IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

JUSTICE SUJOY PAUL

&

JUSTICE AMAR NATH (KESHARWANI)

FIRST APPEAL No. 1124 OF 2019

Between :-

ABHISHEK PARASHAR AGED ABOUT 38 YEARS S/O SHRI PRAMOD KUMAR PARASHAR R/O – 19, E-8 BASANT KUNJ ARERA COLONY, BHOPAL

….APPELLANT

(SHRI ASHISH SHROTI WITH SHRI PIYUSH TIWARI -ADVOCATES FOR THE APPELLANT - HUSBAND)

AND

SMT. NEHA PARASHAR AGED ABOUT 35 YEARS, W/O SHRI ABHISHEK PARASHAR, OCCUPATION – HOUSE WIFE, R/O HOUSE NO. 65 MANDAKNI COLONY, KOLAR ROAD, BHOPAL (M.P.),
R/O H.NO. 13 ROHITA GARDEN TATA NAGAR KODIGE HALLI HIBBAL BENGALORE, 560092

…..RESPONDENT

(SHRI PUSHPENDRA DUBEY – ADVOCATE FOR THE RESPONDENT/WIFE)

FIRST APPEAL No.1125 OF 2019

Between :-

SMT. NEHA PARASHAR AGED ABOUT 35 YEARS, W/O SHRI ABHISHEK PARASHAR, OCCUPATION – HOUSE

WIFE, R/O HOUSE NO. 65 MANDAKNI COLONY, KOLAR ROAD, BHOPAL (M.P.), R/O H.NO. 13 ROHITA GARDEN TATA NAGAR KODIGE HALLI HIBBAL BENGALORE, 560092

…APPELLANT

(SHRI PUSHPENDRA DUBEY – ADVOCATE FOR THE APPELLANT - WIFE)

AND

ABHISHEK PARASHAR AGED ABOUT 38 YEARS S/O SHRI PRAMOD KUMAR PARASHAR R/O – 19, E-8 BASANT KUNJ ARERA COLONY, BHOPAL

…..RESPONDENT

(SHRI ASHISH SHROTI WITH SHRI PIYUSH TIWARI -ADVOCATES FOR THE RESPONDENT - HUSBAND)

Reserved on	:	11/01/2023
Pronounced on	:	17/01/2023

These First Appeals having been heard and reserved for judgment, coming on for pronouncement this day, ***Justice Sujoy Paul*** *pronounced the following :*

J U D G M E N T

The common judgment dated 27th March, 2019 passed in RCS No. 1289A/2015 and RCS No. 516A / 2017 is subject matter of challenge in these appeals. RCS No. 1289A/2015 was an application filed under Section 13 of Hindu Marriage Act, 1955 (H.M. Act) by the husband seeking decree of divorce on various grounds whereas other RCS was an application filed under Section 9 of H.M. Act by the wife for restitution of conjugal rights. The Court below by the impugned judgment dated 27th March, 2019 decided both the matters and while

rejecting the RCS No. 516A /2017 passed judgment and decree in RCS No. 1289A/2015 and granted a decree of judicial separation in favour of the husband..

2. The parties are at logger heads on the validity of this common judgment dated 27th March, 2019. The grievance of appellant– husband is that as per the findings given by the Court below, a clear case was made out by the husband for grant of a decree of divorce. The Court below has committed an error in not granting the decree of Divorce and instead granted a decree of judicial separation.

3. The grievance of wife is that the finding given by the Court below shows that there was a possibility of reunion between the parties. The husband continued to help the wife in various aspects and in that event, when possibility of reunion was alive, the Court was not justified in rejecting the application for restitution of conjugal rights filed by the wife.

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4. This appeal is preferred by husband feeling aggrieved by the part of impugned judgment whereby instead of passing a decree of divorce, the Court below granted a decree of judicial separation.

