

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
FAMILY COURT APPEAL NO.16 OF 2019**

SAMEENA BEGUM W/O. ASADULLAH KHAN
VERSUS
ASADULLAH KHAN S/O. KHALIEELULLAH KHAN

...

Mr. Saeed S. Shaikh, Advocate for the Petitioner.

Mr. Taher Ali Quadri, Advocate for Respondent.

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**AND
FAMILY COURT APPEAL NO.18 OF 2020**

ASADULLAH KHAN S/O. KHALIEELULLAH KHAN
VERSUS
SAMEENA BEGUM W/O. ASADULLAH KHAN

...

Mr. Taher Ali Quadri, Advocate for the Petitioner.

Mr. Saeed S. Shaikh, Advocate for Respondent.

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**CORAM : NITIN W. SAMBRE AND
S. G. CHAPALGAONKAR, JJ.
DATE : 13th MARCH, 2023.**

FINAL ORDER:-

1. In Family Court Appeal No.16/2019 the appellant-wife has questioned the judgment delivered by the Judge, Family Court, Nanded on December 18, 2014, whereby the petition for restitution of conjugal rights preferred by the respondent-husband came to be allowed, as the appellant has failed to contest the said litigation by filing her reply.

2. In the Family Court Appeal No.18/2020 the appellant-husband has questioned the order dated 4th January, 2020 passed below Exhibit-12 whereby the proceedings initiated by him for custody of minor daughter pursuant to the provisions of Section 7 of Family Court Act and Section 25 of the Indian Guardian and Ward Act, 1890 came to be dismissed for want of prosecution.

3. The facts necessary for deciding both these appeals are as under:

The appellant and respondent got married on 13th January, 2013 and out of the aforesaid wedlock daughter Layba was born on February 8, 2014, who is admittedly in the custody of the wife.

It is the case of the respondent-husband in the proceedings for restitution of conjugal rights that the wife left his company without any reasonable cause after the period of two months from the date of marriage and never returned back. According to the husband in view of the subsistence of marriage, the husband intends to reside with the respondent-wife and daughter and as such, has prayed issuance of decree for restitution of conjugal rights which was allowed on December 18, 2014. In the said proceedings the wife has inspite of notice being served has neither appeared nor filed her reply. Even the evidence laid by the husband was not contested.

4. In the aforesaid background, while questioning the aforesaid decree for restitution of conjugal rights, the learned counsel for the appellant-wife urged that the appellant be given chance to contest the said proceedings by ordering remand of the matter, as her father was not keeping well. Reliance is placed on medical documents of father.

5. Learned counsel for the respondent-husband has opposed the aforesaid prayer. He has urged that wife intentionally has kept herself away from the said proceedings for restitution of conjugal rights. According to him, even today also the husband is willing to accept the respondent and daughter so

as to have restitution of conjugal rights. As such, a prayer is made for the dismissal of the said appeal.

6. In the Appeal No.18/2020 the husband has claimed that after decree for restitution of conjugal rights was passed, the husband was not allowed to meet the child and as such, the custody proceeding was taken out. According to him, even if on January 4, 2020 the petitioner-husband was absent, the said proceeding ought not to have been dismissed merely for non-payment of maintenance. He would urge that the husband remained absent for genuine cause and after the dismissal of the petition for custody on 4th January, 2020 for default, immediately an application was moved for restoration of the same on very same day. He would urge that, the Court below committed an error in allowing the application subject to deposit of 75% of the arrears. Learned counsel has urged that the appellant-husband has immediately offered maintenance of Rs.2000/- so as to show his bonafide, but the Judge, Family Court has dismissed the proceedings for want of payment of entire arrears of maintenance.

7. We have appreciated the aforesaid submissions.

8. The marriage of the parties on January 13, 2013 is not in dispute. The wife has claimed that the husband has treated her with cruelty, as he used to harass and demand dowry and used to physically beat her and as such, she was driven out of the house. It is claimed that the complaint was lodged on November 16, 2015 at the SP office, Nanded.

9. It is also claimed that after the wife was driven out of the house, she being a pardanashin woman was not paid any maintenance.

10. The fact remains that the Family Court in Petition E-114/2015 has awarded maintenance vide order dated November 19, 2018 thereby directing the husband to pay maintenance of Rs.4000/- per month to petitioner no.2 from the date of filing of the petition i.e. the daughter whereas no maintenance was allowed in favour of the respondent-wife, as there appears to be decree for restitution of conjugal rights.

11. The fact remains that the husband has not paid maintenance to the child as was ordered by the Family Court in Petition No.E-114/2015 on February 19, 2018. Apart from above, the order of restitution of conjugal rights was passed by the Family Court after hearing the husband as wife has chosen not to appear in the matter.

12. In this background, learned counsel for the husband submits that he shall make every endeavour to clear the arrears of maintenance and the learned counsel for the wife assures that if given chance by the putting the wife to reasonable condition, she is willing to contest the proceedings for restitution of conjugal rights.

13. The fact remains that, when the proceedings for custody taken out by husband were dismissed on 4th January, 2020, the husband has immediately applied for restoration of the said proceedings and Family Court has put him to condition of clearing 75% of the arrears of maintenance. The clearance of the arrears of maintenance appears to be accepted by the Family Court immediately as the offer made by the husband for deposit of Rs.2000/- was not accepted.

14. That being so, the order of the Family Court in dismissing the proceedings of the husband for custody of the child appears to be for unreasonable cause. If the maintenance amount is not paid by the husband, the Family Court could have put him to reasonable condition of giving him sufficient time to deposit the payment of maintenance and not by incorporating a condition of deposit of amount then and there only.

15. Apart from the above, the fact remains that the learned counsel for the wife has assured that if given chance by putting wife to reasonable condition, she is willing to contest the proceedings for restitution of conjugal rights.

16. In view of the above, we deem it appropriate to allow both these appeals.

17. The order passed by the Family Court dismissing the proceedings for seeking custody of the child for default on 4th January, 2020, the order of putting husband to the condition of deposit of 75% of the arrears as a pre-requisite for restoration of the custody proceedings dated January 4, 2020 and order dated 4th January, 2020 dismissing the custody petition are hereby quashed and set aside.

18. The said custody petition is directed to be heard and tagged with the proceedings for restitution of conjugal rights being Petition No.A-253/2014. The order of grating restitution on December 18, 2014 is also hereby quashed and set aside subject to deposit of cost of Rs.5000/- by the respondent-wife to be deposited in the Family Court in any case by 15th June, 2023. The payment of cost be adjusted to the payment of maintenance to the daughter.

19. The restitution petition is also restored to the file of the Family Court.

20. Both the parties hereby assure that they shall appear before the Family Court in custody proceeding so also restitution of conjugal rights proceeding on 15th June, 2023. As such, fresh notices in both these proceedings are dispensed with.

21. If the wife fails to file her response i.e. written statement so also her affidavit of evidence in restitution proceeding by the said date i.e. 15th June, 2023, the Family Court shall not grant further accommodation to the wife in the said proceeding and proceed ahead to decide the matter on its merit. In case, if so required, the husband be given chance to counter the proceedings by filing additional affidavit in the restitution matter.

22. As far as the custody proceedings are concerned, the wife is granted last chance to complete her pleadings by 15th June, 2023, failing which no further accommodation be granted to the wife.

23. We expect the Family Court to conclude both these proceedings in any case by 31st August, 2023.

24. Both these appeals are as such allowed in the above terms.

(S. G. CHAPALGAONKAR)
JUDGE

(NITIN W. SAMBRE)
JUDGE