

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FAMILY COURT APPEAL (ST) NO. 19144 OF 2021
WITH
INTERIM APPLICATION NO. 3274 OF 2021
WITH
INTERIM APPLICATION NO. 9876 OF 2022
IN
FAMILY COURT APPEAL (ST.) NO. 19144 OF 2021**

Seema Sharad Hulji Appellant

Versus

Sharad Khachoji Hulji Respondent

**WITH
FAMILY COURT APPEAL NO. 44 OF 2021
WITH
INTERIM APPLICATION STAMP NO. 12723 OF 2021
IN
FAMILY COURT APPEAL NO. 44 OF 2021**

Seema Sharad Hulji Appellant

Versus

Sharad Khachoji Hulji Respondent

**WITH
INTERIM APPLICATION NO. 1765 OF 2021
In
FAMILY COURT APPEAL NO. 44 OF 2021**

Sarojini K. Hulji And Anr. Applicants

IN THE MATTER BETWEEN

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Seema Sharad Hulji

... Appellant

Versus

Sharad Khachoji Hulji

.... Respondent

WITH
INTERIM APPLICATION NO. 4348 OF 2021
IN
FAMILY COURT APPEAL NO. 44 OF 2021

Sharad Khachoji Hulji

.... Appellant

Versus

Seema Sharad Hulji

.... Respondent

Ms. Taubon Irani a/w. Ms. Sachi Lodha i/b Ms. Disha U. Shetty for the Appellant-Wife.

Mrs. Rina H. Pujari for the Respondent-Husband.

Mr. M. M. Vashi a/w. Ms. Prachin Khandge i/b M. P. Vashi & Associates for Intervenor in IA No.1765/2021.

CORAM : NITIN JAMDAR &
SHARMILA U. DESHMUKH, JJ.

DATED : 16 NOVEMBER 2022.

P. C.:

Heard the learned Counsel for the parties.

2. The Appeals are admitted and taken up for disposal forthwith by consent of the parties. Intervention Application No. 1765 of 2021 is also taken up for disposal.

3. The Appellant -Seema and Respondent- Sharad got married at Belgaum on 27 December 1990. Their daughter was born on 19 November 1996. Disputes arose between the parties. Petition bearing no. A-899 of 2015 was filed by the Appellant -Seema seeking divorce under section 13 (1) (ia) (ib) of the Hindu Marriage Act, 1955. The Appellant -Seema also filed a petition bearing no. E-39 of 2016 under section 125 of the Code of Criminal Procedure, 1973 and the Protection of Women from Domestic Violence Act, 2005.

4. It was the case of the Appellant -Seema that she was subjected to mental cruelty by the Respondent. She cited instances of the cruelty, and sought a decree of divorce. The Respondent-Sharad filed written statement and the counter claim, and in the counter claim prayed for decree of divorce. The Appellant -Seema filed written statement to the counter claim. In petition bearing no. E-39 of 2016, the Appellant sought various reliefs including restraining the Respondent from dispossessing her or in any manner disturbing her possession from matrimonial home. The Appellant also sought a direction to remove the Respondent from her matrimonial home. Certain other prayers were sought regarding matrimonial house.

5. The Family Court, Mumbai considered the petition bearing nos. A-899 of 2015 and E-39 of 2016 together and by impugned order

dated 1 April 2021, dismissed the claim of the Appellant-Seema for divorce and rejected her petitions, and allowed the counter claim of the Respondent-Sharad for divorce. The operative portion of the impugned order reads thus :-

“1] *The counter-claim of husband in petition No. A-899/2015 is allowed. The claim of wife for divorce is dismissed.*

2] *Petition No. E-39/2016 is dismissed.*

3] *The marriage between Sharad (husband) and Seema (wife), which was held on 27.12.1990, is hereby dissolved by decree of divorce on the ground of cruelty with effect from the date of decree.*

4] *Sharad (husband) is directed to pay Rs. 40,000/- per month to Seema (wife) towards maintenance from today till further order.*

5] *The husband is directed to deposit the maintenance as above, in the designated account of wife on or before 10th day of each month, as per English calendar.*

6] *Wife is directed to vacate matrimonial home after appeal period is over.*

7] *Parties shall bear their own cost in both proceedings.*

8] *A copy of decree, at once in petition No. No.A-899/2015 shall be given free of cost to the parties as per section 23 (4) of the Hindu Marriage Act, 1955.*

9] *A decree be drawn accordingly in counter-claim of petition No.A-899/2015.*

10] *Original copy of this Judgment shall be kept in petition No. A-899/2015 and true copy in petition No. E-39/2016”.*

6. As against rejection of the petition filed by the Appellant, the Appellant has filed Family Court Appeal (St.) No. 19144 of 2021 against the order passed in the counter claim of the Respondent. The Appellant has filed Family Court Appeal bearing No. 44 of 2021. The Appellant has also filed Criminal Writ Petition bearing No. 5633 of 2021, which is not placed before us. The learned Counsel for the Appellant states that this Writ Petition would be withdrawn. Statement is accepted.

7. Family Court Appeal No. 44 of 2021 came up before the Court on 9 July 2021 and while issuing notice, the Division Bench of this Court granted stay to the impugned judgment to the extent of decree of divorce and direction against the Applicant/Appellant to vacate the matrimonial home. Order sheet would show that the attempts were made to resolve the dispute amicably, since they were not successful, it

was directed that the appeal would be disposed of at the stage of admission.

