

Madras High Court

Tmt.Bhuvaneswari @ Sharmila vs M.Prabakaran on 30 June, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.06.2011

CORAM

THE HONOURABLE MR. JUSTICE ELIPE DHARMA RAO

and

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Civil Miscellaneous Appeal Nos.3993 and 3994 of 2008

and

C.M.P.Nos.1 of 2008 and 1 of 2009

Tmt.Bhuvaneswari @ Sharmila

... Appellant in both the appeal

vs

M.Prabakaran

... Respondent in both the appeal

Prayer:- Civil Miscellaneous Appeals filed under Section 19 of the Family Courts Act against the Judgment and Decree, dated 30.09.2008, in O.P.Nos.1099 of 2005 and 1915 of 2004 respectively, on the file of the First Additional Family Court, Chennai.

For Appellant : Mr.K.Sakthivel

For Respondent : Mr.S.Ananthanarayanan

#### J U D G M E N T

(Judgment of the Court was delivered by M.VENUGOPAL, J.) The Appellant/Wife has preferred the present Civil Miscellaneous Appeal Nos.3993 and 3994 of 2008 as against the Judgment and Decree, dated 30.09.2008, in O.P.Nos.1099 of 2005 and 1915 of 2004 respectively, on the file of the First Additional Family Court, Chennai.

2. The Appellant/Wife is the petitioner in F.C.O.P.No.1915 of 2004 and she has filed the said original petition against the Respondent/Husband praying for the dissolution of marriage on the grounds of Cruelty and Desertion, as per Section 13(1) (i), (1-a) and (1-b) of the Hindu Marriage Act, 1955.

3.The Respondent/Husband has filed F.C.O.P.No.1099 of 2005 under Section 9 of the Hindu Marriage Act, 1955 praying for Restitution of Conjugal Rights.

4.Before the trial Court, both the petitions, viz., F.C.O.P.Nos.1915 of 2004 and 1099 of 2005 were tried together and a common order has been passed by the trial Court. The trial Court has resultantly dismissed O.P.No.1915 of 2004 filed by the Appellant/Wife on the ground of cruelty and desertion and permanent alimony. However, she was given the permanent custody of the minor child, Moniessh.

5. In regard to F.C.O.P.No.1099 of 2005 filed by the Respondent/ Husband praying for restitution of conjugal rights as per Section 9 of the Hindu Marriage Act, the trial Court has partly allowed the petition and directed the Appellant/Wife to restore to the Respondent/Husband all the comforts and bliss of married life immediately. As regards the permanent custody of the minor child, it was given to the Appellant/Wife. However, the Respondent/ Husband was granted the visitation rights once in a month on the second Sunday of every month near the Fire Station situated in the High Court Campus and the Appellant/Wife was directed to produce the child at 10.30 a.m. and taken back the child at 4.00 p.m.

6. Being dissatisfied with the dismissal of the O.P.No.1915 of 2004, the Appellant/Wife has filed C.M.A.No.3994 of 2008 and as regards O.P.No.1099 of 2005 filed by the Respondent/Husband, since the trial Court has partly allowed the said original petition, the Appellant/Wife has preferred C.M.A.No.3993 of 2008.

7. The point that arises for determination in C.M.A. No.3994 of 2008 is:

"(i) Whether the Appellant/Wife is entitled to claim the relief of Dissolution of Marriage dated 25.05.2001 on the ground of Cruelty and Desertion?

(ii) Also whether the Appellant/Wife is entitled to claim the monthly permanent alimony of Rs.10,000/- from the Respondent/Husband?

The Point that arises for consideration in C.M.A.No.3993 of 2008 is:

"Whether the Respondent/Husband in F.C.O.P.No.1099 of 2005 is entitled to claim the relief of Restitution of Conjugal Rights?

8. It is the contention of the learned counsel for the Appellant/Wife that the Family Court has treated the character assassination, doubting the fidelity, surveillance in the matrimonial house etc. as normal happenings in a house and has concluded that these are not cruelty by the respondent or his family members.

9. According to the learned counsel for the Appellant/Wife, the trial Court has failed to discuss the evidence of the Appellant/ Wife, instead has rejected the same as normal happenings in every house.

10. It is the case of the Appellant/Wife that in spite of numerous endeavours, the Respondent/Husband refused to take back the Appellant/Wife and therefore, it is a clear case of desertion, which has not been taken note of by the trial Court in a proper and real perspective.

