
(1974) 04 MAD CK 0021
In the Madras High Court
Case No : O.M.S. No. 13 of 1971

Mrs. Valerie Theresa Persich

APPELLANT

Vs

Mervyn Aloysius Persich

RESPONDENT

Date of Decision : 02-04-1974

Acts Referred:

Divorce Act, 1869 — Section 22, 37, 41, 42

Citation : AIR 1975 Mad 322 : (1975) ILR (Mad) 132 : (1975) 88 LW 23

Hon'ble Judges : Mohan, J

Bench : Single Bench

Advocate : N. Veeramani, for the Appellant; A. Balarajan, J. Stanisls, R. Thanikachalam and R. Gopalakrishnan, for the Respondent

Final Decision : Allowed

Judgement

Mohan, J.—Petition for judicial separation, custody of children and payment of maintenance to wife and children on the grounds of

"desertion and cruelty".

(1) The averments in the petition by the wife are as follows:

She was married to respondent on 26-12-1962 as per Roman Catholic Church rites in the Church of Our Lady of Good Health, Saidapet, as

evidenced by the certificate marked Ex- P. 1. After her marriage her life was one of misery and the respondent was deeply in debt having

borrowed from number of "Pathans". On 30-9-1963 she gave birth to a boy Jeff ray Persich and when she was convalescing after birth of the boy

at her parents" house she sprang a surprise visit to her matrimonial home and found dirty glasses and cigarette bits littered all over the place and her

sudden appearance surprised the respondent who struck her on the face and back, as a result of which health suffered and she was obliged to

extend the maternity leave. On 28-12-1963 there was a quarrel on account of marriage invitation of the petitioner's brother not being extended to

the respondent's brother and the respondent used most abusive and obscene language as a result of which she fainted and she was taken to the E.

S. I. Hospital and then to the Mental Hospital. Even for trivial things the petitioner was called by names and was beaten. The respondent was

addicted to drinking, gambling and is in the habit of going to races for which purpose she was compelled by the husband to borrow from "Pathans"

and whenever she refused she was called "whore" the word the respondent often used. On one occasion when there was a quarrel and as a result

of the intervention of the manager of the petitioner's company, it was pacified but yet the life did not improve. On 16-5-1969, a quarrel arose with

reference to the meeting of the household expenses and thereafter the respondent left with the intention of abandoning the matrimonial home

permanently. Throughout the married life the respondent never took care about the welfare or maintenance of the children. Added to this there

was physical ill-treatment which was a daily feature and she was also accused of immorality. These according to her, constitute physical and mental

cruelty. The respondent had no reason or proper cause for desertion.

2. The respondent has filed a counter statement denying these allegations and contends that he was never in the habit of borrowing nor was he

going to races. According to him he never used to beat his wife. At the behest of the petitioner, he left for Bombay with the intention of

permanently settling there but since he could not get a job he returned. From Bombay he had sent presents for "Christmas" to his wife and children

in December, 1965. On his return he found that the petitioner had developed illicit intimacy with one Ronnie Rodrigues with whom she eloped.

When she was reprimanded she prostrated before him and requested him to give her a chance to open a new leaf. Again in May, 1968 the

petitioner was misbehaving indecently with a co-worker in the petitioner's office. When the petitioner was questioned she quarreled with the

respondent, He submits that the petitioner is not maintaining the children properly due to her adulterous course of conduct. She was detaining the

children with an ulterior motive. Of late, the petitioner has developed illicit intimacy with one Rajani Kantha Rao and therefore she is guilty of

adultery and continues to lead an immoral life, thereby annoy the respondent mentally and has made the life for the respondent a total misery.

Under these circumstances he states that the petitioner cannot invoke the clemency of this Court just to escape from her past and present misdeeds and adulterous life. Thus he prays for the dismissal of the petition.

3. On these pleadings the following issues have been framed:

- (i) Whether the respondent is guilty of cruelty as alleged in the petition?
- (ii) Whether the respondent is guilty of desertion as alleged in the petition?
- (iii) Is the petitioner guilty of adultery as stated by the respondent and therefore not entitled to relief of judicial separation?
- (iv) Who is entitled to the custody of children? And
- (v) What relief, if any, the parties are entitled?

4. Before dealing with the various issues, I am bound to state that having regard to the young age of the parties who may not be in a position to

fully understand the stresses and strains or the wear and tear of married life and who are likely to be more emotional even for trivial causes. I

advised them to settle their differences, amicably and start leading a new life. For this purpose. I called them to my Chambers and advised them

individually and together aim The husband was willing to take back his wife whereas the wife was somewhat stubborn and did not want to go back

and started crying before me. This may be due to the deep rooted fear of the wife that any reunion could bring about more disaster contrary to

what was given out as the evidence which is discussed below, will tend to show. I also called the children separately to ascertain their wishes. Both

of them expressed their strong desire to be with the mother and did not at all want to go back to the father who according to them, never took care

of them.

