PETITIONER:
LACHMAN UTAMCHAND KIRIPLANI

Vs.

RESPONDENT:
MEENA alias MOTA

DATE OF JUDGMENT:
14/08/1963

BENCH:
AYYANGAR, N. RAJAGOPALA
BENCH:
AYYANGAR, N. RAJAGOPALA
SINHA, BHUVNESHWAR P.(CJ)
DAS, SUDHI RANJAN (CJ)
SUBBARAO, K.
DAYAL, RAGHUBAR

CITATION:
1964 AIR 40 1964 SCR (4) 331
CITATOR INFO :
R 1972 SC 459 (5)

ACT:
Husband and wife-judicial separation-Desertion without just-cause-offer to return to matrimonial home must be shown to be bona fide-Petition for judicial separation-Burden of proof-Hindx Marriage Act, 1955 (25 of 1955), s. 10(1)(a).

HEADNOTE:
Where an application is made under s. 10(1)(a) of the Hindu Marriage Act, 1955, for a decree for judicial separation on the ground of desertion, the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent intentionally forsook and abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not by his or her action by word or conduct provide a just cause to the other spouse to desist from, making any attempt at reconciliation or resuming cohabitation; -but where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion ter-minates by reason of the conduct of the deserted spouse.
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An offer to return to the matrimonial home after sometime, though desertion had started, if genuine and sincere and represented his or her true feelings and intention, would bring to an end the desertion because thereafter the animus deserendi would be' lacking, though the factum of separation might continue; but on the other hand, if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing. Bipin Chander laisinghbhai Shah v. Prabhawati, [1956] S.C.R, 838, Dunn v. Dunn, [1948] 2 All E.R. 822 and Brewer v. Brewer [1961] 3 All E.R. 957, relied on.

The parties were married in 1946 at Hyderabad in Sind (now in Pakistan) and a child, a son, was born in 1947. The married life of the couple was not as harmonious as it should have been and it soon transpired that much of the trouble arose out of the fact that while the appellant and his parents appear to have been of an orthodox and conservative outlook and bent of mind the respondent and her parents apparently did not set much store by orthodoxy and were liberal and modern. As a result of the partition in 1947 the parties had to leave Sind. The appellant and his parents stayed in a house in Bombay, while the respondent's parents went to Poona. The appellant's complaint was that the respondent was frequently going away to her parent's house. On February 26, 1954, the respondent left' the appellant's house and went to Poona. The evidence was conflicting as to whether she obtained the permission of the appellant 'before going to Poona, but the facts showed that after that date the respondent did not go back to the appellant's house. The appellant along with a friend, Dr. Lulla, went to Poona with a view to bring back the respondent. The evidence as to what transpired at the interview with the respondent was somewhat conflicting, and the appellant's case was that the respondent intimated to him her fixed determination not to go back to him. On July 7, 1954, the respondent along with her father went abroad to the Far Eastern countries, for the purpose of recouping her health, according to her. Before going abroad the respondent had to go Bombay for getting the passport and going through the formalities; and while there she was staying in a house very near the appellant's but she did not visit him nor see their child. On learning that the respondent had gone abroad without intimation to him he cabled to her asking her to come back immediately but the respondent did not do so as required by the appellant. There was some correspondence' about the matter and the respondent continued to say in her letters that she would soon come back to his place. By his letter dated April 1, 1955, the appellant used strong language passing severe strictures against her conduct &id in her continuing to be abroad without obeying his instructions. The respondent replied by letter dated April 12, 1955, saying: "As soon as my.
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health has completely improved I shall, of course come back to you and to our son." After this there was no further correspondence between the, parties. In April, 1956, the respondent returned to India but she did not go to the appellant's home nor did meet him. On September 20, 1956, the appellant filed the present petition praying for judicial separation under s. 10(1)(a) of the Hindu Marriage Act, 1955. The respondent's defenses to the petition, inter alia, were that she never left the appellant's matrimonial home with the intention of breaking it and that, in any case, the appellant charged her falsely with immorality in his letter dated April 1, 1955, and so she was justified in living separately.
Held (Subba Rao, J. Dissenting), (1) that on the facts the respondent left the appellant's matrimonial home On February 26,1954, with the intention of permanently, breaking it up, and thatsuch desertion continued during the requisite period of two years.
(2) that the appellant's letter of April 1, 1955, did not con stitute an interruption of the respondent's desertion by its being a just cause for her to remain away from the matrimonial home; and

(3) that, in consequence, the appellant was entitled to a decree for judicial separation under s. 10(1)(a) of the Hindu Marriage Act, 1955.

Per Subba Rao, I.-(1) Where a spouse seeks judicial separation on the ground of desertion a heavy burden lies on him or her to prove four essential conditions, namely (1) the factum of separation, (2) animus deserendi, (3) absence of his or her consent, and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule of prudence the evidence of the petitioner shall be corroborated.

(2) The expression "includes the wilful neglect" in the explanation to s. 10(1) of the Hindu Marriage Act, 1955, does not enlarge the scope of the word desertion so as to take in by definition the conscious neglect on the part of that offending spouse without the requisite animus deserendi; it does not introduce a new concept in Indian law, but is only an affirmation of the doctrine of constructive desertion in English law. The ingredients of desertion as well as constructive desertion are the same, though in one case there is actual abandonment and in the other there is expulsive conduct. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home.

(3) Sections 9 and 10 of the Act deal with different subjects and s. 9 does not throw any light on the construction of the expression "without reasonable cause" in the explanation to s. 10. Whether there was a reasonable cause or not in a given case could

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be decided only on the evidence and the peculiar -circumstances of that case.

(4) In the present case, the evidence was clear that the respondent left her matrimonial home with the permission of her husband and his parents and that it was not possible to infer from the evidence given by Dr. Lulla that the respondent decided to abandon the appellant. The letters demonstrated beyond any reasonable doubt that the wife did not demonstrated beyond band with the requisite animus, but on the other hand, showed her willingness to go over to Bombay as soon as she regained her health. In view of the false allegations made by the appellant in his letter dated April 1, 1954, in which he charged the respondent with unchastity and leading a fast and reckless life, from that date the desertion, if any, on the part of the respondent came to an end and from that date the appellant was guilty of desertion.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 292 of 1961.

Appeal from the judgment and decree dated July 16, 1959, of the Bombay High Court in Appeal from the Original Decree No. 802 of 1957.

j. C. Bhatt and N. N. Keswam, for the appellant.

C. B. Agarwala, C. M. Mehta and V. j. Merchant, for the respondent.

August 14, 1963. The Judgment of B. P. Sinha, C.J., S. K.Das, Raghubar Dayal and N. Rajagopala Ayyangar,jj. was delivered by Ayyangar, J. Subba Rao, J. delivered a dissenting opinion.

AYYANGAR J.-This is an appeal against the judgment of the

High Court of Bombay reversing the judgment and decree of the City Civil Court at Bombay by which a decree for judicial separation granted by' the trial judge was reversed and it comes before us on a certificate of fitness granted by the High Court under Art. 133(1) (c) of the Constitution. The appellant, the husband, filed a petition in the City Civil Court, Bombay, under s. 10(1) (a) of the Hindu Marriage Act, 1955 (which we shall hereafter refer to as the Act), praying for a decree against the respondent, his wife, for judicial separation on the ground that in terms of that provision she had "deserted" him for "a continuous period of not less than two years immediately preceding the presentation of his petition". The petition was presented on September 20, 1956, and the material allega

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tion was that the wife had left the matrimonial home on February 26, 1954, and had not thereafter come back to him and that this constituted "desertion" within the meaning of the provision just cited. The learned trial Judge held that the appellant had established to the satisfaction of the Court that the respondent-wife had left the matrimonial home with the intention of permanently breaking it up and that such desertion continued during the requisite period of two years and in consequence granted the decree for judicial separation, as prayed for. The wife preferred an appeal, to the High Court and the learned judges disagreeing with the finding of the learned trial judge that the leaving, by the wife, of the matrimonial home was with the intention of deserting the appellant, reversed the decree of the trial judge and directed the dismissal of the appellant's petition with costs. It is the correctness of this reversal that is canvassed in the appeal before us.

Even at the outset we might state that the decision of the appeal does not depend so much on any substantial question of law but rather on an appreciation of the facts on two matters on the basis of which the learned Judges of the High Court have decided the case against the appellant: (1) whether the appellant had established that the respondent had an irrevocable determination to break up the matrimonial home when she admittedly left the petitioner on February 26, 1954, and did not return to him thereafter, it being common ground that the onus of proving this to the reasonable satisfaction of the Court was on the appellant, and (2) whether the respondent had a justifiable cause for not returning to the husband the existence of which prevented her admitted absence from the matrimonial home from constituting "desertion" as to serve as the foundation for an order for judicial separation under s. 10(1) (a) of the Act.

Before, however, dealing with these two points which from the crux of the matter in dispute in the appeal, it is necessary to summarise, briefly, the history of the married life of the parties. The parties are Sindhi Hindus of the: Bhai Bund community. The appellant is a practicing doctor while the respondent is said to have had read up to the High school classes. While the appellant's father and his family were people of but moderate

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means, the respondent's father was a very affluent business-,Man-his business spreading over almost the entire South .East Asia. He had business houses in Singapore, Dakarta, ,Hong Kong, Manila etc. Besides, while the appellant and his parents appear to have been of an orthodox and conservative outlook and bent of mind, the respondent and her parent's apparently did not set much store by

orthodoxy, and were liberal and modern. It looks to us as if it is possible that the trouble between the spouses was in part at least due to these variations.

The parties were married at Hyderabad in Sind (now in Pakistan) on November 11, 1946. The appellant was living with his father and mother and his two sisters and after her marriage the respondent commenced to live with him in this household. The parties are not agreed as to whether their marital life was happy even to start with, for while it was the case of the husband that the same was unhappy even from the very beginning, the respondent's version was that for the first month or so her relationship with her husband was happy, but nothing much turns on this because from soon thereafter both of them agree in saying -that they were not pulling on well together. It is not necessary either to tract the source of the friction between the spouses or narrate the incidents which are related in connection therewith as they are hardly relevant for the decision of the real points arising in the appeal. The only other circumstance to be noted in connection with the early period of their married life was that on July 19, 1947, a son, Ashok, was born to the respondent who, it may be mentioned, is now living with the appellant.

It is common experience that in some cases, the birth of a child puts an end to minor misunderstandings and bickerings between the spouses, for the parties concentrate on lavishing in common their love on the child and thus the two are brought together but in the case on band, it does not seem to have had this effect and the relation between the parties does not appear to have been smoothened by Ashok's birth. With the partition of the sub-continent the parties migrated to India.

The appellant, his parents and his two sisters who were all living with him moved over to Bombay along with the respondent and their young child but apparent-

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ly. the accommodation which they could 'then secure was pot sufficient for this large family, and as a result the appellant took the respondent, his child and his two sisters to Colombo and left them in the care of his maternal uncle, one Narian Das, to stay there till he could find a sufficiently commodius home in Bombay. The respondent stayed for a very short time at Colombo and though she admitted that she was treated with kindness and affection by this uncle, apparently all was not well in the relationship between the appellant's sisters and the respondent. What emerged out of this was that she left Colombo without informing either Narian Das or the appellant and came over to India. She came to Poona and Lonavala and started staying with her mother who was there. There is a complaint by the appellant against her leaving his uncle without informing him and on the other hand there is a complaint by the respondent about the way in which her sisters-in-law behaved towards tier ,but we pass over these incidents and the respective cases ,as, not having any material bearing on the points at issue in the appeal. The appellant having come to know of her ,arrival at Lonavala, it is common ground that he went there and induced her to come over and stay with him at ,Bombay. This was sometime towards the end of January, 1948.

The period from January, 1948, to 1954 might be dealt with together. During this period she was staying most of the time with the appellant at Bombay but his complaint is that she used to leave him very often and that pressure had to be exerted or inducements offered to get her back to Bombay to

stay with him. This is, -of course, denied by the respondent whose story is that every time it was with his consent that she went and that she came back of her own accord. It is not, however, necessary to decide which of these versions is correct, though the learned trial judge who had an opportunity of seeing these two as witnesses was inclined to accept the version of the husband in respect of any matter on which he, was contradicted by his wife. It is only necessary to add that though during these 4 or 5 years or so, the parties were living together most of the time the relations between them had not become normalised. Be-
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sides, it might be mentioned that the relationship between the parents of the two spouses were also strained and similarly the relationship between the appellant and his wife's parents as also between the respondent and her husbands parents.

We next come to a crucial event. On February 26, 1954, the respondent left the appellant's house at Bombay (Colaba) and went to Poona. She was taken from the house by her father who had come there in the evening and she traveled with him to poona by train. It is the case of the appellant that the respondent left his home with the main items of her jewellery and clothes without the knowledge and consent of himself and his parents and at a time when there was no one in the house except a maid-servant and that he came to know of the respondent's departure only from the maid-servant, when he later returned to the house. On the other hand, it is the case of the respondent that she left the house after permission had been obtained by her father from her father-in-law and after she herself had obtained the permission of her husband and that at the time of the departure when her father came to take her, her father-in-law, mother-in-law and the appellant were all present in the house and that the jewels etc., were given to her by her mother-in-law who bade her good-bye and wished her a happy journey. The learned trial judge accepted the appellant's story that the respondent did not seek or obtain anyone's permission for quitting the house and that she left the house without the knowledge or consent 'of anyone. The materiality of the acceptance of the appellant's version stems from the fact that in order to 'constitute desertion the withdrawal of the deserting spouse from the matrimonial home should be without reasonable cause and "without the consent or against the wish of such party" [vide Explanation to s. 10(1) of the Act]. On the other hand, the learned Judges of the High Court were inclined to accept the wife's version that she had the consent of her husband to leave the home. For reasons we shall set out in its proper place we are in agreement with the learned trial Judge and do not share the views of the learned judges who accepted the wife's version of this event. We shall, however, revert to it after comple-
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ting the narrative of the events leading up to the filing of the petition.

