

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO. 2 OF 2021
IN
FAMILY COURT APPEAL NO. 122 OF 2019

Dr.Akshay Arun Ranade

..... Petitioner

VERSUS

Dr.Mrs.Sarika Akshay Ranade

..... Respondent

Mr.Omkar S. Paranjape for the Review Petitioner/Org.Respondent.

Mr.Abhijit D. Sarwate a/w. Mr.Ajinkya Udane for the Original Appellant.

CORAM: R. D. DHANUKA AND
V.G.BISHT, JJ.

DATE : 29th JUNE, 2021
(THROUGH VIDEO CONFERENCE)

P.C:-

By this review petition, the review petitioner (original respondent) seeks recall of the paragraph 52 of the judgment dated 7th April, 2021 delivered by this Court in Family Court Appeal No. 122 of 2019. The review petition is vehemently opposed by the learned counsel for the original appellant by filing affidavit in reply. The review petitioner has filed rejoinder to the said affidavit in reply.

2. Mr.Paranjape, learned counsel for the review petitioner submits that when the judgment was pronounced by this Court on 7th April,

2021, there was no pronouncement by this Court that the order of maintenance passed by this Court on 6th December, 2019 in favour of the daughter Miss Sia to continue and is not affected by the said judgment dated 7th April, 2021. He submits that no notice was issued to the review petitioner by the original appellant when any such clarification was sought after pronouncement of the judgment on 7th April, 2021.

3. It is submitted by the learned counsel for the review petitioner that the said order of maintenance was filed in Interim Application No. 167 of 2019 in Family Court Appeal No.122 of 2019 which appeal was filed by the original appellant. Since the said Family Court Appeal No.122 of 2019 filed by the original appellant has been dismissed by this Court by the said judgment on 7th April, 2021 on the ground of maintainability, the interim orders passed by this Court in the Interim Application filed in the Family Court Appeal filed by the original appellant also came to be vacated automatically.

4. Mr.Sarwate, learned counsel for the original appellant on the other hand invited our attention to the annexures to the affidavit in reply filed by his client in this review petition and would submit that both the parties had impugned the judgment delivered by the Family

Court by filing separate appeal. His client filed Appeal No.122 of 2019 whereas the review petitioner filed Family Court Appeal No. 56 of 2017. He submits that the Roznama would clearly indicate that both the appeals and the interim application were clubbed and were heard together by this Court from time to time. By a common order passed by this Court on 30th August, 2019 both the appeals were admitted. He submits that even if there was any mistake according to the review petitioner in the said order dated 30th August, 2019, while granting order of maintenance in favour of the daughter of the parties by mentioning the number of the said Interim Application as 167 of 2019 in Family Court Appeal No.56 of 2017, the review petitioner never raised any objection and did not apply for correction of the said alleged mistake.

5. The next submission of the learned counsel is that even if there is any mistake on the part the Court in mentioning the wrong number of the appeal in the said order dated 6th December, 2019, the original appellant cannot be made to suffer because of such mistake.

6. The last submission of the learned counsel for the original appellant is that the said paragraph 52 in the judgment dated 7th April, 2021 was added by this Court immediately after the judgment was

pronounced and not later and thus no case is made out for the recall of the said paragraph. It is submitted that no grounds as required under Order 47 Rule 1 of the Code of Civil Procedure are set out in the entire petition.

7. Mr.Paranjape, learned counsel for the review petitioner in his rejoinder argument submits that the learned counsel for the original appellant does not dispute that the said Interim Application for maintenance was filed by the original appellant in the Family Court Appeal filed by his client and not in the Family Court Appeal filed by the review petitioner. He submits that merely because the Family Court Appeal number is mentioned as 56 of 2017 in the said order passed by this Court, that would not change the fact that the Interim Application for maintenance was filed by the original appellant in the Family Court Appeal filed by her and not in the Family Court Appeal filed by the review petitioner. He submits that even subsequently affidavits were filed by the original appellant in support of the said claim for maintenance in the said Interim Application which was filed in Family Court Appeal No.122 of 2019 and not in the Family Court Appeal No. 56 of 2017.

8. It is submitted by the learned counsel that no notice was given to

the review petitioner by the original appellant before seeking any clarification of the judgment dated 7th April, 2021 when the said judgment was pronounced. He also strongly placed reliance on the observations made by this Court in the said order dated 27th April, 2021 in this review petition.

