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**(1981) 01 MP CK 0012**

**In the Madhya Pradesh High Court**

**Case No : Miscellaneous Civil Case No. 256 of 1980**

Pulikkottial Cheru Zechariah

APPELLANT

Vs

Smt. Mary Zechariah and Another

RESPONDENT

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**Date of Decision : 23-01-1981**

**Acts Referred:**

Divorce Act, 1869 — Section 10

**Citation : AIR 1981 MP 112 : (1981) JLJ 178**

**Hon'ble Judges : S.S. Sharma, J;M.D. Bhatt, J;B.C. Verma, J**

**Bench : Full Bench**

**Advocate : P.S. Gothwal, for the Appellant;**

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## **Judgement**

B.C. Vabma, J.—The District Judge has u/s 17 of the Indian Divorce Act, referred for our confirmation the decree nisi, passed in favour of the petitioner and against his wife, the respondent No. 1 for divorce on a finding that she committed adultery with the respondent No, 2, It may be mentioned here only that before the District Judge as also before this Court, the respondents did not appear and could only be served with summons of the suit only by substituted service by publication in newspaper.

2. Marriage between the petitioner and the respondent No. 1 was performed on 6-11-1972 under the Indian Christian Marriage Act. For some time the couple lived well and on 16-9-1973 were blessed with a female child named Elizabeth alias Shalina. The respondent No. 1, however, could not remain faithful to the petitioner for long and developed unholy alliance with one Vasant Holland Deniel with whom she eloped on 3-12-1976. This incident gave rise to proceeding for divorce. The petition was registered as Civil Suit No. 34-A of 1976 before the District Judge, Jabalpur. The respondent No. 1, however, returned to the petitioner, expressed regrets for what she did and promised to remain quite faithful to the petitioner thereafter. The petitioner pardoned her and the proceedings were dropped. The petitioner had a workshop in Adhartal, Jabalpur at some distance from their residence. The respondent No, 2 was employed in

that workshop. He used to visit the petitioner's house quite often, also in his absence. This afforded opportunity to the respondent No. 1 to come in closer contact with him.

3. The petitioner alleges that the solemn assurance given by the respondent No. 1 was very short lived. She took a fancy for the respondent No. 2 who was seen in their house at such hours when he ought to be working in the workshop. The respondents had secret meetings and they developed illicit intimacy, The petitioner became suspicious and even warned the respondent No. 1. Instead of forbearing to proceed in that direction, the respondent No. 1 exhibited an attitude of defiance. The petitioner concluded that the respondent No. 1 had again deviated from the path of virtue and had gone back to lead an adulterous life. This time the companion was the respondent No. 2. An incident actually witnessed by their milkman, by name Fateh Mohammad (P. W. 2) in the morning of 7th April, 1977 made the petitioner firmly believe that the respondent No. 1 had committed adultery with the respondent No. 2. On 6-4-1977, says the petitioner, he had gone out of station leaving the respondent No. 1 and the daughter at home. Next morning the milkman, Fateh Mohammad (P. W. 2), as usual went to their place to deliver them their quota of milk. He knocked at the outer door. Finding no response, he walked over to the other side of the house and pushed back a window which opened as it was not chained from within. To his utter surprise, he saw the two respondents lying in one bed embracing each other. He turned on his heels. He told this incident to the petitioner two or three days thereafter on his return. The petitioner, therefore, alleges that the respondent No. 1 committed adultery and claimed dissolution of marriage by a decree of divorce. Although after due service, the respondents remained absent, the District Judge in his wisdom required the petitioner to prove his allegation of adultery. The petitioner examined himself as P. W. 1 and the milkman-Fateh Mohammad as P. W. 2. Relying upon these testimonies and also looking to the past conduct of the respondent No. 1, the District Judge held that the respondent No. 1 committed adultery entitling the petitioner to a decree of divorce.

4. Meaning of "adultery" as a ground for relief in matrimonial cases is well known. It means voluntary sexual intercourse by one spouse with some person of opposite sex other than his or her spouse during the subsistence of the marriage. Adultery, therefore, can rarely be proved by direct evidence which is looked upon only with disfavour and one has to infer adultery from attending circumstances, the inclination of the spouse and the opportunities available. In its very nature, therefore, such evidence must be clear, cogent and convincing and should admit only of one inference before it can be accepted to infer adultery. Certainly, therefore, the onus to prove this charge of adultery is upon the person making it and it is for him to satisfy the Court by adducing proper and sufficient evidence that adultery has been committed by the other spouse. As circumstantial and presumptive evidence assumes importance in the case of adultery and direct evidence is normally not probable, uncorroborated evidence supported by such circumstantial evidence may be enough. Falsity of defence

may be no substitute. Although this charge of adultery assumes a criminal character and demands of a rather strict proof, yet the standard of proof required is not the same as is required to prove a criminal charge. Proof beyond reasonable doubt is now not necessary and preponderance of probabilities may decide the issue. This is now the law which prevails in England after the decision in *Blyth v. Blyth* ( (1966) 1 All ER 524), Since according to Section 7 of the Indian Divorce Act, the Court should, as nearly as may be, act and give reliefs in proceedings under the Act in conformity with the principles and rules on which the Court in Divorce and Matrimonial causes in England for the time being acts and gives reliefs, the rule of evidence in *Blyth's* case (*supra*) must be followed. After referring to the relevant provisions of law and the decisions in *Earnest John White Vs. Mrs. Kathleen Olive White and Others*, and *Preston-Jones v, Preston-Jones* (1951) AC 391) , G. P. Singh, J. (as he then was) speaking for the Full Bench in *Prem Masih Vs. Mst. Kumudani Bai and Another*, , stated the law in these words :

