

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

% **Date of decision: 14th September, 2018.**

+ **CM(M) 1109/2018**

RAJU **Petitioner**

Through: Mr. R.K. Bali, Adv.

Versus

NEELAM & ORS **Respondents**

Through: None.

AND

+ **FAO 431/2018**

RAM RATI **Appellant**

Through: Ms. Kajal Chandra, Ms. Perna Chopra and Mr. Viren Kapur, Advs.

Versus

JAI SINGH **Respondent**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CMs No.37815/2018 & 37816/2018 in CM(M) No.1109/2018 (both for exemption) & CM No.37678/2018 in FAO No.431/2018 (for exemption)

1. Allowed, subject to just exceptions.

2. The applications are disposed of.

CM(M) No.1109/2018 & CM No.37817/2018 (for stay) &

FAO No.431/2018 & CM No.37679/2018 (for condonation of 48 days delay in re-filing the appeal)

3. Both proceedings are taken up together as entail common question of law i.e., interdiction by Family Courts Act, 1984 of remedies against orders in proceedings under the Hindu Marriage Act, 1955.

4. CM(M) No.1109/2018 under Article 227 of the Constitution of India impugns the order [dated 24th July, 2018 in M No.08/2018 of the Court of Principal Judge, Family Court, Shahdara] of dismissal of an application filed by the petitioner under Order IX Rule 13 of the Code of Civil Procedure, 1908 (CPC) and under Section 126(2) of the Code of Criminal Procedure, 1973 (CrPC), for setting aside of the *ex-parte* order dated 21st February, 2017.

5. The petitioner has not filed the copy of the *ex-parte* order dated 21st February, 2017, setting aside whereof was sought by filing application which has been dismissed. The petitioner has also not placed any documents before this Court from which the nature of the proceedings in which the *ex-parte* order dated 21st February, 2017 was made can be known. However, from the petitioner, besides Order IX Rule 13 of the CPC, also invoking Section 126(2) of the CrPC, it appears that the proceedings in which the *ex-parte* order dated 21st February, 2017 was made, were proceedings under Section 125 of the CrPC. The counsel for the petitioner confirms.

6. The Registry of this Court raised an objection as to the maintainability of CM(M) No.1109/2018. However, the counsel for the petitioner insisted that the petition is maintainable. The Registry has thus listed the petition subject to objection as to maintainability thereof.

7. The counsel for the petitioner in CM(M) No.1109/2018 on being asked to satisfy this Court about the maintainability of the petition, states that the impugned order is an interlocutory order.

8. The counsel for the petitioner in CM(M) No.1109/2018 further states that earlier, proceedings under Section 125 of the CrPC used to lie before the Metropolitan Magistrate and against an *ex-parte* order therein, a Revision Petition under Section 397 of the CrPC used to lie to the Sessions Court; however, now that proceedings under Section 125 of the CrPC are dealt with by the Family Court, the Revision Petition under Section 397 of the CrPC cannot be preferred before the Sessions Court and thus the petitioner has moved this Court under Article 227 of the Constitution of India.

9. FAO No.431/2018 under Order XLIII Rule 1(d) of the CPC along with an application for condonation of 48 days delay in re-filing thereof has been preferred against the order [dated 27th February, 2018 in M No.17/2018 of the Court of Judge, Family Court, Shahdara] of dismissal of an application under Order IX Rule 13 of the CPC filed by the appellant therein to set aside the *ex-parte* judgment and decree dated 30th July, 1991 of dissolution of marriage of parties therein by a decree of divorce under Section 13(1)(ib) of the Hindu Marriage Act.

10. Though the Registry of this Court did not raise any objection as to maintainability of FAO No.431/2018, but I have enquired from the counsel for the appellant in FAO No.431/2018, how, in light of Section 19 of the Family Courts Act, 1984, appeal under Order XLIII Rule 1(d) of the CPC against the orders of the Family Court of dismissal of applications under Order IX Rule 13 of the CPC is maintainable.

11. It is further enquired from both the counsels, whether they have examined the matter in the light of the dicta of the Division Bench of this Court in *Manish Aggarwal Vs. Seema Aggarwal* (2012) 192 DLT 714. Copy of the judgment is supplied to the counsels and the matter passed over to enable the counsels to study.

12. While the counsel for the appellant in FAO No.431/2018, after studying the judgment aforesaid, states that the appeal will have to go before the Division Bench under Section 19(1) read with Section 19(6) of the Family Courts Act, the counsel for the petitioner in CM(M) No.1109/2018 states that since the order of dismissal of an application under Order IX Rule 13 of the CPC is an interlocutory order, the remedy of Article 227 of the Constitution of India and not of Section 19(1) read with Section 19(6) of the Family Courts Act, is the appropriate remedy.

