

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3914 OF 2014
WITH
CIVIL APPLICATION NO. 2820 OF 2015

Sou. Pragati V. Bodkhe & Anr.	..	Petitioners
VS.		
Vyankatesh P. Bodhke	..	Respondent

Mr. Rahul Kate for Petitioners.
Mr. Pratap Nimbalkar for Respondent.

CORAM : M. S. SONAK, J.
DATE: 17 NOVEMBER 2015

P.C. :-

1] Rule. With the consent of the learned counsel for the Respondent, Rule is made returnable forthwith. Even otherwise, by order dated 21 November 2014, the parties were put to notice that this petition will be heard and disposed of finally at the stage of admission.

2] The challenge in this petition is to the order dated 5 February 2014 in Special Darkhast No. 110/2012. The Darkhast was levied for execution of judgment and decree dated 26 September 2013 made by the Civil Judge, Senior Division, Baramati, in Regular Civil Suit No. 141 of 2012. By the said judgment and decree, the Civil Judge has directed the Respondent – husband to pay to the

Petitioners i.e. the wife and her daughter maintenance of Rs.10,000/- per month each from the date of filing of the suit. This judgment and decree has been made under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (said Act).

3] In the course of execution proceedings (Darkhast), the Respondent pointed out that the Judicial Magistrate First Class, Baramati in Criminal Misc. Application No. 167 of 2013 instituted under The Protection of Women from Domestic Violence Act, 2005 (D.V. Act), by order dated 14 March 2013 has directed the Respondent to pay maintenance of Rs.4,000/- per month to the Petitioner and her daughter. On this ground, the Respondent by application at Exhibit '26', urged that the said amounts be set off against the maintenance amounts awarded vide decree dated 26 September 2013. The Executing Court has allowed the Respondent's application at Exhibit '26' and directed adjustment. Hence, the present petition.

4] Mr. Kate, the learned counsel for the Petitioners has submitted that the Executing Court has travelled beyond the decree. In this case, the Civil Court, whilst making the decree dated 26 September 2013 has already taken into consideration the circumstance that the Petitioners were receiving maintenance in

terms of the order of the JMFC dated 14 March 2013. In such circumstances, Mr. Kate, the learned counsel for the Petitioners contended that the impugned order is in excess of jurisdiction.

5] On the other hand, Mr. Nimbalkar, the learned counsel for the Respondent submitted that the decree dated 26 September 2013 has already been appealed against before the District Court. Interim relief was applied for, however the Appeal Court has deferred the hearing therein, in view of interim order granted by this Court on 21 November 2014 in the present petition. That apart, Mr. Nimbalkar submitted that the decree dated 26 September 2013, does not, indicate that the maintenance has been awarded after taking into consideration the order of the JMFC. Mr. Nimbalkar relied upon the decisions of the Hon'ble Apex Court in the case of *Sudeep Chaudhary vs. Radha Chaudhary*¹, *Sanjay Chopra vs. Shyam Chopra*² and decision of the Division Bench of this Court in the case of *Sangeeta Piyush Raj vs. Piyush Chaturbhuj Raj*³, to submit that the amounts of maintenance awarded in criminal proceedings has necessarily to be set off whilst determining the amount of maintenance to be awarded in civil proceedings. Mr. Nimbalkar also made submissions that the Respondent will not be in a position to satisfy the decree / award of maintenance granted by the civil and

1 2000 ALL MR (Cri) 372 (S.C.)

2 2001 (Supp.) Bom. C.R. 739

3 1998 (3) Bom. C.R. 207

the criminal Courts simultaneously in view of the Respondent's financial position. For all these reasons, Mr. Nimbalkar submitted that there is no jurisdictional error in the making of the impugned order and this Court should therefore not interfere with the same.

6] Rival contentions now fall for my determination.

7] It is settled position in law that the Executing Court cannot travel beyond the decree. If the judgment debtor has any grievance against the decree made on merits, then it is appropriate that said judgment debtor institutes an appeal against the decree and persuades the Appeal Court to either set aside the decree or to modify the same. Only if, the judgment debtor is able to make out a case that the decree which is sought to be executed is a nullity, can the Executing Court refrain from executing the decree. It is also open to judgment debtor to raise other defences in the matter of execution of the decree, however, such defences cannot include mere challenge to the decree on the ground that the same is incorrect or, that the same ought not to have been made on the basis of material on record. In the light of such legal position, it is necessary to examine whether the Executing Court, in the facts and circumstances of the present case, has indeed travelled beyond the decree.

