



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

Reserved on: 04.09.2023

Date of decision: 21.09.2023

+ **CM(M) 1147/2023 & CM APPL. 37089/2023 & 37090/2023**
DEBARATI BHUNIA CHAKRABORTY

..... Petitioner

Through: Ms.Ruchi Kohli,
Ms.Chitrangada Rastravara,
Ms.Shrishti Mishra,
Mr.Aishwary Mishra &
Mr.Dhananjai Shekhawat,
Advs.

versus

SUMAN SANKAR BHUNIA

..... Respondent

Through: Mr.Prosenjeet Banerjee,
Ms.Akriti Anand, Mr.Sarthak
Bhardwaj & Ms.Anshika
Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This petition has been filed under Article 227 of the Constitution of India challenging the order dated 17.07.2023 (hereinafter referred to as the 'Impugned Order') passed by the learned Judge, Family Court, Patiala House Courts, New Delhi (hereinafter referred to as the 'Family Court') in GP No. 22/2021, titled *Suman Sankar Bhunia v. Debarati Bhunia Chakraborty*, dismissing the application filed by the petitioner herein seeking permission of the learned Family Court to relocate along with her children to the United Kingdom (hereinafter referred to as the 'UK').

Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 25.09.2023

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2. The learned counsel for the respondent, at the outset, challenges the maintainability of the present petition by contending that the petitioner has an alternate and efficacious remedy in the form of an appeal under Section 19 of the Family Courts Act, 1984 (hereinafter referred to as the 'Family Courts Act').

Submissions of the Learned Counsel for the Respondent:

3. The learned counsel for the respondent has contended that in pith and substance, the relief claimed by the petitioner herein before the learned Family Court was one relatable to Section 26 of the Guardians and Wards Act, 1890 (hereinafter referred to as the 'GW Act'). He submits that an order passed under Section 26 of the GW Act, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, is appealable in terms of Section 47(d) of the GW Act.

4. He submits that, even otherwise, the Impugned Order cannot be termed as an 'Interlocutory Order'; the same would amount to a 'Judgment', as the same is one of substance and affects the vital and valuable rights of the parties and has the trappings of finality. In support of his submissions, he places reliance on the judgment of the Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania and Anr.*, (1981) 4 SCC 8; order dated 22.10.2021 passed by this Court in MAT.APP. (F.C.) 126/2019 titled *Dr. Geetanjali Aggarwal v. Dr. Manoj Aggarwal; Jaswinder Singh v. Mrigendra Pritam Vikram Singh Steiner and Ors.*, 2012 SCC OnLine Del 5506; and, *Manish Aggarwal v. Seema Aggarwal & Ors.*, (2012) 192 DLT 714.



5. The learned counsel for the respondent further submits that the judgment of this Court in ***Colonel Ramesh Pal Singh v. Sughandhi Aggarwal***, 2019 SCC OnLine Del 12380, holding that an order passed on an application under Section 12 of the GW Act is not appealable under Section 19(1) of the Family Courts Act, has been referred to a larger bench in ***Dr. Geetanjali Aggarwal*** (supra) and should not be relied upon by this Court.

Submissions of the Learned Counsel for the Petitioner

6. On the other hand, the learned counsel for the petitioner submits that the orders passed by a Family Court under Section 12 of the GW Act are purely ‘Interlocutory’ in nature, as stipulated by Section 12 of the GW Act itself.

7. She submits that even otherwise, the Supreme Court in ***Rosy Jacob v. Jacob A. Chakramakkal***, (1973) 1 SCC 840; ***Dhanwanti Joshi v. Madhav Unde***, (1998) 1 SCC 112; ***Jai Prakash Khadria v. Shyam Sunder Agarwalla & Anr.***, (2000) 6 SCC 59; ***R.V. Srinath Prasad v. Nandamuri Jayakrishna & Ors.***, AIR 2001 SC 1056; and ***Vikram Vir Vohra v. Shalini Bhalla***, (2010) 4 SCC 409, has held that orders passed on an application under Section 12 of the GW Act are interlocutory in nature and are subject to modification at any future time.

