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

Reserved on: 20.09.2024
Date of decision: 16 .10.2024

\+ MAT.APP.(F.C.) 126/2019

DR GEETANJALI AGGARWAL .....Appellant

Through: Mr.Sumante De, Mr.Rohit Khurana, Ms.Preeti Nair, Ms.Akshita Raina & Mr.Kumar Harsh, Advs.

versus

DR MANOJ AGGARWAL .....Respondent

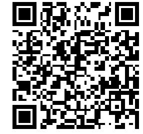
Through: Mr.Siddharth Handa, Adv.
Mr.Prosenjeet Banerjee, Amicus Curiae.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
HON'BLE MR. JUSTICE JASMEET SINGH
HON'BLE MR. JUSTICE AMIT BANSAL

REKHA PALLI, J

JUDGMENT

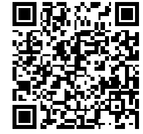
1. This Full Bench has been constituted on the orders of Hon'ble the Chief Justice, pursuant to the reference order dated 22.10.2021 passed by the learned Division Bench in MAT.APP. (F.C.) 126/2019, of which one of us, namely HMJ Jasmeet Singh was a member. Vide the said order, the learned Division Bench while dealing with the appeal preferred by the mother of the minor child, the respondent in Guardianship Petition No. 05/2018, recorded



its reluctance in accepting the view expressed in ***Colonel Ramesh Pal Singh vs. Sugandhi Aggarwal, MAT.APP.(F.C.) 211/2019,*** wherein it was held that an order under Section 12 of the Guardians and Wards Act, 1890 (hereinafter "GW Act") passed during the pendency of proceedings before the Family Court would be an interlocutory order and would consequently, not be appealable under Section 19(1) of the Family Courts Act, 1984 (hereinafter "FC Act"). The Court noticed that a contrary decision regarding the scope of appeal under Section 19(1) of the FC Act had been taken by another Division Bench of this Court in ***Manish Aggarwal v. Seema Aggarwal, (2012) 192 DLT 714 (DB)*** and, therefore, opined that the decision in ***Col Ramesh Pal (supra)*** was required to be reconsidered by a Larger Bench. It is, in these circumstances, that this Bench has been constituted to consider the correctness of the decision in ***Col Ramesh Pal (supra)***.

2. Before dealing with the issue arising for our consideration in the present reference, we may briefly refer to the factual matrix of the appeal, which, as noted hereinabove, has been filed at the instance of the mother of the minor child, assailing the order dated 09.04.2019 passed by the learned Family Court under the GW Act, 1890. This impugned order was passed upon an application being filed by the father of the minor child, with a prayer that the minor child be admitted in one of the three schools near his place, so that instead of being sent to a creche after school hours, the child could be placed in his temporary custody every day during the period when the mother was busy in office.

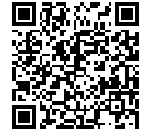
3. Vide the impugned order, the learned Family Court allowed the application filed by the respondent father and permitted him to pick up the



child from the appellant mother's house before school every day and then drop and pick her up from school, with a direction to drop her back at the appellant mother's home by 6:00 p.m. every day. The learned Family Court further directed that the expenses towards education of the child would be borne by the respondent father and would be adjusted from the maintenance being paid by him.

4. In the appeal preferred under Section 19 (1) of the FC Act, 1984, it is the appellant's prayer that since the child was already studying in a reputed nursery school, i.e, Scottish school, the directions issued by the learned Family Court to shift her to a school close to the respondent father's residence so as to enable him to have temporary custody of the child, be set aside. While issuing notice in the appeal on 27.04.2019, the learned Division Bench stayed the operation of the impugned order and on 29.04.2019, directed that though during the ongoing academic session, the child would continue to study in the Scottish school; both parties would make joint efforts to get her admitted in some other reputed school for the next academic session. This Court further permitted the respondent father to pick up the child from the residence of the appellant mother at 2 p.m. every Saturday and drop her back at the appellant's residence by 6 p.m. on the same day.

