IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 969 of 2010

For Approval and Signature:
HONOURABLE MR.JUSTICE JAYANT PATEL
HON'BLE SMT. JUSTICE ABHILASHA KUMARI

RAJENDRA RATILAL DALAL – Appellant(s)

Versus

DHARMISTHABEN WD/O REJENDRA R DALAL & D/O BABULAL KAMDAR – Defendant(s)

Appearance :MR VL THAKKAR for Appellant
MS DHARA M SHAH FOR MR SHIVANG M SHAH for Defendant.

CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL and HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 09/08/2010

ORAL JUDGMENT

(Per: HON'BLE SMT. JUSTICE ABHILASHA KUMARI)

1. The present appeal is directed against judgment and decree dated 26-8-2009 passed by the Family Court No.3, Ahmedabad, in Family Suit No.211 of 2003, whereby, the marriage between the appellant-husband and respondent-wife (hereinafter referred to as the appellant and the respondent as they appear in this appeal respectively) has been dissolved with effect from the date of judgment, under the provisions of Section 13(1) of the Hindu Marriage Act,1955 (The Hindu Marriage Act for short) and a permanent injunction has also been granted against the appellant.

2. The impugned judgment and decree came to be passed in a Suit filed by the respondent wife before the Family Court, being Family Suit No.211 of 2003, wherein she has prayed for a decree under Section 12 of the Hindu Marriage Act declaring that her marriage with the appellant as null and void on the ground that it has not been consummated, owing to the impotency of the appellant. Alternatively,

a decree for dissolution of marriage under Section 13(1) of the Hindu Marriage Act was also prayed for.

3. In order to appreciate the issues involved, it would be necessary to briefly state the relevant facts, which are as under:

3.1 The marriage between the appellant and respondent was solemnised on 28-1-2000. The respondent is serving as Junior Accounts Officer in the Telephone Department whereas the appellant is working in a Private Firm. After the marriage the respondent started staying with the appellant in the joint family. However, it is the case of the respondent that the marriage has never been consummated due to the impotency of the appellant, and this state of affair has continued throughout. According to the respondent the appellant, apart from being unable to fulfil his marital obligations, has inflicted mental and physical cruelty on her, due to which she has been driven out of the house and has been living separately since 7/9 January, 2001 (except for 24-1-2001). She has, therefore, approached the Family Court by way of the above-mentioned Suit, praying for the relief of declaration that the marriage be declared as null and void under Section 12 of the Hindu Marriage Act. Alternatively, it was prayed that as the respondent has treated her with cruelty, a decree of divorce may be granted.

3.2 As far as the aspect of cruelty is concerned it was asserted by the respondent before the Family Court that the appellant has treated her with cruelty as his behaviour changed towards her after the marriage. The appellant started harassing her and forcing her to give Rs.9000/- per month from her salary and also to transfer the Flat purchased by her before the marriage, situated at Himgiri Apartments, in his name. As the respondent did not agree to the same, she was subjected to physical and mental cruelty and torture and also had to endure beatings and false allegations. She has even broken one of her fingers due to the beating given by the appellant. As per the say of the respondent, she tolerated such behaviour even though the appellant was unable to consummate the marriage. On the proposal of the appellant and his mother, she agreed to live with them separately from the joint family at her Flat at Himgiri Apartments as the existing premises, where the joint family was staying, were small and were shared by the brother-in-law of the respondent and his family. However, the harassment continued and the appellant threatened that he would commit suicide, if she refused to transfer the flat. It is the case of the respondent that due to the harassment of the appellant, she was compelled to leave her own Flat, and to start residing with her parents. Even after her departure the appellant and his mother