It is the case of the appellant that he came to know a few days after her leaving him that his wife was staying at Poona with her parents. According to his evidence he considered that, having regard to the manner in which his wife left him, no useful purpose would be served by any trip of his to Poona to persuade her to come back. It was his further case that a friend of his-one Dr. Lulla, an M.R.C.P. of London who was employed as a doctor in a hospital in a suburb of Bombay-suggested that the two of them go to Poona

and try to induce the respondent to come back to Bombay. This proposal, he says, he accepted and the appellant as well as Dr. Lulla who has been. examined as a witness on his side have testified to the fact that in the last week of May, 1954, both of them went to Poona one evening, met the respondent at her parents' house and appealed to her to come back to Bombay to live with the appellant. According to the evidence of both these witnesses, the respondent, when requested to come back to Bombay, stated that she was determined never again to come back to her husband's house. The respondent denied the entire story and stated that neither the appellant nor Dr. Lulla ever came to Poona during her stay there, nor of course ever talked to her. The learned trial Judge who had the opportunity of seeing Dr. Lulla in the box entertained a very favorable opinion of his respectability and credibility and accepted in toto his evidence that the respondent intimated to him her fixed determination not to come back to the appellant. In the background of the previous history of the relationship between the parties and the manner in which the respondent left, the husband's home on February 26, 1954, as found by the trial Judge, he recorded a finding that the factum of desertion which was not in dispute was accompanied by "'animus deserendi' which had been satisfactorily established by the declaration she made to the appellant and his friend. The learned Judges of the High Court were not disposed to differ from the learned trial judge as regards the reality of the visit to Poona of Dr. Lulla accompanied by the appellant and their meeting the respondent there. They were, however, not in-

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clined to attach any value to Dr. Lulla's testimony as regards the statement made by the respondent because of two factors: (1) the time lag between May, 1954, when he met her and April, 1957, when he gave evidence; the learned judges were inclined to hold that the witness could not properly remember correctly the dialogue after that interval ; (2) the fact that Dr. Lulla could not reproduce verbatim the questions put to the respondent and the answers she gave was considered by them as a circumstance which would detract from the acceptability of, the evidence regarding the matters about which he deposed. For these reasons the learned Judges found that though Dr. Lulla might have visited the respondent in May, 1954, as spoken to by him, there was no proper proof before the Court that the respondent had given expression to a determination not to return to the husband. We shall deal later with this appreciation of Dr. Lulla's evidence and the weight to be attached to it, but, to continue the narrative, the respondent left India for Singapore on July 7, 1954, and returned from abroad in April, 1956. During this period there has been some correspondence between the parties by way of telegrams and letter which have considerable relevance on the issues involved in the case and the points in controversy between the parties.

Before, however, referring to the events of that period a few more incidents which happened prior to the departure of the respondent from India have to be noticed After Dr. Lulla's meeting the respondent at the end of May, 1954, the next event of some importance is that the respondent and her father came to Bombay during June, 1954, for the purpose of the respondent obtaining a passport to enable her to leave India. At that time, it is common ground, that the respondent stayed with her paternal uncle-one Tola Ram-whose house was in Colaba and about five minutes' walk from the

appellant's residence. It is the case of the appellant that when the respondent and her father came over to Bombay in June they stayed there for about a month. This however, is denied by the respondent and her father who say that the duration of their stay at Bombay at Tola Ram's house was only for a little over a fortnight. It
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matters little which version is correct but one thing is clear that notwithstanding the admitted stay in Bombay for two weeks or more she never went to her husband's house either to see him or even to see her son, Ashok, then a boy of about 7 years. The learned Judges of the High Court have not adverted to this circumstance which we consider has material bearing in deciding between the rival versions as to whether the respondent did or did not leave the husband's home with his permission and consent and the blessings of the parents-in-law. It is also to be noticed, and about this there is no dispute, that in the application for the passport and in the passport itself it was not the appellant's name or address that was given as her Indian residential address but that of Tola Ram in Colaba. As stated earlier, the respondent left Bombay by air for abroad on . July 7, 1954. Before taking off she was in Bombay for nearly 24 hours before the plane's departure. It is not in dispute that even then, she did not visit her husband or her child though she was staying at Tola Ram's.

From Bombay the respondent reached Singapore by air and it is admitted that she sent no intimation or information to the appellant either regarding her departure, the place to which she had gone or the proposed duration of her stay. The appellant having come to know through other sources of the respondent having gone to Singapore, sent her a cablegram on the 20th July reading :

> "Extremely surprised at your suddenly secretly leaving India without my knowledge and consent. Return immediately first plane"..

to which the respondent replied also by a cablegram
"Returning within a few months".

These telegrams would, at least, make one thing clear that the appellant's case that he had no knowledge of the respondent leaving India was not an after-thought and is probably true. On receipt of this telegram dated the 23rd July the appellant replied the next day
"You must return immediately".

of course, the respondent did not return but her case was that she replied by a letter dated August 2, 1954. There is a controversy between the parties as to whether
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this letter was really written at all, or if written, was posted and to the proper address. It is, however, common ground, and found by both the Courts, that the appellant did not receive any letter from the respondent bearing that date or written at about that time or with the contents which according to her were the contents of that letter. The learned trial judge was inclined to the view that the respondent did write a letter on that date but he was not satisfied that the copy which she produced which has been marked as Ex. 4 in the case represented either a true copy of it or carried the contents of that letter. He, therefore, discarded Ex. 4 from consideration. The learned judges of the High Court on the other hand, took the view that a letter was written by the respondent on that date and they were prepared to accept her story that the original of that letter which was stated to be in manuscript-written in her own hand,. was copied from the typescript which she

produced and which was marked as Ex. 4. The evidentiary value of that letter was stated to consist in its disclosure of the state of mind of the respondent and the learned judges held that its contents indicated the readiness and willingness on the part of the respondent to join her husband and therefore negatived any animus to desert or to continue the desertion, if there was any such intention originally on her part. We shall reserve the discussion of the evidentiary value of this letter to a later stage but shall here merely set out the material parts of it:

> "I really feel surprised why you want me to return to Bombay by first plane without any reason.
> Dear, I was particularly pained to read that I have suddenly and secretly left the place without your consent. What has prompted you to write this I really do not understand. Dear, how comes this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I do not like to discuss here since You are fully aware. It was you who suggested that I should go over and stay at my father's place and at your suggestion I did so. You are fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent. As soon

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as I feel better I shall return to Bombay."

The appellant not having received this letter (if it was written) and not having received any reply to his cable dated July 24, 1954, asking the respondent to return immediately to India, was, according to him, hearing stones that she was moving from place to place. He thereupon' sent her a cablegram on February 24, 1955, and addressed it to both her Singapore and Djakarta addresses as he was not quite sure as to where exactly she was. That telegram read :

> "Since your secret departure you not replying my telegrams, letters. Myself shocked. You wandering different countries leading reckless life spoiling my reputation. Your most disgraceful behaviour ruining my life."
> At the time the cable was received the respondent was still at Singapore and on the 26th she replied by cable :
> "Your allegations in your cable dated 24th not correct. Cannot understand your attitude. I have departed with your knowledge with my father because of ailing health due to reasons you are well aware. Keeping quiet life with my parents. Have not received your letter ; only telegrams which have been replied by cable and letter."
> and to this the appellant replied also by cable:
> "Your telegram dated 26th February contains all foul lies. Myself shocked at your fabricating false stories to justify your secretly quitting home and flouting my repeated instructions."

But even before the receipt of this last cable from the appellant the respondent wrote to him a letter from Singapore dated March 3 in which, after setting out the text of the cablegrams exchanged, she made a positive assertion that

she wrote a, letter to him on August 2, 1954. The rest of the letter was concerned with inviting him to come abroad and stay with her and her father at Hong Kong to which place she said she was leaving the next day and she promised him real pleasure if he stopped working for his parents and commenced having pleasure with the respondent in her father's house. After the dispatch of this letter on the 3rd of March the respondent received the appellants cable in which he reiterated his

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allegation that she had left his house secretly and without his knowledge and was thereafter flouting his instructions., On March 10, 1955, she sent him a cable from Hong Kong refuting this allegation and adverting to the invitation' contained in her letter dated March 3, 1955, she, said.

> "Why don't you come out of Bombay house-hold atmosphere and see for yourself. Cannot understand, what you mean by flouting repeated instructions."

The letter of the 3rd was dispatched by the respondent by registered post and when this was received as well as the cables from the respondent, the appellant wrote in reply a letter sent by registered post dated April 1, 1955, in which he passed severe strictures against her conduct and in her continuing abroad without obeying his instructions. We shall have to deal in somewhat great detail with the contents of this letter. Ordinarily read it might seem to indicate that the appellant was charging the respondent with improper behaviour even amounting to sexual immorality. While in the witness box the appellant specifically repudiated that he intended any Such imputation and, in fact, made it clear that he was neither basing his petition on any allegation of immorality nor that he ever intended to impute any such conduct to her. The learned trial judge accepted this explanation of the appellant and interpreted the letter as the outpourings of an angry and grieved husband and was not, therefore, inclined to read the expressions used therein as imputing unchastity to her. On the other hand, the learned judges of the High Court analysed the text of the letter and considered that it clearly made false and unfounded imputations of unchastity on the respondent and for that reason they held that even if the respondent be held to have had an animus deserendi when she quitted her husband's home on February 26, 1954, and continued to retain that animus, still having regard to the false and malicious amputations of unchastity made by the appellant in his letter dated April 1, 1955, they held that she had justifiable cause for not returning to him thereafter and this formed one of the prime grounds for directing the dismissal of the appellant's petition for judicial separations We shall have to discuss these conflicting views and the different -interpretations of this letter, in the light of the

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evidence adduced in the case when dealing with it. We shall, however, pass this over for the present and continue the narrative.

The respondent received this letter while she was still at Hong Kong. But the next day she left for Manila and she replied from the latter place on April 12, 1955. The main points made in this reply were : (1) She left the house of the appellant with the consent of himself and his parents, (2) The reason for her leaving Bombay to stay with her parents was that her health was poor and -she wanted to recoup it by a trip abroad. The stay abroad was therefore

only for the improvement of her health., (3) The reason for her vacationing with her parents being for the improvement of her health and for no other-not for leading the gay life which was suggested in the appellant's letter dated April 1, 1955. She added :

"As soon as my health has completely improved I shall, of course, come back to you and to our son." This, was the end of the correspondence between the parties. It is common ground that she did not inform the appellant as to when she would be returning to India which was in April, 1956. Nor did she inform the appellant after her arrival in the country, nor did she go to his home-Bombay-to meet him or her son. just about the time some relations of the respondent were vacationing for the summer in Kashmir and she accompanied them there and spent the summer in the valley. No communications passed between the appellant and the respondent during this period either. It was after this that the petitioner filed the petition out of which this appeal arises, on September 20, 1956. After the respondent was served with notice of the petition some attempt was made to effect a reconciliation but it is not necessary to notice this because if there had been desertion, as required by law and the duration of that desertion amounted to two years, the terms of s. 10(1) of the Act are satisfied and the fact that thereafter the guilty spouse repents or recants is not by itself a ground for refusing the relief to which the injured spouse is entitled (Compare s. 23(1) of the Act).

From the above narration it will be seen that there are three points of contested fact on which the decision

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of this appeal would turn : (1) whether the respondent left the appellant's home on February 26, 1954, with his consent or whether she did so without such consent., (2) What was the intention or animus of the respondent-in leaving her matrimonial home, and in regard to this the interview with Dr. Lulla and the other matters to which we have referred earlier and which transpired before the respondent left India on July 7, 1954, would have relevance., (3) The proper interpretation of the letter of April 1, 1955, writ-ten by the appellant to the respondent and whether in the circumstances of the case it would afford legal justification for the respondent's refusal thereafter to return to the matrimonial home, and to these questions we shall immediately address ourselves.

Before doing so, however, it might be convenient to refer briefly to the law on the topic. The relevant statutory provision may first be set out. Reading only the portion that is material s. 10(1) enacts

> "10. (1) Either party to a marriage whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-
>
> (a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or"

This sub-section is followed by an Explanation which runs :

> "Explanation.-In this section, the expression 'desertion', with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without

the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage."

The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the. Court had to consider the provisions of s. 3(1) of the Bombay Hindu Divorce Act, 1947, whose language is in pari material with that of s.
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10(1) of the Act. In the judgment of this Court in Bipin Chander v. Prabhawati(1) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.), Vol. 12, was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

The position was thus further explained by this Court:

"If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid..... Desertion is a matter of inference to be drawn from the facts 'and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference ; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact there has been a separation, the essential question always is whether that act could be attributable to an animus descrendi. The offence of desertion commences when the fact of separation and

(1) [1956] S.C.R. 838.
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the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have-commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time."

Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion-the "factum" as well as the "animus deserenai is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.

> As Denning, L.J., observed : (Dunn v. Dunn)(1) : "The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to' distinguish between a legal burden of proof laid down by law and a provisional burden raised by the state of the evidence..... The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves that fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has

(1) [1948] 2 All. E.R. 822, 823.

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> the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"
>
> This, in our opinion, is as well the law in this country under the Act.

The other matter is this. Once desertion, as defined earlier, is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse) to appeal to the deserting spouse to change her mind, and the circumstance that the deserted husband makes no effort to take steps to effect a reconciliation with the

wife does not debar him from obtaining the relief of judicial separation, for once desertion is proved the deserting spouse, so long as she evinces no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. of course, the matter would wear a different complexion and different considerations would arise where before the end of the statutory period of 2 years or even thereafter before the filing of the petition for judicial separation the conduct of the deserted spouse was such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that the desertion was without just cause du-

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ring the entire period referred to in s. 10(1)(a) of the Act: before he can succeed.

