

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE SIDE JURISDICTION

FAMILY COURT APPEAL NO.66 OF 2008  
ALONG WITH  
FAMILY COURT APPEAL NO.136 OF 2008

F.C.A.NO.66 OF 2008

“X” .. Appellant

Vs

“Y” .. Respondent

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Shri Shashank C. Thatte for the Appellant Husband.  
Shri Diwakar Amarnath Dwivedi for the Respondent wife.

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F.C.A. NO.136 OF 2008

“Y” .. Appellant

Vs.

“X” .. Respondent

—

Shri Diwakar Amarnath Dwivedi for the Appellant wife.  
Shri Shashank C. Thatte for the Respondent Husband.

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CORAM : A.S. OKA & P.D. NAIK, JJ

DATE ON WHICH SUBMISSIONS WERE HEARD : 6TH MAY 2016

DATE ON WHICH JUDGMENT IS PRONOUNCED: 16TH NOVEMBER 2016

JUDGMENT ( PER A.S. OKA, J )

1. Considering the factual controversy, we have directed that the names of the parties shall be masked in this Judgment. The husband will be referred to as “X” and the wife will be referred to as “Y”.

2. Though the submissions were concluded on 6<sup>th</sup> May 2016, considering the very peculiar facts of the case, we decided to give sufficient time to the parties to reconsider their position and to arrive at an amicable settlement. Looking to the peculiar facts of the case, we were of the view that an amicable settlement is the only way out to resolve the matrimonial dispute and that is why we decided not to pronounce the judgment for few months after conclusion of the hearing. We had kept the matter for directions on 27<sup>th</sup> October 2016 when the wife and her Advocate could not appear. We gathered from the learned counsel appearing for the husband that after submissions were concluded, there was no progress in the settlement. Therefore, we have no option but to pronounce the judgment.

3. These two Appeals take exception to the judgment and decree dated 26<sup>th</sup> March 2008 passed by the learned Judge of the Family Court at Bandra, Mumbai, on a Petition for divorce filed by the

husband on the ground of cruelty under Clause (ia) of Sub-section (1) of Section 13 of the Hindu Marriage Act, 1955 ( for short “the said Act”). By the impugned decree, the learned Judge dismissed the Petition for divorce filed by the husband. The prayer for maintenance made by the wife was rejected. The learned Judge directed the husband to pay maintenance of Rs.5,000/- per month each for the benefit of the minor daughter Hemisha and minor son Bhavik till they attain the age of majority. The maintenance was made payable from the date of the impugned decree. Family Court Appeal No.66 of 2008 has been preferred by the husband. Family Court Appeal No.136 of 2008 has been preferred by the wife, inter alia, for challenging that part of the decree by which the maintenance was denied to her. A prayer is made in the said Appeal for directing the husband to pay maintenance at the rate of Rs.3,000/- per month as per the interim order dated 3<sup>rd</sup> March 2006 passed by the Family Court.

4. The marriage between the parties was solemnized on 9<sup>th</sup> November 1986 in accordance with Hindu Vedic Rites. There are three children born to the wife. The son Hemal was born on 22<sup>nd</sup> May 1988. The daughter Hemisha was born on 1<sup>st</sup> May 1989 and the youngest child Bhavik was born on 5<sup>th</sup> July 1995. The Petition was filed by the husband on 26<sup>th</sup> December 1997. As far as the grounds of cruelty are concerned, the husband has specified the said grounds in Paragraph 5 of the Petition. The said grounds read thus:

- “(a) That after initial period i.e. about 1 year or so of the marriage, the Respondent started picking up false quarrels with the parents of the Petitioner for no reason whatsoever;
- (b) That the Respondent never wanted to mix up with the family and society of the Petitioner and always insisted upon him to get his parents separated from him; since he refused to do so; the Respondent also started picking up quarrels with him also for no reason.
- (c) That due to above reasons, the Respondent adopted non-co-operative attitude in the house by not doing or assisting his household work like cooking and maintaining the home as she had not to do washing, cleaning etc.
- (d) That the Respondent developed habit of going away to her parents very often without consent or even telling to him or his mother and especially when there are quests in the family.
- (e) That the Respondent to frustrate the Petitioner, refused to and in fact failed to take proper care of the children also.
- (f) That all her acts are not enough, the Respondent stopped keeping warmth and material relations with the Petitioner and also neglected him in all aspect of life as if strangers have been staying under the one roof; since about 12 months past.
- (g) **That the Petitioner, except his business and family affairs, has no other activities still the Respondent for no reason imaging and doubts his character, after having 3 children and frustrated him so much that he had to leave the home and parents and children and stating away from his own family at the address given in the title hereto.”**

(emphasis added)

5. In Paragraph 8 of the Petition, another ground has been agitated. The husband addressed a letter through his Advocate on 15<sup>th</sup> November 1997 to the wife calling upon her either to live peaceful life or to agree for grant of divorce. The allegation in Paragraph 8 of the Petition is that after receiving the said letter, the wife started threatening the husband and his parents on telephone that she would commit suicide after poisoning the children with the object of brining the husband and his old parents in trouble. Therefore, the husband sought custody of three children apart from seeking a decree of divorce.

6. A written statement was filed by the wife contending that she was employed by the husband in his Garment Factory at Malad, Mumbai, in the year 1980. That is how she came in contact with the husband. It is stated that they developed a love affair and ultimately got married on 9<sup>th</sup> November 1986. It is alleged that till the year 1993, the parties were residing at Malad in Mumbai. In the year 1994, a flat was purchased in Saibaba Nagar, Borivali (East) in Mumbai. The parties started residing in the said flat at Borivali. It is alleged that till the year 1994, the matrimonial life was smooth. Thereafter, the behavior of the husband changed considerably. In Clauses (d) to (g) of Paragraph 2 of her written statement, the wife has stated thus:

**“(d) The Petitioner started getting frequent telephone calls from a lady and he was getting pleasingly engaged in talk with her for long durations. The Petitioner was also getting**

**phone calls at odd hours at night. On inquiries, the Petitioner always showered anger on the Respondent and she was beaten black and blue.**

- (e) The Respondent gave birth to son Bhavik on 5.7.1995 at her mother's place. The Petitioner did not bother to come and see the Respondent and the newly born baby. The Petitioner even did not show any interest in taking the Respondent and child back to the matrimonial home. Finally, the Respondent returned to the matrimonial home after a period of more than three months. The Petitioner was not ready to keep the Respondent in the house and wanted her to stay at her mother's place. The Respondent resisted and stayed in the house but the Petitioner's behaviour went from bad to worse.
- (f) **The Respondent gathered the knowledge that the lady who had been telephoning the Petitioner is one Jyoti Mistry and she was having affair with the Petitioner. The Respondent confronted the Petitioner and the Petitioner did admit that he has having affair with her and the Respondent could do whatever she wanted. He also stated that he had no concern as to how the Respondent takes it. The Petitioner had become aggressive and violent on this aspect on the various occasions.** The Petitioner has physically assaulted the Respondent and she was also driven out of the house. The Respondent has been driven out of the house in all for about 8 to 10 times.
- (g) The Respondent has also contacted the said Jyoti Mistry and met her for three to four times. Said Mrs. Jyoti Mistry is a widow with one daughter. The Respondent has requested her not to carry on her affair with the Petitioner and also stated that how her affair was breaking her marriage and was also ruining her children's life. Said Jyoti Mistry told her that it was the Petitioner who was running after her and she was not to be

**blamed at all. The Respondent's all requests went vain. The situation and the Petitioner's behaviour and conduct did not change.”**

(emphasis added)

