

## Samraj Nadar Vs Abraham Nadachi

**Court:** Madras High Court

**Date of Decision:** Feb. 10, 1969

**Acts Referred:** Divorce Act, 1869 " Section 22, 32, 33

Hindu Marriage Act, 1955 " Section 9

Penal Code, 1860 (IPC) " Section 497

**Citation:** AIR 1970 Mad 434

**Hon'ble Judges:** Venkataraman, J

**Bench:** Single Bench

**Final Decision:** Dismissed

### Judgement

Venkataraman, J.

This is an appeal by a Christian husband against the order dated 3-2-1965 of the learned District Judge, Kanyakumari

dismissing his petition O. P. No. 41 of 1964 filed u/s 32 of the Indian Divorce Act, 1869, for restitution of conjugal rights.

The appellant and the

respondent Abraham Nadachi were married according to the Christian rites in 1956. The petition itself starts by saying that there was an

estrangement between the parties. As a result thereof, the wife filed M. C. No. 31 of 1961 before a Magistrate u/s 488 of the Criminal P.C. and

obtained an order for maintenance of Rs. 25/- per month. The date of this order appears to be 2-3-1962. The husband, for his part, filed O. P.

No. 44 of 1962 for restitution of conjugal rights in the Court of the District Judge Kanyakumari. The appellant however, did not press that petition

and an endorsement was made by him on 28-3-1963 to the following effect. "It is unnecessary to proceed with the petition." The wife and her

counsel made an endorsement "I agree". That petition was accordingly dismissed. (After discussing the evidence in Paras 2 to 17 his Lordship

proceeded).

18. It is thus abundantly clear that the specific case of the husband that his wife rejoined him on 25-2-1963, that the petition was dismissed on 28-

3-1963 because of that circumstance and that she left the house abruptly on 22-8-1963, is false. It is also clear that another woman by name Bhai

is living with him in his house. Learned counsel for the appellant, however, argues that even on these facts the appellant is entitled, as a matter of

right, to restitution of conjugal rights. The argument is that u/s 33 of the Indian Divorce Act nothing shall be pleaded in answer to a petition for

restitution of conjugal rights which would not be ground for a suit for judicial separation or for a decree of nullity of marriage Section 22 lays down

the grounds for judicial separation, namely, adultery, cruelty, or desertion without reasonable excuse for two years or upwards. It is urged that

these elements have not been proved. The grounds for nullity of marriage are set out in Sections 18 and 19 of the Act. But the facts proved would

not bring the case within those provisions.

19. The argument is, however, untenable, because in the first place, adultery on the part of the husband has been established, because it has been

proved that he has been living with Bhai and having continuous sexual intercourse with her. There is no proof that Bhai is a married woman. But,

for the purpose of the Indian Divorce Act, 1869, it is not necessary that Bhai should be a married woman in order to hold that the appellant is

guilty of adultery. The word "adultery" has not been defined in the Act, and, therefore, the ordinary dictionary meaning must be applied. In

Websters New English Dictionary. 1888, the following meaning is given:

Violation of marriage bed; voluntary sexual intercourse of a married person with one of the opposite sex, whether unmarried or married to

another; (the former case being technically designated single, the latter double adultery)."" The same meaning is given 10 Fowler's Concise Oxford

Dictionary

Voluntary sexual intercourse of married person with one of opposite sex married (double adultery) or not (single adultery):"" No doubt, u/s 497, I.

P.C. in order that a man can be guilty of adultery, the woman must be a married person. The actual definition of the offence runs thus:

Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the

consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be

punished with ""imprisonment of either description for a term which may extend to five years, or with fine or with both. In such case the wife shall

not be punishable as an abettor.

