

kambli/ssp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.66 OF 2007
 WITH
 CIVIL APPLICATION NO.155 OF 2007
 WITH
 CIVIL APPLICATION NO.141 OF 2014

...

Mr.XXX

...Appellant

v/s.

Mrs.YYY

...Respondent

...

Mr.R.V.Pai a/w Mr.A.R.Pai, Ms.N.N.Thakkar and Mrs.Bina Pai for the
 Appellant.
 Respondent in person.

...

CORAM : A.S.OKA & A.A. SAYED, JJ.

DATED : 25/26 AUGUST 2016

ORAL JUDGMENT: *(Per A.S.Oka, J.)*

Considering the nature of controversy, the Appeal was heard in camera. We are directing that the names of the parties shall be masked in the title of this judgment.

2. Heard the learned Counsel appearing for the Appellant (wife) and the Respondent (husband) appearing in person. By the impugned decree passed by the learned Judge of the 4th Family Court at Bandra, Mumbai, the Petition filed by the Appellant for a decree of divorce and possession has

been dismissed.

3. In the Petition filed by the Appellant, the first prayer was for passing a decree of dissolution of marriage solemnized on 19 May 1991 between the Appellant and the Respondent on the grounds incorporated under clauses i(a) and i(b) of sub-section (1) of section 13 of the Hindu Marriage Act, 1955 (for short “the said Act”). Thus, the decree was sought on the grounds of cruelty and desertion. The second prayer in the Petition was for directing the Respondent to pay maintenance at the rate of Rs.20,000/- per month to the Appellant. The third prayer was prayer clause (c), which reads thus:-

“(c) this Hon'ble Court be pleased to pass an permanent order of injunction directing the Respondent to vacate the premises situated at C, Shri Siddhivinayak Co.op.Hsg.Society, Flat No.401, Asha Nagar, Near Thackur Complex, Borivali (E).

OR

This Hon'ble Court be pleased to direct the parties to sell of the said flat situated at C, Shri Siddhivinayak Co.op.Hsg.Society, Flat No.401, Asha Nagar, Near Thackur Complex, Borivali (E) and equally distribute the sale proceeds.”

4. We must note here that it appears from the record that the decree of

divorce was also sought on the ground of irretrievable break down of marriage. By the impugned judgment, the prayers for decree of divorce and for the possession of the flat were dismissed. The Appellant was directed to pay costs quantified at Rs.50,000/- to the respondent. In addition, the learned Judge of the Family Court directed the Respondent-husband to deposit in the Court or pay a sum of Rs.3,98,297.50 within three months from the date of the decree and on payment or deposit of the said amount, the Appellant was directed to convey her half title in the matrimonial home (the flat subject matter of prayer (c) , which is hereinafter referred to as the "suit flat") to the Respondent at the cost of both. In case of her failure to convey the title, a liberty was granted to the Respondent to take recourse Rule 34 of Order XXI of the Code of Civil Procedure, 1908 (for short "the said Code").

5. We must note here that the present Petition for divorce which is the subject matter of this Appeal was filed by the Appellant on 3 June 2004. It must be noted here that the present Appellant filed earlier Petition for divorce being Petition No.A/164/2002 in the Family Court at Mumbai seeking a decree of divorce on the same grounds. In fact the prayers made in the said Petition were the same as in the present petition. On 24 April 2003, an Application was made by the Appellant to the Family Court

seeking permission to withdraw the said Petition with liberty to file a fresh Petition at a later stage. On 24 April 2003, the learned Judge of the Family Court at Mumbai permitted the Appellant to withdraw the Petition with liberty to file a fresh Petition. A copy of the said earlier Petition, Application for withdrawal and the order passed permitting withdrawal have been filed on record by the Appellant alongwith Civil Application No.144 of 2014 praying for grant of permission for bringing on record the documents marked as Exhibit-1 to Exhibit-4.

6. Perusal of the impugned judgment shows that the decree of divorce has been denied to the Appellant on the basis of a conduct of the Appellant as noted therein.