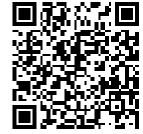
5. It is thereafter that the respondent, on 19.10.2019, moved applications being CM No. 7672 of 2021 and CM No. 34542 of 2021 seeking dismissal of the appeal on the ground that the same was not maintainable under Section 19 of the FC Act. In his application, the respondent has contended that since the impugned order dated 09.04.2019 passed by the learned Family Court was an interlocutory order passed under Section 12 of the GW



Act, 1890, the same was not appealable under Section 19 of the FC Act, 1984, which specifically bars appeal against interlocutory orders.

6. Before the learned Division Bench, learned counsel for the respondent placed reliance upon the decision of this Court in ***Col Ramesh Pal (supra),*** wherein, as noted above, it was held that no appeal could be preferred against an interlocutory order passed under Section 12 of the GW Act, 1890. This plea of the respondent was opposed by the appellant, who contended that the decision in ***Col Ramesh Pal (supra)*** had not correctly appreciated the earlier decision of this Court in ***Manish Aggarwal (supra),*** wherein an appeal against an interlocutory order passed under Section 24 of the Hindu Marriage Act, 1955 was held to be maintainable**.** The appellant also placed reliance on the decision of the Apex Court in ***Shah Babulal Khimji v. Jayaben D. Kania, (1981) 4 SCC 8*** to contend that since the impugned order decided vital rights of the parties as also of the child, the same could not be treated as an interlocutory order. It was the appellant's plea before the learned Division Bench that it was not the nomenclature of the order but its substance which would determine whether the same was an interlocutory order or not.

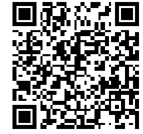
7. The learned Division Bench, after examining the nature of directions issued under the impugned order passed by the learned Family Court and considering the decisions in ***Shah Babulal Khimji (supra), Manish Aggarwal (supra)*** and ***Col. Ramesh Pal (supra),*** observed that since an order passed under Section 12 of the GW Act, 1890 impinges on the rights and welfare of the minor child, it would be incorrect to hold that such an order was not appealable under Section 19 of the FC Act, 1984. It was, in these circumstances, that the learned Division Bench opined that the



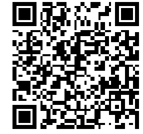
decision in ***Col Ramesh Pal (supra),*** holding that an appeal would not be maintainable against an order passed under Section 12 of the GW Act, 1890, required re-consideration and consequently passed the reference order dated 22.10.2021.

8. Having noted the brief factual matrix, we may begin by referring to the relevant extracts of this reference order, as contained in paragraph nos. 12 to 14 thereof. The same read 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*

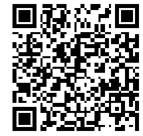


are at logger heads and there is a tug of war going on with regard to the custody of the minor child, acts as the parens patriae and exercises its jurisdiction keeping the welfare of the minor child paramount. An order granting/ refusing visitation or interim custody in respect of the minor child would, 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 cocoordinate 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."*

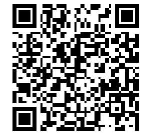
9. From a perusal of the aforesaid, what emerges is that the question which we are required to determine is as to whether an order passed by the



learned Family Court under Section 12 of the GW Act, granting/refusing visitation/interim custody would be appealable under Section 19 of the FC Act. Considering the importance of this question and the significant impact it would have on pending appeals as also the scope of the right to appeal under the FC Act, we, on 19.07.2024, had requested Mr Prosenjeet Banerjee, Advocate, to assist this Court as an *Amicus Curiae*.