7. Before we deal with the subsequent part of the written statement, it will be necessary to make a reference to what has transpired during the pendency of the Petition filed by the husband. On 12<sup>th</sup> May 1998, the husband and wife signed consent terms before the Marriage Counsellor of the Family Court. In the consent terms, they recorded that though they are residing under the same roof, that they are separated from December 1996. In the consent terms, it was recorded that the parties have agreed to take divorce by mutual consent. In fact, on the basis of the said consent terms, an Application was filed on 12<sup>th</sup> May 1998 jointly by both the parties for converting the pending Petition into a Petition under Section 13B of the said Act. However, by an Application dated 14<sup>th</sup> August 1998 at Exhibit-7, the wife stated that she was not desirous of agreeing divorce by mutual consent and therefore, she was desirous of contesting the Petition. She, therefore, sought legal aid which was granted to her. However, the written statement was not filed by wife. Therefore, the Petition proceeded ex parte and on 25<sup>th</sup> October 1999, an ex parte decree of divorce was passed by the Family Court, Bandra, Mumbai. On 23<sup>rd</sup> August 2001, a Misc. Application was filed by the wife for setting aside the ex parte decree of divorce. It was stated in the said Application that

on 27<sup>th</sup> August 1998, the husband took the wife in confidence and had physical relationship with her. The husband expressed desire to settle the matter. Accordingly, on 30<sup>th</sup> August 1998 at 4.00 p.m, there was a meeting which was attended by the husband's two brothers and mother. In the said meeting, the parties agreed to reconcile and stay together at the place of residence at Malad in Mumbai. The husband agreed to withdraw the Petition filed by him. Accordingly, from 31<sup>st</sup> August 1998, the parties started residing together at Malad residence. It is alleged by the wife that on 16<sup>th</sup> September 1998, the husband informed her that he had withdrawn the Petition for divorce. That is the reason why the wife did not attend the proceedings. It is alleged by the wife that on Saturday the 30<sup>th</sup> June 2001, she learnt that the husband had brought one woman in the house. The wife alleged that on 13<sup>th</sup> July 2001, the husband revealed that he has married to the said woman. Thereafter, the wife made inquiry in the Family Court and found that on 25<sup>th</sup> October 1999, an ex parte decree of divorce was passed.

8. A reply was filed by the husband to the said Application for setting aside the ex parte decree. In the reply, he contended that after the ex parte decree was passed on 25<sup>th</sup> October 1999, he got married on 23<sup>rd</sup> June 2001. By an order dated 9<sup>th</sup> September 2004, the learned Judge of the Family Court allowed the Misc. Application filed by the wife and proceeded to set aside the ex parte decree. The learned Judge

of the Family Court accepted the case of the wife that due to the settlement, the husband had assured the wife to withdraw the Petition. The learned Judge of the Family Court observed that the husband obtained the ex parte decree fraudulently. The said order setting aside the ex parte decree has become final.

9. Coming back to the written statement of the wife, she has narrated as to how the settlement took place on 30<sup>th</sup> August 1998. She has reiterated that on 16<sup>th</sup> September 1998, the husband informed her that he had withdrawn the Petition for divorce. In the written statement, it was contended that the income of the husband from his business is not less than Rs.5 lakhs per month and he is leading a very high lifestyle. She alleged that she has no source of income. She stated that the sons Hemal and Bhavik were staying in a Boarding School at Panchgani. She stated that she requires a sum of Rs.60,000/- per month for maintenance of the three children who were minors. She claimed that she is entitled to the maintenance of Rs.30,000/- per month.

10. The husband examined himself by filing his affidavit-in-lieu of examination-in-chief. He was cross-examined by the Advocate for the wife. The affidavit-in-lieu of the examination-in-chief was filed by the wife who was cross-examined by the Advocate for the husband. No

other witnesses were examined by the parties. We may note here that on an Application being made by the wife, an interim order was passed on 3<sup>rd</sup> March 2006 by the learned Judge of the Family Court directing that the maintenance of Rs.3,000/- per month shall be paid to the wife and the maintenance of Rs.2,000/- per month each shall be paid to the three children.

