action for divorce, a civil proceeding without doubt, becomes in a trice a criminal proceeding, all because of the application of the yardstick of proof beyond reasonable doubt, which has in fact been the standard of proof in a criminal case, "from time out of mind", save a note of dissonance in the recent

past. (More of which In paragraph 40 infra.) It, therefore, assists one's convenience to the understanding of the problem if a short history as to the addition of the adverbial phrase "beyond reasonable doubt" to the clear word "satisfied", leading ultimately to its subtraction therefrom, but within a very limited sphere, (paragraphs 37 and 38), is set out.

21. Let us start from that celebrated and oft-quoted case of Loveden v. Love-den, (1810) 2 Hag Con, 1, in which the judgment was rendered by one whom the Earl of Selborne, Lord Chancellor, in G. (The Husband) v. M (The Wife). (1885) 10 AC 171, described as "a judge of the greatest possible eminence, no less a person than Lord Stowell", Sir William Scott in 1810. It was a case of adultery too. And the general rule laid down by Lord Stowell (then Sir William Scott) is:

"The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, --neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The facts are not of a technical nature; they are facts determinable upon common grounds of reason; and courts of justice would wander very much from their proper office of giving protection to the rights of mankind if they let themselves loose to subtilties, and remote and artificial reasonings upon such subjects. Upon such subjects the rational and legal interpretation must be the same."

How well it accords with the definition of "proved" in Section 3 of our Evidence Act 1 of 1872 which adopts the requirement of a prudent man as the footrule to measure proof by. A prudent man is but another name of "a reasonable and just man", "a discreet man". And what such a one requires, with a view to acting upon the supposition that a fact (here adultery) exists, cannot be anything short of his "careful and cautious consideration", of his "guarded discretion, leading to such a conclusion. Neither in (1810) 2 Hag Con 1 nor in Section 3 of the Evidence Act, you find the expression "beyond reasonable doubt" which became the battle-ground of judges in later years.

22. Sixty-four years later, a question arose in Sir Charles Mordaunt v. Sir Thomas Moncreiffe (as Lady Mordaunt's guardian ad litem). (1874) 2 Sc & D. 374, whether proceedings in a petition by Sir Charles Mordaunt for divorce, on the ground of adultery, against his wife, Lady Mordaunt, who had become incurably lunatic, should be suspended, with liberty to Sir Charles to apply again to the Court in the event of her recovery. The House answered the question in the negative, Lord Hatherley observing in his speech (p. 393):

"Much has been said ... as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred, that inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming a lunatic (cf. Section 464 et seq. of our Code of Criminal Procedure), so by parity of reasoning lunacy shall bar all procedure against a Respondent in a divorce case. But the procedure in divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce bills in Parliament were not bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the bill from his unhappy position, that of indissoluble union with one

who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary Divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty."

In sum, the procedure In divorce Is a Civil proceeding, not a criminal proceeding, and the analogies and precedents of criminal law have no authority in the divorce Court, a civil tribunal.

23. Sixty-four years after this pronouncement by the House of Lords that proceedings for a divorce are of a civil nature, though Lord Chelmsford, in his speech, turned to the Act (20 & 21 Vict c. 85) "as the only guide to a determination of the question raised by the appeal" before the House, and considered it unnecessary to determine the exact character of the proceedings--civil, criminal or quasi-criminal --, the High Court of Australia was called upon to apply itself to the problem, in Briginshaw v. Briginshaw, (1938) 60 CLR 336 on an appeal from the Supreme Court of Victoria, the material extracts from the relevant statute, obtaining there, have been reproduced in paragraph 17 ante. The trial judge, Martin J., whose judgment in an action for dissolution of marriage was under appeal in the Briginshaw case, (1938) 60 CLR 336 brought the problem to the forefront, by having used the controversial expression "beyond reasonable doubt" and concluded as under:

"I do not know whom to believe. I have done my best to decide but the petitioner must satisfy me that his story is true. I think I should say that if this were a civil case. I might well consider that the probabilities were in favour of the petitioner, but I am certainly not satisfied beyond reasonable doubt that the evidence called by the petitioner should be accepted."

24. Latham C.J. and his four companion judges of the Australian High Court were unanimous that the appropriate standard was the 'civil' and not the 'criminal'. Even so, the final words just quoted from the judgment of Martin J., they held, did by no means amount to a finding in favour of the petitioner. So they unanimously dismissed the appeal. And one of the reasons, why they decided so, was the law laid down by the House of Lords in (1874) 2 Sc. & D. 374 supra: that a suit for divorce is not a criminal proceeding.

[See the note by an anonymous learned contributor in Law Quarterly Review, volume 66, 1950, pages 35-38].

25. In England, however, the law took a different turn. Even some seventy-one years after the Mordaunt case, (1874) 2 Sc. & D. 374 Lord Merriman P. in the court of appeal, seized with the question of adultery and connivance, was saving:

"The same strict proof is required in the case of a matrimonial offence as is required in connexion with criminal offences properly so called".: Churchman v. Churchman, (1945) P. 44.

And it was so said, reversing Denning J. (as his Lordship then was) who, as trial judge, held that the adultery was proved, but not absence of connivance on the part of the petitioning husband. In Ginesi v. Ginesi, (1948) p. 179. whereas Wrottesley L.J. would not go so far, but confine instead the standard of proof in criminal offences to cases of adultery, "leaving to other occasions the decision

whether it is equally applicable to other matrimonial offences, in addition, of course, to connivance which Lord Merriman P. must have had in mind in 1945 P. 44"; Tucker L.J. would approve of the general rule of Lord Stowell (then Sir William Scott) in (1810) 2 Hag & Con 1 supra about "the guarded discretion of a reasonable and just man" leading to a conclusion, one way or the other, upon the whole of the matters.

26. It, therefore, very much looks that the rule, rested on the high authority of the House, that an action for divorce fosters civil not criminal proceedings, is made a casualty of in England even up to 1948, seventy-four years after the Mordaunt case, (1874) 2 Sc. & D. 374 which enunciated such rule. To Australia again. Because, in the same year, 1948, and after the Ginesi case, 1948 P. 179 too, the High Court of Australia, seized of an appeal from the Supreme Court of South Australia, the relevant law whereof has been reproduced, in so far as it is material here, in paragraph 18 ante, was confronted with the difficult task of deciding whether to adhere to its earlier decision in the Briginshaw case, (1938) 60 CLR 338 or to follow the view of the English Court of appeal in 1948 P. 179. The Court, by a majority of three to one, declined to follow the Ginest case, 1948 P. 179 and reiterated its view, that the "civil" and not the "criminal" standard of persuasion would apply to matrimonial causes including issues of adultery: Wright v. Wright. (1948) 77 CLR 191. Dixon J., a member of the court, commented Inter alia:

"Of late years English courts have from time to time dealt in almost an unconsidered fashion with the standard of persuasion in civil proceedings involving crime, fraud or moral turpitude, that is, without going back to earlier case law inconsistent with assertions that have been casually made."

(1874) 2 Sc & D 374 --is one such earlier case-law not gone back to. Dixon J. went on:

"A 'full-dress' examination of the question would, I am sure, lead to some revision of the statements made in 1948 P. 179."

Such words proved almost prophetic. Only 18 years later, that is, in 1966. the House of Lords, in Blyth v. Blyth, (1966) AC 643, by a majority of three to two, did make the revision Dixon J. had expressed a wish for in 1948, but within a very narrow limit. (More of which in paragraph 37 infra).

27. But how the judicial view was getting into shape in England after (1948) 77 CLR 191 In Australia and before 1966 must be noticed. On November 25, 1948, Lord Merriman P., who had, in 1945 P. 44 (supra), equated the standard of proof for a matrimonial offence with that of in a criminal offence, contented himself saying in Lauder v. Lauder, (1949) P. 277 : (1949) 1 All ER 76:

"The wife alleged a course of conduct (not including any acts of violence) of such a character as to be calculated to injure the wife's health. It is a commonplace to say that cases of that character need, as, indeed, do all cases of cruelty, to be strictly proved. . . ."

On March 22 and 23. 1949. In Fairman v. Fairman. (1949) P. 341: (1949) 1 All ER 938, Lord Merriman P., sitting with Ormerod J., had before them an appeal by the wife against the decision, discharging a maintenance order in her favour, on the ground that she had committed adultery with

a man who had been stay-Ing as a lodger with her qua landlady. The decision appealed from was set aside, because the finding on adultery rested on the lodger's evidence alone and his evidence was plainly that of an accomplice. Cf. Section 114, illustration (b), and Section 133 of our Evidence Act, as also the law laid down by the Privy Council in Mahadeo v. King, AIR 1936 PC 242: that this rule of corroboration of the evidence of an accomplice, long a rule of practice, is now virtually a rule of law. So, here again the standard of proof in a criminal prosecution triumphed very much, even the analogy of criminal law on accomplice evidence having been pressed into service with vigour, just the thing the House of Lords had set its face against in 1874 in the Mordaunt case, (1874) 2 Sc & D. 374. But it was so only about adultery, "a quasi-criminal offence". About other matrimonial offences. Lord Merriman P. quoted what he had said in 1945 P. 44 (reproduced In paragraph 25 ante), and, "as a footnote to the phrase" he had then employed, added:

". . . . I am not conscious of ever having directed either myself or a jury that the same strictness (as in adultery) applies to other matrimonial offences --In other words, in relation, for example, to desertion, cruelty, or wilful neglect to provide reasonable maintenance, that It is necessary to direct oneself more strictly than that the onus lies on the spouse who makes the charge to satisfy the Court that the offence is proved."

So, no more of the standard of proof in a criminal case is seen here. What Is seen here instead is the triumph of the plain meaning of the simple word "satisfy". And in becoming humility It may be pointed out that the addition of the adverb "strictly", as in the phrase employed by Lord Merriman PJ "strictly proved", is apt to create a difficulty. Sure enough, we have nothing like "loosely proved" or "lightly proved" in our courts, That apart, "proved" is "proved", meaning just what it says: the fact to be proved has been proved. If "proved" means always "strictly proved", what duty would the word "proved" filleted to itself do? I repeat, I submit so, with great humility.

28. Then came another cruelty case: Davis v. Davis, decided on November 9, 1949, and come into the reports in 1950: (1950) P. 125: (1950) 1 All ER 40. The trial judge, Barnard J., on the line of what Lord Merriman P. had laid down in (1945) P. 44. said:

"A charge of cruelty must be proved with the same degree of strictness as a crime is proved in a criminal court."

This judgment was displaced by the Court of appeal (Bucknill, Somervell and Denning L.JJ.). Bucknill L.J. considered it unnecessary to bring the question of criminal charges into consideration, referred to the mandate of the statute that the court should be "satisfied on the evidence that the case for the petition has been proved", and said:

"I understand that to mean that if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged and the decree ought not to be granted. If on the other hand, the court is satisfied beyond all reasonable doubt, the petitioner is entitled to a decree."

So, the standard of proof beyond reasonable doubt again. But is that not just the standard of proof in a criminal case? What error then did Barnard J, fall into, in saying what he did? More of which

hereafter in paragraph 34 infra. Denning L.J. agreed with Bucknill L.J. and Somervell L.J. (who delivered Judgment only on the facts) that the appeal should be allowed, but his approach, which was different, may be summed up as under:

I. A considerable degree of difference between the standard of proof required in criminal cases and that required in civil cases.

The degree of cogency required in a criminal case before an accused person is found guilty.

That degree is well settled. It need not reach certainty. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "Of course it is possible, but notin the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The degree of cogency required to discharge a burden in a civil case.

That degree is well settled too. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "We think it more probable than not," the bur-den is discharged, but if the pro-babilities are equal, it is not This is just the gist of what his Lordship had said in an earlier case: Miller v. Minister of Pension, (1947) 63 TLR 474: (1947) 2 All ER 372, a case of a widow's claim to a higher pension for death of her husband, an officer of the army, on account of cancer of the gullet, i.e. carcinoma of cesophagus, attributable, so it was said, to war services.

II. (1874) 2 Sc. & D. 374 again, and effect thereof.

A suit for divorce is a civil and not a criminal proceeding. The rules of civil procedure would, therefore, apply to divorce suits, and not the rules of criminal procedure, which have been built up out of the high regard, the law has for the liberty of the individual, --liberty which is not to be taken away unless the case is proved against him or her beyond reasonable doubt. The same stringency is not necessarily called for in divorce suits, or, at any rate, in divorce suits on the ground of cruelty or desertion, where the court is concerned not to punish any one, but to give statutory relief from a marriage that has irretrievably broken down.

[So, even Lord Denning here confines himself to divorce suits on the ground of cruelty or desertion, leaving such suits on the ground of adultery open.] III. Satisfied on evidence -- a sufficient test.

The statute itself lays down a sufficient test as this. That puts the burden of proof on the person who makes the allegation, but it is not a burden of extraordinary weight. It is a burden which exactly accords with the general rule laid down by Lord Stowell (when Sir William Scott) in (1810) 2 Hag Con 1: that circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. Even Lord Merriman P., in 1949 P. 341 = (19491 1 All ER 838 (paragraph 27) has never required, in cruelty cases, any higher standard than that of the court being satisfied on the evidence, and, strengthened by his authority. Lord Denning would require no more too in this

cruelty case as well.

IV. 1948 P. 179 and standard of proof In criminal cases.

Whatever may be the position in adultery cases --(one more indicium of the standard of proof in adultery cases being kept open) --1948 P. 179 gives no authority to the Divorce Courts to adopt for themselves in all divorce cases at one jump the standard of proof in criminal cases, to say nothing of the rules as to corroboration of accomplices and so forth in criminal courts.

[In 1949 P 341=(1949) 1 All ER 938, paragraph 27 ante, Lord Merriman P. rejected the evidence of the lodger on the question of adultery, the evidence of an accomplice as it plainly was.] V. A danger in asserting what the statute does not assert.

The statute requires the court to be satisfied on the evidence. The statute does not say that the charge must be proved beyond reasonable doubt. Why say then what the statute does not? Therein lies the danger, because of the temptation it affords to give effect to shadowy or fanciful doubts.

29. Such was the lone voice of Lord Denning on November 9, 1949, up against the imposition, upon divorce suits, grounded on cruelty and desertion, at any rate, of the standard of proof in a criminal case. Soon enough, indeed on March 6 and 7, 1950, came an adultery case: Gower v. Gower, [1950] 1 All ER 804, and before Bucknill and Denning L.JJ, again. The facts were strongly in favour of adultery. It was a case for reduction of maintenance granted to a wife who had divorced her husband on the ground of adultery. The wife, with the child of the marriage, lived with a Mr. Cockburn, a married man living apart from his wife, in a flat consisting of a bed-sitting room, a kitchen and a bathroom. The landlord knew the wife as Mrs. Cockburn. In 1945. they moved to Wolverhampton, where the wife and Mr. Cockburn occupied one bedroom. To London and then to Richmond, they --the wife of another husband and the husband of another wife --went together and lived together so. Yet the trial judge (Barnard J. again) found that adultery was not made out, as there was not a scrap of evidence of any inclination.

30. The husband appealed. The appeal was allowed. Bucknill L.J. held that it was proved beyond reasonable doubt that the parties did commit adultery, though his Lordship did not accept the contention on behalf of the wife that adultery, a quasi-criminal offence, was to be proved as such, i.e., as a crime would be proved. Denning L.J. agreed, but not without adding:

"I think the real reason why the judge fell into error may have been that he required an excessively high standard of proof. I would issue a caveat about the standard of proof. I do not think that this court is irrevocably committed to the view (remember Lord Merriman P.'s view in 1945 P. 44: Paragraph 25: reversing Lord Denning, then Denning J.) that a charge of adultery must be regarded as a criminal charge to be proved beyond all reasonable doubt."

Barnard J. was perhaps overborne by 1948 P. 179 (Paragraph 25) where Lord Wrottesley confined the standard of proof in criminal offences to cases of adultery only. Lord Denning pointed out several things affecting the weight of the Ginesi case, 1948 P. 179:

One, counsel there conceded that the standard of proof of adultery was the same as in a criminal case.

