

A.F.R.

Court No. - 11

Case :- CRIMINAL APPEAL No. - 3030 of 2024

Appellant :- Jitendra Kumar Lakhmani

Respondent :- State Of U.P. Thru. Prin. Secy. Home Deptt. Lko And Another

Counsel for Appellant :- In Person

Counsel for Respondent :- G.A.

Hon'ble Abdul Moin,J.

1. By means of the instant appeal filed under Section 380 of Bharatiya Nagarik Suraksha Sanhita, 2023 (earlier Section 341 of the Criminal Procedure Code, 1973 in short 'Code, 1973'), the appellant seeks to challenge the order dated 24.07.2024 passed by learned Family Court whereby the application filed by the appellant under Section 340 of the Code, 1973 has been rejected.

2. A preliminary objection has been taken by Sri Piyush Kumar Singh, learned AGA appearing on behalf of respondent no.1, that considering the provisions of Section 19 of the Family Court Act, 1984 (hereinafter referred to as the 'Act, 1984'), the appellant will have to file an appeal under the provisions of the Act, 1984 itself and instant appeal would not be maintainable.

3. Learned AGA argues that Section 19 of the Act, 1984 clearly provides for filing of an appeal and as such the instant appeal filed under the provisions of the Code, 1973 would not be maintainable.

4. Heard Sri Jitendra Kumar Lakhmani, the appellant, who appeared in person, and learned AGA for the State on the preliminary objection.

5. The appeal has been filed under Section 341 of the Code, 1973 (now Section 380 of BNSS, 2023) aggrieved against the order dated 24.07.2024 whereby the application filed under Section 340 of the Code, 1973 has been rejected by learned Family Court.

6. In order to consider the preliminary objection as raised by learned AGA the

Court may have to consider the provisions of Section 19 of the Act, 1984.

7. For the sake of convenience, Section 19 of the Act, 1984 is reproduced as under:-

"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 (59 of 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."

8. From perusal of the provisions of Section 19 of the Act, 1984, it emerges that the Act categorically provides that except as provided in sub-section (2) of Section 19 of the Act, 1984 and **notwithstanding** anything contained in the Code of Criminal Procedure, 1973 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.

9. Sub-section (2) of Section 19 of the Act, 1984 provides that 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.

10. The order which is sought to be challenged in the instant appeal is not an order passed on the basis of consent between the parties nor an order passed under Chapter IX of the Code, meaning thereby that the provisions of sub-section (2) of Section 19 of the Act, 1984 would have no applicability. Thus, it is the provisions of sub-section (1) of Section 19 of the Act, 1984 which would be applicable.

11. As already indicated above sub-section (1) of Section 19 of the Act, 1984 starts with a non-obstante clause, meaning thereby that irrespective of anything contained in the Code, 1973 it is provisions of the Act, 1984 which would be applicable.

12. Consequently, once the Act, 1984 provides for filing of an appeal from every judgment or order not being an interlocutory order of a Family Court except an order passed under Chapter IX of the Code and in the instant case it is an order by which an application filed under Section 340 of the Code has been rejected which falls under Chapter XXVI of the Code. Therefore, it is only an appeal under the Act, 1984 which would lie in case the appellant herein is aggrieved by the said order.

13. Considering the aforesaid, it is thus apparent that in case the appellant herein is aggrieved by an order by which his application under Section 340 of the Code has been rejected consequently the only remedy available to him is to challenge the said order by filing of an appeal under Section 19(1) of the Act, 1984 and the appeal filed under the provisions of the Code or BNSS would not be maintainable keeping in view the non-obstante clause as per sub-section (1) of Section 19 of the Act, 1984 and the Act, 1984 being a special Act.

14. Further, whether the order by which the application under Section 340 of the Code has been rejected would be an interlocutory order or an order is also no

longer res-integra keeping in view the Full Bench judgment in the case of **Kiran Bala Srivastava vs. Jai Prakash Srivastava - MANU/UP/2771/2004** wherein considering the Full Bench of this Court which has been passed after considering the judgment of Hon'ble Supreme Court in the case of **Shah Babulal Khimji vs. Jayaben - AIR 1981 SC 1786**, it is apparent that the order passed under Section 340 of the Code would be an 'order' as per Section 19 of the Act, 1984 and accordingly it is an appeal which would be maintainable under the provisions of the Act, 1984.

15. After the aforesaid order has been dictated the appellant states that he does not intend to press on with the instant appeal and prays that the same may be dismissed as withdrawn with liberty to him to pursue other remedy as may be available to him under law.

16. Accordingly, the instant appeal is dismissed as withdrawn with liberty as aforesaid.

17. Let certified copies of the orders as annexed be returned to the appellant as per rules.

Order Date :- 25.9.2024

A. Katiyar