ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
C.P. No. S- 275 of 2023

Date	Order with signature of Judge

1. For hearing of CMA No. 2172 of 2023
2. For hearing of CMA No. 2994 of 2023
3. For hearing of main case

Date of Hearing	:	31 May 2023 and 1 June 2023
Petitioner	:	**Maria Ramesh** through **Mr. Muhammad Ali Lakhani, Advocate** along with Muhammad Arsal, Advocate, Safa Wasim, Advocate and Kajal Kawari, Advocate
Respondent No. 1:	:	Nemo
Respondent No. 2	:	Nemo
Respondent No. 3	:	**Ameet Mohan** through **Dr. Mohammad Khalid Hayat, Advocate** along with Muhammad Nadeem Babar, Advocate and Muhammad Arshad Mehmood, Advocate
Amicus Curaie	:	Ravi Pinjani, Advocate

O R D E R

MOHAMMAD ABDUR RAHMAN J. The Petitioner maintains this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 as against the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 partially modifying a Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020.

2. The Petitioner and the Respondent No. 3 are Hindus. They were married in accordance with their personal law on 23 January 2010 and from which wedlock a Minor A was born on 4 May 2011. The marriage has not been a happy one and the Petitioner and the Respondent No. 3 have been living apart from one another for a considerable amount of time; the

Petitioner residing with her family. During this period, the Petitioner had maintained Family Suit No. 1761 of 2020 before the VIIIth Family Judge Karachi (East) and in which she claimed the following relief:

> " .. *(i) Grant of Maintenance of Rs. 45,000 /- (Rupees Forty Five Thousand only) to be calculated from December 2011 till actual conclusion of proceedings.*
>
> *(ii) Grant of maintenance (as above) subject to annual increments at the rate of Twenty Five (25%) from December 2011 till actual conclusion of the proceedings*
>
> *(iii) grant future maintenance for the Plaintiffs, in perpetuity, particular till marriage for the Plaintiff No. 2*
>
> *(iv) (if necessary) Attachment and arrest of the Defendant and his assets (including salary) for purposes of securing payment of maintenance granted.*
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> *(v) Relief(s) in any other terms as may be deemed appropriate and necessary in given circumstances*
>
> *(vi) grant of costs of proceedings."*

3. The Respondent No. 3 has also maintained a Petition under Section 12 of the Hindu Marriage Act, 2017[1] before the XVIth Family Judge Karachi (East) bearing Family Petition No. 206 of 2020 seeking the following relief:

> " … *(a) to dissolve the petitioners marriage with the respondent by way of judicial separation*
>
> *(b) to grant cost of the petition or any other relief(s) which this Hon'ble Court under the facts and circumstances of the matter may deem fit and proper."*

4. The Petitioner had in her Written Statement averred that:

(i) the XVIth Family Judge Karachi (East) did not have the requisite jurisdiction to entertain a Family Petition No. 206 of 2020 which, as per Rule 6 of the Family Court Rules, 1965, had to be instituted in a court having jurisdiction over the area within which the Petitioner resided;

(ii) the circumstances that are required to exist under Section 11 read with Section 12 of the Sindh Hindu Marriages Act

[1] The Respondent No. 3 had incorrectly maintained Family Petition NO. 206 of 2020 under the Hindu Marriage Act, 2017 which is not applicable to the Province of Sindh. The Family Court had treated the Petition as being made under Section 11 of the Sindh Hindu Marriages Act (Amendment) Act, 2018.

(Amendment) Act, 2018 did not exist to merit the grant of judicial separation;

It is necessary to mention that as Family Petition No. 206 of 2020 had been filed for ***Judicial Separation*** under Section 8 of the Sindh Hindu Marriages Act (Amendment) Act, 2018, no specific ground was taken in the Written Statement as mandated under Section 12 of the Sindh Hindu Marriages Act (Amendment) Act, 2018 to aver that the ***Termination of the Marriage*** should not be granted on that ground as the Petitioner would suffer "grave financial hardship" unless the Respondent No. 3 made an "arrangement" to "eliminate" such "grave financial hardship."

5. It seems that the Petitioner had maintained an application under Order 7 Rule 10 of the Code of Civil Procedure, 1908 in Family Petition No. 206 of 2020 initially arguing that the provisions of the Hindu Marriage Act, 2017 did not apply to the Province of Sindh. That Application was dismissed on 12 October 2020 by the XVIth Family Judge Karachi (East) on the ground that while the contentions of the Petitioner were correct, the Respondent No. 3 had simply misstated the statute on the basis of which he was claiming his right to terminate his marriage and which would not create a ground for the return of the Plaint; the Court having the requisite jurisdiction to treat the Suit as having been instituted under Section 11 of the Sindh Hindu Marriages Act (Amendment) Act, 2018. Another application was filed by the Petitioner, under Order 7 Rule 11 of the Code of Civil Procedure, 1908, to reject the plaint in Family Petition No. 206 of 2020 on the grounds that it should have been instituted within the territorial jurisdiction of the court within which the Petitioner resided. This Application was also dismissed by the Court on 17 March 2021. The Petitioner challenged the the order dated 17 March 2021 passed by the XVIth Family Judge Karachi (East) dismissing the application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 in Family Petition No. 206 of 2020 and maintained Constitution Petition No.

S-290 of 2022 before this Court and which was disposed of on 20 May 2022 with a direction to adjudicate on the issue of maintainability first and only after adjudicating on that issue, would thereafter consider the additional issues involved in the *lis*.

6. The XVIth Family Judge Karachi (East) heard Family Petition No. 206 of 2020 and framed the following issues:

> " … (i) *Whether the petition has cause of action to file present suit against the respondent;*
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> (ii) *Whether the Petitioner is entitled for termination of his marriage under the Hindu Marriage Act, 2018;*
>
> (iii) *Whether the marriage of the parties can be terminated under Hindu Marriage Act, 2018; and*
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> (iv) *What should the decree be?"*

After hearing the parties, the XVIth Family Judge Karachi (East) has on 9 February 2023 passed a Judgement and Decree directing that:

(i) while the prayer in the Petition was for Judicial Separation under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018, it could be deemed as having been filed for termination of marriage under Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018;

(ii) that as the Respondent No. 3 had established through evidence that the Petitioner had treated him "cruelly" he was entitled to Terminate his Marriage with the Petitioner.

7. The Petitioner maintained an appeal under Section 14 of the Family Courts Act, 1964 to the IXth Additional District Judge Karachi (East) bearing Family Appeal No. 55 of 2023. After hearing the Petitioner and the Respondent No. 3 that court was by its Judgement dated 15 March 2023 pleased to partially allow the Appeal holding that:

(i) the marriage between the Petitioner and the Respondent No. 3 was to be terminated on the grounds of "cruelty" and "desertion"; and

(ii) that the Decree dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 was maintained subject to the Respondent No. 3 making a "reasonable financial arrangement" for the Petitioner and for the Minor A.

8. The Petitioner being aggrieved by the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 partially modifying the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020, maintain this Petition before this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Mr. Muhamad Ali Lakhani entered appearance on behalf of the Petitioner and contended that Family Petition No. 206 of 2020 had been maintained seeking a prayer forJudicial Separation and the XVIth Family Judge Karachi (East) has exceeded its jurisdiction by treating the *lis* as a petition for terminating a marriage. He said even if the *lis* could have been treated by the XVIth Family Judge Karachi (East) as one for terminating a marriage the same could not have been done without making a proper adjudication as to an "arrangement" to be made to "eliminate" the "grave financial hardship" that would be faced by the Petitioner on account of the termination of her marriage as mandated by Section 12 of the Sindh Hindu Marriages Act (Amendment) Act, 2018. He further alleges that the ground of "desertion" was never addressed either in pleadings or in the issues and a Judgement could not have therefore have been given on this basis. He contended that Section 8 of the Sindh Hindu Marriages Act (Amendment) Act, 2018 for Judicial Separation was a stand-alone provision and could not

be interchanged with the relief of Termination of a marriage under Section 11 of the Sindh Hindu Marriages Act (Amendment) Act, 2018 or vice versa. On this basis he contends that while the ground for Judicial Separation and the Termination of the marriage are similar under the provisions of the Sindh Hindu Marriages Act (Amendment) Act, 2018, that is the only overlap between the two sections and the remedies that exist are entirely independent one of the other and as such it was not open to the Family Court to exercise jurisdiction in such a manner. To make this distinction he states that while under Sub-Section (2) of Section 8 of the Sindh Hindu Marriages Act (Amendment) Act, 2018 Judicial Separation was reversible, the Termination of a marriage was not. In this regard he while conceding that the decisions reported as ***Muhammad Imran Ahmed vs. Mst. Hina Faheem***,[2] ***Amir Shahzad vs. Additional District Judge, Multan***[3] and ***Muhammad Sharif vs. Additional District Judge***[4] held that the Family Court had the requisite jurisdiction to adapt relief, submitted that it could not be construed in a manner to go against the provisions of the Sindh Hindu Marriages Act (Amendment) Act, 2018. Expanding on this proposition he submitted that while Judicial Separation could be granted unconditionally, a Termination of a marriage under Section 11 of the of the Sindh Hindu Marriages Act (Amendment) Act, 2018, where a plea was made under Section 12 of the of the Sindh Hindu Marriages Act (Amendment) Act, 2018, could only be granted as against an "arrangement" made in favour of the wife to "eliminate" her "grave financial hardship" ***and*** as against a maintenance award being made in favour of the Minor A and until so determined the marriage could not be terminated. He therefore contended that the Family Court could not adjust the grant of its relief to the extent of exercising discretion to interchange the reliefs that exist in Section 8 and Section 11 of the Sindh Hindu Marriages Act (Amendment) Act, 2018without such an adjudication. He therefore prayed that the Judgement dated 15

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[2] 2014 MLD 1400
[3] 2015 CLC 632
[4] 2007 SCMR 49

March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 partially modifying the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020, be set aside and the matter should be remanded to the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 for a proper adjudication as to the Termination of the marriage being granted as against a proper "arrangement" being made in favour of the Petitioner to "eliminate" the "grave financial hardship' that would be faced by the Petitioner ***and*** as against a proper maintenance award being made in favour of the Minor A.

9. Dr. Muhammad Khalid Hayat, Advocate addressed arguments on behalf of the Respondent No. 3 and argued that the as the Petition had been maintained against two concurrent findings the same was not maintainable. He stated that the Petitioners are seeking a writ of certiorari which can only be granted where there is a violation of the law and which did not exist here. He said that the Petition for the Termination of the Marriage was clearly maintainable on the ground of "cruelty" and "desertion" as the Petitioner and the Respondent No. 3 have been separated for over 10 years. He contended that the issue of the Termination of the Marriage should not be made on the basis of maintenance being awarded keeping in mind that Family Suit No. 1761 of 2020 was also pending before the Family Judge Karachi (East) and which was to be granted on its own terms. He concluded by saying that the criteria for determining "cruelty" in a marriage should be determined in accordance with the decisions reported as ***Neelu Kohli vs. Naveen Kohli***,[5] ***Smt. Pushpa Rani vs. Vijay Pal Singh***,[6] and ***Maya Devi v. Jagdish Prasad***.[7]

[5] AIR 2004 Allahabad 1
[6] AIR 1994 Allahabad 216
[7] AIR 2007 SC 1426

10. I had appointed Mr. Ravi Pinjani, Advocate as Amicus Curiae to assist the Court on the issue as to whether the relief that a Family Court could granted under the provisions of the Sindh Hindu Marriages (Amendment) Act, 2018 on the grounds of Judicial Separation and Termination of a Marriage were interchangeable. Mr. Ravi Pinjani addressed arguments on the interpretation of the provisions of the Sindh Hindu Marriages (Amendment) Act, 2018 and submitted that:

(i) Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 recognises a right of either party to a Hindu marriage to present a petition to the Family Court praying for a decree of ***Judicial Separation*** under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 on the same grounds as are prescribed for the ***Termination of a Marriage*** under Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018;

(ii) The language of Sub-Section (1) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 when compared with the language of Sub-Section (1) of Section 8 and Sub-Section (2) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 ***appears to empower the Family Court to grant the remedy of Termination of Marriage on a petition presented to the Court by either party on the grounds noted in Sub-Section (1) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018*** and which he states do not necessarily require the Petitioner to specifically pray for the Termination of a marriage and which can be granted by the Court if it seems that the grounds for granting such relief had been made out;

