

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 9455 OF 2018

Mr. Prajeet Budhale
s/o. Prabhakar Budhale

...Petitioner

Versus

Ms. Anjali Ramnath @ Budhale
And another.

...Respondents

....

Mr. Mandar Limaye, Advocate for the Petitioner.
Ms. Kokila Kalra, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 30th AUGUST, 2018
[In chamber, at 2:35 p.m.]

P.C.

1. Heard Mr.Mandar Limaye, learned counsel for the petitioner and Ms.Kokila Kalra, learned counsel for respondent No.1, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner-husband has challenged the order dated 18.6.2018 passed by the learned Judge, Family Court No.3, Mumbai below Exhibit-28 in Petition No.B.69/2017. By that order, the learned trial Judge allowed the application made by respondent No.1, hereinafter referred to as the 'respondent', and directed the petitioner to clear the arrears of Equal Monthly Installment [for short, 'EMI'] of the housing loan borrowed by him for purchasing Flat No.3B, 21, Kalpataru Aura, Opp. R-City Mall,

LBS Marg, Ghatkopar (W), Mumbai – 400 086 (for short, 'suit premises'). The petitioner is further directed to continue to pay regular EMI.

3. In support of this Petition, Mr. Limaye invited my attention to the order dated 26.4.2018 passed by this Court in Writ Petition No.3806/2018. That Petition was instituted by the respondent challenging the order dated 23.2.2018 passed by the Family Court, Mumbai below Exhibit-7 in Petition No.B-69/2017. By that order, the respondent was permitted to withdraw the Petition with liberty to file Petition seeking review of the order dated 23.2.2018. Mr.Limaye submitted that in pursuance of that liberty, the respondent filed application Exhibit-28. He invited my attention to the said application and contended that no ground for review of the order dated 23.2.2018 is made out. He also invited my attention to the impugned order and in particular paragraph-2. The learned trial Judge after going through the contents of the review application observed that “the respondent's application for review needs to be rejected. However, merely because of the mistake of an Advocate, the respondent cannot be penalized”. The learned trial Judge proceeded to consider the application on merits treating the application as fresh application. He submitted that this course was not open to the learned trial Judge and once the learned

trial Judge recorded that no case is made out for review of the order dated 23.2.2018, he should have rejected the application Exhibit-28.

4. Mr. Limaye further submitted that the respondent had filed application Exhibit-15 in Petition NoA-1865/2016 filed by the petitioner under Section 13(1)(ia) of the Hindu Marriage Act, 1955 (for short, 'Act'). The reliefs claimed in the application Exhibit-15 and the reliefs claimed in the applications Exhibits-7 and 28 are identical. Application Exhibit-15 was not pressed. Instead of pressing that application, the respondent filed application Exhibit-7 in Petition No.B-69/2017. He invited my attention to the prayers made in Petition No.B-69/2017 and more particularly prayer clause (e) thereof. By that prayer, the respondent prayed for issuing direction to the petitioner herein to pay EMI of the second respondent ICICI Bank Ltd. (for short, 'Bank'). He submitted that the Family Court cannot entertain application seeking direction against the petitioner herein to pay EMI to the Bank. He relied upon Section 7(1)(a) *Explanation* (c) of the Family Courts Act, 1984 which lays down that the Family Court will have jurisdiction to entertain and try a suit or proceedings between the parties to a marriage with respect to the property of the parties or either of them. The relief claimed in the application Exhibit-28 is beyond the scope of Section 7(1)(a) *Explanation* (c) of the Family Courts Act. The Family

Court, therefore, did not have jurisdiction to entertain and try the application.

5. Mr. Limaye invited my attention to the findings recorded by the learned trial Judge in paragraph-4 where the learned trial Judge observed that the petitioner has not come with specific defence that due to financial constraint, he is not in a position to pay EMI of housing loan. He submitted that the respondent filed application Exhibit-28 on 7.6.2018. The respondent filed additional affidavit on 13.6.2018. The petitioner filed reply to the Review Application on 15.6.2018. However, no opportunity was given to the petitioner to file reply to the additional affidavit filed by the respondent on 13.6.2018. He, therefore, submitted that the impugned order may be set aside thereby restoring the application Exhibit-28 for deciding it afresh with liberty to the petitioner to file reply to additional affidavit of the respondent dated 13.6.2018.

