NEUTRAL CITATION
2024:GUJHC:64562-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3862 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV
and
HONOURABLE MR. JUSTICE MAULIK J.SHELAT

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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

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Versus

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Appearance:
Mr. M.R.PRAJAPATI FOR MS. ALPA A. PRAJAPATI(10023) for the Appellant(s) No. 1
MR AM PAREKH(562) for the Defendant(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE BIREN VAISHNAV**
and
HONOURABLE MR. JUSTICE MAULIK J.SHELAT

Date : 22/11/2024
CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE MAULIK J.SHELAT)

1. A disgruntled wife, who failed to secure divorce, has preferred the present appeal under Section 19 of the Family Courts Act, 1984 (hereinafter referred to as “the Act, 1984”) against the Judgement and Decree dated

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30.04.2018 passed by the learned Principal Judge, Family Court, Palanpur in Family Suit No. 7 of 2017. Her suit for seeking divorce is dismissed. The Appellant is original plaintiff-wife and Respondent is original defendant-husband. For the sake of convenience, the parties are referred to as per their original positions before the Family Court.

2. **Admit,** learned Advocate Mr. A.M. Parekh waives service of notice of admission of appeal. Truely, ordinarily this Court, in its appellate jurisdiction, before finally adjudicating any first appeal, would like to call for the record and proceedings, but having been supplied necessary documentary evidence and pleadings by the parties as well as considering the request made by the learned advocates of the respective parties, especially, the defendant – husband, who was present in the Court identified by learned Advocate Mr. A.M. Parekh, which was duly recorded in the order dated 30.10.2024 passed by this Court while reserving the order, whereby both parties have tendered a compromise purshis and requested the Court to modify the impugned judgment and decree, then this Court would like to finally adjudicate the present appeal without calling for the record and proceedings.

3. The copy of compromise purshis duly signed by the parties and their respective advocates appears to have been notarized on 23.10.2024 is taken on record.

Brief Facts of the case

4. The short facts of the case, which are necessary for the

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adjudication of the present appeal, are as follows:-

4.1 The marriage of the plaintiff – wife was solemnized with the defendant – husband on 01.03.2009, and out of the said wedlock, they were blessed with a boy, namely, "Vidhan" on 31.10.2012.

4.2 It is the case of the plaintiff that following birth of "Vidhan", differences arose between the couple which seriously affected her matrimonial life. It is further stated that the defendant had a habit of betting on cricket matches, thereby creating a huge debt. According to the plaintiff, her husband was not taking care of either the plaintiff or her son instead asking for money from her to get rid of his debt. Eventually, the defendant and his family members had started inflicting cruelty upon the plaintiff, which ultimately led to her decision to leave her matrimonial home somewhere around April, 2013. Since then, the couple are residing separately and thereafter have never cohabited**.**

4.3 It is further stated by the plaintiff that due to the intervention of elders, a mature decision was taken by the couple to happily depart by executing mutual/consent deed of divorce, which according to the parties is permissible in their custom. The mutual deed of divorce appears to have been executed between the parties/couple on 10.04.2014, which was duly witnessed and notarized.

4.4 It is the case of the plaintiff that as per the above-preferred mutual deed of divorce, the parties have been residing separately since last one year before the date of execution of the mutual consent deed. Since then

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plaintiff-wife is residing with her parents at Palanpur, whereas the defendant-husband is living at Ahmedabad. It was observed in the divorce deed that there is no possibility of reunion as the differences and ill-will between the parties are not going to be resolved amicably by any means and then it was felt that they should happily depart in the best interest of their son.

4.5 Therefore, in light of the aforementioned facts and circumstances and based on the strength of the mutual deed of divorce, the plaintiff - wife filed Family Suit no. 7 of 2017 seeking divorce from the defendant - husband under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the 1955 Act"). The said Family Suit got amended by filing an application below Exh. 12, which was granted by the Court below.

4.6 It appears that the defendant was not served through the normal mode of service at the relevant point of time. Subsequently, he was served by way of publication of a notice of the Family Suit in the daily newspaper "Divya Bhaskar", but he failed to appear, resulting the suit in ex parte proceedings against defendant – husband before the Family Court.

4.7 After considering the plaintiff's pleadings and in the absence of any written statement of the defendant - husband, the Family Court framed the following issues for its consideration:-

(1) Whether the plaintiff proves that she is the legally wedded wife of the defendant ?

(2) Whether the plaintiff proves that after solemnization of the marriage the defendant has treated her with cruelty?

(3) Whether the plaintiff proves that the defendant has deserted her for continuous period of more than two years, immediately preceding the presentation of this application?

