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The Plaintiff v. The Defendant

Facts:

The couple was married on November 17, 2016, in accordance with Orthodox Jewish law. On November 18, 2018 the plaintiff left the defendant due to his physical abuse of her and his consumption of drugs and alcohol.

Claims of physical violence had been filed in criminal court by two women against the defendant prior to our marriage, but the criminal court dismissed the allegations of one of the women, and the other withdrew her complaint. One of the defendant's ex-girlfriends claims that he assaulted her. On the other hand, it was alleged that the defendant was convicted for violent behavior towards certain tenants, and that there was also a conviction for reckless driving and yet another for reckless driving under the influence of alcohol. Indeed, the plaintiff submitted to the *Beit Din* pictures of drugs found in the ashtrays of his car.

Furthermore, an ex-girlfriend of the defendant from before the marriage sent the plaintiff various text messages regarding his violent behavior and his addiction, and also sent her a copy of a police report regarding an incident of violence where she caught him with another woman. The plaintiff only discovered much of the above during her fourth month of pregnancy.

Furthermore, during her marriage or after the separation, the plaintiff found out about the existence of criminal indictments had been filed against him prior to the marriage for assaulting two women, about the two convictions of reckless driving, and about the eleven restraining orders that had been taken out by several tenants in one of his buildings due to his violent behavior towards them.

In the course of the marriage, when the plaintiff was pregnant, the defendant was arrested by the police for assaulting her. Later, in November 2017, there was an incident of domestic violence, when he choked her. In the wake of that event, an order of

protection was issued, but the plaintiff decided to withdraw the complaint due to his promise that he would change his ways. However, the domestic violence persisted, and the order of protection was reinstated.

On various occasions he threatened to kill her, for example, in September 2018. The plaintiff submitted to the *Beit Din* a video recording in which he is seen threatening to cut up her body into parts.[1] Following an increase in the number of violent incidents and in his becoming drunk, on November 18, 2018 she contacted the police and the defendant was evicted from the marital home for eight months.

Subsequently, on the basis of his claim that he had attended anger and domestic violence management classes, the defendant returned to their home. However, the violent incidents continued. All this domestic violence began approximately nine months after the marriage, when their daughter was two months old.

The fact that the plaintiff had a natural miscarriage, which according to the defendant was her fault, increased the frequency of the assaults and the drinking. The first time he assaulted the plaintiff, in October 2017, the defendant was already drunk by early morning. When he attacked her on the night of his first arrest, he had been smoking weed, which she found in his car.

The plaintiff left the defendant on November 16, 2017; she nevertheless had conjugal relations with him on several occasions thereafter. In short, a year and half after the onset of acts of domestic violence, she left him for good.

Following the final separation on June 22, 2019, he broke her fingers. She has submitted a medical bill containing a description of the event and her convalescence in the hospital, as well as pictures of her broken hand.

The plaintiff submitted copies of text messages between the defendant and another woman which attest to their affair: it was clear from the texts that this was a sexual relationship which predated his marriage to the plaintiff and continued during the marriage.

After their separation, two incidents of domestic violence occurred for which a criminal indictment was filed, and the plaintiff is at present awaiting for the trials to begin. One charge dealt with the incident of her hand; the other charge was that he grabbed her wrist and caused her pain (despite the existence of a restraining order) when she was in a parking lot, an incident which was caught on a surveillance camera at the location and supported by the testimony of a detective who observed the footage from the camera. On June 1, 2020 the defendant was convicted on the above two charges of domestic violence.

[1] Although it is impossible to determine that the recording constitutes evidence, nevertheless it can be used in order to discover the truth within the halakhic rules of assessment. See File 851799/2, Netanya Regional Beit Din, 16 Iyyar 5772; IBD judgement no. 2020/253.

On February 11, 2020 we convened a hearing in the presence of the plaintiff in order to address the matter of the *gett.* Subsequently, on February 24, 2020 we obligated the defendant to give the plaintiff a *gett* immediately. To date, he has refused to give her a *gett*.

Deliberations

Mistaken *Kiddushin* due to Physical Abuse

Before the mechanism of mistaken *kiddushin* can be applied in order to invalidate the *kiddushin* and to claim that a mistake occurred in the creation of the marriage, there must be an identification of a major defect.

a. The defect must be serious, such as impotence, insanity, homosexuality or exposure of the wife to risk of a dangerous illness such as AIDS. All these examples are defined as "major defects" in the rabbinical *responsa*.

A criterion for determining whether a particular behavior constitutes an instance of a "major defect" is whether the abuse is a ground for divorce, and whether the husband may be compelled to give a *gett* in the particular circumstances.