continued to reside in the Flat of the respondent at Himgiri Apartments. On 24-1-2001, the appellant came to the parental house of the respondent and apologized for his misbehaviour, asserting that he would treat her well,therefore, the respondent had returned to Himgiri Apartments, on his assurance, but on the very same night the appellant started torturing her in order to compel her to transfer the Flat in his name. Even then the appellant could not fulfil his marital obligations, therefore, the respondent returned to her parental home on 25-1-2001. According to the respondent, the appellant threatened her that he would not allow her or her family members to live a peaceful life but on the very next day i.e. 26-1-2001 a devastating earthquake took place and Himgiri Apartments, was destroyed. The appellant sustained injuries and was admitted to V.S. Hospital. It is the case of the respondent that she had taken care of the appellant during the period while he was injured and served him as a dutiful wife, and had even taken him to a Private Hospital for better treatment. However, after recovering from the injury, the appellant has fraudulently taken a cheque for Rs.50,000/-, which was given by Mahudi Trust as compensation towards earthquake relief, by misrepresenting that he has purchased the Flat in the name of the respondent. The appellant had assured her that he would return the amount of Rs.50,000/- to her, but the same has not been done. It was further the case of the respondent that the parties have been living separately for more than two years and there is no relationship of husband and wife between them. However, the appellant used to come to the office of the respondent in order to harass and abuse her in the presence of her colleagues, which has resulted in an apprehension in her mind that there is danger to her life and limb from the appellant. Further, with the intervention of elders, a compromise was arrived at, in order to take divorce by mutual consent between the parties, wherein it was agreed that the compensatory amount of Rs.50,000/- would be returned by the appellant to the respondent, who was to delete her name from the Locker of the Bank, and give back articles of the appellant and the key thereof. According to the respondent, she has deleted her name from the Bank Locker and returned the key and has not taken any ornaments belonging to the appellant. The appellant has committed breach of the agreement and not returned Rs.50,000/- and also refused to sign on the petition for divorce by mutual consent, just to harass the respondent and extract money from her, as she is drawing a better salary than him. It was the case of the respondent that as there is no physical relationship between the appellant and her and as the appellant has treated her cruelly, harassed and tortured her physically and mentally, she was constrained to file the Suit for divorce, before the Family Court.

4. The appellant opposed the Suit, denying all the allegations levelled against him. According to the appellant, the allegation of impotency is false and incorrect and the marriage has been consummated on the very first night. The appellant is capable of fulfilling his marital obligations and the Report of the Laboratory, for analysis of his semen is in his favour, and the same does not prove that he is impotent. The allegations of cruelty, physical and mental torture, harassment, and beatings have been denied. On the other hand, the appellant has stated that it is solely because the respondent does not want his mother to live with him that she had levelled false and concocted allegations against him,for obtaining divorce. It is denied that he has compelled the respondent to leave the matrimonial home and is asserted that she left on her own, on 25-1-2001. Though the appellant has admitted that the respondent took care of him after he was injured during the earthquake, he has further asserted that when the respondent came to know that he suffered from a paralytic effect, she left his company. The appellant has admitted that he has received Rs.50,000/- as compensation from Mahudi Trust and as per the compromise he was to give the said amount to the respondent, but has asserted that the respondent has not honoured her part of the compromise. All other allegations have been denied by the appellant, who has specifically stated that he is not ready to give divorce to the respondent, unless she returns the cash and ornaments which were lying in the joint Locker. According to the appellant, as the respondent comes from a well-off family and was used to living a lavish life, and as her salary is more than that of appellant,she was dissatisfied with the marriage from the very beginning and had, therefore,decided to take a divorce from him. In this background, being aggrieved by the impugned judgment and decree of the Family Court, the appellant has filed the present appeal.

5. On the pleadings of parties, the Family Court framed issues for determination at Exh.14, which are reproduced herein under:

"(1) Whether the petitioner proves that the marriage has not been consummated owing to the impotence of the respondent,and therefore, the marriage is null and void?

(2) Whether the petitioner proves that after solemnization of the marriage the respondent treated petitioner with cruelty as alleged in the petition?

(3) Whether the petitioner proves that the respondent has deserted the petitioner for a continuous period of not less than two years

immediately preceding from the date of the presentation of the petition without any cause and without consent of the petitioner?

(4) Whether the petitioner is entitled to get a decree of dissolution of marriage on any of the above grounds, if yes, on which ground?

(5) Whether there is any legal ground under Section 23 of the Hindu Marriage Act for not granting the petition?

(6) What order and decree?

6. The findings of the Court on issues Nos.1,2 and 3 are in the affirmative and on issue No.4 it is found that the respondent is entitled to get a decree of dissolution of marriage on the grounds of cruelty and desertion.