11. The learned counsel appearing for the Applicant has taken us through the pleadings, notes of evidence and the record. He pointed out that there was no basis for the finding recorded by the learned Judge of the Family Court that the cruelty was not proved. He urged that the finding of the learned Judge that the cruelty alleged was a mere wear and tear of married life is completely erroneous as the specific instances of cruelty were set out and proved. He submitted that after the ex parte decree was passed, the husband has admittedly remarried. He pointed out that notwithstanding this fact and the fact that there was a gross delay in filing an Application for setting aside the ex parte decree, the Family Court proceeded to set aside the ex parte decree. His submission is that the ex parte decree ought not to have been set aside. He submitted that the marriage between the husband and wife has irretrievably broken down which cannot be revived. He urged that now no purpose would be served by saving the marriage and, therefore, the Court ought to pass a decree of divorce. Reliance

was placed on a decision of the Andhra Pradesh High Court in the case of *Lokeshwari (Dr.) v. Srinivasa Rao (Dr.)*<sup>1</sup>. He urged that there was no reason to grant maintenance at the rate of Rs.5,000/- per month to the two children who have not attained the majority. He urged that as the husband has taken care of the children, the decree of maintenance was not warranted. The learned counsel appearing for the wife submitted that the finding recorded against the husband on an Application for setting aside the ex parte decree has attained finality. He urged that now the said order cannot be assailed. He submitted that even going by the averments made in the Petition for divorce, no case of cruelty was made out. He submitted that the husband has a very large income and therefore, there was no reason to deny maintenance to the children as prayed. He submitted that there was no reason to deny maintenance to the wife.

12. We may note here that even during the pendency of the Appeals, there were some efforts made to bring about amicable settlement. However, all efforts failed. We were hopeful that after the conclusion of submissions, the parties will rethink and come to the terms. However, notwithstanding the grant of longer time, the parties have not settled their dispute and therefore, we have no option but to decide the Appeals on merits by pronouncing the Judgment.

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1 2000 AIR (A.P.) 451

13. As stated earlier, the ex parte decree was passed on 25<sup>th</sup> October 1999 which was set aside by the learned Judge of the Family Court by detailed judgment and order dated 9<sup>th</sup> September 2004. In Paragraphs 8 and 9 of the said judgment and order dated 9<sup>th</sup> September 2004, the learned Judge of the Family Court has observed thus:

- “8. It is the case of the Petitioner that on 27.8.1998 the Respondent took the Petitioner in confidence and he desired to settle the matter. In the presence of the brothers and mother of the petitioner, the matter was settled. The Respondent put a condition that the Petitioner, who was staying at Borivli house with her children and in laws, should stay with him at Malad, where the Respondent was staying at that particular time. The said version of the petitioner has not been challenged in her cross-examination. The address mentioned in the Petition A-59/1998 confirms the place of residence of the parties during that period. The Petitioner further submits that a meeting was held on 30.8.1998 as decided by the parties and the Respondent agreed to withdraw the Petition No.A-59/1998 and the matter was settled. Thereafter the Petitioner and the Respondent started residing at their Malad residence. The said version of the Petitioner has not been shaken in the cross-examination. The brother of the Petitioner has supported the said version of the Petitioner and the same has remained unshattered.
9. The Respondent has not stepped into a witness box to substantiate his case. The case of the Petitioner that as the Respondent assured her that he would withdraw the case, she did not attend the Court on his promise and

**therefore, the matter proceeded exparte [without written statement]; appears to be true. The Respondent thereafter married with some other lady. However, this fact would not protect him to proceed against him. The Respondent has not approached this Court with clean hands and he had obtained the decree without written statement fraudulently.”**

(emphasis added)

