

A Vs. B

A Vs. B

SooperKanoon Citation : sooperkanoon.com/354279

Court : Mumbai

Decided On : Aug-10-1981

Reported in : 1982(1)BomCR236a

Judge : A.N. Mody, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13

Appeal No. : First Appeal No.729 of 1980

Appellant : A

Respondent : B

Advocate for Def. : C.R. Dalvi and ; P.N. Karlekar, Advs. for respondent No. 1, ; R.N. Vakharia, Adv. for respondent No. 2 and ; K.J. Vasavade, Adv. for respondent No. 3

Advocate for Pet/Ap. : Narendra K. Shah and ; K.H. Panchal, Advs.

Disposition : Appeal dismissed

Judgement :

A.N. Mody, J.

1.This appeal arises out of the matrimonial petition filed by the appellant (original petitioner) in the Bombay City Civil Court at Bombay against his wife, the 1st respondent (original respondent) for divorce on the grounds of adultery alleged to have been committed by her with the respondents Nos. 2 and 3 (original co-respondents Nos. 1 and 2) and in the alternative on the ground of cruelty. The appellant husband had also earlier filed an infructuous petition for divorce. The 1st respondent wife however did not emerge unscathed though she succeeded in the earlier petition.

2. The petitioner had filed the earlier petition being M. J. Petition No. 1973 of 1972 on the same grounds as the present petition. The co-respondent therein was one Ram Ahuja and not the present respondents Nos. 2 and 3. He lost the said petition in the trial Court. He filed an appeal to this Court being First Appeal No. 599 of 1979, which was dismissed by me on 5/6th August, 1981. He lost the said appeal on the ground that out of the several incidents, only one incident of the 1st respondent and the said Ram Ahuja having been found in the family room of a restaurant can be possibly said to have been proved and even on the assumption that the same was proved, no inference of adultery can be drawn and as regards cruelty there was no evidence of any danger to the health or apprehension of any danger to the health of the appellant which is the requirement now imposed by law as decided by Division Bench of this Court in Madanlal Sharma v. Santosh Sharma, L.P. Appeal No. 28 of 1980 by Rege & Kanade, JJ., dated 10th March, 1981.

3. During the pendency of the above petition, the appellant again engaged another detective agency and based on the reports thereof, filed the present petition. An application was made for amendment of the

earlier petition to include the new facts, which was rejected by the trial Court as well as the Appellate Court.

4. The allegations relied on by the petitioner in support of his case are to be gathered from the report of the detective agency rather than the petition which is delightfully and unjustifiably vague, resulting in vague denials in the written statements.
5. The appellant was suspicious of the character of the 1st respondent and in the year 1967, made a complaint to her maternal uncle as also to her brother about the 1st respondent living in adultery to which no reply was sent. The 1st respondent did not improve in her behaviour and an Advocate's notice dated 16th May, 1969 was also sent, which also was ignored by her. Being suspicious, he engaged a detective agency who kept a watch and whose reports led to the earlier petition. The incidents in the earlier petition may be ignored for the purpose of this petition in view of the fact that most of them were held to be proved and only one incident was held to be worthy of belief by the trial Court, while the appeal was decided without going into the question as to whether the same was proved. It was held that even on an assumption that the same was proved, there cannot be an inference of adultery nor can it be said that evidence established legal cruelty.
6. After the earlier petition was filed, another detective agency viz. Globe Detective Agency was engaged by the appellant. One Sunderjit Tacker, an employee of the said agency was the operative in-charge of gathering material about the 1st respondent. The work was done by the said Tacker along with other employees of the agency but only he has given evidence. Basically, the evidence is that what is stated in the report is correct but that because of passage of time when he is giving evidence, he is not able to recollect anything except what is stated in the report. As per the report, he kept the 1st respondent under surveillance on 2, 3, 9, 13 to 17, 19, 20 to 24, 28 and 29 January, 1976. Out of this nothing material transpired on the dates other than 13th to 27th and 24th and 29th January, 1976. The relevant date as regards the 3rd respondent (original 2nd co-respondent) is the 17th January, 1976 and the remaining dates concern the 2nd respondent (the original 1st co-respondent). The case of the appellant as emerges from the petition, the report and the evidence is as follows.
7. On 13th January, 1976, the 1st respondent come out of the house and met the 2nd respondents near Taj Talkies. They hired a taxi and they proceeded in the direction of Grant Road but the detective missed them near Shalimar Talkies. On 14th January, 1976 at about 4.15 p.m. the 1st respondent hired a taxi bearing No. MRR 3932 which at about 4.32 p.m. stopped at the corner of Khetwadi Back road and 7th Lane. The 2nd respondent got into the taxi, the taxi proceeded towards Charni Road Junction and then went to Chowpatty and stopped in front of Paramount Restaurant. The couple went into the cabin on the first floor at about 4.40 p.m. They came out at about 5.20 p.m. and thereafter the photographs were taken. A taxi was hired in which the couple were seen sitting very close to each other. The taxi came to the Mercantile Bank near High Court, the 1st respondent got down and the taxi entered the High Court compound. The 2nd respondent paid the bill and then followed the 1st respondent in the High Court but remained only in the verandah on the ground floor of the High Court. The 1st respondent came down. Both the respondent No. 1 and respondent No. 2 took a taxi. The 1st respondent got down on the Khetwadi Main Road and walked to her residence. The 2nd respondent went away in the taxi. On 15th January, 1976, at about 3.18 p.m. the 1st respondent went to the Roxy Theatre and found that the tickets were not available and waited for some one. The 2nd respondent came, both of them hired a taxi, went to Swastik Theatre, found that the tickets were sold out, hired another taxi, went to Shabnam Restaurant near Minerva Theatre and entered a family room. A photograph was taken showing them near Shabnam Restaurant. They entered the restaurant at about 3.43 p.m. and came out at about 5.10 p.m. More photographs were taken. They took a taxi bearing No. MRR 3376. The 2nd respondents was observed putting his arms around the 1st respondent and talking intimately. Several photographs were taken. The 1st respondent then get out of the taxi at about 4.20 p.m. did some shopping and went home. On 16th January, 1976, the respondents Nos. 1 and 2 again met at a bus stop near Messrs. A.B. Mistry & Co., a taxi bearing No. MRP 8964 was hired and the couple got down near Oriental Restaurant, Gowalia Tank entered a cabin on the first Floor, the detective entered the next cabin and from the mirror which was fixed outside the cabin on the roof observed the respondents Nos. 1 and 2 kissing each other and also observed

the 2nd respondent holding breasts of the 1st respondent. The detective went out of the cabin once or twice and saw both the respondent sitting very close and indulging in the aforesaid acts. They were inside the cabin from about 5 to 6.30 p.m. After coming out, a taxi bearing No. MRB 1759 was hired, the two respondents were sitting in the rear and the 2nd respondent was observed putting his arms around the 1st respondent. The 1st respondent was dropped near her residence. On 24th January, 1970, the 1st respondent went by a taxi to the corner of 7th Khetwadi Lane, where the 2nd respondents entered the taxi and again went to the said Oriental Restaurant, where similar events took place as earlier and were observed by the detective through the mirror on the roof. On this occasion the couple had been there between 5.35 p.m. and 6.50 p.m. and they returned by a taxi. On 29th January, 1976, the 1st respondent took a taxi near her residence and in the same way as earlier picked up the 2nd respondent and both of them went to Sangam Vegetarian Restaurant at Marine Drive and entered the same. The petitioner was informed about this and came there. The said respondents rushed out of the restaurant and there was a scuffle, they were taken to the Police Station and complaints were lodged.