9. Insofar as the first submission of the learned counsel for the original appellant that no grounds for review are set out in the review petition is concerned, a perusal of the grounds set out on pages 4, 5 and 6 of the review petition would clearly indicate that it is the case of the review petitioner that there are errors apparent on the face of the judgment delivered by this Court. The said paragraph (52) was added subsequently and was not in the judgment when the same was pronounced by this Court. In our view sufficient grounds are set out in the review petition to attract Order 47 Rule 1 of the Code of Civil Procedure, 1908.

10. A perusal of the said judgment and more particularly paragraphs 51 and 52 would clearly indicate that this Court had already signed the said judgment with 51 paragraphs immediately after pronouncement. After pronouncement of the said judgment, after few matters were called out, the original appellant mentioned the matter for clarification.

This Court was under an impression that the notice was given to the review petitioner for mentioning the said matter again after sometime for seeking clarification on the issue of maintenance. On this premise, we made it clear that the order of maintenance passed by this Court on 6th December, 2019 in favour of the daughter Miss Sia to continue and was not affected by the said judgment dated 7th April, 2021. After clarifying the said issue, we once again signed the said judgment as is apparent at page 46 of the review petition. We accordingly, in the said order dated 27th April, 2021 in this review petition observed that Mr.Paranjape, learned counsel for the review petitioner is right in his submission that the original appellant had applied for clarification of the judgment not immediately after pronouncement of judgment but later without giving any notice to the review petitioner. There is thus no substance in the submission of the learned counsel for the original appellant.

11. insofar as submission of the learned counsel for the appellant that both the proceedings were clubbed together and therefore review petitioner could not be allowed to take any advantage of the mistake if any of this Court in the order dated 6th December, 2019 is concerned, upon raising a query to the learned counsel for the original appellant whether the said Interim Application No. 167 of 2019 for seeking

maintenance of the daughter Sia was filed by his client in Family Court Appeal No.56 of 2017 or the same was filed in Family Court Appeal No. 122 of 2019, learned counsel for the original appellant confirmed that the said Interim Application No. 167 of 2019 was filed by his client not in Family Court Appeal No.56 of 2017 but was filed in Family Court Appeal No.122 of 2019. It is thus clear that the number of Interim Application mentioned in Family Court Appeal No.56 of 2017 in the order dated 6th December, 2019 while granting maintenance to the daughter Sia was an inadvertent error. It is nobody's case that the said Interim Application No.167 of 2019 for maintenance was filed in the Family Court Appeal No. 56 of 2017. None of the parties applied for correction of the said inadvertent error in the said order at any point of time.

12. Be that as it may, the fact remains that the said Interim Application was filed in Family Court Appeal No. 122 of 2019 filed by the appellant. In our view, Mr.Paranjape, learned counsel for the review petitioner is thus right that since the said Family Court Appeal No. 122 of 2019 filed by the original appellant is dismissed by this Court by judgment dated 7th April, 2021 on the ground of maintainability, all interim orders passed in the said Family Court Appeal No. 122 of 2019 stood vacated automatically. If the original

appellant would have given a notice to the review petitioner before seeking clarification of the said order and would have pointed out the order fact that the said Interim Application was filed in her own appeal, this Court would not have passed the said clarification as made in paragraph (52) of the judgment dated 7th April, 2021.

13. Insofar as last submission of the learned counsel for the original appellant that in view of the mistake of the Court if any, the parties should not suffer, we do not dispute about this proposition of law canvassed by the learned counsel for the original appellant. The appellant however cannot be allowed to take advantage of the typographical error in the said order passed by this Court by canvassing before this Court that both the proceedings were heard together and thus the said order for maintenance though passed in the Interim Application filed by her in her own appeal would not stand vacated though Family Court Appeal filed by her is dismissed as not maintainable.

14. We accordingly pass the following order :-

(a) Review petition is made absolute in terms of prayer clause (a).

(b) Paragraph (52) of the judgment dated 7th

April, 2021 is deleted from the said judgment.

(c) There shall be no order as to costs.

[V.G.BISHT, J.]

[R. D. DHANUKA, J.]