6. Mr. Limaye further submitted that the petitioner does not intend to dispossess the respondent from the suit premises. In fact between July, 2014 and January, 2017 the petitioner was regularly paying EMI to the Bank. He further submitted that the learned trial Judge has passed the impugned order after considering the internet printouts from pages-114 to 125 and observed in paragraph-3 that the

turn-over of of the “Fourth Quadrant” the company run by the petitioner has turn over of 4.4 Million Dollar. As against this, the learned trial Judge ignored the income tax returns submitted by the petitioner. He submitted that the income tax returns have evidentiary value as compared to the internet printouts produced by the respondent. Mr. Limaye submitted that the petitioner has given offer to provide alternate accommodation to the respondent. However, she has refused to accept the offer.

7. Lastly, Mr. Limaye submitted that similar prayer was made by the respondent in proceedings filed before the Additional Chief Metropolitan Magistrate, Vikhroli Court and the learned Magistrate declined to grant said relief. For all these reasons, he submitted that the impugned order deserves to be set aside.

8. On the other hand, Ms. Kalra supported the impugned order. She submitted that the respondent is residing with two children. Her son Dev aged about 10 years is diagnosed with Autism Spectrum Disorder. Having regard to his condition, it is not advisable to shift to any other place. He is comfortable in the suit premises. She invited my attention to paragraph-10 of the order dated 16.3.2017 passed by the learned Magistrate where the learned Magistrate observed that the petitioner is running a company and earning amount of Rs.6 Crores to

Rs.7 Crores per year. She, therefore, submitted that the petitioner has no financial constraints in payment of EMI to the Bank.

9. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. Mr. Limaye submitted that the application Exhibit-28 filed by the respondent is not as per the order dated 26.4.2018 passed by this Court in W.P. No.3806/2018. Though the learned trial Judge observed that no case is made out for review of the order dated 23.2.2018, he treated the application Exhibit-28 as a fresh application. The learned trial Judge should have rejected the application Exhibit-28 as the course adopted by the learned trial Judge was not permissible.

10. On the other hand, Ms. Kalra submitted that the learned trial Judge decided the application on merits regardless of the technicalities. In the facts and circumstances of the present case, the learned trial Judge was fully justified in passing the impugned order.

11. Mr. Limaye further submitted that in view of Section 7(1)(a) *Explanation* (c) of the Family Courts Act, the Family Court was not justified in entertaining and trying the application. I do not find any merit in any of the submissions. It is no doubt true that by order dated 26.4.2018 passed by this Court in W.P. No.3806/2018, the respondent was given liberty to file petition seeking review of the order dated

23.2.2018 passed by the learned trial Judge below Exhibit-7. Though the respondent filed application styled as 'Review Application', a perusal of that application does not indicate that ground for review of the order dated 23.2.2018 was made out. The learned trial Judge thought it appropriate not to relegate the respondent to file application for review and proceeded to decide the application on merits as a fresh application. The petitioner was given opportunity to contest that application. The petitioner filed reply dated 15.6.2018 opposing the application. After considering the merits of the case, the learned trial Judge has allowed that application.

12. Mr. Limaye relied upon Section 7(1)(a) *Explanation* (c) of the Family Courts Act to contend that the Family Court had no jurisdiction to entertain and try application Exhibit-28. Section 7(1)(a) *Explanation* (c) reads thus:

“7. Jurisdiction.-- (1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the *Explanation*; and

(b) xxxxxx

*Explanation.--*The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) xxxxxx

(b) xxxxxx

- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;”

13. A perusal of the above extracted provision shows that the Family Court has and shall exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court **under any law for the time being in force** in respect of the suits and proceedings of the nature referred to in the Explanation (c) amongst others. The relief claimed by the respondent is in respect of the property of the parties in the proceedings between the parties to the marriage. Merely because the Bank is impleaded in the present proceedings that will not oust the jurisdiction of the Family Court to entertain and try the application filed by the respondent. In the case of **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others, (1999) 8 SCC 16**, Apex Court held that order lacking jurisdiction need not be set aside if the result would be the revival of an illegal order. Mr. Limaye submitted that in the first place, this Petition instituted by the petitioner is under Article 227 and not under Article 226 of the Constitution of India. Secondly, by exercising the power by this Court will not result in revival of the illegal order.

