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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 09.12.2021
Pronounced on: 18.02.2022

\+ **MAT.APP.(F.C.) 213/2018 & CM APPL. 3289/2021**

VINAY KHURANA .....Appellant
Through: Appellant-in-person
versus

SHWETA KHURANA .....Respondent
Through: Mr. Naman Joshi, Mr. Guneet Sidhu, Adv. with respondent-in-person

\+ **MAT.APP.(F.C.) 231/2018**

SHWETA KHURANA .....Appellant
Through: Mr. Naman Joshi, Advocate
versus

VINAY KHURANA .....Respondent
Through: Appellant-in-person

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T O F T H E C O U R T

1. MAT. APP. (F.C.) 213/2018 has been filed by the appellant-husband Vinay Khurana (hereinafter referred to as "appellant") challenging the judgment dated 02.07.2018 passed by the Family Court, Shahdara District, wherein the Family Court has granted a relief of Judicial Separation, instead of the relief of divorce–as had been sought by the appellant.

2. On the other hand, MAT. APP. (F.C.) 231/2018 has been filed by the respondent-wife – Shweta Khurana (hereinafter referred to as "respondent") challenging the findings returned by the Family Court, Shahdara District against the respondent in the said judgment.

3. The admitted facts are as under:

   (a) The marriage of the parties took place on 14.04.2006 according to the Hindu rites and ceremonies. One girl child was born out of the wedlock on 23.09.2007, who is in the custody of the respondent.

   (b) The appellant filed the petition for divorce on 13.07.2012, on the ground of cruelty under section 13(1)(ia) of the Hindu Marriage Act.

   (c) The parties have been staying separately since 29.05.2009. There are conflicting statements placed before us as to the reasons why the appellant and the respondent have been staying separately since 29.05.2009. The appellant has levelled various allegations against the respondent, for ignoring him and his family members; giving importance to her own family while avoiding to perform her matrimonial obligations; excessively talking on the phone with her family members at odd hours of the night; showing a non-cooperative and disrespectful attitude towards the appellant and his parents. The appellant further alleged that the respondent constantly threatened him and his family members to desert them, and implicate them in false cases, amongst others.

(d) The respondent in her written statement, as well as her appeal, has denied all the allegations and rather blamed the appellant for committing physical and mental cruelty on the respondent for bringing less dowry. The respondent has stated that it was the appellant, who had thrown her out of the matrimonial house on 29.05.2009, after giving her beatings, and thereafter, he never made any efforts to bring her back. The respondent has stated that she has always been ready and willing to go back to the house of the appellant, and it is the appellant who is spoiling their matrimonial life.

(e) On 19.08.13 the Family Court granted Rs.10,000/- per month to the respondent and the minor child as an interim maintenance.

4. On 03.08.2013, the Family Court framed the following issues:

(a) Whether the respondent has, after solemnization of marriage, treated the petitioner with cruelty? OPP;
(b) Relief.

5. In order to prove the case, the appellant has examined himself as PW-2, and his father Shri Om Prakash Khurana as PW-5. The appellant also examined Shri Khairati Lal, (Uncle of the appellant) as PW-1, Shri Rakesh Bawa, (Brother-in-law of the appellant) as PW-3, Shri Anurag Pahuja, (close friend of the appellant) as PW-4, and Smt. Mamta Mehra, (close friend of the appellant) as PW-6 – who had contacted respondent and had gone to her house on different occasions to make her understand and bring her back to the matrimonial home. On the other hand, the respondent examined herself as RW-1 and her brother Lucky, as RW-2.

