

MANU/BH/0471/2009

Equivalent Citation: AIR2009Pat183, II(2010)DMC264, 2009(3)PLJR990

IN THE HIGH COURT OF PATNA

Decided On: 05.08.2009

Appellants:**Sunita Kumari and Ors.**

Vs.

Respondent:**Prem Kumar**

Hon'ble Judges/Coram:

S.K. Singh , A.C.J., V.N. Sinha and Anjana Prakash , JJ.

JUDGMENT

S.K. Singh, A.C.J.

1. The issue referred to the Full Bench for adjudication at the very initial stage of filing of present appeals is whether these appeals under Section 19 of the Family Courts Act, 1984 (hereinafter referred to as 'the Act'), preferred against the judgment and order of a Family Court should be treated and recorded as First Appeal or as Miscellaneous Appeal. This issue being an issue of law does not require going into the facts of the appeals.

2. However, some facts which may be helpful in deciding the issue in question, relate to Miscellaneous Appeal No. 191 of 2009 and are noticed in brief. This appeal has been filed against an order dated 19-2-2009 passed in Misc. Case No. 11 of 2000 by Principal Judge, Family Court, Muzaffarpur whereby and whereunder the judgment and decree dated 7-10-1966 obtained by the appellant's husband against the private respondent, the wife of the appellant has been set aside on accepting the plea of the respondent wife that the ex parte judgment and decree of divorce had been obtained without notice to her. The result of the order under appeal is to revive the original suit No. 12 of 1964 which has to be decided afresh in accordance with law. This order does not amount to a decree but is appealable under Section 19 of the Act.

3. The reference to the Full Bench has been necessitated on account of two conflicting Division Bench judgments of this Court. In the, case decided earlier, Raj Kumar Saha v. Ritu Kala Saran MANU/BH/0540/2007 : 2008 (2) PLJR 211, Section 19 of the Act providing for appeal from a judgment or order, not being an interlocutory order of a Family Court was quoted and on the basis of an observation-"it further appears that orders passed by Family Court is in the form of a decree," it was concluded that a decree drawn in a suit can be tested by the High Court only in a First Appeal and not in a Miscellaneous appeal. On the basis of this Judgment, appeals preferred under Section 19 of the Act were labelled as First Appeals.

4. Another Division Bench in a later decision in the case of Binod Thakur v. State of Bihar and Anr. MANU/BH/0911/2008 : 2008 (4) PLJR 545 had the occasion to once again consider the same issue on account of defects/objection raised by the Office against not labelling the appeal as First Appeal. In this 'judgment the Division Bench considered Section 19 of the Family Courts Act and pointedly noticed that Section 19 does not provide that a judgment or order of the Family Court is appealable as a decree of the Court made in exercise of the original jurisdiction. The point was

further highlighted by referring to Section 28 of the Hindu Marriage Act 1955 which contains provision for appeals from decrees and orders in any proceeding under that Act with a clear stipulation that all such decree made by the Court in any proceeding under that Act shall be appealable as decrees of the Court made in exercise of its original civil Jurisdiction, subject to exception provided in Sub-section (b) of Section 28 of the Hindu Marriage Act.

5. To similar effect, Section 54 of the Land Acquisition Act, 1894 was also noticed in that judgment to highlight that under the said provision the award passed by the Civil Court in reference is deemed to be a decree and appeal is provided under Section 54 of the Land Acquisition Act as if it has arisen from the, original decree. In contrast, it was noticed that under Section 19 of the Act, neither by any direct provision nor by any legal fiction, the judgment or order of the Family Court is treated as a decree made in exercise of original civil jurisdiction. The office of the Court was therefore directed to treat an appeal under Section 19 of the Act not as First Appeal but as Miscellaneous Appeal.

6. It is interesting to note that in the case of Dr. Vivekanand Sharma v. Smt. Manorma Rai @ Amrita First Appeal No. 104 of 2008 the appeal under Section 19 of the Act before this Court was originally registered as First Appeal. Such labelling was defended by learned Counsel for the appellant of that case on account of judgment of the Division Bench in the case of Raj Kumar Saha (supra). The same Division Bench which had passed the order in the case of Binod Thakur (supra) noticed its own earlier judgment and order in detail and preferred to follow that judgment in spite of its attention being drawn to the earlier Division Bench order. That led to the said appeal being labelled as a Miscellaneous Appeal but when a stay petition came up for orders on 10-2-2009 the counsel for the appellant in that case, attacked the correctness of the views of the Division Bench recorded in the order dated 23rd September, 2008 which was based upon reported judgment in the case of Binod Thakur (supra). The attack was on the, ground that although, the Court noticed the earlier order of the Division Bench in the case of Raj Kumar Saha (supra) but it failed to notice the provisions of Section 18 of the Act because it was not brought to its notice. On that submission alone the Division Bench hearing the matter at a later stage withdrew the order dated 23rd. September, 2008. As a result that appeal was redesignated for the third time, now again as a First Appeal.

