
(1998) 09 AHC CK 0124
In the Allahabad High Court
Case No : C.M.W.P. No. 24551 of 1998

Ranvir Kumar

APPELLANT

Vs

Judge, Family Court, Moradabad and another

RESPONDENT

Date of Decision : 14-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 9 Rule 13, 115
Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 397(2)
Family Courts Act, 1984 — Section 19, 19(1)
Government of India Act, 1935 — Section 205(1)
Hindu Marriage (Amendment) Act, 1995 — Section 13
Hindu Marriage Act, 1955 — Section 13

Citation : (1998) 4 AWC 39 : (1998) AWC 39 : (1999) 1 DMC 511

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : K.K. Arora, for the Appellant; S.C. and A.D. Prabhakar, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Singh, J.—Constant marital bickering and consequent stand-off between the petitioner and the respondent appears to be the causative factors for institution of a petition by the petitioner u/s 13 of the Hindu Marriage Act, 1955, seeking dissolution of the marriage on the ground of "willful neglect" and "desertion" by the wife-respondent herein. The learned Judge. Family Court, passed an order on 29.9.1997 that the case would proceed ex parte against the defendant. Thereafter, on the basis of ex parte evidence, the matter escalated into a decree passed for dissolution of marriage vide judgment dated 16.10.1997, reinforced with the finding that "desertion and willful neglect on the part of Smt. Rekha Gupta is proved." "On coming to know of the ex parte judgment, the respondent-wife moved an application with the prayer to set aside the order dated 29.9.1997 and the judgment and decree dated 16.10.1997. The reason for non-appearance on material dates was that she was residing with her father at Pathankot and

owing to her own ailments. she could not attend the Court as a result of which the case proceeded ex parte against her and ultimately, the matter culminated in ex parte decree on the basis of ex parte evidence adduced by the husband. It is also alleged that she was stymied in appearing on the dates fixed in the case through a lawyer in that the lawyers are not permitted to prosecute the cases in Family Courts. The learned Judge Family Court, deduced the cause for default and absence on the relevant dates to be "sufficient" and resultantly, set aside the order dated 29.9.1997 and the ex parte judgment and decree dated 16.10.1997 by means of the order dated 25.4.1998. Despaired of the order, the petitioner-husband has filed the instant petition for quashing the order dated 25.4.1998.

2. Sri A. D. Prabhakar, learned counsel appearing for the respondent, to begin with, raised a preliminary objection as to the maintainability of the writ petition on the ground that the petitioner had an alternative remedy of appeal u/s 19 of the Family Courts Act, 1984, Sri K. K. Arora, appearing for the petitioner, tried to meet and controvert the preliminary based on the submissions that the order impugned herein has the complexion of an "interlocutory order" and therefore, no appeal lies against it. The learned counsel canvassed that as provided in sub-section (1), appeal lies against "every judgment or order, not being an interlocutory order, of the Family Court". Dwelling on his submission, the learned counsel urged that an order allowing application under Order IX, Rule 13. C.P.C. partakes of the nature of an "interlocutory order" in that the suit stands revived. Sri Arora made a further submission that an appeal under Order XLII. Rule 1, C.P.C. lies against an order rejecting an application for setting aside an ex parte decree and not against an order allowing the application under Order IX, Rule 13, C.P.C.

3. I have scanned the submissions made at the bar, for its substance. Section 19 of the Family Courts Act, 1984, in so far as it is germane to the controversy involved in this petition, is excerpted below :

"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 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.

(3) * * * * (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.

(3) * * * * *

4. Expression "interlocutory order" occurring in Section 397(2) of the Code of Criminal Procedure, 1973 came up for consideration before the Apex Court in the case of *Madhu Limaye v. State of Maharashtra* AIR 1978 SC 183. in which the Apex Court held as under :

"12. Ordinarily and generally the expression "interlocutory order" has been understood and taken to mean as a converse of the term "final order". In Volume 22 of the third edition of Halsbury's Laws of England at page 742, however, It has been stated in para 1606 :

"a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required.

In para 1607 it is said :

"In general a judgment or order which determines the principal matter in question is termed "final"."

In para 1608 at pages 744 and 745 we find the words :

"An order which does not deal with the final rights of the parties, but either (1) is made before judgment and gives no final decision on the matter of procedure or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out is termed "interlocutory." An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals."

13. In *S. Kuppuswami Rao v. King* [3] Kanta, C.J. delivering the judgment of the Court has referred to some English decisions at pages 185 and 186. Lord Esher M. R. said in *Saleman Warner* (4), "if their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute. I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way will finally dispose of the matter in dispute, but, if given in the other will allow the action to go on, then I think it is not final, but interlocutory." To the same effect are the observations quoted from the judgments of Fry. L. J., and Lopes L. J. Applying the said test, almost on facts similar to the ones in the instant case, it was held that the order in revision passed by the High Court (at

that time there was no bar like Section 397(2) was not a "final order", within the meaning of Section 205(1) of the Government of India Act, 1935. It is to be noticed that the test laid down therein was that if the objection of the accused succeeded, the proceedings could have ended but not vice versa.

