Calcutta High Court
Ramish Francis Toppo vs Violet Francis Toppo on 22 August, 1988
Equivalent citations: AIR 1989 Cal 128, (1989) 1 CALLT 87 HC, 1988 (2) CHN 241, 93 CWN 165, 1 (1989) DMC 322
Author: A Bhattacharjee
Bench: A Bhattacharjee, S Mookherjee, A K Nayak
JUDGMENT A.M. Bhattacharjee, J.

1. I have no doubt that we cannot but decline to confirm this decree nisi for dissolution of marriage passed by the learned District Judge in the Divorce Suit under Section 10 of the Divorce Act, 1869, which has come up before us for confirmation under Section 17 of the Act. I am, however, of opinion that, for the reasons stated hereinafter, a decree for divorce a mensa et thoro. i.e., a decree of judicial separation should instead be passed in favour of the petitioner-husband against the wife-respondent under Section 22 of the Divorce Act.

2. In Swapna Ghosh v. Sadananda Ghosh (SB) disposed of by this Bench, I have confessed my inability to appreciate the utility of retaining any longer the provisions of Section 17 of the Divorce Act of 1869, which compulsorily requires confirmation by this Court of the decree for dissolution of marriage passed by the District Court and that too, by a Bench of not less than three Judges. It may be that the concerned Legislature in that mid-nineteenth century intended the continuance of the marriage to be the rule and dissolution thereof to be the exception and attached so great importance to the continuance of marriage that it thought that a marriage could be allowed to be dissolved only after a District Judge had decreed the same and a three-Judge Bench of the High Court was also satisfied that it could not but be so decreed. Inspiration might have been derived from the law relating to Criminal Procedure whereunder a death-sentence could not, and even now cannot, be executed unless confirmed by the High Court and since the decree for divorce results in death of the marriage, the relevant law intended to express its very grave concern in respect of such a decree, as it did and still does in respect of a sentence of death. But as I have pointed out in some details in Swapna Ghosh (supra), under the Special Marriage Act of 1954 providing the general matrimonial law of the land and the various special matrimonial laws governing all the communities in India except the Christians like the Hindu Marriage Act of 1955, the Parsi Marriage and Divorce Act of 1936, the Dissolution of Muslim Marriages Act of 1939 etc., a decree of dissolution by a District Court, and in some cases, even by Courts subordinate thereto, is final conclusive and binding, unless the party aggrieved chooses to prefer appeal, while, because of Section 17 of the Divorce Act, 1869, a similar decree between the Christian spouses would not acquire legal efficacy unless the proceedings are dragged to the High Court before a three-Judge Bench and confirmed by it. I have pointed out that these provisions under Section 17 have been very rightly done away with by an Amendment Act by the Uttar Pradesh State Legislature, being Uttar Pradesh Act No. 30 of 1957 and that, as has also been observed by a Special Bench of the Madhya Pradesh High Court in Neena v. John Parmer , it is high time that similar amendment is introduced in the Divorce Act by Parliament on all-India basis or at least by our State Legislature without waiting any further for that august body to move in its due course. I have also said that these provisions may also appear to have discriminated the Christians on the basis of religion alone thus transgressing Article 15 of the Constitution and also to be violative of procedural due process for denying procedural reasonableness to the Christians, in

the context of the other matrimonial laws operating in the country. Both my Lords Mookherjee, J. and Nayak, J., have been pleased to concur with me in holding that the question of introducing some such amendment deserves very serious consideration. But while his Lordship Mookherjee J., has, in his separate judgment (supra, at pp. 163-164 of (1988) 2 Cal LJ): (at pp. 5-6 of AIR)), expressly reserved his views on the constitutional questions raised by me, his Lordship Nayak, J., if I have read his separate judgment correctly, has held (supra) at p. 164 (of Cal LJ) : (at p. 6 of AIR) those questions also to warrant serious and in depth consideration. I have also, in Swapna Ghosh (supra), raised several other questions relating to the constitutional vires of some of the relevant provisions of the Divorce Act though I have not finally decided those questions in that case as determination of those questions were not indispensibly necessary for the disposal thereof. I could riot then lay hand on a decision of Alagiriswami, J., then of the Madras High Court (subsequently elevated to the Supreme Court) in Solomon Devasahayam Selvaraj v. Chandirah Mary (1968) 1 Mad LJ 289 and I am now glad to find that the learned Judge also thought it fit to advert to some of those questions and expressed himself (at p. 294) as hereunder: --

