(1986) 04 CAL CK 0038

Calcutta High Court

Case No: A.O.D. No. 76 of 1983

Ratnamayee Das		APPELLANT
	Vs	
Bikash Das		RESPONDENT

Date of Decision: April 18, 1986

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 32
- Constitution of India, 1950 - Article 14, 21
- Hindu Marriage Act, 1955 - Section 10, 10(1)(b), 10(1)(h), 13, 13(1)

Citation: 91 CWN 87

Hon'ble Judges: Mohitosh Majumdar, J; M.N. Roy, J

Bench: Division Bench

Advocate: Mainindra Chandra Chakraborty and Tarun Sankar Basu, for the Appellant;D.N. Dutta and Rathindra Kumar De, for the Respondent

Final Decision: Allowed

Judgement

M.N. Roy, J.

After the commencement of the Hindu Marriage Act, 1955 (hereinafter referred to as the said Act), any party to marriage, solemnized before or after the commencement of the Act, has been given the right to apply for a decree for judicial separation on one or more of the six grounds as mentioned in section 10 of the said Act. The first ground is based on desertion which includes neglect. We are not concerned with that ground in this case. The second ground is based on cruelty and such as would induce a reasonable apprehension of harm or injury. The cruelty as involved in the second ground may be both mental and physical. In this appeal, which has been taken against the judgment and decree dated 27th August, 1981 and 3rd September, 1981 respectively, as made and passed in Matrimonial Suit No. 139 of 1979, by Shri S.K. Mitra, the learned Judge, 9th Bench, City Civil Court, Calcutta, we are really concerned with such second ground and not with any other

ground. Even, on the basis of the concessions as made by Mr. Chakraborty, the learned Advocate for the appellant, we are also not required to consider the case of physical cruelty, if any, caused to the wife, the petitioner appellant, who instituted the concerned proceedings against the husband, Opp. party/Respondent on 17th August, 1979, u/s 10 of the said Act. The appellant, who instituted the proceeding as mentioned above, stated that the marriage between her and the husband, was solemnized on 24th May, 1971 at her father''s residence at 15A, Balaram Ghosh Street, P.S. Shyampukur, Calcutta, according to Hindu rites and ceremonies and after such marriage, she lived with her husband at 14/1, Krishna Ram Ghosh Street, P.S. Shyampukur, Calcutta, till 31st January, 1979. It has also been stated that out of such wedlock, a female child was born and on the date of institution of the proceedings, she was 3 years only. The factum of marriage, the solemnization thereof, and the other factors viz the parties living together after such marriage as mentioned hereinbefore, was not denied by the Respondent husband, but he stated that the daughter as claimed was Jhampa or Jilli was really not of three years age as claimed, but her date of birth was 26th June, 1976.

2. The appellant/petitioner in her pleadings, claimed that her married life was most unhappy ever since the marriage or throughout, as the Respondent husband used to abuse her in most insulting languages in the presence of other inmates of the family, apart from torturing her quite often, both physically and mentally and he also behaved roughly and treated her with great harshness, wilful negligence and cruelty. It was her further case that on 21st January, 1979, the Respondent husband assaulted her mercilessly with fists and blows and threatened to kill her with hired goondas. The petitioner wife, further claimed the Respondent husband, to be an ill-tempered man and also claimed that he was addicted to gambling, drinking and races. It was her further grievance that the Respondent husband quite often used to come at midnight and even then, on slightest protest, he used to illtreat her with filthy languages or with such languages which were unworthy of a gentleman. It was the further allegation of the petitioner wife that from the words and the deeds of the Respondent husband, it was clear, that he had no heart nor any love and affection for her. The allegations as indicated hereinbefore, if not categorically, were denied by the Respondent husband. He further claimed that those allegations were made by the petitioner wife, to suit her evil design against him.

3. It was the specific case of the petitioner wife that she was driven out by the Respondent husband from his house on 1st January, 1979, by taking away all ornaments and since then, she with her daughter, have been living at her father''s residence and during such stay there, the Respondent husband has not made any enquiry or taken any information either of the petitioner wife or of the daughter and thus, the Respondent husband has voluntarily withdrawn himself from the society of the petitioner wife. It has also been alleged that the Respondent husband, on 25th July, 1979, came to the petitioner wife''s present place of residence with some goondas, for the purpose of taking away the child from her custody and a F.I.R. was

lodged in the local Police Station on 26th July, 1979. The Respondent husband in his turn, has denied to have driven out the petitioner wife from his house on the date as mentioned above and that too by taking away all the ornaments. He has further denied, that on 25th July, 1979, as alleged, he went to the petitioner wife''s present place of residence and tried to take away the daughter Jhumpa from the custody of the wife with the help of some goondas. The filing of the F.I.R. has also been denied by the Respondent husband. It was the case of the Respondent husband that the true fact was that the petitioner wife left his custody without his knowledge and consent on or about 1st June, 1979 and not on 1st February, 1979 as alleged. He has further stated that on 25th and 26th July, 1979, he was out of Calcutta on his official duty as an employee of the Accountant General, West Bengal, so it was not possible for him to visit the petitioner wife''s present place of residence as alleged.

4. In view of the facts and circumstances of the case as indicated hereinbefore, it was stated by the petitioner wife that there arose apprehension in her mind that it would be harmful and injuries for her to continue to live with the Respondent husband and the illegal acts of the Respondent husband as indicated hereinbefore, compelled her to present the concerned petition u/s 10 of the said Act. The Respondent husband, in his written statement has also stated that there was no cause or any reason for such apprehension in the mind of the petitioner wife as mentioned hereinbefore. He further denied that the continuance of the petitioner wife''s or her staying in the family of the Respondent husband or with him, would be harmful and injurious to the petitioner wife. It was his further case that the petitioner wife requested him regularly, to live separately in her father''s house severing all connections with the old parents and on refusal to accede to such request by him, the concerned proceeding was instituted, without cause or any justification. It was the categorical case of the Respondent husband that he was never cruel to the petitioner wife and in fact, he was always a loving husband and affectionate father. He claimed the proceedings as instituted, to be a malafide one and not maintainable on law and facts.

5. The prayer, in the proceeding u/s 10 of the said Act, was merely for judicial separation and thereafter, the petitioner wife wanted to amend the proceedings by incorporating the words "application for divorce, in the alternative decree for judicial separation, under the Hindu Marriage Act," in the cause title and in the prayer portion, by deleting the words "judicial separation", and wanted to substitute the same by the words "divorce" with the further prayer, "in the alternative decree for judicial separation may kindly be passed". Such application for amendment, on contest, was dismissed on 9th September, 1980.

6. On the pleadings as indicated above, the issues which were framed for determination were, (1) has the Respondent husband abused, assaulted or otherwise treated the petitioner-wife with cuelty, physically as well a mentally, as alleged ?, (2) has the Respondent-husband driven out the petitioner-wife from his

residence on 1.2.79 and has he since then, withdrawn himself from the society of the petitioner-wife ? and (3) is the petitioner-wife entitled to a decree of judicial separation, as prayed for ?

