IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COUR APPEAL NO.19 OF 2016
ALONG WITH
CIVIL APPLICATION NO.287 OF 2017

Ms. Anupama Sharma : Appellant.
Versus
Vikram Kamal Jagtiani : Respondent.

Mr. Y H Muchhala, Senior Advocate a/w Mr. Sharique Nachan i/by Bhave & Co. for the Appellant.
Mr. S M Gorwadkar, Senior Advocate i/by Ms. Radhika Mehta for the Respondent.

CORAM : R. M. SAVANT &
SANDEEP K SHINDE, JJ.
DATE : 19th December 2017

P.C.

1 The above Family Court Appeal arises out of the Judgment and Order dated 01/12/2015 passed by the learned Judge of the Family Court, Mumbai by which order the Application (Exhibit 13) filed in Marriage Petition No.A-3118 of 2013 came to be allowed and the Application filed in Petition No.D-97 of 2013 below Exhibit 43 came to be rejected. Consequently the Marriage Petition No.A-3118 of 2013 came to be dismissed. The instant Family Court Appeal is however restricted to the challenge to the impugned order in so far as the same allows Application Exhibit 13 filed in Marriage Petition No.A-3118 of 2013 and dismisses the said Marriage Petition.

2 Shorn of unnecessary details a few facts can be stated thus :-

The said Marriage Petition No.A-3118 of 2013 has been filed by

the Appellant herein for divorce on the ground of cruelty i.e. under Section 13(1)(i-a) of the Hindu Marriage Act. The Appellant and the Respondent herein were the residents of the United State of America (USA). They married in the USA and lastly resided in the USA where the Respondent – husband is continuing to reside whereas on account of their estrangement the Appellant – wife has returned to India and presently residing in Mumbai. It seems that the Appellant – wife has also filed a Petition under the Guardians and Wards Act being Petition No.D-97 of 2013 for the custody of the minor girl Nikita who is born out of the wedlock between the Appellant and the Respondent. It appears that an Application for interim relim came to be filed in the said Guardianship Petition No.D-97 of 2013 by the Appellant – wife, and the said Application came to be disposed of by the learned Judge of the Family Court. Thereafter the Respondent – husband filed an Application referable to Section 9A of the Code of Civil Procedure questioning the jurisdiction of the Family Court to try the said Guardianship Petition No.D-97 of 2013. Framing of the preliminary issue sought by the Respondent – husband was sought to be questioned on behalf of the Appellant – wife on the ground that since the Application for interim relief has already been disposed of, no Application under Section 9A of the CPC could have been entertained by the Family Court. The Family Court however allowed the said Application filed by the Respondent – husband under Section 9A of the CPC for framing of preliminary issue of jurisdiction of the Family Court to try and entertain the said Guardianship Petition No.D-97 of

2013. This resulted in the Appellant – wife filing a Writ Petition in this Court being Writ Petition No.3878 of 2015. The said Writ Petition came up for hearing before a learned Single Judge of this Court. The learned Single Judge in view of the consensus between the parties which was recorded in the order disposed of the said Writ Petition by the order dated 27/04/2015 and thereby set aside the order dated 23/03/2015 passed by the learned Judge of the Family Court framing the preliminary issue. The learned Single Judge recorded the statement made on behalf of the Respondent – husband that he would file his written statement on or before 22/05/2015 i.e. the next date in the Family Court. The learned Single Judge directed that the Family Court would thereafter frame the issues in the matter and the Respondent – husband would be at liberty to apply for hearing of the issue of jurisdiction as a preliminary issue. The learned Single Judge further directed that in the event such a request is made, the Family Court would decide the same expeditiously and in accordance with law.

3 It is pursuant to the said order dated 27/04/2014 passed in the said Writ Petition No.3878 of 2015 that the Respondent – husband filed the Application (Exhibit 43) raising a preliminary issue as to the jurisdiction of the Family Court to try and entertain the said Guardianship Petition No.D-97 of 2013. The Respondent – husband also filed an Application Exhibit 13 (The Application in contention in the present Family Court Appeal) raising a

preliminary issue as regards the jurisdiction of the Family Court to try and entertain the said Marriage Petition No.3118 of 2013. In view of the fact that the both the said Applications i.e. the Application (Exhibit 13) and the Application (Exhibit 43) were filed by the Respondent – husband raising preliminary issue of jurisdiction, the learned Judge of the Family Court deemed it appropriate to try both the Applications together. As indicated above, the learned Judge of the Family Court by the impugned order dated 01/12/2015 has allowed the Application (Exhibit 13) thereby dismissing the Marriage Petition No.A-3118 of 2013, and dismissed the Application (Exhibit 43) in Guardianship Petition No. D-97 of 2013 as a consequence of the ruling on the issue of jurisdiction.

