

Subrata Kumar Banerjee Vs. Dipti Banerjee

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Court : Kolkata

Decided On : Jun-04-1973

Reported in : AIR1974Cal61,77CWN944

Judge : Laik, ;M.M. Dutt and ;Sen Gupta, JJ.

Acts : [Divorce Act, 1869](#) - Section 14; ;[Evidence Act, 1872](#) - Sections 3 and 29

Appeal No. : Divorce Suit No. 19 of 1967

Appellant : Subrata Kumar Banerjee

Respondent : Dipti Banerjee

Advocate for Def. : Sanjib Dutta and ;Neloo Biswas, Advs. for Respondent No. 1-
Wife, ;B.M. Shaw, Adv. and ;Party in person

Advocate for Pet/Ap. : Arun Prokash Sircar, Adv.

Judgement :

Sen Gupta, J.

1. This is a Reference under Section 17 of the Indian Divorce Act for confirmation of a decree nisi for dissolution of marriage between the petitioner Subrata Kumar Banerjee and his wife Dipti Banerjee. The husband filed the petition for dissolution against his wife on the allegation that she committed adultery with respondent No.

2. From the marriage certificate which has been produced in this case, it appears that the petitioner was married to the respondent No. 1 on the 9th of March, 1953 at the Duff Church, Calcutta, according to Christian rites. The marriage was consummated and as a result of the same, respondent No. 1 gave birth to three children. The first child of the marriage was a still born male child born on 4-2-54. The second child, a daughter Sudipta, was born on 17-1-55 and the last one the son Sudip, was born on 1-3-57.

2. Upon the evidence which has been believed by the Court below and which has not been controverted before us, the husband and the wife lived together for some years after their marriage and their last matrimonial home was at premises No. 144, Rashbehari Avenue, P. S. Tollygunge, within the jurisdiction of the District Judge, 24-Parganas. It is an admitted case that both the petitioner and his wife have been living in India since their birth and both of them are Indian Christians. Thus the District Judge, 24-Parganas had jurisdiction to entertain such a suit.

3. The petitioner's case is that they came to know co-respondent in June, 1960 while they went to Delhi and staying at Broadway Hotel, co-respondent went there in connection with his work of M/s. Jatia Industries; that they returned back to Calcutta by the same train and their acquaintance grew to an intimacy; that the petitioner went to Delhi on transfer and stayed there with his family till June, 1963; that the respondent had to stay at Delhi till December, 1963 as she was employed there, she was, however, persuaded to come to Calcutta in December, 1963.

4. The petitioner's further story is that they accidentally came to meet co-respondent in February, 1964 in a restaurant and their old friendship revived. The petitioner found Mr. Shaw the corespondent, to visit his house in his absence and he also noticed change in behaviour of his wife; sometimes his wife exposed herself in showing her abnormal attraction to the co-respondent. The petitioner raised objection to the said behaviour of his wife but it had no effect.

5. According to the petitioner he was very ill from 27th of April, 1964 suffering from stomach trouble. At that time while he was undergoing through a physical and mental agony the wife respondent disclosed that she required an immediate operation and as such she decided to take admission in the Harrington Nursing

Home. On being questioned she gave out that the entire arrangement had been made by the co-respondent Mr. Shaw and that he would bear all the expenses. Though the petitioner did not agree to that proposal she left home in the company of Mr. Shaw and was admitted in the said Nursing Home on 30-4-64. The wife had to undergo an operation and remained confined in the Nursing Home for about a month. The petitioner said that after his recovery, he went to the Nursing Home to enquire about his wife but he found himself an unwanted person there. On 2-6-64 to his utter surprise he was told by his wife that she was going to Bombay and not returning home as previously arranged. He was shocked to see this reckless behaviour of his wife and he was more shocked to know that she left Calcutta by plane with Mr. Shaw for Bombay where both of them stayed together. He got a trunk call from his wife informing him as to her arrival at Dum Dum Airport from Bombay with a request to attend. He did not go to Dum Dum Airport. The wife and Mr. Shaw without coming to their home at Calcutta, went to Gopalpore on 15-6-64.