8. As regards the 3rd respondent, the report is that on 17-1-1976, at about 5.42 p.m. the respondent No. 1 was seen entering the office of the 3rd respondent. They came out of the building at about 5.52 p.m. and entered Moonlight Hotel at 5.53 p.m. They went to the 3rd floor. The detective got held of a woman of easy virtue from nearby and followed them in the hotel. 1st and the 3rd respondents were supposed to have been registered as Mr. & Mrs. Shah. The detective registered himself in the register. The detective came out soon thereafter and the respondents Nos. 1 and 3 came out at about 6.55 p.m. The report does not mention any photographs having been taken, but three photographs are produced, alleged to have been taken at the same time, that is at about 5.53 p.m.

9. The only evidence that the petitioner is able to produced in support of his allegations is that of the said detective and regarding the event of 29th of January, partly of himself. If this was the only evidence and the case of the respondents was only that of denials, in view of the fact that the evidence of the detective regarding the event at Moonlight Hotel not being very reliable, it would have been difficult for us to rely on the evidence of this detective and giving any finding in favour of the petitioner. However, fortunately for the petitioner, the evidence of the respondents Nos. 1 and 2, partially supports that of the detective and so the evidence of the detective will have to be partly believed. Coupled with the improbability of what the respondents Nos. 1 and 2 say being true, the evidence of the detective will have to be believed when it finds some support from the evidence of the said respondents and the photographs.

10. In as much as the learned trial Judge has completely disbelieved the detective on his evidence regarding respondents Nos. 1 and 3 being found at Moonlight Hotel and with I agree, I will deal first with the allegations of adultery between the respondents Nos. 1 and 3. The respondent No. 3 is an Income-tax Practitioner. It is the admitted position that the 1st respondent had visited the office of the 3rd respondent twice; once with a note from her Advocate Mr. J.K. Parikh, for the purpose of requesting the 3rd respondent to get unofficial copies of the documents from the income-tax department relating to the income of the petitioner and on second occasion with a view to collect those papers. As per their evidence this happened in 1973. Now there is no case that this detective was following the 1st respondent in the year 1973, therefore, if they had met only in 1973 it is not possible that the detective would have known about the existence of the 3rd respondent or about the 1st respondent meeting the 3rd respondent. The report however that he observed the 1st respondent going to the office of the 3rd respondent and after the event of the Moonlight Hotel, he further reports that he followed the 3rd respondent to Kamla Sadan, 255 Gymkhana Road, which appears to be near Matunga. That is the very place where the 3rd respondent resides. If the 1st respondent had not met the 3rd respondent on 17th January, 1976, it is not possible to believe that the detective could have make a report of the type that he has done. No doubt, as I will point out later on, the observations in the reports and the evidence give leaves much to be desired, leading me to discard much of the evidence of the detective. It cannot, however, be denied that he had follow the respondent No. 1 and did observe that she met the 3rd respondent. It is believable that the detective has given some imaginary incident based on the truth of the 1st

respondent meeting the 3rd respondent but it is difficult to believe that he was made a report of the meeting between the 1st respondent and the 3rd respondent, without having seen them together. Unless the detective had seen the 1st respondent entering the office of the 3rd respondent it is not possible that he could have made the report that he did, about the incident of 17th January, 1976. I, therefore, believe the evidence of the detective when he says that he saw the 1st respondent entering the office of the 3rd respondent. However, as regards his having seen them entering Moonlight Hotel and making use of a room therein, I am not accepting his evidence for several reasons. It is not possible to believe that the photographs which he produced as having been taken at the time when the respondents Nos. 1 and 3 went to the Moonlight Hotel, could have been taken at that time. The photographs are alleged to have been taken at about 5.53 p.m. and I find that the sun set took place within about half an hour thereafter. It is not possible that so much light could have been there as is seen in the photographs at 5.30 p.m. or 6 p.m. nor is it possible to believe from the angle of the light that the photographs were taken in the late evening. The photographs are, therefore, obviously taken at some other time with a view to bolster up his story of having seen the respondents Nos. 1 and 3 entering Moonlight Hotel. This attempt to bolster up the story destroys the veracity of his evidence regarding his having seen the said respondent entering the said Hotel. Apart from this the petitioner has got produced entries in the register of the hotel on that day. The entries show that Mr. & Mrs. Shah are supposed to have entered the said hotel at about 12 noon, while the detective entered the hotel at about 3 p.m. I do not for a moment say that the timings of arrival as mentioned in the hotel registrar are absolutely reliable, particularly, as a hotel, if of illrepute, is bound to enter the timings in such a way as to hide the real purpose for which the hotel is being used. However, the time of 3 'O' Clock shown is the detective entering the hotel co-includes with the angle of light and the available light as seen in the photographs. The evidence of the detective therefore, as regards the event of Moonlight Hotel is to be rejected. The suspicion, however, still remains about the purpose of the meeting between the 1st and the 3rd respondents on 17th January, 1976. No presumptions to be drawn of any adulterous relationship between the two. I may point however that the evidence of the 3rd respondent as well as of the 1st respondent regarding this event leaves much to be desired and is not at a satisfactory.

11. As regards the meeting between the respondents Nos. 1 and 2 it is alleged by them that they had met on three occasions; on one occasion at Sangamkala Saree Centre, at another occasion at Venilal Saree Shop and on third occasion at Harkisondas Hospital. The Shabnam Restaurant which the detective alleges was visited by the couple is situated nearabout Sangam Kala Saree Centre and, therefore, it can be presumed that the detective was following this couple and did see them in the area where the Shabnam Restaurant is situated. The photographs produced by him also show that the couple was found in the said area.

