IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 1624 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-

and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
	Circulate this judgment in the Subordinate Judiciary	

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BHARTIBEN W/O AMITBHAI VITTHALBHAI AND D/O RAVJIBHAI KAVANI
Versus
AMITBHAI VITTHALBHAI SOJITRA

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Appearance:
MR RAJESH K SHAH(784) for the Appellant(s) No. 1
NOTICE SERVED(4) for the Defendant(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

Date : 06/09/2021

ORAL JUDGMENT

(PER : HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI)

1. This appeal under Section 19 of the Family Court's Act, 1984 (for short 'the Act, 1984) read with Section 29(2) of the

Hindu Marriage Act, 1955 (for short 'the Act, 1955) respectively, is at the instance of the original plaintiff - wife and is directed against the judgment and decree dated 18.02.2020 passed by the Family Court No.6, Ahmedabad in the Family Suit No.2543 of 2018 whereby the Family Court dismissed the Suit and declined to grant the declaration as prayed for in the plaint.

2. The facts giving rise to the present appeal may be summarized as under:

2.1 The marriage between the appellant (original plaintiff/wife) and the opponent (original defendant/husband) was solemnized on 09.12.2010 as per the Hindu rites and rituals at village Hadala, Taluka: Bagasara, District: Amreli. The marriage was registered with the Office of the Registrar of Marriage on 27.04.2011. Over a period of time, matrimonial disputes arose between the appellant and the opponent. It appears that as reconciliation between the parties was not possible, the respective family members and relatives of the parties decided to dissolve the marriage by way of a customary deed of divorce. It appears from the materials on record that the Panch of the community thought fit to put an end to the marriage by way of customary divorce. The parties amicably relegated themselves to customary divorce.

2.2 The appellant intends to get remarried and settle abroad. It is the case of the appellant that for the purpose of visa etc. the foreign embassy/authority would insist for a valid decree of divorce drawn by a competent Court. In other words, it is the case of the appellant that the foreign embassy/immigration authority may not look into the customary deed of divorce so

as to understand the marital status of the parties in law.

2.3 In such circumstances referred to above, the appellant (original plaintiff) instituted the Family Suit No.2543 of 2018 under Sections 7 and 8 respectively of the Act, 1984 read with Section 29(2) of the Act, 1955 seeking a declaration that the marriage between the parties stood validly dissolved by way of the customary deed of divorce.

2.4. Having regard to the important issue relating to customary divorce being involved in the present appeal, we deem fit to reproduce the entire plaint as under:

> *"In the court of the Ld. Judge of the Family Court*
>
> ***Family Suit No...../2018***
>
> ***Plaintiff:*** *Bhartiben W/o. Amitbhai Vitthalbhai Sojitra and D/o. Ravjibhai Kavani, Age 33 years, Occupation: Household, Hindu by Religion, Presently residing at: A/25, Kailashdham Raw House, Nr. Shivpark Society, B/h. Gokul Bungalows, Nikol, Ahmedabad*
>
> *Versus*
>
> ***Defendant:*** *Amitbhai Vitthalbhai Sojitra, Age about 33 Years, Hindu by Religion, Occupation: Business, Residing at: 'Khodiyar Krupa', Shyam Vihar Society, Satyasai Heart Hospital Road, Rajkot*
>
> *AND ANOTHER ADDRESS:*
>
> *Raandalnagar, B/s. Anmol Society, Chittal Road, Baabraa-365421*
>
> ***Subject:*** ***Suit for Declaration of Divorce as per Section-7B and 8 of the Family Court Act.***
>
> *I, the plaintiff, pray before the Hon'ble Court that:*
>
> *1) I reside with my parents at aforesaid address.*
>
> *2) I, the plaintiff got married to the respondent as per Hindu wedding rituals and our community traditions at Hadala, Taluka – Bagasra, Dist. - Amreli on 09-12-2010. The marriage was registered vide Register Part No.02 and Serial No.2010/2011 at Hadala on 27-04-2011 and from then, the respondent and I became legally husband and wife.*
>
> *3) We, the plaintiff and the respondent do not have any child out of our wedlock and I, the plaintiff am not pregnant by the*

respondent.

4) *As we, the plaintiff and the respondent had extreme displeasures and disputes during our married life and do not have coordination, it was not possible to continue our married life by staying together and therefore, we – the plaintiff and the respondent decided to end our marriage and accordingly, we – the plaintiff and the respondent had customary divorce by executing "agreement of divorce, i.e. dissolution of marriage" on stamp papers of Rs.100/- and Rs.100/- vide Sr. No.3948 of Page No.34 of Register Book No.2 of Notary Shri Rajnikant S. Sojitra on 02-07-2018 as per custom of our community. The deed of dissolution of marriage has been executed unanimously by us – the plaintiff and the respondent in presence of witnesses and is agreed upon by us. Such practice of executing deed of dissolution of marriage is recognized by our community. Such divorce is customary and recognized in our community.*

5) *After getting married on 09/12/2010, I-the Plaintiff went to reside with the Respondent, but as there were no harmonious relations between me and Respondent, we have executed divorce agreement on 02/07/2018 on the stamp paper of Rs.100/- for each as per our social customs. Since then, there has not been any relation between me and the Respondent. Thus, I-Plaintiff and the Respondent have accepted the divorce agreement on 02/07/2018 and we have ended the relations of husband-wife and we have been living independently. As we have executed this agreement as per the customs of our community, the same is binding to me-the Plaintiff.*

