

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

% **Date of decision: 19th September, 2018.**

+ **CM(M) 140/2018 & CM No.4633/2018 (for stay)**

JAYANTI PRASAD GAUTAM **Petitioner**
Through: Mr. J.M. Kalia and Ms. Bhawana
Garg, Advs.

Versus

PRAGYA GAUTAM **Respondent**
Through: Mr. Mukesh Bhardwaj, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 17th September, 2018, following order was passed:

“1. This petition under Article 227 of the Constitution of India impugns the orders [dated 22nd August, 2017 and 3rd October, 2017 in H.A.M. No.10/2016 of the Court of Principal Judge Family Courts (South-East)] granting litigation expenses of Rs.11,000/- and interim maintenance of Rs.10,000/- per month to the respondent who is the daughter of the petitioner, against the petitioner.

2. This petition came up first before this Court on 6th February, 2018 when notice thereof was ordered to be issued and the operation of the impugned order stayed. The respondent has filed a reply to the petition to which rejoinder has been filed.

*3. Attention of the counsel for the petitioner is drawn to the dicta of the Division Bench of this Court in **Manish Aggarwal Vs. Seema Aggarwal** ILR 2013 (1) Del 210 holding that against orders under Sections 24 to 27 of the Hindu Marriage Act, 1955, appeal lies under Section 19(6) of the Family Courts Act,*

1984. On parity, an appeal would lie under Section 19(6) of the Family Courts Act against an order of maintenance under the Hindu Adoption and Maintenance Act, 1956 also.

4. However since neither counsel is aware of the said judgment, it is deemed appropriate to grant them an opportunity to study and respond.

5. On request, list on 19th September, 2018.”

2. Today, the counsel for the petitioner states that though there is no mention of Hindu Adoption and Maintenance Act, 1956 in **Manish Aggarwal** supra, but on the parity of reasoning given therein, appeal under Section 19(6) of the Family Courts Act, would lie against the impugned order also.

3. I may add, that the reasons which prevailed in **Manish Aggarwal** supra for holding orders passed under Sections 24 to 27 of the Hindu Marriage Act to be appealable under Section 19(1) of the Family Courts Act were that, (i) under Section 19(1) of the Family Courts Act, save as provided in Section 19(2), an appeal lies from every judgment or order of Family Court, to the High Court, both on facts and law; (ii) qua an order or judgment of the Family Court, the provision of appeal under Section 19 of the Family Courts Act would prevail, irrespective of what is contained in the Cr.P.C., CPC or any other law which would include the Hindu Marriage Act; (iii) however the right of appeal comes with one limitation i.e. it does not lie against an interlocutory order; (iv) question thus arises as to what is meaning of interlocutory order; (v) the orders passed under Sections 25 and 26 of the Hindu Marriage Act were appealable under Section 28(2) thereof, provided they were not interim orders; (vi) that the orders passed for permanent

alimony and maintenance under Section 25 *per se* are in the nature of final orders as they are passed at the time of passing of the decree or any time subsequent thereto, unless they are procedural in nature; (vii) that the issues of interim maintenance pending matrimonial proceedings are dealt with under Section 24 of the Hindu Marriage Act; (viii) Section 26 of the Hindu Marriage Act on the other hand deals only with passing of interim orders and making provision in the decree as may be deemed just and proper with respect to custody, maintenance and education of minor children; (ix) orders passed under Sections 25 and 26 were specifically incorporated as one of the species against which an appeal would lie under Section 28(2) of the Hindu Marriage Act; (x) the only way by which full effect can be given to the appeal provision in Section 28 of the Hindu Marriage Act is by construing the expression “interim orders” used in Section 28(2) to mean procedural orders, passed while dealing with proceedings under Sections 25 and 26 of the Act; (xi) though Legislature had amended Section 28(1) of the Marriage Act in the year 1976 by removing the provision for appeal against all kinds of orders, except those covered by Section 28(2), but subsequently, in the year 1984, while enacting the Family Courts Act, in Section 19(1) thereof provided for an appeal from all judgments and orders, not being interlocutory orders; (xii) the scope of appeal under Section 19(1) of the Family Courts Act cannot take its colour from the scope of appeal under Section 28 of the Hindu Marriage Act particularly because of the *non obstante* clause contained in Section 19(1) of the Family Courts Act and Section 19(1) using both expressions ‘judgment’ and ‘order’; (xiii) the legislature was thus conscious of the consequences of providing for appeals from orders which are not interlocutory orders; (xiv) as explained in *Shah*

