Kerala High Court
Dr.Smitha Mathew vs Dr.Prasoon Kuruvila on 5 July, 2011

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Mat.Appeal.No. 263 of 2010()

1. DR.SMITHA MATHEW,
... Petitioner

Vs

1. DR.PRASOON KURUVILA, S/O. KURUVILA,
... Respondent

For Petitioner :SRI.CHITAMBARESH.V. (SR.)

For Respondent :SRI.MATHAI M PAIKADAY(SR.)

The Hon'ble MR. Justice K.M.JOSEPH
The Hon'ble MR. Justice M.L.JOSEPH FRANCIS

Dated :05/07/2011

O R D E R

K.M. JOSEPH &
M.L. JOSEPH FRANCIS, JJ.

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Mat.A..Nos. 263 & 265 of 2010

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Dated this the 5th day of July, 2011

JUDGMENT

Joseph Francis, J.

Mat.A. No.263 of 2010 is filed by the respondent/wife in O.P. 491 of 2009 on the file of the Family Court, Kottayam. The respondent in this appeal is the petitioner in that petition, which was filed by him under Section 10(1)(x) of the Divorce Act for divorce on the ground of cruelty. Mat. A.No. 265 of 2010 is filed by respondents 1 to 3 in O.P.No. 492 of 2009 on the file of the Family Court, Kottayam. The respondent in that appeal was the petitioner in that Original Petition, which was filed by him for the custody of the child. The first respondent in that Original Petition is his wife and respondents 2

and 3 are the parents of the first respondent.

2. The averments in O.P.No.491 of 2009 are briefly as follows: The petitioner is the husband and the respondent is the Mat.A..Nos. 263 & 265 of 2010 wife and their marriage was solemnised on 3.2.2003 as per the Christian rites. After the marriage they lived together in the house of the petitioner. A male child was born in this wedlock on 20.2.2004. The petitioner is a doctor by profession and was doing his MD in General Medicine at Kottayam at the time of marriage. The respondent is also a doctor preparing for the entrance examination for MD course. It was an arranged marriage.

3. During the initial days of the marriage itself the respondent behaved very much indifferently with the petitioner and his family. She did not like the lifestyle and eating habits of the petitioner and his parents. She was not ready to mingle with the family members of the petitioner and she always preferred to remain inside the bed-room. She was not even ready to have food together with the family members of the petitioner. The respondent was in the habit of humiliating and insulting the petitioner. She claimed better financial and social status than the petitioner. She stated that she married the petitioner only on the compulsion of her parents.

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4. About three months after the marriage the respondent became pregnant, but she abused the petitioner saying that he spoiled all her life and career and it was her misfortune to marry a man like the petitioner. Her mother also supported this view and created a lot of embarrassment in the matrimonial life. After the baptism of the child the petitioner requested the respondent to come back to the matrimonial home, but the respondent and her parents were not ready for the same. In June 2004, the petitioner and his father discussed about the issue, but during that period the respondent took an adamant stand that she will not return to the matrimonial home and she had no intention to bring up the child.

5. When the child was five months old the respondent began to stay in a hostel at Kottayam after leaving the child under the custody of her aged mother without informing the petitioner. She gave her career more importance than the family life. In September 2004, the petitioner was suffering from jaundice and he was very serious and bed ridden, but the respondent who was staying at YWCA hostel was not willing to look after him and she came only on two occasions. The Mat.A..Nos. 263 & 265 of 2010 illness of the petitioner was very serious, but the attitude of the respondent was highly irresponsible. The petitioner rejoined his MD course on 13.3.2005 after recovering from his illness. In the meantime the respondent also got admission for DMRD course at Medical College, Kozhikode. The petitioner and his parents requested the respondent to come to her matrimonial home during holidays and vacation, but the respondent was not willing. She has not even entrusted the child with the petitioner. The petitioner noticed that the respondent was getting a lot of phone calls during odd hours in the night.