(4) Whether the plaintiff proves that divorce had taken place on 10/04/2014, at Palanpur, as per the custom prevailing in their community?

(5) Whether the plaintiff proves that she is entitled to get the relief as prayed for?

(6) What order and decree?

4.8 The plaintiff – wife was examined below Exh.17 and in absence of any cross-examination by the defendant, her testimony/evidence went uncontroverted.

4.9 After appreciating the pleadings, oral evidence and documentary evidence submitted by the plaintiff, the Family Court arrived at a finding that the plaintiff has failed to prove any of the said issues except issue no.1 in her favour, thereby, dismissed the suit. Hence, the present appeal.

Submissions of the parties

5. Learned advocate Mr. M.R.Prajapati appearing for Ms. Alka Prajapati**,** learned advocate for the plaintiff - appellant would submit that the Family Court has, without appreciating the predicament of the plaintiff - wife, dismissed her suit, who was forced to leave her matrimonial home due to the acts of the defendant and having been residing separately from the defendant since 2013, would amount to mental cruelty. He would further submit that a very hypothetical approach was taken by the Family Court, ignoring the object and purpose of the

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Family Courts Act, 1984 as well as the Hindu Marriage Act, 1955, thereby, committed a serious error in dismissing the suit.

5.1 He would further submit that the case was made out by plaintiff while seeking divorce under Section 13 of the Hindu Marriage Act, 1995 on different grounds, which remained uncontroverted by defendant as there was no written statement filed by defendant then according to learned advocate for the appellant, the Family Court has committed a serious error in dismissing the suit.

5.2 He would further submit that a very myopic and pedantic approach on the part of the Family Court while adjudicating the issues germane to the suit. It is submitted that when there is a foundational fact about the separation of parties made in the suit, i.e., a consent deed of divorce taken on 10.04.2014, which was also elaborated to some extent by way of an amendment in the suit, the details of such a foundational fact about the separation of parties stated in her oral evidence could not have been negated by the Family Court on the ground that it was not part of the pleading.

5.3 He would further submit that when the Family Court observed in the impugned judgment that the parties have decided to dissolve their marriage by executing a mutual deed of divorce on 10.04.2014 and residing separately without any cohabitation, such a fact is self-sufficient to grant a divorce in favor of the plaintiff on the ground of cruelty as well as desertion.

5.4 Lastly, he would submit that both sides have dissolved their marriage by executing a mutual deed of divorce on

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10.04.2014 and now, the consent terms have also been duly executed by parties on 23.10.2024 and, therefore, he has requested this Court to consider all of the above-stated facts and circumstances as well as the intention of the parties to get divorce since 2014 then the decree of divorce may be granted as prayed for and, thereby, both can live their future life pleasantly.

6. Per Contra, Learned advocate Mr. A.M.Parekh for the respondent – defendant (husband) would adopt the arguments of learned advocate Mr. Prajapati and requested this Court that the defendant is also willing and agreeable to divorce the plaintiff as the marriage is completely dead. He would submit that since last more than 11 years, there is no relationship and cohabitation between the plaintiff and defendant. As per his submission, there is a complete breakdown of the marital relationship, which is beyond repair, so he would also urge this Court to pass a decree of divorce as prayed for by the plaintiff, albeit, requested this court, in view of above referred consent terms, not to grant any order of permanent maintenance in favour of wife.

7. Heard learned advocates appearing for the respective parties at length. Both the learned advocates appearing for the respective parties have requested this Court to consider the issue of cruelty, desertion as well as compromise arrived at between the parties to get divorce then did not press any other issues germane in the suit.

Points for consideration

8. The following points require to be determined by this Court:-

1. Whether in the facts and circumstances of the case, the Family Court has committed any error while dismissing the Family Suit?

2. Whether in the facts and circumstances of the case, the plaintiff proves that she was subjected to cruelty by the defendant which ultimately led to desertion?

3. Whether the plaintiff is entitled to get decree of divorce as prayed in the suit?

Appreciation and findings of the Court

9. Before adverting the main issues, we would first like to refer the statement of object and reasons of the Family Courts Act, 1984.

"STATEMENT OF OBJECTS AND REASONS"

Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. **The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial**. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. **However, not much**

use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes."

The object to bring special legislation like Family Courts Act is to bring change in the procedure of the Civil Court. As such matrimonial dispute and family dispute is not an adversarial litigation like other civil and/or commercial dispute. Such disputes, which deal with human relations need special attention by the Court, which requires sensitivity, kindness, reasonableness, not to be rigid in procedure and pleading rather for advancement of justice between the parties, it requires to conciliate first then adjudicate as per the object of the Act, 1984.