13. The orders impugned in both the proceedings aforesaid are of the Family Court constituted under the Family Courts Act. Section 19(1) of the Family Courts Act provides that “save as provided in sub Section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973 or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law”. The Division Bench of this Court in *Manish Aggarwal* supra held that the words “any other law” in the non-obstante clause in Section 19(1) would include the Hindu Marriage Act. Thus, irrespective of the remedies provided under the Hindu Marriage Act or under the CPC, unless the order impugned in both these proceedings is provided for in sub-Section (2) of Section 19 or

qualifies as an interlocutory order, an appeal thereagainst would lie to this Court under Section 19(1). Section 19(6) of the Family Courts Act provides that such appeal shall be heard by a Bench consisting of two or more Judges. Sub-Section (2) of Section 19 provides that (i) no appeal shall lie from a decree or order passed by the Family Court with the consent of the parties; or (ii) from an order passed under Chapter IX of the CrPC.

14. The Division Bench of this Court in ***Manish Aggarwal*** supra further held:-

- (i) that the legislature, in Section 19(1) of the Family Courts Act, has used the expression ‘interlocutory order’ as distinct from ‘intermediary order’;
- (ii) that Supreme Court, in ***Shah Babulal Khimji Vs. Jayaben D. Kania*** (1981) 4 SCC (interpreting the word ‘judgment’ in clause 15 of the Letters Patent of the High Court of Bombay) held:-
 - (a) there can be three kinds of judgments viz. final judgment, preliminary judgment and interlocutory or intermediary judgment;
 - (b) a final judgment is one which decides all questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided and by virtue of which the action brought before the Trial Judge is disposed of in full;
 - (c) a preliminary judgment decides the issue of maintainability of an action brought before the Court; if it

holds the action to be not maintainable, the action again is decided in full with nothing remaining before the Trial Judge; if it holds the action to be maintainable, the action is not terminated but continues and has to be tried on merits but the order of the Trial Judge holding the action to be maintainable decides an important aspect of the trial which affects a vital right and must therefore be also construed to be a judgment so as to be appealable; and,

- (d) most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order XLIII Rule 1 and are judgments for the purposes of letters patent and therefore appealable; there may also be interlocutory orders which are not covered by Order XLIII 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 proceedings; 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.
- (iii) that the order of interim maintenance under Section 24 of the Hindu Marriage Act has a character of finality attached to it and does not qualify as an interlocutory order within the meaning of Section 19(1) of the Family Courts Act and an appeal under Section 19(1) of the Act lies thereagainst.

15. The order impugned in FAO No.431/2018 is not a consent order and is not an order passed under Chapter IX of the Cr.PC. Thus as far as FAO No.431/2018 is concerned, Section 19(2) of the Family Courts Act is not applicable thereto.

16. Applying the tests adopted by the Division Bench in ***Manish Aggarwal***, an order of dismissal of an application under order IX Rule 13 of the CPC has characteristics of finality. The same is also evident from the same being made appealable under Order XLIII Rule 1(d) of the CPC. There is thus no doubt whatsoever that an order of dismissal of an application under Order IX Rule 13 of the CPC for setting aside of an *ex parte* judgment or decree in a proceeding under the Hindu Marriage Act is appealable under Section 19(1) and (6) of the Family Courts Act. Once it is so, the appeal under Order XLIII Rule 1(d) of the CPC before the Single Bench of this Court would not be available thereagainst. FAO No.431/2018 is thus misconceived and is liable to be rejected.

17. The order impugned in CM(M) No.1109/2018 also is not a consent order and though on an application under Section 126(2) Cr.P.C. (Order IX Rule 13 would not apply to proceedings under Section 125 Cr.P.C.) but which is to the same effect as an application under Order IX Rule 13 CPC. The order of dismissal of an application under Section 126(2) Cr.P.C. for setting aside of an *ex parte* order under Section 125 Cr.P.C. also, for the same reasons, has characteristics of finality and would not be a interlocutory order.

18. However Section 19(2) of the Family Courts Act takes away from the ambit of appeal under Section 19(1), a decree or order of a Family

Court passed under Chapter IX of the CrPC. Thus no appeal under Section 19(1) read with Section 19(6) of the Family Courts Act would lie thereagainst. What has to be seen is, the appropriate remedy if any available thereagainst.

19. Once the invocation of Order IX Rule 13 of the CPC for setting aside *ex parte* order under Section 125 CrPC was misconceived, a petition under Article 227 of the Constitution of India invoking which CM(M) No.1109/2018 has been filed, is also misconceived.

20. The Division Bench in ***Manish Aggarwal*** supra was concerned with an order of interim maintenance in a proceeding under Section 124 of the CrPC and held (i) that per Section 19(4) of the Family Courts Act, the High Court may of its own motion or otherwise call for and examine a record of any proceeding in which the Family Court situated within its jurisdiction passed an order under Chapter IX of the CrPC for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order and as to the regularity of such proceeding; and, (ii) while specifically excluding from the ambit of appeal, orders passed under Chapter IX of the CrPC, the remedy against such orders has been specifically provided under Section 19(4) of the Act and thus clearly, a Criminal Revision would be maintainable.

21. Thus the remedy against order impugned in CM(M) No.1109/2018 is of Criminal Revision.

22. Both the proceedings are thus rejected as not maintainable. Needless to state, the parties shall have liberty to invoke appropriate remedies.

SEPTEMBER 14, 2018

bs/pp

RAJIV SAHAI ENDLAW, J.