7. Before we advert to the submissions made across the bar, it will be necessary to briefly refer to the case made out in the Petition for divorce filed by the Appellant. As stated earlier, the marriage between the parties was solemnized on 19 May 1991. Considering the view which we propose to take, it will not be necessary for us to make a reference to the averments made in the Petition in greater detail. It is alleged in paragraph (5) of the Petition that the Appellant and the Respondent were neighbours at Goregaon. Their friendship in the childhood blossomed into love. It is

stated by the Appellant that as at that time she was naïve, she fell into the trap of the Respondent's sweet talk and admiration and gave consent for the marriage. It is stated in the Petition that the family members of the Appellant were against the marriage for various reasons and therefore, at the instance and instigation of the Respondent, on 19 May 1991 she left the house of her parents and got married with the Respondent. In subsequent paragraphs, the Appellant has set out as to what transpired according to her after the marriage. As far as the suit flat is concerned, in paragraph 16 of the Petition, the Appellant stated that as she was hopeful that after having their own house, the Respondent would allow her to have a child and therefore, she decided to purchase a flat at Borivali. Her case is that in the year 1998, they jointly purchased the suit flat. She liquidated all the investments in the fixed deposit to the tune of approximately Rs.4 lakhs and gave money to the Respondent to buy the house. Her case is that for paying the balance amount, they took a loan from the HDFC Bank. Her specific allegation in paragraph 16 is that the Appellant and the Respondent paid a sum of Rs.10 lakhs for the purchase of the suit flat, out of which a sum of more than Rs.5 lakhs was paid by her from her own income. It is further stated that the suit flat was purchased in the joint names of the parties. It is alleged that in April 1998, they shifted to the said flat. It is further alleged in the Petition that considering the behavior of the

Respondent, which is set out in detail in the Petition, some time in the month of November 1998, the Appellant left the matrimonial home due to mental and physical abuse by the Respondent and started residing in her mother's house. The allegation is that the friends who supported the Appellant were abused by the Respondent by calling over at their residences. Paragraphs 22 and 23 of the petition filed by the appellant are material. Paragraph 22 and relevant part of paragraph 23 read thus:

“22. The Petitioner states that the Respondent very often alleged that the Petitioner was having inappropriate relations with her male professional colleagues, simply because she was working in the television medium. In a recent incident sometime in June 2000, the Respondent engaged the services of the local gundas to threaten her colleague.

23. The Petitioner states that by August 2001, she was in desperate circumstances due to the constant and unrelenting emotional pressures she had undergone over an extended period of time at the hands of the Respondent. Fearing that she might even suffer a nervous breakdown, she ultimately sought the help of one of their close friends. The Respondent had known the said friend for more than four years and both the Petitioner and the Respondent had visited the said friend's house frequently, very often staying overnight when it became to late for them to go home. When the said friend expressed sympathy and offered support to the Petitioner, the Respondent

did not appear to have any objections whatsoever. The
Petitioner gratefully accepted the said friend's offer that, until
the situation and her economic circumstances improved, she
could stay as his house guest. The Respondent too agreed
whole-heartedly with this suggestion and had full knowledge of
the circumstances in which the Petitioner had made this
decision to accept the said friend's offer. But over a period time
the Respondent appears to have had a complete reversal of his
agreeing to this and started to cast aspersions on the
relationship of the Petitioner and the said friend. He said filthy
rumours among their common friends frequently made obscene
and threatening phone calls to the Petitioner, and even
threatened the said friend's life on more than three occasions.
He had always doubted any genuine friendship that the
Petitioner may have had with her professional colleagues and
had very often alleged that the Petitioner was having more than
professional and even inappropriate relations with the opposite
sex, simply because she was working in the television medium.
The Petitioner states that on July 2nd, 2002 the Respondent
lodged a false and defamatory complaint against her and her
friend with the Social Service Wing of the C.I.D. (Samaj Sevi
Sanstha). The Petitioner and the said friend appeared before
the police authority on the 8th August, 2002 at 11 a.m. and were
surprised to find that the complaint lodged by the Respondent
was full of lies and deceit (more in the nature of absurd
allegations than any factual matter).”

(underline supplied)

8. It is alleged that the constructive desertion started from November 1996. As far as the suit flat is concerned, in paragraph 28 of the Petition, the Appellant has stated that she has paid more than half of the amount of consideration paid towards the suit flat and even paid installments of the loan payable to HDFC Bank. It is alleged that though the suit flat is jointly owned, the Appellant does not desire to stay in the said flat jointly with the Respondent. That is the reason why two prayers in the alternative have been made in respect of the suit flat.

9. The Petition was contested by the Respondent by filing his written statement. An important ground of objection raised in the written statement, apart from dealing with the merits of the allegations, is found in paragraphs Nos.4 to 11 of the written statement. Paragraphs Nos.4 to 11 of the written statement read thus:

“4. Factually the Petitioner has been staying separate from the Respondent for last 6 years and is cohabiting and residing with her paramour. She has son born in this relation. The ground of desertion is not available to the Petitioner. She has been residing with her paramour even at the time of filling this Petition. The Petitioner mischievously and with the intention to misdirect this court has given wrong address as her residence. The Petition deserves to be rejected.

