

(1974) 12 BOM CK 0015
In the Bombay High Court
Case No : O.C.J. Petition No. 556 of 1972

David alias Balasaheb Sunderrao Takalkar	APPELLANT
Vs	
Kalpana alias Mai alias Vijayamala Prabhakar Londhe	RESPONDENT

Date of Decision : 16-12-1974

Acts Referred:

Constitution of India, 1950 — Article 38
Divorce Act, 1869 — Section 10, 12, 13, 14, 18
Hindu Marriage Act, 1955 — Section 12, 2, 23, 3
Penal Code, 1860 (IPC) — Section 34, 417

Citation : (1976) 78 BOMLR 85

Hon'ble Judges : Gandhi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gandhi, J.—This is a petition filed by the husband who is an Indian Christian under the Indian Divorce Act and under Clause 35 of the Letters Patent for obtaining a decree that his marriage with the respondent be declared null and void. The original petition has been amended pursuant to the order dated April 3, 1974 on April 17, 1974, making allegation that the respondent committed frequent acts of adultery with the co-respondent since December 6, 1970. An additional prayer has been made that in the alternative to the prayer of declaring the marriage null and void, the Court may pass a decree of divorce in favour of the petitioner. Though this was an ex parte matter, after recording the evidence of certain witnesses, my brother Kania J. felt that the petition raises some important questions of law and the Court would require assistance of some advocate and made an order requesting Mrs. Manohar to appear as amicus curiae to assist the Court. After this order, the petitioner has amended the petition and has also prayed for a decree for divorce as mentioned above. It is the case of the petitioner that in April 1968, one V.R. Londhe and one L.W. Bansode of Poona met petitioner's maternal uncle Rev. N.R. Pandit and made representations that respondent was a virgin; that she has passed S.S.C,

examination and that she was working as a steno-typist in an office at Bombay. These representations were made to Pandit with a view to suggest that the respondent would be an admirably suitable person as wife for the petitioner.

2. As suggested by the parties, a meeting was arranged on April 28, 1968 in Bombay at the residence of the respondent at Goregaon. It is the petitioner's case that the petitioner was introduced to the respondent and her parents there. The petitioner was accompanied by Pandit and at that meeting, respondent's parents represented to the petitioner that the respondent was a girl of good moral character and a virgin; that she had passed S.S.C. examination and had completed a, Telephone Operator's course and a course in Stenography and that she was employed as a steno-typist with Messrs. Comteck Laboratories, Mahim, Bombay. According to the petitioner, there was a further meeting which took place at Poona at the house of Bansode. At that meeting, the petitioner's mother and Pandit were present and respondent and her parents, Bansode and one Patole were also present. Again the same representations were repeated to Pandit by the respondent and her parents. According to the petitioner, these representations regarding the character and qualifications and respondent's service were all false. According to him, they were fraudulently made, dishonestly concealing- the true facts with a view to deceive the petitioner and to induce the petitioner to marry the respondent. Relying on the said representations and believing them to be true, the petitioner agreed to marry the respondent. After this, the petitioner and the respondent signed the marriage notice form, wherein the petitioner stated that he was a bachelor and the respondent stated that she was a Kumari. The respondent stated in the form that her date of birth was September 4, 1949, which according to the subsequent information received by the petitioner was also a false birth date. The petitioner in the petition has also alleged that the respondent deliberately and fraudulently and with a view to concealing her character which was notorious, avoided publication of her banns in Bombay so that the people of her parish in Bombay may not know that she was getting married and may not raise a lawful impediment to her marriage. It is the case of the petitioner that the respondent instead of mentioning her real name viz. Vijayamala by which she was called from birth and continued to be called, falsely stated her name as Kalpana in the notice of marriage. It is also the case of the petitioner that instead of publishing the banns in the Bombay Church to which the respondent's parents belonged, the banns were published in the Brother Deshpande Memorial Church, Poona, with a view that the respondent's antecedence could not be known. On May 27, 1968, the petitioner and the respondent went through a marriage in the Hume Memorial Church, Ahmednagar. According to the petitioner, this was a pretended marriage. As the marriage was held at Ahmednagar, the petitioner and the respondent spent the wedding night at the residence of the petitioner's maternal uncle, the said Pandit at Ahmednagar. It is the case of the petitioner that on the same night i.e. the first night of the wedding, when the petitioner and the respondent were alone together, petitioner was surprised to find that the

respondent was behaving in a manner of a girl who was well experienced in sexual intercourse. The petitioner found that the respondent was not a virgin. When the petitioner protested, the respondent confessed that she was experienced in sex and she was not in fact a virgin. She also admitted that she had been carrying on with a married man with whom even at that time she was in love. It is the petitioner's allegation that the respondent told him that she never loved the petitioner. But she and her parents deliberately made the efforts of false representations to the petitioner to conceal her past and to induce the petitioner to marry her. The petitioner reacted and told the respondent that fraud had been practised upon him and under the circumstances the petitioner would not consider her as his wife and would not have any relations with her. The petitioner told the respondent on that very night that she was free to go wherever she liked or wanted, as the petitioner was not prepared to take her to Pimpri as his wife.

3. The petitioner further states in the petition that the respondent begged of the petitioner not to disgrace her publicly and requested the petitioner to take her to Pimpri for a short time and thereafter to take her back to her parents. The petitioner to keep up the appearance, took the respondent to his quarters at Pimpri for two days, but had no sexual connection with her whatsoever. The petitioner thereafter took the respondent from Pimpri to respondent's parents at Goregaon, Bombay, where after staying the night at Goregaon, the petitioner and the respondent stayed for about six days at the residence of the petitioner's maternal uncle Pandit at Abbott House, Sophia Zuber Road, Byculla, Bombay. But it is the case of the petitioner that he had no sexual intercourse with the respondent during this period. It is further stated in the petition that thereafter from June 1968 to January 25, 1969 the petitioner and the respondent resided together at the petitioner's quarters at Pimpri viz. room No. 8 in quarter No. HB/17, Sindhi Camp, Pimpri, but the petitioner had no sexual relations with the respondent at all. It is further stated in the petition that quarrels broke out between the petitioner and the respondent and ultimately the respondent left the petitioner on or about January 25, 1969 with "the intention of breaking up the pretended marriage and went to the residence of her brother-in-law, Bansode, at Nana Peth, Poona. There are allegations in the petition that when she went away, she took away some ornaments, but they are not relevant for the determination of this petition and I need not go into the details about those allegations. On these allegations, the petitioner wanted this Court to declare that the said marriage between the petitioner and the respondent was null and void. There was correspondence between the legal advisors of the petitioner and the respondent, wherein the petitioner had pointed out all that has been stated above. Besides that, petitioner had filed a criminal complaint u/s 417 read with Section 34 of the Indian Penal Code against the respondent and some of her relations, bearing case No. 324/S of 1971 in the Court of the Presidency Magistrate, Borivli. When the petition was filed, the said criminal complaint was pending, but I am now told that in view of this petition, the criminal complaint has been withdrawn. By amendment, the petitioner has alleged that after he filed