8. Placing reliance on the judgment of the High Court of Allahabad in ***Isma Alam v. Irshad Alam***, Neutral Citation No. 2011:AHC:10201-DB; of the Rajasthan High Court in ***Seema v. Sanjeev Godha***, 1993 SCC OnLine Raj 216; and of this Court in ***Col. Ramesh Pal Singh*** (supra) and, ***Prashant Prakash Sahni v. Devika***



Mehra, 2020 SCC OnLine Del 2111, she submits that as orders passed under Section 12 of the GW Act are interlocutory in nature, an appeal under Section 19 of the Family Courts Act is not maintainable against them.

9. Placing reliance on the judgment of the Supreme Court in *Athar Hussain v. Syed Siraj Ahmed*, (2010) 2 SCC 654, the learned counsel for the petitioner submits that question of guardianship is independent and distinct from that of custody. She submits that, therefore, the Impugned Order cannot be considered as one passed under Section 26 of the GW Act.

Analysis and findings:

10. I have considered the submissions made by the learned counsels for the parties.

11. Section 19 of the Family Courts Act reads as under:-

“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 sub-section (1) shall be heard by a Bench consisting of two or more Judges.”

(Emphasis supplied)

12. A reading of the above provision would show that an appeal lies to the High Court, both on the facts and on law, against every judgment or order, ‘not being an interlocutory order’, of a Family Court. The issue to be determined in the present petition, therefore, is whether the Impugned Order passed by the learned Family Court can be termed as an ‘Interlocutory Order’ or whether the same can be termed as a ‘Judgment’, against which an appeal shall lie under Section 19 of the Family Courts Act.

13. The Supreme Court in ***Shah Babulal Khimji*** (supra) explained the concept of ‘Judgment’, *inter alia* in relation to an ‘Intermediary or Interlocutory Judgment’, 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 1 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.

116. We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the Letters Patent. Suppose the Trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases, although the order passed by the Trial Judge



is purely discretionary and interlocutory, it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the Letters Patent. This is what was held by this Court in Shanti Kumar's case, as discussed above.

117. Let us take another instance of a similar order which may not amount to a judgment. Suppose, the Trial Judge allows the plaintiff to amend the plaint by adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant who would have ample opportunity to disprove the amended plea taken by plaintiff at the trial. In such cases, the order of the Trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore not be a judgment within the meaning of clause 15 of the Letters Patent.

118. The various instances given by us would constitute sufficient guidelines to determine whether or not an order passed by the Trial Judge is a judgment within the meaning of the Letters Patent. We must however hasten to add that instances given by us are illustrative and not exhaustive. We have already referred to the various tests laid down by the Calcutta, Rangoon and Madras High Courts. So far as the Rangoon High Court is concerned we have already pointed out that the strict test that an order passed by the Trial Judge would be a judgment only if it amounts to a decree under the Code of Civil Procedure, is legally erroneous and opposed to the very tenor and spirit of the language of the Letters Patent. We, therefore, do not approve of the test laid down by the Rangoon High Court and that decision therefore has to be confined only to



the facts of that particular case because that being a case of transfer, it is manifest that no question of any finality was involved in the order of transfer. We would like to adopt and approve of generally the tests laid down by Sir White, C.J., in Tuljaram Row case (which seems to have been followed by most of the High Courts) minus the broader and the wider attributes adumbrated by Sir White, C.J., or more explicitly by Krishnaswamy Ayyar, J. as has been referred to above.”

