

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

FAMILY COURT APPEAL NO. 150 OF 2008

Mrs. Christine Lazarus Menezes	Appellant
V/S	
Mr. Lazarus Peter Menezes	Respondent

ALONGWITH

CRIMINAL REVISION APPLICATION NO.368 OF 2008

Mrs. Christine Lazarus Menezes	...Applicant
V/S	
Mr, Lazarus Peter Menezes	...Respondent

Mr Amogh Singh a/w Mr. Jeet Gandhi & Ms. Varsha Bhogle i/by Shri.
D.R. Shah for the Appellant/Applicant
Smt. Prabha Badadare for the Respondent

...

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

RESERVED ON : 27 OCTOBER 2016
PRONOUNCED ON : 21 APRIL 2017

JUDGMENT: (Per A.A.Sayed, J.)

1. The above Family Court Appeal and Civil Revision Application are filed by the Appellant/Applicant/wife challenging the common judgment

and order dated 26 May 2008 passed by the Family Court at Bandra, Mumbai, in Petition No.A-1162/2005 and Petition No.E-187/2005. Petition No.A-1162/2005 was filed by the Respondent/husband for dissolution of marriage on the ground of desertion and cruelty under sections 10(ix) and (x) respectively of the Divorce Act, 1869. Petition No.E-187/2005 was filed by the Appellant/Applicant/wife for maintenance under section 125 of the Code of Criminal Procedure Code, 1973. The operative part of the impugned common judgment of the Family Court reads as under:

“ORDER

PETITION NO.A-1162/2005:

Petition is allowed with costs.

The marriage between the Petitioner-Lazarus Peter Menezes and the respondent-Christine Lazarus Menazes solemnized on 28-12-1987 is hereby dissolved by a decree of dissolution of marriage.

Decree be drawn up accordingly.

PETITION NO.E-187/2005:

The Petition is partly allowed.

As regards the claim of maintenance of the Petitioner is concerned, it is rejected.

The Respondent shall pay Rs.1,000/- per month to each of the daughters payable from the date of this order.

He shall pay Rs.2,000/- to her towards cost and bear his own.”

Both, the Family Court Appeal as well as the Civil Revision Application, are being disposed of by this common judgment and order.

2. The parties are hereinafter referred to as 'husband' and 'wife'. They were married according to Christian rites and customs on 28-12-1987. Both were residing in the same building and fell in love with each other and decided to get married. At the time of marriage the husband was an electrical contractor and the wife was working as a clerk in a school at Bandra. They were blessed with two daughters born on 28-9-1988 and 8-5-1990 respectively. In or about 1989, the husband got a job as Electrician in Hindustan Petroleum Corporation Ltd. (HPCL).

3. Common evidence was recorded by the Family Court in the husband's Petition for divorce and the wife's Petition for maintenance. The husband has examined himself. The wife examined herself and 3 witnesses in support of her case. After hearing the parties, the Family Court allowed the Petition of the husband and passed a decree of dissolution of marriage between the parties on the grounds of 'cruelty' and 'desertion' and partly allowed the Petition of the wife by granting maintenance of Rs. 1000/- per month to each of the two daughters and rejected the prayer of maintenance to the wife, as indicated in paragraph 1 hereinabove.

4. We have heard the learned Counsel for the parties. The learned Counsel have taken us through the pleadings and evidence recorded by the Family Court.

FAMILY COURT APPEAL NO. 150 OF 2008

5. The issues framed and answered by the Family Court in respect of the husband's Petition No.A-1162/2005 seeking divorce, were recorded as under:

ISSUES	FINDINGS
1) Does the Petitioner prove that the Respondent has deserted him for at least two years immediately preceding the presentation of the Petition?	In the Affirmative
2) Does the Petitioner prove that the Respondent has treated him with cruelty?	In the Affirmative
3) Is he entitled for a decree of divorce?	In the Affirmative
4) Whether the Petitioner be declared as an exclusive owner and in possession of the Flat 45/2219, Samadhan CHS Ltd. Gandhi Nagar, Bandra (East), Mumbai 400 051 of his matrimonial house and row house No.17 at Ashwini Residency, Sansodo Raia Salcette, Goa and that the Respondent has no right or claim to sell away or dispose of the same without prior written consent of the Petitioner?	