Let us look at the position of the authorities in relation to a husband who physically beats his wife: in this context, the authorities discussed explicitly whether there were grounds for compelling the *gett*.

Or Zarua (3:161) was of the following opinion:

> If he habitually beat her and publicly degraded her, he is compelled to divorce her, and there was indeed a case in which the husband often beat his wife, and R. Simha was questioned about this and answered that he is compelled to divorce her ... for a person is not required to cohabit with a snake…

However, Maharam of Rothenberg (*Resp. Maharam of Rothenberg*, Prague ed., 81) rules as follows:

> If a person beats his wife, I accept that he must be treated more stringently than a person who beats another man … and if she wishes to be divorced, he divorces her and gives her her *ketubah*.

Ramban too (*Resp. Rashba* attributed to Ramban, 102), wrote:

> A husband must not beat or afflict his wife … and he is informed that if he beats [her] unlawfully, he will be obligated to divorce her and give her her *ketubah*.

In other words, as opposed to R. Simha and *Or Zarua*, who rule that the *gett* is to be compelled, according to Maharam and Ramban he is only ordered [not compelled] to give a *gett*.

Beit Yitzhak (*Tur, Even ha-Ezer*, end of 154) ruled as follows:

> In all events, in my opinion one cannot rely on what appears in *Sefer ha-Aguda*, and on what R. Simha and Or Zarua wrote, viz., that the *gett* is to be compelled, since they were not mentioned in any of the decisions of the leading authorities.

Darkhei Moshe disagreed with him (*Tur, Even ha-Ezer* 154:17), holding as follows:

> I see nothing in this. These scholars may certainly be relied upon, and even more so in that Ramban and Maharam agreed in their *responsa* on the matter of beating a wife, and supported their views with clear proofs; the *sevara* too agrees with them … but that he should not be compelled to give a *gett* … only to uphold what he is obligated to do, and Binyamin Ze'ev (no. 68) cited many *responsa* on this and wrote at the end that if he is the cause, he must divorce her.

The implication of the words of Ramban, as well as the words of Binyamin Ze'ev is that the husband is not compelled to divorce her, but is obligated to do so, and this also emerges from a close reading of the words of *Darkhei Moshe*. Other authorities too hold that the *gett* may not be compelled. See: *Resp. Radbaz* 1:156, 4:157; *Resp. Maharshakh* 2:130; *Resp. Lehem Rav* 31; *Resp. Perah Mateh Aharon* 1:60*; Resp. Hut ha-Meshulash* col. 3, 35 citing Rosh, Tur, Rashba and Rivash.

There are indeed other authorities who hold that a *gett* may be compelled even if the beatings are not frequent and do not endanger the wife's life. See: *Resp. Tashbetz* 2:8; Rema, *Even ha-Ezer* 154:3 in the name of *Yesh Omrim*; *Resp. Hut ha-Meshulash* col. 3, 35; *Resp. Mas'at Moshe* 1 *Even ha-Ezer* 17; *Resp. Maharit* 1:113, and in *Resp. Hatam Sofer, Even ha-Ezer* 2:60 we find that the *gett* is to be compelled, for "the maxim 'It is better to dwell as two than to live alone' is not relevant when it is more than a quarrel." *Arukh ha-Shulhan* (*Even ha-Ezer* 144:15) ruled similarly: "When he provokes her and hits her, it is worse than halitosis," in which case the husband is compelled.

Although there are several later authorities who did not wish to adopt Rema's position that a *gett* should be compelled, but who nevertheless thought that *Beit Yosef* would agree that compulsion may be invoked where there is danger, as well as in the case of a husband who damaged three of his wife's teeth with a fork, Rav Yitzhak Walid (*Resp. Vayomer Yitzhak, Even ha-Ezer* 135) rules:

> The truth is, that with all of this, one must still disagree and say that to date, the authorities who were mentioned said that there is no

> compulsion only in relation to the case in which the beating only caused distress, but where there was no danger; but if, as in the present case, he beat her with a fork in a way that was dangerous, then it is possible that even Maran and those who agree with his approach would agree that he is compelled. However, since one cannot find any disagreement with this in any of the authorities and the books that we have, we cannot bring ourselves to do such a thing, which is a major prohibition, and to create a coerced *gett*.

However, further in the responsum, R. Walid wrote that in a case where there is concern for danger, and where he even threatened to kill her, as in the present case –

> In such a case, all would agree that there is compulsion, for we are all witnesses that because she was hated by him, all his life was full of quarrels and fights with her, then what he wanted was only to spite her; the end attested to the beginning, that he did things to her that should not have been done, and if she had remained with her husband, she would have been in danger and at risk of being killed … .

