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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

FAMILY COURT APPEAL NO.56 OF 2014

Rajni w/o Naresh Giradkar,
Aged 34 years, occupation household,
R/o c/o Manohar Mokadam,
P.No.81, Maitri Nagar, Bhilai,
District Durg.

..... **Appellant.**

:: V E R S U S ::

Naresh s/o Pandurang Giradkar, died,
Aged 38 years, occupation – service,
R/o plot No.2A, Vishwakarma
Nagar, Galli No.3,
Nagpur.

1.1 Ku.Niharika d/o Naresh Giradkar,
Aged about 18 years, occupation education,
R/o c/o Amit s/o Bhaiyyaji Rehpade,
Plot No.39, Galli No.8, Bajarangnagar,
Manewada Road, Nagpur.

1.2 Smt.Radhabai wd/o Pandurang
Giradkar, aged about 70 years,
Occupation – household, r/o plot No.47,
Annapurna layout, Mhalginagar,
Pipla Road, Nagpur.

..... **Respondents.**

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Shri P.D.Ganvir, Advocate for the Appellant.
Shri R.M.Wasnik, Advocate for Respondent No.1.1.
Shri Akash Matetwar, Advocate for Respondent No.1.2.
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CORAM : **A.S.CHANDURKAR & URMILA JOSHI-PHALKE, JJ.**
CLOSED ON : **SEPTEMBER 29, 2022**
PRONOUNCED ON : **OCTOBER 21, 2022**

ORAL JUDGMENT (Per : Urmila Joshi-Phalke, J.)

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1. Heard Shri P.D.Ganvir, learned Advocate for the appellant, Shri R.M.Wasnik, learned Advocate for respondent No.1.1 and Shri Akash Mattewar, learned Advocate for respondent No.1.2.

2. Alleging cruelty and desertion against the appellant-wife, the deceased respondent-husband had filed a petition bearing Petition No.A-22/2003 for divorce in the Family Court at Nagpur. The Family Court at Nagpur had granted decree of divorce by passing judgment on 19.6.2006. Being aggrieved and dissatisfied with the said judgment and decree of divorce, the appellant-wife filed this appeal for setting aside the said decree of divorce.

3. Facts of the case in brief are as follows:

The marriage between the appellant-wife and the deceased respondent-husband was solemnized on 2.7.1995 at Nagpur as per rites and customs of Hindu. After their marriage, the appellant-wife resumed cohabitation at the house of the deceased respondent-husband. As per allegations of the deceased respondent-husband, the appellant-wife behaved well in initial four months and thereafter she started harassing the deceased respondent-husband by not doing domestic work. She used to pick up quarrels with him and used to insult him as well as his parents. It is further alleged that she was in habit of leaving matrimonial house and stay along

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with her parental house. She was not allowing him to have access for conjugal relationship. On asking her the reason about her disinterest in conjugal relationship with the deceased respondent-husband, she replied that her marriage was performed against her desire as well as she used to call him as beggar. It is further alleged by the deceased respondent-husband that the appellant-wife was insisting him to stay separately from his old mother and younger sister and when he refused to stay separately, she used to pick up quarrels with the deceased respondent-husband and his family members. She used to abuse him in a filthy language as 'Bhikari', 'Bastard' and 'Rascal.' It is further contention of the deceased respondent-husband that on her insistence, he started residing separately at Vishwakarma Nagar. He also went along with her to Bhilai at her parental house as the appellant-wife was pregnant. The appellant-wife delivered a child at Bhilai wherein he incurred all expenses. After returning from Bhilai, the appellant-wife and the deceased respondent-husband were residing at her matrimonial house, but there was no change in her behaviour. She was demanding entire salary from the deceased respondent-husband and was asking to construct a bungalow for residing. She was also in habit to approach the police station and lodge false complaints. She used to threat him that she will lodge a complaint with police and he would have to face dire consequences.