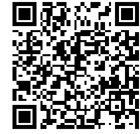
10. In his detailed and comprehensive assisting note, the learned *Amicus Curiae* has, while setting out the issues emanating from a cumulative reading of the decisions of the two Division Benches in ***Manish Aggarwal (supra)*** and ***Col Ramesh (supra)*** wherein there was observed to be an apparent conflict, urged that orders passed under Section 12 of the GW Act, 1890 would be amenable to appeal under Section 19(1) of the FC Act, 1984. He has contended that Section 19(1) of the FC Act is a comprehensive provision overriding the limited appellate provisions found under other statutes governing disputes arising out of marriage and family affairs. This, he has contended, would also include orders passed under the GW Act, 1890. His plea being that Section 19(1) of the FC Act, 1984, is specifically prefaced by a non-obstante clause, and, therefore, an appeal would be maintainable before the High Court in every case where an order decides vital rights of the parties, irrespective of whether the parent statute under which the order has been passed provides for an appeal or not.

11. The learned *Amicus Curiae* has, therefore, contended that the expression 'interlocutory order' used in Section 19 of the FC Act, 1984 against which no appeal lies to the High Court, would not include orders which, unlike purely procedural orders, have the trappings of a final judgment and affect the valuable rights of the parties. He has, therefore,



urged that access and visitation orders passed under Section 12 of the GW Act which have a significant impact on the welfare of the child and often materially affect the finality of adjudication of guardianship petitions, cannot be treated as merely being procedural in nature or being simply interlocutory orders. His submission, therefore, is that taking into account that interim orders passed under Section 12 of the GW Act, 1890, generally govern the parties for years together and are adjudicatory in nature, they cannot be treated as interlocutory orders which are not amenable to appeal under Section 19 of the FC Act, 1984. In support of his plea, he has relied on the decision of the Apex Court in ***Shah Babulal Khimji (supra)*** wherein the Apex Court while dealing with the scope of the term 'judgment' against which an appeal was maintainable under clause 15 of the Letters Patent of the Bombay High Court explained that an order which may otherwise be interim in nature could be treated as a judgment if it vitally affects the rights of the parties.

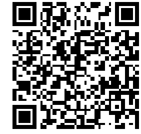
12. The learned *Amicus Curie* has then referred to the discussion in the Parliament leading to the amendment introduced in 1991 to Section 19 of the FC Act. He has urged that in the opening remarks made by the then Hon'ble Minister of Law, Justice and Company Affairs while introducing the amendment, it was observed that though interim maintenance orders passed under Section 125 Code of Criminal Procedure, 1973 ("Cr.P.C.") [*pari materia* to the present Section 144 of the Bhartiya Nagarik Suraksha Sanhita ("BNSS")] were revisable under the Cr.P.C., they had been made appealable before the High Court under the FC Act. However, since some of the States had not adopted the FC Act, this was leading to an anomaly as an order passed under Section 125 Cr.P.C. was appealable under Section 19 in



States where the FC Act had already been adopted but continued to be only revisable in States where the FC Act was yet to be adopted.

13. The learned *Amicus Curiae* finally referred to Section 397 (2) of the Cr.P.C [*pari materia* to Section 438 of the BNSS], which provision, like Section 19 (1) of the FC Act, excludes interlocutory orders from its ambit. By relying on the decisions of the Apex Court in ***Amar Nath and Ors. v. State Of Haryana (1977) 4 SCC 137, Madhu Limaye v. The State of Maharashtra (1977) 4 SCC 551*** and ***VC Shukla v. State through CBI, (1980) SCC (Cri) 695,*** wherein the Apex Court was dealing with the revisional powers exercised by the High Court/Sessions Court under Section 397 Cr.P.C, he has contended that orders which involve valuable rights or liabilities of the parties cannot be considered to be interlocutory in nature. His plea, thus, is that orders which authoritatively determine the rights of the parties cannot be treated as interlocutory orders. He has, therefore urged that the expression 'interlocutory order' as used in Section 19 (1) of the FC Act should, in consonance with the decision of the Apex Court in ***Shah Babulal Khimji (supra),*** be given a restrictive interpretation by excluding only those orders which are procedural in nature.

