

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY*****CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 7176 OF 2017**

**Jaideep Ashok Gholkar** )  
**Aged 40 years, Occ : Service,** )  
**Residing at 12, Saptasur Apartment,**)  
**Plot No.9 & 10, Survey No.94,** )  
**Bhusari Colony, Kothrud,** )  
**Pune – 411 038** ) **..... Petitioner**

**VERSUS**

**Rakhee Jaideep Gholkar,** )  
**@ Rakhee Sudhir Shejwalkar,** )  
**Aged 38 years, Occ : Service,** )  
**Residing at C/o. Mr.Sudhir Shejwalkar,**)  
**S-34, Indira Nagari Lane – 15,** )  
**Dahanukar Colony, Kothrud,** )  
**Pune – 411 038.** ) **..... Respondent**

Mr. Nitin P. Dalvi for the Petitioner.

Mr.Abhijeet D.Sarawate for the Respondent.

**CORAM : R.D.DHANUKA, J.**

**RESERVED ON : 20<sup>th</sup> NOVEMBER, 2017**

**PRONOUNCED ON : 30<sup>th</sup> NOVEMBER, 2017**

**JUDGMENT :**

By this writ petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 27<sup>th</sup> May, 2016 below Ex.1 and order dated 26<sup>th</sup> April, 2017 below Ex.56 in P.A.No. 743 of 2015 passed by the learned Family Court No.2, Pune. By an order dated 27<sup>th</sup> May, 2016 below Ex.1, the Family Court No.2,

Pune had allowed the application filed by the respondent wife and had directed the petitioner to vacate the Flat No.12, Saptasur Apartment, Plot Nos. 9 and 10, Survey No.94, Bhusari Colony, Kothrud, Pune – 411 038 within a period of 30 days from the date of the said order. By the order dated 26<sup>th</sup> April, 2017, below Ex.56, Judge, Family Court No.2, allowed the application filed by the respondent and directed the petitioner to provide vacant, peaceful possession of the said flat in compliance with the earlier order passed by the learned Judge, Family Court No.2 and further directed the petitioner to make an appropriate provision of residence of his mother at the place where he was currently residing at Pune or at Karad where she was holding a property. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner and the respondent were married as per Hindu Vedic Rights on 26<sup>th</sup> June, 2004 at Pune. It is the case of the respondent that prior to her marriage, she was working at Microline India Pvt. Ltd. The petitioner was working as a software developer. According to the respondent, the respondent was meted with cruelty by the petitioner and his mother. The petitioner accordingly had filed a petition P.A.No.743 of 2015 *inter alia* praying for decree of divorce against the petitioner on the ground of cruelty and for various reliefs. There was a son born out of the said wedlock to the parties. It is the case of the respondent that the said flat was jointly owned by the petitioner and the respondent. The respondent filed an application (Ex.1) *inter alia* praying that she be inducted in the said flat and prayed for an injunction against the petitioner from entering the said flat on various grounds. The petitioner did not dispute the contribution of the

respondent while purchasing the flat before the Family Court and that the respondent was joint owner of the said flat with the petitioner.

3. Before the Family Court, the respondent placed reliance on the transcript of conversation between the petitioner and the respondent in the form of compact disc containing audio files. The Family Court considered the said transcript of conversation between the parties and observed that the petitioner herein was in abusive relationship with the respondent and the respondent was out of the flat though she had contributed major share while purchasing the flat. The Family Court also observed that there was no record to believe that the respondent had made any attempt to provide such accommodation or the alternative accommodation to the child, since they parted their ways.

4. The Family Court accordingly held that the abusive husband can be asked to vacate the flat to make a room for the respondent wife to enter and live in the flat along with her child. The Family Court accordingly directed the petitioner to vacate the said flat and to handover peaceful possession of the said flat to the respondent herein and the child and permitted the respondent herein to hold interim possession of the said flat till final disposal of the petition. In paragraph (6) of the order, the Family Court directed that after vacating the flat, the petitioner shall not re-enter the flat till rights of the parties are decided finally in the main petition.

5. The petitioner herein filed a writ petition bearing No.7851 of 2016 in this court impugning the said order passed by the Family

Court. The said writ petition appeared before this court on 19<sup>th</sup> July 2016 when the learned advocate for the petitioner herein sought to withdraw the said writ petition stating that he would challenge the impugned order by way of an appeal and the petition was allowed to be withdrawn.

