Before S.S. Saron, J

KAILASH DEVI,—*Appellant*

versus

JAI KISHAN & ANOTHER,—*Respondents*

F.A.O. NO. 15/M OF 1991

5th February, 2003

Hindu Marriage Act, 1955—Ss.13(1)(i) & 23(1)—Hindu Marriage (Punjab) Rules, 1956—R1.6—Allegation of adultery against wife—Trial Court granting decree of divorce to husband—Challenge thereto—R1.6 of 1956 Rules requires to give particulars of the acts of adultery as nearly as he can of the acts of adultery alleged to have been committed by the wife—Husband failing to mention in petition the names of persons who deposed in his favour—In the absence of specific pleadings, evidence of witnesses is not to be considered—Husband also failing to fully discharge the burden of proving letter allegedly written by respondent No. 2—Merely marking of documents as exhibits would not make the documents admissible in evidence—Evidence of proving a charge of adultery requires a slightly higher standard of proof than mere preponderance of probabilities—Having failed to prove by producing sufficient, cogent, convincing & reliable evidence that his wife had voluntary sexual intercourse with a person, it cannot be said that husband had been subjected to any cruelty by wife—Husband not entitled to decree of divorce—Wife's appeal accepted while setting aside decree of divorce granted by the matrimonial Court.

Held, that the levelling of allegation of adultery is a more serious matter than of a case where matrimonial relief is sought on the ground of cruelty. Therefore, to prove the charge of adultery in a matrimonial cause the standard of proof would definitely be higher and a strict measure of proof is required, though it may not be beyond shadow of reasonable doubt as is required in a criminal case but at the same time it is also not on mere preponderance of probabilities. The proceedings for claiming divorce on ground of adultery partake a character of quasi criminal procedure.

(Para 16)

Further held, that the evidence of proving a charge of adultery in matrimonial cause requires a slightly higher standard of proof than mere preponderance of probabilities. Therefore, in this view of the matter respondent No. 1—husband has failed to fully discharge the burden of proving the letter, allegedly written by respondent No. 2, on the basis of the provisions of the Evidence Act. It is not shown by respondent No. 1 husband in any manner as to how he was in a position to identify the handwriting of respondent No. 2 Ram Karan. Therefore, mere marking of document as exhibits would not make the documents admissible in the evidence. The mere fact that the respondent—husband has stated and exhibited the letter alleged to have been written by respondent No. 2 to the appellant does not dispense with the formal mode of proof enjoined by the provisions of the Indian Evidence Act. In the circumstances, the letter said to have been written by respondent No. 2 is no evidence of the facts stated therein and as per the settled law the only legitimate use to which the said letter could be put would be to use it for discrediting the witness if he had appeared in the witness box and what he had written may be inconsistent with his evidence that he deposes. Therefore, the said letter is liable to be ruled out of consideration.

(Para 20)

Further held, that the failure on the part of the respondent—husband to mention in his petition the names of the persons who were known to him at the time of filing the petition goes to show that these witnesses have in all probability been asked to depose at a later stage to obtain the relief of divorce. It is well established rule of the pleadings that all necessary and material facts should be pleaded by the party in support of its case set up by it. In the absence of pleadings, the evidence, if any, produced by the parties is not to be considered. No party is to be allowed to travel beyond its pleadings. Besides, in order to have fair trial the parties should bring such material so that the other party is not taken by surprise. Therefore, in the absence of specific pleadings, the evidence of PWs Mir Singh and Smt. Rissalo which were in the knowledge of the respondent—husband even as per in his own statement in Court, it is difficult to rely on the testimony.

(Para 22)

Further held, that the evidence on record is contrary to the pleadings and is quite unnatural. In the circumstances, respondent—husband has failed to prove his case by sufficient, convincing and reliable evidence that his wife had voluntary sexual intercourse with respondent No. 2. Therefore, a satisfaction beyond reasonable doubt as to the commission of matrimonial offence cannot be held to have been made out.

(Para 24)

Further held, that the case of respondent—husband for grant of divorce on the ground that the appellant had sexual intercourse with a person other than the respondent—husband not being established, it cannot be said that the respondent—husband has been subjected of any degree to cruelty which would amount to any threat to him whether physical and mental.

(Para 26)

S.K. Jain, Advocate, for the appellant.

Ramesh Hooda, Advocate, for the respondent.

JUDGMENT

S.S. SARON, J.

