

CHAPTER NINE

SEXUALITY AND REPRODUCTIVE DECISION-MAKING IN MATRIMONIAL LAWS

India's matrimonial laws touch on several aspects of sexuality and reproduction, including the role of sex and reproduction in marriage. In recent years, the Supreme Court of India has in a number of cases, recognized sexual and reproductive autonomy as a right of an individual.¹ In *Joseph Shine v. Union of India*,² the Supreme Court struck down a provision that criminalized adultery by a wife,³ and in doing so recognized the sexual autonomy of a person within marriage in the following terms:

[There is an] assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values...

This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. ... Marriage – whether it be a sacrament or contract – does not result in ceding of the autonomy of one spouse to another.

Despite this judgment, challenges to sexual and reproductive autonomy emerge in India's matrimonial laws.⁴ The following issues have arisen in the context of sexuality and reproductive-decision making within matrimonial laws:

- Denial of Sex Within Marriage as “Cruelty” and a Ground for Divorce
- Termination of Pregnancy Without Spousal Consent as “Cruelty” and a Ground for Divorce
- Restitution of Conjugal Rights: Implications on Rights to Sexual and Reproductive Autonomy and Health

Denial of Sex Within Marriage as “Cruelty” and a Ground for Divorce

Divorce laws in India do not recognize no-fault grounds of divorce.⁵ In contested cases, the party seeking divorce has to prove that the other party engaged in wrong-doing as defined in the grounds for divorce under the personal law governing that marriage. One such fault-based ground in various divorce laws is that of treating one's spouse with “cruelty.” For example, Section 13(1)(ia) of the Hindu Marriage Act, 1955, provides for cruelty as a ground for divorce. Courts have had to decide whether denial of sexual intercourse amounts to the “fault” of “cruelty” under Section 13(1)(ia) and consequently whether the spouse is entitled to a divorce on this ground.⁶ In light of the Supreme Court's observations regarding sexual autonomy, including within marriage,⁷ it is pertinent to ask whether terming denial of sex to a spouse as “cruelty” within marriage and therefore a ground for divorce, violates a person's sexual autonomy.

The Supreme Court's decision in *Samar Ghosh v. Jaya Ghosh*,⁸ is the authoritative judgment on the issue of whether denial of sex amounts to “cruelty.” The Court, noting that a straitjacket definition could not be provided for what amounts to “mental cruelty” listed a few circumstances, which in its opinion amounted to such cruelty. Denial of sex by a spouse for a “considerable period” of time without any valid reasons was one ground. A unilateral decision by one of the spouses not to have children was another.

The decision of the Supreme Court in *Samar Ghosh* has often been cited and relied on thereafter in cases involving denial of sex by a spouse. The Supreme Court in *Vidhya Viswanathan v. Kartik Balakrishnan*,⁹ held that not allowing one's spouse to have sexual intercourse for a “long period” of time without valid reasons would amount to “cruelty.” In *Shashi Bala v. Rajiv Arora*,¹⁰ the Delhi High Court ruled that sexual relations between spouses is an important element of a marriage, without which the relationship would become insipid. It reiterated pronouncements of various courts to hold that sex is the foundation of a marriage and that marriage without sex is an anathema. Although it refused to quantify the number of times a couple should have sexual intercourse during a period of time, it cited *Samar Ghosh* to rule that

unilateral denial of sex by a spouse without reasonable grounds amounts to “mental cruelty.” In *Rajeev Kumar v. Vidya Devi*,¹¹ the Delhi High Court relying on *Vidhya Viswanathan* held that denying sexual intercourse for four and a half years amounted to “cruelty.”

Agreeing with the holding of the court in *Shashi Bala*, the Bombay High Court in *Reshma Rakesh Kadam v. Rakesh Vijay Kadam*,¹² ruled that sex plays an important role in the marital life of a couple. Consequently, avoiding sexual relations would amount to “cruelty.” The Madras High Court in *Krishnaraj v. Sathyapriya*,¹³ however, ruled that if avoidance of sexual relations is after a considerable time of being married (in this case sixteen years), it cannot be considered to be “cruelty.” The Court ruled that if denial of sexual intercourse is soon after the marriage, it may be considered to be “cruelty,” but not otherwise.

In *Manju Thakur v. Raj Kumar*,¹⁴ the Himachal Pradesh High Court ruled that sex is the purpose of marriage. On the facts of the case, it ruled that non-consummation of a marriage because of physical or psychological impotence is a ground for divorce. It further held that persistent refusal to consummate the marriage would lead to an inference that the spouse is incapable of having sexual intercourse. In *Sri Uma Mahesh v. Smt. Methravathi*,¹⁵ the Karnataka High Court distinguished between impotence and sterility. It ruled that impotence means the inability to have sexual intercourse and not the inability to conceive. Inability to have sexual intercourse may lead to non-consummation of a marriage, and that can be held to be “mental cruelty.” However, inability to conceive due to a medical condition cannot be considered to be “cruelty” and, consequently, a ground for divorce.

Termination of Pregnancy Without Spousal Consent as “Cruelty” and a Ground for Divorce

The Medical Termination of Pregnancy Act, 1971 (MTP Act) provides the legal framework governing termination of pregnancies, as well as the procedure to be followed before such termination. It does not require the doctor terminating the pregnancy to take the consent of the spouse, in case of married women. Despite this, the question of whether spousal consent is required for termination of pregnancy has arisen in many cases. For instance, in *Dr. Mangla Dogra v. Anil Kumar Sharma*,¹⁶ the question before the Punjab and Haryana High Court was whether the express consent of the husband is required before his wife’s pregnancy is terminated. The court ruled that an unwanted pregnancy in the case of a married woman can be terminated as per Section 3(2) of the MTP Act. Section 3(4)(b) of the Act requires only the consent of the woman to be obtained. Consent of the husband is required by neither the MTP Act nor the MTP Rules. The court also recognized the reproductive choice of the wife and ruled that consent to sexual intercourse does not imply consent to give birth to a child conceived as a result. The woman, the court held, is the best judge to decide whether to continue or terminate the pregnancy. It ruled that the consent of the husband, either express or implied, is not required to terminate the pregnancy under the MTP Act. The husband filed an appeal in the Supreme Court against the decision of the High Court. The Supreme Court refused to entertain the appeal and dismissed it.¹⁷ Consequently, the Court has approved the position taken by the Punjab and Haryana High Court that the consent of the husband is not required for a woman to terminate her pregnancy. More recently, the Supreme Court in *Z v. State of Bihar*,¹⁸ ruled that only the consent of the woman is relevant under the MTP Act. The consent of the husband or father (in case of adult women) is not required.¹⁹

However, cases have arisen where courts have granted divorce on the ground that termination of pregnancy without the consent of the husband amounts to “cruelty.”²⁰

Restitution of Conjugal Rights: Implications on Rights to Sexual and Reproductive Autonomy and Health

Under the Hindu Marriage Act, if a husband or a wife has “withdrawn from the society” of the other, without reasonable grounds, the other spouse may file an application before the court for restitution of conjugal rights.²¹ If the court is satisfied of the truth of the allegations made, it may decree restitution of conjugal rights.

The Andhra Pradesh High Court in *T. Sareetha v. Venkata Subbaiah*,²² struck down Section 9 of the Hindu Marriage Act, holding it to be unconstitutional. The Court ruled that a decree of restitution of conjugal rights implies enforcing marital intercourse. This would improperly transfer the choice of the person to have intercourse or not to the state, and at the same time transfer the choice of whether to procreate or not also to the state. The High Court held that the provision violates the right to sexual autonomy and bodily integrity of the individual to whom the decree is directed. In the case

of women, it also violates their reproductive autonomy. The Court ruled that Section 9 violated the right to privacy of the individual since it invaded their zone of intimate decisions. A decree of restitution of conjugal rights would imply forcing sex on an unwilling individual. It noted that such forced/coerced sex violates the fundamental rights of the person. Coerced sex could also lead to pregnancy, which would be a violation of the woman's reproductive autonomy. This, the Court held, violates the right to dignity and the right to privacy of the woman. Consequently, a decree of restitution of conjugal rights was said to offend the guarantees of life, personal liberty, and human dignity and decency under Articles 14, 19, and 21 of the Indian Constitution. The Court added that "state coercion" of this nature was ineffective in preserving or prolonging a matrimonial relationship.

This case was, however, overruled by the Supreme Court in *Saroj Rani v. Sudarshan Kumar Chadha*.²³ The Supreme Court held that the Andhra Pradesh High Court in *T. Sareetha* had misinterpreted the meaning of the term "conjugal." It held that the term pertains to the right of the spouses to the "society of the other." This right, it ruled, was inherent in the marriage itself. The Court held that Section 9 was only a codification of preexisting law and served a social purpose in ensuring that marriages do not break up. Hence, if understood in the "proper perspective," Section 9, the Court ruled, does not violate Articles 14 and 21 of the Indian Constitution. In doing so, the Court referenced, and agreed with the decision of a Single Judge of the Delhi High Court,²⁴ wherein the court had held that sexual intercourse, though an important element of a marriage, is not the ultimate goal of the marriage. It ruled that a court cannot enforce sexual intercourse. The remedy of restitution of conjugal rights, the Delhi High Court held, is to provide restitution for "cohabitation and consortium" and "not merely sexual intercourse."

A nine-judge bench of the Supreme Court in *Justice K.S. Puttaswamy — I v. Union of India*,²⁵ held that an individual's right to privacy is a fundamental right, guaranteed under Articles 19 and 21 of the Indian Constitution. The Court ruled that sexual and reproductive autonomy, and decisions relating to marriage and procreation, amongst others, form a part of the right to privacy and dignity. Further, in *Joseph Shine v. Union of India*,²⁶ the Supreme Court has recognized the right of a married woman to retain her sexual autonomy. Hence, it is conceivable that Section 9 of the Hindu Marriage Act may not survive a future constitutional challenge and that the Andhra Pradesh High Court's judgment in *T. Sareetha* may be revived.

Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations concerning women's sexual and reproductive rights in the context of marriage, including concerning criminalization of marital rape and ensuring reproductive autonomy to women regardless of marital status.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).²⁷ Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.²⁸ The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."²⁹

INTERNATIONAL TREATY STANDARDS

TREATIES

- **CEDAW, Articles 1, 5(a), 12, 15(4), 16(1)** (prohibiting discrimination on the basis of marital status and within marriage; guaranteeing women's rights to health care, family planning information and services, and to decide the number and spacing of children; obligating elimination of practices based on stereotyped roles for men and women).
- **ICESCR, Article 10(1)** (protecting right to equality and affirming "marriage must be entered into with the free consent of the intending spouses").

- **ICCPR, Articles 17, 23** (protecting the rights to privacy and family life; affirming no marriage can be entered into without free and full consent, and to equality during and at the dissolution of marriage).

SELECTED GENERAL COMMENTS

- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 15–21, 24–26, 29–33 (recognizing violence against women may constitute torture or ill-treatment, including rape and forced continuation of pregnancy, abortion, sterilization, and pregnancy; and affirming that marital rape must be criminalized).
- **CEDAW Committee, *General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 1–2, 12–15, 17, 21, 29 (recognizing reproductive health as part of the right to health, including ensuring family planning services without requiring third-party authorization; affirming that protection from violence is a component of the right to health).
- **CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations***, U.N. Doc. A/49/38 (1994), paras. 16–17, 22–40, 50 (outlining the key aspects of the right to equality in entering into, during, and at the dissolution of marriage).
- **Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 25–29, 41, 49 (recognizing the obligation to ensure women’s equal rights to sexual and reproductive health, including abortion, guarantee women’s autonomous consent to care, and ensure protection from marital rape).
- **Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (recognizing the right to life requires refraining from introducing new barriers and removing existing barriers to effective access to safe abortion).

INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women***, UN Doc. CEDAW/C/OP.8/PHL/1 (2015), paras. 41–43, 52(a)–(b) (recognizing that local policies limiting access to modern methods of contraceptives violate the obligation to eliminate discrimination against women in marriage and family relations by denying them independence and choice in determining the number and spacing of their children; also finding such policies reinforce discriminatory stereotypes of women as primarily mothers and childbearers; and urging the State to ensure women have information on and access to contraceptives regardless of marital status).

UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on violence against women, its causes and consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy: Cultural practices in the family that are violent towards women***, U.N. Doc. E/CN.4/2002/83 (2002), paras. 99–104, 109–111, 119, 123–132 (describing how poor legislation on sexual activity can lead to the violation of women’s rights to sexual and reproductive health, such as unequal divorce laws for men and women and the failure to criminalize marital rape; and outlining State obligations to prevent and punish violence against women and to change customs that constitute or facilitate violence against women).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 24–30, 34, 39, 44, 53–56, 85 (recognizing that inequality within marriage, family life, and divorce can lead to violations of women’s right to sexual and reproductive health).
- **SR Health, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 54–60 (outlining that women’s autonomous consent in health care settings is fundamental to the right to sexual and reproductive health, that third-party consent requirements violate this right, and that “[r]eproductive freedom should never be limited by individuals or States as a family planning method”).

- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak***, U.N. Doc. A/HRC/7/3 (2008), paras. 44–49, 68, 70–71 (describing how domestic violence can amount to torture and outlining how State laws on marriage and divorce can contribute to gender-based violence, and thus to torture or ill treatment).

SELECTED REGIONAL CASE LAW

EUROPEAN COURT OF HUMAN RIGHTS

- ***S.W. v. United Kingdom, Application No. 20166/92 (1995)***, para. 44 (finding that criminalizing marital rape conforms with “respect for human dignity and human freedom” and holding that applicant’s conviction for marital rape did not violate his right to be free of arbitrary prosecution, conviction, or punishment).

RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

IN THE HIGH COURT OF ANDHRA PRADESH

T. Sareetha v. T. Venkata Subbaiah

AIR 1983 AP 356

P.A. Choudary, J.

A husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. The suit succeeded in the lower court and the wife challenged the order of the lower court in a civil revision petition before the High Court asking it to decide upon the issue of whether Section 9 of the Hindu Marriage Act, 1955 was liable to be struck down as being violative of fundamental rights guaranteed under Articles 14, 19 and 21 of the Indian Constitution. It was contended that Section 9 violates the right to life, personal liberty, human dignity and decency.

Choudary, J.: “This Civil Revision Petition is filed by Sareetha, a well-known film actress of the South Indian screen against an order passed by the learned Subordinate Judge, Cuddapah, overruling her objection raised to the enter training of an application filed by one Venkata Subbaiah, under Section 9 of the Hindu Marriage Act (hereinafter referred to as ‘the Act’) for restitution of conjugal rights with her.

2. Sareetha while studying in a high-school and then hardly aged about sixteen-years and staying with her parents at Madras, was alleged to have been given in marriage to the said Venkata Subbaiah, at Tirupathi on 13-12-1975. Almost immediately thereafter, they were separated from each other and have been continuously living apart from each other for these five-years and, more, Venkata Subbaiah had, therefore, filed under section 9 of the Act O.P. No. 1 of 1981 on the file of the Sub-Court, Cuddapah, for restitution of conjugal rights with Sareetha...

...

PART II.

17. This leads me to the consideration of the other half of this case which raises an important constitutional question. Sareetha in her petition dated 31-8-1981 of which notice from this court had been duly given to and served upon the Attorney General of India, New Delhi, raised for the first time a question of constitutional validity of Section 9 of the Hindu Marriage Act. Through that petition, Sareetha claimed that Section 9 of the Act, “is liable to be struck down as violative of the fundamental rights in Part III of the Constitution of India, more particularly articles 14, 19 and 21 inasmuch as the statutory relief under the said provision, namely, restitution of conjugal rights offends the guarantee to life, personal liberty and human dignity and decency.” As the above contention of Sareetha involves the question of constitutional validity of Section 9 of the Act, authorising grant of curial relief of restitution of conjugal rights to a Hindu suitor, I read Section 9 of the Act in full and the relevant parts of its allied procedural provisions contained in Order 21 Rules 32 and 33 of the Civil Procedure Code.

SECTION 9: RESTITUTION OF CONJUGAL RIGHTS:

“When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the court, on being satisfied the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation: Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.”

Order 21 Rule 32 of C.P.C. Decree for specific performance for restitution of conjugal rights, or for an injunction:

“(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property, or, in the case of a decree for the specific performance of a contract, or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(2)

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for (six months) if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of proceeds the court may award, to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree, and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) from the date of the attachment, on application to have the property sold has been made, or if made has been refused, the attachment shall cease.

Rule 33. Discretion of court in executing decrees for restitution of conjugal rights:

(1) Notwithstanding anything in R. 32, the court either at the time of passing a decree (against a husband) for the restitution of conjugal rights or at any time afterwards, may order that the decree (shall be executed in the manner provided in this rule.)

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction secure to the decree-holder such periodical payment.

(3) The court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.”