14. The said judgment and order dated 9<sup>th</sup> September 2004 was never challenged by the husband. It cannot be said that the said judgment and order is an interim order or interlocutory order passed in the main divorce petition. Therefore, the same cannot be assailed by the husband in the Family Court Appeal preferred by him by taking recourse to Section 105 of the Code of Civil Procedure, 1908. Moreover, his conduct shows that he accepted the said order. He appeared before the Family Court on 7<sup>th</sup> October 2004 after the ex parte decree was set aside. Thereafter, the written statement of the wife was taken on record and an Application for maintenance was filed by the wife which was decided on merits after a contest. The affidavit-in-lieu of the examination-in-chief was filed by the husband and he subjected himself to the cross-examination. Therefore, it is not permissible for the husband now to assail the said order. Therefore, he cannot claim any advantage or equity on the basis of the fact that he married to a lady “A” after the ex parte decree of divorce was passed. There is an observation made by the learned Judge of the Family Court in Paragraph 36 of the

impugned judgment and decree that deciding the Miscellaneous Application for setting aside the ex parte decree on affidavits is completely superfluous. The said observation is totally uncalled for. The Paragraph 6 of the judgment and order dated 9<sup>th</sup> September 2004 specifically records that the wife examined herself as well as her brother and husband did not examine himself or any other witness on his behalf. In Paragraph 8 of the said judgment and order dated 9<sup>th</sup> September 2004, there is a specific observation that the wife's version has not been shaken in the cross-examination. Therefore, it appears that the wife and her witness were allowed to be cross-examined in the said Application. Moreover, there is a concluded finding against the husband that he obtained a decree of divorce by practising fraud.

15. As far as the grounds of cruelty are concerned, we have already quoted the specific grounds set out in Clauses (a) to (g) of paragraph 5 of the Petition filed by the husband. The allegations in Clauses (a) to (f) are of very general nature and are very vague. Even if the said allegations are taken as correct, at highest, they will constitute a normal wear and tear of matrimonial life. As regards the allegation that the wife was suspecting the character of her husband by alleging that a particular woman used to frequently talk to the husband on phone, it is an admitted position that the husband married to the same lady after the decree of divorce was initially passed. Therefore, it

cannot be said that the said allegation made by the wife was an unsubstantiated allegation.

16. We have perused the affidavit-in-lieu of the examination-in-chief of the husband. Apart from reiterating the allegations which we have quoted above, he has reiterated the allegation made in Paragraph 8 of the Petition that after receiving a letter dated 15<sup>th</sup> November 1997, the wife has been threatening to commit suicide and administer poison to the children. In Paragraph 8 of the Petition, the specific allegation is that she has been threatening him and his parents on telephone. The relevant portion of Paragraph 8 reads thus:

**“8. The Petitioner submits that after receiving the letter at Exhibit “B”, the Respondent has been threatening him on telephone and to his parents that she shall put the Petitioner and his old parents in trouble by committing suicide and poisoning the children. The Petitioner submits that his father normally remains out of the home and the Respondent, children and his old mother are in the house during the day. The Petitioner, therefore, apprehends that as the counter blast to the said letter at Exhibit “B” to the present Petition, the Respondent is likely to put them in trouble by putting her said threat in realty.”**  
(emphasis added)

17. The husband did not examine the parents in support of this allegation. Moreover, it is alleged that the said threats were administered by the wife after receiving the letter dated 15<sup>th</sup> November

1997. The husband did not file any police complaint. He did not serve any further notice through the Advocate through whom the letter dated 15<sup>th</sup> November 1997 was sent.

18. Therefore, apart from the conduct of the husband of obtaining ex-parte decree fraudulently, it is impossible to record a finding that any act of cruelty on the part of the wife was established by the husband.

