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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 21st August, 2019
Judgment pronounced on: 1st October, 2019

\+ **MAT.APP.(F.C.) 211/2017 & CM APPL. 44390/2017**
COLONEL RAMESH PAL SINGH ..... Appellant

Through: Ms.Nitya Ramakrishnan with Ms.Warisha Farasat, Mr.Saurabh D. Karan, Mr.Karan Singh and Ms.Kanika Jain, Advocates with appellant in person

Versus

SUGHANDHI AGGARWAL ..... Respondent

Through: Mr.Ashok Kumar Singh, Sr. Advocate with Mr.Sanjeev Kumar and Mr.Ashutosh Ranjan, Advocates with respondent in person.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

1. The appellant/husband is aggrieved by the order dated 16.10.2017 passed by the Family Courts on an application filed by the respondent/wife under Section 12 of the Guardians and Wards Act, 1890 (hereinafter referred to as G & W Act). By way of the impugned order the Family Courts granted the custody of both the children to the Respondent after the completion of current session i.e. 2017-2018 and also drew out a vacation

arrangement of summer, winter and other holidays being Deepawali and Holi. The relevant portion of the order dated 16.10.2017 reads as under:-

> "*15. In the given facts and circumstances the custody of both the kids needs to be given to the petitioner after the final examination of both the kids in current session 2017-2018 is over and the same is ordered accordingly.*
>
> *16. The transfer certificate and the annual progress cards be immediately handed over by the respondent to the petitioner on getting the same to facilitate admission of both the kids in a school at Delhi in the next academic session.*
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> *17. As regards the vacations falling in summer, winters, Deepawali, Holi, the petitioner shall hand over/ get back the custody of the kids to/from the Respondent no.2 at her residence at Delhi for spending 60% of the vacation by the kids with the respondent from the date of commencement of the vacation. The Respondent shall accordingly pick up and drop the kids at the residence of the petitioner. The pick up and drop off time would be 11 AM and 5 PM respectively.*
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> *18. The parties are allowed to take the kids to any place in India or abroad during the vacation period and otherwise but would provide their contact number, itinerary of the programme to each other. The petitioner will inform the respondent about the school report, extracurricular activities of the kids by emailing the documents. Both the parties will report contemporaneously through email each other about doctors attending to kids, as and when needed by the kids.*

19. For December vacation 2017 this year the petitioner is given the custody of the kids for 60% of the vacation mentioned from the first date of the vacation. The respondent shall e-mail the schedule of the school vacation to the petitioner the day the same is received from the school. The petitioner shall pick and drop the kids for winter vacation from Mohali. Parties are given liberty on their own to make mutual adjustments in period of respective share of their vacations for the benefit of the kids.

20. For celebrating Diwali 2017 failing on 19.10.2017 the petitioner is allowed to visit the kids at Mohali and can celebrate the festival at any place to be decided mutually by the parties from 06.00PM to 09.00 PM. The respondent and parents of both the parties are allowed to remain present for the Diwali celebrations.

21. During, the custody of the kids with the petitioner, she would allow the kids to have audio video interaction of the kids with the respondent for 15 minutes daily between 6 PM – 8 PM. This arrangement can be mutually changed by the parents as per their mutual convenience and convenience of the kids."

2. The necessary facts to be noticed for the disposal of the present appeal are that the marriage between the parties was solemnized on 22.12.2002 at New Delhi in accordance with Sikh rites and rituals. Two children namely Suhani aged 10 years and Shabad aged 7 years were born out of the wedlock. The parties separated in the year 2015. That on 11.08.2015, the appellant took the children with him to Kashmir and thereafter shifted to Bikaner alongwith his children and his mother. The Respondent preferred a petition under section 7, 9 & 25 of the G & W Act, 1890 for the

custody of the minor children. Along with the main petition filed under the aforesaid petition, the respondent also preferred an application under Section 12 of the G & W Act in Delhi for the interim custody of her children. The Appellant also filed a case under G & W Act at Bikaner Rajasthan seeking custody of the children. The respondent in the meanwhile moved a transfer petition before the Supreme Court and the case at Bikaner was transferred to Delhi. The Family Court vide order dated 16.10.2017 allowed the application for the interim custody in Guardianship Petition No. 75/2015 and granted the interim custody of the children to the respondent. Being aggrieved, appellant filed the present appeal challenging the impugned order passed by the Family Courts.

