

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FAMILY COURT APPEAL NO.183 OF 2008
WITH
CIVIL APPLICATION NO.192 OF 2009
IN
FAMILY COURT APPEAL NO.183 OF 2008**

Mrs. Lavina Martin ...Appellant

Versus

Mr. Sam Bosco Martin ...Respondent

.....

Shri A.N. Mulla for the Appellant.
None for the Respondent.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

**JUDGMENT RESERVED ON: 1st MARCH, 2017
JUDGMENT PRONOUNCED ON: 5th MAY, 2017**

Judgment (Per Smt. Anuja Prabhudessai, J.):

The Appellant wife has by this application challenged the judgment and decree dated 17th July, 2008 whereby the 7th Family Court, Mumbai allowed the Petition under section 10(x) and 10(ix) of the Indian Divorce Act, 1869 filed by the Respondent-husband and dissolved the marriage solemnised between them.

2. The brief facts necessary to decide this Appeal are as under:

The marriage between the Appellant-wife and the

Respondent-husband was solemnised on 2.1.1988 at St. Joseph Church, Umarkhadi, Mumbai as per Christian Rules and rituals. On 19.6.1989, a son was born in the wedlock. On 12th October, 2006 the Respondent -husband filed a petition under section 10(x) and 10(ix) of the Divorce Act, 1869 for a decree of divorce.

3. The Respondent-husband claimed that the Appellant-wife had agreed to stop working in shifts and instead work during regular office hours. However, after marriage she refused to alter her work schedule. The Respondent-husband claimed that the Petitioner-wife was frigid and psychologically impotent. The Respondent-husband further claimed that the Appellant-wife had given in writing that she did not have any objections if he had affair with or marries any other girl and that she displayed total lack of interest and indifference towards him.

4. The Respondent-husband further claimed that Appellant-wife frequently visited her parents without informing him and thus caused mental agony to him and inconvenience to his ailing mother. The Respondent-husband alleged that in 1988 the Appellant-wife went to church alone on Christmas day and avoided his company. During

the Christmas season of 1988 she slapped and abused him and insulted his mother.

5. The Appellant-wife went to her maternal house during her pregnancy. The Appellant-wife did not inform him about the birth of their son, baptism and his first birthday. She returned about two years later, after much persuasion, but there was no change in her behaviour. She deprived him of physical relations and remained aloof and on some occasions she was violent towards him. She did not do household work and started visiting her parental home.

6. The Respondent-husband claimed that in April-1992 Appellant-wife visited her brother at Kenya with the child without his permission and knowledge, she started residing in her parental house after she returned from Kenya, she did not join him in the matrimonial home and deserted him since 1992. The Respondent-husband therefore sought divorce on the ground of cruelty and desertion.

7. The Appellant-wife repudiated all the allegations levelled against her. She claimed that she was ill treated by her mother-in-law since the date of the marriage. The Respondent-husband did not help

her in any manner even when she told him about the ill-treatment meted out to her by his mother, on the contrary, he too started abusing, assaulting and ill-treating her. The Appellant-wife claimed that the ill-treatment at the hands of the Respondent-husband and his mother continued even during her pregnancy. She went to her parental house for delivery and their son was born on 19.6.1989. Though the Respondent-husband was informed about the birth of the child, he visited her only once and thereafter, he refused to take her and the child to the matrimonial home. It was only after a joint meeting held between the family members of both sides that the Respondent-husband took her to the matrimonial house. The Appellant-wife claims that even thereafter there was no change in his behaviour and which necessitated her to approach the parish priest for intervention. The Appellant-wife has stated that she suffered tremendously due to continuous quarrels and abusive nature of the Respondent-husband. She has stated that she was forced and coerced into writing the note that she would have no objection if the Respondent-husband had affair with or married any other girl.

8. The Appellant-wife has stated that since she was working for AIR India, was given free tickets to Kenya. She had requested the

Respondent-husband to accompany her to Kenya, but he refused to join her. The Appellant-wife claims that she had visited her brother at Kenya with the permission of the Respondent-husband. When she returned, she was surprised to receive a legal notice from the Respondent-husband. She replied to the said notice. She has stated that the Respondent-husband turned down every attempt made by her to sort out the differences and to join him at the matrimonial home. The Appellant-wife claimed that the Respondent-husband cannot take advantage of his own wrong.