A combined reading of the above substantive and procedural provisions relating to the grant of relief of destitution (sic) of conjugal rights by court makes it clear that the decree for restitution of conjugal rights contemplated to be granted under Section 9 of the Act is intended by the statutory law to be enforced in species under O. 21 Rr. 32 and 33 by applying financial, sanctions against the disobeying party. Additionally always a court can enforce its decree through its contempt powers. The Judicial Committee of the Privy Council in *Moonshed Buzleo Rhueem v. Shumsoon Nissa Begum*, (1867) 11 Moo Ind App 551, held that a suit for restitution of conjugal rights filed by a Muslim husband was rightly filed as a suit for specific performance. It is on the same lines that Order 21 Rule 32 of the Code of Civil Procedure speaks of a decree granted for restitution of conjugal rights as a decree of specific performance of restitution of conjugal rights. Conjugal rights connote two ideas, (a) “the right which husband and wife have to each other’s society” and (b) “marital intercourse.” (see *The Dictionary of English Law* by Earl Jowitt P. 453.) In *Wily v. Wily* (1918) P. 1 “an offer by the husband to live under the same roof with his wife, each party being free from molestation by the other was held not an offer of matrimonial cohabitation.” (see N.R. Raghavachariar’s *Hindu Law*, 7th Edn. Vol. II P. 980. *Gupte’s Hindu Law of Marriage* P. 181 and *Derrett’s Introduction to Modern Hindu Law* Para 308). In other words, sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights. It follows, therefore, that a decree for restitution of conjugal rights passed by a civil court extends not only to the grant of relief to the decree-holder to the company of the other spouse, but also embraces the right to have marital intercourse with the other party. The consequences of the enforcement of such a decree are firstly to transfer the choice to have or not to have marital intercourse to the State from the concerned individual and secondly, to surrender the choice of the individual to allow or not to allow one’s body to be used as a vehicle for another human being’s creation to the State. Relief of restitution of conjugal rights fraught with such

serious consequences to the concerned, individual were granted under Section 9 of the Act enables the decree-holder through application of financial sanctions provided by Order 21 Rules 32 and 33 of C.P.C. to have sexual cohabitation with an unwilling party. Earlier such a decree could have been enforced against an unwilling party even by imprisonment in a civil prison. Now compliance of the unwilling party to such a decree is sought to be procured, by applying financial sanctions by attachment and sale of the property of the recalcitrant party. But the purpose of a decree for restitution of conjugal rights in the past as it is in the present remains the same which is to coerce through judicial process the unwilling party to have sex against that person's consent, and freewill with the decree-holder. There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and the mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of such a person. The uninhibited tragedy involved in granting a decree for restitution of conjugal rights is well illustrated by *Anna Saheb v. Tara Bai* (AIR 1970 Madh Pra 36). In that case, a Division Bench of the Madhya Pradesh High Court decreed the husband's suit for restitution of conjugal rights observing "but if the husband is not guilty of misconduct, a petition cannot be dismissed merely because the wife does not like her husband or does not want to live with him....." What could have happened to Tarabai thereafter may well be left to the reader's imagination. According to law, Tarabai could be forced to have sex with Anna Saheb against her will.

18. It cannot be denied that among the few points that distinguish human existence from that of animals, sexual autonomy an individual enjoys to choose his or her partner to a sexual act, is of primary importance. Sexual expression is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation of the opposite sexes. No relationship between man and woman is more rested on mutual consent and freewill and is more intimately and personally forged than sexual relationship. The famous legal definition of marriage given by Lord Penzance in *Hyde v. Hyde* (1866) LR IP & D 130 (Divorce Court), as a voluntary union between man and woman only highlights this aspect of free association. The ennobling quality of sex of which Havelock Ellis wrote in his *Studies on the Psychology of Sex* ensues out of this freedom of choice. He wrote that "the man experiences the highest unfolding of his creative powers not through asceticism but through sexual happiness." Bertrand Russell who ought to know, declared that:

"I have sought love, first, because it brings ecstasy-ecstasy so great that I would often have sacrificed all the rest of life for a few hours of this joy."

Forced sex, like all forced things, is a denial of all joy. Yet in conceivable cases, sex may statutorily be denied and even forbidden by law between specified groups of persons. But no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act. The restitution of conjugal rights by force of arms can be more and can be no less than what late Sri, the greatest of the Modern Telugu poets, described in his poem "Kavitha" as "Rakshasa Rathi". The act of sex requires primarily the participation of mind...Sex act therefore, can never be treated, as a mere act of body that can be ordered to obey by the State. The coercive act of the State compelling sexual cohabitation therefore, must be regarded as a great constraint and torture imposed on the mind of the unwilling party...In *Russet v. Russet* (1897 AC 395 Lord Herschell long-ago noted the barbarity of this judicial remedy. He observed, "I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous."

19. There is even graver implications for the wife. An act of coerced sex is no less potent than an act of consensual sex in producing pregnancy and procreating offspring. The only difference lies in the fact that the latter is with her consent while the former is without her consent. In the process of making such a fateful choice as to when, where and how if at all she should beget, bear, deliver and rear a child, the wife consistent with her human dignity, should never be excluded, Conception and delivery of a child involves the most intimate use of her body. The marvel of creation takes place inside her body and the child that would be born is of her own flesh and blood. In a matter which is so intimately concerns her body and which is so vital for her life, a decree of restitution of conjugal rights totally excludes her.

20. The origin of this remedy for restitution of conjugal rights is not to be found in the British common law. It is the medieval Ecclesiastical Law of England which knows no matrimonial remedy of desertion that provided for this remedy which the Ecclesiastical courts and later ordinary courts enforced. But the British Law Commission, presided over by Mr. Justice Scarman, (as he then was) recommended recently on 9-7-1969 the abolition of this uncivilized remedy of restitution of conjugal rights. Accepting that recommendation of the British Law Commission, the British Parliament through Section 20 of the Matrimonial Proceedings and Property Act, 1970 abolished the right to claim restitution of conjugal rights in the English Courts...

But our ancient Hindu system of matrimonial law never recognised this institution of conjugal rights although it fully upheld the duty of the wife to surrender to her husband. In other words, the ancient Hindu Law treated the duty of the Hindu wife to abide by her husband only as an imperfect obligation incapable of being enforced against her will. It left the choice entirely to the free will of the wife. In *Bai Jiva v. Narsingh Lalbhai* (ILR (1927) 51 Bom 329 at p. 339) : (AIR 1927 Bom 264 at p. 268) a Division Bench of the Bombay High Court judicially noticed this fact in the following words:

“Hindu law itself, even while it lays down the duty of the wife of implicit obedience and return to her husband, has laid down no such sanction or procedure, as compulsion by the courts to force her to return against her will”

21. This could have been only because of its realisation that in a matter so intimately concerned the wife or the husband the parties are better left alone without State interference. What could happen to the fate of a person in the position of Tara Bai (the respondent in the abovementioned Madhya Pradesh Appeal) who was forced to go back to her husband even after declaration of dislike and abhorrence towards her husband could have been well considered by the ancient Hind (sic) Law...Section 9 of the Act had merely aped the British and mechanically reenacted that legal provision of the British Ecclesiastical origin. The plain question that arises is whether our Parliament now functioning under the constitutional constraints of the fundamental rights conceived and enacted for the preservation of human dignity and promotion of personal liberty, can legally impose sexual cohabitation between unwilling, opposite sexual partners even if it be during the matrimony of the parties.

22. The Hindu Marriage Act was enacted by our Parliament in the year 1955 and the legislative competence of the Parliament to enact Section 9 of the Act under Item 5 of the List III of the VII Schedule to the Constitution is undoubted. But the question is whether that provision runs foul of Part III of the Constitution. The petitioner attacks Section 9 of the Act on the ground that granting of restitution of conjugal rights violates the petitioner's rights guaranteed under Articles 14, 19 and 21 of Part III of our Constitution. Let us, therefore, first examine the content of Article 21. Article 21 of the Constitution guarantees right to life and personal liberty against the State action. Formulated in simple negative terms, its range of operation positively forbidding the State from depriving any person of his life or personal liberty except according to the procedure established by law is of far-reaching dimensions and of overwhelming constitutional significance. Article 21 prevents the State from treating the human life as that of any other animal. It is now well established by the decisions of the Supreme Court that the word 'life' occurring in the above Article 21 has spiritual significance as the word 'life' occurring in the famous 5th and 14th Amendments to the American Constitution does. In those constitutional provisions of the American Constitution, the 'life' is interpreted by Mr. Justice Field in his dissenting judgment in *Munn v. Illinois*, (1877) 24 L.Ed. p. 17 to mean and signify "more than a person's right to lead animal or vegetative existence". Field J., said in the above *Munn's* case. "By the term 'life' as here used something more is meant than mere animal existence". The contrast drawn by Field J., emphasising the difference between existence of a free willing human and that of an unfree animal was accepted by our Supreme Court first in *Kharak Singh v. State of U.P.* (1964) 1 SCR 332 : (AIR 1964 SC 1295) and next in *Govind v. State of M.P.* (1975) 3 SCR 946 : (1975) 2 SCC 148 : (AIR 1975 SC 1378), transforming Article 21 of our Constitution into a Charter for Civilization...

23... The centrepiece of the judgment in *Govind's* case (AIR 1975 SC 1378) is to hold that right to privacy is part of Art. 21 of our Constitution and to stress its constitutional importance and to call for its protection. The learned Judge then examined the content of the right to privacy and observed that "any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing." The learned Judge stressed the primordial importance of the right to privacy for human happiness and directed the courts not to reject the privacy-dignity claims brought before them except where the countervailing State interests are shown to have overwhelming importance...

24. However, it must be admitted that the concept of right to privacy does not lend itself to easy logical definition... The difficulty arises out of the fact that this concept is not unitary concept but is multidimensional susceptible more for enumeration than definition. But it can be confidently asserted that any plausible definition of right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's inviolability and integrity and intimacy of personal identity, including marital privacy. A few representative samples would bear this out. Gaiety defined privacy as "an autonomy or control over the intimacies of personal identity." Richard B. Packer in his "A Definition of Privacy", quoted in "Philosophy and Public Affairs" (1975 Vol. 4 No. 4 P. 295-314) wrote:

".....privacy is control over when and by whom the various parts of us can be sensed by others. By "sensed" is meant simply seen, heard, touched, smelled or tasted."

Gary L. Bostwick, writing in *California Law Review*, Vol. 64 P. 1447 suggests that “privacy” is divisible into three components, (a) repose, (b) sanctuary and (c) intimate decisions. Of these three components, he holds, that the last one is an eminently more dynamic privacy concept as compared to repose and sanctuary (P. 1466). Prof. Tribe in his *American Constitutional Law*. P. 921, stressed another fundamental facet of the right to privacy problem. He wrote, inter alia,

“Of all decisions a person makes about his or her body, the most profound and intimate relates to two sets of questions: first, whether, when, and how one’s body is to become the vehicle for another human being’s creation.”

25. Applying these definitional aids to our discussion, it cannot but be admitted that a decree for restitution of conjugal rights constitutes the grossest form of violation of an individual’s right to privacy. Applying Prof. Tribe’s definition of right to privacy, it must be said, that the decree for restitution of conjugal rights denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. Applying Parker’s definition, it must be said that a decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. Applying the tests of Gaiety and Bostwick, it must be said, that the woman loses her control over her most intimate decisions. Clearly, therefore, the right to privacy guaranteed by Art. 21 of our Constitution is flagrantly violated by a decree of restitution of conjugal rights.

...

28. [C]ases of the American Supreme Court clearly establish the proposition that the reproductive choice is fundamental to an individual’s right to privacy. They uphold the individual’s reproductive autonomy against the State intrusion and forbid the State from usurping that right without overwhelming social justification. That this right belongs even to a married woman is clear from Justice Brennan’s opinion quoted above. A wife who is keeping away from her husband, because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she is probably contemplating an action for divorce, the use and enforcement of Section 9 of the Act against the estranged wife can irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. During a moment’s duration the entire life-style would be altered and would even be destroyed without her consent. If that situation made possible by this matrimonial remedy is not to be a violation of individual dignity and right to privacy guaranteed by our Constitution and more particularly Art. 21, it is not conceivable what else could be a violation of Article 21 of our Constitution.

29. Examining the validity of S. 9 of the Act in the light of the above discussion, it should be held, that a court decree enforcing restitution of conjugal right constitutes the starkest form of governmental invasion of personal identity and individual’s zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity. Above all, the decree for restitution of conjugal rights makes the unwilling victim’s body a soulless and a joyless vehicle for bringing into existence another human being. In other words, pregnancy would be foisted on her by the State and against her will. There can therefore be little doubt that such a law violates the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution. It is of constitutional significance to note that the ancient Hindu society and its culture never approved such a forcible marital intercourse. Our ancient law-givers refused to recognize any State interests in forcing unwilling sexual cohabitation between the husband and wife although they held the duty of the wife to surrender to the husband almost absolute. Recently, the British Law Commission headed by Mr. Justice Scarman also found no superior State interests implicated in retaining this remedy on the British Statute Book. It is wholly without any social purpose. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither State coercion can soften the ruffled feelings nor clear the misunderstandings between the parties. Force can only beget force as action can only produce counter-action. The only usefulness in obtaining a decree for restitution of conjugal rights consists in providing evidence for subsequent action for divorce. But this usefulness of the remedy which can be obtained only at enormous expense to human dignity cannot be counted, as outweighing the interests in upholding the right to privacy... It is therefore, legitimate to conclude that there are no overwhelming State interests that would justify the sacrificing of the individual’s precious constitutional right to privacy.

30. Duncan Derrett in his “Modern Hindu Law” para 306 however, while approving the abolition of this remedy in England advocated for somewhat strange reasons the continuance of this remedy in India. He wrote that “..... The practical utility of the remedy is little in contemporary England”. He, however says, that:

“In India, where spouses separate at times due to misunderstandings, failure of mutual communication, or the intrigues of relatives, the remedy of restitution is still of considerable value, especially when coupled with the right under Section 491 of the Criminal Procedure Code to recover (under certain circumstances) custody of a minor bride, and in the light of the rule that where restitution has been ordered a decree for separate maintenance cannot, without proof of new facts, issue in favour of the respondent.”

With respect, I am unable to agree with this recommendation. Firstly, Derrett did, not examine the matter from the constitutional point of view of right to privacy guaranteed by Art. 21 of the Constitution. Restitution of conjugal rights is an instance of punishing a criminal without a victim. Secondly, his remedy of restitution of conjugal rights is not only excessive but is also inappropriate...I therefore hold that there are no overwhelming State interests to justify the subordination of the valuable right to privacy to any State interests.

31. On the basis of my findings that Section 9 of the Hindu Marriage Act providing for the remedy of restitution of conjugal rights violates the right to privacy guaranteed by Art. 21 of the Constitution, I will have to hold that Section 9 of the Hindu Marriage Act is constitutionally void. Any statutory provision that abridges any of the rights guaranteed by Part III of the Constitution will have to be declared void in terms of Article 13 of the Constitution.

...

34. In *Mithu v. State of Punjab* (supra) the Supreme Court went even farthest where it struck down S. 303 I.P.C. on the ground that Section violated not only Article 14 but even Article 21. The Supreme Court while approvingly referring to the above quotations observed in *Mithu's* case that:

“these decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it: that it is for the legislature to provide the punishment and for the courts to impose it.”

Explaining the scope of expansion which Article 21 has undergone by reason of *Bank Nationalisation* case (AIR 1970 SC 564) and *Maneka Gandhi's* case (AIR 1978 SC 597) the Supreme Court in *Mithu's* case (AIR 1983 SC 473) declared:

“if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21.”

In *Mithu's* case the Supreme Court implied that imposition of death sentence even under Section 302 I.P.C. would have been held in *Bachan Singh's* case (AIR 1980 SC 898) invalid and ultra vires of the protection guaranteed by Article 21 if the Parliament had not provided for alternative sentences of life imprisonment and death sentence but provided for only a mandatory death sentence. A mandatory death sentence would then have been shot down by the civilized jurisprudence of Article 21. Now savagery of a death sentence is more an attribute of substantive law. In *Mithu's* case (AIR 1983 SC 473), Chinnappa Reddy, J., ascribed the whole of his concurrence to Article 21. The reasoning of our Supreme Court in *Mithu's* case comes very close to the reasoning adopted by the American Supreme Court in cases like *Lambert v. California* (1957)2 L.Ed. 2d 228 decided, upon the basis of substantive due process clause. In *Lambert v. California* (supra) the American Supreme Court invalidating a State criminal law held that:

“where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.”

After *Mithu's* case, it is not easy to assert that Article 21 is confined any longer to procedural protection only. Procedure and substance of law now co-mingle and overlap each other, to such a degree rendering that a finding of any law that can competently establish a valid procedure for the enforcement of a savage punishment impossible.

35. ...The constitutional doctrine of privacy is not only life giving but also is life-saving. It gives spiritual meaning to life which Sankara described as emanation of Brahman and saves such a life from “inhuman and degrading treatment” of forcible sexual cohabitation. (Art. 5 of the Universal Declaration of Human Rights)...Nothing much that is reasonable, in my opinion, can be urged in support of this barbarous remedy that forces sex at least upon one of the unwilling parties.

36. Following the reasoning adopted in the above Mithu's case, Section 9 of the Hindu Marriage Act, should be declared as unconstitutional, for the reason that the remedy of restitution of conjugal rights provided for by that Section is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of our Constitution.

37. The Constitutional validity of Section 9 of the Act when examined on the touch-stone of equal protection of laws also leads to a conclusion of its invalidity. This is so because of two reasons. Firstly, Section 9 of the Act does not satisfy the traditional classification test. Secondly, it fails to pass the test of minimum rationality required of any State Law.

38. Of course Section 9 of the Act does not in form offend the classification test. It makes no discrimination between a husband and wife. On the other hand, by making the remedy of restitution of conjugal rights equally available both to wife and husband, it apparently satisfies the equality test. But the requirements of equal protection of laws contained in Article 14 of the Constitution are not met with that apparent though majestic equality at which Anatole France mocked. Our Supreme Court declared that:

“Bare equality of treatment regardless of the inequality of realities is neither justice nor homage to the constitutional principle.” (see *M. Match Works v. Asst. Collector* AIR 1974 SC 497 at 503).

The question is how this remedy works in life terms. In our social reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife. A passage in Gupte's 'Hindu Law in British India' page 929, (second edition) attests to this fact. The learned author recorded that although “the rights and duties which marriage creates may be enforced by either spouse against the other and not exclusively by the husband against the wife; a suit for restitution by the wife is rare.”

The reason for this mainly lies in the fact of the differences between the man and the woman. By enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievably whereas the husband's can remain almost as it was before. This is so because it is the wife who has to beget and bear a child. This practical but the inevitable consequence of the enforcement of this remedy cripples the wife's future plans of life and prevents her from using that self-destructive remedy. Thus the use of remedy of restitution of conjugal rights in reality becomes partial and one-sided and available only to the husband. The pledge of equal protection of laws is thus inherently incapable of being fulfilled by this matrimonial remedy in our Hindu society. As a result this remedy works in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife. By treating the wife and the husband who are inherently unequal as equals, Section 9 of the Act offends the rule of equal protection of laws. For that reason the formal equality that Section 9 of the Act ensures cannot be accepted as constitutional. Section 9 of the Act should therefore be struck down as violative of Article 14 of the Constitution.