(Emphasis supplied)

14. The judgment in ***Shah Babulal Khimji*** (supra) was considered by a Division Bench of this Court in ***Manish Aggarwal*** (supra), specifically in relation to Section 19 of the Family Courts Act, holding as under:-

“8. Section 28 of the HM Act underwent an amendment by Act 68 of 1976 made effective from 27.5.1976. A fundamental difference brought about by the amendment is that while earlier sub-section (1) of Section 28 of the HM Act provided for appeals from decrees and orders, post amendment appeals are provided only from decrees. This was to remedy the malice of appeals being filed from all and sundry orders passed during the progress of matrimonial proceedings from time to time, delaying the final adjudication of the matrimonial disputes. However, a specific provision was made qua Sections 25 & 26 under sub-section (2) of Section 28 of the HM Act. Thus, orders passed under these two provisions, i.e., Sections 25 & 26 were made appealable under sub-section (2) of Section 28. The qualification, once again, was that they should not be interim orders. We may note that 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. This is so as issues of interim maintenance pending matrimonial proceedings are dealt with under Section 24 of the HM Act. Section 26 of the HM Act, on the other hand, deals with only 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. Orders passed under Sections 25 & 26 of the HM Act were specifically incorporated as one of the species against which an appeal would lie under sub-section (2) of Section 28 of the HM Act. The only way by which full effect can be given to the appeal provision is by construing the expression “interim orders” used in sub-section (2) of Section 28 of the HM Act to mean procedural orders passed while dealing with proceedings under Sections 25 & 26 of the HM Act.

9. We may add here that the legislature in its wisdom amended sub-section (1) of Section 28 of the HM Act in 1976 by removing the provision of appeal against all kinds of orders [except those covered by sub-section (2) of Section 28], but subsequently enacted the said Act in the year 1984, to provide for an appeal from all judgements and orders under sub-section (1) of Section 19 of the said Act, not being interlocutory orders.

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21. On having examined the divergent views of different High Courts and on hearing learned counsel for the parties, we are inclined to adopt the view of the Uttarakhand, Allahabad, Madhya Pradesh, Gujarat & Calcutta High Courts while differing from the views of the Bombay, Rajasthan, Karnataka & Orissa High Courts. The reason for adopting such a course of action is the manner in which we have explained our view and understanding of the provisions of Section 19 of the said Act at the inception of the judgement. It is quite clear



that qua an order or judgement of the Family Court the provision of appeal under Section 19 of the said Act would prevail, irrespective of what is contained in the Cr.P.C., CPC or any other law which would include the HM Act. The exception to the maintainability of an appeal is an interlocutory order, and, under sub-section (2) of Section 19, an order under Chapter 9 of the Cr.P.C. and a decree or order passed on consent. As noticed above, an order passed under a provision contained in Chapter 9 Cr.P.C. has to be dealt with in accordance with sub-sections (2) & (4) of Section 19 of the said Act.

22. The contra view plays down the non obstante clause contained in sub-section (1) of Section 19 of the said Act. What is important is that while the amendment to Section 28 (1) of the HM Act sought to remove the provision of appeal from an order, while confining the right to an appeal only qua a decree, sub-section (2) of Section 28 made provision for appeal from orders passed under Sections 25 & 26 of the HM Act, except an interim order, sub-section (1) of Section 19 of the said Act has used both expressions 'judgement' and 'order'. The amendment to the HM Act in Section 28 was made in 1976, while the said Act was enacted in 1984, i.e., much later. The legislature was, thus, conscious of the consequence of providing for appeals from orders which were not interlocutory orders. This judgement in Shah Babulal Khimji case (supra) had also been delivered before the enactment of the said Act which elucidated the law qua intermediate orders as distinct from interlocutory orders. Thus, certainly the scope of appeal under sub-section (1) of Section 19 of the said Act cannot take its colour from the scope of appeal under Section 28 of the HM Act, particularly, because of the non obstante clause contained in Section 19 (1) of the said Act.



23. We may also notice that the definition of “judgement” as contained in Section 17 of the said Act only provides as what it should contain, i.e., a statement of case, the point for determination, the decision thereon and the reasons for such decision. Thus, the essentials of a judgement have been set out in Section 17 of the said Act. This, in no manner, takes away from the definition of “judgement” as elucidated in Shah Babulal Khimji case (supra) which not only discussed the scope and ambit of an appeal under Section 15 of the Letters Patent, but has an elaborate discussion - as extracted aforesaid, qua what is understood by a final judgement, an interlocutory order and, in that context, what would be an intermediate order. Even if the definition of an intermediate order as explained in Shah Babulal Khimji case (supra) is seen, it would satisfy the test as laid down in Section 17 of the HM Act. In our view, the significance of use of both the expressions ‘judgement’ and “order” under sub-section (1) of Section 19 of the said Act appears to have been lost while forming the contra view.