7. The learned Court below has recorded that the judicial separation in the instant case, was asked for by the petitioner wife on the ground of cruelty, both physical and mental. In her evidence the petitioner wife stated that the Respondent husband used to abuse her in filthy language in the presence of the other tenants of the house, who again sometimes used to come to her rescue when she was assaulted by the Respondent husband. It was also her evidence that since she did not agree, because of the previous conduct of the Respondent husband, to part with the ornaments of the daughter, he assaulted her at her father''s residence, whereupon, the members of her father''s family opposed. But strangely enough, neither the tenants nor any member of the father''s family were examined to testify to the happenings as mentioned hereinbefore and such fact being pointed out to Mr. Charkaborty, he, in his usual fairness, stated that it is not possible for him to press his client''s case on the question of physical cruelty, but he mainly pressed his case on the question of mental cruelty. That being the position, in the present determination, we keep it on record that we are not considering the case of physical cruelty and really, on such concession as made by Mr. Chakraborty, we are not required to do so. Before we take up for consideration, the case for consideration on the basis as indicated hereinbefore, we must keep it on record, that the wife petitioner initially took up a job as a teacher in a school, very near to the house of her in-laws. This, she has of course stated to have taken with the knowledge and consent of the Respondent husband, which fact has of course been denied by him. Therefore, in 1976,'' she took up an employment in the Health Department of the state Government and was posted at Mathurapur. This time also, there was also some dispute about obtaining consent of the Respondent husband. We are informed that now the petitioner wife is posted here at Calcutta and more particularly in the Medical College Hospital.

8. The allegations made by the petitioner wife against the Respondent husband, on the question of mental cruelty, as have been indicated by the learned Court below, were based on the basis of abusive words used to the petitioner wife, assualts committed on her and the conduct and character of the Respondent husband, since he was addicted to wine and gambling. It was the further case of the petitioner wife that when the husband needed money, he used to ask for the same from her in writing, as they were not in speaking terms with each other. This fact would receive ample corroboration from Exts. 1, 1(a) and 2. The learned Court below has also recorded that it was the case of the petitioner wife that she was driven out by the Respondent husband from the house on 1st February, 1979 and on 24th July, 1979, he went to her place and asked her to show the ornaments of the daughter. The ornaments could not be shown on that date, but they were shown on the next day, when the Respondent husband tried to take them away, which could not be agreed

to by the petitioner wife, since she was apprehensive of the fate of those ornaments, considering the previous conduct of the Respondent husband. It was stated before the learned Court below by the petitioner wife that as such, the husband tried to assault her, to which, as mentioned earlier, her father''s family members opposed. Those facts, coupled with the other facts, that the petitioner wife was driven out from the husband''s house, according to the learned Court below, were the grounds, on which the wife wanted to establish mental cruelty as committed/inflicted on her. The learned Court below has further observed that apart from the petitioner wife, the only corroborative evidence was available from P.W. 2, the father Monmotho Kr. Ghosh and according to him, the said Shri Ghosh was not an independent witness. The learned Court below has also commented on the non-examination of the type of witnesses as indicated hereinbefore and he has also considered the denial put forward by the Respondent husband against the charges of bad behavior and bad conduct as leveled against him by the petitioner wife. Of course, it has also been pointed out by the learned Court below that so far the Respondent husband was concerned, there was also no corroborative evidence, excepting that of his father, D.W.2 who, according to the learned Court below, was also much interested in the cause of his son and such being the position, the learned Court below has also recorded that, thus the lis in the instant case was required to be judged from the intrinsic evidence, both documentary and oral and so also on consideration of the probabilities of the case.

9. On consideration of Ext.1(a), the letter dated 4th December 1976, the learned Court below has observed that the same was undoubtedly written by the Respondent husband and thereby, he wanted an accommodation loan of Rs. 200/- from his wife, to save him from a dangerous situation, as depicted in the said letter. That letter also contained an assurance by the husband that he would not any more indulge in unwarranted acts or deeds and admittedly, the petitioner wife paid the amount to him after pledging her golden necklace. On consideration of that letter, the learned Court below has also observed that the Respondent husband used to indulge in acts or deeds which were not approved by the petitioner wife and of course, he was also in the habit of living beyond his means and for which, he was also required to take loans from his office colleague, which again, compelled him to absent himself from his office for some time, which fact was also suppressed from his father and other members of the family. The other letter Ext. D(1) as produced, was also scanned by the learned Court below and on such scanning it has been observed that the Respondent husband used to mix young men, who again were considered to be undesirable and unfit to mix with, by the petitioner wife. The learned Court below has also observed that such evidence of undesirable association, was however, not sufficient to warrant the further inference, that the Respondent husband used to spent his time by mixing or gossiping with bad character or that, he used to indulge in black marketing of cinema tickets. Such act, according to the learned Court below, was certainly dangerous for a Government

servant like that of the Respondent husband, as there was the risk of apprehension, by the police and in such case, there was also the chance of loosing his job. Such being the position, the learned Court below has also, observed that it would thus be improbable that the Respondent husband would take the risk of indulging in black marketing of cinema tickets. Such fact and also the other evidence as mentioned above, which was also considered to be undesirable by the petitioner wife, according to the learned Court below, was not also sufficient for making the further inference in a reasonable way that the Respondent husband was prone to such offences, as going to races and wasting money there, apart from playing satta. The learned Court below has also considered that the returning home late at night after being drunk or the evidence as let on that basis, was not sufficient to establish the offence as alleged. In fact, it has been stated that the petitioner wife has not been able to prove her case satisfactorily.

10. While on the question of taking money occasionally by the Respondent husband from the petitioner wife, the learned Court below has also observed that the said fact has not satisfactorily established, that the money which was taken, was spent for any immoral purpose. The learned Court below has stated that since the Respondent husband was a class IV staff, therefore, it was only too likely that he would require occasional temporary financial accommodation from her and there and he was not satisfied that the expenses for the child, as alleged by the petitioner wife, were used to be met entirely from her income. One thing is certain, that both the families do not belong to a rich middle-class and from the income statements as available, it can be observed that they belonged to ordinary middle-class and it is also an admitted fact that the petitioner wife used to earn something. The particulars of her service have been indicated hereinbefore and on the basis of those particulars, the Respondent husband''s allegation that the petitioner wife used to spent more money for her father''s family, was not believed. The learned Court below has also observed that cruelty, caused by the Respondent husband to the petitioner wife, either mental or physical, has not at all or satisfactorily been established and there has absolutely been no corroboration by any independent witness about the petitioner wife having been assaulted by the Respondent husband or that she was driven out of the house by him. On facts, the learned Court below has also observed that it seems that the petitioner wife had left the house of the Respondent husband voluntarily and that may be for some reasons, which were known to her only. In short, the learned Court below has also observed that "cruelty" even as meant under the amended law, has not been established in the facts and circumstances of the case, but it is not unlikely that the concerned proceeding was the outcome of the difference in social and educational status between the parties to the marriage at the present moment. It has also been pointed out by the learned Court below that when the parties to the marriage fell in love with each other, they were very young and in fact, they were only in schools. It has been indicated that the Respondent husband was not good at education and he

only found pleasure in games and sports and it is only after the marriage, at the persuasion of the petitioner wife, the Respondent husband could somehow manage to get through School Final Examination, after a long gap. Thereafter, he somehow managed to secure a class IV job and even then his pre-occupation with games and sports remained unabated and he used to spent a lot of money over them. It has also been indicated that in the meantime, the petitioner wife got/her B.Sc. degree and ultimately secured for herself a Government job. Thus, a wide gap was created in respect Of status between the two, in course of those years and according to the learned Court below, it was not unlikely that the same may have brought about the incompatibility in the spouses living together now. On such facts and findings as above, the learned Court below thought that it was not a fit case for warranting an order for decree of judicial separation.