Two, (1874) 2 Sc. & D. 374, ruling that a suit for divorce is a civil and not a criminal matter, was not cited. Result, this strikes at the root of 1948 P. 179 which appears to have proceeded on the supposed criminal or quasi-criminal character of adultery.

Three, the statute simply requires the Court on a petition for divorce to be "satisfied on the evidence that the case for the petition has been proved." This itself lays down a standard and puts adultery on the same footing as cruelty, desertion or unsoundness of mind.

Four, the High Court of Australia in (1948) 77 CLR 191 (paragraph 26), after a full consideration, declined to follow 1948 P. 179 and held the 'criminal' standard of proof to be not appropriate in an adultery case.

Five, 1950 P. 125-(1950) 1 All ER 40 (paragraph 28) held that the 'criminal' standard of proof would not apply to cruelty. And between cruelty and adultery no valid distinction could be drawn. [Thus, the question of the standard of proof, not beyond reasonable doubt, but by the test in 'civil' law of the preponderance of probability, in an adultery case, a question which was kept open by Lord Denning in 1950 P. 125= (1950) 1 AU ER 40: paragraph 28: was now closed.]

31. Pointing all this out, Lord Denning concluded:

"These matters may well be sufficient to entitle this court to reconsider 1948 P. 179 if and when the occasion arises . . . In the present case, I say simply I am satisfied on the evidence that adultery has been proved."

32. It will be noticed that though the conclusion come to by Lord Bucknill and Lord Denning is the same, the approach by each to the problem is different. While Lord Bucknill finds adultery proved beyond reasonable doubt, keeping the concept of proof beyond reasonable doubt separate from the 'criminal' standard of proof. Lord Denning will have nothing to do with such a concept, proof beyond reasonable doubt being in the domain of criminal law, not in that of civil law, within which a suit for divorce falls, and is simply satisfied on the evidence about the adultery having been committed.

33. On December 14, 1950, came the decision of the House in Preston-Jones v. Preston-Jones, (1951] AC 391. Here is an extraordinary case of the birth of a normal full-time baby conceived 360 days after a particular coitus by the husband. Held by the majority: a child conceived so, it is proved beyond reasonable doubt, cannot be the fruit of that coitus. But cannot spermatozoa remain alive that long in the tucks and crannies of the female genital tract? After all, abnormal things do happen; a freak of nature does happen too. But the scientific impossibility of the husband, continuously absent abroad, being the father of the child, need not be established. That will be putting upon him the onus too high. The standard of proof beyond reasonable doubt does suffice. By that standard, the adultery of the wife, against whom there is not the slightest breath of scandal or of looseness of

conduct, is proved. By parity of reasoning, by that standard, the child is bastardized too.

34. Such then is the ratio. But is not to go by the standard of proof beyond reasonable doubt really to go by the 'criminal' standard, by that degree of cogency required in a criminal case before an accused man is found guilty? No. I can do no better than quote the words of Lord MacDermot's speech (p. 417) in the Preston-Jones case, 1951 AC 391 in support of such a negative answer:

"The jurisdiction In divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be 'satisfied', in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in (1874) 2 Sc & D. 374, that two jurisdictions (divorce and criminal) are other than distinct. The true reason, as it seems to me, why both accept the same general standard --proof beyond reasonable doubt --lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

The position then comes to this. If the standard of proof beyond reasonable doubt is there, in the realm of criminal Jurisdiction, out of high regard the law has for the liberty, and even the life, of the individual, it is there too, in the realm of divorce jurisdiction, out of high regard the law has, on grounds of public policy, for the sanctity of home, which is not to be broken far too easily. As Lord Selborne, L.C., observed in Cuno (The Wife) v. Cuno (The Husband), (1873) 2 Sc. & D. 300:

"To open the door to lax and easy declarations of matrimonial nullity would be a grave public mischief; and it is therefore imperative to proceed upon strict and thoroughly satisfactory proof."

35. On February 4, 1954, the Court of appeal (Singleton, Jenkins and Hodson L. JJ.) rendered judgment in Caller v. Galler, [1954] P. 252, where Commissioner Grazebrook accepted the uncorroborated testimony of a Mrs. Thompson to the effect that she had come to the house of the husband, Harry Galler, in 1950, after the departure of the wife, Marjorie Phillis Galler, therefrom, in October 1948, and that, while acting as a nurse for the husband's three children, she had frequently committed adultery with the husband in her bedroom. Hodson L.J., with whom the other two members of the court agreed, referred to 1949 P 341, where Lord Merriman P. discarded the evidence on adultery given by the lodger, himself the participator in the adultery, the evidence of an accomplice as it plainly was (paragraph 27), quoted inter alia the passage (I have just quoted: paragraph 34) from the speech of Lord MacDermot in 1951 AC 391, and ordered a new trial, observing) "It might appear from the passages I have read from the judgment in 1949 P. 341 that the analogy of criminal law was the ratio of that decision, but I think the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt."

36. Thus, the standard of proof beyond reasonable doubt --the 'criminal' standard for all time --was passing as the standard in divorce jurisdiction as well --entirely a civil jurisdiction --even In February 1954. And so it was, because to send an accused man to the gallows or to the jail without

his guilt being proved beyond reasonable doubt would be as much a grave public mischief as to dissolve the tie of marriage, say, on the ground of adultery without that matrimonial offence being proved beyond reasonable doubt. Not that divorce has anything penal about it and, therefore, draws from the criminal law the standard it goes by. As Lord Pearce says in his speech in Williams v. Williams, (1963) 2 All ER 994, a case on insanity, the second limb of the MacNaghten rules affording the husband no defence to the wife's petition for dissolution of marriage on the ground of cruelty:

"I cannot accept the argument that divorce is partly punitive and should, therefore, look to the criminal law for guidance. The dissolution or permanent interruption of a union which is in theory life-long and indissoluble cannot be justified by any logic. But the frailties of humanity , produce various situations which demand practical relief, and the Divorce Acts owe their origin to a merciful appreciation of that demand." : p. 1022 of the report.

Again, at page 1023:

"I do not find anything in the Divorce Acts to justify a theory that the law is intended to punish. They appear to intend a practical alleviation of intolerable situations with as little hardship as may be upon the party against whom relief is sought."

When that is the outlook in divorce jurisdiction: "practical alleviation of intolerable situation", or, as Lord Denning says in 1950 P. 125= (1950) 1 All ER 40 (paragraph 28), the giving of a statutory relief from a marriage that has irretrievably broken down, or, as Lord Hatherly puts in (1874) 2 Sc & D. 374 (paragraph 22), relieving the spouse from his unhappy position, that of indissoluble union with one who had herself broken the marriage tie, why go in for such a high standard of proof beyond reasonable doubt, by which the guilt of one arraigned in criminal jurisdiction has got to be proved, no matter whether the divorce jurisdiction has borrowed it from the criminal jurisdiction or has suffered it to have an automatic growth because of the gravity and public importance of the issue? Will not such a high standard of proof unjustly deprive an injured spouse of a remedy which he ought to have?

37. The House of Lords answered the questions, just posed, on February 15, 1966, in (1966) AC 643, by "three voices to two", three voices being the voices of Lord Denning, Lord Pearce and Lord Pearson, and two voices being the voices of Lord Morris of Borth-y-Gest and Lord Morton of Henryton. Such majority however was only about condonation, connivance and the like, where satisfaction beyond reasonable doubt was not necessary, not about the grounds for dissolution: adultery and the like, where satisfaction beyond reasonable doubt was necessary. Such was the lone view of Lord Pearson. The majority view, so limited, may be put thus:

A. "Satisfied", a neutral word, does not mean "satisfied beyond reasonable doubt". The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said on whom the burden of proof rested, leaving to the court itself the duty of assessing its own satisfaction.

B. Even in criminal cases, an accused is never bound to prove his innocence beyond reasonable doubt when the burden of proof is on him. It is sufficient if the balance of probability is in his favour: Sodeman v. The King, (1936) 2 All ER 1138, Rex v. Carr-Briant. (1943) KB 607. So also with connivance and condonation, 1966 AC 643 being a case on condonation, rested only on a casual act of intercourse prompted by the wife's allurement, namely, her naked invitation on the rug, which made the husband carried away by his passion, with not a single thought about forgiveness or reinstatement.

C. Analogies and precedents of criminal law have no authority in the divorce court, a civil tribunal: (1874) 2 Sc & D. 374. It is, therefore, wrong to apply the analogy of criminal law. Do not say that adultery must be proved with the same strictness as is required in a criminal case. Say simply it must be proved to the satisfaction of the court, by a preponderance of probability, just as any other civil case is.

D. Yet the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear.

38. Of 1948 P. 179 (paragraph 25) insisting on a matrimonial offence (later brought down to adultery only: paragraph 27) being proved, just as a crime is proved, Lord Denning observes in 1966 AC 643.

"Sitting in this House, I feel at liberty to say that I prefer (1948) 77 CLR 191 to 1948 P. 179."

But this is not the majority view. It is the view of Lord Denning and Lord Pearce. Lord Pearson shares the view, only about condonation, connivance and the like, which are bars to relief, not about adultery and the like, which are grounds for relief. Lord Morris of Borth-y-Gest and Lord Morton of Henryton insist on nothing short of proof beyond reasonable doubt, no matter whether it is ground for relief or bar to relief. In sum, for condonation, which is the subject-matter of 1966 AC 643, the majority view is: preponderance of probability is the standard of proof, not proof beyond reasonable doubt --an expression, which, according to the minority view, is implicit in the word 'satisfied.' Lord Morris of Borth-y-Gest observing:

"No one, whether he be a judge or juror, would in fact be satisfied if he was in a state of reasonable doubt."

39. This completes our review of all the English cases Mr. Gouri Mitter has been good enough to cite before us, and a few more too, we have examined on our own. In England, the standard of proof beyond reasonable doubt, in a divorce court, a civil tribunal, is no more a concept of criminal jurisdiction; it is consigned there, its proper place, and we come full-circle back to the general rule of Lord Stowell (then Sir William Scott) in (1810) 2 Hag Con 1: the standard furnished by "the guarded discretion of a reasonable and just man" (paragraph 21). This is however so, not about grounds of relief: adultery and the like, but about bars to relief, condonation and the like, just the periphery within which the majority decision in 1966 AC 643 lies.

40. It is interesting to note, however, as I point out to Mr. Gouri Mitter in the course of his argument, that while so much divergence of opinion is there about the standard of proof beyond reasonable doubt, a concept of criminal law, being applied in a divorce suit, a civil proceeding, criminal jurisdiction is being Instructed, on high authority, to eschew the expression "beyond reasonable doubt" --an expression which is too refractory to be brought within the limits of a clear and precise definition --and, what is more, to go by simply "satisfied". Such indeed is the case of R. v. Summers, (1952) 1 All ER 1059, where the Chairman of quarter sessions had taken pains, in the summing-up, to explain to the jury the meaning of the words "reasonable doubt". The court of criminal appeal saw no ground for interfering with the conviction, on merits. But Lord Goddard C. J., speaking for the court, said this about the expression "reasonable doubt":

"I have never yet heard any court give a real definition of what is a 'reasonable doubt', and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words 'reasonable doubt' and then trying to say what is a reasonable doubt, to say to a jury: 'you must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed.' "

In R. v. Hepworth, (1955) 2 All ER 918, Lord Goddard C.J., presiding over the court of criminal appeal again, adhered to what he had said in (1952) 2 All ER 1059, just noticed, confessed to having some difficulty in understanding how there could be two standards of proof --one in a civil case and another in a criminal case --and added:

"It is very difficult to tell a jury what is a reasonable doubt."

His Lordship continued:

"One would be on safe ground if one said in a criminal case to a jury: 'you must be satisfied beyond reasonable doubt'. One could also say --'you, the jury, must be completely satisfied' --or, better still --'you must feel sure of the prisoner's guilt.' "

In R. v. Attfield, (1961) 3 All ER 243 (247), Ashworth J., speaking for the court of criminal appeal, said:

"This court would wish to reiterate what has been laid down now in several cases that the proper form of direction is . . . ..that the standard of proof required before a verdict of guilty can be returned is that the jury should be satisfied, that they should feel sure."

41. If that is that, what is all this controversy about on the 'civil' and 'criminal' standard? The very edge of the controversy is then gone. And the standard of proof in all jurisdictions --Civil, criminal and matrimonial (part of civil) --appears to be the same: satisfaction of the court. Section 3 of our Evidence Act, defining "proved", lays down as much too, making no distinction between proof in a civil case and proof in a criminal case.

42. Yet upon a review that goes before of all matrimonial cases, it may be said, as has indeed been said by Mr. Gouri Mitter, that, in England, on the law as it now stands, after 1966 AC 643, the standard of proof in a matrimonial cause is not 'satisfaction of the court beyond reasonable doubt', but simply 'satisfaction,' without that adverbial qualification, but only on matters relating to condonation, connivance and the like, the majority of three voices going to that extent only, and no further: paragraph 37. From 1966 AC 643, the proposition, contended for, does not follow that adultery has not to be proved with the same strictness as is required in a criminal case, but may be proved, like any other matrimonial offence, by preponderance of probability. But what is the law here in India on the standard of proof? By that law, the litigation on hand will have to be governed. By that law, we shall have to govern ourselves too.

43. The four Supreme Court's decisions, noticed below one after another, in order of date, lay down what the law is in India in matrimonial causes on the standard of proof.

44. I, Bipinchandra Jaisingbai Shah v. Prabhavati, decided on October 19, 1956, and come into the reports in 1957: .

In this case, one of divorce, at the instance of the husband, on the ground of desertion by his wife for a continuous period of four years, under Section 3, Sub-section (1), Clause (d), of the Bombay Hindu Divorce Act 22 of 1947, come into force on May 12, 1947. Sinha C.J, (then Siriha J.), speaking for the court, laid down the law as under:

"It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like any matrimonial offence, beyond all reasonable doubt."

45. II. Earnist John White v. Kathleen Olive White, .

It was a case of divorce on the ground of adultery, and that too under the Indian Divorce Act 4 of 1869, the seventh section whereof provides: Courts in all suits and proceedings under the Act shall act and give relief on principles and rules which in the opinion of the Court are as nearly as may be conformable to the principles and rules on which the court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Having quoted this, as also just the passage I have quoted from the speech of Lord MacDermot (paragraph 34) in 1951 AC 391, Kapur J., who was speaking for the court, enunciated the law thus:

"In our opinion, the rule laid down by the House of Lords would provide the principle and rule which Indian Courts should apply to cases governed by the Act and the standard of proof in divorce cases would therefore be such that if the judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence he would be satisfied within the meaning of Section 14 of the Act. The two jurisdictions, i. e., matrimonial and criminal are distinct jurisdictions, but terms of Section 14 ('in case the Court is satisfied on the evidence that the case of the petitioner has been proved ....') make it plain that when the Court is to be satisfied on the evidence in respect of matrimonial offences the guilt must be proved beyond reasonable doubt. . . "

"Satisfied on the evidence", the language used in the Indian Divorce Act, as also in the English statute, (paragraph 17), and simply "satisfied", the language used in the Hindu Marriage Act, mean the same thing, as pointed out by Mudholkar J. in his minority judgment in Mahendra v. Sushila. at p. 402 (paragraph 209).

46. Gower v. Gower, decided on March 7, 1950, (paragraph 29), (1950) 1 All ER 804 a case on adultery, was pressed before their Lordships in the White case, "as to the approach the Court should have to a matrimonial offence", presumably with particular reference to the approach made by Lord Denning (paragraphs 30-32). But in view of the decision rendered by the House on December 14, 1950, in the Preston-Jones case, 1951 AC 391, (paragraph 33), their Lordships considered it unnecessary to discuss it --1950-1 All ER 804. It is futile to make a point of that before us; the more so, as the test of proof beyond reasonable doubt, though not as a concept of criminal law. was adopted in 1950-1 All ER 804 by Lord Bucknill. That is the test Lord MacDermot went by in the Preston-Jones case, 1951 AC 391 and Kapur J. adopted in . True it is. as argued, that in the Preston-Jones case, 1951 AC 391 the grave issue of adultery was rendered graver still by the consideration that in effect a child was to be bastardized, nothing like which was present in , a case of adultery simpliciter. Yet bow I must before the authority of the Supreme Court laying down the standard of proof as proof beyond reasonable doubt.

