2024:BHC-GOA:1502

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IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.29/2024

ARSHAD KHALIFA ALIAS ARSHAD HUSSAIN S/o. Shri Mohammed Hasham aged 52 years, service, R/o. H.No. 40, Shafi Masjid, Baina, Vasco-da-Gama, Goa 403802.

… APPELLANT

Versus

GULZAR KHALIFA, D/o. Shri Arshad Khalifa Alias Arshad Hussain; Aged 49 years r/o H.No. 34, Kiratolem, Bhute Bhat, Vasco-da-Gama.

… RESPONDENT

Mr. Shivan Desai with Ms M. Viegas, Advocates for the Appellant.

Ms Prachi Sawant, Advocate through legal aid scheme for the Respondent.

CORAM: M. S. KARNIK, J.

Reserved on: 19th JULY 2024
Pronounced on: 9th AUGUST 2024

JUDGMENT:

1. Heard Mr Shivan Desai for the appellant and Ms Prachi Sawant for the respondent.

2. The appeal is taken up for hearing with the consent of both the parties. The parties rely upon the paper book of pleadings and notes of evidence. This appeal is admitted on the following substantial question of law:

(I) What is the meaning of 'freely consented' in the context of a de facto separation for the purpose of Article 4(8) of the Law of Divorce and in the facts and circumstances of the present case?

3. There appears to be a typographical mistake in the original cause title which records the name of the party respondent-wife as 'D/o' instead of 'wife of'. This is obviously a typographical mistake.

4. The challenge in this appeal is to the Judgment and Decree dated 27.09.2022 of the Ad-hoc District Judge (FTC-II) at Margao, Goa partly allowing the appeal. The appellant is the husband and the respondent is the wife. The husband filed a Matrimonial Petition before the Senior Division, 'A' Court at Vasco-da-Gama, under Article 4(4), (5) and (8) of the Law of Divorce (Divorce Act of 1910, Decree of 3rd November 1910), in force in the territories of Goa, Daman and Diu w.e.f. 26.05.1911, on the grounds of ill-treatment, complete abandonment of the conjugal domicile for at least three years and de facto separation, freely consented, for ten consecutive years.

5. The marriage between the appellant and the respondent was an arranged marriage, registered against Entry No.320/1992 before the Civil Registrar of Quepem on 03.11.1992 and religiously solemnized on 26.12.1992 as per Muslim rites. Out of the said wedlock, the couple had a son named Sarfaraz, who at the time of filing the matrimonial petition was 22 years of age.

6. The reason for filing the matrimonial petition before the Trial Court for divorce according to the husband was that the wife continually picked quarrels with him, abused him and his family members, disturbed his

family life and disrespected his parents. It is alleged that the wife used to leave the house in the morning and return only at night. The wife would find excuses to trouble the husband and his family members who were residing in the matrimonial home. On one occasion, when the wife did not return home till late at night, the husband lodged a missing persons report with the police. As a result of such verbal altercation and abuses, the husband's father asked the husband to reside separately with the wife but she refused to do so. According to the husband, the wife refused to accompany him to the new matrimonial home at Katem, Baina. It is the husband's case that despite showing concern for her, and calling upon her to reside with him at the new matrimonial home, the wife filed false cases against the husband and his family members, including a domestic violence case demanding a separate house for herself to reside and for a share in the property.

7. It is the husband's case that the cause of action to file the Matrimonial Petition arose on 15.05.1993 when the wife refused to come to reside with him at the new matrimonial home. The husband claims that he is suffering mental torture as a result of constant cruelty and harassment meted out against him by the wife. The Matrimonial Petition for divorce therefore came to be filed.

8. Per contra, it is the case of the wife that the husband was residing with a woman named 'A', a relationship outside marriage. This was prior to their marriage. This fact was never disclosed to the wife or their family members prior to the marriage. It is for this reason that the wife claims that she is justified in refusing to leave the original matrimonial home and deciding not to live with the husband who was residing with the said 'A' and their children in the so-called new matrimonial home at Katem, Baina.