10. It is by now a well-settled position of law that the burden of proof lies on the shoulder of the plaintiff, who is seeking divorce, but such a degree of proof is not beyond a reasonable doubt but should be on the principle of preponderance of probability. It is also well recognized that what is cruelty for a woman in a given case may not be cruelty for a man, and a relatively more elastic and broad approach is required when a Family Court examines a case in which a wife seeks divorce.

11. It is true that an element of subjectivity has to be applied, albeit what constitutes cruelty is objective. The Hindu Marriage Act, 1955 was amended in the year 1976, whereby clauses (ia) & (ib) to Section 13 were introduced

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with an object and reason to liberalize the provisions relating to divorce, to enable expeditious disposal of the proceedings under the Act and to remove certain anomalies and handicaps that have come to light after passing of the act.

12. At this juncture, it would be apposite to refer to and rely upon few recent pronouncements of the Hon'ble Supreme Court to decide the points germane to the appeal.

13. In the case of **Smt. Roopa Soni Vs Kamalnarayan Soni, reported in AIR 2023 SC 4186**, wherein the Hon'ble Supreme Court has observed that:-

> "5. **The word 'cruelty' under Section 13(1) (ia) of the Act of 1955 has got no fixed meaning, and therefore, gives a very wide discretion to the Court to apply it liberally and contextually**. **What is cruelty in one case may not be the same for another. As stated, it has to be applied from person to person while taking note of the attending circumstances**.
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> 7. We would like to emphasize that an element of subjectivity has to be applied albeit, what constitutes cruelty is objective. **Therefore, what is cruelty for a woman in a given case may not be cruelty for a man, and a relatively more elastic and broad approach is required when we examine a case in which a wife seeks divorce.** Section 13(1) of the Act of 1955 sets contours and rigours for grant of divorce at the instance of both the parties. Historically, the law of divorce was predominantly built on a conservative canvas based on the fault theory. Preservation of marital sanctity from a societal perspective was considered a prevailing factor. With the adoption of a libertarian attitude, the grounds for separation or dissolution of marriage have been construed with latitudin-arianism.
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> 8. Even with such a liberal construction of matrimonial legislations, the socio-economic stigma and issues attached to a woman due to divorce or separation are raised. Justice O.Chinnappa Reddy, in his concurring opinion in **Reynold Rajamani and Another v. Union of India and Another**, (1982) 2 SCC 474 (see paragraph 14), took note of the position of women in a marital relationship and the consequent social and economic inequalities faced by the female spouse in view of divorce. The resultant

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stigmatization hinders societal reintegration, making a woman divorcee socially and economically dependent. Courts must adopt a holistic approach and endeavor to secure some measure of socio-economic independence, considering the situation, case and persons involved. An empathetic and contextual construction of the facts may be adopted, to avert the possibilities of perpetuating trauma - mental and sometimes even physical - on the vulnerable party. It is needless to say that the courts will be guided by the principles of equity and may consider balancing the rights of the parties. The Court, while applying these provisions, must adopt 'social-context thinking', cognisant of the social and economic realities, as well as the status and background of the parties.

9. This concept of "social justice adjudication" has been elaborately dealt with by this Court in Badshah v. Urmila Badshah Godse and Another, (2014) 1 SCC 188:

> "14. Of late, in this very direction, it is emphasised that the courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:
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> "It is, therefore, respectfully submitted that 'social context judging' is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication." [Keynote address on "Legal Education in Social Context" delivered at National Law University, Jodhpur on October 12, 2005, available on http://web.archive.org/web/20061210031743/ http:/www.nlujodhpur.ac.in/ceireports.htm [last visited on 25-12-2013]]

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15. The provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from “adversarial” litigation to social context adjudication is the need of the hour.

16. The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society. The role of the court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both constitutional and statutory interpretation, the court is supposed to exercise discretion in determining the proper relationship between the subjective and objective purposes of the law.
xxx xxx xxx

18. The court as the interpreter of law is supposed to supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision — libre recherché scientifique i.e. “free scientific research”. We are of the opinion that there is a non-rebuttable presumption that the legislature while making a provision like Section 125 CrPC, to fulfil its constitutional duty in good faith, had always intended to give relief to the woman becoming “wife” under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from Shah Bano [Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556 : 1985 SCC (Cri) 245 : AIR 1985 SC 945] to Shabana Bano [Shabana Bano v. Imran Khan, (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873 : AIR 2010 SC 305] guaranteeing maintenance rights to Muslim women is a classical example.” (Emphasis supplied)

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15. Secondly, the court must also keep in mind that the home which is meant to be a happy and loveable place to live, becomes a source of misery and agony where the partners fight. When there are children they become direct victims of the said fights, though they may practically have no role in the breakdown of marriage. They suffer irreparable harm especially when the couple at loggerheads, remain unmindful and unconcerned about the psychological and mental impact it has on her/him. Way back in 1982, this Court in Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka, (1982) 2 SCC 544, observed:

