AFR

Court No. - 5

Case :- FIRST APPEAL DEFECTIVE No. - 246 of 2020

Appellant :- Sana Afrin
Respondent :- Zohaib Khan
Counsel for Appellant :- Mohammad Umar Khan
Counsel for Respondent :- Arun Kumar Pandey

Hon'ble Surya Prakash Kesarwani,J.
Hon'ble Dr. Yogendra Kumar Srivastava,J.

(Per : Dr. Yogendra Kumar Srivastava,J.)

1. Heard Sri Mohammad Umar Khan, learned counsel for the petitioner and Sri Arun Kumar Pandey, learned counsel appearing for the sole respondent.

2. The present first appeal under Section 19 of the Family Courts Act, 1984[1] has been preferred against an order dated 01.10.2020 passed by the Principal Judge, Family Court, Kanpur Nagar in Case No.63 of 2020 (Zohaib Khan *v* Sana Afrin), whereby the application (paper no.6ga) filed by opposite party no.2 under Section 12 of the Guardians and Wards Act, 1890[2] has been allowed.

3. At the very outset an objection was taken with regard to the maintainability of the appeal filed under Section 19 of the Act, 1984 on the ground that the order under Section 12 of the Act, 1890 is in the nature of an interlocutory order and an appeal would not lie against such interlocutory orders.

4. We have heard learned counsel for the parties on the question of maintainability of the present appeal and have perused the records.

1 the Act, 1984
2 the Act, 1890

5. It would be worthwhile to take notice of the fact that proceedings under Section 25 of the Act, 1890 were initiated by the opposite party no.2 before the Principal Family Judge, Kanpur Nagar, registered as Case No.63 of 2020 for delivery of custody of his minor son. It was during the pendency of the aforesaid proceedings that an application (paper no.7ga) was filed under Section 12 of the Act, 1890 for making an interlocutory order for grant of visitation rights to enable the opposite party no.2 to meet the child. The aforesaid application for grant of interlocutory order under Section 12 came to be allowed in terms of the order dated 01.10.2020 passed by the Principal Judge, Family Court, Kanpur Nagar, against which the present first appeal has been preferred.

6. In order to decide the issue with regard to maintainability of the present first appeal against an order passed under Section 12 of the Act, 1890, which is of an interlocutory nature, the relevant statutory provisions may be adverted to.

7. The power to make an interlocutory order for production of minor and interim protection of person and property has been provided for under Section 12 of the Act, 1890 and in terms thereof the Court may direct that the person having custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper. A visitation right or order which is essentially an order granting visiting times for the non-costodial parent with his or her children may also be granted in exercise of powers under Section 12 of the Act, 1890 and such an order

granting visitation rights essentially enables the parent who does not have interim custody to be able to meet the child without removing him or her from the custody of the other parent. For ease of reference Section 12 of the Act, 1890 is being reproduced below:-

> "**12. Power to make interlocutory order for production of minor and interim protection of person and property**.—(1) The Court may direct that the person, if any, having the custody of the minor, shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.
>
> (2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.
>
> (3) Nothing in this section shall authorise—
>
> > (a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or
> >
> > (b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property."

8. Section 47 of the Act, 1890 provides for orders which are appealable, and the same reads as under:-

> "**47. Orders appealable**.—An appeal shall lie to the High Court from an order made by a Court,—
>
> (a) under section 7, appointing or declaring or refusing to appoint or declare a guardian; or
>
> (b) under Section 9, sub-section (3), returning an application; or
>
> (c) under Section 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or
>
> (d) under Section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto; or
>
> (e) under Section 28 or Section 29, refusing permission to a

guardian to do an act referred to in the section; or

(f) under Section 32, defining, restricting or extending the powers of a guardian; or

(g) under Section 39, removing a guardian; or

(h) under Section 40, refusing to discharge a guardian; or

(i) under Section 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order; or

(j) under Section 44 or Section 45, imposing a penalty."

9. A plain reading of Section 47 as aforesaid would indicate that no appeal is provided for against an order under Section 12, which is of an interlocutory nature, for production of minor and interim protection of person and property or grant of visitation rights.

10. In terms of the provisions contained under Section 19 of the Act, 1984, 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. Section 19 is being extracted below:-

> "**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 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 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 with in its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 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."

