

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

**FAMILY COURT APPEAL NO.95 OF 2009
WITH
CIVIL APPLICATION NO.135 OF 2010
WITH
CIVIL APPLICATION NO.136 OF 2010
IN
FAMILY COURT APPEAL NO.95 OF 2009**

Wife ...Appellant/Applicant

Versus

Husband ...Respondent

**WITH
FAMILY COURT APPEAL NO.149 OF 2009
WITH
CIVIL APPLICATION NO.201 OF 2009
WITH
CIVIL APPLICATION NO.200 OF 2009
IN
FAMILY COURT APPEAL NO.149 OF 2009**

Husband ...Appellant/Applicant

Versus

wife ...Respondent

.....

Mr. Y.E. Mooman with Ms Manisha Gawade for the Appellant in FCA/95/2009 and for the Applicant in CAM/135/2010, CAM/136/2010 and for the Respondent in FCA/149/2009, CAM/201/2009 and CAM/200/2009.

Mr. R.T. Lalwani with Mr. Prakash Mahadik for the Respondent in FCA/95/2009, CAM/135/2010, CAM/136/2010, for the Appellant in FCA/149/2009 and for the Applicant in CAM/201/2009 and CAM/200/2009.

**CORAM : A.S. OKA &
SMT. ANUJA PRABHUDESSAI, JJ.**

DATED: 15th and 16th MARCH, 2017.

ORAL JUDGMENT : (PER A.S.OKA,J.)

These two Appeals can be disposed of by a common judgment as the challenge in these Appeals is to the same judgment and decree.

2 Considering the nature of the dispute, we direct that the names of the parties shall be masked in this judgment. We are referring to the parties for the sake of convenience as the husband and the wife. We are also directing that while reproducing the portions of the pleadings and/or evidence in this judgment, the names appearing therein shall be masked.

3 The marriage between the parties was solemnised on 19th May, 1994. The husband initially filed a Petition claiming a decree of divorce on the ground of cruelty under clause i (a) of Sub-Section (1) of section 13 of the Hindu Marriage Act, 1955 (for short 'the said Act'). During the pendency of the Petition, by way of amendment, the ground of desertion was added by invoking clause i(b) of Sub-Section of 13 of the said Act. Apart from seeking a decree of divorce, a decree of permanent injunction was claimed by the husband enjoining the wife

to remove herself from Flat No. A 403, Padmavati, 3rd Cross Lane, Swami Samarth Nagar, Andheri, Mumbai- 400 004 (described in the Petition as 'the suit premises'). The third and the last prayer is for substantive relief of injunction restraining the wife from harassing the husband in any manner whatsoever. The written statement and the additional written statement were filed by the wife. On the basis of the pleadings of the parties, the learned Judge of the Family Court framed the issues and additional issues, which read thus:-

Sr. No.	Issues	Findings
1	Does the petitioner prove that the respondent has, after solemnization of the marriage, treated the petitioner with cruelty?	In the affirmative
2	Does the petitioner prove that the respondent deserted him two years preceding the amendment of the petition on 7.6.2006?	In the affirmative
3	Is the petitioner entitled to a decree of divorce on the ground of cruelty u/s 13(1)(ia) and 13 (1) (ib) of the Hindu Marriage Act?	In the affirmative
3a	Is the petitioner entitled to a permanent injunction as prayed by him in prayer clauses (b) & (c) of the petitioner.	As per final order
4	Is the respondent entitled to permanent alimony? If yes, what amount?	In the affirmative @ Rs.3,000/- p.m.
5	What order?	As per final order

Additional Issues

Findings

- | | |
|---|--------------------|
| 1. Is the petition valued appropriately? | In the affirmative |
| 2. If not, what would be the proper valuation of the petition? Accordingly what would be additional Court fees to be affixed by the petitioner? | Does not survive. |

4 In the light of the findings recorded by the learned Judge of the Family Court on the issues, the Petition filed by the husband was partly allowed by the impugned judgment and decree dated 31st March, 2009. The marriage between the parties was ordered to be dissolved both on the grounds of cruelty and desertion. The wife was restrained by an order of permanent injunction from harassing the husband in any manner whatsoever. In addition, the learned Judge of the Family Court passed a decree directing the husband to pay maintenance at the rate of Rs.3,000/- p.m. from the date of the decree.

5 Family Court Appeal No.149 of 2009 is preferred by the husband. He is aggrieved by that part of the impugned decree by which the learned Judge of the Family Court declined to grant mandatory injunction in terms of prayer clause (b) in relation to the suit premises. The Husband is also aggrieved by a decree directing him to pay maintenance at the rate of of Rs.3,000/- p.m to the wife from

the date of the decree.

6 The Family Court Appeal No.95 of 2009 is preferred by the wife for challenging the decree passed by the Family Court of divorce and injunction. We may note here that on instructions of the wife, the learned counsel for the wife has stated that she is not pressing Civil Application Nos.135 of 2010 and 136 of 2010. With the assistance of the learned counsel representing the husband and wife, we have gone through the pleadings and notes of arguments and other documents on record.