5. Issue No. 2. This issue may be taken up first. The desertion according to the petitioner is on 16-5-1969 when the respondent left the

matrimonial home with the permanent intention of abandoning co-habitation with the petitioner. The learned counsel for the respondent argues that

having regard to the wording of Section 22 of the Indian Divorce Act, 1869 (hereinafter referred to as the Act) the petition falls short of 4 months

and hence premature. Section 22 of the Act reads as follows:

No decree shall hereafter be made for a decree a Mensa-et-toro but the husband or wife may obtain a decree for judicial separation, on the

ground of adultery or cruelty or desertion without reasonable excuse for two years or upwards and such decree shall have the effect of Divorce-a-

Mensa-et-toro, under the existing law and such other legal effects as hereinafter mentioned"".

6. From this, it is obvious that desertion must have been for a period of two years or upwards. The petition in this case has been filed on 29th

January 1971, i. e. even before the period of two years had elapsed and hence the petition is premature and the contention of the respondent is

well founded. Dey v. Dey (1957) 1 All ER 848 is a clear authority for this proposition. The wording of Section 22 quoted above is also emphatic.

Hence this ground of desertion need not be dealt with in greater detail. If the petition is based only on the ground of desertion it will fail for the

reason stated above. But there is yet another ground viz. cruelty and therefore the question will be whether the petitioner has made out her cases

on that ground. The same is considered under issue No. 1.

7. Issues Nos. 1 and 3: The word "cruelty" is not defined under the Act and therefore it is a word which should take its meaning from the context.

To use the words of Lord Tucker in Jamieson v. Jamieson 1952 A. C. 525 ""Judges have always carefully refrained from attempting a

comprehensive definition of cruelty for the purposes of matrimonial suits and experience has shown the wisdom of this course. It is, in my view,

equally undesirable if not impossible -- by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or

quality which render them capable or incapable in all circumstances of amounting to cruelty in the cases where no physical violence is averred"".

8. In Russel v. Russel 1897 A. C. 395 cruelty was defined as, conduct on the part of one's spouse of such a character as to cause danger to life,

limb or health (body or mental) of the other spouse or as to give a reasonable apprehension of such danger to the other spouse. In the case of

physical cruelty while it is not required there should be repeated acts of violence, or a single act of violence of an aggravated nature, if the Court

thinks that under the circumstances it is likely to occur again and cause real suffering, it will interfere (See Foster v. Foster} 1921 PD 438. Further

as pointed out in *Waters v. Waters* (1956) 1 All ER 432 in all cases of cruelty the rule is that the whole matrimonial relations should be considered.

Regard must be had to the physical and mental conditions of the parties and also to the character of social status. In this connection Rayden on

Divorce (8th Edition at p. 122) can be usefully referred to:

The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the

cruelty consists not of violent acts but of injurious reproaches, complaints, insults or taunts".

The position is summed up in Halsbury's Laws of England in Vol. 12 Lord Simonds 3rd Edition, page 270, paragraph 516 as below:

The general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the

cruelty consists not of violent acts but of injurious reproaches, complaints, accusations and taunts. Before coming to a conclusion the judge must

consider the impact of the personality and conduct of one spouse on the mind of the other and all incidents and quarrels between the spouses must

be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case

keeping always in view the physical and mental conditions of the parties and their character and social status.".

The approach to this question should be as observed by Lord Pearce in *Gollins v. Gollins* (1963) 2 All ER 966.

"I agree with Lord Merriman whose practice in cases of mental cruelty was always to make up his mind, first whether there was injury or

apprehended injury to health. In the light of that vital fact 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 weighty to say that from a reasonable person's point of view, after

consideration of any excuse which this respondent might have in the circumstances the conduct, is such that this petitioner ought not to be called on

to endure it. What on paper may seem little more than a series of pinpricks".

said Lord Norman in 1952 A. C. 525 may present a very different aspect when it has been developed in evidence

The quality of every piece of conduct is affected by its context and by that it

precedes and follows it".

9. Having regard to the principles set out above, the evidence in the instant case may be examined. P. W. 2 the petitioner has spoken to the

various acts of cruelty committed by her husband. In fact, she prefaces her matrimonial life as "it was nothing but misery. For hardly a month, my

husband was all right. Later on, he was addicted to bad habits and I did not enjoy life with him and he used to beat me, scold me, etc. But some

times he used to cajole me and there was nothing but sorrow and lot of "Pathans" used to visit the house and I used to feel very humiliated and

distressed. I used to suffer myself without revealing to anybody". According to her on 28-12-1963, her husband quarrelled with her and went

away and later on she was taken to E. S. I. Hospital since she got swooned and thereafter she was taken to the Mental Hospital since she was

upset after that incident. She also says about the quarrel when she paid & surprise visit to her matrimonial home, a few days after giving birth to a

son in 1963. Again, in December, 1966, there were quarrels, In May, 1968, there was a quarrel and her husband slapped her and drove her out.

