

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

% **Date of decision: 6<sup>th</sup> August, 2018**

+ **CM(M) 883/2018 & CMs No.31126/2018 (for stay) & 31127/2018 (for condonation of 49 days delay in re-filing)**

**AMITABH BHASIN** ..... **Petitioner**

Through: Mr. Aman Mudgal, Adv.

Versus

**HEMLATA BHASIN** ..... **Respondent**

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. This petition under Article 227 of the Constitution of India impugns as many as three orders, in HMA No.206/10/08 (New No.61747/2016) of the Court of Principal Judge, Family Court (Central).
2. The first order under challenge is the order dated 12<sup>th</sup> October, 2010 allowing the application of the respondent/wife under Section 26 of the Hindu Marriage Act, 1955 for enhancement of maintenance of two minor children of the parties from Rs.12,000/- per month to Rs.18,000/- per month.
3. The second order is the order dated 20<sup>th</sup> January, 2018 of dismissal of the application filed by the petitioner/husband for review of the order dated 12<sup>th</sup> October, 2010 supra.
4. The 3<sup>rd</sup> and the last order is the order dated 26<sup>th</sup> February, 2018 of adjournment of HMA No.206/10/08 (New No.61747/2016) supra filed by the petitioner/husband for dissolution of marriage under Section 13(1)(a) of the Act for the reason of the petitioner/husband, inspite of opportunity, having not paid the arrears of maintenance.

5. I have enquired from the counsel for the petitioner/husband as to how the petition against the order dated 20<sup>th</sup> January, 2018 of dismissal of review application, is maintainable. I have, for detailed reasons given in ***Ramvati Vs. Sukhbir Singh Chauhan*** 2018 SCC Online Del 9632, held that even a petition under Article 227 of the Constitution of India does not lie against an order of dismissal of an application for review and the need to reiterate the same herein is not felt.

6. The counsel for the petitioner/husband, without having the reply to the aforesaid query, then contends that the challenge is also to the order dated 26<sup>th</sup> February, 2018.

7. The order dated 26<sup>th</sup> February, 2018 of adjournment *sine die* of the petition for dissolution of marriage, till payment of maintenance, is only consequential to the order dated 20<sup>th</sup> January, 2018 vide which, while dismissing the application for review, last opportunity was also given to the petitioner/husband to pay the arrears of maintenance. Unless the order dated 20<sup>th</sup> January, 2018 is modified, no error is found in the order adjourning the proceeding *sine die* till the payment of maintenance. No such error is pointed out also.

8. As far as the challenge to the order dated 12<sup>th</sup> October, 2010 is concerned, the petitioner/husband claims to have earlier preferred CM(M) No.562/2011 against the said order and which petition, after some arguments, was withdrawn with liberty to file review. Thereafter, the application dated 1<sup>st</sup> June, 2011 for review was filed and which seems to have remained pending for an unduly long period of seven years. The counsel for the petitioner/husband is unable to tell as to why the review

remained pending for seven years.

9. I have enquired from the counsel for the petitioner/husband, whether not now that the proceedings, in which the order dated 12<sup>th</sup> October, 2010 was made, have been transferred to the Family Court, the order dated 12<sup>th</sup> October, 2010, though not of the Family Court, will be deemed to be of the Family Court.

10. The counsel for the petitioner/husband has no answer.

11. The Family Courts Act, 1984, though Act No.66 of 1984, came into force in Delhi on 19<sup>th</sup> November, 1986. The same, vide Section 3 thereof required the State Government to, after consultation with the High Court, and by Notification, establish, for every area in the State comprising of city or town whose population exceeds one million, a Family Court. The said Act vide Section 7 thereof provides for the jurisdiction hitherto 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 explanation thereto, to be exercised by the Family Court. The explanation thereto *inter alia* referred to a suit or proceeding between the parties to a marriage for a decree of dissolution of marriage. The Act, further vide Section 8 thereof, on establishment of a Family Court for any area, prohibited District Court or any subordinate Civil Court from, in relation to that area, exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in explanation to Section 7(1) and required all proceedings pending immediately prior to the establishment of such Family Court before any District Court or subordinate Court to stand transferred to such Family Court.

