

(1991) 06 BOM CK 0006

In the Bombay High Court

Case No : First Appeal No. 53 of 1991 in M.J. Petition No. A-387 of 1990

Mala Ramesh Pherwani of Bombay

APPELLANT

Vs

Ramesh Pherwani of Bombay

RESPONDENT

Date of Decision : 26-06-1991

Acts Referred:

Family Courts Act, 1984 — Section 19(1)

Citation : (1991) 93 BLJR 784 : (1991) 3 BomCR 116 : (1993) 1 DMC 475 : (1991) 1 MhLj 1188

Hon'ble Judges : V.P. Tipnis, J; S.M. Jhunjhunwala, J

Bench : Division Bench

Advocate : P.K. Samdani and N.M. Shah, instructed by Desai and Diwanji, for the Appellant; R.C. Nichani, for the Respondent

Final Decision : Dismissed

Judgement

V.P. Tipnis, J.—This appeal, which was admitted on 21st June, 1991, was taken up for final hearing forthwith with the consent of the parties as the issue raised in the appeal was capable of being disposed of quickly and the issue also is likely to be raised in several cases.

2. The respondent husband commenced proceedings before the Family Court for Greater Bombay by M.J. Petition No. A-387 of 1990 against the appellant wife for a decree of divorce on the grounds of cruelty and desertion.

3. During the pendency of the said petition and different applications between the parties, the appellant wife made an application to the learned Judge of the Family Court at Exh. 9 on 11th April, 1991 praying that she should be permitted to be represented by Advocate or Solicitor for pleading on her behalf in the interim maintenance application. In the application, she asserted that the matter in dispute, relating to her application for maintenance, involves complicated questions of facts and law, her right share and entitlement in the assets and properties of the petitioner as also her entitlement by way of maintenance. She

pleaded that she is not conversant with the aforesaid aspects of law or facts. She has never worked anywhere and she has been living only as a housewife. She also pleaded that she found it extremely difficult even to understand the Xerox sheets which were shown to her, purporting to be accounts or statements of income of the petitioner.

4. This application was considered by the learned Principal Judge of the Family Court, Bombay. The learned Judge in paragraph 2 of his order observed that he has gone through the pleadings of both the sides from which it will be quite clear that in this petition, no complicated question either of fact or law is involved. The learned Judge further observed that the applicant Mala is a graduate, petitioner Ramesh is also graduate. Petitioner Ramesh is not represented by an Advocate, no permission is given to him to be represented by any Advocate. Thereafter, the learned Judge referred to provisions of section 13 of the Family Courts Act and referring to several judgments of the Supreme Court, he recorded a finding that party is not entitled to engage an Advocate in view of the clear provisions of section 13 of the said Act. In paragraph 3 of the judgment, he recorded a finding that parties are educated, there are no complicated questions of law or fact and when the petitioner is not allowed to be represented by an Advocate, the respondent could not be allowed to engage an Advocate. The learned Judge, however, made it clear in the order that if at the time of recording of evidence, he found that either the applicant or the respondent is not in a position to put forth her or his claim properly, then he would definitely use his discretion as provided by proviso to section 13 of the Family Courts Act, appointing Advocates as *amicus curiae* of their choice, "but at this stage I reject this application". The learned Judge disposed of the application accordingly by his Order dated 25th April, 1991.

5. Being aggrieved by the said order, original respondent wife to the petitioner has filed this appeal.

6. Shri Samdani, learned Counsel appearing for the appellant, contended that the learned Judge was wrong in recording a finding that the case did not involve complicated questions either of fact or law. He further submitted that as a matter of fact, record of the proceeding would show that this is a fit case in which both parties should be allowed to be represented by an Advocate. Miss Nichani, learned Counsel appearing for the respondent husband, on the other hand submitted that the appeal itself is not maintainable in view of the clear provisions of section 19 of the said Act. She further submitted that the learned Judge was more than justified to reject the application inasmuch as similar request on behalf of the husband was also turned down by the learned Judge. Miss Nichani submitted that the order is clearly interlocutory and as such, no appeal can lie under the provisions of the Family Courts Act against the said order. Lastly, Miss Nichani submitted that in case the wife's application for engaging an Advocate is allowed, ends of justice require that the husband also should be allowed to engage an Advocate.