OR in the alternative

Whether the Petitioner be declared the joint owner and in possession with Respondent in Flat 45/2219, Samadhan CHS Ltd. Gandhi

Nagar, Bandra (East), Mumbai 400 051 and row house No.17 at Ashwini Residency, Sansodo Raia Salcette, Goa of his matrimonial house and that Respondent has no right or claim to sell away or dispose of the same without prior written consent of the Petitioner?

In the Negative

5) Whether the Respondent is hereby restrained by a permanent and perpetual order from restraining, transferring, selling or disposing off or from creating any third party interest or alienating or encumbering the said flat at Flat 45/2219, Samadhan CHS Ltd. Gandhi Nagar, Bandra (East), Mumbai 400 051 and row house No.17 at Ashwini Residency, Sansodo Raia Salcette, Goa?

In the Negative

6) Whether the Respondent is hereby restrained by a permanent and perpetual order from restraining, transferring, selling or disposing off or from creating any third party interest or alienating or encumbering the said Flat 45/2219, Samadhan CHS Ltd. Gandhi Nagar, Bandra (East), Mumbai 400 051 and row house No.17 at Ashwini Residency, Sansodo Raia Salcette, Goa and or from regularizing the tenancy/ownership/ membership of the said flat in the name of any third party?

In the Negative

7) What order and decree?

As per final order

6. At the outset it needs to be mentioned that the husband has not challenged the findings in the impugned order of the Family Court against

him in his Petition for divorce with regard to the reliefs claimed in respect of the matrimonial house at Bandra (East) and the Row House at Goa which he had allegedly bought in his wife's name and those findings have attained finality.

7. We shall first deal with the ground of 'cruelty' alleged by the husband at the hands of his wife for seeking dissolution of marriage under section 10(x) of the Divorce Act, 1869. It is required to be noted that the expression 'cruelty' has not been defined under the Divorce Act, 1869.

8. In **Samar Ghosh v/s. Jaya Ghosh** (2007) 4 SCC 511, the Apex Court, while construing the expression 'cruelty', after reviewing various judgments of the Indian Courts as well as Foreign Courts, observed in paragraphs 99,100 and 101 as follows:

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family

and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect

may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

9. In **K.Srinivas Rao v/s. D.A.Deepa**, (2013) 5 SCC 226, in paragraphs 31, 32 and 33, it has been observed by the Supreme Court as under:

“31. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of

marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

32. In *V. Bhagat* this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that:

“21. ... Irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind.”

33. In *Naveen Kohli*, where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed that:

“86. ... the marriage had been wrecked beyond the hope of salvage [and] public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto.”

It is important to note that in *Naveen Kohli* case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.”

Though in the aforesaid cases, the Apex Court has dealt with the expression 'cruelty' under the Hindu Marriage Act, 1955, the principles laid down in the said judgments would also apply in the present case governed by the Divorce Act, 1869.

10. In **Malathi Ravi, M.D. v/s. B.V.Ravi, M.D.**, (2014) 7 SCC 640, it has been held by the Supreme Court that subsequent events which are established on the basis of undisputed material on record can be taken into consideration in determining whether the grounds for divorce are made out.

11. In **V.Bhagat v/s. D.Bhagat**, (1994) 1 SCC 337, after considering the material on record, the Supreme Court held that averments made in the counter and the questions put by her Counsel in the cross-examination of the Petitioner constitute act of cruelty and no further material is necessary to establish additional grounds.

12. In **Vijaykumar Ramchandra Bhate v/s. Neela Vijaykumar Bhate** (2003) 6 SCC 334, the Apex Court has held that the allegations made in the written statement or suggested in the course of examination and by

way of cross-examination satisfy the requirement of law (for the grant of divorce on the ground of cruelty) has also come to be firmly laid down by the Supreme Court following the decision in V. Bhagat Vs. D. Bhagat.