It is further the case of the wife that the husband owns private vehicles registered in the name of the 'A' and her children, which he lets out on hire on rental basis for his business, without providing for the wife and their son. The wife denies having harassed the husband and his family members and in fact it is the husband and his family members who are harassing her.

9. Before the Trial Court the husband examined himself as PW1 and closed his evidence. The wife examined herself as DW1 in support of her case. The Trial Court framed the following issues and rendered the findings which read as under:-

ISSUES	FINDINGS
1. Whether the petitioner proves that he has suffered cruelty and mental torture at the hands of the respondent?	In the negative
2. Whether the petitioner proves that the respondent abandoned the conjugal domicile from 15.05.1993?	In the negative
3. Whether the respondent proves that the petitioner was staying with one woman by name 'A' and her two sons prior to his marriage with the respondent and that the life of the respondent was made miserable by petitioner and his family members?	In the affirmative
4. What relief? What order?	As per the final order

10. The Trial Court dismissed the petition with exemplary costs of ₹50,000/- to be paid by the husband to the wife within sixty days.

11. In challenge to the order passed by the Trial Court, the First Appellate Court framed the following points for determination and rendered the findings which read as under:-

Sr. No.	Points for determination	Findings
1	Whether the Ld. Trial Judge was right in holding that the Appellant failed to prove that the Respondent had treated him with cruelty and that he had suffered mental torture at the instance of the Respondent?	Affirmative
2	Whether the Ld. Trial Judge was justified in holding that the Appellant had failed to prove that the Respondent had abandoned the conjugal domicile on 15.05.1993?	Affirmative
3	Whether the Ld. Trial Judge was right in holding that it was the Appellant who had abandoned the conjugal domicile and was staying with 'A' and her two sons, prior to his marriage with the Respondent and that he and his family members had made the life of the Respondent miserable?	Affirmative
4	Whether the Ld. Trial Judge was justified in awarding exemplary cost of ₹50,000/- to be paid by the Appellant to the Respondent within a period of 60 days of the impugned Judgement, Order and Decree?	Negative

5	Whether the impugned Judgement, Order and Decree are arbitrary, perverse, illegal, have caused a miscarriage of justice and are required to be set aside in Appeal?	Partly in the Affirmative

12. Mr Shivan Desai, the learned counsel for the husband/appellant invited my attention to the pleadings and the evidence recorded. I have carefully perused the findings of the Trial Court as well as the First Appellate Court. The following are concurrent findings recorded by the Courts:-

A) That the husband failed to prove that the wife treated him with cruelty and that he had suffered mental torture at the instance of the wife;

B) That the husband failed to prove that the wife had abandoned the conjugal domicile from 15.05.1993; and

C) That it was the husband who had abandoned the conjugal domicile and was staying with 'A' and her two sons prior to his marriage with the wife.

13. The First Appellate Court interfered with the Judgment and Decree of the Trial Court to the extent the exemplary costs of ₹50,000/- are awarded which the First Appellate Court found to be not justified. The question is whether the case made out by the husband on the basis of evidence on record would be covered by Clause 8 of Article 4 of the Law of Divorce affording him a ground for a Divorce.