5. Shri Ashish Shroti, learned counsel for the appellant submits that he is not aggrieved by the finding in the impugned judgment to the extent it relates to the ground of 'desertion'. By taking this Court to

various paragraphs of the impugned judgment, it is submitted that almost all the grounds relating to 'cruelty' were accepted by the Court below in the impugned judgment. In that event, it was not open to the Court below to pass a decree of judicial separation. The Court below in no uncertain terms gave a finding regarding 'mental cruelty' on the part of the wife. The reliance is placed on **K. Srinivas Rao Vs. D.A. Deepa (2013) 5 SCC 226** and **Malathi Ravi, M.D. Vs. B.V. Ravi, M.D.(2014) 7 SCC 640.** Much emphasis is placed on para-25 of this judgment of **Malathi Ravi (Supra)**. It is contended that this Court can take into account the subsequent events. Shri Shroti, learned counsel for the appellant has taken pains to submit that admittedly the parties are not living together with effect from August, 2014. This fact itself is sufficient to establish that the marriage has not worked. Subsequent events can also be taken into account by this Court is another limb of submission of Shri Shroti. He placed reliance on the bonafides of the husband whereby he has helped the wife by giving Rs.50,000/- per month, taking care of travel of mother-in-law of the husband and also provided financial assistance to the wife for obtaining permanent residential visa for Australia. In this backdrop, the behaviour of wife is clearly egocentric and for this reason, no useful purpose would be served in affirming the decree of judicial separation. All efforts between the parties for reunion failed which can be seen from the mediation report dated 12.11.2022 which shows that mediation failed despite the reference made by this Court by order dated 28.10.2022.

6. Thus, by taking this Court to various paragraphs of impugned judgment, Shri Ashish Shroti, learned counsel for the husband urged that the impugned judgment may be interfered with to the extent Court below passed decree of judicial separation and it may be substituted by the decree of divorce. Shri Shroti initially argued that neither party prayed for decree of judicial separation and therefore, it was not proper for the Court below to pass such decree in a suit claiming decree of divorce. However, in view of Section 13A of H.M. Act, he abandoned this argument.

FA. No.1125 / 2019

7. Sounding a *contra* note, Shri Pushpendra Dubey, learned counsel for the wife placed reliance on Section 13 (1A) (i) of H.M. Act and took an objection that the appropriate remedy for the husband is to present a petition for dissolution of marriage because as per the husband, there has been no resumption of cohabitation between the parties after passing of decree for judicial separation. Thus, the FA No.1124/2019 is not maintainable.

8. The next contention of Shri Dubey, learned counsel for the wife is based on the statements of various witnesses. He drew attention of this Court on the statement of Ms. Prabha Parashar (DW-2) wherein she deposed that the husband left the wife in August, 2014 because wife told him that it is for him to reside with her or to leave her. It is submitted that the husband on his own volition left the wife. Thus,

question of 'cruelty' on the part of wife does not arise. Para-11 of her deposition is relied upon to show that the wife never said that the husband was impotent.

9. The next reliance is on the deposition of Neha Parashar (DW-1). In para-5 of the deposition she clearly stated that she is ready and willing to reside with the husband as per his terms and condition. Thus, the bone of contention of learned counsel for the wife is that the husband could not establish the existence of 'cruelty' in general or 'mental cruelty' in particular. The husband traveled to Bangalore to attend the proceeding in the counselling centre. This shows that all attempts were made to reconcile the matter. During the course of hearing, heavy reliance is placed on para Nos.148 and 151 of the impugned judgment wherein Court below gave specific finding that husband is still paying Rs.50,000/- per month to the wife. In addition, husband has assisted the wife to procure permanent Residential Visa for Australia. A son was born out of the wedlock between the parties. In view of conduct and behavior of the parties, circumstances do not exist where possibility of their reunion can be said to be completely closed. In this backdrop, learned counsel for the wife submits that the finding of Court below is inconsistent wherein on the one hand decree of judicial separation is passed and on the other hand the Court below opined regarding the positive behavior of the parties and gave finding about possibility of their reunion. Thus, the Court below was not

justified in declining relief in the application filed under Section 9 of the HM Act.

10. The alternative argument of Shri Dubey, learned counsel for the wife is that if this Court comes to the conclusion that the husband deserves to succeed and marriage deserves to be nullified, the wife is entitled to get the permanent alimony in view of Section 25 of H.M. Act. By placing reliance on a Division Bench judgment passed in the case of **Disha Kushwaha Vs. Rituraj Singh 2019 (4) MPLJ 694.** It is submitted that an oral prayer for grant of maintenance is sufficient and a written application is not required.