13. In **Vishwanath Agrawal v/s. Sarla Vishwanath Agrawal**, (2012) 7 SCC 288, the Apex Court after analyzing the subsequent events and conduct of the wife allowed the Petition of the husband for divorce.

14. The aforementioned judgments thus make it clear that the averments in the Written Statement and the undisputed evidence on record of the subsequent events after filing of the Petition for divorce, can be taken into consideration in determining whether the grounds of divorce are made out. The present case is required to be examined keeping in mind the exposition of law laid down in the aforesaid rulings. It is not necessary for us to set out the innumerable allegations in the Petition (and the oral evidence) by the husband against his wife and burden this judgment. We therefore propose to essentially deal with the more significant and overriding material on record. Having carefully analyzed the pleadings and evidence on record and upon hearing the learned Counsel for the parties, for the reasons to follow, we are of the

view that no interference is called for with the impugned order of the Family Court in allowing the Petition for divorce of the husband on the ground of 'cruelty'. However, as discussed in the latter part of this judgment, insofar as the ground of 'desertion' is concerned, we are not in agreement with the Family Court that the husband is entitled to dissolution of marriage on that count.

15. The wife has admitted in her affidavit in lieu of examination-in-chief that she had lodged an FIR with the Kherwadi Police Station, Mumbai, against her husband on 07-01-2005 under sections 498-A and 406 of the Indian Penal Code, 1860. In the said FIR she has inter alia accused her husband of stealing her gold ornaments and demanding Rs.2 lakhs from her to buy a car. The said FIR has been filed by the wife against her husband after about 18 years of marriage. It is stated by the wife in her Written Statement that her husband had left the matrimonial home on his own accord in the night of 3/4 January 2005 despite she and their daughters pleading him not to leave. She has admitted in her cross-examination that pursuant to her Criminal Complaint, her husband was arrested at Goa from his parent's house on 10 January 2005 and he was brought to Mumbai and was in jail for 7 days and after he was granted bail, he was required to attend the police station every Monday between

4 p.m. to 6 p.m. She has not denied the statement of the husband in his Petition that due to influence of her friends, she came with Police at Goa and got him arrested from his parent's home. What is however of significance is that she has admitted in her cross-examination that she had filed the Criminal Complaint in order to bring back her husband to their matrimonial home. She has admitted in her cross-examination that her relationship with her husband's family was cordial till the time she had filed a Criminal Complaint under section 498-A against her husband and he was arrested in Goa. Thus, if on the wife's own showing, the Criminal Complaint filed by her against her husband was false and was filed only to bring back her husband and consequent to which he was arrested and was in jail for about 7 days, it would constitute a clear case of cruelty by the wife against her husband. We are informed that the husband was ultimately acquitted of all charges in the said Criminal proceedings. In our view, the aforementioned act of the wife in lodging a false Criminal Complaint under section 498-A against her husband pursuant to which the Police arrested him from his parent's house at Goa and he was incarcerated, was sufficient in itself to grant decree for dissolution of marriage to the husband on the ground of cruelty by the wife.

16. It is noticed that at the time of filing of the Petitions, the wife was shown as residing in the matrimonial home at Bandra viz.- Room No.2219, Building No.45, Gandhi Nagar, Bandra (East), Mumbai. The wife has stated in her Written Statement as well as in the cross-examination that her husband owns a flat being flat No.603, Building No.4, Krishna Green Land Park, Kasar Wadali Naka, Ghodbunder Road, Thane (West). In the cross-examination, however, she has stated that immediately after filing her Petition, she has shifted and now lives in the very flat viz. Flat No.603 at Thane belonging to her husband, since April 2005. She has further stated that she has lodged a criminal complaint at Ghodbunder Road Police station, Thane, against her husband in September 2005 as she was threatened to leave the said flat at Thane. She has admitted that she has also filed a suit against her husband in the District Court, Thane, in respect of the said flat at Thane, because she was allegedly threatened by her husband by sending people. She has stated that in order to pay education expenses and daily expenses of her children, who have school and college at Bandra, she had rented the matrimonial home at Bandra and shifted to the said flat at Thane. She denied the suggestion that she, accompanied by a constable, broke the lock of the said flat No.603 at Thane and forcibly entered the said flat. She had admitted that because the property came in her possession, her

husband does not have a place to live. She has, however, volunteered to state in her cross-examination that her husband is welcome to stay with her. She has admitted that she has not given any legal notice to her husband calling him back to stay with her and she has not filed any Petition for restitution of conjugal rights. It is also an admitted position before the Court that the husband now lives in Goa.