47. III. Lachman Utamchand v. Meena, decided on August 14, 1963, and come into the reports in 1964: .

Here was a case of judicial separation for desertion by the wife under Section 10, Sub-section (1), Clause (a) of the Hindu Marriage Act, 1955. The trial Judge decreed the relief the husband had prayed him for. The High Court reversed him. In the Supreme Court, Ayyangar J., for Sinha C.J., Das A.C.J., Raghubar Dayal J. and for himself. reversed the High Court. Subba Rao C.J. (then Subba Rao J.) did not. Whatever might have been their difference of opinion on merits, both the majority view and the minority view were agreed on the standard of proof.

Majority view.

Minority view It is settled law that the bur-en of proving desertion the factum as well as animus deser-endi is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfac- tion of the court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause: P. 48.

Para- graph 18, of the report.

(i) The offence of desertion must be proved beyond any reason- able doubt ..... In short, this court (in AIR 1957 SC 176) equated the proof in a matri- monial case to that in a crimi- nal case: P. 56 of the report: paragraph 42.

(ii) The legal burden is upon the petitioning spouse to estab- lish by convincing evidence be- yond any reasonable doubt that the respondent abandoned him without reasonable cause: p. 59

paragraph 50 ibid.

48. It is said that the minority view reproduced above attributes to more than it had laid down, because nothing has been said there about the standard of proof in a criminal case. But what is said there is necessity of proof "beyond all reasonable doubt" (paragraph 44). That is the standard in a criminal case from time out of mind. As Rayden on Divorce, 10th edition, puts it at page 170:

"But proof beyond reasonable doubt is in fact the standard of proof in a criminal case".

That apart, what Lord MacDermot said in the Preston-Jones case 1951 AC 391 (paragraph 34) and what Hodson L.J. said in the Caller case, 1954 P. 252 (paragraph 35) appear to be a complete answer to a contention as this.

49. IV. Mahendra v. Sushila decided on March 18, 1964, and come into the reports in 1965; .

It is the Preston-Jones case 1951 AC 391 of India the other way round: the normal delivery of a child too soon, 171 days after the date of the marriage, just the opposite of the delivery of a normal full-time baby too late, 360 days after the last coitus as in the other. Whatever may be difference in opinion between the majority view and the minority view, on merits, and other matters, the same standard of proof is adhered to as much in one as in the other:

Raghubar Dayal J. for himself and Ayyangar J. . . . .what the court has to see in these proceedings is whether the petitioner has proved beyond reasonable doubt that the respondent was pregnant by someone else at the time of marriage: p. 371, paragraph 21, of the report.	Mudholkar J. for himself alone. In my judgment, what the Court has said in White's case, (paragraph 45 ante), about the applicability of the rule in 1951 AC 391: the Preston-Jones case: must also apply to a case under the Hindu Marriage Act: p. 402, paragraph 209, of the report

50. What one, therefore, finds is consensus, in the sense of unanimity, that the standard of proof in a matrimonial cause in India is proof beyond reasonable doubt. Agnes Cecillia Gome v. Lanceieot Ashley Gome, , and Adelaide Mande Tobias v. William Albert Tobias, , we have referred to, lay down as much too. The criticism levelled, against the decision in Gome v. Gome is this: To demand proof beyond reasonable doubt in adultery, and yet to say that the proposition that the same strict proof is required as is required in a criminal case "has been widely expressed", amount to an inconsistency. To such criticism we have little to add to what we have stated in paragraph 48 ante. On the Tobias case. a twofold comment is made. First: it is not right to relegate, as obiter as has been done here, so many reasons of Lord Denning in (1950) 1 All ER 804 (Paragraph 30) in support of the standard of proof in a matrimonial cause, a civil proceeding, being the 'civil' and not the 'criminal' standard, only because his Lordship was simply satisfied on evidence --not that his Lordship was satisfied beyond reasonable doubt, as has been attributed to him --that adultery was proved. In reality, they

are additional reasons why the 'criminal' standard of persuasiveness cannot be called in aid. Once that is so, obiter they cannot be. Perhaps this may be said, if we may say so, with the greatest respect. See Jacobs v. London County Council, (1950) 1 All ER 737 = 1950 AC 361. But what value has such criticism now? 1966 AC 643, a pronouncement of the House, has since settled the controversy in England in favour of the standard of persuasion being 'civil,' not 'criminal', but only in matters relating to condonation, connivance and the like. Second: (1966) AC 643, decided on February 15, 1966. was not cited before the court in the Tobias case, decided on March 8, 1967 It Was not. But what difference would such citation have made? The court would have been bound by the law on the standard of proof being proof beyond reasonable doubt, as laid down by the Supreme Court in the four decisions referred to above. Surely, the court could not have preferred 1966 AC 643 to those decisions of the Supreme Court.

51. In Lilabati v. Kashinath, (1969) 73 Cal WN 19, the last case referred to us by Mr. Gouri Mitter on the question of standard of proof, a decision rendered by my learned brother and myself, we did no more than go by the standard laid down by the Supreme Court, quoting an excerpt from the minority judgment of Subba Rao C.J. (then Subba Rao J.) in , as we have quoted here as well (paragraph 47). So long as the law laid down by the Supreme Court stands, we see nothing to unsay what we had said then. And as to equating the proof to that in a criminal case, we reiterate what we have stated in paragraph 48 ante.

52. To sum up, the law, in India, on the standard of proof, in a matrimonial cause, is proof beyond reasonable doubt, though, in England, the law, after 1966 AC 643, is otherwise: satisfaction of the court by a preponderance of probability in matters relating to condonation, connivance and the like. Whether their Lordships of the Supreme Court, when referred to 1966 AC 643 on an appropriate occasion, will approve the majority view there, that "satisfied", a neutral word, does not mean "satisfied beyond reasonable doubt," or the minority view there, that that adverbial qualification "beyond reasonable doubt" is implicit in the word "satisfied", quite in keeping with their Lordships' present view, we cannot say. All we can say is that we must go by the law as it now stands, on the foot of existing pronouncements by the Supreme Court, that law being: 'Prove you must a matrimonial offence beyond reasonable doubt'.

52A. How 1966 AC 643 has to be construed, the court of appeal in England points out in Eastable v. Bastable, (1968) 1 WLR 1684, which we have since come across, and, where, pending further guidance from the House, a high standard of proof was required to be satisfied about the commission of the offence of adultery. The standard furnished by a mere balance of probability was ruled out, 1966 AC 643 notwithstanding. So still less can we say what view will ultimately commend itself to the Supreme Court. Therefore, the law, as it now stands, as pronounced by the Supreme Court must receive effect. The law is proof beyond reasonable doubt. And by that law we must govern ourselves.

53. This is how we get out of the way the difficulty on the standard of proof, (paragraph 16), pressed upon us by Mr. Gouri Mitter. Having done so. we now apply ourselves to facts, which, however, are such, as we find upon the whole of the evidence and the pleadings, that, to put it very mildly, not a single count of the fourfold charge, Sachindra brings against his life's partner Nilima, can be said to

have been proved, no matter what standard of proof we call in aid: the strictest one of proof beyond reasonable doubt, ensuring, say, a 90 per cent certainty, or the lightest one of proof on a very slender balance of probability, say, even a 51 per cent, probability of Sachindra's case being true. Yet a chronological review of the development of the law on the standard of proof, as we have done, we could not very well go without, not only out of deference to Mr. Gouri Mitter's painstaking argument, but also with a view to satisfying ourselves what the law now is in England and also in India, and how it grew. The more so, as we have on the high authority of Mudholkar J. in : "The law of divorce in India is, broadly speaking, modelled on the law of England."

54. To the first affair first, namely, the Gopal affair (paragraph 15), who this Gopal is has been noticed: a son of Jitendra, Sachindra's eldest brother. Such a one was forty-two or forty-three years of age on March 24, 1964, as Sachindra says in his evidence on that date. So, on June 28, 1937, when Sachindra and Nilima were married, Gopal was a lad of fifteen or sixteen years old. And Nilima, his aunt, let it be recalled, was then aged eighteen. A little more deserves to be noticed. Jitendra retired as a professor of the Cooch-Behar College. And Gopal was a student living at Cooch-Behar at the time of the marriage of his uncle Sachindra with Nilima. But during the summer vacation and the Pujah vacation as well, Gopal used to visit Bakal, the ancestral home of all, where, as noticed, Nilima used to live too until July 1948 when she was permanently shifted to "4D". Such is the evidence of Sachindra himself.

55. Now, what Sachindra alleges about the Gopal affair be noticed. In his petition bearing date January 19, 1962, for divorce or judicial separation, he would say no more than this:

In July 1941 Nilima was in Calcutta for a short stay. Gopal was also then staying in Sachindra's "Calcutta residence" with a view to prosecuting his studies. It then came to his (Sachindra's) notice that Nilima's behaviour with Gopal "was not such as was consistent with the normal notions of decency expected of a married lady of Hindu Society." He took exception to such inelegance. Result: Gopal, his nephew, left. But he used to visit Nilima at Bakal.

56. Such is the averment in paragraph 5 of the petition --an averment which is true to Sachindra's knowledge. It is difficult to conceive of a pleading more 'liquid,' when it is borne in mind that the finding Sachindra invites from the Court is that in July 1941, Nilima. about twenty-two years of age, and the mother of a child (Khana), some three years old then, committed adultery with Gopal aged about twenty or twenty-one. Far be it from us to suggest that the direct fact of adultery has to be invariably pleaded, because spouses, who love to gad about outside the bonds of matrimony, are seldom surprised in such extra-marital gallivanting and worse, though a feature of this unpleasant litigation is, as will presently be seen, that, according to Sachindra, Nilima and her paramour are surprised in such direct or near-direct fact of adultery on each of the four occasions. That is not what we are on, in criticising the 'liquid' averment in the fifth paragraph of the petition. What we are on is that adultery can be proved in two ways. One way is to testify to the direct fact of adultery --a phenomenon so rare. Another way is to infer from circumstances "that lead to it by fair inference as a necessary conclusion". Now, read the averment in the fifth paragraph once more. What Sachindra seeks to convey, by such averment, true to his knowledge, is the existence of such circumstances, not the direct fact of adultery, which he does plead about the second Umakanta affair (paragraph 7 of

the petition), nor the near-direct fact of adultery, which he does plead about the Narayan affair (paragraph 8 ibid). So, what sort of behaviour on the part of Nilima with Gopal Sachindra noticed --behaviour so inconsistent with decorum and decency expected of a married lady in Hindu society --has got to be pleaded; not the evidence by which the material fact of such behaviour has to be proved.

57. The law on this appears to be clear enough. Order 6, Rule 2, of the Procedure Code prescribes just so, And Rule 4 of of the same Order makes it clearer still, prescribing as it does that, what to say of cases where misrepresentation, fraud, breach of trust, wilful default, or undue influence is relied upon and where particulars thereof must be set out in the pleading, even in all other cases, in which particulars may be necessary beyond such as are exemplified in the statutory forms such particulars shall be stated in the pleading. When a husband charges his wife with a conduct so unbecoming of a married lady in society, a conduct to which he takes exception, causing Gopal to flee, it is very necessary that he do state the particulars: what exactly did the wife do? When? Where? Nothing of the kind is there in the fifth paragraph.

This is why such averment is regarded as "liquid".

58. That the Code, by the provisions of which we are going, applies here, is provided for by Section 21 of the Hindu Marriage Act 1955. This section is no doubt subject, amongst other things, to such rules as the High Court may make in this behalf. This court has since made the rules: The Hindu Marriage Act (Calcutta High Court) Rules 1957. See Rule 340B, High Court Civil Rules and Orders, Volume I, which, incorporates these rules. But they provide for (i) application of the Original Side Rules to the institution and trial of suits etc. to proceedings on the Original Side under the Hindu Marriage Act and (ii) application of the City Civil Court Rules 1956 to proceedings thereunder in the City Civil Court. Where go then so many district courts throughout the State --the proper forum of such proceedings under Section 19 of the Hindu Marriage Act? The Hindu Marriage Act (Calcutta. High Courts Rules 1957 do not provide for these district courts. They do not, because it is so unnecessary to make such provisions. It is so unnecessary, because the statute itself provides, by Section 21, the application of the Code of Civil Procedure.

59. That apart, the statute (the Hindu Marriage Act), by Section 20, Sub-section (1) prescribes:

"Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded."

In the case on hand, one of the facts on which Sachindra's claim to relief for divorce is founded is the adultery of Nilima with Gopal in July 1941. The nature of such case permits very much indeed a statement, distinctly enough, of what Sachindra had seen Nilima doing with Gopal, where and when. Yet all he states is that the behaviour of Nilima with Gopal at Calcutta in July 1941 was not such as is consistent "with the normal notions of decency expected of a married lady of Hindu Society." This is not stating a fact distinctly, as is the requirement of the statute. To say so little is to leave so much unsaid. The material facts touching the misbehaviour of Nilima with Gopal are not pleaded. And that is what we emphasize, not the evidence by which such tacts are to be proved.

60. In sum, a pleading as this, so indistinct and inadequate, appears to be beneath notice. It goes down still more, when we turn from such poor pleading, as we now do, to evidence. And the lone evidence in assertion of Nilima's inelegance on this count is that of Sachindra himself, the first of his ten witnesses, including himself, as is only to be expected. Only to be expected, because when a spouse stoops to libidinous performance with somebody, not her spouse, in the privacy of the matrimonial home, you cannot ordinarily expect witnesses to be about So, that by itself is not to be reckoned against Sachindra. It is not reckoned either. What is reckoned against him instead is the manner of his evidence on material facts, which it was so easy for him to plead, but which he did not, with no explanation for this sort of amazing omission. What is reckoned against him instead is the existence of authentic circumstances, contemporaneous and subsequent, proclaiming the utter falsity of the Gopal affair.

61-77. (The judgment then deals with facts inclusive of letters written by Nilima to Sachindra. touching the Gopal affair and continues:)

78. Such then is the letter, to spell adultery from which is an impossible task. It is just the letter a loving and loyal wife writes to her husband, hiding nothing from him. The husband, no less loving, shows his concern for his wife's health, while in Calcutta, as the wife's reply reveals. No doubt, the husband's aversion for Gopal remains, as is quite natural. But for Gopal's misdeed, or rather attempt to do something improper to his aunt, as will presently be seen (paragraph 86), the aunt cannot be blameworthy. And if her only fault has been to talk the minimal to Gopal, she has given an explanation which is at once as cogent, as reasonable, backed by the assurance: 'Let nothing you worry. That sort of thing which you apprehend and which leads you to ask me not to talk? From my side, I hope, never.' And, in any event, only from that sort of little talking, "the guarded discretion of a reasonable and just man", "the careful and cautious consideration of a discreet man", can never come to a fair inference of adultery as a necessary conclusion. On the contrary, an opposite conclusion is clearly indicated: absence of adultery as alleged, and Nilima's chastity remaining unsullied.

79. A conclusion as this appears to be strengthened all the more by the important consideration that both the letters written by Nilima from Bakal to Sachindra at Calcutta are contemporaneous or near-contemporaneous documents, recording so many detail soon after Gopal had misbehaved himself, and have, therefore, a force all their own. More, they are ante litem motam, an expression which means before the commencement of any controversy and not merely before the commencement of proceedings relating to the matter: Phipson on Evidence, 10th edition, paragraph 859, page 352. These two letters of Nilima, along with the letters of Sachindra to which the aforesaid two letters are the replies, in so far as they can be judged from the replies themselves, clearly show that no controversy had arisen then about the adultery, as alleged now, on the part of Nilima. The only controversy, if that, was about Nilima speaking to Gopal, notwithstanding his entirely one-sided impropriety. dealt with in paragraph 86. So regarded, the value of these two letters appears also to be on the high side in countering the allegation of adultery with Gopal, in July 1941, bolstered up, as it appears upon evidence, for this matrimonial litigation, and that too when the trial begins.

