

Calcutta High Court

Anil Kumar Banerjee vs Smt. Sefali Banerjee on 3 July, 1996

Equivalent citations: AIR 1997 Cal 6, I (1998) DMC 37

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Bench: S Mallick, Vidyanand

ORDER S. N. Mallick, J.

1. The present appeal has been preferred by the husband-petitioner whose prayer for a decree of divorce against, the wife-respondent on ground of desertion and cruelty made in Matrimonial Suit No. 638 of 1983 renumbered as Matrimonial Suit No. 19 of 1985 has been dismissed by the learned Additional District Judge, 2nd Court Alipore, 24-Parganas by the judgment and decree dated 30-4-1987 passed in a contested trial. The learned Additional District Judge has dismissed the suit on categorical finding that the present appellant i.e. the husband petitioner has failed to prove both the grounds of desertion and mental cruelty by cogent and reliable evidence. It has been contended in appeal that the learned trial Judge has not at all considered the evidence on record and the facts and circumstances of the case according to law and has wrongly dismissed the appellant's suit for divorce. The point for consideration in this appeal is whether the learned trial Judge has rightly dismissed the matrimonial suit on both the above grounds by refusing to grant a decree for divorce under S. 13 of the Hindu Marriage Act.

2. The facts of the case may be briefly stated in the following paragraph :--

Admittedly the appellant married the respondent on 11-12-1967 according to Hindu rites and customs at 3/2A B.T. Road, Bara-nagar in the latter's patrimonial home. A very cryptic case for divorce has been made out in the plaint by the petitioner. In para 3 of the petition for divorce it is stated that the respondent has been working as a school teacher at Calcutta against the will of the the appellant deserting him without showing any reasonable ground for such withdrawal from the society of the husband. In para 5 it is stated that the appellant after serving a notice upon the respondent filed a suit for restitution for conjugal rights in the Court of the learned District Judge, Nadia at Krishnanagar which was Matrimonial Suit No. 48 of 1975. The suit was disposed of as the respondent agreed with the proposal of the petitioner, inter alia that she would live with him after tendering resignation to the school where she was working. In paras 7 and 10 of the petition it is stated that the respondent did not comply with her own assurance and without tendering resignation as was agreed by the respondent she started living with one Gajendra Nath Banerjee own uncle of the petitioner at Ramlal Agarwal Lane since November, 1977. It is the petitioner's case that he and the respondent lived as husband and wife till June, 1977 sometimes at the residence of the petitioner at Palassy, sometimes at 5B, Desh-priya Park West Calcutta-29 and sometimes at the respondent's father place at B.T. Road. According to the petitioner the respondent has deserted him on and from July, 1977 for a continuous period of not less than two years immediately preceding the presentation of the petition for divorce and the respondent has been living in adulterly with Gajendra Nath Banerjee which is a mental cruel by to the petitioner. On these two allegations of desertion and mental cruelty the petitioner filed above matrimonial suit in the Court of the District Judge, Alipore on 17-8-1983 i.e. after a lapse of more than six years.

3. The respondent's case as made out in the written statement filed on 18-4-1985 is primarily emphatic denial of the allegations made by the husband in his petition for divorce. The specific case of the respondent is that after marriage the respondent was taken to Bethuadahari, Nadia at the house of one Digendra Mukherjee a relation of the petitioner wherefrom after a few days she came to her father's house at Calcutta. Thereafter she was taken to the quarters of the petitioner in Ambika Jute Mill at Belur where she spent from sometime in January, 1968 till March, 1968 with occasional visits to her father's house at Calcutta. In the month of April, 1968 she received a letter dated 2-4-1968 written by the petitioner himself demanding divorce on false allegations. It is the case of the respondent that during her stay at Belur she found an Insurance Policy taken out by the petitioner after their marriage which was standing in favour of one Itu Mukherjee. As she enquired of the husband regarding the said policy the latter became furious and beat her mercilessly. Anyway, after receiving the said letter dated 2-4-1968 (vide Ext. A(3)) the respondent came to the petitioner's quarters in Ambika Jute Mill at Belur and asked him about the reasons for issuing such notice at which the petitioner became violent and abused her in most filthy language. Although the respondent was carrying at that time the petitioner drove her out from the said quarters and she was compelled to come back to her father's house and in spite of repeated request the petitioner never came to see her or to take her back and in fact did not keep any contact with her. Under the circumstances the petitioner was compelled to take up a job in Chandapara Balika Vidyalaya, Bongaon and started to stay there in the teachers' hostel although she was carrying at that time. After sometime she was admitted to R.G. Kar Medical Hospital at Calcutta where she delivered a male child and the petitioner although informed, never came to the hospital and spent a single farthing for her medical treatment. The petitioner was requested to take her to his place from her patrimonial home but he did not respond. After much persuasion the petitioner, however, took her to Palassy at the end of March, 1969 where she stayed there in her in-laws' house for about two months. The petitioner during her stay at Palassy visited her only on two occasions and he and his mother used to treat her with cruelty. At the instance of Gajendra Nath Banerjee the uncle of the petitioner, the brother of the respondent took her back to her father's house at Calcutta. The respondent thereafter took a job in a local school at Calcutta in the year 1969 but the petitioner filed a matrimonial suit in the Krishnanagar Court (i.e. Mat. Suit No. 48 of 1975 as referred to. In para 5 of the petition) which was compromised and the respondent to maintain family peace, agreed to resign and actually submitted resignation. But observing the attitude of the petitioner and his living in adultery with Itu and others she was compelled to withdraw the same. Thereafter the petitioner again disassociated himself from the respondent and changed his service in another concern. Subsequently the respondent came to know that the petitioner had joined the Indian Oxygen Ltd. and was putting up in a hotel named Hotel Gautam in Calcutta. The respondent thereafter met the petitioner there and lived there as husband and wife and during such stay she gave birth to a female child on 5-2-1975 in the R.G. Kar Hospital, Calcutta. The petitioner did not bear any expenses for her there. The respondent thereafter came back to her father's house as the petitioner refused to live with her. Thereafter the respondent being accompanied by one Ardhendu Chowdhury a friend of the petitioner went to the petitioner's flat at 5B, Deshpriya Park (East) and found that the petitioner was living there with the said Itu Mukherjee. The petitioner on seeing the respondent and his friend became angry and insulted them and also drove out the respondent from his flat. On being given no entry at the Deshpriya Park flat the respondent came to her father's house and thereafter being accompanied by Gajendra Nath Banerjee uncle of the petitioner she again went to Deshpriya Park