[Only one form of adultery has been made punishable by that section. It will be noted that under that provision a married woman is not guilty of

adultery even as an abettor. If there is consent or connivance of the husband, then there will be no offence of adultery. There is no reason why this

specialised definition of adultery should be extended to the interpretation of Section 32 of the Indian Divorce Act. It may be noted that under

that section the husband may obtain a decree of judicial separation on the ground of adultery committed by the wife, though as we have seen, u/s

497, I. P.C. the wife will not be guilty of the offence of adultery u/s 497, I. P.C. This itself shows that the narrow definition of adultery in Section

497, I. P.C. cannot be applied to the interpretation of the terms of Section 22 of the Indian "Divorce Act, 1869. Further, the principle underlying

the relief of judicial separation on the ground of adultery of the spouse, namely, violation of the marriage bed, makes it immaterial whether the

woman with whom the husband has sexual relationship is a married woman or not. The offence u/s 497, I. P.C. is against the husband with whose

wife another man has committed adultery. But wider considerations apply when a husband or wife seeks judicial separation or dissolution of the

marriage on the ground of adultery. In the latter case, it is the violation of the marriage tie which is relevant.

20. The above view has been taken by a Special Bench of three Judges of the Calcutta High Court in *Olga Thelma Gomes Vs. Mark Gomes*, .

There, the wife filed a petition for dissolution of her marriage with her husband (under Section 10 of the Indian Divorce Act, 1869) on the ground

that he was guilty of adultery coupled with cruelty, and adultery coupled with desertion, without reasonable excuse, for two years or more. The

trial Court accepted her case, passed a decree and made a reference u/s 17 to the High Court for confirmation of the decree. The learned Judges

accepted the findings. There was no difficulty so far as cruelty and desertion without reasonable cause were concerned. So far as adultery was

concerned, the evidence showed that the husband had been keeping another house where he was living with girls of bad repute. Actually on one

occasion when those premises were visited, a girl of bad repute was found lying on the bed with her body covered with a sheet upto the throat.

The learned Judges, therefore, accepted the case that the husband was living with women of questionable character. There was no proof that those

persons were married. But it was held that it was immaterial and that the husband was guilty of adultery for the purpose of the Indian Divorce Act.

It was pointed out that the narrower definition in Section 497, I. P.C., could not be applied to the Indian Divorce Act because the purposes of the

two enactments were entirely different. The learned Judges observed that u/s 7 of the Act the Court shall follow the principles and rules followed

by the Court for Divorce and Matrimonial Causes in England. They quoted the definitions from Halsbury's Laws of England, Murray's Oxford

Dictionary and the decision in *Abson v. Abson*, 1952 P 55 : (1952) 1 All ER 370. In Halsbury Volume 12, page "235 in paragraph 444 under the

heading "Meaning of adultery", it is stated:

For the purposes of relief in the matrimonial jurisdiction adultery means consensual sexual intercourse during the subsistence of the marriage

between one spouse and a person of the opposite sex not the other spouse.

It is not stated anywhere there that the other person should be married. . In Latley on Divorce 14th edition (1952) at page 74 it is stated:

In the Divorce Court, adultery means willing sexual intercourse between a husband or wife and one of the opposite sex while the marriage

subsists."" I have already quoted the definition in Murray's Oxford Dictionary. The Judges also quoted from Tomlins Law Dictionary:

The sin of incontinence between two married persons or if but one of the persons be married, it is nevertheless adultery, but in this last case it is

called single adultery or distinguish it from the other which is double"".

Stroud's Judicial Dictionary defines ""adultery"".

The offence of incontinence by married persons"".

It is not stated as a further requisite that the other person should be married.

21. In Rayden on Divorce (10th edition) in paragraph 107 at page 172 it is stated:

For purposes of relief in the Divorce Division, adultery may be defined as consensual sexual intercourse between a married person and a person

of the opposite sex, not the other spouse, during the subsistence of the marriage.

It is not stated that the other person should be a married person. Indeed, by necessary implication of the discussion in what are called ""Hotel

Cases"" and ""Brothel cases"" (paragraphs 116 and 117) at pages 186 and 187 it is dear that the other person need not be married. Thus at bage

186 under the heading ""Hotel cases"" it is stated:

Where the only evidence of adultery is that the respondent stayed at an hotel or boarding house with a woman, of whom nothing further is known,

the Court views the case with some suspicion. The Court must be satisfied that the true case is before it, not a mere cover or a sham, nor putting

on an act to provide the petitioner with evidence. There is, therefore, need in some cases for the petitioner to prove a background of an adulterous

association; and, where no such background is proved, the Court is not always prepared to make a finding of adultery where a hotel bill is

produced and a witness from the hotel is called to say that the respondent and a person of the opposite sex were in a bedroom together. There

should be proof of disposition as well as of opportunity for committing adultery. If the name or identity of the woman is not known to the proposed

petitioner, she should, before filing a petition request the proposed respondent to furnish it. But if the evidence of adultery is otherwise conclusive,

the Court will grant relief. Notwithstanding that nothing is known of the woman's name or Identity.