14. Mr Shivan Desai, learned counsel for the husband submits that assuming without admitting and accepting the case of the wife as it is, having regard to the purport of Clause 8 of Article 4, the petition filed before the Trial Court for divorce ought to have been allowed. It is submitted that since 15.05.1993 the wife is residing separately. According to Mr Desai, admittedly, the wife is living separately from the husband for more than ten years. Mr Desai submitted that the husband never shied away from his responsibility of permitting the wife to stay in the matrimonial home and taking care of her, but the wife chose not to stay with him at the matrimonial home. It is submitted that Clause 8 of Article 4 further provides that such divorce must be granted whatever may have been the cause of their separation if three things are satisfied: (a) de facto separation; (b) free consent; and (c) separation for ten consecutive years. It is submitted that even from the evidence of the wife it is apparent that the couple is residing separately for twenty-five years. It is urged that even if it is the case of the wife that the husband has abandoned her, the only relevant consideration is the factum of separation. He submits that in the affidavit in evidence of the wife, there is no statement that there were any attempts made by the wife to re-unite. Mr Desai submitted that para 3 of Article 4 stipulates that in a case coming under Clause 8, evidence should be restricted to the fact of separation, its continuity and duration. He then submits that the ingredients of Article 4(8) of the Law of Divorce stand established by the pleadings as also by the evidence. It is submitted that invocation of principles of Contract Act by the First Appellate Court to interpret the expression "free consent" is misconceived. The submission is that the expression "free consent" has to be considered in terms of the intent of the provision which is further clarified by the para 3 to the provision which is in the nature of an explanation. Mr Desai relied upon the decisions in *S. Sundaram Pillai & Ors. v/s. V. R. Pattabiraman & Ors.*

– (1985) 1 SCC 591, Alvito Laurento Fernandes v/s. Maria Elsa de Oliveira Gomes – First Appeal No.66/1997, Prakash Gopal Virginkar v/s. Umadevi Prakash – First Appeal No.311/2003, Sheetal Prakash Pai Nee Vijaya Bhangui (Smt.) v/s. Prakash Ramnath Pai (Dr.) – 2010 DGLS (Bom.) 66 and *Antonio Ferdino Varela v/s. Thereza Maria Angela Varela – 2014 (5) Bom. C.R. 117* in support of his submissions.

15. Ms Prachi Sawant, learned counsel for the wife on the other hand invited my attention to the findings recorded by the Trial Court and the First Appellate Court and the decision in *Prakash Gopal Virginkar (supra)* in support of her submissions.

16. The rival contentions now fall for my determination.

17. At the outset, it is pertinent to extract Article 4(8) of the Law of Divorce. What is also relevant in this context is para 3 of Clause 8 which read thus:-

> *"Article 4 – The contested divorce may be obtained only on the following grounds and on no other:*
>
> *..... (8) De facto separation, freely consented, for ten consecutive years, whatever may have been the cause of that separation.*
>
> *Paragraph 3. In a case coming under Clause (8), the evidence shall be restricted to the fact of separation, its continuity and duration.*"

18. Before dealing with the submissions, I may make a brief mention to the decisions relied upon by the learned counsel. The Supreme Court in *S. Sundaram Pillai & Ors. (supra)* has observed that the object of explanation to a statutory provision is to explain the meaning and intendment of an Act and to clarify the same to make it consistent with the dominant object, which it seems to subserve. This decision is relied upon in the context of para 3 of Article 4(8) which according to Mr Desai is in the nature of an explanation, which strengthens his submissions.

19. Further, this Court in *Alvito Laurento Fernandes (supra)* has held that once the three ingredients of Clause 8 of Article 4 are established, the husband is entitled for divorce. In *Prakash Gopal Virginkar (supra)*, this Court distinguished *Alvito Laurento Fernandes (supra)* considering the factual aspects, the distinguishing factor in *Alvito Laurento Fernandes (supra)* being the concerned spouse had made attempts to reconcile which establishes that there was no free consent for separate residence and de facto separation.

20. In *Sheetal Prakash Pai (supra)*, this Court has held that the cause for separation is not material, for what is material is the *animus non revertendi* (intention not to reunite) during the period of continuous ten years of separation between the spouses. This Court in *Antonio Ferdino Varela (supra)*, observed that for proving divorce on the ground under Article 4(8) of the Law of Divorce, the free consent is not an issue to be proved and it is a presumption that flows from the proof of three facts, namely, (a) the couple is de facto separated; (b) the separation has been un-interrupted; and that (c) the separation is for more than ten years.

