IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 2202 of 2021
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2021
In
R/FIRST APPEAL NO. 2202 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA **Sd/-**

and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
	Circulate this judgement in the subordinate judiciary.	

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JINNAT FATMA VAJIRBHAI AMI W/O NISHAT ALIMADBHAI POLRA
Versus
NISHAT ALIMADBHAI POLRA

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Appearance:
MR CHETAN K PANDYA(1973) for the Appellant(s) No. 1
KEWAL J SHAH(9579) for the Defendant(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 20/12/2021

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. This Appeal under Section 19 of the Family Courts Act, 1984 (for short, the 'Act 1984') is at the instance of the original defendant-wife, questioning the legality and validity of the order passed by the Family Court at Palanpur dated 7th July 2021 in the Family Suit No.47 of 2019 instituted by the respondent-husband for restitution of conjugal rights whereby the Family Court allowed the suit instituted by the husband and directed the appellant-wife herein to go back to her matrimonial home and perform her marital obligations.

2. The facts giving rise to this Appeal may be summarised as under :

2.1 The parties before us are Muslims. The 'Nikah' between the parties was performed on 25th May 2010 at the village Kanodar, Taluka Palanpur, District Banaskantha. In the wedlock, a son named Kabir was born on 2nd July 2015.

2.2 It appears that the appellant-wife took up a Government job as a Staff Nurse at the Thara Village Referral Hospital (CHC). Having regard to the nature of her duties, she was required to stay at the Thara Village Referral Hospital. It appears that in April 2017, the appellant-wife got transferred to the Palanpur Civil Hospital. The appellant-wife, while residing at Kanodar

with her husband and in-laws, used to travel to Palanpur for work.

2.3 It is the case of the respondent-husband that his wife left the matrimonial home along with their minor son on 20th July 2017 without any lawful ground and further even without informing anyone. Many attempts were made to persuade the wife to come back to her matrimonial home with the intervention of the family members and other members of the community but such efforts failed. The husband also issued a legal notice dated 22nd July 2019 to his wife, however, the wife failed to respond to such notice.

2.4 In such circumstances referred to above, the respondent-husband instituted the Family Suit No.47 of 2019 in the Family Court at Palanpur, District Banaskantha, invoking Section 282 of the Mohammaden Law for the restitution of the conjugal rights.

3. Having regard to the pleadings of the parties, the Family Court framed the following issues vide Exh.11;

> "(1) Whether the plaintiff husband proves that he is the legally wedded husband of the defendant wife?
>
> (2) Whether the plaintiff husband proves that the defendant wife has deserted him from the society without any reasonable cause as alleged in the petition?

(3) Whether the plaintiff husband proves that defendant wife has no legal cause to stay separate from the plaintiff?

(4) Whether the plaintiff husband proves that he is entitled to get the decree for restitution of conjugal rights?

(5) What order and decree?"

4. The aforesaid issued came to be answered as under;

"(1) In the affirmative
(2) In the affirmative

(3) In the affirmative
(4) In the affirmative
(5) As per the final order."

5. The oral evidence of the plaintiff is at Exh.15. The plaintiff also examined his father, namely, Ali Mohammed Polara as his witness vide Exh.25. The plaintiff also examined one Miyajibhai Vajirbhai Polara as one of his witnesses at Exh.26.

6. The defendant wife led her oral evidence vide Exh.29. She also examined her father, namely, Vajirbhai Miyajibhai Ami as one of her witnesses vide Exh.32.

7. Upon appreciation of oral as well as documentary evidence on record, the Family Court thought fit to allow the suit and passed a decree for restitution of conjugal rights in favour of the husband. Some of the observations

made by the court below are as under;