7. For deciding the issue already noticed earlier, this Bench has either to follow the views taken earlier by the Division Bench of this Court in the case of Raj Kumar Saha (supra) that appeals under Section 19 of the Act be treated as First Appeals or the later views of another Division Bench of this Court in the case of Binod Thakur (supra) that such appeal be treated as Miscellaneous Appeals.

8. For taking a definite stand in the matter it is deemed necessary to first notice some salient features of the Act including its preamble which mentions that the Act was being enacted by the Parliament to provide for the establishment of Family Courts with a view to promote conciliation in, and secure, speedy settlement of dispute relating to marriage and family affairs and for matters connected therewith. The jurisdiction of the Family Court covers all the jurisdiction exercisable by any District Court or any subordinate Civil Court in respect of suits and proceedings of a nature mentioned in the explanation to Section 7 of the Act. A Family Court for the purpose of exercising such jurisdiction shall be deemed to be a District Court or such subordinate Civil Court for the area covering the Jurisdiction of the Family Court. According to Section 8 of the Act, upon the establishment of a Family Court for any

area, it acquires jurisdiction over suits and proceedings covered under Section 7 of the Act to the exclusion of other district Courts or any subordinate civil Court in the area concerned.

9. The procedure prescribed for the Family Courts contains a mandate that it shall be duty of Family Courts to make efforts for settlement and for the purpose, subject to any rules made by the High Court, it may follow such procedure as it may deem fit. Under Section 10 of the Act, the procedure as per provisions of the Code of Civil Procedure 1908 has been made generally applicable to Family Courts, subject to other provisions of the Act. For that purpose a Family Court is deemed to be a Civil Court having all the powers of such Court. Sub-section (3) of Section 10 of the Act contains a further provision that the general procedure under Sections 10(1) and (2) shall not prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of dispute or proceedings or at the truth of the facts alleged by the one party and denied by the others. According to Section 11 of the proceedings may be held in camera if the Family Court so desires and shall be so held if either party so desires. As per Section 13 of the Act no party before a Family Court is entitled, as of right, to be represented by a legal practitioner. In appropriate circumstances, in the interest of justice a legal expert may be requested to assist the Family Court as amicus curiae. Section 14 permits a Family Court to receive in evidence any report, statement etc. regardless of whether the same would be relevant or admissible under the Indian Evidence Act, 1872 or not. Section 15 provides that for a Family Court it shall not be necessary to record the evidence of witnesses at length, but the Judge shall record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record. Section 16 permits giving of evidence of a formal character by affidavit but the person giving such evidence, on the application of any of the parties shall be summoned and examined in respect of facts contained in his affidavit.

10. Section 18 of the Act bears the heading- "Execution of decrees and orders". It was on account of provisions of this Section that in the case of Dr. Viveka Nand Sharma v. Smt. Manorama Rai @ Amrita a later Division Bench by order dated 10-2-2009 recalled the earlier order of another Division Bench, dated 23rd September, 2008. thus preferring the views of the Division Bench in the case of Raj Kumar Saha (supra) over the views of another Division Bench in the later judgment in the case of Binod Thakur (supra). Hence, Section 18 as well as Section 19 need to be quoted and kept in mind for coming to a proper decision.

Section 18. Execution of decrees and orders (1) a decree or an order other than an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), passed by a Family Court shall have the same force and effect as a decree or order of a civil Court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the execution of decrees and orders.

(2) An order passed by a Family Court under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) shall be executed in the manner prescribed for the execution of such order by that Code.

(3) A decree or order may be executed either by the Family Court which passed it or by the other Family Court or ordinary Civil Court to which it is sent for execution.

Section 19. Appeal.- (1) Save as provided in Sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties (or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991).

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

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.)