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4. As per contention of the deceased respondent-husband, in July 2002 the appellant-wife approached to Ajni Police Station where from she was referred to Mahila Cell, Nagpur. She went away along with her daughter at Bhilai. After four months, he along with constables of the Mahila Cell went to Bhilai to fetch her back, but she asked for divorce. On his denial, her brothers namely Rajesh and Chandresh assaulted him in presence of the constables of the Mahila Cell. She did not return along with him and lodged a false report against the deceased respondent-husband in the month of January 2003 with Ajni Police Station under Section 498-A of the Indian Penal Code. Thus, as per allegations of the deceased respondent-husband, the appellant-wife had left his company without sufficient and reasonable cause by threatening and causing him cruelty and deserted him. Therefore, the deceased respondent-husband filed a petition bearing Petition No.A-22/2003 seeking divorce under Section 13(1-a) of the Hindu Marriage Act, 1955.

5. In response to notice, the appellant-wife resisted the petition filed by the deceased respondent-husband and denied all contentions of the deceased respondent-husband. She had only admitted the relationship that she is legally wedded wife of the deceased respondent-husband and their marriage was solemnized on 2.7.1995. She further admitted that after their marriage, she

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resumed cohabitation at the house of the deceased respondent-husband. Rest of the allegations are totally denied by her. She had also admitted that in July 2002 she reported the matter to Ajni Police Station. As per her contention, after their marriage, she was treated well by the deceased respondent-husband for one year and, thereafter, her mother-in-law and sister-in-law started torturing her. The deceased respondent-husband used to quarrel and beat her under the influence of liquor. The deceased respondent-husband as well as his family members were torturing her to go back at her mother's house. She further alleged that the deceased respondent-husband had illicit relation with Sushma who was also working along with him at Indira Gandhi High School at Nagpur. As per her allegations, the deceased respondent-husband was having illicit relationship with the said lady and she had witnessed both of them in a compromised position. As per her contention, the mother and sister of the deceased respondent-husband had accepted the relationship between the deceased respondent-husband and the said lady, but as she opposed the same, there was quarrel between her and the deceased respondent-husband. The deceased respondent-husband had also demanded amount of Rs.12,500/- from her and she was ill-treated by him as well as his family members for the same and, therefore, she approached to the police station and lodged the report. As she was driven out of the house, she lodged

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the report on 7.4.2002 at Ajni Police Station. However, as the deceased respondent-husband gave written assurance that he will treat her nicely, she returned back. She lodged a report on 27.7.2002 as she was driven out of the house. The sum and substance of the contentions of the appellant-wife is that as she was not treated well by the deceased respondent-husband and his family members, she was constrained to leave the matrimonial house and took a shelter to her parental house. She submitted that in fact she was treated with cruelty and there is no ground for the deceased respondent-husband to ask for divorce. Hence, the petition deserves to be dismissed.

6. After hearing both the sides and after recording evidence, the Family Court at Nagpur was pleased to hold that the deceased respondent-husband had proved that he was subjected for mental cruelty as well as the appellant-wife had deserted him and granted decree of divorce in favour of the deceased respondent-husband. Being aggrieved and dissatisfied with the same, the present appeal is preferred by the appellant-wife on the ground that the Family Court at Nagpur had not considered evidence properly and wrongly granted decree of divorce in favour of the deceased respondent-husband.

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7. As per submissions of Shri P.D.Ganvir, learned Advocate for the appellant-wife, various complaints lodged by the appellant-wife are sufficient to show that it was the deceased respondent-husband who was ill-treating her, however the Family Court had not considered the same. There is an attempt by the appellant-wife to resume cohabitation, but she was constrained to leave her matrimonial house. The deceased respondent-husband failed to prove the cruelty and desertion at the hands of the appellant-wife. The decree of divorce passed by the Family Court is erroneous and liable to be set aside.