11. The reliance is also placed on (**2020) 2 MPLJ 561 (Dharmendra Tiwari vs. Rashmi Tiwari)** to contend that this Division Bench has also taken a view that a separate application is not required for grant of permanent alimony. It is further submitted that the Division Bench in the case of **Dharmendra Tiwari (supra)** considered a Single Bench judgment in the case of **Surajmal Ramchandra Khati vs. Rukminibai (2000) 1 MPLJ 19** wherein the Single Bench read Section 23-A with Section 25 of H.M. Act conjointly and opined that a combined reading of these provisions makes it clear that the expression 'on application made to it' as mentioned in Section 25 of HM Act should not be construed in strict sense. It does not mean always that such a spouse is required to present a separate application for making a prayer for permanent alimony.

12. Lastly, reliance is placed on **Ramesh Chand Rampratapji G. Daga Vs. Rameshwari Rameshchandra Daga, AIR 2005 Supreme Court 422** wherein without there being any application under Section 25 of H.M. Act, the Supreme Court opined that Court can invoke its 'ancillary' or 'incidental' power to grant permanent alimony. In that case, submits Shri Pushpendra Dubey, despite the fact that the income of both the parties was not clear before the Court, the Court granted permission to the parties to approach the matrimonial court for enhancement of amount of maintenance. Shri Dubey also placed reliance on a Madras High Court order reported in **2000 (2) CTC 449 (Umarani Vs. D. Vivekanandan).**

13. Faced with this, in his rejoinder submissions Shri Ashish Shroti submits that the Division Bench Judgment of this Court in **Rituraj Singh (*supra*)** is a judgment passed without considering the statutory enabling provision i.e. Section 25 of the Hindu Marriage Act. In catena of previous judgments, the Single Benches and Division Benches of this Court took a contrary view and opined that as per the plain language of Section 25 of Hindu Marriage Act, an express application needs to be filed by the party claiming alimony. Thereafter, the Court was required to hear both the sides and after taking into account the relevant considerations/factors, decide the question and quantum of alimony. Importantly, in **Rituraj Singh (*supra*)** the Division Bench has not considered the previous judgments and therefore, in view of **State of Bihar v. Kalika Kuer, (2003) 5 SCC 448** the judgment of **Rituraj Singh *(supra)*** passed by Division Bench of this Court must be treated

as *per incuriam*. It is pointed out that an SLP was unsuccessfully filed by Rituraj Singh. The leave was not granted and SLP was disposed of without considering the statutory provision mentioned in Section 25 of the Act. Thus, judgment of **Rituraj Singh *(supra)*** is not an authority regarding interpretation of Section 25 of the Act. The same argument is advanced to distinguish the another Division Bench judgment of this Court in the case of **Dharmendra Tiwari *(supra)*.**

14. Shri Shorti submits that first judgment of this Court on this point is **Jitbandhan Vs. Gulab Devi, 1982 SCC OnLine MP 275**, Justice G.P. Singh (C.J.) after considering the language employed in Section 25 of the Act clearly held that Court has no jurisdiction to pass an order under Section 25 of the Act in absence of an express application. Justice Deepak Misra (As his Lordship then was) speaking for the Division Bench in **LPA No.199/1996 (J) (Chhaya Kshatriya Vs. Pramod Kumar Kshatriya)** decided on 30/09/197 (MANU/MP/0699/1997) considered the ambit and scope of Section 25 of the H.M. Act and held that the requirement of application under Section 25 of the H.M. Act cannot be treated to be directory. After considering the previous judgments of this Court in **Bhikalal Vs. Kamlabai, 1 (1982) DMC 83** and in **Meerabai Vs. Laxminarayan Mishra 1 (1984) DMC 120,** the Division Bench opined that the expression 'on an application made to it for the purpose' does not admit to any ambiguity and therefore, in absence of an application, Courts have no jurisdiction to grant permanent alimony. It is further pointed out that the same view was taken by a Single Bench of Justice

Deepak Misra in **Mahesh Prasad Vs. Smt. Chhoti Bai, 2003 (2) MPLJ 560**. The judgment of Division Bench in **F.A.No.665/2010 (Manoj Vs. Raksha)** decided on 23/10/2012 is relied upon, wherein after considering the previous judgments of this Court speaking for the Bench Justice Shantanu Kemkar (As his Lordship then was) opined that without an application made to the Court under Section 25 the Act, the trial Court has committed an error in passing of decree of alimony. Thus, it was held that Section 25 of the Act is clear and unambiguous and therefore, without there being any express application, the question for grant of permanent alimony does not arise. More so, when there is no material before this Court to assess the income of appellant and the respondent.