6) *I-the Plaintiff and the Respondent have executed the agreement of dissolution of marriage as per the customs of our community. Hence, it is required to award the divorce decree by confirming this dissolution of marriage executed between I-the Plaintiff as legally valid. As I-the Plaintiff require the divorce decree awarded by the Hon'ble Court for passport and for producing in government or semi-government offices, I have filed this Plaint to obtain the same. My marriage was solemnized in the jurisdiction of this court and I have been residing within the territorial jurisdiction of this court, this Hon'ble court has authority and power to try and hear this Plaint.*

7) *Our marriage has been dissolved as per the customs and rituals of our community and accordingly, considering the said divorce took place by deed of marriage dissolution dated 02/07/2018 to be valid, this suit is filed to obtain decree of divorce.*

8) *The cause of action was arisen in the jurisdiction of this court when we, the parties, entered into marriage as per Hindu Customs and Rituals on 09/12/2010 and when it appeared impossible to continue the conjugal life and when we ended the marital relationship as per the customs and rituals of the community in presence of the elders and when we executed Divorce Deed on 02/07/2018 and when we needed to pray for the decree of divorce from the Hon'ble Court.*

9) *By this suit, I pray and seek relief that:*

(A) Kindly allow this suit and pass the decree of divorce

between the parties as per Section-7B of the Family Act, 1984 declaring the divorce deed dated 02/07/2018 executed between the parties to be valid and legal.

(B) Kindly declare the marriage solemnized between us on 09/12/2010 as per Hindu customs and rituals, to be dissolved w.e.f. 02/07/2018 and direct to pass the decree of divorce declaring the end of our marriage w.e.f. 02/07/2018.

(c) Kindly pass any other relief that the Hon'ble Court may deem fit.

10) I have affixed prescribed court fee on this suit.

11) It is declared by the pursis that the names and addresses of the parties mentioned in the title of the suit are true and correct as per Order-6, Rule-14A of the C.P.C.

12) Vakilpatra, List of Evidences and Additional Plaint is appended herewith. Fixed Court Fee Stamp is affixed on this suit.

Ahmedabad

Date: ----------

DECLARATION:

I, the plaintiff, hereby declare at Ahmedabad City that all the facts mentioned above are true and correct as per my knowledge and belief.

Ahmedabad

Date: ----------"

2.5. The examination-in-chief of the appellant - plaintiff in the form of affidavit reads thus:

"In the court of the Family Court Judge, Ahmedabad
Family Suit No.2543 of 2018

Plaintiff : Bhartiben W/o Amitbhai Vitthalbhai Sojitra and D/o Ravjibhai Kavani
vs.
Respondent : Amitbhai Vitthalbhai Sojitra

Subject : Affidavit of Examination-in-Chief of the Plaintiff

I, the undersigned Bhartiben W/o Amitbhai Vitthalbhai Sojitra and D/o Ravjibhai Kavani, age about – 34 years, occupation – housewife, religion – Hindu, residing at present at – A/25, Kailashdham Row House, Near Shiv Park Society, B/h. Gokul Bungalows, Nikol, Ahmedabad hereby execute this affidavit of examination-in-chief on oath of my religion that:-

(1) I, the plaintiff live with my parents at the above mentioned address.

(2) I, the plaintiff got married to the respondent as per Hindu

wedding rituals and our community traditions at Hadala, Taluka – Bagasra, Dist. - Amreli on 09-12-2010. The marriage was registered vide Register Part No.02 and Serial No.2010/2011 at Hadala on 27-04-2011 and from then, the respondent and I became legally husband and wife.

(3) We, the plaintiff and the respondent do not have any child out of our wedlock and I, the plaintiff am not pregnant by the respondent.

(4) As we, the plaintiff and the respondent had extreme displeasures and disputes during our married life and do not have coordination, it was not possible to continue our married life by staying together and therefore, we – the plaintiff and the respondent decided to end our marriage and accordingly, we – the plaintiff and the respondent had customary divorce by executing "agreement of divorce, i.e. dissolution of marriage" on stamp papers of Rs.100/- and Rs.100/- vide Sr. No.3948 of Page No.34 of Register Book No.2 of Notary Shri Rajnikat S. Sojitra on 02-07-2018 as per custom of our community. The deed of dissolution of marriage has been executed unanimously by us – the plaintiff and the respondent in presence of witnesses and is agreed upon by us. Such practice of executing deed of dissolution of marriage is recognized by our community. Such divorce is customary and recognized in our community.

(5) After getting married on 09/12/2010, I-the Plaintiff went to reside with the Respondent, but as there were no harmonious relations between me and Respondent, we have executed divorce agreement on 02/07/2018 on the stamp paper of Rs.100/- for each as per our social customs. Since then, there has not been any relation between me and the Respondent. Thus, I-Plaintiff and the Respondent have accepted the divorce agreement on 02/07/2018 and we have ended the relations of husband-wife and we have been living independently. As we have executed this agreement as per the customs of our community, the same is binding to me-the Plaintiff.