"The Indian Divorce Act, 1869 is wholly out of date. Its provisions were exact copies of the English Matrimonial Causes Act of 1857. Under that Act, it was enough if the husband proved adultery in order to enable him to get a divorce from his wife. On the other hand that was not enough for a wife to get a divorce against her husband. Something more must be proved. The law had been amended in England as early as 1923 by the Matrimonial Causes Act, 1923, putting the husband and the wife on equal footing. The Matrimonial Causes Act of 1937 added some more grounds for divorce. The law in India under the Hindu Marriage Act is practically the same as in England at present. The Parsi Marriage Act was amended in 1936 to put it more or less on the same basis as the English Law of 1937. Only the Divorce Act, which applies to Christians, is at least 50 years behind the times. No one will consider that the Christians are a backward community compared to the other communities in the country. It is high time that the Indian Divorce Act is brought in line with the Hindu Marriage Act, the Parsi Marriage Act and the Special Marriage Act, 1954. Indeed, the Special Marriage Act even provides for divorce by consent of parties."

"Another important matter is that under the Indian Divorce Act for cases arising inside the city of Madras, the High Court is the Court competent to try such cases whereas in the case of other communities the City Civil Court, Madras, can deal with the cases. What is more, a decree for dissolution of marriage, of nullity of marriage passed by a District Judge has to be confirmed by a Bench of three Judges of the High Court In the case of the other communities the Subordinate Courts are competent to deal with these matters and the ordinary provisions of appeal in civil cases apply. It is unfiecessary and wholly incongruous that the causes under the Indian Divorce Act, should be heard by a High Court Judge, in the city and decrees passed by District Judges should be confirmed by a Bench of three Judges of the High Court. It is necessary and it would be advisable, to bring the provisions of the Indian Divorce Act, in regard to divorce and judicial separation, in line with the provisions of the other three Acts already mentioned".

3. Now to the merits the decree obtained by the petitioner-husband is an ex parte one as the wife-respondent did not turn up to contest the petition even though she filed her Written Statement. It needs hardly to be stated that a judicial proceeding, even if not defended or contested, can never

be a matter of easy insouciance but must be heard and determined with all due care and attention. But since the whole of our civilized society germinates around the institution of marriage which concerns not merely the spouses and the children but also the society at large and since the society itself is vitally interested in the maintenance of marriage and also its dissolution, wherever necessary, trial of matrimonial causes must, as a rule, be a matter of most anxious advertence. But even then, though the petitioner-husband in this case has only examined himself and there is no witness to corroborate him, I am nevertheless inclined to hold that the finding of the trial Judge that the wife-respondent has deserted the petitioner for more than two years without reasonable excuse is justified and should be affirmed. Not only we have the categorical and obviously unchallenged, assertion of the petitioner in his deposition that she "left the matrimonial home on 1st January, 1981" when she was pregnant, "gave birth to a female child who died after one day's of birth", "did not give any information about (its) birth, death and cremation", "is not willing to come back" and that the petitioner "tried to get her back but to no effect", we have also the wife's own admission in her written Statement about such leaving the matrimonial home and of not coming back thereto, as alleged It is true that, as has again been recently pointed out by a Division Bench of this Court in Kamal v. Kalyani , the mere fact of one spouse leaving the matrimonial home does not necessarily make him or her the deserter, unless it is shown to have been done with the requisite animus deserendi, i.e., the intention to desert and the animus non-revertendi, i.e., the intention not to return. But the wife-respondent in para 11 of her Written Statement has clearly asserted "that the conduct of the petitioner is so abhorrent and heinous that no lady could keep any communion with him". We are inclined to think that reading such assertion in the respondent's own Written Statement along with the case made out by the petitioner in his deposition, we can not but accept the case of the petitioner that the wife-respondent has deserted him having left the matrimonial home with the requisite animus deserendi and animus non-revertendi.

