

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.389 of 2023

Benazir Hasan W/o late Md. Ruhe Nadim Azam, D/o Tanvir Hasan, Resident of S.N. Singh Road, Near D.I.G. Kothi, Khanjarpur, P.S.- Barari, District-Bhagalpur.

... .. Appellant/s

Versus

1. Md. Rayeesul Azam S/o Abdus Salam, Resident of Village and P.O.- Badharwa Fatheh Mohammad, P.S.- Kundwa Chainpur, District- East Champaran, Temporary resident of Qtr. No. D-4, P and T Colony, Gopinath Bazar, New Delhi, Pin 110010.
2. Bibi Ruhi Anjum W/o Md. Rayeesul Azam, Resident of Village and P.O.- Badharwa Fatheh Mohammad, P.S.- Kundwa Chainpur, District- East Champaran, Temporary resident of Qtr. No. D-4, P and T Colony, Gopinath Bazar, New Delhi, Pin 110010.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Diwakar Sinha, Advocate
For the Respondent/s : Mr. Asif Kalim, Advocate

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 19-09-2023

The present Miscellaneous Appeal has been filed by the respondent under Section 19(1) of Family Court Act, 1984 against order passed in Guardianship Case No. 06/2022 by learned Principal Judge, Family Court, East Champaran, Motihari. The appellant's contention is that the aforementioned case was admitted and O.C. was directed to issue notice, which reads as under:-

*“23.05.2022: Petitioner is in attendance
heard case is hereby admitted O.C. to*



*issue notice against O.P. through Nazarat
Civil Court, Motihari put up on 13.07.22
for appearance of O.P.”*

02. Learned counsel for the appellant submitted that Family Court, Motihari has no jurisdiction to entertain respondents' Guardianship Case No. 06/2022 to the extent that Family Court, Motihari has no territorial jurisdiction. Therefore, admission of the aforementioned case and further proceedings is without authority of law. Hence, the present Miscellaneous Appeal is filed.

03. Respondent Nos.1 and 2 are parents of the deceased Md. Ruhe Nadim Azam and the father-in-law and mother-in-law of appellant. Appellant married deceased Md. Ruhe Nadim Azam on 13.04.2019. Appellant gave birth to a baby boy on 22.01.2020. He has been named as Arhan Azam. Md. Ruhe Nadim Azam died on 10.03.2021 while working as Specialist Officer (Civil Engineer), S.B.I. Zonal Office, Bhagalpur. In this backdrop, respondent nos.1 and 2 have filed application under Section 10 of the Guardian and Wards Act, 1890 (in short "G and W Act"). Application was registered as Case No.06 of 2022 on the file of Principal Judge, Family Court at Motihari, East Champaran. The reliefs sought by the respondent nos.1 and 2 are as under:



“A. The petitioner no.1 be declared as legal guardian of the minor Arhan Azam.

B. The O.P. be disqualified for the custody of the minor Arhan Azam.

C. In consequences of relief No.B, O.P. be directed to handover the custody of minor Arhan Azam to the petitioners.

D. Any other relief or reliefs for which the court be deems fit proper be granted to the petitioner.”

04. Appellant herein filed the written statement by way of objection petition in which she has prayed for as under:

“It is therefore respectfully prayed that the court be pleased to my transfer the said petition would be disposed of more justly leave convently to the Principal Judge, Civil Court Bhagalpur having jurisdiction to try the above noted petition where the opposite party with her minor sons having residing for ends of kindness to by rejected the petition with special cost.

And for this act kindness the opposite party shall ever pray.” (sic)

05. Before advertng to the factual aspect of the matter, it is necessary to reproduce certain statutory provisions of the Guardian and Wards Act. Sections 9, 10, 11, 13 and 47 of G and W Act read as under:

“9. Court having jurisdiction to entertain application.—(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court



having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

(Under line supplied)

10. Form of application.—*(1) If the application is not made by the Collector, it shall be by petition signed and verified in manner prescribed by the Code of Civil Procedure, 1882 for the signing and verification of a plaint, and stating, so far as can be ascertained—*

(a) the name, sex, religion, date of birth and ordinary residence of the minor;

(b) where the minor is a female, whether she is married, and, if so, the name and age of her husband;

(c) the nature, situation and approximate value of the property, if any, of the minor

(d) the name and residence of the person having the custody or possession of the person or property of the minor;

(e) what near relations the minor has, and where they reside;

(f) whether a guardian of the person or



property, or both, of the minor has been appointed by any person entitled or claiming to be entitled by the law to which the minor is subject to make such an appointment;

(g) whether an application has at any time been made to the Court or to any other Court with respect to the guardianship of the person or property, or both, of the minor; and, if so, when, to what Court and with what result;

(h) whether the application is for the appointment or declaration of a guardian of the person of the minor, or of his property, or of both;

(i) where the application is to appoint a guardian, the qualifications of the proposed guardian;

(j) where the application is to declare a person to be a guardian, the grounds on which that person claims;

(k) the causes which have led to the making of the applications; and

(l) such other particulars, if any, as may be prescribed or as the nature of the application renders it necessary to state.