This was the opinion expressed in *Resp. Yefe Lev* 7, *Even ha-Ezer* 154:3; *Resp. Shoshanim le-David Zabah* 2, *Even ha-Ezer* 20; *Resp. Mateh Lehem* 1:8; *Resp. D'var Shmuel* (Amar), *Even ha-Ezer* 23; *Resp. Noseh ha-Ephod* 32; *Resp. Tzitz Eliezer* 6:42, chap. 3.

In the present case, as noted by two friends of the couple, the husband was an alcoholic, addicted to strong drink. This was not a case of isolated incidents, but of a daily recurrence of heavy drinking, including loss of control to the point of physical violence, a condition which existed prior to the marriage. As *Be'er Heitev* (*Even ha-Ezer* 77:32) mentioned, "…"there is nothing more repulsive" than constant drinking of alcohol. But in the present case, we are dealing only with something repulsive, but also with danger to the wife. The presence of alcohol increases the chances of abusive acts. See: National Institute of Alcohol Abuse and Alcoholism, no. 38, October 1997; Shorey et al., "Trait Anger and Partner-specific Anger Management Moderate the Temporal Association between Alcohol Abuse and Dating Violence," *J. Stud. on Alcohol and Drugs* 78(2) 313-18 (2017).

Moreover, a person who consumes drugs is "not a normative person" and he is "as if he is removed from the world" in general, and out of control in particular, and he may be compelled to give a *gett*. See Rabbis Atlas, Shahor and Domem, "Compelling a *gett* in the Case of a Drug-User and the Bounds of 'He is Repulsive to Me'" (Heb.) *Divrei Mishpat* 2, 135.

On the basis of the above, in view of the circumstances of this case, compulsion of a *gett* would be justified.

Due to the fact that throughout the Diaspora, the secular state authorities are not prepared to enforce an order of a rabbinical court to compel a *gett*, Rabbi Klatzkin, Rabbi Feinstein, Rabbi Frank, and Rabbi Ovadia Yosef and others opined that the mechanism of "mistaken *kiddushin*" could be invoked in order to invalidate *kiddushin* insofar as the circumstances of the case justified such a solution. See: *Resp. Dvar Eliahu* 48; *Resp. Har Tzvi, Even ha-Ezer* 2:81; *Resp. Ein Yitzhak* 1, *Even ha-Ezer* 24(41); *Piskei Halakhot, Ishut* 1, *Yad David* 372 (in theory and not in practice); *Resp. Imre Yosher* 2:159; *Resp. Minhat Avraham* 2:10.

Absent the possibility of compelling the *gett* in the United States, and where a major defect is the subject, there is a basis for invalidating the *kiddushin*.

Alternatively, even were we to hold that there is no basis for compelling the *gett* in the case of wife-beating, there is another approach which concludes that this is a "major defect" and therefore the *kiddushin* may be invalidated.

In a judgment of the Supreme Rabbinical Court (App. [Supreme R. Court] 7.9.2004) 1-22-1510, Rabbi Shlomo Dichovsky, President of the Supreme Rabbinical Court, wrote as follows in relation to defining defects in the husband:

> The matter of defects in respect of which a wife can sue for her *gett* is not a matter of Scripturally-prescribed law, but a matter of logic and reason, as Maimonides said (*Ishut* 25:2): "These matters are concepts that reason dictates; they are not decrees of the Torah." The entire matter of defects is one of human opinion and the psychological unwillingness to tolerate an unbearable situation on the part of the other spouse. For this reason, the *halakhah* of "he considered and accepted", or "she considered and accepted" exists. One may say that if general opinion about a certain defect changes, then there is no room to say, "she considered and accepted" on the basis of her agreement in the past. A defect might not necessarily be physical: defective behavior, such an philandering, also entails an obligation to give a *gett*. And indeed, this *halakhah* in relation to philandering appears in *Shulhan Arukh* 154, which is the section dealing with defects. In all civilized countries, it is very degrading for the woman to share her husband with another woman, and a husband who takes a second wife will be obligated to give a *gett*, not only because of Rabbenu Gershom's ban, but also due to the degradation and the defect inherent in it. The parties came from Yemen, where it was accepted to marry two women. Here, this is considered a major disgrace, and it must be regarded as a major defect. The consent of the wife in the past does not obligate her today; thus it is not a case of "he is repulsive to me", but a case of a defect of the husband, due to which the wife is not able to live with him. When it is a matter of divorce due to a defect, the wife will not lose her *ketubah*. It would seem

> reasonable to say, that even if a woman married a philandering husband, and she later repented and can no longer tolerate this situation, the husband will be obligated to give her a *gett* and will not be able to claim that "she considered and accepted." Similarly, it appears to me that a person cannot claim "she considered and accepted" in relation to a woman who married a husband who engaged in homosexual practices knowing clearly about his situation and later learned of the severity of the prohibition and wishes to divorce due to her disgust with the husband. Here too, there is no room for the claim, "she considered and accepted."