12. Though as aforesaid, the Family Courts Act came into force in Union Territory of Delhi on 19<sup>th</sup> November, 1986 but the Notification under Section 3 establishing Family Courts in Delhi was issued first on 23<sup>rd</sup> April, 2009. Obviously, the Notification establishing Family Courts in the district in which the proceedings aforesaid were pending was not issued till 12<sup>th</sup> October, 2010 and was issued thereafter. The proceedings aforesaid, filed by the petitioner/husband for dissolution of marriage with the respondent/wife, which were pending before the Additional District Judge till that date, on issuance of such Notification and establishment of the Family Court stood transferred to the Family Court.

13. Though Section 28(2) of the Hindu Marriage Act provides for an appeal against an order on an application under Section 26 of the Act, to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction and as per which the appeal against the order under Section 26 would lie to the High Court, to be heard by a Single Judge of this Court, but Section 19(1) & (6) of the Family Courts Act provides for an appeal from every judgment or order, not being the interlocutory order, of a Family Court to the High Court to be heard by a Bench consisting of two or more Judges.

14. The petitioner/husband earlier also had preferred a petition under Article 227 of the Constitution of India and not an appeal under Section 28(2) of the Hindu Marriage Act against the order dated 12<sup>th</sup> October, 2010 and this time also has preferred this petition under Article 227 of the Constitution of India and not an appeal as provided in Section 28(2) supra.

15. I have however wondered that once by a statutory provision the

pending proceedings are ordered to be transferred to a new forum created/established by the said Statute, what would be the status of the orders passed in those proceedings prior to the date of such transfer. Whether the remedies against such orders would be under the law applicable to the proceedings of the date prior to the transfer or the law applicable after the date of the transfer. If the former were to be the correct position, an appeal under Section 28(2) of the Hindu Marriage Act would lie against the order dated 12<sup>th</sup> October, 2010 and if the latter were to be the correct position, the appeal would lie under Section 19(1) & (6) of the Family Courts Act to be heard by a Division Bench of this Court.

16. In my opinion, once the Statute has provided for pending proceedings to stand transferred to the Family Court constituted under the Family Courts Act and to be continued in the Family Court, the orders passed in the said proceedings of a date prior to the date of transfer and against which no remedies have been availed of till that date, are to be deemed to be orders of the Family court and remedies thereagainst as provided in the Family Courts Act have to be availed.

17. Section 8 of the Family Courts Act, providing for transfer of pending proceedings, unlike Section 24(2) of the Code of Civil Procedure, 1908 (CPC) vesting discretion in the Transferee Court to, subject to any special direction in the order of transfer, either re-try the transferred proceeding or to proceed from the point at which it was transferred, does not provide anything in this regard. I am unable to find any other provision of CPC providing for the status of the orders of the Court from which the proceedings have been transferred i.e. whether they continue to

be the orders of the Court before which the suit was pending prior to the transfer or are deemed to be orders of the Court to which the proceedings are so transferred. Section 150 of the CPC is found to provide as under:-

***“150. Transfer of business.- Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.”***

What has however been held by this Court in ***Shriram Pistons & Rings Ltd. Vs. Manju Awasthy*** 68 (1997) DLT 112 is, that deprivation of a right of appeal is not a defence to an application for transfer under Section 24 of the CPC. Inference therefrom can be drawn, that once the order of transfer is made, the appellate remedy which may have been available against the order of the Court from which transfer was effected and is not available against the order of the Transferee Court, disappears.

18. As far back as in ***Dulhin Janak Nandini Kunwari Vs. Kedar Narain Singh*** AIR 1941 All 140, the Division Bench of that Court was concerned with the question whether the Court which had passed the order, inspite of transfer of the proceedings from it to another Court, retained power to punish for disobedience of its order. It was held that the transfer implies transfer of ‘all proceedings’ which arise out of the suit. Support was drawn from Section 37 of the CPC whereunder execution of a decree, where the Court which passed the decree has ceased to have jurisdiction, is vested in the Court which would have power to entertain the suit at the time when the application for execution of the decree is presented. On the analogy of

the said rule, it was held that a Court which had passed the order which requires execution ceases to have jurisdiction in the matter of enforcing the order when it ceases to have jurisdiction to deal with the suit and consequently the power of enforcing the order lies in the Court which would have dealt with the application on which order was made had the proceedings been initiated in that Court only.

