PETITIONER:
SIRAJMOHMEDKHAN JANMOHAMADKHAN

Vs.

RESPONDENT:
HAFIZUNNISA YASINKHAN & ANR.

DATE OF JUDGMENT14/09/1981

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
SEN, A.P. (J)

CITATION:
1981 AIR 1972 1982 SCR (1) 695
1981 SCC (4) 250 1981 SCALE (3)1400

ACT:
Code of Criminal Procedure, 1973-Section (3)-Scope of-Husband's impotence to have sexual relations with his wife-Whether a just ground for grant of maintenance to the wife.

HEADNOTE:
The respondent was the appellant's wife. In her petition under section 125(3) Criminal Procedure Code, 1973 for grant of maintenance, the Metropolitan Magistrate, upheld her allegation that the appellant was impotent and was incapable of having sexual relations with his wife. But the Magistrate refused to grant maintenance to her on the ground that the husband's impotence was not a just cause for her refusal to live with the husband.

Holding that impotence of the husband was a just ground for the wife to refuse to live with the husband, the High Court granted her maintenance.

In appeal to this Court while the husband contended that impotence was not a good ground for the wife's refusal to live with him, the wife contended that the second proviso to section 125(3) 1973 Code enabled the wife to refuse to live with the husband if there was a suit ground for doing so and in this case the husband's impotence was a just ground for such refusal.

Dismissing the appeal,

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HELD: Proved impotence of the husband and his inability to discharge his marital obligations amount to both legal and mental cruelty make it a just ground for the wife to refuse to live with the husband. The wife would be entitled to maintenance from him according to his means. [710G-711A]

The second proviso to section 125(3) of the 1973 Code was a proviso to section 488 of the 1898 Code which provides that it is incumbent on the Magistrate to consider the grounds of refusal and to make an order of maintenance, if he is satisfied that there is a just ground for the wife to refuse to live with the husband. Decision of High Courts that section 488 of the 1898 Code had nothing to do with the ordinary conjugal rights were directly opposed. to the very object of the section. [703 D-F]

Bundoo v. Smt. Mahrul [1978] Cr. L, J. 1661, Emperor v. Daulat Raibhan & Anr., A.I.R. 1948 Nagpur 69, Arunachala v.

Anandayammal, A.I.R. 1933 Mad. 668, Jaggavarapu Basawamma v. Japgavarapu Seeta Reddi, A.l.R, 1922 Mad. 209 & Vedayudhan v. Sukmari [1971] KLT 443 overruled.
696
In the Matter of the Petition of Din Muhammad ILR [1883] 5 Allahabad 226 approved.

By an amendment made in 1949 the scope and ambit of the term "just ground" had been widened by adding a second proviso to section 488 of the 1898 Code. The object of introducing this provision was to widen the scope and ambit of the term "just ground". This provision is not exhaustive but purely illustrative and self-explanatory and takes within its fold not only the two instances mentioned Therein but other circumstances also of a like nature which may be regarded by the Magistrate as a just ground by the wife for refusing to live with her husband. In the present Code this provision has been incorporated as explanation to the second proviso to section 125(3). [703 G-704 B]

A perusal of this provision shows that it was meant to give a clear instance of circumstances which may be treated as a just ground for refusal of the wife to live with her husband. By virtue of this provision, the proviso takes within its sweep all other circumstances similar to the contingencies contemplated in the Amending provision as also other instances of physical, mental or legal cruelty not excluding the impotence of the husband. These circumstances clearly show that the grounds on which the wife refuses to live with her husband should be just and reasonable as contemplated by the proviso. Similarly, where the wife has a reasonable apprehension arising from the conduct of the husband that she is likely to be physically harmed due to persistent demands of dowry from her husband's parents or relations, such an apprehension also would be manifestly a reasonable justification for the wife's refusal lo live with her husband.
[704 D F]