The implied assumption in Rabbi Dichovsky's understanding is that a major defect in the husband (and in the wife) may be defined as mistaken transaction (see below). When the accepted practice is to consider the phenomenon as a defect, the purchaser may cancel the transaction. See *Resp. Rif* 153; *Hiddushei ha-Rashba*, *Ketubo*t 72; *Mishneh Torah*, *Mechira* 15:5; *Shulhan Arukh, Hoshen Mishpat* 232:6; SeMaG*, Prohibitions* 170; *Resp. Divrei Rivot* 300; *Resp. Maharshakh* 1:19; *Resp. Tzedakah u-Mishpat*, *Hoshen Mishpat* 36; *Malbushei Yom Tov* 4.

Relying on acceptance of what society considers a "major defect", Rabbi Shlomo Amar ruled (*Resp. Shema Shlomo* 1:15) in relation to wife-beating as follows:

> In our time, we must be stringent in the matter of wife-beating, since every decent intelligent man would be ashamed of this, and no woman can tolerate this and it is a great shame for her at the present day more so than in earlier times … for a man who beats his wife is utterly repulsive and despicable in his wife's eyes, to the extent that she is absolutely unable to live with him…

According to Rabbi Dichovsky and Rabbi Amar, there is no doubt that the wife may invoke the claim that her husband is repulsive to her due to his degrading conduct. Therefore it is no wonder that there is rabbinical case law which is prepared to include acts of violence in the family as an example of the woman who claims, "He is repulsive to me." See PDR 7: 201, 12:324, 16:145; File no. 284412/9 Netanya Regional Beit Din 4.9.13; File no. 980712/1 Haifa Regional Beit Din, 27.10.14; File no. 269629/9 Netanya Regional Beit Din, 6.19.16; File no. 1078402/6, Haifa Regional Beit Din, 6.5.17.

Therefore, in the present case, wife-beating is a major defect. In the absence of a psychological diagnosis of the defendant, we may rely on what has been written by the scholars:[2]

> The initial theories related to IPV (intimate partner violence-Flynn) were

[2] P.A. Ali and P.B. Naylor, "Intimate Partner Violence: A Narrative Review of the Biological and Psychological Explanations for its Causation", *Aggression and Violent Behavior*,10 (2013) 373-382.

> based on the psychopathological orientation of violence. Based on studies conducted on known violent men in prisons, community based settings or victim women in shelters, some theorists believed that men who perpetuate violence and women who experience violence suffer from mental health problems such as depression (Hastings & Hamberger, 1994; Julian & McKenry, 1993; Murphy, Meyer, & O'Leary, 1993; Pan, Neidig & O'Leary, 1994), personality disorders including antisocial personality, borderline personality disorder (BPD) (Edwards, Scott, Yarvis, Paizis & Panizzon, 2003; Ehrensaft, Cohen & Johnson, 2006; Holtzworth-Munroe et al., 1997; Levy Meehan, Weber, Reynoso & Clarkin, 2005; Mauricio, Tein, & Lopez, 2007; Porcerelli, Cogan, & Hibbard, 2004)...

For the above-cited literature see Ali and Naylor, 379-82.[3]

(b) In the present case, therefore, wife-beating coupled with the use of drugs and consumption of alcohol amounts to a major defect. As mentioned above, prior to the marriage, 11 restraining orders had been taken out by several tenants of one of the defendant's buildings due to his violent behavior towards them; there is also a conviction for dangerous driving under the influence of alcohol. Of course, in order to invalidate the *kiddushin*, it must be clear that the defect indeed existed prior to the marriage, and that the wife was not aware of the defect prior to the marriage. As we mentioned above, the plaintiff discovered only after they were married that her husband was violent, that he used drugs and that he was an alcoholic.

On the basis of the above, the plaintiff is free to marry any Jewish man, including a Kohen.

In witness whereof we have signed this 9th day of Sivan, 5781 (2021)

[3] See Ali and Naylor, ibid.