14. In passing, for the sake of explaining ourselves, we may refer to what has been said by Kania, C. J., in *Kuppuswami's case* (supra) by quoting a few words from Sir George Lowndes in the case of *Abdul Rahmem v. D. K. Cassim and Sons* (7). The learned Law Lord said with reference to the order under consideration in that case :

The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way."

5. in *V.C. Shukla Vs. State through C.B.I.*, , the Supreme Court held in paragraphs 23 and 95 as under :

"23. Thus, summing up the natural and logical meaning of an interlocutory order, the conclusion is inescapable that an order which does not terminate the proceedings or finally decide the rights of the parties is only an interlocutory order. In other words, in ordinary sense of the term, an interlocutory order is one which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however conclude the trial at all. This would be the result if the term interlocutory order is interpreted in its natural and logical sense without having resort to Criminal Procedure Code or any other statute. That is to say, if we construe interlocutory order in ordinary parlance It would indicate the attributes, mentioned above, and this is what the term interlocutory order means when used in Section 11(1) of the Act (at page SC 999 ; AIR 1980).

"95. Ordinarily speaking, the expression "interlocuted in legal parlance is understood in contra/distinction to what is styled as final, In the course of a judicial proceeding before a Court, for judicially determining the main dispute brought to the Court for its resolution, a number of situations arise, when that Court goes on disposing of ancillary disputes raised by parties to the proceeding by making orders and unless the order finally disposes of a proceeding in a Court all such orders during the course of a trial would be broadly designated "interlocutory1 orders. Such interlocutory orders are steps, taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding. They regulate the procedure only and do not affect any right or liability of the parties (See *Central Bank of India Vs. Shri Gokal Chand*, . Every such interlocutory order may for the time being, dispose of a particular point of controversy raised in the proceeding, yet nonetheless the order would be an interlocutory order unless by such an order the controversy between the parties is finally disposed."

6. In *Ram Sarup Vs. Gaya Prasad*, the suit was decreed ex parte and the application for setting aside ex parte decree filed under Order IX, Rule 13. C.P.C. was rejected by the trial court, but on appeal, the decree was set aside by the appellate court. The plaintiff preferred a revision u/s 115, C.P.C. A question arose as to whether the appellate order setting aside an ex parte decree was a "case" within the meaning of Section 115, C.P.C. The argument was that the appellate order setting aside the ex parte decree, did not come within the sweep of Section 115 of the CPC as there was no "case" which had been decided. Lindsey quoted with approval the following passage from *Hevanchal Kunwar v. Kanhaiya Lal* (1909) 12 OC 405 : 41 C 878 413 of the report :

"Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree ex parte for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of section (i.e.. Section 115)."

Sulaiman and Daniels, JJ. concurred with Lindsay. J., and in separate judgments held that the question must be answered in affirmative holding that the restoration application was a separate proceeding initiated not by the plaintiff in the suit, but by the defendant and the order passed upon it by the appellate court was in no sense an interlocutory order.

7. In the cloister of the above authorities, I feel persuaded to the view that the order setting aside the ex parte decree of divorce is no doubt fraught with the effect of restoring the status quo ante qua the main issues involved in the divorce petition and reviving the issues which were settled by the ex parte decree but, the expression "interlocutory order" seems to have been used in Section 19(1) of the Act in the sense of orders passed on miscellaneous applications during the pendency of the main case, divorce petition in the instant case, which do not have the effect of the case itself being finally disposed of, if once the main case is decided, an order setting aside the decision and restoring the case for decision afresh would not be treated as one interlocutory order for restoration proceeding is an independent proceeding. The decision on the issues raised in the restoration application will have the complexion of a final decision qua the restoration application. The order allowing or rejecting restoration application, is therefore, not an interlocutory order within the ambit of Section 19(1) of the Family Courts Act. 1984, and is clearly appealable under the said provisions. Order XLI11, Rule 1 of the CPC envisage an appeal against an order rejecting an application under Order IX. Rule 13, C.P-C. while Section 19 of the Act provides for an appeal against any Judgment and order not being an interlocutory order. This carves out the distinction between the two provisions and, therefore, submissions made by the learned counsel for the petitioner that no appeal lay u/s 19 of the Act against the order allowing restoration application, does not commend itself for acceptance.

8. However, an alternative remedy does not operate as an absolute bar and in

the perspective of the facts and circumstances of the case, I find that the learned Family Judge has assigned cogent reasons for setting aside the ex parte order dated 29.9.97 and the ex parte judgment dated 16.10.97. The explicatory plea of the defendant-respondent Smt. Rekha Gupta that she was living with her father at Pathankot and was stymied in attending the Court at Moradabad on relevant dates on account of her ailment, has been given credence by the learned Judge, Family Court and In the circumstances, interference with the finding of the Court below under Article 226/227 of the Constitution is uncalled for.

9. As a result of the foregoing discussion, the petition fails and is dismissed.