Where a husband had contracted a married with another woman or kept a mistress, it was considered to be a just ground for the wife's refusal to live with the husband Similarly where a wife refuses to live with an impotent husband who is unable to discharge his marital obligations that would be a just ground. Moreover when impotence under the civil law is a good ground for granting divorce or for refusing restitution of conjugal rights there is no reason to hold that it would not be a just ground under section 125. The concept of cruelty remains the same whether it is a civil case or a criminal case or a case under similar Acts. The general principles governing acts constituting cruelty-legal or mental ill-treatment or indifference cannot vary from case to case, though the facts may be different. [704 H-705 C, 709 C]

It is well recognized that 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. Abstinence from intercourse effecting ill health of the wife can be held to be cruelty. [709 E, 710 F]

Rita Nijhawan v. Balkishan Nijhawan, AIR 1973 Delhi 200, Bhikaji Maneckji v. Maneckji Mancherji, 5 Cr. L.J. 334, Bai Appibai v. Khimji Cooverji, AIR 1936 Bom. 138, Gunni v. Babu Lal, AIR 1952 Madnya Bharat 131, Biro v. Behari Lal, AIR 1958 J & K. 47, Smt. Panchoo v. Ram Prasad, AIR 1956 All. 41 and Dr.Srikant Rangacharya Adya. v. Smt. Anuradha, AIR 1980 Karnataka 8, approved.

Sheldon v. Sheldon [1966] 2 All. E.R. 257 referred to.
697

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 602 of 1981.

From the judgment and order dated 27th August, 1980 of the Gujarat High Court at Ahmedabad in Cr. Revision Application No. 282 of 1979.

N.N. Keshwan and R.N. Keshwani for the Appellant.

Vimal Dave and Miss Kailash Mehta for Respondent No. 1.

S C. Patel and R.N. Poddar for Respondent No. 2

The Judgment of the Court has delivered by

FAZAL ALI, J. This appeal by special leave is directed against a judgment dated August 27, 1980 of the Gujarat High Court accepting the revision application of the Respondent and setting aside the order of the Metropolitan Magistrate, Ahmedabad. The facts of the case lie within a very narrow compass, which may be detailed thus.

The respondent who is the wife of the appellant filed an application before the Magistrate under s. 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code of 1973') for grant of maintenance by the appellant on the ground that her husband-appellant was guilty of wilful neglect and was unable to fulfil his primary responsibility of discharging his marital obligations. The parties were married on May 27, 1978 according to Sunni Muslim rites. After the marriage the respondent lived with her husband upto July 1978. The respondent alleged that during this period she found her husband to be physically incapable of carrying on sexual relationship and that her husband frankly told her that he was impotent. The respondent further alleged that she was maltreated and ultimately driven out of the house by her husband on July 11, 1978. On November 17, 1978 the appellant sent a registered notice (Ext. 5) to the respondent informing her that he had no physical disability and was prepared to keep her with him and discharge his marital obligations. On October 28, 1978 the respondent filed an application before the Magistrate for awarding maintenance against the appellant.

So far as the facts found are concerned, there is no dispute and the case will have to be decided on the point of law that arises

698

on the contentions raised by the parties before the courts below as also in this Court. Both the High Court and the Metropolitan Magistrate clearly found that the appellant was physically incapable of having sexual relations with the respondent. In other words, the concurrent finding of fact by the courts below is that the appellant was impotent and was, therefore, unable to discharge his marital obligations. The respondent, however, refused to live with her husband on the ground that as he was impotent and unable to discharge his marital obligations, she could not persuade herself to live with him and thus inflict on herself a life of perpetual torture. The Metropolitan Magistrate relying on a decision of the Allahabad High Court in Bundoo v. Smt. Mahrul found that the mere ground that the husband was impotent was not a just cause for the refusal of the wife to live with her husband and accordingly dismissed the application filed by the respondent for maintenance.