4. In her Written Statement, the wife-respondent has no doubt put forward a case of reasonable excuse for her withdrawing from the matrimonial home and has asserted that the conduct of the petitioner compelled her to do so. It is true, as pointed again in Kamal v. Kalyani (supra), in a matrimonial case on the ground of desertion, very often the question arises as to who has deserted and who is deserted, because the physical act of withdrawal or departure by one spouse does not necessarily make that spouse the deserting party. For, if a husband has behaved in such a way as to make it impossible for the wife to live in the matrimonial home and the wife in consequence leaves the home, may be with animus deserendi and animus non-revertendi, then, even if the wife has herself made the physical departure, she would not be guilty of desertion as the husband has given the wife reasonable cause to form such animus and to make the departure. But not only the wife has not turned up to prove such a case, there is also nothing on record to show that the conduct of the husband was such as to justify the wife to withdraw and depart. It is the wife's own case in the Written Statement that there has been a "break up of the matrimonial home" and that her life in that home became "quite unbearable and this is the resultant act of coming away from the petitioner's dominion". The deposition of the petitioner read in the light of these statements of the wife would give rise to the inference that the marriage between the parties has broken down irretrievably. As I have had occasion to point out with the concurrence of Nayak, J. in Apurba v. Manashi (F.A. 345 of 1986, disposed of on 10-6-88) : () and also with the concurrence of Baboolal Jain, J., in Harendra v. Suprava (F. A. 79 of 1984, decided on 11-7-88) : () "irretrievable break down of marriage", by itself,

has not yet been made a ground of divorce under the Special Marriage Act or the Hindu Marriage Act and so far the Divorce Act of 1869 is concerned, which governs the case at hand, the decision of the Supreme Court in Reynold Rajamani is a clear authority for the view that we cannot make out and add any new ground to those expressly specified as grounds for matrimonial reliefs under the Act, however desirable the ground may otherwise be. But all that I intend to drive at is that if the evidence and also the pleadings of the parties show the marriage to have been wrecked beyond repair and to have broken down irretrievably, it would make the allegation that a spouse of such a marriage has deserted the other to be more readily acceptable.

5. But accepting, as we do, that the wife-respondent has deserted the petitioner-husband, desertion of one spouse by the other, is not, by itself, a ground for dissolution of marriage under Section 10 of the Divorce Act, but is only a ground of a divorce a mensa et thoro, i.e.. judicial separation under Section 22. In fact, the Divorce Act in Section 10 provides for divorce on one ground only, the ground of adultery, which again, in the case of a wife seeking divorce, must be adultery coupled with some other lapses on the part of the husband Desertion, cruelty and the like are grounds for divorce, and not merely judicial separation under all the matrimonial laws operating in this country and in Swapna Ghosh (SB) (supra), I have raised the question as to whether providing so many grounds of divorce to all the other communities while restricting a Christian divorce only to the ground of adultery amounts to discriminating the Christian spouses on the ground of religion alone and I indicated an affirmative answer. As already noted, while Mookherjee, J. has reserved comment on the question, Nayak, J. has held the question to warrant serious consideration.

6. Be that as it may the petitioner-husband in this case has also alleged adultery on the part of the wife and the decree of dissolution before us has been passed in favour of the petitioner-respondent on the ground of such adultery also. But I am afraid that, for the reasons stated hereinbelow I cannot confirm that decree.

