(2011) 01 AHC CK 0217

Allahabad High Court

Case No: First Appeal No. 495 of 2010

Isma Alam		APPELLANT
	Vs	
Sri Irshad Alam		RESPONDENT

Date of Decision: Jan. 25, 2011

Acts Referred:

- Civil Procedure Code Amendment Act, 1973 - Section 115, 397(2)
- Constitution of India, 1950 - Article 136
- Family Courts Act, 1984 - Section 19
- Guardians and Wards Act, 1890 - Section 12, 19, 25, 26, 28
- Hindu Marriage Act, 1955 - Section 24, 25

Hon'ble Judges: R.K. Agrawal, J; K.N. Pandey, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

1. The present appeal purporting to be u/s 19 of the Family Courts Act, 1984 (hereinafter referred to as the Act of 1984) has been filed against the order dated 04.12.2010 passed by the learned Principal Judge, Family Court, Kanpur Nagar (hereinafter referred to as the Judge) on two applications Paper No. 8 Ga and 33 Ga filed by the opposite party seeking interim custody of Master Irish Irshad Alam. The learned Judge had allowed both the applications and had directed that interim custody of Master Irish Irshad Alam be given to the opposite party herein after taking custody of the child by issuing of arrest warrant.

2. From the impugned order, it appears that a dispute is going on between the Appellant and the opposite party before the Judge in respect of custody of the minor child Master Irish Irshad Alam. The opposite party had filed an application u/s 25 of the Guardians and Wards Act. 1890 (hereinafter referred to as the Act) seeking custody of his minor son Master Irish Irshad Alam on various grounds. The aforesaid application has been registered as Case No. 50/70/2009. Along with the

said application, the opposite party also filed an application purporting to be u/s 12 of the Act praying that a direction be issued to the Appellant herein to produce the minor child Master Irish Irshad Alam before the Court so that he may meet his son. The application was accompanied by his affidavit. The said application was numbered as Paper No. 8 Ga.

3. On the said application, it appears that on 04.12.2009, the learned Judge had directed the Appellant herein not to take the child Master Irish Irshad Alam outside the jurisdiction of Kanpur. Vide another order dated 17.09.2010, the learned Judge once again directed that the minor child should not be taken outside the territorial jurisdiction of Kanpur.

4. Thereafter, the opposite party herein filed an application dated 27.11.2010 seeking interim custody of the minor child u/s 26 of the Act. This application was numbered as 33 Ga.

5. Objections were filed by the Appellant herein and the learned Judge, after considering the plea raised by the learned Counsel for the parties and going through the record had held that the Appellant herein had intentionally taken in violation of the orders dated 04.12.2009 and 17.09.2010, the minor child outside the jurisdiction of Kanpur which amounts to denying the opposite party herein from the natural love and affection towards his son Master Irish Irshad Alam and, therefore, the right of the Appellant herein of a guardian stands extinguished. He also recorded a finding that the child is more than 7 years and the mother, who is the natural guardian ceases to be so after a male child attains the age of 7 years. He came to the conclusion that the provisions of Section 26 of the Act has been violated. He also came to the conclusion that the lifestyle of the Appellant is having a bad effect on the mind of the minor child and his welfare has to be seen. He accordingly directed for interim custody of the minor child to be given to the opposite party herein by issuing arrest warrant and taking the minor child into custody.

6. The order dated 04.12.2010 is under challenge in the present appeal.

We have heard Sri V.M. Zaidi, learned senior counsel assisted by Sri S.M.G. Asghar, Advocate on behalf of the Appellant and Sri M.D. Singh ''Sekhar'', learned senior counsel assisted by Sri Rajesh Dwivedi, Advocate, on behalf of the opposite party.