4 A reading of the impugned order discloses that in so far as the issue of jurisdiction in the Marriage Petition No.A-3118 of 2013 is concerned, the learned Judge of the Family Court has placed reliance on the said order dated 27/04/2015 passed in the said Writ Petition No.3878 of 2015 to decide the said preliminary issue. A reading of the order discloses that the learned Judge of the Family Court has alluded to the fact that the said order was passed in a sister case viz. the Guardianship Petition No.D-97 of 2013. The learned Judge of the Family Court has thereafter recorded the findings on merits and has arrived at a conclusion that he would not have the jurisdiction to try and entertain the said Marriage Petition No.A-3118 of 2013.

5 The impugned order dated 01/12/2015 passed by the Family Court, Mumbai is sought to be assailed principally on the ground that the learned Judge of the Family Court has committed an error in relying upon the order dated 27/04/2015 passed in the said Writ Petition No.3878 of 2015 for framing a preliminary issue in the Marriage Petition No.A-3118 of 2013 when the mandate of the said order would have an application only in so far as the Guardianship Petition No.D-97 of 2013 is concerned. The said order is also assailed on the ground that the Application (Exhibit 13) ex-facie does not disclose under which provision it has been filed i.e. either under Section 9A or under Order 7 Rule 11 of the CPC. It was therefore urged on behalf of the Appellant by the learned Senior Counsel Shri Muchhala that in the absence of the mention of the provision under which the said Application (Exhibit 13) was filed, the Appellant was put at a dis-advantage and therefore prejudice has been caused to the Appellant and ultimately the cause of justice has suffered.

6 Per contra, the learned Senior Counsel appearing on behalf of the Respondent Shri Gorwadkar would justify the framing of the preliminary issue on the ground that the averments made in the Application would indicate that the said Application was referable to Order 7 Rule 11 of the CPC. It was also the submission of the learned Senior Counsel that the Family Court was entitled to evolve its own procedure and in the said process has probably

framed the preliminary issue. In support of the said submission, reliance was sought to be placed on Section 10(3) of the Family Court Act, 1984.

7 Having heard the learned Senior Counsel for the parties, we had expressed dis-satisfaction in the manner in which the said preliminary issue was framed and tried by the Family Court especially by placing reliance on the order passed in a cognate matter which had no relevance in so far as the Marriage Petition No.A-3118 of 2013 is concerned. We were also of the view that a modicum of procedure was required to be followed in view of the fact that the Code of Civil Procedure applies to the proceedings before the Family Court. Faced with this situation, the learned Senior Counsel appearing on behalf of the Respondent – husband, on instructions of the Advocate on record, fairly states that the Respondent has no objection if the impugned order is set aside and the matter is relegated back to the Family Court for a de-novo consideration of the issue of jurisdiction after the Respondent – husband files his written statement. In view of the said statement made by the learned Senior Counsel for the Respondent – husband, it is not necessary to give detailed reasons for setting aside the impugned order in so far as the Application (Exhibit 13) in Marriage Petition No.A-3118 of 2013 is concerned. The impugned order dated 01/12/2015 would accordingly stand set aside to the extent of Application (Exhibit 13) in Marriage Petition No.A-3118 of 2013 and the following directions are issued :-

1] Marriage Petition No.A-3118 of 2013 to stand restored to file.

2] The learned Senior Counsel for the Respondent – husband on instructions states that the Respondent – husband would file his written statement in the said Marriage Petition No.A-3118 of 2013 on or before 15/02/2018 raising such defences as he is entitled to and as are available to him in law.

3] If the issue of jurisdiction of the Family Court is raised, the learned Judge of the Family Court would frame the said issue.

4] The said issue of jurisdiction would be tried first in point of time than the other issues by permitting the parties to lead evidence. The learned Senior Counsel appearing for the Appellant – wife, Shri Mucchala is agreeable to the said course of action being followed.

5] The said issue of jurisdiction to be tried latest by 30/04/2018 if the written statement is filed by 15/02/2018 in terms of clause (2) as above.

6] All the contentions of the parties on merits are kept open for being urged before the Family Court.

7] Needless to state that the said issue of jurisdiction would be tried on its own merits and in accordance with law.

8] It would also be open for the Family Court to try the other issues after recording its findings on the issue of jurisdiction we do not express any opinion in that regard.

9] With the aforesaid directions, the above Family Court Appeal is disposed of.

10] In view of the disposal of the Family Court Appeal, the Civil Application No.287 of 2017 does not survive and the same to accordingly stand disposed of as such.

[SANDEEP K SHINDE, J] **[R.M.SAVANT, J]**