. After deleting paragraph 52 from the said judgment dated 7th April, the said judgment read as under :-

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO.122 OF 2019

DR.MRS.SARIKA AKSHAY RANADE)
 Aged 40 years, Occupation : Doctor)
 Residing at – C/o. Shri. D. C. Bhagat)
 Ashirvad, Prabhat Road, Lane No.4, Pune.)...APPELLANT

V/s.

DR. AKSHAY ARUN RANADE)
 Aged 43 years, Occupation : Doctor)
 Residing at – C/o. Shri.Arun Laxman Ranade)
 Bungalow No.34, Shreesh Society, Hajuri Road)
 Opposite LIC, Thane (W))...RESPONDENT

Mr.Abhijit Sarwate, Advocate for the Appellant.

Mr.Omkar Paranjape, Advocate for the Respondent.

**CORAM : R. D. DHANUKA &
 V. G. BISHT, JJ.**

RESERVED ON : 18th FEBRUARY 2021
PRONOUNCED ON : 7th April, 2021

JUDGMENT : (PER : V. G. BISHT, J.)

1 This Family Court Appeal is directed against the orders passed by the Family Court No.5, Pune on Exh. 77 (application for appointment of Commissioner) on 16th December 2014, Exh. 285 (application for maintenance and other reliefs under Sections 24, 25 and 26 of Hindu Marriage, 1955) on 18th July 2016, Exh. 391 (application for amendment) on 8th August 2016 and on Exh. 403 (application under Sections 18, 19(8), 20 and 22 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “ the Domestic Violence Act” for the sake of brevity) on 22nd August 2016. By these impugned orders, the learned Judge of the Family Court partly allowed the application at Exh. 285 to the extent of granting interim maintenance to daughter of the appellant-wife and rejected all the other applications.

2 Before we summarize the subject matter of all those

applications, we deem it appropriate to indicate that those applications were taken out by the appellant – wife herein in Marriage Petition being PA No.459 of 2010 under Section 9 of Hindu Marriage Act, 1955 (for short “the Act”) with allied reliefs by the respondent – husband. We also note from the record that said Marriage Petition culminated into dismissal on 16th December 2016. It is only after dismissal of the petition, the appellant-wife by way of present appeal is now assailing the impugned orders although those orders came to be passed on various dates, as noted hereinabove, that is during the pendency of the petition and admittedly exception to those orders were never taken during the pendency or at any earlier point of time before the dismissal of main petition or when the petition was very much on record before the Family Court.

3 The appellant-wife herein moved an application at Exh. 77 on 8th February 2012 contending therein that she and her husband had a joint locker bearing No.569 at Buldhana Urban Co-operative Bank at Prabhat Road Branch, Pune. Her stridhan and ornaments belonging to Miss Sia i.e. daughter are kept in the

locker, the keys of which are in possession of the husband. According to her, articles kept in the locker are mentioned in the list annexed therewith and are the exclusive property of her and daughter. Since the husband had refused to part with the keys, she requested to appoint a Court receiver with a direction to open the locker in the presence of both the parties, make an inventory of the articles in the locker and hand over those articles to her. This application was resisted by respondent-husband by filing his say (Exh. 121) on 18th March 2014 and out rightly denied that the articles kept in the locker are the exclusive property of his wife and daughter and strongly opposed the appointment of any Court commissioner.

4 The appellant-wife then moved another application at Exh. 285 on 19th January 2016 under Sections 24, 25 and 26 of the Act claiming therein permanent alimony, reimbursement of expenses, enhanced interim maintenance, retention of child custody and provision for accommodation/residence. This application was also resisted by the respondent-husband by filing his say (Exh. 313) by contending that the essential precondition

which is required for claiming maintenance under Sections 24, 25 and 26 of the Act is that she should make out a clear cut case in the pleadings bonafidely disclosing all her incomes, investments, assets and all other relevant facts and has to make out a case as to how she is unable to maintain herself or her child out of her own income. Moreover, maintenance of child is not covered under Section 24 of the Act so also permanent alimony under Section 25 of the Act as his petition is for restitution of conjugal rights.