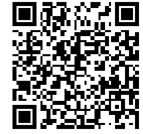
14. Having noted the submissions of the learned *Amicus Curiae* regarding the maintainability of the appeal, which submissions were adopted by the learned counsel for the appellant, we may avert to the stand of the respondent who has contended that the impugned order, being an interlocutory order under the GW Act, an appeal to assail the same is barred under Section 19 (1) of the FC Act. We find that the respondent has, by placing reliance on the provisions of Section 12 of the GW Act, as also the observations of the learned Division Bench in ***Col Ramesh Pal (supra),***



urged that once Section 12 of GW Act specifically provides that orders passed thereunder are to be treated as interlocutory orders, these orders would be automatically excluded from the ambit of Section 19 (1) of the FC Act. Learned counsel for the respondent has further contended that even Section 47 of the GW Act which enumerates the list of orders which are appealable, excludes an interlocutory order passed under Section 12 of the GW Act. He has, therefore, urged that the view expressed by the learned Division Bench in ***Col Ramesh Pal (supra)*** that no appeal would lie against an order passed under Section 12 of the GW Act, is in consonance with the scheme of both, the GW Act as also the FC Act.

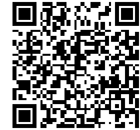
15. From the aforesaid submissions of the parties, we find that to decide the question as to whether an order passed under Section 12 of the GW Act would be appealable under Section 19 of the FC Act, it would be necessary to decide two issues; the first being as to whether the provisions of Section 19 (1) of the FC Act can be read independently of the provisions of the GW Act. Depending upon the answer to this issue, the next issue which is required to be determined would be as to whether, taking into account the nature of the order passed by the learned Family Court under Section 12 of the GW Act, the said order, which is as an interlocutory order under the GW Act, has to be treated as an interlocutory order for the purposes of the FC Act as well, thereby rendering it unappealable.

16. In order to determine the first issue as to whether the appellate provisions of the FC Act are independent of the appellate provisions under the GW Act, it would be relevant to refer to some of the provisions of the FC Act, so as to appreciate the extent of the applicability of this Act. In this regard, we may first note hereinbelow Section 7 of the FC Act, which



provides for exclusive jurisdiction of the Family Courts to try and entertain *inter alia* matters pertaining to validity of marriage, dissolution of marriage, claim for maintenance, as also declaration of legitimacy of any person and those in relation to the guardianship or custody of a minor, thereby ousting the jurisdiction of Civil and Criminal Courts in respect of such matters:

> "***7. Jurisdiction***.*—(1) Subject to the other provisions of this Act, a Family Court shall—*
>
> *(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and*
>
> *(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.*
>
> *Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—*
>
> *(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;*
>
> *(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;*



(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit of proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit of proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

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

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the Jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment."

17. We may now refer to Section 20 of the FC Act, which, in the same vein as Section 7 thereof, indicates the wide reach of the FC Act, by specifically providing that the provisions of the FC Act would have an overriding effect and would be applicable, notwithstanding anything inconsistent therewith contained in any other law or instrument. The same reads as under:

***"20. Act to have overriding effect**. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for*

the time being in force or in any instrument having effect by virtue of any law other than this Act."

18. We may now proceed to note Section 19 of the FC Act, the scope of which provision is the real question which is required to be determined in the present case. This provision, we find, provides for an appeal to the High Court from judgments and all orders passed by the Family Courts, except those orders which are interlocutory in nature. The term 'interlocutory order', it is noteworthy, is used not only in the appellate provision of Section 19 (1) but also in the revisional provision contained in section 19 (4). The same 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 or Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgement 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 [6][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].

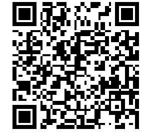
(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgement or order of a Family Court.

[7][(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.]