6. The petitioner alleged that the wife committed matrimonial offence by committing adultery with Mr. Shaw during their stay at Bombay. On her return from Bombay and Gopalpur, she behaved fairly well and she confessed her guilt that she shared the same bed with Mr. Shaw while at Bombay and the said confession was recorded by her in the letter dated 28-6-64. After that she was condoned by the petitioner who was very eager to re-establish the matrimonial peace in the family. Even after that the petitioner found the wife to be incorrigible as she was found to have liaison with the co-respondent.

7. The petitioner next stated that in spite of his best endeavour to lead a peaceful marital life, she left his house and went to her mother on 29-3-65, and after staying there for sometime went to Simla at the instigation of the co-respondent. On returning back to Calcutta from Simla, she put up in various places, viz. Spences Hotel, Harrington Chamber, Harrington Lodge and Killnery Lodge from November, 1965 to November 1966. The costs for stay of the wife in those places were met by Mr. Shaw. The allegation of the petitioner is that both the respondent and co-respondent committed adultery in those hotels and lodges. Over again the wife was persuaded to come to her husband at Rashbehari Avenue on 6th November, 1966 and lived with the petitioner as husband and wife and the guilt of the wife

was condoned.

8. The petitioner further stated that in spite of his best endeavour he could not make his wife stay in his house. She left his protection with his children and came to reside at 737/B.P. Block, New Alipore. She had been living there financed by Mr. Shaw. The petitioner alleged that the respondent committed adultery with Mr. Shaw there too.

9. On the above allegations the petitioner states that the respondent being his wife committed adultery with the co-respondent at Bombay, at Harrington Mansion, Harrington Lodge, Killarney Lodge and at New Alipore. On the above allegations, the petitioner claimed a decree for dissolution of his marriage with the respondent and also for a decree for the sum of Rs. 50,000/- as damages against the co-respondent.

10. The suit has been contested by both the respondents. All the allegations made by the petitioner against both the respondents have been strenuously denied by them.

11. The wife-respondent has characterised her husband the petitioner as a man of wild temperament and of wicked nature attempting even to utilise the wife as a money-earning machine.

12. The respondent asserted that she had no amorous behaviour with corespondent at any time. They were known to each other being introduced by the petitioner. Co-respondent and his wife became family friends of the petitioner. Both the families exchanged their courtesy visits. The co-respondent as a family friend and at the request of the petitioner bore all the costs of Harrington Nursing Home when she had to undergo an immediate operation. The petitioner expressed his inability to meet the expenses as he was short of fund. Accordingly the respondent was taken to the Nursing Home by her mother accompanied by the co-respondent at the request of the petitioner and to his knowledge. All the expenses were met by Mr. Shaw on clear assurance given by the petitioner that the same would be repaid by him. The corespondent was going to Bombay and Gopalpur in connection with his official work. The petitioner suggested that the respondent

required some change and requested him to take her there for that purpose, promising to pay back all the expenses incurred on her account. The petitioner expressed his inability to go to Bombay and Gopalpur; firstly as it was not possible for him to remain out of Calcutta for so many days and secondly as it was a very expensive matter. As such he himself suggested that the respondent should accompany the co-resndent alone.

13. Due to unbearable torture of the petitioner, she had to leave the matrimonial home for safety and solace. Thus for sometimes, she lived in different hotels and lodges only being disgusted by the cruel and nasty behaviour of the petitioner. Even then the petitioner visited her with her children. Co-respondent being a friend of the petitioner, merely helped him by spending some money to meet the expenses of this respondent. All the sum spent by the co-respondent was advanced by way of accommodation loan The respondent described the petitioner as a man having greed for money. According to her the petitioner used to take pride that he owned his success to diverse unscrupulous methods including supply of women, wine, money to persons who were in a position to help him in getting the lifts. The respondent also stated that she was introduced to various undesirable persons in clubs, hotels and even in his house and that he also suggested that she should give company to some persons whom he would introduce to her and to win them over even at the cost of sharing bed with them if they so desired. She asserted that such a state of affairs was unbearable to her and to get rid of it, she even thought of making an end to the matrimonial relationship with him. Even under compulsion and physical torture she was compelled to raise loan from co-respondent pretending always to repay the same.