8. On the contrary, Shri Akash Matetwar, learned Advocate for respondent No.2, supported the judgment and decree of divorce granted by the Family Court at Nagpur and submitted that the appellant-wife had attempted to commit suicide by consuming phenyl. The said incident itself is sufficient to show that she was threatening the deceased respondent-husband to commit suicide and face dire consequences. The various complaints lodged by her are sufficient to show that she had quarreled with him, left the matrimonial house and was in habit of lodging of false reports. The appellant-wife had admitted, during her cross-examination, that the deceased respondent-husband was assaulted at her house by her brother when he had been at their parental house along with

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constables of the Mahila Cell. This fact is itself sufficient to show that the cruelty was caused by the appellant-wife to the deceased respondent-husband and the ground of desertion was also proved and, therefore, the Family Court rightly granted the decree of divorce.

9. During the pendency of the present appeal, respondent-husband / Naresh Pandurang Giradkar reported to be dead and, therefore, his legal heirs namely mother and daughter were brought on record.

10. After hearing both the sides, following points arise for our consideration and we answer the same as follows:

(1) Whether the appeal is maintainable on account of death of the respondent-husband?

(2) Whether the petition for dissolution of marriage is liable to be allowed on the ground of cruelty as complained of in the petition?

(3) Whether the deceased respondent-husband proves that the appellant-wife intentionally abandoned him without reasonable cause?

(4) Whether the decree passed by the Family Court granting divorce warrants interference?

Point No.1:-

11. It is not in dispute that the appellant-wife is the legally wedded wife of the deceased respondent-husband and their marriage was solemnized on 2.7.1995. It is also not in dispute that after their marriage, the appellant-wife had resumed cohabitation. It is also not in dispute that the deceased respondent-husband had filed a petition for divorce on the ground of cruelty and desertion and the Family Court had granted the decree of divorce in favour of the deceased respondent-husband. Against the said decree of divorce, the present appeal is preferred by the appellant-wife. During the pendency of the appeal, the husband of the appellant-wife died. Now, question is, whether the appeal is abated on the ground of death of the deceased respondent-husband.

12. Learned Advocates for respondents contended that the appeal is not maintainable as on the death of the respondent-husband of the appellant-wife against whom the relief is claimed is not alive. The appeal is abated on the death of the deceased respondent-husband.

13. Learned Advocate for the appellant-wife contended that the once decree, granting divorce under Section 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955, gets passed in such

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proceedings, the rights and obligations get crystallized under the orders of the Court. The marriage was dissolved and, therefore, status of the appellant-wife has changed as ex-wife. It attaches social stigma and, therefore, she approached this Court to get it aside by filing this appeal. In support of the said submissions, learned Advocate relied upon a decision of the Honourable Apex Court in the case of Yallawwa (Smt) vs. Shantavva (Smt) reported at (1997) 11 SCC 159 wherein it is held that, "it must be kept in view that petition of divorce was moved by the husband for getting his marriage with the respondent dissolved by a decree of divorce on the ground that the respondent deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. Consequently, the husband died before decision of the appeal. It is held that consequently, in such proceedings before and decree comes to be passed of either of the spouse expires pending the trial then the personal cause of action would die with the person. Such civil proceedings would not abate if right to sue survives after the death of one or more of the parties to the proceedings as laid down by Order XXII Rule 1 C.P.C. However, if during the pendency of the petition for divorce either of the spouses expires, the cause of action being personal to both of them, the right to sue would not survive. The next question is whether after the decree of divorce passed ex parte or bipartite against the other spouse, whether the