> "29.... A broken home, however, has a different tale to tell for the children. When parents fall out and start fighting, the peace and happiness of home life are gone and the children become the worst sufferers. It is indeed sad and unfortunate that parents do not realise the incalculable harm they may do to their children by fighting amongst themselves. The husband and the wife are the persons primarily responsible for bringing the children into this world and the innocent children become the worst victims of any dispute between their father and the mother. Human beings with frailties common to human nature, may not be in a position to rise above passion, prejudice and weakness. Mind is, indeed, a peculiar place and the working of human mind is often inscrutable. For very many reasons it may unfortunately be not possible for the husband and wife to live together and they may be forced to part company. Any husband and wife who have irreconcilable differences, forcing them to part company, should, however, have sense enough to understand and appreciate that they have their duties towards their children. In the interest of the children whom they have brought into existence and who are innocent, every husband and wife should try to compose their differences. Even when any husband and wife are not in a position to reconcile their differences and are compelled to part, they should part in a way as will cause least possible mischief to the children.
> (emphasis supplied)

11. In Dr. N.G. Dastane v. Mrs. S. Dastane, (1975) 2 SCC 326 : (AIR 1975 SC 1534), it was held:

"25. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the

liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, not a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

26. **Neither Section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor Section 23 which governs the jurisdiction of the court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt**. Section 23 confers on the court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities" and not satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.

27. **The misconception regarding the standard of proof in matrimonial cases arises perhaps from a loose description of the respondent's conduct in such cases as constituting a "matrimonial offence"**. Acts of a spouse which are calculated to impair the integrity of a marital union have a social significance. To marry or not to marry and if so whom, may well be a private affair but the freedom to break a matrimonial tie is not. The society has a stake in the institution of marriage and therefore the erring spouse is treated not as a mere defaulter but as an offender. But this social philosophy, though it may have a bearing on the need to have the clearest proof of an allegation before it is accepted as a ground for the dissolution of a marriage, has no bearing on the standard of proof in matrimonial cases."

14. As per the Constitution Bench decision of Hon'ble Supreme Court in the case of **Shilpa Sailesh v. Varun Sreenivasan, reported in 2023 (6) SCALE 402 : (AIR 2023 SC (Civ) 2212)**, the Hon'ble Supreme Court has held as under:-

> "26. V. Bhagat v. D. Bhagat [(1994) 1 SCC 337], which was pronounced in 1993, 18 years after the decision in N.G. Dastane [(1975) 2 SCC 326], gives a life-like expansion to the term 'cruelty'. This case was between a husband who was practicing as an Advocate, aged about 55 years, and the wife, who was the Vice President in a public sector undertaking,

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aged about 50 years, having two adult children - a doctor by profession and an MBA degree holder working abroad, respectively. Allegations of an adulterous course of life, lack of mental equilibrium and pathologically suspicious character were made against each other. This Court noticed that the divorce petition had remained pending for more than eight years, and in spite of the directions given by this Court, not much progress had been made**. It was highlighted that cruelty contemplated under Section 13(1)(i-a) of the Hindu Marriage Act is both mental and physical, albeit a comprehensive definition of what constitutes cruelty would be most difficult. Much depends upon the knowledge and intention of the defending spouse, the nature of their conduct, the character and physical or mental weakness of the spouses, etc. The sum total of the reprehensible conduct or departure from normal standards of conjugal kindness that causes injury to health, or an apprehension of it, constitutes cruelty. But these factors must take into account the temperament and all other specific circumstances in order to decide that the conduct complained of is such that a petitioner should not be called to endure it. It was further elaborated that cruelty, mental or physical, may be both intentional or unintentional.** Matrimonial obligations and responsibilities vary in degrees. They differ in each household and to each person, and the cruelty alleged depends upon the nature of life the parties are accustomed to, or their social and economic conditions. They may also depend upon the culture and human values to which the spouses assign significance. **There may be instances of cruelty by unintentional but inexcusable conduct of the other spouse. Thus, there is a distinction between intention to commit cruelty and the actual act of cruelty, as absence of intention may not, in a given case, make any difference if the act complained of is otherwise regarded as cruel**. Deliberate and wilful intention, therefore, may not matter. Paragraph 16 of the judgment in V. Bhagat (supra) reads as under:-

> "16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. **The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner**. **While arriving at such conclusion, regard**

> **must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively**. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. **If it is a case of accusations and allegations, regard must also be had to the context in which they were made**."
> XXX XXX XXX."