Thereafter, the matter was taken up in revision before the High Court which differed from the view taken by the Magistrate and held that the husband having been found to be

impotent, this should be a just ground for the wife to refuse to live with the husband and hence she was entitled to the grant of maintenance. The High Court after having come to the aforesaid conclusion further held that having regard to the means of the husband he was in a position to pay Rs. 150/- per month by way of maintenance to the respondent. Hence, this appeal by special leave by the appellant-husband

Mr. Keshwani, learned counsel for the appellant, vehemently contended before us that it is now well settled by a long course of decisions of various High Courts that impotency is no good ground or reason for the wife to refuse to live with her husband and hence the wife is not entitled to maintenance if she refused to live with the husband merely because her husband was impotent. Mr. Keshwani cited a number of decisions in support of his contentions, on the other hand, Mr. Dave, appearing for the respondent, submitted that the various authorities of the High Courts seems to have overlooked the legal effect of the second proviso to sub-section (3) of section 125 of the Code of 1973 under which a wife could refuse to live with her husband if there was a just ground for doing so. The said proviso may be extracted thus:-

> "Provided further that if such person offers to maintain his wife on condition of her living with him, and she
> 699
> refused to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

We are of the opinion that if the husband was impotent and unable to discharge his marital obligations, how could he fulfil the main object of marriage, more particularly, under the Mahomedan law where marriage is a sacrosanct contract and not a purely religious ceremony as in the case of Hindu law. This would certainly be a very just and reasonable ground on the part of the wife for refusing to live with her husband, as also in cases under the Hindu law or other Laws. In Nanak Chand v. Shri Chandra Kishore Agarwala and Ors. this Court held thus:

> "Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties."

After having heard counsel for the parties we are clearly of the opinion that the contention of the counsel' for the respondent is sound and must prevail. It is true that there are several decisions of the High Courts taking a contrary view but they seem to have proceeded on a totally wrong assumption and we are constrained to observe that in taking such a narrow view they have followed a most outmoded and antiquated approach. The learned Magistrate mainly relied on a decision of the Allahabad High Court in Bundoo's case (supra). It is true that Bakshi, J. in that case seems to have been influenced more by the concept of neglect rather than by the reasonableness of the ground on which the refusal of the wife was based. While dwelling on this aspect of the matter, the learned Judge observed as follows:-

> "Assuming now for the purpose of argument that Bundoo was physically incapable of satisfying the sexual desire of his wife, it cannot be said this inability amounted intentionally to disregarding, slighting, disrespecting or carelessly and heedlessly

treating his wife. In this view of the matter, I am of the opinion that the element of neglect as envisaged under Section 488 Cr. P.C., old and under Section 125 Cr. P.C. new, has not been established. "

700

The attention of the learned Judge does not seem to have been drawn to the provisions of second proviso nor has the Judge come to any clear finding that the refusal of the wife could not fall within the ambit of "just ground" as contemplated by the aforesaid proviso. Secondly, the learned Judge mainly relied on an earlier decision of Hidayatullah, J. (as he then was) in Emperor v. Daulat Raibhan and Anr. in which it was held that a wife was not entitled to live apart from her husband and claim maintenance on the ground that her husband was impotent and unable to perform his marital obligations. In fact, a number of decisions of the High Courts which were relied upon by the counsel for the appellant follow the decision of the Nagpur High Court as also the previous decisions of other High Courts replied upon by Hidayatullah, J. in the Nagpur case. We shall consider the legal effect of this decision a little later. So far as the decision of the Allahabad High Court, in which the Magistrate had relied, is concerned, the observations of Bakshi, J. were purely obiter. It would appear that there was a clear finding cf fact by the Magistrate. which had been accepted by the High Court, that the wife failed to prove by convincing evidence that her husband was impotent. In view of this finding of fact, the question of law posed and decided by Bakshi, J. did not fall for decision at all because if the wife failed to prove that her husband was impotent, the question of her refusal to live with him for a just ground did not arise at all. While adverting to this finding of fact, Bakshi, J. in the aforesaid case observed as follows:-

"I find from the perusal of judgment of the Magistrate that he has taken into consideration the entire evidence on the record led in connection with this question and he was of the opinion that Shrimati Mahrul Nisa failed to prove by convincing evidence that Bundoo was impotent."