5.The Respondent states that he never wanted to break this marriage since he believes in the sanctity of marriage. He is opposing this Petition, as he does not want to break this marriage. The Petition deserves to be rejected.

6. The Petitioner has suppressed material and relevant facts in this petition to suit her convenience. It is submitted that this petition suffers from suppressions of material and relevant important facts. This also amounts to playing fraud on judicial authorities as such the same may be rejected on the ground of suppression of facts as well.

7.In fact this petition is filed at the instance of one Mr.A (the name is masked while reproducing the paragraph) who is the paramour of the Petitioner. It is submitted that filing this Petition amounts to gross misuse and abuse of process of law, waste of valuable time of this Hon'ble Court and the machinery available to suit the conveniences of the concerned persons. This petition is filed to cover up gross matrimonial illegalities committed by concerned persons. It is submitted that the Petitioner cannot take advantage of her own wrong. The Petitioner's conduct also so amount to different illegalities under matrimonial laws and criminal offences as specifically stated herein below. The Petition deserves to be rejected.

8.At present including the time and date of filing the petition, the petitioner is staying and cohabiting with Mr.A, who is

about 30 years older to the Petitioner. The Petitioner is actually residing with Mr.A for more than two years in his residential flat situated at X X X X X, Mumbai (the details of the address are masked while reproducing). She had illicit relations with this paramour even before that. The paramour has instigated the Petitioner to file this Petition with vengeance and vindictive attitude and malafide intentions to suit his illegal activities and criminal offence against the Respondent.

9. This Petition is filed since the Respondent has filed a Criminal Case on 13-4-2004 against Mr.A for adultery who is the petitioner herein. The Criminal Case is bearing No.676/sw/2004. The same is filed under sec. 497 of Indian Penal Code which pending in 24th Court, Borivali, before Hon'ble Additional Chief Metropolitan Magistrate Court. The Hon'ble Additional Metropolitan Magistrate Court was pleased to direct Malvani Police Station for investigation under provisions of Criminal Procedure Code.

10. It is submitted that pursuant to the above order Mr.`A' was interrogated at Malvani Police Station on 14-7-2004 wherein he has admitted that he has sexual relation with the petitioner and continues to have the same. He has admitted that initially the Petitioner used to call him `Papa' i.e. as good as `Father' and he used to call her `Beti' i.e. daughter. However, they have entered into regular sexual relations and the Petitioner has given birth to a male child

called 'XXXXX' (real name is masked) and he is the father of the child. The Petitioner was also interrogated on 19-7-2004. She has admitted these fact in Malvani Police Station at the time of interrogation and she has admitted that she is staying with Mr.`A ' and a child 'XXXXX' is born in this illicit relationship. It is submitted that a child 'XXXXX' is born in this illicit relationship as the Petitioner has given birth to this child and Mr.A is the father of the child. This child was born at Anupam Maternity and Nursing Home situated at Goregaon (West). The birth records of this child speak volumes.

11. The petitioner got the official Birth Report of the child 'XXXXX' wherein she has mentioned Mr.`A' as father of the child and she is using her name as Mrs`.B' (the name is masked). The Petitioner has mentioned her address at X X X X X, Mumbai. The Respondent craves leave to product and rely on all relevant documents in support of case. The Petitioner has been staying with Mr.A at his present residential address since August 2001."

(underlines supplied)

10. As far as the paragraph 16 of the Petition dealing with the acquisition of the suit flat is concerned, in paragraph 26 of the Written Statement, it is contended that some time in April 1998, the Respondent purchased the suit flat by investing his own money and by taking loan from HDFC Bank, his employer, friends and relatives. He denied that the Appellant has made any

contribution towards the price of the suit flat.

11. The Appellant adduced evidence by producing her Affidavit in lieu of Examination-in-Chief. She was cross-examined. The Respondent also filed his Affidavit in lieu of Examination-in-Chief and he was subjected to cross-examination. No other witness was examined by the parties.