14. The respondent admits to have signed letters at the direction and under coercion of the petitioner, so those letters could not be used as her admission that she had some illicit affair with the corespondent.

15. As already stated co-respondent also denied all the allegations of the petitioner. According to him, he became their family friend. As a friend he merely helped the petitioner at the tune of his need and difficulties. He spent all the money to the tune of Rs. 25,000/- on getting a clear assurance from the petitioner,

that the same would be repaid. In fact he served a registered notice on 8-2-67 on the petitioner demanding the said sum. But the petitioner without caring to pay that amount, brought this Matrimonial Suit on 5-7-67 demanding a sum of Rs. 50,000/- by way of damages. Co-respondent asserts that he has been made a fool and that as a counterblast this suit has been filed by the petitioner.

16. The learned trial Court held that the respondent committed adultery with co-respondent at Bombay, Calcutta in several hotels and at New Alipore as alleged by the petitioner. Accordingly he passed a decree nisi for dissolution of marriage between the petitioner and the respondent. The claim for damages against the co-respondent has, however, been disallowed. The said decree is awaiting confirmation by this court under Section 17 of the Indian [Divorce Act, 1869](#).

17. Mr. Dutta learned Advocate represents the wife, respondent before us. Mr. Dutta has challenged the finding of the learned trial Court in its entirety. According to Mr. Dutta, the evidence on record would not justify any finding as to adultery between the respondent and co-respondent as alleged by the petitioner. We shall deal with this matter fully while we shall discuss the evidence adduced by the parties in this case. Mr. Dutta has also contended that the learned trial Judge has erred in holding that the act of adultery committed by the respondent and co-respondent at Bombay and at several hotels at Calcutta having been condoned, the same revived after the respondent began to lead a fast life and again having committed adultery with co-respondent at New Alipur. According to Mr. Dutta the learned trial Judge has put a wrong interpretation to the provision of Section 14 of the Indian [Divorce Act, 1869](#) (hereinafter referred to as the Act). In Section 14 under the heading 'condonation' it has been laid down that 'no adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed and continued'. The learned trial Judge in the instant case has held that the respondent withdrew herself from the company of the petitioner and did not allow the continuation of the conjugal co-habitation; that in consequence the past act of adultery which might have been condoned by the husband should be considered to have been revived and that a decree for dissolution of marriage on that score could be passed. Mr. Dutta has drawn our attention to this aspect of this case and has submitted that under the provisions of

the law the said interpretation of Section 14 of the Act, is not sustainable. We shall deal with these matters at the appropriate place.

18. Mr. Sarkar, learned Advocate for the petitioner on the other hand, has tried to support the judgment of the learned trial Court, Mr. Sarkar's contention is that the evidence on record has clearly justified the finding of the learned trial Court as to the commission of the adultery by the wife with the co-respondent at several places as alleged by the petitioner.

19. The co-respondent appeared in person and made his submission before this Court. He denied all the charges levelled against him. He has submitted that as a family friend he advanced money to the petitioner and his wife to accommodate at the time of their needs. When he found that the petitioner was not in the mood of repaying the money he served a notice on 7-2-67 on the petitioner demanding a sum of Rs. 25,000/-. According to the co-respondent the petitioner thereafter instituted this suit making a fantastic claim of Rs. 50,000/- by way of damages against him on false and frivolous charge to counteract his threatened suit.