3. At the outset, Mr. Ashok Kumar Singh, Senior Advocate appearing on behalf of the respondent argued that the present appeal filed under Section 19 of the Family Courts Act is not maintainable as the order under challenge is an interlocutory order and the G & W Act as well as the Family Courts Act bars an appeal against interlocutory orders.

4. Ms. Nitya Ramakrishnan learned counsel for the appellant contended that the order passed by the Family Courts under Section 12 of the G & W Act granting temporary custody of the children to the Respondent is not an '*interlocutory order*' but a '*judgment*' or '*order*' passed by the Family Courts. Learned counsel contended that the order dated 16.10.2017 passed under Section 12 of the G & W Act was a '*judgment*' or '*order*' as it

finally decides the issue between the parties. Learned counsel for the appellant relying upon the case of ***Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.*** reported in ***AIR 1981 SC 1786*** contended that as per the observations made by the Apex Court in *Shah Babulal Khimji (Supra)* case, an interlocutory order could be called a '*judgement*' when it has the trapping of a judgment. Learned Counsel laboured hard to contend that likewise an order passed by the Family Courts under Section 24 of the Hindu Marriage Act, which is appealable under Section 19(1) of the Family Courts Act, an order passed under Section 12 of G & W Act is also amenable to scrutiny under Section 19(1) of the Hindu Marriage Act, as the issue had attained finality between the parties. In order to fortify the arguments learned counsel further relied on the case of ***Manish Aggarwal Versus Seema Aggarwal*** reported in ***(2012) 192 DLT 714 (DB),*** relevant portion of which reads as under:-

"*26. We, thus, conclude as under:*

i. In respect of order passed under Section 24 to 27 of the HM Act appeals would lie under Section 19(1) of the said Act to the Division Bench of this Court in view of the provisions of sub-section (6) of Section 19 of the said Act, such orders being in the nature of intermediate orders. It must be noted that sub-section (6) of Section 19 of the said Act is applicable only in respect of sub-section (1) and not sub-section (4) of Section 19 of the said Act.

ii. No appeal would lie under Section 19 (1) of the said Act qua proceedings under Chapter 9 of the Cr. P.C. Section 125 to 128) in view of the

mandate of sub-section (2) of Section 19 of the said Act.

iii. *The remedy of criminal revisions would be available qua both the interim and final order under Sections 125 to 128 of the Cr. P.C. under sub-section (4) of Section 19 of the said Act.*

iv. *As a measure of abundant caution we clarify that all order as may be passed by the Family Courts in exercise of its jurisdiction under Section 7 of the said Act, which have a character of an intermediate order, and are not merely interlocutory orders, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act."*

5. On the contrary, Mr. Ashok Kumar Singh, Senior Advocate appearing on behalf of the Respondent raised four contentions:-

(a) That the present appeal is not maintainable, as the order dated 16.10.2017 passed by the Family Courts under Section 12 of the G & W Act is an '*interlocutory order*' and Section 47 of the G & W Act does not provide for filing an appeal against an order passed under Section 12 of the G & W Act.

(b) That Section 7 (g) of the Family Courts Act gives power to the Family Courts to adjudicate a proceeding in relation to the custody of children, however, Section 19(1) of the Family Courts Act specifically debars an appeal against an interlocutory order.

(c) That the Family Courts Act was enacted after two years of the pronouncement of the *Shah Babulal Khimji (Supra)* case, which makes it clear that the legislature

has intentionally barred an appeal under Section 19(1) of the Family Courts Act from an order passed under Section 12 of the G & W Act.