6. In 2007 May the respondent completed her course. The petitioner brought her back from the hostel to the matrimonial home, but on the next day itself the respondent insisted to go to the her

parental house at Pathanamthitta and she left the place with all her belonging brought from her hostel. The petitioner and his family members made several attempt to bring back her, but she was adamant. The respondent had no love and affection to the petitioner and the child. In January 2008 the petitioner brought her to his house, but she Mat.A..Nos. 263 & 265 of 2010 did not even talk with the petitioner's mother. When the petitioner questioned it, the respondent slapped him on his cheek and it caused much mental agony to the petitioner. She joined for DNB course in Thiruvananthapuram without the consent of the petitioner in February 2008. In July 2008 also when the petitioner made attempt to bring the respondent to his house, she was not willing. So the petitioner is constrained to live separately from the respondent. Hence the petitioner is entitled to get a decree of divorce on the ground of cruelty.

7. The respondent filed objection contending as follows. The allegation that the respondent behaved in differently with the petitioner is absolutely false. The cruelty alleged is also not true. The respondent never insulted or humiliated the petitioner or his family members. The respondent never made any complaint regarding the financial position and social status of the petitioner's family. The allegation that the respondent had no love and affection to the husband and child is absolutely false. The child was given proper care and attention by the respondent's mother. Actually there was no quarrel between the petitioner and the respondent. The respondent resided in YWCA hostel Mat.A..Nos. 263 & 265 of 2010 for the purpose of entrance coaching. Actually the respondent preferred to stay in the petitioner's house, but during that period the petitioner contracted hepatitis in 2004. So the petitioner refused to allow the respondent and child to stay with him at Kottayam. Because of that reason the child was entrusted with the parents of the respondent. It was on the petitioner's insistence that the respondent decided to stay in a hostel at Kottayam. The respondent used to visit the petitioner on every 3 days while he was suffering from illness. The petitioner's medical conditions was not at all serious. The marital relationship has not been broken irretrievably. The reason for misunderstanding is the behavioural aberrations of the petitioner and his psychological problem. If the petitioner is ready and willing to solve his behavioural and psychological problem it is possible to resume the marital life. The allegation of cruelty against the respondent is baseless. The divorce prayed for is not allowable.

8. The averments in O.P. No. 492 of 2009 are briefly as follows. The petitioner is the husband and the first respondent is the wife. The respondents 2 and 3 are the parents of the first respondent. Mat.A..Nos. 263 & 265 of 2010 The child is in the custody of respondents 2 and 3. The first respondent behaved very indifferently and she always wanted to avoid the love and affection of the petitioner to the child. She allowed her parents to look after the child against the interest of the petitioner and the child. The respondent was not at all willing to reside in the matrimonial home with the child. The respondents are refusing to return the custody of the child without any reason and it caused much mental pain to the petitioner. Because of the cruelty of the respondent he filed divorce case.

9. The first respondent is not at all interested for the welfare of the child. The third respondent is suffering from breast cancer and second respondent is a heart patient. They are being looked after by the servants. The first respondent is doing her DNB course at Medical College Hospital, Thiruvananthapuram. The petitioner is very much interested in the welfare of the child. At present

he is working as a physician at Caritas Hospital, Kottayam. The petitioner is having financial capacity to look after the child. For the welfare of the child the custody is to be given to the petitioner.

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10. The respondents filed objection contending as follows. The allegation that the first respondent behaved cruelly towards the petitioner and she wilfully refused to come to the house of the petitioner is absolutely false. The respondents never abandoned the child. The first respondent entrusted the child with her parents for the reason that the petitioner suffered illness. The allegation that the respondents are not interested in the welfare of the child is absolutely false. After completing her study she joined the ESI Hospital, Kadambanad, Adoor and for that purpose she has to stay at Pathanamthitta in her parental house. The minor was admitted to Vimala Matha Nursery School, Pathanamthitta in June, 2006 and he remained there till February, 2008 and it was with the knowledge and consent of the petitioner. It is true that the third respondent is suffering from breast cancer and she was undergoing treatment from Amritha Hospital. The minor child was brought to Pathanamthitta only periodically and he was at Kottayam. The allegation that the respondents are not at all interested for the welfare of the child is absolutely false. The first respondent is interested in resuming marital Mat.A..Nos. 263 & 265 of 2010 relationship, but because of the adamant stand taken by the petitioner they are living separately.