flat-towards the end of June, 1977 and forcibly lived there for a few days. At Deshpriya Park residence the petitioner assaulted his uncle and forcibly sent the respondent to Palassy with his uncle. As the said uncle-in-law was about to retire from service-requiring him to vacate the official quarters at Palassy the respondent requested the petitioner to take her back which was not heeded to. As at that time the uncle-in-law was seriously ill, a flat was hired at Ramlal Agarwal Lane at Calcutta to nurse him. At that time the respondent came to know that the petitioner had left the service of Indian Oxygen and had joined the Indian Jute Mill Association. She contacted the petitioner without any effect. Thereafter on the recovery of her uncle-in-law from illness the respondent along with her brother, sister-in-law and the said uncle-in-law went to the quarters of the petitioner at Barrackpur and found the petitioner living with Itu Mukherjee. On being interrogated by the uncle-in-law the petitioner became furious and struck him because of which he fainted. It is the petitioner who deserted the respondent and not she who allegedly deserted the former. She is still willing to maintain marital relationship with him. According to the respondent the petitioner has withdrawn himself, from her society and has been living in adultery. It is the specific case of the respondent that at the instance of the petitioner she used to live with the uncle-in-law who has brought up the petitioner and maintained him and his mother since the death of the petitioner's father. The mother of the petitioner lived with the said uncle-in-law till her death and the petitioner himself had always asked the respondent to live with him and to nurse his uncle who maintained them and who saved them from their death and said that the uncle was their god father. The respondent emphatically denied the allegation of adultery levelled against her with Gajendra Nath Banerjee who is like her father and being an elderly person and a patient the respondent stated that the allegation of adultery is absolutely false and motivated. It is the petitioner who is living in adultery and he became angry as the uncle demanded the money from him which was his money kept infixed deposit. The respondent asserts that there are correspondences to that effect. It is further stated by the respondent that since November, 1979 she has been living in her parent's house and the tenancy of Ramlal Agarwal Lane which was taken in the month of November, 1977 has already been given up.

4. Before assessing the evidence on record and considering the law of divorce on ground of desertion and cruelty it would be helpful to note certain admitted facts on record and in evidence.

i) Admittedly the couple lived together for the last time as husband and wife at the residence of the petitioner at 5B, Deshpriya Park (East) till June, 1977 (vide paras 9 and 11 of the petition and para 9 of the written statement page 6 of seventh line). However, according to the petitioner the respondent deserted him without showing any cause and according to the respondent she was forcibly driven out from the Deshpriya Park residence.

ii) The couple since after their marriage on 11-12-1967 never continuously resided or lived together at a permanent place till June, 1977. Living together was occasional and temporary and in most cases the respondent on her own came to live with the husband.

iii) The first living together as husband and wife after the marriage was at Belur from January to March, 1968.

iv) The first child (male) was born to the couple on 10-12-1968 at R.G. Kar Medical College and Hospital while she was staying in her paternal home in Calcutta.

v) On 2-4-1968 the petitioner gave a notice to the respondent asking her to give a consent letter to terminate the relationship mutually to be filed before the Court for the purpose of getting divorce in default the petitioner threatened her with a suit for divorce (vide Ext. A(3)).

vi) While working with Indian Oxygen at Calcutta the petitioner stayed in Hotel Gautam in Calcutta. He lived there for about four years (vide evidence of the petitioner P.W. 1 at pages 35 and 41 of the paper book). The respondent lived with him in the said Hotel Gautam till May, 1974. A female child was born to the couple in R,G. Kar Medical College and Hospital on 5-2-1975.