9. Both parties adduced oral as well as documentary evidence. The learned Judge after considering the evidence adduced by both the parties held that the Respondent-husband had proved the grounds of cruelty and desertion and was therefore, entitled for a decree of divorce under section 10(1) (x) and 10(1) (ix) of the Divorce Act, 1869. Accordingly the Petition was allowed and the marriage between the parties was dissolved. Being aggrieved by the impugned decree the Appellant-wife has preferred this Appeal.

10. We have heard Mr. Mulla, the learned counsel for the Appellant-wife. The Respondent-husband failed to put in his

appearance despite due service of notice.

11. Mr. Mulla, the learned counsel for the Appellant-wife has assailed the judgment on the following grounds.

a) The learned Judge has blindly accepted the allegations levelled against the Appellant-wife and discarded the case of the Appellant-wife without any cogent reason.

b) The inference drawn by the learned Judge on the basis of the writing at Exhibit-16 that the Appellant-wife was avoiding physical relations with the Respondent-husband is totally erroneous.

c) The learned Judge has failed to consider that the marriage was consummated and a child was born in the wedlock. Therefore, the finding that the Appellant-wife was frigid and psychologically impotent are totally contrary to the evidence on record.

d) The learned Judge erred in holding that the Appellant-wife had subjected the Respondent-husband to cruelty.

e) The learned Judge discarded the evidence of the Appellant-wife that she was forced to leave the matrimonial-home and that the efforts to resume co-

habitation were frustrated by the Respondent-husband.

f) The findings on cruelty and desertion are totally erroneous and cannot be substantiated.

12. We have perused the records and considered the submissions advanced by the learned counsel for the Appellant-wife. The Respondent-husband had sought divorce on the ground of cruelty and desertion under sections 10(1)(x) and 10(1)(ix) of the Divorce Act.

13. In order to obtain a decree of divorce, the Respondent-husband had to substantiate that the Appellant-wife had treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the Appellant-wife.

14. Before advertng to the facts of the case, it is necessary to refer to the decision of the Apex Court in ***Samar Ghosh Vs. Jaya Ghosh (2007) 4 SCC 511*** wherein the Apex Court after surveying the previous judgments has summarised the concept of 'cruelty' as under:-

"79.

On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such

that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

15. Now reverting to the facts of the present case the main grievance of the Respondent-husband was that the Appellant-wife was frigid and psychologically impotent and that she deprived him of pleasures of marital life. It is pertinent to note that the Appellant-wife and the Respondent-husband were married in the year 1988. Their marriage was consummated and they were blessed with a son on 19.6.1989. Therefore, the contention of the Respondent-husband that the Appellant-wife was frigid and psychologically impotent needs to be rejected outright.

16. It is pertinent to note that the Appellant-wife had categorically denied the allegations of frigidity and impotency. The learned Judge discarded the defence and accepted the case of Respondent-husband, mainly on the basis of the writing at Exhibit-16 wherein the Appellant-wife had stated that she had no objection if the Respondent-husband had affair with any girl or if he married any girl or all of them.

17. The evidence on record clearly indicates that the marital life of the Appellant-wife and the Respondent-husband was not smooth, peaceful or blissful. There were constant quarrels and squabbles between the parties over trivial issues. In such circumstances, writing at Exhibit-16 can at the most be construed as an expression of frustration and mental stress. The said note, wherein the Appellant-wife had allegedly given permission to the Respondent-husband to have affair with other women certainly cannot be construed as an admission of frigidity or psychological impotency. Hence, the inference drawn by the learned Judge on the basis of the said writing is totally erroneous. Furthermore, apart from the bold allegations made by the Respondent-husband, there is absolutely no

evidence to indicate that the Appellant-wife was repugnant to have physical relationship with the Respondent-husband or that she had deprived him of marital relationship as to constitute mental cruelty.

18. The Respondent-husband has also alleged cruelty in the form of continuous insulting and denigrative treatment meted out to him and his mother by the Appellant-wife. The incidents as narrated by the Respondent-husband in his evidence are :-

(1) The Appellant-wife, though agreed prior to marriage, did not get her work schedule changed from shifts to regular office hours and this caused inconvenience to him and his mother.

(2) The Appellant-wife frequently visited her parental home during her pregnancy and stayed there for a long period without his permission.