6. After discussing the entire evidence on record, the Family Court in the impugned judgment has held as under:

> *"However, from the evidence led it is clear that that it was the respondent who left the matrimonial home without any sufficient reasons. In fact, she wanted to live with the petitioner in a separate house but not in the joint family. She always wanted the petitioner to separate himself from his parents and after taking share in the joint family, purchase separate property. Petitioner always wanted to live with the respondent but it was also not possible for him to ignore his parents. Petitioner had made various efforts for the compromise and to bring her back the respondent to this house but the adamant attitude of family member of the respondent created hurdles. Respondent was under full control and emotional pressure of her father and brother who were the real instrumental in damaging the matrimonial relations of the parties and they did not want to get the matter settled for their own ulterior motive so that respondent remain in their house and take care of them and other younger unmarried sisters.* ***The act and conduct of the respondent amounted to desertion of the petitioner as well as cruelty upon him. However, I am of the view that if the respondent comes out of pressure of her father and brother, then the parties still can live together because petitioner always wanted that respondent should come back to him and even lastly in the court on 2-4-2018 he agreed to take her from the court room itself.*** *I still feel that good sense can prevail over the respondent in future and she can remove pressure of her brother and father from her mind and can join the company of the petitioner at least for the welfare and sake of the child without insisting to live in a separate house after going against the wishes of her brother and father. Even if the act, conduct and behaviour of the respondent amounts to desertion and cruelty committed upon the petitioner but she was doing the same under pressure of her family members against whom she cannot revolt and apparently she has lost her own thinking power to determine what is wrong and what is right. Respondent is in fact doing what is asked by her family*

members without applying her own mind. Counsel for the respondent rightly relied upon the case law ***Dastane vs. Dastane AIR 1975 SC 1534*** *to show that* ***in the present situation it is not a fit case where divorce should not be granted but instead relief of judicial separation can be given. This issue is accordingly decided against the respondent and in favour of the petitioner****".* (emphasis supplied)

7. While holding that the respondent-wife was guilty of matrimonial misconduct, the Family Court was of the opinion that respondent, in fact, was doing what was asked by her family members, without applying her independent mind. The Family Court, thus, after relying on ***Dastane*** *(supra)***,** came to the conclusion that while the grounds of cruelty and desertion were attracted and fully proved, it was not a fit case where divorce should be granted and, instead, granted judicial separation. In addition, the respondent was advised to think again, independently, without any pressure of her family members, in order to settle and re-establish her matrimonial home.

8. The appellant has assailed this judgment, primarily, on the following grounds:

   (a) The Family Court has found both desertion and cruelty in favour of the appellant and against the respondent, but has committed an illegality by not granting the decree of divorce in favour of the appellant, when that was the relief sought in the petition. The appellant had the option to choose one, or the other relief i.e. judicial separation, or divorce. Since the appellant had chosen the relief of divorce, the same could not have been substituted by the Family Court, on its own, as they

are both qualitatively different reliefs, having completely different ramifications in law and different consequences for the future lives of the parties.

(b) The parties have been living separately since 2009 – for a period of more than 12 years now, and hence the bond and the golden thread of matrimony between them has been severely destroyed beyond repair. In these circumstances, the decree of divorce should have been passed by the Family Court.

(c) The marriage between the parties is dead emotionally and practically, and there is no chance of the parties reuniting and cohabitating together, and thus the continuance of such a marriage would, in itself, amount to cruelty to both the parties.

9. On the other hand, the learned counsel for the respondent has argued that the normal friction and discord of a matrimonial relationship has been construed as cruelty by the Family Court. None of the instances mentioned in the divorce petition, and proved on record, can be said to be instances constitute cruelty. At best, they are instances of normal wear and tear and disharmony in a matrimonial relationship. Learned counsel for the respondent has further submitted that the audio recording of the conversation between the appellant and the respondent, without the consent of respondent, is an illegality, for which he relied upon ***Rayala M. Bhuvaneswari v. Nagaphanende Rayala AIR 2008 AP 98.*** He submitted that the appellant interacted with the respondent with the premeditated intention of divorce, and for the said purpose made recordings of the conversation between him and the respondent, post-separation of the parties. Learned counsel

for the respondent has further submitted that the conversations between the appellant and the respondent could not be relied upon in the absence of an affidavit under Section 65B of the Indian Evidence Act, 1872. Lastly, learned counsel for the respondent has submitted that all the witnesses, namely, Shri Khairati Lal/PW-1, Shri Rakesh Bawa/PW-3, Shri Anurag Pahuja/PW-4, Smt. Mamta Mehra/PW-6 & Shri Om Prakash/PW-5 are not credible, and that their testimony cannot be relied upon.

10. We have heard the learned counsel for the parties and have perused the findings of the Family Court.

11. We may first consider the issue whether finding of cruelty returned by the Family Court, against the respondent-wife calls for interference.