(iii) He contended that Section 19 of the Sindh Hindu Marriages (Amendment) Act, 2018 prescribes that the provisions of the Family Courts Act, 1964 would be applicable to Petitions presented under the Sindh Hindu Marriages (Amendment) Act, 2018. The procedural law to be followed while adjudicating a petition under the provisions of the Sindh Hindu Marriages (Amendment) Act, 2018 is therefore the Family Courts Act, 1964 with all its inherent flexibility inasmuch as Section 17 of the Family Courts Act, 1964 excludes the application of the Code of Civil Procedure, 1908 and the Qanun-e-Shahadat Order, 1984 so as not to burden a Family Court with matters of procedural technicalities but to enable it to do substantive justice on the facts and circumstances before it. In this regard he relied on the decision reported as ***Muhammad Imran Ahmed vs. Mst. Hina Faheem***[8] in which it was held that in proceedings under the Family Courts Act, 1964, the Family Court is competent to grant relief keeping in view the circumstances of the case, which in its view is just and proper for disposal of the case. He also relied on the decision reported as ***Amir Shahzad vs. Additional District Judge, Multan***[9] to state that the Family Court has the jurisdiction to regulate its own proceedings and in doing so it has to proceed on the premise that every procedure is permissible unless a clear prohibition is found in law. He finally relied on the decision reported as ***Muhammad Sharif vs. Additional District Judge***[10] in which the Supreme Court of Pakistan has held that it was not even necessary to mention the cause of action in the contents of the Plaint in a case instituted under the Family Courts Act, 1964 and rather

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[8] 2014 MLD 1400
[9] 2015 CLC 632
[10] 2007 SCMR 49

that the substance of the Plaint should be considered while granting relief;

(iv) that the restriction as otherwise imposed by Order 7 Rule 7 of the Code of Civil Procedure, 1908 read with Order 2 Rule 2 of the Code of Civil Procedure, 1908, that require the plaint to specify the relief claimed and which limits the scope of the procedure of a civil court, do not and cannot apply to proceedings before the Family Courts – neither when dealing with Muslim marriages under the Muslim Family Laws Ordinance, 1961 nor while dealing with Hindu marriages under the Sindh Hindu Marriages (Amendment) Act, 2018;

(v) The interpretation of the power given to a Family Court to grant a petition for Termination of the marriage under Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018, without it having been specifically pleaded appears to be in line with the flexibility granted to the Family Courts under the Family Courts Act, 1964 and the jurisprudence developed thereunder; ***however the facts and circumstances of the case and the pleadings themselves must of course make out a case for Termination of marriage even if the prayer clause is insufficiently or poorly worded or drafted.***

(vi) He states that as per the second recital of the preamble of the Sindh Hindu Marriages (Amendment) Act, 2018, one of the objects of the Sindh Hindu Marriages (Amendment) Act, 2018 was to achieve uniformity in the law concerning Hindu marriages i.e. with the Hindu Marriage Act, 2017. A comparison of the Hindu Marriage Act, 2017 with the Sindh Hindu Marriages (Amendment) Act, 2018 does suggest that in most respects the laws are identical. However, he points out, that one relevant distinction is that a provision analogous

to Section 14 of the Hindu Marriage Act, 2017 does not exist in the Sindh Hindu Marriages (Amendment) Act, 2018. He states that as Section 14 of the Hindu Marriage Act, 2017 specifically enables the Family Court, while hearing a case for terminating a marriage, to grant in the alternate the remedy of Judicial Separation in a petition. This specific "one-way" provision, by necessary implication, therefore excludes the reverse situation i.e., that in a petition for Judicial Separation a Termination of a Marriage cannot be granted. He argued that such an intention on the part of the legislature, by reason of the omission of a provision paralleling with Section 14 of the Hindu Marriages Act, 2017 from the purview of the Sindh Hindu Marriages (Amendment) Act, 2018 would lead to the conclusion that while the Family Courts in the 3 other provinces cannot grant the relief of Termination where the prayer clause only seeks decree of judicial separation, this "Clog" on the power of the Family Court has not been imposed by the legislature when enacting the Sindh Hindu Marriages (Amendment) Act, 2018.

11. I have heard the Counsel for the Petitioner, the Counsel for the Respondent No. 3 and the Learned Amicus Curiae, each of whose assistance has been very useful and have also perused the record.

A. *Marriage Under Hindu Personal Law*

12. The Petitioner and the Respondent are admittedly Hindus and were married on 23 January 2010 and from which wedlock a Minor A was born on 4 May 2011. Hinduism, as a religion, does not permit persons who subscribe to that religion to divorce. Sir Gooroodass Banerjee in his treatise

on the subject entitled "The Hindu Law of Marriage and Stridhana" has clarified that:[11]

> " … *The provisions of the Hindu law on this important subject are somewhat unique. By that law, marriage is regarded as a sacrament and an indissoluble union; and accordingly Manu declares, – "Neither by sale nor desertion, can a wife be released from her husband;" and in another place he says,- 'Let mutual fidelity continue till death;' this in few words may be considered as the supreme law between husband and wife." So far our law deals equally with both parties. But it goes farther. While, as you have seen, it allows a man to have a plurality of wives, it forbids the second marriage of a woman even after the death of her first husband. It is true that some authorities permit a woman to take a second husband under certain circumstances. Thus Parasara in his celebrated text declares – "If the husband be missing, or dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband." And Narada and Devala lay down rules to the same effect. But these rules, either like the practice of raising up issue by a kinsman on an appointed wife, relate to a primitive stage of Hindu society in which rapid multiplication of the race was deemed an important object, or they merely show the existence of some difference of opinion among the Hindu sages on a point on which absolute unanimity of opinion can hardly be expected. The prevailing sentiment of Hindu society has for a long time been repugnant to the second marriage of a woman. Manu says: "The holy nuptial texts are applied solely to virgins, and nowhere on earth to girls who have lost their virginity; since those women are in general excluded from legal ceremonies." And in another place he declares: "Nor is a second husband allowed in any part of this code to a virtuous woman." Indeed a twice-married woman (punarbhu) and a disloyal wife (swairim) are considered as belonging to classes not very far removed from one another. Thus Narada says; "Others are women who had a different husband before (parapurva); they are declared to be of seven kinds, in order as enumerated: among these, the twice married woman is of three descriptions, and the disloyal wife of four sorts."*
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> *Their husbands are, according to Manu, 'to be avoided with great care; their children, says Harita, 'should not be admitted to social meetings; neither they, nor their daughters, are to be taken in marriage; and their sons, called the paunarbhava, though formerly allowed to inherit in default of legitimate sons, as coming under one of the twelve descriptions of sons," are in the present age declared unfit to have any share of the heritage."*
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> *Thus, while the practice of polygamy renders dissolution of marriage unnecessary for the husband, the prohibition of the second marriage of a woman renders divorce useless for the wife. Accordingly, as a rule, divorce in the ordinary sense of the word has been unknown in Hindu society.*

As such according to the tenets of Hinduism, a marriage is a sacred relationship, a divine covenant and a sacrament meant for procreation and continuation of a family lineage. Such an obligation is an obligatory duty under the Hindu dharma and which, once accepted, should be upheld by both the parties to a marriage throughout their lives. Marriage is therefore a sacred bond, which cannot be dissolved through divorce.

[11] Banerjee, Sir Gooroodass, ***The Hindu Law of Marriage and Stridhana*** (1913) Calcutta, S.K. Lahiri & Co.; 1913 at pgs. 187-189

B. Statutory Intervention Conferring the right of Divorce to Hindus

13. In India, Hindu Personal Law was statutorily amended through the Hindu Marriage Act, 1955 that confers a statutory right of divorce to parties who follow the tenets of Hinduism. In Pakistan it would seem that no statutory right to divorce existed for Hindus until the promulgation of the Hindu Marriage Act, 2017. As per Sub-Section (2) of Section 1 of that statute, the Act was declared to apply only to the Islamabad Capital Territory, the Province of Baluchistan, Khyber Pakhtunkhwa and Punjab and wherein Section 9 and 12 of the Hindu Marriage Act, 2017 respectively conferred, on a person subscribing to Hinduism, the right to a Judicial Separation and the right to terminate their marriage against the criterion mentioned therein.[12]

14. The year before the promulgation of the Hindus Marriage Act, 2017, the Province of Sindh had promulgated The Sindh Hindus Marriage Act, 2016 and which statute, while regulating various aspects of a marriage *inter se* persons subscribing to Hinduism, conferred no right on a person to either obtain a Judicial Separation or to Terminate their Marriage. Such rights were legislated on in this Province by the Sindh Hindu Marriages (Amendment) Act, 2018 and pursuant to which the rights of seeking Judicial Separation and Termination of a Marriage were conferred on Hindus.

15. I have perused the Indian Hindu Marriage Act, 1955, the Hindu Marriage Act, 2017 and the Sindh Hindu Marriages (Amendment) Act, 2018 and it is apparent that each of the statutes in Pakistan have been premised on the Indian Hindu Marriage Act, 1955 and as such it would be convenient

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[12] The constitutional validity of the Hindu Marriage Act, 2017 and the Sindh Hindu Marriage (Amendment) Act, 2018 in terms of legislative capacity to have enacted such law has not been argued before me and therefore I would not dilate on that issue and leave that issue to be considered by a court in appropriate proceedings.

to compare the provisions of each of them one with the other and which are reproduced hereinunder:

Indian Hindu Marriage Act, 1955	Hindu Marriage Act, 2017	Sindh Hindu Marriages (Amendment) Act, 2018
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.	**19. Judicial separation** (1) Either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition to the Court praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 12, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof. (2) Where a decree for judicial separation has been passed, on the application of both the parties 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	**8. Restitution of Conjugal Rights** (1) Either Party to Hindu Marriage, whether solemnized before or after commencement of this Act, may present a petition to the court praying for decree of judicial separation on any of the grounds specified in sub-section (1) of Section 11 and in the case of a wife also on any of the ground specified in sub-section (2) thereof. (2). Where a decree of judicial separation has been passed, the Court may on application of both the parties and on being satisfied or truth of statements made in such petition, rescind the decree if it considers it just and reasonable to do so.
13. Divorce. (1) Any marriage solemnized, 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— (i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or (ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or	**12. Termination of Hindu marriage.** (1) Any Hindu marriage solemnized whether before or after commencement of this Act may, on a petition presented to the Court by either a husband or a wife, be terminated by decree of termination of marriage on the ground — (a) that the other party — (i) has, after the solemnization of the marriage, treated the petitioner with cruelty; or (ii) has deserted the petitioner for continuous period of not less than two years immediately proceeding the	**11. Termination of Hindu Marriage** Any Hindu Marriage solemnized whether before or after commencement of this Act may, on a petition presented to the Court by either a husband or a wife, be terminated by decree of termination of marriage on the ground : - (a) That the other party:- (i) has, after the solemnization of the marriage, treat the petitioner with cruelty, or (ii) has deserted the Petitioner for a continuous period of not less than two years immediately preceding