12. Second incident is about the couple having been found in the Paramount Restaurant. It is an admitted position that the said restaurant and the Venilal Saree Shop are in the locality. Actually, they are on the same footpath; that is the footpath opposite the sea side at Chowpatty and if one walks from Venilal Saree Shop towards the Nariman Point side, one will pass the paramount Restaurant. Therefore, the detective's evidence is to be believed that he saw the said respondent together in the said locality. He has also produced certain photographs which show respondents Nos. 1 and 2 together near Paramount Restaurant. These photographs establish that at one time or the other these two respondents were seen near about Shabnam Restaurant as well as Paramount Restaurant. However, both the respondents deny not only having ever entered the said restaurants but also having been anywhere near them. Moreover, the effect of their evidence is that, if they are to be believed, they could never have been seen anywhere near either of the said two restaurants. Therefore, this denial, which is falsified by the photographs coupled with the fact that admittedly they were in the same locality must mean that the evidence of the detective is to be believed when he says that he had seen them entering these two restaurants. It is the further evidence of the respondents Nos. 1 and 2 that they had again met at Harkisondas Hospital. The report of the detective does not show that he had observed them at Harkisondas Hospital. According to the respondents Nos. 1 and 2 they had met thrice, apart from the meeting at Shabnam Restaurant, and out of that, two meetings are admittedly in the area where the detective has observed them as stated above. The detective's evidence regarding atleast two meetings between the

respondents Nos. 1 and 2 will, therefore, have to be read in the light of this respondents Nos. 1 and 2.

13. The report of the detective has to be accepted with caution and unless there is some corroboration, it is hazardous to accept the evidence of such a paid agency in toto. However, corroboration can be either by the document such as photographs or by the evidence of the respondents themselves. Not believing respondents on certain aspect of the matter can also in certain circumstances furnish corroboration for the evidence of such an agent. It is with a view to ascertain to what extent the evidence of respondents Nos. 1 and 2 can be accepted, that I will have to judge the evidence of the detective, and therefore, I must consider the evidence of the respondents Nos. 1 and 2 its effect.

14. It is the admitted position that respondents Nos. 1 and 2 are neither related nor close friends. It is not the case that respondent No. 2 was a close family friend. It will be more apt to describe the respondent No. 2 as an acquaintance rather than a friend. In these circumstances, the meeting between respondent No. 1 and respondent No. 2 require cogent explanation by them, especially, when the respondents Nos. 1 and 2 had though met and seen each other, they had not talked to each other till 1973 as per the evidence of respondent No. 2. The story in short put up by respondent Nos. 1 and 2 is as follows :

(a) The respondent No. 2 who is a brother-in-law of B.C. Joshi, a sales-tax practitioner came to Bombay from Ahmadabad sometime in the year 1964. He came to Bombay alone and stayed with his brother B.C. Joshi at Utkarsh, C.P. Tank, for about 6 months. At that time on one occasion, the appellant met the respondent No. 2 at the residence of B.C. Joshi. On another later occasion appellant and respondent No. 1 both visited B.C. Joshi when the appellant introduced the respondent No. 1 to Mr. & Mrs. B.C. Joshi as also to the respondent No. 2. From 1964, till 1966, the appellant used to go to the residence of Mr. Joshi almost every Friday to play cards in the night. Occasionally the 1st respondent also used to accompany the appellant. It is at this cards sessions that she also came to know the wife of the respondent No. 2. The card sessions were discontinued after 1966. However, according to the 2nd respondent, he continued to visit his brother on weekends and on occasions met the 1st respondent there till 1967. According to the respondent No. 1 she continued to meet the 2nd respondent till 1969. As against this, the petitioner has completely denied having ever met the 2nd respondent and he also denied that he used to play cards at the residence of Mr. B.C. Joshi. He has further denied that he is fond of playing cards and averred that the rare occasions on which he played cards, he did so only at his residence, with his family.

(b) The brother of the 1st respondent had come to Bombay, according to the 1st respondent after 1969 and according to the 2nd respondent sometime in the year 1966/67. He had put up at Andheri. Accidentally, the 2nd respondent and the 1st respondent met each other on the road near Sika Nagar when the 1st respondent requested the 2nd respondent to take her brother with him to Andheri, since both were going to the same place. It is in these circumstances that her brother Jitendra was introduced to the 2nd respondent in the year 1966/67 or 69. Thereafter, the first petition came to be filed by the appellant. The 1st respondent had engaged an Advocate and was being advised by the Advocate and counsel. However, she was taking the help of her brother-in-law one Subanbhai. He died in June 1973. Jitendra had come to Bombay at that time. Jitendra was worried as to what will happen to the 1st respondent as because of the death of Subanbhai there will be nobody to advise her in the litigation. He, therefore, is alleged to have suggested that the 1st respondent should take the help of the 2nd respondent. In or about June 1973, Jitendra telephoned to 2nd respondent and asked him to meet him at Flora Fountain without telling him why. Admittedly, they had met earlier only once and that too casually and neither the 1st respondent nor Jitendra had any contact with the 2nd respondent thereafter for about 6 or 4 years depending on whether the 1st respondent or the 2nd respondent is to be believed. It is admitted that the 1st respondent had close relatives in Bombay, such as two brothers, a sister and her husband, i.e. Subanbhai's grown up children, another sister Jyoti staying at Ghatkopar and her own grown up children with whom according to her, her relations were good and they did not like the attitude of the petitioner and had sympathy for her. Admittedly, her relations with them were good. She has been in Bombay since 1943 and she is bound to have some close friends also. It is rather strange that out of all the persons who were available and who were close to her, she and her brother

Jitendra decides upon a comparative stranger, no doubt a law graduate, but not a practising lawyer, to advise her in such personal dispute as divorce on the ground of adultery. This she did inspite of the fact that, to her knowledge, her husband, the appellant, has since long entertained suspicions about her character and according to her was prone to jump to conclusion if she was found with stranger. It is again surprising that a person who had not met her for a number of years and had met her brother only once and that too several years back unquestioningly agreed to come to Flora Fountain without knowing the purpose of the visit. It is also the evidence of the 1st respondent that after the death of Subanbhai, she had on occasions, taken advice of one Arunbhai, her another brother-in-law (cousin's husband) who is an Advocate. In these circumstances without any further corroboration and acceptable explanation, it is difficult to accept the evidence of the respondents as to why if at all, the 2nd respondent was contacted in the year 1973 and why he readily agreed to help her. What is supposed to have happened after the meeting of Flora Fountain also is rather peculiar. After they met at Fountain, the 2nd respondent, attended a meeting in the chambers of Mr. S.T. Tijoriwala, Counsel. For the first time he was given a copy of the petitioner there, he glanced through the petition and returned the petition back, he did not participate in the meeting, did not discuss anything with the petitioner or Mr. Tijoriwala and quietly went back. Thereafter, the written statement is filed in September 1974 by the 1st respondent without any consultation with the 2nd respondent. Between this meeting and 2nd January, 1976, there is no attempt to contact each other by either the 1st respondent or the 2nd respondent. If help was urgently required, this dump attendance at the meeting and their separating without any discussion and filing of written statement without any contact with the 2nd respondent inspite of the avowed purpose of contacting him to get his help and guidance in defending the petition makes the whole story unbelievable. Even if he was stranger in the matter but if he was to take interest in the matter, the 1st respondent ought to have found it necessary to contact him earlier and would not have sat quietly till 1976.