this petition for a decree for nullity, in or about the end of October 1973, from one Sudhakar Yadavrao Prabhune, the petitioner came to know that the respondent committed frequent acts of adultery with the co-respondent since December 6, 1970, and as a matter of fact, on December 10, 1970, in the early morning, respondent and the co-respondent in the co-respondent's bed room at Madina Manzil were seen together when the wife of the co-respondent was not at home; that the respondent and the co-respondent were also seen together again on December 30, 1970 at Sea View Hotel, Juhu, and the petitioner believed that the respondent had committed adultery and frequent acts of adultery with the co-respondent and has prayed that he is entitled to have his marriage with the respondent dissolved by a decree of divorce on the ground of adultery also. When the petition came up for hearing before Kania J on December 6, 1972, the petitioner examined himself as a witness in support of his petition. He also examined one Nilkanth Rangnath Makasare, a Parish Priest of the Emmanuel Church at Proctor Road. He also examined John Yadavrao Shirshat, a Pastor of the First Church at Ahmednagar known as the Hume Memorial Church and examined N.R. Pandit. The petitioner also examined one Waman Keshav Wad, Principal of the People's Education Society's Maharashtra High School at Lower Parel, to prove that the date of birth was registered as June 3, 1945 and that the respondent was sent up for S.S.C. examination in March 1963, but she did not get through. The petitioner also examined one Abaji Mahadeo Kale, a store-keeper from Comteck Laboratory to show that the respondent was Miss V.P. Londhe; that her first name was Vijayamala; that there is no entry in the register showing the name as Kalpana as an employee and according to Kale, the respondent was working as a packer in the firm. On December 7, 1972, at the request of the petitioner's counsel, the matter was adjourned to December 20, 1972. Thereafter as mentioned above, the petitioner amended the petition on April 17, 1974 pursuant to the order obtained on April 3, 1974 and by amendment, the petitioner has added Kesharikumar Kashinath Shinde as a co-respondent and has also prayed for a decree for divorce on the ground of adultery. When the matter reached before me on December 6, 1974, Mr. Sethna, counsel for the petitioner applied for permission to lead further evidence as the petition was amended and in order to substantiate the allegations of adultery against the respondent and the co-respondent. The permission having been granted, the petitioner has examined one more witness viz. Sudhakar Yadavrao Prabhune to substantiate his allegations of adultery against the respondent.

4. It is mainly the case of the petitioner that the petition is u/s 18 of the Indian Divorce Act, 1869 for marriage being declared null and void and it is urged that Section 19 provides the grounds on which a decree for nullity can be obtained from the Court. Section 19 mentions four specific grounds and in the last paragraph, it states:

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

It is the case of the petitioner that under this provision, he has filed this petition before the High Court and the High Court can in the exercise of its jurisdiction pass a decree of nullity of marriage as his consent was obtained by fraud.

5. The petitioner also relies upon the provisions of dissolution of marriage contained in Section 10, that the marriage be dissolved on the ground that the respondent, his wife, has since the (solemnization of the marriage been guilty of adultery. Section 7 of the Indian Divorce Act, provides as follow:

Subject to the provisions contained in this Act, the High Courts and District Court shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief:....

It is submitted on behalf of the petitioner that reading the provisions of Section 19 and especially the last clause which has been reproduced coupled with the provisions of Section 7, this Court taking into consideration the principles and rules on which the Court for Divorce and Matrimonial Causes in England gives relief, should grant the relief prayed for viz. a decree for nullity of marriage. Though in the petition reliance has been placed on false representations with regard to the qualifications of the respondent viz. that she has been represented to have passed S.S.C. examination and also with regard to the respondent having obtained training as a telephone operator and a steno-typist and was serving as a steno-typist and further that banns were not published as per the requirements of the Church, Mr. Sethna appearing on behalf of the petitioner fairly stated that he does not rely upon these misrepresentations as providing grounds for holding that fraud has been perpetrated and the consent obtained from the petitioner was as a result of such fraud. However, he submitted that these mis-representations are relied upon by the petitioner in support of his contention, that the main representations made on behalf of the respondent by her parents that respondent was a girl of good moral character and a virgin, which according to Mr. Sethna an essential condition of marriage, was a false representation and such a false representation was made deliberately to Induce the petitioner to give his consent to the marriage with the respondent and that the other conduct on the part of the respondent and her parents are indicative to support the contention of the petitioner that there was a deliberate fraud played upon the petitioner viz, to induce him to give his consent on false representation that respondent was a girl of good moral character and a virgin. It is submitted by Mr. Sethna that the petitioner had made specific inquiries regard to the good moral character of the respondent and her being a virgin and in response to that inquiry, such representations were made by the respondent's parents. It is further submitted by Mr. Sethna that these representations were made in the presence of the respondent and the respondent by remaining silent is also guilty of concealment of material and important question about her bearing good moral character or being virgin. To that extent the respondent has also by suppressing

the truth been responsible for making false representations. Mr. Sethna in support of his submissions relied upon the changes in the Matrimonial Law in England and tracing the history of Matrimonial Law, submitted that the Royal Commission to Inquire into the Matrimonial Relations, made its report in 1850 and that Act was passed in 1857 and by that Act, Courts in England were invested with the jurisdiction to try matrimonial cases. He has relied upon Section 22 of that Act, which runs as follows:

In all Suits and Proceedings, other than Proceedings to dissolve any Marriage, the said Court shall proceed and act and give Relief on Principles and Rules which in the Opinion of the said Court shall be as nearly as may be conformable to the Principles and Rules on which the Ecclesiastical Courts have heretofore acted and given Relief, but subject to the Provisions herein contained and to the Rules and Orders under this Act.

He submitted that the provisions of Section 22 of 1857, Matrimonial Causes Act, England are verbatim incorporated in the Indian Divorce Act in Section 7. The only difference being that there, the Courts were required to proceed and act on principles and rules on which the Ecclesiastical Courts had acted and given relief, here, the Courts in India have to act and give relief on principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Mr. Sethna submitted that there are important changes in the Matrimonial Law in England and he has referred to the changes brought about by Matrimonial Causes Act of 1923, whereby for the first time, the right was granted to the wife for filing petition for divorce for adultery; then Matrimonial Causes Act, 1937, whereby for the first time grounds for nullity of marriage were specifically stated, then Matrimonial Causes Act, 1965, whereby desertion and cruelty were added as grounds for matrimonial relief; then Divorce Reform Act, 1969, which provided further reforms in the matter of obtaining divorce and lastly the Nullity of Marriage Act, 1971, in which provisions have been added which clearly indicate the difference between void and voidable marriage and specifically provide that marriage is voidable if no valid consent in consequence of duress, mistake, unsoundness of mind or otherwise is obtained. It is submitted by Mr. Sethna that this Court while exercising the jurisdiction under Letters Patent and under the Indian Divorce Act, should follow the principles and rules laid down not only by English decisions, but also by certain changes which have been brought about by various legislations in England. He has submitted that even if the Court is not inclined to introduce all the legislative changes brought about, at least the policy and the principles followed by English Courts and English law viz. that the grounds for divorce and nullity having been expounded should be taken into consideration in view of the provisions of Section 7 of the Indian Divorce Act. Mr. Sethna submitted that neither by any decision of English Court nor by any legislation in England, there has been any case, wherein the question of obtaining consent by fraud ("error" as used in English Act) or the consent obtained by mis-representation with regard to the vital condition or essential condition of marriage viz. the bride being virgin, has been decided. The

Courts in India should, under the heading "fraud" apply the ordinary principles applicable to ordinary contracts and if on applying those principles there is no real consent to the marriage, should declare the marriage to be null and void. Mr. Sethna urged before me that this is an important question for Christian" religion and even if the petitioner is entitled to get a decree for divorce on the ground of adultery, the decree may be liable to be set aside and he would like the Court to grant him decree declaring the marriage to be null and void. He further submitted that a decree of nullity was recognised by the Church and the petitioner's re-marriage would be recognised by the Church; the petitioner being a very religious-minded follower of the Church, would have an easy conscience to re-marry if there is a decree of nullity and not merely a decree for dissolution of marriage on the ground of adultery. Mr. Sethna also submitted before me that there is no direct authority either of the English Courts or of the Indian Courts under Indian Divorce Act or similar provisions of the Hindu Marriage and Divorce Act, which has similar provision for declaring the marriage a nullity. He submitted that the Court may consider the entire question including the main question whether the allegations made by the petitioner, if substantiated by evidence would provide the ground for decree of nullity on the basis of the provisions of Section 19 that his consent was obtained by fraud, In other words, Mr. Sethna submitted that the question how the Court interprets the word-"fraud" is an important thing for the determination of the first question whether the petitioner is entitled to a decree for declaration of nullity of marriage u/s 19 of the Indian Divorce Act. As the evidence of the original petition was not taken before me, and as I had not gone through the evidence and as my learned brother Kania J. had requested Mrs. Manohar to appear as amicus curiae to assist the Court on this very important matter and as Mrs. Manohar has taken pains to assist the Court, I allowed Mr. Sethna to argue the matter at considerable length and now I propose to consider the question whether a decree for nullity could be passed on consent being obtained by fraud. Several authorities have been cited before me and it is submitted on behalf of the petitioner that in interpreting the word "fraud" as appearing in Section 19 of the Indian Divorce Act, I should follow the same principles followed under the Contract Act and if I am satisfied that the consent was obtained, which would render such consent to be illusory or non-existent, I should hold that, even in a matrimonial case, if consent has been obtained by false representation as to an essential condition of marriage, viz. the question of virginity of a bride at the time of marriage, the marriage was void, Mr. Sethna submitted that even if the Court is take the view that the marriage is not void ah into, but it is voidable at the instance of the party, who has been induced to enter into a contract or give his consent because of certain false representation, even then I should hold that the marriage is voidable at the instance of the petitioner and declare and give a decree for nullity of marriage.