7. Under Section 11 of the Divorce Act, "upon a petition (for dissolution of marriage) presented by a husband" on the ground of the adultery of the wife, "the petitioner shall make the alleged adulterer co-respondent to the said petition unless he is excused from so doing on one of the grounds, to be allowed by the court" and the three grounds on which the Court can allow him to be so excused are : (1) that the respondent is leading a life of prostitute and that the petitioner knows of no person with whom the adultery has been committed; (2) that the name of the alleged adulterer is not known to the petitioner, although he has made due efforts to discover it; and(3) that the alleged adulterer is dead".

8. In his deposition, the petitioner has stated that the respondent "is leading an immoral life and many people are visiting her" and that "I do not know the details of those persons", but has not said that "he has made due efforts to discover" the name or other details of any of them, either in his deposition or in the original petition filed on 6-2-85, though in his application for amendment of the petition filed on 20-8-86 and allowed on 29-8-86, he has stated that "even after his best endeavour, he could not collect the names of persons with whom the opposite party is leading an adulterous life". Even assuming, though not accepting that the petitioner made "due efforts" or "best endeavour", we have a clear authority of a three Judge Bench of this Court, speaking through P. B.

Mukharji, J. in Susanta Kumar v. Himangshu Prova (SB) "that not only the Statute makes it clear that the only exceptions when the adulterer need not be made a party are those three and none others" but that "even these exceptions can only be made by the permission of the Court and if allowed by the court". This Special Bench decision of this Court has been followed by a Special Bench of the Kerala High Court in Idicula Jacob v. Mariyamma and has been treated as an authority for the view that a petition by a husband for dissolution of marriage on the ground of adultery of the wife would not be maintainable unless Section 11 is duly complied with. I have examined the records of this case at hand and I do not find that the petitioner had at any stage made any application for permission of the Court nor do I find from the records that the Court had at any stage allowed the petitioner not to make the adulterer co-respondent to the petition on any of the grounds recognized by Section 11, or, for the matter of that, on any ground at all. Such non-joinder without obtaining the permission of the Court was one of the grounds on which the Special Bench of this Court in Susanta Kumar (supra) refused confirmation of the decree for dissolution obtained by the petitioner-husband.

9. I, for my part, would not, however, like to decline confirmation on this ground alone. The object of the Section in providing that the alleged adulterer shall be made a party is obviously to prevent any form of collusive divorce and in effect enshrines the principle analogous to audi alteram partem, as it would not be fair to declare a person to have adulterous relation with the wife-respondent without affording that person an opportunity of being heard in the matter. That is why, even though the Special Marriage Act of 1954 does not contain any such provision, the rules made thereunder by some of the High Courts provide for joinder of the alleged adulterer. But the fact remains that neither the Special Marriage Act, nor the Hindu Marriage Act nor any other matrimonial laws of our country, except the Parsi Marriage and Divorce Act, 1936, provides for such joinder and, therefore, all but the Christians and the Zoroastrians can get a decree for divorce even on the ground of adultery of the respondent without joining the alleged adulterer as a co-respondent. I am afraid that this might give rise to the contention that the Christians and the Parsis have been discriminated against with the imposition of additional procedural burden and have thus been denied procedural due process or procedural reasonableness. Then again, while Section 33 of the Parsi Marriage and Divorce Act makes the joinder of adulterer compulsory, whosoever may be the petitioner, whether the husband or the wife, Section 11 of the Divorce Act imposes such an obligation on the husband-petitioner only, but allows the wife-petitioner to sue the husband for dissolution even without the alleged adulterer joined as a co-respondent. It may be that this favourable position in favour of the softer sex, even though apparently discriminatory, may be saved by Article 15(3) of the Constitution giving the State an absolutely free hand in "making special provision for women". But burdening the Christian husband with the obligation to join an adulterer while freeing all other husbands and wives (except the Parsis) from such obligation may be violative of the Equality Clause of the Constitution, which, as is now well-settled since Royappa and Maneka , comprehends "reasonableness" as an all-pervading and brooding omnipresence, and may also be violative of procedural due process.