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or (ii) has ceased to be a Hindu by conversion to another religion; or (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. Explanation.—In this clause,— (a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia; (b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub—normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or (v) has been suffering from venereal disease in a communicable form; or (vi) has renounced the world by entering any religious order; or (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive; Explanation.—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without	presentation of the petition: Explanation.—In this clause, the expression. "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the Marriage; or (iii) has ceased to be Hindu by conversion to another religion; or (iv) has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent; . Explanation.—In this clause, the expression "mental disorder" means mental other disorder or disability of mind including schizophrenia and the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether illness, arrested or incomplete development of mind, psychopathic disorder or any or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or (v) has been suffering from a virulent and incurable from of leprosy; or (vi) has been suffering from venereal disease in a communicable from or HIV Aids; or (vii) has renounced the world by entering any religious order; or	the presentation of the petition, Explanation :- In this clause, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage; or (iii). has ceased to be Hindu by conversion to another religion; or (iv) has been incurably of unsound mind, Mental disorder. Explanation :- in this clause the expression "mental disorder" means mental illness, arrested or incomplete development of mind, "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or serious irresponsible conduct on the part of the other part of the other party and whether or not it requires or is susceptible to medical treatment, or (v) has been suffering from virulent and incurable form of leprosy (vi) has been suffering from venereal disease in communicable form or HIV Aids: or (vii) has renounced the world by entering any religious order, or

reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. (1A) Either party to a marriage, whether solemnized 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; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. (2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or (ii) that the husband has, since the solemnization of	(b) that there has been no resumption of cohabitation as between the parties to the marriage for a period of more than one year after he passing of decree for judicial separation or order of restitution of conjugal rights passed by the Court. (2) A wife may also present a petition for termination of her marriage on the grounds,— (a) in the case of any marriage solemnized before commencement of this Act, that the husband had married again before such commencement or that another wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner: Provided that in either case the other wife is alive at the time of the presentation of the petition; or (b) that the husband has neglected or has failed to provide for her maintenance for a period of two years; (c) that the husband has been sentenced to imprisonment for a period of four years or upwards; or (d) that her marriage, whether consummated or not, was solemnized before she attained the age of eighteen' years and she has repudiated the marriage before attaining that age; Explanation.—This clause .aplies whether the marriage was solemnized before or after commencement of this Act.	(b) That there has been no resumption of cohabitation as between the parties to the marriage for a period of more than one year after the passing of a degree for judicial separation or order of restitution of conjugal rights passed by the Court. (2) A wife may also present a petition for termination of her marriage on the ground:- (a) in the case of any marriage solemnized before commencement of this Act, that the husband has married again before such commencement or that another wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the Petitioner. Provided that in either case the other wife is alive at the time of the presentation of the petition: or (b) that the husband has neglected or has failed to provide for her maintenance for a period of two years; (c) that the husband has been sentenced to imprisonment for a period of four years or upward; or (d) that her marriage whether consumed or not, was solemnized before she attained the age of eighteen years and she has repudiated the marriage before attaining that age; Explanation – This clause applies whether the marriage was solemnized before or after commencement of this Act.

the marriage, been guilty of rape, sodomy or bestiality; or (iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years. Explanation. This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).		
	13. Financial security of wife and children. (1) If a wife is respondent in a petition for termination for the marriage by decree of termination, she may oppose the grant of decree on the ground that the termination of the marriage may result in grave financial hardship fo her unless arrangements have been made to the satisfaction of the Court to eliminate such hardship: Provided that nothing contained in this Act shall	**12. Financial Security of wife and Children** (1) If a wife is respondent in a petition for termination of the marriage by decree of termination, she may oppose the grant of decree on the ground that the termination of the marriage may result in grave financial hardship to her unless arrangement have been made to the satisfaction of the court to eliminate such hardship. Provided that nothing contained in this Act shall

	affect any right which she may have to her dower or any part thereof on the termination of marriage. (2) The Court shall not pass a decree of termination unless the Court is satisfied that adequate provisions for the maintenance of children born out of the marriage has been made in commensuration with the financial capacity of the parties to the, marriage.	affect any right which she may have to her dower or any party thereof on the termination of marriage. The Court shall not pass a decree of termination unless the Court is satisfied that adequate provisions for the maintenance of children born out of the marriage in commensuration with the financial capacity of the parties to the marriage
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.	**14. Alternate relief in termination of marriage proceeding.** In any proceeding under this Act, on a petition for termination of marriage by decree of termination, except in so far as the petition is found on the ground mentioned in sub-clauses (i), (ii), (iv) and (vii) of clause (a) and clause (b) of subsection (1) of section 12, the Court may, if it considers it just so to do having regard to the circumstances of the case, pass, a decree for judicial separation instead of a decree for termination of marriage.	
13B. Divorce by mutual consent. (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. (2) On the motion of both the parties made not earlier	**15. Termination of Hindu marriage by mutual consent.** (1) Subject to the provisions of this Act, a petition for termination of marriage by decree of termination may be presented to the Court by both the parties to a marriage together, whether such marriage wassolemnized before or after commencement of this Act, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and they have mutually agreed that the marriage should be terminated. (2) On the decision by both the parties made not earlier than six months after the	**13. Termination of Hindu marriage by mutual consent.** (1) Subject to the provisions of this Act, a petition for termination of marriage by a decree of divorce may be presented to the Court by both the parties to a marriage together, whether such marriage was solemnized before or after commencement of this Act, on the ground that they have been living separately for a period of Six Month a year or or more, that they have not been able to live together and they have mutually agreed that the marriage should be terminated. (2) the Court shall on being satisfied, after hearing the parties and

than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.	date of the presentation of the petition referred to in subsection (1) and not later than eighteen months after the said date, the Court shall, on being satisfied after hearing the parties and after making such inquiry as it thinks fit that a marriage has been solemnized and that the averments in the petition are true, pass a decree of termination declaring the marriage to be terminated with effect from the date of the decree.	after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of termination declaring the marriage to be terminated with effect from the date of the decree.

16. Before considering the various provisions of the Sindh Hindu Marriages (Amendment) Act, 2018 it is noted, with a degree of concern, that numerous typographical errors exist in that statute each of which are listed hereinunder and which should be read as clarified below as to do otherwise would lead to absurdity[13]:

(i) The heading of Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 is entitled "Restitution of Conjugal Rights" and which clearly has been done in error as the section does not confer any right therein to apply for "Restitution of Conjugal Rights" and which section in fact deals with issues pertaining to Judicial Separation. In fact unlike the Hindu Marriage Act, 2017, the Sindh Hindu Marriages (Amendment) Act, 2018 does not confer any right to seek "Restitution of Conjugal Rights." Whether or not such rights can be construed to exist under the common law governing the personal obligations as between Hindus would have to be considered in appropriate proceedings. In the

[13] Reliance is placed on ***<u>House Building Finance Corporation vs. Shahinshah Humayun Cooperative House Building Society</u>*** 1992 SCMR 19 and ***<u>Haji Adam Ali Agaria vs. Asif Hussain</u>*** 1996 MLD 322

circumstances, I am of the opinion that the heading given in that act to Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 should not be used in respect of the interpretation of that section;

(ii) the word "or" as used in Sub-section (2) of Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 between the words "satisfied" and "truth" should be read as "of the";

(iii) the word "degree" as used in clause (b) of Sub-Section (1) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 should be read as "decree"; and

(iv) the word "consumed" as used in clause (d) of Sub-Section (2) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 should be read as "consummated."

C. <u>Termination of a Marriage and Judicial Separation</u>

17. Sir Gooroodass Banerjee in his treatise entitled "The Hindu Law of Marriage and Stridhana" has very articulately summarised the need for a person to have a right to divorce in a marriage and the various remedies that have existed in various legal systems as follows:[14]

> *" … exceptional cases may arise in which the continuance of the union would be a source of lasting misery to either or both of the parties. To meet these contingencies, divorce in some form or other is prescribed by most systems of law. The different forms of divorce may be classed under either of two heads,-- first, dissolution of marriage; and second, separation of the husband and wife in bed and board, their marriage-tie still subsisting. The former is resorted to when owing to some circumstance affecting the validity of the marriage, or owing to disagreement of a lasting nature between the parties, it is thought improper that they should continue as husband and wife; while the latter is the remedy in cases in which, owing to some present cause of disagreement, such as ill-treatment or the like, it becomes necessary that the parties should live separate, though there may be hope of future reconciliation between*

[14] Banerjee, Sir Gooroodass, ***<u>The Hindu Law of Marriage and Stridhana</u>*** (1913) Calcutta, S.K. Lahiri & Co.; 1913 at pgs 183 to 187

them. The former mode has been called divorce a vincula matrimonii, or divorce simply, or dissolution of marriage; and the latter has been styled divorce a mensa et thoro, or judicial separation.

In the former case, the effect of divorce is to dissolve the marriage-tie completely, and to leave the parties free to marry again; and when the ground of the divorce is the invalidity of the marriage, its effect is to declare the marriage void ab initio, and, except for some purposes in certain cases, to bastardize the issue of such marriage. In the latter case, the effect is to permit the husband and the wife to live separately, and to prevent either party from enforcing restitution of conjugal rights against the other; though, if they both agree, there would be no bar to their living together again as man and wife...

The determination of the proper grounds for allowing dissolution of marriage not void ab initio, is one of the most difficult problems for the legislator. If, on the one hand, to deny divorce universally would involve a grievous wrong to individuals in some cases, on the other hand, to allow it freely would be equally grievous in its consequences to society; for it needs hardly to be pointed out that it is upon the indissolubility of marriage that the integrity of the family, 'the proper rearing of the next generation, and the cultivation of domestic virtues depend. The grounds which are usually insisted upon as justifying divorce, may be classified under two heads,- namely, consent of both parties, and misconduct of either or of both. At first sight, the former ground seems to be so natural and so little open to objection, that one is apt to wonder why it has not been universally adopted, and why, on the contrary, collusion between the parties should form a ground for rejecting an application for divorce. The propriety of allowing divorce upon consent of both parties has been discussed at some length by Jeremy Bentham in his Principles of the Civil Code, and his opinion is decidedly in its favour. It would carry me much beyond the scope of the present lecture to examine the question in detail. Generally speaking, one reason why this ground of divorce, which is apparently so unobjectionable, is rejected in most systems, is, because it is thought that the disagreement and the consequent separation which we may bring about by our own choice, may as well be prevented by some care and self-sacrifice on our part, if we know that there is no choice in the matter. Another reason is, that it is apprehended, that marriage will be thoughtlessly contracted if it can be dissolved by mutual consent. The admissibility of the grounds of the latter class rests upon a very different consideration. When the conduct of either of the parties has been such that it would be cruel to the other to allow the matrimonial relation to subsist between them, divorce is the only remedy for the wrong. But it ought to be granted only at the instance of the wronged party, and the misconduct for which it should be granted, ought to be such that no one would be likely to permit it to be imputed to him merely for the purpose of obtaining divorce. It is upon grounds of the latter class — that is misconduct of the parties, — that divorce is allowed in most civilized countries.

The Roman law allowed divorce by the mutual consent of parties, or at the choice of either of them if the other was guilty of conjugal infidelity.) The Mahomedan law goes further, and permits divorce, not only by the consent of both parties, but also at the mere will and pleasure of the husband. The Code Napoleon allows divorce by mutual consent in a certain limited class of cases under very stringent restrictions. It also authorises divorce on the ground of adultery by the wife, or by the husband if he keeps this concubine in the common dwelling house; or of ill-treatment; or of condemnations of either party to an infamous punishment. By the law of Scotland either spouse can divorce the other on the ground of adultery or wilful desertion. By the English law and the Indian Divorce Act (IV of 1869) for Christians, divorce can be obtained by the husband on the ground of adultery by the wife; and by the wife on the ground of adultery by the husband, coupled with certain aggravating circumstances such as incest, cruelty, or the like. The Indian Act also allows the wife to obtain a divorce on the ground of her husband's change of religion and subsequent marriage with another woman.

You will observe that, while conjugal infidelity in the wife is always a ground of divorce in all these systems, the same offence in the husband

> *would not, according to some of them, authorize divorce, unless it is coupled with some aggravating circumstance. Morally the offence is the same by whichever party it is committed; but from a social point of view, the consequences of infidelity in the wife are far more seriously embarrassing to the matrimonial union than those of infidelity in the husband; and this seems to be the only ground of justification for this unequal legislation."*

As is apparent the Sindh Hindu Marriages (Amendment) Act, 2018 recognises the right to a Hindu to apply for both a Judicial Separation and for terminating their marriage as against certain criteria mentioned in that statute and which rights and obligations are to be regulated through the Family Courts constituted under the provisions of the Family Courts Act, 1964 and the Family Court Rules, 1965.