5 The appellant-wife further moved an application at Exh. 391 on 27th July 2016 seeking amendment of her written statement. By the proposed amendment she wanted to include in her written statement certain suggestions appearing in the cross-examination in criminal proceedings between her and her husband about ornaments, forcible attempt made by her husband to take away her daughter from the school, counter-claim claiming dissolution of marriage on the ground of cruelty, custody of daughter, permanent alimony and permanent maintenance and as also other reliefs. This application was also

resisted by the respondent-husband by filing his say on 30th July 2016. According to him, the proposed amendment was in no way related to issues or matters in controversy. Similarly, no counter-claim can be filed by her by way of amendment of her written statement as the same was clearly barred by limitation and also barred due to waiver of alleged rights by her.

6 The appellant-wife then lastly filed an application at Exh. 403 on 16th August 2016 under Section 18, 19(8), 20 and 22 of the Domestic Violence Act thereby claiming reliefs in the form of protection orders, directions to the husband to return her stridhan, monetary reliefs and compensation. This application was also opposed by the respondent-husband by filing his say on 18th August 2016. According to him, Section 26 of the Domestic Violence Act does not contemplate seeking of reliefs by filing such an application but there has to be pleading in respect of that. He further contended that filing of an application under the said Act seeking reliefs exclusively under the said Act, especially when no relief is claimed in the written statement on record is not contemplated under Section 26 of the Domestic Violence Act

and therefore, the application was not tenable.

7 The learned Judge of the Family Court after hearing both the parties on the above noted applications at various exhibits was pleased to allow Exh. 285 partly and reject remaining applications.

8 This Court (Coram : K. K. Tated & N.R.Borkar, JJ.) on 13th October 2020 had posed a query to learned counsel for the appellant-wife as to how the present appeal filed under Section 19 itself is maintainable impugning the interim orders passed by the Family Court. This Court vide order dated 13th October 2020 directed the appellant-wife to file her written submissions, if any, along with authorities explaining how the present appeal itself is maintainable and at the same time also granted liberty to the respondent-husband to file written submissions, if any, to that effect.

9 Pursuant to the above direction/order, the appellant-wife has filed affidavit cum written submissions along with authorities relied on by her as to how the present appeal is

maintainable. The appellant-wife has relied on **Smt.Sukhrani (dead) by L.R's and Others vs. Hari Shankar and Others¹, C.V.Rajendran and Another vs. N.M.Muhammed Kunhi², Satyadhyan Ghosal and Others vs. Smt.Deorjin Debi and Another³, Rajashri Alias Rajani and others vs. Maria Elsa De Noronha Wolfango Da Silva⁴ and Shri Ramo Barman and Others vs. Smt. Dagripriya Kachari and Others⁵**. Similarly, the respondent-husband has also filed written submissions along with copies of the judgments in support of his case to show that the present appeal is not maintainable. The respondent-husband placed reliance on **Sunil Hansraj Gupta vs. Payal Sunil Gupta⁶ and Smt.Amishi Milan Honawar vs. Shri Milin Bhavanishankar Honawar (Coram : R.M.S. Khandeparkar & Anoop V. Mohta, JJ.)⁷**.

10 We have perused the written submissions and as also the judgments. We have also heard Mr.Sarwate, learned counsel for the appellant-wife and Mr.Paranjape, learned counsel for the

1 AIR 1979 SUPREME COURT 1436

2 (2002) 7 Supreme Court Cases 447

3 AIR 1960 Supreme Court 941

4 LAWS (BOM) 2010 2 77

5 AIR 1992 GAUHATI 72

6 AIR 1991 BOMBAY 423

7 Family Court Appeal No.7 of 2005 decided on 14th June 2005

respondent-husband. They have practically reiterated the stand taken by them in their written submissions.

11 There is hardly any dispute to the fact that parties to the petition are governed under the provisions of the Family Court Act. Even in the written submissions the appellant-wife has contended at paragraph 9 that “Order 43 Rule 1 of the Civil Procedure Code, 1908 does not contemplate an appeal against the impugned orders. Further, considering that the proceedings are from Family Court, being special law, Family Court Act would be applicable.”

12 The preliminary objection sought to be raised on behalf of respondent-husband to the present appeal is to the effect that impugned orders having been passed during the pendency of the proceedings for restitution of conjugal rights and since it did not determine the rights of the parties upon which the main dispute would have been decided, it are interlocutory orders within the meaning of Section 19(1) of the Family Court Act and, therefore, no appeal lies under the said provision of law.