11. In the Family Court both the above Original Petitions were tried jointly and evidence was recorded in O.P. 491 of 2009. Pws 1 to 3 were examined on the side of the petitioner and Exts.A1 to A9 were marked. On the side of the respondent Rws.1 and 2 were examined and Exts.B1 to B3 were marked. The learned Family Court, on considering the matter, allowed O.P.No.491 of 2009 and the marriage between the petitioner and the respondent was declared as dissolved w.e.f. 18.2.2010. O.P.No.492 of 2009 was disposed of directing that the child will be in the custody of the mother during the academic year till 30.4.2010 and during that period the father will be having visitation right twice in a month, the first and third Sundays during day time for a period of two hours and from 30.4.2010 onwards the custody of the child is to be given to the father and during that period the mother will be having visitation right twice in a month i.e. on the 1st and 3rd Sundays during day time for a period of two hours. Both parties shall not oppose the right of the other party to exercise the visitation right Mat.A..Nos. 263 & 265 of 2010 ordered as above. Against the judgment in O.P. 491 of 2009 the respondent/wife filed Mat.A.No. 263 of 2010 and against the judgment in O.P. 492 of 2009 respondents 1 to 3 filed Mat.A. No. 265 of 2010.

12. Heard learned senior counsel for the appellants and the learned senior counsel for the respondent.

13. In Mat.A.No. 263 of 2010 the learned counsel for the appellant mainly raised the following contentions. The Court below failed to take note of the actual problems between the parties and instead of addressing it with a view to save the marital relationship between the parties, proceeded to dissolve the marriage. In paragraph 18 of the impugned judgment, the Family Court wrongly found that 'the petitioner/husband' has succeeded to prove that the wife behaved cruelly and

indifferently towards him and a complete reading of the said paragraph will show that the Court below has not assigned any reason whatsoever to arrive at the said conclusion.

14. The learned senior counsel for the appellant wife submitted that the finding in paragraph 18 of the judgment is to the effect that the wife wanted to stay away from the matrimonial home. She disliked Mat.A..Nos. 263 & 265 of 2010 parents-in-law and failed to look after the husband even while he was suffering from serious illness - jaundice' is entered into contrary to evidence on record. The circumstance under which the appellant stayed away from home i.e., in connection with the education, work etc, was not considered while arriving at the conclusion. The Court below also failed to take note of the fact that the particular course in Radiology specialized by the appellant is offered only in Medical Colleges at Thiruvananthapuram and Kozhikode. Appellant if at all stayed away from home, is under compulsions of education or work. That by itself cannot be treated as a reason to arrive at the finding that the 'respondent avoided to stay in matrimonial home'. Instead of finding that the wife stayed away from husband during his illness, the court below ought to have found that it is the husband who compelled the wife to stay away from him so as to avoid their child from being infected with jaundice. The evidence adduced in this connection is not taken note of by the court below.

15. The learned senior counsel for the appellant submitted that the finding in paragraph 18 of the judgment that the illness of the Mat.A..Nos. 263 & 265 of 2010 husband started in September 2004, but the wife opted to stay in the hostel at Kottayam from July 2004 onwards is contrary to evidence on record. Even the petitioner did not advance such a case. It has come out in evidence that the husband contracted hepatitis in September 2004 and the appellant stayed in hostel from October 2004 onwards as insisted by the husband for protecting the child from possible infection. Court below also failed take note of the fact that even during this period, the appellant used to regularly visit the husband and used to accompany him for his regular blood tests.