(1) This is an appeal under Section 28 of the Hindu Marriage Act, 1955 (Act—for short) by the appellant—wife against the judgment and decree dated 20th August, 1990 passed by the learned Additional District Judge, Rohtak, whereby the petition of Jai Kishan respondent—husband for grant of divorce under Section 13 of the Act has been allowed.

(2) The facts leading to the case are that Jai Kishan respondent No. 1 husband of the appellant filed a petition under Section 13 of the Act for the grant of decree of divorce on the ground that the appellant is living in adultery with respondent No. 2 and has also treated him with cruelty. The marriage between the parties was solemnized at Delhi in April, 1970. After marriage both the parties lived together in village Gawalison, Tehsil Jhajjar, District Rohtak. Through this wedlock, one daughter was born in October, 1978. It has been alleged by respondent No. 1 that the appellant is a woman of

unchaste character who has been living in adultery with respondent No. 2 and has inflicted many acts of cruetly on him. He has given the details of the cruetly in his petition. It is stated by the respondent—husband that he was serving in the army and was posted at different stations, while his wife was living with his aged parents. It was just by chance that illicit relationship of his wife with respondent No. 2 came to his notice in July, 1987 through a letter addressed by respondent no. 2 to his wife. It is averred that the letter handed over by the Postman to the father of the respondent—husband suggested that the appellant—wife was carrying on llicit relations and committing voluntary sexual inter course with respondent No. 2 a resident of the village. When the respondent—husband is stated to have learnt about this he was shocked beyond measure and probed into this matter deeply. A lady and another resident of the village confirmed that the appellant—wife had been secretly visiting the house of the respondent No. 2 in the village at odd hours during 1987, 1988 and 1989 when they had personally seen her coming out of the house of respondent No. 2. The respondent—husband was disgusted with her conduct and stopped cohabiting with her. He advised his wife that she should leave this adulterous conduct and act like a chaste and loyal wife. She, however, reacted furiously and started hurling filthy abuses and insulted him even in the presence of others. The respondent—husband consequently lost his faith and apprehended in his mind that because of cruel and adulterous acts of the appellant—wife it was harmful and dangerous for him to live with her. When the respondent—husband again confronted his wife regarding her unchaste and cruel conduct in 1989 she left her matrimonial home, about three weeks earlier to the filing of the petition. She left in the absence of the respondent—husband after taking Rs. 10,000 in case and two tolas of gold ornaments belonging to the respondent—husband. The respondent—husband, however, did not give much publicity to this scandal for the sake of family honour. After the aforesaid letter was received from his wife's paramour (respondent No. 2), the respondent—husband had not condoned the acts of his wife's voluntary extra-marital sexual intercourse in any manner. On these grounds the respondent—husband prayed for the grant of a decree of divorce.

(3) The appellant wife contested the petition and filed her written statement. She stated that the respondent—husband is not entitled to any relief as he himself was at fault and had not come

with clean hands. The petition had been filed with *mala fide* intention only to harass her. The petition was false, frivoluous and a concocted story had been made by the respondent—husband in connivance with respondent No. 2. The other material aspects with regard to the factum of marriage and child being born from the wedlock and they residing together from 1970 to 1987 have been admitted. It was, however, denied by the appellant that she was living in adultery. She states that in fact respondent No. 2 was not known to her and that it was a planted story by the respondent—husband with respondent No. 2. The respondent—husband it is stated wanted to get rid of her and wanted to re-marry another lady as the appellant gave birth to a girl and afterwards no child was born out of the wedlock between the parties. It is stated by the appellant-wife that she is a faithful lady to her husband and had performed all the duties of a wife towards her husband. It is alleged that the respondent husband and his parents and sister had started taunting her for the last four years for not having a male child and they always threatened her of re-marriage of the respondent—husband. It is also alleged that the petitioner and his family started giving beatings to the appellant-wife for the last four years so that she may leave the house of the respondent—husband of her own accord or that she may commit suicide. They also demanded dowry like Motor-Cycle, T.V. and Cash. The panchayat accompanying the appellant-wife went to village Gwalison for persuading the respondent—husband and his family members not to trouble the appellant, but, to no effect. It is on 17th May, 1989 at mid night that the appellant was severally beaten with the consent of respondent—husband by her father-in-law, mother in-law and sister of the respondent—husband and they threw her out from the house. She came to her parent's house having no other alternative. Thereafter, the respondent—husband in his army uniform and under intoxication came to the house of the appellant at Sultanpuri and he was accompanied by three persons and all threatened the respondent and her father either to provide the articles demanded or cash or to get divorce. The appellant had been severally beaten tortured by the family members of the respondent husband and by the respondent—husband so that she may leave his house. These acts of the respondent—husband it is alleged deteriorated the health of the appellant—wife.