15. In the case of **Rakesh Raman vs. Smt.Kavita, reported in AIR 2023 SC 2144**, the Hon'ble Supreme Court has held as under:-

> 16. **Matrimonial cases before the Courts pose a different challenge, quite unlike any other, as we are dealing with human relationships with its bundle of emotions, with all its faults and frailties. It is not possible in every case to pin point to an act of "cruelty" or blameworthy conduct of the spouse. The nature of relationship, the general behaviour of the parties towards each other, or long separation between the two are relevant factors which a Court must take into consideration**. In Samar Ghosh v. Jaya Ghosh, three judge Bench of this Court had dealt in detail as to what would constitute cruelty under Section 13(1) (ia) of the Act. An important guideline in the above decision is on the approach of a Court in determining cruelty. What has to be examined here is the entire matrimonial relationship, as cruelty may not be in a violent act or acts but in a given case has to be gathered from injurious reproaches, complaints, accusations, taunts, etc. The Court relied on the definition of cruelty in matrimonial relationships in Halsbury's Laws of England (Vol 13, 4th Edn, Para 1269, Pg 602) which must be reproduced here:
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> > "The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, 6 (2007) 4 SCC 511 accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty;

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for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists." The view taken by the Delhi High Court in the present case that mere filing of criminal cases by the wife does not constitute cruelty as what has also to be seen are the circumstances under which cases were filed, is a finding we do not wish to disregard totally, in fact as a pure proposition of law it may be correct, but then we must also closely examine the entire facts of the case which are now before us. When we take into consideration the facts as they exist today, we are convinced that continuation of this marriage would mean continuation of cruelty, which each now inflicts on the other.

Irretrievable breakdown of a marriage may not be a ground for dissolution of marriage, under the Hindu Marriage Act, but cruelty is. A marriage can be dissolved by a decree of divorce, inter alia, on the ground when the other party "has, after the solemnization of the marriage treated the petitioner with cruelty"7. In our considered opinion, a marital relationship which has only become more bitter and acrimonious over the years, does nothing but inflicts cruelty on both the sides. To keep the façade of this broken marriage alive would be doing injustice to both the parties. A marriage which has broken down irretrievably, in our opinion spells cruelty to both the parties, as in such a relationship each party is treating the other with cruelty. It is therefore a ground for dissolution of marriage under Section 13(1) (ia) of the Act.

17. Cruelty has not been defined under the Act. All the same, the context where it has been used, which is as a ground for dissolution of a marriage would show that it has to 7 Section 13(1) (ia) of the Hindu Marriage Act, 1955 be seen as a 'human conduct' and 'behavior" in a matrimonial relationship. While dealing in the case of Samar Ghosh (supra) this Court opined that cruelty can be physical as well as mental:- "46…If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of

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such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse.

Cruelty can be even unintentional:- ...The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful illtreatment." This Court though did ultimately give certain illustrations of mental cruelty. Some of these are as follows:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair.

The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

(emphasis supplied)

18. We have a married couple before us who have barely stayed together as a couple for four years and who have now been living separately for the last 25 years. There is no child out of the wedlock. **The matrimonial bond is completely broken and is beyond repair. We have no doubt that this relationship must end as its continuation is causing cruelty on both the sides. The long separation and absence of cohabitation and the complete breakdown of all meaningful bonds and the existing bitterness between the two, has to be read as cruelty under Section 13(1) (ia) of the 1955 Act. We therefore hold that in a given case, such as the one at**

> **hand, where the marital relationship has broken down irretrievably, where there is a long separation and absence of cohabitation (as in the present case for the last 25 years), with multiple Court cases between the parties; then continuation of such a 'marriage' would only mean giving sanction to cruelty which each is inflicting on the other.** We are also conscious of the fact that a dissolution of this marriage would affect only the two parties as there is no child out of the wedlock.

16. What is deduced from the aforesaid pronouncements of the Hon'ble Supreme Court of the India on the issue of cruelty is that as per Section 13(1) (ia) of the 1955 Act, when there is a long separation, absence of cohabitation, complete breakdown of all meaningful bond and the existing bitterness between the parties, and a severed matrimonial bond beyond repair, despite efforts and attempts at mediation for reunion failed, such factors would constitute cruelty under Section 13(1)(ia) of the 1955 Act.

17. Now, adverting to the facts of the case on hand, which are eloquent and have remained undisputed, are that the marriage of the plaintiff did not go well after the birth of her son "Vidhan" on 31.10.2012. There appear some serious disputes, which had started between the couple including the habit of the defendant—i.e., betting in cricket matches — which created debt, thereby, defendant – husband was unable to help the plaintiff – wife and her son financially. So, ultimately such act of the defendant – husband forced the plaintiff – wife to leave her matrimonial home. It has also been alleged by the plaintiff – wife that she was subjected to mental cruelty, and the defendant was heavily in debt, which was the root cause of their separation in the year, 2013.