*** *** ***

*** *** ***
*** *** ***
*** *** ***

82. Interrupting the review of Nilima's pleading, it will be profitable to recall what L
"That there were opportunities for committing adultery is nothing: there must be circum

Here, upon the whole of the evidence, there is none: neither opportunity in a crowded jo

83. To return to Nilima's written statement, it is averred in paragraph 5 that she had not come to Calcutta ever "for a stay" with Sachindra prior to 1948. An averment as this is true to her knowledge, as she says in her verification at the foot of the written statement bearing date, April 25, 1962. If this averment stands, the Gopal affair of July 1941, no matter whether at Calcutta or in a house near Barrackpore, falls all the more. But the evidence completely satisfies us that it cannot stand. After having made two contradictory statements: (i) that she had never been to Calcutta before 1948 and (ii) that she did come once to the house of her "Dadu" (at Calcutta) after her marriage, she breaks down and admits:

"Before 1948 I once came to Calcutta at 4D Mohanlal Street as one of the legs of Khana got fractured."

Such clear admission apart, the contents of Nilima's letters coupled with her oral evidence go to show that she was in all likelihood in Calcutta, not once, but probably more than once, before July 1948, as indeed is Sachindra's version: a true version, as it seems to be, in our judgment. See paragraph 7. Cross-examined, Nilima speaks of Moti Babu, Bankim Babu and Jnan Babu as co-tenants of "4D" before 1948 along with her husband who, however, became the sole tenant thereof (the whole "4D") in 1948. She does not stop there. She says further, she "was acquainted with Jnan Babu and his wife at 4D Mohanlal Street." It, therefore, looks so probable that she was at "4D" before 1948, when Jnan Babu was a co-tenant, and thereby got to know Jnan Babu and his wife. Similarly, it appears, she came to know Bankim Babu and his people. And in her letters from Bakal she goes on enquiring about them. In that letter reviewed already, exhibit 1, she wants to know whethere or not Bankim Babu's wife has returned, and, if so, how those people are behaving then. More, earlier in the same letter, she reminds her husband how a letter from home had nettled him when she was in Calcutta for the first time. Again in another letter, exhibit l(i) bearing date, Bhadra 17, written by Nilima from Bakal --a letter which Nilima admits to be in her handwriting --she enquires of "Sundar of my heart" how the members of Jnan Babu's are keeping.

84. The conclusion must, therefore, be that Nilima did come to Calcutta before 1948, her averment to the contrary in the written statement being not correct. This fosters the contention on behalf of Sachindra that Nilima took reluge under a lie as this only to negate the Gopal affair: a true occurrence. With respect, we cannot agree. We cannot, because this is tackling the problem from a wrong end. The problem is: 'You have raised an action for divorce on the ground of adultery, the

Gopal affair of July 1941 being an instance of such adultery, as you say, so distinctly in your evidence, but pleading in your petition indecent behaviour and no more. It is for you to prove such case. Have you proved so?' That is the problem. And that one of the pleas taken by Nilima--a plea of alibi --is found to be false, if that, does not answer this problem. Sure enough, the falsity of a particular defence of hers can never be a substitute for proof of the charge of adultery brought against her. To the Preston-Jones, 1951 AC 391 case again. Faced with the stern fact of having given birth to a full-time baby 360 days after her husband had left her and England, having been continuously absent abroad, the wife led evidence to establish her husband having been home on leave some nine months before the birth of the child. Such evidence was disbelieved. Was it, therefore, inconsistent with her being a respectable woman with an easy conscience? No; that would be tackling the problem from a wrong end again, as pointed out by Lord Normand in his speech, (1951) AC 391 at p. 405:

"In divorce proceedings it is for the petitioner to prove his case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would be in the circumstances of this case be unjust to the respondent to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born 360 days after coitus and if that was what had indeed happened, the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse."

We govern ourselves by the principle laid down here: an ancient and well-established principle at that, followed in all jurisdictions. The falsity of the defence does not in itself prove the truth of the plaintiff's case. And the circumstances here go in favour of Nilima much more. Called upon to answer the vaguest of a vague charge as laid in the fifth paragraph of Sachindra's petition of January 19, 1962: that in July 1941 the behaviour of Nilima and Gopal was not such as was consistent with the normal notions of decency etc., she had charged her memory on or about April 25, 1962, (some twenty-one years after such date), when she filed her written statement, emphatically denied the charge of such behaviour, adding that she was not in Calcutta ever before 1948. Lapse of twenty-one years, and three more children of the marriage after 1941, the last of them having been born in 1950: So. her having pleaded so in April 1962, cannot be regarded as anything but venial: the more so, when she has the candour to admit, on cross-examination, that she had been to Calcutta before 1948. After all, everybody is not endowed with superabundance of memory. A thing which you do not remember today does come back to your mind later, much later. It does happen always. And Nilima is Nilima, not Sachindra the learned. It will, therefore, be so unjust to her, that objection of principle apart, to infer that her inaccurate pleading of not having come to Calcutta before 1948 is tantamount to admission on her part of the Gopal affair, either as pleaded or as testified to in evidence, the difference between the two being poles asunder. Even if it be assumed, though we are both to do so, upon the whole of the evidence, that Nilima did "palter with the truth" in her pleading, and deliberately too, the proof of the Gopal affair in a house near Barrackpore in July 1941, spoken to for the first time by Sachindra from the witness-box on March 24, 1964, some

twenty-three years after the so-called affair, the parties having co-habited meanwhile and got three more children, remains as far as ever. And the less said about Sachindra's 'liquid' averment in paragraph 5 of his petition, the better.

*** *** ***
*** *** ***
*** *** ***

86. But what did Gopal actually do? That he did something improper appears to be manifest. On this the direct evidence must be of Gopal and Nilima, and none else. Gopal does not figure as a witness. Nilima does. Hers is evidence not in one court, not in two. but in three: the court of the committing magistrate, the court of session, and the court of the judge who has tried this matrimonial cause now under appeal. The conjoint effect of such evidence, Nilima having been confronted at the trial, (a fact which has been clumsily recorded by the trial judge) with hers in the magistrate's court and the session court, comes to this:

(A) Gopal had once an evil eye on her. But he could do little. (B) Gopal once made an immoral proposal to her and attempted to outrage her modesty. But he failed. (C) Gopal had some weakness for her. He had desire too for an immoral approach. But he did not succeed in doing any harm to her. So, this is all that Gopal had done. For that, Gopal deserves condemnation, not Nilima. From that, no inference of adultery can follow.

*** *** ***
*** *** ***
*** *** ***

90. No more need be said about the Gopal affair of July 1941, which, in view of all that goes before, we, going a little more than the trial judge who is simply "not prepared to accept the uncorroborated testimony of the plaintiff on this point", find as a fact to be false. We can only deplore that one like Sachindra, otherwise so talented, could bring himself to level such a baseless accusation against Nilima, none else than his married wife of mature years, who had borne him four children one after another from 1938 to 1950. What to say of us, even his counsel, Mr. Gouri Mitter, who has argued the case with great ability and thoroughness, "gives up", in the end, with his usual fairness, the Gopal affair, subject to the reservation that Nilima's pleading on having ever come to Calcutta before 1948 should be weighed against her. To such reservation we have said all we have to, in paragraph 84 et seqante, to which we have little to add. And if we have dealt with the Gopal affair in detail, in spite of Mr. Gouri Mitter having been good enough to give it up at the end, it is only because we feel that Nilima, a married woman for the last thirty-one years and a little more, and a mother of four children, the last of whom is some nineteen years of age now should have from this court, on such a charge, a finding on merits, and not merely on concession from counsel of her adversary. Sachindra's evidence, towards the close of his examination in chief, about his having condoned Nilima's adultery with Gopal, looks amusing in the context. No offence of such adultery being there,

no question of condonation can arise.

*** *** ***
*** *** ***
*** *** ***

[The judgment then deals with, amongst other things, the first Umakant affair of July 19

107. we have then before us the oath against oath of Sachindra and Nilima, who directly contradict each other on the triple allegation of adultery, exchange of glances and kulpi ice-cream candies. Each such allegation is one of fact, known, as it appears, only to Sachindra and Nilima, barring, of course, Umakanta and the icecream vendor who do not figure as witnesses and whom it will not be prudent either, to expect as witnesses. Whom are we to believe then --Sachindra or Nilima? Sachindra we cannot bring ourselves to believe. We cannot, because he is one who carries his oath very lightly by deposing to such material facts for the first time from the witness-box, saying not a word thereabout in his pleading, and offering for such a grave omission an explanation which has only to be stated in order to be rejected. We cannot, also because such evidence appears to be self-defeating and otherwise unsatisfactory. We have stated why. Nilima we believe. And certainly we prefer her testimony to that of Sachindra. It ill-behoves a judicial personage to be dogmatic about matters sexual. Because sex is a mighty demun capable of overturning so many, barring, of course, those whose moorings are strong enough, as also those, so few, who have mastered their passions instead of being mastered by them. But, here, upon the whole of the evidence, we are satisfied that Nilima, a married woman of 36, haying behind her then a conjugal life of eighteen years, with the rough and the smooth, and a mother too of four children, one of whom was just married, did not misbehave with Umakanta, as alleged, not in Sachindra's petition, but in his evidence, the allegation in the petition being beneath notice *** *** *** *** *** *** *** *** ***

124. Now, we deal with the period: March 1956, when Sachindra left for England to qualify himself for D.M.R.T.. to February 1958, when he returned home, with the qualification he had gone to England for. Nilima did not go to the Dum Dum aerodrome to see her husband off. She did not, because Sachindra did not allow her to. Even this fosters a suggestion that her husband did not allow her to see him off at the aerodrome, because he suspected her character. What one has got to do with the other completely beats us. Surely, going to the aerodrome will not give a characterless woman the sort of thing she is after and revels in. Nothing of the kind is put to Sachindra. Shantipada who had been to the aerodrome to see his father-in-law off speaks of his mother-in-law having not accompanied them. But he had seen a lady there and Sachindra talking to her in the lounge. That lady is Asha (as Shantipada came to know subsequently) --a woman who is put forward by Nilima as Sachindra's mistress with whom he openly lived and had even sexual intercourse in Nilima's presence. So it is said. If that is the reason why Nilima was not allowed by Sachindra to go to the aerodrome, that should have been, but has not been, put to him. He has. therefore, no opportunity to explain all this: why Nilima stays away from, and Asha goes to, the aerodrome. So, no inference adverse either to Sachindra or Nilima can be drawn on such evidence. A painful litigation has been rendered still more painful by the 'hit and run' method of conducting it without any

forethought, the result of which has been the record being full of materials not needed and empty of some materials badly needed.

125. Fortunately, with all the imperfections in the conduct of a serious case, both on behalf of Sachindra and Nilima, the correspondence to and fro, during this period, appears to be a revelation. And this correspondence we go through, in order of date, as- far as possible, touching at the same time the material oral evidence on the matters concerned.

126. 1. A letter bearing date, June 27, 1956, exhibit A(2), written by Sachindra from Manchester to his son-in-law Shantipada at "4D".

By this letter of June 27 Sachindra answers Shantipada's of June 24 previous. The first paragraph deals with two important matters--Khana's success in the examination and her first pregnancy. The history of Khana's studies, as elicited from her on cross-examination, is that she could not appear at the matriculation examination from Victoria Institution, a well-known school in North Calcutta, on account of her illness. She took the examination instead from Haranath Girls School; whether as a private candidate or a regular candidate, she does not remember. Khana denies that she played truant from her classes with a view to making herself merry in the company of her boy friends. But she admits she was absent from her school for several days month in month out. At the same time she denies, she was reported against by the headmistress to her father with the threat of rustication for bad conduct. Indeed, to prove her "gross misconduct", Ajoy Kumar Shome, assistant librarian of Victoria Institution, is examined as Sachindra's ninth witness. He brings the only record available: the attendance register of class for the year 1954, when Khana was a student of that class, and speaks of the removal of her name from the roll for gross misconduct. But what is such misconduct about? This witness Shome, who started his service in the school in 1952, when he was "15 to 20 years of age", what a way of an assistant librarian stating his age--, and whose duty is to distribute books to the pupils and to take them back, does not know anything about that, as indeed he cannot. All he can say is: the Principal told him that Khana's name was struck off the rolls "because of her misconduct". And he did not enquire of the Principal about this. But the truth of what the Principal told Shome is very much in issue here. That being so, it is hearsay and inadmissible, in absence of the Principal 's evidence. The outlook would have been otherwise if the object of such evidence was not to establish the truth of the Principal's statement, but only the fact that she did make a statement. Certainly that is not the outlook here. See Subramaniam v. Public Prosecutor. (1956) I WLR 965. a decision of the Judicial Committee of the Privy Council, which I governed myself by in Kamal Krishna Deb v. Biriu Kumvakar, (l967)72Cal WN 279, and Sm. Tusharkana Debi v. Bho-wani Prosad Roy Chowdhury, (1969) 73 Cal WN 143, a matrimonial appeal, and which I govern myself by here too. So, Khana's misconduct, bolstered up obviously with a view to adding strength to the story of her elopement, remains unproved, nothing to say of the fact that misconduct on the part of a school-going girl does not necessarily mean sexual misconduct only. To disobey a teacher, for example, is misconduct too.

*** *** ***
*** *** ***
*** *** ***

148. The evidence we have covered so far, on the cause of Sachindra's sudden frustration, as is evidenced for the first time by his letter of February 27, 1957, exhibit 3(a), appears to be so poor. It is indeed difficult to conceive of poorer evidence. And still we shall have to hold, as is said, we should, that this sort of frustration, expressed for the first time on February 27, 1957, is the natural reaction of the first Umakanta affair of July 1955, upon which it rests: With respect, to hold so will be to negate reason, no Less to invert it. Even Sachindra does not. say, either in this letter or in his substantive evidence, that the feeling of misery and frustration he gave vent to was the aftermath of the first Umakanta affair of July 1955. Then the affair itself is conceived in falsity for the first time Sachindra steps into the witness-box. The time he does so is March 1964. No averment on anything like the racy affair, as stated from the witness-box, is there in Sachindra's petition bearing date January 19, 1962. Yet to attempt to turn the corner saying: 'no matter I did not plead the first Umakanta affair of July 1955 in my petition for divorce --and that indeed is my weakest point --the affair itself is proved by my fulmination contained in the letter of February 27, 1957, exhibit 3(a),' is really to advance an argument of despair. Here it is we see not only negation of reason but also inversion thereof. First things first. The Umakanta affair of July 1955 is the first thing. Upon a consideration of all relevant evidence, it is found to be false. Will this falsehood of July 1955 be converted into truth only because the author of such falsehood writes a letter some two years later expressing his frustration, the cause of which is capable of being stated, but he does not state ever? We confess, we cannot subvert common-sense and reason that way. To prove adultery then becomes the easiest thing in a court of law. No manner of evidence, direct or circumstantial, on adultery. Or worse still, as here, there is false evidence. It does not matter. All you have to do then is to write a letter months or years later bemoaning about your wife's adultery. (Sachindra does not do that little even). And adultery is proved, the complainer corroborating himself in this wise. We have no hesitation in rejecting this contention on behalf of Sachindra, the appellant, rested on such extravagant consideration. So. the cause for Sachindra'a frustration expressed in his letter of February 27, 1957, exhibit 3 (a), must be sought elsewhere,

149. The clue to what is thus sought, if not what is sought itself, is probably found in the letter we review now:

IV A letter bearing in ink the date, May 13, 1957, exhibit l(b), and written in pencil, on a leaf of a ruled exercise-book, by Nilima from here to Sachindra in England.

Nilima opens the letter in the usual way in which she addresses Sachindra, that is, as "Sundar" (the beautiful). But what she writes in the inside is anything but beautiful. Truth to tell, it is horrible. So, her addressing Sachindra as "Sundar" still looks mechanical, empty of that love and warmth such address shows in her earlier letters reviewed above. Or is it manifestation of deeper love still, Nilima running amok by the wrong sought to be done to her and Khana's home, as she takes for granted? To run on with this letter. The very first sentence bears:

"I have answered all your letters."