(i) <u>Judicial Separation</u>

18. Under Sub-Section (1) of Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 a right has been conferred on both the Husband and the wife, to independently apply to the Family Court, by presenting a petition for Judicial Separation on any of the following grounds:

(i) the Petitioner has been treated by their spouse with cruelty;

(ii) the Petitioner's spouse has "deserted" the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

(iii) the Petitioner's spouse has ceased to be a Hindu, having converted to another religion;

(iv) The Petitioner's spouse is of unsound mind or is suffering a "mental disorder" which is incurable;

(v) The Petitioner's spouse is suffering from a virulent and incurable form of leprosy;

(vi) The Petitioner's spouse is suffering from venereal disease in communicable form or HIV Aids;

(vii) The Petitioner's spouse has renounced the world by entering into a religious order; or

(viii) The Petitioner and their spouse have been separated for a period of more than one year after the passing of a decree for Judicial Separation or order of restitution of conjugal rights passed by the Court.

In ***addition*** to the abovementioned grounds, a ***Wife*** may independently Petition the Family Court to seek Judicial Separation on the following grounds:

(i) that the Husband had committed bigamy by either marrying the Petitioner while he was married to another woman or by having married another woman while he was married to the Petitioner and at the time of the presentation of the Petition the other Wife is alive;

(ii) the Petitioner's Husband has either neglected or failed to provide for the Petitioners maintenance for a period of two years;

(iii) the Petitioners Husband has been sentenced to imprisonment for a period of four years or upward; or

(iv) the Petitioner at the time of the solemnisation of a marriage was under the age of eighteen years and she has "repudiated" the marriage before attaining that age;

19. It is apparent from the above that while the grounds for Judicial Separation as contained in the Sindh Hindu Marriages (Amendment) Act, 2018 are identical to the grounds for Judicial Separation as contained in the Indian Hindu Marriages Act, 1955, the Sindh Hindu Marriages (Amendment) Act, 2018 remains silent as to whether a Wife is entitled to maintenance during the period when she is "judicially separated" from her Husband. In India, such obligations are regulated by Section 18 of the Hindu Adoptions and Maintenance Act, 1956, while in Pakistan no statute exists to regulate such obligations. In the absence of a statute that will regulate these obligations I would think that the Family Court should rely on Regulation 26 of Sind Regulation IV of 1827 to consider whether a Wife would be entitled to such maintenance payments and which reads as follows:

> " *The law to be observed in the trial of suits shall be Act of Parliament and Pakistan Laws applicable to the case, in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, justice, equity and good conscience alone.*

The expression "justice equity and good conscience" as used therein has been interpreted by the Supreme Court of Pakistan in the decision reported as ***Hitachi Limited v Rupali Polyester***[15] wherein while considering the provisions of Sub-article (2) of Article 175 of the Constitution of the Islamic Republic of Pakistan, 1973 it was held that:

> " 7. *In Indo-Pak, under the Letters Patent under which High Courts were created, inter alia provided that the High Courts were competent to apply inter alia the principles of equity and rule of good conscience (as an example, reference may be made to clauses 12 and 13 of the Letters Patent High Court Judicature Lahore). We may also refer to the cases of Azim Khan v. State of Pakistan and another (PLD 1957 (W.P.) Karachi 892), Nizam Khan v. Additional District Judge, Lyallpur (PLD 1976 Lahore 930), and A.M. Qureshi v. Union of Soviet Socialist Republics (PLD 1981 SC 377). In the first case it was contended by the counsel for the State that common law principles prevalent in England and equally applicable in Pakistan permitted a lessor to eject his lessee by use of minimum force necessary for the purpose. Reliance was placed on Halsbury's Laws of England, Third Edition, Volume 20, page 280. The above contention was repelled by observing as under:--*
>
> > "*The basis of this para. appears to be that if a tenant is ejected by force, no civil remedy is available to him for getting redressed. That may be the position in England but is not so in*

[15] 1998 SCMR 1618

> *Pakistan. Section 9 of the Specific Relief Act provides a remedy in such cases."*
>
> *In the second case, Muhammad Afzal Zullah, J. (as his Lordship then was) held that it was not permissible for Courts in Pakistan to apply and import any Rules of English law relating to equity, justice and good conscience but the Courts could invoke the Rules of equity, justice, good conscience and public policy as contained in the Muslim Jurisprudence. In the third case, Muhammad Afzal Zullah, as a Judge of this Court (as his Lordship then was), reiterated his above Lahore view that for filling gap where law is not available, the principles of justice, equity and good conscience as given in Islamic Jurisprudence and as enunciated in the fundamental principles and judicial norms of Islam are to be pressed into service and not English common law or principles of equity and good conscience."*
>
> *The principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law. In this regard reference may be made to clause (2) of Article 175 of the Constitution of Pakistan, which provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. The High Courts derive their jurisdiction under the Constitution and the statutes. In view of the above Constitutional provision and the case-law the principles of English common law or equity or good conscience cannot be pressed into service in Pakistan as having **statutory** force. **But a Court may adopt a procedure, which is not prohibited by any law if the dictates of justice so demand**."*

(Emphasis is added)

20. The jurisdiction of a Family Court to regulate its procedure has been clarified by the Supreme Court of Pakistan in the decision reported as ***Farzana Rasool and 3 others vs. Dr. Muhammad Bashir and others***[16] wherein it was held that:

> *" … In presence of the Code, need was felt to have a forum for resolution of family disputes, wherein instead of cumbersome procedure, a short and simple methodology shall be provided for settlement and disposal of disputes relating to family matters. It was, therefore, that the Act was promulgated, which is a special Act for special cases in respect of special disputes between a special class of people i.e. husband and wife and children in case of their maintenance and custody.*
>
> *The object was to have expeditious disposal of such matters in shortest possible time. The provisions of the Code and the Evidence Act were made inapplicable on the strength of section 17 of the Act. It is well known that under the Code, there is lengthy procedure for trial with so many bottlenecks, where civil disputes linger on between the parties for decades at the trial stage. Similarly, strict adherence to the rules of the Evidence Act, if followed, would also create so many hindrances in recording of the evidence and technical bars as to the admissibility and relevance of the evidence. It is, therefore, that even the provisions of the Evidence Act were made inapplicable to avoid technicalities.*
>
> *So, if the provisions of the Code and the Evidence Act were made applicable, it would have frustrated the very object of the Act, which requires the Special Court shall be constituted and such Court shall have exclusive jurisdiction in respect of the matrimonial disputes. The object of the Act is to shorten the agony of litigant parties and to provide them justice as early as could be possible. Matters pertaining to the Family Court be of dissolution of marriage, restitution of conjugal rights,*

[16] 2011 SCMR 1361

entitlement of a child or children or of wife to the maintenance, payment of dower, all such issues are required to be decided in speedy manner, because no such issue can be left undecided for decades; because a minor, seeking maintenance, may become major by the time his case is decided by the Family Court or a wife, seeking dissolution of marriage, may go out of marriageable age by the time she get decided her suit for dissolution of marriage."

Similarly in the decision reported as ***Lt. Col. Nasir Malik vs. Additional District Judge, Lahore***[17] it was held that:

*" … 6. As far as the contention of the learned counsel for the petitioner that enhancement in maintenance allowance cannot be sought through an application under section 151, C.P.C. but through a separate suit is concerned, suffice it to say that the provisions of C.P.C. are not stricto sensu applicable to the proceedings under West Pakistan Family Courts Act, 1964, as such the Family Court was competent **to adopt its own procedure**, therefore, the objection raised by the learned counsel is misconceived. The legislature has established the Family Courts for expeditious settlement and disposal of the disputes relating to marriage and family affairs and the matters connected therewith."*

More recently in the decision reported as ***Muhammad Arshad Anjum vs. Mst. Khurshid Begum***[18] the Supreme Court of Pakistan has opined that:

" … 4. Petitioner's recourse to defend his title in the disputed land, decreed in respondent's favour as her dower, before the Family Court and latter before the Additional District Judge, though somewhat haphazard, nonetheless, was the only option available to him. The Family Court decreed the suit, without a full dress trial merely upon failure of respondent's husband to take special oath, a circumstance that too prevailed with the learned Appellate Court. Ostensible contest remained restricted between the spouses without slightest breach in the nuptial bond, to the exclusion of rest of the world. Failure of petitioner's Constitution petition in the High Court also turned out a far cry. Throughout the contest, respondent relied upon technical barricades, thus, the questions that call for our consideration are whether exclusion of the provisions of the Code of Civil Procedure, 1908 barring sections 10 and 11 thereof, stood in impediment to petitioner's approach to the Family Court for re-examination of the judgment within the contemplation of section 12(2) of the Code or that he should have asserted his claim of being a bona fide purchaser with consideration through an intervener in civil plenary jurisdiction?

The Family Court Act 1964 (W.P. Act XXXV of 1964) (the Act) was enacted for "expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith"; provisions of the Qanun-e-Shahadat Order, 1984 (P.O. No.10 of 1984) and those of the Code except sections 10 and 11 have been excluded to achieve the legislative intent. The exclusion of normal rules of procedure and proof, applicable in civil plenary jurisdiction for adjudication of disputes in proceedings before a Family Court, is essentially designed to circumvent delays in disposal of sustenance claims by the vulnerable; this does not derogate its status as a Court nor takes away its inherent jurisdiction to protect its orders and decrees from the taints of fraud and misrepresentation as such powers must vest in every tribunal to ensure that stream of justice runs pure and clean; such intendment is important yet for another reason, as at times, adjudications by a Family Court may involve decisions with far reaching implications/consequences for a

[17] 2016 SCMR 1821
[18] 2021 SCMR 1145

> *spouse or a sibling and, thus, there must exist a mechanism to recall or rectify outcome of any sinister or oblique manipulation, **therefore, we find no clog on the authority of a Family Court to re-examine its earlier decision with a view to secure the ends of justice and prevent abuse of its jurisdiction and for the said purpose, in the absence of any express prohibition in the Act, it can borrow the procedure from available avenues, chartered by law**."*

(Emphasis is added)

I don't think that there can be any doubt that where the Sindh Hindu Marriages Act, 2016 or the Sindh Hindu Marriages (Amendment) Act, 2018 is silent as to the manner in which to regulate an obligation inter se between Hindus, a Court and especially the Family Court has the jurisdiction to regulate the obligations as between a Husband and a Wife as per the personal law applicable to Hindus.

21. The right of a Wife to be maintained by Husband under Hindu Personal Law has also been considered by Sir Gooroodass Banerjee in his treatise on "The Hindu Law of Marriage and Stridhana" wherein it is stated that:[19]

> " … *The duty of maintaining the wife **and other dependent members of the family who are in want**, is strictly enjoined by the Hindu law, and even censurable acts, such as receiving presents from a low person, are excused if done with a view to provide maintenance for them." The maxim that one must be just before he can be allowed to be generous, is beautifully expressed by Manu, thus: -*
>
> > *"He who bestows gifts on strangers with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey but swallows poison: such virtue is counterfeit." (XI, 9.)*
>
> *The right of a wife to maintenance cannot be evaded by any arrangement purposely made in fraud of it. (Manu III 55-59; IV, 251; IX, 74, 95)*
>
> *Ordinarily the right to maintenance does not rest upon contract. The liability to give maintenance is one that is "created by the Hindu law in respect of the jural relations of the Hindu family." (ILR 2 Bom 628)*
>
> *But the payment of her husband's debts must take precedence of the wife's maintenance.*
>
> *The wife can enforce her claim for maintenance if it is denied, and such claim is not affected by her super session.*
>
> *A wife forsaken without fault may, according to Yajnavalkya, compel her husband to pay her a third part of his wealth, or if poor, to provide maintenance for her. From the alternative provisions of this rule, it would seem that the third part of the deserting husband's estate is mentioned as the ultimate measure of the wife's maintenance, and, is directed to be given to her in lieu of maintenance, and also as a sort of*

[19] Banerjee, Sir Gooroodass, ***The Hindu Law of Marriage and Stridhana*** (1913) Calcutta, S.K. Lahiri & Co.; 1913 at pgs. 151 to 157

punishment for the offending husband. Though according to some opinions, an unjustly deserted wife may 'claim and recover a third of her husband's wealth, yet there are opinions to the contrary; and considering the perpetual dependence of woman, and the possibility of the husband and the wife being reconciled to each other at any time, the penal provision in Yajnavalkya's text would not, I think, be enforced by our Courts; and the wife would be allowed maintenance only, though in assessing its amount, the husband's means and conduct would be taken into due consideration.