21. In my opinion, para 3 of Article 4 is very clear and free from any ambiguity. It provides that any case coming under Clause 8, the evidence shall be restricted to the fact of separation, its continuity and duration. Hence, if a contested divorce is to be obtained on the ground stipulated in Clause 8 i.e. de facto separation, freely consented for ten consecutive years whatever may have been the cause of that separation, then the evidence shall be restricted to the fact of separation, its continuity and duration. Article 4 provides that the contested divorce may be obtained only on the grounds mentioned therein and no other, one of which is Clause 8.

22. No doubt, para 3 in clear terms mentions that the evidence shall be restricted to the fact of separation, its continuity and duration. The husband has been examined as PW1. The evidence on record reveals that in the present case, there is in fact a separation between the husband and the wife for more than ten consecutive years. However, such de facto separation must be freely consented whatever may have been the cause of that separation. The bone of contention is the understanding of the expression 'freely consented' in the context of such de facto separation.

23. A reading of the provision indicates that it is not necessary for the husband to bring to fore and prove what has been the cause of that separation. The requirement is that such de facto separation must be freely consented. Learned counsel Mr Desai wants this Court to read Clause 8 to mean that once the factum of separation for ten consecutive years is proved, it follows that there is free consent of the spouse for divorce. In my opinion, it is not possible to read Clause 8 in the manner which Mr Desai wants this Court to understand. The words "freely consented" will have to be given a meaning. Even if para 3 is to be seen in the context of explaining what is provided in Clause 8 of Article 4, meaning thereby that

the evidence in a case coming under Clause 8 shall be restricted to the fact of separation, its continuity and duration, still then, what is a free consent within the meaning of Clause 8 will depend on the facts and circumstances of each case and on the basis of the evidence on record. It is material to note that in terms of the provisions of Article 4, the contested divorce may be obtained only on the grounds mentioned thereunder and no other.

24. In the present case, Clause 8 provided a ground to the husband to file a petition for obtaining a divorce. The said petition was contested by the wife. If the evidence in the petition is to be restricted to the fact of separation, its continuity and duration, the words "freely consented" in Clause 8 are rendered meaningless and inconsequential. There may be a situation where the reasons are so compelling that the spouse seeking a divorce creates a situation where the spouse opposing the petition is compelled to live separately and against her/his wishes. If the provisions of Clause 8 of Article 4 read with para 3 are to be given restrictive meaning as is the submission of Mr Desai, then any separation for ten consecutive years will be sufficient to obtain a divorce. In my opinion, when the divorce is sought on the ground mentioned in Clause 8 of Article 4, the restriction provided in para 3 for leading evidence will be on such spouse who has filed for divorce. Para 3 cannot be read to take away the right of the wife opposing the petition for divorce to lead evidence which would go to show that such separation is not freely consented on the basis of the evidence on record. That the de facto separation is freely consented has to be established.

25. At the cost of repetition, the facts of the present case demonstrate that the husband married the wife which marriage was duly registered. Thereafter, the marriage was solemnized by performing religious ceremony

as per Muslim rites. The wife started residing in the matrimonial home along with the husband and his family members. A son was born out of the said wedlock. It was post marriage that the wife came to know that the husband was having a relationship outside marriage and in fact is living with 'A' from whom the husband has two sons.

26. The evidence on record shows that the husband wanted the wife to reside with him in the new matrimonial home where he was residing with 'A'. This arrangement was refused by the wife and she continued to reside in the matrimonial home along with her son. The husband continued to reside with 'A' at a different place which he says is the new matrimonial home. The husband wanted his wife to reside with him in the new matrimonial home. Even on the date of filing of the petition almost after twenty-five years since the husband left his parental home, the wife and her son continue to reside in the matrimonial home with her in-laws. This clearly indicates that there was no intention on the part of the wife to live separately from the husband, but was compelled to do so and hence such separation can never be 'freely consented' enabling the husband to obtain divorce under Article 4(8) of the Law of Divorce.