Thus, there appears to have been correspondence to and fro between these two unfortunate spouses, one in India and another in England, even before this letter of May 13, 1957. But we do not get any, whether from Sachindra or from Nilima. In chief, all Sachindra says in this letter is:

"I received this letter from my wife at Calcutta in England, marked Ex. 1/B"--the mark on the letter itself reading: Exbt. l(b). About Nilima having answered all the letters of Sachindra, what these letters are like, where they are, why they are not produced, etc.. etc. we have no evidence. So, all we can find is that there were letters of Sachindra to Nilima and hers to him earlier than May 13, 1957. But how much earlier? Could they be a little earlier than February 27, 1957 --some seventy-five days ahead of May 13, 1957? Yes, they could be. Indeed, they were; as early as in January 1957. More of which hereafter in paragraphs 166 and 167.

150. But let the further contents of the letter Nilima admittedly wrote to Sachindra in England, on May 13, 1957. exhibit l(b), be noticed:

"Here is news for you. The bad women you are addicted to bring into being that matter over Khana's going to Agra. Those vile women tell Khana's mother-in-law and (her) grandmother all sorts of things. A passage of arms follows. And in the end an occurrence like this takes place. How nice indeed! For these wenches, lather and daughter part with one another. And that perhaps fills you with a great joy. Your daughter, however, will not forget to venge it. And Shriman Shantipada says: 'Should they enter our house, in my presence, I shall lambast them, breaking their legs.' Khana is in peace nowadays. What is the sorrow of a woman who has such a husband? What is her want as well?"

Then, begins a passage which was not read before us in court during the hearing of the appeal, but which we were invited by counsel for both the spouses to read for ourselves. So it was done out of regard for public decency. But we feel that our public duty calls upon us to reproduce the whole of it, so that none of the parties, and Sachindra in particular, who has preserved it with care all these years and tendered it' as his evidence, treating it as his trump-card, may not leave our court with the impression that we have blinked over it. Such consideration apart, when it is our misfortune to adjudicate a case of this nature, some of the arguments in a big way resting on this letter itself, to pass an important passage by is not to do our duty. More, called upon to decide a divorce litigation on the ground of naked adultery, it is, in our judgment, puerile to be swayed by a too-strict morality. Sure enough, the theme of this unfortunate litigation is not Sachindra and Nilima saying their paternoster. And here is the passage:

"Do you get letters from these sluts regularly? Does the inside of these letters smell their genital passage? Lick those letters: they smell so. Blinded by the infatuation for the moisture of the genital passage of these whores, you have in a manner given up the modest claim to your paternal property. Because of such infatuation for those sluts, how much deeper will you sink, and how much more will you get the minor children stranded on the street? Oh those women who lament, now that they cannot suck you this wav and that way. I am in peace."

Venom written in vitriol. Yet Nilima concludes:

"Accept my obeisance (pranam).

Shantu."

That name again by which Sachindra used to pet Nilima in the heyday of their married life, sounding so cacophonous in the context of the letter; obeisance no less. Because obeisance connotes reverence. What goes before shows irreverence in the extreme.

151. A despicable letter by any standard. And we cannot but too strongly condemn this: that Nilima some thirty-eight years of age then, and the mother of four children, the oldest of whom (Khana) was nineteen, married about two years ago, and the youngest of whom was seven years of age, at the time, could bring herself to write such filthy letter, no matter what the provocation was. But let us not run away from the point that awaits our decision. And the point that awaits our decision is whether or no Nilima did commit adultery as alleged. Does this nasty letter prove 'that: adultery as Sachindra alleges? That is the question. A consummate hypocrite may write the nicest letters in the world and yet revel in adultery. On the other hand, one, frank to a fault, may write the most vulgar letter, throwing discretion and decency to the winds, and yet keep her unsullied. So, to find adultery only on the basis of such letter, is, in our judgment, not the right way to look at the matter. Give us some dependable material to sustain the charge of adultery, and we can say, to put it very high, that a coarse letter as this lends assurance to the charge. But when there is no dependable material (as here), there is necessarily nothing to be lent assurance to. And such coarse letter can hardly do any duty except showing the coarseness of the writer. To say, therefore, as has indeed been said, that the letter shows Nilima to be "a sexual pervert", having committed adultery with Umakanta in July 1955. even though what is there in support thereof is false evidence, is to say the unsayable.

152. Then, let a clean look be taken of this unclean letter, without being prejudiced by its language, which undoubtedly stinks and tempts one to be prejudiced. It consists of two parts. The first part deals with all that falsehood and malice could invent, over the going of Khana to Agra, dinned into the ears of Khana's mother-in-law and her grandmother, by those women, referred to in the original letter as "magira", to whom Sachindra was addicted, and the failure of such attempt to do harm to Khana in her matrimonial home, thanks to Shantipada. to have a husband like whom is to be free from sorrow and want. The second part deals with the reaction in the writer's mind of such nefarious game played by those women to wreck her own and her beloved daughter's home --women who, the writer takes it for granted, are in correspondence with Sachindra, much to the satisfaction of his libido, and who miss so much their Eros in Sachindra so far away.

153. Now who are these women referred to as "magira" (plural of "magi") in so disparaging a manner, apart from the fact that that expression means prostitutes in that part of undivided Bengal, Sachindra and Nilima hail from? Surprisingly enough, Sachindra says, on cross-examination:

"I do not know exactly what is meant by the word 'magira' in Ex. l(b)."

Surprisingly enough, because even if he did not know then (May 1957) who Nilima was referring to by such word, surely, he knew it very much in March 1964 when he was giving evidence. Surely,

because even in or about August 1957, Sachindra had written to Nilima for the requisite information on the point, as is evidenced by Nilima's letter written after Shantipada's, bearing date August 13, 1957, exhibit A{1), gone into evidence, on admission by Sachindra: just what the endorsement over the signature of the trial judge is, in the list of documents admitted in evidence, in High Court form no. (J)23. And Nilima told Sachindra what he had wanted to know, Nilima's letter, part of exhibit A(l), an admitted document, reading:

"Om.

Sundar, The letter of yours I have received in due time. In reply I inform you what you want to know.

(1) After Khana's marriage, your 'Mejda' (second brother Surendra: in calling Surendra 'mejda' instead of "chhorda", Nilima deviates from the family norm) and "Boudi" (Jibanbala) one day went to 'Kalibarhi' (the temple of Goddess Kali at Kalighat where Khana's matrimonial home is) and brought, through one of the locality. Khana's mother-in-law to them, Both --husband and wife --told her all sorts of nasty things, attacking our character. More, they said too: 'Khana and I are unchaste, and for that and that only you oppress us and do not get peace of mind.' (2) Kamala, Gita, (two daughters of Surendra and Jibanbala), Bhawani, Gour and others even go to the residence (of Khana's father-in-law), and also to 'Cenemahalla' and 'Kalibarhi' by a secret appointment, only to whisper into the ears of Khana's mother-in-law all sorts of nasty things.

I have heard such thing happening, from Shantipada's sister Gouri. Also, only a few days ago, she casually dropped in at our place. I have then managed to get it all the better. And Gouri could get to know all this, because she would lie by her father and mother at night and hear the discussions between them day after day.

Even to Pagla Banerjee of our country home, they have said all sorts of nasty things concerning my character.

You will have to cut off connexion --this is a 'must' for you --with those rogues and dirty fellows, for whom the sweet relationship between husband and wife is torn asunder, for whom father and daughter are separated, for whom a home is broken.

We are all well here. Khana is not keeping good health at all. How are you? Inform me how to keep on the social formality concerning our daughter (at her father-in-law's place) for the (coming) Pujah season.

Accept my 'pranam'.

'Shantu'."

154. Such is the illuminating letter Sachindra received in August 1957 at 8, Elms Road. Stonegate, Leicester. U.K., just the address it bears, telling him all he had wanted to know about the campaign

of calumny waged against Nilima and Khana by Jibanbala, Kamala and Gita, amongst others. Yet Sachindra's evidence in March 1964 is that he does not know exactly what is meant by the word "magira" in Nilima's indecorous letter of May 13, 1957. Lapse of memory on the part of Sachindra, the nimble-witted? He does not say so. He says instead, he does not know. And these are things which a husband and a father cannot forget; and certainly not a gifted one like Sachindra, with mind alert and acute, so unlike Nilima, an ordinary matriculate, who first says, on cross-examination, that she does not know Pagla Banerjee, only to admit later that she did refer to Pagla Banerjee in her letter of August 13, 1957. exhibit A(l), just reviewed. Even if it be regarded as fencing, which it is not--it looks like a venial slip, when one like her is speaking of a seven-year-old event-- falsity of her evidence does not prove the truth of her husband's case, to prove which the onus is upon him and him alone: the same principle we have governed ourselves by.

*** *** ***
*** *** ***
*** *** ***

156. It is time to make it clear that we do not use these letters of Nilima, one of May 13, 1957, exhibit l(b), and another of August 13, 1957, exhibit A(l), in assertion of the truth of various statements attributed to Gouri, Jibanbala, Kamala, Gita and others. To do so will be to infract the rule of hearsay pointed out in paragraph 126 on the authority of a decision of the Judicial Committee of the Privy Council. We use these letters instead to probe into the mind of Nilima prevailing then. Her mind --the mind of the mother of a married daughter and the mind of a wife too --was greatly exercised over the wrong (as was her belief) attempted to be done to her and Khana in so mean and cruel a manner by Jibanbala, Kamala and Gita--women who, she considered, were in liaison and correspondence with her husband. Having been exercised so, she became a picture of imbalance, so far as her husband was concerned, and hit him so hard, oblivious of all sense of decorum and decency, but not without expressing gratification, so far her daughter Khana was concerned, at the failure of such base attempt, because of Shantipada the good, who had seen through the dirty game, and in whose care Khana was safe. This is how we read and treat the letters. And that cannot offend against the rule of hearsay. Because, the letters are very much there as primary evidence, mirroring so faithfully the mind of Nilima then: a matter of the utmost relevance in judging her at the time. It will be noticed that the letter of August 13, 1957 exhibit A(l), is so matter-of-fact, placing the data she has come by, even enquiring of her husband's health, as also of the Pujah present for Khana and her husband, and certainly devoid of that obscene outburst which marks and mars her letter of May 13, 1957, exhibit 1 (b). It looks, on having come to know of the campaign of vilification against her and Khana, she completely lost her head, which only could have led her to write the shameful and shameless letter she did on May 13, 1957, attacking her husband in that vile way. But by August 13, 1957, when she wrote the other letter, exhibit (A)l, she had calmed down a lot in three months' time and, therefore, became so matter-of-fact, posting her husband with the detail and demanding of him to severe all connexion with those "pisachas" (literally demons) and "Shaitans" (satans), --words we have translated, going by the sense and context, as rogues and dirty fellows--, for their attempted villainy in wrecking her and Khana's home. Once the obscene letter of May 13, 1957, is looked at so. --and this, in our judgment, is the only way to look at it, upon the whole of the evidence--, the capital

Sachindra seeks to make out of it, a precious document preserved with care all these years, though any other decent husband would have thrown such impromptu handiwork of a semi-literate and unbalanced woman, none else than his wife for the last twenty years, to the flames, no sooner was it received and read, really degenerates into us and fume, with a view to prejudicing the mind of a judge, who is a "human" too in spite of being a judge. We condemn the vulgarity Nilima evinces by her letter of May 13, 1957, but infer no bestiality on her part, itching for, and having in fact, sexual intercourse with a servant Umakanta in July 1955, because of such a letter some two years later. And this is what we have been asked to infer.

157. If we condemn Sachindra for seeking to make a perverted use of a perverse letter written by his wife in a fit of high temper, we condemn Nilima no less, not only for the obscenity such letter shows, but also for a diatribe launched upon by her, against her life's partner ever since 1937, as if he was an acrobat, without a rival and beyond compare, in the realm of sex, performing the sexual act with her and also with every woman he came across, irrespective of age and relationship, such as (i) his second brother Surendra's wife Jibanbala, sixty-eight years in March 1964, according to Sachindra and fifty-eight years of age, according to Nilima, one who is the mother of eleven children, nine living and two dead and the grandmother too of her children's children, (ii) Kamala. (iii) Gita, daughters both of Jibanbala, (iv) Ramgopal's mother, (said to be sixty-five years of age in 1959), the wife of Nilima's cousin, a mother too of four children, two of whom are married, and a grandmother again of her children's children numbering four or five, according to Nilima, and a dozen, according to Sachindra, (v) Keso's mother, a cook, whose husband was an A.S.I. (Assistant Sub-Inspector?) and a next-door neighbour of the Chatterjees at Bakal, (vi) Nurse Asha. (vi) Monorama (viii) Putul, (ix) some other vilage girls and (x) maid-servants too. The learned trial Judge rejects such a wild charge upon the whole of the evidence, confining himself to the first six of the women listed just now. So do we, What to speak of us, the judges, even Nilima's advocate concedes before the trial judge absence of evidence to prove that Sachindra "is guilty of any illicit intercourse or any other matrimonial offence with any woman", to quote the very words in which the judge records, in his judgment, the concession so made. Mr. Amarendfa Mitra sees in such concession a concession on a mixed question of fact and law, so that it may not be binding on his client With respect, we do not. What we see in such concession is a concession on fact, fact and fact. No question of legal cruelty is involved here. So, what does or does not constitute cruelty may well be a mixed question of fact and law. What is involved here is illicit intercourse with named women: 100% a question of fact.

*** *** ***
*** *** ***
*** *** ***

166. The big matter is: what is the reason of Sachindra having ceased writing to his wif

"The reply I get is so uncivil. Her condition looks like that of one who all on a sudden looks down upon the world as a trifle. Far from replying to such letter, I hate even to read the whole of it. No matter I do not write back, she goes on pouring venom at an interval of one month or one month and a half. What is the end of all this? Where will it end? And how far will it go? As I brood over this, I get frightened from time to time. She was seized with a passion to live all to herself. For my part I

am also praying to God that she may live alone."

But it is really a curse in the garb of a prayer, because in the very next sentence, he adds:

"There may not be any one by her to give her even a glass of water."

So, he wants Nilima to die of thirst,

167. Here then is the cause of Sachindra's frustration, passionately given vent to, in his letter of February 27, 1957, exhibit 3 (a) --a cause we have been searching for so long. From early in January 1957. Nilima has been torturing Sachindra, as he himself writes, by inflicting upon him one uncivil letter after another, a grand specimen of which is that preposterous one of May 13. 1957, exhibit l(b). The cause is not the first Umakanta affair of July 1955, as we are asked to hold, on behalf of Sachindra. The cause cannot be that, invented for the first time from the witness-box for the purpose of this painful litigation.

*** *** ***
*** *** ***
*** *** ***

211. Such being our conclusion, (on Jadav's letter), rested on the wealth of material that goes before, it is hardly necessary to notice in detail some other points referred to on behalf of the respondent Nilima. They may, however, just be touched. Here are they:

*** *** ***

(ii) In the concluding portion of the penultimate paragraph on the third page of the let
" In particular, it is Kashinath Dey who Khana is terribly afraid of."

appears to be in different ink and is, therefore, an interpolation. So is said to be another portion in the third paragraph of the second page, beginning with "Basar Khabar": the news of the residence (at "4D"). Indeed, the manner in which these two words have been written goes ill with the paragraph-wise arrangement of the letter. But nothing like this was put to Jadav who has, therefore, no opportunity to explain these features now complained of. In absence of such opportunity and explanation, it will be so unfair to Jadav to draw any inference adverse to him: just the principle we have gone by on cognate matters, a principle for which the leading authority is Browne v. Dunn, (1893) 6 R 67.

*** *** ***

215. It must, therefore, be held, accepting Nilima's evidence and rejecting Sachindra's, that, on return from England in February 1958, Sachindra and Nilima resumed normal marital life at "4D", notwithstanding the letter in so bad taste of Nilima on May 13, 1957, exhibit l(b): paragraph 149: which, we can well realize, had tormented Sachindra a lot in England, of which however Sachindra does not say: 'Because of this dirty letter, on my return from England, I stopped cohabiting with Nilima and taking food cooked or even touched by her', but of which Nilima makes the following significant statement in chief:

"When my husband was in England, I wrote him a letter accusing him of bad character. My husband never protested by any letter that he is innocent."

For all we see, there is no cross-examination on this point. The suggestion, on the contrary, is that Sachindra "had written several letters" to Nilima with a view to correcting her. Sure enough, that is not suggesting: "Why do you refer to my association with those whom you call sluts ("magis")? They are not sluts and I do not associate with them either, in the manner you say.' Towards the close of Nilima's cross-examination, she answers:

"It is not a fact that I have made false imputation against the character of my husband to save myself."