24. The view of the Uttarakhand High Court in Rahul Samrat Tandon case (supra) has lucidly explained the contours of the controversy and the nature of an order under Section 24 or, for that matter, even under Sections 25 & 26 of the HM Act. No doubt, it is interim maintenance which is determined under Section 24 of the said Act but the proceedings are final in its nature till the decision on the main matter (except unless modified under Section 27 of the said Act). These are, thus, proceedings within proceedings which have the character of finality attached to them, especially as the same visit the parties with civil consequences. As to what are these civil consequences have again been set out in the opinion of the Allahabad High Court in Smt. Kiran Bala Srivastava case (supra). 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 out the defence/dismissal of the substantive cause. Orders passed under Sections 24, 25 or 26 of the HM Act fit the definition of an intermediate order, which may adversely affect valuable rights.

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26. We, thus, conclude as under:

- i. In respect of orders passed under Sections 24 to 27 of the HM Act appeals would lie under Section 19 (1) of the said Act to the Division Bench of this Court in view of the provisions of sub-section (6) of Section 19 of the said Act, such orders being in the nature of intermediate orders. It must be noted that sub-section (6) of Section 19 of the said Act is applicable only in respect of sub-section (1) and not sub-section (4) of Section 19 of the said Act.

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- iv. As a measure of abundant caution we clarify that all orders as may be passed by the Family Court in exercise of its jurisdiction under Section 7 of the said Act, which have a character of an intermediate order, and are not merely interlocutory orders, would be amenable to the appellate jurisdiction under sub-section (1) of Section 19 of the said Act.”

(Emphasis supplied)



15. In ***Colonel Ramesh Pal Singh*** (supra), another Division bench of this Court, while considering an appeal against an order passed by the learned Family Court granting custody of the children to the respondent therein after the completion of the current session of their school, and also drawing out a vacation arrangement of the summer, winter and other holidays, being Deepawali and Holi, held that the order passed by a Family Court in relation to the custody of the children, by its very nature, is 'Interlocutory' and an appeal against such order is barred by Section 47 of the GW Act. It was held that Section 19(1) of the Family Courts Act also does not provide for an appeal against an order passed under Section 12 of the GW Act. I may quote from the judgment as under:-

“24. As discussed above, the coordinate High Courts are of the view that the plain reading of the provisions of the G & W Act reflect that an order passed under section 12 of the said act is an interlocutory order and hence, an appeal is barred by section 47 of the G & W Act.

25. To conclude, the Family Court Act came into force in the year 1984, i.e. 2 years after the pronouncement of Shah Babulal Khimji (Supra) by the Apex Court. Nowhere was it intended by the legislature to bring an appeal under Section 19(1) of the Family Courts against an order passed under Section 12 of the G & W Act nor does the G & W Act provide for an appeal against order passed under Section 12 of the G & W Act.

26. Coming to the facts of the case in hand, the impugned order dated 16.10.2017 relates to an application which was brought under Section 12 of the G & W Act. Through this order the custody of both the children was handed to the respondent. It is pertinent to mention that while the proceedings before the Family



Courts were pending, the impugned order dated 16.10.2017 was passed, which is yet pending disposal. To our mind, the order under challenge is nothing but an interlocutory order and as per the settled preposition of law no appeal would lie against the order dated 16.10.2017 passed under Section 12 of the G & W Act being barred under section 19(1) of the Family Courts Act.

27. Therefore, keeping in view the law discussed above as well as the relevant provisions discussed above, the present appeal is dismissed, being not maintainable. Liberty is granted to the appellant, take appropriate recourse in accordance the parties, the family Court is directed to dispose of the custody petition as expeditiously as possible.”