6. Mr. Sethna has further submitted that the petitioner has led evidence to show that certain representations were made and those representations were false. He further submits that the evidence discloses that the petitioner who was a believer

in Christian religion, had made it clear that he would not have married the respondent unless she was a virgin and a woman of good character. He also submits that the petitioner would not have married the respondent if the representations which were made, were not made, but they were made to induce the petitioner to consent to a marriage. Mr. Sethna submits that there is sufficient evidence to draw an inference that the respondent's parents must have known that their daughter, the respondent, was not bearing good moral character or was not virgin and knowingly made false representations. He further submits that in any event the respondent was present when such representations were made and was keeping silent" when these material and essential conditions of marriage were contemplated and representations were made, and thereby she suppressed the truth which she at least knew and has induced the petitioner to give his consent to the marriage. "When I will discuss the evidence in a little detail, I will express my opinion of the view that I take of the evidence on the question whether the evidence satisfies the requirements: of false representations having been made with the knowledge that they were false. Mr. Sethna submitted that whatever be my view with regard to the sufficiency of evidence on the record, the main question is whether such false representations inducing consent on essential matters would enable a party to prove that his consent was obtained by fraud and further entitle him to obtain a decree declaring the marriage null and void. In the alternative, Mr. Sethna has submitted that the evidence with regard to the allegations of adultery are proved by examining an independent witness and that evidence has remained unchallenged as the respondent or the co-respondent who have been served with the petition and the amended petition have remained absent in the proceedings and therefore, the petitioner is entitled to a decree for divorce on the ground of adultery.

7. Mrs. Manohar who has been appearing as amicus curiae in this matter, submitted that unless the consent was obtained by such fraud as under Matrimonial law would entitle the petitioner to have the marriage declared invalid or obtain a decree of nullity, the petitioner would not be entitled to a decree. She further submitted that even if such fraud is established, the Court has to consider the conduct of the petitioner and to see whether such right to obtain a decree for nullity is lost to the petitioner by reason of acquiescence, approbation, condonation or waiver. She submitted that fraud under Matrimonial law must be of such a nature that the Court would come to the conclusion that there was no real consent to the marriage and submitted that this happens only in two ways; (1) if there is misunderstanding or mistake regarding the nature of ceremonies of the marriage; and (2) if there is a mistake regarding the identity of the person to whom the other person is married. She submitted further that no amount of misrepresentation regarding the quality, status or fortune of the person which might have induced the other side to agree to marry will render the marriage a nullity. She submitted that if a person who has consented, is capable of consenting and he has consented to the marriage, then the marriage must be held to be valid.

She has also pointed out according to Clause 42 of the Letters Patent of the Supreme Court in Bombay and Clause 35 of 1865 High Court Establishment Act and under Clause 30 of the Letters Patent 1865, the High Court is exercising the matrimonial jurisdiction. She has submitted that on a correct interpretation of Section 7 of the Indian Divorce Act, what is required by the Courts in India to be followed are rules and principles of English Courts and not the substantive law in England. She submitted that only principles of procedural law and gwasi-substantive law may be interpreted while taking recourse to Section 7 for consideration and further submitted that the new grounds for granting relief cannot be considered as grounds for granting relief in India if they do not form part under the Indian Divorce Act. She has also pointed out certain authorities with regard to the publication of banns, but as Mr. Sethna has not pressed the petition on non-publication of banns resulting into a fraud which would vitiate the consent given by the petitioner, I do not wish to dwell upon that aspect. Commenting upon the evidence, Mrs. Manohar pointed out that there is no allegation either in the petition or in the evidence led by the petitioner that any representations were made by the respondent herself. She further pointed out that with regard to the allegations about the representations made by others, there is neither any averment in the petition nor any statement in evidence to show that the persons making such representations knew that the representations made were false. She submitted that if one were to read, the letters of the girl which the petitioner has obtained from the wife of the co-respondent, it would go to show that the respondent has-kept it concealed about her own affair with the co-respondent from her own parents and other relatives. She further submitted that if one were to look at the conduct of the petitioner subsequent to the marriage, it would be difficult to come to the conclusion that this petitioner would not have given his consent to marry the respondent if representations with regard to her bearing good moral character or regarding her virginity were not made. She submits that these representations are alleged to have been made first by certain relations in Poona to the maternal uncle of the petitioner and then in two meetings by the parents of the respondent on April 28, 1968 and May 12, 1968. She further submits that the marriage of the petitioner and the respondent took place on May 27, 1968; that it is the case of the petitioner that he discovered on the same night that the respondent was not a virgin and not a woman of good moral character; that the respondent, according to the petitioner, confessed this before the petitioner and in spite of that, the petitioner and the respondent stayed together for two days at the petitioner's house at Pimpri and thereafter they stayed together for a day at the house of the respondent's parents; that as stated in the petition, though not stated in the evidence, the petitioner and the respondent stayed for six days at the house of Pandit in Bombay and that between June 1968 and January 1969, the petitioner and the respondent stayed together at Pimpri at the house of the petitioner. She submitted that even though the petitioner has stated on oath that during all these period, he had" no sexual intercourse with the respondent, the fact that the petitioner and the respondent stayed together is indicative that even after

knowing that the respondent was not of good moral character or a virtuous virgin, the petitioner continued to stay with her. She pointed out that witness Prabhune who has been examined by the petitioner to establish the allegations of adultery, has also deposed that he had met respondent at the petitioner's house and he knew the respondent as Kalpana and as the wife of the petitioner at Pimpri on August 15, 1968 and thereafter on two more occasions at the same place at Pimpri, Prabhune met the respondent at the petitioner's house on all those occasions and the respondent Kalpana was residing at the petitioner's place as petitioner's wife. Mrs. Manohar further submitted that if the Court holds that the marriage is void ab initio, then the principles of condonation will have no application. But if the Court comes to the conclusion that the marriage is voidable at the instance of a party in a case where the party's consent has been obtained by fraud, it is possible for the Court to apply principles analogous to the doctrine of condonation and in view of the conduct of the petitioner which she had pointed out, the Court should refuse to grant any relief to the petitioner. Mrs. Manohar submitted that even otherwise the Court may refuse to grant reliefs to a party if the circumstances show that the petitioner had accepted the marriage in spite of his consent being obtained by fraud. Mrs. Manohar submitted that granting any relief on such a petition which is filed about four years after the marriage on the allegation that on the very night of the marriage the petitioner realised that his consent was obtained by fraud, that he allowed the respondent to stay with him at his own place and even after she went to her parents' place, brought her back to his own place at Pimpri between June 1968 and January, 1969, and declaring the marriage to be void or granting a decree of nullity of marriage would be inequitable and against the public policy to grant relief to such a petitioner. Pointing out certain passages from "Rayden on Divorce", Mrs. Manohar submitted that normally the doctrine of condonation applies to matrimonial offences which offences have been committed by either spouse subsequent to the marriage. Generally matrimonial offences are adultery, cruelty or desertion. Even in such cases of matrimonial offences, if the spouse who condones the other party and reinstates the other spouse in the original position, then on the original cause of action viz., matrimonial offence which might have given some right in favour of the wronged spouse, it is lost to him. She submitted that it is true that if the married couple had sexual relations after condonation, it may help the Court to come to the conclusion that there was reinstatement. But she submitted that it is not a necessary ingredient and unless a statute makes it a necessary ingredient for reinstatement, reinstatement can be inferred from the conduct of the parties to indicate clearly that the "wronged spouse has condoned the other side. She further submitted that it is correct to say that even after reinstatement and condonation, it is always a conditional condonation and on breach of the condition, revival of the old original matrimonial offence takes place in favour of the original "wronged spouse. For the submission's stated above, Mrs. Manohar relied upon "Rayden on Divorce" paras. 42, 43 and 46, which deal with the subject of condonation, reinstatement and revival of condoned offence. It is observed in para. 42 "Rayden on Divorce",