Likewise, in May, 1969, when the husband was asked to procure some funds, to run the family, she was beaten. In spite of her protestations to

give up the race going, gambling and the evil habit of drinking, he persisted in the same and used to slap her. In May 1969, he left the family with

his box. Since he was heavily indebted, "Pathans" used to visit her house and he used to force her to sign some bonds for securing loans and used

to leave the house after beating her and she never signed any bond voluntarily. In cross-examination, she would depose on a number of occasions

"the said Pathans" used to come to motor cycles and that she had answered them: her husband used to hide inside a cloak room. When she was

asked what was the language used by the husband while bearing she said "Bloody etc, were all the words that will come out from his mouth

frequently." As a result of the beating, her lips got cut and there was pain all over the body but she used to suffer in silence by treating herself but

never made a complaint to others. She says she was beaten with sticks and sometimes with his hands and fists and she also fainted. To a pointed

question that these allegations are false and that is why she did not seek good offices of the Priest, she states that it is not false and her children

knew it. She was asked about her adulterous conduct that she was found embracing one Perira in the school compound and that she had developed illicit intimacy with Ronnie Rodrigues, Rajani Kant and Kanakaraj. She denied all of them. P. W. 1, the servant maid also speaks about the quarrels and beating and how the husband was addicted to evil ways and about the visit of "Pathans". In the cross-examination she would state that she saw the husband healing the wife. According to her she has seen me wife crying many times in the morning before going to the office on account of these quarrels.

10. On the side of the respondent, the husband is examined as R. W. 1. He has admitted the borrowings from "Pathans" but according to him it was only once and that he beat her only on those occasions when he could not put up with her adulterous conduct or insults. According to him, she went to Mental Hospital as she was possessed of evil spirits and she behaved abnormally in that particular afternoon. As regards the charges of adultery he would say whatever he had heard from others was averred in the counter statements, though it was not possible for him to prove the same. He would sum up and say that he was prepared to take her back in spite of her elopement with Rodrigues and previous Immoral conduct with others, since it is "One sided love affair" and this he is prepared to do for the welfare of the children.

11. R. W. 2 the sister of the respondent, would state that her brother, the husband was not addicted to evil ways and that he was very kind and considerate to his wife and that she suspected illicit intimacy with one Ronney Rodrigues since the wife used to go early in the mornings and one day she noticed that she had nothing covered her body above the waist in his (Ronnie Rodrigues') presence.

12. The learned counsel for the petitioner on this evidence contends that the letter by Ronald Rodrigues (Ex. Rule 1) has been fabricated for the purpose of this case and such letters can be produced at any time. There is no proof that it was the said Ronald Rodrigues who wrote it and even that letter according to him does not prove adultery and mere vague allegations of dissolute living are not evidence of adultery and for this purpose he relies upon Ambujam G. Ammal Vs. M.R. Arumugham, . The evidence of P. Ws. 1 and 2 clearly establishes the cruelty, both physical and

mental and there is no reason to disbelieve them,

13. It is further contended that the evidence of R. W. 1 and R. W. 2 being interested could not be accepted. Even if accented, it does not in any way, belittle the cruelty meted out to the petitioner.

14. The learned counsel for the respondent on the other hand relying on Madhavan Pillai Vs. Mrs. Katherine M. Pillai, states that having regard to

all the circumstances and keeping in view the mental conditions of the parties and their character and social status, these acts, would not constitute

cruelty. According to him drinking is a fashion in that community to which the parties belong and stray acts of violence would not constitute cruelty.

He also relies on (1963) 2 All ER 966 and contends that the test would be as laid down at page 992 of the decision wherein it is stated that:

It is impossible to give a comprehensive definition of cruelty but when reprehensible conduct or departure from the normal standards of conjugal

kindness causes injury to health or apprehension or it, it is, I think cruelty, if a reasonable person after taking due account of the temperament and

all the other particular circumstances would consider that the conduct complained of is such that this spouse could not be called on to endure it"".

15. Applying the said test here, he argues that there is no injury to health or apprehension of it.

16. I am unable to accept this contention, The evidence of P. W. 2 extracted above read with the averments of the petition, clearly establish that

the health of the wife did deteriorate on account of cruelty meted out to her. There is no reason as to why she should be called upon to endure it.