(d) That the Division Bench of this Court in the case of *Manish Aggarwal (Supra)* had specifically considered the case of *Shah Babulal Khimji (Supra)* and held that an order passed under Section 125 of the Code of Criminal Procedure is an interlocutory order and an appeal under Section 19(1) of the Family Courts Act is not maintainable. That in *Manish Aggarwal (Supra*) case maintainability of an appeal under Section 19(1) of the Family Courts Act from an order passed under Section 12 of the G & W Act was not at all considered and discussions were with regard to Section 126 Cr. P.C. and Sections 24 to 26 of the Hindu Marriage Act. In order to support his contentions learned Senior Counsel for the Respondent relied on the case of ***Dhanwanti Joshi Vs. Madhav Unde*** reported in ***(1998) 1 SCC 112***, ***Rosy Jacob Vs. Jacob A. Chakramakkal*** reported in ***(1973) 1 SCC 840, Vikram Vir Bohra Vs. Shalini Bhalla*** *reported in* ***(2010) 4 SCC 409***, ***Swarna Prava Tripathy and Anr. vs. Dibyasingha Tripathy and Anr.*** *reported in* ***1998 SCC Online Ori 56*** *and* ***Smt. Usha Kumari vs. Principal Judge, Family Court and Ors.*** *reported in* ***AIR 1998 Pat 50.***

6. We have heard learned counsel for the parties on the maintainability of the present appeal and have also perused the available records.

7. In order to decide the issue under consideration, we deem it appropriate to reproduce Section 12 of the G & W Act, 1890 which reads as under:-

> **"*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 G & W Act, 1890 provides for orders which are appealable before this Court which reads as under:-

"*47. Orders appealable.—An appeal shall lie to the High Court from an order made by a 1[***] 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 bare reading of the above provisions would manifest that the principle enshrined under Section 12 of the G & W Act provides for power to make interlocutory orders for production of a minor child, interim protection of the child and his property and empower the court to handover temporary custody as well modify or vary any such orders required due to changed

conditions and circumstances. Section 47 bars an appeal against an order passed under Section 12 of the G & W Act.

10. Section 7 of the Family Courts Act, 1984 reads as under:-

> "*7. Jurisdiction.-(1) Subject to the other provisions of this Act, a Family Courts shall- -(1) Subject to the other provisions of this Act, a Family Courts shall-"*
>
> *(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and*
>
> *(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Courts extends. Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-*
>
> > *(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;*
> >
> > *(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;*
> >
> > *(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;*

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Courts shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

11. Section 19 (1) and (2) of the Family Courts Act, 1894 reads 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 Courts to the High Court both on facts and on law. -(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 Courts to the High Court both on facts and on law."

(2) No appeal shall lie from a decree or order passed by the Family Courts with the consent of the parties 1[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]."

12. In ***Balram Yadav vs Fulmaniya Yadav***, ***AIR 2016 SC 2161***, the Apex Court while considering the scope of Section 7 of the Family Courts Act observed that the Family Courts Act has an overriding effect. A plain reading of sub section (1) of Section 19 makes it clear that no appeal lies against interlocutory orders passed under the Family Courts Act.

13. The scope of '*Judgment*' and '*interlocutory order*' has been distinguished time and again by the Apex Court and this Court in various judgments. In ***Shah Babulal Khimji Vs. Jayaben D. Kania & Anr., AIR 1981 SC 1786*** the Hon'ble Supreme Court discussed the scope of '*interlocutory order*' and the expression *'judgment'* which was assigned a wider meaning and has extended the scope of right of appeal where the characteristics and trappings of the finality of the issue is available. The relevant paras 113-115 reads as under:-

*"**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 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 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 a 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 1 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."*