As a rule, the wife is entitled to maintenance from the husband alone; and so long as he is alive, neither his nor her relations are bound to support her. Nor is there any authority to show that a wife can in the life time of her husband claim maintenance in the absence of any allegation that the husband refuses or has ceased to maintain her, see Purna v. Radha, I. L. R., 31 Cal., 476. Where, however, a husband deserts his wife, and is not heard of for some years, it has been held that though his relations are not under any personal liability to support her, yet if they have property of the husband in their hands, and the proceeds thereof are not accounted for by them, the wife is entitled to receive maintenance from those proceeds to an extent not exceeding one-third of the amount.

So, where the husband is excluded from inheritance by reason of disqualification, his sonless wives, if chaste, are entitled to maintenance from those who inherit to the exclusion of their husband. The right to maintenance is founded on a text of Yajnavalkya, which is adopted by the commentators of all the schools. Express provision is made for the wives who have sons, because in their case, these sons themselves being the heirs to the exclusion of their father, there would be no difficulty in their being supported by the heirs.

*The wife's right to maintenance and her conjugal duty of obedience to her husband, **stand in a reciprocal relation to each other**, and the wife can have no claim to maintenance if she refuses to live with her husband **without just cause**." If she lives apart for no improper purpose her right to maintenance is merely suspended and she may at any time return to her husband and claim to be maintained. See Surampalli v. Surampalli, I. L. R., 31 Mad., 338. In Sitanath Mookerjce v. Sreemutty Haimabutty Dabee, in which a wife living apart from her husband on account of unkind treatment claimed maintenance, Sir Richard Garth, C. J., observed:*

> *"Now what is the Hindu law upon this subject?*
>
> *"It is clear that, according to that law, a wife's first duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection; and although it might be very difficult to deduce from the authorities at the present day any definite rule as to the causes which would justify a wife in leaving her husband's house, it may safely be affirmed that mere unkindness or neglect short of cruelty would not be a sufficient justification.*
>
> *"That the law of modern times does recognize the right of the wife to leave her husband in certain cases of cruelty is apparent from the provision introduced. into the first Code of Criminal Procedure in the year 1861, and reproduced in the existing Code in Section 536, which provides that a man may be ordered to maintain his wife who refuses to live with him if the Magistrate be satisfied that the husband is 'living in adultery or has habitually treated his wife with cruelty.' But it is further enacted by the same section, that no wife shall be entitled to receive this allowance from her husband if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by consent.*
>
> *"We are not at all prepared to say that the jurisdiction or powers of the Civil Courts are bound or limited in any degree by this section of the Criminal Code; but we do consider that in a such a case as the present these provisions may be usefully regarded as a guide to what the Legislature considered to be the*

> *correct law upon the subject; and unless we can see that the husband in this instance has refused to maintain his wife in his house, or has been guilty of acts of cruelty, which would justify her in leaving his protection, she is not entitled to the relief for which she prays."*

An agreement by the husband to pay for separate residence and maintenance of his wife in circumstances which would not justify the wife to claim separate maintenance has been held to be void there being no consideration moving from the wife. See Rajlukhy v Bhootnath, 4 C. W. N., 488.

What causes would justify the wife's refusal to live with her husband, I have already to some extent considered, when treating of restitution of conjugal rights, when any of these justifying causes (which consist of cruelty or ill-treatment in any aggravated form) exists, the wife is entitled to live apart from her husband, and to claim separate maintenance from him. A Hindu wife is entitled to separate maintenance from her husband to be charged on specific property, where she is obliged to live apart on account of his conversion to Mahomedanism; See Mansha Devi v. Jiwan Mal, I. L. R., 6 All, 617. This separate living, at the expense of the husband, corresponds to what is called judicial separation in the English law; and as the Hindu law does not recognize divorce, this is the only remedy that the Hindu wife has against marital injustice and oppression.

Where a Hindu husband keeps a Mahomedan mistress, and by such conduct compels his wife, under her religious feelings, to leave the house, and she lives apart and chastely, she is entitled to claim maintenance from him. Indeed, Colebrooke and Ellis go further, and maintain that the mere entertaining of a concubine is a justification for the wife's living apart, and would subject the husband to the obligation of maintaining her separately." But such a broad rule would be contrary to the precept of Manu,' and its correctness has since been questioned."

So, where a Hindu wife had left her husband's house, and carried on an independent calling, and the husband did not object to the calling, or give her notice to return, it has been held that if she is subsequently desirous of returning to her husband's house, and he declines to maintain her, she is entitled to maintenance.

Conjugal infidelity would of course bar a wife's claim for maintenance. Yajnavalkya says: "Let a man keep a disloyal wife deprived of her rights, squalid, maintained on a ball of grain alone, subdued and only suffered to repose on the meanest bed." So Narada prescribes 'the lowest bed, the meanest food, the worst habitation' as a punishment for the disloyal wife; and Manu permits the husband either to forsake her, or to subject her to penance and mortification. Accordingly, it has been held by the Courts of India that an unchaste wife is not entitled to maintenance. A decree already obtained for maintenance may be set aside on the ground of subsequent misconduct, see Kandasami v. Murugammal, I. L. R. 19 Mad. 6.

But be it said to the credit of our law, that whilst showing the utmost abhorrence towards unchastity, it does not condemn the unchaste wife to die of starvation, or to be forced by absolute necessity to lead a life of shame and misery for one false step. Though it bars her right to maintenance as a source of wealth, it allows her what has been styled starving maintenance, that is, bare food and raiment, as the very texts cited above will show. Though an opposite rule has, it seems, been sometimes followed, yet the true humane spirit of the Hindu law has been generally recognized.

<u>The Civil Courts, it has been held, have power to fix the rate of maintenance payable by the husband to the wife, in cases where for lawful cause she is residing apart from him, and also power to make an order that maintenance at that rate shall be paid in future, subject to any modification that future circumstances may require</u>**." The minimum rate of maintenance is prescribed by the Hindu law with some precision, but the rule had reference to a different state of society, and is not of much practical value now.* ***<u>At the present day, the</u>

> ***<u>rate will have to be determined by the Court after considering the means of the husband and other circumstances in each case</u>.***"

(Emphasis is added)

On the basis of the above I am left in no doubt, that under the Hindu Personal Law it is clearly the obligation of a Husband to maintain both his Wife and other dependent members of his family e.g. his children. However, in respect of a separation of the Wife for a Husband, this duty will not apply to where a Wife refuses to live with her Husband *"**<u>without just cause</u>**."* It would therefore need to be considered as to whether a Wife by exercising her statutory right to being judicially separated under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 would be deprived from maintaining a *lis* for maintenance under Hindu Personal Law. Keeping in mind that the Sindh Hindu Marriages (Amendment) Act, 2018, in certain circumstances, permits a Wife to be separated from her Husband, to my mind it would naturally follow that where such relief is granted by a Court to a Wife in accordance with the criterion mentioned in Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 read with Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018, such circumstances must classify as "just cause" for a separation under the Hindu Personal Law and therefore would permit a Wife to maintain a claim maintenance as against the Husband when a Court grants "Judicial Separation" under that section. I am equally clear that the circumstances as stated in Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 are not exhaustive as to what would classify as 'just cause" and do believe that in addition to the circumstances as stated in in Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018, where a Wife can show that even if she is not entitled to being "judicially separated" under the provisions of Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 read with Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018, she may still have "just cause" outside the scope of the provisions of Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 read with Section 11 of the Sindh

Hindu Marriages (Amendment) Act, 2018 to claim maintenance from her Husband and which circumstances would have to be considered on a case to case basis. Such maintenance, would of course be recoverable by a Wife in a suit for maintenance brought under the provisions of the Family Courts Act, 1964 and which can either be brought by her independently, or under the proviso to Sub-Section (2) of Section 7 of the Family Courts Act, 1964 could be consolidated with a claim under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 read with Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018; the quantum of maintenance would of course "be determined by the Court after considering the means of the Husband and other circumstances in each case."

(ii) Termination of a Marriage

22. The grounds for a Hindu to seek Termination of their marriage is contained in Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 and which are identical to the grounds that exist for the grant of a "judicial separation" under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018. Interestingly, Section 12 of the Hindu Marriages (Amendment) Act, 2018 clarifies that in the event that a *lis* is maintained by a Husband as against his Wife for Termination of their marriage, and which *lis* is opposed by the Wife on the grounds that the Termination of their marriage would result in in her facing "grave financial hardship", then ***without considering the amount of dower that the Wife is entitled to receive*** from the Husband, the Court ***will not*** decree the Termination of the marriage unless ***both***:

(i) an "arrangement" is made to the satisfaction of the court to "eliminate" "grave financial hardship" that would be faced by the Wife on the Termination of her marriage; and

(ii) "adequate provisions" for the maintenance of children born out of the marriage commensurate with the financial capacity of ***<u>the parties</u>*** to the marriage is made.

23. I must admit that the provisions of this section, while clearly developed to secure the rights of the Wife, pose a number of practical procedural challenges in their application. While the grounds on which Termination of a marriage are to be sought have been quite clearly stated in Section 11of the Hindu Marriages (Amendment) Act, 2018, however when the Wife maintains in her Written Statement that she will suffer "grave financial hardship" on account of the Termination of her marriage and which she is subsequently able to prove, it is equally clear that the Husband mandatorily must make an "arrangement" for her to "eliminate" such "grave financial hardship" and which "arrangement" must be to the satisfaction" of the Court. As the Husband cannot be aware, at the time of the filing of the *lis,* that such a plea will be taken by the Wife, he at times may not preempt that such an averment will be made by the Wife in her Written Statement and thereby might not make a contingency for such an "arrangement" in the Plaint. Hence, once such a plea is taken by the Wife in her Written Statement, no indication is given in the Sindh Hindu Marriages (Amendment) Act, 2018 as to how the Husband is to indicate to the Family Court the "arrangement" that he is proposing so as to "eliminate the "grave financial hardship" that will be suffered by the Wife on account of the Termination of their marriage. To my mind, it would seem the only solution to this very procedural problem would be for the Husband, having being alerted to this issue in the Written Statement, to either deny that there would be any "grave financial hardship" suffered by the Wife on account of the Termination of the Marriage or to suggest the "arrangement" that he proposes to "eliminate" the "grave financial hardship" that has been claimed by the Wife at the time of the Pre-Trial hearing to be conducted under section 10 of the Family Courts Act, 1964 and if not accepted at that stage

the same “denial” or “arrangement” **must** be presented by the Husband in evidence.

24. While no issue will arise if the Family Court comes to the conclusion that either no “grave financial hardship” would be faced by the Wife or that the “arrangement” proposed by the Husband would “eliminate” the “grave financial hardship” suffered by the Wife on account of the Termination of their marriage, the law is however silent as to what procedure should be followed if the Family Court comes to the conclusion that “grave financial hardship” would be faced by the Wife on account of the Termination of the Marriage and that it is not “satisfied” with the “arrangement” proposed by the Husband e.g. can the Family Court substitute the “arrangement” proposed by the Husband with its own “arrangement” or whether the Family Courts jurisdiction is limited to simply dismissing the *lis* maintained by the Husband on that ground. I have considered this proposition and cannot consider it to be the intention of parliament that where a Hindu Husband wishes to terminate his marriage and a defence is made by the Wife under Section 12 of the Hindu Marriages (Amendment) Act, 2018 that she will suffer “grave financial hardship” on account of the Termination of the marriage, a court should have the jurisdiction to refuse the person their right to terminate their marriage all together. Clearly the intention of the legislature is not to prevent the Termination of the marriage but rather, while depriving the Wife of her right to “maintenance” that she was entitled to during the period of her marriage, is instead after the Termination of her marriage making some contingency for the Wife post the Termination of her marriage to “eliminate” the “grave financial hardship” that may be suffered by her. The only question to my mind that therefore remains is as to whether the expression “satisfaction of the court” as used in Sub-Section (1) of Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 would confer the power on the Family Court once an “arrangement” is placed before it to substitute that

"arrangement" with its own "arrangement" and in fact impose the Family Courts "arrangement" on the Husband by Decree. I have considered this issue and do believe that the intention of the legislature is precisely to do just that i.e. to conclude the relationship while "eliminating" any chance of the Wife suffering "grave financial hardship." The Family Court having been conferred the ultimate power of having to be "satisfied" with the "arrangement" proposed by the Husband to "eliminate" the "grave financial hardship" of the Wife, clearly confers the Family Court with the jurisdiction to be the final arbiter to settle the terms of the "arrangement" and hence, in the event that the "arrangement" that is proposed by the husband does not satisfy the Family Court, it can well substitute that "arrangement" with an "arrangement" with which it is satisfied against the criteria that the 'arrangement" that is decreed by the Court should "eliminate" the "grave financial hardship" and thereby allowing the Termination of the marriage on those terms.

