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# **IS THE INTERPRETATION OF MENTAL CRUELTY DUE TO SEXUAL FRAILTY TOO LIBERAL IN VIEW OF OBTAINING A MATRIMONIAL RELIEF UNDER THE HMA, 1955?**

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## **ABSTRACT**

Consummation of marriage has been a long-time debated issue. Cruelty, under the Hindu Marriage Act, 1955, has been defined as a ground for judicial separation against a petition for Restitution of Conjugal Rights. The author would like to instil that sexual weakness of either of the spouse in a marital relation that would be a barrier to consummation of marriage would be quite frustrating to the other spouse as a fit marriage includes a healthy physical relationship for intimacy and better understanding and not just for reasons of pleasure. It is a 'normal' for a marriage to sustain among other factors. There have been debates that 'sex' is not everything that a marital relation holds, but it still is important to the extent that it mentally frustrates the other spouse and still amounts to mental cruelty. Though the core of family law is to hold a marriage intact, sexual weakness according to scientific and social research is still mental cruelty and is not too liberal in view of obtaining a matrimonial relief under the HMA, 1955.

**KEYWORDS:** Mental Cruelty, Judicial separation, Sexual weakness, HMA 1955, Consummation, Matrimonial Relief.

Is denial of sex ok while trying to secure a marital bliss? There can be nothing lonelier than having to share and sit in the same room with your partner while having nothing to express or talk about among themselves. The lack of attention and affection can be tolerated to an extent, but the feeling of pain is invisible. Consummation of marriage is the first act of full sexual intercourse (penetration of the penis into the vagina) between a newly married couple that determines the strength of their marital relation. Although the law doesn't really require the consummation of marriage as a factor in determining the validity of a marriage, however the non-consummation of a marriage can determine the incapacity of either of the spouses and act as a barrier to the consummation or may result in obtaining a matrimonial relief thereby ending the wedlock. Consummation is often a religious practise in various Indian traditions, where the families of the newly wedded couple, especially the groom's parents would make sure that the girl was a virgin before the marriage had been consummated. The girl would be given a white saree and the next day the bedsheets along with the saree would be taken away to look for any traces of blood that would determine the virginity of the bride. The consummation of marriage should have been complete and not impartial. The fact that the couple has had a successful and active sex life before marriage will not determine the consummation of marriage at the time and is irrelevant if incapacity existed as a factor after the marriage had taken place. Consummation basically determines the capacity to engage in sexual intercourse and has got nothing to do with the ability to conceive, which means a marriage is successfully consummated even when either of the spouses is infertile or if the wife has had her uterus removed due to certain complications. There are certain grounds that determine non-consummation of marriage. Impotency which is a ground under Section 12 of the HMA, 1955 that holds a marriage voidable and has been legally recognised as a triggering factor of cruelty under Section 13 of the HMA, 1955.

Section 12(1)(a) of the HMA, 1955 states-

“Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely that the marriage has not been consummated owing to the impotence of the respondent.”

Section 13(1) (ia) of the HMA, 1955 states-

“Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the

ground that the other party, has, after the solemnisation of the marriage, treated the petitioner with cruelty.”

Another ground that allows for matrimonial relief is when either of the spouse persistently refuses to have sexual intercourse during marriage and this as well amounts to cruelty. Cruelty need not be physical. In *Maya Devi v Jagdish Prasad (2007)*<sup>1</sup> it was stated that, “Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty must be considered in the light of the norms of marital ties of the society, to which the parties belong, their social values, status, environment in which they live. Cruelty need not be physical. If from the conduct of the spouse it is established or an inference can be legitimately drawn that the treatment of the spouse is such that it causes apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty.”

Impotency means at the time of consummating the marriage, there is an inability to perform the complete act of sexual intercourse. Impotency can also be triggered by psychological factors and is referred to as mental erectile dysfunction or psychological impotence. Marriage without sex is odious, physical intimacy being the foundation of marriage. Studies and research have proved that sexual intercourse has had a commendatory influence on the women’s mind and body, otherwise leading to depression. That it animates a woman’s brain and complements to her multi-tasking purpose is a fact. In the case of *Shakuntala Kumari v. Om Prakash Ghai (1981)*<sup>2</sup>, the court 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 wilful 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.”