"The case of *Blyth v. Blyth* (1966) 1 All ER 524 will, therefore, show that the view expressed in *Preston-Jones*" case (1951 AC 391) that the standard of proof in case of a matrimonial offence in a petition for divorce is proof beyond reasonable doubt, does not now hold the field and that the correct test in that matter is that expressed by Dixon, J. in (1948) 77 CLR 191. In view of the mandate in Section 7 of the Act that the principles and rules on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief should be applied by the Indian Courts, we feel that now the standard of proof recommended in (1966) 1 All ER 524) (*supra*) will have to be applied by the Indian Courts also. But the change in principle as to the standard of proof will most often not make any difference in the result, for even applying the civil standard of proof to a divorce proceeding based on adultery a high standard of proof will be needed to satisfy the Court that adultery has been committed."

We are in respectful agreement with the view so expressed.

5. The petitioner is not relieved of satisfying the Court of the truth of his/ her allegation of adultery and the decree of proof continues to be the same even where the alleged guilty spouse and/or the co-respondent do not appear to contest the charge levelled against them. In such cases the Courts have only onesided version before them and they should be doubly cautious in accepting and acting upon such uncorroborated versions likely to be tainted. The Courts should not be readily inclined to grant reliefs on the charge of adultery which must be decided on the basis of the proof tendered in support of the charge. We are in agreement with the view expressed by a Special Bench of the Madras High Court in *Antoniswamy Vs. Anna Manickam and Another*, that merely because the respondents did not care to contest the proceedings may be no justification for the Court to come to the conclusion that the evidence of the petitioner was true and worthy of credit.

6. In the present case, we have evidence of the wife's (respondent No. 1)

inclination towards betraying the faith reposed in her by the petitioner. The record shows that she earlier eloped with one Vasant Holland Deniel but was forgiven by the petitioner on her expressing words of repentance. There is also quite satisfactory evidence of opportunity. The respondent No. 2 gained confidence of the petitioner and his visits to his house went on increasing, mostly in his absence. The petitioner's sworn testimony discloses that quite often he was at the petitioner's residence when he should be working in the workshop. Such stay of the respondent No. 2 in the petitioner's house in his absence used to be of quite a long duration. This was so when the respondent No. 2 had little work at their residence. The petitioner has also deposed that the association of the respondents gave rise to suspicion and the warnings to the respondent No. 1 produced no good results. He has also stated that the respondents were even seen roaming together although the respondent No. 1 was not supposed to go about that way with the respondent No. 2 who was merely an employee in the petitioner's workshop. The climax reached when the petitioner was informed by his milkman, Fateh Mohammad (P. W. 2), of what he saw in a morning when he went to deliver milk at the petitioner's house. Accordingly this witness, the petitioner had then gone out of station. When he reached the petitioner's house, he found the doors closed from inside. The knocks at the door and his shouts did not awaken the inmates. He went to the other side of the house and in his attempt to draw the attention of the occupant, viz., the respondent No. 1, he pushed the window. The window opened. Then what he saw may be stated in his own words :

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We feel that this milkman has no reason to speak ill of the respondent No. 1. His version has ring of truth about it and does not seem to be in any way tainted and we are inclined to accept it. From that version, it can safely be inferred that the two respondents were together inside the house where they remained certainly not for offering prayers, but for sharing the bed together. This incident, which we have little hesitation in accepting as proved, necessarily leads to an irresistible inference of adultery. The circumstances in the present case are not different from the case of *England v. England* (1952) 2 All ER 784). There the wife and one M got attracted to each other. M was a constant visitor to the room occupied by the wife and he spent one night with her there. They admittedly discussed committing adultery but deposed that they decided not to do so and denied having committed adultery then or at other time. It was held that although there was sufficient evidence to establish adultery, that evidence could be contradicted e.g. by the sworn testimony of the wife and M. In the present case, we do not have the evidence of the wife respondent No. 1 or that of the respondent No. 2 to \_con-tradict the version of Fateh Mohammad (P. W. 2). We are satisfied from the circumstances established in the case, the conduct of the respondent No. 1 and the evidence of Fateh Mohammad (P. W. 2) that the petitioner has successfully proved that the respondent No. 1 committed adultery. He is, in our

opinion, entitled to a decree of divorce,

7. The decree of dissolution of marriage passed by the District Judge, Jabalpur is confirmed. As the respondents have not appeared before us, there shall be no order as to costs.