(4) The respondent—husband filed his replication to the petition, in which the averments made in the written statement were denied and those in his petition were reiterated. It was prayed that divorce be granted. On these pleadings the following issues were framed by the learned Additional District Judge, Rohtak on 23rd April, 1990 :—

(1) Whether the petitioner is entitled to the decree of divorce on the grounds of adultery and cruelty ? OPP.

(2) Relief.

(5) The learned trial Court after considering the facts and circumstances of the case, passed a decree for divorce in favour of the respondent—husband which as already noticed is assailed by the appellant—wife who has filed the present appeal.

(6) Shri S.K. Jain, Advocate, learned counsel appearing for the appellant—wife has contended that preponderance of evidence has wrongly been taken into account by the learned trial Court for the grant of divorce on the ground that the appellant has voluntary sexual intercourse with a person other than her husband. It is contended that in case of adultery the liability cannot be fixed on the mere preponderance of evidence and is to be strictly proved beyond reasonable doubt.

(7) On the other hand Shri Ramesh Hooda, Advocate learned counsel appearing for the respondent—husband has contended that the case stands fully proved inasmuch as there is a letter written by respondent No. 2 to the appellant and eye—witnesses have seen the appellant going to the house of respondent No. 2. Therefore, the petition should be dismissed.

(8) I have considered the respective submissions urged by the the parties.

(9) The question that requires consideration is what is the standard of proof required for the grant of matrimonial relief on the ground that one of the parties has after the solemnization of marriage had voluntary sexual intercourse with any other person other than his or her spouse. In other words, what is the standard of proof required for the grant of matrimonial relief on the ground that the appellant wife has been living in adultery.

(10) In the case of **Earnist John White** *versus* **Mrs. Kathleen Oliva White and others (1)** which was a case under the Indian Divorce Act, the husband sued his wife for dissolution of marriage on the ground of her adultery between his wife and two other co-respondents. The same was dismissed by the Patna High Court reported in **Earnist John White** *versus* **Kathleen Oliva White and others (2).** The husband in the said case alleged various act of adultery between his wife and other two co-respondents. The allegation of adultery of the wife with one of the respondents was found against the husband which was not challenged. The allegations of adultery between the wife and the other respondent were also held to be not proved. In appeal before the Hon'ble Supreme Court the husband confined his case to acts of adultery alleged to have been committed at the Central Hotel, Patna where the wife and respondent No. 2 therein were alleged to have resided for three days under assumed names. The wife pleaded that she came to Patna solely with the object of having her tooth extracted and returned to Samastipur, the same day. The Hon'ble Supreme Court referred to the provisions of Section 14 of the Indian Divorce Act which provides :—

> "S.14. In case the Court **is satisfied on the evidence** that the case of the petitioner has been proved....." (emphasis added)

(11) The Hon'ble Supreme Court after referring to the above provision held as follows :—

> "The important words requiring consideration are "satisfied on the evidence". These words imply that the duty of the Court is to pronounce a decree if satisfied that the case for the petitioner has been proved but dismiss the petition if not so satisfied. In S.4 of the English Act, Matrimonial Causes Act of 1937 the same words occur and it has been there held that the evidence must be clear and satisfactory beyond the mere balance of probabilities and conclusive in the sense that it will satisfy what Sir William Scott described in Loveden *versus* Loveden (1810) 161 E.R. 648 (D) as "the guarded discretion of a reasonable and just

(1) AIR 1958 S.C. 441
(2) AIR 1954 Patna 560

man". Lord Mac Dermott referring to the description of Sir Willian Scott said in Preston Junes *versus* Preston Jones, 1951 A.C. 391 at p.417 (E) :

> "The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict enquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be "satisfied" in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusion as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in **Mordaunt** *versus* **Moncreiffe,** (1874) 30 L T 649 (F), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt,—lies not in any analogy but in the gravity and public importance of the issue with which each is concerned."