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18. It also remains undisputed between the parties that they executed a mutual deed of divorce on 10.04.2014. However, the plaintiff -wife was not able to prove before the Family Court that the same was permissible as per their customs. We would also not like to deliberate upon such issue of customary divorce as the same is not pressed into service by the appellant during course of hearing. Nonetheless, the fact remains that the parties have decided to live separately, and the custody of the minor child is to remain with the plaintiff – mother.

19. With this background of facts, the plaintiff - wife had approached the Family Court to get divorce from the defendant - husband. The suit went ex parte. The pleading and oral evidence of the plaintiff remained uncontroverted.

20. The Family Court went completely wrong when given more emphasised to rule of pleading and procedure by observing that no specific allegation of cruelty and desertion made out in pleading but later on brought by plaintiff in her evidence, which according to Family Court is not permissible in law. Such approach of the Family Court is opposite to object of the Act, 1984 as well law laid down by Hon’ble Supreme Court Of India, ultimately resulted into failure of justice. The plaintiff - wife has succinctly pleaded her case of meeting cruelty at the instance of the defendant – husband resulted into her desertion. Further, her oral evidence remained uncontroverted clearly explained in detail about root cause of cruelty & desertion, which according to this Court, is self-sufficient to prove the issues, which require to be judged on preponderance of probability.

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21. So, considering the aforementioned ratio laid down by the Hon'ble Supreme Court of India, it remains an undisputed fact that there has been a long separation between the parties since 2013, by now, period of separation is 11 years. There has been no cohabitation after this separation, and the chance of reunion is non-existent. There is a complete breakdown of the matrimonial bond, which is beyond repair, as also evidenced by the mutual divorce deed executed in the year, 2014 and the consent terms recently executed on 23.10.2024, by the parties, which have been advanced in the present proceedings. All these facts lead to only one conclusion that the plaintiff - wife has successfully proven that she has been subjected to mental cruelty by the defendant - husband, who could not, by all means, retain a pious matrimonial bond. According to this Court, the plaintiff has made out a clear case of cruelty under Section 13 (1) (ia) of the 1955 Act, and the Family Court has committed a serious error while answering Issue No.2, as referred to hereinabove, in negative, thereby committing an error of facts as well as law in dismissing the suit.

22. So far as the issue of desertion is concerned, the ground for separation of the plaintiff – wife from the defendant - husband was due to the defendant’s bad habit of betting in cricket matches, which led to disharmony between the parties and serious differences and, ultimately, plaintiff’s desertion.

23. It is also not in dispute that the plaintiff – wife was residing separately from the defendant – husband since the year, 2013 and she filed a family suit for divorce in

the year, 2016. So, it has been proven by her that she had been deserted by her husband for more than two years prior to filing the family suit. It is true that the mutual deed of divorce executed between the parties on the 10.04.2014 suggests that they have mutually consented to reside separately and gave consent to mutually divorced themselves, albeit, the same was without any seal of approval by a competent Court of law. This would not mean that by conduct, the defendant - husband has not deserted the plaintiff – wife.

24. At this stage, it is beneficial to rely upon the decision of the Hon'ble Supreme Court in the case of **Rohini Kumari vs Narendra Singh reported in (1972) 1 SCC 1,** wherein it has been held as under:-

> "10. The question that arises is whether the conduct of the respondent was such as to excuse the appellant from making an attempt to put an end to the desertion or from attempting at any reconciliation. **The rule of law involved in the above question appears to be that such conduct on the part of the deserted spouse would legally operate as a consent to the existing separation and would have the effect of absolving the deserted spouse from any obligation to return to the matrimonial home or to make amends for her improper conduct**. In a petition for judicial separation based upon allegations of desertion by the other spouse, it has to be proved that for the period of two years specified in Section 10 (1) (a) **the deserting spouse has been in desertion without cause and that the deserting spouse had further the intention of putting an end to marital relations.** If during that period, the deserting spouse has a just cause to remain apart, desertion would come to an end and the relief for judicial separation must be refused."

25. In the case of **Debananda Tamuli vs. Kakumoni Kataky, reported in 2022 (5) SC 459**, in which, the Hon'ble Supreme Court of India has held as under:-

> "7. We have given careful consideration to her submissions. **Firstly, we deal with the issue of desertion.** The learned

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counsel appearing for the appellant relied upon the decision of this Court in the case of Lachman Utamchand Kirpalani (supra) which has been consistently followed in several decisions of this Court. **The law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus deserendi on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home.** The view taken by this Court has been incorporated in the Explanation added to sub-section (1) of Section 13 by Act No.68 of 1976. The said Explanation reads thus:-

> "13. Divorce.— (1) ..... 3 [Explanation.—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the _____ 3 Substituted by Act 68 of 1976 (w e f 27-05-1976) marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]"

8. The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. **Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence**."