14. The scope of an order passed by the Family Courts on an application under Section 24 of the Hindu Marriage Act which is

appealable under Section 19 (1) of the Family Courts Act, in terms of an order passed by the Apex Court in ***Shah Babulal Khimji (Supra)*** has been dealt by the Division Bench of this Court in the case of ***Manish Aggarwal vs. Seema Aggarwal*** reported in ***(2012) 192 DLT 714 (DB)***. In *Manish Aggarwal (Supra)* case the Division Bench of this Court while examining the applicability of dicta laid down in *Shah Babulal Khimji (Supra)* case, in determining whether an appeal would lie under Section 19 (1) of the Family Courts Act qua proceedings under Chapter 9 of the Cr. P.C (Sections 125 to 128), has observed that in respect of order passed under Section 24 to 27 of the Hindu Marriage Act an appeal would lie under Section 19 (1) of the Family Courts Act, in terms of the provisions of sub section (6) of Section 19 of the Family Courts Act being intermediate orders, however declined to apply the principles of *Shah Babulal Khimji (Supra)* case in relation to proceedings qua Chapter 9 of the Cr. P.C (Sections 125 to 128).

15. In Manish Aggarwal case (supra), the Division Bench of this Court has adopted the principles laid down in the *Shah Babulal Khimji (Supra)* case as far as Section 24 of the HM Act is concerned but declined to extend the scope of Section 19(1) of the Family Courts Act in relation to appeal against orders under Section 125 Cr. P.C. The relevant observations of the Division bench is as under:-

> *"24. We have to also proceed to discuss not only the consequences of the aforesaid intermediate orders, but*

also orders which may be passed under Chapter 9 of the Cr.P.C. While specifically excluding from the ambit of appeal orders passed under Chapter 9 of the Cr.P.C. (Sections 125 to 128) as per sub-section (2) of Section 19 of the said Act, the remedy against such orders has been specifically provided thereafter under sub-section (4) of Section 19 of the said Act and, thus, clearly a criminal revision would be maintainable. However, there is an exception under sub-section (4) of Section 19 of the said Act in as much, as, interlocutory orders specifically stand excluded from the ambit of revision. We may also add here that sub-section (5) of Section 19 of the said Act clearly bars any appeal or revision against an order of the Family Courts unless specifically provided for under Section 19 of the said Act. We have to, thus, examine as to what would be the meaning of the expression interlocutory order in this context. There can be procedural orders passed, against which no revision would be maintainable. The analogy may be taken from the discussion qua the provision of Section 397 (2) of the Cr.P.C. in Aakansha Shrivastava case (supra) which in turn had relied upon the judgement of the Supreme Court in Amarnath & Ors. case (supra). These procedural orders, thus, would undoubtedly be interlocutory in nature. The issue arises from the second proviso to sub-section (1) of Section 125 Cr.P.C. which provides for grant of interim maintenance, i.e., whether criminal revision would be maintainable qua such determination. Once again, the same principle would apply, as qua determination of interim maintenance under Section 24 of the HM Act, since the nature of the order is such that it would be really an intermediate order affecting the vital rights of the parties. It can even result in consequence of civil imprisonment for violation. Thus, both kinds of orders under Section 125 Cr.P.C., i.e., interim maintenance and the final order would be amenable to the revisional jurisdiction."

16. We tend to rely on the decision rendered by the Division bench of this Court in *Manish Aggarwal (Supra)* case as far as non-applicability of *Shah Babulal Khimji (Supra)* case is concerned wherein the expression '*judgment*' was assigned a wider meaning and has extended the scope of right to appeal where the characteristics and trappings of the finality of the issue is available.

17. The Apex Court while dealing with provisions of G & W Act, 1890 in the case of ***Dhanwanti Joshi Vs. Madhav Unde*** reported in ***(1998) 1 SCC 112*** has observed that orders relating to custody of children are interlocutory in nature as they require modification from time to time. Relevant portion reads as under:-

> "*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 Courts 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".