20. Before we proceed further we may mention that the following facts were found by the learned trial Judge to be admitted. The same finding of the learned trial Judge has not been challenged before us. Those admitted facts as found by the learned trial Judge are as follows:--

(a) The petitioner and the respondent are Indian Christian and their marriage took place under Christian rites;

(b) They last resided together as husband and wife at 144A, Rashbehari Avenue. P.S. Tollygunge, 24-Parganas within the jurisdiction of this Court;

(c) The petitioner and his wife picked up acquaintance with co-respondent at Delhi sometime in the year 1963 and in course of time he became the family friend;

(d) From February, 1964 to 30th April, 1964 Mr. Shaw was on visiting terms with the petitioner and his wife. From 30th April, 1964 to 1st June, 1964 Mrs. Banerjee was an indoor patient at Harrington Nursing Home and underwent an operation. The entire costs of the Nursing Home including the medical charges were met by

Mr. Shaw;

(e) On the second of June, 1964 Mrs. Banerjee left for Bombay with Mr. Shaw, lived together there for about 10 days, came back together to Calcutta and on the same date left for Gopalpur;

(f) On 20th June, 1964 Mrs. Banerjee returned to her house at Rushbehari Avenue and lived with the petitioner as husband and wife upto 29th March, 1965;

(g) On 29th March, 1965 she again left the matrimonial home, went to Simla, stayed there for sometime and returned to Calcutta and then stayed in costly hotels till November, 1966. During her stay in the hotels the petitioner visited her on several occasions with a request to return to the matrimonial home;

(h) From 6th November, 1966 to 12th April, 1967 she again stayed in her matrimonial home and lived as husband and wife with the petitioner;

(i) On 13th April, 1967 she left for New Alipore with her children in the absence of the petitioner and is still living there;

(j) The co-respondent paid all the usual charges of the respondent during her stay in the hotels;

(k) The co-respondent served a notice of demand asking the petitioner to pay Rs. 25,000/- being the money he lent and advanced to the respondent and the petitioner.

21. The primary question for our consideration is whether the respondent committed adultery with the co-respondent at Bombay or at several hotels at Calcutta as well as at New Alipore as alleged by the petitioner. It may, however, be noted that 'adultery' has not been defined in the Act itself. The definition of adultery as given in Section 497 of the Indian Penal Code, is however, too narrow and the word 'adultery' as mentioned in the Act cannot be restricted to such a definition as given in the Indian Penal Code. The said point came up for decision in the case of *Olga Thelma Gomes v. Mark Gomes* reported in : AIR1959 Cal451, that is a decision of the Special Bench presided over by S. C. Lahiri, B. N.

Banerjee, A. N. Ray, JJ. Mr. Justice Banerjee in his judgment has held 'it is enough in order to be a matrimonial offence, that one of the parties to the sexual intercourse is a married person, if only one is married person it will be a single adultery, if both are married persons the matrimonial offence will also be adultery but in that case it will be a double adultery. The consequence of adultery be it a single or double will be the same in the Indian Divorce Act.' In the absence of any definition in the Act itself their Lordships referred to the meaning of the word 'adultery' as given in the English Dictionary, such as Strouds Judicial Dictionary and Tomlin Law Dictionary. Be that as it may in the instant case both the parties agree that in case the evidence justifies the finding that the respondent had sexual intercourse with the co-respondent at any place and point of time as alleged by the petitioner then it will be a clear case of adultery.

22. The petitioner has stated in his evidence and in the petition, the place where the respondent was alleged to have committed adultery with the co-respondent. To prove the case of the petitioner as many as seven persons have been examined. But curiously enough not a single person from Grand Hotel at Bombay has been called for to depose in this case. Mr. Sarkar has submitted that from the admitted fact the respondent and co-respondent had been to Bombay and lived in the same hotel, it should be legally inferred that they must have committed adultery. According to Mr. Sarkar the burden which initially lay on the shoulder of the petitioner to prove adultery, can be said to have been discharged from the fact that both the respondent and co-respondent lived together in the hotel.

23. The question as to the standard of proof which is required in such a Case has elaborately been dealt with by our learned brother Laik J. while delivering the judgment in the Full Bench presided over by P.B. Mukharji with C. N. Laik and R. N. Dutta, JJ. in the case of Mrs. Agnes Cecillia Gome (Gan-non) v. Lancelot Ashley Gome reported in : AIR1964 Cal28 . His Lordship held

'it is the duty of the Court to pronounce a decree in matrimonial causes only when it is satisfied, that the case has been proved beyond reasonable doubt as to the commission of a matrimonial offence. The evidence must be clear and satisfactory beyond mere balance of probabilities.'