7 The learned counsel appearing for the wife while assailing the decree of divorce has taken us through the findings recorded by the learned Judge of the Family Court. He has submitted that there are no findings recorded at all by the learned Judge and she has proceeded to pass a decree on the ground of cruelty only on the basis of a finding recorded in paragraph 83 on the ground that the wife has made false allegations against the husband about his relationship with one woman 'J'. He invited our attention to various decisions. He firstly relied upon a decision of the Division Bench of Calcutta High Court in the case of

Anuradha Ghosh Moulick vs. Subir Krishna Ghosh Moulick¹. He submitted that there is a difference between a finding that a party had failed to prove allegations made by him and a finding that allegations made by a party are false. He invited our attention to paragraph No.23 of the said decision of the Calcutta High Court. He submitted that by no stretch of imagination, it can be said that the husband has proved that the allegations made by the wife are false. He submitted that in fact, the wife has not made any independent allegations against the husband. The case of the wife is that it is the husband who himself informed her about his relationship with said 'J'. In fact, one of the submissions of the learned counsel for the wife is that as the information regarding his relationship with 'J' was given by the husband himself, there was no question of wife making allegations of illicit relationship between the husband and said 'J'. He also relied upon a decision of the Apex Court in the case of **G.V.N. Kameswara Rao Vs. G. Jabilli**². He also invited our attention to another decision of the Apex court in the case of **Ramchander Vs Ananta**³. He relied upon the observations made by the Apex Court in paragraph No.15 onwards. He submitted that even assuming that in the present case,

1 in F.A. No.270 of 2001 decided on 18th February, 2008

2 Appeal (Civil) No.140 of 2002 decided on 10.1.2002

3 2015(3) ALL MR 493 (S.C.)

the wife has failed to prove her allegations as regards the relationship of her husband with 'J', the mere failure to prove the allegations would not entitle the husband to a decree of divorce. He has also pointed out that after the Appeal preferred by the wife was dismissed on technical grounds, within two days, the husband has admittedly performed a second marriage. He has submitted that the wife has no source to know whether he has married to the same woman. But in any event, appropriate inference will have to be drawn on the basis of the conduct of the husband of marrying within two days from the date on which the appeal preferred by the wife was dismissed on technical grounds, which was restored later on. He has submitted that the decree of divorce on the ground of desertion could not have been passed in view of the fact that admittedly the period of two years of desertion was not completed on the date of presentation of the petition for divorce. He submitted that the decree of injunction restraining the wife from harassing the husband could not have been passed by the Family Court.

8 The learned counsel appearing for the husband pointed out that apart from case made out by the wife that it was the husband who allegedly informed her about his relationship with another woman, there are specific allegations of scandalous nature made by the wife in

her additional written statement. He invited our attention to certain admissions given by the wife in her cross examination which prove that allegations made by the wife regarding character of the husband were established to be false. He placed reliance on various decisions of the Apex Court and this Court in support of his contention that unsubstantiated allegations made by the wife about the character of the husband amount to causing mental cruelty to the husband. He has submitted that unsubstantiated allegations about the character is not the only ground. He urged that evidence on record shows the consistent conduct of the wife, which amounts to cruelty and even the said evidence has been considered by the learned Judge of the Family Court. As far as the ground of desertion is concerned, he relied upon the decision of the learned Single Judge of this Court in the case of ***Suren Chandrakant Shah vs. Rita Suren Shah***⁴. He urged that the ground of desertion will be available from the date on which the amendment for incorporating the said ground was allowed by the learned Judge of the Family Court. He also relied upon the observations made by a Division Bench of this Court in the case of ***Mrs. Manisha Sandeep Gade Vs. Sandeep Vinayak Gade***⁵ in support of his contention. As regards the decree of maintenance, he pointed out the

4 First Appeal No.260 of 1983, 1985 ALL India Hindu Law Reporter 690.

5 AIR 2005 Bom 180

admitted position on record regarding her high educational qualifications. He also pointed out from the cross examination of the wife that the wife was in the employment. He submitted that admittedly, the wife holds a Degree of Mumbai University and Master's degree in Economics and Post Graduate Diploma in business administration. He has submitted that in subsequent proceedings, it is brought on record that the wife has been employed as a lecturer. As regards the prayer for decree of mandatory injunction directing the wife to remove herself from the suit premises, he pointed out various acts of cruelty on the part of the wife. He submitted that there is evidence on record to show that other premises are available to the wife. He has submitted that even going by the case of the wife, the husband has $\frac{1}{2}$ share in the suit premises. He has submitted that as regards the decree of injunction, which is already granted, the same has been continuously operating during the pendency of Appeals. He has submitted that this Court not only declined to grant stay to that part of the decree, but warned the wife that if she fails to abide by the said decree, the consequences would follow.