18. Similar observations have been made by the Apex Court in the case of ***Rosy Jacob Vs. Jacob A. Chakramakkal*** reported in ***(1973) 1 SCC 840*** which reads as under:-

> **"*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."*

19. In case of ***Vikram Vir Bohra Vs. Shalini Bhalla*** reported in ***2010 4 SCC 409*** the Apex Court observed as under:-

> ***"12.*** *In a matter relating to the custody of a child, this Court must remember that it is dealing with a very sensitive issue in considering the nature of care and*

affection that a child requires in the growing stages of his or her life. That is why custody orders are always considered interlocutory orders and by the nature of such proceedings custody orders cannot be made rigid and final. They are capable of being altered and moulded keeping in mind the needs of the child."

20. Further in the case of ***R.V. Srinath Prasad v. Nandamuri Jayakrishna & Others, AIR 2001 SC 1056***, the Supreme Court has observed that orders of custody can never be final.

21. Having being discussed the dicta as to the nature of orders passed for the custody of children under the provisions of the G & W Act in general, it is pertinent to refer to the findings and views of the coordinate benches of the various High Courts.

22. In ***Seema vs. Sanjeev Godha*** reported in ***1993 SCC Online Raj 216***, the Hon'ble Rajasthan High Court while dealing with the a similar issue in hand as to whether order passed under Section 12 of the G & W Act has held that the order is an interlocutory order and hence an appeal is not maintainable. The relevant portion has been reproduced as under:

7. An application under Section 7 of the Act of 1890 has been filed and during the pendency of that application, under Section 12 of that Act an application, for interim custody of the minor child was filed. A bare reading of Sub-section (1) of Section 12 of the Act of 1890 will show that the Court is empowered to make an interim order for protection of the person or property of the minor. It will be seen that under Section 12 more than one order for

temporary custody and protection of person and property can be made. Though, we are dealing with an appeal under Section 19(1) of the Act, but even under Section 47 of the Act of 1890 which deals with orders appealable, an order under Section 12 for temporary custody and protection of the person of the minor has not been made appealable. Before coming into force of the Act a revision might have been maintained and perhaps was maintainable but the matters of custody of minor haying come under exclusive jurisdiction of the Family Courts under the Act, it is the Act which will apply and therefore, we are of the opinion that so far as the order of the Court relating to temporary custody under Section 12 of the 1890 Act pending the application under Section 7 of that Act is concerned, it is an 'interlocutory order' and an appeal under Section 19(1) of the Act will not be maintainable. But during the course of arguments we had put to the learned Counsel for the parties the question whether or not in a given case if the order of the Family Court is such which is perverse and is one which could not have been made under the provisions of law and an appeal does not lie under Section 19(1) of the Act because the said order is 'Interlocutory order' whether this Court can exercise its power under Article 226 or 227 of the Constitution of India, Learned Counsel for the respondent could not satisfy us that this power could not be exercised. We are of the opinion that Article 227 of the Constitution of India confers power on this Court of superintendence over all Courts and Tribunals through the territory of Rajasthan and in exercise of those powers, which powers have no doubt to be exercised most sparingly

only in cases where grave injustice would be done unless this Court can quash thee order of the Tribunal. The said power under Article 227 of the Constitution being discretionary it is for the Court to exercise the discretion and no party can claim the exercise of such power as of right.

23. In ***Varsha Lakhmani vs. Hitesh Wadhva*** reported in ***2008 (71) ALR 665*** the Allahabad High Court while taking into consideration the judgment of ***Shah Babulal Khimji (supra)*** has held as under:

12. From the provision of Section 28 of the Hindu Marriage Act it is crystal clear that all decrees are appealable in nature. Therefore, a necessity arose to consider the cause of Section 24 of such Act, which itself could exist for pendente lite period and cannot exist after decree. Hence, it has to have the characteristics and trappings of final order. In any proceeding there are two stages i.e. interim and final. But an order under Section 24 itself exists at an interim stage till final decision. Therefore, in that way the order under such Section seems to be both interim and final. Hence, characteristics and trappings of finality is available under such section. Thus, the Full Bench has rightly accepted the ratio of Shah Babulal Khimji (supra) with regard to the Section under anterior Act. But such decision by no means is applicable under the Section of the Act applicable herein. Therefore, this case is to be considered only on that background being relevant for the purpose.