12. In MAT APP (F.C) 231/2018, and in the Written Statement in HMA 165/2018 before the Family Court – as well as the evidence by way of affidavit, the respondent has stated that the instances cited by the appellant can be said to be normal wear and tear of the marriage, and do not amount to cruelty. What is relevant, for our adjudication is that the respondent has categorically stated in her affidavit of evidence that "*she was subjected to physical and mental cruelty on account of bringing less dowry".* Her brother RW-2 has also in his affidavit by way of evidence stated that "*respondent was turned out of her matrimonial home by the petitioner and his family members on 29.05.2009 due to the non-fulfillment of dowry demands*". However, the affidavits of evidence of both respondent and her brother are totally silent on the date, time, and place of demand of dowry, or what were the demands. The respondent and her family members have

never lodged any complaint to the police, or to any authority in this regard. Thus, her version that she was thrown out of her matrimonial home, or that the members of the appellant's family tried to take her life – in respect whereof there was no complaint or evidence, is difficult for us to accept. In fact, RW-2 has stated that the appellant and his family members had given beatings to the respondent several times for the lack of dowry. Pertinently, respondent No.2, in his cross-examination has stated that no such demand was made in his presence, nor any demand was fulfilled by his family, and no beatings of the respondent–by the appellant or his family members, took place in his presence.

13. At one stage, the respondent put suggestions to the witnesses of the appellant, trying to show that the appellant had demanded a car as dowry, but since no such averment was made in the Written Statement, the suggestion, itself, was irrelevant. Even otherwise, the respondent did not disclose any articles demanded, which were fulfilled, or which were left unfulfilled. Hence, the allegations of demand of dowry by the appellant or his family members do not inspire any confidence, and remain unsubstantiated.

14. The Supreme Court in ***Mangayakarasi v. M. Yuvaraj*** *(2020) 3 SCC 786* has held as follows:

> ***"14.*** *It cannot be in doubt that in an appropriate case the unsubstantiated allegation of dowry demand or such other allegation has been made and the husband and his family members are exposed to criminal litigation and ultimately if it is found that such allegation is unwarranted and without basis and if that act of the wife itself forms the basis for the husband to allege that mental cruelty has been inflicted on him,*

certainly, in such circumstance, if a petition for dissolution of marriage is filed on that ground and evidence is tendered before the original court to allege mental cruelty it could well be appreciated for the purpose of dissolving the marriage on that ground…."

15. In ***Samar Ghosh v. Jaya Ghosh*** (2007) 4 SCC 511, the Supreme Court has held as follows:

"No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(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.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant

danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to 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) When there has been a long period of continuous separation, it may be fairly 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 the marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties, it may lead to mental cruelty"

16. Learned counsel for the respondent also argued that there are no specific instances of cruelty, and that the instances relied upon by the appellant, are instances of "*friction*". The term *'mental cruelty'* is a broad term, and there can be no particular set parameter to determine it. As held in *Samar Ghosh v Jaya Ghosh (supra),* there is no straitjacket formula for determining cruelty. Thus, the conduct of the parties – as established, would need examination to arrive at the conclusion, whether the same tantamount to cruelty.

17. On the aspect of cruelty, the Family Court has returned the following findings:

"However, from the evidence led it is clear that that it was the respondent who left the matrimonial home without any sufficient reasons, In fact, she wanted to live with the petitioner in a separate house but not in the joint family. She always wanted the petitioner to separate himself from his parents and after taking share in the joint family, purchase separate property. Petitioner always wanted to live with the respondent, but it was also not possible for him to ignore his parents. Petitioner had made various efforts for the compromise and to bring back the respondent to his house but the adamant attitude of family members of the respondent created hurdles Respondent was under full control and emotional pressure of her father and brother who were the real instrumental in damaging the matrimonial relations of the parties and they did not want to get the matter settled for their own ulterior motive so that respondent remain in their house and take care of them

and other younger unmarried sisters. The act and conduct of the respondent amounted to desertion of the petitioner as well as cruelty upon him."