> ***"10. In the present suit, plaintiff has deposed vide Ex. 15 and other two witnesses have been examined on behalf of plaintiff vide Ex. 25 and 26. On going through the deposition of plaintiff, he has narrated the facts as per his suit. In the cross examination conducted by the defendant, he admits that his relatives are residing at Australia and America and he was also planning to go to Austrailia. It is also admitted that the defendant was studying at the time of their engagement and at the time of marriage she was already appointed and was serving in C.H.C. Hospital at Thara. Plaintiff has denied all the allegations leveled by the defendant against him regarding cruelty and physical and mental torture. Plaintiff has also denied that he or his family were pressuring the defendant for going to Australia. It is also denied by the plaintiff in his cross examination that on dated 20/07/2017, he and his family threw out the defendant from his house. It is said that the defendant himself went away with her mother and maternal uncle at her own wish. It is also stated by the plaintiff that his father tried for the compromise before the members of their community. In the cross examination, defendant has specifically asked a question that if the plaintiff is ready to give guarantee of two persons and if he assures that he will not inflict mental and physical torture upon the defendant and if he will not pressurize her to go to Australia and if plaintiff is ready to get separate from his parents and reside in a separate house with defendant, then she is ready to go with plaintiff, if he is ready to take her with him. In reply to which the plaintiff has stated that he is ready to take the defendant to his own house, but as he has not done any***

such offence as alleged, there is no question of guarantee and he is not ready to get separate from his parents and stay in separate house with defendant.

11. Similarly, vide Ex. 25, father of plaintiff has been examined. In his affidavit and his chief in examination, he has supported the version of the plaintiff. However, in cross examination he states that they have never tortured the defendant for going to Australia, however, it is admittedly true that the defendant being educated can go and earn more in Australia, but the witness has clearly denied that they have ever tortured or pressurized defendant to go to Australia. It is also stated that on 20/07/2017, the defendant herself called her parents and went away with her mother and maternal uncle and has denied that they drove her away from their house.

12. Vide Ex 26, Miyajibhai Vajirbhai Polara has been examined, who is uncle of plaintiff's father. In his chief in examination, he has stated that neither plaintiff nor his family members have ever pressurized the defendant for going to Australia and neither have they inflicted any torture, physical or mental, upon the defendant In cross examination, the witness states that the distance between his house and plaintiff's house is about 500 ft. He admits that he is aware of the disputes between parties and also that the defendant went away leaving the house of plaintiff and the reason is that the defendant did not want to stay in a joint family along with plaintiff. This witness absolutely denies regarding any incident of beating up the defendant. In his cross examination this witness also denies that plaintiff or his family were torturing or pressurizing the defendant to go to Australia He admits that a person can earn more in a

foreign country if he is well qualified, but denies that the defendant was being pressurized or tortured for going to Australia.

13. On going through the deposition, it appears that the contention raised by the defendant is that the plaintiff has been pressurizing her to go to Australia and she was not willing to go. However, on the other side from the pleadings and deposition of the plaintiff, contention raised by him is that defendant had left plaintiff's house without any sufficient reason and she has been willing to stay separate from the in-laws. In this regard, the deposition of defendant as well as her witness is also required to be looked into, wherein, the defendant herself has filed the affidavit of chief in examination vide Ex. 29 and one of her witness that is father of defendant has filed their chief in examination

14. Defendant has submitted in her chief in examination as per her reply and has alleged accordingly. In the cross examination, she admits that her two brothers are residing at Australia and she alone is residing with her parents. At first incidence she denies that she was serving at the time of marriage, however again after asking the same question in a different way she states that she was serving at the time of marriage and was earning Rs 3 500/- fixed salary and at present that is at the time of her cross-examination about one year ago she was earning Rs.31,000/- per month. She admits that there are six persons in her in-laws family- her mother-in-law was under treatment of mental retardation whereas her father-in-law was also having breathing problems. She also admits that her service since 2009 to 2010 was at Thara and therefore, she was residing at Thara. However, it is denied by her that due to her shift time in her

service she was unable to manage the household work and therefore, she refused to reside with her in-laws. She also denied that as she was unable to cope up with her service and household work, her in-laws were scolding her. It is also denied by her that she was staying with her parents because they were alone at this old age. She had also denied that on 20.07.2017, her mother and maternal uncle took her away on her own insistence.