16. The judgment of the Division Bench of this Court in **Colonel Ramesh Pal Singh** (supra) has been doubted by another Division Bench of this Court in **Dr. Geetanjali Aggarwal** (supra). While referring the issue to a larger Bench, the Division Bench in **Dr. Geetanjali Aggarwal** (supra), has observed as under:-

“12. We have heard learned counsels and perused the judgment of the coordinate Bench of this Court in Ramesh Pal Singh (supra) and the judgement of the Supreme Court in Shah Babulal Khimji (supra). With the utmost respect, we find difficulty in accepting the ratio laid down in the said decision – to the effect that an order passed under Section 12 of the Guardians and Wards Act, or any order of the nature that we are concerned with – which purports to deal with aspects of visitation and custody during the pendency of proceedings, would not be appealable before the Division Bench of this Court under Section 19(1) of the Family Courts Act because the same is an interlocutory order.



13. *It appears to us that the mere use of the expression “interlocutory order” – in respect of an order, is not determinative of the issue whether the order is appealable or not. It is the nature of the order which would have to be looked at. An order which deals with aspects of interim, or call it interlocutory – custody or visitation, is an order which, first and foremost, impinges on the aspect of the rights and welfare of the minor child in respect of whom the order is passed. An order passed by the Family Court touching upon the aspect of visitation – or even interim custody, may be such that if implemented, it may not be in the welfare of the minor child. The High Court, in all cases where the parents are at logger heads and there is a tug of war going on with regard to the custody of the minor child, acts as the parens patriae and exercises its jurisdiction keeping the welfare of the minor child paramount. An order granting/ refusing visitation or interim custody in respect of the minor child would, in our view, be like a final judgement inasmuch, as, it impacts the day to day existence of the child till it remains in force and is implemented, and it may have serious, lasting and irretrievable consequences for the child i.e. on the child’s psychological health, as well as physical wellbeing. The time period/ interval during which such an order remains in force, and in operation, would be lost forever and the impact that it may have on the child may be lifelong. In that sense, in our view, the orders touching upon aspects of interim custody or visitation rights cannot be considered as merely interlocutory orders. They are certainly orders touching upon matters of moment. “Interlocutory orders” often are procedural orders which do not impinge on substantive rights of the parties. Though such orders are not made appealable – with a view to remove obstacles in the progress of the substantive cause before the Court, such orders can be challenged when the final order/ judgement is assailed – if the aggrieved party is also*



aggrieved by any such interlocutory order, and claims that the interlocutory order has affected the final determination of the cause by the Court. Section 105(1) CPC may be referred to in this regard. One such example is where the Court may have closed the right of one, or the other party, to lead evidence – for whatever reason. Section 10 of the Family Courts Act specifically provides that the provisions of, inter alia, the CPC shall apply to the suits and proceedings before the Family court and, for the purpose of the said provisions of the code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court. In our view, an order dealing with the aspects of visitation and/or interim custody of a minor child, cannot be labelled as an “interlocutory order”, which does not have the trappings of a final judgement. It certainly is not a procedural order. It may seriously and adversely impinge on the rights of the minor child, if not on the rights of one of the parties to the lis. If it is treated as an order against which no appeal is maintainable – by terming it as a routine “interlocutory order”, it may deprive the aggrieved party – and the minor child concerned, of a valuable right to appeal before the Appellate Court to seek correction of the order passed by the Family Court. What will the aggrieved party argue at a later stage – when appealing against the final judgment before the High Court under Section 19 of the Family courts Act? – that the “interlocutory order” granting/refusing visitation/ interim custody was wrong and unjustified and it has done much harm to the minor child! That may turn out to be an academic exercise, and nothing more. The order granting/ refusing visitation/ interim custody may have caused irretrievable damage by then to the parties/ the minor child.

14. We are, therefore, of the considered view that the decision of the co-coordinate Bench in Ramesh Pal Singh (supra) needs re-



consideration. We, therefore, refer the issue raised by the respondent in the present application by placing reliance on Ramesh Pal Singh (supra) to a Larger Bench. Let the matter be placed before Honourable the Chief Justice for constitution of a Larger Bench for consideration of the aforesaid aspects.”