25. The final hurdle for a Hindu, either a Husband or Wife, seeking a Termination of their marriage is found in Sub-Section (2) of Section 12 of the Hindu Marriages (Amendment) Act, 2018 whereby on the Termination of a marriage, brought by either the Husband or the Wife, the Court has to be "satisfied" that despite the Termination of the marriage "adequate provisions for the maintenance of the children born out of the marriage" is made "in commensuration with the financial capacity of the parties to the marriage." Once again, I do believe that the intention of the legislature is not to refuse the person their right to terminate their marriage but rather to ensure that financially security, for the proper upkeep of their Children is safeguarded at the time of the Termination of the marriage as against the criteria of the financial capacity of the parties to the marriage. This proposition however needs to be examined with a degree of caution. While the expression "parties to the marriage" prima facie would give the impression that at the time of the dissolution of the marriage both the

Husband and the Wife are obligated to maintain their Children this is not correct. There is no stipulation in either Sub-Section (2) of Section 12 of the Hindus Marriage (Amendment) Act, 2018 which would indicate that the provision regulates the obligation to maintain the children to the marriage, much to the contrary the section only prevents the court from terminating the marriage until adequate provision is made for the maintenance of the children against the criterion stipulated in that section. There being no statutory provision to regulate such an obligation the principles of "justice equity and good conscience" as clarified in Regulation 26 of Sind Regulation IV of 1827 may again be pressed into service by the Family Court and resort would be made to Hindu Personal Law regulating such oblgiations amongst Hindus. Sir Gooroodass Banerjee in his treatise on the Hindu Law of Marriage and Stridhana has clarified this obligation wherein he states that:[20]

> " … *That a man should be bound to maintain his legitimate children is natural and obvious, and the same texts that enjoin him to support his wife, may be cited also for the present purpose."*

As such, while passing the decree for terminating the marriage, a Family Court ***must*** make sure that "adequate provisions for the maintenance of children born out of the marriage" is made "in commensuration with the financial capacity of the parties to the marriage" i.e. the financial status of both the Husband and the Wife, ***with the liability to pay such maintenance resting solely on the Husband***.

(iii) ***Alternate Relief***

26. Both Section 14 of the Hindus Marriage Act, 2017 and Section 13 A of the Indian Hindus Marriage Act, 1955, while entertaining a *lis* for Termination of a marriage on the grounds stipulated within each of those sections, permit a court instead of granting the Termination of the marriage to instead pass a decree for judicial separation. While clearly the courts

[20] Banerjee, Sir Gooroodass, ***The Hindu Law of Marriage and Stridhana*** (1913) Calcutta, S.K. Lahiri & Co.; 1913 at pgs. 172

exercising jurisdiction under those statutes would have such a jurisdiction, the absence of such a provision in the Sindh Hindu Marriages (Amendment) Act, 2018 make it less then clear as to what the jurisdiction of the Family Court is under that statute to grant the relief of Judicial Separation in a *lis* for Termination of a marriage and vice versa.

27. Section 19 of the Sindh Hindu Marriages (Amendment) Act, 2018 prescribes that:

> *" … Every Petition under this Act shall be presented to the Family Court and the provisions of*
>
> *(a) The Family Court Act 1964(XXXV of 1964) except proviso of Sub-section (4) of Section 10, Sub-section (2) of Section 14 and Section 21 and 23 thereof; and*
>
> *(b) the West Pakistan Family Courts Rules, 1965 except proviso to clause (b) of rule (6) thereof*
>
> *shall mutatis mutandis application to the proceedings under this Act."*

28. As is apparent, the interpretation by the Supreme Court of Pakistan of the procedural powers of a Family Court[21] confers expansive powers on a Family Court regarding its procedure to decide a matter within its jurisdiction and as such where a procedure is not specified in either the Family Courts Act, 1964 or the Family Court Rules, 1965 then the Court can "adopt its own procedure"[22] or "borrow the procedure from available avenues, chartered by law."[23] In this context, it is therefore necessary to consider as to whether in the absence of provisions analogous to Section 14 of the Hindus Marriage Act, 2017 and Section 13 A of the Indian Hindus Marriage Act, 1955, it is open to a Family Court in Sindh to adopt a procedure which, as submitted by Mr. Ravi Pinjani, would allow a Family Court to grant the relief of a Judicial Separation in a *lis* maintained for Termination of a marriage and vice versa.

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[21] See paragraph 20 above
[22] ***Lt. Col. Nasir Malik vs. Additional District Judge, Lahore*** 2016 SCMR 1821
[23] ***Muhammad Arshad Anjum vs. Mst. Khurshid Begum*** 2021 SCMR 1145

29. While considering the proposition as to whether when a *lis* for Termination of a marriage is presented under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 the Family Court could convert the *lis* into one maintained under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018 and grant the lesser claim of judicial separation, I find myself concerned that such a procedure may not allow the Wife to **simultaneously** maintain an independent claim for maintenance against a Husband, simply on the basis that she having alleged that the Termination of the marriage would result in her suffering "grave financial hardship" and expecting the proceedings for terminating the marriage to be determined subject to an "arrangement" to be settled in her favour under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018, therefore did not make a claim for maintenance post a Judicial Separation under Section 8 of the Sindh Hindu Marriages (Amendment) Act, 2018. Conversely if one is to also consider the proposition that in a *lis* maintained for Judicial Separation if a court is to grant the Termination of a marriage, then the Wife may not even get to plead that she would suffer from "grave financial hardship, let alone examine the Husband on the terms of the "arrangement" to be made in her favour under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 on account of the Termination of the marriage. Hence, rather than advancing a less cumbersome process, the Wife would be well subjected to having to institute a new *lis* rather than have the issue concluded. Conversely, in the event that the *lis* is presented in such a manner where the Wife is made fully aware of the various options that exist e.g. where prayers are made in the *lis* for the Termination of the marriage and in the alternate a prayer is also made in the same *lis* for judicial separation, then the Wife may defend the *lis* and in such defence may establish her claim for both an "arrangement" under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 or for "maintenance" post her judicial separation. While, therefore agreeing with Mr. Ravi Pinjani contention that no "clog" has been imposed on the jurisdiction of the Family

Court to mould the relief it may grant and keeping in mind, as held by the Supreme Court of Pakistan that the Family Court is empowered to "adopt its own procedure"[24] or "borrow the procedure from available avenues, chartered by law,"[25] I do however consider it incumbent on a Family Court that where it exercises such discretion, it must ensure that the Wife should be given an opportunity to be informed of the nature of the relief that is being claimed in the *lis* so as to allow her to set out her defence and make the necessary claims as envisaged under the law and not to be blindsided by the Family Court or be subject to gamesmanship during the proceedings by the Husband. Clearly, where the Family Court exercises it jurisdiction without giving such an opportunity to the Wife would be an act or omission which would be in excess of its jurisdiction and warrant intervention either in Appeal or in appropriate circumstances before this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

D. The Grounds of Cruelty And Desertion As A Basis For Seeking <u>Termination of A Marriage</u>

30. Two of the grounds that are available to a Husband under the provisions of the Sindh Hindu Marriages (Amendment) Act, 2018 to terminate a marriage are those of "cruelty" and "desertion" and are prescribed in Sub-Clause (i) and (ii) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 as under:

> " … *Any Hindu Marriage solemnized whether before or after commencement of this Act may, on a petition presented to the Court by either a husband or a wife, be terminated by decree of termination of marriage on the ground : -*
>
> *(a) That the other party:-*
>
> *(i) has, after the solemnization of the marriage, treat the petitioner with cruelty, or*
>
> *(ii) has deserted the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition,*
>
> *Explanation :- In this clause, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such*

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[24] ***<u>Lt. Col. Nasir Malik vs. Additional District Judge, Lahore</u>*** 2016 SCMR 1821

[25] ***<u>Muhammad Arshad Anjum vs. Mst. Khurshid Begum</u>*** 2021 SCMR 1145

party and includes the willful neglect of the petitioner by the other party to the marriage…"

(i) Cruelty

31. The genesis of "Cruelty" as being a ground for Termination of a Marriage is found under Christian Personal Law. J. E. G**.** de Montmorency in his Article Divorce Law in England[26] explains the historical background as to how cruelty was established as a ground for permitting divorce under Christian law as under:

> *" … It would be impossible to understand the English law with- out a brief historical retrospect. The early Christian Church was faced with a Roman Society which, having abandoned the old formal marriages (confarreate and coemptionate) after the Punic Wars, had drifted into a condition of moral corruption which made it possible for St. Jerome to record a case of a wife who was married to her twenty-third husband, she being his twenty-first wife. The official Christian Church-alter the time of Constantine the Great-inevitably reacted from this state of social affairs, but the Fathers differed on one special issue raised by the New Testament texts: was re-marriage to be allowed after divorce for adultery? St. Chrysostom (d. **407** A. D.) finally held that adultery itself dissolved the marriage, while St. Augus- tine (d. **430** A. D.) finally adopted the strict doctrine of the indissolubility of marriage, each eventually holding the view orig- inally held by the other. A century and a half later Justinian imposed a new check upon marriage itself by the invention of the doctrine of spiritual affinity (cognatio spiritualis) which ex- tended the bars to marriage implied in certain natural and adoptive relationships to the affinities which were supposed to arise from the relationship of godparent and godchild. This played a part in the medieval history of divorce. It **was** not until the twelfth century that the doctrine of the strict indissolubility of marriage was enforced in England **by** the Canon law in the Court of the Bighop. From that time onwards there were in these courts two kinds of divorce:*
>
> *(1) Nullity of marriage due to some initial impediment, including spiritual affinity, which gave the right of remarriage, and*
>
> *(2) Divorce a iensa et thoro on the ground of adultery, heresy or cruelty, which did not give the right of re-marriage."*

Marriage therefore under Christian Personal Law, as under Hindu Personal Law, was treated as a religious sacrament and "Cruelty" as a ground for Termination of a Marriage therefore found itself established in England through the Christian Personal Law. A definition of "cruelty" in this context

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[26] J.E.G. Monmorency, ***Divorce Law in England***, 75 U. PA. L Rev. 36 (1926)

was settled by the House of Lords in the decision reported as ***Russell (Earl) vs. Russell (Countess)***[27] wherein it was held that:

> *" ... The principle is that cruelty consists of the wilful infliction of bodily or mental pain, and the Courts will not wait until a person suffers before they find they find cruelty, the apprehension of injury being enough."*

While the expression cruelty is easy to define, when it comes to human relationships clearly every case must be examined on its own particular facts to see whether within those subjective facts the circumstances adduced through evidence amount to "cruelty" to permit the Termination of a Marriage. As was very succinctly summarised in by the House of Lords in ***Simpson vs. Simpson*** [28]

> *" ... It has so often been said that it is obvious- yet worth repeating- that all cases that come before this court must be determined on their own particular facts, and I should imagine that in no class of cases is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case. The fact is, I think, another reason for a sense of danger in trying to formulate principles of law out of particular circumstances in particular cases, and then treating those principles of law as being, so to speak, explanations or riders to the actual statutory language."*

The standard by which one is to assess cruelty is not objective but subjective to the parties to the Marriage. As clarified in ***Collins v. Collins***[29]

> *" ... In matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."*

32. In India, The Hindu Marriage Act, 1955, as originally promulgated while permitting Judicial Separation on the grounds of cruelty did not permit the Termination of a Marriage on this ground until an amendment was made by the insertion of clause (ia) into Sub-Section 1 of Section 13 of the Hindu Marriage Act, 1955. The interpretation of what would constitute

[27] (1897) A.C. 357
[28] [1951] 1 All ER 955
[29] [1963] 2 ALL E.R. 966

cruelty for the purpose of allowing a petition for Judicial Separation against this head was considered by the Supreme Court of India in the decision reported as ***Dr. N.G. Dastane vs. Mrs. S. Dastane*** [30] wherein it was held that:

> *" … 30. An awareness of foreign decisions could be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment, namely, Section 10(1)(b) of the Act. What constitutes cruelty must depend upon the terms of this statute which provides :*
>
> *10(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party-*
>
> *(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;*
>
> ***The inquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent.*** *It is not necessary, as under the English law. that the cruelty must be of such a character as to cause "danger" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly, danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other.*
>
> *31. The risk of relying, on English decisions in this field may be shown by the learned Judge's reference to a passage from Tolstoy (p. 63) in which the learned author, citing Horton v. Horton [1940] P. 187, says :*
>
> *Spouses take each other for better or worse, and it is not enough to show that they find life together impossible, even if there results injury to health.*
>
> *If the danger to health arises merely from the fact that the spouses find it impossible to live together as where one of the parties snows an attitude of indifference to the other, the charge of cruelty may perhaps fail. But under Section 10(1)(b), harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty.* ***Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent****"*

(Emphasis is added)

It would therefore seem that while in England, the Petitioner would have to have only an "apprehension" as to the conduct of the Respondent, in India

[30] AIR 1975 SC 1534

for assessing cruelty, if the conduct of the Respondent led to a ***"reasonable apprehension"*** in the Petitioners mind that the conduct of the Respondent ***would be "harmful or injurious"*** to the Petitioner the ground of "cruelty" would stand established.