9 We have given careful consideration to the submissions. The first issue which arises for consideration is whether the decree

passed by the Family Court on the ground of desertion can be sustained. The finding recorded by the learned Judge of the Family Court on this aspect is in paragraphs 84 and 85 of the impugned judgment. In fact a submission has been recorded in paragraph No.84 by the learned Judge of the Family Court which was canvassed by the husband that when the Petition for divorce was filed by the husband, the ground of desertion was not incorporated as on the date of filing of the Petition, the statutory separation for a period of two years was not completed. The submission of the husband specifically recorded is that the desertion started from the year 2002. We may note here that the Petition for divorce was filed by the husband in the Family Court on 17th September, 2003. The learned Judge observed that there are several judgments of this Court under which this Court has allowed amendment applications and allowed addition of the ground of desertion to avoid multiplicity of proceedings. The learned counsel appearing for the husband has relied upon the decision of the learned Single Judge in the case of ***Suren Chandrakant Shah vs. Rita Suren Shah (supra)***. This was a case where admittedly, on the date of presentation of Petition for divorce, the prayer for grant of decree of divorce on the ground of desertion was not maintainable as the statutory period of desertion of two years immediately preceding the

presentation of the Petition was not completed. In the Petition filed in the year 1977, amendment was sought in the year 1980 alleging that till the date of seeking amendment, the wife has not resumed cohabitation. The decree of divorce passed by the City Civil Judge was assailed before the learned Single Judge. A submission was sought to be made by the learned counsel for the Respondent wife that the Trial Court ought not to have granted amendment. While dealing with the aspect of amendment, the learned Single Judge held thus:-

“I am not impressed by the submission advanced on behalf of the respondent, because it is not in dispute that the parties never cohabited after September 12, 1976. In case the learned Judge had not granted the amendment, that would have led the petitioner to file another petition and grant of amendment avoided multiplicity of proceedings. Merely because the amendment was granted during pendency of the petition it does not relate back to the date of filing of the petition, but the ground would become available to the petitioner only from the date of grant of the amendment. It is always open for the opposite party to establish that inspite of availability of the ground, the court may not pass the decree because of certain circumstances transpired during the interregnum, that is from the date of filing the petition and grant of amendment. In my judgment, it is therefore necessary to examine whether the petitioner has established the ground of desertion for seeking the relief of divorce.”

10 Thus, the learned Single Judge proceeded on the footing

that when by way of an amendment, the ground of desertion is added, the same would become available to the Petitioner only from the date of grant of amendment as the same cannot relate back to the date of the institution of the Petition. The learned Judge, therefore, observed that it is always open to consider the said ground of desertion which was incorporated by way of amendment.

11 We respectfully disagree with the proposition of law laid down by the learned Single Judge for more than one reasons. We may advert clause (ib) of Sub section 1 of section 13 of the said Act:-

“13 Divorce.

(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.”

(underline added)

12 It is well settled that a decree of divorce under the said Act can be passed only on the grounds which are specified in the said Act. secondly, in view of clause (a) of Sub section (1) of Section 23 of the said Act, it is very clear that the Court is powerless to grant a decree of divorce unless it is satisfied that any of the statutory grounds exist. The condition precedent for grant of a decree of divorce on the ground of desertion is that the Respondent in the Petition must have deserted the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the Petition. If we read clause (i)(b) to mean that the period of two years of desertion must be completed immediately preceding the date on which the Petition is amended, it will amount to making a violence to the express language used by the said Act. As stated earlier, the condition precedent for passing a decree of divorce on the ground incorporated in clause (i) (b), the desertion has to be continuously for a period not less than two years immediately preceding the presentation of the Petition for divorce. The view taken by the learned Single Judge cannot be countenanced for the simple reason that unless the condition under clause (ib) of sub section 1 of section 13 is satisfied, the Court is powerless to pass a decree of divorce.

13 At this stage, we may make reference to the decision of a Division Bench of this Court in the case of Uttara Praveen Thool vs. Praveen s/o Bhanudas Thool⁶. The Division Bench had an occasion to consider the aforesaid decision of the learned Single Judge in the case of ***Suren Chandrakant Shah***. In paragraph 14 of the said decision, the Division Bench has specifically observed that the view taken by the learned Single Judge in paragraph 4 of the said decision in the case of ***Suren Chandrakant Shah*** is correct.

14 Considering the opinion which we have expressed in earlier paragraph, in a normal course, it was necessary for this Bench to make a reference to a Larger Bench as this Bench cannot take a view which is different from the view taken by a co-ordinate Bench in the case of Uttara Praveen Thool vs. Praveen s/o Bhanudas Thool. However, for the reasons which we are recording hereafter, this issue will be academic as we have come to the conclusion that even otherwise, there is no merit in the decree passed on the ground of desertion. That is the reason why we are not referring the issue to a larger Bench.