(Emphasis supplied)

17. Having considered the above judgments, it is evident that in terms of Section 19 of the Family Courts Act, an appeal shall be maintainable against any order or judgment passed by the learned Family Court, however, not against an ‘Interlocutory Order’. The term ‘Interlocutory Order’ is to be read in conformity with the judgment of the Supreme Court in **Shah Babulal Khimji** (supra) and, therefore, an order which possesses the characteristics and trappings of finality will be treated as a ‘Judgment’. Similarly, orders which decide matters of moment or affect vital and valuable rights of the parties, and which work serious injustice to any of the parties concerned, shall be considered as a ‘Judgment’.

18. In the present case, the Impugned Order has been passed on an application filed by the petitioner herein praying for the following relief:-

“a) allow the Applicant/ Wife to take her minor children, namely, Sushrik Sankar Bhunia & Devyasini Wriddhi for relocation to the United Kingdom;
b) allow the Applicant/ Wife to appear virtually in the captioned matter pending before this Hon'ble Court;”

19. The application filed by the petitioner, therefore, sought permission of the learned Family Court to take the children away from



its jurisdiction. Though the application is not strictly under Section 26 of the GW Act, the application clearly draws its colour from the said provision. Section 26 of the GW Act is reproduced hereinbelow:-

“26. Removal of ward from jurisdiction. (1) A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction except for such purposes as may be prescribed.

(2) The leave granted by the Court under sub-section (1) may be special or general and may be defined by the order granting it.”

20. Until the custody of the children is with the petitioner herein, she is the ‘guardian’ of their interest, though not formally declared to be such by the Court. Section 4(2) of the GW Act defines the term ‘Guardian’ to mean a person having the care of the person of a minor or of his property or of both his person and property. When the Court allows a person to retain the custody of the children, in effect, it is also appointing such person as the ‘Guardian’ of such a child, though may be for a short or *interim* duration. The application filed by the petitioner, which prays for the petitioner to be allowed to take the children out of the jurisdiction of the family court, not for a temporary period, but for a long period of time, is therefore, essentially one under Section 26 of the GW Act.

21. The Impugned Order, inasmuch as it refuses leave to the petitioner herein for the removal of the children from the limits of the jurisdiction of the learned Family Court, would also be appealable



under Section 47(d) of the GW Act. Section 47(d) of the GW Act is reproduced hereinbelow:-

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

xxxxx

(d) under section 26, refusing leave for the removal of a ward from the limits of the jurisdiction of the Court, or imposing conditions with respect thereto;”

22. In my view, therefore, applying the above-mentioned test, the Impugned Order cannot be said to be ‘Interlocutory’ but would amount to a ‘Judgment’ passed by the learned Family Court, thereby being appealable under Section 19 of the Family Courts Act. It must be emphasized that the petitioner seeks to take the children away from the jurisdiction of the Family Court for a long and uninterrupted duration. This would have serious and far reaching effect on the rights of the respondent.

23. The Impugned Order would also not be *stricto sensu* covered by Section 12 of the GW Act. Section 12 of the GW Act reproduced as under:-

“12. Power to make interlocutory order for production of minor and interim protection of person and property.—(1) *The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.*

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under sub-section (1) for her production shall require her to be produced in



accordance with the customs and manners of the country.

(3) Nothing in this section shall authorize—

(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband, unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property.”

24. A reading of the above provision would show that the same empowers the learned Family Court to direct the child to be produced and to make orders for the temporary custody and protection of the person or property of the minor. As noted hereinabove, the Impugned Order refuses permission to the petitioner to relocate along with the children to the UK. The Impugned Order, therefore, though in parts refers to the implication of the relief sought on the rights of the respondent herein under Section 12 of the GW Act, is not *stricto sensu* an order passed under Section 12 of the GW Act.

25. The Impugned Order is such which not only vitally affects a valuable right of the petitioner herein, but also has characteristics and trappings of finality, inasmuch as it refuses permission to the petitioner herein to relocate to UK. It is also relatable to Section 26 of the GW Act and this factor shall also influence this Court into holding that the same is not an ‘Interlocutory Order’, and is, therefore, appealable under Section 19(1) of the Act.

