

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.252 OF 2019
IN
FAMILY COURT APPEAL NO.103 OF 2013**

Mamta Hetal Joshi ... Applicant
versus
Hetal Vijaykumar Joshi ... Respondent

Mr. G.N.Pandit, for Applicant.

Mr. Induprakash Tripathi with Ms. Bhagyashri Gawas, for Respondent.

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.
DATE: 20th SEPTEMBER, 2019**

P.C.:

1. This civil application is filed by the wife for multiple prayers. She has however, confined the civil application for only one of them which reads as under :

“(b) That pending the hearing and final disposal of the above appeal, this Hon’ble Court be pleased to vacate the stay granted on the Execution Proceedings bearing No.R.D.No.260 of 2013 vide order dated 8th August, 2014;”

2. It is clarified that rest of the prayers are not entertained in this application leaving it open to the wife to take out independent proceedings if so needed and advised.

3. The above noted prayer arises in the following factual background. The applicant-wife had filed Petition No.C-164 of 2003 claiming maintenance for herself

and for minor son under the provisions of Hindu Adoption and Maintenance Act, 1956. The said application came to be disposed of by the Family Court by its judgment dated 30th March, 2013, operative portion of which reads as under :

“52. In the result, following order is passed :

ORDER

- (i) The petition is decreed with cost.*
- (ii) The respondent is directed to pay maintenance at the rate of Rs.15,000/- per month to the petitioner from the date of order.*
- (iii) The respondent is directed to pay maintenance at the rate of Rs.5,000/- per month to the petitioner for the son Smeet from the date of application for enhancement of maintenance dated 26th April, 2005 till the date of his attaining majority.*
- (iv) The Respondent is also directed to give permanent shelter to the petitioner and son Smeet in the matrimonial home being A-301, Sai Amrut, 3rd Floor, J.S.Road, Dahisar (W), Mumbai within two months from the date of this order.*
- (v) The respondent is further directed to return the petitioner's streedhan to her as per list annexed to the petition, which shall form part and parcel of the decree.*
- (vi) The respondent is hereby permanently restrained from transferring, selling or creating any third party interest in respect of the matrimonial home being A-301, Sai Amrut, 3rd Floor, J.S.Road, Dahisar (W), Mumbai.”*

4. The respondent-husband filed an appeal against the said judgment being Family Court Appeal No.103 of 2013. He also prayed for interim stay in civil

application No.154 of 2013. On 22nd October, 2013 the Division Bench of this Court passed the following order on such civil application :

“1. Heard the learned counsel for the appellant. None appears for the respondent though served.

2. Admit.

3. Interim stay in relation to the direction by the Family Court to return the Stridhan of the Respondent, is granted.”

5. The wife filed civil application No.217 of 2014 seeking certain prayers from the Court, which was disposed of by an order dated 2nd July, 2014 which reads thus :

“Heard the learned advocate for the applicant.

2. Prayer (a) in this application is for expediting the final hearing of the Family Court Appeal No.103 of 2013 along with Civil Application No.154 of 2013. This Family Court Appeal has been admitted on 22nd October, 2013. There are Family Court Appeals of the year 2011 pending for final hearing before this Court. We see no reason to give preference to this matter, hence, as far as prayer clause (a) which is for expediting the Family Court Appeal is concerned, the said prayer is rejected.

3. Another prayer in this application is to direct the appellant to quit, vacate and give peaceful possession of the matrimonial home as a permanent shelter to the applicant-wife and son. This prayer cannot be considered at the interim stage, hence, prayer clause (b) is also rejected at this stage.

4. The Civil Application is disposed of accordingly.”

6. The wife had filed execution application before the family court and pressed

for the recovery of maintenance awarded by the family court which the husband had not paid as well as for recovering the possession of the immovable property as per the judgment of the family court. The family court had also passed certain orders in such application for enriching the husband from this property, at which stage, the respondent-husband approached the High Court by filing civil application No.272 of 2014, which application contained the following reliefs :

- “(a) This Hon’ble Court by its order and direction be pleased to direct the restoration of the premises viz. A-301, Sai Amrut, 3rd Floor, Jaywant Sawant Road, Dahisar (W), Mumbai – 400 068 to the applicant.*
- (b) This Hon’ble Court by its order and direction be pleased to take such action against the respondent for misleading the family court and obtaining the order dated 16th July, 2014 including the action of contempt as may be deemed fit and proper by this Hon’ble Court.*
- (c) Pending the hearing and final disposal of the civil application, this Hon’ble Court be pleased to stay the effect of the order dated 16th July, 2014 passed in R.D.No.260 of 2013 in Petition No.C-164 of 2003.*
- (d) Pending the hearing and final disposal of the civil application, this Hon’ble Court by its order and direction be pleased to permit the applicant to use, occupy and enjoy his residential premises viz. A-301, Sai Amrut, 3rd Floor, Jaywant Sawant Road, Dahisar (W), Mumbai – 400 068.*
- (e) Interim and ad-interim relief in terms of prayer (c) and (d) as above.*
- (f) cost of the application be provided.”*

7. This civil application came to be disposed of by the Division Bench of this

Court by an order dated 8th August, 2014 operative portion of which reads as under :

“13. In view of the above, we pass the following order :

(i) The advocate representing the Respondent wife is hereby discharged with immediate effect.

(ii) Execution proceedings bearing R.D.No.260 of 2013 arising out of judgment and decree dated 30th March, 2013 passed in Petition No.C-164 of 2003 are hereby stayed till further orders from this Court.