39. Section 9 of the Act has also to be examined for its constitutional validity from the point of view of the test of minimum rationality. The American Constitutional writers and court decisions on the equality clause of the American 14th Amendment recognize the inadequacies of the mere classification theory of minimum rationality not merely as an additional test to the above theory of classification but even as basic to the whole of the 14th Amendment...Our Supreme Court had accepted the theory of minimum rationality in *E.P. Royappa v. Tamil Nadu* (1974) 2 SCR 348, at p. 386 : (AIR 1974. SC 555 at pp. 583-4) in the following words:—

“From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.” They require that State action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.”

But our Supreme Court called the test as test of arbitrariness and followed it in the subsequent decisions...The theory of minimum rationality test which is heavily criticised by Seervai in his latest Constitutional Law, 3rd Edition page 272 is described by Prof. Tribe as requiring all legislation to have “a legislative public purpose or set of purposes based on some conception of general good.” (see his American Constitutional Law page 995.) Examined from this point of view, it is clear that whether or not Section 9 of the Hindu Marriage Act suffers from the vice of over-classification as suggested in the preceding paragraph it promotes no legitimate public purpose based on any conception of the general good. It has already been shown that Section 9 of the Act does not subserve any social good. Section 9 must therefore be held to be arbitrary and void as offending Art. 14 of the Constitution,

40. In the view I have taken of the constitutional validity of Section 9 of the Hindu Marriage Act, I declare that Section 9 is null and void...

...”

IN THE SUPREME COURT OF INDIA

Saroj Rani v. Sudarshan Kumar Chadha

(1984) 4 SCC 90

S. Murtaza Fazal Ali and Sabyasachi Mukharji, JJ.

A petition filed by the wife for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 succeeded in the trial court. The High Court upheld the decision of the trial court. The main question raised in the wife's appeal before the Supreme Court was whether Section 9 was violative of fundamental rights and was liable to be struck down as held by the Andhra Pradesh High Court in the T. Sareetha case.

Mukharji, J.: "The parties herein were married at Jullundur city according to Hindu Vedic rites on or about January 24, 1975...It is...alleged that on May 16, 1977, the respondent husband turned the appellant out of his house and withdrew himself from her society...On October 17, 1977, the wife-appellant filed a suit against the husband respondent herein under Section 9 of the Hindu Marriage Act, 1955 hereinafter referred to as the said Act for restitution of conjugal rights.

2. ...On March 28, 1978, a consent decree was passed by the learned Sub-Judge First Class for restitution of conjugal rights... It was alleged by the petitioner-wife that the appellant had gone to the house of the respondent and lived with him for two days as husband and wife. This fact has been disbelieved by all the courts. The courts have come to the conclusion and that conclusion is not challenged before us that there has been no cohabitation after the passing of the decree for restitution of conjugal rights.

3. On April 19, 1979, the respondent husband filed a petition under Section 13 of the said Act against the appellant for divorce on the ground that one year had passed from the date of the decree for restitution of conjugal rights, but no actual cohabitation had taken place between the parties...

4. The learned District Judge on October 15, 1979 dismissed the petition of the husband for divorce...[O]n the question of relief the learned Judge was of the view that in view of the provisions of Section 23 of the said Act and in view of the fact that the previous decree was a consent decree and at that time there was no provision like provision of Section 13-B of the said Act i.e. "divorce by mutual consent", the learned Judge was of the view that as the decree for restitution of conjugal rights was passed by the consent of the parties, the husband was not entitled to a decree for divorce.

5. Being aggrieved by the said decision, there was an appeal before the High Court of Punjab and Haryana...

6. ...[T]he learned Judge expressed the view that the decree for restitution of conjugal rights could not be passed with the consent of the parties and therefore being a collusive one disentitled the husband to a decree for divorce. This view was taken by the learned trial Judge relying on a previous decision of the High Court. Mr Justice Goyal of the High Court felt that this view required reconsideration and he therefore referred the matter to the Chief Justice for constitution of a Division Bench of the High Court for the consideration of this question.

7. The matter thereafter came up before a Division Bench of Punjab and Haryana High Court and Chief Justice Sandhwalia for the said Court on consideration of different authorities came to the conclusion that a consent decree could not be termed to be a collusive decree so as to disentitle the petitioner to decree for restitution of conjugal rights...

...

10. Our attention, however, was drawn to a decision of a learned Single Judge of the Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkata Subbaiah* [AIR 1983 AP 356 : (1983) 2 APLJ (HC) 37 : (1983) 2 Andh LT 47 : 1983 Hindu LR 658] . In the said decision the learned Judge has observed that the remedy of restitution of conjugal rights provided for by Section 9 of the said Act was a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Hence, according to the learned Judge, Section 9 was constitutionally void. Any statutory provision that abridged the rights guaranteed by Part III of the Constitution would have to be declared void in terms of Article 13 of the Constitution. According to the said learned Judge, Article 21 guaranteed right to life and personal liberty against the State action. Formulated in simple negative terms, its range of operation positively forbidding the State from depriving any person of his life or personal liberty except according to the procedure established by law was of far-reaching dimensions and of overwhelming constitutional significance. Learned Judge observed that a decree for restitution of conjugal rights constituted the grossest form of violation of any individual's right to privacy. According to the learned Judge, it denied the woman her free choice whether, when and how her body was to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprived, according to the learned

Judge, a woman of control over her choice as and when and by whom the various parts of her body should be allowed to be sensed. The woman loses her control over her most intimate decisions. The learned Judge therefore was of the view that the right to privacy guaranteed by Article 21 was flagrantly violated by a decree for restitution of conjugal rights. The learned Judge was of the view that a wife who was keeping away from her husband because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she was probably contemplating an action for divorce, the use and enforcement of Section 9 of the said Act against the estranged wife could irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. The learned Judge was therefore clearly of the view that Section 9 of the said Act violated Article 21 of the Constitution. He referred to the Scarman Commission's report in England recommending its abolition. The learned Judge was also of the view that Section 9 of the said Act, promoted no legitimate public purpose based on any conception of the general good. It did not therefore subserve any social good. Section 9 of the said Act was, therefore, held to be arbitrary and void as offending Article 14 of the Constitution. Learned Judge further observed that though Section 9 of the said Act did not in form offend the classification test, inasmuch as it made no discrimination between a husband and wife, on the other hand, by making the remedy of restitution of conjugal rights equally available both to wife and husband, it apparently satisfied the equality test. But bare equality of treatment regardless of the inequality of realities was neither justice nor homage to the constitutional principles...The learned Judge, however, was of the opinion based on how this remedy worked in life that in our social reality, the matrimonial remedy was found used almost exclusively by the husband and was rarely resorted to by the wife.

11. The learned Judge noticed and that is a very significant point that decree for restitution of conjugal rights can only be enforced under Order 21, Rule 32 of Code of Civil Procedure. He also referred to certain trend in the American law and came to the conclusion that Section 9 of the said Act was null and void. The above view of the learned Single Judge of Andhra Pradesh was dissented from in a decision of the learned Single Judge of the Delhi High Court in the case of *Harvinder Kaur v. Harmander Singh Choudhry* [AIR 1984 Del 66]. In the said decision, the learned Judge of the Delhi High Court expressed the view that Section 9 of the said Act was not violative of Articles 14 and 21 of the Constitution. The learned Judge noted that the object of restitution decree was to bring about cohabitation between the estranged parties so that they could live together in the matrimonial home in amity. The leading idea of Section 9 was to preserve the marriage. From the definition of cohabitation and consortium, it appeared to the learned Judge that sexual intercourse was one of the elements that went to make up the marriage, but that was not the summum bonum. The courts do not and cannot enforce sexual intercourse. Sexual relations constituted an important element in the conception of marriage, but it was also true that these did not constitute its whole content nor could the remaining aspects of matrimonial consortium be said to be wholly unsubstantial or of trivial character. The remedy of restitution aimed at cohabitation and consortium and not merely at sexual intercourse. The learned Judge expressed the view that the restitution decree did not enforce sexual intercourse. It was a fallacy to hold that the restitution of conjugal rights constituted "the starkest form of governmental invasion" of "marital privacy".

12. This point namely validity of Section 9 of the said Act was not canvassed in the instant case in the courts below, counsel for the appellant, however, sought to urge this point before us as a legal proposition. We have allowed him to do so.

13. Having considered the views of the learned Single Judge of the Andhra Pradesh High Court and that of learned Single Judge of Delhi High Court, we prefer to accept on this aspect namely on the validity of Section 9 of the said Act the views of the learned Single Judge of the Delhi High Court. It may be mentioned that conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression "conjugal". *Shorter Oxford English Dictionary*, Third Edn., Vol. I, p. 371 notes the meaning of "conjugal" as "of or pertaining to marriage or to husband and wife in their relations to each other". In the *Dictionary of English Law*, 1959 Edn. at p. 453, Earl Jowitt defines "conjugal rights" thus:

"The right which husband and wife have to each other's society and marital intercourse. The suit for restitution of conjugal rights is a matrimonial suit, cognisable in the Divorce Court, which is brought whenever either the husband or the wife lives separate from the other without any sufficient reason, in which case the court will decree restitution of conjugal rights (Matrimonial Causes Act, 1950, Section 15), but will not enforce it by attachment, substituting however for attachment, if the wife be the petitioner, an order for periodical payments by the husband to the wife (Section 22).

Conjugal rights cannot be enforced by the act of either party, and a husband cannot seize and detain his wife by force (*R. v. Jackson* [(1891) 1 QB 671 : 60 LJ QB 346 : 64 LT 679 : 39 WR 407 (CA)])."

14. In India it may be borne in mind that conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. See in this connection *Mulla's Hindu Law* — Fifteenth Edn., p. 567, para 443. There are sufficient safeguards in Section 9 to prevent it from being a tyranny. The importance of the concept of conjugal rights can be viewed in the light of Law Commission — Seventy-first Report on the Hindu Marriage Act, 1955 — “Irretrievable Breakdown of Marriage as a Ground of Divorce”, para 6.5 where it is stated thus:

“Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage — ‘breakdown’ — and if it continues for a fairly long period, it would indicate destruction of the essence of marriage — ‘irretrievable breakdown’.

15. Section 9 is only a codification of pre-existing law. Rule 32 of Order 21 of the Code of Civil Procedure deals with decree for specific performance for restitution of conjugal rights or for an injunction...

16. It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights, the sanction is provided by court where the disobedience to such a decree is wilful i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by attachment of property against disobedience of a decree for restitution of conjugal rights where the disobedience follows as a result of a wilful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only financial sanction, provided he or she has properties to be attached, is provided for. This is so as an inducement by the court in appropriate case when the court has decreed restitution for conjugal rights and that the court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned Single Judge of Andhra Pradesh High Court has viewed it and we are therefore unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.

...”

IN THE SUPREME COURT OF INDIA

Samar Ghosh v. Jaya Ghosh

(2007) 4 SCC 511

B.N. Agrawal, P.P. Naolekar and Dalveer Bhandari, JJ.

The husband filed a petition for divorce on the ground of cruelty. He contended that soon after they got married, his wife unilaterally decided that they would not have a child, and refused to cohabit with him. He argued that this amounted to “mental cruelty,” and he was hence entitled to divorce. The suit succeeded in the trial court but the divorce decree was reversed by the High Court on appeal filed by the wife. The husband filed an appeal in the Supreme Court asking it to decide whether the acts of the wife such as unilateral decision to not have children and not live with her husband amounted to “mental cruelty.”

Bhandari, J.: “This is yet another unfortunate matrimonial dispute which has shattered the twenty-two year old matrimonial bond between the parties. The appellant and the respondent are senior officials of the Indian Administrative Service, for short “IAS”. The appellant and the respondent were married on 13-12-1984 at Calcutta under the Special Marriage Act, 1954. The respondent was a divorcee and had a female child from her first marriage. The custody of the said child was given to her by the District Court of Patna where the respondent had obtained a decree of divorce against her first husband, Debashish Gupta, who was also an IAS officer.

...

3. ...According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love, affection, future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.

4... According to the appellant, he felt like a stranger in his own family. The respondent unilaterally declared that she would not have any child and it was her firm decision. The appellant felt that his marriage with the respondent was merely an eyewash because immediately after the marriage, serious matrimonial problems developed between them which kept growing.

...

10. Admittedly, the appellant and the respondent have been living separately since 27-8-1990. The appellant further stated that the respondent refused cohabitation and also stopped sharing bed with him without any justification. Her unilateral decision not to have any child also caused mental cruelty to the appellant. The appellant was not permitted to even show his normal affection to the daughter of the respondent although he was a loving father to the child. The appellant also asserted that the respondent desired sadistic pleasure at the discomfiture and plight of the appellant which eventually affected his health and mental peace. In these circumstances, the appellant has prayed that it would not be possible to continue the marriage with the respondent and he eventually filed a suit for the grant of divorce.

...

23. The trial court, after analysing the entire pleadings and evidence on record, came to the conclusion that the following facts led to mental cruelty:

1. The respondent's refusal to cohabit with the appellant.
2. The respondent's unilateral decision not to have children after the marriage ...

24. The learned Additional District Judge came to the finding that the appellant had succeeded in proving the case of mental cruelty against the respondent, therefore, the decree was granted by the order dated 19-12-1996 and the marriage between the parties was dissolved.

25. The respondent, aggrieved by the said judgment of the learned Additional District Judge, filed an appeal before the High Court. The Division Bench of the High Court vide judgment dated 20-5-2003 reversed the judgment of the Additional District Judge on the ground that the appellant has not been able to prove the allegation of mental cruelty. The findings of the High Court, in brief, are recapitulated as under:

I. The High Court arrived at the finding that it was certainly within the right of the respondent wife having such a high status in life to decide when she would like to have a child after marriage.

II. The High Court also held that the appellant had failed to disclose in the pleadings when the respondent took the final decision of not having a child.

III. The High Court held that the appellant also failed to give the approximate date when the respondent conveyed this decision to the appellant.

IV. The High Court held that the appellant started living with the respondent, therefore, that amounted to condonation of the acts of cruelty.

V. The High Court disbelieved the appellant on the issue of the respondent's refusing to cohabit with him, because he failed to give the date, month or the year when the respondent conveyed this decision to him.

VI. The High Court held that the appellant's and the respondent's sleeping in separate rooms did not lead to the conclusion that they did not cohabit.

VII. The High Court also observed that it was quite proper for the respondent with such high status and having one daughter by her previous husband, not to sleep in the same bed with the appellant.

...

27. The finding of the Division Bench of the High Court is that, considering the position and status of the respondent, it was within the right of the respondent to decide when she would have the child after the marriage. Such a vital decision cannot be taken unilaterally after marriage by the respondent and if taken unilaterally, it may amount to mental cruelty to the appellant.

28. The finding of the High Court that the appellant started living with the respondent amounted to condonation of the act of cruelty is unsustainable in law.

...

30. The High Court has seriously erred in not appreciating the evidence on record in a proper perspective. The respondent's refusal to cohabit has been proved beyond doubt. The High Court's finding that the husband and wife might be sleeping in separate rooms did not lead to a conclusion that they did not cohabit and to justify this by saying that the respondent was highly educated and holding a high post was entirely unsustainable. Once the respondent accepted to become the wife of the appellant, she had to respect the marital bond and discharge the obligations of marital life.

...

37. The learned Additional District Judge decreed the appellant's suit on the ground of mental cruelty. We deem it appropriate to analyse whether the High Court was justified in reversing the judgment of the learned Additional District Judge in view of the law declared by a catena of cases. We deem it appropriate to deal with the decided cases.

...

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

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

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

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:

(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.

...

(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.

...

(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.

...

(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 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.

...

102. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen-and-a-half years (since 27-8-1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

...

104. In the backdrop of the spirit of a number of decided cases, the learned Additional District Judge was fully justified in decreeing the appellant's suit for divorce. In our view, in a case of this nature, no other logical view is possible.

..."

IN THE HIGH COURT OF PUNJAB AND HARYANA

Dr. Mangla Dogra & Ors. v. Anil Kumar Malhotra & Ors.³⁰

ILR (2012) 2 P&H 446

Jitender Chauhan, J.

A civil suit was filed by a husband against his wife, her family and her doctors for recovery of damages on account of mental pain and agony suffered due to termination of his wife's pregnancy in the absence of any medical requirement and without obtaining his consent. The Civil Court rejected the claim of the doctors and family members that the suit was not maintainable. In these revision petitions before the High Court, the issue was whether the express consent of the husband is required for terminating a pregnancy once consent of the wife has been obtained and provisions of the MTP Act are complied with. Further, if such consent of the husband is required, whether the husband is entitled to damages in case such termination is carried out without his consent.

Chauhan, J.: "This judgment of mine shall dispose of two Civil Revision Nos. 6337 of 2011 (titled "*Dr. Mangla Dogra v. Anil Kumar Malhotra*"); and 6017 of 2011, titled ("*Ajay Kumar Pasricha v. Anil Kumar Malhotra*") which have been directed against the order dated 20.8.2011, passed by Civil Judge (Junior Division) Chandigarh, vide which the application filed by the petitioners under Order 7 Rule 11 Civil Procedure Code was dismissed.