(3) That Appellant-wife insulted him in presence of his mother.

(4) The Appellant-wife did not accompany him to church on the Christmas day of 1988 and during a quarrel, she slapped and abused him and insulted his mother.

(5) The Appellant-wife did not inform him of the birth of

his son on 19th June, 1989 and he learnt about the same on 29th June, 1989 through his friend.

(6) The Appellant-wife did not name the child as 'Victor' i.e. after the name of his father.

(7) The Appellant-wife baptised the child in his absence.

19. The allegations against the Appellant-wife are either of trivial nature or vague and therefore, are not adequate for grant of divorce. Furthermore, the Appellant-wife in her evidence has denied all these allegations. She has deposed that after her marriage she was ill-treated by the Respondent-husband and his mother. She has deposed that she used to go to her parental house with due permission of the Respondent-husband. The Appellant-wife has denied that the Respondent-husband was not informed about the birth of the child. She has deposed that the Respondent was informed on the same date but he visited them only on 29th June, 1989. She has denied that she had abused, insulted or slapped the Respondent-husband.

20. The Appellant-wife has thus refuted each and every accusations levelled against her by the Respondent-husband. Hence, in absence of corroborative evidence the learned trial Judge was not

justified in accepting the evidence of the Respondent-husband and discarding the evidence of the Appellant-wife, without there being any justifiable reasons.

21. It is also to be noted that despite these allegations, the matrimonial dispute was settled with the intervention of the relatives and the Appellant-wife had joined the Respondent-husband in the matrimonial home in the year-1990. Thus, cruelty, if any was condoned by subsequent conduct and hence the incidents narrated above could not be a ground for divorce.

22. The Respondent-husband has also given some instances of cruelty after the Appellant-wife had joined the matrimonial home. These allegations which are akin to those stated above, are again not corroborated. Furthermore, these allegations are nothing more than ordinary wear and tear of married life.

23. The evidence does not indicate that the Appellant-wife by her acts or action or by her conduct had subjected the Respondent-husband to such physical or mental suffering as to raise reasonable apprehension that it would be harmful or injurious for him to live with

the Appellant-wife. Hence, we are of the view that the conduct attributed to the Appellant-wife does not amount to 'cruelty'.

24. The Respondent-husband has also sought divorce on the ground of desertion. To obtain divorce on the ground of desertion, in terms of section 10(1)(ix) of the Divorce Act the burden was on the Respondent-husband to prove that the Appellant-wife had deserted him for more than 2 years immediately preceding the presentation of the Petition. In *Rohini Kumari v/s. Narendra Singh (1972) 1 SCC 1*, the Apex Court while considering the true meaning of 'desertion' has held as under :

"It is stated that 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 the wife and the case of a man who with the same intention compels his wife by his conduct to leave him.

In [Lachman Utamchand Kirpalani v. Meena](#) alias Mota(1) this Court had occasion to consider the true meaning and ambit of s. 10 (1) (a) of the Act read with the Explanation. Reference (1) [1964] 4 S.C.R. 331.

was made in the majority judgment to the earlier decision in [Bipin Chander Jaisinghbhai Shah v. Prabhawati](#) (2) in which all the English decisions as also the statement contained in authoritative text books were considered. After referring to the two essential conditions, namely, the factum of physical separation and the animus deserendi which meant the intention to bring the cohabitation permanently to an end as also two elements

so far as the deserted spouse was concerned i.e. (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention aforesaid, it was observed while examining how 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".

25. Reverting to the facts of the present case, the Respondent-husband has claimed that on 28th April, 1992 the Appellant-wife left the matrimonial home and did not return. He was subsequently informed by the brother of the Appellant-wife that she had gone to Nairobi with their minor son, to visit her elder brother and that she would return after about 15 days. The Respondent -husband has stated that the Appellant-wife had left the country with minor child without his knowledge, permission or consent and that it was the final separation. He has deposed that the Appellant -wife had purposely rejected all opportunities of coming together and deserted him for more than 15 years and had thus brought cohabitation to an end.