(6) I-the Plaintiff and the Respondent have executed the agreement of dissolution of marriage as per the customs of our community. Hence, it is required to award the divorce decree by confirming this dissolution of marriage executed between I-the Plaintiff as legally valid. As I-the Plaintiff require the divorce decree awarded by the Hon'ble Court for passport and for producing in government or semi-government offices, I have filed this Plaint to obtain the same. My marriage was solemnized in the jurisdiction of this court and I have been residing within the territorial jurisdiction of this court, this Hon'ble court has authority and power to try and hear this Plaint.

(7) The name of the Respondent is being continued after my name but, as the marriage between us has been dissolved, I want to delete the name of Respondent which is being continued after my name. I require the decree of this Hon'ble Court to change my name as such in the passport and also in the government and semi-government record. Therefore, I have filed the present Plaint as per section-7(B) of the Family Court Act to get the decree declaring the agreement of dissolution of marriage executed between I-the Plaintiff and the Respondent on 02/07/2018 as legal and valid and

declaring our marriage solemnized on 09/12/2010 as per Hindu rituals as dissolved vide the agreement of dissolution dated: 02/07/2018.

(8) The summons/notice of this suit issued by this court have been served to the Respondent of this case on 05/01/2019. Thereafter, this Suit was adjourned on 11/01/2019, 19/02/2019 and 27/03/2019 but the Respondent of this case has neither appeared nor filed his reply despite giving him three adjournments.

(9) The respondent in this case does not appear before this Court deliberately and he does not wish that proceedings of this suit are carried out. Thus, the respondent in this case is deliberately wasting the valuable time of the Hon'ble Court and plaintiff. The respondent in this case does not wish that the decree is issued by the Hon'ble Court as sought by the plaintiff in the suit and thus he is mentally and physically harassing me and wasting my precious time and money. It becomes clear that the respondent has malafide intention of harassing me.

(10) I have submitted the xerox copy of documentary evidences in connection with the aforementioned case along with my plaint. True copies obtained from the original have been submitted with the list vide Exh-.... My marriage with respondent was solemnized on 09-12-2010 at Hadala, Taluka: Bagasara, District: Amreli. The marriage was registered on 27/04/2011 vide Register part no.2, sr. no.2010/2011 at Hadala. The notarized true copy of the certificate is submitted vide Mark-..../1 and it is requested to assign Exhibit to it.I the applicant and the respondent executed the Divorce Deed at Mark-__/2 for dissolving our marriage. The deed is signed by I the applicant and the respondent which I identify. It is the notarized copy of the deed which is registered at Serial no. 3948 dated 02/07/2018 on page no. 34 of Register Book No.2 of Notary Shri Rajnikant S. Sojitra. The deed was executed with the consent of I the applicant and the respondent. It was executed in accordance with the tradition followed in our community. It is requested to assign a final exhibit number to it. The notarized copy of passport of I, the applicant am produced at Mark- __/3. It is requested to assign final exhibit number to it. The notarized copy of identity proof of I, the applicant am produced at Mark- __/4. It is requested to assign final exhibit number to it.

(11) Considering all the above stated facts, Your Honour may be pleased to grant as prayed at Para 9(a) of our original application and issue a decree in accordance with Section- 7(b) of the Family Act, 1984 declaring that the Divorce Deed dated 02/07/2018 dissolving the marriage is legal and valid. Your Honour may also be pleased to grant as prayed at Para 9(b) and issue a decree declaring that our marriage dated 09/12/2010 in accordance with the Hindu rituals is dissolved w.e.f. 02/07/2018."

2.6 The Family Court having regard to the pleadings in the plaint, framed the following issues at Exh.8:

"ISSUES

1. Whether the petitioner proves that the divorce deed vide

List Exh.-4 at M-4/2 dated 02.07.2018 executed by and between the parties is legal and valid as per the custom prevailing in their community?

2. *Whether the petitioner is entitled to get a decree of declaration as prayed for?*

3. *What order and decree?"*

2.7 The above referred issues came to be answered by the Family Court as under:

"1. In the negative
2. In the negative
3. As per the final order."

2.8 The Family Court thought fit to dismiss the Suit substantially on the ground that the plaintiff failed to prove any practice of customary divorce being prevalent in the Leuva Patel Community. The parties hail from the Leuva Patel Community. The Family Court while dismissing the Suit held as under:

"11. Now, three questions arise before the Court, are whether the relief which is prayed for by the petitioner can be granted? and second question comes before the Court is whether Court may pass order for declaration of marital status of the parties based upon divorce deed executed by and between the parties as per the custom of their society? and the third question comes before the court that whether parties of the present petition proves that there has custom in their society to take customary divorce?