16. The learned senior counsel for the appellant submitted that the further finding in paragraph 18 of the impugned judgment that the appellant 'slapped the husband on his face twice' is entered into only based on the stray averment of the respondent. Even the uncle of the respondent (PW3) deposed that he is not having any direct information about this incident. The Court below ought not to have entered into this finding. Even the petitioner does not have a case that the appellant 'tortured' him, but surprisingly the court below found that the 'denial of torture of the wife is not with bonafides'. Mat.A..Nos. 263 & 265 of 2010

17. The learned senior counsel for the appellant wife submitted that the aspect relating to the taking of room in Hotel at Thiruvananthapuram on 4.4.2009 is not analysed by the Court below in its proper perspective. The findings in paragraph 18 that 'she continued her habit of avoiding the husband and in laws' is wrong and perverse. The court below failed to take note that on 5.4.2009 the respondent abandoned the child at Thiruvananthapuram and rushed back to Kottayam and within few weeks (on 21.5.2009) filed the Original Petition for divorce. Therefore the court below went wrong to find that the 'wife continued' her habit of avoiding the husband and in-laws. Therefore the dictum laid down in Chathu v. Jayasree (1990(1) KLT

604) is having no application to the facts and circumstances of this case. The court below failed to take note of the fact that the respondent actually avoided the company of the appellant and the child.

18. The learned senior counsel for the wife submitted that the conclusion in paragraph 18 of the judgment that 'from the evidence it can be seen that the wife behaved cruelly towards the petitioner both mentally and physically' is without any support from evidence on Mat.A..Nos. 263 & 265 of 2010 record and the court below ought not to have arrived at such a conclusion.

19. The learned senior counsel for the respondent husband submitted that the Family Court is fully justified in granting a decree of divorce on the ground of cruelty on the basis of evidence on record.

20. Section 10(1)(x) of the Divorce Act, 1869 provides that the marriage be dissolved on the ground that the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. The cruelty as a ground of matrimonial relief has been defined as conduct of such a character as to have caused danger to life, limb or health, bodily or mental, so as to give rise to a reasonable apprehension of such danger. The concept of cruelty varied from time to time, from place to place and from individual to individual in its application to social status of persons involved and economic condition and other matters.

21. The parties have relied on a large body of case law. We Mat.A..Nos. 263 & 265 of 2010 need only refer to a fiew of them. In Dr. N. G. Dastane v. Mrs. S. Dastane (1975 (2) SCC 326), the Court, inter alia, held that the Court has to deal not with the ideal husband and an ideal wife, but with the particular man and woman before it. The Court also, inter alia, held as follows:

> "32. One other matter which needs to be clarified is that though under Section 10(1)(b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. Spouses are undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Someone may want to keep late hours to finish the day's work and someone may want to get up early for a morning round of golf.

The Court cannot apply to the habits or hobbies of these the test whether a reasonable man situated Mat.A..Nos. 263 & 265 of 2010 similarly will behave in a similar fashion. The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an individual under one set of circumstances may be extreme cruelty under another set of circumstances."

22. It was further held that simple trivialities which can truly be described as the reasonable wear and tear of married life have to be ignored, and that in many marriages, each party can if he so wills, discover many a cause for complaint, but such grievances arise mostly from temperamental disharmony which is not cruelty. In Naveen Kohli v. Neelu Kohli (2006 (4) SCC 558) the Apex Mat.A..Nos. 263 & 265 of 2010 Court reviewed the case law. The Court, inter alia, noted that cruelty was not a ground for claiming divorce under the Hindu Marriage Act prior to the amendment in 1976. It noted that the words "as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious to the petitioner to live with the other party" were omitted, and that it is not necessary to claim divorce that the cruel treatment is of such a nature as to cause apprehension of the nature earlier insisted upon. The Court referred to the decision of the Apex Court in A. Jayachandra v. Aneel Kaur (2005 (2) SCC 22) wherein the Court, inter alia, held as follows:

> "11. The expression `cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem in determining it. It is a question of fact and Mat.A..Nos. 263 & 265 of 2010 degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to love with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted (See Shobha Rani v. Madhukar Reddi".

12. To constitute cruelty, the conduct complained of should be `grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than `ordinary wear and tear of married life'. The conduct, taking into consideration the circumstances and Mat.A..Nos. 263 & 265 of 2010 background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using

filthy and abusive language leading to constant Mat.A..Nos. 263 & 265 of 2010 disturbance of mental peace of the other party.