Since the term cruelty or mental cruelty has not been properly defined by law, what amounts to cruelty is up to the judges’ comprehension of trying to apprehend as to what is basic for a marriage and what keeps the marital union unstable. Yet most of the judges agree that marriage without sex is unendurable and that it is a good enough reason to end the marriage. Though

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<sup>1</sup> Maya Devi V Jagdish Prasad AIR 2007 SC 1426

<sup>2</sup> Shakuntala Kumari v. Om Prakash Ghai A.I.R. 1981 Del.

there have been debates that “sex” is not everything that determines a marital relationship and all that matters is the love and affection that the spouses share through emotions. This for instance was argued in the case of *Kaslefsky v. Kaslefsky* (1951)<sup>3</sup>, where the court held that such factors like impotency that is said to reflect mental cruelty on the other spouse shall be disregarded since it’s too liberal in view of obtaining a matrimonial relief. The court observed that:

“If the doors of cruelty were opened too wide, we should soon find ourselves granting a divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled.” There have been other arguments that the effect of marital life will be disastrous if sexual weakness would be reason enough to obtain a divorce, then matrimonial courts would be flooded with divorce cases of spouses claiming that they are unable to get the expected satisfaction, “Unbridled sexual urge, it is said, is like the voracity of the fire, and is unquenchable.”

When it comes to persistent refusal to engage in sexual intercourse, if the spouse on most of the occasions is engaging in fulfilling marital obligations, then doesn’t amount to cruelty. However in situations such as those as in the case of *Sheldon v Sheldon* (1955)<sup>4</sup> which held that, “a decree was granted to the wife on the finding that the husband’s persistent refusal of sexual intercourse over a long period without excuse, caused a grave injury to the wife’s health and amounted to cruelty on his part”, can act as a reason to obtain matrimonial relief.

Considering intention as an element while committing matrimonial offence, is not considered very essential to prove cruelty. What is important is for the wife to prove that the husband has never been able to engage in sexual intercourse for a long duration of time or has been unable to consummate the marriage, thereby leaving the wife unsatisfied with unfulfilled desires though there wouldn’t actually be a proof that the husband wantonly tried to refuse to engage in the act of having sexual intercourse but would still be considered as cruelty, and so intention doesn’t matter. Karnataka High Court in the case of *Srikant Rangacharya Adya v Anuradha* (1980)<sup>5</sup> held that, “the legal concept of cruelty in matrimonial offences is not confined to positive acts of causing physical injury by one spouse to another. Without there being a physical

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<sup>3</sup> *Kaslefsky v. Kaslefsky* 1950-2 All ER 398

<sup>4</sup> *Sheldon v. Sheldon* 47 Wn.2d 699 (1955)

<sup>5</sup> *Srikant Rangacharya Adya v Anuradha* AIR 1980 Kant 8

injury, there can be cruelty in a greater degree. 'Cruel' means, cruel in the ordinary sense of the term. It has no esoteric or artificial meaning. There may be cruelty without an intention to injure. Failure to comply with one of the essential obligations of the marital life by the husband would amount to subjecting the wife to cruelty and it is one of the essential and principal obligations on the part of the husband to satisfy the sexual urge of his wife which is a natural instinct. Married life without a sexual life will be a curse to the wife thus failure to or inability to or refusal to effectuate the sexual intercourse by the husband without any reason on the part of the wife, would amount to subjecting the wife to cruelty".

The author of this paper is of the opinion that marriage without sex is repugnant. To coerce the other spouse to live in a distasteful marriage will unavoidably vandalize his or her mental health more than the physical health resulting in depression or frustration and is cruelty in the eyes of the law. A marriage does require intimacy to continue its existence. It is only true that physical intimacy enhances a marital life. Of course, it can be said that all you need for a marriage to sustain is love and understanding or emotional intimacy, that the spouses can get pleasure even without the perfect act of sexual intercourse, that they could just achieve pleasure by other sexual activities, but however it is understood that physical intimacy plays a pivotal role when the full act of sexual intercourse(insertion of the penis into the vagina) has taken place. Even in the eyes of law, only when such an act has been fulfilled, is it deemed to be consummation of marriage. It is extremely challenging when one partner must suffer because of the others health issue, no interest in performing the act or due to incapacity. It is quite unfair how the partner has to live a monotonous life without being able to decrease a space of understanding while being able to share emotions between each other. The relationship would be unbalanced with one person unwilling to take part in sexual intercourse and the other partner wanting it. One may be not be satisfied with a certain level of intimacy while the other would be perfectly content. At times, a wife's illness that does not allow her to consummate the marriage could take a wild turn if the husband forces himself on her, that would be equal to marital rape. For instance, in the case of ***Kusum Lata v. Kamta Prasad (1964)***<sup>6</sup>, the wife filed for divorce on the grounds of cruelty claiming that her husband insisted on having sex against her wishes. It cannot be ignored that sexual intercourse is rather a mutual act and not a mechanical one. In the case of ***Shashi Bala v Rajiv Arora (2012)***<sup>7</sup>, the court held that , "Although it is difficult to exactly lay down as to how many times any healthy couple should have sexual intercourse in a