11th edn., (p. 1136):

Condonation is the reinstatement in his or her former marital position of a spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse, with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not thenceforward commit any further matrimonial offence. Condonation therefore consists of a factum of reinstatement and an animus remittendi. Adultery or cruelty shall not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, in it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation.

Paragraph 43 states (p. 1138):

Mere forgiveness of a matrimonial offence, whether expressed orally or by letter, cannot amount to condonation, unless it is followed by the reinstatement of the offending spouse in his or her former marital position. Although the best evidence of such reinstatement is the continuance, or resumption, of sexual intercourse, there may be a resumption of conjugal cohabitation sufficient to constitute a reinstatement without sexual intercourse: conversely, there may be sexual intercourse not amounting to reinstatement. But nothing short of full reconciliation will suffice; therefore if the guilty party does not consent to be forgiven there is no condonation.

Paragraph 46 states (p. 1143) :

The reinstatement and forgiveness of a guilty spouse is subject to a condition implied by law that he or she shall commit no further matrimonial offence. If, therefore, a further matrimonial offence is committed the condonation is cancelled and the old cause of complaint is revived.

Mrs. Manohar also relied upon Latey on Divorce, 15th edn., wherein it is stated (p. 157):

On a petition for divorce it was the duty of the court to inquire whether there had been any condonation by the petitioner and if the court was satisfied on the evidence that the proved adultery or cruelty was not condoned it had to pronounce a decree, but if not so satisfied dismiss the petition.

The court was bound to act on evidence of condonation even if it is not pleaded.

She also pointed out passages from Mulla on Hindu Law and submitted that more or less the same is the position as held by our Courts in matters of matrimonial disputes. She submitted that it is the duty of the Court to be satisfied before granting any relief under matrimonial petition and it is always in the discretion of the Court whether the relief should be granted or not to a particular party. More or less, the commentary is on the same lines and she submitted that the doctrine

of condonation is applied to matrimonial offences like cruelty or adultery u/s 23 of the Hindu Marriage Act also, She frankly pointed out and that was also submitted by Mr. Sethna that if one were to look to the position of the Indian Divorce Act, the reference to condonation is with regard to the matrimonial offences, wherein a party is entitled to dissolution, of a marriage. Sections 12, 13 and 14 refer to the condonation and relying upon these provisions, Mr. Sethna submitted that doctrine of condonation has no application whatsoever on a petition for declaring marriage a nullity under Sections 18 and 19, Mrs. Manohar, however, pointed out that though principles of condonation may strictly not apply to voidable contracts or voidable marriages, principles analogous to the principles of condonation are applicable and she submitted that even for offences other than matrimonial offences like bestiality, sodomy or rape also, principles analogous to condonation are applied by English Courts. She has also cited four or five authorities and she also referred to Rayden on Divorce, para. 18 (p. 300) :

Voidable marriages: delay: recognition of the marriage-Delay in bringing a suit for nullity on the ground of impotence or of wilful refusal to consummate the marriage is a material element: there is no bar arising from delay alone, even if culpable; though apart from the mere fact of delay, there may be facts and circumstances proved which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage as to render it inequitable and contrary to "public policy to permit him or her effectually to challenge it: in this context, culpable delay is material. Time only begins to run for this purpose as from the date when the petitioner is aware of his or her legal rights.

Relying upon these passages, Mrs. Manohar submitted that in England, by Section 3 of the Nullity of Marriage Act, 1971, there is a provision which fixes the period of three years as a period of limitation for relief of declaring marriage a nullity. She submitted that though under the Indian Divorce Act, there is no period of limitation and even if the Court wants to consider Section 7 of the Indian Divorce Act, the statutory provisions of English law are not applicable. Taking into consideration all the facts, if the Court finds the delay on the part of the petitioner such that it would be inequitable or contrary to public policy to grant him the relief, the Court should not grant. She has relied upon *Cramp v. Cramp and Freeman* [1920] P. 158 which lays down:

Condonation, as applied to matrimonial offences, though frequently defined as conditional forgiveness, is not forgiveness in the ordinary sense, but would be more properly defined as conditional reinstatement of the offending spouse. It is always subject to the condition that the offence must not recur. Resumption by the husband of connubial intercourse with his wife, when he has full knowledge of her adultery, is conclusive proof of condonation. It cannot be rebutted by the fact that he never forgave her, though that fact is admitted by the wife.

In *Bertram v. Bertram* [1944] P. 59 it is stated:

In the case of a wife's petition for divorce on the ground of cruelty, which she had condoned, very slight evidence of a resumption, of the cruelty condoned is needed, as shewing cruelty of character, to prevent the condonation from being a bar to the petition.

The fact that condonation is not pleaded by the respondent does not prevent the judge from investigating and adjudicating on facts which seem to show condonation where those facts transpire in the evidence of the petitioner himself or herself.

In *Henderson v. Henderson* [1944] A.C. 49 it has been laid down as follows:

Sexual intercourse amounts to condonation of a wife's adultery unless she induced it by a fraudulent misstatement of fact. A breach of an assurance as to future conduct will not remove the disabling consequences of condonation, since there is no such thing as contingent condonation.

She has also referred to *Perry v. Perry* [1952] P. 203 where it is held:

...(1) that desertion as a ground for divorce differs from the other Statutory grounds of adultery and cruelty, in that the offence founding the cause of action is not complete until the action is constituted, i.e., the petition is presented. The conception of condonation either in strictness or by analogy has no application to the continuing matrimonial offence of desertion as defined in Section X (1)(b) of the Matrimonial Causes Act, 1950.

(2) That a resumption of cohabitation in the sense of the setting up of a matrimonial home together, accompanied by a common intention on the part of both spouses to do so, is necessary to end or interrupt desertion. Accordingly, sexual intercourse between a deserted and a deserting spouse unaccompanied by the setting up of any such home or by any intention to do so cannot end or interrupt the state of desertion whether the deserter is the husband or the wife and whether or not the intercourse leads to the birth of a child.