11. On a reference to Mulla on Hindu Law, Mr. Chakraborty, in fact, after reading the discussions on cruelty u/s 10 of the Hindu Marriage Act, indicated that the legal conception of cruelty and the kind or degree of cruelty, necessary to amount to a matrimonial offence, has not previously been defind by any statute of the Indian Legislature relating to marriage and divorce; nor has the expression been defined in the Matrimonial Causes Act, 1950, or any earlier enactment in England and the danger of any attempt at giving a comprehensive definition which may cover all cases has been emphasised in a number of decisions. The law on the subject he stated, has hitherto been gathered from decided cases and Court in India had accepted and adopted the conditions in India, the principles underlying the judge-made law on the subject in England. The accepted legal meaning in England as also in India of the expression, which is rather difficult to define, has been "conduct of such a character as, to have caused danger to life, limb or health (bodily or mental), or as observed in the case of Russel v. Russel, (1897) A.C. 395, as to give rise to a reasonable apprehension to such danger." It was pointed out by Mr. Chakraborty and that too on a reference to Mulla''s Hindu Law as mentioned above, that the rule laid down in the present clause would seem to give legislative sanction to what has previously been judicially understood and accepted as the legal conception of cruelty. It also prescribes a criterion or test which emphasizes the treatment which amounts to cruelty must be such as to cause a reasonable apprehension in the mind of the injured spouse that cohabitation with the other spouse will be harmful or injurious. Though the Joint Committee has observed that "cruelty has now a self-contained definition", it is difficult to say that any comprehensive definition of cruelty has been given in this clause. In any case, it does not seem that the Legislature intended to give any different meaning to the expression cruelty or aimed at a more elastic or restricted definition. There is nothing in the language of the clause to show that beyond adding a criterion which has always been applied by the courts flowing from the accepted legal conception of cruelty, any comprehensive definition has been laid down. This is just as well since actions of men are so diverse and infinite that it is almost impossible to expect a

definition, exclusive or inclusive, which will aptly make every particular act or conduct and not fail in some circumstances. It seems permissible, therefore, to enter into a caveat against any judicial attempt in that direction. It was also pointed out by Mr. Chakraborty that though the clause does not in terms so state, it is abundantly clear from the language used, that the application of the rule must depend on the circumstances of each case. Without attempting to define cruelty, it. may be said that this clause in effect lays down that in order to be cruelty, there must such treatment of the petitioner which causes suffering in body or mind whether in realisation or apprehension in such a way as to render cohabitation harmful or injurious, having regard to the circumstances of each case, keeping always in view, the character and condition of the parties. Thus, it is necessary to note, that legal conception of cruelty comprises two distinct elements first, the ill-treatment complained of, and, secondly, the resultant danger or apprehension thereof and it would be inaccurate and liable to lead to confusion, if the word cruelty is understood, apart from its effect as observed in the case of Jamieson v. Jamieson, (1952) A.C. 525, on the victim. It was also pointed out by Mr. Chakraborty that the apprehension contemplated by the clause is that further cohabitation will be harmful or injurious, and not that the same or similar acts of cruelty will be repeated. He indicated that where the acts of conduct can be said to amount to cruelty, it is immaterial that there is no danger of its repetition and the inquiry must be whether the cruel treatment is established by evidence is of such a nature as to cause. In the mind of the victim reasonable apprehension that it will be harmful or injurious to live with the other party. In Cooper v. Cooper, (1950) W.N. 200, it has been.observed that "the more serious the original offence, the less grave need be the subsequent matters to constitute cruelty, for the subsequent acts must be looked at in the light of the earlier history from which they derive their significant." Mr. Chakraborty, in fact pointed out that the judicially accepted legal concept of cruelty had for its basis, principles adopted and which again found favour in Russel v. Russel (supra), by the five law Lords, who were in a majority against four others, who were willing to extend the meaning still further, But it would be academic to refer to those opinions.

12. Mr. Chakraborty also pointed out, placing on his submissions on Mulla as mentioned above, that what is cruel treatment must be a large extent be a question of fact or a mixed question of law and fact, to be determined within the ambit of the rule and tests given in the clause and no dogmatic answer can be expected to the variety of the problems that must continue to arise before the Court and the law has no footrule, by which to measure the nature and degree of cruel treatment, which may satisfy the tests of apprehended harm or injury. It was pointed out by him that physique, temperament, standard of living and culture of the spouses and the interaction between them in their daily life and all other relevant circumstances must be bearing on the question, whether the acts of conduct complained of amount to the matrimonial offence, which entitles a spouse to relief under the

clause and the conduct alleged must be judged upto a point by reference to the victim''s capacity or incapacity as observed in the case of Mackenzie v. Mackenzie, (1895) A.C. 384, for endurance in so far as that is or ought to be known to the offending spouse and further, in terms of the determinations in the case of King v. King, (1953) A.C. 124, it is also necessary to weigh ail the incidents and quarrels between the parties, keeping in view, the impact of the personality and conduct of one spouse upon the mind of the other. Mr. Chakraborty further pointed out that language of the clause is comprehensive enough to include cases of physical as also mental cruelty and cases where both the elements are present. Since we are not concerned in this ease with physical cruelty or violence, let us consider his dealings on the aspect of mental cruelty. While on that point, on a reference to Mulla''s as mentioned above, Mr. Chakraborty indicated that the language of the clause is comprehensive enough, to which we agree, to apply to cases of mental cruelty. He further indicated that it was formerly thought that the actual physical harm or reasonable apprehension of it was the prime ingredient of the matrimonial offence, but he pointed out that such doctrine has now been repudiated and the modern view has been, that the mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful of unsafe to live with the other party. It was further pointed out by Mr. Chakraborty that the principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence, is of greater cogency in cases failing under the head of mental cruelty and he referred to the following, to establish the broad general principles which have emerged from the decided cases.

13. (i) Cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence. The question whether the respondent treated the petitioner with cruelty is a single question only to be answered a titer all the facts have been taken into account. Without quoting the specific opinions in which this principle was stated by at least two of the Lords who decided the case of Jamison v. Jamison (supra) in the House of Lords this principle may now be said to be sell established by that decision. It may be taken as equally well established that it is a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and therefore, that the totality cannot pass that test.

(ii) It is undesirable, if not impossible to create categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances amounting to mental cruelty Lord Narmad in Jamison v. Jamison (supra). Not is it necessary to compare acts as being gross and less gross, there maybe cases where the acts complained of are themselves so trivial that the Court would be justified in not attaching any importance to them. On the other hand acts not serious in themselves may be symptomatic of the pass to which the marriage

had come and of the state of mind of the parties. Since cruelty is to be inferred from the whole of the relations between the husband and wife it would not be a proper approach to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage in the present context is not to be taken as just the sum of a number of incidents.

(iii) In general cruelty is in its character a cumulative charge. It is not necessary that the acts complained of must be of a certain character. The conduct may consist of a member of acts each of which is serious in itself, but may well be even more effective if it consists of along continued serious of minor acts no one of which could be regarded as serious if taken in isolation. Every such act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse and the offender''s knowledge of the actual or (sic) effect of his conduct on the other''s health Lord keld in Jamison v. Jamison, (supra). The age, environments, stand a of culture and status in life of the parties are also matters which may be decisive in determining on which side of the line a particular act for course of conduct lies. The acts and incidents complaint of as composite picture from which alone it can be ascertained whether the acts of one spouse on another should, judged in relation to all the surrounding circumstances, be found to amount to cruelty.