15. The chief in examination of her father submitted at Exh.32 is in favour of defendant, however, in cross examination, he admit that his two sons are residing at Australia and due to dispute, they are not coming regularly, but they have not returned to this house since 7 years. He admits that his daughters are married. He also admits that the defendant since after marriage till 2017, was coming at her house on all occasions. He admit that on 20.07.2017, his daughter called his wife, i.e, defendant's mother and therefore his wife and her brother went to plaintiff's house. He denies that defendant came alone with them, but he states that she came after some time. This witness also admits that his daughter was feeling burdensome and over worked due to service and household work. He also admits in his cross-examination that no police complaint was filed regarding the incident of 20.07.2017 and no treatment of defendant was taken regarding any injury. It is also admitted that in his chief in examination, he did not mention any details of any incident except that of 20.07.2017.

16. On going through the deposition of the defendant as well as plaintiff and the record of the case, there is no evidence except the oral version of defendant that she was beaten by plaintiff and his family members on 20.07.2017

and plaintiff drew her out of the house with her mother and maternal uncle. It is pertinent to note that the defendant has failed to explain how any why her mother and maternal uncle came to the house of plaintiff on 20.07.2017. However, version of father and defendant a day before was that, that they have been called by the defendant herself. Even if it is believed for the sake of argument, that as per allegation levelled by the defendant she has been suffering from physical and mental torture for a long time, as a result of which she was unable to reside with the plaintiff, then the defendant would have used the provision of law and filed a complaint or any application before the police station which has not happened in the present case. The allegations of the defendant regarding physical and mental torture by the plaintiff are also unbelievable as there is nothing on record to show on behalf of the defendant that any effort or endeavour has been made by her for compromise. On the contrary, said endeavours appear to have been made on behalf of the plaintiff which can be construed from Exh.22, which is a letter written by father of plaintiff, who has been examined vide Exh.25. He and plaintiff have stated that they made the endeavour for compromise through the members of their community. The letters vide Exh.22 appear to have been written to the members of plaintiff's community to resolve the disputes between the parties. However, the outcome has not come on record. Similarly, plaintiff has also produced legal notice vide Exh.17, which was given on 22.07.2017 by the advocate of plaintiff to the defendant, in which he has prayed for fulfilling conjugal rights and has called the defendant to return back with the plaintiff and fulfill her marital life. However, no reply has been given by the defendant to this notice. Defendant has

not uttered a single word about the notice even though the same has been narrated by the plaintiff in his deposition. This means that the notice was received by the defendant and was ignored absolutely. From both these documents, it can be construed and believed that the plaintiff has made efforts for compromise with the defendant and bring her back, but the defendant had not bothered to return and fulfill her duties of marital life with the plaintiff.

17. It is the most important point to note that in the reply as well as in cross examination of the plaintiff, specific conditions have been placed by the defendant that – if the plaintiff gives guarantee of two persons and if he promises not to give physical or mental torture and that he and his family members will not pressurize her to go to Australia and if plaintiff is ready to live with defendant in a separate house apart from his parents, she is willing to join the plaintiff and fulfill her marital life. These conditions show that the defendant has left the house of plaintiff as she is not willing to reside in the joint family of the plaintiff. For the sake of argument even if the defendant's condition regarding promise for not giving physical and mental torture, is accepted, then also the most important point of plaintiff living in a separate house with defendant away from his parents, is not acceptable.

18. It is a settled ritual of all the communities that after marriage, the girl has to join the family of husband and reside with the husband if he is residing in a joint family or join husband if he is residing separately. But nowhere the custom has allowed the wife to pray that she reside in a separate house with her husband and away from her in-laws, and

even the law also does not recognize the same. A wife is expected to be with the family of her husband after marriage. If wife makes any such attempt or put any such condition, it would certainly be tortuous and unbearable for a man to be forced to choose between his aging parents on one hand and his wife and children on the other.