19. It is true that going by the evidence of the husband and wife, there appears to be an irretrievable break down of the marriage. The law is well settled. Unless one of the statutory grounds for divorce set out in Section 13 of the said Act is established, a decree of divorce cannot be passed by the Family Court or this Court. Clause (a) of Sub-section (1) of Section 23 of the said Act lays down the same principle. As stated earlier, remarriage of the husband will not give any advantage to him considering the finding recorded by the learned Judge of the Family Court. Therefore, it is not possible to pass a decree on the ground of cruelty which is the only ground pleaded by the husband.

20. As far as the maintenance under Section 25 of the said Act is concerned, the law is very well settled. In view of the decision of the Apex Court in the case of **Chand Dhavan v. Jawaharlal Dhavan**<sup>2</sup>,

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<sup>2</sup> (1993)3 SCC 406

unless a decree of divorce is passed, the matrimonial Court has no jurisdiction to grant relief under Section 25 of the said Act. Therefore, as we are confirming the decree rejecting the prayer for divorce, the wife cannot be granted permanent alimony. But, a liberty will have to be granted to the wife to take out appropriate proceedings for grant of maintenance.

21. In the case of *Chand Dhavan v. Jawaharlal Dhavan*, the Apex Court interpreted Sub-section (1) of Section 25 of the said Act which gives power to the Court exercising jurisdiction under the said Act to pass an order of permanent alimony and maintenance at the time of passing any decree or at any time subsequent thereto. The Apex Court interpreted the words “any decree” to mean a decree of nullity, a decree of restitution of conjugal rights, a decree of judicial separation or a decree of divorce. The Apex Court held that a decree of dismissal of Petition seeking aforesaid reliefs will not be “any decree” within the meaning of Sub-section (1) of Section 25 of the said Act. There is a difference between the phraseology used in Sections 25 and 26 of the said Act. Sub-section (1) of Section 25 of the said Act reads thus:

“25 Permanent alimony and maintenance .

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall <sup>55</sup> [\*\*\*] pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the

applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant <sup>56</sup> [, the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has re-married or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, <sup>57</sup> [it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just].”

(underline supplied)

Section 26 of the said Act reads thus:

“26 Custody of children. In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made: <sup>58</sup> [Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.]”

(underline supplied)

22. The phraseology used in Section 26 of the said Act is very wide. It confers power on the matrimonial Court to make such provisions in the decree passed in the proceedings under the said Act as it may deem just and proper for maintenance and education of minor children. Thus, the power under Section 26 can be exercised by making a provision in decree even if there is no decree passed of nullity, restitution of conjugal rights, judicial separation or divorce. Therefore, the law laid down by the Apex Court in the case of ***Chand Dhavan v. Jawaharlal Dhavan*** will not be applicable when the matrimonial Court exercises a power under Section 26. Section 26 provides for making a provision in a decree passed in proceedings under the said Act for payment of maintenance and education expenses of minor children irrespective of the nature of the decree. The reason is when a matrimonial dispute is filed, a provision has to be made for maintenance and education of the children during the pendency and at the time of conclusion of the proceedings under the said Act so that the children should not suffer. In fact, the children are the worst victims of the matrimonial dispute of their parents. Under Section 25, as far as spouses are concerned, the power to grant permanent alimony can be exercised only when the Court passes a decree of the nature specified in the said Act.

23. In the case in hand, the decree of maintenance has been passed under Section 26 of the said Act in relation to a minor daughter Hemisha and the minor son Bhavik. Both of them have not attained the majority. Both of them are taking education in a Boarding School at Panchgani near Mahabaleshwar. The wife claimed that the school fees of daughter Hemisha are Rs.65,000/- per annum and the school fees of the son Bhavik are Rs.75,000/- per annum. She claimed monthly expenses of Rs.20,000/- per month each for the daughter and son.