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

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

11. After hearing the parties and considering the various judgments noticed earlier as well as the two orders passed in the case of Dr. Vivekanand (supra) I am of the considered view that the judgment and order of the Division Bench in the case of Binod Thakur v. State of Bihar and Anr. (supra) lays down the law correctly that Appeals under Section 19 of the Act cannot be treated as appeals against a decree having been made in exercise of original civil jurisdiction and therefore such appeals under Section 19 lie before this Court as Misc. Appeals and not First Appeals. Besides adopting the views expressed in that judgment after conjoint reading of relevant provisions of the Act with the relevant provisions of Hindu Marriage Act, 1955 and Land Acquisition Act, 1894 I come to the same conclusion even after considering Section 18 of the Act. Under this Section the manner and machinery for execution of decrees and orders of the Family Court have been provided and for that limited purpose a fiction has been created that a decree or order other than an Order of maintenance under the Code of Criminal Procedure!, passed by a Family Court shall have the same force and effect as a decree or order of a Civil Court. However, this fiction is not created for the purpose of the whole Act as would be clear on a careful reading of the very next Section i.e. Section 19 providing for appeals. Sub-section (2) of Section 19 provides that no appeal shall lie from a decree or order passed by a Civil Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure 1973. While noticing the provisions of Section, 19(2) as an exception, Section 19(1) begins with a non obstante clause that notwithstanding anything contained in the Code of Civil Procedure 1908 or in the

Code of Criminal Procedure, 1973 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.

12. The word decree is conspicuous by its absence in Section 19(1) of the Act and the non obstante clause noticed above clearly means that the distinction made in the Code of Civil Procedure between appeals from original decrees and those from Orders have been done away with. As a result, the provision for appeal under Section 19 of the Act is meant to take care of all kinds of judgments and orders of the Family Courts, not being interlocutory in nature, regardless of the fact whether such judgments and orders amount to a decree as defined under the Code of Civil Procedure or not. The instances of various kinds of orders from which appeals lie under Section 104 of the Code of Civil Procedure indicate that many of such orders though made appealable, do not amount to a decree as defined under Section 2(2) of the Code of Civil Procedure. Decree is a formal expression of only that adjudication which for the Court concerned, conclusively determines the right of the parties with regard to all or any of the matter in controversy in the suit. It may be, either preliminary or final. The definition of decree further provides that it shall not include (a) any adjudication from which an appeal lies as an appeal from an order (enumerated in Section 104 of the Code of Civil Procedure) or (b) any order of dismissal for default. But even such orders are covered by the provision for appeal under Section 19 of the Act and hence the Legislature clearly intended to cover all kinds of judgments and orders whether amounting to decree or not under the expression "every judgment or order" occurring in Section 19 of the Act.

13. If it is held that appeals under Section 19 have to be treated as First Appeal then it would follow that provision for appeal under Section 19 is not available in respect of orders which do not amount to a decree although they may not be interlocutory orders as is the nature of impugned order in M. A. No. 191 of 2009. Such interpretation would be against the intention of the Legislature which is evident from plain meaning of expressions used in Section 19 of the Act. The omission of the word decree "from Section 19(1) is clearly intentional and deliberate and there is no need to incorporate the word "decree" into that Section of the Act by way of interpretation. Section 19 of the Act requires no interpretation because it neither suffers from any vagueness nor creates a situation of unwarranted Hardship or injustice. To the contrary labelling the appeals under Section 19 of the Act as Miscellaneous Appeals would serve one of the purposes of the Act which is to secure speedy settlement of dispute relating to marriages and family affairs. The provisions in the Patna High Court Rules governing First Appeals are much more detailed and formal than those governing Miscellaneous Appeals. The cause of justice as per requirement of the Act is also best subserved by the view expressed above.

14. A contrary view is sure to make the process of hearing the appeal more lengthy and time, consuming. A judgment of this Court in the case of Usha Kumari v. Principal Judge, Family Court MANU/BH/0011/1998 : AIR 1998 Pat 50 has clearly enunciated that the avowed object of the Act is speedy disposal of disputes covered by the Act.

15. In view of aforesaid discussions and findings, I hold that appeals under Section 19 of the Family Courts Act 1984 cannot be treated as appeals against a decree having been made in exercise of original civil jurisdiction. The provisions under Section 19 of the Act have a wider ambit so as to cover all kinds of judgments and orders made appealable by the express provisions of that section and not only

decrees as defined under Code of Civil Procedure. These appeals and similar other pending appeals, therefore, have to be treated as Miscellaneous Appeals and not First Appeals.

16. The issue determined above does not relate to merits of the matter Under appeal hence the office is directed to give an opportunity to the parties in pending appeals under Section 19 of the Act which are still labelled as First Appeal to convert them as Miscellaneous Appeal. This disposes of the issue under reference. Since these appeals are correctly labelled, they shall proceed in accordance with law.

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