20. Another issue which has been emphasized by the learned advocate for the defendant that plaintiff and his family members were pressurizing her to go to Australia due to which the dispute has arisen, does not have a stand in the present case as there are no circumstances or no evidence in this regard. From the cross examination of plaintiff and his witnesses as well as the version of defendant, it can be said that this is the defence taken by the defendant, but it does not have any stand as it is an admitted fact that both the brothers of defendant are already living in Australia and there has been dispute between parents of defendant and her brothers. It is already admitted by defendant's father in his cross examination that both his sons have not visited them since last 7 years. It is also admitted that his three daughters are married out of which, one, i.e, the defendant resides with them. It is also admitted fact that the defendant is a working woman and is earning a handsome salary. Nothing has been brought on record by the defendant regarding the earning of her father or mother. From these facts, it can be assumed that since both the sons of defendant's father (defendant's brothers) do not have any relationship with them and since they are settled in Australia and are living their happy married lives, they are not sending any monetary relief to defendant's parents for their livelihood. Also, since two sisters of

defendant are also married and they are living at their marital house, there is no support from them too. And as such the defendant has been earning from prior to her marriage and she has been supporting her parents this would cause a reason to stay with her parents. From the deposition of witnesses on behalf of plaintiff, their family members are also residing at Australia and America. The arguments posed on behalf of defendant that the plaintiff and his family members were pressurizing the defendant to go to Australia so that the way for the plaintiff also gets opened does not have any stand in view of the above facts.

21. From all the above facts, it appears that the defendant has been working from prior to the marriage and after marriage, she was to reside with plaintiff in a joint family of about six members and she was also to go to her job. She was unable to cope up and was feeling over-burdened and over-worked, due to which, she would have decided to reside separately from the joint family of the plaintiff and, therefore, the condition posed by her is not in context, which is not acceptable in the eyes of law. Considering the provisions of Section 7 of Family Court Act and Section 282 of Muhammadan Law, the reasonable cause for living separately must fall within the ambit of the provision, wherein, the defendant has to show that it is difficult for her to live with the plaintiff. Those reasons may be cruelty inflicted by the plaintiff, adulterous life of plaintiff or any other mental agony. But in the present case, the reason stated by the defendant does not fall within the ambit of provisions of law and it does not appear to be the reasonable cause and therefore, the plaintiff would be entitled to get the decree against the defendant for fulfilling the conjugal rights of marriage. Hence, issue No.2 and 3 are

decided in affirmative."

8. Thus, it appears from the aforesaid that the Family Court arrived at the conclusion based on conjectures and surmises that as the wife was a working lady and was not able to cope up with her other household responsibilities, she thought fit to walk out of her matrimonial home on a lame excuse of being harassed by her husband and the other family members of her husband.

ANALYSIS

9. We have heard Ms. Hetal Patel, the learned counsel appearing for the appellant-original defendant wife and Mr. Keval Shah, the learned counsel appearing for the respondent-original plaintiff husband. We have also gone through the oral evidence on record in the form of depositions of the parties and their respective witnesses.

10. It appears from the materials on record and, more particularly, the case put up by the appellant-wife before us that she was being pressurized to migrate and settle at Australia considering that the appellant is a qualified nurse and she may be able to secure a good job at Australia. The appellant is dead against such idea of her husband and her in-laws and outright declined to leave her job at Palanpur and prepare herself to go to Australia. This appears to be the root cause of the matrimonial disputes that arose between parties over a period of time.

The suggestions put by the learned advocate appearing on behalf of the wife in the cross-examination of the husband would indicate that the wife was not, at all, interested to go to Australia. In the cross-examination of the husband, an assurance was sought from the husband that if he would not insist that his wife should migrate to Australia and no further harassment is caused in that regard, then the wife would be inclined to return to her matrimonial home. A further assurance was sought for from the husband that he should not unnecessarily doubt the character of his wife and further should buy a house of his own so that the husband, wife and the child can stay together indepdently. The husband, in his cross-examination, declined to give any such assurance and also made himself clear that he would not go for a separate home and reside separately with his wife and child. There are many other allegations levelled against the husband in the form of various suggestions. We are conscious of the fact that suggestions, as such, have no evidentiary value. However, in the cases of the present type, more particularly, matrimonial disputes, the Family Court owes a duty to read something in between the lines so as to try to understand the root cause of the discord between the parties rather than going by the strict rules of evidence.

11. In the aforesaid context, we may refer to Section 14 of the Family Courts Act, 1984. Section 14 reads thus;

> "14. Application of Indian Evidence Act, 1872- A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872."