7. Mr.V.L.Thakkar, learned advocate for the appellant has submitted that the judgment and decree under challenge is liable to be quashed and set aside as the same is not in accordance with law and has been passed without application of mind, inasmuch as the Family Court has not considered the facts in proper perspective and had wrongly passed the decree in favour of the respondent, on the ground of cruelty and desertion. It is further submitted that even on the ground of impotency, there was no material before the Family Court to make good the allegations of the respondent, as a semen test is not sufficient evidence for establishing whether the appellant is impotent or not, therefore, the finding of the Family Court on this ground is un-justified. On the contrary, apart from the report of the Genetics Test Laboratory dated 3-7-2001 at Exh.22 produced by the respondent, where it is mentioned that the semen 'motility' is 'poor', other reports are produced by the appellant at Exh.43 wherein the count of semen is stated to be 'fair', but the Family Court has not taken these into consideration, and only the documents produced by the respondent have been relied upon to arrive at the conclusion that the appellant is impotent and that the marriage has not been consummated. It is further submitted by Mr.Thakkar that 'poor motility', as mentioned in the report at Exh.22, refers to the semen count, and as such it cannot be presumed to mean that the petitioner is impotent and incapable of consummating the marriage, therefore, the finding on issue No.1 regarding impotency of the appellant is incorrect, and not supported by any material on record.

7.1 Regarding the issue of cruelty, it is submitted by the learned counsel for the appellant that the fact that the appellant has taken

Rs.50,000/- from Mahudi Trust as compensation for the Flat cannot be considered as cruelty to the respondent. Though it is denied that the appellant has inflicted beatings upon the respondent, it is admitted by the learned counsel for the appellant that it may have happened once or twice but beatings cannot be considered to be 'cruelty' as these type of incidents are the normal wear and tear of married life. It is further denied on behalf of the appellant that he was pressurising the respondent to transfer the Flat in his name. It is submitted that as the respondent was paying the loan on the Flat, there was no point in asking for transfer of the same, therefore, the allegation of cruelty is not proved. Similarly, the learned counsel for the appellant has submitted that there is no question of asking the respondent to hand over her salary to the appellant as the respondent was paying the loan installments therefrom, and hardly anything was left over after payment of the same. It is asserted by the learned counsel for the appellant that the appellant was also paying the monthly loan installments towards the Flat along with the respondent. Further, it is submitted that the respondent has taken money and ornaments from the joint Locker of the respondent and appellant during the time when the earthquake took place and she has not returned the same, which has not been considered by the Family Court.

7.2. On the point of desertion it is contended by the learned counsel for the appellant, that the appellant has never treated the respondent with cruelty nor has inflicted mental or physical torture upon her, or harassed her at home or at the work place, so as to compel her to leave the house. On the contrary, the respondent has voluntarily gone on her own, therefore, the finding of the Family Court that the appellant is guilty of desertion as the respondent had been compelled to leave the house due to his ill- behaviour and cruelty,is incorrect.

8. On the above grounds, it is submitted by the learned counsel for the appellant that the impugned judgment and decree deserves to be quashed and set aside.

9. Ms.Dhara Shah, learned counsel for the respondent has strongly opposed the appeal by contending that the judgment of the Family Court is just and proper, and has been passed after proper application of mind,after considering the cogent evidence on record. It is submitted that the appellant has not been able to adduce sufficient proof to the effect that he is not impotent and that the marriage was consummated. It is further contended that the appellant has admitted in his cross-examination that he used to quarrel with the respondent. The cruelty and harassment meted out by the appellant were of such a

degree that the respondent was forced to leave her own flat. The learned counsel for the respondent has emphasised that there is no marital relationship between the appellant and the respondent, and they have been living separately since the year 2001, nor is there any likelihood of reconciliation between the parties. The learned counsel for the respondent has further submitted that even though the respondent had to leave her own Flat, she had taken care of the appellant when he was injured after the earthquake. Further, the respondent was living in the said Flat on the request of the appellant's mother and brother, and at no point of time has she refused to live in the joint family. It is further contended on behalf of the respondent that the appellant has not submitted any original documents before the Family Court and has only levelled baseless allegations, without any proof, therefore, on the facts and in the circumstances of the case,the Court may not interfere with the decree of divorce passed by the Family Court, which is perfectly legal and justified.