15. During the course of hearing on a specific query from the Bench Shri Pushpendra Dubey, learned counsel for the wife fairly admitted that despite repeated efforts, he could not obtain any instructions from his client. He further urged that for about an year, the respondent is not in touch with him. He sent Whatsapp messages to the respondent about the present proceedings but could not get any response from her.

16. The parties confined their arguments to the extent indicated above.

17. We have heard the parties and perused the record.

Maintainability of F.A. No.1125 of 2019

18. The first and foremost objection of learned counsel for the wife is regarding maintainability of F.A. No.1124 of 2019 in the light of Section 13(1)(A) of H.M. Act. The relevant provision reads as under:-

> "**13. Divorce**.- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party.
> ……
> ……
> 1(A) Either party to a marriage, whether solemnised before or after the commencement of this Act, **may also present a petition** for the dissolution of the marriage by a decree of divorce on the ground –
> (i) that there has been no resumption of cohabitation as between the parties to the marriage **for a period of [one year]** or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties."

19. A bare perusal of clause 1(A) shows that it is an enabling provision. Pursuant to this provision, the aggrieved party may prefer a petition for dissolution of marriage by a decree of divorce on the basis of a decree of judicial separation. This provision does not come in the way of husband to assail the impugned judgment whereby decree of divorce was not granted by the Court below. Indeed, clause 1(A) provides an independent and subsequent remedy to the appellant/husband to file a petition for dissolution of marriage on the ground of judicial separation as envisaged in sub-clause (i) of clause 1(A).

20. In other words, clause 1(A) is a fresh and independent enabling provision available to either party to seek divorce after one year from the date of passing of decree for judicial separation. This provision is

not an impediment for maintainability of FA No.1125 of 2019. Thus, the objection of Shri Dubey fades into insignificance.

Findings in impugned judgment

21. The appellant / husband deposed his statement before Court below on 29.01.2019 and other witnesses on his behalf also deposed their statements. The grounds taken by the husband for grant of decree of divorce are:- (i) The false allegation of wife regarding illicit relation of appellant with the lady namely Vijaya. (ii) The false allegation of wife regarding illicit relation of husband with his real sister. (iii) Cruel behaviour of wife with the husband and allegation regarding impotency. (iv) The action of wife in restraining the family members and relatives of husband in participating in any family program and not permitting them to visit the house of husband. (v) The conduct of wife in making attempt to keep family members and relatives away from the husband and the conduct of misbehaving with them. (vi) Not discharging the duties of a wife with the husband and unnecessarily causing mental agony to the husband.

22. In support of these grounds, husband Abhishek Parashar (PW-1) deposed his statement on 29.01.2019. His statement shows that he deposed *in extenso* relating to aforesaid grounds taken by him. An extensive cross-examination of husband was made by the learned counsel for the wife but his statement could not be demolished. A careful reading of the statement of PW-1 shows that he deposed with clarity about the cruelty/misbehaviour of the wife. The wife used to

call him as impotent is clearly stated by him. Regarding misbehaviour by wife with family members and relatives, the husband narrated various incidents. The wife made allegation regarding illicit relation of husband with another lady is also subject matter of his deposition. The husband in para 2 of his deposition clearly stated that wife used to tell him that he had illicit relation with his real sister. His statement could not be demolished during cross-examination.

23. The next witness is mother of the appellant/husband. She deposed that the wife used to misbehave with the family members. She corroborated the statement of husband that the wife had suspicion about alleged illicit relation between her husband and the real sister of the husband. During cross-examination, her statement could be demolished only to the extent allegation relating to impotency of the husband is concerned.