24. In the affidavit-in-lieu of the examination-in-chief, the husband has not come out with the figures of his income for the relevant period. He has not produced any document in that behalf. He has stated that his income from all sources is less than the taxable limit. He stated that he is possessing only one immovable property which is a residential flat at Goregaon in Mumbai. He claimed that he had one gala in Anand Shopping Centre at Malad, Mumbai. He claimed that he has disposed of the same as his business was running into losses. He claimed that he is earning the income by assisting his father. He claimed that sometimes, he got brokerage. In the cross-examination, he claimed that the daughter has completed her school education at Panchgani who is staying with the wife and son Bhavik is staying in the Boarding School at Panchgani. In the cross-examination, he admitted that he had a Garment Factory at Malad in Mumbai. He denied the

correctness of the suggestion given to him in the cross-examination that he had two showrooms at Malad. He admitted that he had two factories at that time which have been sold. He denied the correctness of the suggestion that he was the owner of four flats. He stated that he had a Maruti Car and a two-wheeler which are sold subsequently.

25. The wife in her examination-in-chief stated that her daughter was studying in 12<sup>th</sup> Std. in the Boarding School at Panchgani and her son Bhavik was studying in the Boarding School at Panchgani. She relied upon receipts produced by her. In the cross-examination, she claimed that she used to pay Rs.25,000/- per month for both the children. In the cross-examination, she admitted that she was carrying on business of beautician. She claimed that she was earning Rs.1,500/- to 2,000/- per month from her business.

26. We find from the evidence and the documents on record that both the husband and wife have not produced any document for showing their respective income though both of them have admitted that they have an income. The wife produced certain receipts issued by Triveni Hostel at Panchgani on account of certain amounts allegedly paid by her on account of son Bhavik. She produced certain receipts issued by the Sweet Memorial School of the amounts paid by her on account of her son and daughter. However, no attempt is made to prove

the documents by examining appropriate witnesses from the school and hostel. Atleast on two receipts, the date is kept blank. The said receipts are in the sum of Rs.9,500/- each. No attempt is made by the wife to procure any certificate from the school authorities regarding expenditure incurred by her on the children. During the pendency of the Petition, there was an interim order passed by the Family Court directing the husband to pay maintenance of Rs.2,000/- each to the three children and Rs.3,000/- to the wife. The said amount was made payable from 3<sup>rd</sup> March 2006 which is the date on which the Application was made by the wife for seeking maintenance. The wife is running a business as a beautician. Therefore, she has also to contribute to the expenditure incurred on education and maintenance of the children. Admittedly, the elder son is being taken care of by the parents of the husband. Therefore, it is very difficult to find fault with the quantification of the amount made payable by the husband towards maintenance of the children on the date of the impugned decree. In the event, after the decree, the expenditure on education of the children and cost of maintenance has increased, the wife can always seek second part of Section 26 of the said Act and apply for variation of the decree of maintenance and education expenses passed for the benefit of the two children.

27. As we are confirming the decree of dismissal of the prayer for divorce, the wife is entitled to costs in the Appeal preferred by the husband. The cost amount is quantified at Rs.25,000/-.

28. Accordingly, we pass the following order:

ORDER :

- (a) That part of the decree by which the prayer for grant of divorce was dismissed is hereby confirmed;
- (b) Family Court Appeal No.66 of 2008 is dismissed;
- (c) Family Court Appeal No.136 of 2008 is hereby dismissed with no order as to costs;
- (d) We grant liberty to the wife and the children to take out appropriate proceedings in accordance with law for grant of maintenance, and/or other reliefs as observed in the judgment. If such proceedings are taken out, the same shall be decided on its own merits;

- (e) As the husband has failed to substantiate his case for passing a decree of divorce, we direct the husband to pay cost of Family Court Appeal No.66 of 2008 to the wife quantified at Rs.25,000/-;
- (f) Costs shall be paid or deposited by the husband within a period of two months from today;
- (g) Pending Civil Applications do not survive and the same are disposed of.

( P.D. NAIK, J )

( A.S. OKA, J )