10. We have heard the learned counsel for the respective parties at length and in detail, in order to decide the appeal finally, at this stage with their consent. We have also perused various documents on record,including the deposition of parties and other relevant material made available to us.

11. The first aspect that arises for our consideration is regarding the finding recorded by the Family Court on the issue of impotency of the appellant, and his inability to consummate the marriage. After examining the entire material on record, we find that there is no conclusive medical evidence of any expert, produced by either of the parties which would prove that the appellant is impotent and unable to perform his marital obligations. In his cross-examination, the appellant has himself referred to the Certificate of the Genetics Center Laboratory at Exh.22 wherein, on analysis of the semen the report states that the 'motility' is 'poor'. The appellant has produced some reports of another Laboratory vide Exh.43 wherein it is stated that the 'motility' is 'fair'. On the basis of these reports, the appellant has sought to prove that he is not impotent. It is, however, an admitted fact that the reports at Exh.43 are not in original and have not been proved by the appellant by examining any Doctor or Specialist in the concerned field of Medical Science. In the absence of any conclusive proof or opinion of a medical expert, it is not possible for us to conclude that poor or fair motility of the semen analysis of the appellant would mean that the appellant is impotent, or unable to consummate the marriage. It is true that the respondent has categorically stated that the marriage has not been consummated in

spite of the fact that the appellant and respondent went for their honeymoon for a week, which had to be cut short as they returned after two or three days due to some difference of opinion, but apart from the divergent stands taken by the parties on this issue, there is no material on record to enable us to come to any definite conclusion regarding the impotency of the appellant. The appellant has maintained that the marriage has been consummated and relations as husband and wife took place between the parties on several occasions. The respondent categorically denies this and has asserted that there is no consummation of the marriage at all. It is the ipse dixit of the appellant against that of the respondent. However, such personal and intimate matters are known only to the partners to a marriage, and in the absence of any specific proof of impotency by a medical expert,in our view, the finding of the Family Court that the respondent has been successful in establishing that the marriage has not been consummated due to the impotency of the appellant, cannot be endorsed. Though the respondent had sought a declaration under Section 12(1)(a) of the Hindu Marriage Act that the marriage be declared void and be annulled on the ground that it has not been consummated owing to the impotency of the appellant, the Family Court, though having found issue No.1 regarding impotency of the appellant against him, has not passed the impugned judgment and decree on the ground that the marriage is void as it has not been consummated, but has declared the marriage to be dissolved under the provisions of Section 13(1) of the Hindu Marriage Act, on the grounds of cruelty and desertion.

12. Insofar as the issues of cruelty and desertion are concerned, it is clear from the evidence on record that the respondent was serving in the Telephone Department and earning a decent salary, when she married the appellant. It is also an admitted position that the respondent owned the Flat situated at Himgiri Apartments where she was staying with the appellant and his mother. Though the appellant has stated that he was also paying monthly loan installments towards the Flat along with the respondent, there is no material on record to support this assertion. On the contrary, it is admitted by the appellant that the Flat was purchased by the respondent before her marriage and was in her name and she was paying the monthly installments. Though the appellant has put up a case that the respondent did not want his mother to stay with them, it is clear from a perusal of the material on record that not only did the respondent stay in the joint family before moving into Himgiri Apartments but the mother of the appellant also came to live with them due to the fact that the joint family house where they were previously staying was very small and

was shared by the parents of the appellant, his brother and his family consisting, of wife and two children, aged 18 and 16 years respectively. The material on record does not reveal that it was on the insistence of the respondent that they moved to Himgiri Apartments as asserted by the appellant. Further, we find that in spite of the fact that the Flat where the respondent was staying with the appellant belonged to her, she was forced to leave the same due to the harassment,cruelty and continuous mental and physical torture meted out by the appellant, in order to compel her to transfer the same in his name. It is also clear from the material on record that the appellant has pocketed the amount of Rs.50,000/- which was given as compensation by the Mahudi Trust when the Flat was destroyed in an earthquake. Further it is admitted by the appellant that the respondent came back to take care of him after he was injured in the earthquake and had taken him to a Private Hospital for better treatment. The Family Court has found that there is no material on record to prove the assertion of the appellant that the respondent has taken away ornaments and cash from the Locker which was in her joint name along with the appellant. This finding cannot be faulted.The statement of the respondent that the Locker in question was given to her by her parents and the name of the appellant was added later on,as he was her husband, and that after the scandal of Madhupura Bank, she had taken her ornaments and gifts from the Locker, has also remained unchallenged.