33. It would also be appropriate to mention that cruelty would not only be physical cruelty but would also include "Mental Cruelty". The Supreme Court of India has dilated on this aspect of "cruelty" in the course of teriminating a Marriage in the decision reported as ***Vishwanat vs Sau. Sarla Vishwanath Agrawal*** [31]wherein it was held that:

> " … *16. First, we shall advert to what actually constitutes 'mental cruelty' and whether in the case at hand, the plea of mental cruelty has been established and thereafter proceed to address whether the courts below have adopted an approach which is perverse, unreasonable and unsupported by the evidence on record and totally unacceptable to invite the discretion of this Court in exercise of power under Article 136 of the Constitution to dislodge the same.*
>
> *17. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. In Sirajmohamedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan and another (1981) 4 SCC 250, a two-Judge Bench approved the concept of legal cruelty as expounded in Sm. Pancho v. Ram Prasad AIR 1956 All 41 wherein it was stated thus: -*
>
> *"Conception of legal cruelty undergoes changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition that a second Marriage is a sufficient ground for separate residence and separate maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used.*
>
> *Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which may undermine the health of a wife." It is apt to note here that the said observations were made while dealing with the Hindu Married Women's Right to Separate Residence and Maintenance Act (19 of 1946). This Court, after reproducing the passage, has observed that the learned Judge has put his finger on the correct aspect and object of mental cruelty.*
>
> *18. In Shobha Rani v. Madhukar Reddi (1988) 1 SCC 105, while dealing with 'cruelty' under Section 13(1)(ia) of the Act, this Court observed that the said provision does not define 'cruelty' and the same could not be defined. The 'cruelty' may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty. Thereafter, the Bench proceeded to state as follows: -*
>
> *"First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the*

[31] AIR 2012 SC 2586

complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

19. After so stating, this Court observed about the marked change in life in modern times and the sea change in matrimonial duties and responsibilities. It has been observed that when a spouse makes a complaint about treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. Their Lordships referred to the observations made in Sheldon v. Sheldon [1966] 2 ALL ER 257 wherein Lord Denning stated, "the categories of cruelty are not closed". Thereafter, the Bench proceeded to state thus: -

"Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Ried observed in Gollins v. Gollins [1963] 2 All ER 966 :

In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman."

34. In Pakistan the Supreme Court of Pakistan in the decision reported as ***Mst. Tayyeba Ambareen & another vs. Shafqat Ali Kiyani & another***[32] has clarified what constituted "cruelty" in the context of the provisions of clause (a) of Sub-Section (viii) of the Dissolution of Muslim Marriages Act, 1939 and has held that:

" … 9. The cruelty alleged may be mental or physical, premeditated or unpremeditated, but lack of intent does not make any distinction. Obviously, if it is a physical act then it would be a question of fact, and in the event of mental cruelty, an enquiry is required to be made as to the nature of the cruel treatment to find out the impact or repercussions thereof on the mind of the spouse. Mental cruelty can be largely delineated as a course of conduct which perpetrates mental pain with such a severity and harshness which would render it impossible for that party to continue the matrimonial tie or to live together."

Expanding on what would constitute Mental Cruelty in the same decision the Supreme Court of Pakistan has opined that:

" … Mental cruelty is a conduct and behavior which inflicts upon the wife such mental pain and anguish making it impossible for her to continue

[32] 2023 SCMR 246

> *the matrimonial relationship which is also a state of mind caused due to the behavioral pattern of the husband, but this is required to be determined by the Court according to the facts and circumstances of each case and must be more serious than the ordinary, petty or trivial issues or disputes of married life which usually occur in day-to-day married life."*

Finally, regarding the standard of proof to be discharged to prove cruelty the Supreme Court of Pakistan in the same decision has also held that:

> *" … therefore, while deciding any lis for dissolution of marriage on the ground of cruelty, the Court must adjudge the intensity and ruthlessness of the acts and examine whether the conduct complained of is not merely a trivial issue which may happen in day-to-day married life, but is of such a nature which no reasonable person can endure…*

35. The Provisions of clause (ia) of Sub-Section (1) of Section 13 of Hindu Marriages Act, 1955 and Sub-Clause (1) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 each stipulate that a marriage is to be terminated if the Petitioner "has, after the solemnization of the marriage, treated the petitioner with cruelty." Clause (a) of Sub-Section (viii) of the Dissolution of Muslim Marriages Act, 1939 by contrast clarifies that a wife is entitled to Terminate her Marriage where the Wife alleges:

> *" … (viii) that the husband treats her with cruelty, that is to say,*
>
> *(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment."*

It would seem that the standard under the Dissolution of Muslim Marriages Act, 1939 to Terminate a Marriage on the grounds of "Cruelty" is to be assessed as against the criterion as to whether the "Cruelty" makes the life of the Wife "miserable." By contrast under the provisions of Sub-Clause (1) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 no such standard of making a Wife "miserable" has been prescribed by the legislature and as such it would seem that on a literal interpretation of these provisions, a different standard has been set in respect of both the grounds for Termination of a Marriage under the Sindh Hindu Marriages (Amendment) Act, 2018 and in such circumstances on a literal interpretation once cruelty has been demonstrated whether or not the Wife

is “miserable” the Termination of the Marriage has to be granted under the provisions of the Sindh Hindu Marriages (Amendment) Act, 2018. However, this interpretation to my mind is a false dawn. While moving away from a literal interpretation of each of those sections, if one is to delve slightly deeper into the practical application of what would constitute cruelty, I cannot conceive a situation where a Wife despite being treated with cruelty would not be miserable! I am therefore of the opinion that there is in fact no difference as between to the standard that has been mentioned under the provisions of Sub-Clause (1) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 and Clause (a) of Sub-Section (viii) of the Dissolution of Muslim Marriages Act, 1939 to assess “cruelty” to a Wife and hence under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 a Family Court would necessarily have to follow the decision as rendered by the Supreme Court of Pakistan when assessing as to whether “cruelty” has been inflicted on a Wife under the provisions of Sub-Clause (1) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 while considering an issue of Terminating a Marriage or by reference an issue pertaining to judicial separation.

(ii) <u>Desertion</u>

36. The Latin expression “Animus Deserendni” or the intention to desert” is well established as a ground for Termination of a Marriage for Termination of a Marraige. While well understood in common parlance, the definition of the expression in terms of being a basis for terminating a Marriage has proved much more elusive. The Indian Supreme Court while outlining the evolution of desertion as a ground for terminating a Marriage has also attempted to settle the terms of what would entitle a person to seek the Termination of their Marriage on the grounds of

desertion in the decision reported as ***Bipin Chander Jaisinghbhai Shah vs Prabhawati***[33] wherein it was held that:

" … *In England until 1858 the only remedy for desertion was a suit for restitution of conjugal rights. But by the Matrimonial Causes Act of 1857, desertion without cause for two years and upwards was made a ground for a suit for judicial separation. It was not till 1937 that by the Matrimonial Causes Act, 1937, desertion without cause for a period of three years immediately preceding the institution of proceedings was made a ground for divorce. The law has now been consolidated in the Matrimonial Causes Act, 1950 (14 Geo. VI, c. 25). It would thus appear that desertion as affording a cause of action for a suit for dissolution of marriage is a recent growth even in England. What is desertion? "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-*

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to on end without reasonable cause and without theconsent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras. 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.) Vol. 12, in the following words:- "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. , The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion fromwilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.' ***For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there., namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid****. The petitioner for divorce bears the burden of proving those elements in the two spouses*

[33] AIR 1957 SC 176

respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. … Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or-implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial some with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced,, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce' the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson(1) may be referred to:-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..."

(Emphasis Is added)

37. In addition, "desertion" has been held to be both "actual or "constructive". The distinction was explained by the Privy Council in the decision reported as ***Lang vs. Lang***[34]

" … Since 1860 in England and for a long time in Australia, it has been recognized that the party truly guilty of disrupting the home is not necessarily or in all case the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be by reason of conduct on his part making it unbearable for a wife with reasonable self respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her: by driving her out. In such a case the factum is the course of conduct pursued by the husband -something which may be for more complicated than the mere act of leaving the matrimonial home. It not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may be got on the wife's nerves that she leaves as a direct consequence of them but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying and taking the arty of the marriage "for better, for worse". The course of conduct- the "factum" must be grave and convincing."

[34] [1954] 3 All ER 571

The standard of proof that has to be proved to establish constructive desertion had also been clarified in the same decision as being an objective one, it being unnecessary to look at the parties subjective intention and rather on how a reasonable person would act, the Privy Council stating that:

> " … *They found, and, as their Lordships think, were entitled to find, that the appellant must have known that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would.."*

38. The provisions of Sub-Clause (ii) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018 parallel with the provisions of clause (ib) of Sub-Section (1) of Section 13 of Hindu Marriages Act, 1955 and the dicta that has been developed in those decisions to my mind should be followed in this jurisdiction. On such a basis it would therefore seem that the essential ingredients for establishing desertion as a ground for Terminating a Marriage would require three separate elements:

(i) the fact that the Husband and Wife are separated being proved;

(ii) there being deduced from the evidence the ***intention*** of the party, either actually or constructively deserting the other, to bring their cohabitation to an end against the standard of a reasonable person; and

(iii) such ***intention*** of the party deserting the other having ***remained consistent*** during the entire statutory period prescribed in Sub-Clause (ii) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018.