19. Here of course, we are not concerned with execution but with appeal against the order of the Court from which the proceedings have been transferred. However, in my opinion the principles aforesaid would apply inasmuch as not applying the said principles would lead to inherent contradictions with different appellate foras hearing appeals arising from orders in the same proceedings.

20. Reference in this regard may also be made to (i) **Vysaraju Appala Narasimha Raju Vs. Brundavanasahu** AIR 1943 Mad 617 (DB) laying down that in respect of the business transferred, the Transferee Court will be in the same position as the Court which passed the decree; thus an application for setting aside an *ex parte* decree was held to lie before the Transferee Court and not before the Court from which the proceedings had been transferred; (ii) **Mehar Singh Vs. Kasturi Ram** 1961 ILR XIV (2) Punjab 445 (FB) holding that in all cases of loss of jurisdiction, whether territorial, pecuniary or on the subject matter, after a decree has been passed, execution lies before the Transferee Court; (iii) **Kahan Chand Vs. Faqir Chand** (1968) 1 ILR Punjab & Haryana 775 holding that if it were to be held that disobedience of an order under Order XXXIX Rule 1 of the CPC cannot be punished by the Transferee Court, it will lead to bifurcation

of proceedings, with the Transferor Court retaining some jurisdiction inspite of transfer and confusion prevailing; (iv) ***Subbiah Vs. Muthuswamy*** AIR 1984 Mad 206 holding that an application for review of an order, even if passed by the Transferor Court, lies before the Transferee Court and not before the Transferor Court; (v) ***Chellath Vasu Vs. Pathootty Umma*** 1990 SCC OnLine Ker 97 (DB) holding that if inspite of change by law of the fora before which appeal lies, applying the principle that the right of appeal vests on the date of institution of the original proceedings, appeals continue to lie before the fora which had been denuded of appellate power, there will simultaneously be two sets of appellate authorities and which was not found to be contemplated by the law; a distinction was made between cases of jurisdiction of Appellate Court in the existing hierarchy of courts and cases where specific appellate fora had been created; it was held that law was empowered to change the appellate fora and the appellate fora which had been so denuded of appellate power loses jurisdiction and cannot continue to entertain appeals against orders made in proceedings which were originally filed before such change in law; (vi) ***Peoples Union for Human Rights Vs. Union of India*** 1991 SCC OnLine Gau 31 (Full Bench) holding that the decision of the Delhi High Court, from which the proceedings were transferred to that Court, would continue to bind the Gauhati High Court as it would have continued to bind the Delhi High Court if the proceedings had not been transferred; (vii) ***Devaki Vs. Chandrika*** AIR 1998 Ker 198 holding that after the transfer of proceedings under Section 7&8 of the Family Courts Act, it was the Family Court alone which had jurisdiction to entertain an application for setting aside an order of dismissal in default or of proceeding *ex parte*, of the Court from which

the proceedings were transferred to the Family Court; (viii) ***Mayadhar Mallik Vs. Laxmi Mallik*** AIR 1999 Ori 81 (DB) holding that application for execution of orders, even if passed by the Court from which the proceedings have been transferred to the Family Court, lies before the Family Court and not before the Court from which the proceedings were transferred to the Family Court; (ix) ***C.J. Glennys Vs. The Catholic Syrian Bank Ltd.*** AIR 2003 Ker 373 (FB) holding that after the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) the Civil Court lost the jurisdiction to entertain applications for setting aside of the *ex parte* decree of the Civil Court and such an application could have been presented only to the Debt Recovery Tribunal (DRT) and that a decree passed by the Civil Court also could be challenged before the Appellate Tribunal constituted under the said Act.

21. As far as this Court is concerned, (i) in ***Arjan Singh Vs. Union of India*** ILR (1973) II Delhi 933 (FB) it was held that after the setting up of the High Court of Delhi, the jurisdiction to entertain applications for execution of a decree and/or under Order IX Rule 13 of the CPC for setting aside of the decree in a suit, pecuniary jurisdiction whereof was before the High Court, lies before the High Court and not before the Court which had passed the decree; and (ii) in ***Risk Capital & Technology Finance Corporation Ltd. Vs. Harnath Singh Bapna*** 1997 (40) DRJ 521 and in ***Punjab & Sind Bank Vs. Rama Minerals & Chemicals*** 2003 (66) DRJ 550 it was held that an application under Order IX Rule 13 of the CPC for setting aside of a decree passed by the Court, after the coming into force of DRT Act, lies before the DRT and not before the Civil Court.