26. It is also pertinent to note that the Co-ordinate bench of this Court, wherein one of us (Hon'ble Mr.Justice Biren Vaishanv) was a member, in the case of **Chetna Alias Dipa Harishbhai Mamnani W/O Mukesh Arjandas Samtani Versus Mukesh Arjandas Shamtani in its judgement dated 08-08-2024 in First Appeal No.11 of 2020** has also considered and followed the aforesaid

principles laid down by Hon'ble Supreme Court of India, and held as under:-

> "6.....On the ground of desertion, which is pleaded in the plaint that w.e.f. January 2015 the cross examination of the husband indicates that it was an admitted fact from the cross examination itself the husband had made no attempts to reunite with the wife nor did he make any effort to bring her back to matrimonial home for a period of two years till the date when proceedings were filed before the Family Court. His absence post the judgment and decree of the Family Court for a period of over four years in this appeal would lead us to believe that the desertion a ground in favour of appellant wife can reasonably be made out**. Considering the decision of theHon'ble Supreme Court in the case of Rohini Kumari (supra), where the intention to co-habitate and concept of constructive desertion is discussed, we are of the opinion that the concept of desertion cannot or could not be tested merely by ascertaining which party left the matrimonial home first. The conduct of the respondent husband even when the cross examination is appreciated brings forth a fact that after the wife left in the year 2015, no attempt was made by her to bring her back and therefore, the desertion is evident**....."

27. The Family Court has failed to appreciate the aforesaid principle while adjudicating issue no.3 - desertion and having very myopic and hyper technical approach while adjudicating the issue. The basic undisputed fact proved on record by the plaintiff - wife that she was compelled to leave her matrimonial home due to aforesaid conduct of defendant – husband, who was never ready to change which appears by the parties's mutual/consent divorce in the year 2014. The conduct of defendant - husband speaks for itself. Normally, no wife would like to leave her matrimonial home which as per Hindu rites and tradition considered as her ultimate home to stay till she alive. Nevertheless, if the conduct of husband is such, which is going to affect the interest of wife as well as children (if any) in any way then she has all right to leave her

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matrimonial home for betterment of herself and children. Albeit, burden is upon her (plaintiff) to prove cause of desertion and same requires to be proved as per settled principles of law. So, keeping in mind the aforesaid ratio of the Hon'ble Supreme Court followed by this Court, the plaintiff - wife has clearly proven that she was deserted by the defendant - husband as no effort was made by the defendant – husband to bring back the plaintiff - wife and their son “Vidhan” to his home, and the aforesaid conduct of defendant - husband so observed by us leads to the desertion of the plaintiff and her son.

28. Lastly, as far as the submission of the consent/compromise purshis by the parties praying for the grant of divorce is concerned, in view of our aforesaid findings, we are not addressing the issue of granting the consent divorce in the present case, but the same shall be considered in an appropriate case. Nonetheless, such consent/compromise purshis executed between the parties requires reproduction here as the plaintiff is waiving her right to claim permanent alimony, and the defendant is also not claiming any right over son “Vidhan”, i.e., the custody of the son “Vidhan”. The consent compromise executed between the parties on 23.10.2024 reads as under:

> “I Zarana Sureshkumar Modi Age: 38 Female Residing at 61, Shivnagar Society, Mansarovar Road, Palanpur, Ta. Palanpur, Dist. Banaskantha. Appellant and I Hetarth Nileshbhai Gohil Age: Adult, Male F-603, Ganesh genesis, Jagatpur road, Jagatpur, S.G.highway, Ahmedabad 382470 Respondents we married on 1/3/2009 and stay as husband at Respondents House and during wedlock one son Vidhan was brown on 31.10.2012 and at present he stay with Appellant.
>
> 1. We submits that after brown Vidhan the Appellant stay At Palanpur and since the there are difference of

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opinion we are stay separately therefore the we taken divorces under customary on 10.4.2014.