18. As regards the respondent leaving the matrimonial home, the Family Court has observed that :

"Not only this court but also another court of MM tried to get the matter compromised between the parties on various occasions but most of the times, it was the respondent who showed disinterest in going back to matrimonial home. Order sheet dated 15-9-2015 of this case shows that once it was agreed upon between the parties that respondent shall search for a separate house and inform the petitioner about it and thereafter after finalization of the said house, parties will live together. However, no steps were taken by the respondent in this regard. Again order sheet dated 5-3-2018 point out that respondent was not ready to talk for any settlement and wanted to contest the case. One maintenance case between the parties was once pending in Mahila Court and order Ex. RWl/P-2 dated i4-3-2012 shows that it was the respondent who did not wish to go to the mediation centre for settlement.

The action of the petitioner to raise query from the respondent why she had gone to her parent's house and coming late at about 10 p.m. cannot be held as improper especially when she had gone there one day before also. RW-2 in his cross examination denied giving of beatings by the petitioner to respondent in his presence which is contrary to the allegations made in his affidavit, It is not explained how and in which manner beatings were given and to what an extent. Whether the physical assault was of such nature that respondent was compelled to leave the house is also not explained. There is no medical to show that any physical assault was committed. Hence, the manner of leaving the, matrimonial house by the respondent as alleged by her cannot be accepted as correct. There is no ground to disbelieve the petitioner that she left the house her own merely on the ground of making query about the

reasons of going to her parent's house. The action on the part of the respondent amounts to desertion.

There is no hesitation to say that father and brother of the respondent were the main instrumental in damaging the relationship of the petitioner and respondent. They for their own convenience and benefit were unnecessary stopping the respondent to go back to her matrimonial home and were pressurizing or influencing her to desert the petitioner. Apparently, respondent fully understood the tricks of her family members as per admitted telephonic conversation taken place with the petitioner but due to their influence or emotional pressure was hesitating to join the company of the petitioner. Her conduct shown even during the pending proceedings not to live with the petitioner or even to settle the matter also point out that she was intentionally deserting the petitioner. Even respondent admittedly had not sent any reply to the legal notice Ex. PW2/5 sent by petitioner or anything in writing to show her willingness to join matrimonial house……."

19. It is also an admitted case that the appellant and the respondent separated on 29.05.2009. It is further admitted, that the father of the respondent used to be abusive towards the appellant, as a result of which appellant was constrained to file a civil suit against the father of the respondent. The matter was compromised on 13.09.2011, and the father of the respondent had made a statement as under:

"*I shall not interfere in the matrimonial life of my daughter and I further undertake that I shall not hurl abuses to the plaintiff and I shall not make any telephonic call to the Plaintiff (Petitioner herein) and the Plaintiff should also not visit my house without my permission and shall also not make a telephonic call to me."*

20. As per this statement, it was the father of the respondent, who forbade the appellant from coming to his house or making any calls. The onus, therefore, shifted on the respondent to show her intent, and the effort

that she made to re-join company of the appellant. There is no evidence on record to show any effort made by the respondent to re-join the company of the appellant. After 29.05.2009, no petition under Section 9 of the Hindu Marriage Act, 1955 –for Restitution of Conjugal Rights, was filed by the respondent. In fact, the appellant has led the evidence of Shri Khairati Lal/PW-1, Shri Rakesh Bawa/PW-3, Shri Anurag Pahuja/PW-4, Shrimati Mamta Mehra/PW-6 & Shri Om Prakash/PW-5, who all gave evidence to the effect that they have tried to get the respondent back to her matrimonial home and, despite their best efforts, they could not succeed.

21. Shri Khairati Lal/PW-1, by way of his evidence affidavit stated as under:

> *"4. That deponent says that the brother of the respondent namely Lucky Malhotra came and flatly refused to send the respondent with the deponent/at her matrimonial home. Then on persuasion of the deponent, Shweta herself came there and the deponent with folded hands requested her to come back at her matrimonial home and asked her if any type of difficulty, she is facing in coming back, then the respondent bluntly refused-to come back to her matrimonial home."*

22. Shri Rakesh Bawa/PW-3, by way of his evidence affidavit also stated:

> "*2. That deponent says that or. 29/05/2005, the deponent had talk with the father of the respondent and requested him not to ruin the matrimonial life of the petitioner and the respondent, but the father of the respondent didn't talk in good manner, then in the evening he went at his home and again cleared about the position of both the parties. The deponent asked Shweta/respondent that whether he has any problem from the petitioner, but she replied that he has no problem from the petitioner rather, he praised about the behaviour of the petitioner, but the father of the respondent*

remarked that "MAIN APNI LADKI ,K0 GHAR PAR RAKHONGA AUR YE MERE GHAR KA KAAM KAREGI, MAIN APNI PROPERTY ISKE NAAM KAR DOONGA AUR YE AARAM SE RAHEGI, BUT I WILL SEND HER BACK TO HER MATRIMONIAL HOME ONLY IF VINAY WILL GIVE HIS SHARE IN PROPERTY IN THE HANDS OF SHWETA" and started abusing the deponent in filthy language and asserted that it will make no difference, if his daughter remains with him for the years together.