6. Though there was no stay of the order dated 27<sup>th</sup> May, 2016 passed by the Family Court No.2, Pune, the petitioner did not vacate the said flat. The respondent thereafter filed an application (Ex.35) *inter alia* praying for implementation of the said order which was passed below Ex.1 by giving police assistance. The said application was opposed by the petitioner. The petitioner also filed an application (Ex.40) *inter alia* praying for review of the order dated 27<sup>th</sup> May, 2016 on various grounds. By an order dated 1<sup>st</sup> August, 2016, the Family Court No.2 allowed the application (Ex.35) filed by the respondent herein and once again directed the petitioner to vacate the said flat within 30 days from the date of the said order and further directed the petitioner to file an undertaking in that court within seven days from the date of the said order that he would vacate the said flat within 30 days from the date of the order.

7. It was further directed that if the petitioner did not file undertaking as directed within the time contemplated, the police shall help the respondent herein to execute the order dated 27<sup>th</sup> May, 2016. The Family Court made it clear that if the petitioner did not vacate the flat within 30 days inspite of the undertaking, the police shall provide aid to the respondent to peacefully enter in the flat and to peacefully

remove the petitioner from the flat. The Family Court rejected the application filed by the petitioner for review of the order dated 27<sup>th</sup> May,2016.

8. The respondent thereafter filed an application on 17<sup>th</sup> November,2016 *inter alia* praying for execution of the order dated 27<sup>th</sup> May,2016 (Ex.56). The respondent pointed out that inspite of the said order dated 27<sup>th</sup> May,2016, the petitioner had not vacated the said flat. The respondent alleged in the said application that the petitioner had purposely kept his mother at the said house and was not handing over the vacant and peaceful possession of the said flat to the respondent. The mother of the respondent was not the owner of the said property and was a trespasser. It was alleged that these acts on the part of the petitioner and his mother were merely to harass the respondent and with a view to not to give her peaceful and vacant possession of the said house. It was further alleged that the petitioner had called upon the mother to stay in the said flat so that the respondent herein does not get vacant and peaceful possession of the house. The respondent prayed that the petitioner be issued direction to handover peaceful and vacant possession of the said house by giving him direction to leave the house along with his mother and to handover the possession to the respondent herein.

9. By an order dated 26<sup>th</sup> April, 2017, the Family Court No.2, Pune allowed the said application (Ex.56) and directed the petitioner to provide vacant peaceful possession of the said flat in compliance with the earlier order passed by the Family Court and to make appropriate

provision of residence of his mother at the place where he was currently residing at Pune or at Karad where she was holding a property.

10. The petitioner thereafter filed Appeal from Order bearing (stamp) No.25562 of 2016. On 21<sup>st</sup> June, 2017 the petitioner sought leave to withdraw the said appeal from order with liberty to file a writ petition. This court granted the petitioner leave to withdraw the said appeal from order with liberty to file a writ petition. The petitioner thereafter filed this petition *inter alia* impugning both the orders i.e. dated 27<sup>th</sup> May,2016 and 26<sup>th</sup> April, 2017 in this writ petition.

11. Mr.Dalvi, learned counsel for the petitioner invited my attention to various paragraphs of the pleadings filed by the parties and the impugned order passed by the Family Court No.2. He also invited my attention to the order dated 19<sup>th</sup> July, 2016 passed by this Court allowing the petitioner to withdraw Writ Petition No.7851 of 2016 and order dated 21<sup>st</sup> June, 2017 passed by this court allowing the petitioner to Appeal from Order (Stamp) No.25562 of 2016 with liberty to file a writ petition. It is submitted that the respondent wife had already shifted to the residence of her father prior to the date of the filing of the petition bearing no.P.A.No. 743 of 2015 *inter alia* praying for divorce and for various other reliefs. In support of this submission, learned counsel invited my attention to the address mentioned by the respondent of her father in the cause title of the said petition bearing no. P.A.No. 743 of 2015 and mentioning the address of the petitioner herein as the said flat bearing no.Flat No.12, Saptasur Apartment, Plot Nos. 9 and 10, Survey No.94, Bhusari Colony, Kothrud, Pune.