12. Here in the present case, main issue is whether by way of customary divorce the petitioner and respondent's marital status can be declared as they are divorcee? For this it is required to decide and to appreciate the evidence produced by the petitioner. It is pertinent to note that merely she has filed her routine affidavit in support of the petition and no witness has been examined by the petitioner side. It is the argument of the petitioner side that she has declared on oath that there is custom in her society to obtain customary divorce. But merely by said words, Court can not consider that there is custom. To prove customary divorce, petitioner must establish the existence and fact of prevailing of custom. The record of the present case shows that petitioner-wife has not lead any evidence to show existence of any customary divorce prevailing in her community. No document has been filed relating to the period prior to the passing of the Hindu Marriage Act. In my view, no evidence has come before the Court to prove that there was a practice of dissolving the marriage by way customary divorce prevailing in their community. So far as the

custom is concerned, petitioner shall have to prove what is the custom in their society for obtaining divorce? For this it is required to narrate reported judgments of Hon'ble Apex Court as well as Hon'ble Various High Courts. In the case of M. Chandralekha Versus Subramani and others, reported in 2001 Supreme (Madras) 1284, Hon'ble High Court of Madras has held that-

> *"6. The only point that survives for consideration is whether the document viz., Ex.B-1 dated 25.10.1984 would dissolve the marriage between the plaintiff and Kandasamy. The plaintiff is not disputing, having executed such a document. Sec.29(2) of the Hindu Marriage Act is as follows:*
>
> *"Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu Marriage, whether solemnized before or after commencement of this Act."*
>
> *Hence, firstly the defendants in order to establish their case has to satisfactorily prove that there has been a custom in the community in question, by which the marriage can be dissolved by an agreement. Or in other words, a party who claims that a marriage duly solemnized was dissolved by a custom, has to state with precision and clarity what that custom is. It is not enough to state that there is an ancient custom of divorce and that divorce could be obtained by even one party executing a deed or from the caste Panchayat. The law requires to prove a fact, first he/she must plead the same and then prove by letting in satisfactory oral and documentary evidence. Secondly, the party should convince the Court that whatever procedure required as per the said custom has been complied with by the parties."*

19. Hence, from the above cited cases, it can be said that petitioner shall have to prove the custom, which is ancient and prior to enforcement of Hindu Marriage Act, but such evidence has not produced by the petitioner. Hence, merely by filing affidavit, no decree can be passed. The Division Bench of the Hon'ble High Court of Gujarat has decided case of NRG Patel couple and has decided on 2.7.2018 observing that the Patel community does not follow such practice for obtaining divorce by way of custom. Here in this present petition, no satisfactory evidence has produced by the petitioner to believe that there is custom in their society to obtain the divorce by way of agreement or deed as customary divorce. Hence, no marital status can be declared under explanation (b) of Section 7 of the Family Courts Act, 1984. Hence, petitioner is not entitled for said declaration."

2.9 Being dissatisfied with the impugned judgment and order referred to above dismissing the Suit, the appellant – original plaintiff is here before this Court with the present appeal.

3. Mr. Shah, the learned counsel appearing for the appellant vehemently submitted that the Family Court committed a serious error in dismissing the Suit on the ground that the

appellant has failed to prove the practice of customary divorce prevalent in the Leuva Patel Community. According to Mr. Shah, the Family Court failed to take into consideration the five affidavits of the members of the Leuva Patel Community stating that customary divorce is prevalent and permissible in the Leuva Patel Community. In such circumstances, referred to above, Mr. Shah prays that there being merit in his appeal, the same may be allowed and the declaration as prayed for in the plaint may be granted. Mr. Shah, in the alternative prays that the Suit be remitted to the Family Court so as to give an opportunity to the appellant to lead appropriate evidence to establish that customary divorce is permissible and prevailing in the Leuva Patel Community.

4. We take notice of the fact that the respondent - husband thought fit not to appear before the Family Court and put forward his stance. In such circumstances, the Family Court proceeded to decide the Suit in the absence of the defendant - husband. In the present appeal also although the respondent has been served with the notice issued by this Court, yet has chosen not to remain present before this Court either in person or through an advocate and put forward his stance.

Analysis:-

5. Having heard the learned counsel appearing for the appellant – plaintiff and having gone through the materials on record, the only question that falls for our consideration is whether the Family Court committed any error in passing the impugned judgment and decree?

6. At this stage, we would like to refer Section 29(2) of the

Hindu Marriage Act, 1955, which reads thus:

> *"29(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after commencement of this Act."*

7. At this juncture, it would also be apposite to refer to 23rd Edition, Hindu Law, published by Sir Dinshaw Fardunji Mulla, explaining the realm of Section 29(2) of the Hindu Marriage Act, 1955, which reads thus:

> *"Divorce was not known to the general Hindu law but then in certain communities, divorce was recognised by custom and the courts upheld such custom when it was not opposed to public policy. The scheme and object of the present Act is not to override any such customs, which recognised divorce, and effect is given to the same by the saving contained in this sub-section. It is not necessary for the parties in any such case to go to the court to obtain divorce on the ground recognised by custom. The custom must, of course, be a valid custom. There exists a custom among the Sikh Jats of Amritsar district, under which a husband can dissolve his marriage even otherwise than under the provisions of the present Act. When the material on record does not show the existence of a custom of divorce on the basis of which the purported deed of divorce is entered into and custom has not even been pleaded, divorce cannot be granted on the basis of custom."*

7.1. The Supreme Court in case of **Yamanaji H. Jadhav vs. Nirmala** reported in **AIR 2002 SC 971** has held in paragraph 7, which reads thus:

> *"7. In the view that we are inclined to take in this appeal, we do not think it is necessary for us to go into the contentions advanced by the learned counsel for the parties in this case, because we find that the courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable for divorce in the community to which the parties to this litigation belong to. As per the Hindu Law administered by courts in India divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is*

contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court. In the instant case, we have perused the pleadings of the parties before the trial court and we do not find any material to show that prevalence of any such customary divorce in the community, based on which the document of divorce was brought into existence was ever pleaded by the defendant as required by law or any evidence was led in this case to substantiate the same. It is true in the courts below that the parties did not specifically join issue in regard to this question and the lawyers appearing for the parties did orally agree that the document in question was in fact in accordance with the customary divorce prevailing in the community to which the parties belonged but this consensus on the part of the counsel or lack of sufficient pleading in the plaint or in the written statement would not, in our opinion, permit the court to countenance the plea of customary divorce unless and until such customary divorce is properly established in a court of law. In our opinion, even though the plaintiff might not have questioned the validity of the customary divorce, the court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that a divorce by consent is also not recognisable by a court unless specifically permitted by law. Therefore, we are of the opinion to do complete justice in this case. It is necessary that the trial court be directed to frame a specific issue in regard to customary divorce based on which the divorce deed dated 26th of June, 1982 has come into existence and which is the subject matter of the suit in question. In this regard, we permit the parties to amend the pleadings, if they so desire and also to lead evidence to the limited extent of proving the existence of a provision for customary divorce (otherwise through the process of or outside court) in their community and then test the validity of the divorce deed dated 26.6.1982 based on the finding arrived at in deciding the new issue.

7.2 The Supreme Court in case of **Subramani and others vs. M. Chandralekha,** reported in **AIR 2005 SC 485**, has held in paragraph 15, which reads thus:

"15.....The courts below have erroneously proceeded on the basis that the divorce deed relied upon by the parties in question was a document which is acceptable in law. It is to be noted that the deed in question is purported to be a document which is claimed to be in conformity with the customs applicable to divorce in the community to which the parties belong. As per the Hindu law administered by courts in India divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognized by custom. Public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the

manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and establish by the party propounding such a custom since the said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleading by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the Court."

7.3 Further, the Supreme Court in case of **State of M.P. and another vs. Dungaji (D) by Lrs. and another**, reported in **AIR 2019 SC 3665** has held in paragraphs 8 and 9, which reads thus:

"8. Now, so far as the impugned Judgment and Order passed by the High Court declaring and holding that the marriage between Dungaji and Kaveribai had been dissolved by way of customary divorce, much prior to the coming into force the provisions of the Act 1960 and therefore after divorce, the property inherited by Kaveribai from her mother cannot be treated to be holding of the family property of Dungaji for the purposes of determination of surplus area is concerned, at the outset, it is required to be noted that as such there were concurrent findings of facts recorded by both the Courts below specifically disbelieving the dissolution of marriage between Dungaji and Kaveribai by way of customary divorce as claimed by Dungaji-original plaintiff. There were concurrent findings of facts recorded by both the Courts below that the original plaintiff has failed to prove and establish that the divorce had already taken place between Dungaji and Kaveribai according to the prevalent custom of the society. Both the Courts below specifically disbelieved the Divorce Deed at Exhibit P5. The aforesaid findings were recorded by both the Courts below on appreciation of evidence on record. Therefore, as such, in exercise of powers under Section 100 of the CPC, the High Court was not justified in interfering with the aforesaid findings of facts recorded by both the Courts below. Cogent reasons were given by both the Courts below while arriving at the aforesaid findings and that too after appreciation of evidence on record. Therefore, the High Court has exceeded in its jurisdiction while passing the impugned Judgment and Order in the Second Appeal under Section 100 of the CPC.

9. Even on merits also both the Courts below were right in holding that Dungaji failed to prove the customary divorce as claimed. It is required to be noted that at no point of time earlier either Dungaji or Kaveribai claimed customary divorce on the basis of Divorce Deed at Exhibit P5. At no point of time earlier it was the case on behalf of the Dungaji and/or Kaveribai that there was a divorce in the year 1962 between Dungaji and Kaveribai. In the year 1971, Kaveribai executed a Sale Deed in favour of Padam Singh in which Kaveribai is stated to be the wife of Dungaji. Before the Competent Authority neither Dungaji nor Kaveribai claimed the customary divorce. Even in the Revenue Records also the name of Kaveribai

> *being wife of Dungaji was mutated. In the circumstances and on appreciation of evidence on record, the Trial Court rightly held that the plaintiff has failed to prove the divorce between Dungaji and Kaveribai as per the custom."*

8. We shall first address ourselves on the issue whether there was a recognized custom in the Leuva Patel Community to dissolve a marriage by way giving divorce to each other, privately before the Panchas and if so, whether the appellant – plaintiff could be said to have led appropriate evidence in that regard.

9. In the aforesaid context, it is necessary to summarize the law laid down by the Supreme Court in the case of **Yamanaji (Supra).** It has been held therein that in accordance with the Hindu Law administered by the Courts in India, divorce was not recognized as a means to put an end to marriage, which was always considered to be a sacrament, with the only exception, where it is recognized by custom, public policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. It is held that such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since such custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. The Supreme Court held that there was an obligation on the trial Court to have framed an issue whether there was proper pleadings by the parties contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact

established in the case on hand to the satisfaction of the Court. In the said case, the Supreme court held that even if the plaintiff might not have questioned the validity of the customary divorce, the Court ought to have appreciated the consequences of their not being a customary divorce based on which the document of divorce has come into existence bearing in mind that the divorce by consent is also not recognizable by a Court unless specifically permitted by law.