(iv) The existence of cruelty depends and on the magnitude, but rather on the consequence of the offence, actual or apprehended as indicated in Barker v. Barker (1949) All E. R. 247.

(v) Mental ill-treatment may be coupled with physical ill-treatment in order together to found a charge of cruel treatment. Since mental and physical ill-treatment can, though they are not ejusdem generics, be taken together, it must follow that different forms of ill-treatment may be taken together to found a charge of treatment which amounts to cruelty as indicated in Cooper v. Cooper (supra).

14. marriage in the instant case solemnised on or about 24th May 1971. Mr. Chakraborty, in support of his submission on mental cruelty or reasons why the petitioner wife felt insecurity in her mind, referred to the letter dated 5th April 1969 (Ext.D), from the petitioner wife to the Respondent husband. Although the said letter was earlier than the date of marriage and not subsequent thereto. Mr. Chakraborty contended that since the writing of that letter, the mind of the petitioner wife was broken and she was apprehensive of the friends of the Respondent husband and as such, even prior to their marriage she was trying to take the Respondent husband out of the clutches of their company. Apart from the above, Mr. Chakraborty referred to the document dated. 4th December 1976 (Ext.1), where from it appeared that the Respondent husband was asking for a temporary accommodation of Rs. 200/- from the petitioner wife, for the reasons as disclosed therein. It was Mr. Chakraborty''s contention that the reasons for which such accommodation was

asked for from the petitioner wife, were enough, to show and suggest that the Respondent husband was not only living beyond his means, but perhaps he was mixing in such company, for which he was required to ask for the accommodation as indicated hereinbefore and furthermore, from to the letter, the Respondent husband further made it clear that thereafter, he would not indulge in such activities as mentioned in the said letter. Ext.1(a) would show that the petitioner wife, on 7th December, 1976, paid Rs. 200/- to the Respondent husband after mortgaging her gold necklace.

15. Even though Mr. Chakraborty agreed that evidence in the instant case was very scanty, he claimed that from the treatment to the petitioner wife by the Respondent husband after 1976, as also the circumstances, the training and the status of the parties to the marriage and more particularly when the petitioner wife, inspite of her repeated attempts failed to have the conduct and character of the Respondent husband amended and since his attitude towards her could not be changed, the house was not only broken, but the same was not suitable for the petitioner wife and that would be enough to hold that such mental cruelty was exercised on the petitioner wife, for which she reasonably felt that her further continuance in the house of the Respondent husband or with him would be injurious and harmful to her life and mind. While on the question of the treatment meted out to her, it was contended by the petitioner wife that even before permanently leaving the matrimonial home on 1st February, 1979 according to her or on 1st June, 1979, as claimed by the Respondent husband, she had to leave the matrimonial home for more than once and on several occasions she had to accede to the requests of her mother-in-law and to go back to the Respondent husband''s house or to his company, only for being ill-treated and that is why, on the last occasion, when her mother-in-law asked her to return back to the matrimonial home, she insisted that the Respondent husband should come and take her back. It was pointed out by Mr. Chakraborty that even inspite of that, the Respondent, husband, without caring to meet the petitioner wife or to take her back, sent a chit dated 22nd September 1978 (Ext.2), asking her to return back. Such conduct of the Respondent husband, according to Mr. Chakraborty, should also be considered as a limb to establish that the house, as mentioned hereinbefore, was broken and there was every reasonable possibility for the petitioner wife to think, that it would not be safe for to return back to the Respondent husband or to his house, as such return, may not be helpful or rather would be harmful to her.

16. It was further pointed out by Mr. Chakraborty that although the judgment of the learned Court below was passed on 27th August, 1981, even thereafter, no steps have been taken by the Respondent husband to bring back, the petitioner wife or to. have the decree executed and even to take any information about her or their daughter. That fact also, according to Mr. Chakraborty established the real mind and attitude of the Respondent husband towards the petitioner wife. While on the question of cruelty as involved in this case or the ambit thereof, Mr. Chakraborty

referred to the Bench determinations of this Court in the case of Smt. Krishna Sarbadhikari vs. Alok Ranjan Sarbadhikari, 89 CWN 156, where the decree dissolving the marriage of the appellant wife with the Respondent husband, on the ground of cruelty, was questioned in the appeal by the appellant wife, contending that the cruelty, if any, did not amount to legal and that the said act of cruelty was condoned by the Respondent ''Husband. On a reference to the case of Dr. N.G. Dastane Vs. Mrs. S. Dastane, amongst others it has been held in that case that in proof of matrimonial offence the Court insisted upon corroboration evidence unless its absence is accounted for the satisfaction of the Court. The satisfaction of the Court contemplating in section 23 of the Hindu Marriage Act is preponderance of probabilities and not satisfaction beyond doubt.

17. In the above case it has also been observed that clause (1a) of section 13(1) of the Hindu Marriage Act, 1955 requires that after solemnisation of the marriage, if a person has treated his spouse with cruelty, Court dissolved the marriage by passing a decree, apart from holding that the legal concept of cruelty comprises two distinct elements. Firstly, the ill-treatment complained of and secondly, the resultant danger or apprehension thereto and the expression apprehension both mental and physical cruelty and intention to act, may amount to cruelty, even though one who perpetuated the same had no intention of being cruel.

18. While on the question of condonation, on a further reference to the case of Dastane vs. Dastane (supra), it would appear that it has been observed "condonation" means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position he or she occupied before the offence was committed. To constitute condonation, there must be two things; forgiveness and restoration. When such forgiveness is continual on the condoned spouse thereafter fulfilling to all respects the obligation of marriage. It has also been observed in that case that where the wife had finally left the husband''s home with her child, she had failed to prove by legal evidence that her husband and family had themselves crudely treated her and had compelled her to leave and that the marriage had failed because of the conduct of the husband without her fault, the evidence on the side of the petitioner husband was more acceptable to prove that the wife used to treat her husband cruelty and there if no unnecessary or improbable delay in instituting the proceedings, the petitioner husband was entitled to rely on all the previous guilt of his wife and the ground for leaving u/s 13(1)(1a) of the Hindu Marriage Act. In the case under consideration, it has also been observed that lodging of complaint of commission of matrimonial offence against the husband who was a Government official was very likely to cause an apprehension in the mind of the husband that continued cohabitation with his wife may be harmful and injurious, and as such, husband cannot be compelled to endure the company of the wife, who makes false complaints to police over matrimonial differences, apart from holding, that a propensity to commit suicide also, might raise a reasonable apprehension in the mind of the husband to that it would be harmful and injurious to live with the wife

and it is not necessary that the act or acts complained of must take place within what is sometime described as the ambit of the marital relationship. It may well be that the acts may occur after the husband and wife began living apart.

19. The above case was cited by Mr. Chakraborty, on the condonation; as Mr. Dutt, appearing for the husband Respondent claimed and contended that the wife petitioner, had really, because of her conduct, condoned the short galls or shortcomings, if there be any, of his client, not only prior to the marriage, but even after the same. The particulars of the instances on account of such condition as put forward by Mr. Dutt, would be indicated hereafter and his specific submission was that, since the Respondent husband''s alleged conduct or character, which have now been claimed to have caused mental cruelty, were condoned by the petitioner wife, the submissions on mental cruelty as put forward now, would not be available. Mr. Chakraborty contended that there was in fact no condonation of matrimonial offence as alleged against the Respondent husband by the wife petitioner an she has in fact been able to discharge the onus to prove mental cruelty in the facts of this case and specially, if the attending circumstances which forced her to leave the matrimonial home, are duly Considered and which according to Mr. Chakraborty, the learned Court below failed to detect and consider duly.