13. The court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

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23. In Samar Ghosh v. Jaya Ghosh (2007 (4) SCC 511), the Apex Court laid down the following illustrative cases of human behaviour in dealing with the cases of mental cruelty:

> "101. 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:
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> (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, Mat.A..Nos. 263 & 265 of 2010 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 miserabale 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 Mat.A..Nos. 263 & 265 of 2010 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 longe, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation 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 Mat.A..Nos. 263 & 265 of 2010 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."

24. The Court also held that the concept of cruelty differs from person to person depending upon the "upbringing, level of sensitivity, educational, family, cultural background, financial position, social status, customs, traditions, religious beliefs, human Mat.A..Nos. 263 & 265 of 2010 values and the value system". The Court also took the view that the concept of mental cruelty cannot remain static

and there can be no uniform standard. The Court also took the view that it should seriously make an endeavour to reconcile the parties; yet, if it is found that the break down is irreparable, then divorce should not be withheld. In Neelam Kumar v. Dayarani (AIR 2011 SC 193), the Court, inter alia, held as follows:

> "9. The High Court then took up the other allegation that the respondent did not come to attend and take care of the appellant when he was undergoing medical treatment in a hospital for the injuries caused in an accident. The High Court found that this allegation was not part of the appellant's pleadings and the matter was introduced in course of evidence. The court observed that not being stated in the pleadings, the allegation could not be taken into consideration. Even otherwise, apart from the oral statement made before the trial court, there was no material to support the allegation. The appellant did not examine any doctor or produce the medical Mat.A..Nos. 263 & 265 of 2010 records in connection with his treatment. In any event, one single instance, in isolation, was hardly sufficient for the dissolution of marriage on the ground that the respondent treated the appellant with cruelty.
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> 13. We are not impressed by this submission at all. There is nothing to indicate that the respondent has contributed in any way to the alleged breakdown of the marriage. If a party to a marriage, by his own conduct brings the relationship to a point of irretrievable breakdown, he/she cannot be allowed to seek divorce on the ground of breakdown of the marriage. That would simply mean giving someone the benefits of his/her own misdeeds. Moreover, in a later decision of this Court in Vishnu Dutt Sharma v.

Manju Sharma (2009) 6 SCC 379: (AIR 2009 SC 2254: 2009 AIR SCW 2984), it has been held that irretrievable breakdown of marriage is not a ground for divorce as it is not contemplated under section 13 and granting divorce on this ground along would amount to adding a clause therein by a judicial verdict which would amount to legislation by Court. In the Mat.A..Nos. 263 & 265 of 2010 concluding paragraph of this judgment, the Court observed (para12):

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts." "

25. The learned counsel for the respondent/husband pointed out seven instances of cruelty. The first instance is the repeated slapping of the respondent/husband by his wife, which is confirmed by PW3. In the proof affidavit filed by PW1 the husband has sworn to the fact that on one Saturday in the year 2008 he took back his wife to his house at Kottayam and at that time she insisted to go back to her house and he refused and then suddenly she slapped on his face and on the next day also the wife slapped on his face when he refused to take her back to her house. When the respondent/wife was examined as RW1 she Mat.A..Nos. 263 & 265 of 2010 denied the happening of such an incident. PW2, who is the father of PW1, does not speak about any incident regarding the slapping of PW1 by

RW1. PW3 is the uncle of PW1. PW3 deposed that he had no direct knowledge with regard to the slapping of PW1 by RW1. Therefore the allegation of PW1 that RW1 slapped him twice is not properly proved. Even if it is taken that the wife slapped the husband on his face, there were two incidents as such that cannot be treated as much cruelty coming under the purview Sec.10(i)(x) of Divorce Act.