Mrs. Manohar submitted that according to the principles analogous to those of condonation, if applied in the present case, the conduct of the petitioner referred to above qua the respondent for a period up to nine months after the marriage, would indicate that the wife was reinstated in the house by the husband-petitioner after full knowledge about the alleged fraud having been perpetrated on him for obtaining his consent for the marriage. She submitted that even assuming the principles of condonation were not applicable to the present case, it is open to the Court not to grant any relief to the petitioner whose conduct immediately after the knowledge of the fraud and continuously thereafter for nine months qua the wife and not filing any petition for a period of four years, are sufficient for the Court as it would be inequitable and against the public policy to grant relief to such a petitioner. Both Mr. Sethna and Mrs. Manohar have submitted before me that *Moss v. Moss* [1897] P. 263 is the most important case on the interpretation of the word "fraud" which appears in the last part of

Section 19 of the Indian Divorce Act, though the decision in *Moss v. Moss* was under the English statute. It is also submitted before me, both by Mr. Sethna and Mrs. Manohar that inspite of the diligent search, they have not come across a single decision either under the canon law or under the statute law of England or under the Indian Christian Marriage Act wherein the Court has considered the question of consent being obtained by misrepresentation or false representation regarding the moral character or virginity of the bride at the time of the agreement to marry by the bridegroom. But Mr. Sethna submitted that *Moss v. Moss* was a case wherein husband had filed a suit for nullity of marriage on the ground of fraud on the part of the respondent. It was a case where the pregnancy of the bride at the time of the marriage by another man was concealed by the bride from the bridegroom and this fact came to the knowledge of the husband after the marriage on the wife having delivered a child and the husband had filed a suit for a declaration that the marriage was null and void. It is submitted by Mr. Sethna that good moral character or virginity of a bride is an important factor and misrepresentation or false representation or concealment of such a fact constituted a fraud in the essentially of the marital relation. Sir F.H. Jeune, President of the Court while considering arguments advanced before him has held (p. 266):

...It would perhaps be sufficient for me to say that for this proposition no authority in the English law can be found, and it would be impossible for this Court, at the present day, to give assent to a principle of such importance, and so far-reaching, without the sanction of precedent.

Referring to *Swift v. Kelly* [1835] 3 Knap 257 the President quoted (p. 266) :

It should seem, indeed, to be the general law of all countries, as it certainly is of England, that unless there be Some positive provision of statute law, requiring certain things to be done in a specified manner, no marriage shall be held void merely upon proof that it had been contracted upon false representations, and that but for such contrivances, consent never would have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made".

It has been further observed that (p. 267) :

...While habitually speaking of marriage as a contract, English lawyers have never been misled by an imperfect analogy into regarding it as a mere contract, or into investing it with all the qualities and conditions of ordinary civil contracts. They have expressed their Sense of its distinctive character in different language, but always to the same effect.

It has been further observed while distinguishing fraud in respect of ordinary civil contracts and fraud in respect of a contract of marriage as under (p. 268) :

...when in English law fraud is spoken of as a "ground for avoiding a marriage,

this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation, or such a case as that supposed by Lord Ellenborough in *The King v. The Inhabitants of Burton-upon-Trent* (1815) 3 M. & S 537 of a man assuming a name to conceal himself from the person to whom he is to be married.... In all these, and I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent.

Referring to *Wakefield v. Mackay* (1807) 1 Phi 134 the President further quoted (p. 269) :

"Error about the family or fortune of the individual, though procured by disingenuous representations, does not at all affect the validity of the marriage".

It has been quoted further from *Ewing v. Wheatley* (1814) 2 H. C. 175 as under:

"It is perfectly established, that no disparity of fortune, or mistake as to the qualities of the person, will impeach the vinculum of marriage;"

Quoting from *Sullivan v. Sullivan* (1818) 2 H. C. 238 the President quotes:

The strongest case you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains, which, though forged by others, he had reverted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced".(p. 269)

Observing further, it has been stated (p. 271) :

"And tho" there is nothing more contrary to consent than error, yet every error does not exclude consent. Wherefore I shall here consider what kind of error it is, according to the canon law, that hinders or impeaches a matrimonial consent and renders it null and void ab initio".

Observing further it has been stated (p. 272) :

"Now there are four species of error, which are hereunto referred. The first is stilled error personae, as when I have thoughts of marrying Ursula; yet by my mistake of the person I have marry'd Isabella. For an error of this kind is not only an impediment to a marriage contract, but it even dissolves the contract itself, through a defect of consent in the person contracting.... A second species is stilled an error of condition; as when I think to marry a free woman, and through a mistake I have contracted wedlock with a bondwoman and so vice versa; for by the canon law such an error is an impediment to a matrimonial contract, But as there is now no such thing among Christians as persons that are truly bondmen or bondwomen (this kind of bondage or servitude being now

abolish'd among us by the advantage of the Christian religion) I shall not long insist on this head.... The third species is what we call error fortunes; and is when I think to marry a rich wife and in truth have contracted matrimony with a poor one. But this error does not, even by the canon law, dissolve a marriage" contract made simply and without any condition subsisting. But 'tis otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousands pounds, and the condition is not made good. The last species is stilled an error of quality-viz., when a person is mistaken in respect of the other's quality, with whom he or she contracts. As when a man marries Berta, believing her to be a chaste virgin, or of a noble family and the like, and afterwards finds her to be a person deflower'd or of a mean parentage. But according to the common opinion of the doctors this does not render the marriage invalid; because matrimony celebrated under such kind of error, is point of consent, is deem'd to be simply voluntary as to the nature and substance of it, though in respect of the accidents 'tis not voluntary".

Thus, analysing different types of errors, it has been clearly laid down by this authority that except in the kinds of errors as to person, in error with regard to quality of a spouse, there "is no other ground for granting a decree for nullity. Mr. Sethna, however, relying upon the observations-"but it is otherwise by that law if I have contracted with a person to marry her upon condition that she is worth so many thousands pounds, and the condition is not made good", submitted that in the present case, the petitioner had made it abundantly clear that he would marry a girl of a good moral character or who was a virtuous virgin and a special inquiry was made" on behalf of the petitioner and on such inquiry false representations were made by the parents of the respondent. He submitted that even if one were to follow Moss v. Mass, this is a peculiar case where if the Court accepts the evidence of the petitioner, it was almost a condition made it clear to the other side that the petitioner was interested only in marrying a girl of good moral character and who is a virtuous virgin and knowing that he would not otherwise marry, false representations were made and his consent was obtained by fraud. On the other hand, Mrs. Manohar has stated that at the most, it can be said that these are representations regarding the quality of the bride and, in any event, there is nothing on record to show that the representations were made by the parents with the knowledge that the girl was not of good moral character or was not a virgin. Thus Mrs. Manohar stated that even assuming the arguments of Mr. Sethna to be taken into consideration in this particular case, the petitioner is not entitled to any relief of declaring his marriage null and void. Referring to the observations made by the President in Moss v. Moss, while referring to Reynolds v. Reynolds the President observed that (p. 275):

...fraud vitiates a marriage just as it does other contracts, but that the fraud must be "in the essential of the marriage relation," and that the fraud of a woman in concealing her pregnancy by a man other than her intended husband at the time of her marriage is such a fraud.

It is further observed that (p. 275):

...a fraud in the essential of marriage for two reasons-first, because a child may be born which, according to the presumption of law, will be the husband's, though not really his; and, secondly, because the woman, at the time of marriage, is incapable of bearing a child to her husband.

The President further observed (p. 275) :

...The departure...(of the American Courts) from the law of England consists not only in unduly extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold. According to English Law, as I have above said, the only material circumstance by operating on which fraud vitiates a marriage is the reality of consent.

Discussing further *Reynolds v. Reynolds*, the President observed:

...the reasoning, when looked at in all its parts, is unsatisfactory.

He further observed (p. 276):

It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage. I could understand a broad principle that unchastity before marriage should vitiate the contract, as some legislatures have I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and, unless there is to be one law for a man and another for a woman, it is impossible to suppose it ever could be.