20. While on the question and the limbs necessary for establishing cruelty or on whom onus in such a case would like and the standard of proof required and what is meant by condonation and if there is no due pleading on condonation, what should be the duty of the Court, Mr. Chakraborty also referred to and relied on the determinations in the case of Dr. N. G. Dastane vs. Mrs. S. Dastane (supra), where the Hon''ble Supreme Court of India has observed that doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. This principle accords with common-sense as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of section 10(1)(b) of the Act, and the belief regarding the existence of a fact may be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second, apart from holding that proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials, involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. It is wrong to import such considerations in trials of a purely civil nature and neither section 10 which enumerates the grounds on which a petitioner

for judicial separation may be presented nor section 23 which governs the jurisdiction of the Court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond reasonable doubt. Section 23 confers on the Court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Proceedings under the Act being essentially of a civil nature, the word "satisfied" in section 23 must mean "satisfied on a preponderance of probabilities and not satisfied" beyond a reasonable doubt. Section 23 does not alter the standard of proof in civil cases. While dealing with the pleadings or the effect when condonation is a matrimonial proceedings is not pleaded. It has been indicated by the Hon''ble Supreme Court of India that even though condonation is not pleaded as a defence by the respondent it is Court''s duty, in view of the provisions of section 23(1)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the Court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if the Court is satisfied "but not otherwise" that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty, apart from holding condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things, forgiveness and restoration. The evidence of condonation in this case is, as strong and satisfactory as the evidence of cruelty and sex plays an important rule in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment. Therefore, evidence showing that the spouses led a normal sexual life even after a serious of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course is not a necessary ingredient of condonation because there may be evidence otherwise to shows the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtained here would raise a strong inference of condonation with its dual requirements, forgiveness and restoration. That inference stands uncontradicted, the petitioner-husband not having explained the circumstances in which he came to. lead and live a normal sexual life with the respondents, even after a series of acts cruelty on her part. In the facts of the case under consideration, it was of course held that though the Respondent wife was guilty of cruelty, the petitioner husband condoned it and the subsequent conduct of the wife was not such as to amount to revival of the original cause of action.

21. Mr. Chakraborty also contended that when the marriage tie in this case has been irretrievably broken and furthermore, when it is evident from the facts and circumstances of the case, that the parties can no longer live together as husband and wife, the chapter of their marriage, should be closed and must not be allowed

to be revived and as such, the learned Court below should have decreed the proceedings. In support of his submissions, Mr. Chakraborty referred to the case of Smt. Saroj Rani Vs. Sudarshan Kumar Chadha, , which was a determination under sections 913, 13B and 23 of the Hindu Marriage Act, 1955. In that case, there was no cohabitation for one year and the petition by the wife, for restitution of conjugal rights, was decreed by consent and the Supreme Court has observed that consent decrees per se in matrimonial matters are not collusive. Where the parties had agreed to passing of a decree after attempts had been made to settle the matter, in view of the language of section 23 if the Court had tried to make conciliation between the parties and conciliation had been ordered, the husband was not disentitled to get a decree, on the ground that he was taking advantage of his own ''wrong'' by refusing co-habitation in execution of the decree. In the instant case, it is clear that there was no collusion between the parties. The wife petitioned against the husband on certain allegations, the, husband denied these allegations. He stated that he was willing to take the wife back. A decree on that basis was passed. It is difficult to find any collusion as such in the case. Further, it would be evident from legislative intent of section 13B that divorce by mutual consent is no longer foreign to Indian Law of divorce but of course this is a subsequent amendment and was not applicable at the time when the decree in question was passed.

22. A part from observing why the wife''s application for amendment that the husband got the consent decree with ulterior motive cannot be allowed at the stage of hearing before the Supreme Court or if the wife can be allowed to make out an inconsistent case by such amendment, while dealing with section 9 of the Act, which provides a remedy of restitution of conjugal rights for a spouse, the same cannot be said to be violative of Article 14 of Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the Act is understood in its proper perspective and if the method of its execution in case of disobedience be kept in view, it has also been observed that in India conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution or marriage itself. The term conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression conjugal" and the said section is a codification of preexisting law. There are sufficient safeguards infection 9 to prevent it from being a tyranny. Order 21 Rule 32 Civil P. C. deals with decree for specific performance for restitution of conjugal rights or for an injunction. It is significant to note that unlike a decree of specific performance of contract for restitution of conjugal rights, the sanction is provided by court where the disobedience to such a decree is willful i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by attachment of property against disobedience follows as a result of willful conjugal rights where the disobedience follows as a result of willful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but

disobeys the same in spite of such conditions, then only financial sanction, provided he or she has properties to be attached is provided for. This is so as an inducement by the court in appropriate case when the court has decreed restitution for conjugal rights and that the Court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage.

23. Mr. Dutt contended that since the petitioner wife had married his client, after many years of free mixing, of her own and without anybody''s inference or institution, and that too when, because of such mixing as indicated above, the wife was in the know of his character and conduct or at least was expected to know them, she cannot be allowed to raise the contention as mads now and alternatively, she had condoned the adverse conduct of his client, if any, prior to the marriage. In fact, Mr. Dutt stated that the parties to the marriage nixed freely for 7/8 years before marriage and after marriage, they lived happily for about 21/2 years. It was further contended had also condoned the conduct of the Respondent husband, since even after temporary difference, if any, with the Respondent husband, the wife petitioner had more than once, come back to the matrimonial home and stayed with him. In fact, Mr. Dutt claimed that since a person cannot take advantage of his or her own wrong, so the petitioner wife in this case, because of her specific conduct, would not be entitled to raise the alleged plea of cruelty in any manner or form Mr. Dutt, also indicated or at least sought to establish from the pleadings, that the petitioner wife had left the matrimonial home on 1st June, 1979 and not on 1st February, 1979 as claimed and while she left, she did not take with her, the minor daughter. Such act on her part, Mr. Dutt claimed, would show that she had no love and affection for the daughter even and as such also, it was expected that she had no love and affection for the Respondent husband also. Mr. Dutt, on a reference to Ext. E., a prescription dated 15th March, 1979, wanted to supplement his submissions that even after the alleged leaving of the matrimonial home, be it on 1st February, 1979 or 1st June, 1979, the petitioner wife was taking full advantage of her husband''s position, as she got the said prescription, which was meant for the daughter Jhilly Das and issued under the Central Government Health Scheme, served. That prescription showed that in September, 1979, the age of the daughter was 2 years and 9 months and it is also strange that he who prescribed the medicine, had also directed the supply of physician''s sample on 17th September, 1979, at least in respect of one item of the medicines, as prescribed. We were not also given any satisfactory explanation, as to why and how such prescription was issued under the Central Government Health Scheme, when the Respondent husband was admittedly working with the Accountant General West Bengal''s Office, as a Class IV staff. After placing the pleadings, Mr. Dutt further contended that no decree, as asked for, could be passed and as such, the determinations by the

learned Court below require no interference.