12. The learned Judge of the Family Court declined to grant a decree of divorce considering the conduct of the Appellant, which was reflected from the admissions of the Appellant herself. The said conduct was of maintaining living-in-relationship with a gentleman (Mr.A). The learned Judge noted that the Appellant admitted that she has a child born from the said gentleman even before filing of the present Petition. Relying upon the second part of clause (a) of sub-section (1) of section 23 of the said Act and on the ground of suppression of material facts, the learned Judge declined to grant a decree of divorce. As far as the issue regarding the suit flat is concerned, the learned Judge dealt with the case of the Appellant that she had invested a sum of about Rs.6,62,000/- in purchasing the flat. The learned Judge referred to two separate valuation reports placed on record. The learned Judge came to the conclusion that the Appellant has failed to substantiate her case that she had made a major

contribution for purchasing the said flat. The learned Judge held that the value of the suit flat was Rs.10,41,000/- and held that the Appellant and the Respondent were having equal shares in the said flat. By taking 50% of the amount of Rs.10,41,000/-, the learned Judge deducted the sum of Rs.1,22,536/-, which was paid by the Respondent to the Appellant for purchasing a car, which was in exclusive possession of the Appellant. After deducting a sum of Rs.1,22,536/- from the amount of Rs.5,20,000/-, the learned Judge held that the Respondent was liable to pay a sum of Rs.3,98,297.50 being the share of the Appellant in the market value of the flat and that is how the second part of the decree was passed by the learned Judge directing the Respondent to deposit an amount of Rs.3,98,297.50 within three months and directing the Appellant to convey her half title in the suit flat to the Respondent at the cost of both parties.

13. We may note here that firstly we have heard the learned Counsel appearing for the Appellant on the question whether the relief of divorce could have been denied to the Appellant on the ground of suppression of material facts and on the basis of clause (a) of sub-section (1) of Section 23 of the said Act. Secondly, we have heard him on the second part of the decree in relation to the suit flat.

14 The submission of the learned counsel for the appellant is that the learned Judge of the Family Court has unnecessarily entered into the issue of the conduct of the appellant. He submitted that the conduct was relevant only as far as second part of sub-section (1) of section 23 is concerned. He pointed out that the conduct on the basis of which the Appellant was non-suited is of not disclosing before the Court her relationship with the third person and the fact that before filing of the petition, a child was born from the said relationship. He submitted that the said conduct has no relevance as far as both the grounds urged in the petition namely the cruelty and desertion. He submitted that to attract clause (a) of sub-section (1) of section 23, the conduct must be such that the party who approaches the matrimonial Court has taken undue advantage of such conduct. He submitted that by no stretch of imagination it can be said that the appellant has taken any undue advantage. Inviting our attention to the averments made in the petition for divorce and in particular paragraph 23, he submitted that though may not in so many words, but the petitioner had indicated her relationship with the third person. He submitted that earlier petition and the present petition were filed as per the legal advice and the appellant was advised not to disclose the events which she has disclosed in her cross-examination. He submitted that the non disclosure is not sufficient to throw out the petition for divorce even without considering the merits thereof. He

submitted that the decision of the Apex Court in the case of S.P.Chengalvaraya Naidu since deceased (dead) through L.Rs vs. Jagannath (dead) by L.Rs. And others¹ was rendered in the peculiar facts of the case. He submitted that in any event, it cannot be disputed that the marriage between the appellant and the respondent has completely and irretrievably broken down and therefore, a decree of divorce deserves to be passed. He urged that under section 151 of the Code of Civil Procedure, 1908, there are abundant powers vesting in the matrimonial Court to do substantial justice and even by exercising the said powers, this Court can pass a decree for divorce after finding that the marriage is completely broken down. He urged that the decision of Apex Court in case of Chetan Dass vs. Kamla Devi² has no application to the facts of the case as no undue advantage has been taken by the alleged suppression of facts. He invited our attention to the application for additional evidence being Civil Application No.141 of 2014. He submitted that the documents sought to be produced along with the civil application for seeking permission to lead additional evidence show that the respondent sought custody of the child of the appellant though he was not the biological father of the child, and therefore, the said ground will have to be taken into

¹ AIR 1994 SC 853

² (2001) 4 SCC 250

consideration and even on this ground, a decree of divorce deserves to be passed. Lastly, he submitted that in any event, the case made out by the appellant on merits for the grant of decree the divorce on both the grounds of desertion and cruelty ought to have been considered.