8. An Interim Application No. 1765 of 2021 for intervention is filed by Sarojini K. Hulji, mother of the Respondent and mother-in-law of the Appellant. Intervention is sought on the ground that the Intervenor is the owner of the suit flat which is claimed as matrimonial house and in view of the dispute between the Appellant and Respondent, and the orders passed in these appeals, the Intervenor is prejudiced. The learned Counsel for the Respondent and the Intervenor submitted that it is the case of the Appellant herself that divorce should be granted and only a technical objection is raised that it should have been in the petitions filed by the Appellant and not in the counter claim. According to the Respondent and the Intervenor, the decree of divorce can be confirmed, and the aspect of maintenance can be separately considered. The learned Counsel for the Intervenor submitted that because of the interim order, the Suit filed by the Intervenor, bearing No. 635 of 2017 is affected.

9. The learned Counsel for the Appellant submitted that the issue of divorce and the accommodation aspect cannot be separated in this manner and there is no consideration by the Family Court, Mumbai of the prayers made by the Appellant in respect of her accommodation and possession in the matrimonial home. The learned Counsel for the

Appellant submitted that the suit filed by the Intervenor, mother of the Respondent, is a collusive suit to evict the Appellant from her matrimonial home.

10. We have considered the rival contentions. As stated earlier, the Appellant had filed two petitions, which were before the Family Court, Mumbai along with the counter claim of the Appellant. In the Petition bearing No. A-899 of 2015, the Appellant had also prayed that a direction to pay educational and activities expenses for the daughter and had sought maintenance of Rs. 75,000/- for herself, house and kitchen expenses. In the counter claim filed by the Respondent, the Respondent had prayed for decree of divorce, no other relief was sought. In the petition filed by the Appellant under section 125 of the Cr.PC and under the provisions of Act of 2005, the Appellant had sought series of several prayers as against the matrimonial home. The following prayers were made, which read thus :-

“(a) This Honourable court be pleased to pass order directing Respondent to pay Rs. 1,00,000/- per month as maintenance to Petitioner as permanent maintenance.

(c) This Honourable court be pleased to pass order directing Respondent to return back Rs. 15,00,000/- with interest at 14% per month.

(l) This Honourable court be pleased to pass order permanently restraining the respondent from dispossessing or in any other manner disturbing the possession of the Petitioner from the shared household, i.e. matrimonial house.

(m) This Honourable court be pleased to pass order directing the respondent to remove himself from the shared household, i.e. matrimonial house.

(n) This Honourable court be pleased to pass order permanently restraining the respondent or any of his relatives from entering any portion of the shared household, i.e. matrimonial house in which the Petitioner resides.

(o) This Honourable court be pleased to pass order permanently restraining the respondent from alienating or disposing of the shared household i.e., matrimonial house or encumbering the same”.

11. We have gone through the impugned order. The operative portion of the impugned order is reproduced earlier. Direction that the Appellant should vacate the matrimonial home is not traceable to any prayer in the counter claim filed by the Respondent. According to the Respondent and the Intervenor, it is sequitur of grant of divorce and that the Appellant will lose all rights in the property. However, the petition invoking the provisions of the Act of 2005 was also before the Family Court, Mumbai. We find no consideration of the prayers made by the Appellant in respect of accommodation. The only discussion

that is found which can be said to be on this topic in paragraph 36 of the judgment, which is a general discussion with no specific findings.

12. Considering the manner in which the counter claim of the Appellant has been so disposed of by the Family Court, Mumbai, we find considerable merit in the case of the Appellant that the impugned order cannot be sustained and the aspect of divorce cannot be separated from the issue of accommodation in this manner. In light of this position, we are of the opinion that the impugned order will have to be quashed and set aside and the proceedings will have to be remanded to the Family Court, Mumbai for consideration. The interim order in this appeal can be continued for some time and thereafter, the continuation or otherwise can be considered by the Family Court, Mumbai on its own merits.

13. We, however, take note of the fact that both the parties are *ad-idem* as regards the need to grant of divorce.

14. Accordingly, the Appeals are disposed of as under :

- (a) The impugned order dated 1 April 2021 is quashed and set aside. The Petitions and the counter claim are restored to file. The parties will appear before the Family Court, Mumbai on 28 November 2022.

Thereupon, the Family Court, Mumbai will give further directions.

(b) Position under ad-interim order passed in this proceeding as regards accommodation to continue for a period of 4 weeks from 28 November 2022. The continuation or otherwise of this position would be decided by the Family Court on its own merits and without being influenced by the grant or continuation of the ad-interim order. The Family Court, Mumbai will ensure that decision in that regard will be taken within the above period of 4 weeks.

(c) The Family Court, Mumbai will decide the proceedings within a period of 6 months from the date the parties will appear before the Family Court.

15. As regards the Intervention Application is concerned the Intervenor has already filed a suit on the original side of this Court and it is for the parties to argue in the said suit the implication of the order that we have passed.

16. The learned Counsel for the Appellant states that in view of this order, all pending proceedings filed by the Appellant in this Court

other than the one we have disposed of would be withdrawn. The statement is accepted.

17. All pending applications are disposed of.

(SHARMILA U. DESHMUKH, J.)

(NITIN JAMDAR, J.)