7. As the respondent has taken the preliminary objection regarding the very maintainability of the appeal and as we have heard both the sides on the point at some length, it is necessary to decide the issue as to whether an order passed by the learned Judge of the Family Court, either granting or rejecting an application by any party to the proceeding for engaging an Advocate or a lawyer is an inter-locutory order within the meaning of section 19 of the Family Courts Act, 1984 and as such, no appeal shall lie to this Court u/s 19 of the said Act.

8. Shri Samdani, the learned Counsel appearing for the appellant relied upon the judgments of the Supreme Court reported in *Amar Nath and Others Vs. State of Haryana and Another*, , *Madhu Limaye Vs. The State of Maharashtra*, , He also referred to the judgment of the Division Bench of this Court reported in *Leela Mahdeo Joshi Vs. Dr. Mahadeo Sitaram Joshi*, . Shri Samdani also made reference to the provisions of Rules 7 to 10 of Order 39 of the Code of Civil Procedure. On the basis of these judgements and the provisions of the Family Courts Act, Shri Samdani submitted that the order rejecting the application for permitting the party to engage a lawyer cannot be termed inter-locutory within the meaning of section 19 of the Family Courts Act. Shri Samdani submitted that though not in a sense, the order may be an intermediate order as was the case reported in *Madhu Limaye Vs. The State of Maharashtra*, . Shri Samdani submitted that what is inter-locutory order is also indicated broadly by provisions of Rules 7 to 10 of Order 39 of the Code of Civil Procedure. Shri Samdani submitted that the order with which we are concerned can be termed as intermediate order meaning thereby though not final , it is not an inter-locutory order. Shri Samdani therefore, submitted that if it is not an inter-locutory order, section 19 of the Family Courts Act gives right of appeal against every judgment and order of the Family Court and as such, the present appeal is maintainable Shri Samdani also attempted to distinguish the judgment of the Division Bench of this Court, *Sunil Hansraj Gupta Vs. Payal Sunil Gupta*, , by submitting that the said judgment decides specifically only two issues, viz. whether an appeal lies to the High Court u/s 19(1) of the Family Courts Act from an order of maintenance pendente lite passed by the Judge of the Family Court on an application u/s 24 of the Hindu Marriage Act in a matrimonial petition and whether such an order is an inter-locutory order. Miss Nichani, the learned Counsel appearing for the respondent husband, on the other hand, heavily relied upon the said judgment of the Division Bench and submitted that the order rejecting an application for permission to engage an Advocate is clearly an inter-locutory order within the meaning of section 19(1) of the Family Courts Act.

9. Chapter IV of the Family Courts Act, which deals with procedure as is indicated by the heading of the Chapter, includes section 13 which is as follows :-

"13. Right to legal representation :---Notwithstanding anything contained in any law, no party to a suit or proceeding before a family Court shall be entitled as a right, to be represented by a legal practitioner;

Provided that if the Family Court considers it necessary in the interest of justice,

it may seek the assistance of a legal expert as *amicus curiae*."

The aforesaid section obviously and clearly provides that no party to a suit or proceeding before the Family Court shall be entitled as of a right, to be represented by a legal practitioner. Section 19 of the said Act which provides for "Appeals" is 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.

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

(5) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."

Therefore, it is clear that an appeal shall lie from every judgment and order unless it is an interlocutory order.