(12) The Hon'ble Supreme Court after referring to the above Rule held as follows :—

> "In our opinion the rule laid down by the House of Lords, would provide the principle and rule which Indian Court's should apply to cases governed by the Act and the standard of proof in divorce cases would therefore be such that if the judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence he would be satisfied within the meaning of S.14 of the Act."

(13) Under the Hindu Marriage Act, to claim the matrimonial relief of divorce on the ground of adultery, Section 13(1)(i) of the Act may be noticed, which reads as under :—

> "**13. Divorce.—(1)** Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition

presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse;"

(14) Section 23(1) of the Act is also apposite and the same reads as under :—

"**Decree in Proceedings.—(1)** In any proceedings under this Act whether defended or not, **if the Court is satisfied that—**

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

(b) where the grounds of the petition is the ground specified or in Cl. (i) of sub-section (1) of Sec. 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or which the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty, and

(bb) when a divorce is sought on the ground of matual consent, such consent has not been obtained by force fraud or undue influence, and

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

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

(e) there is no other legal ground why relief should not be granted,

then, and in such a case, but not otherwise, the Court shall decree such relief accordingly. (Emphasis added)

(15) The relief, therefore, in terms of Section 23(1) of the Act is also to be granted if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. The standard of proof required to prove a matrimonial cause was considered by the Hon'ble Apex Court in **Shobha Rani** versus **Madhukar Reddi (3)**, wherein their Lordships referred to its earlier decision in the case of **Narayan Ganesh Dastane** versus **Sucheta Narayan Dastane (4)**, wherein the question of standard of mode required to prove a matrimonial conduct which constitutes cruelty as a ground for dissolution of marriage was considered. It was held by the Hon'ble Supreme Court in **Shobha Rani's** case *(supra)* as follows :—

> "We are, however, not concerned with criminal offence either under the Dowry Prohibition Act or under the Indian Penal Code. We are concerned with a matrimonial conduct which constitutes cruelty as a ground for dissolution of marriage. Such cruelty if not admitted requires to be proved on the preponderance of probabilities as in civil cases and not beyond a reasonable doubt as in criminal cases. This Court has not accepted the test of proof beyond a reasonable doubt. As said by Chandrachud, J. in Dastane case (AIR 1975 SC 1534) (at page 1540) :—
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> Neither section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor section 23 which governs the jurisdiction of the Court to pass a decree in any proceedings under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the court the power to pass a decree if it is " satisfied" on matters mentioned in Clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word " satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt." Section 23 does not alter the standard of proof in civil cases." (emphasis added)

(3) AIR 1988 S.C. 121
(4) AIR 1975 S.C. 1534

(16) It is appropriate to note that the standard of proof in respect of matrimonial conduct which constitutes cruelty as a ground for seeking a matrimonial relief of dissolution of matrimonial relief may be established on the preponderance of probabilities as in civil cases and not beyond a reasonable doubt as in criminal cases. However, the question in the case in hand, that is required to be considered is in relation to seeking matrimonial relief on the ground of adultery where it is alleged that the appellant is living in adultery or in other words after the solemnization of the marriage, she has had voluntary sexual intercourse with a person other than the respondent—husband. It is appropriate to note that the levelling of allegation of adultery is a more serious matter than of a case where matrimonial relief is sought on the ground of cruelty. Therefore, to prove the charge of adultery in a matrimonial cause the standard of proof would definitely be higher and a strict measure of proof is required, though it may not be beyond shadow of reasonable doubt as is required in a criminal case but at the same time it is also not on mere preponderance of probabilities in view of the dictum of the Hon'ble Supreme Court in **Earnist John White's case.** (supra). The proceedings for claiming divorce on ground of adultery partake a character of quasi criminal procedure.

(17) In the case in hand, the respondent husband in order to prove adultery apart from appearing himself as PW-1 has examined one Mir Singh son of Chandgi Ram PW-2 and one Rissalo wife of Pannu Ram as PW-3. All the three witnesses were examined on 28th May, 1990 and thereafter the evidence of the respondent—husband was closed. In his examination the respondent—husband Jai Kishan reiterates his stand taken in the petition and he also states that he knows Ram Karan (respondent No. 2) the alleged adulterer. He it is alleged used to visit his house and that his wife is distantly related as his aunt. The said Ram Karan, it is stated lives at Allahabad but he frequently visits his village. He has his house and land in the village. It is stated that in the summer season of 1987, an inland letter addressed to Smt. Kailash from Ram Karan was received at their house. He had brought the original letter in Court on that day. He further states that he had been seeing Ram Karan writing and can identify his handwriting. The letter was exhibited as PA (which was objected to). The respondent—husband states that in the month of May or June 1987 when he had come on short leave, his father had given him the aforesaid letter and after reading the letter he felt very