10. I would rather decline confirmation on merits as I am satisfied that even accepting the deposition of the petitioner, the sole witness in this case, the allegation of adultery cannot be said to have been reasonably proved. The law laid down by the Supreme Court as to the standard of proof of

the grounds of dissolution of marriage may not appear to be quite uniform. In Dastane v. Dastane , a three-Judge Bench of the Supreme Court, while refering to the provisions of Section 23 of the Hindu Marriage Act which empowers the Court to pass a decree "if the court is satisfied" as to the existence of any ground for granting relief, has ruled that the "word 'satisfied' must mean 'satisfied on a preponderance of probabilities' and not 'satisfied beyond reasonable doubt"' and that the Civil and not the Criminal standard of proof applies to matrimonial causes. But even though Section 14 of the Divorce Act of 1869, uses the similar expression, namely, "in case the court is satisfied", an earlier three-Judge Bench decision of the Supreme Court in White v. White has held that "Section 14 makes 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". In Dastane v. Dastane (supra), the three-Judge Bench has not even noticed this earlier decision in White v. White (supra), emanating from a Bench of co-ordinate jurisdiction nor another yet earlier decision of another coequal Bench in Bipinchandra v. Prabhavati where also a three-Judge Bench has ruled that "it is also well-settled in proceedings for divorce that the plaintiff must prove the offence of desertion, like any other matrimonial offences, beyond all reasonable doubt".

11. As has been pointed out in a recent Special Bench decision of this Court in Bholanath Karmakar , while confronted with two conflicting decisions of the Supreme Court rendered by Benches of equal strength, the High Court would have to prefer one to the other and is not necessarily obliged as a matter of course to follow either the former or the latter in point of time, but must follow the one which, according to it, is better in point of law. Needless to say that it would be quite embarrassing for the High Court to declare one out of two decisions of the Supreme Court to be more reasonable or better in point of law implying thereby that the other is less reasonable. But if such a task falls upon the High Court because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however unpleasant and uncomfortable, has to be performed. In the case at hand, however, we are relieved of such an exercise for more reasons than one. For we may hold that since White v. White (supra) is a decision directly under the Divorce Act, which has been also followed by a Special Bench of this Court in Agnes Cecilla v. Lancelot in a case under Divorce Act, which is also the statute governing us in this case, we should follow the same in preference to Dastane v. Dastane , which is a decision under a different statute, namely, the Hindu Marriage Act. But, even otherwise, I am satisfied that even if we go by the Dastane standard and hold that the allegation of adultery need not be proved beyond reasonable doubt, it would be trite to say that the allegation must nevertheless be reasonably proved, for proof, in a Court of law, cannot but mean reasonable proof, or to borrow from Section 3 of the Evidence Act, such proof which a prudent man ought to accept. No citation should be necessary for such obvious a proposition, but yet reference, if need be, may be made to the Special Bench decision of this Court in Susanta Kumar (supra) at 34, where P.B. Mukharji, J. speaking for the Bench has observed that "adultery must at least be averred and alleged in the petition under Section 10 of the Indian Divorce Act and reasonably proved'.

12. Now all that the petitioner has stated in his deposition about the adultery is that the wife-respondent "is leading an immoral life and many people are visiting her". This is, if weareto, as we should govern ourselves by the Special Bench decision in Susanta Kumar (supra), not even allegation of adultery, far less any proof thereof. In Susanta Kumar (supra, at 34, para 3), the

evidence of the petitioner-husband was that "my wife used to bring young men into the house and spend nights with them" and the evidence of the petitioners mother was that the wife-respondent was "living a vicious life". But the Special Bench clearly ruled that no adultery could be said to have been proved thereby and that "a life of vice is not necessarily one of adultery", for "living a vicious life may or may not be adultery and that evidence is not enough". I would also like to hold accordingly that "leading an immoral life", as alleged by the petitioner-husband in the case at hand, is not necessarily living an adulterous life and a woman does not necessarily commit adultery simply because "many people are visiting her". I would, therefore, hold that even accepting the deposition of the petitioner as it is, the allegation of adultery against the wife-respondent cannot be said to have been reasonably proved.