2. The facts giving rise to these Civil Revisions originated from a matrimonial dispute between respondent No. 1 Anil Kumar Malhotra and respondent No. 2, Seema Malhotra. The marriage between the parties was solemnized on 17.4.1994. Out of the wedlock, a male child was born on 14.2.1995. The parties resided at Panipat. Due to the hostilities and strained relations between the parties, Seema Malhotra along with her minor son had been staying with her parents at Chandigarh since 1999... Respondent No. 1, Seema Malhotra filed an application under section 125 Cr.P.C claiming maintenance from the husband, Anil Kumar Malhotra. On 9.11.2002, during the pendency of the application under section 125 Cr. P. C, with the efforts of the Lok Adalat, Chandigarh, she agreed to accompany the husband... On 2.1.2003, Anil Kumar Malhotra came to know that Seema Malhotra had conceived. The wife-Seema Malhotra did not want to continue with the pregnancy and she wanted to get the foetus aborted, as despite their living together, the differences between them persisted. It was the case of the husband-respondent No. 1 that on the pretext of getting herself medically examined, the wife went to Dr. (Mrs.) Riru Prabhakar, Prabhakar Hospital, Panipat. However, she was adamant to get the foetus aborted but the husband refused. On 3.1.2003, she contacted her mother at Chandigarh. On the advice of her mother, she along with her husband and son came to Chandigarh. On 4.1.2003, they went to General Hospital, Sector 16, Chandigarh. The husband refused to sign the papers giving his consent to terminate the pregnancy. The husband filed a suit for mandatory injunction restraining the wife from getting the foetus aborted. That suit was withdrawn in September, 2003, as the respondent No. 2 underwent MTP (Medical Termination of Pregnancy)

at Nagpal Hospital, Sector 19, Chandigarh. The MTP was done by Dr. Mangla Dogra assisted by Dr. Sukhbir Grewal as Anesthetist. The husband-respondent No. 1 filed a civil suit for the recovery of Rs. 30 lacs towards damages on account of mental pain, agony and harassment against the wife, Seema Malhotra, her parents, brother, Dr. Mangla Dogra and Dr. Sukhbir Grewal for getting the pregnancy terminated (sic) illegally. The ground taken in the suit is that the specific consent of respondent No. 1, being father of the yet to be born child, was not obtained and the MTP was done in connivance with respondents No. 2 to 6. All the respondents are jointly and severally responsible for conducting the illegal act of termination of pregnancy without any medical requirement...

...

6. Defendant No. 1 informed the doctor that she did not want to continue with the pregnancy as this was an unwanted pregnancy and on examination by defendant No. 5, it was found that pregnancy was less than 12 weeks old, the defendant No. 5 after getting due consent from defendant No. 1, terminated the pregnancy. Under Section 3(4)(b) of the Act, only the consent of the pregnant woman undergoing the termination of pregnancy is required. An unwanted pregnancy as per Explanation II to Section 3(2) of the Act is a grave injury to the physical or mental health of the woman. The defendant No. 5 and 6 have conducted the abortion strictly in accordance with the provisions of the Act and they have no connivance with defendant Nos. 2 to 4 in any manner, whatsoever, as alleged by the plaintiff-respondent No. 1.

...

8. Reply to the application under Order 7 Rule 11 CPC was filed by the husband, plaintiff-respondent No. 1 on the ground that the defendant No. 1 has undergone MTP with active connivance of defendants No. 5 and 6, so they are the necessary parties to the suit. It was further stated that the foetus could not have been aborted unless it was essential in view of the health of the woman. Further, specific consent of the father of yet to be born child is required, despite the fact that there was no medical problem to the pregnant woman. When the consent of the father was not obtained, it amounts to cruelty on the father. No document has been placed on record showing that there was immediate need to do the MTP and that too with the consent of single parent, i.e. mother only. It was alleged that the sole motive of defendants No. 5 & 6 was to mint money.

9. The Ld. Civil Judge, (Jr. Division) Chandigarh, after perusing the record, dismissed the application vide order dated 20.8.2011. Para Nos. 4 to 10 of the same reads as under:—

“4. I have perused the plaint and have also perused the concerned Medical Termination of Pregnancy Act, 1971. The present suit is a suit for recovery of damages for mental agony and pain caused to the plaintiff/respondent by illegal termination of pregnancy undertaken by defendant No. 1 with active connivance with defendants No. 2 to 6 and it is stated in para No. 13 of the plaint that the foetus could not have been aborted unless it was essential in law in view of the health of the respondent and further the consent of the father of the child was not taken and the applicants No. 5 & 6 in connivance with defendants No. 2 to 4 have conducted the abortion of foetus of respondent No. 1 on 4.1.2003. It is further in para No. 5 that the applicants No. 5 & 6 actually conducted the abortion when there was no such need and further no consent of plaintiff/respondent being father of the child was taken in this regard.

5. Section 3 of the Medical Termination of Pregnancy Act provides the situation under which the pregnancy may be terminated by a registered medical practitioner. It provides that the pregnancy may be terminated where the length of the pregnancy does not exceed 12 weeks and when such medical practitioner is of the opinion formed in good faith that continuance of the pregnancy would involve a great risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation No. 1 & 2 provides the nature of grave injury which is required to be there in case valid termination is to be done.

6. In the present case, the plea forwarded by the applicants No. 5 & 6 is that defendant No. 1 duly consented to termination of her pregnancy and that foetus was less than 12 weeks old and further defendant No. 1 did not want to continue such pregnancy as it was unwanted pregnancy caused due to failure of contraceptive. But at this stage, the applicants/defendants No. 5 & 6 have failed to produce on record any record of theirs by way of which they can, prima-facie, prove that the foetus which they operated was less than 12 weeks and they had formed the opinion that continuance of pregnancy is going to cause great risk to the life of pregnant woman and is going to cause injury to her physical or mental health. Further, there is no proof of the fact at this stage that the pregnancy was caused due to failure of any contraceptive etc.

...Accordingly, the present application filed under Order 7 Rule 1] CPC is hereby dismissed.”

10. Aggrieved against the same, the petitioners have preferred these revisions.

...

14. I have heard the learned counsel for the parties and perused the record with their able assistance.

15. In order to appreciate the rival submissions, a reading of the relevant provisions of The Medical Termination of Pregnancy Act, 1971 (No. 34 of 1971) would be necessary.

“3. When pregnancies may be terminated by registered medical practitioners. (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of the Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,

(a) Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II. Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in subsection (2), account may be taken of the pregnant woman actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who having attained the age of eighteen years, is a (mentally ill person), shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

16. The question arising for consideration in these revisions is “whether the express consent of the husband is required for unwanted pregnancy to be terminated by a wife?”

17. This is the most unfortunate case where a husband has brought privileged acts and conducts of husband and wife in the court. The relation between the husband and wife became sour in the year 1999, when the wife started residing with her parents at Chandigarh. It is an admitted fact that on 09.11.2002, during proceedings under section 125 of the Code of Criminal Procedure, with the efforts of the Lok Adalat, Chandigarh, the wife agreed to accompany the husband and started residing with her, under one roof. Naturally, they have cohabited as husband and wife while residing together. Besides love and affection, physical intimacy is one of the key elements of a happy matrimonial life. In the present case, the wife knew her conjugal duties towards her husband. Consequently, if the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. The wife did so in order to strengthen the matrimonial ties. On 02.01.2003, admittedly the husband and wife came to know that the wife was pregnant from her husband. She did not want to give birth to a child and showing unwillingness, got her pregnancy terminated in January, 2003, from the petitioners in Civil Revision No. 6337 of 2011 who are authorized to do so under the Act.

18. The argument of the Ld. counsel for the husband/respondent has to be rejected in view of the medical termination of pregnancy Rules, 1975. Rule 8 provides as under:—

“ 8. Form of Consent-The consent referred to in sub section (4) of Section 3 shall be given in Form C.”

Form C is prescribed as under:—

FORM C

(see rule 8)

Idaughter/wife of Aged..... about years of
 (here state the permanent address)..... at present residingat do hereby give
 my consent of the termination of my pregnancy at

(State of name of place where the pregnancy is terminated)

.....

Signature

Place

Date

19. This form is to be signed by the wife only, showing her willingness to have the pregnancy terminated or aborted. The Medical Termination of Pregnancy Act, 1971 (34 of 1971), nowhere provides for the express or implied consent of the husband. The wife is the best judge and is to see whether she wants to continue the pregnancy or to get it aborted. The husband has unsuccessfully brought an action for perpetual injunction restraining the wife to get the pregnancy terminated, but the suit was dismissed as withdrawn.

20. When the husband has no right to compel her wife not to get the pregnancy terminated, he has no right to sue her (sic) wife for compensation. The husband also has no cause of action against her wife on this account. Keeping in view the strained relations between the husband and wife, the decision of the wife to get the termination of unwanted foetus was right. It was not the act of termination of pregnancy, due to which relation became sour, but the relations between the husband and the wife were already strained. So, keeping in view the legal position, it is held that no express or implied consent of the husband is required for getting the pregnancy terminated under the Act.

21. Now the next question arises for consideration is as to whether the husband has any cause of action or right to sue against the medical practitioners, for getting the pregnancy terminated under the Act. Section 8 of the Act provides as under:—

“8. Protection of action taken in good faith-No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything - which is in good faith done or intended to be done under this Act.”

22. It is a personal right of a woman to give birth to a child, but it is not the right of a husband to compel her wife to give birth to a child for the husband. No doubt the judicial precedents are there, where the courts have considered the termination of pregnancy by the wife as mental cruelty and gave divorce to the husband on this ground, keeping in view the unique facts and circumstances of the case. But, in the case in hand, the parties have a son born on 14.02.1995. The relations of the parties became strained and in the year 1999 the wife started living separately from her husband at Chandigarh. At the time of the second conception the age of the son was about eight years, who is with the mother/wife. Nobody can interfere in the personal decision of the wife to carry on or abort her pregnancy which may be due to the reason that an effort to live together under one roof has failed and that their son was of eight years. She approached the petitioners, who are admittedly an authorized hospital to have the pregnancy terminated. A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women. When the husband/plaintiff, came to know that his wife was pregnant from his loins, it was his duty to convince his wife to continue with the pregnancy, but his coming to the court by filing a Civil Suit for permanent injunction restraining the wife from getting the pregnancy terminated was a shameful act on his part...The act of the medical practitioners (herein the Revision petitioners) was perfectly legal. No offence or tortuous act was committed by the medical practitioners. So it is held that the act of the medical practitioners Dr. Mangla Dogra and Dr. Sukhbir Grewal, in Civil Revision No. 633 7 of 2011 was legal and justified. The plaintiff/husband has failed to bring any document on record to show that the act of the medical practitioners was illegal or unjustified and thus they are liable to pay the damages. The act of the medical practitioners can not be termed as unethical.

23. Now, this Court is going to decide whether the impugned order dated 20.08.2011 **Annexure P-5**, whereby the application filed by the Revision petitioners under order 7 Rule 11 read with section 151 of the Code of Civil Procedure, for rejection of the plaint, qua the medical practitioners was illegal, erroneous, without jurisdiction, miscarriage of justice and that the court has not exercised its powers in rejecting the plaint qua them.

...

27. The Medical Termination of Pregnancy Act 1971 does not empower the husband, far less his relations, to prevent the concerned woman from causing abortion if her case is covered under section 3 of that Act. Under section 312 of the Indian Penal Code, 1860 causing miscarriage is a penal offence. Relevant civil law has since been embodied in the Act legalising termination of pregnancy under certain circumstances. Since law is liberal for effecting such termination, the Act does not lay down any provision on husband's consent in any situation.

...

30. Keeping in view the above discussion, it is held that no cause of action accrued to the plaintiff-husband against the present petitioners, in Civil Revision No. 6337 of 2011 and No. 6017 of 2011. They are not necessary and proper parties in the suit and the suit qua them appears to have been filed with ulterior motive best known to the husband/plaintiff. The continuation of the Civil Suit against these petitioners would amount to the abuse of process of law and miscarriage of justice and this Court would not feel hesitate to come to the rescue of the petitioners.

..."

IN THE HIGH COURT OF DELHI

Shashi Bala v. Rajiv Arora

(2012) 188 DLT 1

Kailash Gambhir, J.

A husband filed a suit in the trial court for divorce on the ground of mental cruelty, alleging that his wife did not permit consummation of the marriage on the wedding night. He also alleged that she had sex with him only 10-15 times within the first five months of their marriage. The wife denied the allegations and filed a counter claim for restitution of conjugal rights. The trial court decided in the favour of the husband and decreed for dissolution of marriage. In this appeal, the High Court addressed the issue of whether denial of sex amounts to "cruelty."

Gambhir, J.: "By this appeal filed under section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the impugned order and decree dated 12.2.2001 passed by the learned Trial Court whereby a decree of divorce in favour of the respondent husband under Section 13(i)(a) of the Hindu Marriage Act was granted and the counter claim filed by the appellant seeking a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act was dismissed.

2. Brief facts of the case relevant for deciding the present appeal is that the marriage between the parties was solemnized on 17.2.1991 according to Hindu rites and ceremonies. It was stated by the husband in his divorce petition that after the solemnization of the marriage, right from the inception, the attitude of the appellant was indifferent and she complained that the marriage had not been solemnized with a man of her taste. As per the respondent husband, the appellant had refused to participate in the traditional ceremony of dud-mundri by saying that she did not like all this but without disclosing any reasons. As per the respondent, the appellant also did not take any interest in the dinner which was served on the wedding night i.e. 18.2.1991. It is also the case of the respondent that when both of them went to their bedroom around 11.30 p.m. the appellant was not responsive and she did not allow the respondent to have sexual intercourse with her. The respondent has alleged that it is only on 25.2.1991, that he was allowed to have sexual intercourse with the appellant for the first time, but again the appellant remained unresponsive and such conduct of the appellant caused mental cruelty to the respondent... It is also the case of the respondent that he had sexual intercourse with the appellant only for about 10-15 times during her stay with him for a period of about 5 months... Based on these allegations the respondent husband claimed the decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act.

3. In the written statement filed by the appellant wife, she denied all the abovesaid allegations leveled by the respondent husband... She also denied the allegation of non-consummation of the marriage on the wedding night. The appellant took a stand that right from the wedding night i.e. 18.2.1991 the parties had normal physical relationship with each other...The appellant denied that she had sexual relationship with the respondent only 10-15 times or she had refused to have sex with the respondent...

...

5. After taking into consideration the pleadings of the parties, the learned Trial Court found that the refusal of the appellant wife to participate in the "Dud Mundari ceremony" and thereafter "Chudha ceremony", which were customary rituals in the family of the respondent husband caused embarrassment and humiliation to the respondent and such acts on the part of the appellant amounted to cruelty. The learned Trial Court also found that in the span of one year and two months of the married life, the parties had sex only for about 10-15 times and also denial of the appellant for sexual relationship on the very first night of the marriage is a grave act of cruelty as healthy sexual relationship is one of the basic ingredients of a happy marriage...Accordingly, the learned trial court granted a decree of divorce in favour of the respondent and against the appellant and consequently also dismissed her counter claim for restitution of conjugal rights.

...

9. Cruelty as a ground for divorce is nowhere defined in the Hindu Marriage Act as it is not capable of precise definition. There cannot be any straitjacket formula for determining whether there is cruelty or not and each case depends on its own facts and circumstances. What may be cruelty in one case may not be cruelty in other and the parameter to judge cruelty as developed through judicial pronouncements is that when the conduct complained of is such that it is impossible for the parties to stay with each other without mental agony, torture and stress. It has to be something much more than the ordinary wear and tear of married life. The conduct complained of should be grave and weighty and touch a pitch of severity to satisfy the conscience of the court that the parties cannot live together with each other anymore without mental agony, distress and torture. The main grievance of the respondent herein is the denial of the appellant to have normal sexual relationship with the respondent. As per the case of the respondent, during the short period of 5 months he had sexual intercourse with the appellant only 10-15 time while the plea taken by the appellant is that she had never denied sex to the respondent. The courts have through various judicial pronouncements taken a view that sex is the foundation of marriage and marriage without sex is an anathema. The Division Bench of this Court in the celebrated pronouncement of *Mrs. Rita Nijhawan v. Mr. Bal Kishan Nijhawan* AIR 1973 Delhi 200 held as under:

"In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body, the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

The learned Trial Court referred to the judgment of this court in the case of *Shankuntla Kumari v. Om Prakash Ghai* AIR 1983 Delhi 53 wherein it was held that:

"(25) A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married."

Hence, it is evident from the aforesaid that willful denial of sexual intercourse without reasonable cause would amount to cruelty. In the authoritative pronouncement of the Hon'ble Supreme Court in *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511, the Hon'ble Supreme Court took into account the parameters of cruelty as a ground for divorce in various countries and then laid down illustrations, though not exhaustive, which would amount to cruelty. It would be relevant to refer to the following para 101(xii) wherein it was held as under:—

"(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."

Although it is difficult to exactly lay down as to how many times any healthy couple should have sexual intercourse in a particular period of time as it is not a mechanical but a mutual act, however, there cannot be any two ways about the fact that marriage without sex will be an insipid relation. Frequency of sex cannot be the only parameter to assess the success or failure of a marriage as it differs from couple to couple as to how much importance they attach to sexual relation vis a vis emotional relation. There may be cases where one partner to the marriage may be over sexual and the other partner may not have desire to the same level, but otherwise is fully potent. Marriage is an institution through which a man and a woman enter into a sacred bond and to state that sexual relationship is the mainstay or the motive to be achieved through marriage would be making a mockery of this pious institution. By getting married, a couple agrees to share their lives together with all its moments of joy, happiness and sorrow and the sexual relationship between them brings them close and intimate by which their marital bond is reinforced and fortified. There may not be sexual compatibility of a couple right from inception of the relationship and depending upon physical, emotional, psychological and social factors, the compatibility between some couples may be there from the beginning and amongst some may come later. Undoubtedly, a normal and healthy couple should indulge into regular sexual relationship but there may be exceptions to this and what may be normal for some may not be normal for others as it would depend upon various factors such nature of job, stress levels, social and educational background, mood patterns, physical well being etc. Indisputably, there has to be a healthy sexual relationship between a normal couple, but what is normal cannot be put down in black and white.

10. Adverting back to the facts of the present case...[t]he case of the respondent is that he had sex with the appellant only for about 10-15 times in a span of five months of married life and that he was denied sexual relationship on the very first night of their marriage and denial of sex at the wedding night caused great mental cruelty to him. The respondent husband also stated that he was allowed to have sexual intercourse by the appellant for the first time only on 25.2.1991. The appellant wife has denied the said allegations of the respondent husband and in defence stated that she was having normal sexual relationship with her husband and even had sexual intercourse on the wedding night. The learned Trial Court after analyzing the evidence adduced by both the parties found the version of the appellant untrustworthy and unreliable while that of the respondent, much more credible and trustworthy. The appellant on one hand took a stand that on 18.2.1991 the atmosphere on that night was very tense so much so that, both the parties could not sleep and speak to each other and she did not even take proper food and the whole night there was tension between the parties and the atmosphere was fully charged, but at the same time in the cross-examination of PW 2 the suggestion was made by counsel that the appellant touched the feet of the respondent when he entered the room on the said wedding night and she also admitted that her husband had never taken liquor in her presence and he had never come to her in drunken state. It would be appropriate to reproduce para 55 of the Trial Court judgment to bring to surface the said contradiction on the part of the appellant.