15 We must note here that the appeal was partly argued on 24th August 2016. Yesterday, when the appeal was called out, the learned counsel for the appellant on instructions stated that the appellant may be permitted to withdraw the divorce petition with liberty to file a fresh petition for divorce on the same cause of action. After the Court expressed a view that such a liberty cannot be granted, he made submissions on the second aspect. He submitted that admittedly, the suit flat stands in the joint name of the appellant and the respondent. He submitted that the prayer for the possession of the suit flat was pressed by the Appellants before the Family Court. He pointed out the operative part of the impugned decree. He submitted that the said decree is completely illegal in as much as though there was no counter claim or cross petition by the respondent-husband, the learned Judge of the Family Court directed the respondent to deposit a sum of Rs. 3,98,297.50 and on payment of the said amount, the appellant has been directed to convey her half share in the suit flat to the respondent. He submitted that such a relief in favour of the respondent could not have

been granted.

16 He invited our attention to the documents produced along with the list of documents at Exh.18. The first document is a ledger account of the amounts allegedly paid/spent by the appellant on the suit flat including the amounts allegedly paid towards the repayment of the housing loan. He also relied upon the statement of account of HDFC Bank Limited which is annexed to the Civil Application No.141 of 2014 and he submitted that the said statement will show that the contribution of the appellant was of more than 50% of the consideration. He, therefore, submitted that the second part of the decree deserves to be interfered with. The respondent appearing in person supported the impugned decree. He submitted that the appellant has adduced no evidence of any contribution made by her for purchasing the suit flat and therefore, no interference is called for with the impugned decree.

17 We have considered the submissions. We have already quoted paragraph 23 of the petition for divorce filed by the appellant. We may note here that a copy of the petition No.A-164 of 2003 filed by the appellant in the Family Court on 9th September 2002 is placed on record along with Civil Application No.155 of 2007. Even the learned counsel for the appellant did

not seriously dispute that there is no difference between the contents of the said petition and the present petition. In fact, the paragraph 23 of the present petition is a replica of paragraph 23 of the earlier petition for divorce filed by the appellant.

18 We have already quoted the material portion of the written statement of the respondent in which by specifically naming a person, he had stated that the appellant was having relationship with the said person for last 6 years and from the said relationship, a son is born to her. It is pointed out in the written statement that he had filed a criminal case against the said person . It is pointed out in the written statement that the said person has been interrogated in Malvani Police Station when he admitted his relationship with the appellant. In fact, the specific case in the written statement is that the present petition has been filed at the instance of the said third person. The written statement was filed on 5th September 2005. The affidavit in lieu of examination-in-chief was filed by the appellant on 20th February 2006. When the affidavit in lieu of examination-in-chief was filed, the appellant had full knowledge of the factual contentions raised by the respondent in his written statement. Perusal of the affidavit in lieu of examination-in-chief shows that it is no different from the petition for divorce. It is a replica of the petition. The appellant could have dealt with the

said factual contentions raised in the written statement in her affidavit in lieu of examination-in-chief and could have come out with the truth. However, she has not chosen to come out with true and correct facts. In her cross examination, the appellant stated thus:

“...At present I am staying with Mr.A (real name masked) at Malad. Even at the time of presentation of petition, I was staying with him. As I used to give my postal address of my mother i.e disclosed in the petition. I have not begotten any issue from the respondent but I have son i.e born from Mr.`A' in July 2003. I was admitted in Anupam Maternity home on 23<sup>rd</sup> July 2003. I delivered a son on 24<sup>th</sup> July 2003. I was admitted in said hospital as XXXX . I had apprised my advocate about my relations with Mr.`A'.”

(underline supplied)

19 Thus, the appellant accepted that not only at the time of recording of her evidence but even at the time of presentation of her petition for divorce, she was staying with the said third person. We may note that the petition was presented on 3rd June 2004. Further admission is that she has a son born from the said third person “A” on 24th July 2003. In further part of the cross examination, she accepted that while admitting her to the maternity home on 23rd July 2003, the said third person “A” signed as her spouse. It is in this context the filing of earlier petition on 9th September 2002 and withdrawal thereof on 24th April 2003 becomes significant. Even in the

earlier petition, the appellant has not disclosed the truth which she could have easily disclosed. In any event, there was no reason for the appellant to withhold the material facts while filing the present petition. As stated earlier, in the written statement, the said facts were pointed out by the respondent. Therefore, while filing the affidavit in lieu of examination in chief, there was an opportunity available to the appellant to come out with the truth. However, she suppressed the said facts. The said facts were disclosed only when there was a specific cross examination on the said point.

20 We may also note another relevant admission given by the appellant in her cross-examination which reads thus:

“It is correct to say that on July 2005 on one night there was quarrel in between myself and Mr.A. Due to which I left the house of Mr.A at 1.30 a.m with the son and went to the house of respondent. It is correct to say that for about 4 days I was staying with respondent. It is correct to say that I left the house of the respondent on one fine morning without informing any thing to the respondent.