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

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

19. From a cumulative reading of Sections 7, 19 and 20 of the FC Act, it clearly emerges that the Act provides for a composite jurisdiction by laying down a complete procedural code for filing of appeals in respect of orders passed under various enactments dealing with marriage and family affairs. This includes appeals against orders passed under the GW Act. It, thus, becomes evident that the FC Act bestows the Family Courts with multifarious jurisdictions arising out of marriage and family affairs and matters connected therewith, and was clearly intended to consolidate the jurisdictions which were available with different Courts/Tribunals under the relevant statutes, in one specialised Court, i.e, the Family Court. It is, for this reason, that while introducing one single appellate provision under the FC Act, a non-obstante clause has been used to avoid the confusion which was

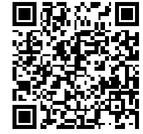


earlier arising from multiple appellate provisions spread over various pre-existing statutes.

20. We may also note that in order to emphasize that the scope of the appellate and revisional provisions under the FC Act was always intended to be very wide, the learned *Amicus Curiae* has painstakingly drawn our attention to the Family Courts (Amendment) Bill, 1991. He has contended that though initially even an interim maintenance order passed under Section 125 Cr.P.C. was appealable under Section 19 of the FC Act, it was only when it was realised that some States had not adopted the FC Act and, therefore, an interim maintenance order was only revisable in those States, that Section 19 was amended to make the said order revisable under the FC Act as well. This amendment, he has urged, clearly shows that the provisions of Section 19 of the FC Act was always meant to be much wider and extensive, vis-à-vis the limited appellate/revisable jurisdictions provided for under other statutes.

21. In order to appreciate this plea of the learned *Amicus Curiae*, even though it is not necessary to refer to the amendment to Section 19 of the FC Act, as introduced in 1991, it would still be useful to refer to the relevant extracts of the opening remarks made by the Hon'ble Minister of Law, Justice and Company Affairs while introducing the Bill for amendment, which throw light on the reasons as to why an order passed under Section 125 Cr.P.C, though initially appealable, was made revisable. We are, therefore, reproducing hereinbelow the relevant extracts of these remarks:

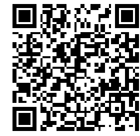
> *"After the enactment of the Family Courts Act, 1984, a proceeding relating to the maintenance of wife, children and parents under Chapter IX (which*



> *includes Section 125) of the Code of Criminal Procedure, 1973 (Cr. P.C.) falls within the jurisdiction of the Family Courts. An anomalous situation has arisen inasmuch as the States where the Family Courts Act has not been extended, there will be no appeal against the maintenance order passed by the Magistrate under Section 125 of the Cr. P.C. and only the general provisions in Cr. P. C. regarding filing of revision petition would apply, while in those States where the Family Courts Act has been extended, an appeal under Section 19 of that Act would lie to a Division Bench of a High Court against the maintenance order passed by the Family Court under Section 125 of Cr. P.C.*"

22. From a bare perusal of the aforesaid, it is evident that when the FC Act was enacted in 1984, the legislature intended to make all those orders passed by the Family Court as appealable as were affecting the vital rights of the parties, including orders pertaining to interim maintenance passed under Section 125 of the Cr.P.C. Even though through a conscious amendment introduced in 1991, the interim/interlocutory maintenance orders passed under Section 125 Cr.P.C. were excluded from the ambit of Section 19 (1), they were simultaneously included under the revisional powers of the High Court by way of Section 19 (4) of the FC Act, clearly indicating that the scope of the appellate/revisional jurisdiction under the FC Act was always envisaged to be very wide.

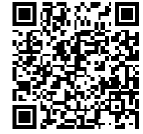
23. What, therefore, emerges is that while enacting the FC Act, the legislature had consciously introduced a provision providing for appeals to the High Court against orders passed under different statutes relating to marriage and family affairs. The purpose of this appellate provision by way of Section 19 (1) of the FC Act was, therefore, meant to provide for an



appeal against all orders passed by the learned Family Court, irrespective of the fact as to whether the said order is appealable or not under the parent statute, the only rider being that the order should not be an interlocutory order. We are, therefore, of the opinion that the ambit and scope of this wide provision under the FC Act which streamlines the appellate provisions pertaining to marital and family matters by providing for an appeal to the High Court, cannot be controlled or curtailed in any manner by the mechanism available under other statutes.

