IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

FAMILY COURT APPEAL No. 1/2019

Darshana W/o Alok Borkar,
Age 42 years, Occ. Service,
R/o Plot No.25, Laghuvetan Colony,
Kamptee Road, Nagpur - 440014. **APPELLANT**

.....VERSUS.....

Alok Namdeo Borkar,
Age 45 years, Occ. Service,
R/o Plot No.123, Laghuvetan Colony,
Kamptee Road, Jaripatka, Nagpur - 440014. **RESPONDENT**

Shri R.D. Bhuibhar, counsel for the appellant.
Shri S.V. Sirpurkar, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND PUSHPA V. GANEDIWALA, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 05TH MARCH, 2021.
DATE ON WHICH JUDGMENT IS PRONOUNCED : 06TH APRIL, 2021.

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

This appeal filed under Section 19 of the Family Courts Act, 1984 takes exception to the judgment dated 28.08.2018 in Petition No.A-177/2009 decided by Family Court, Nagpur thereby allowing the petition filed by the respondent-Husband for divorce on the grounds of cruelty and desertion.

2. It is the case of the respondent-Husband that he was married with the appellant-Wife on 26.01.2007 at Nagpur. In the said marriage,

one Shri Manish Mehta who was treating the wife as his daughter played a major role. It is the case of the husband that his wife stayed along with him from 26.01.2007 till 16.02.2007 and thereafter at her request the husband took her to the house of Shri Manish Mehta. The husband was thereafter informed by the wife that she had gone to Mumbai along with Shri Manish Mehta to make enquiries about a course in Pilot training. His wife stayed with Shri Manish Mehta for about seven days and thereafter returned back home on 25.02.2007 at 11.00 p.m. in the night. After staying in the company of the husband, the wife started quarreling with the husband that she wanted to leave for Mumbai. The husband requested her not to leave for Mumbai as the family life was likely to get disturbed. According to the husband, the wife avoided to have sexual intercourse and gave cruel inhumane treatment to the husband. From 26.02.2007 there were no physical relations between the parties and the wife continued her demand of leaving for Mumbai. On 26.02.2007, the wife wanted to visit the house of Shri Manish Mehta at about 1.00 p.m. and the husband dropped her there. He came back in the evening at about 9.00 p.m. to take her back. While proceeding to fetch the wife the husband met her on Panchpaoli bridge and requested her to accompany him back home. The wife however refused and started abusing the husband and created a scene on the road. The husband thus gathered that his wife did not intend to continue matrimonial relations and stay

with him. Despite efforts taken there were no relations between them from 26.02.2007 onwards. Various phone calls made by the husband were also not responded to and thus according to the husband his wife deserted him since 26.02.2007. The husband's father met with an accident on 04.05.2007 and thereafter expired on 18.07.2007. All relatives had called upon the husband to console him but the wife did not share his grief and did not return to mourn the death of her father-in-law. On the next day, when the ashes were to be immersed the wife along with Shri Manish Mehta had visited the place. In the aforesaid backdrop, it is the case of the husband that the conduct of the wife has resulted in rendering cruel treatment and causing mental harassment to him. On 24.12.2008 the husband issued a legal notice to the wife at her address both at Nagpur as well as Mumbai. There was no response whatsoever and hence on 02.03.2009 the husband filed a petition for divorce under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955 (for short, 'the Act of 1955').

3. The wife filed her written statement at Exhibit 27 and opposed the prayers as made in the said petition. She pleaded that the marriage between them was solemnized on 30.12.2006 and that all expenses were borne by the wife. Thereafter on 01.01.2007 both of them went to Mumbai and stayed there for about seven days. Since the family

of the husband wanted them to get married as per Buddhist rites and customs they returned back. On 26.01.2007, the marriage was again solemnized as per Buddhist rites and customs. The expenses were again borne by the wife. She admitted that Shri Manish Mehta had played a role in the marriage and that he was treating her as his daughter. The allegations as levelled by the husband with regard to rendering cruel treatment and refusing to have sexual intercourse were denied. She pleaded that on 27.01.2007 the family members of the husband had pressurized her and had also ill-treated her. The wife was interested in pursuing a course in Civil Aviation and for that purpose she was required to go to Mumbai. It was denied that she had quarreled with the husband either on 25.02.2007 or thereafter. On 26.02.2007 Shri Manish Mehta was celebrating his wedding anniversary and hence the wife had been to his place and had also requested the husband to join her there. When she was returning back she was asked by the husband to meet her at Panchpaoli bridge. Thereafter, the husband had started abusing her in a drunken state and had also physically assaulted her. She was left alone there and was not brought back. She was therefore required to call the wife of Shri Manish Mehta to take her home. She pleaded that even after 26.02.2007, she and her husband resided together at Mumbai, Nagpur and Baramati. The wife was not aware about her father-in-law being injured in an accident as she was never informed about the same. She

was informed by her colleagues about the death of her father-in-law and hence she had immediately reached Nagpur for attending the immersion of his ashes. She denied having received the legal notice sent by the husband and thus prayed that the allegations made in the divorce petition being incorrect and false the petition was liable to be dismissed.

4. During pendency of the proceedings the wife amended her written statement pursuant to an order passed below Exhibit 103 on 08.07.2016. By the said amended pleadings, it was sought to be brought on record that the husband had performed a second marriage with one Sweety Ambade. From the said marriage, the husband had two issues, a son born on 06.05.2011 and a daughter born on 31.01.2015. It was pleaded that the husband and his second wife and their children were residing at Surat. It was further pleaded that the sister-in-law of the husband had filed a complaint on 02.04.2015 against the husband and his family members for the offence punishable under Section 498-A read with Section 34 of the Penal Code. Regular Criminal Case No.2507 of 2015 was pending before the learned Judicial Magistrate First Class, Nagpur. In those proceedings, the husband and his second wife had appeared and had obtained bail after admitting that they were husband and wife residing at Surat.

After the written statement was permitted to be amended the husband did not consequentially amend his petition to respond to the contents of amended paragraph no.29.

