
(1993) 12 AHC CK 0041
In the Allahabad High Court
Case No : First Appeal No. 238 of 1989

Smt. Indu Mati Koorichh

APPELLANT

Vs

Yogendra Pal Koorichh

RESPONDENT

Date of Decision : 05-12-1993

Acts Referred:

Family Courts Act, 1984 — Section 19, 19(1), 19(2), 8
Hindu Marriage Act, 1955 — Section 13, 25, 26, 28, 28(2)

Citation : (1993) 12 AHC CK 0041

Hon'ble Judges : S.N. Sahay, J;B.C. Saksena, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.C. Saksena, J.—This is an appeal against order dated November 17, 1989 passed by the Family Court, Lucknow allowing an application of the Respondent u/s 26 of the Hindu Marriage Act for the custody of his minor son and daughter, Master Rahul Koorichh and Km. Monika Koorichh.

2. The Respondent has filed a petition u/s 13 of the above mentioned Act for divorce against the Appellant. During pendency of that case, an application for custody of the minor children was moved by the Respondent. The application was contested by the Appellant and after hearing the same, the Family Court proceeded to allow it by the order under appeal. The very first question which arises for consideration is whether the appeal is maintainable.

3. Section 19(1) of the Family Court Act, 1984 provides: "Save as provided in Sub-section (2), and notwithstanding anything contained in the Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973 or in any order law, an appeal shall lie every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law." Sub-section (2) of Section 19 says that no appeal shall lie from a decree or order passed by the Family Court with the consent of the parties. The proceedings arising out of the petition u/s 13 of the Hindu Marriage Act are said to have been transferred to

and pending before the Family Court by virtue of Section 8 of the Family Court Act. Therefore, an appeal will lie against order dated November 17,1989 only if it can be shown that is not an interlocutory order.

4. Section 26 of the Hindu Marriage Act, 1955 provides that in any proceeding under this Act, the Court may, from time to time, pass such interim orders and, make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible. Section 28 of the same Act provides that all decrees made by the Court in any proceeding under this Act shall, subject to the provisions of Sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction. Then Sub-section (2) of Section 28 provides that orders made by the Court in any proceeding under this Act u/s 25 or Section 26 shall, subject to the provisions of Sub-section (3), be appealable if they are not interim orders and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

5. If the Family Courts Act had not been passed, even then no appeal could have been preferred against the order dated November 17,1989, which is an order passed u/s 26 of the Hindu Marriage Act as it was an interim order. The position has not changed after the enforcement of the Family Courts Act because Section 19 of the Family Court Act is with regard to that matter in accord with the provisions of Sub-section (2) Section 28 of the Hindu Marriage Act. By means of the order under appeal, interim order has been passed for the custody of the children and the rights of the parties have not been finally determined. This order is clearly an inter-locutory order and so the appeal is not maintainable in view of Section 19 of the Family Courts Act.

In view of the above conclusion, this appeal is dismissed as not maintainable. No order as to costs.