(Emphasis supplied)

In the circumstances, we are not in a position to accept the observations of Bakshi J. which are in the nature of obiter dictum, in support of the argument of Mr. Keshwani.

This brings us now to the consideration of the authorities of other High Courts which seem to have taken' the view that impotency is no ground for grant of maintenance to the wife. We would first deal with the decision of Hidayatullah, J. in Daulat Raibhan's case

701

(supra). In the first place, the learned Judge thought that the point A raised before him was one of first impression and his decision was, therefore, greatly influenced by the fact that there was no direct decision on the point taking a contrary view. In this connection, the learned Judge observed as follows:-

"No authority has been cited before me in support of the case of the wife that she is entitled to live separate from her husband on account of his impotence."

Subsequently, the learned Judge mainly relied on the following observations made in Arunachala Anandayammal:

"I cannot see that s. 488, Criminal P.C. has anything to do with ordinary conjugal rights; it deals with maintenance only..."

The learned Judge seems to have been under the impression that so far as the provisions of s. 488 of the Code of 1898 were concerned they had no bearing on conjugal relations between the husband and the wife. With great respect to the learned Judge we are unable to agree with this process of reasoning. In fact, the fundamental basis of the ground of maintenance under s. 488 is conjugal relationship and once conjugal relationship is divorced from the ambit of this special provision, then the very purpose and setting of the statutory provision vanishes. In the matter of the Petition of Din Mohammed, Mahmood, J. very pithily and pointedly observed as follows:

> "The whole of Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relations as a condition precedent to an order of maintenance and, on general Principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect." (Emphasis supplied)

We find ourselves in complete agreement with the observations made by the eminent Jurist Mahmood, J. which lays down the correct law on the subject. Thus, one of the fundamental premises on which rested the decision of Hidayatullah, J. appears to us to be

702

clearly wrong and directly opposed to the very object of the section (which at the relevant time was s. 488). In Arunchala's case (supra) which was relied upon by Hidayatullah, J., Burn J. Observed thus:

> "I cannot see that S. 488, Criminal P.C. has anything to do with ordinary conjugal rights; it deals with "maintenance" only and I see no reason why maintenance should be supposed to include anything more than appropriate food, clothing and lodging."

It would-be seen that here also the learned Judge proceeds on a legally wrong premise, viz., that s. 481 had nothing to do with ordinary conjugal rights. Moreover, the Madras decision as also the earlier decision seem to have followed the outmoded and antiquated view that the object of s. 488 was to provide an effective and summary remedy to provide for appropriate food, clothing and lodging for a wife. This concept has now become completely out dated and absolutely archaic. After the International Year of Women when all the important countries of the world are trying to give the fair sex their rightful place in society and are working for the complete emancipation of women by breaking the old shackles and bondage in which they were involved, it is difficult to accept a contention that the salutary provisions of the Code are merely meant to provide a wife merely with food, clothing and lodging as if she is only a chattel and has to depend on the sweet will and mercy of the husband. The same line of reasoning was adopted in an earlier decision of the Madras High Court in Jaggavarapu Basawama v. Jaggavarapu Seeta Reddi. Here also, the Judge was of the opinion that food and clothing was sufficient for the maintenance of the wife and even if the husband refused to cohabit that would not provide any cause of action to the wife to claim separate maintenance. In a recent decision in Velayudhan v. Sukmari a Single Judge observed as follows:

> "Learned magistrate seems to have concentrated solely on the last-mentioned ground namely, failure of the husband to perform his marital duties, and has held that it is a sufficient ground entitling the wife to live away from the husband, and claim separate

maintenance. But I do not think, in the face of authorities cited before me that this
703
is a sufficient ground justifying the award of separate maintenance to the wife. It was observed by Kumaraswami Sastri, J. in Basawamma v. Seetareddi (AIR 1922 Mad. 209) that there is nothing in the Code which compels the criminal court to award separate maintenance to a wife whom the husband agrees to protect and maintain in a manner suitable to her position in life; refusal to cohabit is no ground.