17. The husband has averred in his Petition for divorce that his wife was of suspicious nature and doubted his character and had made his life miserable. He has stated that in or about the year 2003, his wife started accusing him of having illicit relationship with one Beryl who was staying in his parent's building. He has averred that his wife accused him of having relationship even with the maid servant. He has further averred that his wife also accused him of having relationship with his own maternal uncle's daughter and she went to the extent of saying that he did not spare even their younger daughter and that he had slept with her. While the wife in her Written Statement has denied that she has stated anything of the kind about her husband's maternal uncle's daughter and their daughter, she has reiterated in her Written Statement that the maid servant was brought by her husband and many times her husband and the maid servant were caught red-handed indulging in all inappropriate

and unmentionable acts. The wife has deposed in her examination in chief that her husband had kept Beryl in a flat at Chembur and even went to the extent of giving the address of the said flat as Flat No. 2002, Dalal Sadan CHS, Peston Sagar, Chembur, which according to her was taken on leave and license basis from one Mr. Sawant. In her cross-examination, however, she has admitted that she had made false allegations that her husband and Beryl lived at the flat in Chembur for 11 months.

18. The wife has examined three witnesses in support of her case that her husband had an illicit relationship with Beryl. The first witness is one Ms. Rushana Baig. She has admitted in her cross-examination that she is a close friend of the wife and came with her to Court every day and also helped her in filing the Petition and police complaints. Her examination in chief reveals that she has infact improved upon the case of the wife by stating that the husband used to 'torture' the wife for dowry. As stated earlier, even the wife has admitted in her cross examination that she had filed the FIR under section 498-A only to bring back her husband. The second witness is the wife's brother, Rocky D'Souza. In his examination in chief he has stated that he had seen the husband with Beryl at the following places - Building No. 41, Mahim, MIG Colony,

Shivaji Park and Bandstand. He has gone to the extent of stating in his deposition that he saw the husband and Beryl in MIG Colony hugging, kissing and smooching in the dark. In his cross-examination however, he admits that he had seen the husband and Beryl at Mahim Church, outside Gurunanak Hospital and Shivaji Park and beyond this he has not seen anything else, which demonstrates that he has falsely stated that he had seen the husband hugging, kissing and smooching. Pertinently, the wife, neither in her pleadings nor evidence has stated that her brother had seen her husband and Beryl indulging in the aforementioned acts. The third witness is one Rahimuddin Chawkhan. He has stated that he knows the wife as her brother Rocky D'Souza was working in Kuwait, where he was working. He has admitted that he was a driver and had driven the two policemen to Goa who collected one policeman from Goa and went to the house of the husband and he was arrested.

19. On assessing the material on record, we are of the view that the wife has not been able to substantiate her allegations and hence, we find it difficult to accept the case of the wife that her husband was having an illicit relationship with Beryl or had relation with the maid servant or that her husband had eloped with Beryl on one occasion for 60 days as averred in her Written Statement, particularly when she has lied on oath and has