13. The findings of the Family Court that the appellant has treated the respondent with cruelty by harassing and pressurising her to transfer the Flat of the respondent in his name, and by pocketing the amount of Rs.50,000/- towards compensation for the said Flat is, in our view, amply supported by material on record. It is evident that the respondent was compelled to leave her own Flat which she had purchased out of her own money before the marriage, due to the cruelty and harassment of the appellant. The material on record also points out to beatings given by the appellant to the respondent, which also resulted in a broken finger which has virtually been admitted by the learned counsel for the appellant. The allegations of taking away the ornaments would, constitute mental cruelty and cause pain to any spouse. It is not possible for us to believe that the respondent would have left her own Flat, where the appellant and his mother were staying, had she not been subjected to physical and mental cruelty of such a degree, so as to compel her to do so. The finding of the Family Court that the respondent has not left the matrimonial house without any reasonable cause as the appellant has forced her to leave the flat and that the appellant has, therefore, deserted the respondent for a

continuous period of not less than two years immediately preceding the date of the presentation of the petition not liable to be interfered with, as the same is well-founded and supported by material on record.

14. In **Manisha Tyagi v. Deepak Kumar, reported in (2010)4 SCC 339, the Supreme Court** held as under:

"26. At this stage we may notice the observations made by this Court in Naveen Kohli v. Neelu Kohli. In this case the court examined the development and evolution of the concept of mental cruelty in matrimonial causes. In para 35 it is observed as follows: (SCC p.568)

35. The petition for divorce was filed primarily on the ground of cruelty. It may be pertinent to note that, prior to the 1976 amendment in the Hindu Marriage Act, 1955 cruelty was not a ground for claiming divorce under the Hindu Marriage Act. It was only a ground for claiming judicial separation under Section 10 of the Act. By the 1976 amendment, cruelty was made a ground for divorce and the words which have been omitted from Section 10 are 'as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party'. Therefore, it is not necessary for a party claiming divorce to prove that the cruel treatment is of such a nature as to cause an apprehension a reasonable apprehension that it will be harmful or injurious for him or her to live with the other party.

(emphasis supplied)

27. The classic example of the definition of cruelty in the pre-1976 era is given in the well-known decision of this Court in N.G.Dastane (Dr.) v. S.Dastane, wherein it is observed as follows: (SCC p.337,para 30)

30.... The enquiry therefore has to be whether the conduct charged 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.

This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonably be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that it would be harmful or injurious to continue the cohabitation with

the other spouse. Therefore to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment, cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the trial court and the appellate court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce.

(emphasis supplied)"

15. The principles of law enunciated herein-above are applicable to the facts and circumstances of the present case, and the impugned judgment and decree does not deserve to be interfered with.

16. However, before parting with this judgment we would like to make it clear that there is no conclusive evidence regarding the impotency of the appellant, or the assertion that the marriage has not been consummated. The finding of the Family Court on this point, therefore, cannot be endorsed. However, as the decree of dissolution of marriage has been passed by the Family Court under the provisions of Section 13(1) of the Hindu Marriage Act, on the ground of cruelty and desertion and not under Section 12 thereof, the same is not interfered with. Similarly, as the Family Court has recorded cogent findings on the ground of desertion and cruelty against the appellant and in view of the material on record that the appellant used to harass the respondent at her work place and misbehave with her, the permanent injunction granted by the Family Court restraining the appellant from harassing the respondent at her work place and misbehaving with her and also with the father and brother of the respondent, is justified and not interfered with.

17. The appeal is devoid of any merit, therefore, fails and is dismissed. There shall be no orders as to costs.

(Jayant Patel,J)

(Smt.Abhilasha Kumari,J)