11. Advancing his arguments, the learned counsel for the Appellant/Wife submitted that when there has been no evidence as regards the payment and maintenance by the Respondent/Husband, the trial Court has erroneously assumed as if the Respondent/ Husband has been paying maintenance and concluded that the Respondent/Husband has not deserted the Appellant/Wife and their son.

12. Expatiating the submission, it is the contention of the learned counsel for the Appellant/Wife that the trial Court has failed to take into account that the fact of cruelty of the Respondent/Husband in the family as far as torturing his wife by indulging in her character assassination has been proved beyond doubt.

13. The learned counsel for the Appellant/Wife invites the attention of this Court as far as the desertion of the Appellant/Wife is concerned, the marriage between the parties took place on 25.05.2001 and that the Respondent/Husband took the Appellant/ Wife to her parents house on 10.11.2001 under the guise of 'Thalai Deepavali' and thereafter, the Respondent/Husband had not cared even to speak to the Appellant/Wife, leave alone visiting her till the filing of the petition on 20.08.2004. Also when the Appellant/ Wife was pregnant, she was thrown out of her matrimonial home and delivered the child on 17.06.2002. Notwithstanding the fact, the Respondent/Husband was informed of the delivery of the child, he neglected to maintain the Appellant/Wife and also the child. These facts were not repudiated or contradicted by the Respondent/Husband, according to the learned counsel for the Appellant/Wife. Therefore, it is a clear case of desertion. However, these aspects of the matter have not been adverted to by the trial Court.

14. The learned counsel for the Appellant/Wife submits that the Appellant/Wife was asked to do all the household chores without the assistance of any other family members and servant maids and in fact, there were two servant maids before the marriage that took place between the parties, but as soon as the Appellant/Wife entered the matrimonial home, the servant maids were stopped from service and the Appellant/Wife was asked to do all the household chores and at times, even odd jobs like lifting the filled gas cylinder.

15. The learned counsel for the Appellant/Wife contends that when the Appellant/Wife was three months pregnant, the Respondent/Husband deserted her and he had not taken any care or shown interest on the child till the child was 4 = years old. Only after the Appellant/Wife filing O.P.No.1915 of 2004, seeking the relief of divorce and child custody, the Respondent/Husband showed interest on the child. Another important fact that the trial Court had ignored to take into consideration is the fact that the Respondent/Husband had filed a petition in F.C.O.P.No.1099 of 2005 for restitution of conjugal rights only to thwart the Appellant/ Wife obtaining an order of divorce.

16. Before the trial Court, on the side of the Appellant/Wife, witnesses, P.Ws.1 and 2 were examined and Exs.P-1 to P-8 were marked. On the side of the Respondent/Husband, witnesses, R.Ws.1 to 3 were examined and Exs.R-1 to R-36 were marked.

17. It is not in dispute that the marriage between the parties took place on 25.05.2001. It is the case of the Appellant/Wife that whenever she went to the temple, she was followed by her mother-in-law and suddenly she was kept under surveillance by the Respondent/Husband's side and it amounted to cruelty. Also the Respondent/Husband, in his evidence, had clearly admitted that he had obtained the salary certificate of the Appellant/Wife through a Detective Agency and this also would go to show that the Appellant/Wife was given the treatment of cruelty by the Respondent/Husband.

18. At this juncture, the learned counsel for the Appellant/ Wife cites the decision of the Hon'ble Supreme Court reported in Samar Ghosh -vs- Jaya Ghosh [(2007) 4 Supreme Court Cases 511], wherein it has been observed at Page Nos.511 and 512 that there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. Further it is also observed that by refusing to sever the marriage 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 etc. and the irresistible conclusion would be that the matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the respondent and this was a clear case of irretrievable breakdown of marriage. Moreover, the Hon'ble Supreme Court opined that they can never be any straightjacket formula or fixed parameters for determining mental cruelty in matrimonial matters.

19. The Hon'ble Supreme Court in the aforesaid decision at page Nos.529 to 536 has observed as follows:-

"39. The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

40.The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

"Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

41. The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their

social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists."

42. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

43. In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

44. This Court has had an occasion to examine in detail the position of mental cruelty in N.G. Dastane v. S. Dastane reported in (1975) 2 SCC 326 at page 337, para 30 observed as under :-

"The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."

45. In the case of Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan & Anr. reported in (1981) 4 SCC 250:1981 SCC (Cri) 829, this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

46. In the case of Shobha Rani v. Madhukar Reddi reported in (1988) 1 SCC 105: 1988 SCC (Cri) 60, this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of

such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the 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. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

47. In *Rajani v. Subramonian* AIR 1990 Ker. 1, the Court aptly observed that the concept of cruelty depends upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance, judged by standard of modern civilization in the background of the cultural heritage and traditions of our society.