12. Various High Courts across the country have taken the view that the consideration of evidence by a Family Court is not restricted by the rules of relevancy or admissibility provided under the Evidence Act. The Family Court is left free to receive any evidence or material which assists it to deal effectually with a dispute and the provisions of the Evidence Act would not be applicable. The different High Courts have held that the Family Court deals with disputes concerning the family and should adopt an approach radically different from that adopted in any ordinary civil proceedings. Many High Courts have taken the view that Section 14 of the Act does not suffer from any vice of either arbitrariness or being fanciful.

13. This is not a case in which it could be said that the wife left her matrimonial home along with her minor child with the intention to desert the husband. It is more than clear having regard to the evidence on record that the wife was not comfortable at her matrimonial home on account of various domestic issues. If on account of all such problems, one fine day if she decided to walk out of

her matrimonial home, could it be said that the husband straightway is entitled to have a decree for restitution of conjugal rights.

14. It has to be borne in mind that the decision in a suit for the restitution of conjugal rights does not entirely depend upon the right of the husband. The Family Court should also consider whether it would make it inequitable for it to compel the wife to live with her husband. Our notions of law in that regard have to be altered in such a way as to bring them in conformity with the modern social conditions. Nothing has been shown to us in the form of any rule or otherwise which compel the Courts to always pass a decree in a suit for restitution of conjugal rights in favour of the husband. As long as there is no such rule, it would be just and reasonable for the Court to deny the said relief to the plaintiff-husband if the surrounding circumstances indicate that it would be inequitable to do so. (See Raj Mohammad vs. Saeeda Amina Begum, AIR 1976 Kant 200).

15. Section 281 of the Muhammadan Law deals with the aspect of the restitution of conjugal rights, but does not throw any light as to in what circumstances, a decree for restitution of conjugal rights can be granted or declined. For the purpose of clarity we quote Section 281 from the Principles of Mohamedan law by Mulla 20th edition at page 367 which reads as under:-

> "*Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights.* "

16. The aforesaid would indicate that there is no such law for seeking the relief of restitution of conjugal rights. The parties will be governed by their personal law.

When restitution may be refused

17. The wife can set up the following defences to a suit for restitution of conjugal rights;

(1) That the marriage between the parties was not a valid marriage or is no longer binding. The existence of a valid matrimonial relationship is an essential condition for a decree in the suit. If the marriage is not valid (i.e., either irregular or void) restitution will not be allowed. So also if subsequently the marriage has terminated, for example by reason of the husband having become an apostate or by the exercise by the wife of the option, on attaining puberty, of repudiating her marriage or of a power to the wife to divorce, restitution will be refused.

(2) That the husband was guilty of legal cruelty. For legal cruelty, “there must be actual violence of such

a character as to endanger personal health or safety or there must be reasonable apprehension of it. A simple chastisement on one or two occasions would not amount to such cruelty. The Mohammedan law on the question of what is legal cruelty between man and wife does not differ materially. A good deal of ill-treatment, even if it is short of cruelty, may amount to legal cruelty. If the Court is of opinion that by the return of the wife to the husband, her health and safety would be in danger.

(3) That the husband made a false charge of adultery against the wife. Restitution will not, however be refused if the charge was true.

(4) That there was gross failure by the husband in the performing of the matrimonial obligations imposed upon him for the benefit of the wife. Cruelty is not the sole defence. The Mohammedan wife has got better rights than the English wife. The Court may well admit defences founded on the violation of those rights. Conduct falling for short of legal cruelty (e.g. charges of immorality and heaping of insults) may be a good defence to a suit by the husband. In fact any reprehensible conduct on the part of the husband affords grounds for refusing to him the assistance of the Court. Expulsion of the husband from caste has been held to be sufficient ground for

refusing restitution of conjugal rights. But the mere fact that the wife cannot get on with mother of the husband would not be sufficient ground.

(5) That, where the marriage has not been consummated, her prompt dower has not been paid. This would be a means for securing the payment of dower by the husband.

18. A marriage between Mohammedans is a civil contract and a suit for restitution of conjugal rights is nothing more than an enforcement of the right to consortium under this contract. The Court assists the husband by an order compelling the wife to return to cohabitation with the husband. "Disobedience to the order of the Court would be enforceable by imprisonment of the wife or attachment of her property, or both". Moonshee Buzloor Ruheem v. Shumsoonissa Begum, 11 Moo Ind App 551 (609). Abdul Kadir v. Salima, ILR 8 All 149 (FB).