15 Since, we are on the issue of decree passed on the ground of

⁶ 2014 (2) Mh.L.J.321

desertion, it will be necessary to make a reference to the assertions in the petition for divorce filed by the husband. Paragraph 31-b which was added by way of amendment reads thus:

“(31-b) The petitioner states that in addition to causing physical and mental harassment, torture and cruelty to him, the Respondent is also guilty of deserting the petitioner. The petitioner states that even since the respondent left the house March 2002, there has been no co-habitation between the petitioner and the respondent. Though the respondent broke open the flat and returned in September 2003, it was with an agenda to harass the petitioner and extract money from him. After return, the Respondent has not been staying in the house on regular basis. She frequently disappears for days together. Whenever she is there, she harass the Petitioner. There is absolutely no normalcy between the Petitioner and the Respondent. The Respondent has failed to perform any of her duties and responsibilities. The Respondent has thus deserted the Petitioner since March 2002. The Petitioner is therefore entitled to dissolution of his marriage even on the ground of desertion u/s 13(1)(ib) of the Hindu Marriage Act,1955.”

16 Thus, a case is made out in paragraph 31-b is that the wife returned to the suit premises in September 2003 with the object of harassing the husband and extract money from him. We may note here paragraph 31-b was incorporated by way of amendment. In the petition, as originally filed, it is not the case made out by the husband that any time after March 2002 either he called upon the wife to resume co-habitation or that he made any efforts for ensuring that the wife resumes co-habitation. It is not the case of the husband either in the unamended petition or in the amended petition that though the wife was called upon by him to resume the co-habitation, she did not resume the cohabitation. On the contrary, the petition filed on 7th Separation 2003 seeks a decree of divorce on the ground of cruelty. At this stage, we may also note that in the original petition, there is a prayer made for passing a decree of mandatory injunction directing the wife to remove herself from the suit premises. Thus, on the one hand, the husband approached the Family Court with a prayer to virtually evict the wife from the suit premises which she was claiming to be the matrimonial home and that the said prayer was persisted with by the husband, and on the other hand, by adding only one paragraph which is quoted above, a decree of divorce was sought on the ground

of desertion. Going by the assertions made in the amended petition as well as affidavit in lieu of examination-in-chief filed by the husband, it is crystal clear that he never expressed a desire that wife should resume co-habitation. As stated earlier, no efforts were made by him for calling upon the wife to resume the cohabitation. In fact, the act of the husband of seeking eviction of the wife from the suit premises will itself come in the way of the husband claiming a decree on the ground of desertion in the light of clause (b) of sub-section 1 of section 23 of the said Act.

17 At this stage, it will be also necessary to make a reference to the findings recorded by the learned Judge of the Family Court on the issue No.2 dealing with the ground of desertion. Paragraphs 84 and 85 of the Judgment are the only two paragraphs which contain cryptic findings recorded by the learned Judge of the Family Court. Paragraph 84 refers to the legal position laid down in the case of **Suren Chandrakant Shah (supra)** by the learned Single Judge. Paragraph 85 is the only relevant paragraph which reads thus:

“85 It can be said that both of them were residing together in Padmavati, but from their evidence it can be said that they

had no relations with each other. As per the counsel for the respondent they are not having physical relations with each other since 2005. As per the petitioner she left his house and went to reside in Ankita Co-operative Housing and again when he went to Tirupati she forcibly made entry in the house. It can be said that though they are residing together under one roof, but they have no relations as husband and wife. Both of them have not stated before the Court that they have physical relations with each other. In this petition, the order of injunction was granted in his favour and she was restrained to harass him in any manner. In such circumstances, it can be said that it is the respondent who compelled him to reside separate from her though they are residing under one and the same roof. But, it can be said that they have no relations as husband and wife and she has deserted him with an intention to bring the cohabitation to an end permanently. I, therefore, answer Issue No.2 in the affirmative.” .

18 The learned Judge was influenced by the fact that both husband and wife did not come out with a case in their evidence that they were

having any physical relationship since 2006. There is no finding recorded by the learned Judge of the Family court that there was any intention on the part of the wife to desert the husband. The learned Judge of the Family Court seems to have oversimplified the whole matter by coming to the conclusion that though the husband and the wife were residing under the same roof, there was no relation between them as husband and wife and therefore, the plea of desertion was established.

19 We have already quoted paragraph 31-b of the petition for divorce. Even taking the contents of the said paragraph as correct, it is not possible to accept that the act of desertion on the part of the wife was established. Therefore, we are of the view that the findings recorded by the learned Judge on the issue of desertion cannot be sustained at all. As observed earlier, as we are not accepting the correctness of the findings of the learned Judge of the Family Court on the ground of desertion, we are not going into the correctness of the decisions in the case of the ***Suren Chandrakant Shah and Uttara Praveen Thool***.

20 Now we come to the decree passed on the ground of cruelty. We

have carefully perused the discussion made by the learned Judge of the Family Court on the Issue No.1 which is from paragraphs 39 to 83. Perusal of paragraphs 39 to 77 show that the learned Judge has referred therein to the evidence and arguments canvassed across the bar. Paragraph 78 refers to various decisions cited by the parties. Paragraph 83 is the only paragraph which records a finding. It reads thus:

“83 I have already held that she has made false allegations against him about his illegal relations with “J” and having a child and certainly it amounts to mental cruelty to him. Hence, I answer Issue No.1 in the affirmative.”