48. Again, this Court had an occasion to examine in great detail the concept of mental cruelty. In the case of *V. Bhagat v. D. Bhagat (Mrs.)* reported in (1994) 1 SCC 337, the Court observed, in para 16 at page 347, as under:

"16. Mental cruelty in Section 13(1) (i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

49. This Court aptly observed in *Chetan Dass v. Kamla Devi* reported in (2001) 4 SCC 250, para 14 at pp.258-259, as under:

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in

general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

50. In *Savitri Pandey v. Prem Chandra Pandey* reported in (2002) 2 SCC 73, the Court stated as under:

"Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

51. This Court in the case of *Gananath Pattnaik v. State of Orissa* reported in (2002) 2 SCC 619: 2002 SCC (Cri) 461, observed as under:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."

52. The mental cruelty has also been examined by this Court in *Parveen Mehta v. Inderjit Mehta* reported in (2002) 5 SCC 706 at pp.716-17 [para 21] which reads as under:

"21. Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."

53. In this case the Court also stated that so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties

has broken down irretrievably.

54. In *A. Jayachandra v. Aneel Kaur* reported in (2005) 2 SCC 22, the Court observed as under: (Paras.10, 12 & 13) "10. The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

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 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 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 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."

55. This Court in *Vinita Saxena v. Pankaj Pandit* reported in (2006) 3 SCC 778) aptly observed as under:(paras 37-38) "37.As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

38. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer."

56. In *Shobha Rani -vs- Madukar Reddi* (1988) 1 SCC 105 : 1988 SCC (Cri) 60 (supra) at pp.108-09, para 5, the Court observed as under:

"5. Each case may be different. We deal with the conduct of human beings who are no generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty."

57.In this case, the Court cautioned the lawyers and judges not to import their own notions of life in dealing with matrimonial problems. The judges should not evaluate the case from their own standards. There may be a generation gap between the judges and the parties. It is always prudent if the judges keep aside their customs and manners in deciding matrimonial cases in particular.

58. In a recent decision of this Court in the case of *Rishikesh Sharma v. Saroj Sharma* reported in (2007) 2 SCC 263 : 2006 (12) Scale 282, this Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. The Court further observed that it will not be possible for the parties to live together and therefore there was no purpose in compelling both the parties to live together. Therefore the best course was to dissolve the marriage by passing a decree of divorce so that the parties who were litigating since 1981 and had lost valuable part of life could live peacefully in remaining part of their life. The Court further observed that her desire to live with her husband at that stage and at that distance of time was not genuine.

20. Also, in the aforesaid Judgment at Page 546 and 547 in Paragraph 101, the Hon'ble Supreme Court has enumerated some instances of human behaviour, which may be relevant in dealing with the cases 'mental cruelty' etc. and the same runs as follows:-

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, discommodore 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.

21. We deem it appropriate to make a mention that Wilde, J.O. in *Power v. Power* (1865) 4 SW & Tr. 173 : 12 LT 824, as observed that cruelty lies in the cumulative ill conduct which the history of marriage discloses.

22. The learned counsel for the Appellant/Wife also relies on the decision of the Hon'ble Supreme Court reported in *Manisha Tyagi -vs- Deepak Kumar* (I [2010] DMC 451 {SC}), wherein it is laid down that, "even the continued ill-treatment, cessation of marital intercourse, studied neglect, indifference of one spouse to other may lead to inference of cruelty".

23. The learned counsel for the Appellant/Wife cites the decision of the Hon'ble Supreme Court reported in *A. Jayachandra -vs- Aneel Kaur* [2005 (1) C.T.C. 215] and at Page 220, in Paragraph Nos.10 to 12, it is observed as follows:-

"10. The expression 'cruelty' has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a

matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

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 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 live 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 *Sobh Rani v. Madhukar Reddi*, AIR 1989 SC 121).

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 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 disturbance of mental peace of the other party."

24. Also, in the aforesaid decision at Page No.222, in Paragraph No.16, it is observed hereunder:-

"The matter can be looked at from another angle. If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In the instant case, after filing of the divorce petition a suit for injunction was filed, and the respondent went to the

extent of seeking detention of the respondent. She filed a petition for maintenance which was also dismissed. Several caveat petitions were lodged and as noted above, with wrong address. The respondent in her evidence clearly accepted that she intended to proceed with the execution proceedings, and prayer for arrest till the divorce case was finalized. When the respondent gives priority to her profession over her husband's freedom it points unerringly at disharmony, diffusion and disintegration of marital unity, from which the Court can deduce about irretrievable breaking of marriage.