“55. From the evidence on record, it is gathered that on the wedding night i.e. on 18.2.91 a “Dud Mundari” ceremony was to be performed but the respondent wife refused to participate in the same. This version of PW 2 has been fully corroborated by his father PW 3. The husband i.e. Rajiv Arora, had entered by both PW 2 and RW 1. RW 1 in her cross-examination has stated that their marriage had been consummated on that very night and her husband had come to her and she did not have to persuade the petitioner. On the other hand the petitioner has stated that their marriage could not be consummated on their wedding night and he had sex with his wife for the first time only on 25.2.91. RW 1 in her cross-examination has stated that the atmosphere that night was very tense and both the parties could not sleep and they did not speak to each other and her husband had grievance about the insufficient dowry which had been given in the marriage. RW 1 has also admitted that on 18.2.91, she did not take proper food as she was not feeling well. This version of RW 1 that she did not take food that night is corroborated by the version of PW 1 who has stated that on the wedding night at the time when the dinner was served the attitude of the respondent was indifferent and she did not take any dinner but she took only a little sweet.”

11. In matrimonial cases, more often than not it is a challenging task to ascertain as to which party is telling truth as usually it is the oral evidence of one party against the oral evidence of the other. What happens in the four walls of the matrimonial home and what goes on inside the bed room of the couple is either known to the couple themselves or at the most to the members of the family, who are either residing there or in whose presence any incident takes place. Whether the couple has had sex and how many times or have had not had sex and what are the reasons; whether it is due to the denial or refusal on the part of the wife or of the husband can only be established through the creditworthiness of the testimonies of the parties themselves. Consequently, the absence of proper rebuttal or failure of not putting one's case forward would certainly lead to acceptance of testimony of that witness whose deposition remains unchallenged.

In the present case, the testimony of the respondent that the appellant was never responsive and was like a dead wood when he had sexual intercourse with her remained un rebutted. It is not thus that the respondent had sex with her wife only about 10-15 times from the date of his marriage within a period of five months, but the cruel act of the appellant of denying sex to the respondent especially on the very first night and then not to actively participate in the sex even for the said limited period for which no contrary suggestion was given by the appellant to the respondent in his cross-examination... Thus, taking into account the conduct of the appellant in totality, this court is of the view that the same amounts to causing mental cruelty to the respondent.

12. Before parting with the judgment, this court would like to observe that the sex starved marriages are becoming an undeniable epidemic as the urban living conditions today mount an unprecedented pressure on couples. The sanctity of sexual relationship and its role in reinvigorating the bond of marriage is getting diluted and as a consequence more and more couples are seeking divorce due to sexual incompatibility and absence of sexual satisfaction. As already stated above, to quantify as to how many times a healthy couple should have sexual intercourse is not for this court to say as some couples can feel wholly inadequate and others just fine without enough sex. "That the twain shall become one flesh, so that they are no more twain but one" is the real purpose of marriage and sexual intercourse is a means, and an integral one of achieving this oneness in marriage.

13... The present appeal filed by the appellant is devoid of any merits and the same is hereby dismissed."

IN THE HIGH COURT OF KARNATAKA

Sri. Uma Mahesh v. Smt. Methravathi

AIR 2013 Kar 41

N.K. Patil and B.V. Pinto, JJ.

A husband filed a petition for divorce on grounds of cruelty and desertion stating that his wife was suffering from a serious physical disorder pertaining to her reproductive system and could not conceive. He further alleged that there was no cohabitation between them as she deserted him. The wife went on to prove through a medical opinion that she was capable of conceiving and that it was the husband who refused to cohabit with her. The divorce petition was rejected in the family court and the main issue raised in the appeal before the High Court by the husband was whether the wife was impotent and infertile and if yes, whether it was a valid ground of mental cruelty entitling the husband to a decree of divorce.

Patil and Pinto, JJ.: "This appeal arises out of the impugned judgment and order dated 18th December 2010, passed in M.C. No. 241/2008, by the learned judge, Family Court, Mysore, dismissing the petition filed by appellant, under Section 13(1)(1-a) and (1-b) of Hindu Marriage Act, on grounds of cruelty and desertion.

2. The brief facts of the case on hand as set out in the petition are that, the appellant and respondent are husband and wife and their marriage was solemnized on 4th May 2003... as per the Hindu customs prevailing in their community. Thereafter, the respondent joined the company of the appellant and they lived together as husband and wife in the matrimonial home. The respondent lived with the appellant, till about two and a half years prior to filing of the petition.

3. Be that as it may, it is the specific case of the appellant that, when the respondent failed to beget children, she deserted him on her own will and volition and started staying in the house of her Parents... and never bothered to return to the matrimonial home to lead marital life with him. It is the further case of the appellant that his wife is suffering from serious physical disorder pertaining to her reproductive system and in fact, she was subjected to thorough medical check-up and investigation by expert Doctors and according to the opinion of the Doctors, the respondent is unable to bear children and she is not exhibiting any signs of attaining age of puberty and not undergoing regular menstrual cycle every month. It is the allegation of the appellant that though the respondent and her Parents were aware of the inherent defect suffered by the respondent, they have played fraud on him and through mis-representation and suppression of the fact that, she had not attained puberty and not undergoing monthly menstrual cycle, performed her marriage with him, and thereby cheated him... In fact, a panchayat was also convened in this regard and according to the appellant, the panchayatdars and other close relatives who were present in the panchayath have taken the respondent and her family members to task for having suppressed the inherent defect from which the respondent is suffering from and for performing her marriage with the appellant, by suppressing the said inherent defect. The appellant's further case is that the respondent and her mother

suffered humiliation in the presence of the panchayatdars and having admitted the fact that her daughter had not attained puberty and not undergoing monthly menstrual cycle, admitted that she has suppressed that fact, while performing the marriage of the respondent with the appellant. Further, the mother of the respondent took the respondent to her house on the date of the panchayat itself i.e. during December 2005 and since then, the respondent is staying with her mother in the house of her Parents and there is no sort of any cohabitation between him and the respondent since then and the marital relationship between him and the respondent has been broken down, irretrievably and there is no chance and possibility of reunion or resumption of the marital relationship between them.

4....According to [the appellant], the respondent has (sic) left his house about 2½ years ago from the date of the petition, and she is staying away from him thereby she is also guilty of committing the matrimonial offence of desertion and also that of cruelty. Hence, he was constrained to file (sic) a petition seeking the relief of decree of divorce from the respondent/wife, both on the ground of cruelty and desertion...

5. Upon notice to the respondent, she contested the petition and filed her objections, opposing the prayer sought in the petition. She admitted her marriage with the appellant, but denied all other allegations made against her, more Particularly (sic) the allegation that, she has not attained puberty and not undergoing periodical menstrual cycle. According to her, after the marriage she joined the appellant and started residing with him in the matrimonial home. But the appellant and his family members started demanding her for payment of additional dowry and started harassing her and ill-treating her and since she refused to comply with their illegal demand for additional dowry, the appellant and his Parents (sic) have driven her out of their house by making use of the fact that, she did not conceive even after leading marital life with the appellant for about three and a half years. Further, it is her specific contention that, at the beginning, she was suffering from some minor medical problem regarding menstrual cycle and during November, 2005, the appellant himself took her to B.G.S. Appolo Hospital and subjected her to medical examination by Dr. Anish Behl, who diagnosed the problem that she is suffering from premature ovarian failure and provided her necessary medication. She has further taken up a contention that after about six months, she was again subjected to medical examination by Dr. Sudha Rao of Harsha Hospital and Dr. Sudha Rao, having thoroughly examined her, has issued a Certificate, opining that, the respondent is fully cured and she is getting her regular menstrual cycle and there are chances of good conception, It is the further contention of the respondent that. (sic) Dr. Sudha Rao gave her opinion on 24th May 2006 and during that period, she and the appellant were living together, by leading the marital life. According to her, subsequent to the opinion tendered by Dr. Sudha Rao and on coming to know that, she is not suffering from any inherent defect and she started getting her regular menstrual cycle, the appellant in order to get rid of her, started making allegations against her that she is unable to conceive and she is incapable of begetting children, since she is suffering from serious physical disorder pertaining to reproductive system. In spite of having the report given by Dr. Sudha Rao from Harsha Hospital, before whom the appellant himself has taken her for investigation and medical checkup, the appellant started making allegations that, her marriage with him was performed by suppressing this fact in order to make out a ground to obtain divorce from her. According to the respondent, she is perfectly all right and she is not suffering from any inherent defect as per the opinion tendered by Dr. Sudha Rao of Harsha Hospital and according to Dr. Sudha Rao, she is capable of begetting children. But the appellant himself since withdrawn from her society and refused to cohabit with her, she could not conceive. That itself cannot make a ground and further she has denied about holding of the alleged panchayat by the appellant and the members of the panchayat allegedly took the mother of the respondent to task and also denied the allegation that her mother took her back to her house and since then she is residing in her Parents' house...

6. During pendency of the matter, after going through the pleadings of both Parties, the learned Judge, Family Court has referred the matter for conciliation and several sincere efforts were made by the Conciliators. As per the report of the conciliators, the conciliation failed as the husband of the respondent, i.e. The appellant has refused to take his wife back to the matrimonial home, but insisted on divorce only on the ground of her infertility problem...Because of the stubborn stand taken by the appellant, the conciliation failed and the case was taken up for trial...

Thereafter, after hearing the learned counsel for the Parties and on the basis of the pleadings, the Family Court framed necessary points for consideration, which are as follows:

1] Whether the petitioner/husband proves that, the respondent/wife has subjected him to cruelty by her willful conduct of harassment thereby committed the matrimonial offence of cruelty and on that ground he is entitled for a decree of divorce against her?

2] Whether the petitioner/husband further proves that, the respondent/wife has without reasonable excuse withdrawn herself from his society and having abandoned him. continued to stay in the house of her mother, thereby deserted him and hence he is entitled for a decree of divorce on the ground of desertion?

3] For what order?"

After careful evaluation of the oral evidence of PWs 1 and 2 and RW1 and RW2 and documentary evidence at Exs. P1 to P10 and Exs. R1 to R3, the Family Court, by assigning valid reasons and placing reliance on the judgment of the Apex Court and taking into consideration the conduct of the appellant and his family members, has answered the point Nos. 1 and 2 in the 'Negative' and point No. 3 as per the final order, and dismissed the petition filed by the appellant, for a decree of divorce. Being aggrieved by the said judgment and order passed by the Family Court, the appellant has come up in appeal before this Court, seeking to set aside the said judgment and to grant him the decree of divorce from the respondent.

...

7. The submission of the learned counsel appearing for the appellant, *Shri. v. Rangaramu*, at the outset is that, the Family Court has grossly erred in dismissing the petition filed by appellant for a decree of divorce, holding that appellant has failed to make out a case regarding the infertility in the respondent wife that she is not a position to conceive. To substantiate the said submission, he quipped to point out to the letters/opinions of Dr. Anish Behl, dated 26th November 2005 and Dr. Mala Dharmalingam dated 11th December 2004 as per Exs. P5 and P7 respectively, and submitted that the respondent has undergone detailed investigation by the Endocrinologist, to assist the fertility panel of the respondent wife. They have opined that the respondent has premature ovarian failure and the only way she can conceive is with IVF +donor eggs and therefore, it can be concluded that the ovaries of the respondent are not producing eggs, which are necessary to conceive and since she is suffering from premature ovarian failure, her ovaries are not in a position to produce eggs. This opinion expressed by the expert Doctors has not been looked into nor considered nor appreciated by the Family Court. By merely accepting the opinion of Dr. Sudha Rao, dated 24th May 2006, which discloses that she is getting regular periods and there are good chances of conception, as per Ex. R1, the Family Court has rejected the prayer of the appellant. But, it can be seen that the opinion given by Dr. Sudha Rao is only with respect to her menstrual cycle. Therefore, he submits that the said opinion itself is not sufficient to reject the prayer sought for by the appellant under Section 13(1)(1-a) and (1-b) of the Act. Further, he submits that the appellant has sought for a decree of divorce, on the ground of mental cruelty and desertion, for the reason that the respondent wife has left the house of the appellant on her own will and volition after two and half years and started to live with her Parents and therefore, the impugned judgment and order passed by the Family Court is liable to be set aside and the prayer sought in the petition for a decree of divorce may be granted.

8. As against this, Shri. P. Mahesha, learned counsel appearing for respondent/wife, inter alia, contended and substantiated the impugned judgment and order passed by Family Court, stating that the same is a well-considered, well founded, well reasoned judgment, inasmuch as the same is passed after critical evaluation of the oral and documentary evidence available on file and relying on the judgment of the Apex Court Further, he submits that the Family Court is also highly justified in dismissing the petition filed by appellant on false and frivolous allegations and assumptions and presumptions. Therefore, interference in the same is not justifiable.

9. After careful consideration of the submission of the learned counsel appearing for the Parties and after critical evaluation of the impugned judgment and order passed by the Family Court, the only point that arise for our consideration is as to:

Whether the appellant has made out a case for interference in the impugned judgment and order passed by the Family Court?

After careful perusal of the impugned judgment and order passed by the Family Court and on critical evaluation of the original records available on file, it is manifest on the face of the impugned judgment passed by the Family Court that, there is no error or material illegality as such committed by it in dismissing the petition filed by appellant for a decree of divorce...It is significant to note that the petition filed by appellant is for a decree of divorce on the ground of mental cruelty and desertion. From the pleadings and other relevant material available on file, it reveals that the appellant, after leading marital life for nearly one year and nine months, had himself taken the respondent/wife for medical check-up regarding some physical disorder pertaining to reproductive system. In this regard, the appellant has produced documentary evidence of Dr. Anish Behl, at Ex. P5 and of Dr. Mala Dharmalingam at Ex. P7. From a perusal of the said documents, it emerges that the respondent wife was being referred to Dr. Anish Behl of BGS Apollo Hospitals. Consultant Endocrinologist & Diabetologist and also Dr. Mala Dharmalingam, Professor & Endocrinologist, Endocrinology and Metabolism, M.S. Ramaiah Medical College. Dr. Mala Dharmalingam, after conducting various tests, has opined

that the respondent has premature ovarian failure. She can be put on OC and then planned assisted reproduction for pregnancy. This opinion is given during December 2004. Dr. Anish Behl, after detailed medical check-up and tests, has opined that the respondent wife has premature ovarian failure. She needs to be on OCPs. The only way she can conceive is with IVF + Donor eggs. This opinion is given during November 2005. Thereafter, it can be seen that Dr. Sudha Rao, Consulting Obstetrician & Gynecologist of Harsha Hospital, who appears to have referred the case of respondent to Dr. Mala Ramalingam and Dr. Anish Behl and after giving proper treatment to the respondent, has opined on 24th May 2006 that, the respondent is getting regular periods and there are good chances of conception. The said opinion of Dr. Sudha Rao is produced by respondent at Ex. R1. Therefore, having regard to the totality of the case, it can be concluded that as per the latest opinion given by Dr. Sudha Rao, the respondent is in fact, getting her regular periods and she has good chances of conception. In fact, it can also be seen that, the appellant has made all his sincere efforts to take respondent/wife for medical check-up and tried to give proper medication, to which, after some time, the respondent has shown positive response and accordingly, the latest report of Dr. Sudha Rao states that the respondent is getting her regular periods and there are good chances of conception.

10. The allegation of the appellant against the respondent wife is that, she has serious physical disorder pertaining to reproductive system, as per the opinions/letters written by Dr. Anish Behl and Dr. Mala Dharmalingam to Dr. Sudha Rao, wherein both the said Doctors have opined that the respondent has premature ovarian failure, she can be put on OC and then planned assisted reproduction for pregnancy and that the only way she can conceive is with IVF + Donor eggs. But it can be seen that the said defect is curable by giving due medication, which is evidence as per the opinion of Dr. Sudha Rao, at Ex. R1 who states that the respondent is getting her periods regularly and she has good chances of conception. The Family Court, in our view, has rightly taken note of this crucial aspect of the matter also and dismissed the petition filed by appellant. The medical disorder in a person cannot be treated to be mental cruelty or desertion. Further, the Family Court has observed that the appellant and respondent lived together as husband and wife for about one year and nine months and there was cohabitation between them. Except making the allegation of cruelty and desertion by the respondent wife, the appellant has not adduced any oral evidence of his family members to substantiate the same nor has established the same by adducing any Independent witnesses. The appellant himself has admitted in his cross-examination that, he led marital life with the respondent and they lived together as husband and wife for about one year nine months, after marriage. Therefore, we can easily come to the conclusion that the marriage was in fact, successful and consummated during the said period and there was no complaint whatsoever by the appellant about the respondent. Just because the respondent had some minor medical problem and was not immediately capable to conceive, it cannot be presumed that the said problem is a permanent one and on that ground, the appellant cannot take advantage of it and file the petition, for a decree of divorce on grounds of cruelty and desertion. Due some minor problem in the ovaries, the respondent was not able to conceive. But, as per the opinion of Dr. Sudha Rao, from 2006 onwards, the respondent is getting her regular periods and she has good chances of conception.

11. Further, it can be seen that the Family Court has gone in greater detail regarding the instances of mental cruelty, by relying upon the decision of the Hon'ble Apex Court and held that if there is refusal on the Part of the either spouse to have intercourse with other spouse for a considerable period, without there being any physical incapacity or valid reason, it may amount to mental cruelty to the other spouse. But, in the case on hand, it is undisputed inasmuch as the appellant himself has admitted even in his cross-examination that he led marital life with the respondent wife for about one year nine months after marriage. That means, the marriage between appellant and respondent consummated and they cohabited. Simply because the respondent was unable to conceive, may not be a ground for the appellant to urge that her inability to conceive amounted to mental cruelty. Admittedly, they led marital life for about one year nine months and never complained that she was unfit for sexual intercourse...Further, the appellant also never branded the respondent wife as an impotent person nor filed any petition seeking nullity of the marriage on the ground of her impotency. Therefore, the Family Court observed that mere barrenness and sterility would not amount to impotency. Impotence means incapacity for accomplishing the act of sexual intercourse. Impotency has to be distinguished from sterility associated with it. Further, the Family Court observed that even though the respondent was not able to conceive due to disfunction of the ovaries, the appellant was capable of having sexual intercourse, though not bearing children. By the use of the word 'impotency', the legislature did not intend to bring in the idea sterility or incapacity of conception. Impotency in this connection signifies incapacity to have normal sexual intercourse. Therefore, the Family Court came to the conclusion that even though the respondent wife appears to be having some problem of non-functional ovaries, there was no congenital abnormality of the vagina. Therefore, it cannot be held to be ground for divorce, on the ground of cruelty, as the respondent never denied the appellant the conjugal bliss and they led marital life for about one year nine months and absolutely there was no complaint against the respondent about her incapacity to provide him marital bliss.