19. Dealing with the kinds of defences which a wife under the Muslim Law can take in a suit for restitution of conjugal rights, the Judicial Committee of the Privy Council observed in ***Moonshee Buzloor Ruheem v. Shumsoonnissa Begum***, (1866-67) 11 Moo Ind App 551 (PC), as follows:

> "*It seems to them clear, that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered and considered with some reference to Mohammedan Law.*"

20. In ***Anis Begum v. Muhammad Istafa Wali Khan***, MANU/UP/0352/1933: (AIR 1933 All 634) Sulaiman, C. J., observed as follows:

> "*Their Lordships of the Privy Council in the case of Moonshee Buzloor Ruheem v. Shumsoonnissa Begum, (1866-67) 11 Moo Ind App 551 (PC) observed that a suit for restitution of conjugal rights, though in the nature of a suit for specific performance is in reality a suit to enforce a right under the Muhammadan law and the Courts should have regard to the principles of Muhammadan law. The observation of their Lordships was directed to emphasising the point that Courts should not exercise their discretion in complete supersession of the Muhammadan Law, but that in exercise of their discretion they should refer to that law. But the principle was fully recognised that in passing a decree for the restitution of conjugal rights, the Court has power to take into account all the circumstances of the case and impose terms which it considers to be fair and reasonable.*"

21. But a decree, for the specific performance of a contract is an equitable relief and it is within the discretion of the Court to grant or refuse it in accordance with the equitable principles. In Abdul Kadir's case ILR 8 All 149 (FB), it was held that in a suit for conjugal rights, the Courts in India shall function as mixed Courts' of equity and be guided by the principles of equity well-established under the English Jurisprudence. One of those is that the Court shall take into consideration the conduct of the person who asks for specific performance.

22. If the Court feels, on the evidence before it, that the husband has not come to the Court with clean hands or that his own conduct as a party has been unworthy, or his suit has been filed with ulterior motives and not in good faith, or that it would be unjust to compel the wife to live with him, it may refuse him assistance altogether. The Court will also be justified in refusing specific performance where the performance of the contract would involve some hardship on the defendant wife which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

23. It follows, from the aforesaid that in a suit for restitution of conjugal rights by a Muslim husband against his wife, if the Court after a review of the evidence feels that the circumstances reveal that the husband has been

guilty of unnecessary harassment caused to his wife or of such conduct as to make it inequitable for the Court to compel his wife to live with him, it will refuse the relief.

24. Take a case wherein the wife leaves her matrimonial home on account of matrimonial disputes and in the meantime, the husband marries for the second time and brings home a second wife and simultaneously institutes a suit for restitution of conjugal rights against his first wife, still whether the Court would be justified in passing a decree of restitution of conjugal rights on the ground that a Muslim under his personal law can have several wives at a time upto a maximum four. In such circumstances, the first wife may decline to live with her husband on the ground that the Muslim law permits the polygamy but has never encouraged it. The Muslim law, as enforced in India, has considered polygamy as an institution to be tolerated but not encouraged and has not conferred upon the husband any fundamental right to compel his wife to share his consortium with another woman in all circumstnces.

25. In the aforesaid context, we may refer to a Division Bench decision of the Bombay High Court in the case of Sheikh Abdullah W/o. Sheikh Hafizullah vs. Dr. Husnaara Parveen W/o. Sheikh Abdulla, reported in 2012 (1) MH.L.J., wherein the Court observed in Para-13 as under;

> "Although it is not necessary to go into the next question as to whether the respondent had withdrawn from the society of the petitioner without reasonable cause, it is necessary for the appellant in such case to establish that the other spouse has without reasonable excuse withdrawn from the society of the petitioner. The Court in such case, if it is satisfied as to the truth of the averments made in the petitioner and also that there is no other legal grounds as to why the petition/application shall not be granted, may decree restitution of conjugal right, as prayed for. In the case of Lachman Uttamchand vs. Meena, reported in AIR 1964 SC 40, the Constitution Bench of the Apex Court made reference to settled law as to burden of proof in such cases. It was observed that heavy burden lies upon a petitioner who seeks relief on the ground of decision to prove four essential conditions, namely (1) the factum of separation, (2) animus deserendi; (3) absence of his or her consent and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home. It was also further observed that he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion through the entire period of two years (then statutory period required under section 9 of the Hindu Marriage Act) before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause."