27. It is pertinent to mention that the wife filed domestic violence proceedings in the year 2010 as can be seen from her deposition. It is also pertinent to note that in response to a question asked by the Court, the husband replied that he would have abandoned the previous wife ('A') had the respondent-wife come to stay with him. The husband in a question asked by the Court during his deposition stated that he wanted to stay with the respondent-wife. The evidence on record demonstrates that the husband was living with 'A' in the new matrimonial home. The husband wanted the respondent-wife to reside in this matrimonial home. I find

force in the submission of Ms Prachi Sawant that this was a good enough reason for the wife to stay separately. Such de facto separation can never be regarded as 'freely consented' to afford a ground to the husband for divorce under Article 4(8) of the Law of Divorce.

28. No doubt, the factum of separation for ten consecutive years exists. The cause for separation in terms of Clause 8 may have been the husband having relationship outside the marriage. However, such de facto separation in terms of Clause 8 must be freely consented. The evidence on record shows that the wife continues to reside in the original matrimonial home along with her in-laws. The wife is justified in refusing to reside with her husband in the new matrimonial home where he is residing with 'A'. This is not a case where de facto separation is freely consented.

29. The decision relied upon by the husband in *Alvito Laurento Fernandes (supra)* is in a totally different set of facts involved where there was evidence to show that the respondent/wife had taken a decision on her own, on advise of a third party to remain separated from the husband i.e. from her marital home. The decision in *Alvito Laurento Fernandes (supra)* was distinguished by the same learned Judge in *Prakash Gopal Virginkar (supra)* which is relied upon by the learned counsel for the wife. In *Prakash Gopal Virginkar (supra),* the defendant wife stated that the separation was not by free consent.

30. The decision in *Sheetal Prakash Pai (supra)* was rendered in a fact situation where the parties lived separately for more than ten consecutive years and particularly the defendant wife at no point of time made any attempts to re-unite with the plaintiff husband. This Court observed that there is nothing credible found by the First Appellate Court by means of

which it could be said that the continuous separation between the two for over a decade was not freely consented. Thus, the decision in *Sheetal Prakash Pai (supra)* is distinguishable on facts.

31. In *Antonio Ferdino Varela (supra)*, the issue was of amendment of a petition for divorce under Order VI Rule 17 and in the context of considering whether to grant the amendment application or not, reference was made to Article 4(8) of the Law of Divorce. The observations thus made were in the context of considering an application for amendment. The decision is therefore distinguishable on facts.

32. I may make a reference to the decision of this Court in ***Mr Sheikh Camruddin alias Xeque Camrudin v/s. Mrs Zarinabi Sheikh Camruddin alias Zarina Begaun – Second Appeal No.20 of 2002 decided on 31.08.2010***. The relevant paragraph 11 reads thus:-

> "*11. No doubt, in terms of paragraph 3 of Article 4, in a case under clause (8), the evidence shall be restricted to the fact of separation, its continuity and duration. However, the fact remains that in order to get the decree of divorce under Clause (8) of Article 4, the de facto separation must be freely consented by both the parties for 10 consecutive years, whatever be the cause of separation. In order to get a decree of divorce under clause 8, the party seeking divorce must establish free consent on the part of both the parties in respect of separation for 10 years. I am unable to accept the submission of Mr. Lotlikar that in terms of paragraph 3 the consent is totally irrelevant while deciding the suit filed claiming divorce under Clause (8) of Article 4. It is well settled rule of interpretation that a provision in a statute has to be read harmoniously and applying this principle,*

Clause (8) and paragraph 3 of Article 4 have to be read harmoniously. Merely because paragraph 3 provides that evidence shall be restricted to the fact of separation, its continuance and duration, the aspect of consent does not lose it relevance. In the present case, the learned Appellate Court in paragraph 13 of the impugned judgment stated that the defendant had vehemently contested the suit and in the additional written statement filed in that Court, the defendant had denied that the separation was duly consented by her. She further stated that she was ready and willing to join the plaintiff in the conjugal house. The Plaintiff did not lead any additional evidence on this ground. The learned Appellate Court, therefore, held that that separation was not freely consented."