12. Further, it can be seen that the allegation of the appellant is that, she was not getting her menstrual periods regularly and he took her to a gynecologist, since her menstrual cycle was not regular. But, after going through the Certificate issued by Dr. Sudha Rao, as per Ex. R1, it can be seen that, after proper medical treatment, the respondent is getting regular periods and there are good chances of conception. Therefore, the appellant cannot have any grievance regarding her irregular menstrual cycle also.

...

18. Thus, viewed from any angle, we are of the considered opinion that the Family Court, taking into consideration all the relevant aspects, has passed a well considered, well reasoned and well founded judgment. Hence, we are of the firm opinion that the appellant has failed to make out a case for granting a decree of divorce, by setting aside the impugned judgment and order and hence, there is no justification to grant the relief sought in the appeal, nor we find any error or illegality as such in the impugned judgment and order passed by the Family Court.

..."

IN THE HIGH COURT OF BOMBAY

Reshma Rakesh Kadam v. Rakesh Vijay Kadam

2013 SCC OnLine Bom 1546

V.K. Tahilramani and V.L. Achliya, JJ.

A husband filed a petition for a decree of divorce on the ground of cruelty as the wife avoided having physical relations with him. His wife also filed a petition in the family court for restitution of conjugal rights. The family court granted the decree of divorce and dismissed the wife's petition. She filed an appeal in the High Court. The court was asked to address the question of whether refusal to engage in sexual intercourse or the avoidance of the same by a spouse amounted to "mental cruelty."

Tahilramani, J.: "1. The appellant has preferred this appeal against the common Judgment & Order dated 30.08.2012 passed by the Judge, Family Court at Bandra, Mumbai in Petition No. A-1525 of 2008 and Petition No. A-1192 of 2008. Petition No. A-1192 of 2008 was filed by the respondent-husband for decree of divorce on the ground of cruelty and desertion. The appellant-wife had filed Petition No. A-1525 of 2008 against the respondent-husband for decree of restitution of conjugal rights. By the said Judgment and Order, Petition No. A-1192 of 2008 filed by the respondent-husband came to be decreed and the marriage between the appellant and the respondent came to be dissolved by decree of divorce on the ground of cruelty. By the said Judgment and Order, Petition No. A-1525 of 2008 filed by the appellant-wife for restitution of conjugal rights was dismissed. Hereinafter, for the sake of convenience, the appellant will be referred as 'wife' and the respondent will be referred as 'husband'.

2. Some of the admitted facts are that the appellant and the respondent got married on 26.12.2005 according to Hindu rites and rituals. There is no issue born out of the said wedlock. The appellant-wife was residing with the respondent-husband in his joint family till November-December 2007. According to the husband, the wife left the house on 07.11.2007 whereas according to the wife, she was compelled to leave the matrimonial house on 06.12.2007 and not on 07.11.2007. It may be stated at this stage that though the husband had filed petition for divorce on the ground of cruelty and desertion, his petition for divorce was allowed only on the ground of cruelty. As far as the ground of desertion was concerned, the Family Court observed that...the pre-requisite condition of two years to get the decree of divorce on the ground of desertion is not satisfied.

3. The husband has given several instances of cruelty caused by the wife to him...

4. The second instance of cruelty stated by the husband is that on 31.12.2005, they left Mumbai and went for their honeymoon. During the honeymoon, his wife quarreled with him on small matters and harassed him and she did not cooperate during physical relations and avoided it on one or the other pretext. His evidence shows that the wife avoided sexual relations even thereafter. This important fact deposed by the husband was also not challenged in the cross-examination.

...

7. The evidence of the husband that she avoided physical relations with him, she quarreled and harassed him and threatened him to commit suicide, is sufficient to held (sic) that the husband was subjected to cruelty by the wife during the course of her stay with him. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment. In *Parveen Mehta v. Inderjeet Mehta* (2002) 5 SCC 706 and in the case of *Shashi Bala v. Rajeev Arora* 1 DMC 721 Delhi High Court, it is held that, “Sex is the foundation of marriage and marriage without sex is an anathema. Willful denial of sexual intercourse without reasonable cause would amount to cruelty. A person enjoying normal health being deprived of normal cohabitation by spouse and thus undergoing anguish and frustration could be said to have been subjected to mental cruelty.” Importantly, this fact was not at all challenged in the cross-examination of the husband.

8. The wife in her affidavit by way of examination in chief Exh. 20 stated that the husband had caused mental and physical cruelty to her during her stay with him, however, it is to be noted that she has not disclosed any details of the acts of cruelty caused to her in her evidence...

...

10. ...We do not find any reason to disbelieve the unchallenged evidence of the husband discussed above regarding the cruelty caused to him by the wife, hence, we are of the opinion that the Family Court was right in holding that the husband, by adducing cogent and satisfactory evidence, has proved that the wife has caused cruelty to him after solemnization of their marriage and as such, he is certainly entitled to have a decree of divorce on the ground of cruelty.

...”

IN THE HIGH COURT OF HIMACHAL PRADESH

Manju Thakur v. Raj Kumar

2014 SCC OnLine HP 3950

Tarlok Singh Chauhan, J.

A husband filed a petition for divorce on the ground of cruelty and desertion stating that the wife did not allow him to have marital intercourse with her. His further contention was that the marriage could not be consummated due to the conduct of the wife and that she suffered from mental and physical impotence. The suit succeeded in the district court and the main issue that came for consideration before the High Court was whether the wife was suffering from impotency and whether or not the marriage was consummated between the parties and if not, whether that amounted to “cruelty.”

Chauhan, J.: “The appellant is the wife and is aggrieved by the judgment and decree passed by the learned District Judge, Shimla, on 20.08.2011 in H.M.A. No. 4-S/3 of 2007 whereby the petition filed by the respondent for grant of a decree of divorce and also to declare the marriage between the parties annulled, has been allowed.

2. The facts as are necessary for the adjudication of the appeal may be noticed. The respondent preferred a petition under Sections 12(1)(a), 13(1)(ia) and (ib) of the Hindu Marriage, Act, 1955...Dowry less marriage had been performed in ‘Butail Dharamshala’, Shimla between the appellant and respondent in accordance with Hindu rites and rituals on 29.06.2002. After marriage, the appellant had accompanied the respondent to his house and had stayed there for about a month. During this period, the appellant did not allow the respondent access to her. The appellant did not agree for marital intercourse. After some time, the appellant left for house of her parents and had stayed with her parents for about 45 days and thereafter returned to the matrimonial house. Even after visiting her parents, appellant did not agree for marital intercourse and she had not been permitting the respondent even to touch her body. The appellant had been insisting for separate accommodation. Since the marriage could not be consummated due to the conduct of the appellant, the respondent had felt intense mental and physical pain, shock and suffering. The respondent had been in depression and had been so observed by his mother. The mother-in-law of the appellant had observed her unusual conduct and even she was not observed menstruating and when asked to go for a medical check up, the appellant had started picking up quarrel with the respondent and his mother. Respondent’s mother was owner in possession of one old house at Ghanahatti and the parents of the appellant belonged to nearby area. With a view to carry on with his marriage, the respondent was directed to take the appellant to his house at Ghanahatti and even at Ghanahatti, the appellant did not permit the respondent to establish physical contact with her.

3. As per respondent, the appellant started inviting her parents, brothers, sisters and nephews to her house as a result of which the respondent was compelled to sleep in separate room. The appellant had been suffering from mental and physical impotency and she and her family members had not disclosed such disability prior to the marriage. The appellant had treated him with cruelty. The respondent could not consummate his marriage even though he had persuaded the appellant for the purposes a number of times. Respondent had suffered agony and mental as well as physical cruelty at the instance of the appellant...The marriage of the parties had irretrievably broken down. As per respondent, he was entitled to dissolution of marriage on the grounds of cruelty and desertion.

4. The appellant, who was the respondent below, had resisted the petition on the ground of maintainability in preliminary objections. In reply to paras on merits, the appellant admitted her marriage with the respondent on 29.06.2002 at Shimla. After marriage, the appellant had accompanied the respondent to his house and the marriage between the parties stood consummated. The appellant denied her suffering from mental and physical impotency. After staying for 1½ months with her husband, the appellant had left for the house of her parents. She had stayed there for sometime and had returned to the matrimonial house...

5. On the pleadings of the parties, the following issues were framed:-

- i). Whether the petitioner is entitled to decree of declaration under Section 12 of the Act, as prayed? OPP.
- ii) If issue No. (i) is not answered in affirmative, whether it is proved on record that the respondent has deserted the company of the husband without any reasonable cause, if so, its effect? OPP.
- iii) If issue No. (i) is not answered in affirmative, whether it is proved on record that the respondent/wife had treated the petitioner with cruelty, if so, its effect? OPP.
- iv) Whether the petition is not maintainable in the present form? OPR.
- v) Whether the petitioner has concealed material facts from the court, if so, its effect? OPR.
- vi) Relief.

6. After recording the evidence and evaluating the same, the learned Court below allowed the petition and annulled the marriage on the ground of impotency of the appellant under Section 12(1)(a) of the Hindu Marriage Act, 1955 (for short 'the Act') and further declared that the appellant herein had treated the respondent with cruelty and deserted him for over a period of two years prior to institution of the petition. Therefore, the marriage was dissolved under Section 13(1)(ia) and (ib) of the Act.

7. Aggrieved by the judgment and decree passed by the learned Court below, the appellant has filed the present appeal on the ground that the learned Court below has not correctly appreciated the provisions of law as well the oral and documentary evidence...

...

9. I have considered the rival submissions of the learned counsel for the parties and gone through the records of the case. It cannot be disputed that sex is one of the purposes of marriage. The institution of marriage believes in consummation of the same. Cohabitation is a corollary. After solemnization of marriage when either sides declare that marriage has not been consummated and cohabitation has not taken place, the very foundation of marriage is crumpled. The importance of active sexual life has been noticed by a Division Bench of the Delhi High Court in *Mrs. Rita Nijhawan v. Shri Balkishan Nijhawan* AIR 1973 Delhi 200 wherein it was observed as under:-

"22. In the present case the marriage took place in 1954. Barring the pregnancy in 1958 which according to the appellant was the result of part improvement right from the day of marriage till 1964, there has never been any normal sexual life, and the respondent has failed to give sexual satisfaction. The marriage has really been reduced to a shadow and a shell and the appellant has been suffering misery and frustration. In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore, cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual

satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage than disappointments in sexual intercourse.

23. The appellant is only in mid thirties. To force the appellant to this life of frustrating and unsatisfied sexual life which would inevitably damage her health both mental and physical is nothing but cruelty.....”

10. The aforesaid observations in Nijhawan's case (supra) were quoted with approval by the Hon'ble Supreme Court in *Vinita Saxena v. Pankaj Pandit* (2006) 3 SCC 778.

11. It is to be borne in mind that a normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. The importance of sex in a married life was emphasized by the Hon'ble Supreme Court in the celebrated judgment of *Dastane v. Dastane* AIR 1975 SC 1534 wherein it was observed that “sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment”.

...

19. Now, the first and foremost question which is required to be considered is as to whether the appellant was impotent or was suffering from impotency.

20. The word “impotency” has not been defined in the Hindu Marriage Act, 1955. But, it is a ground to avoid marriage if it is established that at the time of marriage either of spouses was incapable of effecting the consummation either due to structured defect in the organs of the generation rendering complete sexual intercourse impracticable or due to some other cause. The burden of proving impotency of the opposite side would lie on the person making such allegations in order to obtain a decree of nullity of marriage on the ground of impotency as enumerated under Section 12(1)(a) of the Act...The respondent was required to establish that the appellant was impotent at the time of marriage and continued to be so until the institution of the proceedings. However, it must be noted that when impotency is alleged as a ground to declare the marriage between the parties as nullity, it is then the evidence has to be adduced by the person making such allegations, particularly, in the form of expert medical testimony.

21. Impotency is ordinarily understood to mean an incapacity, physical or mental, which admits of neither copulation nor procreation. However, the capacity to copulate and the capacity to procreate are two different capacities and resultant incapacities are also different. It can, therefore, be said that impotency means an incapacity, physical or mental on the part of either spouse to copulate which incapacity is permanent and incurable.

22. In *Jayaraj Antony v. Mary Seeniammal*, AIR 1967 Mad 242 the Full Bench held impotency as incapacity of consummate marriage, which may be physical or psychological.

23. In *Digvijay Singh v. Pratap Kumari*, AIR 1970 SC 137: (1969) 2 SCC 279 the Hon'ble Supreme Court held:-

“A party is impotent if his mental or physical condition makes consummation of marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings.”

24. Similarly, a Full Bench of the Delhi High Court in *Manjula and S. Desmukh v. Suresh Deshmukh* AIR 1979 Delhi 93 while deciding matrimonial reference has discussed ‘impotency’ as under:-

“19. Impotence is inability to consummate the marriage and to be a ground for nullity, such inability must exist at the time of marriage and continue to exist at the time of the institution of the suit.

For this purpose sexual intercourse has been defined as ordinary and complete intercourse, not partial and imperfect intercourse. If so imperfect as scarcely to be natural, it is no intercourse at all, but recent cases suggest that modern surgery has introduced the need of further scrutiny.

Though it has been held that full penetration without ejaculation on at least one occasion amounts to consummation, but more recently another judge decided that penetration for a short time without any ejaculation, did not amount to consummation. See *R. v. R.* (1952) 1 All. E.R. 1194 and *W (orise K) v. W*; (1967) 1 W.L.R. 1554 see *Latey on Divorce* (1973) 15th ed. P. 225.

20. Impotency means incapacity to consummate she marriage and not merely incapacity for procreation. The test is consummation and capacity to consummate.”

25. A Division Bench of Andhra Pradesh High Court in *Smt. Suvarna v. G.M. Achary*: held that impotency of spouse, in particular case, vis-à-vis, the other spouse is sufficient. Total impotency need not be proved.

26. Modi's Textbook on Medical Jurisprudence and Toxicology, Twenty-first Edition, deals with impotency in the following terms:-

“Impotence is defined as physical incapacity of accomplishing the sexual act, while sterility means inability for procreation of children. Impotence in males is the persistent inability to develop or maintain a penile erection sufficient to conclude coitus to orgasm and ejaculation. It should be remembered that the term impotence or sexual incapacity in forensic medicine connotes physical incapacity to accomplish the sex act.

Impotence has been described in Halsbury's Laws of England to be such a state of mental or physical condition which makes consummation of the marriage a practical impossibility.

An impotent individual need not necessarily be sterile, nor a sterile individual impotent, though both conditions may sometimes be combined in the same individual.”

27. There is yet another aspect of impotency which is termed as relative impotency which prescribes that a person suffering from no handicap whatsoever still feels inhibited or incompetent vis-à-vis the particular sexual partner.

28. Therefore, while dealing with a case of impotency the paramount consideration is not only physical incapacity which the Courts are guided but another important fact which is often ignored that the non consummation of marriage could be due to several other circumstances which drives to a situation whereby both the spouses though physically and mentally potent in the normal sense find it impossible to achieve a satisfactory sexual relationship.

29. The respondent has stated that the appellant had been suffering from mental and physical impotency because they had tried to consummate the marriage but without any success. The appellant, on the other hand, had refuted the charges of impotency.

30. On 19.11.2007, the respondent herein preferred an application under Section 151 CPC whereby he had asked for medical examination of the appellant on the ground that this would establish that she was impotent and there had been non consummation of marriage. The appellant had resisted her medical examination and had stated that she had not been suffering from mental or physical impotency and that the marriage between the parties had been consummated.

31. This application was, however, allowed and the appellant was ordered to be examined by a Medical Board. Even the respondent was directed to go in for medical examination. The Medical Officer had reported the respondent to be fit for cohabitation and it was found that he was not suffering from any mental or physical disability rendering marital intercourse impracticable.

...

33. In her cross-examination, Dr. Rita Mittal had explained that impotency was of two types (i) physical (ii) psychogenic and claimed that psychogenic impotency could not be judged merely by physical examination as the same required a detailed study of the patient after obtaining history. It was also claimed that vaginismus means sudden involuntary contraction of the vaginal muscles. However, she had stated that at the time of physical examination of the appellant, she had not found such features in her but could not rule out that such state of affairs could possibly appear at the time of sexual activity. It was also explained that if vaginismus occurs during the course of sexual activity, it becomes quite painful to the female as a result of which she avoids sexual intercourse. She admitted that there could be many other causes for the rupture of hymen other than the sexual intercourse. The witness admitted that she could not say with certainty as to whether rupture of the hymen in the case of the appellant was due to coitus or otherwise.

34. What appears from the statement of the Medical Officer is that that the appellant had congenital deformity as the opening of her vagina was too small to allow healthy and complete sexual intercourse and that may be the reason that she had avoided consummation of marriage. On the other hand, as noticed above, the respondent had been found medically fit for cohabitation.

35. It has come on record that the appellant had been given sufficient time and an environ to consummate the marriage at Shimla and then at Ghanahatti, but, one pretext or the other, the appellant appears to have avoided consummation.

...

37. One fact which clearly emerges from the reply filed by the appellant is that the marriage at least till the date of filing of the reply on 05.12.2007 had not been consummated or else the appellant would not have made such averments and asked for the medical examination of the respondent. Therefore, in this background, the respondent is right in contending that he has not been provided physical access by the appellant and the marriage has not been consummated.