bad with regard to the character of his wife. He told his wife that she had done a very bad thing and he asked his parents to keep watch on his wife regarding her movements because the letter can also be wrong. It is further stated by the respondent—husband that after the receipt of the afore-mentioned letter, he did not keep his relation as husband and wife with the appellant. On his further visit to village on leave he was told by Mir Singh Panch of their village that he had seen his wife with Ram Karan in a picture hall at Jhajjar on one occasion. The respondent—husband further states that he was told by his neighbour Smt. Rissalo daughter of Kalu that she had seen his wife in a compromising position with Ram Karan in the room of Juthar of their village. It is stated that he persuaded his wife not to have illicit relations with Ram Karan and she thereupon abused him and called him 'Hijra' (eunuch). The respondent—husband also states that he never demanded from his in-laws T.V., Scooter or any other gift. In the month of May, 1989, the appellant left his house and went to the house of her parents without his consent. She at that time took with her Rs. 10,000 in cash, one pair of ear rings, a tikka and one tola raw gold i.e. two tolas of gold. He had withdrawn Rs. 10,000 from his G.P. Fund and he had retired as ordinary Naik from the Army on 1st April, 1990 and was likely to get Rs. 400 as monthly pension which had not been sanctioned till then. It is also stated by the respondent—husband that he was prepared to keep his daughter with him and provide her education and maintenance and that he wanted decree of divorce from his wife. In cross examination, he states that he had informed his counsel about information given to him by Mir Singh (PW-2) and Rissalo (PW-3). He also states that the petition was read over to him by his counsel and then he signed. He had studied up to 5th class.

(18) Mir Singh, (PW-2) states that he is member of the village Panchayat. He had seen the appellant and respondent No. 2 Dalip Kumar *alias* Ram Karan at Bus Stand Jhajjar in January, 1987 when he had gone to purchase some electrical appliances. Thereafter, he had again gone to Jhajjar in December 1988 and he had again seen them at Jhajjar. He further states that Ram Karan used to visit the house of Jai Kishan (respondent No. 1) but he had never seen the appellant going to the house of Ram Karan. He further states that he could not say about the character of the appellant. In his cross examination, he states that Jai Kishan (respondent No. 1) had brought him on that date for evidence.

(19) Smt. Rissalo (PW-3) states that she knew the parties, her house and that of Jai Kishan (respondent No. 1) were in the same street. She further states that Ram Karan *alias* Dalip Kumar (respondent No. 2) used to visit the house of Jai Kishan (respondent No. 1). About one year earlier to the recording of her evidence on 28th May, 1990 in the second month of the year she had seen Kailash Devi (appellant) and Ram Karan (respondent No. 2) in compromising position in the house of Juthar of their village. Both of them were naked at that time and were performing sexual intercourse. She had informed Jai Kishan's father Phool Singh about this incident. It is also stated by Smt. Rissalo (PW-3) that about three years back, letter of Ram Karan *alias* Dalip Kumar (respondent No. 2) addressed to Kailash Devi (appellant) was received by Phool Kumar. In her cross-examination, it is stated by Smt. Rissalo (PW-3) that the room where she had seen Kailash Devi (appellant) and Ram Karan *alias* Dalip Kumar (respondent No. 2) in compromising position was not used as residence and that cattle feed was stored there. The door of that room opens into a street and that room does not have window and ventilators. It is further stated that only two cots can be laid in that room and that room remains open. She had gone into the room to take cattle-feed for her own cattle. It was dark in the room and she had lighted the match-box (sic.-match stick). She further states that Juthar was her cousin brother and is separate from them. He had since died. She also states that her eye sight was weak and again said was weak to some extent.

(20) Apart from this oral evidence, there is the letter Ex.PA which is said to have been written by respondent No. 2 to the appellant wife which has been exhibited Ex.PA in the statement of respondent No. 1 Jai Kishan. The letter Ex.PA is a letter addressed to the appellant on an Inland letter paper in which it is primarily stated that their friendship shall remain intact and that nobody should get to know about the writing of the said letter and that the author of the letter should not be forgotten and that the letter should be written in the name of some other fellow. The said letter is written in Hindi and it is only in the place meant for writing address, that the name of the appellant figures. The contents of the letter are to the effect that the writer of the letter is Dalip Kumar. It may be noticed that the said letter has been exhibited in the statement of Jai Kishan (respondent No. 1) but he does not say as to how he is aware of his handwriting.