E. The Decision in Family Appeal No. 55 of 2023 and Family Petition No. 206 of 2020

39. The Respondent No. 3 had maintained Family Petition No. 206 of 2020 before the XVIth Family Judge Karachi (East) which while headed as being a Petition for Termination of Marriage sought the following prayer:

> *" … a) to dissolve the petitioner's marriage with the respondent by way of judicial separations"*

Family Petition No. 206 of 2020 was inadvertently pleaded as being maintained under Section 12 of the Hindu Marriages Act, 2017, which as per its heading, admittedly would be a claim for Termination of a Marriage under that law. The Petitioner clearly pointed out this discrepancy in her Written Statement and which the XVIth Family Judge Karachi (East) correctly treated as being maintained under Section 11 of the Sindh Hindus Marriage (Amendment) Act, 2018 for Termination of Marriage despite the prayer clause seeking to "dissolve" the Marriage through Judicial Separation. The grounds taken for maintaining the Petitioner were that the conduct of the Petitioner amounted to "cruelty" as against the Respondent No. 3 and that the conduct of the Petitioner amounted to desertion which entitled the Respodent No. 3 to terminate his Marriage with the Petitioner under Sub-Clause (i) and (ii) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018

40. The Petitioner had in her Written Statement averred that she was suffering from financial hardship and had maintained Suit No. 1761 of 2020 before the Court of the VIIIth Family Judge Karachi (East) seeking maintenance for herself and the Minor A. As clarified, hereinabove ***her claim for maintenance, prior to the Termination of her Marriage, is entirely separate to her defence to Family Petition No. 206 of 2020***. To my mind once a statement was made before the XVIth Family Judge Karachi (East) that she was financially impacted by the Termination of the Marriage it was incumbent on the Family Court to have framed an issue as to whether the financial hardship that was being suffered by the Petitioner was in the nature of "grave financial hardship" and to allow both the

Petitioner and the Respondent No. 3 both to lead evidence on this issue so as to clarify as to whether the Termination of the Marriage necessitated the need for an "arrangement" to have been made to "eliminate" the Petitioners alleged "grave financial hardship. " While it could have been phrased better, this was apparently done through the following issue that was settled by the Family Court:

> " … *iii. Whether the marriage of parties can be terminated under Hindu Marriage Act, 2018"*

Regrettably the finding of the XVIth Family Judge Karachi (East) on this issue is less than convincing. The XVIth Family Judge Karachi (East) while finding that the Petitioner would face "financial hardship" on account of the Termination of the Marriage has failed to appreciate the standard as stated in Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 which had to be considered by the Court was not one of "financial hardship" but rather was of "grave financial hardship" and as against which standard no finding has been made by that Court at all. In addition, if the XVIth Family Judge Karachi (East) had come to the conclusion that in fact the Petitioner would suffer "grave financial hardship" on the account of the Termination of the Marriage on the basis of the evidence led, then, as no "arrangement" had been put forward by the Respondent No. 3, it was incumbent on the XVIth Family Judge Karachi (East) to have settled an "arrangement" to "eliminate" such "grave financial hardship" prior to terminating the Marriage as between the Petitioner and the Respondent No. 3 and which was also not done by the XVIth Family Judge Karachi (East) and who instead decreed Family Petition No. 206 of 2020 clearly in breach of the provisions of Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 without averring to whether an "arrangement" to "eliminate" the "grave financial hardship" that would be faced by the Petitioner was required or not and also without making any "adequate provisions" for the maintenance of the Minor A commensurate with the "financial capacity of the parties to the marriage."

41. The matter thereafter went to Appeal before the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 and wherein that Court while acknowledging that the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 had failed to take into account the provisions of Section 12 of the Sindh Hindu Marriage (Amendment) Act, 2018 instead of settling an "arrangement" that would "eliminate" the Wife's "grave financial hardship" and without providing for the maintenance of the Minor A "in commensuration with the financial capacity of the parties to the marriage." instead stated that:

> " … *Before marriage between parties is terminated, respondent/husband must make reasonable financial arrangement for appellant wife and his child.*
>
> *21. In view of above, I reply the point for determination accordingly, maintain the impugned decree, however subject to compliance of section 12 of the Act. The respondent/husband shall make reasonable financial arrangement for appellant/ wife and his daughter to the satisfaction of Family Court and once that Court such arrangement the termination of marriage between parties shall take effect immediately."*

While noting that the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 had attempted to address the fallacies in the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 by directing that the Respondent No. 3 was responsible for making a reasonable financial arrangement for the Petitioner and the Minor A prior to the Termination of the Marriage between the Petitioner and the Respondent No. 3 this is again clearly incorrect. As stated above, it was incumbent on a Family Court when it believes that the Termination of the Marriage would result in "grave financial hardship" to settle the "arrangement" in favour of the Wife ***prior*** to the Termination of the Marriage. The findings of the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 simply states that the Respondent No. 3 was liable to make a "reasonable financial arrangement" for the Petitioner and which clearly does not satisfy the requirement of Section 12 of the Sindh Hindu Marriages (Amendment)

Act, 2018 whereunder it was incumbent on the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 to spell out clearly the terms of the "arrangement" that would "eliminate' the "grave financial hardship" that would be faced by the Wife post the Termination of the Marriage and to make that "arrangement" part of the terms of the Decree that was passed in Family Petition No. 206 of 2020. In addition, the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 while also clarifying that a reasonable financial settlement should be made by the Respondent No. 3 to secure the maintenance of the Minor A again failed to settle the maintenance payments let alone to ensure that the maintenance payments was ***commensurate with the financial capacity of the Petitioner and the Respondent No. 3***. Clearly, the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 can also not be sustained.

42. Dr. Mohamamd Khalid Hayat had raised various objections to the maintainability of this Petition by first arguing that there were concurrent findings as against the Petitioner and hence the Petition was not maintainable. While, Dr. Mohamamd Khalid Hayat is correct to the extent that both the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 and the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 had both terminated the Marriage of the Petitioner and the Respondent No. 3 and to which extent the findings are concurrent, in fact the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 partially modified the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 by directing a financial settlement should be made in favour of the Petitioner and the Minor A prior to the Termination of the Marriage and hence it is disputable as to whether these findings were or were not concurrent findings. In addition, the principle of a Court setting aside concurrent findings of fact has

been clarified by the Supreme Court of Pakistan in the decision reported as ***A. Rahim Foods (Pvt.) Limited Vs. K&N's Foods (Pvt.) Limited*** [35] wherein it was held that:

> " ... *6. In the exercise of its appellate jurisdiction in civil cases, this Court as a third or fourth forum, as the case may be, does not interfere with the concurrent findings of the courts below on the issues of facts unless it is shown that such findings are on the face of it against the evidence available on the record of the case and is so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence."*

While clearly some discretion has been settled on this Court by the Supreme Court of Pakistan to even interfere with concurrent findings of fact where they are found to be "so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence" it is always available to a Court to set aside concurrent findings on points of law if the decision on the points of law are incorrect. Reliance in this regard may be placed on the decision of the Supreme Court of Pakistan reported as ***Utility Stores Corporation of Pakistan Limited vs. Punjab Labour Appellate Tribunal*** [36] wherein it was held that:

> " ... *I cannot agree with the learned Judge in the High Court. The view of the learned Judge that this Court has ruled that even if the order of a Tribunal is wrong in law, the High Curt still cannot intervene in exercise of its constitutional jurisdiction is not justified and I feel that the judgments of this Court in the cases of Muhammad Hussain Munir (PLD 1974 S.C. 139) and Zulfiqar Khan Awan (1974 S.C.M.R. 530) have not been read in their proper context. It is not right to say that the Tribunal, which is invested with the jurisdiction to decide a particular matter, has the jurisdiction to decide it "rightly or wrongly" because the condition of the grant of jurisdiction is that it should decide the matter in accordance with the law. When the Tribunal goes wrong in law, it goes outside the jurisdiction conferred on it because the Tribunal has the jurisdiction to decide rightly but not the jurisdiction to decide wrongly. Accordingly, when the tribunal makes an error of law in deciding the matter before it, it goes outside its jurisdiction and, therefore, a determination of the Tribunal which is shown to be erroneous on a point of law can be quashed under the writ jurisdiction on the ground that it is in excess of its jurisdiction.*
>
> *It needs hardly be said that under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, it is the right of every individual to be dealt with in accordance with law. Where the law has not been correctly or properly observed a case for interference by the High Court in exercise of its Constitutional jurisdiction is made out."*

There being a clear misapplication of the law by both the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 and the XVIth

[35] 2023 CLD 1001
[36] PLD 1987 SC 447

Family Judge Karachi (East) in Family Petition No. 206 of 2020 I do believe that this Court has the jurisdiction to intervene in these matters in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to set aside such illegalities and the argument advanced by Dr. Muhammad Khalid Hayat is not sustainable.

43. Dr. Muhammad Khalid Hayat next argument that the finding of both the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 and the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 terminating the Marriage could not be set aside on the basis that an award of maintenance was not necessitated on account of the pendency of Family Suit No. 1761 of 2020 to my mind is also not sustainable. There is a clear distinction that is made for a Hindu Wife to claim maintenance during the subsistence of the Marriage and an "arrangement" to be made to "eliminate" her "grave financial hardship" after the Termination of her Marriage and ***which cannot and should not be equated by a Family Court***. As stated above, a Husband under the tenets of Hindu Personal Law is obligated to maintain his Wife during the subsistence of their marriage and in the event that the Husband fails to fulfil this obligation during the subsistence of a marriage she will be entitled to maintain a claim for maintenance before a Family Court. Such a right, is entirely separate from her statutory right under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 to have settled on her an "arrangement" to "eliminate" her "grave financial hardship" once her marriage is terminated. Clearly, the rights claimed under Suit No. 1761 of 2020 for maintenance being entirely different to the statutory right claimed by the Petitioner under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 i.e. an "arrangement" to "eliminate" her "grave financial hardship" once her marriage is terminated under Section 12 of the Sindh Hindu Marriages (Amendment) Act 2018 are different and hence the argument of Dr. Mohammad Khalid Hayat cannot be sustained.

44. I have also considered both the the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 and the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 so as to see whether each of those decisions have applied the law as applicable to “cruelty” or “desertion.” In respect of the finding of “cruelty” the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 has, after quoting various case law, concluded that cruelty was established by simply stating that:

> “ … *17. As discussed above, respondent/husband in the present case has alleged general harsh behaviour of appellant/wife towards his paternal relations and during evidence, one instance of violence has been proved wherein relative of appellant/wife had beaten up siblings of respondent/husband”*

I must admit I cannot accept how an “allegation” of general harsh behaviour of the Petitioner to her “in laws” or for that matter how an altercation as between the relatives of the Petitioner and the Respondent No. 3 can by itself be held to be the basis for “cruelty” under Sub-Clause (1) of Clause (a) of Section 11 of Sindh Hindu Marriages (Amendment) Act, 2018 ***as between the Husband and the Wife*** to permit the Termination of a marriage against the criteria as to assess “the intensity and ruthlessness of the acts” to examine “whether the conduct complained of is not merely a trivial issue which may happen in day-to-day married life, but is of such a nature which no reasonable person can endure.”[37] The XVIth Family Judge Karachi (East) in the Judgement dated 9 February 2023 passed by the in Family Petition No. 206 of 2020 also seems confused as between the two separate heads of “cruelty” and “desertion” on the basis of Family Petition No. 206 of 2020 as despite alluding to both “cruelty” and “desertion” in the Judgement, no finding has been given in that Judgment as to whether the “desertion” had been proved as a ground to grant the Termination of

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the marriage. I am therefore of the opinion that neither the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 nor the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 can be sustained.

45. In the circumstances, this Petition is granted and both the Judgement and Decree each dated 9 February 2023 passed by the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 and the Judgement dated 15 March 2023 passed by the IXth Additional District Judge Karachi (East) in Family Appeal No. 55 of 2023 are set aside and the matter is remanded to the XVIth Family Judge Karachi (East) in Family Petition No. 206 of 2020 with the directions ***on the basis of the evidence that has already been led*** to decide Family Petition No. 206 of 2020 afresh keeping in mind that while terminating a marriage under Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018, under Section 12 of the Sindh Hindu Marriages (Amendment) Act, 2018 it is incumbent on the Family Court:

(i) to make separate findings, as against the criteria stated by the Supreme Court of Pakistan and by this Court in this Judgement, as to whether the marriage as between the Petitioner and the Respondent No. 3 can be terminated either for "cruelty" ***or*** for "desertion" under Sub-Clause (i) and (ii) of Clause (a) of Section 11 of the Sindh Hindu Marriages (Amendment) Act, 2018;

(ii) to make an adjudication as to whether the Petitioner has been able to demonstrate that she will suffer from "grave financial hardship" on account of the Termination of the Marriage;

(iii) in the event that the Family Court comes to the conclusion that the Petitioner will suffer “grave financial hardship” on account of the Termination of her Marriage then to either approve of the “arrangement” proposed by the Respondent No. 3 or if that is not made to the “satisfaction of the Court” to itself settle an “arrangement” to “eliminate” the “grave financial hardship” that the Petitioner will suffer on account of the Termination of the Marriage; and

(iv) whether or not an “arrangement” is required to “eliminate” the “grave financial hardship” that may be suffered by the Respondent No. 3, on account of the Termination of Marriage to ensure that a decree is passed regarding maintenance payments to be made for the benefit of Minor A commensurate with the financial capacity of both the Petitioner and the Respondent No. 3.

JUDGE

Karachi dated 2 September 2023