It has also been laid down therein that in the case of adultery no higher proof of a fact is demanded than what is established beyond all reasonable doubts, but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case. It is also established principle of law that in the case like this no direct evidence is necessary as the same may not be available but circumstantial evidence must be sufficiently strong and conclusive to base a finding of adultery on the same. Mr. Sarkar has drawn our attention to the fact that the co-respondent had enough opportunity on getting the respondent at Bombay to commit adultery. It is, no' doubt, true that such a phase is relevant for the determination of the point at issue, still then the question remains whether that opportunity was availed of. In such a case the court will try to find out whether in addition to the opportunity, the parties had illicit affection, undue familiarity, guilty attachment between themselves. That is also the view which has been expressed by their Lordships in the abovementioned case reported in : AIR1964 Cal28 . What would be the standard of proof has been discussed by their Lordships in the case of E.J. White v. K.O. White reported in : [1958]1SCR1410 . Their Lordships observed that the rule as to the standard of proof laid down at page 138 by Lord Macdermott in the House of Lords in the case of Preston Jones, (1951) 1 All ER 124 should be followed by the Indian Courts under the provisions of Section 7 of the Act

24. We hold that in a case like this the duty is on the petitioner to prove that the offence of adultery was committed by the respondent and the proof which is required to establish the said offence should be beyond reasonable doubt. In a case where the factum of adultery is sought to be proved by circumstantial evidence, the evidence should be such as would be incompatible with the innocence of the parties charged. In the case where it is noticed that the parties had opportunity to commit such an offence it must also be shown by some cogent evidence that such opportunity was in fact availed of by the parties. Above all, the cumulative effect of the evidence on record should be such as to satisfy the conscience of the Court for coming to the conclusion that a matrimonial offence has been committed by a spouse. We may also note that in a case where matrimonial relationship is in question and future of the children involved very careful consideration should be made of the evidence to see whether the standard

of proof as required, have been met, keeping in view that the result of such a decision may change the social status of the parties and their dependants.

25. Mr. Dutta in this connection has drawn our attention to the fact that there is no evidence to show that the respondent and the co-respondent lived together in the same room in the hotel. Neither owner of the hotel nor any employee of the same has been examined to show that those offending parties lived together in the same room or at least to show that both of them were found together in the closed room. Mr. Sarkar in this connection has submitted that the co-respondent ought to have proved that they lived in the Grand Hotel at Bombay in separate rooms by producing vouchers which he must have received after payment. In this connection it should be remembered that non-production of those documents may go against the co-respondent but that has got no effect on the respondent, who has been charged in the instant case for adultery. To prove that charge against the respondent, the conduct of the co-respondent in this regard cannot go against the respondent to fill up the blank in the evidence which ought to have been produced by the petitioner. From the letter, Ext. 1 (g) dated 4-6-1964 written by the respondent to the petitioner it is seen that she engaged a nurse at Bombay for 24 hours to look after her. That is an innocent letter which must have been written by the wife to the husband informing the general condition of her health and the precaution she was taking. The learned trial Judge, however, interpreted the said letter as a letter written by a party while she must have been in a pleasure trip, being a preplanned one. It is unfortunate that the learned trial Judge came to that jumping conclusion without applying his mind to the circumstances under which she had to go to Bombay. The respondent had to undergo an operation in the Harrington Nursing Home. She remained there in the convalescent state of health for about a month. She was taken to the hospital within the full knowledge of the petitioner. She was accompanied by her mother. Mr. Shaw as a friend of the family had to bear the costs of the said operation on the clear promise by the petitioner to re-pay the same. She was discharged from the hospital on 2-6-1964. At that time Mr. Shaw was to go to Bombay and Gopalpur in connection with his job. The respondent was at that time in a very low state of health. Accordingly on the suggestion of the petitioner the respondent was taken to Bombay and Gopalpur for a change. Nothing abnormal is found in the same. It is hard to believe that a lady

after undergoing operation in a Nursing Home would preplan for a pleasure trip merely with the idea of having sexual intercourse with another person. It is too much to believe the said part of the story of the petitioner. Therefore, we hold that the letter, Exhibit 1 (g) was a simple letter written by the wife to the husband while she was taking rest and the change of climate. It has also transpired in evidence that the respondent had talk with the petitioner over telephones. He was told that the party would be going to Gopalpur. He was requested to come to Dum Dum Air Port on the date of their arrival while going to Gopalpur. It may, however, be noted that no allegation of adultery at Gopalpur has been made by the petitioner against the respondent.