24. On a reference to the letter, dated 4th December, 1976 (Ext.1), from the Respondent husband to the petitioner wife, Mr. Dutt stated that his client had to write that letter, for the necessary accommodation loan of Rs. 200/- from the wife petitioner, as the parties were not in speaking terms. If such statements of Mr. Dutt are accepted, then there would be no other way but to agree with Mr. Chakraborty''s submissions that the house was really broken and the same could not be said, to be in order. In fact, the said exhibit, we agree with the submissions made at the Bar, was produced for the purpose of establishing the fact or the relationship as was existing at the material time between the parties to the marriage. Mr. Dutt also contended that the allegations about the ornaments as made or put forward by the petitioner wife, for establishing her charges or allegations constituting mental cruelty against the Respondent husband, on the pleadings in this case, were immaterial and similar would be the fate of her allegations against the Respondent husband''s addiction to drink. In fact, Mr. Dutt specifically pointed out that it was the allegation of the petitioner wife that the Respondent husband had driven her out of the matrimonial home on 1st February, 1979, by taking away all the ornaments and since then, she was living with her father and the Respondent husband, not having made any enquiry or he, not having taken any information also, had voluntarily withdrawn from her society and thereafter, on 25th July, 1979, the Respondent husband went to his father-in-law''s place, to take away the child with the help of goondas. The F.I.R. as indicated to have been filed on such alleged happening, was pointed out by Mr. Dutt, not to have been produced or tendered in evidence in the case. In fact, there is no doubt about such statements. Even though Manamatha Kumar Ghosh (P.W. 2), the father of the petitioner wife spoke about the said F.I.R., he took no steps to bring the same on record legally. The allegations as indicated hereinbefore were pointed out by Mr. Dutt, were categorically denied by the Respondent husband and it was his case that the petitioner wife had left her matrimonial home and at that time, she not only took along with her, the daughter, but also the ornaments and that is the reason why, according to Mr. Dutt, the F.I.R. as mentioned hereinbefore, was not brought on record by any legal evidence. As indicated earlier, there was dispute about the date of the leaving of the matrimonial home by the petitioner wife and the Respondent husband claimed the said date to be 1st June, 1972 and not 1st February, 1972 and it was also stated by the Respondent husband that since on 25th and 26th July, 1979, he was away for official work, so it was impossible far him to visit his father-in-law''s house on 25th July 1979 as alleged. Mr. Dutt, after placing the evidence of the petitioner wife (P.W.1), indicated that therefrom it would not appear that the Respondent husband was addicted to wine, even though there were allegations against him for returning late at night or to mix with people, whom the petitioner wife claimed and considered to be undesirable.

25. Dealing with his submissions on condonation or the facts relating to or relevant for the same, Mr. Dutt pointed out that admittedly, the parties to the marriage lived as husband and wife upto 1978 i.e. for about 7 years after the marriage and the complaint, if any, was focussed only on 1st February, 1979, when the petitioner wife had left the matrimonial home. It was also pointed out by Mr. Dutt that the birth of the daughter took place in 1976 and thereafter also, the parties to the marriage, as would appear from the evidence of P.W.2 Manamatha Kumar Ghosh, lived happily for sometime. The said P.W.2 has stated that "on 1st February, 1979, which was the day preceding the Saraswati Puja, the petitioner wife went to his house and helped in making preparations for Saraswati Puja, which was performed at his House". This evidence, according to Mr. Dutt, also belied the story or suggestion of the petitioner wife that she was driven out on that day by the Respondent husband. Above state of facts, if considered with the other facts as admitted by the petitioner wife viz. that the behaviour of the mother-in-law towards her was good and that, on her requests she repeatedly came back to the matrimonial home, would establish that she had either wholly or at least to some extent condone the adverse conduct, if any, of the Respondent husband.

26. As indicated earlier, Mr. Dutt, on the basis of the evidence as available, contended that the petitioner wife was not only not a loving wife but she was not affectionate to her daughter even, on the other hand the Respondent husband was a loving husband and an affectionate father too. It was also claimed by Mr. Dutt that the wife petitioner, on the basis of the evidence as available and tendered by her, has established the fact that she had no regard for truth and in any event, the concern she had expressed over some of the friends of the Respondent husband had no basis whatsoever, since there has been no evidence adduced by her that those persons or friends of the Respondent husband, were bad company. It was also the contention of Mr. Dutt that upto 1978/1979 there was thus no cause or any occasion for mental cruelty and the petitioner wife had the quality and character of being suspicious and to consider every thing against the Respondent husband in a magnified manner and that being the position, it should be considered whether any reliance should be placed on her evidence. It was then contended by Mr. Dutt, that whatever be the law in the case of judicial separation, real character of the Hindu marriage should be considered and kept alive viz. the marriage tie of a Hindu must not be allowed to be broken on a flimsy grounds or pretests, as in this case.

27. Mr. Dutt of course, agreed that mental cruelty may also appear out of physical cruelty or without any such cruelty, an apprehension of cumulative effect will have to be considered, testing such effect with the conduct, character, education, dealing training and environment in which the parties to the marriage are placed. It is true that physical violence is not always be the ingredient of mental cruelty. It was pointed out by Mr. Dutt that in this case there has been no pleadings of specific mental cruelty from 1978 to 1st February, 1979.

28. Before dealing with the cases as were cited by Mr. Dutt while on the aspect of cruelty, we must keep it on record a strange incident which happened during the course of hearing. Admittedly, the case was heard in part for many days and 7th of April, 1986, a letter dated 5th April, 1986, addressed both to Mr. Dutt and his junior Mr. Rathindra Nath Dey, by Bikash Das, the Respondent husband, was produced. By that letter, the Respondent husband instructed his lawyers that since he understood that his wife Smt. Ratanmayye Das was not willing to live with him even if the decision in the case goes against her, so he was not willing to contest the appeal and as such necessary actions was requested to be taken. When this letter was produced on 7th April, 1986, Mr. Dey made a statement that both the father of the Respondent husband and the Respondent husband and the Respondent husband himself, came to his house and the concerned letter, on being signed by the Respondent husband in his presence, was handed over to him. It would appear from the order dated 7th April, 1986, that we have directed the said letter to be kept on record. In such circumstances, both Mr. Dutt and Mr. Dey wanted to retire from the case or not to place any father argument, but at that point of time, Mr. Chakraborty appearing for the petitioner wife contended that since the letter contained certain terms and unknown exigencies, this Court should not act on the basis of the same and more particularly when, the hearing of the appeal, which was continuing for many days, was practically over. Mr. Chakraborty also stated that if the appeal was disposed of interims of the concerned letter and thereafter, the case is taken higher up, his client would be put to great difficulties. On such submissions, we thought that it may not be proper for us to request Mr. Dutt to complete his arguments, as in that case, he may not have his remunerations. Mr. Datt of course, made it clear that he was not anxious about his remunerations and he, in his usual fairness stated that in discharge of his obligations to the Court, he will complete his arguments, no matter whether such remuneration was received by his or not. The attitude which was taken by Mr. Dutt was highly appreciated by us and keeping his statements on record, we requested to him to complete his arguments so that thereafter, Mr. Chakraborty could give his reply and we would be in a position to decide the appeal on merits.

29. It should be noted that on 7th April 1986, we had directed the parties, to the proceedings, to appear before us in our chamber at 1-45 P.M. along with the minor daughter, for the purpose of ascertaining their wishes and such directions were given on the prayers of the learned Advocates appearing before us. It must also be noted and that would also appear from the order sheet that in terms of our directions, the petitioner wife along with the daughter appeared before us in our chamber, but the Respondent husband did not. We had thus heared the wishes of the petitioner wife and the daughter and they had informed us that they were not willing or desirous to go back to the Respondent husband.