10. In *Amar Nath and Others Vs. State of Haryana and Another*, , the Supreme Court dealt with the interpretation of words "interlocutory order" used in section 397(2) of the Code of Criminal Procedure, 1974. In paragraph 6 of the judgment, the Supreme Court observed that the term "interlocutory order" is a term of well-known legal significance and does not represent any serious difficulty. The Supreme Court further observed that decided cases have laid down that interlocutory orders to be appealable must be those which decide the rights and liabilities of the parties concerning a particular aspect. It seems to the Supreme Court that the term "interlocutory order" in section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. The Supreme Court further observed that orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court. In *Madhu Limaye Vs. The State of Maharashtra*, , in paragraph 12 of the judgment, the Supreme Court referred to Volume 22 of the third edition of Halsbury's Laws of England at pages

742, 744 and 745. Thereafter referring to earlier judgments of Federal Courts, the Supreme Court stated that in the judgment of the Supreme Court such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified, because the Supreme Court felt that if it were so, it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by section 397(1). The Supreme Court observed that there may be an order passed during the course of proceeding which may not be final in the sense noticed in Kuppuswami's case, but yet it may not be an interlocutory order-pure or simple. Some kinds of order may fall in between the two and that the bar in sub-section (2) of section 397 is not meant to be attracted to such kinds of intermediate orders. The Division Bench judgment reported in Leela Mahdeo Joshi Vs. Dr. Mahadeo Sitaram Joshi, is really not relevant for the issue of maintainability of the appeal though undoubtedly it is relevant for the purpose of deciding whether in a given case, an application of a party to engage a lawyer should be granted or refused. So far as the decision of the Division Bench of this Court in First Appeal No. 22 of 1991 decided on 11th February 1991 is concerned, we are of the opinion that the said judgment is extremely relevant and in fact decides the issue. Undoubtedly, as submitted by Shri Samdani, the issue before the Court was whether an appeal lies to the High Court u/s 19(1) of the Family Courts Act and whether the order of maintenance is rightly passed by the Judge of the Family Court on an application u/s 24 of the Hindu Marriage Act in a matrimonial petition. But the perusal of the judgment makes it absolutely clear that the learned Judges, after consideration of several authorities of the Supreme Court, including the aforesaid two authorities, relied upon by Advocate Shri Samdani, have interpreted provisions of section 19(1) with special reference to what is an interlocutory order within the meaning of the said provisions. After referring to the various provisions of the Family Courts Act in the light of several judgments, the Division Bench has observed that upon review of various decisions of the Supreme Court, the essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought, but not a final decision or judgment in the matter in issue. The Division Bench has made detailed reference to the object of the Family Courts Act and the various provisions of the Family Courts Act and held that it is apparent that the Parliament wanted to give only one right of appeal to the High Court against final judgment/order passed under the Hindu Marriage Act and Chapter IX of the Criminal Procedure Code. Considering in the light of the aforesaid decisions, there is no manner of doubt in our mind to hold that the impugned order rejecting an application of the appellant for permission to engage a lawyer is clearly an interlocutory order within the meaning of section 19(1) of the Act. It is clear that in view of provisions of section 13, no party to the proceeding before the Family Court is entitled as a right to be represented by legal practitioner. The decision on the application in either way does not bring the main proceedings to an end. Whether the party's application for engaging a lawyer is granted or refused, the main proceedings will go on. The decision does

not in any manner affect the rights of liabilities of the parties so far as the main proceedings are concerned. That apart, the learned Judge has made it amply clear that the application for engaging a lawyer is rejected for the time being at that stage of the proceedings and if he finds that either of the parties is not in a position to put its claim properly, he would consider the matter of allowing to engage lawyer of their choice.

11. Looking from any angle, there can be hardly an doubt that the impugned order is an interlocutory order within the meaning of section 19(1) of the Family Courts Act.

12. In view of our finding as aforesaid, the appeal is clearly maintainable u/s 19 of the Act. As we are holding that the appeal itself is not maintainable, it is unnecessary and we are making it clear that we have not dealt with the merits of the application on the desirability of the appellant being allowed to be represented by a lawyer in the facts and circumstances of the case.

13. The appeal, therefore, is dismissed. In the circumstances of the case, however, there shall be no order as to costs.