26. Considering the facts and circumstances narrated above we do not think that the petitioner has been able to establish the fact that the respondent committed matrimonial offence by committing adultery with the co-respondent at Bombay.

27. Let us now consider the evidence on record to see whether the allegations of co-habitation between the respondent and co-respondent and thus committing matrimonial offence in the respective hotels at Harrington Chamber, Harrington Lodge and at Killnery Lodge, have been established. In the evidence it has also transpired that the petitioner and their children visited those hotels. In the normal condition the stay of the wife in those hotels at Calcutta leaving her matrimonial home may go against her. But the trend of events which took place between the husband and the wife is a lamentable one. The wife made serious allegations against the husband. She also went so far to say that the petitioner was a man of unscrupulous nature. He wanted to utilise the wife as a money earning machine. She protested and in lieu of that she was insulted. From the conduct of the parties it is crystal clear that the peace of the matrimonial home was at times shattered. The evidence has established that the wife had to go to Simla in connection with a job. Allegations were also made against Mr. Shaw that he was responsible to take her to Simla but curiously enough no attempt has been made by the petitioner to prove that part of the case. The statements in the petition, made by the husband exposed him thoroughly. He went so far as to say that even before marriage the respondent had illicit relation with one D. K. Ghosh. Again he made a wild allegation against the wife by saying that while she was at Delhi she had love

affairs with a driver. That shows the meanness of the husband. From this it is seen that at times there was dent in the peaceful life of the married couple. The result was that the wife had to take shelter elsewhere to have solace and comfort. Accordingly she had to come to Calcutta from Simla and she had to put up in those hotels. The conduct of the husband visiting those hotels with his children would unmistakably show that he even could not suspect anything wrong in the conduct of the wife and far less in her alleged involvement with the correspondent.

28. As already noted the plaintiff has examined as many as seven witnesses to prove his allegations against the wife and co-respondent. Curiously enough not a single person from those hotels has been examined nor any register from the same has been called for. Only in one document showing the payment of charges, reference to an extra bed that too for one day in the room of the respondent is noticed. It is, however, seen that the daughter sometimes lived with the mother in those hotels. It is, therefore, not unnatural that one extra bed could be provided in the room of the respondent. In the absence of any other evidence that fact itself will not justify to come to a conclusion that the said bed must have been rented for ulterior purpose to be used by the co-respondent for the purpose of committing adultery with the respondent. The evidence of P. W. 7 P. C. Ganguly, would show that he was a common friend of the parties trying to effect reconciliation between the husband and the wife. According to him he accompanied the petitioner to the Harrington Mansion (Chamber) for three days. That shows that the respondent was living there in the full knowledge of the petitioner and his friends. For the reasons stated we do not agree with the finding of the learned trial Judge that the respondent committed adultery with the correspondent in any of those hotels. Our attention has been drawn to a letter Exhibit 1 (f) dated 28th June 1964. Admittedly at that time the parties were in the matrimonial home at Calcutta. That is a letter alleged to have been written by the respondent after coming from Bombay. The learned Judge attached much importance to this letter. The scrutiny of the said letter would show otherwise. The language of the said letter would show that some one else must be responsible for drafting the same. The wife has stated in her evidence that the said language is not expected of her as she had no such education enabling her to write such a letter. She stated on oath before the Court that she was forced to write such letter by her husband. It is not a fact that the wife

for the first time challenged the said letter procured by coercion while deposing in the Court. As long back as on the 16th April, 1965 she wrote one letter to the petitioner marked Exhibit A-1 (4). Therein she stated that she was forced to write such a letter to help the petitioner to get a divorce. She also made serious allegation against the husband. According to respondent, the husband insisted on her to squeeze money from Mr. Shaw on one pretext or another.