30. In support of his submissions on cruelty, Mr. Dutt firstly, referred to the case of Suresh Kumar Gulaty v. Smt. Suman Gulaty, AIR 1983 All 225, on the basis whereof,

the word "cruelty" would mean, must be conduct of a Respondent as gives the petitioner reasonable cause of apprehension to body, mind or health in future, apart from holding that past conduct, undoubtedly relevant as it forms the very wishes of reason for the apprehension of the injury or harm in the future. In that case it has also been indicated that cruelty can be mental; but when one speaks of mental cruelty as distinct from physical cruelty, the idea is to us that while in the case of physical cruelty, harm or injury inflicted to the body directly, in the case of mental cruelty, harm or injury caused is through the mind, but nevertheless it is harm or an injury caused to the human body. It has also been observed in that, case that the injury which caused to the physical body is something which could be perceived by the senses but when it has caused mental, the result of it may appear latter on by affecting the health of the person to whom it is caused and every mental tension cannot amount to infliction of mental cruelty. It must, however, be shown that injury inflicted through the mind of the petitioner has affected the health, or that the future repetition of that injury is most likely to affect the health. Secondly, Mr. Dutt placed reference to the case of Shri Pranab Biswas v. Smt. Mrinmayee Dassi & Anr., 1976 Cal 156. This case was of course one prior to the amendment, and has observed that u/s 10(1)(b) of the Hindu Marriage Act cruelty simpliciter is not a ground for passing a decree for judicial separation. The cruelty of a particular nature of a particular virulence only entails the consequence of judicial separation. The qualifying word "such" placed before the word "cruel" in section 10(1)(b) makes it abundantly clear that cruelty in its universality has. not been brought within the ambit, of the section. Only, cruelty which produces a particular type, of consequence falls within the scope of section 10(1)(b). The cruelty has to be such as to cause reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party. Where mental cruelty is alleged on the basis of a letter written by the respondent wife to her lover, but the effect produced by it upon the mind, mental condition and thinking process of the petitioner husband has not even been given casual reference in the petition, nor has it been shown that the mental cruelty alleged to have been caused had produced any deleterious effect upon the petitioner''s health, it cannot be held that any ground has been made out for seeking judicial separation, apart from observing that the use of the verb "treat" made by section 10(1)(b) is indicative of the fact that the act on the part of the offending spouse is required to be volitional, intentional, deliberate and designed to be cruel. Of course, cases and cases differ and there may arise some cases where by some indirect or overt art cruelty may be caused. But a single, solitary act of cruelty followed by remorse does not fall within the mischief of the section unless it satisfies the requirement of section 10(1)(b) wholly. Mr. Dutt thirdly, placed reliance on the case of Sankar Prosad Paul Chowdhury Vs. Madhabi Paul Chowdhury, . Where it has been observed that the Court ought to draw an adverse presumption against the petitioner husband for non-examination of the members of his family who were described as witnesses to the alleged act of cruelty and insult by his wife. In this case the wife petitioner has not mentioned any of such

witness to be examined but in her deposition, she had stated that certain acts were committed by the Respondent husband in the presence of other tenants and members of her father''s family. But admittedly none of those witnesses were examined. Those evidence would, have been material and relevant on the question of physical cruelty. But, since we are not concerned in this case with physical cruelty, the case as mentioned hereinbefore and which was cited by Mr. Dutt, in our view, would be of no avail or any assistance. Then and fourthly, Mr. Dutt relied on the case of Sm. Bijoli Choudhury Vs. Sukomal Choudhury, , where it has been observed that the question of mental cruelty should be answered in the light of the norms of marital status of the particular society to which the parties belonged, their social values, status and environment of the parties. Lastly and fifthly, Mr. Dutt referred to the case of Dr. N. G. Dastane v. Mrs. S. Dastane (Supra), the particular findings whereof have been indicated hereinbefore.

31. From the submissions at the Bar and the intrinsic evidence as available in this case, it would appear that the birth of the daughter took place in or about June 1976 and upto the end of 1 975, perhaps no serious exceptions could be taken about the marital relationship of the parties to the proceedings. But, it is strange that even after the birth of the daughter, the Respondent husband, who claimed himself to be an affectionate father did not even visit the hospital, where such birth took place, for a single day. Even if the Respondent husband had no love for the petitioner wife, it was not expected of him that he would not go to the hospital to see his daughter and that too when there is no evidence available that he was otherwise busy or his preoccupations prevented him from visiting the hospital. Such conduct is enough to create mental cruelty on the mind of the petitioner wife, for which, she can reasonably feel that her stay in the matrimonial home or with her husband may not. be congenial and peaceful, rather the same may be harmful for her mind and body and that would bring the case, within the tests as indicated in the cases as cited at the Bar. Apart from the above it is in evidence that before finally leaving the matrimonial home 1st February 1979, two to three times, the petitioner wife, for such reasons as indicated hereinbefore, had to leave the matrimonial home and each time, she was persuaded by her mother-in-law to return to the matrimonial home, only to be humiliated by the Respondent husband and as such, on the last occasion, she refused to accord to the mother-in-law''s request to go back to the matrimonial home and insisted that if she was required to go back to the matrimonial home, the Respondent husband should come and take her back. The respondent husband, instead of himself taking her back, had sent the chit (Ext.2) and that also in our view showed and established, that the story of love and affection of the Respondent husband, as put forward now, towards the petitioner wife, was not true, correct and real and that conduct and behavior of the Respondent husband, would go a long way to establish mental cruelty on the petitioner wife. It would also appear from the records of the case and as indicated hereinbefore, that after the decree was made in 1981, the Respondent husband has

not taken any steps to have the restitution of conjugal rights and we are firmly of the view, that for circumstances as discussed and indicated hereinbefore, there cannot be any doubt that the house has been broken and mental cruelty which has a greater, far reaching and deep rooted effect than physical cruelty has been committed on the petitioner wife. We further feel that when the house is really broken, then no useful purpose would be served in attempting to bring the same in order, the more so when, after hearing the wife and the daughter, we are also of the firm opinion that they, not only do not want to go back to the Respondent husband, but are really apprehensive of him. We also find that excepting claiming to be interested in games like cricket and foot-ball, the Respondent husband has not made any real contribution to the petitioner wife and he used to fork out money from her, whenever, he was in need of the same and it is strange that the story of Annaprashan of the daughter, for which accommodation was asked for by him from the petitioner wife, was found to be unreal and untrue. In the facts of this case, we are constrained to hold that for ends of justice, the wife petitioner''s application for judicial separation should have been allowed by the learned Court below and we feel, such observations as made by us, would also get ample support from the determinations in the case of Smt. Saroj Rani v. Sudarshan Kumar Chadha (supra) and more particularly when the said determinations is of great and wide import and has opened a new dimension in respect of matrimonial proceedings and has really laid down, that if it is evident for whatever be the reason, the marriage has broken down and the parties can no longer live together as husband and wife, it is better to close the chapter. Here, in this case, we find from the facts and circumstances of the case, apart from our earlier findings that the house has been broken and that it will not be helpful and congenial for the parties to the marriage, if they are asked or forced to live as husband and wife and more particularly when, such living and that too peacefully, is no longer possible.

32. A marriage, admittedly, implies the living together of two persons and under no system of law it is permissible for married people to live separately. A Hindu marriage implies the same if not more and a decree for judicial, separation is, so to say, a license for two married persons, to live separately and weigh the advantage and disadvantages of such a law; either take the benefit of sub-section (2) of section 10 by getting the decree rescinded or to apply after two years for a complete separation through a divorce u/s 13 of the said Act. It should of course and must be noted that judicial separation does not break the marriage tie. It merely allows the parties to a marriage to be separated. As indicated earlier, in the facts of this case, even inspite of the above, we feel that it would not be possible for the parties to the marriage to continue with their married live peacefully and without any separation of causing harm either to body or mind and a such, we also feel that subject to what we shall be saying hereafter, there is no other way out but to allow the petitioner wife, to have a decree for judicial separation.