24. In the light of the aforesaid, we are of the considered view that the appellate jurisdiction under the FC Act was always envisaged to be exercised independently of the appellate/revisional powers under specific statutes relating to marriage and family affairs. Once the provisions of the FC Act, especially Sections 7 and 20 clearly indicate that the Act will have an overriding effect on all other statutes relating to marital and family matters, the effect and ambit of the provisions of the FC Act, including that of the appellate provision under Section 19 (1), which conceptualises a common appellate forum, cannot be controlled by the provisions of the parent statute, including the GW Act which was enacted about 94 years before the FC Act. We are, therefore, in agreement with the learned *Amicus Curaie* as also the appellant, that the provisions of the GW Act could not curtail the right of appeal available to the appellant under Section 19 of the FC Act.

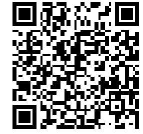
25. Having come to the conclusion that the provisions of the GW Act cannot curtail the ambit and scope of powers exercisable under Section 19 (1) of the FC Act, we may now proceed to consider whether such an order passed under Section 12 of the GW Act would be appealable under Section



19 (1) of the FC Act, as has been urged by the appellant as also the learned *Amicus Curiae***.** For this purpose, it is first necessary to examine the nature of orders that are passed by the Family Court under Section 12 of the GW Act. It would, therefore, be apposite to refer to the said provision which reads 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 authorise(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."*

26. From a perusal of the aforesaid, it is clear that the Family Court while exercising powers under Section 12 of the GW Act, cannot only direct that the minor child be produced before Court but can also direct that the minor



child be produced before any person as the Court deems appropriate; this may include a counsellor or a psychologist. In fact, the Court may also direct that the temporary custody of the minor child be handed over to any party as it deems appropriate. Taking into account the far-reaching effects that directions issued under Section 12 of the GW Act can have, it is evident that the orders passed under Section 12 of the said Act not only impact the rights of the parties, but also have a huge impact on the minor child. Furthermore, these orders can be passed by the Family Court only after examining the merits of the rival submissions of the parties and are, therefore, necessarily adjudicatory in nature.

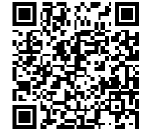
27. However, despite the far-reaching effects which orders passed under Section 12 of the GW Act can have on the parties as also on the minor child, this provision describes such orders as interlocutory orders. Learned counsel for the respondent has, therefore, urged that even if the provisions of the FC Act are treated as being overriding in nature, once an order passed under Section 12 of the GW Act has been described as an interlocutory order under the GW Act, the said order must be treated as an interlocutory order under the FC Act as well. Learned counsel for the appellant has, however, urged that taking into account the impact orders passed under Section 12 of the GW Act can have, they, despite being interim in nature, cannot be treated as mere interlocutory orders from which no appeal would lie.

28. Having given our thoughtful consideration to the rival submissions of the parties as also the erudite submissions made by the learned *Amicus Curiae*, we are unable to agree with the respondent. Once we have come to the conclusion that the provisions of the FC Act cannot be controlled by the provisions of the GW Act, the description of an order as an interlocutory

order under the GW Act, cannot, in our view, be a ground to treat the said order as an interlocutory order for the purposes of the FC Act as well. In our opinion, an order like the order impugned in the present appeal, which undoubtedly impinges on the substantive rights of the parties and can also have an effect on the final determination of their rights as also the welfare of the child, cannot be treated as merely being interlocutory in nature. It is necessarily an order touching upon matters of moment and certainly has the trappings of a final order.