(c) The next stage is that the earlier petition was expected to reach hearing in February 1976. According to the 1st respondent's evidence-in-chief on 2nd January, 1976, she had visited her daughter at Santa Cruz and that it is there that the detective might have seen her entering Vithalnagar Building at Santa Cruz. She says that after the death of her brother-in-law Sumanbhai, she had no one else to advice her an so she spoke to Manglaben who referred her to the 2nd respondent. She does not mentions when this happened. She says that thereafter she spoke to the 2nd respondent to help her understand the proceedings which were in English. She met him at the house of Manglaben. He was surprised at her request but thereafter agreed to explain to her proceedings which were in English. She says that she used to requested him to meet her from time to time in this connection. It is difficult to understand why the respondent No. 2 should express surprise at this request, particularly, when in or about June 1973, he had readily agreed to help the respondent No. 1. In her cross-examination she says that after the death of Sumanbhai, she was assisted sometime by her cousin's husband. Arunbhai and sometime by the 2nd respondent. She says that she had to take advice of others because she did not know English and was unable to understand the proceedings which were in English. She admits that she had engaged Advocates and had also consulted counsel. She however, explains that sometime she could not understand the advice given to her by her Advocates and sometime she could not explain to they whatever was required to be explained. Sometime they used to go too fast for her to understand. She says that sometimes she could not follow whatsoever the Advocates told her, though all of them used to speak in Gujarati. She says that this she could not follow because she was forgetful. She used to tell her Advocates about this when they explained to her all over again but she again forgets. She says that sometime she even forgets the date of her marriage. She never requested the advocates to allow her to write down whatever they wanted. She, however, admits that the petition was explained to her and she had filed the written statement which was translated to her in Gujarati by the official translator. It is difficult to follow her explanation of not understanding the proceedings and therefore, wanting to take the did of the 2nd respondent particularly, when admittedly she had taken the help of her cousin's husband Arunbhai on more than one occasions. She does not explains why she discontinued to take the help of Arunbhai.

(d) As regards the meeting at the residence of Manglaben i.e. Mrs. B.C. Joshi, the evidence of the said two respondents make interesting reading. The 1st respondent in her evidence in examination-in-chief says that

because the proceedings were in English she was not able to understand the same and in that connection she met the 2nd respondent so that he could explain to her everything in connection with the proceedings. Formerly she used to consult her own sister's husband, but after his death, since she had no one else, she spoke to Manglaben who referred her to the correspondent No. 1 in that behalf. This, she thought would be in order. She spoke to the 2nd respondent herself to help her to understand the proceedings which were in English. She met him at the house of Manglaben. He was surprised to hear her request but thereafter he agreed to explain to her the proceedings. In her examination-in-chief, there is no mention at all about her seeking help from the 2nd respondent prior to the meeting at Manglaben's residence. There is no reference to her brother requesting the 2nd respondent to help her in 1973 or of the 2nd respondent going along with her to meet either Mr. Tijoriwala or Mr. J.K. Parikh. The 2nd respondent in his examination-in-chief says that on 2nd or 3rd January, 1976, he had gone to the residence of Mr. B.C. Joshi at about 3.30 p.m. The 1st respondent was also present there at that time. She had talk with the wife of B.C. Joshi about the petition which was typed in English. Thereupon, the wife of B.C. Joshi told the 1st respondent to speak to the 2nd respondent in that connection. She told him that she was finding it difficult to understand the contents of the petition which had been shown to him earlier in the year 1973 in the end of June by Jitendra and 1st respondent. He was surprised to hear from her that she wanted him to explain the contents of the petition to her. She told him that her Advocate Mr. J.K. Parikh was at that time very busy and that he had explained to her the contents of the petition in Gujarati but in short and brief. She wanted that he the 2nd respondent, should explain the same to her in full and in detail. She wanted to know from him as to how her Advocate would defend her, and therefore, she wanted to know the contents of the petition in full. He told her that he had no time for that but when she told him that the petition was coming up for hearing in the following month and that if somebody did not guide her she would be very much worried, he agreed to explain to her in full the contents of the petition. He has latter on stated again in examination-in-chief that but for the request from Mrs. B.C. Joshi on 2nd or 3rd January, 1976, he might not have met the 1st respondent or cared for her what he states as having been done for her. In his cross examination, he has stated that when he met he respondent No. 1 at the place of Mrs. Joshi, he was told to explain the contents of the petition to the 1st respondents in short and brief. The 1st respondent had told him that Mr. J.K. Parikh was very busy and he had no time to explain the contents of the petition to her. There is a clear contradiction between what he has said in his examination-in-chief and in his cross examination. The contradiction is such as to make the incident of alleged meeting at the residence of Mrs. Joshi unbelievable. It is difficult to believe that Mrs. Joshi had at all requested him to help the 1st respondent, in view of the conflict in the evidence. Another reason which makes it difficult to believe his evidence is that admittedly he did not tell Mrs. Joshi that he had already advised the 1st respondent in the case. If the meeting had taken place at Joshi's residence as alleged, the first reaction would have been to tell her that he had already been advising the 1st respondent. It also cannot be believed that if such a meeting had taken place he would have expressed surprise at the request made, since a similar request had already been made to him in 1973 and to which he had readily agreed as stated earlier. Again with the Advocate and counsel engaged, it was hardly necessary to have a third party to explain the petition in short and in brief or to take his advice as to how the advocate on record is going to defend the matter. The whole incident of 2nd or 3rd January, 1976 appears to be imaginary.

15. Moreover it is admitted that the relationship between the 2nd respondent and B.C. Joshi and her sister in law were good. It is admitted that other persons were also present when the cards were played. This playing or cards is completely and vehemently denied by the petitioner. Nothing was easier for the respondents than to call as witnesses Mr. or Mrs. B.C. Joshi to prove that there were card sessions at their residence and that the petitioner used to attend the same, and, therefore, knew the 2nd respondent well. Mrs. Joshi also could have deposed to what happened on 2nd or 3rd January, 1976 and thereby land support to this otherwise unbelievable episode. I must, therefore, draw an adverse inference that if Mrs. B.C. Joshi was called, she would have given against the respondents, and, therefore, she was not called. Other friends also were not called for the same reason.

16. I will now consider to what extent the evidence as to what happened prior to 2nd January, 1976 can be

believed. I find that the evidence regarding this is quite conflicting as will appear from the following circumstances. According to 1st respondent she met the 2nd respondent not only between 1964 and 1969, but also between 1969 and 2nd January, 1976. She says that after 1969, she might have seen the 2nd respondent on the road. On one occasion she had requested him to take her brother to Andheri and in that connection the 2nd respondent and his wife had gone to her residence. Thereafter also she had met the 2nd respondent. He had visited her residence with his wife on some occasions. The 2nd respondent in his evidence says that after 1967 till January 1976 he had not met the 1st respondent at all. Then he changes and says that he had met the respondent No. 1 in June, 1973, when her brother had called him at the chambers of Mr. Tijoriwala. He then adds that there was a further meeting when he and the respondent No. 1 had met Mr. J.K. Parikh, Advocate and then affirms that he had not met the respondent No. 1 for a third time between 1967 and 1976. However, according to both the respondents Nos. 1 and 2, respondent No. 2 was invited to attend the marriage of the daughter of the appellant and the 1st respondent and which the 2nd respondent is supposed to have attended. He must have met the 1st respondent at that time, therefore, either his evidence that had not met the 1st respondent for the third time during this period is not correct or his evidence that he had attended the marriage of the daughter of the appellant and the 1st respondent is not correct. The appellant denies having invited the respondent No. 2 to attend the marriage of the his daughter and in my view, I must believe the appellant, when he says that the respondent No. 2 was not invited to the marriage.