29. In the background of the case, we are convinced that Exhibit 1 (f) was not a voluntary document but it was procured from the respondent under threat and coercion. Confession becomes only relevant when it is shown that it was voluntarily made and that the statement was true. In this case both the ingredients are wanting.

30. Now coming to the allegation against the wife of adultery alleged to have been committed by her with the co-respondent at New Alipore, we find no evidence in that respect. The evidence of the lady is that she was assaulted and that she had no other alternative but to leave the matrimonial home for her safety and the safety of her children. Accordingly she shifted to New Alipore where she has been accommodated by some friend. The petitioner's allegation of adultery is sought to be proved by the evidence of P. W. 2. He only stated that he found both the respondent and co-respondent in the small car something in April, 1967. He also found both of them standing in the balcony of their house. P. W. 3 is a maid servant meant to look after the children of the petitioner. She stated Mrs. Banerjee had been living at New Alipore at the time when she deposed in this case. According to her on 2/3 occasions she visited the house of the respondent at New Alipore and found Mr. Shaw there. P.W. 4 is a witness who wanted to show that he found Mr. Shaw for the first time in Harrington Nursing Home and thereafter at times he noticed Mr. Shaw and the respondent near New market. From his evidence the association of the respondent with co-respondent is sought to be proved. It should however, be remembered that P.W. 4 is a friend of the petitioner P.W. 5 is Sudip Banerjee, son of the petitioner. It is unfortunate that in this case the parties even employed their children to achieve their own ends. P.W. 5 is a very young boy reading in class V of the South Point. He was meant to say that Mr. Shaw rented the house at Alipore, but the truth came out. While cross-

examined he admitted that he was taught by his father to say what he said before the Court. That is all the evidence to show the association of the respondent with Mr. Shaw. Mr. Dutta has very rightly submitted that the above evidence of those witnesses were got up one. Those witnesses must have been tutored to speak falsely against the respondent. Some of them are chance witnesses. It is very risky to attach any credence to the evidence of witnesses of such a nature. The learned Judge, however, most hesitatingly came to the finding that the respondent also committed adultery at New Alipore.

31. Considering all the evidence on record and also the evidence adduced on behalf of the respondent i.e. D.W. 1 to D.W. 4 and also the evidence of Mr. Shaw we have got no hesitation to come to the conclusion that, that part of the incident alleged to have taken place at New Alipore, has not been proved.

32. We may refer here to a letter written by the petitioner to his wife which has been marked Exhibit 1-E therein Mr. Shaw has been described as a hon'ble man. It has also transpired in evidence that the brother of the petitioner was also living with him in the premises at Rashbehari Avenue and that he too was intimately known to the corespondent whom he approached for establishing him in life by providing him with a job.

33. From the evidence of D.W. 1 for respondent No. 2 Satadal Biswas it is seen that the respondent is a daughter of Late Prof. S. P. Biswas, Vice-Principal of the Scottish Church College. She stated that she accompanied respondent to the Nursing Home for her operation, and that the entire cost was borne by Mr. Shaw. She collected money from Mr. Shaw and paid the same to the Nursing Home, as per receipt Exhibit G-2. She also said that on the day when they left for the Nursing Home she found Mr. Shaw to pay the petitioner a sum of Rs. 100/-. We find no reason to disbelieve that lady. She is, undoubtedly an unfortunate mother eager to see that his daughter and son-in-law live in peace. It is also seen that the petitioner lost his job but being requested by her he was reinstated in the service by Birlas. The trial Court did not at all consider the evidence of the daughter of the spouse, Sudipta D.W. 3, though he considered the son's evidence, younger than his sister.

34. The learned trial Judge has taken objection for non-production of the bills of Bombay and Gopalpur hotel by the co-respondent. The evidence is that he paid money to the respondent for meeting those charges. Accordingly what she did is not known to him. All other papers, namely, bills and vouchers of the Nursing Home and other hotels have been produced.