22. Appellants has filed Regular Civil Suit No 114 of 2016 AT (INDI before the Learned Principal Civil Judge Palanpur for declaration for dissolution of the marriage as per the agreements dated 10.4.2014 petition and after the establishment of the Family Court the present suit has been transfer the Suit to Family Court and New Number Family Suit No 7 of 2017 has been registered and after public Notice to the Respondents by the learned trial Court the Suit of the Appellant has filed the Amendment Application below Exh.12 which was allowed and there after rights of the Respondent Was closed and Suit of the Appellant was decide ex prate and by order dated 30.10.2017 by the Learned Family Court passed the final order dismissed the Family Suit of the present Appellant The Appellant being aggrieved and dissatisfy with judgment and decree passed by the Learned Family Court Palanpur on 30.4.2018 in Family Suit No 7 of 2017 Rejected the Suit of the Appellant and therefore the F.A has been filed and we both have decide the all the dispute on the intervention of the relatives and well wisher on the following terms:-

(A) The respondents has no objection if the appeal of the Appellant is allowed and marriage of the both has been dissolved and decree of the Divorce has been passed.

(B) The Respondent will also not claim any right of the son "Vidhan" aged about 13 years.

(C) The Appellant will not claim any amounts of permanents maintains in future him self or minor Vidhan against the Respondents.

(D) We both have agree that they will free to remarried future any person.

(E) Respondents has also no objection for permanents custody of Vidhan in favor of the Appellant."

29. Before parting the judgement, we would like to remind the Family Court to keep in mind the following broad principles to be followed by it, while adjudicating the Family Suit/Child Custody/Maintenance etc. These are not exhaustive one but illustrative.

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29.1 The Family Court must keep in mind the Object and Reasons whereby the Family Court Act, 1984 was brought by the Parliament.

29.2 The Family dispute of any kind, which is brought before Family Court, would not be considered as an adversarial litigation like any other civil or commercial dispute. The Family Court has to deal with it in a more sensitive and humane manner.

29.3 It is the duty of the Family Court to get rid of normal rule of procedure set out for civil litigation rather its approach is more of a conciliator first then adjudicator.

29.4 At the cost of repetition, we would like to state that it always must be an endeavour to achieve the object of the Act, 1984 rather frustrate it by unnecessary creating lengthy procedure like civil trial. Albeit, the evidence, which is prohibited in law, should not form basis of final opinion.

29.5 The Family Court must be sensitive towards issue of marriage, child custody and maintenance and requires different approach while dealing with family issues, which touches life of the parties. It always try to avoid mechanical, myopic and hyper technical approach towards the issue germane in the suit and always act for betterment and welfare of victim of family dispute to sub-serve the object of Act, 1984.

29.6 The burden of proof lies on the shoulder of the plaintiff, who is seeking divorce, but such a degree

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of proof is not beyond a reasonable doubt but should be judged on the principle of preponderance of probability.

29.7 It should keep in mind that what is cruelty for a woman in a given case may not be cruelty for a man, and a relatively more elastic and broad approach is required when a Family Court examines a case in which a wife seeks divorce. What is found by us is that the Family Court by merely reproducing the case law take a decision without really appreciating the facts of each case on its own merits.

29.8 When in a given case, the Family Court is granting decree of divorce then it should consider the issue of permanent alimony of spouse who is considered weak/poor not in a position to maintain hereself/himself and pass appropriate order of permanent alimony in favour of such a party and also, where there is/are child/children out of such a wedlock, the alminoy has to be worked out accordingly.

Conclusion

30. The upshot of aforesaid discussions and considering the facts and circumstances of the case, we hold that the Marriage solemnised by and between the plaintiff – wife with defendant – husband is hereby dissolved on the ground of cruelty and desertion with effect from the date date of this judgment under Section (1) (ia) and Section 13 (1) (ib) of Hindu Marraige Act, 1955.

30.1 In view of the above, the impugned judgment and

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decree dated 30.04.2018 passed in Family Suit No.7 of 2027 are hereby quashed and set aside. The plaintiff - wife is entitled to and accordingly granted decree of divorce as prayed for in para-13 of Family Suit no. 7 of 2017.

30.2 In view of the aforesaid consent terms executed between the parties and having been submitted before this Court, no order of permanent alimony is passed in favor of the plaintiff - wife/mother, who will take care of herself and her son, “Vidhan”, who is aged about 13 years. Nevertheless, in future, in case of exigency, the right of the minor son “Vidhan”, to claim any maintenance and/or financial assistance/support requires from the defendant who happens to be his father, is unaltered.

30.3 It is also declared that the defendant - father is permanently giving up his right to get custody of “Vidhan” in favor of the plaintiff – mother.

30.4 The present appeal is accordingly allowed to the aforesaid extent with no orders as to costs.

30.5 Decree of divorce be drawn up accordingly as aforesaid.

30.6 Registry is directed to cirulate the copy of this judgment to all the Family Courts in the State of Gujarat.

(BIREN VAISHNAV, J)

(MAULIK J.SHELAT,J)

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