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right to sue would survive for the spouse against whom such decree had been passed by the Court and whether such a decree can be got set aside by the surviving spouse either by filing an appeal or by moving an application under Order IX Rule 13 C.P.C. for getting it set aside if it is an ex parte decree. The answer to the question will depend upon the legal effects of such a decree of divorce passed by the Trial Court under Section 13(1) of the Hindu Marriage Act, 1955. It is obvious that so long as the decree is not passed and proceedings are at any stage prior to the decree, no rights or obligations of either spouse get crystallized. The marital status of both the spouses remains intact as it was prior to the filing of the suit. But once a decree gets passed in such proceedings the rights and obligations of the respective spouses who are parties to such proceedings get crystallized under the orders of the court. The marriage gets dissolved; the status of the spouses gets changed and they become ex-husband and ex-wife. As a result of such a decree of divorce the marital tie is snapped. Both of them become free to marry again as laid down by Section 15 of the Hindu Marriage Act, 1955. Not only that after such a decree when the spouses have ceased to be husband and wife and become ex-husband and ex-wife, property right of both the spouses also get affected and, therefore, the Court had held that though a personal cause of action dies with the person, all the rest of causes of action which have impact on

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property rights and socio legal status of the parties cannot be said to have died with such a person.

14. In the light of the above observations of the Honourable Apex Court, in the present case also the deceased respondent-husband died during the pendency of the appeal wherein challenge to the decree for divorce has been raised. Hence, the rights and obligations are crystallized. On passing of orders of decree of divorce, the marriage gets dissolved. The status of the appellant-wife has changed from wife to ex-wife. As the decree of divorce, which attaches social stigma on the spouse concerned, such a spouse cannot be said to be left without any remedy. Such finding can be got vacated by filing an appeal on account of death of another spouse. Therefore, the appeal is maintainable after the death of husband.

Point Nos.2 to 4 :-

15. It is always said that the marriages are settled in heaven. The parties to marriage tying knot are supposed to bring about the union of souls. It creates a new relationship of love and affection, concern between the husband and wife. According to Hindu Vedic it is 'Sanskar'. The two human being pledged

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themselves. Despite the pledge and promises sometimes said relationship becomes complex.

16. The present case is also one more example of the said complex relationship. There is no dispute about matrimonial relationship between the deceased respondent-husband and the appellant-wife. The appellant who is the wife faced litigation as the deceased respondent-husband had filed a petition seeking dissolution of marriage on two grounds i.e. cruelty and desertion under Section 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955. The petition for dissolution of marriage is preferred by the deceased respondent-husband mainly on the ground that the behaviour of the appellant-wife after the marriage was not proper. She treated him with cruelty. She alleged that the deceased respondent-husband was having an extra marital relationship with a lady who was working with him in his school. She further alleged that she had witnessed both of them in a compromised position and, therefore, she opposed the same. It is further alleged by the deceased respondent-husband that the appellant-wife was not interested in conjugal relationship and never shown her positive response to the conjugal relationship. On his enquiry, she clarified that her marriage was performed without her consent and, therefore, she is not interested. It is further alleged that the appellant-wife used to abuse him in a filthy

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language. She also lodged various complaints against the deceased respondent-husband. Though the deceased respondent-husband attempted to save their marriage by taking steps to fetch the appellant-wife back to resume cohabitation, she did not return back. On the contrary, he was assaulted when he had been to bring her back and, therefore, he filed a petition for dissolution of marriage.

17. To substantiate the contentions, the deceased respondent-husband had adduced his evidence before the Family Court and reiterated the contentions as per his petition. During his cross-examination, it came on record that since last fifteen years he was working as Assistant Teacher at Indira Gandhi High School, Nagpur. He admitted that one lady was also working in his school. He denied that he is in habit of consuming liquor. He also denied his relationship with the lady as alleged during the cross-examination. He admitted that in the police station he had assured that he will not quarrel. He also admitted that he is prosecuted for the offence under Section 498-A of the Indian Penal Code. In support of his contentions, he also examined one Dharmendra, vide Exhibit-45, who is his neighbour. The said Dharmendra testified that he is running a shop adjacent to the house of the deceased respondent-husband. He stated that he heard noise of quarrel and also heard abuses like 'beggar' and 'bastard'. The appellant-wife threatened the

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deceased respondent-husband that she would send him behind the bars. His entire cross-examination is in the denial form. On the basis of the above, it was claimed by the deceased respondent-husband that he was treated with cruelty by the appellant-wife and, therefore, he filed the petition. He further submitted that the appellant-wife withdrawn herself and left her matrimonial house without sufficient and reasonable cause and deserted him. Besides, in his oral evidence, he relied upon one letter written by him to his mother-in-law and a legal notice issued to her. The said letter is at Article-A and the legal notice is at **Exhibit-43**.