5. Shri R.D. Bhuibhar, learned counsel for the wife-appellant submitted that the learned Judge of the Family Court erred in passing the decree for divorce. According to him cruelty as contemplated by Section 13(1)(i-a) of the Act of 1955 had not been proved by the husband. Only on the basis of a solitary instance that was alleged to have occurred on 26.02.2007 the Family Court had proceeded to hold that the wife had treated the husband with cruelty. He referred to the pleadings of the parties as well as the evidence on record to submit that the case as pleaded by the husband was false. Though the marriage took place on 30.12.2006 as per Hindu rites and customs the same was being denied by the husband as according to him on that day they were merely engaged. There was evidence on record to indicate that after the marriage on 30.12.2006 the couple had gone to Mumbai and had stayed there for a period of seven days. On 26.01.2007 as per Buddhist rites and custom, the marriage was again solemnized. Even according to the husband, the relations between them were normal and it was admitted by the husband in paragraph 37 of his deposition that after 26.01.2007 the couple had stayed together for about twenty days and both of them along with the

family members were happy. The wife was serving at Mumbai and when she did not return on 17.02.2007 the husband had made necessary enquiries. She returned back on 25.02.2007 and on the next day she had gone to the house of Shri Manish Mehta as it was his wedding anniversary. The allegations made by the husband that while returning back at night there was a quarrel between them as a result of which she was left alone on the road could not be said to amount to cruelty so as to warrant passing a decree of divorce on that count. It was an admitted position that from 26.02.2007 the parties have been residing separately. The fact that the divorce petition was filed almost two years thereafter on 02.03.2009 indicated that the allegations with regard to cruelty were not grave to warrant passing of any decree on that count. Though the husband had examined himself he failed to examine any family member or close relative to prove the alleged cruelty inflicted by the wife on the husband. In that regard he placed reliance on the decision in *Seema Suman Kumar Sinha Versus Suman Kumar Sinha & Others* [AIR 2016 Patna 128].

6. According to the learned counsel another reason taken into consideration by the Family Court as constituting cruelty was the quashing of the criminal proceedings initiated by the wife against the husband and his family members. An offence under Section 498-A, 494

read with Section 34 of the Penal Code had been registered against the husband and his family members on 26.07.2016 at the instance of the wife. Though it was true that the charge insofar as offence under Section 498-A read with Section 34 of the Penal Code had been quashed it was a fact that the proceedings under Section 494 of the Penal Code had not been quashed. The husband merely placed on record at Exhibit 162 a copy of the judgment dated 18.01.2018 passed by this Court in Criminal Application (APL) No.653/2016. The pleadings in the divorce petition were not amended nor was there any evidence on record to indicate that by virtue of such proceedings being initiated against the husband and his family members he was required to undergo mental cruelty. It was his contention that a ground which was not the basis for initiation of the original proceedings and became available subsequently ought to have been pleaded in view of the provisions of Section 20 of the Act of 1955. In absence of any pleadings or evidence in that regard there was no reason to come to the conclusion that on account of such acquittal in the criminal proceedings a conclusion could be drawn that same has resulted in causing mental cruelty to the husband. For said purpose he placed reliance on the decision in *Mangayakarasi Versus M. Yuvraj* [(2020) 3 SCC 786]. It was urged that the Hon'ble Supreme Court had observed therein that acquittal from a criminal case if automatically treated as a ground for granting divorce would be against the statutory provision. He

pointed out that this decision was rendered by the Bench of three learned Judges and being later in point of time the same ought to be followed. By holding that the husband was entitled to a decree of divorce on the ground of cruelty on account of criminal proceedings being quashed the same would result in granting divorce without any actual evidence of cruelty. Referring to the decision in *Shobha Rani Versus Madhukar Reddi* [(1988) 1 SCC 105] it was sought to be urged there was a distinction between the cruelty as contemplated between Section 498-A of the Penal Code and that under Section 13(1)(i-a) of the Act of 1955. The decree passed on that count was not sustainable.

7. On the aspect of desertion it was submitted that *animus deserendi* of the wife to desert the husband had not been proved. The wife was serving at Mumbai and was required to stay there often. Though it was the case of the husband that his father had suffered an accident and thereafter he expired on 18.07.2007 the wife had not visited her matrimonial home. It was however evident from the record as well as the admissions of the husband that the fact that his father had suffered an accident and had thereafter expired was never informed to the wife. It was only after she got information in this regard from her colleagues that she immediately went to Nagpur to attend the function with regard to immersion of ashes. This act on the part of the wife clearly indicated that

she had no intention whatsoever to sever her ties with her husband. On the contrary, she was kept in dark about the said accident and the subsequent demise of her father-in-law. Placing reliance on the decision in *Adhyatma Bhattar Alwar Versus Adhyatma Bhattar Sri Devi* [AIR 2002 SC 88] it was urged that in absence of any such intention on the part of the wife to bring the cohabitation permanently to an end there was no cause for granting the decree for divorce on the ground of desertion.

As regards the averments in paragraph 29 of the written statement as amended it was submitted that the husband failed to consequentially amend his petition for divorce. It was clearly pleaded by the wife that her husband had contracted a second marriage and had two children from the same. The allegations in that regard could not be said to be unsubstantiated inasmuch as the wife had brought on record substantial evidence in the form of various photographs and the bail bond executed to secure bail for the second wife. The deposition of her sister-in-law also supported the pleadings as made and hence there was no basis for the trial Court to hold that the wife had made false and reckless allegations against the husband. It was thus submitted that in absence of any evidence either to indicate cruelty on the part of the wife and the fact that the desertion as alleged had not been proved there was no reason to grant a decree for divorce as was done by the learned Judge of the Family Court. As regards the subsequent marriage of the husband which was

alleged to have taken place on 09.12.2018 reliance was placed on the decision in *Smt.Lata Kamat Versus Vilas* [AIR 1989 SC 1477] to urge that the said marriage had been contracted prior to the time within which the appeal could be preferred and in contravention of Section 15 of the Act of 1955. The present appeal having been filed within limitation after receiving the certified copies, the copying days in that regard were liable to be excluded and thus it was clear that the husband had in breach of the provisions of Section 15 of the Act of 1955 contracted the second marriage. On this count also the husband was not entitled to any relief whatsoever. It was thus submitted that the judgment of the Family Court was liable to be set aside and the petition for divorce ought to be dismissed.

8. Per contra, Shri S.V. Sirpurkar, learned counsel for the husband-respondent supported the impugned judgment. According to him there was sufficient evidence on record to indicate that the wife had treated the husband with cruelty and that her acts of filing frivolous proceedings under Section 498-A of the Penal Code resulted in causing mental cruelty. The behaviour of the wife especially on 26.02.2007 was of such nature that the same resulted in causing mental distress to the husband amounting to cruelty. The stand taken by the wife in her defence had not been proved and the learned Judge of the Family Court was justified in holding in favour of the husband. Referring to the order

passed by this Court quashing the criminal complaint filed by the wife against the husband and her family members under Section 498-A read with Section 34 of the Penal Code it was submitted that since this Court had observed that continuation of those proceedings would amount to abuse of the process of the Court that itself amounted to causing cruelty to the husband. The husband and his family members were required to face those proceedings which ultimately came to be quashed. The order passed by this Court was affirmed by the Hon'ble Supreme Court and the husband was justified in placing the said judgment on the record of the Family Court *vide* Exhibit 162. There was no reason to further amend the pleadings especially when it was an admitted fact that the husband and his family members had been acquitted in those proceedings. Placing reliance on the decision in *Rani Narasimha Sastri Versus Rani Suneela Rani* [2019 SCC Online SC 1595] it was submitted that launching of such prosecution by the wife making serious allegations which proceedings ended in acquittal amounted to cruelty on the part of the wife. It was further urged that the allegations in paragraph 29 of the written statement were not proved by the wife and therefore making such wild and reckless allegations also amounted to cruelty. The Family Court was justified in taking the same into consideration while granting the decree of divorce. He also referred to the decision in *Samar Ghosh Versus Jaya Ghosh* [(2007) 4 SCC 511] and the judgment dated 20.02.2014 in First

Appeal Nos.585/1996, 584/1996 and 41/1996 [*Bhojraj Sakharam Nagdeve Versus Smt.Sharda Bhojraj Nagdeve*] by the Division Bench at the Nagpur Bench.