12. It is submitted by the learned counsel that the mother of the petitioner was admittedly not a party to any of the applications filed by the respondent. The Family Court No.2 however has passed an order on 26<sup>th</sup> April, 2017 directing the petitioner to make an appropriate provision of residence of his mother either with him or at Karad where the mother of the petitioner was holding property. He submits that no such order could have been passed by the Family Court No.2 against the mother of the petitioner. He submits that the Family Court No.2 has granted a decree of possession in respect of the suit flat at the interlocutory stage in the proceedings filed under the provisions of Hindu Marriage Act, 1963 by the respondent against the petitioner. He submits that the impugned orders passed by the Family Court No.2 are totally contrary to the provisions of sections 24 and 25 of the Hindu Marriage Act, 1963. He submits that the said petition bearing P.A.No. 743 of 2015 filed by the respondent is still pending before the Family Court at Pune.

13. Mr.Sarawate, learned counsel appearing for the respondent on the other hand invited my attention to the prayers in the P.A.No. 743 of 2015 and more particularly prayer (I) sought by the respondent for an order and direction against the petitioner of permanent mandatory injunction to vacate the said flat and handover peaceful possession thereof with all amenities to the respondent and pass further necessary order thereby prohibiting him from entering the flat again. He also invited my attention to various observations made by the learned Family Court Judge in the order dated 27<sup>th</sup> May,2016. He submits that

it is not disputed by the petitioner that the said flat was the joint property of the petitioner and the respondent. He submits that the Family Court has rendered such finding of joint ownership based on the averments made by the petitioner in his written statement before the Family Court admitting that the respondent was the joint owner of the said flat with the petitioner and had contributed for consideration of the said flat.

14. It is submitted by the learned counsel that the Family Court has also considered the transcript of the conversation between the petitioner and the respondent and rightly came to the conclusion that the petitioner was in abusive relationship with the respondent. Though the respondent was paying EMI of the flat, the petitioner was not paying the EMI and the petitioner was enjoying the flat and the respondent herein was relegated to her parental home at Kothrud, Pune.

15. It is submitted by the learned counsel for the respondent that the petitioner had misguided the Family Court and had though mentioned that he did not want to challenge the order passed by the Family Court in the High Court and had given an undertaking to vacate the flat, he did not vacate the said flat. He submits that on 29<sup>th</sup> June, 2016, the petitioner had made a statement before the Family Court that he did not wish to challenge the order passed by the Family Court and wish to vacate the flat. However, on the same day, he filed a writ petition in this court bearing (Stamp) No.17760 of 2016 which act was contrary to the statement made before the Family Court by the petitioner. It is submitted that the Family Court thus was right in

making such observations in the order dated 1<sup>st</sup> August, 2016 that the petitioner was manipulative husband who has no regard for truth, fairness and justice. He has tried to snatch the order of the Family Court and thereafter challenged the said order.

16. The next submission of the learned counsel for the respondent is that no liberty was granted by the Court in favour of the petitioner on 19<sup>th</sup> July, 2016 when the petitioner sought liberty to withdraw the writ petition. He submits that this writ petition is thus not maintainable.

17. It is submitted by the learned counsel for the respondent that the mother of the petitioner was deliberately asked to stay in the suit flat to deprive the respondent from occupation of the suit flat exclusively along with her daughter. He submits that the Family Court has already made an observation in this regard in the impugned order. The mother of the petitioner already has an accommodation at Karad. He submits that though there is an order of injunction passed against the petitioner not to re-enter upon the said flat, the petitioner has committed breach of the said order and has been regularly visiting the suit flat and also by bringing his mother to the said flat in violation of the order passed by the Family Court. He submits that an appeal is maintainable against such order passed by the Family Court under Section 19 of the Family Courts Act and not a writ petition.

18. Learned counsel for the respondent placed reliance on the judgment of the Supreme Court in the case of **Samir Vidyasagar**

***Bhardwaj Vs. Nandita Samir Bhardwaj, reported in AIR 2017 SC 2713*** and in particular paragraphs 4 and 9 to 13 in support of the submission that the Family Court has ample power to stop the husband from entering in the suit premises and to ask the husband to move out of the matrimonial home and handover vacant and peaceful possession of the same to the wife in appropriate cases.