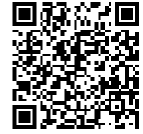
29. In this regard, we may at the outset, refer to the decision in ***Amar Nath (supra)*** relied upon by the learned *Amicus Curiae,* wherein the Apex Court while dealing with the term interlocutory order used in Section 397(2) Cr.P.C. with revision being barred against interlocutory orders, held as under:

> "***6.*** *Let us now proceed to interpret the provisions of Section 397 against the historical background of these facts. Sub-section (2) of Section 397 of the 1973 Code may be extracted thus :*
>
> *"The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding."*
> *The main question which falls for determination in this appeal is as to what is the connotation of the term "interlocutory order" as appearing in sub-section (2) of Section 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious difficulty. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World*



> *Dictionary "interlocutory" has been defined as an order other than final decision. 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 us 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. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, 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 under Section 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."*

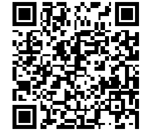
30. In the light of the aforesaid, we are inclined to agree with the appellant that the nomenclature of an order in itself cannot be determinative of the nature of that order. Merely because an order, despite affecting the vital rights of the parties, is labelled as an interlocutory order under a particular statute, cannot imply that the same must always be treated as an interlocutory order. In the present case, the FC Act which provides for this



appellate provision, neither defines the expression 'interlocutory order' nor contains any ouster provision as contained in the Commercial Courts Act, 2015, and therefore, it would be against the very object and spirit of the said Act to exclude orders that pertain to matters of moment from the ambit of the appellate provision under Section 19 (1) of the FC Act. It is only those orders which are merely procedural and do not have trappings of finality which can be treated as interlocutory orders and would, therefore, not be amenable to appeal under the FC Act.

31. In this regard, it may also be pertinent to refer to the celebrated decision of the Apex Court in ***Shah Babulal Khimji (supra),*** wherein the Court while dealing with the question as to whether an order passed by the learned Single Judge refusing to appoint a receiver and grant ad interim injunction was appealable under clause 15 of the Letters Patent of the Bombay High Court which envisaged appeals only against judgments, observed that it is the nature of the order and not its nomenclature that would determine whether the order should be treated as being a judgment appealable under the said clause. The Apex Court held that while the circumstances under which orders could be treated as judgments for the purpose of clause 15 could not be laid down exhaustively, it is only those orders which have trappings of a final order and substantively decide the rights of the parties that could be treated as appealable under clause 15. It would, therefore, be apposite to refer to the following observations of the Apex Court, as contained in paragraph nos. 113 and 120 of its decision:

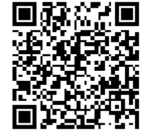
> ***"113.*** *Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a*



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:

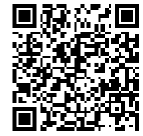
(1) A final judgment.— A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. 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

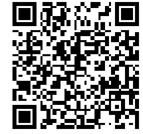


into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause 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"

* * * * * * * *

120. *Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the trial Judge amounts to a judgment within the meaning of the letters patent. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:*

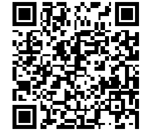
(1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.

(2) An order rejecting the plaint.

(3) An order refusing leave to defend the suit in an action under Order 37, of the Code of Civil Procedure.

(4) An order rescinding leave of the trial Judge granted by him under clause 12 of the letters patent.

(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against competency of the suit against the defendant even though the suit is kept alive.



(6) An order rejecting an application for a judgment on admission under Order 12 Rule 6.

(7) An order refusing to add necessary parties in a suit under Section 92 of the Code of Civil Procedure.

(8) An order varying or amending a decree.

(9) An order refusing leave to sue in forma pauperis.

(10) An order granting review.

(11) An order allowing withdrawal of the suit with liberty to file a fresh one.

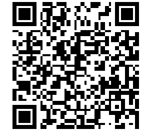
(12) An order holding that the defendants are not agriculturists within the meaning of the special law.

(13) An order staying or refusing to stay a suit under Section 10 of the Code of Civil Procedure.

(14) An order granting or refusing to stay execution of the decree.

(15) An order deciding payment of court fees against the plaintiff."