9. On the aspect of desertion it was submitted that the intention of the wife of not returning to the matrimonial home was evident from her conduct. She had left the company of her husband voluntarily on 26.02.2007 and had not returned thereafter. Assuming that she attended the function with regard to immersion of ashes of the husband's father that would not indicate her intention of re-joining the company of her husband. Even in the written statement it had not been pleaded that the wife was willing to resume cohabitation with the husband. Considering the overall material on record in that regard it was clear that the *animus deserendi* on the part of the wife had been established. There was no reason to interfere with the decree of divorce on that count.

As regards the subsequent marriage of the husband it was submitted that the same had been contracted after the period prescribed in Section 15 of the Act of 1955 had expired. The wife did not issue any notice to the husband informing him of her intention to challenge the decree for divorce. Relying upon the decision in *Smt.Lila Gupta Versus Laxmi Narian & Others* [**AIR 1978 SC 1351**] it was submitted that such marriage was not void. On this basis, it was urged that the learned Judge

of the Family Court after considering the entire material on record was pleased to pass a decree for divorce and the same did not call for any interference. In any event, it was submitted that since February-2007, the husband and wife were residing separately and the marital ties between them had been broken. It was thus submitted that considering all these aspects, there was no reason to interfere with the impugned judgment.

10. In the light of rival submissions of the parties the following points arise for determination:

a. Whether the husband has proved that he is entitled to be granted divorce on the ground of cruelty?

b. Whether acquittal of the husband and his family members in proceedings under Section 498-A of the Penal Code by itself would amount to causing mental cruelty?

c. Whether the husband has proved that his wife deserted him so as to constitute a ground for divorce?

d. What is the effect of the subsequent marriage of the husband?

e. Whether the judgment of the Family Court deserves to be interfered with?

11. **AS TO POINT (a):** For seeking divorce on the ground of cruelty it has been pleaded by the husband in the divorce petition that after getting married on 26.01.2007 the couple enjoyed the marital fruits of life for one day. The wife stayed in the house of the husband from 26.01.2007 to 16.02.2007 after which the husband dropped the wife at the house of Shri Manish Mehta. The wife thereafter went to Mumbai with Shri Manish Mehta in connection with her course in Pilot training.

She returning back to the husband's house on 25.02.2007. The wife started quarreling with husband on that day by stating that she again wanted to leave for Mumbai. The wife avoided to have sexual intercourse with him. On 26.02.2007 as per the desire of the wife the husband dropped her at the house of Shri Manish Mehta. The husband went to fetch her at night and he met his wife at Panchpaoli bridge. The wife refused to accompany him and according to husband there was a quarrel between both of them. From 26.02.2007 onwards there was no relationship between them. These facts were pleaded as constituting cruelty on the part of the wife.

In the written statement the aforesaid allegations were denied. On the contrary, it is pleaded that on the night of 26.02.2007 it was the husband who ill-treated her and also physically assaulted her. She was required to call the wife of Shri Manish Mehta to drop her home.

12. In his evidence the husband admitted that after getting married on 26.01.2007 he and his wife stayed together for about twenty days. There were no complaints either from him or his family members against his wife. The couple as well as the family members of the wife were happy. He admitted that he was used to drinking liquor occasionally. He admitted that there was a quarrel between both of them on 26.02.2007 but he denied that he had abused his wife or had assaulted

her. The suggestions made to her in her cross-examination that she had abused her husband were denied. It was denied that she did not want to return to the house of her husband.

13. For the purposes of constituting cruelty as contemplated by Section 13(1)(i-a) of the Act of 1955 there should be treatment of the petitioner with such cruelty that would cause a reasonable apprehension in the mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty has to be distinguished from the ordinary wear and tear of the family life and it has to be adjudged on the basis of the course of conduct which would in general be dangerous for the spouse to live with the other. These observations can be found in the decision in *Savitri Pandey* (supra). Further cruelty to constitute a ground for divorce need not be physical. Mental torture or abnormal behaviour could also amount to cruelty in a given case. The approach of the Court in such matters should be to take cumulative effect of the facts and circumstances emerging from the evidence on record and thereafter draw a fair inference as to whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other spouse. These observations can be found in *Parveen Mehta Versus Inderjeet Mehta* [(2002) 5 SCC 706]. In *Samar Ghosh* (supra) various illustrative instances have been referred to in paragraph 101 of the said decision.

On consideration of the evidence on record led by the parties on the aspect of cruelty it is found that the husband seeks to rely mainly on the incident that was alleged to have occurred in the night of 26.02.2007. According to the husband when he had gone to fetch his wife from the house of Shri Manish Mehta he met her at Panchpaoli bridge and there was a quarrel between them in which the wife abused him and refused to accompany him back. On the other hand according to the wife there was a quarrel between them on 26.02.2007 but it was the husband who was under intoxication and he had assaulted her and also abused her. Besides this solitary instance the husband has not led any further evidence to substantiate his plea for grant of divorce on the ground of cruelty. No doubt, it was urged on behalf of the husband that filing of false criminal case and making unfounded allegations against the husband in the written statement also amount to cruelty, said aspect is being dealt with separately. Insofar as the incident alleged to have occurred on the night on 26.02.2007 is concerned we find that the evidence on record is in the nature of word against word. The quarrel that took place between the husband and wife can at the highest be said to arise out of ordinary wear and tear of marriage. It is not a quarrel of such nature that could be stated to be of such a level or gravity to hold that the same amounted the wife inflicting cruelty on the husband. As held in *Samar Ghosh* (supra) mere trivial, irritations, quarrels, normal

wear and tear of married life which occur in day-to-day life would not be adequate to grant divorce on the ground of mental cruelty. It is thus found that the pleadings of the husband and the evidence on record in support of the plea that the wife had treated the husband with cruelty are not of such nature or gravity that would furnish a ground to the husband to have an apprehension in his mind that it would be harmful or injurious to him to live with his wife. On these pleadings referred to hereinabove and the evidence in that regard, it is found that the husband has failed to prove that the wife treated him with cruelty so as to furnish a ground for divorce under Section 13(1)(i-a) of the Act of 1955.