vii) The petitioner filed on 1-10-1975 the Matrimonial Suit Being 48 of 1975 in the Court of the District Judge, Nadia at Krishnanagar for restitution of conjugal rights on the ground that the respondent had left the matrimonial home at Palassy since sometime in July, 1974 without taking his consent and without any reasonable cause (vide Ext. B).

viii) The petitioner did not take any information of his wife after she took up a job at Chandpore School, Bongaon on receiving his notice as per Ext. A93).

ix) Itu Mukherjee P.W. 4 is intimately known to the petitioner from before his marriage with the respondent. Admittedly, . the petitioner had a L.I.C. policy undertaken after his marriage with the respondent in favour of Itu Mukherjee who was his nominee there. Itu Mukherjee was married long before the marriage of the petitioner and has three daughters and a son. From 1982 Itu's one son and one daughter have been staying at the petitioner's Salt Lake residence and prosecut-

ing their studies there. Itu's husband D.W. 2 Kanailal Mukherjee resides at Ranaghat and runs a printing press there. Sacred thread ceremony of Itu's son was celebrated in his quarters at Barrackpur but the petitioner does not know whether the sacred thread ceremony of his own son was performed or not. In January-February of 1977 the petitioner fell ill and called Itu Mukherjee is alleged god sister to come to Deshpriya Park flat from Ranaghat and to look after him. At the time. when the respondent being accompanied by the uncle Gajendra Nath and the respondent's brother and his brother's wife went to the petitioner's quarters at Barrackpur Itu Mukherjee was staying with the petitioner there (vide evidence of P.W. 1).

x) Itu was taken to the petitioner's residence at Salt Lake by her husband who went back to Ranaghat after keeping her there (vide cross-examination of P.W. 2 Kanailal Mukherjee). P.W. 3 Sunii Kumar the servant of the petitioner admits that in Deshpriya Park flat Itu used to sleep in the covered varandah. P.W. 4 Itu admits her visit and stay at Salt Lake residence of the petitioner. She also admits her visit to Gautam Hotel. She also admits her stay ing with the petitioner at Deshpriya Park flat for 8-9 days, and says that her children were also with her there. She also admits that she had been to the Barrack-pur flat of the petitioner. She also admits that she had gone to Puri and Agra in 1969-74 with the petitioner and her husband.

xi) The petitioner since after the death of his father has been brought up by his uncle Gajendra Nath Banerjee. Since 1948 his mother stayed in the quarters of Gajendra Banerjee till her death in August, 1975. The petitioner admits that he also asked his wife to stay in the quarters of his uncle Gajen and to look after his mother and his uncle. The petitioner further admits that his uncle resides at 4A Kali Banerjee Lane, Calcutta which is close to the house of his father-in-law. He last saw his uncle in January, 1978 in his Barrackpur quarters when he came there with the respondent and respondent's brother and his wife. He also admits that he has never visited the quarters of his uncle at Ramlal Agarwal Lane.

5. As we have already noted the appellant's case for divorce is based on two grounds, namely, desertion and cruelty which is mental in nature. It should also be noted here that although it has been alleged by the appellant in his petition for divorce that his wife has been living in adultery with his uncle Gajendra Nath Banerjee at Ramlal Agarwal Lane since November, 1977, such alleged adultery has not been taken as a ground for divorce under S. 13(1)(i) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act). On the other hand it has been pleaded that such adultery on the part of the respondent has caused mental cruelty to the appellant so as to be a ground for divorce under S. 13(1)(i-a) of the Act. It may also be pointed out that the cruelty which is a ground for divorce under the Act has nowhere been defined in it. As to what constitutes cruelty, mental or physical so as to sustain a decree of divorce we have to consider the decisions given by our High Court. The Supreme Court and other High Courts wherein legal principals in this regard have been laid down and the question has been set at rest. The expression 'desertion' contained in S. 13(1)(i-b) of the Act has been explained in the Act. According to the explanation given in the Act the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage and its grammatical variations and cognate expressions shall be construed accordingly. In order to see whether the learned trial Judge has rightly dismissed the petitioner's suit for divorce by rejecting both the grounds of desertion and cruelty on the basis of the evidence on record it would be helpful to refer to the reported decisions of the Supreme Court, our High Court and other High Courts as relied upon by both the parties in this appeal wherein the legal principles regarding the ground of desertion and cruelty have been laid down. In this connection it would also be necessary to refer to S. 23(1) and (2) of the Act which may be quoted below for the sake of convenience:--

Decree in proceedings-- (1) in any proceeding under this Act, whether defended or not, if the Court is satisfied that-

(a) any of the grounds for granting relief exists and the petitioner (except in cases where the relief is sought by him on the ground specified in sub-clause (b) or sub-clause (c) of Cl.(ii) of S. 5) is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified (or in Cl.(i) of sub-section(1) of S. 13, the petition has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and (bb) when a divorce is sought on the ground of mutual consent, such

consent has been obtained by force, fraud or undue influence, and)

(c) the petition (not being a petition presented under S. 11) is not presented or prosecuted in collusion with the respondent, and

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

(e) there is no other legal ground why relief should not be granted, the, and in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the Court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