6. Father of Shweta had never met Vinay in my presence. It is wrong to suggest that even today Shweta is ready to live with Vinay. (Vol. The kind of language used by her brother and father on 29.06.2009 showed that they were not interested to sent her to her matrimonial home;). It is wrong to suggest that after 29.09.2009 I had called her father asking him to settle the dispute by divorcing both the parties after negotiating settlement amount and during negotiations her brother. Lucky will not sit. It is wrong to suggest that her father had told me that I should try patch up both the spouses and persuade them to live together. (Vol. Her father had told me to stay out of all this)."

23. Shri Anurag Pahuja/PW-4, also deposed:

"3. That in march 2010 deponent persuaded to the respondent to rejoined her matrimonial home then the respondent replied that petitioner/Vinay is a very good person and his no problem from Vinay but till his parent in laws did not full, fill her condition she will not rejoined her matrimonial home.

4. That deponent put his all efforts to convince respondent that she should not spoil her matrimonial home, but she flatly refused to come back -rather, threatened to take legal action against the petitioner and his parents and asked the deponent that he is 10th person from petitioner's side who has trying to conveyance her to come back at her matrimonial home."

24. Smt. Mamta Mehra/PW-6 also deposed :

> *"I came to know about the dispute between the (parties first time on 29.05.2009. I along with my husband had gone to the house of the respondent after 5-6 days of 29.05.2009 to "find out the reasons of separation. (Again said : Had gone to the house of the petitioner and not of the respondent). We had not gone to the house of the respondent as I had called her 3-4 times on phone but she disconnected die phone every time."*

25. Shri Om Prakash/PW-5, father of the appellant also has stated as under:

> *"10. That on 5.06.2009 deponent along with Sh. Khairati Lal Batra and his wife Neelam went to the parental home of the respondent to bring her back to the matrimonial home, but the respondent made a call to her father and informed him that the deponent along with his relatives have reached their home and she asked-her father to come immediately. After receiving the call, the respondent's father; went to the residence of. Sh. Rakesh Bawa and then, wife of Mr. Bawa – Lalita Baw telephonically informed the deponent that father of respondent has come to their home and deponent should leave the parental home of respondent with their relatives. Mrs. Lalita Bawa further informed that if they won't leave the parental home of the respondent, they will face the consequences as all of them have visited the parental house of respondent without any intimation. Then in-front of deponent Mr. Khairati Lal persuaded the respondent to come back at her matrimonial home but she bluntly refused for the same and her brother Lucky Malhotra said that he will get his sister remarried but will not send her back to her matrimonial home.*
> *He misbehaved with the deponent and other people along with him."*

26. All the appellant's witnesses made efforts to repair the matrimonial bond of the parties. They endeavoured to help the parties to live together and solve their differences, and there is no reason to

disbelieve their statements, or assume them to be untrustworthy. They are not "interested witnesses", whose testimony should be discarded. They have been cross-examined, and nothing has come out from their cross-examination, to throw any doubt about their credibility. Their evidence is also corroborated by documentary evidence viz. the statement made by the respondent's own father in the appellant's suit, on 13.09.2011, and the lack of intent to resume cohabitation exhibited by the respondent.

27. The respondent's attitude, reluctance and obstinacy to join the appellant in the matrimonial home, despite his, his relatives and friends' effort to bring her back - also amount to cruelty. The respondent-wife seemingly left her matrimonial home for no reason; levelled various false and serious allegations against the appellant and her in-laws, and; refused to cohabitate or compromise with appellant. Such indifference on the part of the respondent would have caused substantial anguish and agony to the appellant. The appellant did not get married to the respondent to lead a bachelor's life. He got married in the hope, and with the expectation, of leading a happy and fulfilling married life. The respondent, by not joining him, has denied him conjugal satisfaction. He has been denied the companionship that he would have been legitimately and rightfully hoping to experience with the respondent.