Here also, the Judge while noticing that the ground taken by the wife was that the husband has failed to perform his marital duties, found himself bound by the decisions of the Madras High Court in Jaggavarapu Basawamma's case (supra). Thus even in this decision though given in 1971 when the entire horizon of the position and status of women had changed, it is rather unfortunate that the Judge chose to stick to the old view.

There is however a very formidable circumstance which seems to have been completely overlooked by later decisions while following the previous decisions of the Nagpur or the Madras High Courts. Although the second proviso to sub-section (3) of s. 125 of the Code of 1973, which was also a proviso to the old s. 488, clearly provided that it is incumbent on the Magistrate to consider the grounds of refusal and to make an order of maintenance if he was satisfied that there was just ground for refusing to live with the husband, yet this salutary provision which was introduced with the clear object of arming the wife with a cause of action for refusing to live with the husband as the one which we have in the present case, no legal effect to the legislative will and intent appears to have been given by the aforesaid decisions.

Another important event which happened in 1949 also seems to have been completely ignored by the recent decisions while following the previous decisions of the High Courts. It would appear that by the Code of Criminal Procedure (Amendment) Act No. 9 of 1949 an additional provision was added after the proviso which may be extracted thus:

"If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him."

The object of introducing this provision was clearly to widen the scope and ambit of the term 'just ground' mentioned in the
704
proviso. This provision is not exhaustive but purely illustrative and self-explanatory and takes within its fold not only the two instances mentioned therein but other circumstances also of a like or similar nature which may be regarded by the Magistrate as a just ground by the wife for refusing to live with her husband. Under the Code of 1973, this provision has been incorporated as Explanation to the second proviso to sub-section (3) of s. 125.

The decisions of the High Courts given prior to the Amendment of 1949 would no longer be good law after the introduction of the Amendment which gives, as it were, a completely new complexion to the intendment and colour of the second proviso to s. 488 (now Explanation to the second proviso to sub-section (3) of s. 125) and widens its horizon. It is, therefore, needless to refer to these decisions or to subsequent decisions which have followed the previous cases.

A clear perusal of this provision manifestly shows that it was meant to give a clear instance of circumstances which may be treated as a just ground for refusal of the wife to live with her husband. As already indicated, by virtue of this provision, the proviso takes within its sweep all other circumstances similar to the contingencies contemplated in the Amending provision as also other instances of physical, mental or legal cruelty not excluding the impotence of the husband. These, circumstances, therefore, clearly show that the grounds on which the wife refuses to live with her husband should be just and reasonable as contemplated by the proviso. Similarly, where the wife has a reasonable apprehension arising from the conduct of the husband that she is likely to be physically harmed due to persistent demands of dowry from her husband's parents or relations, such an apprehension also would be manifestly a reasonable justification for the wife's refusal to live with her husband. Instances of this nature may be multiplied but we have mentioned some of the circumstances to show the real scope and ambit of the proviso and the Amending provision which is, as already indicated, by no means exhaustive.

In other words, where a husband contracts a marriage with another woman or keeps a mistress this would be deemed to be a just ground within the meaning of the second proviso so as to make the refusal of the wife to live with her husband fully justified and entitled to maintenance. If this is so, can it be said by any stretch of imagination that where a wife refuses to live with her husband if
705
he is impotent and unable to discharge his marital obligation, this would not be a just ground for refusing to live with her husband when it seems to us that the ground of impotence which had been held by a number of authorities under the civil law to be a good ground not only for restitution of conjugal rights but also for divorce. Indeed, if this could be a ground for divorce or for an action for restitution of conjugal rights, could it be said with any show of force that it would not be a just ground for the wife to refuse to live with her husband. The matter deserves serious attention from the point of view of the wife. Here is a wife who is forced or compelled to live a life of celibacy while staying with her husband who is unable to have sexual relationship with her. Such a life is one of the perpetual torture which is not only mentally or psychologically injurious but even from the medical point of view is detrimental to the health of the woman. Surely, the concept of mental cruelty cannot be different in a civil case and in a criminal case when the attributes of such a cruelty are the same.