6. The scope of S. 23 has been propounded by the Supreme Court in a case (Dr. N. G. Dastane v. Mrs. S. Dastane). It has been observed by the Supreme Court in this case that in a matrimonial petition doubtless, the burden must lie on the petitioner to establish his or her case for, ordina-

rily, the burden lies on the party which affirms a fact, not on the party which denies it. While raising the question as to what is the standard of proof to be applied in order to judge whether the burden has been discharged or not the Supreme Court has answered that the normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities because under S. 3 of the Evidence Act, a fact is said to be proved when considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Consequently the belief regarding the existence of a fact may thus be founded on a balance of probabilities. The Supreme Court observes that a prudent man faced with conflicting probabilities concerning a fact situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man so the Court applies this test for finding whether a fact in issue can be said to be proved. In a civil matter the test to apply is whether on a preponderance of probabilities the relevant fact is proved. At this juncture it would be helpful to quote a few lines from the above Supreme Court judgment (paras 25 and 26) :--

"Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, nor a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

Neither S. 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor S. 2 which governs the jurisdiction of the Court to pass a decree in any

proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the Court the power to pass a decree if it is "satisfied" on matters mentioned in Cls. (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied" on a preponderance of probabilities and not "satisfied beyond a reasonable doubt." Section 23 does not alter the standard of proof in civil cases."

7. In the above case the Supreme Court has also held that the Court has to deal not with an ideal husband and an ideal wife (assuming any such exists) but with the particular man and woman before it. The ideal couple or a near ideal one will probably have no occasion to go to a matrimonial Court for, even if they may not be able to drown their differences, their ideal attitude may help them overlook or gloss over mutual fault and failures. The Supreme Court has also emphasised the interdict of S. 23(1) of the Act which we have already quoted. Relief prayed for can be granted under S. 23 of the Act only if the Court is satisfied that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief and where the ground of the petition is the ground of adultery under C1. (1) of sub-section (1) of S. 13 the petitioner has not in any manner being access'ory to or connived at or condoned the Act or Acts complained of, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty.

8. The law of granting divorce on ground of desertion has also been well settled by the Supreme Court, our High Court and other High Courts. In a case (*Lachman Utamchand Kirpalani v. Meena alias Mota*). It is the majority view that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause meaning a total repudiation of the obligations of marriage. It has been settled by the Supreme Court that for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*) and that two elements are essential so far as the deserted spouse is concerned :-- (1) the absence of consent, (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. In the above case the Supreme Court has reiterated its view taken in an earlier case (*Bipinchandra Jaisinghbai Shah v. Prabha-vati*) that desertion is a matter of inference to be drawn from the facts and circumstances of each case. It has been further made clear that the inference which may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, the fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. It has been further held by the Supreme Court that even if the wife where she is the deserting spouse, does not prove just cause for her living apart the petitioner husband has still to satisfy the Court that the desertion was without just cause. In view of the Supreme Court the legal burden is on the husband to prove desertion without just cause. It has been further clarified by the Supreme Court in this case that once desertion, as defined in the Act is established there is no obligation on the deserted spouse to appeal to the deserting spouse to change his or her mind and the circumstance that the deserted spouse makes no effort to take steps to effect a reconciliation with the deserting spouse does not debar him or her from obtaining the relief

because once desertion is proved the deserting spouse so long as he or she evidences no sincere intention to effect a reconciliation and return to the matrimonial home is presumed to continue in desertion. At the same time the Supreme Court's view is that the matter would wear a different complexion and different consideration would arise where before the end of statutory period of two years or even thereafter before the filing of the petition the conduct of the deserted spouse was such as to make the deserted spouse desist from making any attempt at reconciliation. The Supreme Court observes :-- "If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause during the entire period referred to in S. 10(1)(a) of the Act before he can succeed." (Lachman's case supra).

9. In the instant case, on factual score, the appellant petitioner has alleged mental cruelty as a ground of divorce against the respondent petitioner wife on two counts, viz., (i) the respondent-wife has been living in adultery with his own uncle Gajendra Nath Banerjee at Ramlal Agarwal Lane since November, 1977 (vide paragraphs 7, 10 and 11 of the petition); (ii) she has also made false and baseless allegations in her written objection against him of having adulterous relationship with one Itu Mukherjee since after his marriage and also living in adultery with her. Whether a petitioner can have a decree of divorce on ground of mental cruelty in view of the baseless and false allegations of adultery made in the written objection the law is well settled on this issue and the answer is in the affirmative. It is well settled in law that the Court while considering a case for divorce can look into the post suit allegations of adultery made by the opposite party in the written objection and evidence and may grant a decree of divorce on that count if the same are proved to be baseless, vide (1993) 1 Cal HN 213 (Amarendranath Sanyal v. Krishna Sanyal). In that case our High Court in a Bench decision while following other former decisions of this High Court in many reported cases, viz., (Nemai Kumar Ghosh v. Smt. Mita Ghosh, , Harendranath Burman Vs. Su-proya Burman, and Smt. Santana Banerjee v. Sachindra Nath Banerjee, , along with the Supreme Court case (Shikar Chand v. Digambar Jain) has found the law to be well settled that false allegations against the character of any spouse made by the other spouse in the written statement or in the evidence constitutes mental cruelty and that such mental cruelty will be a valid ground for passing a decree of divorce under the provisions of S. 13(1)(ia) of the Hindu Marriage Act. In Dastane v. Dastane, (supra) it has also been clarified by the Supreme Court that the important question to be answered in such a case is whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it would be harmful or injurious for him to continue to live as husband and wife. In another case reported in (1987) 91 Cal WN 87^ (Ratnamayee Das v. Bikash Das) referring to Dastane's case, our High Court in a Bench decision has held on the point of cruelty as follows :--