24. The wife Smt. Neha Parashar (DW-1) deposed her statement and in the cross-examination stated that she is still ready and willing to reside with the family. She admitted that she had lodged a report against the husband in the Police Station. A counseling at the instance of Bangalore Police had taken place between the husband and wife. She during her deposition tried to take a diametrically opposite stand qua deposition made by the husband. The Court below in the impugned judgment after considering various judgments of the Courts opined that the wife made frivolous allegations against the husband regarding illicit relation between husband and his real sister. This was held to be

'mental cruelty' in the light of certain judgments which are mentioned in para 109 to 115 of the impugned judgment.

25. In para-116 of the impugned judgment, the Court below clearly opined that the allegation of wife against the husband that he had illicit relation with some other woman and also the allegation about his illicit relation with real sister without any basis amounts to serious 'mental cruelty'. In the next paragraph, the Court below opined that the statement of husband could not be demolished in the cross-examination. Thus, the wife has committed 'cruelty' with the husband. Similarly, in para-121, the Court below after considering the statement of Abhishek Parashar (PW-1) opined that when parents of husband came to meet their grandson, the wife did not permit them even to touch the grandson. The parents of husband went back weeping. The Court below for this reason also held that husband was subjected to 'cruelty'.

26. We have considered the aforesaid findings of Court below in the light of the depositions of the parties. We do not find any perversity of finding in the impugned judgment. The conduct of the wife, in our opinion, clearly false within the ambit of 'cruelty'.

F.A. No.1125/2019

27. So far appeal preferred by the wife is concerned, it is directed against the impugned judgment whereby her application under Section 9 of H.M. Act was rejected. Wife prayed for restitution of conjugal

right on following grounds :- (i) The bad behaviour of husband towards her. (ii) The disliking of husband towards the wife. (iii) The demand of money by husband from the family members of wife. (iv) The action of husband and his family members in asking the wife for abortion. (v) Negligence of husband and family members at the time of sickness of wife. (vi) The quarrel by mother-in-law of wife on trivial issues. (vii) Calling the wife as insane by husband and (viii) Leaving the wife suddenly on 18/08/2014.

28. The Court below considered the aforesaid stand of the wife and by common judgment opined that the wife has indeed committed 'mental cruelty' with the husband.

29. As noticed above, the bone of contention of Shri Dubey, learned counsel for the wife, is based on the findings given in para-148 & 151 of the impugned judgment. It was argued that in view of findings given in these paragraphs, the conclusion drawn by the Court below is mutually inconsistent /contradictory.

30. It was contended that once it is found that the behaviour of both the parties does not lead to a situation where possibility of their reunion is bleak/closed, it was not proper for the Court below to grant decree of judicial separation.

31. Furthermore it was urged that the claim of divorce by the husband is also bad in law for the same reason. This point taken by

Shri Dubey, learned counsel for the wife deserves serious consideration.

32. Before dealing with the rival contentions in this regard, it is apposite to refer Section 13(A) of H.M. Act which reads as under :-

> "**13A.Alternate relief in divorce proceedings** – In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of Section 13, the Court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation."
>
> **(Emphasis Supplied)**

33. The provision is clear which enables the Court to pass a decree of judicial separation in a case which is pregnant with a prayer for grant of divorce of decree. However, the discretion of Court must be exercised judiciously and it cannot be based on unjustifiable reasons. [See : **Dr. Leena Vs. Prashant, 2021 SC Online Bom 2361** (Para-24)]

34. We find substance in the argument of Shri Ashish Shroti, learned counsel for the husband that once a clear finding of 'cruelty' and 'mental cruelty' is recorded against the wife, the Court below was not justified in declining grant of decree of divorce and passing the decree of judicial separation.

35. Reference may be made to **Malathi Ravi (Supra)** wherein the Apex Court opined that :-

" 24. The seminal question that has to be addressed is whether under these circumstances the decree for divorce granted by the High Court should be interfered with. We must immediately state that the High Court has referred to certain grounds stated in the memorandum of appeal and taken note of certain subsequent facts. We accept the submission of the learned counsel for the appellant that the grounds stated in the memorandum of appeal which were not established by way of evidence could not have been pressed into service or taken aid of. But, it needs no special emphasis to state that the subsequent conduct of the wife can be taken into consideration. It is settled in law that subsequent facts under certain circumstances can be taken into consideration.