In other words Jai Kishan (respondent No. 1) does not specifically state that as to in what capacity he had seen Ram Karan (respondent No. 2) writing or signing. As already noticed, the evidence of proving a charge of adultery in matrimonial cause requires a slightly higher standard of proof than mere preponderance of probabilities. Therefore, in this view of the matter the respondent No. 1 husband has failed to fully discharge the burden of proving the said letter on the basis of the provisions of the Evidence Act. It is not shown by respondent No. 1 husband in any manner as to how he was in a position to identify the handwriting of respondent No. 2 Ram Karan. Therefore, mere marking of document as exhibits would not make the documents admissible in the evidence. In the case titled **Sait Tarajee Khim Chand and others** *versus* **Yalamarti Satyam and another, (5)** it was held that mere marking of document as exhibit does not dispense with its proof. Therefore, the mere fact that the respondent—husband has stated and exhibited the letter alleged to have been written by respondent No. 2 to the appellant does not dispense with the formal mode of proof enjoined by the provisions of the Indian Evidence Act. In the circumstances, the letter said to have been written by Ram Karan (respondent No. 2) is no evidence of the facts stated therein and as per the settled law the only legitimate use to which the said letter could be put would be to use it for discrediting the witness if he had appeared in the witness box and what he had written may be in-consistent with his evidence that he deposes. Therefore, the said letter Ex.PA is liable to be ruled out of consideration.

(21) The question that then requires to be considered is what is the evidentary value of the statements of Mir Singh (PW-2) and Smt. Rissalo (PW-3). Mir Singh (PW-2), as already noticed above, had seen the appellant and respondent No. 2 on two occasions at Jhajjar in January, 1987 and December 1988. Smt. Rissalo (PW-3) states that she had seen the two in a compromising position. The evidence of both the witnesses i.e. Mir Singh (PW-2) and Rissalo (PW-3) are in the nature of a chance encounter. Though the "chance witness" is not necessarily a false witness, however, it is proverbially rash to rely upon such evidence. Besides,as already noticed above,the statements of the three witnesses of the respondent-husband were recorded on 28th May, 1990. The petition was filed on 29th May, 1989. The period of time when Smt.Risalo (PW-3) states that she had seen the two in compromising position and having sexual inter course is about one year back in the

(5) AIR 1971 S.C. 1865

second month of the year that would mean sometime in February 1989. The petition is dated 29th May, 1989 and was instituted in the Court below on 30th May, 1989. In the petition the respondent No.1 who was the petitioner before the trial Court states that a lady and another resident of the village confirmed that his wife had been secretly visiting the house of respondent No.2 in the village many times at odd hours during 1987, 1988 and 1989 when they had personally seen them coming out of the house of Ram Karan (respondent No. 2). In the petitiion,the respondent-husband does not name the lady and the other resident of the village who allegedly saw this. He also does not mention the fact that Smt. Rissalo (PW-3) was the lady who had seen them and had actually seen them in a compromising position having sexual intercourse. It is highly improbable that Smt. Rissalo (PW-3) would perchance walk into the house of her cousin in a room which is dark and see the appellant and respondent No.2 in the act of having sexual intercourse. She is,therfore,even otherwise a mere chance witness and already observed it is proverbially rash to rely on a chance witness. This Court in exercise of powers under Section 14 and 21 of the Act has framed the Hindu Marriage (Punjab) Rules 1956. Rule 6 thereof reads as under :—

> "6. **Full acts of adultery to be given,**—In any petition for divorce the petitioner shall be required to give particulars as nearly as he can of the acts of adultery alleged to have been committed by the respondent or respondents as the case may be."