33. The decision of this Court in ***Caitano Antonio Lourenco Crasto v/s. Assencao Andrade Crasto alias Doris Crasto – 2013 SCC OnLine Bom 1424*** needs to be referred. In paragraphs 13 and 14 this Court observed thus:-

"***13.*** *Admittedly, there is on record the birth certificate of Cynola Valanki Crasto wherein the name of the plaintiff is written as her father. There is no dispute that Cynola is the daughter of Deodita Jennifer Crasto, who is a widow. The plaintiff, in his cross-examination, has stated that his name is shown as father since he has adopted Cynola as his daughter. There is no document of adoption. It is to be kept in mind that the plaintiff and defendant have two daughters. It is therefore difficult to believe that the plaintiff would adopt the daughter. In the circumstances above, there could not be any other conclusion than the one drawn by the learned First Appellate Court to the effect that the plaintiff is having illicit relationship with Deodita Jennifer Crasto and out of their*

relationship, a baby girl has been born on 24/08/2007 at Goa Medical College, Bambolim. In his cross-examination, after amendment of the plaint, the plaintiff has clearly stated that he is not ready to take the defendant for staying with him together. The defendant in her affidavit-in-evidence has specifically stated that she is willing and ready to return back to her matrimonial house along with the daughters and that she does not wish to give divorce to the plaintiff but the plaintiff wants divorce in order to get married again. She has further specifically stated in her affidavit-in- evidence that she did not leave the matrimonial house with her wishes but she was thrown out by the plaintiff after assaulting her. Though no police complaint in this regard has been produced on record, however, it is stated by the defendant that she had lodged a police complaint in this regard. There is no dispute that the defendant had filed several complaints against the plaintiff though it is a fact that according to the plaintiff these are all false complaints. According to the defendant, the plaintiff had threatened to kill her if she enters the matrimonial house. The defendant has also stated that she does not wish to enter that house because the plaintiff has been living with another lady from Ambora. It cannot be expected that the defendant would suffer another woman in the relationship of her husband, staying in the matrimonial house. In such circumstances, it cannot be said that de facto separation is on account of free consent by the defendant.

14. *Merely by showing that the couple is separated for a continuous period of 10 years, the same is not sufficient. In order to get a decree of divorce under clause 8 of Article 4 of the Law of Divorce, as applicable to Goa, de facto separation must be freely consented by*

both the parties for 10 consecutive years whatever may be the cause of separation. In the case of "Mr. Shaikh Camruddin alia Xeque Camrudin v. Mrs. Zarinabi Sheikh Camruddin alia Zarin Begaun" (Second Appeal No. 20 of 2002) relied upon by the learned Counsel for the defendant, the learned Single Judge of this Court has held that in order to get a decree of divorce under clause 8 of Article 4 of the Law of divorce, the parties seeking divorce must establish free consent on the part of both the parties in respect of separation for 10 years. I am in respectful agreement with the above."

34. The decision in *Mr Sheikh Camruddin alias Xeque Camrudin (supra)* was relied upon by this Court in *Caitano Antonio Lourenco Crasto (supra).* The above referred decisions in *Mr Sheikh Camruddin alias Xeque Camrudin (supra) and Caitano Antonio Lourenco Crasto (supra)* are in support of the view that I have taken.

35. I see no reason to interfere with the concurrent findings recorded by the Courts. For the reasons stated above, this Second Appeal must fail. The appeal is therefore dismissed without any order for costs.

36. This Court appreciates the assistance and efforts of Ms Prachi Sawant appointed through legal aid scheme in effectively presenting the case on behalf of the wife.

M. S. KARNIK, J.