But obviously this relates to Nilima's charge at the trial of Sachindra having carnal connexion with so many women she names, including, of course, Jibanbala and her two daughters, Kamala and Gouri, the "magira" (sluts) of Nilima's vulgar letter of May 13, 1957. exhibit l(b). But to suggest so is not to suggest that Sachindra did write to Nilima in answer to her abominable letter of May 13, 1957, exhibit l(b), protesting against the charge brought against him therein and proclaiming his innocence. In sum, there' is no cross-examination on the point: the point of Nilima's evidence that Sachindra never protested against her charge of his having been in liaison with the "magis" that is, Jibanbala and her two daughters, Kamala and Gouri, or that he never asserted his innocence. Yet such failure to cross-examine will not amount to acceptance of Nilimas' testimony here, it will not. because such testimony about Sachindra's bad character is inherently incredible, as has indeed been conceded even by Nilima's advocate at the trial, paragraph 157. See Phipson on Evidence, 10th edition, paragraph 1542, at page 595 relying on (1893) 6 R 67.

[The judgment then notices common aerpgrammes written by Sachindra and Nilima to their son-in -law in England, and proceeds:]

227. Now, what does such sharing, in March 1959, of a common aerogramme by Sachindra and Nilima. who share too the sentiments expressed for Khana, Shantlpada, "Dadubhai" and all, go to show? A glum Sachindra, living at arm's length from his wife Nilima "in a separate room altogether" and not partaking of food cooked or even touched by her, ever since his return home in February 1958 and right up to March 1959. or a contented Sachindra, living his normal marital life over again, after his return from England, filled with the joy of sending his son-in-law to England with high expenses and higher hopes, feeling gratified along with his wife at such a one's success, and sharing with her not only the same aerogramme but also other sentiments just noticed? To a prudent man,

the second alternative is the very probable answer; a contented Sachindra, living his normal marital life over again, on his return from England, is the very probable answer. To hold otherwise is to assume so many extravagant steps, one after another:

One, Sachindra finishes writing his portion of the letter dated March 3, 1959:

Two, somehow he passes it on to Nilima.

Three, Nilima finishes writing her portion of the letter.

Four, somehow she passes it on back to Sachindra.

Five, Sachindra then gets it put into post.

Nothing is impossible in this world. So, the aerograrnme moving about, as if in a game of battledore and shuttlecock, is possible, but not in the least probable, in the context of the two writers: husband and wife: living at arm's length from one another, in separate rooms "altogether", animated too by the worst of hostility, for which the husband does not partake of food cooked or even touched by the wife. Upon the whole, therefore, accord and amity look far more probable than discord and hostility. In having proceeded so, we have done no more than governed ourselves, as indeed is obvious, by both the standards of proof, --, 'civil' and 'criminal' --, the degree of difference between the two having been made crystal clear, if we may say so with utmost respect, by Lord Denning in (1947) 63 TLR 474. By whichever standard we go, the conclusion reached is the same: Sachindra's version of living in complete isolation from Nilima, on his return from England, appears to be improbable to a degree and cannot, therefore, be accepted *** *** *** *** *** *** *** *** ***

234. Acknowledging all letters written by Shantipada, in the first part, Nilima writes:

"Do your studies in sound mind. Whatever money you need your father-in-law will give. Do return so soon as you qualify yourself as D.M.R.D. Then and then only peace and welfare will prevail all in all."

Consider this along with what Sachindra writes in the same aerograrnme (of May 26, 1959): 'No job over there? Let that not disturb you and your studies. I shall stand your expenses until your next examination in October'. Do we not see the heart of Sachindra and Nilima beating in unison? Does such unison exist only in letters written in one and the same aerogramme? Possible, but not in the least probable. Far more probable--a very great probability indeed --is that Sachindra and Nilima both, living quite a normal marital life, talk things over, work as a team and cheer up their son-in-law in a distant land in that way. Just think of the reverse, as Sachindra wants us to do. Sachindra lives "in a separate room altogether" and takes no food cooked by Nilima or even touched by her. ever since February 1958, the time he returned home after an absence of some two years in England, and right up to May 26, 1959. the date this conjoint letter bears. To think so is to be convinced that they are at daggers drawn, all these fifteen months or thereabouts. And still such a conjoint letter in identity of pitch? And Nilima has not a single paisa of her own. She has then no

authority either, of her husband to write what she does about his standing for all expenses. So, the opposite of what we think and hold looks very, very improbable, almost impossible.

*** *** ***
*** *** ***
*** *** ***

236. The third part of her letter has as its burden "Dadubhai" referred to by Sachindra
'Dadubhai' has learnt to speak a lot. There is not a word he cannot utter. His tongue g

Nilima then concludes:
"Here go for you my blessings, full of heart. 'Ma'."

Regular and frequent correspondence between Sachindra and Nilima. on one hand, and Shantipada, on the other. And the same approach again. What is seen in the sharing, by Sachindra and Nilima, of a common aerogramme as this is the sharing of the common problem over their son-in-law Shantipada's studies in England, no less of the common joy over their grandchild "Dadubhai's" stay with them, the grandmother very naturally speaking more than the grand-father, though not nineteen to the dozen, as "Dadubhai" does. Necessarily, what is seen is a normal marital relationship between the two, with all it means, right up to May 26, 1959, --and not that sort of life Sachindra speaks of in his evidence, making a pariah of his wife, though living in the same house, all these fifteen months or so, from February 1958, because of her unchastity --a reason which appears to be doubly false. First: the first Umakanta affair of July 1955, upon which such charge of unchastity rests, is itself false. Second: after the so-called first Umakanta affair of July 1955. Sachindra had had sexual intercourse with Nilima up to March 1958 when he left for England, as we have found. So, there was no earthly reason for Sachindra to withdraw himself completely from the matrimonial consortium from March 1958, on his return home and to his family, after an absence of nearly two years, as he says he did, on the ground of Nilima's unchastity; but unchastity there is not, and there cannot be, either on account of the first Umakanta affair of July 1955 (which is a sham) or on account of any fresh unchastity, of which there is not even a soupcon of evidence. So, the fact that the charge of unchastity is doubly false becomes patent.

[The judgment then proceeds to deal with, amongst other things, the second Umakanta affair, in the light of pleadings and evidence, and proceeds:]

250. Thus, even on the basis of Sachindra's evidence, we find it impossible to say that the second Umakanta affair of July 1959, as he alleges, is true. If to this be added Nilima's denial on oath, which we regard as true, upon the whole of the evidence, it does lend assurance all the more to the conclusion we have come to. In sum, the ground we have covered so far, completely satisfies us, unless there is anything to the con trary, that the second Umakanta affair of July 1959 clearly appears to be a sham just like the first one of 1955.

251. It is however, said, and very strenuously too, that there is a great thing to the contrary. If there is, we shall be in duty bound to discharge the conclusion we have just come to, on the second Umakanta affair of July 1959. This brings us to the third part of Sachindra's averment in paragraph 7 of his pleading:

"Your petitioner being adamant fin not forgiving Nilima who prayed for his forgiveness and promised to be faithful), she left the house and ultimately went to Benaras (Varanasi) and stayed there for about three months."

Sachindra supplements this by his oral evidence, --as indeed he is entitled to do, for evidence has not to be pleaded--, in the manner following:

"My wife also left after assault to the house of her maternal grandfather, Sashi Kanta Chakrabarti, at Entally. From the house of Shashi, my wife went to Benaras, in the house of my brother Jitendra."

The recording is inaccurate, in that Sashi Kanta Chakrabarti (S.K. Chakrabarti) is the brother of Nilima's maternal grandfather Chandra Kanta Chakrabarti. Sashi Kanta is, therefore, her grand-uncle (not grandfather) on the mother's side. Be that as it may, this is what Sachindra says in chief: Second Umakanta affair of July 1959: Nilima's flight thereafter to Varanasi in the house of Sachindra's brother Jitendra via the residence of her grand-uncle S.K. Chakrabarti at Entally in Calcutta.

252. What did Sachindra do then? For his part, he decided, after the second Umakanta affair of July 1959, "to start a divorce case" against Nilima. More, he posted his brothers with this sort of misfortune, as also with his decision to go to law for divorce. So he did, not in writing, but orally; because all his brothers "were present at Calcutta at that time." Such is Sachindra's evident on cross-examination, and admissible evidence at that. But when he says further, on cross-examination:

"My elder brother protested against my action (proposed action?) through my nephew Ramesh Chatterjee and other brothers. They told me not to take any action till my daughter was married."

He oversteps the limit of admissibility. None of his brothers he examines; not even his nephew Ramesh Chatterjee. The truth of what they say is very much at issue here; not merely the factum of statements they make to him. Clearly, therefore, this part of Sachindra's evidence degenerates into hearsay: paragraph 126. Leave it alone. Still what remains as evidence within bounds is that Sachindra did tell all his brothers, including Jitendra, at Calcutta then, all about the second Umakanta affair or "the July 1959 incident", as he puts it, and also about his decision "to start a divorce case against his wife."

253. This is then the stance taken by Sachindra --second Umakanta affair of July 1959 at "4D": Sachindra's assault on Nilima: Nilima's flight therefrom to Varanasi via Entally (in Calcutta): Sachindra's determination to start divorce proceedings: his brothers (including Jitendra), told so and the reason thereof. 'vetoing' it

254. The stance taken by Nilima is -- No second Umakanta affair of July 1959: But Sachindra's misbehaviour with Ramgopal's mother at "4D": Protest by her against such misbehaviour: Assault by Sachindra: Report by her to Grand-uncle S.K. Chakrabarti at Entally: Then, on to Varanasi and putting up with her "Bhasur" Jitendra for sometime: Back to "4D" on S.K. Chakrabarti having driven away Ramgopal's mother from "4D".

255. In two such conflicting versions, two common factors, agreed to by the two spouses, are plain to be seen. One, Sachindra's assault upon Nilima. two, Nilima's absence from "4D" and stay at Varanasi. Sachindra's version be called S. Nilima's version be called N. Now, the great thing contrary to the conclusion of there having been no second Umakanta affair of July 1959 (paragraph 251) is put in the manner following:

Two causes, one being the alternative of the other, are there for Nilima's leaving "4D" for Varanasi in July 1959. One cause is the cause set out in S: the second Umakatna affair of July 1959 followed by assault upon Nilima by Sachindra. Another cause is the cause set out in N: Nilima's protest against Sachindra's misbehaviour with Ramgopal's mother followed by assault upon her by Sachindra. There is no scope for a third cause, far less for a conjecture. So if the cause in N be rejected and it deserves to be rejected for various infirmities the cause in S must be accepted.

256. Such is said to be the great thing, contrary to the conclusion of the second Umakanta affair being a sham. And it is put in so attractive a form. Broadly speaking, it comes to saying:

I. Truth is S or N.

II. Truth is not N.

III. Ergo, truth is S.

The attractiveness of such a great thing, however, cannot hide its two great fallacies. One, the very first premise may break down on its own falsity, (as indeed it does), if the materials we have had put before us by the whole of evidence lead to the conclusion (as indeed they do) that truth is neither S nor N. And that will be enough for the failure of Sachindra whose case it is and who is to prove his case, irrespective of failure on the part of Nilima to establish N. Two, --it is a corollary to what just goes before--, the falsity of N in itself does not prove the truth of E, which it is for Sachindra to prove by evidence worthy of being accepted. See the extract from the speech of Lord Normand in the Preston-Jones case, 1951 AC 391 paragraph 84.

257. The question therefore is that: Has Sachindra, whose case it is, been able to prove by evidence that the cause of Nilima going away to Varanasi is the second Umakanta affair of July 1959 followed by thrashing at the hand of her husband? The evidence, on the foot of which we have held the second Umakanta affair to be a sham, we put out of our mind for the time being. We now confine ourselves only to the question just posed: is the cause of Nilima's flight to Varanasi the second Umakanta affair followed by the beating given her by Sachindra?

*** *** ***

*** *** ***

*** *** ***

269. Thus, the more we probe into the second Umakanta affair, the more it goes down and down into the bottom of a bottomless pit, not seen nor capable of being seen by anybody -except Sachindra. whom we regard, much to our regret, as a witness of untruth and disbelief. There is yet another matter which, it is contended, on one hand, lends assurance to the falsity of the second Umakanta affair, and which, it is contended, on the other, is not deserving of serious consideration. That matter is Sachindra's averment in paragraph 4 of his petition, supported by his affidavit dated May 18, 1962, in answer to Nilima's verified petition dated April 25, 1962, in the court below, for maintenance pendent lite and expenses of the proceedings, under Section 24 of the Hindu Marriage Act 25 of 1955. Such averment reads:

"That the Respondent committed adultery with Umakanta in Calcutta and was discovered in (the) first week of July 1959 in a compromising position in the same bed with him."

The affidavit by Sachindra in support of this averment bears:

"That the statements made in paras (a vile abbreviation for paragraphs) 1 to 5 of the above petition marked with the letter 'A' are true to my information and the rest are true to my knowledge."

We have looked into the original petition. It is marked "A" almost at the top on the left-hand side. The paper-book (page 26, part I) does not bring that out So, here is Sachindra solemnly affirming by an affidavit that the second Umakanta affair in the first week of July 1959 is true to his information only.

270. He is. So what? In his pleading, paragraph 7, he is definite that the second Umakanta affair is true to his knowledge. And his pleading is dated January 19, 1962. What happened in the course of four months from January 19. 1962, to May 18, 1962, the date of his petition, opposing Nilima's, for relief under Section 24 of the Hindu Marriage Act 25 of 1955, by which his 'knowledge' was converted into 'information', save of course, gross negligence on the part of his lawyer who drew up the affidavit on May 18, 1962, fed by his own negligence in having subscribed to such an affidavit? Nothing or little. That apart, Sachindra's petition of May 18, 1962, must be read as a whole. Once that is done, "repeated acts of adultery of the respondent" (Nilima), as stated in paragraph 7. "as a result of adulteries", as stated in paragraph 9, "adultery of the respondent", as pleaded in paragraph 10, "as a: result of repeated adulteries of the respondent," as pleaded in paragraph 11, "she (Nilima) persisted in living a life of adultery", as pleaded in paragraph 12, etc., etc., are all true to his knowledge, as he affirms in the same affidavit. Now, the second Umakanta affair is one of the "repeated acts of adultery." So, it is true to his knowledge. How can it be then true to his information again? Palpably a mistake: palpably a case of negligence, first on the part of the drafter and then on the part of the deponent. We do not, therefore, allow a capital to be made of. such infirmity. That apart, the utter falsity of the second Umakanta affair is proved, to our complete satisfaction, by so many facts and circumstances reviewed. We are, therefore, in no need of any other matter, nothing

to say of a poor one like this, to lend assurance to the falsity of the second Umakanta affair --falsity which is so satisfactorily proved, infirmity or no infirmity of this type in an interlocutory petition. In the view we take of such' infirmity, it is not necessary for us to deal with the further contention on behalf of Sachindra that the statements in his interlocutory petition of May 18, 1962, may not be, and, at any rate, should not be, referred to as evidence under the provisions of Section 20, Sub-sectiontion (2) of the Hindu Marriage Act 25 of 1955.

271. We revert to Jitendra's letter of July 28, 1959, exhibit A, which, we have found, militates against the second Umakanta affair. In other words, the cause of Nilima having fled "4D" in July 1959 for Varanasi via Entally is not the second Umakanta affair coupling with assault upon her by Sachindra for that. Sachindra's version, which we have called, S, therefore, fails. Thus, in the first proposition: Truth is S or N: (N being the symbol we have resorted to for Nilima's version of her going to Varanasi), S fails. Truth is not S. [See paragraphs 255 and 2561.

272. Now, if truth is not S, which means that the second Umakanta affair is not true, --indeed, it appears to be false -, that is enough for Sachindra's failure on this part of the case, resting on the second Umakanta affair itself. In that view, whether truth is N or not may not be gone into even. But when the point is there, it is well we deal with it.