18. The appellant-wife had also adduced her evidence in support of her contentions. She reiterated the contentions as per her written statement. She was also cross-examined at length. During her cross-examination, she admitted that she stayed along with her deceased respondent-husband for seven years. She further admitted that she also stayed separately along with him at Hudkeshwar and lived there for one year and nine months. She also stayed with his family members at Vishwakarma Nagar. She admitted that her deceased respondent-husband was working as teacher at Indira Gandhi High School, Nagpur and his duty shift was during morning time. Whereas, a lady by name Sushma was also working in the said school and her school timing was in the noon time. She specifically

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admitted that her deceased respondent-husband never behaved as husband and wife with the said lady in her presence. She further admitted that in the year 1997, due to domestic quarrels, she consumed phenyl. Thus, her cross-examination shows the allegations levelled by her against her deceased respondent-husband that she had witnessed her deceased respondent-husband and lady Sushma in a compromised position and they behaved as husband and wife were completely washed out. Besides, her evidence, she had not adduced any other evidence.

19. It is an admitted position that the appellant-wife had lodged various reports at Ajni Police Station. It is also an admitted position that the Mahila Cell of Ajni Police Station made an attempt to settle the dispute. She also admitted that though two ladies and one more person came at her house, who were from the Mahila Cell at Ajni Police Station, she did not return along with them. She further admitted that in the month of July 2002 she was residing at her parental house. However, she lodged report against the deceased respondent-husband in the year 2003 at the instance of her family members. Thus, it is not in dispute that various police complaints were lodged by the appellant-wife against the deceased respondent-husband. The attempts made by the deceased

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respondent-husband were futile as his appellant-wife did not return back to resume cohabitation.

20. Now, question is whether the ground of cruelty is made out for grant of decree of divorce by the deceased respondent-husband is sustainable. It is to be ascertained whether the contention of the deceased respondent-husband that the appellant-wife treated him with cruelty by making allegations against him of chastity and extra marital relationship as well as the appellant-wife abused him. Admittedly, the deceased respondent-husband had not made any allegation against the appellant-wife regarding physical violence. In relation to matrimonial matters, it is contemplated that a conduct of such type which endangers the living of the other amounts to cruelty. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. The expression cruelty has been used in relation to human conduct or human behaviour. The expression 'cruelty' has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the

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Court will have no problem in determining it. To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life. Cruelty however, has to be distinguished from the ordinary wear and tear of the family life. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In Samar Ghosh Vs. Jaya Ghosh (2007) 4 SCC 511, the Hon'ble Apex Court given certain illustrative examples wherefrom inference of mental cruelty can be drawn. The Hon'ble Apex Court reproduced some of the illustrations:-

"(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.

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(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.

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(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.

(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."

21. After adverting to the material on record, it was proved that the deceased respondent-husband stayed along with the appellant-wife separately on her insistence. It is also evident that the appellant-wife made allegations against the deceased respondent-husband in her written statement that the deceased respondent-husband was having illicit relationship with one lady. She further alleged that due to ill-treatment, she left her matrimonial house. However, she had lodged police complaint after six months after she left her matrimonial house. It is well settled that

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allegations of cruelty cannot be considered on trivial issues. The allegations should have the origin with reference to time, place and manner of cruelty. It is well settled that general allegations of cruelty do not constitute cruelty in the eyes of law so as to grant decree of dissolution of marriage on that premise. The word 'cruelty' has not been denied in the Hindu law, but it has to be gathered from attending circumstances of each each.