There were a few submissions made to us by learned counsel for the appellant regarding the nature of the "just cause", particularly whether this should amount to "cruelty" or other matrimonial offence etc., based on a construction of certain other provisions of the Act, but as these have no substance and were not persisted in, we consider it unnecessary even to refer to them.

We shall now proceed to consider the facts in the light of these principles with a view to find out whether the appellant has proved that the respondent had deserted him without just cause for the requisite period. We start with the admitted circumstance that the respondent left the husband's home on February 26, 1954. It was not suggested that the husband threw her out or that she left because of any expulsive conduct on his part. There is therefore no suggestion or case that she left for any justifiable cause. The next question that would fall for determination is whether she left with his consent. As we have stated earlier, on this point the learned judges of the High Court have recorded a finding different from that of the trial Judge. The case of the respondent was that she had the consent of her parents-in-law and also of the husband, and she even went to the length of suggesting that it was he who suggested that she might go abroad with her father in order to improve her health. Now as to the obtaining the consent of the respondent's parents-in-law, the evidence was this. The respondents father who was her second witness deposed as follows: There had always been disinclination on the part of the appellant and his parents in permitting the respondent to go over to her parents' place on most earlier occasions. When permission was thus sought for such a purpose, there had always been friction and trouble. In connection with his taking his daughter with him when he intended to leave India in July, 1954 he sought their permission on more than two occasions but the same was refused. Subsequently a friend and a neighbour of his at Poona--one Maganmal-promised to intercede with the appellants father. The latter spoke to the appellant's father and obtained permission and informed the witness.

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The entire story of Maganmal having spoken to appellant's

father and obtained the latter's permission was denied by the appellant as false and the learned trial Judge was not inclined to believe the story as true. Maganmal who gave evidence as D.W. 3 admitted that he could not claim to be any close friend of the petitioner's father and, in fact, he admitted to what might ordinarily constitute a state of unfriendliness between them. Kanayalal who had married the appellant's sister was the adopted son of one Nanikram who was stated to have died leaving a will by which he disposed of his properties in favour of a trust. The trustees, including Maganmal who was one of the trustees, upheld the validity of the will and claimed the properties for the trust, but Kanayalal challenged the truth and validity of the will and claimed the property as the heir of Nanikram. It was stated by Maganmal that himself and the appellant's father became acquainted with each other when they happened to meet in connection with this trust estate and when the appellant's father came to him to sponsor the interests of his son-in-law. This apart, the talk between himself and the appellant's father as a result of which the permission is said to have been granted was thus stated by Maganmal in his evidence:

> "I (Maganmal) talked to the petitioner's father in Bombay in collection with the securing of permission for the respondent at the most for five months. I straightaway talked to the petitioner's father about the securing of the permission for the respondent. There was no other topic discussed between myself and the petitioner's father. The talk between myself and the petitioner's father took place in the compound of Ishardas Temple when I and the petitioner's father came out of the temple. I took the petitioner's father aside when I had a talk with the petitioner's father."

This would not be a very credible story, because if to the requests of the respondent's father on two or three occasions the appellant's father had refused permission it does not stand to reason that to a person situated as Maganmal was in relation to him he would have yielded merely because it was mentioned by Maganmal. The learned trial Judge who had an opportunity of seeing Maganmal in the box was not impressed with his evidence and for the reasons

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we have set out earlier regarding the relationship between the appellant's father and Maganmal learned trial judge considered that the story of Maganmal being deputed to obtain permission and his having obtained permission was false. We are inclined to agree with the learned trial judge in this appreciation of the oral testimony. If Maganmal's evidence is rejected then the entire superstructure of the respondent's case about the consent of the appellant's parents must fall to the ground. In this connection there arc a few other matters to mention. It was common ground that the appellant's father was, at the time of the trial, away at Tokyo on business and he was not in a position to be examined as a witness. The learned judges of the High Court, however, drew an inference adverse to the appellant from (1) his not calling his mother as a witness, and (2) the non-examination of maidservant who was stated to have been in the house at the time when the respondent left it on February 26, 1954. We do not agree with the learned judges of the High Court in the inference so drawn. If Maganmal's evidence is -rejected, as it must, the father of

the respondent who supported the story of Maganmal's intervention would not come out with flying colours and if his evidence as to this part is rejected we consider that it was not incumbent on the appellant to adduce the negative evidence of his mother etc., at the risk of an adverse inference being drawn against him in the event oil his not doing so.

Besides, there -.ire some circumstances which lead to the inference that the story spoken to by the respondent about her parents-in-law being per sent at the time of her departure and their loading her with gifts of jewellery and clothes is not credible. If really the respondent had left the house with the consent and goodwill of the appellant's parents or if as she would have it in some of her letters, it was the appellant himself who suggested her going abroad with her father to recoup her health. there could be no explanation for the conduct of the respondent in ,not going over to the house of the appellant during her stay in Bombay in June, 1954, for a fortnight or more when she was there in connection with her passport, and when she stayed admittedly within a few minutes' walk of the appellant's place. There would also be no explanation for

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her failure to inform the appellant and his parents about her departure from Bombay on July 7, 1954. It is only necessary to add that even in the first cable which the appellant sent her on coming to know of her departure from India the appellant complained that she had left India secretly without his knowledge and consent to which there was no contradiction in the reply by cable that she sent on July 22, 1954, though in her later cablegrams and letters she asserted that she had such a consent. There are several other matters which have been mentioned by the learned trial judge, such as the discrepancies in the several versions that the respondent spoke to from time to time and between these and the evidence given by her father and that of Maganmal coupled with her case as set out in the -pleadings as circumstances for discarding the entire story as false, but to these it is not necessary for us to advert in view of the broad features we have pointed out which have led us to the conclusion that the respondent did not leave the house of the appellant with his consent but that she did so of her own accord and without his knowledge.

The next matter for enquiry is as to the animus which prompted the respondent to leave the appellant's house. There was admittedly no incident which led to the departure from the matrimonial home which could throw light on that question nor is there any contemporaneous declaration of the respondent. The learned trial judge has set out the history of the relationship of the parties ever since their marriage up to 1954 as the background in which the simple act of leaving should be viewed for the purpose of determining the animus with which that act was done. The learned Judges of the High Court considered that this was not a proper approach to the question. Without deciding on the correctness of the approach of the learned trial judge, we shall proceed on the basis that the learned judges were right in discarding the earlier history of the relationship between the parties as irrelevant for determining whether the respondent in removing herself from her husband's house did or did not intend her withdrawal to be permanent and with a view to disrupt their marriage and terminate their married life. We shall consequently confine ourselves to the events and matters which trans-

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pired after she left the appellant's home to determine what her intention was at the time when she left it.

The first matter to which reference must be made is the fact that after reaching Poona on February 26, 1954, until the end of May of that year she never wrote any letter to her husband. If, as we have found earlier, she left the appellant's house without his Consent or even knowledge, the failure on her part to intimate to him as to where she had gone would certainly be a relevant circumstance indicative of the animus which impelled her to leave the home. This is, no doubt, a slight circumstance, but she has really no explanation to offer for her silence and particularly so when taken in conjunction with the case that she put forward that she left her husband's place with the blessings of her parents-in-law and almost at the suggestion of her husband in order that her health might improve.

The next circumstance which, however, is very much more important, is her declaration on the occasion when the appellant and Dr. Lulla visited her at Poona towards the end of May. The learned trial judge, as stated earlier, has accepted that Dr. Lulla and the appellant did visit her at Poona as spoken to by them and that her story denying this meeting is false. The learned Judges of the High Court also did not accept her denial of the meeting, but they however refused to attach any importance to the evidence of Dr. Lulla for the reason that he was unable to specify the exact words of the questions put to her and her answers. We do not agree with the learned judges about the value to be attached to the evidence of Dr. Lulla. The relevant portion of Dr. Lulla's evidence runs thus :

> "I told her (the respondent) to go back to Bombay and then settle the differences whatever they were between the petitioner and the respondent but she said that she was not prepared to go back for ever. There was no further talk between myself and the respondent. The petitioner had a talk with the respondent first and then I had a talk with the respondent. I cannot recollect what the petitioner actually told the respondent. The respondent did not mention the differences which she had with the petitioner' She only stated that she was not prepared to come back to the peti-

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tioner for ever."

Now, it will be seen that this evidence is categorical. It Consists of two parts: The first is as regards the gist of the conversation between the appellant, and the respondent when they were together. He admits he was not present when they talked to each other and it is the question and answer at that stage, i.e., between the appellant and the respondent that the witness is unable to state to the Court. The second part of the evidence is in relation to the questions that he himself put to the respondent. There is, no ambiguity in his evidence either about the questions which he put nor about the answers which she gave. The comment of the learned judges that the witness was unable to reproduce the exact words of the question put to the respondent and the words of her answer does not obviously apply to this second part of the witness's testimony. If Dr. Lulla be treated as a truthful witness, and even the learned judges of the High Court did not express any view to the contrary, it is clear that the respondent had specifically stated to him that she would never come back to her husband's home.

There is thus clear evidence and satisfactory proof that besides the factum of desertion there was also the animus descrendi at the time when she left the husband's house or at least at the time of this meeting -it Poona at the end of May, 1954.

The matter does not rest here for there is further proof of her animus afforded by her conduct up to the time of her leaving India for abroad on July 7, 1954. We are, here, referring to three matters: (1) Her presence in Bombay for a fortnight or for a month, whichever it be, at her uncle Tola Ram's place five minutes walk from the appellant's residence and her failure to call on the appellant even for the purpose of seeing her boy Ashok; (2) her conduct in giving her address in India as Tola Ram's place in the application for a passport and in the passport itself; and (3) her failure to inform the appellant of her departure from Bombay and her not calling on him even when she was leaving India for a stay of a considerable duration abroad.

If then the conduct of the respondent was an act of desertion with the requisite animus when it started, the question next to be considered is whether it continued for

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the duration of two years before the presentation of the appellant's petition under s. 10(1)(a) of the Act to satisfy the requirements of the statute. We have already set out the correspondence which passed between the parties. In the first telegram which was exchanged between them and which started immediately the appellant got information that the respondent had left India-towards the end of July, 1954-he required the respondent to return to India immediately. In her replies she stated that she would return, not immediately-we are not, here, concerned so much with the reasons which she gave for not so returning-but after her health improved. If her offer to return after sometime was genuine and sincere and represented her then true feelings and intention it cannot be disputed that the desertion would be brought to an end because thereafter the animus deserendi would be lacking, though the factum of separation might continue. On the other hand, it cannot also be disputed that if the offer was not sincere and there was in reality no intention to return, the mere fact that letters were written expressing such an intention would not interrupt the desertion from continuing. The question for inquiry would, therefore, be whether these offers by the respondent to return were sincere. In this connection it is riot without significance that there are admittedly several occasions on which the respondent could have returned to India but she did not do so until April 1956. One of these was when one. Mr. Choith Rama relation of the parties-returned to India. It is admitted by both the respondent as well as her father that it was possible for the respondent to have returned to India with Choith Ram but it was stated that she did not do so because she had not been invited to some wedding in the appellant's house. We consider this explanation not satisfactory or convincing. If, as -we have found, she had left the appellant's house without his consent, and she expressed her determination not to return to him when the appellant and Dr. Lulla met her in May in Poona, and when in spite of repeated assertions in her letters and telegrams that she would be coming back, but she fails so to return when she had occasion and opportunity to do so, we consider that her acts and conduct in failing to return are entitled to more weight as evidence of her true

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intention than her assurances contained in her letters. We

are not, therefore, prepared to hold that bona fide intended to return to her husband when in her letters and telegrams, to which we have already adverted, she expressed her intention to return to him. Besides, it would be seen that even after she returned to India in April, 1956, she did not go straight to her husband's house or even inform him of her return to India but on the other hand went away to Kashmir and that state of things continued until the petition was filed on September 20, 1956. If nothing more happened between the parties it is clear that the petitioner would be entitled to the relief which he sought as there was satisfactory proof of desertion as defined by the statute for the full term of two years.

The point, however, that forms one of the major bases of the judgment of the learned Judges and which was strenuously sought to be supported by Mr. Aggarwala, learned counsel for the respondent, was based upon the letter of the appellant dated April 1, 1955, as affording a justification in law for her refusal to come back to join him.

Before proceeding to deal with the contents of the letter and the other points urged in relation to it, it might perhaps be useful to set out the legal position in the light of which the entire matter has to be considered. As stated by Scott. L. J., in Tickler v. Tickler(1), quoting the words of Lord Romer in an earlier decision :

> "The question whether a deserting spouse has a reasonable cause for trying to br ing the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact."

The question for consideration in such cases is "Is the con- duct of the deserted spouse such as to excuse the deserting spouse from making any attempt to put an end to the deser- tion or from attempting any reconciliation?" (Vide also Brewer v. Brewer(1). The basis of this rule rests on this, that such conduct on the part of the deserted spouse would legally operate as a consent to the existing separation and would have the effect of absolving the deserting spouse from any obligation to return to the matrimonial home or

(1) [1943] 1 All E.R. 7, 59. (2) [1961] 3 All E.R. 957, 964.

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to make amends for her improper conduct, for the petitioner in a petition for judicial separation grounded on desertion by the other spouse has to prove that for the period of two years specified in s. 10(1) (a) of the Act the respondent has without cause been in desertion and that intention must be proved to exit through out that period. If, therefore, during that period the respondent has just cause to remain apart he or she would not be in desertion and the petition for judicial separation would fail.