26. The second incident pointed out by the learned counsel for the respondent/husband is the suicide attempt by the wife by threatening to jump out of the moving car, which by the timely act of the husband was averted. PW1 deposed that on 1.6.2008 the wife informed him that she was coming to see the child and then he went to the Railway Station in a car along with the child to pick her and when he tried to take her to his house she threatened that if she was taken to his house she would jump out of the car and then Mat.A..Nos. 263 & 265 of 2010 he went to a hotel at Kottayam by name 'Homestead' and Ext.A3 is the hotel bill showing that he stayed in the hotel along with his wife. When RW1 was cross examined, no question was asked about the incident in which she alleged to have threatened to jump out of the car. Therefore that allegation is not proved.

27. The third incident narrated by the learned counsel for the respondent/husband is that the repeated accusation of the husband by the wife as mental patient and further calling their son as a mentally retarded child. In cross examination RW1 deposed that she would say that PW1 is having mental illness due to her experience in life. When RW1 was cross examined, PW1 has no case that she called her child as mental patient. In the proof affidavit filed by RW1, it is stated that the petitioner is prone to irrational fears being infected by diseases and he constantly washes his hands fearing germs or bacteria. He refused to eat food from hotels or restaurants fearing that the same may be contaminated. On one occasion when the petitioner and the Mat.A..Nos. 263 & 265 of 2010 respondent had to stay in a hotel the petitioner refused to sleep on the bed fearing that the bed sheet may be contaminated. The respondent had to go outside to buy a set of new bed sheets for the petitioner and even then the petitioner refused to sleep stating that there were hidden cameras installed in the hotel room. The next day the petitioner insisted that the new bed sheet should be burned and destroyed. These facts sworn to by RW1 in the chief affidavit are not challenged by the petitioner in cross examination. Therefore even if RW1 stated that PW1 is having some mental disorder it cannot be said as baseless allegations and may not amount to cruelty.

28. The next ground alleged by the learned counsel for the respondent is that there is continued refusal of the wife to perform her conjugal obligations. PW1 deposed that even after a lapse of six years from the date of the marriage, the husband and the wife resided only for a period of six months and that the wife failed to perform the obligations as a wife. In the proof affidavit filed by Mat.A..Nos. 263 & 265 of 2010 RW1 it is stated that if the petitioner is ready and willing to redress his behavioural problems and personality disorder it may well be possible for the parties to resume their married life. Therefore even if RW1 failed to perform her conjugal obligations that cannot be treated as cruelty.

29. The learned counsel for the respondent pointed out that the wife was secretly using another mobile phone at odd hours even after repeated requests by the husband to disclose the number. In the proof affidavit filed by PW1 it is stated that RW1 wife gave the other mobile phone number at the

time of counselling by the direction of the Counsellor and that Ext.A7 is that sim card. The petitioner has not adduced any evidence to show that the wife made any undesirable phone calls by using that mobile number.

30. The learned counsel for the respondent submits that the appellant/wife accepted job without informing and without the concurrence of the husband. When RW1 was cross examined, the Mat.A..Nos. 263 & 265 of 2010 petitioner has not put any question regarding acceptance of the job by her without informing and without concurrence of the husband. It has come out in evidence that RW1 accepted an employment in the E.S.I. hospital, Kadambanad when the relationship between the petitioner and the respondent was not cordial. Even the respondent was aware that the appellant was preparing for the entrance examination for Post Graduate course at the time of marriage. Attempting to secure a job or getting a job, as such cannot amount to cruelty.

31. Another point raised by the learned counsel for the respondent is that the appellant neglected the husband while undergoing treatment for hepatitis. In the proof affidavit RW1 has stated that in October, 2004 herself along with Dr. Nice shifted to Y.W.C.A., hostel at Kottayam to attend Entrance Examination coaching and unfortunately the petitioner contracted hepatitis in September, 2004 and the petitioner refused to allow her and their child to stay with him at Kottayam as the petitioner feared that the Mat.A..Nos. 263 & 265 of 2010 minor child and herself would be affected with hepatitis and when she received information that petitioner was affected by hepatitis she visited the petitioner, but the petitioner discouraged her from visiting him as he feared that she and the child would be affected by hepatitis. It has also come out in evidence that several doctors died in the Medical College Hospital, Kottayam during that period. In the above circumstances there is ample justification for the wife in not visiting the husband regularly during that period. If the grounds narrated by the learned counsel for the respondent are accepted as true, most of the allegations can be treated as mere trivial and normal wear and tear of married life which happens in day today life, which would not be adequate to grant divorce on the ground of cruelty.