8] This is clearly not a case where the Civil Court was unaware of the order dated 14 March 2013 made by the JMFC awarding maintenance at the rate of Rs.4,000/- per month to each of the Petitioners under the provisions of the D.V. Act. In fact, on behalf of the Respondent, a specific plea was raised that order dated 14 March 2013 has already been made by the JMFC and in view of the same, there was no case made out for grant of any further maintenance under the provisions of the said Act. The Civil Court, therefore, upon consideration of the circumstance that maintenance had already been awarded by the JMFC under the provisions of the D. V. Act, but by taking into consideration several other parameters has proceeded to decree the civil suit by grant of maintenance at the rate of Rs.10,000/- per month to each of the petitioners. At this stage, this Court is not concerned with the issue as to whether said award was right or not. That is a matter which will be gone into by the Appeal Court in appeal No. 14 of 2014 instituted by the Respondent against the judgment and decree dated 26 September 2013. However, it is at least clear that award of maintenance at the rate of Rs.10,000/- per month to each of the Petitioners was after, the Civil Judge was made aware of the order dated 14 March 2013 by the JMFC under the D. V. Act. This, to a great extent, seals any contentions that the decree dated 26 September 2013 is a nullity

and therefore, the same should not be enforced or in any case the same can be enforced only after grant of adjustments. Any grant of adjustment by the Civil Court would virtually amount to modification of the judgment and decree dated 26 September 2013. In that sense, the Executing Court by making the impugned order has travelled beyond the decree dated 26 September 2013. Such an exercise is in excess of jurisdiction and therefore is required to be interfered with under Article 227 of the Constitution of India.

9] In the decisions upon which reliance is being placed by Mr. Nimbalkar, no doubt, there are some observations with regard to adjustments of amounts awarded towards maintenance in criminal proceedings, when it comes to determination of amount of maintenance in civil proceedings. However, the observations are in the context of very determination of the maintenance amount. In this case, as noted earlier, the Civil Court after taking cognizance of the amounts awarded under the said Act has proceeded to determine maintenance at the rate of Rs.10,000/- per month in respect of each of the Petitioners. Mr. Kate contends that this itself makes it clear that adjustment has been made and the amount of maintenance at the rate of Rs.10,000/- per month to the Petitioners has been determined after setting off the amount of Rs.4,000/- per month awarded by the JMFC.

10] At this stage, it is not necessary to accept Mr. Kate's submission, particularly since the Respondent has already instituted an appeal against the decree dated 26 September 2013 and the same is pending consideration before the Appeal Court. Suffice to observe however, that the Executing Court lacked any jurisdiction to order adjustments which would virtually be in the nature of modifying the decree made by the Civil Court. In making the impugned order, the Executing Court has exceeded the jurisdiction. Accordingly, the impugned order dated 5 February 2014 made by the Executing Court is set aside.

11] Mr. Nimbalkar has submitted that the Civil Court by interim order dated 28 September 2012 had itself made it clear that if any amount towards maintenance is granted under the D. V. Act, then the same can always be adjusted against the amount of maintenance that may be awarded under the said Act. It is to be noted that the order dated 28 September 2012 was in the context of award of interim maintenance. Thereafter, the suit has itself been disposed of and orders have been made with regard to payment of maintenance. In such circumstances, it cannot be said that the decree dated 26 September 2013 is a nullity. The issue as to whether the same is right or not is a matter which is to be decided

by the Appeal Court in the appeal instituted by the Respondent. However, as long as the decree stands and the execution of the same has not been stayed by the Appeal Court, the Executing Court has no jurisdiction to modify the said decree.

12] Mr. Nimbalkar has however placed on record order dated 16 July 2015 made by the District Judge – 1, Baramati (Appeal Court) in civil appeal No. 14 of 2014 instituted by the Respondent questioning the decree dated 26 September 2013. In the said order, the Appeal Court has refused to consider plea or in any case, deferred the hearing on the application for interim relief made by the Respondent on the ground of pendency of the present petition and the interim order dated 21 November 2014 made by this Court. Now that this petition is being disposed of, it is required to be clarified that the Appeal Court shall consider the Respondent's application for interim relief qua the judgment and decree dated 26 September 2013 in accordance with law and on its own merits. In fact, the Appeal Court is directed to dispose of the Respondent's application for interim relief within a period of three months from today. It is made clear that none of the observations in this order need influence the Appeal Court in matter of deciding the appeal or application for interim reliefs. All contentions of all parties are therefore left open.

13] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

14] In view of disposal of the writ petition, civil application no. 2820 of 2015 does not survive and is disposed of accordingly.

(M. S. SONAK, J.)

Chandka