(iii) The Civil Application is accordingly allowed in terms of prayer clauses (a) and (d).”

8. This order was based on the fact that though this Court had passed two orders on 22nd October, 2013 and 2nd July, 2014, the wife without disclosing such facts to the family court, persuaded the family court to commence execution of its judgment directing the husband to vacate the premises. The court recorded prima facie conclusion that the wife had thus committed contempt, but left the husband to pursue the contempt proceedings if so advised. The Court in order to pass the said final order had made following observations :

“11. It is clear from the bare reading of the order dated 30th March, 2013 passed by the Family Court, Mumbai in Petition No.C-164 of 2003 that there is no decree for vacant and peaceful possession of the said matrimonial home i.e. Flat No.301, 3rd Floor, Sai Amrut, J.S.Road, Dahisar (W), Mumbai. What has been granted to the Respondent wife is the permanent shelter to the Respondent wife and son Smeet in the said matrimonial home and therefore, also the claim of wife for vacant and peaceful possession of the

said home/flat is beyond the scope of decree. It is the settled position of law that the executing Court cannot go beyond the scope of decree.

12. Learned counsel for the Applicant husband at this stage has prayed before this Court that in view of the peculiar facts and circumstances of the present case, the execution proceedings pending on the file of the Family Court, Mumbai bearing R.D.No.260 of 2013 may be stayed. After giving our anxious consideration to the facts and circumstances coupled with the conduct of the Respondent wife, we feel that this is a fit case to stay the execution proceedings before the Family Court, Mumbai, in the interests of justice, till further orders, by this Court.”

9. Through this civil application, the wife seeks an order from the Court vacating the stay granted against execution proceedings. The main contention of the counsel for the wife is that whatever be the outcome with respect to the residential premises, at any rate, the wife cannot be denied maintenance from the husband for herself and minor son (till he attained majority), since that part of the judgment of the family court has not been stayed by the High Court at any point of time. The wife is unable to execute the directions for maintenance and is thus, unable to maintain herself.

10. On the other hand, Counsel for the respondent put a strong resistance to this civil application, firstly contending that the same is in the nature of review petition. It is filed long after the order was passed by this Court. In any case, review petition can heard only by the Bench which passed the original order.

11. At the outset, we may clarify that we are not exercising review jurisdiction. The civil application is not filed in the nature of review petition, is not styled in the nature of review petition and is not addressed as such. The facts are noted at some length to note the reasons for the ultimate order that came to be passed by this Court on 8th August, 2014. We may recall, the Court had passed two interim orders. First was 22nd October, 2013 when while admitting the family court appeal of the husband, only interim stay was granted was in relation to the directions issued by the family court for return of the stridhan. In other words, in such order, there was no stay against the order for payment of maintenance. The order dated 2nd July, 2014 came to be passed in civil application filed by the wife. She had prayed for expeditious hearing of the appeal, which was refused. She had also prayed for directions to the husband to vacate the premises in question and handover peaceful possession to the wife, which was also refused on the ground that the same cannot be considered at an interim stage.
12. When withholding these orders from the family court, the wife sought execution for vacating the premises, this Court took exception to her conduct as recorded by the said order dated 8th August, 2014. Before we understand the true purport of the final order passed by the Court, we may refer to the prayers made by the husband in the application in which the said order came to be passed, which have been reproduced in an earlier portion of this order.
13. His prayers were for restoration of the premises, the possession of which he

had lost on account of the execution proceedings. He had also prayed for action against the wife for misleading the family court. The remaining prayers were in the nature of interim prayers for staying the further execution proceedings. Thus, the entire civil application of the husband was also centered around his grievance of the wife having misled the family court and obtained the possession of the premises. This civil application did not concern that part of the execution proceedings, which related to the payment of maintenance.

14. When this Court therefore, disposed of the civil application by the said order dated 8th August, 2014, the question of payment of maintenance to the wife and the minor son was not in the mind of the Court at all. When the Court therefore, stayed the further proceedings in the execution petition before the family court, the Court had only the question of handing over the possession of the premises in mind. This would also be clear from clause (iii) of the operative portion of the order, which records that the civil application is allowed in terms of prayers (a) and (b). Prayer (a) is for restoration of the possession of the husband of the premises in question. Prayer (b) is in the nature of interim prayer for occupying the possession. Thus, the Court primarily intended to restore the status quo ante by reinstating the husband in the premises in question.

15. The Court in the said order dated 8th August, 2014 had not connected the wife's entitlement of maintenance to her conduct. Learned counsel for the respondent

however, submitted that due to her conduct, the wife would disentitle herself from receiving maintenance also. For several reasons, this contention cannot be accepted. Firstly, the order of maintenance was passed long before the wife attempted misleading the family court in the execution proceedings, which was in connection with the vacation of the premises. Secondly, even if the conduct of the wife in this respect was not aboveboard, the law does not require her to starve. Lastly, in any view of the matter, how does the counsel for the husband expect the minor child to not receive maintenance on account of the behaviour of the wife ? All told, we are clear, this Court did not have the intention to stay that part of the execution proceedings before the family court, which related to payment of maintenance to the wife and son. With these clarifications, we provide that continued the stay against the execution of the family court judgment regarding the stridhan and the premises in question, would not prevent the wife from proceeding further, as also the family court from proceeding further and deciding the execution petition so far as it relates to the non payment of the maintenance to the wife and son.

15. With these clarifications and declarations, the Civil Application is disposed of.

(S.J.KATHAWALLA, J.)

(AKIL KURESHI, J.)