It would be seen that we have here the interaction of two distinct matters which have to coexist in order that desertion might come to an end. In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an. impact on the mind of the deserting spouse that in fact it causes her to continue to

live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse. It appears to us that the principle that the conduct of the deserted spouse which is proved not to have caused the deserting spouse to continue the desertion does not put an end to the desertion appears to be self-evident and deducible from the legal concepts underlying the law as to desertion. The position is besides supported by authority. We might usefully refer to the following passage in the judgment of Willmer, L.J., in Brewer v. Brewer(1) where, explaining certain observations of Lord Macmillan in Pratt v. Pratt (2), he said :

> "It remains for consideration however, exactly what Lord Macmillan meant when he spoke of the husband 'making it plain' to his deserting wife that he will not

(1) [1961] 3 All. E.R. 957.
(2) [1939] A.C. 417, 420.
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> receive her back. He cannot have meant, I apprehend, that a deserting wife is entitled to take advantage of any chance statement that her husband may have made, irrespective of whether it had any effect on her mind. It seems to me that what Lord Macmillan must have meant was that a deserted husband cannot complain if what he has said or done has in fact caused hi-, wife to desist from making any attempt at reconciliation which she otherwise would have made. If this view be right, it becomes obvious at once that the question whether the conduct of the husband was such .is to bring the wife's desertion to an end cannot be treated, as counsel for the wife (at any rate at one point of his argument) appeared to invite us to treat it, as an abstract question of law. It becomes necessary to consider the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse."

We should add that this expresses our own view of the legal position.

We shall now proceed to consider the letter of the appellant dated April 1, 1955, and its significance for the purposes of the defence of the respondent in the light of these principles. The questions that arise on this letter fall into two broad classes : (1) The exact meaning and construction of the expressions used in the letter, and (2) its impact on the mind of the respondent.

As to the meaning of the letter the rival contentions are these. According to the appellant the letter was merely the outpourings of an angry and grievously injured husband who found his wife persisting in keeping away from him and expressing happiness at her stay in and movement from place to place in foreign countries. In this connection the expressions used in the letter were put to the appellant in great detail during his cross examination and the burden of his explanation was that he never intended to impute any unchastity to the respondent. It is not necessary to set out the entirety of the letter but we would make a few

extracts for the purpose of judging whether the letter could bear the interpretation which the appellant asserted was his intention in writing that letter:

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> "They (the appellant's parents) have overlooked all your faults and treated you with love and kindness like their own daughter and have made all possible efforts to raise you up from your low turpitude and make you a decent woman It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds. ... Just think how often have I counseled you against your unceasing pleasure hunt which has brought only shame and misery to our whole family It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone SO far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife In spite of all my efforts, you have completely deserted me and chosen the path of pleasure and perversion,at any cost. You are only looking for some cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn into your game."

As we have stated earlier, the appellant expressly disclaimed in the witness box that he ever considered her unchaste or that in that letter or otherwise he imputed unchastity to her. The learned trial judge believed the appellant's testimony as to what he intended to convey by this letter and was of the view that the contents were reasonably capable of being understood in the manner suggested by the appellant. We cannot say that this is not a possible interpretation of the letter and that it must be held that it was intended to impute unchastity to the wife. We must, however, hasten to point out that the intention of the writer is neither very relevant nor, of course, decisive of the matter. The question is what the words were reasonably capable of being understood, and if they have been so understood it is no answer that the writer did not

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intend his words to have that meaning. In view of what we are about to say, it would not be really necessary for us to say whether, reasonably understood. the words would not impute sexual immorality to the respondent, but we shall assume that the learned Judges of the High Court were right in their interpretation of the. letter and the insinuations it contained. The question, however, is how she understood and what her reactions were.

The next question for consideration therefore relates to the impact of this letter on the respondent, for it is ultimately that that would determine, in the present case the legal effect of the conduct of the appellant in terminating or not terminating the desertion that up to then continued. As to this, the position stands thus : The evidence of the

respondent was that she received the letter at Hong Kong, and she stated :

> "I read that a bit. On the next day I left for Manila. .... There I was appraised of the contents of the letter and then I was shocked at the contents of the letter and my health became worse at Manila."

The letter is -stated to have been received in the evening and she was to leave Hong Kong for Manila at 10 a.m. the next day. According to one portion of her evidence she read a part of the letter on the day she received it but she had no time to read the whole letter, but she corrected herself later and stated that the entire letter was then read, but that she understood only a portion of the letter on the day it was received and the rest of it explained to her in Manila. It was her cousin--one Khem Chand-who is said to have been asked to read and explain the letter because she did not understand fully its contents. This was at Hong Kong and he read that letter during the night after he returned home from office. Before he finished reading that letter she said she went to bed. He was reading, that letter till late that night. She, however, slept by then. Khem Chand she said, promised to explain the contents the next morning but there was no time 1eft for this as she left for Manila that day. It is apparent from this state of evidence that it did not have very much upon the respondent or that she under-stood the letter as really charging her with immorality. It' is just possible

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that she understood its contents as merely an admonition ,by the husband at her being away from him and at her conduct in asking him to go over to Hong Kong instead -of returning to him immediately, as he desired in his telegrams. She apparently attached not much significance to this letter and that is clear from the way in which she got the letter read and explained to her partly at Hong Kong and the rest at Manila. And this notwithstanding that her father was there to assist her in understanding the contents of that letter and its implications.

This is so far as the oral testimony of the respondent is concerned, but possibly of more significance and of higher evidentiary value than the inference to be drawn from the statements in her deposition in Court is the reply that she sent from Manila to this letter on April 12, 1955. It is necessary to examine with some care the contents of this reply. It is addressed to him.as 'My dearest husband'. It consists of five paragraphs. In the first she acknowledges as letter dated April 1, 1955. of the contents of that letter those regarding which she deals in the 1st paragraph are: (1) his statement that he had not received any letter from her dated August 2, 1954 and (2) a denial of the fact that she left his house without his knowledge and consent and an assertion that he and his parents consented that she should go and stay 'With her relations for a while. The second paragraph is again taken up with the same matter and repeats (1) that she .did not leave the house without his knowledge and consent, and (2) she left the house only for reasons of her health. The third paragraph states that her health had improved but that she would like to stay a little longer with her parents in order to improve it more and then she would return to him and to her "dear son Ashok". The next paragraph is concerned with denying the unfounded accusations contained in his letter and these are characterised as "merely the product of his hallucination"

and that she would ignore them because they are not based on truth and in the final paragraph she ends by repeating that site was vacationing with her parents only for the improvement of her health and for no other purpose and lie would kindly allow her to stay with her parents
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a little longer for her welfare and advantage and she winds up the letter by assuring him "As soon as my health is completely improved I shall of course come back home to you and to our son".
Now to the question as to what is the impact of the appellant's letter on the mind of the respondent. In the face of this letter could it be said that she understood the appellant's letter as a justification for her to stay apart? For this purpose it is not necessary to consider whether she understood it as imputing unchastity to her or not. As we have already pointed out, it is doubtful whether she did so. If it were so it would not be reasonable for her to read the letter at Hong Kong in part or not understanding it there and not attaching any significance to it as an imputation of a serious character against her morality. But in whatever way she understood it, it is obvious that it did not have any effect on her mind in the matter of persuading her or impelling her to stay apart from her husband, for we find in her reply repeated assertions that she intended to come back to the husband. We do not, therefore, agree with the learned judges of the High Court that the appellant's letter of April 1, 1955, would constitute an interruption of her desertion which had commenced from February-May, 1954, by its being a just cause for her to remain away from the matrimonial home.
As already stated, the letter of April 12, 1955, was the last letter which passed between the parties and though she stayed abroad for nearly a year thereafter she did not write to the appellant and even when she came to India in April, 1956, she did not go to her matrimonial home as she had promised to do in this last letter of hers just referred to. A point similar to the one dealt with by us in relation to the telegram of the respondent dated June 24, 1955, and her letter dated March 3, 1955, arising out of the statements contained in them that she intended to return to the husband on coming over to India and the effect of such a statement in terminating the desertion has also to be considered with reference to the promise to return to the husband contained in this letter of hers dated April 12, 1955. As already pointed out, if the offer to return was genuine and sincere and was made with the intention of being
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kept and as indicative of a desire felt to return to the matrimonial home it would constitute a break in the desertion and thus disentitle the appellant to any relief under s. 10(1) of the Act because in the face of such an intention the desertion of two years duration could not be established. We are, however, satisfied that the intention expressed in this letter to return to the husband was not genuine or sincere. This is shown beyond doubt by the following facts: (1) She wrote no letter to the appellant after April 12, 1955, right up to the date of the petition, (2) she did not intimate to him about her arrival in India-a fact strongly suggesting her disinclination to meet him and to go to his house, (3) that even after she returned to India nearly a year after her letter of April 12, 1955, she did not go to her husband nor was any attempt made by her to contact her husband through friends before the filing of the petition. The facts therefore and her conduct outweigh any

assertion contained in this letter and they convince us that she did not entertain any genuine desire to return to her husband's home when she wrote those words in her letter to him dated April 12, 1955.

It was not contested that if desertion started in February-May, 1954, as we have found, and was not put an end to and if no justifiable cause for the continuance of the desertion was afforded by the appellant's letter of April 1, 1955, there was no other defence to the petition of the appellant under s. 10(1) of the Act.

The result is that the appeal is allowed, the judgment of the High Court reversed and the decree for judicial, separation passed by the learned trial judge restored with costs here and in the High Court.

SUBBA RAO J.-I regret my inability to agree. This appeal by certificate presents a facet of the social and sociological problem of a young Hindu woman landed by marriage in a joint family and of her predicament therein. As Rajagopala Ayyangar, J., has traced the course of the litigation, it is not necessary to cover the ground overagain.

Two questions arise for consideration, namely, (1) whether there was desertion by the respondent without reasonable cause of her matrimonial home; and (2) whether the appellant had prevented the respondent

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during the statutory period from bringing the desertion to an end. Before I consider the evidence in the case, it will be convenient to notice the relevant aspects of the law pertaining to the doctrine of desertion. The Hindu Marriage Act, 1955 (Act 25 of 1955), hereinafter called the Act, codified the law in that regard. The material provisions of the Act read thus : .

> Section 10. (1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the around that the other party-
>
> (a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.
>
> Explanation.-In this section, the expression "desertion", with its grammatical variations and cognate expressions, means, the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party,, and includes the willful neglect of the petitioner by the other party to the marriage."

Under this section a spouse can ask for judicial separation if the other spouse has deserted her or him for a continuous period of not less than two years. This provision introduces a revolutionary change in the Hindu law of marriage. It is given retrospective effect. A spouse in India except in some states, who never expected any serious consequences of desertion, suddenly found himself or herself on May 18, 1955, in the predicament of his or her marriage being put in peril. If by that date the prescribed period of two years had run out, he or she had no locus penitential and could retrieve the situation only by mutual consent. Section 10(1)(a) does not proprio vigore bring about dissolution of marriage. It is a stepping stone for dissolution. On the deserted spouse obtaining a decree for judicial separation,

the said spouse can bring about divorce by efflux of time under s. 13 (1) (viii) of the Act. The expression "desertion" came under the judicial scrutiny of this Court in Bipin Chander jaisinghbhai Shah v. Prabha
(1) [1956] S.C.R. 838.

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wati(1). There, the question arose under s. 3 (1)(d) of the Bombay Hindu Divorce Act, 1947 (Bom. 22 of 1947)., This Court, on the facts of that case, held that there was no desertion. The said section read :

"(1) A husband or wife may sue for divorce on any of the following grounds, namely.....
(d) that the defendant has deserted the plaintiff for a continuous period of four years.

"Desertion" was defined in s. 2(b) in these terms:

"'Desert' means to desert without reasonable cause and without the consent or against the will of the spouse."

Sinha, J., as he then was, speaking on behalf of the Court after considering the relevant textbooks and decisions on the subject, summarized the law thus, at p. 851

> "For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively.

The learned judge dealt with the mode of putting an end to the state of desertion as follows, at p., 852 :

> "Hence, if a deserting spouse takes advantage of the locus penitantiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former."

Based on that reasoning the learned Judge proceeded to lay down the duty of. the deserted spouse during the crucial period

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> "Hence it is necessary that during all the period that there has been a desertion the deserted spouse 'must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable."

Adverting again to the burden of proof and the nature of evidence required to prove desertion, the learned judge made the following observations, at p. 852 :

> "It is also well settled that in proceedings for divorce the plaintiff must, prove the offence of desertion like any other matrimonial offence, beyond all reasonable

doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted, for to the satisfaction of the Court."

Collating the aforesaid observations, the view of this Court may be stated thus : Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely.' (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct 'giving reasonable cause to the deserting spouse to leave the matrimonial home. The offence of desertion must be proved beyond any reasonable doubt and as a rule prudence the evidence of the petitioner shall be corroborated. In short this Court equated the proof required in a matrimonial case to that in a criminal case. I am bound by this decision. I would, therefore, proceed to discuss the law from the point reached by this Court in the said decision.

There is some controversy on the question on Whom the burden of proof lies to establish that the deserting spouse has just cause or not to leave the matrimonial home. The judgment of this Court is clear and unambiguous and it throws the burden on the petitioner seeking divorce.

This view is consistent with that expressed in leading judgment of English Courts.

In Pratt v. Pratt(1) the House of Lords considered the said aspect. Lord Macmillan stated, at p. 438, thus:

"In my opinion, what is required of a petitioner for divorce on the ground of desertion is proof that throughout th e whole course of 3 years the respondent

[1939] 3 All E.R. 437.

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has without cause been in desertion.....In fulfilling its duty of determining whether,on the evi- dence, a case of desertion without cause has been proved, the Court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. if, on the facts, it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may, have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion".

On the question of just cause, Lord Romer made some pertinent remarks, at p. 443, which are relevant to the present enquiry. There, as here, though under different circumstances, the deserting spouse, the wife, after previous correspondence did not call on her husband. In -that context, Lord Romer observed:

It would, in my opinion, be quite unreasonable to bold that the respondent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, 'and therefore at the risk of being subjected to the indignity of having admission refused by her husband or by one of his servants.....It could

> not be expected that she should suddenly make an unheralded entry into his house."