14. It was the contention of the learned counsel for the husband that by making vague, false and unsubstantiated allegations in the written statement amounted to causing mental cruelty by the wife to the husband. Reference was made to the averments in paragraph 29 of the written statement wherein it was pleaded that the husband had performed second marriage with one Sweety Ambade. From the said wedlock it was claimed that the couple had two children and they were all staying together at Surat. It was urged that the evidence on record led by the wife did not substantiate the pleadings in paragraph 29 in the written statement as amended.

Coming to the aspect as to whether the pleadings in paragraph 29 could be said to be vague or unsubstantiated we find that from the material brought on record by the wife said contention would be difficult to accept. The expression "unsubstantiated" means something which is not supported or proven by evidence. Something that has no basis whatsoever. For the present purpose unsubstantiated allegations would mean allegations that are not supported by any material whatsoever or proven by leading evidence. After the wife amended her written statement pursuant to the order passed below Exhibit 103 on 22.07.2016 she moved an application below Exhibit 109 under the provisions of Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (for short, 'the Code'). She prayed that the witnesses examined by the husband including the husband be permitted to be cross-examined with regard to the amended portion of the written statement. This application was allowed by the trial Court on 21.10.2016.

15. To substantiate these averments the wife examined her sister-in-law Smt.Preety Borkar who was the wife of the younger brother of the husband at Exhibit 128. She deposed that she had in fact filed the aforesaid criminal complaint case against her husband and his family members. In the cross-examination of the husband, he was shown the certified copy of the charge-sheet filed in Regular Criminal Case No.2507

of 2015 which is at Exhibit 114. He admitted that his family members had been arrayed as accused therein. He was then confronted with the bail bond that was furnished for releasing his second wife-Sweety Borkar on bail who was arrayed as accused no.4. The surety therein was the mother of said Sweety Borkar (Ambade). Perusal of this bail bond indicates that the name of the alleged second wife of the husband has been shown as Smt. Sweety Alok Borkar (Ambade) and the place of residence is shown as Honey Park Road, Surat. Pertinently the husband was arrayed as accused no.3 and the residential address as shown is the same as the one shown of accused no.4-Smt.Sweety Alok Borkar (Ambade). The husband in his cross-examination stated that he was not present when the name of Sweety was mentioned as "Sweety Alok Borkar". However, he admitted that till date, he had not filed any application before the said Court raising objection to the wrong mention of the said name. He admitted that his address shown in the bail bond was at Surat.

16. Pursuant thereto the husband was cross-examined on the averments in amended paragraph 29 of the written statement. This cross-examination was conducted on 17.11.2016 and 03.12.2016. In the said cross-examination, various photographs placed on record by the wife were marked at Exhibits 118 to 123. The cross-examination indicates

specific suggestion made to the husband that in the said photographs his second wife Sweety along with their children could be seen. No doubt the husband denied the said suggestion. Thereafter the wife also examined her sister-in-law at Exhibit 128 and in her deposition she recognized the husband and his second wife. She was cross-examined and it was suggested that since her relations with her husband who was the younger brother of Alok were strained she was supporting the wife. This was denied by the said sister-in-law. This piece of evidence is being referred to, to indicate that after amending the written statement and alleging that the husband had re-married and two children were born, the wife had taken steps to substantiate these allegations. In that regard she placed on record various photographs indicating presence of her husband and his second wife along with their children. The bail bond executed in Regular Criminal Case No.2507 of 2015 by accused no.4-Sweety Alok Borkar (Ambade) was also brought on record. In the light of this material brought by the wife after amending her written statement, we are of the view that the allegations made in paragraph 29 did not remain unsubstantiated. The wife did take steps to prove those allegations by bringing on record relevant material. What matters is the nature of evidence brought on record to substantiate the allegations as made. Whether such allegations were proved or not would then depend on the quality of evidence brought on record. In other words, the wife after

alleging that the husband had performed his second marriage and had two children from the same brought on record various photographs indicating her husband and his subsequent family as well as the bail bond executed by his second wife for securing bail. The address mentioned therein of Sweety Ambade was similar to the address mentioned by the husband at Surat. Efforts were thus taken to substantiate or prove the allegations as made. This evidence cannot be simply brushed off as being irrelevant. Same has to be evaluated on the touchstone of preponderance of probabilities. Thus it is held that the allegations made in paragraph 29 of the written statement did not remain unsubstantiated and the wife had taken steps as were permissible in law to prove the same. Pertinently, though the wife amended her written statement, the husband did not consequentially amend the divorce petition. As a result the averments in paragraph 29 remained untraversed by the husband. In such situation the provisions of Order VIII Rules 3 and 4 of the Code of Civil Procedure, 1908 would come into play. This would be another reason to hold that the allegations made in paragraph 29 of the written statement did not remain unsubstantiated. These allegations therefore cannot be taken into consideration for holding that the wife was guilty of levelling unsubstantiated allegations against the husband so as to furnish a ground to the husband to rely upon for grant of divorce on the ground of cruelty.

The allegations purported to have been made by the wife against her mother-in-law are not of such grave nature to warrant passing of decree for divorce on the ground of cruelty only on that count. This is after considering the evidence of the wife as well as her witness Shri. Mehta.

17. **AS TO POINT (b)**: Yet another aspect that was debated is the effect of acquittal of the husband and his family members in the criminal proceedings resulting in filing of Charge-sheet No.4123/2016. In this regard, the First Information Report dated 26.07.2016 lodged by the wife against the husband, his mother and younger brother alleged commission of an offence punishable under Section 498-A, 494 and 34 of the Penal Code. The husband and his family members had approached this Court by filing Criminal Application (APL) No.653/2016 seeking quashing of the said first information report as well as the charge-sheet as filed. On 18.01.2018 this Court by observing that continuation of the criminal trial against the said accused would result in the abuse of the process of the Court proceeded to quash the first information report and charge-sheet for the offence punishable under Section 498-A read with Section 34 of the Penal Code. The prosecution under Section 494 o tfhe Penal Code was permitted to proceed. A copy of this judgment was placed on record by the husband below Exhibit 162 along with application dated

18.07.2018 at Exhibit 160. Shortly thereafter, the proceedings before the Family Court were fixed for arguments and on 28.08.2018 the learned Judge of the Family Court proceeded to decide the petition filed by the husband and allowed the same. The consideration of the judgment in these criminal proceedings by the Family Court is from paragraph 55 onwards in the impugned judgment. In the light of the observations made by this Court while quashing the criminal proceedings under Section 498-A read with Section 34 of the Penal Code, the learned Judge observed that the filing of such criminal proceedings amounted to cruelty on the part of the wife against the husband and his family members. The quashing of the said criminal proceedings is the principal ground in the impugned judgment for holding that the husband had proved that the acts of the wife had resulted in causing cruelty to him.