28. Further, despite the decree of judicial separation, the respondent-wife never even attempted to re-join the company of her husband, even temporarily. The respondent-wife - in the impugned judgment, was asked to give her marriage another chance, and think independently of

her family members. However, there has been no positive move on the part of the respondent.

29. The appellant husband did all that he could, to cohabitate with his wife. However, the respondent-wife refused to cohabitate with him, and made false allegations of dowry demand without any proof whatsoever, and left the matrimonial home without any reason and refused to return after that. Thus, it is evident to us, that she perpetrated mental cruelty upon the appellant, and that nothing remains in this marriage.

30. We may now turn to the legality of the relief granted by the Family Court of judicial separation to the appellant, instead of a decree of divorce.

31. Under the scheme of the Hindu Marriage Act, 1955 the ambit and the scope of Judicial Separation and Divorce is qualitatively different. Judicial separation is a completely different relief that the aggrieved spouse may seek against the other, under Section 10 of the Hindu Marriage Act, which reads as under:

> *"10. Judicial separation.—[(1) Either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.]*
>
> *(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements*

made in such petition, rescind the decree if it considers it just and reasonable to do so." (emphasis supplied)

32. Thus, the aggrieved spouse may, instead of seeking the relief of divorce, seek a decree of judicial separation on the same grounds on which he/she may seek divorce. The law gives an option to the aggrieved spouse/petitioner to seek either of the two reliefs. While judicial separation does not end the matrimonial relationship and the marriage is preserved – after a declaration is made establishing the matrimonial misconduct by the other spouse, and it entitles the aggrieved spouse/petitioner to deny conjugal relationships to the other spouse/respondent, a decree of Divorce puts an end to the jural relationship of marriage between the parties, thus liberating them from their marital bond. Whereas a decree of judicial separation can be rescinded by the same court; a decree of divorce can be reversed only by a judicial order: either in review, or in appeal. If it is passed *ex parte*, it may be recalled on an application being made for that purpose.

33. Thus, when a decree of judicial separation is passed, the aggrieved spouse is no longer bound to cohabitate with the other, even though, the matrimonial bond continues to subsist. The parties cannot remarry during the period of judicial separation, since the status of marriage subsists. On the other hand, the parties cease to remain husband and wife, once a decree of divorce is granted, and the parties are free to remarry once the statutory period of appeal expires, and there is no restraint order passed by a competent court against remarriage.

34. Judicial separation and divorce are completely different reliefs– granted on the same grounds–as contained in Section 13 (1), and in the case of a wife, also on any of the grounds specified in sub-Section (2) of Section 13 of the Hindu Marriage Act,1955.

35. The Supreme Court in ***Hirachand Srinivas Managaonkar v Sunanda*** (2001) 4 SCC 125 explained the concept of judicial separation as follows :

> *"16. In this connection another question that arises for consideration is the meaning and import of section 10(2) of the Act in which it is laid down that where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so. The question is whether applying this statutory provision to the case in hand can it be said that the appellant was relieved of the duty to cohabit with the respondent since the decree for judicial separation has been passed on the application filed by the latter. On a fair reading of the sub-section(2) it is clear that the provision applies to the petitioner on whose application the decree for judicial separation has been passed. Even assuming that the provision extends to both petitioner as well as the respondent it does not vest any absolute right in the petitioner or the respondent not to make any attempt for cohabitation with the other party after the decree for judicial separation has been passed.* ***As the provision clearly provides the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the Court to rescind the decree if it considers it just and reasonable to do so on an application by either party. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to***

subsist. It affords an opportunity to the spouse for reconciliation and re-adjustment. The decree may fall by a conciliation of the parties in which case the rights of respective parties which float from the marriage and were suspended are restored. *Therefore, the impression that section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition, it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship."* (emphasis supplied)

36. The Family Court in the impugned judgment observed:

"However, I am of the view that if the respondent comes out of pressure of her father and brother, then the parties still can live together because petitioner always wanted that respondent should come back to him and even lastly in the court on 2-4-2018 he agreed to take her from the court room itself. I still feel that good sense can prevail over the respondent in future and she can remove pressure of her brother and father from her mind and can join the company of the petitioner, at least for the welfare and sake of the child without insisting to live in a separate house after going against the wishes of her brother and father. Even if the act, conduct and behaviour of the respondent amounts to desertion and cruelty committed upon the petitioner but she was doing the same under pressure of her family members against whom she cannot revolt……..