7. Sri M.D. Singh ''Sekhar'', learned senior counsel raised a preliminary objection that as the order dated 04.12.2010 passed by the learned Judge is an interlocutory order, wherein, interim custody of the minor child has been given to the opposite party herein, therefore, the appeal u/s 19 of the Act of 1984 is not maintainable. He further submitted that the appeal u/s 47 of the Act is also not maintainable as the order does not come within any of the Clauses (a) to (j) of Section 47 of the Act. He, thus, submits that the appeal is liable to be dismissed on this ground alone as not maintainable. In support of his aforesaid plea, he has relied upon the following

decisions:

1. V.C. Shukla Vs. State through C.B.I.,

2. Khurshid Gauhar Vs. Siddiqunnisa,

3. Major Raja P. Singh Vs. Smt. Surendra Kumari,

4. Swarna Parava Tripathy v. Dibyasingha Tripathy AIR 1988 Orissa 173 (F.B.);

5. Smt. Usha Kumari Vs. Principal Judge, Family Court and Others,

6. Ravi Saran Prasad alias Kishore v. Smt. Rashmi Singh, 2001 (2) AWC 1333;

7. Smt. Boby Devi v. Kiran Pal Singh, 2002 (48) ALR 558

8. Sri V.M. Zaidi, learned senior counsel on the other hand submitted that the impugned order dated 04.12.2010 passed by the learned Judge is not an interlocutory order. It has all the traits of a final order and amounts to case decided and, therefore, the appeal is maintainable. He also challenged the order on merits and submitted that the object of Section 12 of the Act is very limited and the welfare of the minor child should be the paramount consideration for the Court to decide the question of granting custody whether interim or permanent. In support of his aforesaid plea, he has relied upon the following decisions:

1 Major S.S. Khanna v. Brig.F.J. Dillon, 1963 ALJ 1068

2 Amar Nath and Others Vs. State of Haryana and Another,

3 Smt. Anjali Kapoor v. Rajiv Baijal JT 2009 (5) SC 685

9. On merits Sri M.D. Singh "Sekhar", learned senior counsel submitted that the order dated 04.12.2010 passed by the learned Judge requires no interference as the same has been passed on consideration of all relevant materials and facts. He relied upon the decision of this Court in the case of Amit Beri v. Smt. Sheetal Beri, 2003 (94) RD 356 and the case of Khurshid Gauhar (supra).

10. Before we consider the appeal on merits, we deem it fit and proper to consider the preliminary objection raised by Sri M.D. Singh "Sekhar", learned senior counsel about the maintainability of the present appeal.

11. From a perusal of the impugned order dated 04.12.2010 passed by the learned Judge, we find that by the said order he had granted interim custody of Master Irish Irshad Alam to the opposite party herein after issuing the arrest warrant and taking him into custody. The said order has been passed on applications Paper 8 Ga and 33 Ga. As already mentioned herein before by application Paper 8 Ga, the opposite party herein prayed for issuance of a direction to the Appellant herein to produce the child Master Irish Irshad Alam before the Court so that he may meet him. Vide application Paper 33 Ga, the opposite party herein has sought interim custody of the minor child. The question is as to whether the order dated 04.12.2010 is in the

nature of an interlocutory order or amounts to a final order having decided any case or not.

12. u/s 47 of the Act, orders which are appealable have been mentioned. For ready reference, it is reproduced below:

47. Orders appealable. -An appeal shall lie to the High Court from an order made by a Court,

(a) u/s 7, appointing or declaring or refusing to appoint or declare a guardian; or

(b) u/s 9, Sub-section (3), returning an application;

or

(c) u/s 25, making or refusing to make an order for the return of a ward to the custody of his guardian; or

(d) u/s 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) u/s 28 or Section 29, refusing permission to a guardian to do an act referred to in the section; or

(f) u/s 32, defining, restrictding or extending the powers of a guardian; or

(g) u/s 39, removing a guardian; or

(h) u/s 40, refusing to discharge a guardian; or

(I) u/s 43, regulating the conduct or proceedings of a guardian or settling a matter in difference between joint guardians or enforcing the order; or (j) u/s 44 or Section 45, imposing a penalty.

13. From a perusal of the aforesaid provisions, it is seen that an order passed u/s 12 or an order passed u/s 26 of the Act (except insofar as it relates to refusal of leave for the removal of a ward from the limits of the jurisdiction of the Court or imposing conditions in respect thereto) has not been made specifically appealable under the Act.

14. It is to be borne in mind that nobody has a vested right of filing an appeal. Right of an appeal is a statutory right and is given by the Statute. If the statutory provisions are silent or do not provide the right of appeal against an order passed in any particular provision then no appeal can be filed under the Act against the said order.