25. In A. Jayachandra v. Aneel Kaur [(2005) 2 SCC 22] it has been held thus : (SCC p. 32, para 16)

> "16. … If acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct."

27. From the acceptance of the reasons of the High Court by this Court, it is quite clear that subsequent events which are established on the basis of non-disputed material brought on record can be taken into consideration. Having held that, the question would be whether a decree for divorce on the ground of mental cruelty can be granted. We have already opined that the ground of desertion has not been proved. Having not accepted the ground of desertion, the two issues that remain for consideration are whether the issue of mental cruelty deserves to be accepted in the obtaining factual matrix in the

absence of a prayer in the relief clause, and further whether the situation has become such that it can be held that under the existing factual scenario it would not be proper to keep the marriage ties alive.

In the same judgment, the Apex Court further held as under :-

"36. Presently, we shall advert to the material on record. It is luminous from it that the wife has made allegations that the sister and brother-in-law of the husband used to interfere in the day-to-day affairs of the husband and he was caught in conflict. The said aspect has really not been proven. It has been brought on record that the sister and brother-in-law are highly educated and nothing has been suggested to the husband in the cross-examination that he was pressurised by his sister in any manner whatsoever. It is her allegation that the sister and brother-in-law of the husband were pressurising him not to allow the wife to prosecute higher studies and to keep her as an unpaid servant in the house. On a studied evaluation of the evidence and the material brought on record it is demonstrable that the wife herself has admitted that the husband had given his consent for her higher education and, in fact, assisted her. Thus, the aforesaid allegation has not been proven. The allegation that the husband was instigated to keep her at home as an unpaid servant is quite a disturbing allegation when viewed from the spectrum of gender sensitivity and any sensitive person would be hurt when his behaviour has remotely not reflected that attitude. The second aspect which has surfaced from the evidence is that the wife had gone to the parental home for delivery and therefrom she went to the hospital where she gave birth to a male child. However, as the evidence would show, the husband

despite all his cooperation as a father, when had gone to the hospital to bring the wife and child to his house, she along with the child had gone to her parental house. This aspect of the evidence has gone totally unchallenged. Perceived from a social point of view, it reflects the egocentric attitude of the wife and her non-concern how such an act is likely to hurt the father of the child. The next thing that has come in evidence is that the respondent was not invited at the time of naming ceremony. He has categorically disputed the suggestion that he and his family members were invited to the ceremony. It is interesting to note that a suggestion has been given that they did not attend the ceremony as in the invitation card the names of the parents of the husband had not been printed. It has been asserted by the husband that the said incident had caused him tremendous mental pain. Viewed from a different angle, it tantamounts to totally ignoring the family of the husband.

……..

……..

43. As we have enumerated the incidents, we are disposed to think that the husband has reasons to feel that he has been humiliated, for allegations have been made against him which are not correct; his relatives have been dragged into the matrimonial controversy, the assertions in the written statement depict him as if he had tacitly conceded to have harboured notions of gender insensitivity or some kind of male chauvinism, his parents and he are ignored in the naming ceremony of the son, and he comes to learn from others that the wife had gone to Gulbarga to prosecute her studies. That apart, the communications, after the decree for restitution of

conjugal rights, indicate the attitude of the wife as if she is playing a game of chess. The launching of criminal prosecution can be perceived from the spectrum of conduct. The learned Magistrate has recorded the judgment of acquittal. The wife had preferred an appeal before the High Court after obtaining leave. After the State Government prefers an appeal in the Court of Session, she chooses to withdraw the appeal. But she intends, as the pleadings would show, that the case should reach the logical conclusion. This conduct manifestly shows the widening of the rift between the parties. It has only increased the bitterness. In such a situation, the husband is likely to lament in every breath and the vibrancy of life melts to give way to sad story of life.

44. From this kind of attitude and treatment it can be inferred that the husband has been treated with mental cruelty and definitely he has faced ignominy being an Associate Professor in a Government Medical College. When one enjoys social status working in a government hospital, this humiliation affects the reputation. That apart, it can be well imagined the slight he might be facing. In fact, the chain of events might have compelled him to go through the whole gamut of emotions. It certainly must have hurt his self-respect and human sensibility. The sanguine concept of marriage presumably has become illusory and it would not be inapposite to say that the wife has shown anaemic emotional disposition to the husband. Therefore, the decree of divorce granted by the High Court deserves to be affirmed singularly on the ground of mental cruelty."