(underline supplied)

21 Thus, the appellant accepted that in July 2005, when she had a quarrel with Mr.`A', she left his house at 1.30 a.m with her son and reached the house of the respondent. She had also stated that she stayed in the house of the respondent for a period of four days. She also admitted that she left the house of the respondent on one fine morning without informing the respondent. Even this admission is relevant in the context of the fact that the decree of divorce is sought on the ground of desertion by

the respondent. This is also relevant as the decree of divorce is mainly sought on the ground of cruelty on the basis of events up to the year 2004. Both the appellant and the respondent are admittedly residing separately from the year 1998. After making allegations of cruelty against the respondent, during the pendency of the present petition in July 2005, she returned to the house of the respondent at 1.30 a.m with her son whose biological father is Mr.`A' and stayed with the respondent for four days. It is not her case that there was any resistance or any opposition on the part of the respondent. On the contrary, the aforesaid admission indicates that though she came to the house of the respondent at such odd hour, she was accommodated in his house by the respondent for a period of four days. It is not her case that she was driven out the house. Her own the case is that she left the house without informing anything to the respondent. It is not her case that during the period of 4 days, she was not treated well. This conduct on the part of the Appellant will amount to condonation of the alleged acts of cruelty. This conduct will militate against the ground of desertion as well.

22 Now, it will be necessary to make a reference to clauses (a) and (b) of sub-section (1) of section 23 of the said Act which reads thus:

“(1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that-

“(a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause(c) of clause (ii) of Section 5 is not in any way taking advantage of his or

her own wrong or disability for the purpose of such relief and

(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(b) where the ground of the petition is the ground specified in clause (I) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and”

23 When a spouse files a petition for divorce on the ground of desertion, the said spouse must be ready and willing to cohabit with other spouse. In the present case, from the admissions of the appellant, it is crystal clear that even before filing of the petition and even during the pendency of the petition, she was residing with the said third person “A” and as stated earlier, she gave birth to a son on 24th July 2003. Till the date of recording of her evidence (13th June 2006), she was continuously residing with the said third person and was maintaining relations with him. Therefore, the said conduct of the appellant is very much relevant in the context of clause (a) of sub-section (1) of section 23.

24 At this stage, it will be necessary to advert to the decision of the Apex Court in the case of Chetan Dass. In the said case, the Apex Court considered the scope of clauses (a) and (b) of sub-section (1) of section

23. Paragraph 19 of the said decision reads thus:

“19 In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the Courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point.”

(underline supplied)

25 The paragraph 21 of the said decision is also relevant which reads thus:

“21 In this case, the averment made in the petition for obtaining a decree for divorce, namely, desertion on the part of the wife without any reasonable cause has not been found to be

correct. The petition was liable to be dismissed on that ground alone. The defence of the respondent for having a justified reason to live away from the husband has been found to be correct. Behaviour of the appellant certainly falls in the category of misconduct on his part. In such circumstances, it is too much on his part to claim that he be given the advantage of his own wrong and be granted a decree of divorce on the ground of desertion on the part of his wife who is still prepared to live with him provided he snaps his relationship with the other woman. Similar offer had also been made on behalf of the appellant, which, we have already dealt with in the earlier part of the judgment. He perhaps prefers to snap relationship with the respondent rather than with Sosamma Thomas. A decree of divorce on the ground of marriage having been irretrievably broken cannot be granted in the facts and circumstances of the case as indicated above.”

26 The conduct of the appellant in the present case will have to be appreciated in the light of the fact that during the pendency of the present petition, she was allowed to seek shelter in the house of the respondent-husband for a period of four days. As pointed out earlier, in the cross examination of the appellant recorded on 19th June 2006, she admitted that in July 2005 she had to take shelter in the respondent's house for a period of four days. As stated earlier, her affidavit in lieu of examination-in-chief was filed on 26th February 2006. The said very important fact of her stay with the respondent in July 2005 is also suppressed by the appellant in her examination-in-chief. There is no reason for the appellant to suppress the said material fact especially when the said material fact will certainly amount to the condonation of the cruelty alleged by her against the

respondent. Therefore, in our view, this conduct on the part of the appellant of suppression of material facts will certainly disentitle her to any relief which was sought under the provisions of the said Act namely a decree of divorce. Moreover, her conduct of maintaining relationship with "A" before filing the petition and during pendency of the petition, will disentitle the appellant from seeking divorce on the ground of cruelty and desertion.