19. Mr.Dalvi, learned counsel for the petitioner in rejoinder submits that Section 28(2) of the Hindu Marriage Act, 1955 has overriding effect over the provisions of the Protection of Women from Domestic Violence Act, 2005. He distinguishes the said judgment in the case of ***Samir Vidyasagar Bhardwaj (supra)*** on the ground that the provisions of the said Protection of Women from Domestic Violence Act, 2005 and the provisions of the Hindu Marriage Act, 1955 are different and thus the judgment of the Supreme Court in the case of ***Samir Vidyasagar Bhardwaj (supra)*** would not apply to the facts of this case. He submits that the respondent had already left the suit flat in the year 2014 itself and had been staying with her parents since then. Learned counsel once again placed reliance on the address given by the respondent in the cause title of the petition bearing P.A. No.743 of 2015 filed by her in the Family Court.

20. During the course of arguments, this Court enquired with the learned counsel for the petitioner as to why the mother of the petitioner was occupying the said flat and since when. This Court also enquired whether the petitioner was still visiting in the suit flat. Learned counsel for the petitioner informed this Court that the mother

of the petitioner is now staying in the said flat. The petitioner however, has been frequently visiting the suit flat with a view to take care of his mother. He submits that the injunction order granted by the Family Court in favour of the petitioner not to enter upon the said flat will not include his visit to the said flat to take care of his mother.

21. There is no dispute that the petitioner and the respondent had made contribution while purchasing the said flat in which the petitioner and the respondent were staying together after marriage. There is also no dispute that prior to date of filing petition (P.A.No.743 of 2015) by the respondent before the Family Court against the petitioner, the respondent had already shifted to her parents house and has been staying with them.

22. A perusal of the prayers in the said petition filed by the respondent against the petitioner inter alia praying for dissolution of marriage and decree for divorce against the petitioner, the petitioner has also prayed for maintenance and also for permanent mandatory injunction against the petitioner to vacate the said flat and hand over peaceful possession with all amenities therein intact to the respondent and for necessary orders thereby prohibiting him from entering the flat again. In the said petition, the respondent had also brought on record the material about the behaviour of the mother of the petitioner.

23. A perusal of the order dated 27<sup>th</sup> May 2016 passed by the Family Court No.2, Pune clearly indicates that the Family Court had considered the transcript of conversation between the parties which was

filed on record in the form of compact disk containing audio files. The Family Court rendered a prima facie finding that the petitioner herein has shown aggressive conduct and abusive language while speaking to the respondent and had committed domestic violence. The Family Court also rendered a finding that the flat in question is a joint property of the petitioner and the respondent. It was further observed that though the respondent-wife had major/lions share in contribution while purchasing the flat, she was out of flat. Though she was paying EMI of the flat and husband was not paying EMI of the flat, the petitioner was enjoying the suit flat and the respondent was relegated to her parental home. The petitioner himself had admitted the contribution made by the respondent in purchase of the said flat. In these circumstances, the Family Court passed an order that the abusive husband could be asked to vacate the flat to make a room for wife to enter and live in the flat along with her child. The Family Court accordingly directed the petitioner to hand over peaceful possession of the flat to the respondent and her child by vacating the said flat and also granted injunction against the petitioner not to re-enter the flat till rights of the parties are decided finally in the said proceedings.

24. The petitioner however did not implement the said order dated 27<sup>th</sup> May 2016 which compelled the respondent to apply for implementation of the said order by seeking police aid. The petitioner applied for review of the said order. The Family Court passed an order on 1<sup>st</sup> August 2016 thereby dismissing the review application filed by the petitioner and allowed the application (Exhibit-35) filed by the respondent. The Family Court directed the petitioner to vacate the said

flat within 30 days from the date of the said order and also directed him to file an undertaking in the Court within 7 days from the date of the said order. It was made clear that if the petitioner did not file undertaking as directed, the police shall provide help to the respondent herein to execute the order dated 27<sup>th</sup> May 2016 passed by the Family Court. It was also made clear that if the petitioner fails to vacate the flat within 30 days from the date of the said order, the police shall provide aid to the respondent to peacefully enter in the flat and to peacefully remove the petitioner herein from the flat. In the said order, the Family Court made very strong observation about the conduct of the petitioner. It was observed that the petitioner was not bonafide in giving assurance to the Court after the said order was passed. He did not execute that order, but he preferred an application dated 29<sup>th</sup> June 2016. He misguided the Court by making a statement in the Court that he could not make arrangement and sought time. The order dated 20<sup>th</sup> July 2016 speaks volume about his ingenuity. He also made a statement that he did not want to challenge the order of the Family Court and he wished that his child and wife to stay in the said flat. On the same day, he filed a writ petition in this Court. The Family Court made an observation that the petitioner was the manipulating husband who had no regard for truth, fairness and justice. He tried to snatch the order of that Court. The Family Court observed that considering this ingenuity of the petitioner, the Family Court was sure that the petitioner would not vacate the flat as assured by him before the Family Court on 29<sup>th</sup> June 2016 and 20<sup>th</sup> July 2016 and accordingly provided police assistance to the respondent to execute the said order.