26. In **Athar Hussain** (supra), the Supreme Court was considering



relatives and their father who had, admittedly, remarried after the death of the natural mother of the children. The Supreme Court observed that though, *prima face*, the case lies in favour of the father as under Section 19 of the GW Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian, however, the question of ‘custody’ is different from the question of ‘guardianship’. A father can continue to be the natural guardian of the children, however, consideration pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better. The Supreme Court held that the question of guardianship can be independent of and distinct from that of custody in the facts and circumstances of each case.

27. The above judgment though draws a distinction between the claim of guardianship and the claim of custody of the children. In my opinion, this question would not be relevant in the facts of the present case. In the present case, the custody of the children is with the petitioner herein. She, however, wishes to take them away from the jurisdiction of the learned Family Court to another Country. The relief claimed is, therefore, more relatable to Section 26 of the GW Act as the petitioner is not only claiming the guardianship of the children but also their custody.

28. In ***Prashant Prakash Sahni*** (supra), a Division Bench of this Court was considering an appeal against the order passed by the learned Family Court whereby the respondent therein was allowed to travel to the UK with her younger child to be with her elder child, who was studying in the UK. The Division Bench observed as under:-



“12. A reading of the impugned order clearly shows that it is only an interlocutory order and therefore, the present appeal as filed, is not maintainable. The proper course for the appellant/father would have been to file a writ petition under Article 227 of the Constitution of India, which would have been listed before a Single Judge of this court.

However, this court is of the opinion that even though the appeal is not maintainable in law, but since it touches upon the welfare of the child, the same is not being rejected on the technical ground of maintainability. The other reason is that the court is closing from tomorrow for the Diwali break and if the appeal is rejected on the ground of maintainability, then the appellant may not be in a position to seek timely legal recourse by filing a petition before the learned Single Judge.”

29. I have intentionally emphasized the nature of the Impugned Order passed by the learned Family Court that was in challenge in the above appeal. Unlike the order prayed for by the petitioner in the present petition, the order passed in the above appeal was for a temporary visit to the UK for meeting one of the children of the parties, who was studying in the UK. In the present petition, however, the petitioner is seeking a relocation to the UK for a long period of time along with the children.

30. In ***Seema v. Sanjeev Godha*** (supra), the High Court of Rajasthan was considering an appeal against an order passed by the learned Family Court whereby the learned Family Court refused to pass an *interim* order of custody of a girl child in favour of the mother. The Court observed as under:-



“7. An application under Section 7 of the Act of 1890 has been filed and during the pendency of that application, under Sec. 12 of that Act an application for interim custody of the minor child was filed. A bare reading of sub-section (1) of Sec. 12 of the Act of 1890 will show that the, court is empowered to make an interim order for protection of the person or property of the minor. It will be seen that under Section 12 more than one order for temporary custody and protection of person and property can be made. Though, we are dealing with an appeal under Section 19(1) of the Act, but even under Sec. 47 of the Act of 1890 which deals with an order made under Sec. 12 for temporary custody and protection of the person of the minor has not been made appealable. Before coming into force of the Act a revision might have been maintained and perhaps was maintainable but the matters of custody of minor having come under exclusive jurisdiction of the Family Courts under the Act, it is the Act which will apply and therefore we are of the opinion that so far as the order of the court relating to temporary custody under Sec. 12 of the 1890 Act pending the application under Sec. 7 of that Act is concerned, it is an 'interlocutory order' and an appeal under Sec. 19(1) of the Act will not be maintainable. But during the course of arguments we had put to the learned counsel for the parties the question whether or not in a given case if the order of the Family Court is such which is perverse and is one which could not have been made under the provisions of law and an appeal does not lie under Sec. 19(1) of the Act because the said order is 'interlocutory order' whether this court can exercise its power under Article 226 or 227 of the Constitution of India. Learned counsel for the respondent could not satisfy us that this power could not be exercised. We are of the opinion that Article 227 of the Constitution of India confers power on this court of superintendence over all courts and tribunals through the territory of Rajasthan and in



exercise of those powers, which powers have no doubt to be exercised most sparingly only in cases where grave injustice would be done unless this court interferes, this court can quash the orders of the Tribunal. The said power under Article 227 of the Constitution being discretionary it is for the court of exercise the discretion and no party can claim the exercise of such power as of right.”