27 As stated earlier, even going by the case of the appellant, she was in relationship with the said third person, even during the pendency of the first petition filed in the year 2002. Neither during the pendency of the said petition nor at the time of filing of the present petition, the appellant disclosed the said fact. Even after the respondent-husband pleaded the said facts in his written statement for showing the conduct of the appellant, in the affidavit in lieu of examination-in-chief, the appellant has chosen not to disclose the said facts. Apart from the said material suppression, another suppression which we have pointed out earlier is of her stay with the respondent in July 2005. We must also note here that except for the submission made across the bar that the appellant was advised not to disclose the said facts, no other explanation is forthcoming from the appellant for the suppression of the said material facts. Even the said contention that the appellant acted as per the advice of the Advocate clearly appears to be an afterthought. We have quoted the material portion of the cross examination of appellant wherein she claimed that she had apprised her Advocate about her relationship with the said third person. However, she has not stated that she was advised by her Advocate not to disclose the said facts before the Court.

28 At this stage, we must make a reference to the decision of the Apex Court in the case of S.P.Chengalvaraya Naidu (dead) by his L.Rs and in particular what is held by the Apex Court in paragraph 7 of the said decision. According to us there cannot be a better case where observations made by the Apex Court will squarely apply. The manner in which the material facts are suppressed by the appellant are sufficient to draw a conclusion that her case is based on falsehood.

29 It is true that the learned Judge of the Family Court has commented upon the conduct of the appellant as “unwarrant conduct”. Even without going to that aspect, the learned Judge of the Family Court could have thrown out the proceedings for divorce filed by the appellant on the ground of suppression of material facts. The appellant was duty bound to disclose the facts which were suppressed in the petition for seeking divorce on the ground of cruelty and desertion. Therefore, there was every justification for the learned Judge of the Family Court to dismiss the petition for divorce in the light of the principles enacted in clauses (a) and (b) of sub-section (1) of section 23. The petition for divorce could have been also thrown out on the ground that there was a suppression of material facts. We may also note here that though according to the case of the appellant they were staying separately from the year 1998, the appellant admitted that the respondent had given a cheque dated 28.5.2001 for Rs.1,22,536/- to her for purchasing a car.

30 Now we deal with the submissions made by the learned counsel for the appellant on the ground of irretrievable breaking down of marriage. It cannot be disputed that notwithstanding debate before the Law Commission, the ground of irretrievable break down of marriage does not find place in the

said Act as it stands today. Sub-section 1 of section 13 of the said Act lays down the specific grounds on which marriage can be dissolved. We have already quoted clauses (a) and (b) of sub-section (1) of section 23. The mandate of clause (a) is that in any proceedings under the said Act, no relief can be granted unless the Court is satisfied that any of the grounds for granting relief exists. The intention of the legislature clearly seems to be that the marriages cannot be dissolved mechanically unless a specific ground provided in the said Act is established by the person seeking the relief of divorce. There are decisions of the Apex Court which show that after the Apex Court found that there was a complete breakdown of a marriage, the power of the Apex Court under Article 142 was exercised and the marriage was ordered to be dissolved. But the law laid down by the Apex Court is that the Matrimonial Court cannot dissolve a marriage unless a particular ground of divorce provided under the statute is duly established.

31 The learned counsel for the appellant relied upon section 151 of the said Code. It is not necessary to record detailed reasons to reject the said submission. Something which cannot be done under the express provisions of law, cannot be done by the exercise of power under section 151 of the said Code.

32 As far as prayer for permitting withdrawal of the appeal with liberty to file a fresh petition on the same cause of action is concerned, in the present petition, the appellant is disentitled to a decree of divorce on the basis of her own conduct. Therefore, grant of liberty will amount to condoning the grave acts of suppression of material facts on the part of the Appellant. Moreover, this is the second petition filed by her on the same cause of action. That is the reason why we declined to grant liberty to file a fresh

petition and allowed the learned counsel for the Appellant to argue on merits.

33 As far as the relief in relation to the suit flat is concerned, the said relief is prayed under the provisions of Section 7 of the Family Court Act, 1984. The prayer which was pressed into service by the wife was for possession of the suit flat on the ground that the appellant has paid more than 50% of the consideration for acquiring the suit flat. As stated earlier, the impugned decree directs the respondent-husband to pay a sum of Rs.3,98,297.50 to the appellant and on deposit, it directs the Appellant to execute a conveyance in respect of her half share for transferring them to the respondent. As there was no counter claim or cross petition, such a decree in favour of the respondent could not have been passed by the learned Judge of the Family Court.