10. The Supreme Court in the case of **Jairam Somaji More vs. Sindhubai w/o Jairam More and others,** reported in **1993 (3) Mh.L.J., 872** after considering section 4 and section 29(2) respectively of the Hindu Marriage Act, 1955 has held that the custom cannot be only pleaded but it has to be proved that the parties were entitled for a customary divorce. It has held that unless and until the marriage between the petitioner and the respondent wife was dissolved legally, the husband had no right to contract a second marriage and since the earlier divorce was not recognized by law, the parties continued to be under marital bond. The Supreme Court in case of Rameshchandra Rampratapji Daga vs. Rameshwari Rameshchandra Daga, reported in (2005) 2 SCC 33 has taken a similar view.

11. The Supreme Court in the case of **Subramani & Ors. (Supra)** has held that in the absence of any pleadings that the marriage between the husband and wife could be dissolved in their community under custom and in the absence of any satisfactory evidence let in to prove the custom prevalent in the community or the procedure to be followed for dissolving the marriage, it cannot be held that the marriage between the

respondent and her husband stood dissolved by executing the marriage dissolution deed. It is held that the parties alleging the customary divorce had not proved that the document was in conformity with the custom applicable to divorce in the community to which the parties belonged. The Supreme Court in the said judgment also adverted to its earlier judgment in case of Yamanaji H.Jadhav (supra) and has taken the similar view.

12. The Supreme Court in the case of **Shakuntalabai and another vs. L.V.Kulkarni and another**, reported in **(1989) 2 SCC 526** has held that a custom cannot be extended by logical process. The Supreme Court adverted to its earlier judgment in case of Saraswati vs. Jagadambai, reported in AIR 1953 SC 201 in which it has been held that the oral evidence as to the instances which can be proved by documentary evidence cannot be fairly relied upon to establish custom when no satisfactory explanation for withholding the best evidence is given. It is held that custom cannot be extended by analogy and it cannot be established by a *priori* method. It is held that the custom must be proved and the burden of proof is on the person who asserts it.

13. It is well settled principles of law as laid down by the Supreme Court that prevalence of customary divorce in the community to which the parties belong, contrary to general law of divorce must be specifically pleaded and established by person propounding such custom. In our view, in the absence of any proper pleadings on behalf of the plaintiff in the plaint about the then alleged existing custom and customary divorce in the Leuva Patel Community, the plaintiff could not have led

any oral evidence on the said issue.

14. In the case on hand, the appellant- plaintiff stated in her examination-in-chief that customary divorce in the Leuva Patel Community is permissible. In support of such statement, the appellant – plaintiff relied upon five affidavits of five individuals belonging to the Leuva Patel Community. It is difficult to appreciate how did the appellant -plaintiff expect the Family Court to take into consideration the affidavits of five members of the Leuva Patel community. The question is whether such affidavits would constitute legal evidence?

15. In our view, the appellant – plaintiff could be said to have miserably failed to prove the prevalence of customary divorce in the Leuva Patel Community to obtain divorce by execution of the document in presence of the Panchas when such customary divorce was contrary to the general law of divorce prescribed under the provisions of the Act, 1955.

16. Section 13 of the Hindu Marriage Act, 1955 provides for dissolution of marriage by a decree of divorce on various grounds set out therein. Section 4 of the Hindu Marriage Act, 1955 provides that save as otherwise expressly provided in the Hindu Marriage Act, 1955, any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Hindu Marriage Act, 1955 shall cease to have effect with respect to any matter for which provision is made in the said Act. Section 29 (2) of the Hindu Marriage Act, 1955 provides that nothing contained in the said Hindu Marriage Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage,

whether solemnized before or after the commencement of the said Act. Section 3(a) of the Hindu Marriage Act, 1955 defines the expressions 'custom' and 'usage.' It is provided that unless the context otherwise requires, the custom and usage signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family. It is provided that the rule is certain and not unreasonable or opposed to public policy and further provided that in the case of a rule applicable only to a family, it has not been discontinued by the family.

17. The conjoint reading of Section 3(a), 4(a) and 29 (2) respectively of the Hindu Marriage Act, 1955 indicates that though Section 29(2) of the said Act saves the customary rights, a person who relies upon such custom has to prove that such custom and usage had been continuously and uniformly observed for a long time and had obtained the force of law amongst the Hindus in their local area, tribe, community, group or family and such custom was not unreasonable or opposed to public policy. In our view, the plaintiff has miserably failed to prove at the first instance that there was any such custom prevailing in the Leuva Patel Community to obtain divorce by execution of a document in presence of the Panchas and secondly, whether such alleged customary divorce was continuously and uniformly observed for a long time in the Leuva Patel Community and was not opposed to public policy.

18. A perusal of Section 4 of the Hindu Marriage Act, 1955 clearly indicates that any custom or usage as part of that law

in force immediately before the commencement of the Hindu Marriage Act, 1955 shall cease to have effect after the Hindu Marriage Act, 1955 came into force.