Similarly in paragraph 117 under the heading ""Visiting a brothel"" it is stated:

It has been said that the fact of a woman going to a brothel with a man furnishes conclusive proof of her adultery. Although the fact of a married

man doing so may not raise an irrebuttable presumption against him, still the onus on him, would scarcely be discharged by the denial of himself and

of a woman, with whom he was alone.

22. In the Calcutta decision cited above the learned Judges further pointed out that Section 46 of the Indian Divorce Act says that the forms set

forth in the schedule to the Act might be used, and form No. 5, which may be used by the wife for judicial separation on the ground of her

husband's adultery, sets out for instance in paragraph 4 that on divers occasions in the months of October, November and December her husband

committed adultery with a certain woman, who was then living in the service of her husband at their residence. The wife is not required to state that

the other woman was married. Similarly, it is pointed out that incestuous adultery is a ground for dissolution u/s 10 of the Act, and the definition of

incestuous adultery"" in Section 3(6) is ""adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully

contract marriage by reason of her being within the prohibited degrees of consanguinity, whether natural or legal, or affinity"". Thus, the only

requisite is that the woman falls within the prohibited degree and it is not necessary that the adultery must be committed with a married woman.

23. The learned Judges of the Calcutta High Court also followed a decision of a Full Bench of this Court in Gantapalli Appalamma v. Gantapalli

Yellayya, ILR (1897) Mad 470. It was a case which arose under the provisions of Section 488 of the Criminal P.C., as it then stood, namely, that

a Magistrate may make an order for maintenance in favour of the wife, even though the husband offers to maintain his wife on condition of her

living with him, if the Magistrate is satisfied that the husband is living in adultery. In one case, the adultery was alleged to have been committed with

a widow, and in the other case with a concubine who had lived with the husband for many years. The Magistrate ordered maintenance in each of

those cases. The Sessions Judge made a reference to the High Court on the ground that the adultery alleged was not within the definition of the

offence of adultery in the Indian Penal Code and referred to Section 4 of the Criminal P.C. which says at the end that all words and expressions

used herein, and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to

them by that Code. The Full Bench held that the Magistrate was right and that the word ""adultery"" as used in Section 488, Criminal P.C., should

not be interpreted in the narrow manner indicated in Section 497 of the Indian Penal Code. With reference to the definition in Section 4 of Criminal

P.C., they point out that the opening words state ""unless a different intention appears from the subject or context"" and that the context of Section

488, Criminal P.C. itself clearly showed that the strict definition of Section 497, I. P.C., would not apply to Section 488, Criminal P.C.

Subramania Ayyar, J., observed:

What difference does it make to the wife whom the husband has neglected or refused to maintain, whether the woman with whom he is living in

adultery is a married woman or not and, if the woman be married, whether the woman's husband connives at the adultery or not. So far as the wife

is concerned her grievance is all the same. Therefore while in Section 497; Indian Penal Code, adultery of one specific description only is dealt

with, it is clear that in Section 488 of the Criminal Procedure Code adultery is used in the wider and ordinary sense of voluntary sexual connection

between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse.....

Now looking to the- context, a different intention cannot but be inferred, considering that the offence of adultery u/s 497 of the Indian Penal Code,

as already observed, is one against the husband, whereas u/s 488 of the Criminal Procedure Code, the term includes cases where the wrong done

is to the wife.

Similar observations are made by the other Judges, Benson J., for instance, observed:

The ""adultery"" there contemplated is, I think, adultery in the popular sense of the term, viz., a breach of the matrimonial tie by either party.