15. Sri V.M. Zaidi, learned senior counsel stated that the present appeal has been filed u/s 19 of the Act of 1984, which gives a right of appeal against every order not being an interlocutory order of a Family Court both on facts and on law. The present appeal having been filed u/s 19 of the Act of 1984 is, therefore, maintainable. We

find that there is no dispute that an appeal lies against every order passed by the Family Court on both facts and on law. However, no appeal lies against an interlocutory order.

16. In the case of Major S.S. Khanna (supra), the Hon''ble Supreme Court has held that "the expression ''case'' is a word of comprehensive import: it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression ''case'' as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice".

17. The aforesaid decision arose out of proceeding u/s 115 of the Code of CPC which empowers the High Court to exercise the revisional power in respect of any case which has been decided by any Court subordinate to the High Court and in which no appeal lies. The Hon''ble Supreme Court has held that even interlocutory orders may amount to case decided. The case decided would mean that the issue involved before the Court has been finally decided one way or the other.

18. In the case of Amarnath (supra), the Hon''ble Supreme Court has held that "the main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in sub-s (2) of S. 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster''s New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to us that the term "interlocutory order" in S. 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in S. 397 of the 1973 Code. Thus, for instance, orders summoning witnesses. adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said

to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.

19. In the case of V.C. Shukla (supra), the Hon''ble Supreme Court had an occasion to consider as to what orders are final or interlocutory one. In para 33 of the reports, the Hon''ble Supreme Court has held as follows:

Thus, on a consideration of the authorities. mentioned above, the following propositions emerge:

(1) that an order which does not determine the rights of the parties but only one aspect of the suit or the trial is an interlocutory order;

(2) that the concept of interlocutory order has to be explained in contradistinction to a final order. In other words, if an order is not a final order, it would be an interlocutory order;

(3) that one of the tests generally accepted by the English Courts and the Federal Court is to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue; because, in our opinion, the term ''interlocutory order'' in the Code of Criminal Procedure has been used in a much wider sense so as to include even intermediate or quasi-final orders;

(4) that an order passed by the Special Court discharging the accused would undoubtedly be a final order inasmuch as it finally decides the rights of the parties and puts an end to the controversy and thereby terminates the entire proceedings before the court so that nothing is left to be done by the court thereafter;

(5) that even if the Act does not permit an appeal against an interlocutory order the accused is not left without any remedy because in suitable cases, the accused can always move this Court in its jurisdiction under Article 136 of the Constitution even against and order framing charges against the accused. Thus, it cannot be said that by not allowing an appeal against an order framing charges, the Act works serious injustice to the accused.

20. The Hon''ble Supreme Court in the aforesaid case has further held as follows:

Ordinarily speaking the expression "interlocutory" in legal parlance is understood in contradistinction to what is styled as final. In the course of a judicial proceeding before a court, for judicially determining the main dispute brought to the Court for its resolution, a number of situations arise, where that court goes on disposing of ancillary disputes raised by parties to the proceeding by making orders and unless the order finally disposes of a proceeding in a court, all such orders during the course of a trial would be broadly designated ''interlocutory'' orders. Such interlocutory orders are steps, taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding. They regulate the procedure only and do not affect any right or liability of the parties See Central

Bank of India Vs. Shri Gokal Chand, Every such interlocutory order may, for the time being, dispose of a particular point of controversy raised in the proceeding, yet nonetheless the order would be an interlocutory order unless by such an order the controversy between the parties is finally disposed of. Again in legal parlance such an order finally disposing of a dispute between the parties would be a judgment in a civil proceeding. In a criminal proceeding when either the accused is acquitted or convicted and sentence is pronounced upon the order would be a judgment disposing of case before the Court trying the accused. Till this situation is reached, a number of orders may have to be made, during the progress of adjudication of main dispute, such orders can appropriately and legally be styled as "interlocutory orders.

21. In the case of Khurshid Gauhar (supra), this Court has held that orders passed u/s 12 of the Act is interlocutory in nature.