Babulal Khimji Vs. Jayaben D. Kania (1981) 4 SCC 8, even an interlocutory order could be called a judgment when it has the quality of attaching finality to it; (xv) though the order determining maintenance under Section 24 of the Hindu Marriage Act is of interim maintenance but the proceedings are final in nature, till the decision of the main matter; these are thus, proceedings within proceedings which have the character of finality attached to them, as the same visits the parties with civil consequences; (xvi) the denial of maintenance would greatly prejudice the ability of the disadvantaged spouse to contest proceedings, while on the other hand, inability to pay maintenance by the spouse has serious consequences as it would result in striking off the defence / dismissal of the substantive case; and, (xvii) orders passed under Sections 24, 25 or 26 of the Hindu Marriage Act fit the definition of intermediate order which may adversely affect valuable rights.

4. The reasons which prevailed in *Manish Aggarwal* supra for holding orders of interim maintenance under Section 24 of the Hindu Marriage Act to be appealable under Section 19(1) of the Family Courts Act equally apply to grant of interim maintenance under Section 20 of the Hindu Adoption and Maintenance Act which *inter alia* provides for maintenance of children. I may in this regard record that though Section 24 of the Hindu Marriage Act provides for an order of interim maintenance of spouse only but Section 26 thereof empowers the Court to “from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to custody, maintenance, education of minor children.....”. When an order fixing maintenance of minor children in exercise of powers under

Section 26 of the Marriage Act has been made appealable under Section 19(1) of the Family Court Act, there is no reason to hold that an order of interim maintenance of children under Section 20 of the Hindu Adoption and Maintenance Act is not appealable.

5. Though the respondent in the present case is not a minor but Section 20 of the Hindu Adoption and Maintenance Act makes a Hindu bound, during his / her lifetime, to maintain a daughter who is unmarried and who is unable to maintain herself out of her own earning.

6. The counsel for petitioner however still insists that since the impugned order is without jurisdiction, a petition under Article 227 of the Constitution of India, would also be maintainable. Reliance in this regard is placed on *Archcon Vs. Sewda Const. Co.* AIR 2005 Gau. 58, *Abanindra Kumar Maity Vs. A.K. Biswas* AIR 1954 Cal 355, *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani* AIR 1961 SC 1506, *Committee of Management Vs. Vice-Chancellor* AIR 2009 SC 1159, *Dhariwal Tobacco Products Ltd. Vs. State of Maharashtra* (2009) 2 SCC 370 and *Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd.* AIR 1999 SC 1975.

7. Once the Legislature has provided the remedy of appeal, that too to the Division Bench against the impugned order, the principle enshrined in large number of judgments discussed in dicta of the Division Bench of this Court in *Dinkar Kumar Vs. Union of India* 2014 SCC OnLine Del 2288 relating to writ jurisdiction would apply i.e. that the Writ Court should abstain from exercising jurisdiction when alternative statutory remedy is available. It is not the case that the challenge to the impugned order made in this Writ

Petition cannot be made in appeal under Section 19 of the Family Courts Act.

8. The counsel for the respondent has not made any argument.

9. The petition is thus rejected as not maintainable. Needless to state that the petitioner, in accordance with law, shall be entitled to appropriate alternative remedy.

10. The Trial Court record be sent back forthwith.

SEPTEMBER 19, 2018

'bs/gsr'..

RAJIV SAHAI ENDLAW, J.

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