19. As noted above, the plaintiff has relied upon five affidavits filed by five individuals stating about the customary divorce being prevalent in the Leuva Patel Community. All the five affidavits are stereo type. We quote one of those as under:

> ***"Affidavit***
>
> *I,the undersigned, Talaviya Himmatlal Keshavbhai, Age - 50 years, Date of Birth - 01/06/1970, Place of Birth - Lundhiya, Taluka - Bagsara, District - Amreli, Saurashtra, Religion - Hindu, Occupation - Construction, Residing at - 14, Bhakti Bungalows, near Bhakti Circle, opposite to S.P. Ring Road, New Nikol, Ahmedabad, declare on oath that.....*
>
> *I belong to the Leuva Patel community and my community is in majority in Amreli, Junagadh, Rajkot, Bhavnagar, Jamnagar, Porbandar etc. areas of Saurashtra. When any question regarding the marriage life arises in our community, elders of the community and families and the well-wishers discuss the cases of marriage life in presence of the pancha before such cases are tried in courts with a view to avoid adverse impacts of marriage disputes on the society. An ancestral custom of divorce exists in our community in the interest of both the parties under which transactions are settled amicably and a permanent solution is sought to avoid any future disputes. Bharatiben D/o Ravjibhai Manjibhai Kawani is my niece (Daughter of my wife's sister).*
>
> *Her marriage was solemnized with Amitbhai Viththalbhai Sojitra on 09/12/2010 at Hadala. But there were some disputes in their marriage life, and therefore, a compromise had been done between them in the presence of the pancha on 02/07/2018. This divorce is acceptable in the community and there are examples of such divorce in our community and remarriage can also take place.*
>
> *The fact stated in this affidavit is true and I am willing to give deposition as a witness before the court when it is required.*
>
> *Place - Ahmedabad. Date – 17/03/2020"*

20. To what extent the Court can look into such affidavits as legal evidence has been succinctly explained by the Rajasthan High Court in the case of **Saraswati vs. Narayan** in S.B. Civil Writ Petition No.6667 of 2015 decided on 24.07.2015. We

quote the relevant observations :

“The relevant provisions of the Act read as under:- "10. Procedure generally.-(1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil Court and shall have all the powers of such Court.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-Section (1) or sub-Section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

15. Record of oral evidence.-In suits or proceedings before a Family Court, it shall be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit.-(1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court.

(2) The Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

20. Act to have overriding effect.-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

A bare look at the provisions, noticed hereinbefore, reveals that subject to the other provisions of the Act, provisions of CPC and any other law apply to the suits and proceedings before the Family Court and for the purposes of the provisions of the Code, a Family Court is deemed to be a civil Court and have all the powers of such Court.

Section 15 , which deals with record of oral evidence provides that in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, can record or cause to be recorded, a memorandum of substance of what the witness deposes, and such memorandum signed by the witness and the Judge shall form part of the record.

Further, Section 16 provides that evidence of formal character can be given by affidavit and can be read in evidence in any suit or proceeding. Sub-Section (2) of Section 16 provides for summoning and examination of person giving the affidavit, on an application.

Section 20 provides for overriding effect of the Act regarding anything inconsistent contained in any other Act.

An over all analysis of the above provisions reveals that while provisions of CPC have been made applicable for the purpose of procedure before the Family Court, Section 15 of the Act enables a Family Court to record the evidence of witness by way of memorandum of the substance of what the witness deposes and provides that it shall not be necessary to record the evidence of witnesses at length. The use of expression it shall not be necessary to record the evidence of witnesses at length cannot be read as a prohibition against recording of evidence at length and it cannot be said that in case instead of recording the deposition of witnesses by way of memorandum of the substance, evidence of witness at length has been recorded, the said procedure would stand vitiated.

The emphasis laid by learned counsel for the petitioner that evidence of only formal character can be taken on affidavit with reference to Section 16 is misplaced. The provisions of Section 16(1) have been incorporated to apparently take care of provisions of Section 1 read with Section 3 of the Evidence Act, 1872, which provides that the said Act does not apply to affidavits presented to any Court and as held by Honble Supreme Court in the case of Sudha Devi Vs. M.P. Narayanan AIR 1988 SC 1381 that affidavits are not included in the definition of evidence in Section 3 of the Evidence Act and can be used in evidence only if the Court permits it to be so used for sufficient reasons. Even under Sub-Section (2) of Section 16 of the Act, on an application of any of the parties, even the deponents of affidavits produced by way of evidence of formal character, can be cross-examined, therefore, the submissions made by learned counsel for the petitioner that it is only the evidence of formal character, which can be produced by way of affidavit and not examination in chief qua substantive evidence pertaining to the suit or proceeding before the Family Court has apparently no substance.

However, in case petitioner had any objection regarding filing of affidavits/applicability of Order XVIII CPC, the objections/submissions should have been made at the appropriate stage, to raise the objections after long lapse of time i.e. after the entire evidence of both the parties was recorded, appears to be only a after thought and only an attempt to get out of the evidence available on record, therefore, not bona fide."