Though it was necessary, in order to put an end to her desertion, for the wife to take some active step towards returning to the matrimonial home, Lord Romer held that she had taken such steps by writing letters and that the fact that 'she. did not physically appear in the matrimonial home did not make is any the less a just cause on her part.

In Dunn v. Dunn(1), Denning L.J., as he then was, laid down the scope of burden of proof in such a case, at P-- 823, thus:

> "The legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him

(1) [1948] 2 All E.R. 822.

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> and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case, to ask itself : Is the legal burden discharged? Has the husband proved that she deserted him without cause?"

This passage brings out the well known distinction between legal burden and onus of proof. Legal burden always remains on the petitioner ; and onus of proof shifts and is a continuous process. But, as the learned Lord points out, the court has to hold on the evidence whether the legal burden to establish desertion without cause has been established by the petitioner.

In Day v. Day(1), the husband petitioned for divorce on the ground that his wife had deserted him. The wife relied on the fact that the husband committed adultery and that, therefore, the desertion was not without cause. The Court held that the burden was upon the petitioning husband to prove that his adultery was not the cause of his wife's desertion and that he had proved the same, as the facts proved established that she had formed her intention not to resume cohabitation independently of his adultery. The legal position is stated thus, at p. 853 :

> "On the facts of the present case that involves the husband proving affirmatively that the mind of the wife was not in any way affected by her knowledge of the husband's adultery. Clearly the burden is a heavy one, and doubtless in many cases it will be one that a petitioner will not be able to discharge."

In Brewer- v. Brewer(2), the Court of Appeal explained the views expressed by Lord Macmillan and Lord Romer in Pratt v. Pratt(1). Willmer, L.J. after quoting the observations of Lord Macmillan in Peatt's casr(3), proceeded to state:

(1) [1957] 1 All E.R. 848.
(2) [1961] 3 All E.R. 957.
(3) [1939] 2 All E.R. 437.

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> "This passage, although not necessary for the decision of that case, was expressly approved and adopted by Lord Romer in Cohen v. Cohen(1), and must, I think, be accepted as authoritative having regard to the fact that all the other members of the House expressed their concurrence with Lord Romer."

The case-law here and in England throws the burden of proof on the petitioning spouse to prove that desertion was without cause.

Another aspect of the question may now be touched upon. The definition of desertion under s. 10 of the Act, the argument proceeds, is much wider than that under the English law or under the Bombay Act considered by this Court. Emphasis is laid upon the following words in the explanation to s. 10(1) of the Act :

"includes the willful neglect of the petitioner by the other party to the marriage."

The expression "includes", the argument proceeds, enlarges the scope of the word "desertion", and takes in by definition the conscious neglect on the part of the offending spouse, without the requisite animus deserendi. This argument, if accepted, would impute an intention to the Parliament, which was entering the field for the first time, to bring about a revolutionary change not sanctioned even in a country like England where divorce or separation for desertion had long been in vogue. We would be attributing to the Parliament an incongruity, for, in the first part of the explanation it was importing all the salutary restrictions on the right to Judicial separation. but in the second part it would be releasing the doctrine, to a large extent, of the said restrictions. By such a construction the legislation would be made to defeat its own purpose. On the other hand, the history of the doctrine of "desertion" discloses some limitations thereon conceived in the interests of society and the Parliament by the inclusive definition couched in wide language could not have intended to remove those limitations. The inclusive definition is only intended to incorporate therein the doctrine of "constructive desertion" known to English law and the language is designedly made wide to cover the peculiar circumstances of our society. In Rayden on Divorce,

(1) [1940] 2 All. E.R. 331, 335.

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7th Edn., the expression "constructive desertion" is defined thus, at p. 155 :

> "Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife, and the case of a man who compels his wife by his conduct, with the same intention, to leave him. This is the doctrine of constructive desertion."

Adverting to the question of animus in the case of constructive desertion, the learned author proceeded to observe, at p. 156, thus :

> "It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion as it is in cases of

> simple desertion. The practical difference between the two cases lies in the circumstances which will constitute such proof, for, while the intention to bring the matrimonial consortium to an end exists in both cases, in simple desertion there is an abandonment, whereas in constructive desertion there is expulsive conduct."

The ingredients of desertion as well as constructive desertion are the same, namely, animus and factum, though in one case there is actual abandonment and in the other there is expulsive conduct. Under certain circumstances the deserted spouse may even stay under the same roof or even in the same bed-room. In our society, it is well known that in many a home the husband would be guilty of expulsive conduct towards his wife by completely neglecting her to the extent of denying her all marital rights, but still the wife, because of social and economic conditions, may continue to live under the same roof. The words "willful neglect" in the explanation were certainly designed to cover constructive desertion in the English law. If so, it follows that willful conduct must satisfy the ingredients of desertion as indicated above. Hence, the appellant could not take advantage of the inclusive definition unless he established all the ingredients

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of constructive desertion, namely, animus, factum and want of just cause.

There is yet another legal contention which may be disposed of before I consider the facts. It is based on s. 9 of the Act, which reads :

> (1) when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court, for restitution of conjugal rights and the Court on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.
>
> (2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce."

The contention on behalf of the appellant is that s. 9(2) of the Act affords a dictionary for the expression "without reasonable cause" and that it shows that reasonable cause in the explanation could only, be that cause which will be a legal ground for the offending spouse to resist the petition by the other for restitution of conjugal rights. It is further contended that under cl. (2) thereof such legal ground could only be the legal ground on which there could be judicial separation or nullity of marriage and, therefore, the reasonable cause in the explanation to s. 10 should also be only such grounds like cruelty etc. There is a fallacy in this argument. An illustration will bring it out. A husband files an application against the wife for restitution of conjugal rights under s. 9 of the Act. The wife can plead, inter alia, that the husband is not entitled to restitution of conjugal rights as lie has deserted her without reasonable cause. Section 9(2) of the Act does not afford any dictionary for ascertaining the meaning. of the expression "reasonable cause". We have to fall back again

for its meaning on the principles laid down by decided cases and the facts of each case. That apart, s. 9 and s. 10 deal with different subjects-one with restitution of conjugal rights and the other with judicial separation. We cannot
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import the provisions of the one into the other, except in so far as the sections themselves provide for it. The explanation does not expressly or by necessary implication equate reasonable cause with a legal ground for sustaining a plea against an action for restitution of conjugal rights. Indeed, it is a limitation on one of such legal grounds. There is an essential distinction between the scope of the two sections. The Legislature even in socially advanced countries lean,, on the side of sanctity of marriage ; therefore, under s. 9 of the Act, our Parliament imposes stringent conditions to non-suit a claim for restitution of conjugal rights. On the same reasoning, under s. 10 of the Act, it does not permit separation of spouses on the ground of desertion except when the desertion is without reasonable cause. The expression "reasonable cause" must be so construed as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes. It takes in every cause which in a given situation appears to be reasonable to a Court justifying a spouse to desert the other spouse. This view is consistent with the English law on the subject. In Halsbury's Laws of England, 3rd Edn., Vol. 12, the author says, in para. 484, at p. 257 thus :

> "Any matrimonial offence, if proved, is a ground for the other spouse withdrawing from cohabitation. Further conduct which falls short of a matrimonial offence, that is conduct not amounting to cruelty or adultery, may excuse desertion."

In Edwards v. Edwards(1) this idea was succinctly brought out. There it was stated that conduct short of cruelty or other matrimonial offence, might afford cause for desertion. So too, in an earlier decision in Yeatman v. Yeatman(2) it was held that reasonable cause was not necessarily a distinct matrimonial offence on which a decree or judicial separation or dissolution of marriage could be founded. I am, therefore. of the opinion that s. 9 of the Act does not throw any light on the construction of the expression "without reasonable cause" and that whether there is a reasonable cause or not in a given case

(1) L.R [1950] P. 8.
(2) L.R. [1868] 1. P. & D. 489.
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shall be decided only on the evidence and the peculiar circumstances of that case.

The result of the said discussion may be stated thus The legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by word or conduct from cohabitation. The expression "willful neglect" included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar

situations that arise in an Indian society and home. No inspiration could 'be derived from s. 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there is a reasonable cause or not is a question of fact to be decided on the facts of each case.

I shall now proceed to consider the facts of the case. The main question is whether the appellant has proved that the respondent deserted him within the meaning of the term as explained above. To ascertain that fact from a correct perspective it is necessary to notice broadly the marital life of the couple since their marriage. The appellant is an M.B.,B.S. and a medical practitioner carrying on his profession in Bombay. He belongs to a well-to-do family, his father being a businessman. The family is comparatively old-fashioned in habits and customs. The respondent is the daughter of one Vasanmal, a businessman, who had -branches in Singapore, Hongkong, Jakarta and Manila. Though he spent most of. his time in foreign countries in connection with his business, he always left his family in India and he used to visit his family in India whenever he could conveniently do so. Though the learned counsel for the appellant attempted to argue that the members of Vasanmal's family, including the respondent, were leading a fast life, there is no-

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thing on the record, except some vague suggestions here and there, to support the said argument. It may be accepted that the respondent's father is comparatively a richer man than the appellant. On November 10, 1946, the appellant and the respondent were married at Hyderabad (Sind). On July 19, 1947, a male child was born to them and was named Ashok. Unfortunately for the couple, their even course of life was disturbed by the partition of India. In October, 1947, they had to migrate, as many others did, from Pakistan to India. Though the respondent's father was maintaining a family house at Lonavla, about 70 miles from Bombay, the members of the appellant's family including the respondent, went to the Colombo and were staying with the appellant's mother's brother. In or, about December, 1947, the appellant, along with his mother, left Ceylon for Bombay leaving the respondent and appellant's sisters in his uncle's house at Colombo. The respondent's version is that, as her sisters-in-law ill-treated her, she was not happy there and therefore she had to leave that place, along with her child, in January, 1948, to her parents' house at Lonavla. At the end of January, 1948, the appellant and his mother went to Lonavla and brought the respondent to Bombay. At the end of the first week of February, 1948, the respondent went back to Lonavla and came back to Bombay in or about August or September, 1948, and was living with the appellant for about 3 months. In or about that time, the respondent's parents shifted their residence from Lonavla to Poona and settled down there. Poona is about 100 miles from Bombay. In December, 1948, the respondent visited her parents at Poona and returned back to Bombay in February, 1949. According to her from February 26, 1954, she was living with the appellant in his house at Bombay and she a permitted to go and see her parents ; but according to the a pellant, she was going now and then- to her parents' house. Much is made of her frequent visits to her parents' home, but it is ignore that the frequent visits were only made during the difficult days the evacuees were passing through. But the fact remains that from 1949 for about 4 years she was continuously living with her husband in his house.

It is common case that the couple were not happy in

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their married life. The husband and wife give their versions of the reasons for this estrangement. The husband, as P.W. 1, attempts to throw the blame wholly on the wife He says that the respondent was disrespectful and indifferent to him, that she was proud and arrogant, that she refused to wear the clothes which were made for her by his parents on the ground that they were made of inferior stuff, that she was very disobedient and disrespectful to his parents, that she used to leave for her parents' house very often and sometimes without informing him, that she had no love or affection for him, that when she was in her parents' house she used to play cards, and drank at the parties given by her father, that she did not like to have children and that she was rude and insulting in her behaviour towards him and his parents. In the cross-examination lie admits that lie saw her drinking only twice or thrice at her father's parties, but none of his friends saw her drinking nor did she drink from 1947. He further admits that he saw her playing cards without stakes, but he had not seen personally her playing cards after 1946 or 1947. He admits that the relationship between his mother and the respondent's parents was not cordial. He describes her acts of disobedience thus:

> "On the next day of our marriage, it was customary that she should put on the saree which we got made for her. We had such a saree already prepared. She refused to put on such a saree saying that the same was too inferior to be put on by her. She on many occasions ordered him to do certain things for her. For example, on one day I told her that she should not spread her sarees on the sofa but she should keep the sarees wrapped and keep them in a cupboard. On the next day the same thing was repeated, namely, that she kept her saree spread on the sofa. I called her and requested her to wrap it. She asked me as to why I should not do the same. I protested and told her that I was speaking to her in a polite way and why she should order me to do things, whereupon she told me that her friends' husbands even do boot-polish and why I should not do even such trifling things."

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A perusal of his evidence discloses that though he is an educated man he belongs to the old, school and takes offence for the most trivial things which another would ignore. A perusal of his entire evidence also discloses that he is highly respectful to his parents and that he was particular that his wife also should be obedient to them and particularly to his mother. Though the learned counsel for the appellant painted the respondent in his opening address as a highly sophisticated woman, addicted to all the evils of drink, dance etc., the evidence of the appellant, even if entirely accepted, shows that she is not highly educated, that she has not been ad. dieted to any bad habits such as drink, playing cards, smoking etc., and that she was living in the family house of her husband, though now and then she was going to her parents' house. ID the cross-examination the appellant also stated that he had to take the respondent in 1953 or 1954 to Dr. Marfatia, a psychiatrist, for treatment, indicating thereby that was under some nervous or mental strain.

