

**Asha Gomes Vs. Arthur Gomes**

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**SooperKanoon Citation :** [sooperkanoon.com/369864](http://sooperkanoon.com/369864)

**Court :** Mumbai

**Decided On :** Feb-18-2002

**Reported in :** 2002(2)ALLMR687; 2002(3)BomCR485; I(2002)DMC794

**Judge :** H.L. Gokhale and ;S.J. Vazifdar, JJ.

**Acts :** [Indian Divorce Act, 1869](#) - Sections 10

**Appeal No. :** Family Court Appeal No. 90 of 2001

**Appellant :** Asha Gomes

**Respondent :** Arthur Gomes

**Advocate for Def. :** None

**Advocate for Pet/Ap. :** S.F. Rego, Adv. for ;N.J. D'Monte, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**H.L. Gokhale, J.**

1. Heard Mr. Rego for the appellant. None is present for the respondent, though he has been served. This appeal seeks to challenge the judgment and order passed by the Family Court, Mumbai dated 23rd August, 2001 in Petition No. A-1135 of 2000. The appeal was admitted on 23rd October, 2001 and the hearing

was expedited. The record of the proceedings from lower Court is received thereafter and the appellant has filed paper book.

2. When the matter reached for final hearing before this Bench, Mr. Rego, the learned Counsel appearing for the appellant, pointed out that the respondent had remained absent though served in the Family Court also. The appellant herein had filed the above referred matrimonial petition, seeking divorce under the provisions of Section 10 of the [Indian Divorce Act, 1869](#) on the ground of cruelty, as interpreted by the Full Bench of this Court in *Pragati Varghese v. Cyril George Varghese*, reported in II : AIR1997 Bom349 It is the case of the appellant that the appellant was treated with such cruelty that it was impossible for her to continue her married life with the respondent.

3. The appellant was Hindu by birth though she and the respondent got married as per Christian religious rites on 16th April, 1994. It was a love marriage. The appellant and the respondent had met each other when they were doing the course of travel and tourism and thereafter they decided to marry. After the marriage, they lived together till end of October, 1998 when the appellant was constrained to leave the matrimonial home due to the cruel treatment. There is no issue from this marriage.

4. It was the case of the appellant in the Trial Court that the respondent distanced himself physically from her for no fault of her. In her view there was a studied unkindness on his part which was reflected in various acts on his part. Thus for example he did not confide in her in his financial affairs or with respect to family affairs on his parents side. He did not take her to his parents, nor did he join her to visit her parents. Whenever the appellant got an opportunity to go abroad, she requested the respondent to join her but he turned down that request not less than on three occasions when there was no additional expenditure involved. On the other hand, he would go to Goa alone. He did not contribute to expenditure for the matrimonial home beyond a sum of Rs. 1,000/- or Rs. 1,500/- per month and the payment of electricity bill, when his earning per month was not less than Rs. 8,000/-. All these acts constituted cruelty against her. She was constrained to leave the matrimonial home and to go to the parents home some time in October,

1998. Thereafter she filed matrimonial petition first in this Court in September, 1999 though later the same was transferred to the Family Court, where it has come to be numbered as A-1135 of 2000 and decided against her.

5. After the appellant filed the above referred petition, it was served on the respondent but he did not care to attend in Family Court though served. The appellant filed an affidavit to substantiate her allegations. The learned Judge proceeded ex-parte but unfortunately for her did not accept her version of cruelty and dismissed the petition. Being aggrieved by the judgment and decree, this appeal is filed.

6. Mr. Rego, the learned Counsel appearing for the appellant pointed out for no rhyme or reason that the respondent had kept himself away physically from the appellant and there was no conjugal life between the two. There was a specific averment made by the appellant to that effect in para 7 of her affidavit, though strange enough, the learned Judge has held that it is the appellant who was responsible for that situation and came to the conclusion that the petitioner, neither in her petition nor in her affidavit Exh. 10, has stated that she made any effort to keep physical relations with the respondent and inspite of that he refused to keep physical relations with her. Mr. Rego pointed out that this finding is contrary to the affidavit which is on record and particularly when there is no denial whatsoever, there was no reason for the learned Judge to disbelieve the version of the appellant. Similarly Mr. Rego pointed out that although the appellant placed sufficient material on record through her affidavit as to how the respondent was treating her with cruelty and keeping away from her, the learned Judge has still come to the conclusion that it is the appellant who started keeping herself away from the respondent, and, therefore, it is the appellant herself, who is responsible at least to some extent for the behaviour of the respondent. With respect to this finding in para 11, Mr. Rego pointed out that the same is in fact contrary to the record.