13. The learned counsel for the petitioner-husband has, however, urged that there are categorical statements in the petition, as amended, about the commission of adultery by the wife and since under Section 47 of the Divorce Act, "statements contained in every petition under this Act.... may at the hearing be referred to as evidence", the allegation of adultery against the wife should be taken to have been proved on the basis of such statements in the petition. I shall discuss hereinafter as to what evidentiary value can in law be attached to such statements in the petition, which under Section 47 "may be referred to as evidence" and I would like to hold that no dissolution of marriage on the ground of adultery can be decreed solely on the basis of the statements in the petition, notwithstanding the provisions of Section 47. But even that apart, I have my doubts whether any case of adultery warranting a dissolution of marriage has at all been made out by the statements in the petition.

14. In para 4 of the petition, it has no doubt been stated that the opposite party "is leading the adulterous life". But as would appear from paras 5. 6 and 7, this statement relates to the state of affairs prior to the earlier matrimonial suit No. 45 of 1978 between the parties which ended in compromise followed by resumption of conjugal cohabitation and is, therefore, entirely irrelevant for the purpose of the present suit of 1985. As to the adultery alleged to have given cause of action for this suit, the statements in para 10 are that "the opposite party is moving freely and is having intimate connection with different people and is returning to her father's house very late at night and at times she does not return even during night while she stays in her father's place". For the reasons stated hereinbefore, land following the process of reasoning adopted in the Special Bench decision in Susanta Kumar (supra), I should have no doubt that to allege that a woman "moves freely" and has "intimate connection with different people" is not to allege that the woman is committing adultery for the purpose of matrimonial laws providing for dissolution of marriage on the ground of adultery; "free movement" is not necessarily adulterous course of conduct nor "intimate connection" is necessarily adulterous connection. Para 11 of the petition contains only a bald assertion that "the petitioner has every reason to believe that the opposite party is leading an adulterous life" and it is obvious that such a statement, however assertive, cannot amount to any evidence of adultery.

15. In para 10(a), inserted in the original petition by way of amendment, it is stated that the fact of the opposite party leading "undue/unwarranted adulterous life" and of her being found "in a very affectionate/close manner in a Cinema hall" was reported to the petitioner by one Sarat Kumar

Ghosal. This statement is rank hearsay and cannot obviously be referred to as evidence even with the aid of Section 47, for even under that Section, only such statements may be referred to as evidence which in law can otherwise go in as evidence. The other portion of the statement again refers to "free mixing" and "bringing people" and staying with them and, as already discussed hereinabove following the process of reasoning adopted by the Special Bench in Susanta Kumar (supra), these do not amount to allegation or evidence of adultery. The case of the petitioner about the alleged adultery by the wife-respondent would, therefore, fail even with the statements in the petition referred to as evidence with the aid of Section 47.

16. Under the ordinary law of Evidence and Civil Procedure, statements in the plaint or the pleadings are not, by themselves, "evidence" in the cause, unless any relevant statutory provisions make them so. Under Section 193 of the Penal code, a "verified plaint" may be equated with "evidence", but only for the purpose of that Section. But a clear statutory exception is no doubt to be found in Section 47 of the Divorce Act and this has been reproduced verbatim in Section 32(2) of the Special Marriage Act of 1954 and Section 20(2) of the Hindu Marriage Act, 1955. though in the Parsi Marriage and Divorce Act of 1936, there is no such corresponding provision whereunder statements in the petition initiating a matrimonial lis "may at the hearing, be referred to as evidence". In the Special Bench decision of this Court in J. B. Ross v. C. R. Scriven AIR 1917 Cal 269 (2), which arose out of a suit for unliquidated damages for breach of contract. Sir Ashutosh referred (at 276) to Section 47 of the Divorce Act and pointed out that because, and only because, of such a clear statutory provision, the statements in a verified petition under the Divorce Act could be referred to as "evidence". But notwithstanding Section 47 of the Divorce Act, Costello, J., in this Court had no hesitation in declaring in Stones v. Stones (1935) ILR 62 Cal 541 at 545 that it was not only "desirable" but was "necessary" to have oral evidence in matrimonial suits and it was declared "most emphatically" that it was "altogether undesirable and indeed contrary to established practice to accept evidence on affidavit, specially evidence of the petitioner".