Now let us see what the respondent says about her life in

her husband's house. She says that at the time of her marriage her father gave a dowry of Rs. 25,000.00 and several presents and gifts, including clothes worth about Rs. 10,000.00, but her mother-in-law was not satisfied with the amount of dowry given by her father ; that her parents-in-law would not ordinarily permit her to visit her parents' house, that whenever such permission was asked for they used to refuse a number of times, but would allow her to go only once in a way ; that she, was abused for trivial things, such as when handkerchief'& were missing ; that the treatment of her mother-in-law and sisters-in-law from the beginning was cruel and when they made complaints to the appellant, he used to abuse her; that in Ceylon also they ill-treated her; that between 1949 and 1954 she was allowed to go to her parents' house only on two occasions, that is, once on the wedding of one of her sisters and the second time on the wedding of her cousin and during those occasions . she stayed with them only for a few days; that she'" refused permission to go to Poona even when her uncle died; that her parents-in-law,, not only said many

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dirty things of her but they did not allow her to speak to her son ; that when her father-in-law scolded her son, he started weeping and she was scolded for interfering : that this incident happened in 1953 and that since then her husband ceased to talk with her ; that she was also prevented by her mother-in-law from doing any work for her husband or for her son, that she was also beaten by her husband sometimes ; that she was not allowed to see her child when he was ill; that in 1951 she heard that her husband attempted to remarry and even asked her to sign a paper giving her consent for him to do so that she was made to sleep on a bench in the drawing room till about the year 1952 and thereafter on the floor as her mother-in-law did not provide her with a bed. Her evidence discloses that she had no freedom in her husband's house, that she was abused and insulted by her parents-in-law and sisters-in-law, that she was not given the usual comforts which she expected in her husband's home, that she was not allowed to look after her husband and her child, that the husband took the side of his mother whenever there was trouble between her and her mother-in-law. There may be some exaggeration in this version, but by and large this evidence fits in what generally happens in an old-fashioned house where a girl with modern upbringing goes to stay as a daughter-in law of the house. It may therefore be accepted that she was lead,rig a miserable life in her husband's house and she must have been under a terrible nervous strain.

What does the father of the respondent, who was painted as villain of the piece, say about this unfortunate situation in which his daughter was placed? Whatever may be said about him, his evidence discloses that he is very much attached to his daughter and he attempted to do what an affectionate father could possibly do in the circumstances. He supports -the evidence given by his daughter in regard to dowry and the reluctance of her parents-in-law to send her to his house whenever he requested the them to do so and also he speaks to the complaint made to him by his daughter about the ill-treatment meted out to her by her in-laws and also the want of cordiality between his family and the family of the appellant. I have gone through his evidence carefully

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He does not impress me as one who was out to wreck the life

of his daughter out of pride or anger, but a loving father who tried his best to make her happy and to reconcile the couple, if possible. Whenever there was trouble he tried to persuade them to live together and whenever she was unhappy he tried to take her to his home and give her the necessary warmth of love and affection.

Neither the mother-in-law nor the father-in-law nor the sisters-in-law were examined in the case. If the mother in-law had been examined, more details could have elicited, but unfortunately she was kept back, in my opinion, for obvious reasons.

The said evidence broadly gives the picture of the respondent's unhappy life in her husband's house and the mental strain she was putting up there.

In those circumstances in the month of November, 1953, respondent's father came to India and was very anxious to take her to his house at Poona and thereafter, with him, to foreign countries for a short time to enable her to recoup her health. With that object, the father approached the appellant's family cautiously and through mediators to at their permission. He says, in his evidence, that after he came to India he met the respondent at her husband's place of residence and observed that she was very pale, that she had lost weight and appeared to be much worried and unhappy. He asked the appellant and his parents to allow her to be taken to Poona, but the permission was not granted. Two or three months thereafter, he again came to Bombay two or three times and made similar requests, but they were all turned down. On one occasion, the respondent described to him her miserable condition under her husband's roof and be consoled her that he would get her the permission to visit him. He requested one Manganmal to intercede on his behalf with the appellant's father and get his permission to take the respondent to his house and thereafter abroad for recoupment of health. About a week thereafter, Manganmal told him that he had seen the appellant's father and made the request on his behalf, but the appellant's father wanted to confer with his wife and so he asked him to see him again a week thereafter. A week thereafter, he saw the appel-

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lant's father and repeated the request. The appellant's father requested him to see him 3 or 4 days thereafter. He went to him again, when the appellant's father gave the necessary permission. The witness promised to go to him on February 26, 1954 to fetch his daughter. He went there at 4.30 p.m. on that day and left ,'or Poona by the Deccan Queen at about 5.30 p.m. on the same day. At the time when he went to appellant's house to fetch the respondent, the appellant's father and mother were present, but the appellant was not there. The respondent took the permission of her parents-in-law and accompanied him. This version is natural. It is unthinkable that a man of the status of respondent's father would carry away his daughter from her husband's house without taking the permission of her husband or her parents-in-law. It is not likely that the respondent would have run away from the house of her husband in the absence of her husband and parents in-law taking away the jewels with her as was suggested on behalf -of the appellant. There is nothing in the crossexamination worth the name to belie the version given by this witness. It was the most natural thing any father in the position of the respondent's father would do in the said circumstances. I do not see any Justification to reject his evidence. The respondent in her evidence supports the evidence given by her father and, in addition, she says that on February 26,

1954, she took the permission of her husband before leaving the place. She asked him to allow her to take-her son, but lie refused to give the permission. It is said that while she said that her husband was in the house, her father said that he was not there. But she clearly says in her evidence that her husband was in another room and that she went to that room to take his permission. Obviously, the husband was not willing to face his father-in-law. Manganmal, who interceded on behalf of the respondent's father with the appellant's father, gives evidence as D.W. 3. He is the Managing Director of Chotirmall & Co., with branches in India and in foreign countries. He is a friend of the respondent's father. He corroborates the evidence of the respondent's father. He says in his evidence that he went to the appellant's house and asked his father to allow the respondent to stay with her father while he was

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in India, as, she had not been to her father's house for years. In the cross-examination it was suggested that he was not a friend of the appellant's father, that he, along with others, was a co-trustee with Kanayalal, a sonin-law of the appellant's father, of Nanikram's trust, and that in the dispute that was raised by Kanayalal's father, Nanikram, in respect of the subject-matter -of the trust, Kanayala was supporting his father whereas Manganmal was supporting the trust. He admits that he does not claim to be a friend of the appellant's father and that there was conflict of views between him and Kanayalal in respect of the trust, but adds that on that account there was no lack of cordiality between himself and the appellant's father. He is a respectable witness. He gave straightforward answers to the questions put to him. He did, not support the respondent's father completely in that he did not say that he asked for permission for the respondent's father taking the respondent to foreign countries. Presumably the further request was made by the respondent's father himself and not by this witness. If he had come to lie in the witness-box, he would have added the further request also. There is nothing unusual in the respondent's father requisitioning the services of this gentleman in preference to others more close to the appellant's father, for this witness is a respectable man and very well known to him and in A position and was also willing,, to intercede on his behalf. I do not see any reason why the evidence of this witness should be rejected.

As against this evidence, the appellant says that on February 26, 1954, he was not present when the respondent left his house, that no one, except the maid-servant was present in the house when the respondent left the house, that in the evening at about 6 O'clock he discovered that the respondent had left his house leaving some message with the maid-servant and taking away all her jewels and valuable clothes. He further says that he wrote some letters to his wife soon thereafter, but he did not receive any reply from her. But this was denied by the respondent; and there is nothing except his word for this. This is a remarkable story. If his wife had left him when nobody was present in the house, he would not have taken

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it so philosophically as he asks us to believe. On his own showing, he went to Poona only two or three months thereafter. He does not even tell us what was the message that she left with the maid-servant. The maid-servant was not examined. Neither his father nor his mother nor his sister were put in the witness-box. When three witnesses,

the respondent, her father and a friend of her father, definitely gave evidence that the appellant's parents were approached and that they gave their consent, it was the duty of the appellant to examine them. No doubt some sort of explanation was given that the father was in Japan, but none in respect of his mother or the maid-servant. When the burden was upon the appellant to establish desertion, it is strange indeed that he should have thought fit to keep back the best evidence from the witness- box. When the respondent and her father depose that: they took the consent of the appellant's parents and if the parents of the appellant did not choose to come to the witness-box to deny it, a court ordinarily should accept the evidence of the father and the daughter unless their evidence is ex facie unnatural or -inherently improbable. But that cannot be said in this case, for what the respondent's father is said to have done is the most natural in the circumstances.

It is said that the City Civil. Judge had seen the respondent's father, Manganmal and the respondent in the witness-box and he did not accent their evidence and that, therefore, the High Court should not have taken a different view. On this aspect of the case, after considering the evidence of the witnesses, the High Court says thus

> "The parents of the petitioner were available to give evidence in this case. but they have not been examined: nor has any explanation been given why the maidservant with whom a message was left by the opponent when she left the house, has not been examined in the case. We are left in this case with the two diametrically opposite version of the two interested parties:..... Having regard to these circumstances, we are of the view that the departure of the opponent from the house of the petitioner was, if not with his express permission, with his consent and full knowledge though such consent was given on account, of

Some exasperation on his part."

I entirely agree with this view. It is consistent with the evidence given by the respondent's witnesses and also with the circumstances of the case and subsequent conduct of the parties. The appellant and his parents must have given the consent, though not willingly, either because of the importunities of the respondent's father or because of, the social pressure put oft them through the intervention of a respectable outsider. But they did not like the respondent's parents and therefore they did not like the respondent going to their house. It was a permission reluctantly given and she was afraid that it would be wit& draw.-Li. That is why there was no correspondence between the couple during all the days she was staying at Poona and she did not even meet the appellant or his parents when she was boarding the ship at Bombay. I would therefore, bold that the respondent left her matrimonial home with the permission of the appellant and his parents for the purpose of staying with her father at Poona and thereafter to leave for foreign countries for short stay to recoup her health.

Strong reliance is placed upon an incident that is alleged to have taken place in May 1954. According to the appellant, he and his friend, Dr. Lulla, went to Poona to persuade her to come back to his house, but she definitely told, them that she would never return to his house. It is said that this incident would show that she had decided to leave him permanently. In the petition this May incident

was not specifically 'mentioned nor was it stated that it afforded a cause of action. There was no mention of the appellant and his friend Dr. Lulla going to her and her, stating to them that she would never return to his house. Before the High Court the learned counsel appearing for the appellant did not seek to rely upon this meeting 2nd the reply alleged to have been given by the respondent as furnishing a cause of action for founding a claim for relief of judicial separation. This incident was relied upon: only in support of the appellant's case that the respondent, was intransigent throughout and was unwilling to go back: to the petitioner. Indeed, the learned counsel appears to admit that the evidence of the appellant and Dr. Lulla was not clear as to what was the precise question asked and

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what was the exact answer given by the respondent. It would, therefore, be seen that this incident did not loom large either in the pleadings or in the arguments before the High Court. But it became a sheet-anchor of the appellant's case before us. Let me, therefore, consider this aspect of the case in some detail.

The appellant says in his evidence that he went to Poona along with Dr. Lulla towards the end of May 1954, that he saw the respondent at Poona and inquired of her to why she left his house secretly and that she told him that she had decided not to come back to him. This is interested evidence and is inconsistent with my finding that she left his house with his consent as well as with the consent of his parents. His evidence is supported by the evidence of Dr. Lulla. But the respondent contradicts this evidence. She denies the incident altogether. She is also A interested witness. Dr. Lulla, as D.W.3, says that he went to Poona along with the appellant, that the appellant tiled to persuade the respondent to come back to him, that thereafter he also tried to persuade her to come back to the appellant, but she told them both that she had made up her mind not to go back for ever. He is a doctor with a fairly good practice and a friend of the appellant. But his cross-examination discloses that he did not ask the respondent why she left the appellant, that he was with the respondent at Poona only for a few minutes, that he could not recollect what the appellant told the respondent actually and that she only stated that she was not prepared to come back to the appellant for ever. It also shows that they went to Poona without any intimation, that they had decided to meet her alone, that they thought that they could persuade her in a few minutes' time to come back to the appellant, and that, therefore, when they' left for Poona they did not make any arrangements for the next day, for they expected to return back by the midnight train. This evidence is attacked on many grounds. It is said that Dr. Lulla is a friend of the appellant and, therefore, he went to him in getting rid of his wife as the appellant was not happy with her. It is pointed out that if this incident had happened, this would have been mentioned in the earlier correspondence, in the notice issued and in the plaint

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filed. It is also argued that his entire evidence was artificial and appears to be improvised for the occasion, for the way he went about the business appears to be very casual. It is asked whether Dr. Lulla, who was going on a serious attempt of reconciliation, would go to Poona without the appellant informing the respondent or her father that they were coming if his intention was to meet her alone, how did he expect that her parents would not be there when he

went? And how did he also think that the estrangement that was prolonged could have been put an end to in a few minutes? If he was serious about it as he pretends he was, he would have gone there with preparations for a stay of one or two days after making necessary arrangements in respect of his professional work. There is much to be said for this argument. I have come across in my experience highly respected persons lying, in the witness-box to help a friend or save one from a trouble. But the City Civil Judge accepted his evidence. The High Court says about his evidence thus:

> "The learned trial judge appears to have been considerably impressed by the testimony of Dr. Lulla. He regarded Dr. Lulla as an independent person who was not likely 'to tell an untruth to support the case of the petitioner. The learned judge also took the view, having regard to the contradictory statements made by the opponent in her evidence that the testimony of the opponent was not reliable. Sitting in appeal it will be difficult or us to ignore the appreciation of evidence by the learned trial judge. It must, however, be observed that Dr. Lulla was deposing to an incident which took place about three years prior to the date on which he gave evidence, and he did not claim to remember the exact words in which the conversation took place between the petitioner and the opponent or between the petitioner and himself. Dr. Jethmqlani, who appears on behalf of the petitioner, does not seek to rely upon this meeting and the replies alleged to have been given by the opponent as furnishing a cause of action for founding a claim to relief for judicial separation. .. .. in the absence of evidence as to what precisely were the questions put to and the answers given by the opponent, it is difficult to hold, even on the view that

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> there was in the month of May 1954 a meeting between the petitioner and Dr. Lulla on the one hand and the opponent on the other as alleged by the petitioner, that the opponent had in unmistakable terms informed the petitioner and Dr. Lulla that she had no desire to return at any time to the matrimonial home."