32. We may note that though this judgment of the Apex Court was rendered 3 years before the FC Act was enacted, the FC Act still does not define as to what would be an interlocutory order. In these circumstances, there is no reason why the provisions of Section 19 of the FC Act must not be purposively interpreted to include within its ambit all those orders which touch upon matters of moment and have trappings of finality. An order under Section 12 of the GW Act which entitles the Court to grant temporary custody of the child to one of the parents would definitely be an order passed after evaluating the respective contentions of the parties and would necessarily affect not only their rights but also those of the minor child. To hold that such an order would not fall within the ambit of Section 19 (1) of the FC Act would not only amount to unduly restricting the scope of this

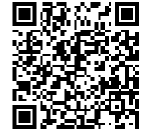


appellate provision but would also curtail the exercise of the *parens patriae* jurisdiction which the Court exercises in the welfare of the minor child.

33. In the light of the aforesaid, we may also note hereinbelow the findings of the learned Division Bench, as contained in paragraph no. 13 of its decision in ***Col Ramesh Pal (supra),*** the correctness of which findings has been doubted under the reference order:

> *"13. Hence, we conclude by saying that the procedural law i.e. The Family Courts Act, 1984 promulgated about three years after the judgement of the Supreme Court in Shah Babulal Khimji (supra), does not give any room for the purpose of appeal from any interlocutory order. Secondly, neither the subjective law i.e. The Guardians and Wards Act, 1890, under which the application was made, provides any scope of appeal from such type of order nor any similar provision under different Act i.e. Section 26 of the Hindu Marriage Act, 1955 provides any scope of appeal from an interim order. Lastly, express intention of the legislature is to be understood from its plain reading at first and in case any vacuum arose, the same is to be understood by the implied intention from such Act as well as parallel Act, if any. In this case neither the express intention nor the implied intention of the legislature speaks that an appeal can be preferred from the order impugned."*

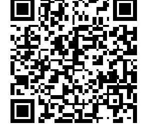
34. As we have already held hereinabove that the powers exercisable under the FC Act, could not be controlled by the provisions of other statutes, we are of the view that the criteria prescribed under the GW Act, could not be applied to test whether an order should be treated as an interlocutory order for the purposes of the FC Act. The mere fact that an order under



Section 12 of the GW Act has been labelled as an interlocutory order under the said Act, cannot, therefore, be a ground to hold the same as an interlocutory order under the FC Act, which Act was enacted 94 years later and was intended to provide a much wider window for appeal. In our view, in every case, when an order passed by the Family Court, is taken in appeal before the High Court, it would be incumbent upon the Court to examine the nature of the impugned order in its entirety to determine whether the same is in the nature of an adjudicatory order which decides valuable rights of the parties. Whenever the Court finds that an order touches upon the vital rights of the parties in contradistinction to an order which is merely a procedural order, an appeal ought to be entertained, irrespective of the fact that the order was passed during the pendency of the proceedings before the learned Family Court.

35. For the aforesaid reasons, we have no hesitation in agreeing with the appellant and the learned *Amicus Curiae* that the decision in ***Col Ramesh Pal (supra),*** wherein it was held that an order passed under Section 12 of the GW Act would not be appealable under Section 19 of the FC Act does not lay down correct law. We, consequently, answer this reference by holding that orders passed under Section 12 of the GW Act would be appealable under Section 19 of the FC Act.

36. Before parting, we must place on record our sincere appreciation for the valuable assistance provided to us by the learned *Amicus Curiae,* Mr.Prosenjeet Banerjee, who had meticulously assisted us in bringing much needed clarity to the question regarding the nature of orders which are appealable under Section 19 of the FC Act.



MAT.APP.(F.C.) 126/2019 & CM APPL. 44796/2024 (directions)

37. List the appeal before the Roster Bench on the date already fixed.

(REKHA PALLI)
JUDGE

(JASMEET SINGH)
JUDGE

(AMIT BANSAL)
JUDGE

OCTOBER 16, 2024
bs/kk