26. Even in the absence of satisfactory proof of the husband's cruelty, the Court will not pass a decree for restitution in favour of the husband if, on the evidence, it feels that the circumstances are such that it will be unjust

and inequitable to compel her to live with him. In Hamid Hussain v. Kubra Begum, ILR 40 All 332: (AIR 1918 All 235), a Division Bench of the Allahbad High Court dismissed a husband's prayer for restitution on the ground that the parties were on the worst of terms, that the real reason for the suit was the husband's desire to obtain possession of the wife's property and the Court was of the opinion that by a return to her husband's custody the wife's health and safety would be endangered though there was no satisfactory evidence of physical cruelty.

27. Before we close this litigation, we must refer to few very apt observations made by the Allahbad High Court in the case of ***Itwari vs. Smt. Asghari & Ors.***, reported in AIR 1960 All 684. We quote as under;

> *"What the Court will regard as cruel conduct depends upon the prevailing social conditions. Not so very long ago in England a husband could inflict corporal chastisement on the wife without causing comment. Principles governing legal cruelty are well established and it includes any conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or as to give a reasonable apprehension of such a danger. Ray-dyn On Divorce 5th Edition p. 80. But in determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character, and social status ibid p. 80. In deciding what constitutes cruelty, the Courts have always taken into consideration the prevailing social conditions, and the same test will apply in a case*

where the parties are Mohammadans. Muslim society has never remained static and to contend otherwise is to ignore the record of achievements of Muslim civilisation and the rich development of Mohammedan jurisprudence in different countries. Muslim jurisprudence has always taken into account changes in social conditions in administering Mohammedan Law.

Necessity and the wants of social life are the two all-important guiding principles recognised by Mohammedan Jurisprudence in conformity to which Laws should be applied to actual cases, subject only to this reservation that rules, which are covered by a clear text of the Quran" or a precept of indisputable authority, or have been settled by agreement among the learned, must be enforced as we find them. It seems to me beyond question that, so long as this condition is borne in mind, the Court in administering Mohammedan Law is entitled to take into account the circumstances of actual life and the change in the people's habits, and modes of living: Mohammedan Jurisprudence by Sri Abdur Bahim, Tagore Law Lecture -- 1908 p. 43."

28. The most convincing proof of the impact of the social changes of Muslim law is the passing of the Dissolution of Muslim Marriages Act, 1939, by which, the legislature enabled a Muslim wife to sue for the dissolution of her marriage on a number of grounds which were previously not available. The second important break through was the judgment of the Supreme Court in the case of Shahbano Begum (1985 (3) SCR 844), wherein it was ruled that a Muslim wife can pray for maintenance invoking Section 125 of the Code of Criminal Procedure. The then

Government tried to nullify this judgment of the Supreme Court by passing a legislation termed as the “Muslim Women (Protection of Rights on Divorce) 1986”. According to this legislation, the Muslim women were entitled to a “fair and just” amount of money within the “Iddat” period beyond which the husband was to have no liability.

29. In ***Danial Latifi & Anr. vs. Union of India***, reported in (2001) 7 SCC 740, the Supreme Court while upholding the validity of the 1986 Act, referred to above in Para-28, held as under;

> *“(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the Iddat Period must be made by the husband within the Iddat period in terms of Section 3(1)(a) of the Act.*
>
> *(2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the Iddat Period.*
>
> *(3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the Iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay*

such maintenance.

(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India."

30. The recent landmark judgment of the Supreme Court with respect to Muslim women is the triple Talaq case titled as Shayara Bano vs. Union of India. In this case, the Supreme Court declared the very concept of "instantaneous triple Talaq" as manifestly arbitrary being violative of Article 14 of the Constitution of India.