"Even though cruelty has not been defined specifically but it appears that the responsibility is left to the Court to interpret, analyse and define cruelty in a case, depending upon various interpretations and the broad and liberal test for interpreting S. 13(1)(ia), as amended, will be found out together on such type, that the complainant cannot reasonably be expected to live with his or her adversaries

and there is no doubt that in order to find cruelty, liberal and broad test will have to be applied. As observed by us earlier, that mental cruelty can even cause more grievous injury and create in the mind of the injured spouse, reasonable apprehension that it will be impossible or unsafe to live with the other party and while viewing a case from that angle the victim's capacity or incapacity for endurance in so far as, that is, or ought to be known to the offending spouse and cruelty is in generality, in its character, and a cruelty as charge, will have to be considered."

10. Against the above legal prospective it may now be seen whether the appellant petitioner has succeeded to prove the ground of cruelty against the respondent wife on the above two counts. The learned Trial Court in the impugned judgment has rejected the appellant's story of mental cruelty after consideration of evidence on record. The learned Trial Judge has held that the allegations that the respondent wife ever lived with petitioner's uncle in adultery is unfounded, false and concocted. On consideration of evidence the learned Trial Judge has found that the allegations of adultery made by the appellant petitioner against his wife and uncle are motivated. But, on the other hand the learned Trial Judge on consideration of the evidence on record has found that there was every reason in the respondent wife to believe that her husband has been living in adultery with Itu Mukherjee. The suit for divorce was filed on 17-8-83. Although it is alleged in the petition for divorce that the cause of action arose in July, 1977 at 5/1B Deshpriya Park West, Calcutta-19, where-from the respondent allegedly deserted the petitioner, there is no explanation as to why the petitioner filed the petition for divorce after a lapse of more than six years. There is no evidence or no case on his part that during this period he had been trying to bring back his wife and children to her matrimonial home. In the peculiar facts and circumstances of the case such conduct on the part of the appellant petitioner has got to be taken note of. Anyway, coming to the point of mental cruelty it may again be noted that the petitioner has not impleaded his uncle Gajendra Nath Banerjee the alleged adulterer as a corespondent in the proceedings for divorce. It is his case that his wife has been living in adultery with his own uncle Gajendra Nath at Ramlal Agarwal Lane since November, 1977. It is in evidence that the respondent had to hire a flat at Ramlal Agarwal Lane near her patrimonial home as he was bed ridden with illness and required treatment and nursing at Calcutta after his retirement from his railway job at Palassy in October, 1977. The respondent has explained in her evidence that before that she went to the flat of her husband at Deshpriya Park with her said uncle-in-law and children and resided there for three weeks. It is her evidence that her husband did not accept her but misbehaved with her and sent him back forcibly to Palassy along with his uncle. She has categorically denied to have any illicit relation with the said Gajendra Nath and that she lived with him at Ramlal Agarwal Lane in adultery with him. She has also denied that she had any illicit connection with Gajendra Nath Banerjee while they were staying in the appellant's flat at Deshpriya Park. It is also her evidence that since 1979 she has been living in the house of her mother at Baranagar. This witness has been subjected to vigorous cross-examination but we find that her credence has not been shattered in any way and there is no reason to disbelieve her. It has come out in cross-examination that in Ramlal Agarwal flat her mother was also staying with her and Gajen till 1979. It appears from her evidence that thereafter Gajendra Nath Banerjee has been living somewhere at Kali Banerjee Lane, Tala. It is surprising to note that in her cross-examination not a single question or suggestion regarding the alleged adultery with Gajendra Nath Banerjee has been put to her. There has been no cross-examination on her evidence that the flat at Ramlal Agarwal Lane was hired in 1977 to nurse her ailing uncle-in-law Gajendra Nath Banerjee and that she was