7. The petition, which was filed before the Family Court invoked Section 10 of the [Indian Divorce Act, 1869](#). The said section reads as follows :

'10. When husband may petition for dissolution.- Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof been guilty of adultery.

When wife may petition for dissolution-Any. wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman :

or has been guilty of incestuous adultery,

or of bigamy, with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro,

or of adultery coupled with desertion, without reasonable excuse for two years or upwards.'

8. This section is so worded that for a wife seeking divorce on the ground of cruelty, it was necessary to prove adultery along with cruelty. A Full Bench of this Court in the above referred case of Pragati Varghese (supra), held that the said provision was ultra vires to Articles 14,15 and 21 of the Constitution of India. The Full Bench in fact directed in paras 39 and 56 of the judgment that it should now be read as follows :

'39. Having considered all the pros and cons, we are inclined to fully endorse the view expressed by the Kerala High Court and hold that only those portions of Section 10 that offend Articles 14,15 and 21 of the Constitution are liable to be severed and quashed and the remainder of the provisions are liable to be retained on the statute. So done, Section 10 would now read as follows :

'10. When husband may petition for dissolution.-Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution.-Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or has been guilty of adultery, or of bigamy, or of marriage with another woman or of rape or sodomy or bestiality, or of cruelty, or of desertion, without reasonable excuse, for two years or upwards.'

'56. In the result, we hold that the indicated portions of Section 10 of the Act are ultra vires Articles 14,15 and 21 of the Constitution and the same are accordingly struck down. We further find the provisions of Sections 16, 17 and 20 of the Act are also arbitrary and unreasonable. We suggest that the Legislature should intervene and carry out suitable amendments to the Act at the earliest. We direct that a copy of this order may be forwarded forthwith to the Ministry of Law and Justice for such action as they may deem fit to take.'

Relying upon these observations, the petition was filed in the Family Court. Mr. Rego points out that similarly many other petitions have been filed on the basis of this judgment.

9. Mr. Rego has drawn our attention to the observations of the Apex Court in the case of Shobha Rani v. Madhukar Reddy, reported in : [1988]1SCR1010 , wherein the Apex Court has pointed out that in the present times there is change in the life around us and ideas of cruelty will largely depend upon the type of life the parties are accustomed to or their economic and social conditions. The Apex Court has observed therein as follows :

'There has been a marked change in the life around us. In matrimonial duties and responsibilities in particular, there is a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes

complaint about the treatment of cruelty by the partner in life of relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance.'

In fact for that matter in a very recent judgment in the case of G.V.N. Kameswara Rao v. G. Jabilli, reported in I (2002) SLT 153=(2002) 1 DMC 266=AIR 2002 SCW 162 the Apex Court has held that for constituting cruelty, the conduct need not necessarily be of such nature as to cause reasonable apprehension that it would harm the petitioner to live with other party. Whether the acts committed by the respondent, amount to cruelty has to be assessed after taking into consideration the status of parties in social life, their customs, traditions and such similar circumstances. The Court should consider whether the conduct of the respondent was such that it had become intolerable for the petitioner to suffer any longer.

10. For the sake of record, we would like to point out that the above referring Section 10 of the [Indian Divorce Act, 1869](#) has been since amended by the Parliament by Act No. 51 of 2001 and has now a much more humane provision in Section 10(l)(x) when it comes to a petition for divorce on the ground of cruelty. This provision has come into force from 24.9.2001. The said provision reads as follows :

'10(1) Any marriage solemnized whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001 may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

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(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for

the petitioner to live with the respondent.'

11. Having gone through the material on record, we are of the view that the appellant had made out a case of cruelty before the Trial Court and the learned Judge has erred in ignoring the material which was placed before him. There was no reason for him to come to the conclusion that in fact the appellant was at fault when the respondent did not care to contest the petition, and the submissions made by the appellant on cruelty were cogent and uncontroverted. It was for her to form her impression as to how she was treated. She has placed it on record and we cannot say that she was unreasonable in contending that she was meted out a cruel treatment over a period of four years in an unsatisfactory married life. For the reasons stated above, in our opinion, she has made out a case under Section 10 of the [Indian Divorce Act, 1869](#) as interpreted in Pragati Varghese (supra). She is, therefore, entitled to a decree of divorce. We, therefore, allow this appeal, set-aside the order passed by the learned Family Court and allow the Petition No. A-1135 of 2000 by this order and grant a decree of divorce to the appellant. The marriage will stand dissolved by this decree.

12. There will not be any order as to costs.

13. Certified copy expedited.