(8) ISSUE NO.2 (RELIEF) :- In view of the above discussion, ***though the case is fully proved by the petitioner and the divorce grounds of cruelty and desertion are attracted but in the present facts and circumstances, while allowing this petition, I am granting the petitioner relief of judicial separation instead of divorce*** *and giving advice to the respondent to think again independently without feeling any*

pressure of her family members in order to settle and re-establish her matrimonial home." (emphasis supplied)

37. The approach of the Family Court in ordering judicial separation, instead of Divorce is faulty, to our mind. What the Family Court failed to appreciate is that, firstly, it is for the petitioner- who approaches the Family Court, to decide whether he/she wishes to obtain the relief of divorce, or of judicial separation. It is not for the Court to decide to substitute the relief sought by the petitioner - from divorce to judicial separation, or vice versa. If the petitioner is able to establish the ground to seek one or the other of these reliefs, the Family Court cannot decide for the petitioner, that it is better for him/her, or the other/respondent spouse, to accept the relief that he/ she has not sought in his/ her petition. The two reliefs of Divorce or Judicial Separation are not–in that sense, larger or lesser reliefs, respectively. To test the approach of the Family Court, one may ask:- if the Family Court was of the view that the respondent-wife may come out of the influence of her family, could the Family Court have granted a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, even though the same was never prayed for by the appellant? In our view, the Family Court could not have done it, for the simple reason, that the petitioner before it had not sought that relief. The powers of the Family Court to change the nature of the relief sought is absent. The Family Court cannot be heard to tell the petitioner before it, what is *"good*" for him/her. It may render its advice to the parties when the matter is pending before it, but when it comes to adjudication, the Family Court is bound to bear in mind the

relief sought by the petitioner. If the petitioner has established the grounds for seeking the relief as sought, he/she should be granted the same. If not, he/she should be denied the relief sought. Conversely, the Family Court cannot grant a relief, the statutory grounds for seeking which, are not established, merely because it feels that that would be "good" for the parties.

38. Now, we may look at the relief granted in the present case on the appellant's Divorce Petition. Instead of granting a decree of Divorce– even though the ground therefor was held established, the appellant was granted Judicial Separation, in the hope that the respondent will rejoin the appellant's company. The grant of the said relief is a contradiction in itself. On the one hand, the Family Court expects the respondent to come out of the influence of her brother and father, and resume cohabitation with the appellant, but, on the other hand, fails to appreciate that the respondent cannot seek to resume cohabitation with the appellant, when the decree of Judicial Separation is operating against her, unless the appellant consents. So far as the appellant is concerned, he had expressed his intention to end the relationship, not only by filing the Divorce Petition, but also by filing the present appeal. The Family Court was swayed by the appellant's statement that he was willing to resume cohabitation with the respondent when the matter was being heard by the Family Court. But the respondent did not respond positively, and the appellant never prayed to the Family Court to amend his prayer to seek a decree of Judicial Separation. The Family Court should have realised, that if the respondent has been unable to come out of the influence of her family

members for the last 13 years, there is very little likelihood of her doing so in the near future. Moreover, the appellant could not have been asked to keep waiting, and to put his life on hold, in the hope that the respondent would change her ways – after 13 long years, and show her willingness to resume cohabitation with the appellant. The judgment of the Family Court is seemingly based more on optimism and hope, rather than the actual factual matrix of the case.

39. The judgment of ***Dastane*** *(supra)* relied upon by the Family Court is clearly distinguishable, as in ***Dastane*** *(supra)* the petition was filed seeking annulment of marriage; alternatively for divorce, or, for Judicial Separation. The annulment was sought on the ground of fraud, the divorce was sought on the ground of unsoundness of mind, and judicial separation on the basis of cruelty. On the other hand, the appellant had only sought to relief of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955.