admitted that she has falsely deposed that her husband and Beryl were residing together in a flat at Chembur and even went to the extent of giving the address of the said flat as Flat No. 2002, Dalal Sadan CHS, Peston Sagar, Chembur, which according to her was taken on leave and license basis from one Mr. Sawant. She has admitted that she had lodged a false FIR under section 498-A of Indian Penal Code against her husband pursuant to which he was arrested and was incarcerated. In her Statement pursuant to her FIR, the wife has stated that her husband used to bring Beryl at the matrimonial home and indulge in illegal relationship in her presence, however, in her Written Statement, she has given only one instance when she had seen her husband with Beryl on the bike. The husband in his deposition has denied that he had a relationship with Beryl as alleged by his wife. It is an admitted position that the said Beryl is about 13 years younger to the husband and known both to her and her husband as she was their neighbour prior to their marriage and was a family friend of the family of her husband. We find that the deposition of the wife and the depositions of the witnesses on her behalf are not at all reliable. However, having said that, it needs to be borne in mind that we are dealing with a Petition filed by the husband seeking divorce on the ground of cruelty (and desertion) and not a Petition filed by the wife seeking divorce on the ground of cruelty or

adultery and the case sought to be brought forth by the wife as regards her husband having extra-marital affairs does not help her in any manner in denying a decree of dissolution of marriage to the husband for her acts of cruelty particularly when it is not the case of the wife that her behavior was justifiable for the reason that her husband was having illicit relations. As a matter of fact, her case is that of denial of the acts of cruelty committed by her as alleged in the Petition for divorce by her husband. Though we are conscious of the fact that it cannot be expected that there be full proof of a spouse having an affair outside of marriage, in the facts and circumstances of the present case, even after preponderance of the material on record, we reiterate that the evidence of the wife and the witnesses examined by her is/are not reliable.

20. It is seen that the parties are residing separately since about 12 years. The pleadings and the evidence on record clearly indicate that the marriage between the husband and wife has irretrievably broken down. We are of the view that the parties cannot reasonably be expected to live together. We are conscious of the fact that irretrievable break down of marriage is not a ground to seek divorce, however, as held by the Supreme Court in **K.Srinivas Rao v/s. D.A.Deepa**, it is one of the weighty circumstance for consideration in granting a decree for

dissolution of marriage on the ground of cruelty. We find that the claim of the wife, despite various serious allegations made against her husband including that of having extra-marital affairs, that she wants her husband to come and stay with her is not at all bonafide. She has made wild allegations against her husband which she has not been able to substantiate. Having regard to the facts and circumstances of the case, we are unable to brush aside the case of the husband that due to the behaviour and conduct of his wife, he was fed up with life and despite having a job with HPCL, he decided to take voluntary retirement and settle in Goa with his parents.

19. In light of the above discussion, in our opinion, the husband has been subjected to mental cruelty at the hands of his wife and the Family Court has rightly allowed the Petition of the husband for dissolution of marriage under section 10(1) (x) of the Indian Divorce Act, 1869 on the ground of cruelty.

20. So far as the ground of 'desertion' under section 10(1)(ix) of the Divorce Act is concerned, we find that the Family Court was not right in granting a decree for dissolution of marriage to the husband on that count. It was the case of the husband in his Petition for divorce that he was thrown out by his wife from their matrimonial home in the midnight of

03/04 January, 2005. The Petition for divorce was filed by the husband on 18 June, 2005, after he was arrested on 10 January 2005 and after the wife had filed her Petition for maintenance on 4 April, 2005. To constitute desertion, it is sine qua non that the spouse deserts the Petitioner for at least two years immediately preceding the presentation of the Petition. In the present case, indisputably, the husband has filed the Petition for divorce within two years of his ceasing to live with his wife in their matrimonial home. There is only a bald assertion in the Petition by the husband that his wife has completely withdrawn herself from the society and his company and he and his wife have no physical relationship since December 2000 though they were living under the same roof and that his wife has deserted him for more than two years prior to filing of the Petition. The wife in her Written Statement however has asserted that her husband has deserted her and had left the house in the night of 3/4 January 2005 on his own accord despite her pleading with him not to leave, and that she had never restricted him for cohabitation and supported her husband's thirst for sex till December, 2004. In our view, the pleadings and evidence on record clearly suggest that the husband himself is not interested in living with his wife after he was allegedly thrown out of the matrimonial home by his wife as claimed by him, in the night of 3/4 January 2005 and after his wife had filed the

FIR pursuant to which he was arrested in Goa on 10 January 2005 from his parent's home. In these circumstances, there was no justification for the Family Court to have granted a decree for dissolution of marriage to the husband on the ground of desertion by his wife.