Nature and quantum of proof of custom:-

21. The Hindu Marriage Act came into force on 18.5.1955. Section 29(2) of this Act reads thus :

"Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to

> *obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act."*

22. Thus, the custom must be ancient and there must be proof of customary divorce prior to passing of the Act. All the documents filed are after the Act and that will not prove custom. The evidence of the plaintiff is that in the presence of Panchayatdars, divorce had taken place. It is not the custom and it does not prove that customary divorce was prevailing in their community and it was ancient and prior to passing of the Act. To prove customary divorce, the plaintiff must establish the proof of custom. As regards the nature and quantum of proof of custom, the following propositions are enunciated by the Madras High Court in **Gopalayyan v. Ragupatiayyan, 7 MHCR 250 :**

> *"(i) The evidence should be such as to prove the uniformity and continuity of the usage and the conviction of those following it that they were acting in accordance with the law and this conviction must be inferred from the evidence.*
>
> *(ii) Evidence of the acts of the kind, acquiescence in those acts, decisions of Courts, or even of Panchayats, upholding such acts; statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible; but it is obvious that although admissible evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."*

23. The Madras High Court has held in **Thangammal v. Gengayyammal, (1945) IMLJ 299**, that:

> *"There was proof of a custom in a community permitting divorce if both the husband and wile desired a divorce on account of disagreement between them and there was no alternative plea in the case by the wife that even if there was a divorce it was forced upon her and that the custom was not illegal and it is only where the divorce is enforced against the wish of the wife that the custom permitting divorce may be illegal."*

24. It is held in **Nallathangal v. Nainan Ambalam, (1960) I MLJ 134,** that-

> *"Hindu Law no doubt does not recognise a divorce, but custom in particular communities permit a valid divorce by means of a caste Panchayat or other simiar tribunal. Such customary divorces continue to have the force of law among the communities where the custom prevails."*

25. It is held in **Are Lachiah v. Are Raja Mallu, 1963 MLJ (Crl.) 212,** that-

> *"Section 29(2) of the Hindu Marriage Act states that, nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act. Thus, the Act does not disturb the position which a customary divorce occupied before the enactment of the Act. What has to be found as a fact for this exception to operate, is, whether, there had been as a fact such a customary divorce or dissolution of a Hindu marriage.*
>
> *In the matter of divorce according to custom it is not necessary for the parties to such a divorce or dissolution of Hindu marriage to have again to go before the Court under Section 10 or 13 of Hindu Marriage Act and obtain sanction of the Court in order that the divorce or dissolution may be rendered valid."*

26. The great philosopher Bertrand Russell authoritatively said that the National policy is the best policy. Internationalism is an Ethiopian world. Regionalism is a bad policy. Thus, nationalism is the best policy and therefore, injecting nationalism in the minds of the people for development of our great Nation is of paramount importance. Internationalism is not possible. Regionalism will paralise the unity and stop the developmental activities. Thus, the Courts and Statesmen should not recognize or encourage regionalism. But, they have to promote nationalism.

27. Our Indian society is now more concerned about women empowerment. We are speaking much about equal employment opportunity to women. Special reservations are made for women to bring them up on par with their counter parts (male candidates). As far as our Indian society is concerned, divorce is a social evil. The concept of family is to

be protected for the development of our Nation. Characteristically molded individuals alone can constitute a good family. A good family constitutes good Nation. A good Nation alone can prosper in developmental activities. Thus, good families are the foundation for the development of our great Nation. The concept of family, even during ancient times, considered as the root for unity and for individual developments. When these all are the concepts being adopted by the Indian Society, even during primitive days, still we love and recognize the concept of family. The man being a social animal cannot live separately. Under these circumstances, on the one hand we are talking about women empowerment, opportunity for women in all fields and at all levels, however, we are neglecting certain other factors, like, grant of divorce, non-maintenance etc. Even after the development of the constitutional principles and in the presence of ever so many welfare legislations in favour of women, the Courts are recognizing the customary divorces, which can never be accepted nor be approved. Customary divorce undoubtedly is a social evil. Customary divorces undoubtedly are happening on account of the attitude of ill-minded male chauvinists. Customary divorces are decided by few persons, who may not have much idea about the social developments and the constitutional perspective. Be that it be, the only concern of this Court is that such customary divorces are approved by the Civil Courts even without ascertaining the basic factors regarding the customs prevailing as well as practice. Customary divorce can never be approved nor recognized by the law. The Hindu Marriage Act, which was enacted in the year 1955, recognized such customary divorce and now, after a lapse of 64 years, the practice of granting customary divorce

can never be adopted nor be followed and the Courts should not approve any such customary divorce granted by few men from the community or the relatives of the husband or wife. In the event of approving such customary divorces, then the implications would be large and we will be marching towards backward and that can never be accepted. Such customary divorces are affecting personal liberty and fundamental rights of the women to adjudicate their issues before the competent forum.

[See: Banumathi vs. The Regional Manager, New India Assurance Company and Another, W.P. (MD) No.6514 of 2014 decided on 22.07.2019]

28. In view of the aforesaid discussion, we have reached to the conclusion that we should not interfere with the impugned judgment and decree passed by the Family Court.

29. In the result, this appeal fails and is hereby dismissed.

30. We clarify that this judgment shall not come in the way of the parties if, even as on date, the parties intend to file an appropriate application under Section 13(B) of the Hindu Marriage Act and pray for a decree of divorce with consent. We leave it open to the parties to do so if they deem fit. If such application is filed, the Court concerned shall take it up for hearing at the earliest, waive the mandatory period as prescribed under the provisions and proceed to pass a decree of divorce with mutual consent.

(J. B. PARDIWALA, J)

(VAIBHAVI D. NANAVATI,J)

NEHA