Thus in the case before the Court, for fraud by concealment by a woman from her husband at the time of the marriage the fact that she was then pregnant by another man, the Court held that the marriage could not be declared null and void. As stated above, this is the most important and the only case directly dealing with the question of fraud as contemplated by Section 19 of the Indian Divorce Act. I see considerable force in Mrs. Manohar's argument that taking into consideration all what is observed in *Moss v. Moss*, it is very clear that according to the English concept, mere fraudulent representation with regard to the quality of a spouse cannot form the basis of fraud for obtaining consent from the other spouse. In other words, if the spouse is capable of giving consent and has gone through the marriage ceremony with consent, certain representations though made during the stage of negotiations may be false, cannot provide ground to declare the marriage null and void. Against this, Mr. Sethna submitted that it is now very well recognised that a marriage is a civil contract and even though it may be something more than a civil contract and may be also a sacrament, the fact that the consent to enter into an agreement for marriage was obtained by false representations and those representations have been proved to be false and made deliberately with the knowledge that they were false

would be sufficient to lead to the conclusion that the consent obtained of the other spouse was vitiated as consent obtained by fraud. Mr. Sethna further submitted that the correct approach would be to apply all principles applicable under the Contract Act and any fraud which would vitiate any other contract would be also sufficient to vitiate the contract of marriage. He submitted that on the same footing, countries like America and other countries in the continent have held that such misrepresentations would amount to fraud for obtaining consent for marriage and this Court should also take a liberal view of the matter and instead of being bound down by what has been laid down in *Moss v. Moss*, the most important case on the subject, and though there is no other case on the same subject or the same question by English Courts, looking to the tendency towards liberalism by enacting laws to liberalise the grounds for declaring a marriage null and void or ground for divorce, this Court should also in line with the liberal thinking, hold that it is a sufficient ground for declaring marriage null and void if once it is established that the consent was obtained by fraud especially in conditions which are material for marriage such as quality of a woman being of a good moral character or a virgin. He submitted that by subsequent legislation to set aside the effect of what has been laid down by *Moss v. Moss*, it has been specifically made a ground for declaring a marriage to be null and void if the bride conceals from the bridegroom at the time of marriage the fact of being pregnant and if that fact is revealed to the husband subsequent, by. Against these arguments of Mr. Sethna, Mrs. Manohar has submitted that English Courts and English Legislature have thought of misrepresentation regarding the fact of the girl being pregnant at the time of entering into an agreement of marriage by another person and concealment of that fact from the person from whom consent has been obtained, but neither the English Parliament nor English decisions have shown that the same effect should be given to misrepresentations with regard to a girl being of good moral character or of virgin.

8. Mr. Sethna submitted before me that in the interpretation of Section 7 of the Indian Divorce Act, what the Indian Courts are required to do are to follow the principles and rules on which the Courts in England for the time being act and give reliefs. He submitted that the Legislature contemplated while introducing Section 7 that all the changes which occur in England either by decisions by Court or by legislation should automatically become matters for consideration of Courts in India while disposing of petitions under Indian Divorce Act of 1869. Mr. Sethna submitted that this section was kept not only during the time when the British Regime was ruling India, but even after the passing of the Constitution the section has been, continued and that clearly shows that in the matter of matrimonial disputes between Indian Christians, the Courts in India should follow the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief, Mr. Sethna relying upon *D.M. Raju v. S. Janaki* AIR[1974] Mys. 61 submitted that in interpreting the word "fraud" u/s 19, the Mysore High Court without invoking the aid of Section 7 has

held that "the fact that the woman was pregnant at the time of marriage from a man other than the petitioner husband would mean that the consent to marriage was obtained by fraud within the meaning of Section 19" and a decree of nullity was issued. This decision has followed a previous decision of *George v. Jaya* [1965] 2 Mys. L.J. 383. No doubt Mrs. Manohar has pointed out that there are observations in this very judgment which show hesitation on the part of the learned Judge in accepting the principle, but it appears that the Court felt that it was bound by the previous decision in *George v. Jaya*, that the Court granted a decree and pointed out para. 11, wherein it has been observed (p. 63):

...I could not readily agree with and it was at that stage I requested Sri V. Krishna-murthi to argue as an *amicus curiae* in this case. The reason for the doubt I entertained at that stage was two-fold; (i) that even in England the ground that the respondent was at the time of the marriage pregnant by some person other than the petitioner became available only on the enactment of Matrimonial Causes Act, 1937; and (ii) in a comparative piece of legislation in force in India, that is, the Hindu Marriage Act, the above ground is dealt with as separate and distinct from the ground that the consent of the petitioner for the marriage is obtained by force or fraud (See Section 12(1)(c) and (4) of the Hindu Marriage Act.)

It was urged by Mrs. Manohar that in that case, Mr. Krishnamurthy who was appearing as *amicus curiae*, supported the view taken in *George v. Jaya*, case and, therefore, the Court did not find real assistance in the matter. Mr. Sethna submitted that there is no warrant for such an inference if Mr. Krishna-murthy, appearing as *amicus curiae*, agreed with the principles laid down in the previous Mysore case, and in assisting the Court he was; not doing anything wrong in supporting that decision. As observed before, as in England, now there is a specific provision for granting a decree for nullity on the ground of concealment of pregnancy by another person by the bride from the other spouse at the time of the marriage. Even if Courts in India would have considered it to be fraud, in spite of the fact that under the old decision of *Moos v. Moss* it was not so held, I do not think that it is sufficient for this Court to enlarge the definition of fraud and include even misrepresentation or concealment of the fact of not being of good moral character or virgin within the meaning of Section 19 of the Indian Divorce Act, especially when a person to whom the representations are made was capable of understanding and after understanding has given his consent to the marriage and has undergone the marriage ceremony. I am of the opinion that marriage is not a simple civil contract, but it is more than a civil contract, a sacrament and the Courts should be reluctant to introduce any such changes which are not warranted either by English decisions or English legislation and which may create a scope for parties to obtain collusive decrees by making such allegations and when undefended to obtain decree for nullity. Mr. Sethna submitted that the Courts are always there vigilant enough to find out whether the evidence is reliable or not and the Courts may not grant decree when the Courts are not satisfied with the evidence, but if satisfactory evidence is led

about the material condition, according to him for marriage viz., that the girl should be of good moral character or a virgin and if by false representations or by concealment of true facts the bridegroom is induced to give his consent, the Courts should grant relief u/s 19, holding that such consent was obtained by fraud. Mr. Sethna also relied upon certain authorities and has strongly relied upon *Ramesh Ramanlal Saraiya Vs. Kusum Madgaokar*, . In this case, it has been held that:

The Court which passes a decree for nullity of marriage, u/s 19 of the Indian Divorce Act, 1869, has also jurisdiction, u/s 7 of the Act, to grant permanent alimony to the wife. The omission of the Legislature to provide for this relief u/s 37 does not in any way militate against the power of the Court to follow the principle and rule in England and to give the necessary relief u/s 7 of the Act.

Dealing with Mr. Taraporewalla's argument that it is only in giving relief that the principles and rules on which the English Court of Divorce and Matrimonial Causes acts that should be taken into consideration and further dealing with Mr. Taraporewalla's argument that as far as the relief itself is concerned, that relief must be expressly found in the statute, Chief Justice Chagla observed (p. 433) :

...That contention, in my opinion, is entirely untenable in view of the plain language of the section itself. The section does not speak that in giving relief the Court should act on principles and rules of the English Courts, but it directs the Courts here to act and to give relief on principles and rules prevailing in England. Of course, the section is prefaced by the opening words "subject to the provisions contained in this Act, and, therefore, it is not open to the Court here to give any relief or to act in any manner which is contrary to or inconsistent with any provision contained in the Act. The object of enacting this section was to make the Indian divorce law flexible and not static. The intention was that the law here should develop alongside with the English law. It may seem surprising that it should be left to the Legislature of another country to mould and modify the law of this country. It was surprising enough when India was a Dependency in the Empire. It seems to be even more surprising today that such a provision should find place in the Divorce Act of this country when India has now become a full-fledged Dominion as sovereign as England herself. In my opinion Section 7 lays down this rule of law that the Court must consider every time it proceeds to act or give relief what is the relevant English law on the subject, and unless it finds that the jurisdiction of the Court to grant the same relief or act in the same manner is expressly negated by any provision of the Act, it must do so. There must be either a clear negating of the jurisdiction of the Court or there must be express and unequivocal terms in which the Legislature must have prevented and prohibited the Courts here from acting in the manner in which the English Courts would act or giving the same relief that the English Courts would give on the same facts and on the same materials.