22. Supreme Court, in ***Punjab National Bank, Dasuya Vs. Chajju Ram*** (2000) 6 SCC 655, held that where the decree for a sum of money exceeding the minimum prescribed in Section 1(4) of the DRT Act was passed in favour of Bank by the Civil Court prior to coming into force of DRT Act but remained unexecuted till the establishment of the DRT, the jurisdiction to entertain an application for execution of such decree was of the DRT and not of the Civil Court. Mention may lastly to be made of ***Ramesh Kumar Soni Vs. State of Madhya Pradesh*** (2013) 14 SCC 696 holding that where by amendment of Code of Criminal Procedure, 1973, the forum of trial of the accused had shifted from the Court of Magistrate First Class to the Court of Sessions, the accused could not claim vested right of forum of his trials, for no such right is recognized.

23. I may with respect state that similarly there is no right of appeal against an order under Section 26 of the Hindu Marriage Act to a particular fora i.e. before a Single Bench of this Court, as long as under the Family Courts Act, the right of appeal before the Division Bench of this Court is recognized.

24. I would however be failing in my duty if do not mention (i) ***Kamal Kumari Vs. State of U.P.*** 2013 SCC OnLine All 13281 (DB) holding that an appeal against a judgment, in a proceedings of dissolution of marriage, of the Civil Court passed prior to the coming into force of the Family Courts Act would not lie under Section 19 of the Family Courts Act; (ii) ***Minimol Vs. Anil Kumar*** AIR 2004 Ker 107 (DB) holding that appeals against judgments in matters, jurisdiction with respect to which, after the coming into force of the Family Courts, vests with the Family Court,

passed before the coming into force of Family Courts Act, would not lie under Section 19 of the Family Courts Act; and, (iii) ***Josekutty Joseph Vs. Aniamma Thomas*** AIR 2006 Ker 337 (DB) holding that pending applications for execution of orders of Civil Court, jurisdiction with respect where to on coming into force of the Family Courts Act was vested in the Family Court, are not required to be transferred to the Family Courts.

25. I may in this regard notice that appeals filed in this Court under Section 28 of the Hindu Marriage Act and being listed before the Single Benches of this Court are continuing to be heard by the Single Benches of this Court and not by the Division Benches. However, a distinction has to be made between appeals which have already been filed and appeals that may be required to be filed against orders in the proceedings which may have been subsequently transferred to the Family Court as is the case in the present facts. In such cases, in my view, the appeal would lie under Section 19(1) & (6) of the Family Courts Act.

26. I also draw support from the principle enshrined in Order XLIII Rule 1A of the CPC, of an appellant being entitled to, in the challenge against the final order in a proceeding, also challenge the interim orders made in that proceeding from time to time and against which no appeal is provided. If it were to be held that in appeal against the final disposal of the case, challenge before the Division Bench can only be made to the interim orders of the date after the transfer of proceedings to the Family Court and not to the orders of the date prior to the transfer, the same would result in splitting up of the proceedings and lead to delays and would obviate the purpose for which the Family Courts Act was enacted.

27. The Division Bench of this Court, in *Manish Aggarwal Vs. Seema Aggarwal* (2012) 192 DLT 714 (DB) has held that orders under Sections 24 & 26 of the Hindu Marriage Act are not interlocutory orders and appeal under Section 19(1) & (6) of the Family Courts Act before the Division Bench of this Court lies thereagainst.

28. I am thus of the opinion that the petitioner/husband, even if entitled to now challenge the order dated 12<sup>th</sup> October, 2010, the said challenge has to be by way of an appeal under Section 19(1) & (6) of the Family Courts Act and cannot be by way of this petition under Article 227 of the Constitution of India.

Thus, this petition is not maintainable and is dismissed.

No costs.

**AUGUST 06, 2018**

bs/pp

**RAJIV SAHAI ENDLAW, J.**