(Emphasis Supplied)

36. In the instant case also despite positive behaviour of husband, wife's behaviour towards him and his parents was painful. Making baseless allegation relating to illicit relation with another woman and real sister certainly falls within the ambit **'**cruelty**'**. No fault can be found in the regard in the finding given by the Court below.

37. In this matter, the parties are admittedly not living together since 2014. During the course of hearing, on a specific query from the Bench, learned counsel for the wife categorically stated that he has not received any instruction from the respondent for more than one year. His efforts to contact her could not fetch any result. The Whatsapp messages sent by him to his client regarding the hearing of this matter were also not responded by her.

38. In this backdrop, the argument of Shri Shroti, learned counsel for the husband based on **Malathi Ravi (supra)** was that this Court can also take into account the subsequent event where wife has not shown any interest to live together with the appellant.

Subsequent Events

39. As noticed above, the Supreme Court in **Malathi Ravi (Supra)** has already held that subsequent events can be taken into account. This view was followed in **K. Srinivas (Supra)** and **Ram Kumar Barnwal Vs. Ram Lakhan, 2007 (5) SCC 660**.

40. The important subsequent fact in this case is that the wife is residing at Australia and has not made any effort/pains to contact her

counsel or to participate in the proceedings. In this backdrop, in our view, no useful purpose would be served in entertaining the appeal of the wife regarding her claim based on Section 9 of H.M. Act.

41. In view of foregoing analysis, we are unable to countenance the impugned judgment whereby the Court below has granted the decree of judicial separation in place of decree of divorce. After forming a definite opinion regarding 'cruelty', in a case of this nature it was not proper for the Court below to decline the decree of divorce and in lieu thereof grant decree of judicial separation. Moreso, when subsequent facts and entire factual backdrop shows that it is not possible for the parties to live together.

Permanent Alimony

42. Learned counsel for the wife by placing reliance on the Division Bench Judgments of this Court in **Rituraj Singh (supra)** and **Dharmendra Tiwari (supra)** contended that no express application is required to be filed under Section 25 of the Hindu Marriage Act and this Court without such application can decide the question of alimony. It is noteworthy that SLP filed against the judgment of this Court in **Rituraj Singh (Supra)** was dismissed (SLP No.27693 of 2019) on 3.2.2022. However, a plain reading of this order makes it clear that :-

> (i) Leave was not granted and SLP was not converted into a civil appeal. Thus, in the light of judgment of Supreme Court in **(2000) 6 SCC 359** (**Kunhayammed & Ors vs State Of Kerala & Anr)**, it cannot be presumed that judgment of this

Court in **Rituraj Singh** got stamp of approval from the Supreme Court and doctrine of merger has played its role.

(ii) The Apex Court while deciding the SLP of **Rituraj Singh** has not specifically dealt with and examined Section 25 of the Hindu Marriage Act.

43. The legal journey shows that way back in the case of **Jitbandhan (supra)** Justice G.P. Singh considered the language used in Section 25 of the Act and came to hold that said provision does not permit the Court to decide the question of alimony in absence of an express application. The *ratio* of this judgment was followed by Division Bench in **Chhaya Kshatriya (supra).** In **Chhaya Kshatriya (supra),** this Division Bench also considered the previous judgments of **Bhikalal** and **Meerabai (supra)**. This principle was followed by Single Bench in **Mahesh Prasad (supra)**. Lastly, another Division Bench in **Manoj (supra)** (decided on 23.10.2012) poignantly held that without an application made to the Court under Section 25 of the Hindu Marriage Act, the Family Court cannot decide the aspect of alimony.