22. Here, in the present case, the allegations are made against the deceased respondent-husband regarding chastity. Subsequently, during cross-examination, the appellant-wife had admitted that her deceased respondent-husband never behaved as husband and wife with lady Sushma in her presence. She further admitted that they were working in the same school and their school timing was different. Said lady Sushma is married. Thus, the admissions, during cross-examination, show that though she had claimed that her deceased respondent-husband had extra marital relationship, she had not proved the same. With regard to the allegation about extra marital relationship with the said lady, re-appreciation of the evidence of the appellant-wife shows that there is no sufficient evidence to show that there was some relationship between them. Admittedly, it is very difficult to establish such allegation, but at the same time while such an allegation is made

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pertaining to one's character especially the husband and wife, it causes mental agony to the person against whom the said allegation is made. Learned Advocate for the appellant-wife submitted that such type of mental agony definitely is a mental cruelty to the deceased respondent-husband. Learned Advocate for the respondent-husband relied upon the decision in the case of Narendra vs. K.Meena reported at III (2016) DMC 429 (SC) wherein the Honourable Apex Court held that allegation with regard to an extra-marital life to be quite serious and that can surely be a cause for mental cruelty. Learned Advocate also relied upon the decision in the Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate reported at 2003(6) SCC 334 wherein it is held that the position of law in this regard has come to be well settled and declared that leveling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such allegations made in the written statement or suggested in the course of examination and by way of cross- examination satisfy the requirement of law and it causes mental pain, agony and suffering.

23. Learned Advocate for the respondent-husband submitted that similar is the fact in the present case though

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allegations are made which are not proved by the appellant-wife, her cross-examination shows that she has never seen the deceased respondent-husband and the said lady together behaving as husband and wife. Thus, false allegations are made against the deceased respondent-husband which caused him mental cruelty. The appellant-wife attempted to commit suicide by consuming phenyl which the appellant-wife had admitted during her cross-examination. Such type of attempt by her was to threaten the deceased respondent-husband. If she would have been successful in her attempt to commit suicide, the deceased respondent-husband would have faced consequences of the said attempt. Learned Advocate submitted this aspect was duly considered by the Honourable Apex Court in the case of Narendra vs. K.Meena cited *supra* and held that such threat or acts constitute cruelty.

24. After giving thoughtful consideration and the evidence laid by both the parties, admittedly the appellant-wife had made allegations against the character of the deceased respondent-husband which she could not prove. On the contrary, her admissions, during her cross-examination, suggest that the allegations made by her are false. Secondly, her attempt to commit suicide definitely would have caused the deceased respondent-husband to mental cruelty. The acts complained of definitely cover

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under the definition of mental cruelty. The deceased respondent-husband had proved the ground of cruelty by adducing sufficient evidence on record. The appellant-wife had not made out a case that she was treated with cruelty at the hands of the deceased respondent-husband. No single incident is quoted by her to show that it was the conduct or behaviour of the deceased respondent-husband due to which she was constrained to leave the matrimonial house. On the contrary, her admissions show that on her insistence the deceased respondent-husband left his old mother and unmarried sister who were dependents on him and started residing along with the appellant-wife. She had also lodged the report under Section 498A after six months of leaving the house. These facts are sufficient to show that she left the matrimonial house without any reason. The decree of dissolution of marriage was also granted on the ground of desertion.

25. 'Desertion' means the intentional, permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. Desertion means withdrawing from the matrimonial obligations. To constitute desertion two essential conditions must be established : (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). For holding desertion as

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proved the inference may be drawn from sudden circumstances. It is held in *Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1* that merely because husband and wife are staying separately, an inference regarding desertion on the wife's part cannot be drawn. The law laid down in the case of *Lachman Utamchand Kirpalani Vs. Meena alias Mota 1964 SCR (4) 331* which has been consistently followed in several decisions of the Hon'ble Apex Court. The law laid down in the above decision is that desertion means the intentional permanent forsaking and abandonment of one spouse by the other without the consent of the other and without reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of the deserting spouse to bring cohabitation to permanent end. In other words, there should be *animus deserendi* on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to deserting spouse to leave matrimonial house.