21 Thus, in substance, the Court proceeded to pass a decree of divorce on the ground of cruelty on the ground that the allegations made by the wife against the husband as regards character of the husband were found to be false. As we are dealing with an Appeal against the said decree, in the light of the submissions canvassed across the bar, we have independently examined the entire record of the case. It will be necessary to make a reference to the additional written statement filed by the wife in which offending allegations are found.

There are two parts of the offending allegations in the additional written statement which read thus:

“....Contrary to it is submitted it is the petitioner who has been repeatedly stating before the respondent that he has indulged into and performed a second marriage with a lady by name “J” ...”

“....It is submitted that the petitioner and the respondent were in need of a maid servant to help the respondent in the household chores and the petitioner taking advantage of this situation introduced to the respondent his girl friend “J”, to be engaged as a maid servant in the house and she was accordingly kept in the house for the household work and the mention of which is made in the earlier paragraphs of her statement. As days passed by the respondent observed that the petitioner was too friendly and intimate towards the said maid servant. At numerous occasions there used to be quarrel between the respondent and the petitioner, with regards to his behaviour with the maid servant. The respondent kept explaining to the petitioner that being a doctor of repute such

a behaviour does not suit him and he should mend his way as soon as possible. But to the disappointment of the respondent, the petitioner continued with his unwarranted behaviour, which the respondent could not tolerate. The maid servant and the petitioner continued getting all the more friendlier so much so that they were spotted at public places roaming with each other. The numerous gossips of the intimacy between the two also came to the notice of the respondent. As time passed by things became intolerable and therefore the respondent gave an ultimatum to the petitioner that if his behaviour persists then some action will have to be taken by her. She had also to remove the said maid servant from her house. At this juncture the petitioner spoke out, revealed and disclosed to the respondent that he knew the maid servant viz "J" since quite a long time and that she was not merely a maid servant in the house as was tried to be made out by him, but for a long time they were quite intimate with each other and that she was in reality his ex-friend. The petitioner further disclosed that they loved each other and that more than her it was he who loved her most and wanted to get married to her but due to the differences in

family he was not in a position to tie a knot with her and that ultimately due to family pressure both of them had to separate and go apart in their own way. He further disclosed that the said “J” got married and was settled abroad, she has an issue from the said marriage. But the things could not go well between herself and her husband and that she divorced her husband and came down to India along with her minor son and on coming down she contacted the petitioner and narrated to him all that he had happened with her. The petitioner further disclosed to the respondent that he could not hold on to his emotions he had for the said “J” and decided to support her and her child. The petitioner has disclosed further saying that he had married the said “J” and that he had embraced Islam. The petitioner went further to state that now the respondent could do no harm to him as he had got himself converted to Muslim and has a right to remarry. The petitioner also stated from the said wedlock with “J” he has a baby boy was 2 years of age and was with the said “J” who started residing in the building namely Mota Mahal situated at Lokhandwala Complex, near to the matrimonial home and which was provided to her by him for

her decent living with the child and which place would be quite convenient for the petitioner to visit. The petitioner further disclosed that the house in question was purchased by him for the said lady and child and in case the lady was removed from the house as a maid servant hardly it would matter to him as he would go and reside alongwith her in the nearby building as and when he desired and to be nearer to her. As time passed by one the own admissions of the petitioner as made to the respondent often the petitioner kept on frequently visiting his second wife and the child and the petitioner used to not to return home for days together without even informing the respondent about his absence from the home...”

22 On plain reading of the aforesaid allegations, it cannot be disputed that the allegations are of very serious nature affecting the character and reputation of the husband.

23 Before we go the question whether the wife has substantiated the said allegations, it will be necessary to deal with another argument canvassed by the learned counsel for the wife. The argument was that

at no stage a case was made out by the husband that the aforesaid allegations amount to causing mental cruelty to him. Therefore, we must make a reference to the affidavit in lieu of examination-in-chief of the husband. In paragraph 33, there is a reference to the employment of `J'. Paragraph 34 refers to the allegations made by the wife against the husband concerning `J'. What is material is paragraph 40 of affidavit in lieu of examination-in-chief. Relevant part thereof reads thus:

“...I deny having told the Respondent that I have a two year baby boy from my alleged wedlock with “J” and that I had kept both of them at a premises allegedly purchased by me at Lokhandwala Complex. I say that there is not even a shred of truth in any of these baseless and ridiculous allegations. I say that the Respondent is under the mistaken belief that by falsely imputing these allegations to me and is under mistaken belief that by putting words in my mouth, she will escape the consequences of her own actions whereby she has defamed and maligned me, caused immense mental torture and trauma to me, adversely affected my respect and reputation and in turn spoiled my image, career etc., by resorting to the false allegations against my

character of having performed second marriage, producing a child etc., which she has been spreading in the society amongst my friends, colleagues, acquaintances, patients, relatives etc., and has even resorted to lodging false police complaints against me based on the aforesaid allegations, which are entirely concocted and figments of Respondent's crooked imagination.”