14. In the case of **Surya Dev Rai Vs. Ram Chander Rai, (2003) 6 SCC 675**, the Apex Court has dealt with powers of High Court under

Articles 226 and 227 of the Constitution of India. It is also held that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. **The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein.** The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court. Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the

Court in a manner not permitted by law and failure of justice or grave injustice has occasioned. The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

[Emphasis supplied]

15. Applying the tests laid down in the above decision, namely, the paramount consideration behind vesting wide power of superintendence in the High Court under Article 227 of the Constitution of India is paving the path of justice and removing any obstacles therein as the power of superintendence is not subject to the technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction, I do not find any merit in the submission of Mr. Limaye that as application Exhibit-28 did not make out any ground for review of the order dated 23.2.2018 and in view of Section 7(1)(a) *Explanation* (c) of Family Courts Act, the Family Court has no jurisdiction to entertain and try application Exhibit-28.

16. Mr. Limaye submitted that the respondent had filed application Exhibit-15 in Petition No.A.1865/2016 filed by the petitioner under Section 13(1)(ia) of the Act. The reliefs claimed in that

application and the reliefs claimed in the applications Exhibits-7 & 28 are identical. Application Exhibit-15 was not pressed. In view thereof, the learned trial Judge ought to have rejected the application Exhibit-28. This aspect was considered by me in the order dated 26.4.2018 while deciding Writ Petition No.3806/2018. For the reasons stated therein, I do not find any merit in this submission.

17. Mr. Limaye submitted that in paragraph-4 of the impugned order, the learned trial Judge wrongly recorded that the petitioner did not come with specific defence that due to financial constraint, he is not in a position to pay EMI of housing loan. He invited my attention to the written statement and reply dated 15.6.2018. A perusal of the written statement as also the reply dated 15.6.2018 does not remotely indicate the defence taken by the petitioner based on financial constraints. I, therefore, do not find any merit in the submission of Mr. Limaye.

18. Mr. Limaye submitted that the learned trial Judge relied upon the internet printouts from pages-114 to 125 of this Petition. The learned trial Judge did not consider the income tax returns submitted by the petitioner. It is not in dispute that income tax returns were not produced by the petitioner before the Family Court and the same are produced for the first time in this Petition. It is, therefore, not possible to test the validity of the impugned order based on the documents which

were not produced before the learned trial Judge. In view thereof, a suggestion was given to Mr. Limaye that as the learned trial Judge has considered the application Exhibit-28 as a fresh application as also petitioner did not produce documents before the trial Court, the petitioner can consider withdrawing this Petition with liberty to file petition seeking review of the impugned order. Upon taking instructions from the petitioner, Mr. Limaye expressed inability of the petitioner to withdraw the petition and file Review Petition

19. In view thereof, income tax returns submitted by the petitioner cannot be considered. As against this in paragraph-2 of the reply the respondent has produced internet printouts indicating the turnover of 4.4 Million Dollar of "Fourth Quadrant Company" run by the petitioner. That apart in paragraph-10 of the order dated 16.3.2017, the learned Magistrate observed that the petitioner is running a company and earning Rs.6 Crores to Rs.7 Crores per year. Mr. Limaye submitted that in fact the learned Magistrate declined to grant the reliefs claimed by the respondent in the present application. I do not find any merit in the submission. A perusal of the order passed by the learned Magistrate shows that the learned Magistrate observed that he has no jurisdiction to deal with the relief claimed by the respondent.

20. Mr. Limaye submitted that the petitioner does not intend to

dispossess the respondent from the suit premises. It is not possible to accept this submission. It has come on record that as the petitioner did not pay EMI regularly to the Bank, the Bank had invoked the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. The Bank has also initiated the proceedings before the D.R.T. against the petitioner and the respondent. Lastly, Mr. Limaye submitted that the petitioner has offered alternate accommodation to the respondent. Ms. Kalra submitted that in view of the condition of her son Dev, it is not possible for her to shift to any other accommodation. During the course of hearing, a suggestion was given to Mr. Limaye that if the petitioner repays the entire loan amount against the suit premises, the offer of the petitioner can be considered. However said suggestion was not accepted by the petitioner.

21. After considering the material on record, I do not find that the learned trial Judge has committed any error in passing the impugned order and that any case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)