13. Hence, we conclude by saying that the procedural law i.e. The Family Courts Act, 1984 promulgated about three years after the judgement of the Supreme Court in Shah Babulal Khimji (supra), does not give any room for the purpose of appeal from any

interlocutory order. Secondly, neither the subjective law i.e. The Guardians and Wards Act, 1890, under which the application was made, provides any scope of appeal from such type of order nor any similar provision under different Act i.e. Section 26 of the Hindu Marriage Act, 1955 provides any scope of appeal from an interim order. Lastly, express intention of the legislature is to be understood from its plain reading at first and in case any vacuum arose, the same is to be understood by the implied intention from such Act as well as parallel Act, if any. In this case neither the express intention nor the implied intention of the legislature speaks that an appeal can be preferred from the order impugned.

24. Further, another bench of the Hon'ble Allahabad High Court while dealing with the scope of appeal in case of order passed under Section 12 of the G & W Act in ***Isma Alam vs. Irshad Alam*** bearing number ***First Appeal No. 495 of 2010*** has extensively discussed the applicability of various Apex Court Judgments in relation to the G & W Act including ***Amarnath vs. State of Haryana*** reported in ***AIR 1977 SC 2185*** and ***V.C. Shukla vs. State through C.B.I.*** reported in ***AIR 1980 SC 962*** and has held that interlocutory orders passed under G & W Act were not amenable to appeal. The relevant portion of the aforesaid judgment has been reproduced as under:

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 under Section 25 of the Act numbered as 50/70/2009 is still pending. He has only decided the applications filed under Section 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 under Section 25 of the Act. Thus, the order impugned in the present appeal is an interlocutory order and an appeal under Section 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 under Section 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.

25. As discussed above, the coordinate High Courts are of the view that the plain reading of the provisions of the G & W Act reflect that an order passed under section 12 of the said act is an interlocutory order and hence, an appeal is barred by section 47 of the G & W Act.

26. To conclude, the Family Court Act came into force in the year 1984, i.e. 2 years after the pronouncement of *Shah Babulal Khimji (Supra)* by the Apex Court. Nowhere was it intended by the legislature to bring an appeal under Section 19(1) of the Family Courts against an order passed under Section 12 of the G & W Act nor does the G & W Act provide for an appeal against order passed under Section 12 of the G & W Act.

27. Coming to the facts of the case in hand, the impugned order dated 16.10.2017 relates to an application which was brought under Section 12 of the G & W Act. Through this order the custody of both the children was handed to the respondent. It is pertinent to mention that while the proceedings before the Family Courts

were pending, the impugned order dated 16.10.2017 was passed, which is yet pending disposal. To our mind, the order under challenge is nothing but an interlocutory order and as per the settled preposition of law no appeal would lie against the order dated 16.10.2017 passed under Section 12 of the G & W Act being barred under Section 19(1) of the Family Courts Act.

28. Therefore, keeping in view the law discussed above as well as the relevant provisions discussed above, the present appeal is dismissed, being not maintainable. Liberty is granted to the appellant, take appropriate recourse in accordance with law.

29. However, taking into account the litigation pending between the parties, the family Court is directed to dispose of the custody petition as expeditiously as possible.

CM APPL. 44390/2017 (Stay)

30. In view of the reasons stated above, the interim orders granted vide order dated 20.03.2018 stands vacated. Application is accordingly dismissed.

SANGITA DHINGRA SEHGAL, J

G.S. SISTANI, J

OCTOBER 1, 2019
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