24 Thus, there is a specific case made out in the affidavit in lieu of examination-in-chief of the husband that the allegations made by the wife in her additional written statement caused immense mental torture and trauma which affected the image and career of the husband. We may also note here that in clause (iv) of paragraph 22 of the examination-in-chief, the husband has referred to the fact that the wife filed a NC complaint dated 12th February 2005 alleging that he has remarried and is guilty of offence Bigamy. He has stated that in the complaint, the wife has alleged that the husband has a child from the said relationship. In the same paragraph, he has stated that rumours were spread about the said conduct of the husband with the sole intention of maligning him. He has stated that as some of his patients were informed by the wife about the said allegations, he suffered anguish and mental torture amounting to cruelty.

25 It is not in dispute that the allegations made by the wife in the additional written statement were not put in so many words to the husband during his cross examination. An argument was sought to be canvassed by the learned counsel for the wife that the allegations regarding unchastity were not made by the wife in that sense. In fact, her case is that it was the husband who disclosed his relationship with the said 'J' to the wife. We have already quoted what is stated in the additional written statement. It contains not only what was allegedly disclosed by the husband to her but also what she alleged against the husband. Moreover, in the examination-in-chief of the husband, it is brought on record that the wife filed a NC complaint making allegations of bigamy against the husband.

26 We have also perused the affidavit in lieu of examination-in-chief of the wife. She has denied the allegations made by the husband that when the husband reached the police station, he was informed that the wife has made complaint alleging bigamy. In the examination-in-chief the wife has stated thus:

“I say that contrary to the allegation as made I submit that it

was the petitioner who himself on his way from police station to home rebuked me saying that I must be in the know-how of the fact that he was not at any other place than at Mota Mahal, enjoying his life with the other woman and that it was no use for me to make any grievance about the same and lodge any missing or other report with the police and that I should not worry about the petitioner missing from the matrimonial home even if it was so for months together. I say that the conduct of the petitioner in the above respect is nothing but merely mental cruelty but also amounts to an offence within the meaning of section 498-A of IPC”

27 Another portion of evidence is also relevant which reads thus:

“...It is correct that I had also lodged another complaint with the Oshiwara Police Station dated 22.9.2005, but it was for the reason that the petitioner deliberately broke down the bathroom door so as to deprive me to take bath in privacy and also with a view to implement his threats which were being advanced by him from time to time to the effect that he would take out the nude video clippings and cassettes of

mine. I say and deny that I have ever lodged my false and bogus complaints with the Oshiwara Police or Social Service Branch etc.”

28 We may also advert to the cross examination of the wife made by the Advocate for the husband in paragraph 67 to 71 of the cross examination which are material:

“67 In the year 2003, I came to know about intimacy and his affair with one “J”. I never associated with that “J”. I have seen her. She was a maid servant in our house. She approximately worked for nine months. I am not having any information about background of “J”. I am not having any document to show that she worked in my house.

68 It is true to say that Mota Mahal is situated adjacent to Padmavati CHS where I was residing with the petitioner in the year 2003. I am not in a position to say the flat number of the floor where “J” was residing. I went to Mota Mahal building to make enquiry about her residence with my friend's friend. I do not remember her name. I was informed that she

was residing in Mota Mahal building. I did not make any further inquiry about her residence. I did not take any further steps for her residence in Mota Mahal.

69 I never saw them together roaming at Public places as stated by me. He has not given any video clippings to me of himself and “J”.

70 As per me, the address of the petitioner and alleged “J” is at Nala Sopara and no other address is known to me. A copy of NC is shown to me by his Advocate filed by him. It is filed by me. Hence, Ex.114 is given to it.

71 It is true to say that in my affidavit, I have not mentioned about his love affair, marriage with “J” and also a child. I am not having document to show about his marriage with “J” and the child. It is not true to say that my allegation about his relation and marriage with “J” and child is false. It is not true to say that he never told that he converted himself to Muslim and performed marriage with “J” and have a child.
It is not true to say that there was no maid servant in our house by name “J”. It is not true to say that I have made such

allegation against him to malign his image and to implicate him in false criminal case. It is not true to say that I have filed further complaints in police station and other social organization making allegation about his relations with Jyoti. A copy of the complaint filed by me to Commissioner of Police, is shown to me by his advocate who has produced it. It is filed by me. Hence, Exh.115 is given to it. It is not true to say that in Exh.114 and 115, I have not mentioned that he informed me about his relations with Jyoti and child.”