This finding appears to me to be couched in euphemistic terms. Though the learned judges were not inclined to disturb the finding of the learned trial judge that Dr. Lulla met the respondent along with the appellant, they were not willing to accept his evidence that she told them that she would not return to the matrimonial home for ever. I feel a real doubt whether the appellant and Dr. Lulla met the respondent at all. But let me assume for the purpose of this case, as the High Court was inclined to assume, that they went there. But Dr. Lulla admits in his evidence that he did not remember the exact words used by the respondent in speaking to the appellant; if so, he could not have also remembered the exact words used by her in answering the appellant's question. Afterall the emphasis is on the solitary word "ever". The witness was speaking to an incident that took place about 3 years before he gave

evidence and in respect of a conversation that took place for a few minutes. It is not advisable to rely upon his memory in regard to the words alleged to have been used by the respondent, particularly when he comes to give evidence on behalf of a friend when the tendency would be to give the necessary twist to a conversion of which one could not remember the exact words. The High Court as Well as the learned Advocate, who appeared for the appellant in the High Court, did not, rightly, rely upon the phraseology used in the alleged conversation between the appellant and the respondent. Even if the incident had taken place, it fits in with my earlier finding, namely, -that the respondent's father had taken the permission of the appellant's parents, though given with reluctance. The appellant might have had second thoughts and intended to go back on the consent and to persuade the respondent to come back to his home and not leave India. With that intention he might have taken his friend Dr. Lulla to Poona, where the respondent was living. She might have refused to return

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as the appellant was going back on his consent. She must have been obviously very angry and must have curtly refused to come back. Even if she had used the word "ever"-which I believe is only a gloss added to her statement intentionally or by lapse of memory-it must have been said in a huff. If every statement made by a spouse in a huff in a short conversation with her husband were taken in its face value, many a home would be broken. I cannot, therefore, give any value to the evidence of Dr. Lulla. I would hold that it is very doubtful whether this incident had taken place, that even if it did, the evidence given by Dr. Lulla could not be taken to be a reproduction of the actual words used by the respondent, and that, even if she had used those words, it was only a statement made in a huff in a short interview and could not be taken as a final word on the subject as to compel a court to hold that she deserted her husband without reasonable cause.

Some emphasis is also made on her conduct in not meeting her husband or his.parents when she came to Bombay to board the ship and also on her not giving her husband's house as the address in the relevant papers prepared for the journey. It was argued that the place where she was staying at Bombay was very near to that of her husband and it is unthinkable that she would not have gone there, if she was going abroad with permission, to see her husband or his parents or her child. This argument misses the real point. Here we are considering the case of a wife who was ill-treated in her husband's house and who, at the instance of her father and his friend, got reluctant permission from her husband and parents-in-law and if Dr. Lulla's evidence were true, the appellant went back on his consent and was trying to prevent her from going with her father. In such a situation it is impossible to expect an unfortunate woman like the respondent to create more unpleasantness to herself by going to her husband's house before departure and to take the risk of spoiling her planned holiday. The fact that her husband's address was not given in the relevant travel papers could not be attributed to her, for they must have been prepared in usual course at the instance of the gentleman who was helping them in that regard. If once it was accepted that she deserted her husband permanently, these circumstances

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may have relevance, but once it was conceded that she was going with the permission of her husband, though unwillingly

given, this conduct would fall in a piece with the respondent's case. I would, therefore, not give much value to such circumstances in the situation in which the respondent was placed. The respondent left Bombay on July 7, 1954, for the Far East with her father. Much was made about her leaving India with her father. IF she had eloped with a stranger, no doubt that would be a different matter. But here a father was taking his daughter to give her a holiday so that she may improve her health. By taking her away for short time from the oppressive surroundings which affected her health,I do not see any justification for the comment that she had deserted her husband. It must also be remembered that the respondent's father was not living with his family in the Far East. His wife and children have all along been in India. He was taking the respondent only for a temporary sojourn; and what is wrong in a father taking his daughter for a holiday in those circumstances ? If he had taken the appellant's or his parents' consent, it was not suggested that there was anything wrong in her so going. If lie or his daughter did not take such a consent, it might be an improper or an inadvisable thing to do. But such a conduct in the case of a wife leaving with her father temporarily to a foreign country as an escape from an oppressive atmosphere cannot be described as reprehensible even by a Hindu society; much less can it be treated as a desertion. It was a natural reaction to an extraordinary situation. She might have known that her conduct would anger her husband, but she would not have thought that it would be a permanent obstacle in their relationship. Be it as it may, I have already found that she left with her father with the consent of the appellant and his father, and that even if the appellant subsequently retracted from his consent, her departure might be only improper, but could not conceivably amount to legal desertion.

Till now I was considering only the oral evidence. But hereafter we come across unimpeachable documentary evidence which shows the attitude of the couple to each other. I shall proceed to consider the documentary evidence on the

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assumption favourable to the appellant, namely, that he, along with Dr. Lulla, went to Poona in May 1954, retracted his permission given earlier, and persuaded her to come back to the matrimonial home, but she refused to do so and left with her father for foreign Countries.

I am definitely of the view that in -,he circumstances narrated above the exact words used by her could not be field to have been proved by the vague oral evidence of Dr. Lulla and that, even if she had expressed herself strongly in a buff, such expression could not in the circumstances -be considered to be decisive of her determination to leave the matrimonial home for ever. She left for the Far East on July 7, 1954. Within a fortnight from that date, on July 20, 1954, the appellant gave a cable to the respondent to the following effect

> "Extremely surprised at your suddenly secretly leaving India without my knowledge and consent return immediately first plane."
>
> On July 22/23, 1954, as soon as the respondent received the cable from the appellant, she gave a cable in reply thus
>
> "Returning within few months".
>
> On July 24, 1954, the appellant gave another cable to the respondent to the following effect :
>
> "You must return immediately."

Pausing here for a moment, let me recapitulate the position. If the respondent definitely told the appellant and Dr. Lulla that she bad given him up and that she would not return to the matrimonial home, why did the appellant send a cable telling her that he was surprised at her secretly leaving India and asking her to return immediately? And why did she reply that she would return in a few months?. The cable given by the appellant is more consistent with the fact that neither of them understood that she had left him for ever. Indeed, the cable reflected his anger on her departure along with her father, because, though permission was given earlier, he did not like her to go. Whatever ambiguity there may be, her immediate reply was inconsistent with her determination to leave him for ever, unless we assume, as we are asked to do, that the cable 'was a link in the chain of the plan conceived by her and her father to resist an action that might be taken by the. husband in a court of law. In July 1954

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what was the action which the appellant could have taken and what was the defence, if such an action was taken, that could be sustained on the basis of this cable? At that time the Act was not passed. The Act was passed in 1955 and came into force on May 18, 1955. Therefore, the only action which the husband could have taken 'Linder the law, as it then stood, was to file a suit for restitution of conjugal rights, and this cable could not possibly be a defence against such an action. If she wanted to join him again she could have submitted to the decree. The Bombay Hindu Divorce Act, 1947, may not have any extra-territorial operation. Even if it has, four years of desertion had to run out before she could be divorced; and there was no particular urgency for her to create any eviedence at that stage. To may this cable is destructive of tile case of the appellant that she left him for ever. His reply cable also is only consistent with the fact that there was no break between them.

Now, I come to a letter dated August 2, 1954, over which there is some controversy, the appellant alleging that it was a forged one and the respondent stating that it was ,a draft of the letter she sent to her husband. It reads

" My dear husband,

Darling I received your two telegrams, copies of which enclosed herewith.

I immediately cabled you that I shall be. returning within few months, however I really feel surprised why you want me return to Bombay by first plane without any reason.

Dear I was particularly pained to read that I have suddenly and secretely left the place without your consent. What has prompted you to write this I really don't understand. Dear how came this change. You know I was not keeping good health and considerably gone down in spirit and weight for reasons which I (10 not like to discuss here since you are fully aware of it. It was you who suggested that I should go over and stay at my father's place and it was at your suggestion that I did so. You were fully aware that I was accompanying my father to Singapore for a few months for a change and you gave consent As soon as I feel better I shall return to Bombay.

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1 hope yourself, Ashok and all the other

> family members are 0. K. Give my loves to Ashok and Best regards to Mother and Father.
> Yours forever,
> Meena."

The respondent, in her examination-in-chief, says:-

> "I had written a letter dated 2nd August 1954 to my husband, a copy whereof has been preserved by me, I produce the copy of the letter dated 2nd August 1954."

That was not objected to and the copy of the letter was put in and marked as Ex. No. 4. In the cross-examination there is some confusion, but she broadly stated that her father dictated to her the letter, that the said letter was typed, that she copied from that typed letter and that Ex. 4 is that typed letter. The father in his cross-examination, deposes that the respondent had written a letter dated August 2, 1954, to the appellant, that he had a draft of that letter and the same was written after consulting him. The appellant denied that he received that letter. The learned City Civil Judge found thus :-

> "I am not prepared to hold that the copy letter Ex. 4 was fabricated subsequently, because there are references to the letter dated 2-8-1954 in subsequent letters addressed by the respondent to the petitioner."

But he held that the appellant did not receive such a letter. The trial Court held that the letter not being a copy of what was written the respondent to the appellant, it could not be regarded is a secondary evidence of the contents of the letter. But the High Court pointed out that it was not the case of the respondent that it was a secondary evidence of the contents of the letter written by her, but her case was that the text of Ex. 4 and the letter written to the appellant was the same; and in support of her case she produced the letter from which she had copied out the letter she had addressed to the appellant. Both the Courts, therefore, held that Ex. 4 was the typed letter from which the respondent drafted her letter to her husband. Undoubtedly, Ex. 4 cannot be a secondary evidence of the letter written by the respondent to her husband, but it certainly corroborates her oral evidence that she wrote a letter with similar recitals contained in Ex. 4 to her hus-
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band on the date Ex. 4 bears. As pointed out by the learned City Civil Judge as well as by the High Court, the subsequent letters written by her clearly demonstrate that Ex. 4 could not have been fabricated subsequently and a letter must have been written by her on August 2, 1954. In view of the concurrent findings of fact, I do not think it is necessary to consider the evidence over again. I accept the concurrent findings that a letter dated August 2, 1954, with contents similiar to those in Ex. 4 was written by the respondent to her husband.

It is contended that the said letter was written at the instance of the father and on his dictation to furnish evidence in an action that might be brought by the appellant against there spondent. Let me first take the comment,VI . Z., would a wife write a letter to her husband in consultation with her father? Ordinarily in the case of married couples it is true that a wife would not write letters to her husband after consulting her father. But the circumstances under which the respondent wrote letter were not ordinary ones. Here, there was trouble between the husband and wife. The husband, according to the respondent,

gave his consent, though reluctantly, for her to leave with her father to the Far East, but soon there-after gave two cables asking her to return immediately. Naturally she would tell that fact to her father and seek his advice in the matter of- replying to her husband. There is nothing wrong in her father helping her to send a suitable reply, so that the husband may not be offended. The second comment, namely, that this 'letter was intended to be a shield against a possible action by the appellant, is devoid of merits. At the time the letter was written the Act had not come into force and this letter could not have been an answer to a possible action the husband might take for restitution of conjugal rights. There was no particular urgency for her to create evidence on that date against a possible action under the Bombay Act, even if it applied to her. This letter demonstrates beyond any reasonable doubt that the wife did not desert her husband with the requisite animus, but, on the other hand, shows her willingness to go over to Bombay as soon as she regained her health. To this letter no reply was sent by the appellant and he says in his evidence that he did not

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receive the said letter. It is very difficult to believe Ms statement. He is obviously denying the receipt of this .letter a,,; it establishes that she had not the animus to desert him. On February 24, 1955, he again gave a cable in the following terms --

> "Since your secret departure you not replying my telegrams letters myself shocked you wandering different countries leading reckless life spoiling my reputation your most disgraceful behaviour ruining my life."

This cable contains incorrect statements. Whether he received the letter dated August 2, 1954, or not, admittedly he had received the cable given by her. I have already held that he must have received the letter dated August 2, 1954. He imputes to her in this cable reckless life and disgraceful behaviour. Where did he get this information that she was leading a bad life? In his evidence he does not say that she was leading any disgraceful life. There is nothing on the record to show that the respondent was leading a bad life, and indeed the appellant admits that she was not even leading a fast one, she never danced, played cards or drank, at any rate, according to the appellant, from the year 1947. This cable must have irritated any respectable woman. Yet on February 26, 1955, she gave the following cable :-.

> "Your allegation,% in your cable dated twenty fourth not correct cannot understand your attitude stop I have departed with your knowledge with my father because of falling health due to reasons you are well aware stop keeping quiet life with my parents stop have not received your letter only telegrams which have been replied by cable and letter."

This reply is in subdued terms and it shows her respectable attitude towards the appellant inspite of his provocation. Therein she denies his wild accusations and restates that she went with her father with his consent and that she had replied to Ms cables by cables as well as by letter. On March 4, 1955, the appellant gave another cable to her- charging her with fabricating false stories. On March 3, 1955, before the respondent received the above cable, she wrote a letter to the appellant giving a detailed reply to his cables. Therein she denied that she was leading any

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less life and told him that she was either with her father or uncle and also that she did not receive any letters from him. Then she proceeded to state :-

> You know darling I being away from the people who despise me, I have improved my health considerably, I wish you could come and meet me her outside that suspicious atmosphere and you will know the real pleasure. I am very lonely without you and my son Ashok who is always with me in my sleep. I long to see both of you and therefore I beg to come out here.. Please do come and do not disappoint me. You know in your heart that I love you so much. This trip outside India will make you good and we shall have a very happy life. You are working so hard for your parents and never think of me and your health which as I know is deteriorating and I also know that you are not happy. Darling, I assure you that this change for few months will improve your health considerably. You need good rest to think on all your problems of daily life which you can do only along and outside the influence of the people who are around you. I hope you will understand and at least come out here for a change-for a short period. I shall do what you want me to do, but please, darling, do come; Please give my Charanawandana to father and mother and love to Ashok."