22. In the case of Major Raja P. Singh (supra), the Rajasthan High Court has held that no appeal u/s 19 of the Family Courts Act, 1984 lies against interlocutory orders. An order allowing or rejecting amendment of the petition can not be termed as finally deciding the case and the appeal is not maintainable. In para 11 of the report, the Rajasthan High Court has held as follows:

The object of this Special Law of the Family Courts Act is to decide the matrimonial cases in a speedy manner. If, the order rejecting or allowing an amendment application will be termed as the case decided for the purpose of this Act and is appealable then, in ordinary course of law the decision of such cases would take years to come to reach the finality of the matter. In order to achieve the object of the Act ie. speedy settlement of dispute relating to marriage, the purpose of expeditious trial is frustrated. That apart if the legislature intended that all interlocutory order be appealable, it should not have used the word in S. 19 of the Act "not being an interlocutory order" and that is why no appeal or revision has been provided. This Court in Smt. Vijay Kaur v. Radhey Shyam D.B. Civil Misc. Appeal No. 107/90 decided on 1-8-1990 has held that the order relating to adjournment cost is an interlocutory order and appeal is not maintainable u/s 19 of the Act. In this view of the matter, the order dated 6-4-1989 cannot be termed finally deciding the case ie. the controversy being settled. The parties can agitate the point in appeal after final disposal of the case by the trial court. In our considered opinion, the allowing or refusing an amendment is an interlocutory order against which no appeal u/s 19 of Act is provided. In conclusion the preliminary objection is sustained and it is held that the order dated 6-4-1989 is an interlocutory order and no appeal lies to this Court.

23. In the case of Swarn Prava Tripathy (supra), the Orissa High Court has held that an order granting interim maintenance under Sections 24 and 25 of the Hindu Marriage Act is interlocutory in nature and no appeal lies.

24. In the case of Smt. Usha Kumari (supra), the Patna High Court has held that an order granting interim custody to the child in an interlocutory order and an appeal u/s 19 of the Family Courts Act is not maintainable. In para 10 of the report, the Patna High Court has held as follows:

Therefore the appeal provisions u/s 19 of the Act have been advisedly made a restricted one to effectuate the above object. It is a one tier appeal to the High Court. Right of appeal being always a creature of statute, the statutory prescription must be adhered to in order to achieve the avowed object of speedy disposal of disputes.

25. In the case of Ravi Saran Prasad (supra), a Division Bench of this Court has held that against an order of maintenance pendentelite and petition expenses passed by the Family Court u/s 24 of the Hindu Marriage Act, no appeal lies u/s 19 of the Act of 1984.

26. In the case of Boby Devi (supra), a Division Bench of this Court has held that from bare reading of Sub-section (1) of Section 19 of the Family Courts Act, it is crystal clear that an appeal is maintainable against every judgment or order passed by a Family Court provided it is not an interlocutory order. As a matter of fact, an appeal is prohibited against interlocutory order and consent decree order passed by Family Courts.

27. It has further held that "in our considered opinion the connotation ''interlocutory order'' used under Sub-section (1) of Section 19 of Family Courts Act means if Family Court in exercising its power passed an order in a way allowing further action to continue in a suit or proceeding before it then such order would be termed as ''interlocutory order'' but on the other hand if by a order passed by Family Court the lis between the parties is finally stood disposed of and nothing is left to be decided further such orders would be termed as ''final order'' and would be appealable under Sub-section (1) of Section 19 of said Act".

28. Applying the principles laid down in the facts and circumstances of the present case, we find that the learned Judge had not decided the case finally between the parties as the petition filed u/s 25 of the Act numbered as 50/70/2009 is still pending. He has only decided the applications filed u/s 12 and 26 of the Act and had directed for granting interim custody of the minor child to the opposite party herein pending final decision on the application filed u/s 25 of the Act. Thus, the order impugned in the present appeal is an interlocutory order and an appeal u/s 19 of the Act would not lie. The submission of Sri V.M. Zaidi, learned senior counsel that by the impugned order, the learned Judge had in fact decided the entire controversy is misplaced.

29. While arriving at a conclusion as to whether the interim custody of the minor child has to be given to the opposite party herein on an application in this behalf before the learned Judge, the learned Judge has necessarily to record a finding as to

why such an order granting interim custody is required to be passed. However, the findings recorded therein is only a tentative finding and would not in any way effect the disposal of case No. 50/70/2009 which has to be decided by the learned Judge on the basis of the material and evidence on record and in accordance with law.

30. In view of the foregoing discussions, we are of the considered opinion that the present appeal filed u/s 19 of the Act of 1984 is not maintainable. As we have come to the conclusion that the appeal itself is not maintainable, we are not entering into the merits of the controversy.

31. The appeal is, therefore, dismissed as not maintainable.