living there also with her children and her mother. Just because the respondent lived with her aged uncle-in-law along with her mother and children there cannot be any inference that she was living in adultery unless some cogent and independent evidence is adduced by the person who alleges it. Gajendra Nath Banerjee is D.W.2. He has categorically denied the allegations of living in adultery with the appellant's wife. Although no question was put to the respondent wife in her cross-examination regarding the alleged adultery, this witness has been cross-examined at length on that score and he has denied all such suggestions emphatically. There is no reason to disbelieve this witness who admittedly brought up the appellant and also maintained him and her mother. Admittedly the appellant and his mother lived with this D.W.2. Gajendra Nath Banerjee after his father's death and that it is also admitted that appellant's mother died while she was living under the care of Gajendra Nath Banerjee in his quarters. It may be recorded here that at the time of argument the learned Advocate appearing for the appellant submitted that he would place no reliance on the evidence of P.W.3 Sunil Kumar Das a servant of the appellant and that he would not press the evidence given by P.W.3 about Gajenbabu being seen in a compromising position in the appellant's flat at Deshpriya Park. Now, we come to the evidence of P.W.1 the appellant himself. It is his evidence that in May, 1977 when he went to Palassy he noticed that the behaviour of his wife towards him was indifferent and that she had unusual attachment towards his uncle. He says in his evidence that his wife has been living in adultery with his uncle Gajendra Nath Banerjee since November, 1977 at Ramlal Agarwal Lane. He admits that he has never visited the flat at Ramlal Agarwal Lane, and that he does not know whether his uncle was seriously ill from November, 1977. He also says that his uncle Gajendra Nath resides at 4A Kali Banerjee Lane at Calcutta. It is surprising to see that in the petition for divorce which was filed on 17-3-83 it has been stated that the respondent is living in adultery since November, 1977 with Gajendra Nath Banerjee at Ramlal Agarwal Lane although the petitioner had full knowledge at the time of filing of the same he was not living there at that time. In the petition he has tried to create an impression that the alleged adultery has been continuing since November, 1977 till the filing of the case which is false to his knowledge. It is also admitted by him that his uncle visited him at his Deshpriya Park flat sometime in June, 1977 and according to him it was settled that after retirement his uncle would come to Barrackpur and stay with him in his quarters there, as he had got a job in Jute Mill Association, Barrackpur. He further admits in his cross-examination that he always asked his wife to stay in the quarter of his uncle and to look after his mother and uncle. Such admissions cannot be reconciled with his allegations of adultery levelled against his wife and his uncle. He had never visited the flat at Ramlal Agarwal Lane and as such it would be risky to come to the conclusion that the respondent and his uncle-in-law had been living in adultery at Ramlal Agarwal Lane flat without any supporting evidence wherefrom at least an inference can be drawn. Furthermore, Ext.A and Ext.A-2 are the letters written by the appellant to his uncle-in-law dated 30-3-77 and 30-4-77 and Ext.A-1 is a letter written to his mother which is undated and from its content it appears that it was written sometime in January, 1988. This letter shows how deeply attached was the appellant to his uncle Gajendranath. From a careful consideration of the above evidence on record it appears to us that the allegations of adultery levelled against the respondent by the appellant is a myth and created for the purpose of the suit. The learned Trial Judge has rightly rejected the story and discarded the evidence in this regard adduced on behalf of the appellant.

11. It may now be seen whether the allegations made by the respondent in her written objection and also in evidence that the appellant has been living in adultery with one Itu Mukherjee are false or baseless so as to be taken as an act of mental cruelty committed against the appellant. The admitted position in this regard has already been noted at serial Nos. 9 and 10 of paragraph 4 of the Judgment as such the same may not be repeated here. On due consideration of the evidence on record the learned Trial Judge has observed :--

"..... thus considered there is every reason in the respondent to believe that her husband has been living in adultery with Itu Mukherjee" From the admitted evidence as noted above the fact comes out that the petitioner has never lived or tried to live on his own with his own legally married wife but instead he has preferred to maintain an extra-marital relationship with one Itu Mukherjee who is the married wife of another man viz., P.W.2 Kanailal Mukherjee to which any reasonable woman of normal sense of dignity and self-respect has a right to object. The appellant does not care to live with his wife but prefers to live with another man's wife and children and nominates the said lady in a L.I.C. undertaken after his marriage. He does not care to know whether sacred thread ceremony of his own son has been performed or not but has celebrated the sacred thread ceremony of Itu Mukherjee's son in his quarters. This Itu Mukherjee is stated to be the God daughter of the appellant's mother and as such claims to be the God sister of the appellant. Except the uncorroborated oral testimony of P.W.4 Itu Mukherjee there is nothing to show that she was ever accepted by the appellant's mother as her God daughter. Furthermore, the conduct of such God daughter in relation to the God mother as manifested in her own evidence does not inspire any confidence. This lady was married in 1958. She came to be acquainted with the appellant and his relations sometime in 1958 a month after her marriage. From 1967 to 1975, i.e., till the death of her alleged God mother she never visited here at Palassy where the latter was living in the quarters of Gajendranath Banerjee. In her evidence P.W.4 has admitted that she comes to stay in the Salt Lake residence of the appellant where her one sons and a daughter are residing with the appellant. She, however, says that whenever she comes she is accompanied by her husband. But her husband's evidence in cross-examination is that he came to Anil Babu's quarters with his wife and after keeping her he returned to Ranaghat. There is nothing to add to this for further explanation. P.W.4 Itu Mukherjee admits her stay at Deshpriya Park flat along with her children with the appellant. She further admits that since 1982 her son and daughter have been living with the appellant at Salt Lake for prosecuting their studies. It is interesting to note that the appellant did not care about the schooling or education of his own children since they were born. P.W.4 further admits her visit to Gautam Hotel where the appellant was staying for sometime. She also admits her stay in the Barrackpur residence of the appellant. In view of this admitted position no ordinary prudent man can say that the respondent wife has made baseless allegations of adulterous life against her husband causing him mental cruelty so as to treated as a ground for divorce. Under the circumstances we hold that the learned Trial Judge has rightly rejected the ground of mental cruelty on this count. The allegations made by the respondent in her written objection against the appellant in this regard can never be said to be false or baseless for the purpose of giving the relief as prayed for.