34 In support of the plea that the appellant has contributed more than 50% of the amount for purchase of the flat, reliance is placed on the ledger account produced by the appellant and the statement of account of the HDFC Bank. None of the said documents have been proved by the appellant. On the bank's statement of account, there is no certification as per the Bankers' Books Evidence Act, 1891. There is no attempt made by the appellant to adduce evidence to prove her contribution. The respondent in his written statement denied that the appellant had made any contribution. In the cross examination, the respondent-husband claimed that for purchasing the suit flat for consideration of Rs.10,00,000/-, he has contributed a sum of Rs.8,00,000/-. He admitted that a sum of Rs.2,00,000/- might have been paid by the appellant. Perusal of the evidence of the respondent shows that even he has not adduced any

evidence for proving his contribution to the extent of the sum of Rs.8,00,000/-. At this juncture, we must note that a photocopy of the agreement for sale of the suit flat was brought on record by the respondent which shows that the suit flat was acquired by the appellant and the respondent jointly by an Agreement of 30th April 1998 executed by Nandira.

35 Thus, the document produced by the respondent himself shows that the flat was acquired in the joint name of the parties. As pointed out earlier, in the plaint there were two prayers made in the alternative. The first prayer was for possession and the other was for direction to sale the suit flat and allow the parties to equally share the sale proceeds. The first prayer was pressed by the appellant.

36 In view of the fact that the appellant and the respondent have not adduced evidence regarding their alleged contribution, we suggested the parties that only for considering the prayer clause(c), an order of remand can be passed with liberty to the parties to adduce additional evidence. The respondent has no objection for adopting the said course. The learned counsel for the appellant has no objection. However, he submitted a leave to amend the petition for divorce be granted. The said request cannot be acceded to. However, a liberty can be granted to the appellant to make an application for amendment which can be considered by the Family Court only if a case is made out by the appellant permit amendment. This liberty is for making an application for amendment only in relation to the claim in respect of the suit flat.

37 Civil application No.155 of 2007 was filed for bringing on record earlier petition filed by the appellant and the order of withdrawal of the said

petition. There is no difficulty in considering the said documents. As far as Civil Application No.141 of 2014 is concerned, the learned counsel for the appellant tried to submit that on the basis of the conduct as reflected from the documents annexed to the said application, cruelty is made out. We have perused the said application. In the said application, no such a case is not made out and therefore, there is no reason to grant permission to produce the documents which are sought to be produced along with the said application.

38 The learned counsel for the appellant submitted that there was no justification for awarding costs of Rs.50,000/- only on the ground that the appellant has suppressed the material facts. We are of the view that considering the extent of suppression, there was every justification for the learned Judge of the Family Court to award costs of Rs.50,000/-.

39 Accordingly, we dispose of the appeal by passing the following order:

- (I) That part of the impugned decree dated 18th January 2007 by which the petition for divorce filed by the appellant was dismissed is hereby confirmed. Even the order of costs is confirmed. The second part of the decree by which prayer clause(c) of the petition was rejected and by which a direction was given to the respondent to deposit the amount of Rs.3,98,297.50 is hereby set aside. As a consequence, the direction given to the appellant to convey her half share is also set aside;
- (II) M.J.Petition No.A-984 of 2004 is remanded to the Family Court only for the purposes of fresh consideration of the prayer clause(c);

- (III) We direct the appellant and the respondent to appear before the learned Judge of the Family Court No.4 at Bandra,Mumbai on 10th October 2016 at 11.00 a.m. On that date, the learned Trial Judge will determine the schedule of hearing of the petition; The proceedings after remand shall be concluded as expeditiously as possible;
- (IV) The learned Judge of the Family Court shall give an opportunity to both the appellant and the respondent to lead further evidence only in so far as prayer clause(c) is concerned;
- (V)It will be open for the appellant to file an application for amendment of the petition confined only to prayer clause(c) of the petition. We, however, make it clear that this liberty should not be construed as a finding by this Court that the appellant is entitled to make an amendment. If such application is made, the learned Judge of the Family Court shall decide the same in accordance with law after giving an opportunity of being heard to the respondent;
- (VI) The Appeal is partly allowed on above terms with no order as to costs. Civil Application stands disposed of;
- (VII) Writ and Record and Proceedings be sent by a special messenger to the Family Court.

(A.A. SAYED, J.)

(A.S.OKA, J.)