44. The aforesaid journey makes it clear that view taken by Justice G.P. Singh way back in the year 1982 in the case of **Jitbandhan (supra)** was consistently followed by various Division Benches. The cleavage of opinion is because of subsequent Division Bench judgments in **Rituraj Singh and Dharmendra Tiwari (supra)** wherein the subsequent Division Benches opined that in order to claim

alimony, it is not necessary to prefer a written application. A careful reading of judgment of **Rituraj Singh (supra)** shows that the Division Bench has not reproduced and considered Section 25 of H.M. Act. Section 25(1) of H.M. Act reads as under:-

> **"25. Permanent alimony and maintenance**
> (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, **on application made to it** for the purpose by either the wife or the husband, as the case may be, order that the respondent shall 55 [***] pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant 56 [, the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
>
> **(Emphasis Supplied)**

45. In both the subsequent judgments i.e. **Rituraj Singh (supra)** and **Dharmendra Tiwari (supra),** the Division Benches have not considered the previous judgments of this Court passed in **Jitbandhan, Chhaya Kshatriya, Bhikalal, Meerabai, Mahesh Prasad and Manoj Vs. Raksha (supra).** Thus, ancillary question is, out of the two views, which view/judgment will be binding on us. In our view, the curtains on this aspect are drawn by a Special Bench (five Judges) of

this Court in the case of **Jabalpur Bus Operators Association and Ors. Vs. State of M.P. and Ors** reported in **(2003) 1 MPLJ 513** wherein it is held as under:-

> **"**……...Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should refer the matter to larger Bench. **In case of conflict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of latter Division Bench shall be binding.** The decision of larger Bench is binding on smaller Benches."
>
> **(Emphasis Supplied)**

46. We also find substance in the argument of Shri Shroti based on the judgment of Supreme Court in the case of **State of Bihar v. Kalika Kuer, 2003 5 SCC 448** wherein it was held that if previous binding judgment is not considered by the subsequent Bench, the judgment of subsequent Bench is *per incuriam.* Thus, it can be safely held that in absence of application preferred under Section 25 of H.M. Act, no directions can be issued by this Court for grant of permanent alimony. Apart from this, for deciding the aspect of permanent alimony various factual aspects regarding income, expenditure etc. of the parties are required to be taken into account by the Court. In **Rajnesh Vs. Neha & Another (2021) 2 SCC 324,** the Apex Court held as under :

> "**73.** Parties may **lead oral and documentary evidence** with respect to income, expenditure,

> standard of living, etc. before the **court concerned**, for fixing the permanent alimony payable to the spouse."
>
> **(Emphasis Supplied)**

47. So far judgment of Apex Court in **Ramesh Chand Rampratapji (Supra)** in concerned, it is noteworthy that Court focussed and interpreted the expression 'at the time of passing any decree' mentioned in Section 25(1) of the H.M. Act. The observation of Supreme Court in para-17 of said judgment about 'ancillary' and 'incidental' power of the Court, in our humble view, is not the ratio or principle laid down. This is trite that precedent is what is actually decided by the Apex Court and not what is logically flowing from it. [**See: State of Orissa v. Sudhansu Sekhar Misra (1968) 2 SCR 154, Regional Manager v. Pawan Kumar Dubey (1976) 3 SCC 334, Ambica Quarry Works v. State of Gujarat (1987) 1 SCC 213, Commr. of Customs (Port) v. Toyota Kirloskar Motor (P) Ltd. (2007) 5 SCC 371**]. Hence, this judgment is of no assistance to respondent-wife.

48. At present, sufficient/complete material is not available before this Court on the basis of which any conclusion regarding alimony can be drawn. Thus, prayer for grant of permanent alimony for this reason is also declined. However, this order will not come in the of the wife to file appropriate application under Section 25 of H.M. Act before the Court of competent jurisdiction. The said court will be best suited to

decide the said prayer for permanent alimony. Thus order of **Umarani (Supra)** cannot be pressed into service.

49. As a consequence, the impugned judgment dated 27th March, 2019 is set aside to the extent the Court below granted decree of Judicial separation in place of decree of divorce. The impugned judgment stands modified and marriage stands dissolved. The judgment of Court below in RCS No. 516 A/2017 is affirmed. The Registry shall draw a decree accordingly.

50. The F.A. No. 1124/2019 is **allowed** and F.A. No. 1125/2019 is **dismissed**.

(SUJOY PAUL)
JUDGE

(AMAR NATH (KESHARWANI))
JUDGE

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