273. And what is the point? The point is that Nilima fled "4D" in July 1959 for "Varanasi, because her husband had misbehaved with Ramgopal's mother--which .she protested against, but only to be assaulted by Sachindra. That led her to go to Varanasi after having reported the matter to her Dadu S.K. Chakrabarti at tils Entally residence: paragraph 254. This is Nilima's version we have represented by the symbol N: paragraph 255.

274. How does Jitendra's letter of July 28, 1959, fit this version N? It appears to fit well enough. On no other hypothesis, can be explained such expressions as we find in this letter:

(i) "This sort of sudden mental lapse on the part of Shriman Kanu (Sachin has been taking place only as the result of planetary influence."

(ii) "But Rahu and Mars lead him astray from time to time."

(iii) "For mental lapse fostered by the planets, if he indulges in incoherent talks before people, pray, treat this as delirious outburst of a patient and forgive him."

(iv) ". . . . .calmly but slowly he will realise his own wrongs and faults; he will be ashamed, and nothing but ashamed, of himself; ....."

(v) ". . . . he very much owes himself a duty to remain calm and to maintain his wife in honour, ..."

275. Leave aside the planets and their influence. Such esoteric approach is alien to a court of law. But, "sudden mental lapse," Sachindra going "astray", realization of his wrongs asking him "ashamed of himself," owing himself a duty 'to maintain his wife in honour', --expressions as these

fit so nicely with N. Jitendra's sorrow over his affectionate brother Sachindra doing that which even the boys do not, with all his learning, does not go ill with N, in so far as its assault part is concerned. It may go so with the charge of sexual misbehaviour Nilima alleges. Boys, if they are really boys, do not generally go as low as that. But, read as a whole, such letter does lean very much in favour of N.

276. To say so however is not to say that truth is N. It must be borne in mind, Nilima at Varanasi has. and Sachindra in Calcutta has not, the ears of Jitendra. Likewise, Nilima at Entally has, and Sachindra at "4D" has not, the ears of S.K. Chakrabarti. Once that is borne in mind, it is plain to be seen that the source of what Jitendra, a gentleman of undisputed and indisputable integrity, writes in this letter is twofold --(i) Nilima's report and (ii) S.K. Chakrabarti's letter based on just that: Nilima's report. Nothing that we see upon evidence enables us to find that Sachindra did anything to disabuse Jitendra's mind of the impression created by the ex parte report of Nilima.

[The judgment enters into evidence and continues]:

282. All this has produced disbelief in our mind about Sachindra's affair with Ramgopal's mother, as Nilima alleges -and reports first to Dadu S.K. Chakrabarti at Entally and thereafter to Jitendra at Varanasi. Jitendra'a letter of July 28, 1959, exhibit A, having been rested on such report. Thus, it is seen that truth is neither S nor N: paragraph 256. Therefore, the very premise, upon which we are invited to find the cause of Nilima's escape to Varanasi being the second Umakanta affair and the assault that followed, appears to be false. And falsity of this premise cannot lead to the inference of the second Umakanta affair being true, by any conceivable process of reasoning. What then, it may be asked, is the reason why Nilima fled "4D" for Varanasi in July 1959, as indeed she did? We do not know, going by evidence, --and we have to go by evidence only. Nor need we know. All we know, upon evidence again, is that neither the second Umakanta affair now any affair of Sachindra with Ramgopal's mother is the cause of her such flight. That is enough for us. That is enough too to reject, as we do, the second Umakanta affair as a sham. As rightly contended, there is no scope for a third cause, far less, for a conjecture: paragraph 255. A conclusion as this is neither to be regretted nor to be surprised at. It is indeed inevitable when one spouse, otherwise respectable, educated and high in his profession, stoops so low as to charge another spouse, a respectable married woman of mature years, having four children of the marriage and a grandchild too, with one false charge of adultery after another, so far three in number, the other spouse in turn retaliating with all that imagination can exaggerate or invent. Result: the real truth which lies at the root of Nilima's departure for Varanasi is made a casualty of. In the midst of such falsehood, however, the truth that emerges in a negative form is that neither the second Umakanta affair, an out-and-out false charge, nor the affair of Sachindra with Ramgopal's mother, patently exaggerated a lot, and very possibly untrue, is the cause of Nilima's leaving her matrimonial home for Varanasi in July 1959. The solitary vulgar letter of Nilima (paragraph 149) written to none less than her husband, and meant for his consumption only, --not that Nilima was giving vent to such vulgarity in a stentorian voice from the housetop--, and that too when she was completely off her head under the apprehension that her home and her beloved daughter Khana's were about to be broken by certain evil-minded persons, does not show her to be a disrespectable married woman.

283. There remains for consideration the Narayan affair --the last act of adultery Sachindra charges Nilima with: paragraph 15. The eighth paragraph of Sachihdra's pleading dated January 19, 1962, contains his case on the topic. It opens with the averment:

"That the respondent could not give up her habit of leading a life of shame."

Such averment Sachindra opens his case with does not stand. It does not, because the life of shame is rested on the Gopal affair and the two Umakanta affairs, each of which we have found to be false.

*** *** ***
*** *** ***
*** *** ***

284. The eighth paragraph of Sachindra's pleading continues:
"She (Nilima) again contracted illicit intimacy with one Narain (Narayan) Chakrabarti,

There is not even a soupcon of evidence in support of any intimacy, in the sense of an antecedent conduct, with a view to showing, as Lord Buckmaster put it in 1930 AC 1, at p. 7, "that the association of the parties (here Nilima and Narayan) was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence." So, an averment (as here), attributing to Nilima and Narayan a prior intimacy, looks singularly barren. And in so far as it attributes an illicit intimacy between the two, it looks still more barren. In sum, there is not a shred of evidence even, to warrant such averment, on prior intimacy, licit or illicit, between Narayan and Nilima. It is simply a jejune manner of preparing the ground for what follows:

". . . . in the first week of January 1961, the owner of the clinic Sri Benoy Banerjee discovered both of them, in a room bolted from inside resulting in Narain's (Narayan's) dismissal forthwith."

Such discovery of Nilima and Narayan "in a room bolted from inside" was made by Benoy, not by Sachindra, who discovered three other affairs found by us to be false. Naturally, therefore an averment as this is true to Sachindra's information derived from Benoy, as is his verification of the pleading dated January 19, 1962.

285. Very rarely are the prurient parties surprised in the direct act of adultery. If one has to go by the pleading (just reproduced), Benoy does not surprise them either, in the direct act of adultery. All he discovers is that they are "in a room bolted from outside". That may be enough, if true. Because, from such a discovery may well follow the fair inference of adultery as a necessary conclusion, other things being there.

*** *** ***
*** *** ***
*** *** ***

288. Such is Benoy's evidence in chief. Leaving aside all other points, we are now conce

Pleading
Bency's evidence in chief.

1.

Date of the occurrence: the Narayan affair .... first week of January 1961.
1.

Date of the occurrence: the Narayan affair . . . .January 1,1961. a Sunday.

2.

Discovery of Nilima and Narayan in a room bolted from inside.
2.

Discovery of Nilima and Narayan in embrace with oneanother (as first stated) and thenon

[Dealing with the variance between pleading and oral evidence and between oral evidence

295. Realization of this sort of absurdity leads to an embellishment in the manner follo

"There is a door inside the patients' sitting-room in the clinic. There is a door of that room leading to the road. It is not possible to bolt the door of the room leading to the road from inside the room. The door of the patients' waiting-room leading to the verandah can be bolted from inside as well as from the outside.": vide Benoy's evidence on cross-examination.

If this is true: that the door leading to the road cannot be bolted from within and has necessarily to be locked from outside, facilitating Benoy's sudden entry into the room, by which Nilima and Narayan were taken by surprise, and that only the inner door can be bolted from inside and outside, why such averment in the pleading:

"Benoy Banerjee discovered both of them in a room bolted from inside."

It is then a room incapable of being bolted from inside, so far as the roadside door is concerned. To say that what is meant is the bolting from inside the door on the verandah-side only is to bring the matter to the verge of ridicule and absurdity. None speaks of a room bolted on one side (the inner side) from within and locked on another side (the roadside and the outer side at that) from outside as a room bolted from inside. If what Benoy says is true --and he reported all this to Sachindra who had personal knowledge too of how the doors were locked and opened --the averment would have been:

"Benoy Banerjee opened the room's door on the roadside, locked from outside, and discovered both of them in that room."

But the averment is not so. It is futile to say, as has been said on behalf of Sachindra: "Shall I 'cook' a story like this and make Benoy enter the room through a door on the roadside even though there is no arrangement for padlocking it from outside?" This is but a poor way of running away from the pleading where discovery by Benoy of Nilima and Narayan inside of a room bolted from within is categorically stated and where such discovery after unlocking the door by Benoy is not stated at all. The difference between the two modes of discovery is very great and fundamental. So, in order to make it look that Benoy could see all he says he had seen, this story of padlocking from outside is introduced for the first time at the trial, without realizing how out of joint it is with the averment in the pleading. Thus, the "cooking" of the story appears to be manifest. And when people "cook" so, they do not always realize the full effect of such "cooking". That has been the case here. Such a story is tested in the light of the party's own pleading and found to be absurd. And because it is absurd, it will be said that author could not have spun out such a trash: Then, no story, found on scrutiny to be absurd, can ever fail. Again, the time and labour taken to plead discovery by Benoy of Nilima and Narayan inside of a room bolted from within will be just the time and labour taken to plead discovery by Benoy of Narayan and Nilima after having opened the door locked from outside. So, why plead the one, and not the other? No question of evidence being pleaded arises here. The question here is of stating as distinctly as the nature of the case permits the facts on which the claim to relief is founded: Section 20, Sub-section (1), of the Hindu Marriage Act 25 of 1955. The claim to relief here is divorce. Binoy unlocks the door padlocked from outside, sees Narayan and Nilima locked in embrace, and finds them having sexual intercourse too. The nature of the case does permit such facts being stated very distinctly. Yet you do not plead anything of the kind and pass such first-rate material by. It is said, all I have to plead is adultery, not how my witness got into the room. Be it so. But have you pleaded Nilima and Narayan locked in embrace and committing sexual intercourse? You have not. All you plead instead is discovery by Benoy of Nilima and Narayan in a room bolted from within. The conclusion, therefore, appears to, be ineluctable that Sachindra did not himself know on January 19, 1962, what case he would try to make out at the trial, for which he deliberately kept his averment at large, so that things found convenient might be made to fit it later.

296. So. falsity of the whole thing appears to be patent. No amount of subsequent evidence can turn this falsity into truth. To sum up, how falsity is piled upon falsity appears to be an interesting study:

I. Discovery by Benoy of Nilima and Narayan in a room bolted from inside: paragraph 8 of Sachindra's pleading. A self-defeating averment. Certainly the walls, doors and windows are not pellucid, enabling Benoy to see Nilima and Narayan inside of such a closed room.

II. Discovery by Benoy of Nilima and Narayan in the same room, on the same bed, and in a compromising position: Sachindra's evidence in chief on the foot of what Benoy had reported to him on the very day of the occurrence. Improvement upon the pleading: (i) sharing of the same bed and (ii) both being in a compromising position. Same comment: lack of transparency of the walls, doors and windows standing between Benoy and what he claims to have seen. And the door, bolted from inside, having been opened either by Nilima or Narayan, each having been inside, they would not revert to the same bed and to their compromising position, so as to oblige Benoy by furnishing direct evidence of their misdeed.

III. Discovery by Benoy of Nilima and Narayan lying in embrace in the visitors' room which is the same as the patients' waiting-room, the locus delicti: Benoy's evidence in chief. New --neither in pleading nor in Sachindra's evidence.

IV. Discovery by Benoy of Nilima and Narayan committing sexual intercourse, completely naked: Benoy's evidence in chief a little later. Newer still: neither in pleading nor in Sachindra's evidence. Told so --and Benoy told Sachindra what he had seen --Sachindra could have never omitted to plead and depose to such an excellent material, V. The visitors' room was bolted from inside in the sense that the inner door thereof could be bolted from inside. Not that the outer door leading to the road was bolted from within: Benoy's cross-examination. A belated exercise in futility in order to explain away the averment in the pleading of discovery by Benoy of Nilima and Narayan inside of a room bolted from within.

*** *** ***
*** *** ***
*** *** ***

305. Where is the ticket for a show by the International Circus at Tallah on January 1, 1961, about which we have heard so much and but for which the Narayan affair could not have been detected? It is said, very wrongly in our judgment, that to comment on the absence of the circus ticket at the trial is "to do violence to common sense." To counter a contention as this, we can do no better than quote the following from the judgment of Sir William Scott (afterwards Lord Stowell) in (1810) 2 Hag Con 1, a judgment from which we have quoted already in paragraph 21:

"It is a fundamental rule that it is not necessary to prove the direct fact of adultery; because, if it were otherwise, there is not one case in a hundred in which the proof would be attainable: it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion cannot be laid down universally.

Because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case."

What Sir William Scott calls very rare is quite a regular feature here. In each of the four affairs from 1941 to 1961 Nilima is surprised in the direct fact of adultery. So it is said; with what effect, it has been seen. Be that as it may, this circus matter, this story of the purchase of a ticket for the show on January 1, 1961, may be slight in itself. But it has an important bearing in the decision as to the truth or falsity of the very reason which brought Benoy to the clinic closed on a Sunday evening. Say, there was nothing like any circus show that day; or if there was any, Benoy had not purchased the solitary ticket he says he did. Then, the very basis of the story fails: the story which brought back Benoy to a closed clinic, with a view to collecting the ticket left there inadvertently, and thereby getting the opportunity to see what he says he had seen. And still it will be said, it does "violence to common sense": Let it not be forgotten that the charge is the charge of adultery against a respectable married woman of ,mature years, the mother of four children, the oldest of whom is then some twenty-three and the youngest some eleven years of age, and a grandmother too. And adultery with whom? With a night-watch thriving on pocket-money. So, the basic fact which leads to the detection of such adultery must be proved to our complete satisfaction, the basic fact being the most unexpected arrival of Benoy to the closed clinic, with a view to collecting the circus ticket, left behind inadvertently. That has not been proved, Benoy being a witness of the type whose uncorroborated evidence on the point --and so poor an evidence at that --we reject as totally unworthy of credence.

[The judgment then deals with facts about the benami purchase of the clinic by Benoy from Sachindra and proceeds!:

326. *** *** ***

C. Account Book.

Coming to the account book, exhibit 11, which, Benoy, says, he maintains in his own way, the first thing that forces itself on the attention of a prudent man is that its very look is repellent. A bound exercise book, it purports to contain only receipts of Rs. 200 a month by Dr. Bhattacharjee and Rs. 75 a month by Niranjan Ganguly, the technician, both of whom Benoy appointed for the clinic, after his purchase. The stamped receipts over their signatures are from May 5, 1950, to April 7, 1964. Looking so fresh the entries may very well have been made in one sitting, and certainly not contemporaneously. In a hurry, a few. a very few, of the revenue stamps have been cancelled; the most of them have not been. Some of the receipts show that Dr. Bhattacharjee received his remuneration later than Technician Ganguli, Yet Dr. Bhattacharjee's receipts are entered first, and Ganguly's thereafter. Smudging is there too. No other expenses are entered, though it is boasted, "all expenses of the clinic would be found" here. In sum, this sort of an accounting book appears to be self-defeating and deserves to be rejected on its own inherent vice, opportunity or no opportunity to the witness to explain such vice. It appears. Benoy spoke at least one truth when he had stated

before the Income-Tax Officer that he did not maintain "any books of account."

*** *** ***

327. Such then are the facts and circumstances we have reviewed from paragraph 307. Do they or do they not lead to the irresistible inference of the sale of the clinic by Sachindra to Benoy, as evidenced by the indenture of sale dated March 2, 1960, exhibit 5, having been benami, in the sense that it is a sham? We are, however, reminded, and very rightly too, on behalf of Sachindra, that the burden of proving benami is on the person who alleges it: here Nilima. That no doubt is settled law. But law is no less settled in two other ways. First: as observed by Sir Lawrence Jenkins in Seturatnam Aiyar v. Venkatachala Goudan, 47 Ind App 76= (AIR 1920 PC 67):

"The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them."