(2) If the application is made by the Collector, it shall be by letter addressed to the Court and forwarded by post or in such other manner as may be found convenient, and shall state as far as possible the particulars mentioned in sub-section (1).

(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses.

(Under line supplied)



11. Procedure on admission of application.—(1) *If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing—*

(a) to be served in the manner directed in the Code of Civil Procedure, 1882, on—

(i) the parents of the minor if they are residing in [any State to which this Act extends],

(ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor,

(iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant, and

(iv) any other person to whom, in the opinion of the Court, special notice of the application should be given; and

(b) to be posted on some conspicuous part of the court-house, and of the residence of the minor, and otherwise published in such manner as the Court, subject to any rules made by the High Court under this Act, thinks fit.

(2) The [State] Government may, by general or special order, require that, when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the Court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides, and on every Collector in whose



district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.

(3) No charge shall be made by the Court or the Collector for the service or publication of any notice served or published under sub-section (2).

13. Hearing of evidence before making of order.—*On the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of, or in opposition to, the application.*

47. Orders appealable.—*An appeal shall lie to the High Court from an order made by a [*]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 award 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.*

Similarly, some of the statutory provisions of the Family Courts Act like Section 7(g), Section 17 and Section 19 are as follows:-

“7. Jurisdiction – (1)-----

(a)-----

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

17. Judgment.—Judgment of a Family Court shall contain a concise statement of the case, the point for determination, the decision thereon and the reasons for such decision.

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 Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [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 (59 of 1991).]

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

[(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) 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.]

[(5)] Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

[(6)] An appeal preferred under subsection(1) shall be heard by a Bench consisting of two or more Judges.”

(Under line supplied)

06. The petitioner has questioned the order-sheet dated 23.05.2022 in Guardianship Case No.06 of 2022 on the file of the Principal Judge, Family Court, East Champaran, Motihari and it reads as under:

“Petitioner is in attendance Heard case is hereby admitted O.C. to issue notice against O.P. through nazarat Civil Court, Motihari, put up on 13.7.22 for appearance



of O.P.”

07. The appellant has assailed the aforementioned order-sheet dated 23.05.2022 by contending that Principal Judge, Family Court, Motihari, East Champaran, has no jurisdiction to decide the Guardianship Case No.06 of 2022 filed on behalf of the respondent nos.1 and 2 on the jurisdictional point. In fact, such contention has been taken in the written statement filed before the Family Court. However, no order has been passed in the Guardianship Case No.06 of 2022 insofar as territorial jurisdiction in the Family Court, East Champaran, Motihari.

08. Learned counsel for the petitioner submitted that the present Miscellaneous Appeal is maintainable in view of the fact that Family Court, East Champaran, Motihari, has no territorial jurisdiction on the score that minor Arhan Azam is residing with the appellant Benazir Hasan, who is minor's natural single parent at Khanjarpur, P.S. Barari, District-Bhagalpur and it is submitted that in terms of sub Section (1) of Section 9 of G and W Act, respondents should have preferred Guardianship case in the territorial jurisdiction of Bhagalpur District and not in East Champaran at Motihari. It is further submitted that Miscellaneous Appeal No.389 of 2023 is



maintainable under Section 7 read with Section 19 of the Family Courts Act.

09. Per contra, learned counsel for the respondents resisted the aforementioned contentions and submitted that Miscellaneous Appeal No.389 of 2023 is not maintainable against the Order-sheet dated 23.05.2022 in view of sub Section 1 of Section 19 of the Family Courts Act. It is also submitted that order dated 23.05.2022 of the Family Court is not an order (Final Order or Judgment) in the light of sub Section 14 of Section 2 of the CPC read with sub Section (2) of Section 9. It relates to Order and Judgment, whereas the impugned order-sheet is not a final Order or Judgment so as to entertain the present Miscellaneous Appeal No.389 of 2023 under Section 19(1) of the Family Courts Act.

10. Heard the learned counsel for the respective parties.

11. Core issue involved in the present *lis* is whether the present Miscellaneous Appeal No.389 is maintainable in view of the language employed under Sections 7 and 19(1) of the Family Courts Act or not? Section 7(g) empowers the Family Court to decided the guardianship issue. Sub Section 1 of Section 19, appeal against the Family Court could be



entertained only against the final order/Judgment. In fact, there is a bar in filing of Miscellaneous Appeal against the interlocutory order.