26. As already observed that the appellant-wife had not adduced any evidence to prove the cruelty at the hands of the deceased respondent-husband. The evidence on record shows that to satisfy the desire of the appellant-wife the deceased respondent-husband resided separately. The deceased respondent-husband adduced the evidence to show that he was abused in a filthy

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language by the appellant-wife. The evidence of PW2 Dharmendra shows that his house is situated near to the house of the deceased respondent-husband and he heard the appellant-wife abusing the deceased respondent-husband in a filthy language. The conduct of the appellant-wife leaving the matrimonial house and after leaving, she lodged the report after a considerable period is sufficient to show that she had left house without reasonable cause. No ground is raised by the appellant-wife to show that it was difficult for her to lead the matrimonial life as the cruelty caused to her was such a nature which made her difficult to lead the matrimonial life. No such evidence is adduced by her. On the other hand, admissions on record show that she made baseless allegations against the deceased respondent-husband which are sufficient to show that she had deserted the deceased respondent-husband. The only inference from the evidence on record can be drawn that the appellant-wife was not interested to lead the marital life with the deceased respondent-husband and, therefore, she made various allegations as well as left the matrimonial house. She had permanently withdrawn herself from the company of the deceased respondent-husband. There is an intention to abandoned the deceased respondent-husband permanently without the consent of the deceased respondent-husband and without reasonable cause. The deceased respondent-husband had proved that there a factum of separation and the said

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separation was with an intention to bring cohabitation to permanent end. The appellant-wife could not give a reasonable cause to leave separately after leaving the matrimonial house.

27. Thus, both the contentions of the deceased respondent-husband are proved by him on the basis of evidence adduced by him on record. The contentions of the deceased respondent-husband appear to be more probable that he was treated with cruelty and the appellant-wife had deserted him by withdrawing herself from his company.

28. Learned Advocate for the appellant-wife relying upon the decision of the Honourable Apex Court in the case of Dr.N.G.Dastane vs. Mrs.S.Dastane, reported at (1975) 2 SCC 326 submitted condonation of cruelty is as defence under Section 23(1)(b) of the Hindu Marriage Act, 1955. We have considered the facts in the case cited *supra*. The facts of the case cited *supra* and the facts of the present case are not identical. The issue raised in the case cited *supra* was that whether on facts the respondent wife committed on the husband justifying a decree for judicial separation, wherein the Honourable Apex Court held the only rider is the interdict of Section 23(1)(a) of the Hindu Marriage Act, 1955 that the relief prayed for can be decreed only if the court is satisfied that the petitioner is not in any way taking advantage of his own wrong. The Honourable

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Apex Court while considering the justification of judicial separation discussed about cruelty in matrimonial relationship and further held that condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be forgiveness and restoration. Here, in the present case, both those things are absent. There is no forgiveness about the deceased respondent-husband as well as there was no restoration of matrimonial relationship by the appellant-wife and, therefore, the case cited supra is not helpful to the appellant-wife.

29. In the light of the above discussion, we are unable to accept the contention of the appellant-wife to set aside the decree of divorce. Learned Judge of the Family Court has rightly considered the evidence brought before it and has rightly come to conclusion that the appellant-wife failed to prove that the behaviour of the deceased respondent-husband was cruel. On the contrary, the deceased respondent-husband had proved that he was treated with cruelty by quoting the allegations made by the appellant-wife against him as well as by quoting the evidence of attempt to commit suicide.

30. In this view of the matter, no ground is made out to interfere with the findings recorded by learned Judge of the Family Court and, therefore, we accept the conclusion derived by the

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learned Judge of the Family Court. Accordingly, point Nos.2 and 3 are answered in affirmative and 4 is answered in negative. The appeal fails and deserves to be dismissed and the same is dismissed with costs.

(URMILA JOSHI-PHALKE, J.)

(A.S.CHANDURKAR, J.)

!! BrWankhede !!

Point...../-