32. The learned counsel for the respondent submits that the wife has admitted desertion by her when she was cross examined as RW1. But the petitioner/husband has not claimed any divorce under Section 10(1)(1x) of the Divorce Act on the ground of Mat.A..Nos. 263 & 265 of 2010 desertion.

33. The learned counsel for the respondent/husband submitted that while passing the order in I.A.No. 1286 of 2010 in Mat. A.No. 263 of 2010 dt. 8.6.2010 there was an undertaking by the wife to part as friends if she is convinced that the husband wants to separate from her and that decision is not influenced by any illness or complications developed consequent to his ailments. The learned senior counsel for the wife would contend that the wife only was pointing out the fact that there were some psychological impediment for the husband to lead a normal married life and it was in this regard that she pointed out certain habits of the husband. They include changing of bed (and rather out of the ordinary hygienic habits of the husband). It is contended that it was not a deliberately false allegation made against the husband without any foundation and the only attempt was to point out a problem in having a normal married life. In answer to the contention of the husband that the conduct of the wife in agreeing Mat.A..Nos. 263 & 265 of 2010 before this Court

that if after the consultation with the Psychiatrist, the Psychiatrist were to find that the husband did not have any problem, she would be agreeable for parting of the ways and, therefore, the wife is estopped in the light of the report of the Psychiatrist, as per which it could be seen that the husband was not harbouring under any illness consequent upon which he was disabled from taking a decision, it is contended that the understanding of the conduct and the order passed by the court is incorrect. It is contended that the order does not bear out any conduct on the part of the wife by which she would stand estopped. He would further contend that a decree of divorce cannot be premised upon any conduct of a party, as contended and it can be validly based only on pleading and proof of cruelty under Section 10(x) of the Indian Divorce Act.

34. Learned counsel for the petitioner sought to draw assistance from the decision of a Division Bench of the Calcutta High Court in Dwijendra Narain Roy v. Joges Chandra De and Mat.A..Nos. 263 & 265 of 2010 others (AIR 1924 Calcutta 600). Therein, the Bench, inter alia, held as follows:

> "It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent."

35. It is necessary to notice the facts. Therein, the appellant/defendant had pleaded that though in the four leases he had affixed the signature, the documents were not genuine in as much as the clauses had been interpolated after execution and without his consent. The litigation was fought on the said basis. The appellant sought to contend at a late stage that the interpolation had been made before execution. It was this plea which is met by the court in the manner referred to in the paragraph. We do not see how the appellant can derive any support from the said proposition and how the court can be invited Mat.A..Nos. 263 & 265 of 2010 to pronounce dissolution of marriage without the petitioner proving the requisite ground available under law.

36. Learned senior counsel for the appellant also relied on the decision in B.(M.A.L.) v. B.(N.E.) (1968) 1 W.L.R. 1109). Therein, the court was dealing with the following short facts:

37. There was a settlement under which special maintenance was payable to the wife and three children including the third child. The husband was adjudicated bankrupt. To get discharge from bankruptcy, the consent of the wife being necessary to withdraw her claim, the husband undertook not to oppose her application for leave to apply for maintenance. He obtained discharge and a maintenance order was made by consent. The husband then sought to deny the paternity of the third child. It was found by serological evidence that he was not the father. The husband sought to set aside the maintenance order on the ground that it was obtained by fraud. It was therein that the court took the view that the husband cannot, after having obtained waiver of Mat.A..Nos. 263 & 265 of 2010 valuable rights of the wife, resile from that arrangement which led to the maintenance order. We find ourselves totally unable to permit the appellant to draw any support from the principle laid down in the said decision and to hold that merely because the appellant, going by the order of this Court, has taken the stand that she may not be opposed to parting of ways, if there was no psychological problem as such, decree of divorce is to be granted. We should bear in mind the nature of the statute, the rights of the parties, the public policy which underlies the statute and hold

that a decree of divorce cannot be pronounced on the basis of the conduct alleged against the wife.