18. In the aforesaid context, the question that arises is whether the learned Judge of the Family Court was justified in recording the finding that by virtue of quashing of the criminal proceedings initiated by the wife under Section 498-A read with Section 34 of the Penal Code such initiation of criminal proceedings and its prosecution amounted to causing mental cruelty to the husband. As stated above, Criminal Application (APL) No.653/2016 was decided by this Court on 18.01.2018. The husband did not bring on record the factual aspect of

quashing of the said proceedings by seeking to amend the divorce petition. Though the aforesaid proceedings were initiated on 26.07.2016 this fact of initiation of such proceedings and its continuation resulted in causing mental cruelty was not brought on record. The husband or his witnesses did not depose about the pendency of the said proceedings either. As a result, there was no material whatsoever on record to determine whether initiation and prosecution of such proceedings resulted in causing mental cruelty except the order passed by this Court in the said criminal proceedings in the form of the judgment dated 18.01.2018 at Exhibit 162.

19. As per provisions of Section 20(1) of the Act of 1955 every petition presented is required to state as distinctly as the nature of the case permits the facts on which the claim to relief is founded. Under Section 20(2) the statements contained in the petition are required to be verified by the petitioner in the manner required by law for verification of claims. As per provisions of Section 21 of the Act of 1955 subject to other provisions in the said Act and to such rules that the High Court may make in that behalf, the proceedings under the Act of 1955 are regulated by the Code of Civil Procedure, 1908. Section 20(1) thus requires pleading of the necessary facts on the basis of which the claim to relief is founded. In other words, if according to the petitioner a fact is found relevant that gives a cause of action to

seek relief under the Act of 1955 the same has to be stated as distinctly as the nature of the case permits. In this regard, useful reference may be made to the following observations in paragraph 27 of the recent decision of the Hon'ble Supreme Court in **Transferred Case No.25/2021** [*Aman Lohia Versus Kiran Lohia*] decided on 17.03.2021 which read as under:

> "***27.*** *Indubitably, the Family Court is obliged to inquire into the matter as per the procedure prescribed by law. It does not have plenary powers to do away with the mandatory procedural requirements in particular, which guarantee fairness and transparency in the process to be followed and for adjudication of claims of both sides. The nature of inquiry before the Family Court is, indeed, adjudicatory. It is obliged to resolve the rival claims of the parties and while doing so, it must adhere to the norms prescribed by the statue in that regard and also the foundational principle of fairness of procedure and natural justice.*"

This requirement prescribed by Section 20(1) of the Act of 1955 has been held to be not one of mere form but of substance in *Nisha Chandrashekhar Khobragade Versus Chandrashekhar Gopichand Khobragade* [**1987 Mh.L.J. 63**]. Said provision has been held to be mandatory in *A Versus H* [**AIR 1993 Bombay 70**] on which reliance was placed by the learned counsel for the wife.

20. By virtue of the provisions of Section 21 of the Act of 1955 the provisions of the Code have been made applicable to proceedings under the Act of 1955 and as a result the requirements of provisions of Order VI Rules 2 to 4 of the Code are attracted. This implies that a petition filed under the Act of 1955 except one filed under Section 11 has to answer the aforesaid requirements. Rule 4 of the Hindu Marriage and Divorce Rules, 1955 framed by the Bombay High Court under Sections 14 and 21 of the Act of 1955 also highlight these requirements besides referring to provisions of Order VII Rule 1 of the Code as well as Section 20(1) of the Act of 1955. It cannot be lost sight of that despite the provisions of Section 21 of the Act of 1955 requiring regulation of the proceedings under the Act of 1955 to be in accordance with the Code, Section 20(1) has been enacted. In other words, it has been emphasized through Section 20(1) of the Act of 1955 that the pleadings on the basis of which a claim to relief is founded are necessary. The intention is thus clear that the opposite party should be in a position to meet the case as pleaded by the other party and should not be taken by surprise by a case not pleaded.

It cannot be disputed that acts subsequent to the filing of the divorce petition can be taken note of to show a pattern in the behaviour and conduct of a party as held in *A. Jayachandra Versus Aneel Kaur* [**(2005) 2 SCC 22**]. Equally well settled is the proposition that in the

absence of necessary pleadings no amount of evidence can be looked into. The fundamental rules in this regard have been referred to in *Bachhaj Nahar Versus Nilima Mandal & Another* [(2008) 17 SCC 491] which are as under:

> "*10. …….*
>
> *(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject-matter of an issue, cannot be decided by the court.*
>
> *(ii) A court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.*
>
> *(iii) ……..*"

The observations in paragraph 10 of the decision in *Bhagwati Prasad Versus Chandramaul* [AIR 1966 SC 735] that to allow one party to rely upon a matter in respect of which the other party did not lead evidence and had no opportunity to lead evidence would introduce considerations of prejudice and in doing justice to one party, the Court cannot do injustice to another also cannot be lost sight of.

21. At this stage, it would be necessary to refer to the decision in *Mangayakarasi* (supra) that was relied upon by the learned counsel for

the wife. The facts therein indicate that the husband had initiated proceedings for dissolution of the marriage while the wife had filed a petition for restitution of conjugal rights. The trial Court dismissed the petition filed by the husband and allowed the petition filed by the wife. The appeal filed by the husband challenging the judgment of the trial Court came to be dismissed after which the husband filed a second appeal. During pendency of the proceedings, the criminal prosecution initiated by the wife against the husband for harassment on account of demand of dowry resulted in acquittal of the husband. The High Court therefore considered the effect of such acquittal. The High Court without interfering with the findings recorded by the Courts below which had held that cruelty had not been proved by the husband relied upon the judgment rendered in the criminal proceedings and granted the relief of dissolution of the marriage in view of the acquittal of the husband. In that backdrop, the Hon'ble Supreme Court held that if the finding with regard to cruelty was rendered merely on the basis of the judgment of acquittal in the criminal proceedings it would lead to a situation that in every case if criminal proceedings are filed by one of the parties to the marriage and the same end in acquittal it would have to be automatically treated as a ground for granting divorce which would be against the statutory provisions. It was noted that in the proceedings seeking dissolution of marriage, the husband had not referred to the criminal

proceedings filed against him by the wife and that was not the basis for seeking divorce. The judgment of the High Court was accordingly set aside. This judgment dated 03.03.2020 has been rendered by the Bench of three learned Judges.