12. Perusal of the impugned order dated 23.05.2022, it is crystal clear that it is order-sheet maintained by the Family Court in the light of Section 11-Procedure on Admission of Application under G and W Act. Thereafter, hearing of the evidence before making order under Section 13 of G and W Act has not reached at that stage in Guardianship Case No.06 of 2022 so as to entertain the present Miscellaneous Appeal No.389 of 2023.

13. At this stage, it is necessary to take note of meaning of 'order' and 'interlocutory order' from the Black's Law Dictionary which read as under:-

“order, n. 1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory di-rections or commands. Also termed court order; judicial order. See MANDAMUS. [Cases: Federal Civil Procedure 928; Motions 46. C.J.S. Motions and Orders §§ 1-3, 13, 50, 59.]

"An order is the mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but



adjudicating a preliminary point or directing some step in the proceedings." 1 Henry Campbell Black, A Treatise on the Law of Judgments § 1, at 5 (2d ed. 1902).

"While an order may under some circumstances amount to a judgment, they must be distinguished, owing to the different consequences flowing from them, not only in the matter of enforcement and appeal but in other respects, as, for instance, the time within which proceedings to annul them must be taken. Rulings on motions are ordinarily orders rather than judgments. The class of judgments and of decrees formerly called interlocutory is included in the definition given in [modern codes] of the word 'order.'" 1 A.C. Freeman, A Treatise of the Law of Judgments § 19, at 28 (Edward W. Tuttle ed., 5th ed. 1925).

interlocutory order (in-tər-lok-yə-tor-ee).

An order that relates to some intermediate matter in the case; any order other than a final order. Most interlocutory orders are not appealable until the case is fully resolved. But by rule or statute, most jurisdictions allow some types of interlocutory orders (such as preliminary injunctions and class- certification orders) to be immediately appeal- ed. — Also termed interlocutory decision; interim order; intermediate order. See appealable decision under DECISION; COLLATERAL-ORDER DOCTRINE. [Cases: Appeal and Error 67; Federal Courts 572, 576; Motions 51. C.J.S. Appeal and Error § 84; Motions and Orders §§ 2, 52-53, 55.]”

14. It is to be noted that final order has to be



interpreted in contradistinction to an interlocutory order; and the test for determining the finality of an order is whether Judgment or order finally disposed of the rights of the parties. If an order which does not determine the rights of the parties but is only on certain aspect of the suit or the trial is an interlocutory order; that the concept of the interlocutory order has to be explained in contradistinction to a final order. In other words, if an order is not a final order, it would be an interlocutory order. Therefore, the impugned order is not appealable under Section 19(1) of the Family Courts Act. There is no concept of order other than interlocutory order or final order. The impugned order would fall in the nature of interlocutory order. Consequently, the present Miscellaneous Appeal is not maintainable.

15. Section 47 of the G and W Act relates to appealable orders. We have quoted various Sections but Section 11, Procedure on Admission of Application, is not part and parcel of Section 47.

16. In ***Balram Yadav v. Fulmaniya Yadav***, (2016) 13 SCC 308: 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.

17. The scope of ‘Judgment’ and ‘interlocutory order’ has been distinguished time and again by the Apex Court. In ***Shah Babulal Khimji v. Jayaben D. Kama*, (1981) 4 SCC 8 : 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 I 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.”

18. In view of Section 19(1) of Family Courts Act, appeal is maintainable only against the final judgment or order passed by the Family Court. In the present case, there is no final order or judgment so as to entertain the present Miscellaneous Appeal.

19. Hence, the present Miscellaneous Appeal is not maintainable.

20. At this stage, learned counsel for the appellant is insisting to entertain the present Misc. Appeal.

21. Having regard to the nature of the order 23.05.2022 passed by the Family Court cited (supra), we are not satisfied in the light of the fact that impugned order in the present Misc. Appeal is in the form of interlocutory in nature.

22. In view of these facts and circumstances, at best, petitioner is at liberty to insist the Family Court to decide the preliminary issue, insofar as maintainability of the respondents’



petition filed under the Guardians and Wards Act, 1890 is concerned.

23. The Family Court is requested to decide the preliminary issue relating to maintainability of the petition filed by the respondents before taking up of any further proceedings in Guardianship Case No. 06 of 2022, in accordance with law.

24. Accordingly, the present Miscellaneous Appeal stands dismissed.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

Ashish/-
P.S./-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	26.09.2023
Transmission Date	NA