40. As regards the ground raised by the appellant that the Family Court has no power to modify an issue on its own, we find that the said argument is misconceived. There were two issues framed, as enumerated above. On the first issue, there is a clear finding of the respondent being guilty of cruelty. However, on the 2nd issue, i.e. the relief to be granted, the Family Court has decided to grant Judicial Separation, instead of divorce. We are of the view for the reasons stated above, and in facts of present case, the relief of Divorce could not have been denied to the appellant, once the ground of cruelty under Section 13 (1) (ia) was held to have been established.

41. We must also take note of the fact that the parties have been living separately for over 12 years now, and the marriage has completely broken down.

42. The Supreme Court in ***Naveen Kohli v. Neelu Kohli*** (2006) 4 SCC 558 has observed :

> *"72. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.*
>
> *73. A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented with concrete instances of human behaviour as they bring the institution of marriage into disrepute.*
>
> *74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of the fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period continuous separation, it may be fairly surmised 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.*
>
> *87. The High Court ought to have visualised that preservation of such a marriage is totally unworkable which has ceased to*

be effective and would be a greater source of misery for the parties.

88. The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life."

43. This court has held in the judgment MAT APP (F.C) 75/2020 titled '***Rahul Kesarwani v. Sunita Bhuyan'*** that :

"24. It has also been observed by the Supreme Court and other Courts that no straitjacket formula can be applied to cases of cruelty in matrimonial dispute. In Samar Ghosh (supra) it was observed that there can be no fixed parameter in determining cruelty. In most of the cases, cruelty is inflicted by one party and felt by another in a variety of circumstances. What may constitute cruelty in one matter may not constitute cruelty in another. Each case and relationship must be viewed separately and its own totality.

25. The matrimonial disputes between a husband and a wife cannot be expected to, and are incapable of following strict parameters of evidence. In cases where there are allegations of cruelty – specially mental cruelty such as Dowry Demand, violent abusive behaviour, starving the spouse of affection, resources and emotional support, there can be no set parameters that the court can follow. Matrimonial issues are generally confined to the bedroom and the matrimonial home, away from public eye and gaze. A lot of times these cases do not have any independent or impartial witnesses. The doctrine of preponderance of probabilities has to be applied while evaluating the evidence, and the court must decide the matter based on the overall picture that emerges from the undisputed and uncontroverted facts and

circumstances, and those established by documentary or other evidence.

26. In the case of Sheenu Mahendru v. Sangeeta, (2019) SCC Online Utt 376 the Court observed:

"The burden lies upon the respondent to establish the charge of cruelty. The question is as to what is the standard of proof to be applied in order to judge whether the burden has been discharged or not. The rule which governs matrimonial cases is, that a fact could be established, if it is proved by a preponderance of probabilities. Proof beyond a reasonable doubt is a proof of a higher standard, which generally governs criminal trials or trials involving inquiry into issues of a quasi- criminal nature. Such proof beyond a reasonable doubt could not be imported in matters of pure civil nature especially matrimonial matters."

44. In the present case, the parties lived together only for 3 years, and have been living separately for more than 12 years now. The period of separation has left the relationship between the parties beyond repair. The adamance of the respondent to refuse to cohabitate with the appellant over the last 12 years shows us that there is nothing remaining in this marriage, for either party.

45. On a proper consideration of the facts and circumstances of this case, we are thus of the view that the Family Court erred in not granting the decree of divorce to the appellant and, instead, granting a decree of Judicial Separation to the appellant. We, accordingly, set aside the impugned judgement passed by the Family Court in so far as it grants a decree of Judicial Separation to the appellant-husband. Further, we find the respondent guilty of cruelty under Section 13 (1)(ia) of the Hindu Marriage Act, 1955.

46. In this view of this matter, we allow the appeal of the appellant-husband i.e. MAT. APP. (F.C.) 213/2018 and grant a decree of divorce between the appellant and the respondent. Their marriage stands dissolved forthwith. The appeal preferred by the respondent-wife i.e. MAT. APP. (F.C.) 231/2018 is dismissed.

47. As regards the alimony claim of the respondent, and maintenance for the 14-year old daughter, the respondent is free to avail of the legal remedies, and nothing said hereinabove shall be construed as an expression on the merits of such a claim. Parties are left to bear their own costs.

VIPIN SANGHI, J **JASMEET SINGH, J**

FEBRUARY 18, 2022
Sahil Sharma