25. Learned counsel for the petitioner before this Court also made a statement that he is not pressing the relief against the orders passed by the Family Court against him to vacate the flat in question and to hand over possession thereof to the respondent. He however submits that no order could have been passed by the Family Court against the mother.

26. In so far as the issue raised by the petitioner that since the mother of the petitioner was not a party to the proceedings, no order could be passed by the Family Court, in so far as the mother of the petitioner is concerned, the petitioner has not disputed that the mother was not staying with the petitioner and the respondent in the suit flat and was staying separately in another premises at Karad. The petitioner also has another premises at Pune. The contents of the CD considered by the Family Court clearly indicated that the petitioner had threatened the respondent to bring his mother in the suit flat. It was not the case of the petitioner in any of the pleadings that the mother was already staying in the said suit flat when first two orders were passed by the Family Court i.e. on 27<sup>th</sup> May 2016 and 1<sup>st</sup> August 2016. It is thus clear that the petitioner having been restrained from entering upon the said flat which order has attained finality, the petitioner has deliberately asked his mother to occupy the said flat and to keep the petitioner out of the said flat inspite of three orders passed by the Family Court in favour of the respondent to occupy the said flat exclusively along with her child.

27. The petitioner has made a statement before this Court that even today the petitioner has been frequently visiting the said flat under the guise of taking care of his mother. In my view, such visit of the petitioner to the said flat is in clear violation of the orders passed by the Family Court from time to time. The petitioner is bent upon to violate the orders passed by the Family Court and to see that the respondent-wife is not able to execute the order passed by the Family Court and to occupy the suit flat exclusively with her daughter by keeping the petitioner out who committed domestic violence upon the respondent. Such conduct on the part of the petitioner cannot be permitted by this Court. In my view, what cannot be done directly cannot be done indirectly. The petitioner is prevented from re-entering the flat with a view that the respondent and child stay in the suit flat without any obstructions from the petitioner. The petitioner thus cannot be allowed to keep his mother in the suit flat so as to create obstructions from entering the respondent and her child in the suit flat. Action on the part of the petitioner, in my view, is extremely contemptuous.

28. Merely because the mother was not a party to the proceedings, the mother cannot be placed in the suit flat so as to obstruct the order passed by the Family Court by the petitioner. The petitioner does not dispute that the petitioner as well as his mother had two places of residence as recorded in the impugned order passed by the Family Court. The mother did not file any application before the Family Court for modification of the order passed by the Family Court. Any party obstructing the Court's orders deliberately can be

removed by the Court by passing an appropriate order.

29. In so far as the judgment of the Supreme Court in the case of ***Samir Vidyasagar Bhardwaj (supra)*** relied upon by the learned counsel for the respondent is concerned, Supreme Court had considered the provisions of Protection of Women from Domestic Violence Act, 2005 in the said judgment. The principles laid down by the Supreme Court in the said judgment can be extended in the facts of this case. In view of the liberty granted by this Court to the petitioner to file a writ petition, I do not propose to go into the issue of maintainability of this petition.

30. In my view, the petition is totally devoid of merits. I therefore pass the following order :-

(i) Writ Petition No.7176 of 2017 is dismissed.

No order as to costs;

(ii) The petitioner is directed to implement the order passed by the Family Court No.2, Pune on 26<sup>th</sup> April 2017 within one week from today and hand over exclusive, vacant and peaceful possession to the respondent and her daughter by shifting the mother of the petitioner to some other accommodation as directed by the Family Court in the impugned order dated 26<sup>th</sup> April 2017.

(iii) If the petitioner and his mother do not shift from the said flat in compliance with the earlier order passed by the Family Court and in compliance with this order passed by this Court within 7 days from today and do not hand over exclusive, vacant and peaceful possession to the respondent within the time prescribed, the concerned local police station shall provide the assistance to the respondent to implement the aforesaid orders and to hand over exclusive, vacant and peaceful possession to the respondent and her daughter immediately upon such default, if any, committed by the petitioner.

31. Parties as well as the concerned police station to act on the authenticated copy of this order.

(R.D.DHANUKA, J.)