(22) Therefore, the failure on the part of the respondent No. 1 to mention in his petition the names of the persons who were known to him at the time of filing the petition goes to show that these witnesses have in all probability been asked to depose at a later stage to obtain the relief of divorce. Besides, it may be noticed that Mir Singh (PW-2) categorically states that he had never seen the appellant Kailash Devi coming to the house of Ram Karan whereas the respondent No. 1 in his petition states that a lady and another person had confirmed that his wife had been secretly visiting the house of respondent No. 2. Therefore, the witness Mir Singh (PW-2) is deposing contrary to the averments as made in the petition. Besides, respondent No. 1 while appearing as PW-1 in his evidence states that he had informed his counsel before filing the petition about the information given to him by Mir Singh (PW-2) and Smt. Rissalo (PW-3). He also states that the petition was read over to him by his

counsel and accordingly he signed. He also states that these matters have not been written in the petition. It is well established rule of the pleadings that all necessary and material facts should be pleaded by the party in support of its case set up by it. In the absence of pleadings, the evidence, if any, produced by the parties is not to be considered. No party is to be allowed to travel beyond its pleadings. Besides, in order to have fair trial the parties should bring such material so that the other party is not taken by surprise. Therefore, in the absence of specific pleadings, the evidence of PWs Mir Singh and Smt. Rissalo which were in the knowledge of the respondent No. 1 even as per in his own statement in Court, it is difficult to rely on the testimony.

(23) In **Manjit Kaur** *versus* **Santokh Singh (6),** the trial Court had decreed the petition of the husband for grant of divorce on the ground that she was living in adultery. This Court held that in such matters public interest requires that marriage bonds shall not be set aside lightly or without strict enquiry and proof and that the act of adultery in its nature is a very secret act and direct proof could not be available in all cases. It was held that proof of actual adultery is not necesary and circumstantial evidence which lends to an inference of adultery was sufficient and that the degree of proof need not reach certainty, but it must carry a high degree of probability. It was held that it required that appreciation of evidence in such cases must be careful and proper and only when evidence is cogent, consistent and reliable, the finding of adultery could be recorded but where the evidence was lacking in corroboration and inconsistent and unnatural, no finding of adultery could be recorded.

(24) In the case in hand, it has already been observed that the evidence on record is contrary to the pleadings and is quite unnatural. In the circumstances, in my view the respondent No. 1 has failed to prove his case by sufficient, cogent, convincing and relaible evidence that his wife had voluntary sexual intercourse with respondent No. 2. In the circumstances, a satisfaction beyond reasonable doubt as to the commission of matrimonial offence as held in **Earnist John white's case** *(supra)* cannot be held to have been made out.

(25) It has not been shown by the respondent No. 1 as to how he has been treated with cruelty. In order to claim materimonial relief under Section 13(1)(1-a) of the Act, it is to be seen whether the respondent has been treated with cruelty by the appellant. Cruelty

(6) 1997 (1) S.L.R. 66

under the Act can be both mental and physical. The degree of cruelty necessary to claim a matrimonial relief has not been defined under the Act. It depends from case to case and the Legislature has also refrained from giving a comprehensive definition of the expression that may cover all cases. In order to claim divorce on the ground of cruelty, it may be shown that the other spouse has treated the complaining spouse with cruelty which may be physical or mental. This has been so held even by the Hon'ble Supreme Court in the case of **Parveen Mehta** versus **Inderjit Mehta (7).** Besides mental cruelty is a state of mind and feeling of one of the spouses due to the behaviour or behavioural pattern of the other. It is a matter of infernece to be drawn from the facts and circumstances of the case and proper approach requires the assessment of the cumulative effect of the attending facts and circumstances as established from the facts and circumstances on record. Physical cruelty on the other hand consists of such acts which endanger a physical health of one of the parties to the marriage and includes the inflicting bodily injury or giving cause for such injuries. Reference in this regard may be made to **Savitri Pandey** versus **Prem Chandra Pandey (8).** Therefore, in this background from the material on record it is to be seen whether the respondent has been subjected to such degree of cruelty so as to sustain the judgment and decree under appeal.

(26) Keeping in view the above test and also keeping in view the fact that the case of respondent No. 1 for grant of divorce on the ground that the appellant had sexual intercourse with a person other than the respondent-husband not being established, it cannot be said that the respondent No. 1 has been subjected to any degree of cruelty which would amount to any threat to him whether physical and mental.

(27) Therefore, in the circumstances of the case, it cannot be said that the wife has had voluntary sexual intercourse with respondent No. 2. Resultantly in my view the Matrimonial Court has erred in decreeing the petition of respondent No. 1. As such the appeal is accepted and the impugned judgment and decree is set aside and the petition of the respondent No. 1 for the grant of divorce is dismissed.

R.N.R.

(7) (2002) 5 S.C.C. 706
(8) (2002) 2 S.C.C. 73