26. It is to be noted that as against the aforesaid evidence, the Appellant-wife has deposed that since she was working for AIR India she had got free tickets for Kenya. She has stated that she had gone to Kenya to visit her brother with the permission and consent of the Respondent-husband. She has stated that when she returned to Mumbai to her surprise she received a legal notice dated 26.5.1992 from the Respondent-husband which was replied by her through her Advocate dated 16.9.1992. She has stated that meanwhile her son was sick as he had asthamatic problem and she remained busy taking care of him. The Respondent-husband sent another notice dated 21.1.1993 making several allegations against her which was replied by her reply dated 11.6.1993. She has deposed that thereafter she contacted the Respondent-husband to allow her to return to matrimonial house. However, he refused to allow her to resume cohabitation. She has stated that the Respondent-husband by his own conduct deserted her and that he is not entitled for decree of divorce. In her cross examination she has stated that she had also approached Mahila Manch in an attempt to resume cohabitation, however, the Respondent-husband refused to allow her to join the matrimonial house.

27. The aforesaid evidence reveals that in the month of April-1992 the Appellant-wife had gone to Kenya for about 15 days to see her brother. The mere fact that the Appellant-wife had visited her brother at Kenya with or without consent of the Respondent – husband, or that upon her return she had started residing at her parental house would not per se amount to desertion or final separation as alleged by the Respondent-husband. The moot question is whether the Appellant-wife had no intention of resuming cohabitation. In this regard, it is pertinent to note that the evidence of Appellant-wife indicates that she had made attempts to join matrimonial house and that the Respondent-husband had not allowed her to resume cohabitation. The contention of the Appellant-wife is fortified by the fact that the Respondent-husband had issued a legal notice immediately after her return from Kenya. In the said legal notice he had made several allegations against the Appellant-wife including the allegation that his consent for marriage was not free and valid consent and the same was obtained by misrepresentation, coercion, pressure and fraud. The records further reveal that vide Petition dated 1.7.1993 addressed to Judicial Vicar, the Metropolitan Tribunal of the Archdiocese of Bombay, the Respondent-husband had sought annulment of the marriage. The allegations made in the notice

as well as filing of the Petition for annulment within a period of two years from the alleged date of separation, reveals that the Respondent-husband was not keen on continuing with the marital ties. The aforesaid facts supports the case of the Appellant-wife that the Respondent-husband had in fact not allowed her to join the matrimonial house despite her efforts. Consequently, it cannot be held that the Appellant-wife had left the matrimonial home without any reasonable cause or with an intention of bringing cohabitation to an end. In the light of the above facts, the marriage could not have been dissolved on the ground of desertion.

28. Now coming to the Application No.192 of 2009 The Appellant-wife has sought following reliefs :

- (a) The Respondent be directed to pay a sum of Rs.16,37,542/- (Rupees Sixteen Lakhs Thirty Seven Thousand Five Hundred Forty Two only) being arrears of maintenance incurred by applicant on their son Zeeshan Sam Martin;
- (b) the respondent be further directed to pay monthly maintenance of Rs.15,000/- to his son Zeeshan Sam Martin to enable him to maintain and study;
- (c) the respondent be directed to pay a sum of Rs.15,000/- to applicant as a monthly maintenance.

29. At the outset, it may be mentioned that the Appellant-wife had not filed any application before the Family Court for maintenance either for herself or the minor son. The question whether the Appellant-wife had indeed incurred expenses of Rs.16,37,542/- towards the maintenance of the child, is a question of fact and needs adjudication on merits.

30. Similarly, the Appellant-wife has claimed maintenance of Rs.15,000/-p.m. for herself and Rs.15,000/-p.m. for her son. The Appellant-wife is employed and the son had attained majority on the date of the judgment of the Family Court. Since the Appellant-wife had not made any such claim before the Family Court, the Respondent -husband had no opportunity of being heard in the matter. In the absence of evidence and adjudication of the issue on merits, the claims for payment of arrears or maintenance for the Appellant-wife and the child cannot be decided or granted in this Appeal. Suffice it to say that we have not gone into the merits of the said claims and the Appellant-wife is at liberty to raise such claims by filing appropriate proceedings, if she so desires.

31. Under the circumstances and in view of discussion (supra) the Appeal is allowed. The impugned judgment and order dated 17th July, 2008 is hereby quashed and set aside. The Application No.192 of 2009 stands dismissed as not maintainable.

(ANUJA PRABHUDESSAI, J.)

(A.S. OKA, J.)