The learned counsel for the respondent-husband has placed reliance on **Sunil Hansraj Gupta (supra) and Smt.Amishi Milan Honawar (supra).**

13 The learned counsel for the appellant-wife, on the other hand, has strenuously submitted that the impugned orders cannot be termed as “interlocutory orders” as these orders affect the substantive rights of the appellant-wife and this being so, impugned orders are not interim orders. Reliance is sought to be placed on the decision of the Hon'ble Apex Court in case of **Satyadhyan Ghosal and Others (supra).**

14 In the above backdrop, Section 19 of the Family Court Act assumes significance and needs to be understood in proper perspective. Section 19 reads thus :

“**19. Appeal** – (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on

facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties 1[or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991].

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to

the regularity of such proceeding.]

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

15 It does not take much discernment from the plain reading of the provision that an appeal would lie from every judgment or order, not being an interlocutory order of a Family Court to the High Court, both on facts and on law. Sub-section (4) engrafts revisional power of High Court against the orders passed by the Family Court. What should engage attention at once is that even revisional powers so vested in the High Court cannot be exercised in relation to the interlocutory order as there is a statutory bar contemplated in that regard under sub-section (4). In substance, any interlocutory order passed by the Family Court is neither appealable nor revisable. This leads to a straight question as to the implication of the term "interlocutory order".

We do not find anywhere in the Family Court Act having defined or described the term “interlocutory order”.

16 It would be apposite to refer usefully oft quoted decisions of the Hon'ble Apex Court given in **Madhu Limaye vs. State of Maharashtra**⁸ and **V.C.Shukla vs. State**⁹ which were also referred to in the decisions relied upon by the learned counsel for the respondent-husband i.e. in **Sunil Hansraj Gupta (supra)** and **Smt.Amishi Milan Honawar (supra)**.

17 In **Madhu Limaye's case (supra)** the Court observed that “ordinarily and generally the expression “interlocutory order” has been understood and taken to mean as a converse to the terms “final order”. It was further held that an order which does not deal with final rights of the parties, but either (i) is made before judgment and gives no final decision on the matter in dispute but is merely on a matter of procedure, or (ii) is made after judgment and merely directs how the declaration of rights already given in the final judgment are to be worked out, is termed “interlocutory order”.

8 AIR 1978 SC 47

9 AIR 1980 SC 962

18 In **V.C.Shukla's case (supra)** after taking resume of various decisions on this topic, the Hon'ble Apex Court in paragraph 21 made following observations :

“21Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for..... Four different tests for ascertaining the finality of a judgment or order have been suggested:

(1) Was the order made upon an application such that a decision in favour of either party would determine the main dispute? (2) Was it made upon an application upon which the main dispute could have been decided? (3) Does the order, as made, determine the dispute? (4) If the order in question is reversed, would the action have to go on."

In paragraph 23 at page 978 it was held :

“23 Thus, summing up the natural and logical meaning of an interlocutory order, the conclusion is inescapable that an order which does not terminate the proceedings or finally decides the rights of the parties is only an interlocutory order. In other words, in ordinary sense of the term, an

interlocutory order is one which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however conclude the trial at all.....”

After reviewing various authorities, Shri Justice Fazal Ali then held, at page 982, paragraph 30 :

“30Thus, the Federal Court in its decision seems to have accepted two principles, namely,-
(1) that a final order has to be. interpreted in contradistinction to an interlocutory order; and
(2) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties.”

The Hon'ble Apex Court later, in paragraph 33, amplified these observations, saying :

(1) that an order which does not determine the rights of the parties but only one aspect of the suit or the trial is an interlocutory order;
(2) that the concept of interlocutory order has to be explained. in contradistinction to a final order.

In other words, if an order is not a final order, it would be an interlocutory order.”

19 After surveying and taking stock of the various decisions of the Hon'ble Apex Court on the subject of interlocutory order, the Division Bench of this Court in **Sunil Hansraj Gupta (supra)** has held that :

“Upon review of various decisions of the Supreme Court we put that the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought, but not a final decision or judgment in the matter in issue.”

20 Needless to say, the decision in **Sunil Hansraj's case Gupta (supra)** was in relation to the order regarding interim maintenance, which was found to be interlocutory and, therefore, not maintainable under Section 19(1) of the Family Court Act.