12. Next we take up the ground of desertion. It is the case of the petitioner that the wife respondent deserted him without any reasonable cause since July, 1977 when they were living last together at

5/1B Deshpriya Park West, Calcutta-19. The respondent's case on the other hand is that it was she who was forcibly driven out from the Deshpriya Park residence by the petitioner. In paragraph 4 the admitted position in this regard has already been recorded. From the evidence on record we come to see that the couple never resided continuously together at any place or places since their marriage effected on 11-12-

67. From the evidence it appears that the trouble begun when the respondent discovered a L.I.C. policy taken out after their marriage by the appellant in the name of Itu Mukherjee while she was staying with her husband at Belur. They lived as husband and wife at Belur from January to March, 1968. Their first male child was born on 10-12-68. There is no reasonable explanation on the part of the appellant why the couple were not living together after March, 1968 or after the first child was born on 12-12-68. From the evidence of the appellant it appears that he lived in occasional and temporary spell with his wife at different places and that too on the sole effort of the respondent; it is his evidence. that on 5-2-75 his daughter was born at R. G. Kar Medical College Hospital when he was working in Indian Oxygen and was staying at Gautam Hotel near Sealdah at Calcutta. He further says in his evidence that January/ February 1974 he used to meet his wife at his father-in-law's house and his wife also used to stay with him at Gautam Hotel for few days till May, 1974. He further says that he took a rented flat in Deshpriya Park in August, 1976 and in the meantime his mother died on 15-8-75. He further says that in January/ February, 1977 he fell ill and 'God sister' Itu Mukherjee. came to his Deshpriya Park residence to look after him and at that time his wife the present respondent also came to his Deshpriya Park flat with his friend Ardhendu Chowdhury and stayed there for 2/3 hours. It is also his evidence that in June, 1977 his wife again came to Deshpriya Park flat with his uncle Gajendra Nath Banerjee and stayed with him there for three weeks. It is also his evidence that keeping in view of his uncle's impending retirement it was settled that his uncle would come to Barrackpur and stayed with him in his quarters at Barrackpur along with his wife and children. This settlement according to the appellant took place at Deshpriya Park flat in June, 1977. The appellant further says that he did not drive out his wife who voluntarily left his house at Deshpriya Park in June, 1977 and did not come back to his house again. This part of his evidence is inconsistent with his earlier evidence about the above talk of settlement which took place at Deshpriya Park residence in June, 1977. If that was the settlement when his wife was staying with him at Deshpriya Park there was no reason for the wife to desert the appellant at Deshpriya Park voluntarily. The evidence of the respondent on this may be looked into. About the couple's stay at Deshpriya Park residence the evidence is that for the first time according to the appellant the wife stayed there for 2/3 hours. The respondent in her evidence says that as the husband did not inform her of her whereabouts she took the help of his husband's friend Ardhendu Chowdhury who took him for the first time to the rented flat of the appellant at Deshpriya Park. It is the evidence of the respondent that on seeing her ' and his friend the appellant got displeased and when she expressed her intention of staying with him there her husband drove her and his friend out of his flat. At that time she saw Itu Mukherjee staying there which is also admitted by Itu Mukherjee in his evidence. Regarding the second visit to Deshpriya Park flat it is the evidence of the respondent that her uncle-in-law" Gajendra Nath Banerjee took her and her children to the flat of her husband at Deshpriya Park where she resided there for three weeks. This took place as it appears from the evidence of the appellant, in June, 1977. The respondent further says in her evidence that her husband did not accept her and misbehaved with her and with her uncle-in-law and sent her back