17. The case put to the petitioner in his cross- examination on behalf of the 1st respondent is that the petitioner know that the 2nd respondent and his wife had long relation with the 1st respondent and that they were supporting her contention against the petitioner and it is for this reason that the petitioner had made allegations against the 2nd respondent and falsely implicated the 2nd respondent in the present case. I do not know on what basis this case was put to the petitioner. I do not find a single word in either the evidence of respondent Nos. 1 or 2 which can indicate that apart from the incident of 29th January, 1976, the appellant had any previous knowledge about the 2nd respondent and his wife supporting the 1st respondent. It is clear that therefore, there was no basis for putting this suggestion to the appellant. This will also indicate that prior to 1976, according to the respondents Nos. 1 and 2, respondent No. 2 and his wife were aware of the disputes and the nature thereof between the appellant and the 1st respondent and had taken sides, and will indicate more than one meeting between the respondent No. 1 and the respondent No. 2, if not also with the wife of the 2nd respondent. The only evidence is of about half an hour's visit to the chambers of Mr. Tijoriwala and of one meeting with Mr. J.K. Parikh, Advocate, at an unspecified date for an unspecified purpose. There is no indication as to how the appellant came to know about the alleged sympathies of the 2nd respondents and his wife. On the contrary, it is the case of 2nd respondent that he did not want to get involved in the personal matter of the 1st respondent and the appellant. This case put to the appellant on behalf of the 1st respondent and which is adopted on behalf of the 2nd respondent is completely contrary to the professed desire of the 2nd respondent not to get involved. This action makes it difficult to believe the evidence of the respondents that the 1st respondent allegedly contacted the 2nd respondent only for the purpose of understanding the petition.

18. According to the evidence of the 2nd respondent the reasons given by the 1st respondent for approaching the 2nd respondent for help was that she was finding it difficult to understand the contents of the petition and that her Advocate J.K. Parikh at that time was very busy and that J.K. Parikh had explained to her the contents of the petition in Gujarati in short and brief and that she wanted that he should explain to her the same fully and in detail. This is not only contrary to the evidence of the 1st respondent who says that she required the help to understand various things which she could not understand when her Advocate explained but also to the averment of the 2nd respondent himself in his cross-examination when he says that he was requested to explain only the contents of the petition and that too in short and in brief.

19. This brings me to the crucial meetings between 2nd or 3rd January, 1976 and 29th January, 1976. According to the evidence of the detective, during this period they had met on five occasions, viz.; 13th, 14th, 15th, 16th and 24th January, 1976. According to the evidence of the 2nd respondent, they had met only thrice.

First at Sangam Saree Centre, second time at the Venilal Saree Centre and on third occasion at Harikisondas Hospital. The evidence of the 1st respondent, though basically is that they met only thrice and has come out from her, that they had met not only at Saree Centre twice and on one occasion at Harikisondas Hospital but also had met on another occasion at Kothari Hospital, making it as four meetings. It is necessary to consider in detail, the respective evidence about two of the meetings, because in my view, if they cannot be believed on these meetings, the evidence of the detective, supported by photographs will have to be believed and the evidence of the detective about their meetings on these two days must be accepted because the only possible explanation for the photographs produced the detective showing them together near the two restaurants can be that they are prevaricating when they say that they met at Saree Centres and not at the restaurants.

20. The 1st respondent has not given any details as to how and when the meeting took place. The 2nd respondent has however given details in his evidence-in-chief. He says that he had received telephone calls between 5th January 1976 and 15th or 16th January, 1976 and had met on three occasions. On one occasion they had met at Sangam Kala Saree Centre. On the second occasion at Venilal Saree Centre Chowpatty and on the third occasion at Harkisondas Hospital. At the Hospital they met about 4.30 p.m. and at the two shops in the afternoon for about 10 to 12 minutes but she did not remember the time when they met. On these three occasions she was not satisfied with the explanation of the contents given by the 2nd respondent and, therefore, she requested him to give a summary translation in Gujarati of the contents of the petition. According to him the first meeting was at Sangam Saree Centre, but he did not remember the date or the time but remember that it was in the afternoon. The second meeting was at Venilal Saree Centre, again he does not remember the date or the time. The third meeting was at Harikisondas Hospital. He did not remember the date but it was at 4.30 p.m. On that day, he had an appointment at 5 p.m. at Bank of Baroda , Kalbadevi Road.

21. In his cross-examination, he says that after the aforesaid request by Mrs. Joshi, he received the first call from the 1st respondent who asked him to see her. He told her that he was willing to meet her at a place convenient to her and she suggested Sangam Kala Saree Centre. They were together for about 10 minutes. He came to Grant Road by train . During those 10 minutes the 1st respondent gave him copy of the petition, he glanced through the same, saw initial paragraphs and thereafter told her the substance in the petition in those initial paragraphs. He told her that it would take time to go through the rest of the petition and to explain it to her and, therefore, they should meet again. On that day he read the petition upto page 3 paragraph 5 and translated the contents of substance thereof. He did not translate to her paragraph by paragraph. There was a bench at Sangam Kala Saree Centre, they sent on the bench. He stopped at paragraph 5 because there was not more time left. He then says that he had not told the 1st respondent that he was in a position to spare only about 10 minutes. Although, he had only 10 minutes to spare, he did not mind meeting her for short time because he wanted to explain the things to the 1st respondent piecemeal. He says that thereafter he had an appointment at the Factory Inspection Office, Tardeo and that is why he gave her appointment near Grant Road Railway Station. According to him the locality was suggested by him but the exact place was given by her. He says that the appointment must have been at about 4.30 p.m. He remembered the exact time of the telephone viz; it was received at about 12.00 noon, and he left his office at 3 p.m. and that the meeting of Tardeo got over at 5 p.m. If one compares this with the earlier evidence that he did not remember the date or the time. It is difficult to understand how he suddenly remembered all these details as to the time when he received the telephone, the time when he left the office, the time of appointment and the time of the meeting with the Factory Inspection Officer.