21 Similarly, the decision in **Smt.Amishi Milan Honawar's case (supra)** was in relation to an interim injunction order restraining the wife from preventing the respondent-husband and other members of his family in having access, use

and utilisation of the Flat No.B-13 in the proceedings for divorce pending before the Family Court. The Division Bench of this Court in the above premise held that the impugned order had been passed during the pendency of the proceedings and cannot have existence or enforceability after the disposal of the main proceedings unless it is specifically protected by the Family Court at the time of the disposal of the main proceedings. Being so, the impugned order is an interlocutory order and, therefore, is not appealable under Section 19(1) of the Family Court Act.

22 Reverting to the facts of the case in hand, unquestionably the impugned orders had been passed on various applications referred hereinabove during the pendency of the proceedings for restitution of conjugal rights at the instance of respondent-husband. This petition ultimately came to be dismissed by the learned Judge of the Family Court on 16th December 2016. Admittedly, the impugned orders were not assailed or challenged anytime by the appellant-wife herein during the subsistence of the proceedings for restitution of conjugal rights.

23 Now, it is time to apply the four different tests as expounded in **V.C.Shukla's case (supra)**. The impugned orders, by no stretch of imagination, would have determined and decided the main dispute which was essentially a petition for restitution of conjugal rights. Even if the impugned orders, had it been challenged and reversed at early stage i.e. before disposal of the main proceedings, still the dispute would have gone between the parties. Succinctly stating, even if these applications had been allowed by the Family Court, keeping in mind the nature of proceedings initiated by the respondent-husband, in our considered opinion would not have concluded the proceedings at all.

24 The ratio laid down in the case of **Smt.Sukhrani (dead) by L.R's and Others' case (supra)** is not applicable to the case in hand in as much as in the said case during the pendency of the suit for partition, a reference was made to arbitration and the Arbitrators gave an award directing payment of certain sum to the plaintiff to equalize the shares of the two branches. The

trial Court was pleased to set aside the Award. Even the appeal preferred by the plaintiff was dismissed by the High Court. The plaintiff did not further pursue the matter at that stage by taking it in appeal to the Supreme Court but preferred to proceed with the trial of his suit. In this factual background, the Hon'ble Apex Court held that the parties could challenge in Supreme Court in an appeal against the final judgment in the suit any finding given by the High Court at the earlier stage in the suit when the Award made by the Arbitrators was set aside and the suit thrown open for trial.

25 First of all, the above case was not covered by the provisions of the Family Court Act and rather was suit for partition and separate possession of share in the properties. Secondly, the Award referred to therein was intrinsic to the subject matter of the suit and therefore could have been very well re-agitated before the Appellate Court. The said judgment does not apply even remotely to the facts of this case.

26 We are also of the opinion that the ratio laid down in

the case of **Rahul Sainath Patkar (supra)** is not available to appellant-wife. In this case, the plaintiffs filed a suit for declaration and injunction. The case of the plaintiffs was that they were in possession of suit premises either through self or through their predecessors for the last 29 years and with an allegation that the defendants had trespassed into the suit property. The defendants contested the suit and also filed a counter-claim for recovery of possession of the suit property from the plaintiffs and for mesne profits. Later on, the defendants filed an application styling the same to be an application for rejection of plaint under Order 7 Rule 11(a) and/or (d) of the Civil Procedure Code (hereinafter referred to as “the Code” for the sake of brevity).

27 It was contended therein that the suit filed by the plaintiffs was for declaration simpliciter and that the incidental prayers in the plaint were only in the nature of interim reliefs and no prayer by way of further relief was sought rendering the suit as a suit for simpliciter declaration only. The defendants further contended that it was incumbent upon the plaintiffs to

have asked for relief of permanent injunction by way of further relief. Since they had not sought for a relief which was available and as the same could not be granted specially when further relief was barred by law of limitation, the suit was not maintainable.

28 The plaintiffs therein replied to the said application and on the same day also filed another application for amendment of the plaint contending therein that in Prayer clause (b) relief of perpetual injunction was applied for but by typographical error it was wrongly stated as temporary injunction. The plaintiffs, therefore, sought to substitute the word “temporary” with the word “perpetual” in Prayer Clause (b), which mistake according to the plaintiffs was patent and obvious. The learned trial Court, however, did not accept the explanation given by the plaintiffs and dismissed the application for amendment filed by the plaintiffs and allowed the application for rejection of the plaint.