33. In Dr. N. G. Dastane vs. Mrs. S. Dastane (supra), the particular findings whereof have been indicated hereinbefore, the decision was under sections 10(1)(b) and 23(1) of the said Act and we feel that the findings therein, in terms of our observations as would be made hereinafter, can be made applicable in the facts of this case. The case of Smt. Saraj Rani vs. Sudarshan Kumar Chadha (supra), was not of course, for judicial separation or on the same, but the principles as indicated therein, in our view, can also be applied with full force in a case of judicial separation as under consideration.

34. The facts which were put forward for the purpose of claiming that the petitioner wife had condoned the conduct and character of the Respondent husband have been indicated hereinbefore. It was claimed by Mr. Chakraborty that in order to determine the issue of condonations there was no pleading as regard to the same and without such pleadings, the Court cannot of its own, condone the matrimonial offence, inasmuch as, condonation has a special meaning in matrimonial matters. It was also Mr. Chakraborty''s, contention that the condonation, as required to be pleaded, was not at all pleaded and according to him, the condonation in the instant case by the petitioner wife, of the conduct and character of the Respondent husband was not at all proved or corroborated by any independent witness. He of course, stated that strict corroboration as is applicable in criminal trials, would not be necessary in matrimonial proceedings since corroboration is a matter of pre occupation and not of law. Mr. Chakraborty further, on scanning the evidence showed, that the Respondent husband was really guilty of cruelty, even though he agreed that the standard of proof applicable in criminal trial would not be required in matrimonial cases. He further claimed that after the amendment brought into the said Act, whereby section 10(1)(h) has amended, the old doctrine of danger has been replaced, by the broad test, whether the petitioning spouse cannot reasonably be separated to live with the Respondent. According to him, the matrimonial offence, if committed by the answering spouse, would not only construe physical cruelty, but that would also mean mental cruelty and there was no legal or factual warrant in this case for the Court below to return a verdict on condonation, as has been urged now or this Court would not be justified, on the basis of available legal evidence, in holding that the Respondent husband''s conduct and character was condoned by his client.

35. We feel and find in the facts of this case that there was, as mentioned earlier, mental cruelty committed on the mind of the petitioner wife and the intrinsic evidence as available in the case, has really corroborated the same. We agree with the observations in the case of Dipali Das vs. Gorachand Das (supra), that the word "cruelty" even if not mentioned in the pleadings, can be proved from the facts stated in the pleadings. We also observe that a Court dealing with such a matrimonial cause as in this case, would be justified in returning a verdict on cruelty, on consideration not only of intrinsic evidence, but also the attending circumstances and the proof of fact as required in criminal proceedings is not necessary in a

matrimonial cause, when the Court is satisfied on the available evidence, that a case has been made out. We also agree on the basis of the determinations in the case of Smt. Krishna Sarbadhikari vs. Alok Ranjan Sarbadhakari (supra), that the Court can discharge its obligation on preponderance of probabilities. It should also be noted that the case as mentioned above, has also decided that the legal concept of cruelty comprise of two different, elements firstly, the ill-treatement complained of and secondly, the resultant danger or apprehension thereto and the expression, "cruelty" comprehend both mental and physical cruelty. The observations in the case of Dr. N. G. Dastane vs. Mrs. S. Dastane (supra), have also been indicated by us hereinbefore and on the basis of the determinations therein, there is no doubt that the said Act warrants, that the satisfaction of the Court must be founded upon legal evidence and while entering into such satisfaction, the Court in a case of the present nature, can base its determinations on probabilities. In the above mentioned Supreme Court case, it has also been held that a mere fact can be said to exist, if on weighing various probabilities, the preponderance is in favour of such existence and the first aim in the necessary process would be to fix the probabilities, the second, to weigh them, though they too are sometimes intermingled and the importance is to be weighed out at the first stage. In that case it has also been observed that the proof beyond reasonable doubt means proof by a higher standard, which generally governs criminal trials or trials involving enquiry into the quasi criminal nature. In the instant case, we feel that the Respondent husband has not only failed to prove such condonation as pleaded, but really there was no basis for the same and as such, we cannot say that the learned Court below was wrong in not consideration such fact of condonation. We cannot also agree with Mr. Dutt''s submissions that "cruelty", even if committed was condoned for the circumstances as indicated hereinbefore and we also hold that the test of legal cruelty would be that any conduct, which would make married life physically or otherwise impossible, apart from the fact that cruelty in law of divorce means cruelty in its ordinary and natural meaning and it has no esoteric or artificial meaning and furthermore the Courts, in a given case will have to decide in the words of Lord Pearce, whether the sum total of the reprehensible conduct was cruel. We feel that such findings would depend on the answer to the question as to whether the cumulative conduct in a given case, was sufficiently grave and weighty to say that from a reasonable person''s point of view, after concession of any excuse, which the adversity might have in the circumstances, the conduct is such, that the petitioner ought not to be called to endure the same and the other element is that the conduct must be grave and weighty and mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, would not construe cruelty. Thus, we feel that in view of the provisions contained in section 23(1)(b) of said Act, we are to find out whether cruelty in this case was condoned by the petitioner wife. Since the provisions as mentioned above, cast an obligation on the Court to consider the question of condonation and to discharge such obligation, even in an independent case and furthermore when, it is not necessary to have

matrimonial offence proved by the person complaining, beyond all reasonable doubts, as the same degree of proof as required in a criminal proceedings is not required in matrimonial cases which is in the nature of civil proceedings. In the Dastane''s case (supra), the Hon''ble Supreme Court of India has also observed that cruelty in matrimonial law may be a subtle or brutal, physical or mental, that it may be of word, gesture or by silence, violent or non-violent and the Court is required to see that cruelty of such type, from which a prudent man would be fully satisfied that the atmosphere or environment in the matrimonial home is so surcharged that it is not conducive to mental and physical health of any of the spouses to live together. As indicated earlier, we feel that in view of the circumstances of the case, the living of the spouse together and any further is not possible or will not be conducive to each other. Even though cruelty has not been defined specifically, but it appears that the responsibility is left to the Court to interpret, analyse and define cruelty in a case, depending upon various interpretations and the broad and liberal test for interpreting section 13(1)(ia), as amended, will be found out together on such type, that the complainant cannot reasonably be expected to live with his or her adversaries and there is no doubt that in order to find cruelty, liberal and broad test will have to be applied. As observed by us earlier, that mental cruelty can even cause more grievous injury and create in the mind of the injured spouse, reasonable apprehension that it will be impossible or unsafe to live with the other party and while viewing a case from that angle the victim''s capacity or incapacity for endurances in so far as, that is, or ought to be known to the offending spouse and cruelty is in generality, in its character, and a cruelty as charge, will have to be considered.

36. Testing the present case on the facts pleadings of the same, we feel as indicated earlier that the petitioner wife had enough cause to form the opinion and idea that staying with the Respondent husband would no longer be possible and conducive to her. For the reasons as above, we allow this appeal and after setting aside the judgment and decree, direct that the petitioner wife will be entitled to a decree for judicial separation. There will be no order as to costs.

Mohitosh Mukherjee, J.

I agree.