Relying upon these observations, Mr. Sethna submitted that u/s 7, it is for the Courts in India to consider the principles and rules on which the Courts for

divorce and matrimonial causes in England for the time being act and give reliefs. He submitted that it is true that there is though not a direct decision of the English Courts on the proper construction and interpretation of the way in which the Law in England has developed, it is open to this Court to interpret the word "fraud" in the manner so as to include fraud in obtaining consent by making false representations with regard to the good moral character or virginity of a bride and by making such false representations inducing the other spouse, the bridegroom, to agree to such a marriage. Mrs. Manohar, on the other hand, submitted that even assuming that *Ramesh Saraiya v. Kusum Madgaokar* lays down that s. T, does not limit its scope to only procedural laws and it may enable the Courts in India to follow the substantive law also, as laid down by English Courts, this decision "nowhere lays down that the Courts in India can enlarge the scope of fraud and make the law of ordinary contract applicable to a contract of marriage. She submitted that marriage is not only a contract, but it is a civil contract and a sacrament and the Court should give a strict interpretation and in her submission, the very fact that concealment of pregnancy has become a specific ground for obtaining a decree for nullity shows that the Legislature did not want other types of fraud which may vitiate an ordinary contract but this concealment should also be considered as fraud for vitiating the contract for marriage. Mrs. Manohar further submitted that the case before the Division Bench in *Ramesh Saraiya v. Kusum Madgaokar* was with regard to providing permanent alimony, whereas the Indian Divorce Act was silent on the subject. Relying upon the separate judgment of Tendolkar J. in *Ramesh Saraiya v. Kusum Madgaokar*, which was no doubt a concurrent judgment with that of Chief Justice Chagla, on the question of interpreting Section 7, Mr. Sethna submitted that the Court should not be afraid of the consequences if for the correct interpretation of Section 7, the Court has to follow the principles and rules on which the English Court in divorce and matrimonial cases for the time being act and give reliefs and has to expand the meaning of the word "fraud" and even has to differ from what has been laid down in *Moss v. Moss*. According to Mr. Sethna, taking into consideration the development of law on the subject in England and looking to the present trend, the Court should not be hesitant to apply even to the contract of marriage the same principle which would otherwise apply to any other civil contract. Though I see some force in Mr. Sethna's argument, I do not think that I can accept such a proposition in view of no clear indication either by the case law or by the statute law in England, as indicated, of obtaining a consent from the bridegroom on misrepresentations or false representations regarding the moral character or virginity of the bride, Mr. Sethna submitted relying upon *Sumathi Animal v. Paul* AIR(1935) Mad. 518 . that even changes of statutory provisions in England should be taken into consideration by Indian Courts. As I am not required to consider this aspect, I do not wish to consider that authority as there has been no statutory change in respect of obtaining consent by fraud viz. by misrepresentations regarding good moral character or virginity. Mr. Sethna has relied upon one more authority viz. *Alfred Wilkinson Vs. Grace Emily Wilkinson*, . After dealing with the interpretation of Section 7 of the Indian

Divorce Act and considering the words "for the time being acts and gives relief, their Lordships have held that the above words were inserted to prevent the principles of law being rigidly fixed as at 1869. Of course that was a case considering the question of jurisdiction over people who were not residents in India.

9. Mr. Sethna also drew my attention to some of the Indian decisions under Hindu Marriage Act. Mr. Sethna relying upon T.O. Aykut Vs. M.O. Aykut, submitted that the Calcutta High Court in this decision while considering Section 19 has held that:

Christian woman marrying another person on his assurance that he was Christian though in fact he was Mahomedan-Marriage can be annulled.

The policy of the Act does not contemplate a valid marriage between a Christian and a person professing a religion which is not monogamous.

Where a Christian woman has entered into marriage with another person on the latter's assurance at the time of celebration of marriage that he was a Christian and it is subsequently found out that he was a Mahomedan at that time, the marriage can be annulled.

He also has relied upon Bimla Bai Vs. Shankerlal and Others, . which was a case under Hindu law and in which an illegitimate son was represented as son and the Court has held that:

The consideration that the bride's father had not made adequate enquiries and was thus negligent, would not help because the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.

There was misrepresentation which amounted to fraud and consequently the marriage which was induced by it is liable to be set aside.

He has also relied upon Vermani v. Vermani AIR[1943] Lah. 51, S.B. where the Court has held that:

A a Hindu who was already married according to Hindu rites to a Hindu woman B falsely represented to C a Christian woman that he was a Christian and a bachelor and married her. In the petition for dissolution of the marriage by C:

Held that the onus was on A to prove that he was converted to Christianity and that he was a Christian at the date of his marriage to B and therefore his marriage to B not being legal, marriage with C was legal. A having failed to discharge that onus C was entitled to a decree of nullity u/s 19(4).

Relying upon these authorities, Mr. Sethna submitted that if according to these Courts, misrepresentations regarding the caste or religion can amount to fraud, this Court in interpreting the word "fraud" u/s 19, should enlarge the meaning to include misrepresentation with regard to good moral character or virginity and

obtaining consent on such representations as playing a fraud upon the spouse whose consent was induced by such misrepresentations.

10. Mr. Sethna also relied upon American Jurisprudence 2nd, Vol. 52, page 888, ¶ 30, "Fraud"-.

A marriage may be held invalid for lack of consent if it was procured or induced by fraud. But not every kind of fraud or misrepresentation will be held to render the marriage defective. Some courts have said that a misrepresentation of a material fact, made with the intention of inducing the other party to enter the marriage relation, and without which he would not have done so, is sufficient to render the marriage voidable. Other courts have said that, to make the marriage voidable, the fraud must be of such a character as to go to the very essence of the marriage contract, and to affect the injured party's free consent to such contract. In determining the nature and kind of fraud that will vitiate a marriage contract, the age and mental condition of the person defrauded are important and, at times, controlling factors.

It is further stated that (p. 889):

As a general rule, a marriage procured or induced by fraud is not absolutely void, but only voidable, and is valid for all civil purposes unless and until avoided by the deceived party. Thus, there may be a binding ratification of a marriage induced by fraud. Such ratification may result from voluntary cohabitation of the parties with full knowledge of the facts.

He has also relied upon American Jurisprudence 2nd, Vol. 4, Article 38 Concealed premarital unchastity or parenthood (p. 466):

While concealment by the wife of premarital incontinence which has not resulted in pregnancy at the time of the marriage generally does not constitute a ground for an annulment, the rule is different where there are circumstances involving fraud, or where an express warranty of premarital chastity was exacted as a condition of consent to marry; in such cases misrepresentations or concealment of premarital sexual misbehaviour may constitute a ground for annulment.

Relying on these observations, Mr. Sethna submitted that looking to the general trend of the development of law and looking to the facts of this case, this Court should hold that fraudulent representations by the parents or concealment by the respondent herself of the fact of her not being of good moral character or virgin by not stating anything when such representations were made in her presence should be held as constituting fraud within the meaning of Section 19 and the consent having been obtained under such fraud, the marriage should be declared null and void, Mr. Sethna has also relied upon one more case under the Babui Panmato Kuer Vs. Ram Agya Singh, which was a case dealing with Section 12, Sub-section (1)(c) of the Hindu Marriage Act, 1955, where the words are more or less similar to that of Section 19 i.e. "Misrepresentation as to age of bridegroom made to mother acting as agent and daughter consenting to marriage believing

the representation, her consent is vitiated by fraud." This was a case where the father of the girl herself had represented to his own daughter that he was giving her in marriage to a bridegroom who was of a young age, whereas as a matter of fact, he was sixty years old and the Court has held that such consent obtained by misrepresentation even by the father of the girl would vitiate the contract. Mrs. Manohar, has however, relied upon the latest decision of this Raghunath Gopal Daftardar Vs. Sau, Vijaya Raghunath Daftardar, and has submitted that this is a judgment of this Court on the interpretation of the word "fraud" appearing u/s 12(1)(c), where the provisions are almost similar to Section 19. It lays down as under:

Section 12(1)(c), of the Hindu Marriage Act, 1955, does not speak of fraud in any general way or of every misrepresentation or concealment which may be fraudulent. A person who freely consents to a solemnization of the marriage under the Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Therefore concealment of curable epilepsy and false representation that a party to the marriage was healthy does not amount to fraud within the meaning of that word used in Section 12(1)(c) of the Act.