22. Later on he says that when he left she continued to remain in the Saree Centre. The evidence, therefore, is clearly to the effect that he met the 1st respondent at the Saree Centre and left her at the Saree Centre. That means they had not walked together in the locality at any time. Now there is a road junction in that locality. One road going South North i.e. Lamington Road and another perpendicular to Lamington Road, which goes from Grant Road to Falkland Road. Apsara Theatre is on the Lamington Road and when one goes further towards the north there is a road crossing Lamington Road which on the right hand side proceeds towards

Falkland Road. After crossing this road, further upon Lamington Road, comes Minerva Theatre on the opposite side from Apsara Theatre. Just before Minerva Theatre is Shabnam Restaurant. The saree shop is about 5 or 6 shops on the road leading to Falkland Road, therefore, it is not possible that the persons who meet and separate at the saree centre could be found together anywhere near Shabnam Restaurant. As against this the photographs taken by the detective which appears to have been taken from the Shabnam Restaurant show the respondents Nos. 1 and 2 near a car which is parked opposite Shabnam Restaurant on Lamington road. Then in the photographs can be seen the Metro Scooter House, which is the corner building on the Falkland Road and Lamington Road. The saree centre is about 5 or 6 shops inside that road and on the opposite side of Metro Scooter House. If the story of the 2nd respondent is to be believed, it is impossible that two respondents could have been found together on the Lamington road. Therefore, I must believe the detective when he says that he had seen them near Shabnam Restaurant. Once I disbelieve the 2nd respondent when he says that they met only at the sangam Saree Centre and that he left her alone it must be believed that they were moving about together at that time in that area and in the vicinity of Shabnam Restaurant and therefore, I must accept the evidence of the detective that they were inside the restaurant. Second reason why I must believe him is that it is difficult to understand that for so called purpose of understanding the petition for fighting the litigation which is obviously a serious matter, parties will meet in a saree centre and discuss their personal matter on a bench. They could have met at the residence of some of the friends if the purpose was legitimate. The only other conclusion can be that they met each other in the restaurant and I, therefore accept the evidence of the detective that they were seen near the restaurant. However, the detective has not explained the reason why he has not taken their photographs showing them coming in or going out of the restaurant. To that extent his evidence loses its strength. Therefore, I conclude that respondents Nos. 1 and 2 were going about together and not for any legitimate purpose but I cannot draw any further inference for lack of sufficient evidence.

23. As regards the second occasion when they are supposed to have met at Venilal Saree Centre and when the detective says that he saw them at Paramount Restaurant similar position is obtained. As earlier stated Venilal Saree Centre is at Chowpatty Sea Face. After one takes a turn from Sendhurst Bridge towards Nariman Point, there is a small lane followed by a shop at which at present houses Messrs. Lords & Taylor and then comes Venilal Saree Centre. At a considerable distance from that place, that is after about 6 or 7 buildings, is this Paramount Restaurant. The evidence of the 2nd respondent is that the 1st respondent gave a telephone call at about 1 p.m. and told him that they could meet on that day in connection with the matter. He asked her where they could meet and she said that she was going to Venilal Saree Centre and he could go there. She fixed the appointment at 4.30 p.m. The 2nd respondent had his meals at 4 p.m. and went to Chaurm Road Railway Station and from there to Venilal Saree Centre. There were sofas and benches at Venilal Saree Centre and they set on the sofa. They were together for 10 to 12 minutes. He explained to her in substance the contents of paragraph 6 to 10 on that occasion. He wanted to go to his brother's place at Marine Lines, and therefore, he did not spend longer time with her. His visit to his brother was only a casual social visit. However, he wanted to explain the petition to her piecemeal, and therefore, did not devote further time in that behalf. He says that there was no particular urgency about his meeting his brother but that he wanted to explain this to her piecemeal so that she could remember as she did not make any notes. As long as he was present no shopping was done at the Venilal Saree Centre. He then proceeds to say that when he left she continued to remain at the Venilal Saree Centre. As against this the detective has produced photographs, which clearly show that both 1st respondent and the 2nd respondent were together near Paramount Restaurant at least on the occasion when the detective took these photographs. There is not much doubt that the photographs are near the Paramount Restaurant. One of the photographs, numbers X-1 shows the respondent No. 1 with her back to the entrance of the restaurant indicating that either she was standing there or she was coming out of the restaurant. It also shows a portion of the head of a person which appears to be of the 2nd respondent, though the face is not visible. If one compares this with the other photographs of the 2nd respondent, it is clear that the head seen is very similar to that of the 2nd respondent and it will be too much of a coincidence that at that very time another person with the similar head come along and was shown in the photograph. That the photograph is that of the 2nd respondent is supported by the photograph

marked X-2 (part of Ex-D only), which shows the 2nd respondent walking near a building adjoining the restaurant followed by another woman. This woman is clearly the same woman who is seen in Ex. X-1 near Paramount Restaurant, it is therefore clear that the photographs have been taken on the same day and at the same place showing the respondents Nos. 1 and 2 together. There is absolutely no explanation why they were found together on this day and the only conclusion that can be drawn is that what the detective says is correct and the evidence of respondent Nos. 1 and 2 is not believable. The only question that remains unanswered is whether the detective found them in the cabin or not and if so what they were doing in the cabin.

24. According to the detective's report there is no mention of their ever visiting this saree centre but he says after this meeting at Paramount Hotel they took a taxi and came to the High Court. The case put to the detective regarding the event of 14-1-1976, when this incident of Paramount Restaurant took place on behalf of the 1st respondent and which is adopted by the 2nd respondent's Advocate is that the particulars in the report as to what happened on this date between 4.30 p.m. and 5.15 p.m. are concocted and false except the fact that the respondent No. 1 and the co-respondent went in a taxi. Therefore, it is the case of the respondents Nos. 1 and 2 that they had gone in a taxi on that day. As against this, the evidence of the respondents Nos. 1 and 2 is that they met at the three places and they never sat in a taxi together on any of those occasions. Therefore, again the detective is to be believed when he says that they took a taxi from Paramount Restaurant. I must, therefore, believe that respondents Nos. 1 and 2 have done all this to hide something and are giving absolutely false evidence about their meeting at least on these two occasions. There is no reason to believe that their meeting was innocent when they have taken the trouble to give such false evidence. The incident of the hiring of the taxi comes twice, once at 4.32 p.m. and another at 5.22 p.m. At least one of these incidents of taking a taxi is admittedly correct and neither of them can be correct if the evidence of respondent No. 2 is to be believed. Looking to these circumstances, viz; that they had been found near Paramount Restaurant and they admittedly had hired a taxi, at least on one occasion, which is not possible if the 2nd respondent's version that they met directly at saree centres and he left her there is to be believed, and therefore, it must be believed that they had gone to Paramount Restaurant and are trying to hide this fact.

25. According to the respondents Nos. 1 and 2, the third meeting was at Harikisondas Hospital on an unspecified date. However, either that meeting did not take place or it took place on an occasion when the detective could not notice the same. It may be that the meeting which had allegedly taken place at Harikisondas Hospital was possible on 13th January, 1976, but this is a mere conjecture. The fact remains that admittedly third meeting did take place. Again it is difficult to believe that such a meeting would be held on a bench at the Hospital.