(Underline added)

29 Thus, the wife reiterated that in the year 2003, she came to know about the intimacy and affair of the husband with `J'. Though she accepts that the said `J' was a maid servant in their house for nine months, she has stated that she was never associated with `J'. Though a specific allegation was made by her that her husband had put her up in Mota Mahal building which is adjacent to the suit premises, the wife stated that she was unable to disclose the floor or flat where the said `J' was residing. Though wife came out with a specific case she has seen her husband and said “J” roaming at public places, in the cross examination, she admitted that she never seen her husband roaming in public places with the said “J”. Though her specific case was that her

husband has given objectionable video clippings, in fact, no such clippings were given. She admitted that she was not having any document to show that the husband has married with 'J' and has a child. She was also confronted with a copy of the complaint filed by her at Exh.115 containing similar allegations. She denied that she has not mentioned that the husband had informed her about relationship with 'J'.

30 There cannot be any dispute that the allegations which the wife has made against the husband as regards her relationship with another woman are the allegations affecting the character of the husband. The allegations have been made not only in the additional written statement but also in her affidavit in lieu of examination-in-chief. The allegations are of unchastity and illicit relationship with another woman. The allegations are of extra marital relationship. The allegations constitute assault on the character and reputation of the husband.

31 At this stage, we may make a useful reference to the decision of the Apex Court in the case of Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate⁷. The law on this aspect has been clearly laid down

⁷ 2006, 3 SCC 334

by the Apex Court. In paragraph 7 of the said decision, the Apex Court has held thus:

“7 The question that requires to be answered first is as to whether the averments accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13 (1) (i-a) of the Act. The position of law in this regard has come to be well settled and declared that levelling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extra marital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult and cruelty, sufficient by itself to substantiate cruelty in law, warranting the claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has

also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible.”

(underline added)

32 We may also note a view taken by the Apex Court in the case of K. Shriniwas Rao Vs. D.A.Deepa⁸. The said decision refers to another well known decision of the Apex Court in the case of Samar Ghosh wherein the Apex Court by way of illustration has set out several grounds of cruelty on which a decree of divorce can be passed. By the said decision in the case of K. Shriniwas Rao, the Apex Court has added one more illustration. Paragraph 16 of the said decision reads

⁸ (2013) 5 SCC 226

thus:

“16 Thus, to the instances illustrative of mental cruelty noted in Samar Ghos, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.”

33 The learned counsel for the wife tried to argue that it is not established that the allegations made by the wife are false. The submission is that it was for the husband to prove that the said allegations are false. In support of the said contention, he relied upon the aforesaid decision of Calcutta High Court in the case of Anuradha Ghosh Moulick wherein the Calcutta High Court has noted the difference between the phrases “not proved” and “false”. In the light of the law laid down by the Apex Court, the question is whether the wife had substantiated the allegations of serious nature made against the

husband. On this aspect, it will be necessary to make a reference to the decision of this Court in the case of Mrs. Manisha Sandeep Gade vs. Sandeep Vinayak Gade (supra). Paragraph 31 of the said decision is relevant which reads thus:

“31 In a matrimonial matter, one cannot apply the standard of stricter evidence. Nothing prevented her from establishing her allegations. The respondent could not have established the negative by leading any further evidence that the allegations made by the wife were false. The appellant had made the allegations. The burden was on her. She had failed to prove those allegations. Once she fails to prove those allegations and if those allegations are not in consonance with matrimonial relationship, and the husband complains that they have caused him agony, the inference that they constitute cruelty has to follow.”

(underline added)

34 In the present case, wife has made no attempt to prove the allegations made by her against husband affecting his character. She has not chosen to examine any witness to prove the said allegations. From the answers given by her in the cross examination, it is clear that

even the allegation that the husband was residing with the said 'J' in a particular building could not be substantiated by her as she has not disclosed the particulars of the premises in the said building. Therefore, this is a case where there is a complete failure on her part to prove the said allegations. The said allegations caused mental agony and cruelty to the husband. Though the Family Court may not have recorded elaborate finding, we concur with the with the ultimate conclusion drawn by the Family Court on this aspect. The Family Court was right in holding that there were unsubstantiated allegations made by the wife against the husband affecting his character and reputation which caused mental agony and cruelty to the husband. Therefore, the decree of divorce will have to be confirmed only on this ground.

35 Now, the next issue canvassed by the husband is as regards failure of the Family Court to pass a decree in terms of prayer clause (b) of the petition which is a prayer for mandatory injunction directing the wife to vacate the suit premises. Admittedly, the husband has not claimed exclusive right, title and interest in respect of the suit premises. On the contrary, admitted position seems to be that the suit premises stand in the joint names of the parties. In view of this admitted position, the husband was not entitled to seek a relief directing the

wife to remove herself from the suit premises, as the wife had an undivided share as well as right, title and interest in the suit premises. The husband did not claim any declaration of exclusive ownership and did not claim a relief of passing a decree of possession. Therefore, there was absolutely no justification for seeking a drastic relief of mandatory injunction against the wife of removing herself from the suit premises especially when she was claiming that it was a matrimonial home.