31. Lastly, the provisions of Order XXI Rule 32(1) and (3), C.P.C. may also be looked into, which provides thus;

"(32) Decree for specific performance for restitution of conjugal rights:(1) where the party against whom a decree for the specific performance of a contract or for restitution of conjugal rights or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison or by the attachment of his property or by both.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months if the judgment-debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold and out of

> *the proceeds the Court may award to the decree holder such compensation as it thinks fit and shall pay the balance if any to the judgment debtor on his application and the Court may for good cause extend the time."*

32. A perusal of the aforesaid provision indicates that a decree for restitution of conjugal rights cannot be enforced except by way of attachment of the property of the other party or compensation and mense profits. In the case on hand, there is nothing on record to indicate that the appellant-wife has a property of her own which could be attached. The object behind Order XXI Rule 32(1) and (3) CPC is that no person can force a female or his wife to cohabit and establish conjugal rights. If the wife refuse to cohabit, in such case, she cannot be forced by a decree in a suit to establish conjugal rights.

33. This litigation reminds us of the observations made by one of us J.B. Pardiwala, J., while sitting as a Single Judge in the case of ***Jafar Abbas Rasool Mohammed Merchant vs. State of Gujarat & Anr***., Criminal Misc. Application No.14361 of 2020, decided on 05.11.2015. We quote the observations;

> *"52 One characteristic feature of Indian Secularism is its determination to adopt a rational and scientific approach in the discussion and solution of socioeconomic problems. Blind adherence to, or reliance on, any sacred text is completely foreign to Indian Secularism, whether the text is that of Hindus, Muslims, Parsis,*

Sikhs, Buddhist, Christians makes no difference. The tendency of the human mind to lean on textual authority in support of or against a proposition is so powerful that it needs consistent and deliberate effort on the part of intellectuals to promote independent and basic thinking in dealing with problems unhampered by the weight of authority or the printed word. Lawyers know that in Courts of Law, precedents in the form of decided cases sometimes have such an overwhelming influence on judicial approach that Judges show a disinclination to analyse and consider the basic points involved in any controversy. The value of precedents cannot be denied; but the precedents sometimes tend to hold the judicial mind in bondage and that shows an approach which is not strictly rational and as such, is inconsistent with the philosophy of Secularism.

53 When the Hindu Code Bill was being debated in Parliament, the conservative Hindus raised a plausible plea that if a Civil Code was intended to be evolved, it should be made applicable to all the communities in India. The main object in raising this plea was not so much to make the Code applicable to the Muslim community as to retard, and if possible, to defeat the Hindu Code itself. The advocates of the Hindu Code wanted to take the first step in the right direction. They realised that to bring the Muslim community within the purview of the Civil Code was impractical at that time having regard to the fact that the public opinion in the Muslim community had not been adequately educated in that behalf. The approach adopted by the reformers in confining the Code to the Hindu community as a first step brings out another feature of Secularism, and that is that Secularism in establishing its philosophy in the social life of the country, adopts a pragmatic approach."

34. Recently the Delhi High Court observed in one of its

orders dated 07.07.2021 that a uniform civil code (UCC) should not remain a mere hope in the Constitution. While expressing regret over the conflicts in the Society due to differences in various personal laws, the Court observed that in modern Indian society, which is gradually becoming homogenous, the traditional barriers of religion, community and caste are slowly dissipating. The youth of India belonging to various communities, tribes, castes or religions who solemnize their marriages ought not to be forced to struggle with issues arising due to conflicts in various personal laws, especially in relation to marriage and divorce.

35. In the overall view of the matter, we have reached to the conclusion that we should interfere with the impugned judgment and decree passed by the Family Court.

36. In the result, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by the Family Court at Palanpur, District: Banaskantha dated 07.07.2021 in the Family Suit No.47 of 2019 is hereby quashed and set aside. The Family Suit No.47 of 2019 instituted by the husband for restitution of conjugal rights invoking Section 282 of the Muhammadan Law is hereby dismissed.

37. In view of the order passed in the main matter, the

connected civil application also does not survive and is disposed of accordingly.

(J. B. PARDIWALA, J)

(NIRAL R. MEHTA,J)

Vahid