In Rita Nijhawan v. Balkrshaan Nijhawan (Sachar, J.) while dealing with a case of annulment of marriage under the Hindu Marriage Act on the ground of impotency very poignantly and pithily observed as follows:

> "Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the 'result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent.
> ... ...
> 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 favourable influence on a women's mind and body. The result being that if she does not get proper sexual satisfaction, it will lead to depression and frustration."

706

We find ourselves in complete agreement with the very practical and pragmatic view that the learned Judge has taken and the principles adumbrated by the Judge apply fully to proceedings for maintenances because as we have said the concept of cruelty is the same whether it is a criminal case or a civil case.

As far back as 1906, the Bombay High Court came out with the concept of cruelty which could be considered for exercising jurisdiction under s. 488 of the Code of 1898. In Bhikaji Maneekji v. Maneekji Mancherji a Division Bench of the Bombay High Court observed as follows:

"Where it is proved that a husband has not refused or neglected to maintain his wife, a criminal Court, acting under the section, has no jurisdiction to make an order upon the husband for her maintenance on the ground that the husband has been guilty of cruelty to her. But that is a very different thing from holding that no evidence of cruelty can be admitted in a proceeding under the section to prove, not indeed cruelty as a ground for separate maintenance, but the conduct and acts of the husband from which the Court may draw the inference of neglect or refusal to maintain the wife. A neglect or refusal by the husband to maintain his wife may be by words or by conduct. It may be express or implied. If there is evidence of cruelty on the part of the husband towards the wife from which, with other evidence as to surrounding circumstances, the Court can presume neglect or refusal, we do not see why it should be excluded. There is nothing in s. 488 to warrant its exclusion, and such has been the practice of the Court. But the section has been altered and now the Court can pass an order for maintenance where neglect or refusal is proved, even if the husband is willing to maintain the wife, provided the Court finds that there are "just grounds" passing such an order. This alteration gives a wider discretion to the Court, which means that in passing such an order it is legitimate for it to take into account the relations between the husband and the wife, and the husband's conduct towards her."

This decision, given as far back as 1907, while construing the proviso appears to be both prophetic and pragmatic in its approach

707

and it is rather unfortunate that subsequent decisions have not noticed this important principle of law decided by the Bombay High Court. We fully endorse this decision as laying down the correct law on the subject and as giving the correct interpretation of the proviso to s. 488 particularly the concept of the words 'just ground'.

Another decision which had touched the question of 'cruelty' is the case of Bai Appibai v. Khimji Cooverji where the following observations were made:

"If, however, the husband by reason of his misconduct, or cruelty in the sense in which that term is used by the English Matrimonial Courts, or by his refusal to maintain her, or for any other justifying

cause, makes it compulsory or necessary for her to live apart from him, he must be deemed to have deserted her, and she will be entitled to separate maintenance and residence."

In Gunni v. Babu Lal Dixit, J. sounded a very pragmatic note on this aspect of the matter and in this connection pointing out the scope of the Amendment of 1949 observed thus:

"There is nothing in the Criminal Procedure (Amendment) Act, 1949 to show that it would not be a just ground for the wife's refusal to live with her husband if the husband has contracted marriage with another wife or taken a mistress before the amendment made in s. 488. The amendment is clearly intended to put an end to an unsatisfactory state of law, utterly inconsistent with the progressive ideas of the status and emancipation of women, in which women were subjected to a mental cruelty of living with a husband who had taken a second wife or a mistress on the pain of being deprived to any maintenance if they chose to live separately from such a husband. If my view to hold that the amendment is intended to afford a just ground for the wife's refusal to live with her husband only in those cases where he has after the amendment, taken a second wife or a mistress is to defeat in a large measure the very object of the amendment."