22. The learned counsel for the husband on the other hand sought to rely upon the decision in *Rani Narasimha Sastri* (supra). The said judgment is dated 19.11.2019 and has been rendered by a Bench of two learned Judges. The facts therein indicate that the husband initiated proceedings for dissolution of the marriage on the ground of cruelty and mental illness. The trial Court held that the husband had failed to prove the grounds raised in the proceedings for divorce and dismissed the petition. The High Court dismissed the appeal preferred by the husband. Before the Hon'ble Supreme Court, it was submitted that the wife had initiated proceedings under Section 498-A of the Penal Code and the husband was tried by the Court of Metropolitan Magistrate. The Court proceeded to acquit the husband under Section 498-A of the Penal Code and on that basis it was submitted that cruelty at the instance of the wife was established. It was observed that the trial Court had noted the ground of cruelty on account of filing of the criminal proceedings but the said allegations were not relied upon as the criminal proceedings were pending for adjudication. It was only during pendency of the appeal

before the High Court that the husband was acquitted in the criminal proceedings. The Hon'ble Supreme Court observed that prosecution had been launched by the wife by making serious allegations against the husband under Section 498-A of the Penal Code which resulted in acquittal. There were observations made that the allegations were of serious nature. The High Court in that context had observed that merely because the wife had filed those proceedings the same would not be a valid ground to hold that it amounted to cruelty. It was observed that though it was true that mere lodging of a complaint or first information report could not be *ipso facto* treated as cruelty when a person undergoes a trial in which he is acquitted of the offence under Section 498-A of the Penal Code it could not be accepted that no cruelty had been meted on the husband. On that count, it was held that the husband had made out a ground for grant of decree of dissolution of marriage on the ground of cruelty.

23. We thus find that the Hon'ble Supreme Court in *Mangayakarasi* (supra) has observed in clear terms that the situation that in every criminal case ending in acquittal it were to be automatically treated as a ground for granting divorce, it would be against the statutory provisions. On the other hand in *Rani Narasimha Sastri* (supra) such acquittal in the criminal proceedings has been considered as furnishing a

ground to make out a case of cruelty. In the light of the fact that the decision in *Mangayakarasi* (supra) has been rendered by the Bench of three learned Judges and is also subsequent in point of time to the decision in *Rani Narasimha Sastri* (supra) rendered by a Bench of two learned Judges, we find ourselves respectfully bound by the decision in *Mangayakarasi* (supra). The factual situation in *Mangayakarasi* (supra) is also somewhat similar to the case in hand inasmuch as the grounds on which decree of divorce on the ground of cruelty was sought were found to be insufficient and the Court proceeded to grant divorce only on the ground that the husband was acquitted in the criminal proceedings initiated by the wife. Such a conclusion without any factual basis was found to be against the statutory provisions.

24. In *Shobha Rani* (supra) the Hon'ble Supreme Court in the context of proceedings for divorce observed in paragraph 10 that the Court was concerned with the matrimonial conduct which constitutes cruelty as a ground for dissolution of marriage. Such cruelty if not admitted is required to be proved on the preponderance of probabilities.

We may also refer to the observations in paragraph 11 of the decision in *Raj Talreja Versus Kavita Talreja* [(2017) 14 SCC 194] which are as under:

> "*11. Cruelty can never be defined with exactitude. What is cruelty will depend upon the facts and circumstances of each*

case. In the present case, from the facts narrated above, it is apparent that the wife made reckless, defamatory and false accusations against her husband, his family members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers. Mere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints. Merely because no action is taken on the complaint or after trial the accused is acquitted may not be a ground to treat such accusations of the wife as cruelty within the meaning of the Hindu Marriage Act, 1955 (for short "the Act"). However, if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse levelling false accusations against the other spouse would be an act of cruelty. ……."

25. We may refer to two decisions of this Court that are relevant in the present context. In *Mr.M Versus Mrs. M* [2014(2) Mh.L.J. 825] the husband had filed proceedings for grant of divorce on the ground of cruelty alleging that the wife had initiated false prosecution against the husband and his family members under Section 498-A of the Penal Code. It was pleaded that the prosecution as conducted resulted in causing mental cruelty to the husband and his family members. The said prosecution had ended in acquittal of the husband and his family members. The Family Court held that the husband had failed to substantiate allegations as made. In the appeal preferred by the husband one of the contentions raised was that since the husband and his family members were acquitted

in the criminal proceedings initiated by the wife it was clear that by filing such a false case the wife inflicted mental cruelty on the husband. The Division Bench took into consideration the manner in which the trial proceeded before the learned Magistrate in the proceedings initiated by the wife. It also considered the evidence on record. In paragraph 27 of the said decision, it has been observed as under:

> "***27.*** *…….Whether an order of acquittal in criminal prosecution lodged at the instance of the spouse amounts to cruelty will depend upon the facts and circumstances of each case. Whether the criminal Court has recorded a finding that the prosecution case was false is again not a clinching factor. Considering the evidence on record, the Matrimonial Court will have to decide whether the prosecution which resulted into acquittal will amount to an act of cruelty. In a given case, depending upon the evidence on record, even if the acquittal is on the ground that the charge could not be substantiated and even if there is no finding recorded by the Criminal Court that the prosecution case was false, there can be a case of cruelty. It depends on the manner in which the complaint is filed and prosecuted.*"

In A Versus B being Family Court Appeal Nos.205 and 206/2007, decided on 13.04.2016 decided at the Principal Seat the facts indicate that the husband had filed proceedings for grant of divorce on the ground of cruelty. The wife filed proceedings seeking maintenance from the husband. While the petition for grant of divorce was dismissed the husband was directed to pay maintenance at the rate of Rs.7,000/-

per month. The husband preferred two appeals. During pendency of the said appeals the petition for divorce was amended on the basis of a subsequent development that was acquittal of the husband and his family members in the criminal proceedings initiated by the wife under Sections 498-A, 406, 354 read with Section 34 of the Penal Code. After framing an additional issue in that regard, the parties were permitted to lead evidence before the Family Court. While considering that evidence this Court found that only a certified copy of the judgment of acquittal passed by the learned Magistrate was placed on record. The copies of notes of evidence in the criminal trial were not placed on record. It was observed after referring to the decision in *Mrs.M* (supra) that only on the basis of the judgment of acquittal, it could not be held that cruelty was established by the husband.

26. The aforesaid decisions thus hold that acquittal simplicitor in the criminal proceedings initiated by the wife against the husband and his family members by itself would not be sufficient to hold that initiation of such proceedings resulted in causing mental cruelty to the husband. In fact in these decisions it is seen that the evidence led before the Criminal Court was placed on record and despite that in the facts of the case the Division Bench held that such evidence was insufficient to hold that the same was a cause of mental cruelty. As noted above in the present case

except for placing on record certified copy of the judgment of this Court in Criminal Application (APL) No.653/2016, there is no further material placed. Neither are the pleadings amended nor is the evidence recorded in the criminal proceedings sought to be brought on record. The judgment in the case of *Bhojraj Sakharam Nagdeve* (supra) is distinguishable in view of the fact that the Court found reference being made to cruelty on account of filing criminal cases in the evidence of the parties therein.