35. From the above we find nothing wrong in the conduct of the co-respondent who, on the contrary, according to us, was exploited by the petitioner and was being squeezed of the money. The petitioner in order to achieve that end employed his wife and on the false pretext of re-paying the loan had taken the money to meet his own and his wife's expenses. Whatever Mr. Shaw did, he did it openly. He spent money to the knowledge of the petitioner and his other relations, who never raised any objection to the same. Mr. Shaw never paid the money secretly to win over respondent for some ulterior purpose.

36. To sum up our findings we hold that the petitioner has miserably failed to establish his charge of adultery against his wife at Bombay, at Calcutta or at New Alipore as alleged by him.

37. We have noticed that even the respondent in her exasperation due to torture of her husband wanted divorce and to make an end to their married life. But at the same time as a loving mother of the children she had to think thrice before resorting to such an action. The event which took place from the date of their marriage upto the time when the respondent left the matrimonial home and when she began to live separately at Alipore, would show the ups and downs in their life as well as the ruptures at times in their matrimonial relationship but still that lady had patience to bear the same with the hope that someday will come when they would live peacefully as partners in their conjugal life looking after the well being of their children. Mr. Dutta has said that the relationship between the couple is not yet such as it can be said to be irretrievable. Be that as it may, we still now expect that better day would come when the parties will live in peace looking after comforts of their children.

38. Mr. Dutta has further submitted that the adultery alleged to have been committed at Bombay and at Calcutta was admitted to have been condoned by the

petitioner. According to him the evidence of adultery at New Alipore is very slender the Judge also found difficulty to rely on the same. So after condonation of the previous acts of adultery, the petitioner could not show anything for which he could get the benefit of the theory of revival. According to Mr. Dutta, the respondent was assaulted and compelled to leave the matrimonial home as such the respondent was not responsible for non-resumption and non-continuance of conjugal co-habitation with the petitioner. Mr. Sarkar on the other hand, submitted that the respondent left the matrimonial home without any cogent reason, being instigated by Mr. Shaw as such the adultery which was committed by her at Bombay and at Calcutta, though the same was condoned by her husband, should be considered to have been revived. In this connection our attention has been drawn to a Bench decision of this Court in the case of *Mr. Constance Catherine Moreno v. Mrs. Hanny William Bunn Moreno* reported in AIR 1920 Cal 439 wherein it has been held by their Lordships.

'Condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse and if, after condonation, the offences are repeated, the right to make the condoned offence a ground for divorce revives, to constitute a revival of a condoned offence, the offending spouse need not be guilty of the same character of offences as those condoned, any misconduct is sufficient which indicates that the condonation was not accepted in good faith, and upon the reasonable conditions implied'. Mr. Dutta has, on the other hand, submitted that at the time when the said decision was made, the jurisdiction for Divorce Courts was that of ecclesiastical Courts. At the relevant time Matrimonial Causes Act, had already come into operation in England. Mr. Dutta has drawn our attention to Section 7 of the Act as a residuary section intended to provide for matters which by inadvertent or otherwise not expressly dealt with in the Act. The question of revival has not specifically been dealt with in any of the sections of the Act. According to Mr. Dutta, Section 14 is silent about the question of revival. The petitioner could only get advantage of the same by dint of the provisions as incorporated in Section 7 of the Act provided it is conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time acts and give reliefs. Mr. Dutta has pointed out to us that at the relevant time there was no such provision in the Divorce and Matrimonial Causes Act for revival of the condoned

adultery. Be that as it may, when we have clearly held that the petitioner failed to establish the allegation of adultery against the respondent at any time and at any place it is not necessary for us for the purpose of this case to enter into this question.

39. We still now feel that the relationship between the married couple cannot be said to be irretrievably broken down so that there could not be any chance of compromise. We hope that a peaceful matrimonial home will be reestablished in which husband and wife and their children would live together.

40. In the result, a decree nisi passed by the learned trial Judge cannot be confirmed. Keeping in view of the parties husband and wife we are not passing any order for the costs.

Laik, J.

I agree.

M.M. Dutt, J.

I agree.