forcibly. According to the appellant during her first visit at Deshpriya Park flat the wife stayed there for 2/3 hours and that his wife came there along with his friend Ardhendu Chowdhury. He does not give any reason for such conduct on the part of his wife. But the wife respondent in her evidence gives the reason. She says that the husband become very much displeased on seeing her and he drove her out when she told him that she had come to stay with him. There is no reason for not believing this part of the evidence of the respondent coupled with the fact that Itu Mukherjee was staying there at that time. There is also no answer in the evidence of the appellant why the respondent would desert him in June, 1977 when admittedly they were living there as husband and wife for a few weeks. According to the appellant's evidence it was the settlement in June, 1977 Deshpriya Park residence that his uncle will come to his quarters at Barrackpur with his wife and children. Under the circumstances there could not be any question of desertion and in that view of the fact, his evidence to the effect that the respondent voluntarily left his house at Deshpriya Park in June, 1977 cannot be relied upon. It is the evidence of the respondent that on the other hand the appellant did not accept her and misbehaved with her and sent her away forcibly with his uncle from the Deshpriya Park residence. It also appears from the evidence of the respondent that even thereafter she made an attempt to live with her husband at Barrackpur. It is admitted by the appellant in his evidence that he last saw his uncle probably in January, 1978 in his Barrackpur quarters when he came there with his wife Sefali and Sefali's brother and his wife. It may be recalled here that according to the appellant the respondent, his uncle Gajendra Nath Banerjee and the children were to stay with him at his Barrackpur flat as per talk of settlement effected in his Deshpriya Park residence in June, 1977. The appellant does not say anything as to why he did not allow the wife, let alone the uncle to stay with him at Barrackpur when she came there along with the uncle as per talk of settlement. Regarding the Barrackpur visit the respondent says in her evidence that she went to her husband's quarters at Barrackpur along with the uncle-in-law and her elder brother and his wife where she found Itu staying with the husband and that on seeing them the appellant assaulted her and his uncle and drove her out then and there. The D. W. 2 Gajendra Nath Banerjee also corroborates the evidence of D.W. 1 in this regard. In view of above conduct of appellant there-is no reason to disbelieve the evidence of D.W. 1 the respondent and D.W. 2 Gajendra Nath Banerjee the uncle of the appellant petitioner in this regard. From the above evidence it is clear that the appellant had never intended to live with his wife and children and that whenever the wife made an attempt to live with her husband the attempt was resisted or foiled. Under the circumstances it cannot be said that the respondent had deserted the petitioner for a continuous period of not less . than two years immediately preceding the presentation of the petition without any reasonable cause and without the consent or against the wish of the husband. The evidence of the respondent on the other hand shows that she was forcibly driven out by the appellant from Deshpriya Park residence in June, 1977 and also from Barrackpur residence in 1978. From the evidence on record although it is proved that the couple have been living separately, there is no evidence that on the part of the respondent there is animus deserendi and there is animus non-revertendi. On the other hand the respondent even before the trial court has unequivocally stated in her evidence that she has all along been eager and is always ready to live with the husband and to look after him. In this context a past conduct of the appellant may be referred to Ext. A-3 dated 2-4-1968 is a letter-cum-notice given by the appellant to the respondent asking her to give consent letter to terminate the relationship of husband and wife mutually to be filed before the Court for the purpose of getting divorce, in default, threatening the wife with a suit for divorce. It

appears that since after the marriage the appellant has been trying to get rid of his wife by any means whatsoever. This letter was not however acted upon. But again in 1975 after the death of the appellant's mother he filed a matrimonial suit being 48 of 1975 in the Court of the District Judge, Nadia at Krishnanagar for restitution of conjugal rights according to the appellant, this proceeding or compromise. But no order of the Court has been produced before this Court or before the trial Court to show how it was compromised. According to the appellant it was compromised on the understanding given by the respondent that she would leave her job in the school where she was working and would live with her husband. Admittely, the respondent is still working as a school teacher in Calcutta. Just because the wife is teaching in some school, the husband cannot take, it as an excuse for filing a suit for divorce. Anyway this aspect of the matter is not much material for the purpose of disposing of the present appeal. Considering the aboye evidence on record and keeping in mind the legal principles in this regard as discussed above we are of the opinion that the appellant petitioner has measurably failed to prove the grounds of mental cruelty and desertion against the respondent to entitle him to get a decree for divorce. The learned trial Judge has rightly discussed the matrimonial suit and we do not find any reason to interfere with the said' Judgment.

13. Shri Roychowdhury appearing for the appellant as a last resort has relied upon a decision of the Supreme Court (B. Bhagat v. D. Bhagat). Referring to the above decision he has submitted that from the evidence on record it is clear that the couple has been residing separately for a long time and the marriage has irretrievably broken down and that as such a decree of divorce may be granted as has been done by the Supreme Court in the above reported case. But in our opinion the above Supreme Court case does not help Mr. Roychowdhury's client in any way. The Supreme Court has observed as follows (at Pp 720 and 721 of AIR) :--

"There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted mate-rial) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is/ are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind."

Irretrievable break down of a marriage is a question of fact based on bilateral acts of both the husband and wife. In this case, although the Appellant and the Respondent have been living separately since June, 1977 we have found in evidence that the wife is and has been all along eager to come back to the husband for living a happy conjugal life. Furthermore, we have found in evidence that since June, 1977, the Appellant has not tried in any way to mend his life style and to bring back his wife. In this position it will be neither logical nor fair to say on the basis of the unilateral allegation of the husband that the marriage has irretrievably broken down. We have found that none of the grounds for divorce has been proved by the appellant. Furthermore, the appellant cannot be allowed to take, advantage of his own wrong committed to the respondent which We have already pointed out while discussing the evidence on record. Accordingly the appeals fails and it is dismissed on contest with cost. We affirm the judgment and decree passed by the trial Court. The Lower Court Records be sent down forthwith.

14. Appeal dismissed.