26. It is the evidence of the 1st respondent that whenever they met at a saree centre they sat down to talk whenever there was space, otherwise they kept standing. As per the evidence of the 1st respondent, they had met at the saree centres only twice. As per the evidence of the 2nd respondent on both the occasions they were sitting down to talk in one case on a bench and in the other on a sofa. This also clearly shows that the respondents Nos. 1 and 2 have not at all met at saree centres or have met more than twice otherwise, the question of standing and talking could not have arisen.

27. Another factor which makes the evidence of respondents Nos. 1 and 2 unbelievable, is the reason given as to why they had to meet in the saree shops and in hospital and discuss the matters on benches rather than meet at some congenial place, where personal matters can be more comfortably discussed in a quite atmosphere. It is admitted that the relations between the 1st respondent and her sister who was staying at Nepean Sea Road were good. Even the 1st respondent's own residence was available to this time B.C. Joshi had acquired two flats and one of the flats was being used only occasionally; even the guests were accommodated there. Admittedly, the relations between the 2nd respondent and B.C. Joshi and his wife were good. Actually, it is Mrs. B.C. Joshi who had requested the 2nd respondent to help the 1st respondent. That being so, it is unbelievable that they would have had to meet on benches of shops and hospitals rather than at the residence of the relatives. The explanation given by the respondent No. 2 for the meeting at the

residence of B.C. Joshi is that there were children in the family . It is then stated that Mrs. Joshi would not have liked them to meet there for an hour or so. The respondent No. 1 explained that they did not meet at the residence of B.C. Joshi because at house there were children and that there was a possibility of other persons visiting her house. At her house her son was there and there and there was a possibility of any guest dropping in. At the place of her sister also there was a possibility of children being in her house. The explanations given by the respondents Nos. 1 and 2 are not at all satisfactory. The children will be less of a nuisance than the benches in the crowded place like saree centres and the hospital. If the meetings were not to be clandestine meetings, the normal course would have been to meet at the residence of some common friends or personal friends of one of the respondents or their relatives. Admittedly one of the two flats of B.C. Joshi was being used only as an office and occasionally for guest from outside Bombay. If the evidence of the respondents Nos. 1 and 2 is to be believed Mrs. B.C. Joshi was sympathetic towards the 1st respondent and so she had requested the 2nd respondent to help her. Moreover, according to the evidence of the 2nd respondent, all the meeting which took place were short and so there was no question of using any place for an hour or so. This explanation for not meeting at somebody's residence, particularly, at one of the flats of B.C. Joshi, makes it difficult to believe that the meetings were innocent of casual. Knowing that the petitioner was out to obtain divorce on the ground of her bad character, it is surprising that the 1st respondent should decide to take advice of a mere acquaintance who had admittedly not spoken a word to her from 1964 till 1973, either when they were meeting at the time of playing cards or otherwise or even at or after the meeting with Mr. Tijoriwala in June 1973, and that too in such a manner that the suspicions of any person is likely to be aroused. There is no question that the 1st respondent was having an affair with the 2nd respondent and had given every justification to the petitioner to doubt her character. This is also supported by next incident at Sangam Restaurant.

27-A. The evidence of the 2nd respondent on this point is that on 29th January he received a phone call at about 3 or 3.30 p.m. from the 1st respondent requesting him to come. She wanted him to spare sometime for her because the matter was urgent. He, therefore, agreed and asked her to come near Parsi Gymkhana at 6 p.m. He arrived at 6 p.m. from the Factory Inspection Officer, at Tardeo. His idea was to sit on the open ground near Parsi Gymkhana but at the entrance near the petrol pump at the corner of Parsi Gymkhana ground, some cable work was going on and the entrance was dug up, he therefore, suggested that they should go to the 1st floor of Sangam Restaurant. He has stated that the digging was done at one corner and they could have entered the lawns from the other corner. He further says that there was a foot path between the Gymkhanas i.e. Parsi and other Gymkhanas and it is true that from those footpaths they could have gone to the lawns of Hindu Gymkhana or Islam Gymkhana or even Parsi Gymkhana, but they thought it fit go to Sangam Restaurant. It is he who had suggested and the meeting should take place at Parsi Gymkhana. He was at Tardeo at 5.30 p.m. and felt that 6 p.m. at Parsi Gymkhana would be convenient to him. It is difficult to understand how Parsi Gymkhana will be convenient place for a person who is coming from Tardeo. According to the evidence of the 1st respondent she had telephoned the 2nd respondent at about 3 or 3.30 p.m., when it was agreed that they would meet at about 6 p.m. They wanted to sit in the open compound near Parsi Gymkhana, but the same was dug up and therefore, they went to Sangam Restaurant. She says that the entire Parsi Gymkhana ground in front of Parsi Gymkhana. Islam Gymkhana or Hindu Gymkhana nor did she know that on the footpath on the opposite side of these Gymkhanas, on the Marine Drive, there are benches although she had lived in Bombay since 1943. She does not remember having noticed any benches on he Marine Drive from Chowpatty to Nariman point. They met near Parsi Gymkhana so that they could stay and have talk on the subject. Before that during the earlier meetings she could not fully understand whatever the respondent No. 2 did explained to her. She went to Parsi Gymkhana from her house in a taxi. According to their evidence they were comfortably meeting in saree centre. There is no explanation as to why they did not arrange their meeting again at a saree centre rather than at Parsi Gymkhana. This place could have been convenient for neither of the respondents. The meeting place, i.e. Sangam Restaurant, itself is sufficient to arouse anybody's suspicion. Then there is no satisfactory explanation for not sitting in the lawns and going to Sangam Restaurant. The evidence is only that a portion near the corner was dug up. It was not difficult at all to enter any of the lawns and if they wanted to sit in the lawns, there was no reason why they could not have

done so. This behaviour of the respondents Nos. 1 and 2 also do not show them in good light. The incident of the petitioner being contacted by the detective when called there and the scuffle is an admitted fact but not material for the purpose of deciding this matter.

28. The story about meeting to give her written translation also is not worthy of credit. First of all it is difficult to believe that such translation could have taken 11 to 12 days time, secondly this written translation is for the first time produced when the evidence was being led in the Court. Moreover, this translation was not referred to in the complaint lodged by the respondent No. 1 nor in the written statement of any of the two respondents nor in the list of documents annexed nor in the affidavit of documents. The only contemporaneous evidence is that of the petitioner who says that the 1st respondent told him when she was confronted at Sangam Restaurant that she was at that place so that the 2nd respondent could interpret to her in Gujarati the pleadings in the earlier petition. In the circumstances, it is quite possible that this translation has been subsequently got up to bolster up the case of meetings for explaining the petition.