38. We are equally unimpressed by the attempt made to draw support from the decision in Mumbai International Airport Private Limited v. Golden Chariot Airport And Another (2010 (10) SCC

422). That was a case where the Court was reiterating the principle of estoppel, and that a litigant cannot change and suit its stand to his convenience. In Smith v. Smith and Others (2001 (1) WLR Mat.A..Nos. 263 & 265 of 2010 1937) the Court referred to the principle of estoppel by convention as laid down in Republic of India v. India Steamship Co. Ltd. (1998 AC 878) as follows:

> "It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law, if it would be unjust to allow him to go back on the assumption: K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd. (1985) 2 Lloyd's Rep 28; Norwegian American Cruises A/S v. Paul Mundy Ltd. (1988)2 Lloyd's Rep 343; Treitel, The Law of Contract, 9th ed (1995), pp 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention."

39. We would think that the principle of estoppel by Mat.A..Nos. 263 & 265 of 2010 convention cannot be invoked by the respondent. The context of the statute and the conduct attributed to the appellant render the said principle inapplicable.

40. Considering all the above aspects of the matter, we are of the view that the Family Court is not justified in passing a decree of divorce in O.P. No. 491 of 2009 on the ground of cruelty and that the judgment has to be set aside in allowing Mat.Appeal No. 263 of 2010.

41. In Mat. A. No. 265 of 2010 the learned counsel for the appellants submits that while dealing with the custody of the child, the Family Court had not considered about the welfare of the child. The learned counsel for the appellants submits that presently the child is with the first appellant/mother. The Family Court has not given any reasons to disturb the present status quo and handing over the custody of the minor child to the respondent/father. The Mat.A..Nos. 263 & 265 of 2010 learned counsel for the appellants submitted that the observation of the Family Court that the mother expressed her willingness to give custody of the child to the father by e-mail message is incorrect and the said conclusion is drawn out of contract and that it is wrong to observe that the first appellant mother permitted the child to be handed over permanently to the respondent/husband and in fact she was expressing occurrence to the respondent to take custody of the child as a stop gap arrangement till she completes her studies.

42. Admittedly the 1st appellant mother is working in a far away place in Anchal leaving the male child having an age of 7 years with her mother in a rented accommodation in Thiruvananthapuram.

The father of the first appellant is now working at Pathanamthitta as an approved Valuer of the State Bank of India and State Bank of Travancore and therefore he is staying permanently at Pathanamthitta and his presence is not there in the rented accommodation at Thiruvnanthapuram. In O.P. No. Mat.A..Nos. 263 & 265 of 2010 492 of 2009 it is alleged by the petitioner/husband that he is working as a Physician at Carithas Hospital, Kottayam and his parents are healthy and they can look after the child well and the child can continue his studies at Marian Senior Secondary School, Kottayam, which is situated near to the petitioner's house. Considering all these aspects of the matter, we are of the view that the judgment passed by the learned Family Court Judge regarding the custody of the child is reasonable and we find no reason to interfere with the judgment.

43. Accordingly Mat. Appeal No. 265 of 2010 is dismissed and the judgment in O.P. (G & W) No. 492 of 2009 on the file of Family Court, Kottayam is confirmed with a modification that the custody of child is to be given to the father from 1.8.2011 instead of 30.4.2010. Mat.Appeal No. 263 of 2010 is allowed and the judgment in O.P. No. 491 of 2009 on the file of Family Court, Kottayam allowing divorce is set aside and that O.P. is dismissed Mat.A..Nos. 263 & 265 of 2010 without costs. Both sides are directed to suffer their respective costs in both the above appeals.

Sd/-

(K.M. JOSEPH) Judge Sd/-

(M.L. JOSEPH FRANCIS) Judge tm (True copy) P.S. to Judge.