31. In **Isma Alam** (supra), the Division Bench of the High Court of Allahabad was considering an appeal filed against the order passed by the learned Family Court, whereby the learned Family Court had directed the interim custody of the child to be given to the respondent therein after taking custody of the child from the appellant by issuing an arrest warrant. The Court held that the appeal against such an order would not lie under Section 19 of the Family Court Act. The Court observed as under:-

“Applying the principles laid down in the facts and circumstances of the present case, we find that the learned Judge had not decided the case finally between the parties as the petition filed under section 25 of the Act numbered as 50/70/2009 is still pending. He has only decided the applications filed under section 12 and 26 of the Act and had directed for granting interim custody of the minor child to the opposite party herein pending final decision on the application filed under section 25 of the Act. Thus, the order impugned in the present appeal is an interlocutory order and an appeal under section 19 of the Act would not lie. The submission of Sri V.M. Zaidi, learned senior counsel that by the impugned order, the learned Judge had in fact decided the entire controversy is misplaced.

While arriving at a conclusion as to whether the interim custody of the minor child has to be given to the opposite party herein on



an application in this behalf before the learned Judge, the learned learned Judge has necessarily to record a finding as to why such an order granting interim custody is required to be passed. However, the findings recorded therein is only a tentative finding and would not in any way effect the disposal of case No.50/70/2009 which has to be decided by the learned Judge on the basis of the material and evidence on record and in accordance with law.

In view of the foregoing discussions, we are of the considered opinion that the present appeal filed under section 19 of the Act of 1984 is not maintainable. As we have come to the conclusion that the appeal itself is not maintainable, we are not entering into the merits of the controversy.”

32. In ***Rosy Jacob*** (Supra), the Supreme Court emphasized that all orders relating to the custody of the minor ward from their very nature must be considered to be temporary orders made in the existing circumstances. It held that with the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders, if such variation is to be in the interest of the welfare of the ward.

33. In ***Dhanwanti Joshi*** (supra), the Supreme Court, however, explained that though the orders relating to custody of children are by their very nature not final, but interlocutory, at the same time in respect of orders as to custody already passed, the doctrine of *res judicata* applies and the Family Court cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated; there must be proof of substantial change in the circumstances presenting a new case



before the Court; it must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results.

34. This view was reiterated by the Supreme Court in ***R.V. Srinath Prasad*** (Supra).

35. Therefore, the orders passed by a Family Court under Section 12 of the Family Court Act can be purely interlocutory and procedural in nature; they could also be temporary; or they may have attributes of finality, which can be disturbed only where there is a change in the circumstances. The present case will fall in the third category. However, this issue need not detain me further, inasmuch as, in my opinion, the order impugned in the present petition takes its color from Section 26 of the GW Act and under Section 47(d), is appealable. Even otherwise, insofar as it refuses permission to the petitioner from relocating along with the children abroad, the Impugned Order has attributes and trappings of finality.

Conclusion:

36. In view of the above, I hold that the petitioner has an alternate and efficacious remedy in the form of an appeal under Section 19 of the Family Courts Act against the Impugned Order. For the said reason, I refuse to exercise my jurisdiction under Article 227 of the Constitution of India.

37. The present petition along with the pending applications is, accordingly, dismissed, leaving it open to the petitioner to exercise the remedy as may be available in law. There shall be no order as to costs.



38. I must emphasize that this Court is not commenting on the merits of the Impugned Order. The above observations are being made only to consider whether an appeal under Section 19(1) of the Family Courts Act to challenge the Impugned Order is maintainable.

NAVIN CHAWLA, J.

SEPTEMBER 21, 2023/rv/rp/AS