25. Moreover, in Paragraph No.17, the Hon'ble Supreme Court has, inter alia, observed as follows:-

"17. Several decisions, as noted above, cited by learned counsel for the respondent to contend even if marriage has broken down irretrievably decree of divorce cannot be passed. In all these cases it has been categorically held that in extreme cases the Court can direct dissolution of marriage on the ground that the marriage broken down irretrievably as is clear from paragraph 9 of Shiv Sunder's case (supra). The factual position in each of the other cases is also distinguishable. It was held that the long absence of physical company cannot be a ground for divorce if the same was on account of husband's conduct. In Shiv Sunder's case (Supra) it was noted that the husband was leading adulterous life and he cannot take advantage of his wife shunning his company. Though the High Court held by the impugned judgment that the said case was similar, it unfortunately failed to notice the relevant factual difference in the two cases. It is true that irretrievable breaking of marriage is not one of statutory grounds on which Court can direct dissolution of marriage, this Court has with a view to do complete justice and shorten the agony of the parties engaged in long drawn legal battle, directed in those cases dissolution of marriage. But as noted in the said cases themselves those were exceptional cases."

26. He also seeks in aid of the decision of Hon'ble Supreme Court reported in Dr.N.G.Dastane -vs- Mrs.S.Dastane [(1975) 2 Supreme Court Cases 326], whereby and whereunder it is held as follows:-

"(a) Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of Section 10(1)(b) of the Act.

(b) The belief regarding the existence of a fact must be founded on a balance of probabilities. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on the promissory note. But whether the issue is one of cruelty or of a loan on a pro-note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved.

Neither Section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor Section 23 which governs the jurisdiction of the Court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the Court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases."

27. It is to be borne in mind that the 'mental cruelty' must be of such a nature that the parties cannot reasonably be expected to live together. The fact situation must be such that the wronged party cannot reasonably be asked to put up with the other party. It is a well settled fact in the absence of a positive act of cruelty a party is not entitled to obtain a decree of divorce.

28. As per Section 9 of the Hindu Marriage Act, 1955 the onus of establishing a case lies on the person who alleges certain facts. As a matter of fact, the petitioner has to prove two things for a Decree of Restitution of Conjugal Rights. (i) The Respondent has withdrawn from the society of the petitioner. (ii) That such withdrawal has been without reasonable excuse. The petitioner is to succeed on the strength of his own case and he cannot take advantage of the weakness of the defence as per decision *Sadhu Singh Balwant Singh -vs- Smt. Jagadish Kuar* (AIR 1969 Punjab 139). If a plea of ill-treatment is raised as a defence to a petition for Restitution of Conjugal Rights the burden of proving the same is on the Respondent as per decision *Anna Saheb -vs- Tarabai* (AIR 1970 Mathya Pradesh 36 (DB)). The early burden in view of the explanation to Section 9 of the Hindu Marriage Act is on the Petitioner to prove the pleading.

29. At this stage, the learned counsel for the Appellant/Wife also read the evidence of the father of the Respondent/Husband to show that in their house, prior to the marriage of the Appellant/Wife, they had two servant maids and after the marriage, the two servant maids were stopped. But there is a discrepancy in the said evidence, since, as per the evidence of the Respondent/Husband, there was only one servant maid at the time of the Appellant's marriage with the Respondent and that the said servant maid herself had stopped. According to the learned counsel for the Appellant/Wife, the said discrepancy between the evidence of the Respondent/Husband and his father affects the case of the Respondent/Husband. Also this particular circumstance is in favour of the Appellant/Wife to show that soon after her entering into the house of the Respondent/Husband, the two servant maids were stopped by his family.

30. It is useful to refer to the evidence of P.W.1, R.W.1 and R.W.2 for better and fuller appreciation of the merits of the case.

31. P.W.1 (Wife) has deposed that when she went to temple, the Respondent's (Husband) parents used to follow her secretly without her knowledge to know whether she is going to the temple or elsewhere. It is also her evidence that when she was sent to her parent's house, neither the Respondent/Husband nor his parents visited her and the child.

32.P.W.1 (in her cross-examination) has stated that she used to visit Kanniamman Temple near the house, but her mother-in-law will come behind her.

33.R.W.1 (Respondent/Husband) in his cross-examination has stated that for doing household work, there was a servant, who used to assist his mother at the time of cooking and it is incorrect to state, after marriage, the servant maid was stopped, but she herself stopped.