27. In the case in hand, though the criminal proceedings were initiated by the wife in the year 2016 when the proceedings were pending before the Family Court, the husband made no attempt to bring this fact on record. He did not depose that on account of initiation of such proceedings by the wife he and his family members were required to undergo stress and ignominy on account of the criminal proceedings thus resulting in mental cruelty. The judgment of acquittal was placed on record of the Family Court on 18.07.2018 and the impugned judgment was passed on 28.08.2018 which principally relies upon the acquittal of the husband and his family members in the criminal proceedings. We thus find that it was necessary for the husband to have in compliance with the requirements of Section 20(1) read with Section 21 of the Act of 1955 at least pleaded about the initiation of the criminal proceedings by

the wife and its subsequent culmination in an order of acquittal may be by amending the proceedings. Such course not having been followed, it becomes clear that circumstances not pleaded by the husband nor deposed as causing mental cruelty have been taken into consideration for granting the relief of decree of divorce on the ground of cruelty especially when the ground on which such claim was based was not found to be sufficient to pass such decree. Point (b) as framed is accordingly answered by holding that in the facts of the present case initiation of proceedings under Section 498-A of the Penal Code by the wife and subsequent acquittal of the husband and his family members by itself would not amount to causing mental cruelty.

28. **AS TO POINT (c):** The husband has sought divorce on the ground of desertion by his wife. In the divorce petition it has been pleaded that from 26.02.2007 the wife was staying at Mumbai and sometimes at Nagpur with Shri Manish Mehta. The husband tried his level best to contact the wife but she was avoiding to meet him. It was then pleaded that on 24.12.2008 the husband issued a notice that was sent to the Mumbai address as well as Nagpur address of the wife. The said notice however was returned back. Thus according to the husband, the wife had deserted him since 26.02.2007. This is the case as pleaded by the husband in the divorce petition.

In the written statement, the wife has specifically denied having deserted the company of her husband. It has been pleaded that the wife used to reside in her matrimonial home along with her husband and in-laws whenever she returned from Mumbai to Nagpur. Similarly the husband used to reside with the husband intermittently whenever the husband visited Mumbai and other places where the wife was pursuing her training her pilot training.

29. The husband in his affidavit in lieu of evidence at Exhibit 14 has reiterated the case as pleaded in the divorce petition. In his cross-examination he has stated that from January to September-2007 he was working at Nagpur and thereafter he joined the Life Insurance Corporation at Kolkata. He had gone there for training for a period of eight months and it was not possible for him to take his wife at the training centre. He stated that he had no problem with the service of his wife nor did he have any objection to her further education or development. He was in Government service and during that period it was not possible for him to go to Mumbai to fetch his wife. He further stated that he had gone to the address of his wife to meet her at Mumbai. The legal notice sent was on her permanent address. From 26.02.2007 he stated that he had not met his wife or talked to her. He admitted that he had not informed his wife that his father had met with an accident on 04.05.2007 and also that his father had expired on 18.07.2007. He further admitted that the wife had come to attend the

last rites of his father. The husband admitted that after September-2007 he was serving with the Life Insurance Corporation at Kolkata and it was not easily possible for him to go to Mumbai during that period.

The wife in her deposition at Exhibit 67 reiterated the stand taken in the written statement. She further stated in paragraph 10 of her affidavit that she never avoided talking with her husband on phone. She also stated "I was and is interested in staying with my husband and never deserted him since 26.02.2007 as alleged." She stated that she was pursuing the training course for becoming a pilot as per the wishes of her husband. They used to meet and stay together whenever he visited Mumbai and also when they resided at Nagpur. They resided together even after 26.02.2007 at Mumbai, Nagpur and Baramati. She further stated that she tried contacting her husband on his cell phone as well as landline of his residence. After getting information from her colleagues about the death of her father-in-law when she was pursuing her studies at Baramati/ Mumbai she immediately came to Nagpur and attended the rituals when the ashes were immersed. She denied receiving the legal notice. In the cross-examination it was suggested to her that after 26.02.2007 she had resided at Nagpur, Baramati and Mumbai which was admitted by her. She denied that after 26.02.2007 she refused to reside with her husband. She however did not have any documentary evidence to show that she lived along with her husband at Nagpur, Mumbai and Baramati.

30. To constitute desertion, it must be shown that there is an intention to bring the cohabitation permanently to an end thus constituting *animus deserendi*. There must also be a factum of separation. Desertion would be a matter of inference to be drawn from the facts and circumstances of the case and even if there has been separation the question to be considered is whether that act could be attributable to an *animus deserendi*. As observed in *Lachman Utamchand Kirpalani Versus Meena alias Mota* [AIR 1964 SC 40] it is not necessary that desertion would commence when the fact of separation and *animus deserendi* co-exist. It is not necessary that they should commence at the same time. *De-facto* separation may commence without the necessary *animus* or the separation and *animus deserendi* may also coincide in point of time. As per explanation in Section 13(1) of the Act of 1955 the expression "desertion" means desertion by the other party to the marriage without reasonable cause and without the consent or against the wish of such party.

31. From the evidence on record it can be seen that the husband alleges that from 26.02.2007 his wife deserted him and there has been no cohabitation thereafter. He admits however in his cross-examination that he had no objection to his wife pursuing the course in Pilot training. He also did not have any objection to her future education and development. According to the wife she was pursuing her course in Pilot training at Baramati and Mumbai. The same had the consent of her husband. As

and when permissible she stated that she and her husband were residing together at Baramati, Mumbai and Nagpur. The conduct of the wife can be gathered from the fact that after getting information of the death of her father-in-law on 18.07.2007 she immediately rushed to Nagpur to attend the ashes immersion rituals. She got the information about the death of her father-in-law from her colleagues and the husband in his cross-examination has clearly admitted that he did not inform his wife about the fact that his father had suffered an accident in May-2007 and had thereafter expired on 18.07.2007. The fact that the wife immediately chose to come to Nagpur and attend the religious ritual after the death of her father-in-law despite not being informed by her husband clearly indicates absence of *animus deserendi* on her part. The evidence of the husband and wife when considered together indicates that the husband has not been able to prove that the wife had left his company with a view not to rejoin him in future and that it was without reasonable cause. On the contrary the wife was pursuing the training course for becoming a Pilot at Baramati and Mumbai and the husband had no objection to this avocation of the wife. Though it was urged by the learned counsel for the husband that in the written statement it had not been pleaded by the wife that she was willing to resume cohabitation with her husband such statement has been specifically made in paragraph 10 of affidavit of wife at Exhibit 67. In fact there is no suggestion made to her that such statement made by her in paragraph 10 was incorrect.