In this judgment, Malvankar J. has at length discussed this subject and has discussed all the case law on the subject. Dealing with *Bimla Bai v. Shankerlal*, Malvankar J. has, with respect, did not agree with the observation in the said judgment. He has observed (p. 848) :

...In the first place, if the parties freely consented with knowledge of the nature of the marriage and with the clear and distinct intention of entering into the marriage, the non-disclosure or concealment of caste would not amount to fraud. Moreover, in my opinion, on general considerations of public policy, misrepresentation as to caste should not be held fatal to a marriage under the Hindu Law, much more so when the marriage is under the Hindu Marriage Act, 1955, which applies to any person who is a Hindu as defined u/s 2 of that Act.

Discussing the cases decided after the Hindu Marriage Act, 1955, came into force, Malvankar J. observed (p. 847):

...in *Raghunath Gopal Daftardar Vs. Sau, Vijaya Raghunath Daftardar*, the allegation of the husband was that during the course of the negotiations of the marriage, the respondents represented to him that the wife Lajjabati Devi was of sound health and was not suffering from any disease. However, after the marriage it was discovered that she was suffering from tuberculosis from some time before the marriage was gone through. Though this case was decided also on the point that there was no allegation in the plaint that the alleged fraud was perpetrated at the time of the solemnization of the marriage, the Calcutta High Court observed that the marriage, according to Hindu Law, not being a contract, the consent at the first stage though obtained by fraud cannot affect the validity

of the marriage.

Referring to Harbhajan Singh v. Smt. Brij Balah AIR[1964] p&H 359 the learned Judge has observed:

In that case, the bridegroom was further assured that the character of the respondent was unblemished. On this assurance, his consent for the marriage was obtained by the respondent. The Punjab High Court held that the fact that the respondent was of bad character before the solemnization of the marriage could not be a ground for the annulment of the marriage, because fraud as a ground for the annulment of the marriage under the Hindu Law is limited only to those cases where the consent of the petitioner at the solemnization of the marriage was obtained by some sort of deception. It is not used in a general way, and on every misrepresentation or concealment, the marriage cannot be dissolved. In that case, the Punjab High Court also found that because there was a specific Clause (d) of Section 12(1) dealing with such a matter, it indicated that the Legislature did not intend that the past conduct of the respondent, except what is mentioned in Clause (d), should become a ground for the dissolution of the marriage. Similarly, in Surjit Kumar Harichand Vs. Smt. Raj Kumari, the allegation was that the girl had an unchaste career and this fact was not disclosed to the husband. On the contrary, it was generally represented to him that the girl was good. The Punjab High Court held that a general observation by the relation of the girl at the time of engagement to the effect that the girl was good did not amount to obtaining consent of the husband by force or fraud within the meaning of Section 12(1)(c) of the Hindu Marriage Act. They were not obliged to disclose to the husband or his relations, without any enquiry from them about the old unchastity of the girl, even if it was known to them. Merely keeping quiet about such past history would not amount to obtaining the consent of the husband to marriage by fraud. If the husband attached so much value to the past unchastity of his would-be wife, he should have made enquiries on his own or from the girl's relations at the time of the negotiation of the marriage. It is only then he should be able to show that though the relations of the girl were aware of her past unchastity, they misled him. (p. 847)

Mr. Sethna however, submitted that the last part of the observations shows that when one of the spouses makes it a condition or makes it known to the relations of the other spouse that the bride must be of good moral character or a virgin or make specific inquiries with regard to the good moral character or virginity of the girl, then it would make all the difference and the Punjab High Court would have held differently if those were the circumstances in the case before it. Mrs. Manohar also relied upon the observation at p. 850 in the same judgment:

...If the evidence shows that the husband or the wife, as the case may be, after the fraud was discovered, lived together for whatever period as wife and husband with full consent, it would be sufficient for not entertaining the petition for annulling the marriage.

Malvankar J. on that ground also held that it was right for the lower Court to have dismissed the petition.

11. Mr. Sethna had also pointed out authorities of English Courts as well as Indian Courts to the effect that delay in filing petition is not always fatal and the Courts have condoned delay of even six years or as much as twenty-seven years in cases where the petitioner could make out the case that the marriage was void on the grounds mentioned in Section 19 and a decree for nullity has been passed. It is true that there being no provision of any period of limitation under the Indian Divorce Act, it is open to the Court to consider petitions filed even after a lapse of four years, but I do not think that in this particular case, delay of four years requires any consideration. As the view that I have taken of the evidence of the petitioner and his witnesses, I think that though principles of condonation may not apply directly, principles analogous to condonation would apply, as according to me, the marriage is only voidable and could be avoided by the petitioner only by filing a petition and establishing that the consent was obtained by fraud. Till such a decree for nullity has been obtained from a Court, the marriage is valid for all purposes and it cannot be said that the marriage was void *ab initio*. The other ground of non-publication of banns has not been pressed for nor the ground that though she was not a stenotypist it was represented that she was a stenotypist has been pressed for as grounds of making false-representations or misrepresentations vitiating the consent of the husband. As stated before, Mr. Sethna has made it clear that he had relied upon these representations in order to show that the representations with regard to good moral character and virginity were deliberately made to mislead the petitioner and induce him to obtain his consent. Mr. Sethna also submitted before me that the provisions of the Special Marriage Act which are equivalent to the provisions of Indian Divorce Act while defining fraud have clearly stated that the principles applicable to ordinary civil contracts should be applied while construing fraud under the Special Marriage Act. Mr. Sethna has also drawn my attention to the Nullity of Marriage Act, 1971, Sections 2 and 3. Section 2(c) refers:

A marriage which takes place after the commencement of this Act shall be voidable...that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

Section 3, Sub-section (2) states:

Without prejudice to Sub-section (1) of this section, the court shall not grant a decree of nullity by virtue of Section 2 of this Act on the grounds mentioned in paragraph (c), (d), (e) or (f) of that section unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

Referring to these provisions, Mr. Sethna submitted that Nullity of Marriage Act, 1971, has now made it clear that consent which was obtained in consequence of duress, mistake, unsoundness of mind or otherwise would not be considered a valid consent and by using the expression "otherwise" it has expanded the scope

of the error or fraud which would vitiate the consent. Against these submissions, of Mr. Sethna, it has been rightly pointed out by Mrs. Manohar that even in England, neither the Parliament nor the Courts have thought it necessary to enlarge the meaning of interpretation of the word "fraud" to include misrepresentations or false representations regarding good moral character or virginity. I am of the opinion, therefore, that not only the petitioner by his evidence has not clearly established that the representations which though may be false, were made by the parents of the respondent with the knowledge that they were false but looking to the conduct of the petitioner, it cannot be said to have been established that his consent was obtained on such misrepresentations. Even if one were to take that such misrepresentations were made and they were responsible for obtaining consent of the petitioner, I am of the opinion that looking to the present trend of the English Courts and English Law on the subject and looking to the various decisions by our High Court in India, interpreting Section 12(7)(c) of the Hindu Marriage Act which is similar to Section 19 of the Indian Divorce Act, on such allegations of fraud, it would not vitiate the consent.

12. Coming to the next prayer of the petitioner as per the amended petition, the petitioner relies upon the frequent acts of adultery of the respondent with the co-respondent since December 6, 1970. The petitioner also relies upon the movement of the respondent with the co-respondent on December 10, 1970 and December 30, 1970. These facts are established by independent evidence of witness Prabhune and which evidence is not challenged and therefore, I hold that the petitioner has established that the respondent has been guilty of adultery and the petitioner is entitled to have his marriage dissolved on the ground that his wife has since the solemnization thereof, been guilty of adultery u/s 10. I have already dealt with that part of the evidence while dealing with the evidence led by the petitioner and I hold that the petitioner is entitled to the relief u/s 10 as prayed for in the alternative prayer and I pass a decree of divorce declaring the said marriage being dissolved on that ground.