17. The over-all evidence would tend to show that the husband has been in debts. Whatever may be the reasons which compelled him to borrow,

he did force the wife to sign the bonds. But the husband would have it that she signed voluntarily. I do not accept that statement. The beating and

quarrels have been the daily features in the matrimonial life. The evidence of the petitioner as corroborated by P. W. 1, the servant maid, would

clearly prove the physical cruelty suffered by the wife at the hands of the respondent. Both of them have spoken cogently to the occasions of

quarrels and the harsh treatment meted out to her by the husband. In fact, in my chambers when I called her and advised her to go back to her

husband she would go to the extent of saying she would rather commit suicide

than going back; and she apprehended every danger to her life from her husband. This grave apprehension in her mind is an important factor in deciding the question of cruelty. Her evidence is also clear to the effect that when she was beaten after the birth of the boy she was obliged to extend her maternity leave since there was a deterioration in her health as a result of the beating. There is a clear averment to this effect in the petition itself. Excepting a bare denial of beating or finding a justification for the occasional beating the husband does not come out with the truth. The evidence of R W. 2, the sister, apart from being interested does not appear to be true at all and I do not believe her when she says that the husband was affectionate and kind. This apart, the counter statement does not, in any way, meet the allegations of cruelty but sets out the various allegations of illicit intimacy with so many persons. These accusations of immorality are easy to make but difficult to repel. The husband has been accusing her always of immorality but there is no proof forthcoming of this adulterous course of conduct. These allegations standing as they are unproved, would undoubtedly cause great mental distress; more so, to a wife decently placed having hopes of a peaceful married life, In assessing the mental cruelty this is also a fact which is to be taken note of.

18, The unwarranted imputations of unchastity would themselves constitute cruelty. In fact, the Courts have gone to the extent of holding that such

unfounded imputations would constitute cruelty Iqbal Kaur Vs. Pritam Singh S. Nanak Singh, ; Smt. Putul Devi and Another Vs. Gopi Mandal and

Another, . In this situation of acrimony and mutual distrust, it is no wonder the wife would go to the extent of saying that she would not go back to

her husband, since she is always having an apprehension that the husband may seek revenge is some way, The statement of her husband that he

has ""one sided love"" is wholly unacceptable to me since his idea seems to be to evade his obligations of payment of maintenance and take care of

the welfare of the children. Having regard to the entire married life of the parties, the beating and the quarrels which have been a daily feature

according to the wife, but only occasional according to the husband, coupled with these accusations of immorality, I have no doubt that these acts

would constitute great mental distress and real apprehension of harm and injury to the wife. Added to this, she has also suffered great humiliation

when she was forced to execute the bond in favour of "Pathans" and what she got back in return for such refusal was good thrashing. Therefore,

the question is, should the wife suffer all these humiliations, distress, menial agony and apprehend danger to her personal health and suffer them in

silence as she states by putting up with all these, consoling herself that the marriage is a life long union. Is she not entitled to a decent or comfortable

or even a life without worries? The law is no doubt rigorous before dissolving a marriage but the rigour of law should not deny a wife of her

legitimate life. After all, home is where the heart finds its greatest comfort. Thus, I answer issues Nos. 1 and 3 in favour of the petitioner,

19. Issue No. (4): The learned counsel for the petitioner contended that having regard to the evidence of P. Ws. 1 and 2, she alone is maintaining

children showering all affection on them, and the father not having cared for them, the petitioner must be entrusted with the custody of the children

and in such cases the welfare of the minors alone is of primary importance as laid down in *Seeyali Veetil Abubacker Vs. Ovinakath Vayyilapurayil*

Mariyumma, . On the other hand, it is argued by the learned counsel for the respondent that he being the father, he is entitled to the custody of the

children. Earlier in my judgment. I have referred to the fact of the wishes of the minors who expressed their keen desire to live with their mother

and would not like to go to their father. Considering their tender age and bearing in mind the welfare of the minors, I hold they would be best

brought up by the mother. In fact, they have been provided with all their wants hitherto by her alone. She has brought them up as nice children

which was evident from their good behaviour and smartness. Right from young age she alone has been showering all the maternal affection which

the children deserve. Under these circumstances. I am of the view that they should continue to live with their mother and consequently she alone

should be held to be entitled to the custody of the children.

20. I may add in this connection that the father has never taken care of the minors nor even made any attempt to look after their welfare and his

statement that he had sent for them and provided the necessary wants is wholly inconceivable. In fact, he has not even paid the maintenance

ordered by this Court during the pendency of this proceeding.

21. Issue No. 5: The husband is earning a sum of Rs. 500/- a month but his

salary is only in the range of Rs. 300/- Having regard to this fact. I

think that the interests of justice would be met, by directing the husband to pay a sum of Rs. 60/- per month to the wife and Rs. 30/- per month to

each of the minor children by way of maintenance.

22. In the result, I allow the petition and there will be a decree in favour of the petitioner. In the circumstances of the case, there will be no order as

to costs.