11. In terms of the aforesaid provision, an appeal is provided for against every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

12. The distinction between an interlocutory order and a judgment or order which has trapping of finality giving rise to right of an appeal, has been considered time and again. In **Shah Babulal Khimji *v* Jayaben D. Kania and another**[3], the distinction in this regard was noticed, and it was stated thus:-

> "113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by Sub-section (2) of Section 2 cannot be physically imported into the definition of the word 'judgment' as used in Clause 15 of the Letters Patent because the Letters Patent has advisedly not used the terms 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a

3 (1981) 4 SCC 8

broader and not a narrower sense. In other words, a judgment can be of three kinds :

(1) *A Final Judgment*.—A judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) *A preliminary judgment*.—This kind of a judgment may take two forms—(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under Section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an R order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) *Intermediary or Interlocutory judgment*.—Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit

under Order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the Trial Judge would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely an interlocutory order. Similarly, suppose the Trial Judge passes an Order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule l Clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

114. In the course of the trial, the Trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal

> against the final judgment passed by the Trial Judge.
>
> 115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment."

13. The nature of orders relating to custody passed under the Act, 1890 were considered in **Dhanwanti Joshi *v* Madhav Unde**[4] and it was observed that orders relating to the custody of children are by their very nature not final but are interlocutory in nature and are subject to modification. The observations made in this regard in the judgment are as follows:-

> "21. It is no doubt true that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at any future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of the child (Rosy Jacob v. Jacob A. Chakramakkal, (1973) 1 SCC 840. However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the Family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting a new case before the court. It must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results. Ormerod, L.J. pointed out in S v. W (1981) 11 Fam Law 81 (Fam Law at p. 82 (CA) that
>
> > "the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not. The more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change"."

4 (1998) 1 SCC 112

14. Taking a similar view, in **Rosy Jacob *v* Jacob A. Chakramakkal**[5] it was held that all orders relating to custody of minor wards by their very nature must be considered of temporary nature made under the existing circumstances and are subject to variation with changed circumstances and it was stated thus:-

> "18. The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and Circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based, on consent decrees. cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation."

15. Considering the sensitive nature of the orders relating to the custody of a child, it was reiterated in **Vikram Veer Vohra *v* Shalini Bhalla**[6] that custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final.

16. The aforementioned legal proposition that custody orders can never be final was reiterated in **R.V. Srinath Prasad *v* Nandamuri Jayakrishna and others**[7].

17. Having regard to the foregoing discussion, we are of the considered view under Section 12 of the Act, 1890, the Court is empowered to make interlocutory orders for production of minor and protection of a person and property and also to

---

5 (1973) 1 SCC 840
6 (2010) 4 SCC 409
7 (2001) 4 SCC 71

pass an order granting visitation rights which may enable the non-custodial parent who does not have interim custody to be able to meet the child without removing him or her from the custody of the other parent such orders relating to custody of a child or grant of visitation rights are of a sensitive nature and are subject to variation, alteration or modification keeping in view the paramount consideration of the welfare of the child.

18. Section 47 of the Act, 1890 does not provide for an appeal against an order under Section 12 wherein the Court is empowered to pass interlocutory orders. Furthermore, Section 19 of the Act, 1984 while providing for an appeal from every judgment or order of a Family Court to the High Court both on facts and law specifically excludes interlocutory orders from its purview.

19. In the case at hand, the order dated 01.10.2020 passed by the Principal Family Judge is upon an application filed under Section 12 of the Act, 1890 whereby visitation rights have been granted to the opposite party no.2. The aforesaid order is clearly of an interlocutory nature and has been granted to the opposite party no.2 who is the non-custodial parent to enable him to meet the child without removing him from the custody of the appellant herein who is the other parent.

20. The aforementioned order has been granted in proceedings under Section 25 of the Act, 1890, registered as Case No.619 of 2020, which is still pending. The observations recorded by the Family Judge in the order dated 01.10.2020 while granting visitation rights can at best be considered to be tentative in nature only for the purpose of deciding the

application under Section 12 of the Act, 1890 and for passing of an order granting visitation rights which by its very nature is an interlocutory order.

21. In view of the aforesaid and considering the legal position as aforestated, we are of the considered view that the present appeal filed under Section 19 of the Act, 1984 is not maintainable.

22. Since we have come to the conclusion that the appeal itself is not maintainable, we refrain from entering into the merits of the case.

23. Accordingly, the appeal is dismissed as being not maintainable.

Order Date :- 11.11.2020
Shahroz

Justice Surya Prakash Kesarwani
Digitally signed by Justice Surya Prakash Kesarwani
Date: 2020.11.11 16:14:22 +05'30'

Justice Yogendra Kumar Srivastava
Digitally signed by Justice Yogendra Kumar Srivastava
Date: 2020.11.11 16:15:11 +05'30'