17. It appears that even though under Section 47 of the Divorce Act, the statements in the petition "may, at the hearing be referred to as evidence", the settled rule of practice has all along been not to decree dissolution on such statements without oral evidence in support thereof. As already noted, in the Special Bench decision of this Court in Susanta Kumar , (supra) the Special Bench has ruled that "adultery must- at least be averred and alleged in the petition under Section 10 of the Indian Divorce Act, and reasonably proved". With Section 47 staring at the face and making all statements in the petition referable as evidence, if the Special Bench still holds that allegations in the petition must be reasonably proved, the Special Bench must be taken to have contemplated proof of the allegation in the petition dehors the petition. In the Special Bench decision of the Bombay High Court in Premchand v. Bai Galal. AIR 1927 Bom 594 at 599, a synthesis was sought to be made and it was held that while "technically" the court "was entitled to refer to the allegations in the petition as evidence", yet "the ordinary practice ....,that the parties give viva voce evidence should invariably be followed in every case unless there are some good reasons to the contrary". If I may put it in other words, while rule of law may permit reference to such statements in the petition as evidence, rule of prudence, which has sanctified itself into a settled practice, would require substantive evidence at the trial to warrant a decree.

18. On an examination of the relevant provisions of the Divorce Act, namely Sections 45. 47, 51 and Section 14. I am inclined to think that the Act contemplates a decree thereunder only on evidence adduced at the trial and not solely on the statements in the petition which have been made referable as evidence under Section 47. Section 45 has provided that all proceedings under the Act shall be regulated by the Civil P.C. "subject to the provisions" of the Act. Section 51 provides that "the witnesses in all proceedings before the Court, shall be examined orally" "provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit" but shall "be subject to be cross-examined" on the application by the opposite party or by the direction of the court. If the statements in the petitions were, under Section 47, to be treated as substantive evidence for all purposes, there should not have been any occasion for the party to verify them further by affidavit, only to subject him or her thereby to cross-examination. These provisions of Sections 47 and 51 of the Divorce Act were considered by the Pollock. Vivian Bose and Digby. J.J., in the Special Bench case of the Nagpur High Court in Kishore v. Snehaprabha, AIR 1943 Nag 185 and it was pointed out (at 187) that the Civil P.C. also enables (Order 19) facts to be proved by affidavit, but in spite of that affidavit evidence is rarely accepted in courts on matters which require proof, except in interlocutory matters or on subsidiary questions and even then it is usual to require regular proof when there is contest. These observations in the Nagpur Special Bench have been quoted with approval by the majority in the Special Bench decision of the Kerala High Court in Arnone v. Arnone .

19. Section 14 of the Divorce Act also, in my view, goes a long way to indicate that court cannot, and at any rate, should not decree dissolution solely on the statements made in the petition, event though Section 47 makes them referable as evidence. Section 14 provides that a Court in order to decree dissolution must not only be "satisfied on the evidence that the case of the petitioner has been proved", but must also be satisfied that the petition is not presented or prosecuted in collusion with the respondent and that the petitioner has not in any manner been accessory to or conniving at or condoned the adultery complained of. I have no doubt that no court can reasonably come to these findings merely on the statements in the petition without examining the petitioner, more particularly in an undefended case and I would like to refer to the single Judge decision of the Allahabad High Court in Anjula v. Milan , where the learned Judge has taken similar view while considering Section 20(2) and Section 23 of the Hindu Marriage Act, analogous to Section 47 and Section 14, respectively, of the Divorce Act I am, therefore, of the view that I cannot, and, at any rate, could not confirm the decree on the basis of the statements made in the petition, even assuming that these statements, if believed, would have reasonably proved the alleged adultery. I must, however, note that my Lord Mookherjee, J., has indicated during our discussion that the view that no decree can ever be founded on the statements in the petition may be too broad a proposition and that there may be appropriate cases where such statement may form part of the basis for a decree.