708

We find ourselves in complete agreement with the observations made by the learned Judge. In Mst. Biro v. Behari Lal, a decision to which one of us (Fazal Ali, J. as he then was a party, where the importance of the Amendment of 1949 also touched, the following observations were made:

"Before the amendment, the fact of the husband's marrying a second wife or keeping a mistress was not by some High Courts considered a just ground for the first wife's refusal to live with him, although it was taken into account in considering whether the husband's offer to maintain his first wife was really 'bona fide' or not.

The amendment is clearly intended to put an end to an unsatisfactory state of law utterly inconsistent with the progressive ideas of the status and emancipation of women, in which women were subjected to a mental cruelty of living with a husband who had taken a second wife or a mistress on the pain of being deprived of any maintenance if they chose to live separately from such a husband."

In Sm. Pancho v. Ram Prasad, Roy, J. while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946) expounded the concept of 'legal cruelty' and observed thus:

"In advancement of a remedial statute, everything is to be done that can be done consistently with a proper construction of it even though it may be necessary to extend enacting words beyond their natural import and effect.

... ...

Conception of legal cruelty undergoes changes according to the changes and advance of social concept and standards of living. With the advancement our social conceptions, this feature has obtained legislative recognition that a second marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.

> Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the
> 709
> husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife.

The learned Judge has put his finger on the correct aspect and object of mental cruelty. The fact that this case did not arise out of the proceedings under s. 125 makes no difference because we have already observed that the concept of cruelty remains the same whether it is a civil case or a criminal case or a case under any other similar Act. The general principles governing acts constituting cruelty-legal or mental ill-treatment or indifference cannot vary from case to case though the facts may be different.

Similarly, while dealing with a case under the Hindu Marriage Act, 1955, a Division Bench of the Karnataka High Court in Dr, Srikant Rangacharya Adya v. Smt. Anuradha dwelling on the aspect of impotency and its impact on the wife observed as follows:-

> "In these days it would be an unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the 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 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 recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

We find ourselves in entire agreement with the observations made by the learned Judges of the Karnataka High Court which seems to be the correct position in law. Even the learned Judge who had delivered the judgment in the instant case had very rightly pointed out as follows:-

710

> "If the maintenance of a wife is supposed to include only food, shelter and clothing having regard to the conjugal rights and if the just cause on which wife can refuse to stay with the husband and yet claim maintenance, can have reference only to the comfort and safe of the wife then it might reduce the wife to the status of a domesticated animal.
>
> In the context of the changing status of woman in society such a proposition would seem outdated and obsolete..... In other words, the Courts cannot compel the wife to stay with husband on the ground that the husband though he is forcing her in a situation where her physical and mental well being might be adversely affected, as there is no intention on the part of the husband to inflict that cruelty, she should suffer that predicament without demur and be satisfied with a grab to bite and some rags to clothe her and a roof over her head."

We fully endorse the observations made above. Apart from the various decisions referred to above, there is a

direct English decision on the point. In Sheldon v. Sheldon, Lord Denning observed as follows:

> "I rest my judgment on the ground that he has persistently, without the least excuse, refused her sexual inter course for six years It has broken down her health. I do not think that she was called on to endure it any longer.
>
> It has been said that, if abstinence from intercourse causing ill-health can be held to be cruelty, so should desertion simpliciter leading to the same result."

Thus, from a conspectus of the various authorities discussed above and the setting, object and interpretation of the second proviso to sub-section (3) of s. 125 of the Code of 1973, we find ourselves in complete agreement with the view taken by the learned Judge of the High Court. We hold that where it is proved to the satisfaction of the court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty which would undoubtedly be a just ground as contemplated by the aforesaid proviso for the wife's refusal to live

711

with her husband and the wife would be entitled to maintenance from her husband according to his means. In these circumstances, therefore, it would be pusillanimous to ignore such a valuable safeguard which has been provided by the legislature to a neglected wife.

For these reasons, therefore, we find no merit in the appeal which fails and we accordingly dismiss the same without any order as to costs.

In view of our decision in this case, it follows that the decisions referred to above in the judgment taking a contrary view must be held to be no longer good law and are hereby overruled.

P. B. R. Appeal dismissed.

712