29 The Division Bench of this Court held that the

impugned order was in two parts. The order rejecting the plaint was entirely dependent on the order rejecting the application for amendment. This Court further held that it was a clear case where the plaintiffs had sought an amendment to correct the typographical or clerical mistake in mentioning the word “temporary” instead of the word “permanent” in Prayer Clause (b). This Court further observed that nobody files a suit for declaration and temporary injunction and as common knowledge goes, suits are filed for declaration and permanent injunction. Even the plaintiffs had valued tentatively the prayer for injunction. In such a situation, the learned trial Court ought to have granted the prayer for amendment and in the light of that rejected the application of the defendants for rejection of the plaint. This Court ultimately allowed the appeal and as a result the application for amendment was also granted and rejected the application for rejection of the plaint.

30 From the above it is more than clear that the proceedings therein was suit for a declaration and injunction. Moreover and pertinently enough, the fact of the rejection of the

plaint depended on the proposed amendment i.e. to say there was a clear nexus between the proposed amendment and rejection of the plaint, as sought by the defendants. Here, in the case in hand, we have already pointed out as to the nature of proceedings and also various applications moved by the appellant-wife. The appellant-wife cannot derive any benefit from the ratio laid down in the case of **Rahul Sainath Patkar (supra)**.

31 We also would like to deal with the tenability and maintainability of Exhibit 285 in so far as rejection of prayer of maintenance to the appellant-wife is concerned, from the perspective of provisions of Section 24 read with 28 of the Act. There is no dispute that as far as order of rejection of maintenance to the appellant-wife is concerned, it is passed under Section 24 of the Act. Here we must take note of Section 28 of the Act.

32. Section 28 reads thus :

“28 Appeals from decrees and orders. — (1)
All decrees made by the court in any

proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(2)Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3)There shall be no appeal under this section on the subject of costs only.

(4)Every appeal under this section shall be preferred within a [period of ninety days] from the date of the decree or order.]”.

33 As noticed hereinabove, the impugned order of rejection of maintenance pendente lite is made under Section 24 of the Act. Sub-section (2) of Section 28 of the Act unequivocally signifies that no appeal shall lie against the order passed under Section 24 of the Act. Only order passed under Section 25 or 26 of the Act not being an interlocutory order shall be assailable under sub-section (2).

34 From the above, what emerges is that under sub-section (2) of Section 28, no appeal shall lie to the High Court against interim orders passed under Sections 24, 25 or 26 of the Act. Under this sub-section reference to Section 24 is purposely omitted and this being a significant aspect, it must be held that legislature wanted to expressly bar an appeal against any order passed under Section 24 of the Act.

35 This brings us to test the validity of the submissions

of the learned counsel for the appellant-wife that in view of Section 105 and Order 41 Rule 33 of the Code, he is entitled to file the present appeal.

36 According to the learned counsel for the appellant-wife, Section 105 entitles him to challenge the errors, defects and irregularities for any order affecting the decision of the case on the ground of objections in the Memorandum of Appeal which categorically points out errors, defects and irregularities in the impugned orders.

37 Section 105 reads as under :

“**Section 105. Other orders** - (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in subsection (1), where any party aggrieved by an order of remand⁶ [***] from which an appeals lies does not

appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

38 The first part of sub-section (1) provides that no appeal shall lie from any order unless such right is expressly given by the Code. But where an interlocutory order is appealable, the party against whom the order is made is bound to prefer an appeal against it at once and under the second part when he appeals against the decree after the final decision, he can make any error, defect or irregularity in the order affecting the decision of the case, a ground of objection in the appeal. The words “in any order” in sub-section (1) indicate that even in the case of an appealable order provided that it affects the decision of the case, either an appeal can be filed straightway or it may be attacked in an appeal from the final decree except in the case of an appealable order of remand. The latter part of sub-section (1) means that although an interlocutory order may not be appealable as such, its legality and correctness can still be questioned and assailed in an appeal from the final decree.

39 We have here a peculiar situation. We have already

indicated and it is also an admitted position in the words of the appellant-wife, if we may say so, that her case is totally governed by Section 19 of the Family Court Act. We have also explained in the preceding paragraphs as to how the impugned orders are interlocutory orders and therefore out of ambit and scope of Section 19 of the Family Court Act. In the circumstances, we do not find utility and applicability of Section 105 of the Code.