38. It further appears from the record that there has been resistance on the part of the appellant to ward off the attempt of the respondent to have sexual intercourse which can be attributed to be due to the impotency of the wife. The refusal on the part of the wife can give rise to an inference of impotency which may be caused due to variety of reasons like nervousness, hysteria or even invincible repugnancy to the act of consummation resulting in the paralysis of the will. It may also happen that the wife may only be impotent qua the husband and it is not necessary then to establish that the wife is impotent genetically or physically because it is enough that she is impotent qua her husband. Though the burden of proving the plea of impotency is on the person, who alleges the same, but then in so far the present case is concerned, there is evidence that the appellant was not responsive in the matter of sexual relationship for a fairly long period. One must, therefore, assume want or desire and intention on the part of the unresponsive spouse to consummate the marriage. This will go a long way in proving the fact of impotency on the part of the wife. In fact, even persistent refusal to consummate the marriage would lead to an inference of incapacity to have sexual intercourse. Frigidity on the part of spouse to the physical act as in this case is also a form of impotency.

39. Admittedly, the appellant had left the house of the respondent on 13.09.2003 and, therefore, keeping in view the contents of the reply dated 05.12.2007 (supra), it can safely be concluded that till and so long the appellant resided in the house of the respondent, the marriage has not been consummated.

...

41. ...It cannot be disputed that willful denial of sexual relationship by a spouse would amount to cruelty. What is cruelty has been succinctly explained by the Hon'ble Supreme Court in Vinita Saxena's case (supra) wherein it was held as under:-

“Legal proposition on the aspect of cruelty

...

36. The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

...

42. In *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511, the Hon'ble Supreme Court gave a treatise on the subject of cruelty after examining the amplitude of cruelty in different countries and after taking into consideration their judicial trends, the Court also laid down broad parameters which may be relevant in dealing with the case of mental cruelty and the illustrative instances that may constitute mental cruelty which are as under:-

“101. ...

(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.

...”

43. In *A v. B* 1996 AIHC 1727, a learned Single Judge of the Kerala High Court held that “refusal on the part of a spouse to indulge in normal sexual intercourse amounts to cruelty”.

44. In *Prem Prakash v. Smt. Sarla* AIR 1989 Madhya Pradesh 326, the Full Bench of the Madhya Pradesh High Court held that “sex plays important role in a matrimonial life and cannot be separated from other factors leading to a successful married life. Therefore, conduct of the husband or wife which renders the continuous of cohabitation and performance of conjugal duties impossible, amounts to such cruelty”.

45. In *Shakuntla Kumari v. Om Prakash Ghai* AIR 1981 Delhi 53, it was held that “a normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case, but willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to cruelty, especially when the parties are young and newly married”.

46. Coming to the facts of the case, it has been duly proved on record that the appellant was not responding to the advances of the respondent whereby the respondent had felt intense physical and mental pain, shock and suffering. In fact, the very denial of sex by the appellant amounts to mental cruelty in terms of Section 13(1)(i-a) of the Act. This was so held by the Hon'ble Supreme Court in *Shobha Rani v. Madhukar Reddi* (1988) 1 SCC 105 reiterated in *Sanat Kumar Agarwal v. Nandini Agarwal* AIR 1990 SC 594.

47. Therefore, for all the reasons discussed above, I find no merit in the appeal and the same is dismissed, leaving the parties to bear their own costs.”

IN THE SUPREME COURT OF INDIA

Vidhya Viswanathan v. Kartik Balakrishnan

(2014) 15 SCC 21

Sudhansu Jyoti Mukhopadhyaya and Prafulla C. Pant, JJ.

A husband filed a petition for divorce on grounds of cruelty, alleging amongst other things that his wife did not allow him to consummate the marriage. The wife denied all allegations and filed a counterclaim for restitution of conjugal rights. The trial court dismissed the husband's petition and allowed the counterclaim of the wife. On appeal, the Madras High Court allowed the divorce petition on the grounds of cruelty. Thereafter, the wife filed a special leave petition challenging the High Court's conclusion that her acts amounted to “cruelty.”

Pant, J.: “Leave granted. This appeal is directed against the judgment and order dated 13-2-2012 passed in *Karthik Balakrishnan v. Vidhya Viswanathan* [*Karthik Balakrishnan v. Vidhya Viswanathan*, Civil Misc. Appeal No. 2862 of 2011, order dated 13-2-2012 (Mad)] whereby the said Court has allowed the appeal filed by the husband under Section 19 of the Family Courts Act, 1986, and dissolved the marriage between the parties.

2. Brief facts of the case are that the appellant, Vidhya Viswanathan got married to the respondent, Karthik Balakrishnan on 6-4-2005 in Chennai following the Hindu rites. After the marriage, the couple went to London where the respondent (husband) was working, and they lived there for some eight months. In December 2005, the appellant and the respondent came back to India. However, the respondent went back to England all alone, and his wife did not go there though her husband had purchased a return ticket for her. On 13-9-2008, the husband filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 for dissolution of marriage. It is pleaded by the respondent (husband) that while the appellant was with him in London, she used to insult him. It is alleged by him that at times she used to get violent and hysterical. The husband further pleaded that even after his best efforts, the appellant did not allow him to consummate the marriage.

3. It is further stated that in November 2005 i.e. about seven months after the marriage the wife (the present appellant) fell sick and she was taken to a Medical Specialist who diagnosed that she was suffering from tuberculosis. According to the husband, he provided the best possible treatment to his wife. After the couple came back to India in December 2005,

the wife stayed back in Chennai and continued her treatment. It is alleged by the present respondent (husband) that his wife used to send him e-mails which were derogatory and in bad taste. It is also alleged by the respondent that his wife refused to join his company even after his best efforts. With the above pleadings, the present respondent filed a petition for divorce before the Family Court, Chennai on the ground of cruelty.

4. The appellant contested the divorce petition and filed her written statement. She denied the allegations made against her. She stated that she went with her husband to London with great expectations. She alleged that her husband and his mother did not treat her well. She admitted that she came back with her husband to India in December 2005. She further pleaded that though the respondent purchased the return ticket for her but he himself instructed her not to return to England without his permission. It is also stated by her that marriage could not be consummated for the reason that her husband wanted to have children after one or two years of marriage. She did not deny having sent e-mails but stated that she only responded to the respondent as he wanted divorce decree based on her consent. She admitted that she received legal notice from her husband but stated that the allegations therein are false. She prayed for counterclaim directing the respondent to restore the conjugal rights between the parties.

5. On the basis of the pleadings of the parties, the trial court framed the following issues:

“(1) Whether the petitioner husband is entitled for divorce on the ground of cruelty?

(2) Whether the respondent wife is entitled for conjugal rights as prayed for in the counterclaim?”

The parties led their oral and documentary evidence before the trial court. The First Additional Family Court at Chennai, after hearing the parties vide its judgment and order dated 11-8-2011, dismissed the petition for divorce, and allowed the counterclaim of the wife.

6. Aggrieved by the said judgment and order, the husband (Karthik Balakrishnan) filed an appeal (CMA No. 2862 of 2011 with MP No. 1 of 2011) before the High Court. The High Court after hearing the parties, allowed the appeal and set aside the judgment and order dated 11-8-2011 passed by the trial court. The High Court allowed the divorce petition, and dissolved the marriage between the parties. Hence, this appeal with special leave petition before this Court.

7. We have heard the learned counsel for the parties, and perused the papers on record.

8. Admittedly, the appellant got married to the respondent on 6-4-2005. It is also admitted that there is no issue born from the wedlock. This Court has now to examine whether the High Court has rightly come to the conclusion or not that the husband was treated with cruelty by the wife, if so, is he entitled to decree of divorce?

9. On going through the evidence on record, we find that the husband (the petitioner before the trial court), in his evidence has narrated in detail, the incidents of alleged cruelty suffered by him. The relevant paragraphs from the statement of the husband are being reproduced below:

...

(10) ... the respondent did not show any intention at all in consummating the marriage. The respondent evinced no interest in having physical contact with me. At times, I myself had tried to have sexual relationship with the respondent as a normal husband would do. However, since the respondent showed no intention, I convinced myself that she would mend her ways. However, there was no attitudinal change in her life.

...

PW 1, Karthik Balakrishnan (husband) who made the above statement, was subjected to lengthy cross-examination but nothing has come out which creates doubt in his testimony.

10. The appellant Vidhya Viswanathan had also filed her evidence before the trial court, in the form of an affidavit, and she also got herself cross-examined as DW 1. She denied the allegations made by her husband but in cross-examination she admits that the marriage was not consummated. The relevant portion from her cross-examination is being reproduced below:

“... It is wrong to state that normally I used to hit the petitioner with my legs and wake him up and that I used to throw the objects on the petitioner and that through this I had harassed the petitioner physically and mentally. If it is asked that whether the marriage was consummated, no it is not. The petitioner said that we can beget the child after one or two years. I and the petitioner were close.

As the petitioner joined the new job he was under stress and tension. The petitioner had thyroid infection frequently. The petitioner said that the starting of the matrimonial life shall be postponed. It was not taken as an issue. After 8 months of the marriage, I became ill. Hence, I came to Chennai. It is wrong to state that there is no connection between thyroid infection, and the physical relationship and that I am adducing falsely.

...

Before my husband could file this case, I did not file any case for the restitution of conjugal rights. It is wrong to state that as I had no intention to live together, I did not file such a case.”

11. The High Court while rejecting the explanation given by the wife as to why the marriage was not consummated observed as under:

“44. It has to be further pointed out that while PW 1 was cross-examined by the respondent, it has not been suggested to PW 1 that he suggested to the respondent that they should have a child only after two years. Thus it appears that this explanation of the respondent for non-consummation of the marriage is only an afterthought. Even assuming for a moment that the appellant wanted to have a child only after two years that does not mean that the appellant and the respondent cannot and should not have sexual intercourse. Admittedly, both of them are well-educated and there are so many contraceptives available and they could have used such contraceptives and avoided pregnancy if they had wanted.”

12. Undoubtedly, not allowing a spouse for a long time to have sexual intercourse by his or her partner, without sufficient reason, itself amounts to mental cruelty to such spouse. A Bench of three Judges of this Court in *Samar Ghosh v. Jaya Ghosh* [*Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511] has enumerated some of the illustrations of mental cruelty. Para 101 of the said case is being reproduced below: (SCC pp. 546-47)

“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:

...

(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.

...

(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 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.”

The abovementioned Illustrations (viii) and (xii) given in *Samar Ghosh case* [*Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511], support the view taken by the High Court in holding that in the present case the wife has treated her husband with mental cruelty.

...

14. In view of the above principle of law laid down by this Court, and having considered the submissions of the parties, and the evidence on record, we do not find any ground to interfere with the decree of divorce passed by the High Court on the ground of cruelty...

...”

IN THE HIGH COURT OF DELHI

Rajeev Kumar v. Vidya Devi

2016 SCC OnLine Del 5425

Pradeep Nandrajog and Pratibha Rani, JJ.

A husband filed a petition for divorce on the ground of cruelty stating various instances which included refusal on the part of the wife to have sexual relations with him for the previous four and half years. The family court declined to grant the decree of divorce stating that the husband had failed to prove “cruelty” by his wife. The main issue raised in the appeal before the High Court was whether or not the refusal on the part of the spouse to have sexual relations for a period of four and a half years amounted to “cruelty.”

Rani, J.: “...

6. The appellant/husband is aggrieved by the judgment and decree dated March 01, 2016 whereby the divorce petition filed by him against the respondent/wife has been dismissed by learned Judge, Family Court mainly on the ground that the instances of cruelty pleaded and proved by him do not satisfy the standard of cruelty as per requirements of Section 13(1)(ia) of the Hindu Marriage Act, 1955.

7. The brief facts are that the appellant/husband is the only son of his parents and is employed as peon in Employees State Insurance Corporation of India having his posting at ESI Hospital, Basai Darapur, Delhi. The marriage between the parties was solemnised on November 26, 2001 at Sonapat, Haryana which is the native place of his wife. The marriage was consummated and the parties were blessed with two sons who were aged about 10 years and 9 years respectively at the time of filing of the petition in the year 2013.

8. The appellant/husband has pleaded various instances of mental cruelty being caused to him and his entire family by the respondent/wife which are mainly on the issues of not attending the household work and asking the other family members to do their own work whether in respect of cleaning the house, washing the clothes or working in the kitchen...

9. In para 22 of the plaint the husband has pleaded as under:

‘22. That apart from above all she has not permitted the petitioner to have bodily relations with the respondent for the last four and half years, though, both were living under the same roof. Whenever, during this cited period, the petitioner to make body relations, the respondent uttered derogatory abusive language (gaaliyan) and pushed him aside.’

10. Divorce petition was contested by the respondent/wife wherein she denied all the averments made in the divorce petition against her and pleaded that she was subjected to cruelty. In response to para 22 of the petition she has pleaded as under:

‘22. That, the contents of para No. 22 of the petition are wrong, incorrect, false, fabricated and hence specifically denied. It is submitted that the petitioner had on his own volition turned out the respondent from her matrimonial home and has now levied false allegations against her in the present petition under reply.’

...

12. The learned Judge, Family Court on considering the testimony of the appellant and his father, observed that the appellant/husband has failed to prove the cruelty being committed by his wife, prayer for divorce was declined.

...

14. The learned Judge Family Court failed to take note of the following facts:-

...

(iii) In the petition in para 22, as reproduced above, he specifically pleaded that for a period of four-and-a-half years despite living under one roof, the parties did not cohabit because of the resistance put by the respondent/wife.

...

16. It is settled legal position that denial of sex to a spouse itself amounts to causing mental cruelty. In the decision reported as AIR 1973 Delhi 200 *Rita Nijhawan v. Balakishan Nijhawan* it was held as under:-

‘Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body. the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain. develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse.’

17. In another decision reported as AIR 2015 SC 285 *Vidhya Viswanathan v. Kartik Balakrishnan* the Supreme Court has held as under:

‘12. Undoubtedly, not allowing a spouse for a long time, to have sexual intercourse by his or her partner, without sufficient reason, itself amounts mental cruelty to such spouse.’

18. When the case of the appellant/husband is examined in the above settled legal position, we find that the averments made by him in para 22 of the petition to the effect that the respondent/wife did not permit him to have bodily relations for a period of four-and-a-half years despite living under the same roof, have not been specifically denied by the respondent/wife in the written statement. At the stage of evidence, she abandoned the proceedings. The testimony of the appellant/husband in this regard has remained unchallenged.

19. In view the forgoing discussion, we are of the considered view that the appellant/husband has fully established that he was subjected to mental cruelty by the respondent/wife by denying sex to him for a long period despite living under the same roof without any justification and though she was not suffering from any physical disability. The appeal being well founded deserves to be allowed.

...”

IN THE SUPREME COURT OF INDIA

Joseph Shine v. Union of India

(2019) 3 SCC 39

Dipak Misra, C.J., and A.M. Khanwilkar, R.F. Nariman, D.Y. Chandrachud and Indu Malhotra, JJ.

A five-judge bench of the Supreme Court struck down Section 497 of the Indian Penal Code, 1860, which dealt with the offence of adultery, as being violative of Articles 14, 15 (1) and 21 of the Indian Constitution. Under the said provision, a man engaging in sexual intercourse (not amounting to rape) with a married woman without her husband's consent or connivance, could be held criminally liable for adultery on a complaint brought forth by the husband. In his concurring opinion, Chandrachud J. held that women's right to sexual autonomy is an integral component of right to privacy, dignity and liberty under Article 21 and right to equality under Article 14.

Chandrachud, J. (concurring): “... ”

114. In the preceding years, the Court has evolved a jurisprudence of rights-granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the stature of a Constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, we set out to examine the validity of Section 497 of the Indian Penal Code. In doing so, we also test the constitutionality of moral and societal regulation of women and their intimate lives through the law.

...

E. CONFRONTING PATRIARCHY

...

159. The petitioner urged that (i) The full realisation of the ideal of equality enshrined in Article 14 of the Constitution ought to be the endeavour of this Court; (ii) the operation of Section 497 is a denial of equality to women in marriage; and (iii) the provision is manifestly arbitrary and amounts to a violation of the constitutional guarantee of substantive equality.

160. The act which constitutes the offence under Section 497 of the Penal Code is a man engaging in sexual intercourse with a woman who is the “wife of another man”. For the offence to arise, the man who engages in sexual intercourse must either know or have reason to believe that the woman is married. Though a man has engaged in sexual intercourse with a woman who is married, the offence of adultery does not come into being where he did so with the consent or connivance of her husband. These ingredients of Section 497 lay bare several features which bear on the challenge to its validity under Article 14. The fact that the sexual relationship between a man and a woman is consensual is of no significance to the offence, if the ingredients of the offence are established. What the legislature has constituted as a criminal offence is the act of sexual intercourse between a man and a woman who is “the wife of another man”. No offence exists where a man who has a subsisting marital relationship engages in sexual intercourse with a single woman. Though adultery is considered to be an offence relating to marriage, the legislature did not penalise sexual intercourse between a married man and a single woman. Even though the man in such a case has a spouse, this is considered to be of no legal relevance to defining the scope of the offence. That is because the provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be “adulterous”, by definition.

161. The essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man. But if the man to whom she is married were to consent or even to connive at the sexual relationship, the offence of adultery would not be established. For, in the eye of the law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. Indeed, even if the two men (the spouse of the woman and the man with whom she engages in a sexual act) were to connive, the offence of adultery would not be made out.

162. Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the ‘institution of marriage’, it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision.

...

168. The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. ‘Ostensible’ it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The essential values on which the Constitution is founded - liberty, dignity and equality - cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness.

169. While engrafting the provision into Chapter XX of the Penal Code - “of offences relating to marriage” - the legislature has based the offence on an implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law is that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman is bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality is an essential aspect of identity. Choices in matters of sexuality are reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be dis-associated from the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and are premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it is only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision is proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which is one sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14.

...

F. “THE GOOD WIFE”

175. Article 15 of the Constitution reads thus:

“15. **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.-**

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them.”