This letter is criticized on the ground that it was another attempt to create evidence at the instance of her father and also on the ground that she asked her husband to come away from his parents. To me this letter appears to be an honest attempt on the part of the wife to reconcile with her husband. It mentions his troubles and requests him to come over the East not for any permanent stay but only as a temporary sojourn to recoup his health and to enjoy a holiday along with her. As I have already stated, by that time the Act was not passed and therefore this letter could not have been written to set up any defence against any possible action by the husband. I find it very difficult to see any sinister motive in this well meant reply to her husband, and particularly after his cable attributing to her reckless life. After dispatching this letter she received a cable dated March 4, 1955, wherein the appellant attributed
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to her the conduct of fabricating false stories. To that cable she sent a reply cable on March 10, 1955, denying the said allegation and telling him that somebody was wrecking their lives and asking him to come over to Hongkong. On April 2, 1955, the appellant wrote a long letter to the respondent in reply to her letter dated March 3, 1955. Therein he chastised her for making insinuations against his parents, who had done much for her welfare and happiness. Emphasizing upon the word "pleasure" in her letter dated March 3, 1955, he proceeded to state :-

> "'Pleasure'! that, indeed, is the crux of the whole problem. It is your perverted funny notions of pleasure giving vent to your past and present associations, both in India and abroad, that are the root cause of all your evil and irrational deeds."

Pursuing the same idea, he observed:-

"Just remember my efforts all these years to improve you and make you a happy and contented wife. It is a wonder that you find pleasure in leaving home, leaving your husband, wandering from country to country, leading reckless life under the guise of being in the company of your relations and uncles whom you find readily available at every port. And you have gone so far in this direction, that you find yourself unable to break your past links and get out of the muddle created by you and seek pleasure and happiness in your own home by being a faithful and devoted wife."

He did not stop with that, but proceeded to state "....you have proceeded to Hongkong and other places, in defiance of my clear instruction to return And, in order to cloak all these evil things you are now inventing dirty excuses, evidently meant for the consumption of the outside world whom you want to fool, so that you may be able to justify your disgraceful conduct and continue to live your life of "pleasure" without let or hindrance."

What is more, he told her that in her letters she had fabricated false and malicious stories to cover up her outrageous conduct for misleading the outside world. He finally ended with the following words expressing his determination to ignore her further correspondence:-

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"However, if you still choose to fling further filth in my face by writing to me such letters and telegrams, I shall have no choice but to ignore and make no reply to the same. Inspite of all my efforts, you have completely deserted me and chosen the path of pleasure and per-version at any cost. You are only looking for same cloak to cover your guilt and continue to live your life of degradation with impunity. I refuse to furnish you with that cloak and I refuse to be drawn in your game."

There is considerable argument on the import of this letter. On behalf of the appellant it is contented that the contents of this letter were nothing more than an emotional outburst of a deserted husband and that the words used therein should not be understood literally. It is argued on behalf of the respondent that this letter did not mince matters in attributing infidelity and unchastity to the respondent and it communicated a final determination on his part not to have anything to do with her. The former argument was accepted by the City Civil Court, but the latter contention had the approval of the High Court. Shah, J., after reading the relevant portions of the document, came to the following conclusion :-

Whatever may be the protestations made by the petitioner in his evidence before the Court, it is impossible to accede to the contention of Mr. Jethmalani that his letter was merely the outpouring of an anguished heart. The letter in no unmistakable terms charges the opponent with infidelity not occasional but a persistent and chosen life of infidelity-and also charges with inventing a scheme whereby

> she may be able to live that life of infidelity under an appearance of being respectfuly married. If after this letter the opponent was unwilling to carry out the petitioner's direction and to forthwith go and live with him, in our judgment, no fault can be found with her."

Deasi, J., in his separate judgment wholly agreed with Shah, J. Theappellant is a graduate and it cannot be said that he does not know English. The terms of the letter indicate that his standard of English is rather high and he has sufficient vocabulary at Ms command. It is not necessary to cover the ground overagain, as I entirely agree

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with the construction laced upon that letter by Shah and Deasi, JJ. The expressions "outrageous conduct" reckless life", "wild ventures", disgustful conduct", "life of pleasure", "past links", "relations readily available at every port" and such others found in the letter leave no room to doubt that the said expressions were intended to impute an immoral and dissipated life to her. Whether he used those words really believeing that. she was such a bad woman or whether he used the wild language because he was angry that she went with her father need not be speculated upon. What matters is that he designedly couched his letter without leaving any room for doubt in clear and precise phraseology and told her that she was a bad woman and, therefore, he had nothing more to do with her. To such an outrageous letter, how did the respondent react? She must have been extremely offended as any self-respecting woman would be. But she controlled herself and replied to him by letter dated April 12, 1955 in a subdued and dignified manner. After repeating that the appellant and his parents gave her consent to leave with her father, she again repeated that she left with her father to improve her health. She told him that her health improved a little and that she would return to him and to her son after sometime. Adverting to his fulminations in his letter she said :

> "I find it unnecessary to reply to the other unfounded accusations contained in your letter because I know and I am sure that the basis of the same are your hallucinations, of what I am not. I deny your charges all over again and you know that they are not true. I believe that the best way is to ignore them since they are not based on truth."
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> She ended her letter thus :
>
> "Please do not indulge in misgivings. As soon as my health has completely improved, I shall of course, come back home to you and to our son. "

This letter shows that she was very much offended and she was also sorry. She told him in mild words that all his accusations were false and requested him not to indulge in such things. She promised to come as soon as her health improved. Here the arguments advanced by learned counsel for the appellant may be noticed.

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Firstly, the usual argument, namely, that this letter was written to the dictation of her father as a shield against a possible action by the appellant, is repeated ; and secondly, this letter indicates that the false accusations made by her husband did not so operate on her mind as to induce her to give up her idea of coming back to him. The first argument calls for the same answer, which I have given in

the context of other correspondence. There is nothing wrong in the respondent consulting her father, who any day was more affectionate to her than the appellant could possibly have been. There is no point in the second contention. This letter clearly shows that she was highly offended by the false accusations ; but she replied in a dignified manner asking him neither to make nor to believe such accusations. She should be unusual woman if she was not offended by this letter. This reply reflects more her self-control than her indifference or insensitiveness. This letter, read along with the letter written by the appellant on April 2, 1955, demonstrates that she was always ready and willing to come back to him inspite of his accusations. Some comment is made on the basis of the answers she gave in her evidence in regard to the manner she got the contents explained to her. Those answers were given in the stress of cross-examination. Those could not possibly detract from the admitted facts that she received the said letter and gave her reply. The letter and her answers speak for themselves. The ingenuity of the cross-examining counsel could not add to or detract from either. So far as the letters go, they proved beyond reasonable doubt that however inadvisable it may be for the respondent to go to the Far East with her father, she had not the least intention of leaving her husband permanently. She was always ready and willing to go back to her husband.

On April 8, 1956, the respondent returned to India. The appellant's complaint is that she did not inform him that she was coming and that she did not come to his house. The contention on behalf of the respondent is that after she received the letter dated April 2, 1955, she was highly offended and that, therefore, she expected some step on the part of her husband to meet her or send somebody to take her to his home. In her evidence she

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says that after she arrived in India, her father spoke to two or three persons for rapprochement and one of them was Kishinchand of Messers. J. Kimatrai and Kundanmal and that her father told her that Kishinchand had a talk with the appellant, but the latter refused to take her back. She adds that after her return no efforts were made either by her husband or on his behalf or by his parents to call her back to his house and she thought that somebody would be sent by her husband to fetch her from Poona to Bombay according to the custom. The appellant admits in his evidence that sometime in the month of May or June 1955 he came to know that the Tespondent had returned to India. Assuming that he was speaking the truth, it is clear from the evidence that he knew of her return about a month after she returned, but presumably he was standing on his rights and prestige and did not move in the matter. It is suggested to her that instead of going to her husband's house, in April 1956 she went to Kashmir for a holiday. She admits that she went, but explains that her father's brother's children had holidays and as they proceeded to Kashmir, she also accompanied them. I do not see any bearing of this Kashmir trip on the question of desertion. If she was waiting for an invitation to go to her husband's place there is nothing wrong in her accompanying the children to Kashmir. The respondent's father says that about 2 months after their arrival in India, he waited for an invitation from the appellant, but as he did not move in the matter, he met one or two friends of his to bring about a rapprochement between the couple, but they could not do anything in the matter. There is nothing unnatural in the

father making the said attempts to bring about reconciliation between the couple. There is no reason to reject his evidence in this regard. I shall assume that no mediators were sent by the respondent's father to, bring about a rapprochement between the couple. Even so, after the letter dated April 2, 1955 the husband, who knew that the respondent had come to India, should have taken some steps directly or indirectly to induce her to come to his house. If he stood on his prestige, the respondent could not be blamed, if after the rebuffs she received and the adment attitude of the appellant communicated
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to her in the said letter, she did not take the first step. In this context another circumstance may also be noticed. The respondent and also her father say that in November 1955, a sister of the appellant was married but no invitation was sent to the respondent. The respondent says that this fact also made her to apprehend that she would not be received if she straightaway went to the appellant's house. In the circumstances if she did not directly on landing in India go to her husband's house but waited for an invitation from him, I cannot say that her attitude was either unreasonable or that it should be attributed to her final determination to desert her husband. On this aspect of the case, Shah, J., observed in his judgment :

> "The conduct of the opponent in not meeting her son after she returned to India may appear to be unnatural, but, if after receiving a highly offensive letter from the petitioner, she did not take an initiative to return to the matrimonial home and waited for some invitation from, or from some amends on the part of, the petitioner, that conduct may not be regarded as improbable or justifying an' inference that she was seeking to continue the state of desertion which had previously started."

I am in entire agreement with these observations.
On the other hand the conduct of the appellant is telltale and reflects his determination to discard her. According to him he came to know that the respondent came to India in April or May 1956, but a few days thereafter instead of inviting her to come, he went to a lawyer for consultation and thereafter filed the petition for judicial separation in September 1956. It is manifest that he was waiting for the statutory time to run out and soon thereafter he rushed to the Court. The respondent, who obviously did not know the passing of the Act, fell into his trap.
Pausing here, let me summarize the facts. The respondent belongs to a fairly rich family. She must have been brought up in comfort and with love and affection. She was not highly educated ; she has read, we are told, upto sixth standard. She was married to the appellant, who belongs to a well-to-do family. The appellant is an M.B.B.S. and has been carrying on the profession of a doctor in Bombay. After the marriage, the respondent
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came to live in the joint family house of the appellant in 1947. There were misunderstanding between the parents of the respondent and the appellant and the latter's sisters. The respondent was ill-treated, insulted and was not even allowed to look after her only child. The husband, for one reason or other, either because of his respect for his parents or because of his weakness or because of both, though at the beginning he was affectionate to his wife, was

not able to stand up for her and later on he fell in line with his parents and sisters and began to ill-treat her. Though in the earlier years she was allowed to go to her parents' house now and then, later on the appellant and his parents refused her permission to go to her parents' house or allowed her to do so once in a while with great reluctance, when her father, on one of his infrequent visits, was in India. She was not even permitted to go when her uncle died. The appellant also contemplated a second marriage, but, for one reason or other, it did not come off. By the year 1954 she was in a nervous strain and necessarily that must have affected her health. Her father, who came to India at the end of 1953, heard her complaints and saw her physical and mental condition. He did what a loving father should do in the circumstances. Giving up the ideas of false prestige, he approached the parents of the appellant directly and through a friend and persuaded them to permit the respondent to go to his house and thereafter to the Far East with him for a short stay to recoup her health. The respondent also took the permission of her husband. After some time, the husband I am assuming that his version of the visit along with Dr. Lulla, to Poona was true-changed his mind and asked her to come back, but she refused to come back. From her standpoint she obviously did not like her husband going back on his word and disturbing her planned holiday, to which she was looking forward. From the standpoint of the husband, he was angry because as, a Hindu husband he expected his wife to obey him whether his demand was reasonable or not. The wife, perhaps' did not tell him the day when she would be leaving with her father to the Far East. She must have been afraid that he would prevent her somehow from going abroad. That explains her conduct
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in not seeing him or his parents at Bombay before she boarded the ship. The subsequent correspondence shows that the appellant was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. The letter dated April 2, 1955, was an unexpected and unmerited blow to her. Therein she was charged with unchastity and leading a fast and reckless life. Even a Hindu wife would be enraged and insulted by such dastardly conduct on the part of her husband. Even so she sent a reply couched in a dignified and controlled language denying his allegations and stating that she would return in a few months. She was not even invited by the appellant when his sister was married in November 1955. She therefore, came back to India only in April 1956. In view of the serious allegations made by the appellant in his letter dated April 2, 1954, and in view of his determined attitude disclosed therein, she naturally and properly expected that the husband would invite her or send somebody to take her back to his home. Instead of doing so, though he knew that the respondent had come to India, he did not make any attempt to invite her or send a relation to bring her to his home as he used to do on previous occasions when she went to her father's house. By that time as the Act came into force, he found his opportunity for which he was waiting and took advantage of the situation. As the statutory period of two years had expired from the date she left India, he rushed to the Court. On these facts, I have no doubt that the appellant failed to establish that the respondent deserted him without any reasonable cause.
Even if she deserted him within the meaning of s. 10 of the

Act, I would hold that by writing the letter dated April 2, 1955, she ceased to be in desertion from that date. A fair reading of that letter, read in the context of her offer to return within a few months, shows beyond any doubt that he closed the door for her return long before the statutory period had expired. When the respondent wrote to the appellant telling him that she would come in a few months, he wrote to her saying that she was leading
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an immoral life and that he would no longer be "drawn into her game." Even after that letter, she wrote back denying his charges and promising to come as soon as her health improved. I have no doubt that, at any rate from April 2, 1955, the desertion, if any, on the part of the respondent, came to an end and from that date the appellant was guilty of desertion.

For the aforesaid reasons, I agree with the conclusion arrived at by the High Court. The appeal deserves to be dismissed and I accordingly dismiss it with costs.

ORDER OF COURT

In accordance with the majority opinion, the appeal is allowed with costs here and in the High Court.