40 Let us assume for a moment that Section 105 is all here to assist the cause of the appellant-wife. Still, what is worth pondering, however, is that whether necessary requisites of section is fulfilled or not. A party necessarily is not obligated to challenge order – appealable or otherwise but he can certainly challenge or attack it, provided that has affected the decision of the case, at the time of challenging the final decree. In the case in hand, it is respondent-husband who has challenged the dismissal of his case for restitution of conjugal rights. The appellant-wife herein has not been affected by the said decision of dismissal and rather the said dismissal is in her favour. It is also not the case that there was a counter-claim which also met

the fate of dismissal.

41 In **Shri Ramo Barman and Others (supra)** a question arose for consideration whether it was open to the parties to challenge the decision of the trial Court on a preliminary issue along with other issues in an appeal against the decree of the trial Court. The learned Single Judge found that the question does not pose much problem in view of the provision of Section 105 of the Code. The learned Single Judge also held that the provision makes it clear that in an appeal from a decree, it is open to the parties to challenge the decree on a preliminary issue as well as the decision upon all other issues in the case. The learned Single Judge further held that it was not necessary to challenge the decision on the preliminary issue separately and parties can wait till final decision of the suit, and if aggrieved, it can file appeal. In such appeal, it can challenge the decision of the trial Court on the preliminary issue in the very same way as decision on any other issue.

42 Again the facts of the case (supra) are quite

distinguishable. In the present case with which we are dealing, no such situation arose where a preliminary issue was framed by the learned Judge of the Family Court. We, therefore, do not find that the decision (*supra*) so relied on by the respondent-husband is any way useful to him.

43 The learned counsel for the appellant-wife has also placed reliance on **Satyadhyan Ghosal and Others (*supra*)** and more particularly has referred paragraph 16 of the judgment wherein it is observed by the Hon'ble Apex Court that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order.

44 We have perused the judgment. It lays down therein that an interlocutory order is an order which did not terminate the proceedings and which had not been appealed against either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final

decree or order. It was observed that interlocutory judgment which have the force of a decree must be distinguished from other interlocutory judgments which are a step towards the decision of the dispute between the parties by way of a decree or final order. In that case the question of applicability of Section 28 of the original Thika Tenancy Act, 1949 was held to be interlocutory in nature falling in the latter category. All that we need to say is that in view of scope and ambit of Section 105 explained by us and in the light of distinguishable facts of decision (supra) we are unable to persuade us to follow the ratio laid down therein.

45 On a consideration of the material before us, we find it difficult to fathom the applicability of Section 105. Thus, seen from any angle, the appellant-wife cannot derive strength and succour from Section 105. Resultantly, we reject the submission on this count.

46 This brings us to Order 41 Rule 33 of the Code. It reads thus :

“Order 41 Rule 33 - Power of Court of Appeal.

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to made such order.”

47 The object of Order 41 Rule 33 has been explained by the Hon'ble Apex Court in **Choudhary Shahu vs. State of Bihar**¹⁰

¹⁰ AIR 1982 SC 98

as follows :

“The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the court appealed from. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience.”

48 Keeping in mind the object of Order 41 Rule 33 propounded by the Hon'ble Apex Court, we reiterate that we are not faced with a decree of such nature where interference in the decree is inevitable so as to accommodate and adjust the rights of the parties before us in tune with justice, equity and good

conscience. At the cost of repetition, we remind ourselves of dismissal of husband's petition for restitution of conjugal rights whereby the wife's rights do not need readjustment in any manner. Here again we go back to Section 19 of the Family Court Act for all purposes, the scope of which has been dealt inextenso vis-a-vis nature of the impugned orders.

49 Thus, the circumstances existing on record do not warrant and necessitate the exercise of discretion conferred under Rule 33. We find ourselves wanting when it comes to the exercise of such power.

50 For the reasons stated hereinabove, we hold that the present appeal is not maintainable under Section 19(1) of the Family Courts Act, 1984 against the impugned orders.

51 In the result, we pass the following order :

ORDER

Appeal is dismissed as being not maintainable
with no orders as to costs.

(V. G. BISHT, J.)

(R.D.DHANUKA, J.)