In the light of the fact that the wife in July-2007 after the death of her father-in-law had come to Nagpur for attending the religious ritual it becomes clear that even at that point of time *animus deserendi* cannot be gathered from her conduct. It is to be noted that the divorce petition was filed on 02.03.2007 and as per the provisions of Section 13(1)(i-b) such desertion has to be for a continuous period of two years immediately preceding presentation of the divorce petition. Seen from this angle the period of two years had not been completed on 02.03.2009 in the backdrop of the admitted position that in July-2007 the act of the wife of attending the religious function after the death of her father-in-law did not indicate her intention to desert her husband. The observations in *Adhyatma* (supra) relied upon by the learned counsel for the wife support her contention. Point (c) is answered accordingly.

32. **AS TO POINT (d)**: The husband by filing a pursis dated 05.07.2019 has sought to bring on record the fact that on 09.12.2018 he got married to one Sweety Dilawarnath Ambade. According to the learned counsel for the wife the appeal challenging the judgment of the Family Court dated 28.08.2018 was filed on 21.12.2018 within limitation and hence in view of the provisions of Section 15 of the Act of 1955 it was not lawful for the husband to have got married in contravention to Section 15 of the Act of 1955. He placed reliance on the decision in *Lata*

Kamat (supra) to substantiate his contention. On the other hand the learned counsel for the husband by placing reliance on the decision in *Lila Gupta* (supra) submitted that a marriage contracted in contravention of Section 15 of the Act of 1955 would not be void and the woman who was so married after passing of the decree for divorce could not be denied the status as a legally wedded wife.

At the outset it may be noted that during pendency of the proceedings before the Family Court the wife by amending the written statement had pleaded that her husband had contracted second marriage with one Sweety Ambade and had thereafter led evidence to substantiate that allegation. The evidence in that regard has been referred to while answering Point (a). The subsequent marriage according to the husband with the same lady is now stated to have been contracted on 09.12.2018. Be that as it may, it is found that in view of the decision in *Lila Gupta* (supra) a marriage contracted in violation of the proviso to Section 15 of the Act of 1955 would not be void but would be merely invalid. The same would not affect the core of marriage and the parties would be subject to a binding tie of wedlock flowing from the marriage. As per the proviso to Section15 of the Act of 1955 it was not lawful for either party to marry again unless the period of one year had elapsed from the date of the decree. This proviso was thereafter deleted in view of the provisions of Section 10 of Act 68 of 1976. This decision rendered by the Bench of

three learned Judges has been subsequently referred to and followed in *Anurag Mittal Versus Shaily Mishra Mittal* [(2018) 9 SCC 691]. It is thus a settled position that a marriage contracted during the period prescribed by Section 15 of the Act of 1955 would not be void but merely invalid.

The decision in *Lata Kamat* (supra) relates to the aspect as to whether the period required for obtaining certified copies of the judgment of the trial Court could be excluded while determining the period stipulated by Section 15 of the Act of 1955. It has been held therein that in view of the provisions of Section 12(2) of the Limitation Act, 1963 the time required for obtaining copies of the impugned judgment would have to be excluded while computing the period of limitation in filing the appeal and thus also for the purposes of Section 15 of the Act of 1955. The present appeal was filed within limitation excluding the number of copying days required for obtaining the certified copy of the judgment of the Family Court.

It is thus clear that in the present case the appeal was filed by the wife within limitation and before "the time for appealing has expired". Prior thereto the husband contracted second marriage. Though it was not lawful for the husband to re-marry the same would not render the alleged marriage said to be contracted by the husband on 09.12.2018 void. In that view of the matter we find that nothing much would turn on

the basis of this subsequent development. Point (d) stands answered accordingly.

33. **AS TO POINT (e)**: A perusal of the impugned judgment indicates that the learned Judge of the Family Court has recorded a finding that filing criminal proceedings under Section 498-A of the Penal Code against the husband and his family members which proceedings came to be quashed by this Court amounted to cruelty on the part of the wife. There is no specific finding recorded that the ground of cruelty as pleaded in the divorce petition had been duly proved on the basis of the evidence led before the Family Court. The ground of cruelty was based on the incident dated 26.02.2007 which has not been proved. While answering Point (a) it has been further held that the allegations made by the wife against the husband in paragraph 29 of the written statement were not unsubstantiated and that she had led evidence to prove the same. Similarly in the absence of any plea or evidence being led by the husband to prove that he had to suffer cruelty on account of initiation of criminal proceedings by the wife, mere acquittal in those proceedings was not sufficient to conclude that this resulted in causing mental cruelty to the husband. In other words, cruelty has been held to be proved not on grounds pleaded but on the assumption that quashing of criminal proceedings in respect of one offence out of two by itself resulted in cruelty.

As regards the ground of desertion the only consideration thereof is in paragraph 57 of the impugned judgment. The fact that the wife after the death of her father-in-law and without being informed of the same by her husband had visited Nagpur to attend the final rites of the deceased father-in-law have not been referred to in the impugned judgment. Only on the premise that after 26.02.2007 the wife did not try to resume cohabitation, a finding has been recorded that she had deserted her husband. This finding has been found to be incorrect while answering Point (c). We thus find that the learned Judge of the Family Court erred in allowing the divorce petition filed by the husband and passing a decree for divorce on the grounds of cruelty and desertion. In terms of Section 23(1) we are satisfied that the grounds pleaded for grant of divorce have not been proved. The impugned judgment thus is liable to be set aside.

34. Though it was urged on behalf of the husband that the facts on record indicated that there was an irretrievable breakdown of the marital ties we find that the same by itself cannot constitute a ground for severing the marital ties by passing a decree of divorce. In the absence of any statutory ground being proved by the husband the decree for divorce cannot be sustained only for the reason that there appeared to be an irretrievable breakdown of the marriage. Point (e) stands answered accordingly.

35. As a result of the aforesaid discussion, the following order is passed:-

(i) The judgment of the Family Court in Petition No.A177/2009 dated 28.08.2018 is quashed and set aside.

(ii) Petition No.A177/2009 stands dismissed.

(iii) Family Court Appeal No.1/2019 is allowed. In the facts of the case the parties to bear their own costs.

(**SMT. PUSHPA V. GANEDIWALA, J.**) (**A.S. CHANDURKAR, J.**)

APTE

At this stage, learned counsel for the respondent prays that the effect of the present judgment be stayed for a period of twelve weeks.

This request is opposed by the learned counsel for the appellant.

In the facts of the case, this judgment shall operate after a period of eight weeks from today.

(**SMT. PUSHPA V. GANEDIWALA, J.**) (**A.S. CHANDURKAR, J.**)

APTE