Abson v. Abson, 1952 P 55 : 1952 1 All ER 370, referred to by the Judges of the Calcutta High Court, was a case where the wife had obtained a

decree for divorce, which was made absolute in 1948 on the ground of desertion by the husband. She was receiving maintenance from the

husband. In 1951, the husband applied for the discharge of the maintenance order on the grounds that the wife had committed adultery with a,

married man Rayner. The application was u/s 7 of the Summary Jurisdiction (Married Woman) Act, 1895. The wife contested the application on

the ground Inter alia that after the divorce she was no longer a married woman and that, therefore, the Act would not apply. The argument was

rejected. What is important for us is that it was recognised that in the ordinary Divorce Court where relief of judicial separation or divorce is sought

on the ground of adultery by the other spouse, it does not matter in the least whether the third party named as the adulterer or adulteress is or is not

married. Learned counsel for the wife himself conceded that that was the position in the ordinary Divorce Court where judicial separation or

divorce is sought, but contended that the position was different u/s 7 of the Summary Jurisdiction (Married Woman) Act, 1895.

24. For all these reasons. I hold that by continuous sexual association with the woman Bhai keeping her in his house, the appellant has been guilty

of ""adultery"" for the purpose of judicial separation u/s 22 of the Act and that consequently that is a valid defence for the wife u/s 23 to his

application for restitution ""of conjugal rights.

25. Even if there be any doubt on the above point, the appellant is bound to fail because of the wording of Section 32 itself. That section says:

When either the husband or the wife has, without reasonable excuse withdrawn from the society of the other, either wife or husband may apply by

petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements

made - in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights

accordingly.

Under this section, it is necessary for the husband, "who has come before the Court seeking the relief of restitution of conjugal rights, to prove that

the wife has without reasonable excuse withdrawn from his society. The burden is on him to show the absence of reasonable excuse on the part of

the wife for her withdrawal from his society. Now it is obvious that when the husband is living with another woman Bhai having sexual connection

with her and even having children by her, it is a reasonable excuse for his wife to withdraw from him. That is the view taken in several decisions

both in India and in England of Sections 32 and 33 of the Indian Divorce Act and the provisions of Section 9 of the Hindu Marriage Act, 1955,

which runs thus:

9 (1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may

apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such

petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity

of marriage or for divorce.

The decisions have all been summarised in the commentary of Chaudhari on ""The Hindu Marriage Act, 1955"" (Third Edition) (Eastern Law Time)

under Notes 6 and 12 of Section 9. Some of them are Rebarani Sen Gupta Vs. Ashit Sen Gupta, ; Smt. Sau. Shakuntalabai Baburao Vs.

Baburao Daduji Mandilik, ; Mst. Gurdev Kaur Vs. Sarwan Singh, ; Tulsa Koli Vs. Pannalal Natha Koli and Another, and Smt. Putul Devi and

Another Vs. Gopi Mandal and Another, . It is pointed out at page 116:

Where the behaviour of the petitioner had given the respondent a reasonable excuse for withdrawing from the society of the petitioner, the

petitioner fails to establish prime fact case. In such- a case the petition shall fail not because of any defence set up by the respondent, but It cannot

succeed on account of the non-fulfilment of one of the essential ingredients of Sub-section (1). Thus, it will be seen that the "reasonable excuse"

need, not be identical with the "defences" permitted under Sub-section (2). English case law leaves no doubt that there may be "a reasonable

excuse" which is not one of the grounds mentioned in Sub-section (2) and may be something less than a justification for- judicial separation or

annulment or divorce but may still justify the Court in refusing the prayer for restitution of conjugal rights. Timmins v. Timmins. (1953) 2 All ER

187.

I think this is the correct statement of the law; To the same effect is the commentary in ""Rayden on Divorce"" at pages 205 and 227," where it is

pointed out: that for grave and weighty conduct on the part of the husband, the wife may be justified in withdrawing from his society even though

she may fail to establish that the husband has committed a matrimonial offence. Several cases are quoted including (1953) 2 All ER 187. It is not

necessary to discuss the cases because it is clear that there cannot be a greater justification for the wife withdrawing from the society of her

husband than the presence of another woman in the house of the husband with whom the husband has been having sexual connection continuously.

26. In the result, the appeal is dismissed, but without costs.

27. I must record that considerable assistance was rendered to the Court by Sri V. Janakiraman, learned counsel appearing for the appellant.