



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FAMILY COURT APPEAL NO.70 OF 2022

Sayyad Lubna w/o Javed,
Age : 29 years, Occ. Household,
R/o Road No.1, Infront of Hasmiya
Masjid, Vyankatesh Nagar, Latur,
Tq. and Dist. Latur.

...APPELLANT
(Wife)

-VERSUS-

Sayyad Javed s/o Sayyad Khayyum,
Age : 34 years, Occ : Business,
R/o Plot No.67, Infront of Aziz Vila House,
Jalan Nagar, Backside of Railway Station,
Aurangabad.

...RESPONDENT
(Husband)

...

Shri Hanumant P. Jadhav, Advocate for the Appellant/ Wife.
Shri Yogesh B. Bolkar, Advocate for the Respondent/ Husband.

...

CORAM : R.G. AVACHAT

&

PRAFULLA S. KHUBALKAR, JJ.

DATE : 12th March, 2025.

JUDGMENT (Per Prafulla S. Khubalkar, J.) :-

1. Heard the learned counsels for both sides.

2. This appeal was admitted on 14.10.2022. The appeal is taken up for final hearing.

3. By the instant appeal, the appellant/ wife has challenged the judgment and order dated 23.08.2018 passed by the Family Court, Aurangabad, in Petition No.A-80/2018, which was a petition filed by the respondent/ husband seeking restitution of conjugal rights.

4. By the impugned judgment and order, the petition was allowed directing the appellant/ wife to resume conjugal society of the husband within a period of two months. The primary ground of challenge is that the petition was decided without service of notice upon the appellant/ wife and resultantly an ex-parte judgment and order is passed.

5. The learned Advocate Shri Jadhav for the appellant/ wife vehemently submits that the impugned judgment and order is unsustainable in law being based on an erroneous approach. The impugned judgment is an ex-parte decision without service of notice upon the appellant herein and without considering the reasons for non appearance of the wife. He submits that the Family Court has arrived at unilateral conclusion based on

uncontroverted testimony of the husband and his father. The Family Court has failed to appreciate that the wife was not served with proper notice and that she was unable to attend the court on account of birth of a child to her. He submits that the Family Court accepted entire version of the husband and without any cogent evidence, straightaway concluded that the wife has withdrawn from company of the husband and, therefore, the husband was held to be entitled for decree of restitution of conjugal rights.

6. *Per contra*, the learned Advocate Shri Bolkar for the respondent/ husband justifies the impugned judgment and order. He submits that the wife had failed to avail opportunity of participating in the proceedings and the Family Court has rightly appreciated evidence before it. He submits that the impugned judgment is based on evidence before the Family Court and needs no interference at all.

7. We have considered rival submissions and perusal the appeal paper book.

8. A perusal of the impugned judgment shows that it is an ex-parte judgment wherein, the Family Court has observed

that the wife had not appeared despite service of notice. It has to be seen that the wife had filed a separate proceeding before the Family Court at Latur bearing Petition No.E-25/2018 claiming maintenance under Section 125 of the Code of Criminal Procedure, 1973, for herself and her two children, one is aged four years and another is four months. The wife was prosecuting this petition claiming maintenance through a lawyer and, therefore, her failure to appear in the proceedings filed by the husband at Aurangabad cannot be considered to be intentional avoidance of the proceedings. The wife has categorically raised the ground that she was not served with the notice in Petition No.A-80/2018 and could not attend the said proceedings filed by the husband. It is undisputed that the appellant/ wife had delivered a child on 27.05.2014 and she was required to take care of new born child. This has to be considered to be a genuine reason for the wife not prosecuting the proceedings before the Family Court at Aurangabad.

9. It is pertinent to note that in the proceedings filed by the wife and her children claiming maintenance, the husband has appeared and contested the said proceedings. He produced the

judgment of Petition No.A-80/2018 (impugned judgment) before the Family Court at Latur and opposed the petition by pointing out the findings of the Family Court at Aurangabad about withdrawal of company by the wife. The Family Court at Latur treated the findings to be binding and with this observation, it has refused maintenance to the wife. As such, the finding about withdrawal of company by the wife, which is infact in an ex-parte proceeding based on unchallenged evidence of the husband, is made the basis to conclusively decide that the wife is not entitled for any maintenance. In this regard, we are of the considered view that the findings of the Family Court at Aurangabad in an ex-parte proceeding about withdrawal of company by the wife, could not have been considered to be binding in the proceeding under Section 125 of the Code of Criminal Procedure filed by the wife before another Family Court. Although the instant appeal is not dealing with the challenge to the judgment of the Family Court at Latur denying maintenance to the wife, it has to be noted that the findings of the Family Court at Latur have severe consequences upon the wife, to the detriment of her rights.

10. A perusal of the impugned judgment shows that the Family Court has straightaway accepted unchallenged evidence of the husband and concluded that the wife has left the company of the husband. In a proceeding which is conducted ex-parte, the Trial Court is expected to be more cautious while relying and accepting the version of the witness, who is not cross-examined. The Family Court has simply believed evidence of the husband to conclude that the wife has left company of the husband without any genuine reason and passed the decree of restitution of conjugal rights.

11. It has to be noted that the wife had earlier issued a notice dated 06.02.2018 to the husband calling upon him to take her back for cohabitation. By this notice, she expressed her readiness to resume matrimonial life with the husband. This notice was served upon the husband and he had replied, but failed to bring the wife back to home for cohabitation. Although the Family Court has referred to this aspect in paragraph No.16 of the impugned judgment, however, brushed aside this crucial aspect by simply observing that the wife has not come before the Court for proving the said notice. It has to be seen that the

husband has not disputed the receipt of this notice and this was crucial aspect demonstrating the conduct of the wife.

12. In view of the above, we are of the view that the approach adopted by the Family Court is erroneous. In view of the grounds raised by the wife including the circumstances of birth of a child, we deem it appropriate to remand the matter to the Family Court, Aurangabad, so that the wife should be afforded an opportunity to participate in the proceedings by filing her Written Statement and leading evidence. We find this case to be a fit case for remand. Thus, the impugned ex-parte judgment and order passed by the Family Court at Aurangabad deserves to be quashed and set aside. Hence, we pass the following order:

ORDER

- (a) This Family Court Appeal is partly allowed.
- (b) The impugned judgment and order dated 23.08.2018 passed by the Family Court, Aurangabad, in Petition No.A-80/2018, is quashed and set aside.
- (c) Petition No.A-80/2018 is remanded to the Family Court, Aurangabad, for a fresh decision after affording an opportunity to the appellant/ wife to file her Written Statement

and lead evidence.

(d) Parties are directed to appear before the Family Court at Aurangabad on 07th April, 2025.

(e) The Family Court is directed to expedite the proceedings and take a decision afresh.

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(PRAFULLA S. KHUBALKAR, J.)

(R.G. AVACHAT, J.)