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<sup>6</sup> Kusum Lata v. Kamta Prasad AIR 1965 All 280

<sup>7</sup> Shashi Bala V. Rajiv Arora. 2012.

particular period of time as it is not a mechanical but a mutual act. 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. 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.” Situations where the wife denies sex due to the pregnancy cannot be considered cruelty or mental cruelty. It was held in the case of *Sumit v. Preeti*(2016)<sup>8</sup> by the Delhi High Court that, “Carrying a foetus in the womb she would obviously be inconvenienced by sex and assuming she totally shunned sex with the petitioner (husband) as her pregnancy grew would not constitute cruelty.”

Analysing the case of *Rita Nijhawan v Balkishan Nijhawan*(1973)<sup>9</sup>, the facts of the case is such that a sixteen-year-old girl and a thirty-year-old man were married to each other as of 1954. The wife claimed that other than having sex once that resulted in pregnancy in 1958, they hadn’t had sex normally like other couples would do, and hence alleged that the husband failed to give her sexual satisfaction. This case gave the term ‘impotence’ a liberal interpretation under Section 12(1) of the Hindu Marriage Act, 1955 that eventually held that a sexless marriage amounts to physical and mental cruelty on the spouse who has been ignored and deprived of the same, making it a valid ground to obtain divorce. The judicial separation of the petitioner was decreed. About the birth of the child, it was held that the birthing is not a conclusive evidence to prove the consummation of marriage. It was stated that, “From 1954 to 1964, there has never been any normal sexual life, and the respondent has failed to give any sexual satisfaction. The marriage has really been reduced go a shadow and a shell, and the wife has been suffering misery and frustration. It is an unthinkable proposition that the wife is not an active participant in the sexual life.”

According to Section 12(1) of the HMA, 1955 in order to obtain a matrimonial relief must be proved that the husband was impotent at all times. The burden of proving this lies on the wife or the petitioner.

In conclusion, being contemptuous, demeaning, asexual, or neglectful is not a very affectionate or loving attitude that the spouses express between each other. And what is worse is that it can

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<sup>8</sup> Sumit v. Preeti. 2016

<sup>9</sup> Nijhawan v Nijhawan AIR 1973 Delhi 200, 9 (1973) DLT 222

get as dangerous and destructive as physical abuse at times. The act of performing sexual intercourse is just a binding force and foundation that would keep the spouses together and help in growth of the bond between them. The denial of sex would, therefore, effect the mental health of either of the spouse depending in the circumstance and affecting mental health would mean amounting to mental cruelty, especially in those cases that involve newly married couples. When it is argued that sex or physical intimacy isn't the only factor that determines a healthy marriage and that there's more to it like the emotional bond and trust, however the author believes that sexual fulfilment is one among the other required emotional needs. The Rajasthan High Court held in *Shri Rajiv Chadha v. Shama Kapoor (2012)*<sup>10</sup> that, "marriage sans sex is a curse and that it is the principal obligation of the husband to satisfy the biological urge of the wife, which is a natural instinct." One of the spouse having to go through such a phase in life would be so stressful and would lead to depression, it is only right that in cases where the husband is impotent or where one of the spouse fails to give the desired level of sexual satisfaction by not wanting to engage in any such act without any said reason, shall allow the other spouse who has been ignored and deprived of his/her needs, to obtain a matrimonial relief. The interpretation of mental cruelty due to sexual weakness as a ground for obtaining a matrimonial relief has not been too broad or liberal and justifies the purpose of and importance of sex in a marriage.

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<sup>10</sup> Shri Rajiv Chadha v. Shama Kapoor. 2012