36 Then comes the challenge by the wife to that part of the decree by which the learned Judge of the Family Court has granted a permanent injunction restraining the wife from harassing the husband in any manner whatsoever . The word harassment is a subjective term. The Judgment is silent on the scope and meaning of the word harassment. On plain reading of the said part of the decree, apart from the fact that there is a serious doubt whether such a decree could have been passed, the said decree is incapable of being enforced. The law on this aspect is very well settled. No Court or Tribunal can grant relief which is incapable of being enforced. One such decision in which the law is reiterated by a Division Bench of this Court in the case of MRF, Ltd. Goa and Goa MRF Employees Union, Goa and another⁹. Relevant

⁹ 2003 (4) L.L.N.1182

paragraph is paragraph 10 which reads thus:

“10...No Court or Tribunal will grant a relief if it is incapable of enforcing it either by execution or otherwise. We have earlier noted that the expression “incidental” would not include an interim relief by way of preventive injunction. No judgment of the Apex Court has been cited to show that the matter has been concluded by any judgment. On the contrary in Delhi Cloth and General Mills (vide supra), the Apex Court has noted that the judgment of Management, Hotel Imperial the question was posed but not answered. Therefore, even if it was held that there was such a power to grant relief there is no power or mechanism for the relief to be enforced. If there be a power to grant relief there must also be power to enforce the relief. In that context it must be held that no power is conferred on the Tribunal or the other authorities under Chp. II to grant relief of injunction.”

Therefore, the said part of the decree cannot be sustained.

37 The Family Court has passed a decree of maintenance in the

sum of Rs.3000/- per month from the date of the decree. The first submission made by the learned counsel for the husband by relying upon the deposition of the wife recorded on 6th August 2016 in another proceedings. His submission is that the said deposition shows that at least from the year 2011, the wife has been employed. However, there is no application made by the husband for leading additional evidence. The copy of deposition has been tendered across the bar without making a proper application. Moreover, if after passing of the impugned decree, the wife has obtained an employment, the husband has a remedy available under sub-section 2 of section 25 of the said Act to apply for variation of the decree granting maintenance. We have carefully perused the cross-examination of the wife made by the husband on this aspect. In paragraphs 52 and 53 of the cross-examination, it is stated by her that she was in the employment of a Bank from September 2007 to June 2008. In the present case, as narrated earlier, the maintenance is made payable from 31st March 2009. There is nothing brought on record in the cross examination of the wife and there is no evidence adduced to show that on the date of the impugned decree, the wife had a source of livelihood or that she had any income. We must note here that against the prayer of the wife for grant of maintenance of Rs.35,000/- per month, the Trial Court has

granted maintenance of Rs.3,000/- per month. There is finding recorded that no evidence could be adduced by the husband to show that the wife was earning. We find no error with the said finding. While fixing the quantum of maintenance at Rs.3,000/- per month, the learned Judge has taken into consideration the admitted fact that the husband was doing medical practice at Charni Road and Kandivali, Mumbai. Therefore, it is impossible to find fault with the finding of the learned Judge that the wife was entitled to maintenance at the rate of Rs.3,000/- from the date of the decree. As stated earlier, if there are any subsequent events warranting exercise of power under sub-section 2 of section 25 of the said Act, it is always open for both the husband and wife to take recourse of the remedy provided under sub-section 2 of section 25 of the said Act.

38 Accordingly, we dispose of the Appeals by passing the following order:

- (i) Family Court Appeal No.149 of 2009 filed by the husband is dismissed;
- (ii) Family Court Appeal No.95 of 2009 filed by the wife is partly allowed. The decree passed by the Family Court on the ground of

desertion under clause i(b) of Sub-section (1) of 13 of the Hindu Marriage Act, 1955 is hereby set aside. However, the decree of divorce on the ground of cruelty under clause i(b) of Sub-section (1) section 13 of the said Act is hereby confirmed;

(iii) The Decree of injunction granted by the Family Court restraining the wife from harassing the husband in any manner whatsoever is also set aside;

(iv) Both the pending civil applications are disposed of as not pressed;

(v) Considering the status of both the parties, and the nature of controversy, there will no order as to costs in both the Appeals;

(vi) At this stage, the learned counsel for the wife seeks continuation of clause 5 of the order dated 15th February 2016 passed by the Apex Court in Civil Appeal No.1402 of 2016. We have upheld the decree of the Trial Court by which prayer for mandatory injunction prayed by the husband has been rejected. The order of injunction passed against the wife has been set aside. The wife did not claim any relief in respect of the suit premises by filing any counter claim. Therefore, there is no reason to continue the direction contained in paragraph 5 of the order dated 15th February 2016 of the Apex Court in Civil Appeal No.1402 of 2016;

(vii) We, however, make it clear that if there is any apprehension on

the part of the wife that she will be dispossessed from the suit premises, it will be open for her to adopt substantive proceedings in accordance with law.

(ANUJA PRABHUDESSAI, J.)

(A.S. OKA, J.)