34. It is the evidence of R.W.2 (Father of Respondent/ Husband) that he had two female servants at his home even when his daughters were at home, one to wash clothes and to clean vessels and one to sweep the courtyard and the house and those servants continued during his daughter-in-law's period and even now.

35.R.W.2 (in his cross-examination) has deposed that in his house, he has two servant maids and at the time of marriage and later, when Appellant/Wife went out of his house, till that time he had two servant maids.

36. Merely sending money by R.W.1 (Respondent/Husband) to the Appellant/Wife as per Exs.R.12 to 15, payment of his son's School Fees, Policy taken by him for his son's welfare are all normal, parental routine acts of every Husband in the matrimonial tie or bond between the parties and therefore, it cannot be said that the payment of money or school fees of the son's etc. will be a pointer for his concern towards them.

37. Finding on points (i) and (ii) in C.M.A.No.3994 of 2008 and point in C.M.A.No. 3993 of 2008:-

Though the marriage between the parties had taken place on 25.05.2001, the fact remains that the Appellant/Wife is employed and well placed in life. Equally the Respondent/Husband is also well employed. The Respondent/Husband had not met the Appellant/Wife after she being taken to her house on 10.11.2001 under the guise of 'Thalai Deepavali'. Also the Respondent/Husband had not taken any steps or care to visit the Appellant/Wife. When the Appellant/Wife was pregnant, she was driven out of her matrimonial home and she gave birth to a male child on 17.06.2002. Notwithstanding the fact that the Appellant/ Wife's side had informed about the delivery of the child to the Respondent/Husband, he had neglected to maintain the Appellant/ Wife and also the child. Thus, these facts were not either contradicted or repudiated or even considered by the trial Court while dealing with F.C.O.P.Nos.1099 of 2005 and 1915 of 2004. The fact that the Respondent/Husband had not taken any care to maintain the Appellant/Wife and the child is a clear case of desertion and further, the mother-in-law could not behave the Appellant/Wife when she had been to temple and keeping her under constant surveillance amounts to cruelty.

38. At this juncture, it is to be pointed out that it is not necessary in a case of cruelty that any injury to health of a person or life of person should be there. Even a mental cruelty by means of a studied neglect or indifference of one spouse to the other or even a continued ill-treatment of one spouse by the other and also that there is a cessation of marital intercourse would amount to the acts of cruelty. To reiterate, at the risk of repetition, we have to point out that the Respondent/Husband had also admitted in his evidence that he has obtained the Appellant/Wife's Salary Certificate

through a Detective Agency. All these acts of the Respondent/Husband, in our view, amount to a clear case of mental cruelty. A cruelty in matrimonial life between the parties may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent. It is true that petty quibbles, trifling differences should not be exaggerated and magnified to destroy what is said to have been made in heaven and all quarrels must be weighed from that point of view in determining what constitutes cruelty in each particular case. It also depends upon the social status and their character and mental and physical conditions of the parties.

39. On a careful and proper consideration of the available materials on record and also taking note of the oral and documentary evidence let in by the parties before the trial Court, coupled with the cumulative facts and circumstance of the case in an integral fashion and further in the light of the discussion mentioned supra, we are of the considered view that the Appellant/Wife had made out a case of cruelty and desertion against the Respondent/Husband. Therefore, we are of the considered view that she is entitled to get a Decree of Divorce on that score.

40. In the instant case, the Appellant/Wife, though initially claimed a monthly maintenance of Rs.10,000/- per month from the Respondent/Husband, later made an endorsement before the trial Court that she had given up her claim. Hence, the Appellant/Wife is not entitled to claim any amount as monthly maintenance from the Respondent/Husband, as opined by this Court.

41. Inasmuch as the Appellant/Wife has proved the ground of Cruelty and Desertion, she is entitled to claim the relief of Dissolution of Marriage dated 25.05.2001 and consequently the Respondent/Husband is not entitled to claim the relief of Restitution of Conjugal Rights in F.C.O.P.No.1099 of 2005 and accordingly, point Nos.(i) and (ii) in C.M.A.No.3994 of 2008 and the point in C.M.A.No.3993 of 2008 are so answered.

42. In the result, the order passed by the I Additional Judge, Family Court at Chennai, in O.P.Nos.1099 of 2005 and 1915 of 2004 dated 30.09.2008 are set aside. Both the Civil Miscellaneous Appeals are allowed. The parties are directed to bear their own costs. Connected M.Ps. are closed.

bs To The Family Court, Coimbatore