21. In that view of the matter, so far as the Petition for divorce of the husband is concerned, the impugned judgment of the Family Court is required to be upheld to the extent of grant of decree of dissolution of marriage to the husband on the ground of cruelty. However, so far as decree of dissolution of marriage on the ground of desertion is concerned, the impugned judgment of the Family Court is liable to be set aside.

CRA NO.368 OF 2008

22. The points recorded and answered by the Family Court in the wife's Petition for maintenance being Petition No.E-187/2005 are as under:

POINTS

FINDINGS

1) Does Petitioner prove that the Respondent has refused and neglected to maintain her and the daughters?

Daughters

2) Whether she is entitled to claim and get maintenance from the Respondent for herself and the minor daughters?

In the Affirmative

3) What order?

As per final order

23. It is an admitted position that during the pendency of the proceedings both the daughters have attained majority (the elder daughter is presently about 28 years of age and younger one about 26 years). In these circumstances, indubitably, the daughters would not be entitled to maintenance. Learned Counsel for the wife, however, pressed for maintenance for the wife. He submits that the Family Court has wrongly rejected the claim of maintenance of the wife by the impugned order.

24. The case of the wife in her oral evidence is that her husband was paying an amount of Rs.8,000/- and sometimes Rs. 10,000/- per month towards household expenses and children's expenses till January 2005 and since February 2005 he has not paid any maintenance. In the Petition for maintenance, the wife has claimed maintenance of Rs.4000/- per month.

25. It is an admitted position that the wife, who was earlier residing at the matrimonial house being Room No.2219, Building No.45, Gandhi Nagar, Bandra (East), Mumbai, has now shifted to flat belonging to her husband viz.- Flat No.603, Building No.4, Krishna Green Land Park, Kasar Wadali Naka, Ghodbunder Road, Thane (West), which flat is being occupied by her since April 2005. It is also an admitted position before the Court that the husband is not residing in the said flat at Thane and that he is now residing at Goa. The wife has admitted in her cross examination that she has given the matrimonial house at Bandra, which is in her name, on leave and license basis since January 2006 and she deriving income therefrom. She had even deposed before the Family Court that she will produce the leave and license Agreement in respect of the said flat at Bandra on the next date. Though she has alleged that her husband is an electrician and is earning Rs.15,000/- to 20,000/- per month, she has stated in her cross-examination that she did not have any document to support her claim of income of her husband. She has admitted that her husband is lame in one leg.

26. It is submitted by the Counsel on behalf of the husband that the husband's health has deteriorated and he is having serious mobility issues and is now has confined to the house at Goa and has no source

of income. This, however, is disputed by the wife. It is contended by the learned Counsel for the wife that the husband is earning Rs.15,000/- to Rs.20,000/- per month and he be directed to pay maintenance to his wife.

27. In our view, even if were to assume that the husband is earning Rs.15,000/- to Rs.20,000/- per month as claimed, it being an admitted position that the wife is having her own source of income from the matrimonial house at Bandra which is given on leave and license and the fact that since April 2005, she is exclusively occupying the flat at Thane belonging to her husband, the wife would not be entitled to maintenance as prayed by her from her husband and we see no reason to interfere with the order of the Family Court in rejecting the Application of the wife for maintenance under section 125 of Cr.P.C.

28. In the circumstances, we pass the following order:

- (i) The Family Court Appeal of the wife is partly allowed. The marriage between the husband and wife shall stand dissolved on the ground of cruelty and impugned order of the Family Court is upheld to that extent. The impugned order of the Family Court granting decree of dissolution of marriage on the ground of desertion shall stand set aside. The impugned order of the Family Court shall stand modified accordingly;

- (ii) The Civil Revision Application is dismissed. Consequently, the impugned order of the Family Court rejecting maintenance to the wife is upheld.
- (iii) Parties are left to bear their own costs.

(A.A. SAYED J)

(A.S. OKA J)