20. I am not inclined to refer to the statements in the petition for yet another reason. Section 47 of the Divorce Act, corresponding to Section 20 of the Hindu Marriage Act and Section 32 of the Special Marriage Act, only makes "the statements contained in every petition" referable as "evidence", but neither that section nor any other section in the Act makes similar provisions for the statements contained in the Written Statements of the respondent. I am yet to understand the rationale behind this discrimination between the pleading of the petitioner and the pleading of the

respondent. The law under Article 14 of the Constitution as to the reasonable classification permissible thereunder has now become almost platitudinous because of the avalanche of case-laws on the point and whether one refers to the earlier seven-Judge Bench decision of the Supreme Court in Budhan Chowdhury, or the much later seven Judge Bench judgment in Special Courts Bill Reference the settled law would appear to be that (a) the classification must be based on a reasonable differentia and (b) the differentia must have a rational relation to the object sought to be achieved. I have asked and asked in vain as to what could or can be the reasonable or rational differentia between a verified pleading of the petitioner and the verified pleading of the respondent, so that the statement in the former only, and not the latter, can be equated with evidence at the hearing. I am afraid that if the provisions contained in Section 47 of the Divorce Act or Section 20(2) of the Hindu Marriage Act or Section 32(2) of the Special Marriage Act are given effect to and the statements contained in the petition of the petitioner only are referred to as an evidence, and not the statements contained in the pleading of the respondent, then the respondent would be unreasonably discriminated and denied equality before and the equal protection of law under Article 14. The law also would appear to be to lack "reasonableness" to pass the crutiny of Article 14 which, as is now well settled since Royappa (supra) and Maneka (supra), is an embodiment of the principle of "reasonableness". I would, however, not like the finally decide this question as I have already held that no decree can be made on such statements alone and that, at any rate, the statements contained in the petition in this case at hand do not clearly make out any case of adultery. I would, therefore, decline to confirm the decree for dissolution of marriage for the various other reasons as stated hereinbefore.

21. But as I have already held, the petitioner-husband has been able to prove that the wife-respondent has deserted him for more than two years without reasonable excuse and that would entitle the petitioner to a decree for judicial separation. As pointed out by this Court in the Special Bench decision in Amita v. Alwin (ILR 1968-1 Cal 390) and also in the Nagpur Special Bench decision in KJ v. KJ, AIR 1952 Nag 395 at 397, a proceeding for confirmation under Section 17 of the Divorce Act is virtually a continuation of the original lis and, therefore, this Court can, even when declining confirmation, grant any relief to which the petitioner may be found to be entitled. It is true that the Divorce Act does not contain any express provision, corresponding to Section 27A of the Special Marriage Act or Section 13A of the Hindu Marriage Act, providing that in a proceeding for dissolution of marriage, the Court may, if it thinks fit, nevertheless decree judicial separation only. But under Section 45 of the Act, the proceedings thereunder are regulated by the Civil P.C., whereunder the Court is always entitled to grant a lesser or other relief if the materials on record justify such grant. I find nothing in the Divorce Act which would debar a Court seized with a proceeding for dissolution under Section 10 to grant judicial separation under Section 22 and in fact we find the Special Bench decisions of the Madras High Court in Siluvaimani v. Thangiah, AIR 1956 Mad 421 and in Doris Padmavathy v. Cristodas, to be clear authorities for the view that the Court can always do so. I would, accordingly decline to confirm the decree for dissolution of marriage and would grant a decree for judicial separation under Section 22 of the Divorce Act. In the circumstances of the case, however, I would make no order as to costs.

S.K. Mookherjee, J.

22. I agree.

Ajit Kumar Nayak, J.

23. I agree.