Just so here. Almost all the relevant! facts are before us --facts we have start-ed chronicling from paragraph 307. And all that remains for decision is what inference should be drawn from them. Mr. Ameer Ali re-echoes the same thing in different language:

"When the entire evidence on both sides is before the court, the debate as to onus is purely academical.": Chidambara Sivaprakasa Pandara Sannadhigal v. Veerama Reddi, 49 Ind App 286 = 27 Cal WN 245= (AIR 1922 PC 292).

Why go then into matters "purely academical"? The almost entire evidence is before the Court, What is more, here the evidence led by and on behalf of Sachindra, in chief and on cross-examination, appears to be sufficient to sustain a firm conclusion. Such then is the first aspect of law equally well settled. The second is: as observed by Lord Hobhouse in Uman Parshad v. Gandharp Singh, (1887), 14 Ind App 127 (PC), the system of putting property benami having been extremely common, even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose.

328. Judged in the light of the law quoted above, what do the facts and circumstances catalogued from paragraph 307 go to show? Taboo upon Sachindra, for the post he holds, to keep a clinic; the clinic, yielding quite a good income, sold for a paltry sum of Rs. 2,000, to one who lacks the rudimentary knowledge of elementary principles of running such a business; the reason given for such sale being false; the conduct of the so-called vendor and vendee, before, during and after the sale, so simulate, from every point of view; --all discussed in detail, in the foregoing lines, furnish evidence, not slight, but considerable, and can. in our judgment, lead to one and only one inference, that the transaction, evidenced by the sale-deed of March 2. 1960, is a sham, Sachindra purporting to sell the clinic to Benoy without intending that his title should cease or pass to Benoy: just the second class of benami, not quite an accurate description though, as pointed out by Venkatarama Ayyar J., speaking for the court, in Sree Meenakshi Mills Ltd. v. Commr. of Income-tax, , the other class of benami being a real sale by A to B, but in the name of X, benamidar of B who remains hidden, which does not bulk large here.

329. So, the conclusion come to by the trial judge on the question of benami, in the sense of the transaction haying been a sham, appears to be plainly right, even though, some of the reasons he goes by, we will not.

*** *** ***
*** *** ***
*** *** ***

330.** ** ** ** We have found the identity of the two: the old clinic purchased and the new one started, Sachindra being the proprietor of both, and Benoy having lent, his name only to a sham deal, Sachindra "paying the rent of the entire house even now including the clinic," as he admits on cross-examination, and Benoy having its use free. The contention that such payment of rent for the whole house by Sachindra, in absence of any cross-examination on the internal arrangement between Sachindra and Benoy, is "absolutely correct," appears to us to be absolutely incorrect. We are concerned with what evidence is, not with what evidence might have been. And on evidence as it is, the conclusion that it is a sham variety of benami appears to be irresistible. That apart, it is common experience, when a transaction is benami of either variety, a sham or a genuine one under the false name of an other, (paragraph 328), "all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality", to quote from Lord Hobhouse again in the Uman Parshad case, (1887) 14 Ind App 127 (PC). Once this is borne in mind, these documents, which the judge passes by in a wrong manner, in our judgment, or the trade licences, exhibits 6 series, and the like, even if free from infirmities (which they are not) appear to be nothing like so important as has been imagined, in the face of other overwhelming indicia in favour of the transaction benami. in the sense of its having been a sham.

331. Once it is found as a fact --as. indeed, it is --that the sale of the clinic on the ground-floor of "4D" by Sachindra to Benoy on or about March 2, 1960, is a sham, the Narayan affair of the first week of January 196i, according to Sachindra's pleading, or of January 1, 1961, as stated at the last moment, in the course of the trial. --an affair which we have found to be false, independently of

benami, --becomes falser still. Sachindra continued to be the proprietor of the clinic as before. And Benoy had no reason whatever to swoop down upon the clinic in the circumstances he says he did. The very contemplation that a husband of Sachindra's standing and attainments can stoop so low, as to press into service Benoy, an abominable type, only with a view to blackening his consort for some twenty-four years, whatever her other faults, in so mean a manner, fills us with horror; and we find it difficult to speak with becoming restraint about such a one. Sachindra.

332. Thus, the Narayan affair does not survive. It cannot. The utter falsity here, there and everywhere proclaims its doom. But the pertinacity of Sachindra remains. To prove that, which is incapable of being proved, so false it is. Sachindra leads evidence on what may be called facts subsequent to the Narayan affair: post-Narayan-affair facts.

*** *** ***
*** *** ***
*** *** ***

[The judgment deals with post-Narayan-affair facts and continues).

356. Nilima's pregnancy, abortion and, therefore, adultery during the carriage of the pr

The genesis of so serious an allegation against Nilima is her routine application dated May 3, 1963, exhibit 14, for postponement in the court below of the pre-sent suit set down for hearing on May 4 1963. on the ground of her illness, in support of which was attached a certificate dated May 2, 1963. exhibit D, over the signature of a registered medical practitioner, Dr. N.P. Mukherjee, "Specialist in Women. Children and Veneral Diseases". Such a specialist certified that Nilima "has been suffering from Acute uterine Haemorrhage since last night". The contention grounded on this is: 'Nilima, some forty-four years of age then, down with acute uterine haemorrhage in May 1963? She must have then been pregnant by one other than her husband whom she had left on April 5,1961. Nothing, in our judgment, can be more fallacious, even though we have been referred to certain standard books, and even though to Dr. N.P. Mukherjee, Nilima's fifth witness, the suggestion thrown out is that he was pressed into service to cause abortion --which he denies.

357. But the matter on the legal plane needs clearing up first. The ratio of Knight v. Knight, AIR 1955 NUC (Cal) 857, we have been referred to, and the full text of which judgment we have seen, is: Evidence on post-suit adultery is admissible, not as the basis for a decree of divorce, not as the ground on which divorce can be granted, but to prove and explain other evidence given in the case, to tend to show the character and quality of the previous acts. Apply this ratio here and to the facts we have found ? Impossible. The evidence given in the case, the evidence we have discussed above, proves the utter falsity of the four specific acts of adultery Sachindra charges Nilima with. So, this sort of post-suit adultery has nothing to explain, far less to prove, such evidence. The character and quality of the previous acts? The evidence completely satisfies us that no previous acts of adultery can be attributed to Nilima. By parity of reasoning, therefore, this sort of post-adultery cannot tend

to show the character and quality of something which does not exist. And of course this cannot serve as the basis for a decree of divorce Sachindra prays the court for.

358. On merits, a mountain has been made of a molehill. Grant Nilima, some forty-four years of age in May 1963, had acute uterine haemorrhage with no exaggeration for the sake of getting a postponement. And at once the inference will be that she was then pregnant with abortion trailing behind: Nothing can be more absurd. The text-books cited do not go to that length. In Gynaecology by MacLeod and Read, 1955, fifth edition, at page 689, it is said:

"In the period of reproductive activity (fifteenth to forty-fifth year) the commonest cause of haemorrhage is some disturbance of pregnancy."

"The 'commonest cause' means what it says: the commonest cause. It does not mean the only cause. So, why so much noise over so little?

359. That some disturbance of pregnancy is not the only cause of haemorrhage is borne out by what the same textbook contains, two lines later:

"Next to pregnancy the commonest causes encountered are fibroid tumours, malignant growth of the uterus, and pelvic inflammatory lesions."

things which are beyond Dr. N.P. Mukherjee that specialist "in women" etc., and a very superficial examination made by him, for which he advises removal of the patient to Eden Hospital for women, in case haemorrhage does not yield to his treatment by hormone.

360. Again, reliance is placed upon the following from the Text book of Gynecology by Brewer, 1964, third edition, at page 186, under the caption: Abortion --

". . . . .abnormal uterine bleeding in women of the childbearing age is indicative of pregnancy, until it is proved otherwise."

But the same author continues:

"Biologic tests are helpful if positive. Examination of clots or other materials which escape from the uterus may disclose fetal tissue and thereby establish the diagnosis (of pregnancy and abortion). If this is not accomplished, the cause of the bleeding may remain obscure."

That is the case here. The cause of Nilima's bleeding remains obscure. Dr. N.P. Mukherjee does examine the blood clots. He does not say, they disclosed "fetal tissue."

*** *** ***
*** *** ***
*** *** ***

365. To negate the Narayan affair, three specific pleas have been resorted to, on behalf of Nilima. One is all about a feast at "4D" on the New Year's Day of 1961: January 1: when Benoy, one with culinary ability, it is said, cooked some delicacies. The other is about a photograph said to have been taken in 1957 (exhibit B) with Benoy in it, in commemoration of a picnic at the Botanical Gardens, only to show how intimate Benoy (called uncle by the children) was with the family long before 1960, the year of the benami deal. The third is about Narayan continuing his service as a night-watchman even after 1-1-1961, there being divergence, even in evidence led or suggested on behalf of Nilima as to how long he continued to serve so, after January 1, 1961. Dismiss the pleas. And certainly the evidence on the pleas so taken is not apt to inspire belief. Say, they are false, as they look like, the feast business and the photograph business in particular having been introduced almost at the last moment. So what? The same approach again, as in paragraphs 84 and 256: a false defence is not tantamount to an admission of guilt, and the falsity of the defence does not prove the case of the party suing. It is, therefore, hardly necessary to enter into these pleas in detail. Suffice it to say we reject them.

366. Shantipada's evidence that his father-in-law Sachindra used to press the breasts of women patients has been severely commented upon. It is said that "even cold wind is gentler than human touch" when one like Shantipada lets down "the architect of his career" in this manner. It will be noticed however that in having come to our conclusions on the four specific facts of adultery, as alleged, or on any other side-issue, we have not taken this or anything like this into our reckoning.

367. All that goes before appears to be good enough for decision of the appeal we have been called upon to adjudicate. But it will not be right on our part to conclude the judgment here and now, though, we realize, much to our regret, that it has already run into a tome, so to say. Because we owe it to ourselves and to the two spouses to give an indication as to where, according to our judgment, lies the seed of this most unfortunate matrimonial litigation, wrecking a home, so full of promise and possibilities, unless, of course, both Sachindra and Nilima can rise to the occasion even now and start their connubial life over again, forgetting all that has happened and trying their best to retrieve the ground they have lost over the years. A very, very difficult thing to do, without doubt. That is, therefore, hoping against hope. Be that as it may, the whole of the evidence completely satisfies us that the four direct facts of adultery Sachindra charges Nilima with are false, and false to the knowledge of Sachindra. Therefore, the seed of this most unfortunate litigation does not lie here, as indeed it cannot,

368. Where then does it lie? Our answer, upon the whole of this evidence, is: it lies in the very foolish step taken in initiating the rape case against Sachindra --a case, of which, Sachindra rightly says, "Reba (his daughter) was the complainant." --of which Sachindra also says, and rightly too:

"Khana (another daughter of his) took Reba with her and it is at the instance of Khana the complaint was filed."

That case failed. And what a case Visualise the agony of the man, in particular that of one like Sachindra so highly placed in life: "Reader. Radiotherapy Medical College, Calcutta" a post to which he was appointed on his return from England in February 1958, a post he holds too on the date of

his evidence who has to go through the ordeal of a prosecution as this, with all it means. Acquitted; he appears to have been seized with a spirit of reprisal. Reprisal against whom? Neither Khana nor Reba is within his reach. Nilima is. And reprisal against Nilima is reprisal against Khana and Reba who are deeply attached to their mother, so naturally too. On top of that, Nilima has given evidence against him as a witness for the State in that criminal case: The State v. Sachindra. Burning with indignation at the indignity he tastes ever since his arrest, no less with the agony he goes through for about a year, he too completely loses his mental balance, as Nilima did years ago, leading to that vulgar letter, and can bring himself to raise this false matrimonial action, only twenty-seven days after his acquittal in the criminal case. Herein lies the seed of this painful litigation, as it seems to us, upon the whole of the evidence. On no other hypothesis can we reconcile ourselves to the role we see Sachindra having played in this case right from the beginning. The least that was apprehended of an acute-minded person like him was that, when out (as in-deed he was) to unleash concoction and falsehood in order to spite his wife, he would do so in such a manner as to defy detection or to make detection very diff cult. Here however falsehood and concoction appear to be patent. Sachindra was burning with rage which perhaps made him blind even to the obvious. More, Sachindra was taking the help of people --Priest Ramani, uncle Abani, Poet Jadav, so-called Businessman Benoy, etc., specimens indeed of untruthful witnesses --who, inspired or uninspired, were bound to land him in disaster. And that is just what has happened here.

369. The failure of the prosecution of Sachindra on a most heinous charge of having raped his own daughter, on which we have heard so much, has been in our mind always. But this is a matter from which nothing can be drawn to the prejudice, or in favour, of the evidence ad duced here. What led to the failure of that prosecution is not within our province to inquire. It is upon the evidence adduced here, in support of the four direct facts of adultery, that the appeal, we are seized of, must have to be determined. We have done no more. That being so, the Missir letters, exhibits l(c)r 1 (d) and possibly 1 (f) too, --letters to the investigating officer, Missir, by Nilima, --requesting him to see that the criminal case may have a tortuous progress for two years, etc.. or to caution Reba so that none can make her admit in writing about the criminal case being a false one --and the like, e.g., consulting a woman police officer, pale into insignificance and irrelevance too, so far as the case on hand is concerned. Such matters had their significance and relevance at the criminal trial where the letters were made good use of as .defence exhibits, the marks of which these papers bear to this day. Exhibit l(e), a letter by Nilima to Khana, conveying her wish and Sachindra's too, that Khana must not come t6 "4D" again, merits like treatment. It had importance and relevance at the criminal trial, in that Khana, the prime-mover in the criminal case, as Sachindra admits, was painted so. And it was made good use of too as a defence exhibit. This is how Nilima befriended her husband standing his trial on a charge of rape upon his own daughter, in addition to her having remained neutral and not opposed his bail, as Sachindra admits.

370. By parity of reasoning, it will be barren to inquire how Sachindra could get hold of these letters, though appearances are very much in favour of Sachindra haying succeeded in getting them from Nilima who thought, and very rightly too, as she says, that they would be beneficial to him. So the charge that Sachindra had forced her to write so does not appear to stand: But it appears to be clear, upon evidence, that Nilima wrote these letters, inclusive of the one to Khana, exhibit He), as Sachindra desired her to write. We accept Nilima's evidence pro tanto, eliminating the allegation of

force.

371. If in such an obliging mood, why, it is asked, did she flee "4D" on April 5, 1961? To answer such question, the mere "dead body" of recorded evidence is not enough; one has to place himself or herself in Nilima's position then. Torn between her daughters, the unmarried daughter Reba in particular, on one hand, and her husband, on the other, what else could she have done; the more so, when Sachindra was demanding more and more a writing from her that Reba had falsely started a rape case against him. The assault Nilima charges Sachindra with does not appear to be true. On the contrary, he had then enough reasons to woo her more and more for a few more of the type of the Missir letters. It therefore, looks very natural that Sachindra and she lived as husband and wife, on good terms, up to April 4, 1961, as Nilima says. We see nothing in it to be pooh-poohed. In any event, all this has nothing whatever to do with the main theme of the present case: the four direct facts of adultery, if we deal with them, it is only because we have been addressed thereon.

372. The charge of adultery against Nilima, on each of the four counts, therefore, fails.

373. Upon the whole of the evidence, we find no manner of cruelty either, on the part of Nilima, who did all she could to help Sachindra by not having opposed his bail and by having written letters to Missir and Khana, as just noticed, with a view to doing him good.

374. The rule remains. Why Sachindra should be restrained from disposing of his land in Linton Street in any manner he thinks fit, in a case of this type, is more than what we can understand. Nilima's maintenance? Let her claim that in a subsequent suit or proceeding, as she says, in her petition, she will. Then, the matter will be considered in accordance with law, not now. That apart, Sachindra, as we size him to be, upon evidence, is quite a solvent man with ample resources, which Nilima may fall back upon, if that stage comes. There is no merit in the rule.

375. In the result, the appeal fails and be dismissed with costs, which we assess in a lump at Rs. 1,000, in addition to what has been paid already to the respondent Nilima.

The connected rule do stand discharged. No costs.

376. We express our indebtedness to the bar for the assistance rendered.

Salil Kumar Datta, J.

377. I agree.