(emphasis supplied)

Article 15 prohibits the State from discriminating on grounds only of sex. The Petitioners contend that (i) Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15.

...

178. A married man may engage in sexual relations with an unmarried woman who is not his wife without the fear of opening his partner to prosecution and without the consent of his spouse. No recourse is provided to a woman against her husband who engages in sexual relations outside marriage. The effect of Section 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Though Section 497 does not punish a woman engaging in adultery as an abettor, a married man and a married woman are placed on different pedestals in respect to their actions. The effect of Section 497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing.

179. Section 497 criminalizes the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being denuded of sexual agency, should be afforded the ‘protection’ of the law. In criminalizing the accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is ‘submissive’, or worse still ‘naïve’ has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalizes only the accused man.

...

181. Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. In condemning the sexual agency of the woman, only the husband, as the ‘aggrieved’ party is given the right to initiate prosecution. The proceedings once initiated, would be geared against the person who committed an act of ‘theft’ or ‘trespass’ upon his spouse. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497.

182. Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values.

...

186. Section 497 rests on and perpetuates stereotypes about women and sexual fidelity. In curtailing the sexual agency of women, it exacts sexual fidelity from women as the norm. It perpetuates the notion that a woman is passive and incapable of exercising sexual freedom. In doing so, it offers her ‘protection’ from prosecution. Section 497 denudes a woman of her sexual autonomy in making its free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to a limited autonomy on entering marriage. The provision is grounded in and has a deep social effect on how society perceives the sexual agency of women. In reinforcing the patriarchal structure which demands her controlled sexuality, Section 497 purports to serve as a provision envisaged for the protection of the sanctity of marriage. In the context of a constitutional vision characterized by the struggle to break through the shackles of gender stereotypes and guarantee an equal citizenship, Section 497 entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order.

...

189. Article 15(3) encapsulates the notion of “protective discrimination”. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of “protection”. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was “seduced” into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to “protect” her. The “protection” afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

G. DENUING IDENTITY - WOMEN AS SEXUAL PROPERTY

...

192. The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.

193. The opinion delivered on behalf of four Judges in *K.S. Puttaswamy (Privacy-9J.) v. Union of India* [*K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1] has recognised the dangers of the “use of privacy as a veneer for patriarchal domination and abuse of women”. On the delicate balance between the competing interests of protecting privacy as well as dignity of women in the domestic sphere, the Court held: (SCC p. 471, para 246)

“246. ... The challenge in this area is to enable the State to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.”

...

195. Control over women's sexuality is the key patriarchal assumption that underlies family and marriage. [Nivedita Menon, *Seeing like a Feminist*, (Zubaan Books 2012) p. 35.] When it shifts to the “public” as opposed to the “private”, the misogyny becomes even more pronounced. [Nivedita Menon, *Seeing like a Feminist*, (Zubaan Books 2012) p. 35.] Section 497 embodies this. By the operation of the provision, women's sexuality is sought to be controlled in a number of ways. First, the husband and he alone is enabled to prosecute the man with whom his wife has sexual relations. Even in cases where the relationship is based on the consent of the woman, the law treats it as an offence, denying a woman who has voluntarily entered into a consensual relationship of her sexual agency. Second, such a relationship would be beyond the reach of penal law if her husband consents to it. The second condition is a telling reflection of the patriarchal assumption underlying the criminal provision: that the husband is the owner of the wife's sexual agency.

196. In remedying injustices, the Court cannot shy away from delving into the “personal”, and as a consequence, the “public”. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and “granting” rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink—women are equal citizens of this nation, entitled to the protections of the Constitution. Any legislation which results in the denial of these constitutional guarantees to women, cannot pass the test of constitutionality.

197. Patriarchy and paternalism are the underpinnings of Section 497. It needs no iteration that misogyny and patriarchal notions of sexual control find no place in a constitutional order which has recognised dignity as intrinsic to a person, autonomy being an essential component of this right. The operation of Section 497 denotes that “adulterous women” virtually exercise no agency; or at least not enough agency to make them criminally liable. [Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Sage Publications 1996) p. 119.] They are constructed as victims. As victims, they are to be protected by being exempt from sanctions of a criminal nature. [Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Sage Publications 1996) p. 119.] Not only is there a denial of sexual agency, women are also not seen to be harmed by the offence. [Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Sage Publications 1996) p. 119.] Thus, the provision is not simply about protecting the sanctity of the marital relationship. It is all about protecting a husband's interest in his “exclusive access to his wife's sexuality”. [*Id.*, p. 120.]

198. Section 497 chains the woman to antediluvian notions of sexuality. Dipak Misra, C.J. in *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] emphasised the importance of sexual autonomy as a facet of individual liberty, thus protected under Article 21 of the Constitution: (SCC p. 138, para 245)

“245. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an inseparable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archaic stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.”

199. In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1 , one of us (Chandrachud, J.) held that the recognition of the autonomy of an individual is an acknowledgment of the State's respect for the capacity of the individual to make individual choices: (SCC p. 237, para 474)

“474. The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them. [David A.J. Richards, “Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution”, *Hastings Law Journal*, Vol. 30, at pp. 1000-1001.] ”

To characterise a woman as a passive object, denuded of agency, is a denial of autonomy. The same judgment in *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1 has recognised sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual: (SCC pp. 238-39, para 477)

“477. In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the “Original Position” serves as a constructive model to illustrate the notion of choice behind a “partial veil of ignorance [Thomas M. Jr. Scanlon, “Rawls' Theory of Justice”, *University of Pennsylvania Law Review* (1973) at p. 1022.] .” Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society. [*Id.*, p. 1023.] The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of “good” might be. [*Id.*, p. 1023.] These neutrally desirable goods are described by Rawls as “primary social goods” and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect. [*Id.*, p. 1023.] *Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy.* [Ed.: David A.J. Richards, “Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution”, *Hastings Law Journal*, Vol. 30 at p. 971.] *Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner.* [*Ibid.* p. 972.] ”

(emphasis supplied)

G.1 Exacting fidelity: The intimacies of marriage

...

202. Section 497 seeks the preservation of a construct of marriage in which female fidelity is enforced by the letter of the law and by the coercive authority of the state. Such a conception goes against the spirit of the rights-based jurisprudence of this Court, which seeks to protect the dignity of an individual and her “intimate personal choices”. It cannot be held that these rights cease to exist once the woman enters into a marriage.

203. The identity of the woman must be as an “individual in her own right”. In that sense, her identity does not get submerged as a result of her marriage. Section 497 lays down the norm that the identity of a married woman is but as the wife of her spouse. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal Constitution. Dipak Misra, C.J. in *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1 has drawn on the interrelationship between “identity” and “autonomy”: (SCC p. 115, para 161)

“161. ... Autonomy is individualistic. ... Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society.”

204. This Court in *Puttaswamy [K.S. Puttaswamy (Privacy-9J.) v. Union of India]*, (2017) 10 SCC 1] has elucidated that privacy is the entitlement of every individual, with no distinction to be made on the basis of the individual's position in society: (SCC p. 484, para 271)

“271. ... Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilisation. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well-being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.”

205. It would be useful to refer to decisions of this Court which have emphasised on the freedoms of individuals with respect to choices in relationships. In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , Dipak Misra, C.J. highlighted the indignity suffered by an individual when “acts within their personal sphere” are criminalised on the basis of regressive social attitudes: (SCC p. 111, para 147)

“147. ... An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age-old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit.”

The Chief Justice observed that the “organisation of intimate relations” between “consenting adults” is a matter of complete personal choice and characterised the “private protective sphere and realm of individual choice and autonomy” as a personal right: (SCC p. 140, para 255)

“255. ... It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. *However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.*”

(emphasis supplied)

206. In *Shakti Vahini [Shakti Vahini v. Union of India]*, (2018) 7 SCC 192 : (2018) 3 SCC (Civ) 580 : (2018) 3 SCC (Cri) 1] , this Court has recognised the right to choose a partner as a fundamental right under Articles 19 and 21 of the Constitution. In *Shafin Jahan [Shafin Jahan v. Asokan K.M.]*, (2018) 16 SCC 368 : (2019) 1 SCC (Civ) 446] , “intimate personal choices” were held to be a protected sphere, with one of us (Chandrachud, J.) stating: (*Shafin Jahan case [Shafin Jahan v. Asokan K.M.]*, (2018) 16 SCC 368 : (2019) 1 SCC (Civ) 446] , SCC p. 405, para 84)

“84. ... The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable.”

207. In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , one of us (Chandrachud, J.) held that the right to sexual privacy is a natural right, fundamental to liberty and a soulmate of dignity. The application of Section 497 is a blatant violation of these enunciated rights. Will a trial to prove adultery lead the wife to tender proof of her fidelity? In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , the principle was elucidated thus: (SCC p. 289, para 613)

“613. ... In protecting consensual intimacies, the Constitution adopts a simple principle: the State has no business to intrude into these personal matters.”

Insofar as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with.

208. In *Puttaswamy [K.S. Puttaswamy (Privacy-9J.) v. Union of India]*, (2017) 10 SCC 1], it was recognised that a life of dignity entails that the “inner recesses of the human personality” be secured from “unwanted intrusion”: (SCC p. 413, para 127)

“127. ... The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.”

209. In criminalising adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship.

210. This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. Individuals in a relationship, whether within or outside marriage, have a legitimate expectation that each will provide to the other the same element of companionship and respect for choices. Respect for sexual autonomy, it must be emphasised is founded on the equality between spouses and partners and the recognition by each of them of the dignity of the other. Control over sexuality attaches to the human element in each individual. Marriage—whether it be a sacrament or contract—does not result in ceding of the autonomy of one spouse to another

212. ...The sexuality of a woman is part of her inviolable core. Neither the State nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalising adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.

...

218. This Court has recognised sexual privacy as a natural right, protected under the Constitution. To shackle the sexual freedom of a woman and allow the criminalisation of consensual relationships is a denial of this right. Section 497 denudes a married woman of her agency and identity, employing the force of law to preserve a patriarchal conception of marriage which is at odds with constitutional morality:

“Infidelity was born on the day that natural flows of sexual desire were bound into the legal and formal permanence of marriage; in the process of ensuring male control over progeny and property, women were chained within the fetters of fidelity.” [Nivedita Menon, *Seeing like a Feminist*, (Zubaan Books 2012) p. 135; quoting Archana Verma, *Stree Vimarsh Ke Mahotsav* (2010).]

Constitutional protections and freedoms permeate every aspect of a citizen's life — the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.

219. Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster.

220. We hold and declare that:

220.1. Section 497 lacks an adequately determining principle to criminalise consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

220.2. Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;

220.3. Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; ...

...”

IN THE HIGH COURT OF MADRAS

Krishnaraj v. Sathyapriya

Civil Miscellaneous Appeal No. 127/2017, decided on January 10, 2019

R. Subbiah and C. Saravanan, JJ.

The appellant (husband) filed a petition for divorce on the ground of cruelty, arguing inter alia that the respondent (wife) had stopped having sexual relations with him. The couple had been married for 16 years when the petition was filed.

Subbiah, J.: “...

13. The present appeal arises out of the order passed by the Family Court...filed by the appellant for dissolution of the marriage with the respondent on the ground of cruelty. This Petition was filed by the appellant by mainly contending that the respondent refused him conjugal bliss and cohabitation, thereby he was subjected to matrimonial cruelty. In order to lend support to this averment of the appellant, the learned counsel for the appellant placed reliance on the decision of the Division Bench of this Court in the case of (*S. Indirakumari vs. S.Subbaiah*) reported in 2003 (1) CTC 259 wherein it was held that wilful refusal to have sexual intercourse by the wife amounts to cruelty. We are in respectful agreement with the ratio laid down by the Division Bench of this Court in the aforesaid decision, however, the facts, on the basis of which the said decision was laid, is inapplicable to the facts of the present case. In that decision, the Division Bench of this Court had an occasion to consider the refusal of the wife to cohabit with the husband on the nuptial night and during the subsequent days. Further in that case, the husband and wife lived together only for seven days after the marriage. During the course of examination of the wife in that case, she admitted that there was no consummation of marriage during the short period of seven days when they lived together. It is in those circumstances, the Division Bench of this Court has held that wilful refusal on the part of the wife, soon after the marriage, would amount to cruelty. The ratio laid down in that case cannot be ipso facto applied in this case. In the present case, the marriage was consummated and due to the wedlock between the appellant and the respondent, a girl child was born. Further, the marriage between the appellant and the respondent was solemnised on 04.09.1998 and after sixteen years, the present petition has been filed by the appellant before the Family Court on 22.12.2014 alleging that the respondent neglects him and refused conjugal bliss. In effect, after sixteen years of the marriage, the appellant has filed the Original Petition contending that the respondent had refused him conjugal bliss. Refusal of one of the spouse to cooperate in the conjugal relationship soon after the marriage can be considered as one of the grounds for dissolution of the marriage and a ground of cruelty. However, the same yardstick cannot be applied after sixteen long years of marriage between the appellant and the respondent. Alleged lack of cooperation of the respondent to reciprocate and yield to the physical desire of the appellant long after sixteen years of marriage cannot amount to cruelty by the respondent. It may be due to several factors such as age, physical inability, commitment towards the children or family, aversion or lassitude or lack of libido to get physical intimacy over a period of time etc. This is a natural phenomenon on account of several reasons including ageing and no one can be blamed for it. The appellant has refused to gracefully acknowledge the changes associated with the ageing and the challenges which the life exposes. There is a lack of acceptance on the part of the appellant. This is more so that after the birth of the child and by passage of time, the other essence in family life gain significance and the frequency of physical relationship between the couple would witness a slowdown in the normal marriage life, but, it cannot be regarded as a ground for dissolution of marriage. Even in the decision rendered by the Division Bench of this Court relied on by the counsel for the appellant in *Indirakumari's* case mentioned supra, it was held that normal and healthy sexual relationship is one of the basic ingredients for a happy and harmonious marriage. However, denial of the same on account of ill health of one spouse may not amount to cruelty and it depends upon the facts and circumstances of each case. Therefore, having regard to the above ratio laid down by the Division Bench of this Court to the facts of this case, we hold that the appellant cannot succeed in his plea that after sixteen years of marriage he was refused cohabitation and on that ground he is entitled for decree of divorce.

...”

Endnotes

- 1 See: *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Justice K.S. Puttaswamy – I v. Union of India*, (2017) 10 SCC 1; *Independent Thought v. Union of India*, (2017) 10 SCC 800; *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1..
- 2 *Joseph Shine v. Union of India*, (2019) 3 SCC 39.
- 3 Section 497, Indian Penal Code, 1860. The Section provided criminal penalties only for a male non-marital partner of the wife, and not for the wife herself.
- 4 By matrimonial laws, reference is to provisions relating to separation, and termination of marriages under personal laws.
- 5 There are certain exceptions to this proposition. For example, all laws on divorce recognize divorce on the basis of mutual consent. See Section 13B, Hindu Marriage Act, 1955; Section 28, Special Marriage Act, 1954; Section 10A, Indian Divorce Act, 1869; Section 2 (ix), Dissolution of Muslim Marriage Act, 1939; Section 32B, Parsi Marriage and Divorce Act, 1936. In recent cases, the Supreme Court has in extraordinary cases granted divorce on the ground of “irretrievable breakdown of marriage.” See *e.g.*, *Naveen Kohli v. Neelu Kohli*, AIR 2006 SC 1675. However, except for these exceptional situations, in contested divorce cases, the party seeking divorce has to establish that the other party is at fault.
- 6 Note that non-consummation of a marriage is a ground for nullifying a marriage. See *e.g. for instance*: Section 12(1)(a) of the Hindu Marriage Act, 1955 states that a marriage shall be voidable and may be annulled by a decree of nullity if it has not been consummated owing to the impotence of the respondent; Section 25(i) of the Special Marriage Act, 1954 states that a marriage shall be voidable and may be annulled by a decree of nullity if the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.
- 7 See *Joseph Shine v. Union of India*, (2019) 3 SCC 39.
- 8 (2007) 4 SCC 511.
- 9 (2014) 15 SCC 221.
- 10 (2012) 188 DLT 1.
- 11 2016 SCC OnLine Del 5425.
- 12 2013 SCC OnLine Bom 1546.
- 13 Civil Miscellaneous Appeal No. 127/2017, decided on Jan. 1, 2019 (High Court of Madras). (Date of Judgment: 10.01.2019).
- 14 2014 SCC OnLine HP 3950.
- 15 AIR 2013 Kar 41.
- 16 ILR (2012) 2 P&H 446.
- 17 Civil Appeal No. 4704/2013, decided on Oct. 27, 2017, by a bench comprising Chief Justice Dipak Misra, Justice A.M. Khanwilkar and Dr. Justice D.Y. Chandrachud.
- 18 (2018) 11 SCC 572.
- 19 *Id.*, 604.
- 20 See *e.g.* *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511 (where the Supreme Court in providing a non-exhaustive list of circumstances which may amount to “cruelty” mentions abortion without the consent or knowledge of the husband as one such circumstance); *Satya v. Siri Ram*, AIR 1983 P&H 252 (where the court held that the wife terminating the pregnancy, in spite of the desire of the husband and his family to have a child, amounts to cruelty. It ruled that if the wife “deliberately and consistently refuses to satisfy” the “natural and legitimate” craving of the husband to have a child, cruelty is made out); *Sushil Kumar Verma v. Smt. Usha*, AIR 1987 Del 86 (where the Court held that one of the primary objectives of marriage is to have children. Abortion, especially in the first pregnancy, without the consent of the husband would amount to cruelty).
- 21 Section 9, Hindu Marriage Act, 1955.
- 22 AIR 1983 AP 356.
- 23 (1984) 4 SCC 90.
- 24 *Harvinder Kaur v. Harmander Singh Choudhry*, AIR 1984 Del 66.
- 25 (2017) 10 SCC 1.
- 26 (2019) 3 SCC 39.
- 27 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 28 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 29 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.
- 30 The SLP filed in the Supreme Court against this order of the High Court was dismissed by the Supreme Court (Civil Appeal No. 4704 of 2013, decided on Oct. 27, 2017 (Supreme Court)). See the “Cover Note” for a discussion on the issue of spousal/parental consent before terminating a pregnancy.