29. In the circumstances I am convinced of the following facts :---

(a) that the respondents Nos. 1 and 2 were meeting frequently in a dubious manner and in suspicious circumstances and it is clear that the purpose of meeting was not innocent or what is alleged in the instant petition;

(b) that they were seen by the detective in the Shabnam and Paramount Restaurants and the story that they had met a saree centres or hospital is not worthy of any credence;

(c) that they were travelling together in taxis and were seen travelling in a taxi atleast once. Assertion by both of them to the contrary cannot be believed;

(d) that the visit of the 1st respondent atleast to the office of the 3rd respondent on 17th January, 1976, is proved and that, visit was for some unexplained purpose which is bound to arouse anybody's suspicion as to the purpose of the visit;

(e) that the 1st respondent carried on with her flirting inspite of two complaints in writing by the petitioner, to which there is no reply nor any explanation as to why replies were not given.

(f) It is clear that the 1st respondent did not care for the feelings of the petitioner and had at no time made any attempt to alloy such suspicions; on the contrary she continued to act in a manner which would fan the fire of suspicion.

30. Another thing which requires mentioning is the attack on the other family members of the petitioner. The instructions of the 2nd respondent to his Advocates to attack the petitioner's mental condition by referring to the family history was thoroughly unjustified. Before me, Mr. Vakharia for the 2nd respondent referred to the case put to the petitioner about the litigation between himself and his brother and about his father being of unsound mind and the case put that the suspicion of the petitioner were due to his mental debility inherited from his father. The Advocates have also raked up the family history about the brother of the petitioner by alleging that the brother of the petitioner and his wife had been living separately before their death: that one of the sons of his another brother had taken divorce twice; that two sons of another brother had taken divorce and that in those cases the wives had filed the petition. It is also raked up that another son of an uncle of the petitioner had left his wife and children. I do not think that this type of attack is at all justified and the cross examination on this line ought to have been stopped by the trial Court. The family history of the relatives does not and cannot reflect on the mental condition of the petitioner. When such questions were asked, the learned Judge ought to have enquired from the advocates for the respondents how they were relevant and as to whether they were going to lead any medical evidence on the subject that the father of the petitioner suffered from mental debility which could have been inherited by the petitioner and that the character of the other family members who were involved in divorces would also medically make the

petitioner prone to entertain unjustifiable suspicions. It is obvious from the fact that no such evidence was led, that the respondents did not at any time desire to lead any such evidence and the entire cross examination to say the least, is irresponsible and was conducted only to throw mud at and run down the petitioner and ought not to have been indulged into. The learned Advocate for the 1st respondent ought not to have indulged in such cross examination. Even the Advocate for the 2nd respondent after adopting the contention of the 1st respondent in this appeal insisted on relying on this part of the cross examination in spite of my request not to do so. This attitude of the advocate has to be strongly deprecated.

31. There is nothing in the established facts to show that the 1st respondent was guilty of adultery, though there is enough evidence to show that she was carrying on with the 2nd respondent. As regards the other incidents in the report regarding Oriental Restaurant, I am not prepared to accept them in the absence of any corroborative evidence. There are no photographs near that place, which the detective could have easily taken. Therefore, I deem it inadvisable to rely on this evidence, particularly, in view of the tendency on his part to bolster up the incidents or add imaginary incident.

32. This brings me to the question as to whether the conduct of the 1st respondent was such, as to have caused danger to life, limb or health bodily or mentally of the petitioner or as to give rise to reasonable apprehension of such danger.

33. Mr. Shah has relied on *Parihar v. Parihar*, , for the purpose of showing as to what constitutes mental cruelty. We are not concerned with the facts of this case. Various judgements are considered in the said judgement and observations made on the basis thereof. The relevant observations are as follows :

'19.... Cruelty is wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health bodily or mental as to give rise to reasonable apprehension of such a danger. It includes action or omission which injures the susceptibilities of the affected spouse and causes him or her mental agony which the sufferer alone can state, Buchnill, J., in *Morton v. Morton*, 1940 P.D. 187 at P. 193 was of the view that a man takes the women for his wife for better, for worse. He cannot establish cruelty merely because he finds life with her is impossible. He must prove that she has committed wilful and unjustifiable act inflicting pain and misery on him and causing him injury to health. In *Siddagangiah v. Smt. Lakshamna*, A.I.R. 1960 Mys. 115, it was held that it is not restricted to acts of physical violence and may extended behaviour which may cause pain and injury to the mind as well, and so renders the continuance in the matrimonial home an agonising ordeal. In *Smt. Puttal Devi v. Gopi Mandal* : AIR1963Pat93 it was observed that a husband or a wife may not Prima facie do anything directly against the other and apparently there may be good relations. Nonetheless, the behaviour may be such as to cause an extreme mental distress and consequent detriment to health. What acts will constitute mental agony will obviously depend upon the circumstances of each case. Several factors will have to be taken into account, such as, environmental status in society, education, cultural development, local customs, social condition, physical and mental condition of the parties etc. In *Dastane v. Dastane* : [1975]3SCR967 a decision handed down before the Act was amended in 1976, the Supreme Court held that the Court has to deal not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The threat by the wife to her husband that she will put an end to her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in news papers and the persistent abuse and insults hurled at the husband and his parents were held all of so grave an order as to imperil the husband's sense of personal safety, mental happiness, job satisfaction and reputation.....'

34. He then relied on *Rajender Singh Joan v. Tarawati* : AIR1980Delhi213 , wherein it is observed :

17. Cruelty means delight in or indifference to pain or misery in others.' It connotes acts which give unnecessary pain to others or which are savage or inhuman or merciless. As an adjective the word 'cruel' is often used to indicate the quality of the thing described. For example the sea and the fate are called 'cruel'. This means each is without mercy. The wife's conduct was one of indifference. She was self-centred. If she

appreciated but was indifferent to the husband's suffering, the cruelty was worse. If she intended to hurt it was worst of all. 'Conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference' Collins v. Collins, (1965) A.C. 644. It is necessary to enquire into motives and causes of the wife's impensitiveness to husband's pain and suffering? I think not Sir William Scott, that great Judge, in 1810 in the case of Holden v. Holden, 1810 (1) H Con 453, said, 'If bitter waters are flowing, it is not necessary to enquire from what sources they spring'.

35. Applying this test, it is clear that the 1st respondent is guilty of cruelty However, there is no evidence at all, not a single word in evidence that conduct of 1st respondent has caused any danger to the health of the petitioner to has given rise to any apprehension of such danger. Such of allegation is made in the petition but there is no evidence to the effect given in examination-in- chief. Mr. Shah has relied on cross-examination of petitioner in which he has stated that it is not true that he has neither suffered in health or reputation as was alleged. This denial in my view is no evidence to establish the danger or apprehension of danger to compel the petitioner to continue the marriage with the 1st respondent, it is unfortunate that the law being what it is, I have no objection but to dismiss the appeal. In my view, the respondent should not be allowed the costs of the petition, and I accordingly set-aside the order of costs passed by learned trial Judge against the petitioner.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com