

Before Ajay Kumar Mittal & Jaspal Singh, JJ.

SUMESH KUMAR GUPTA—Appellant

versus

SAPNA GUPTA—Respondent

FAO No. 980 of 2013

July 10, 2013

Family Courts Act, 1984 - S. 19 - Hindu Marriage Act, 1955 - Ss. 13 B, 28 (as amended in 1976) - Appeal - Maintainable only in two cases - Maintainable against a judgment - Also against an order, if that order is not an interlocutory order - Petition under section 13-B dismissed, as respondent-wife did not agree for dissolution of marriage by mutual consent at the stage of second motion - Against an order passed by the Family Court finally deciding the petition and declining to grant divorce under section 13 B of the HMA Act - An appeal under section 19 of the Family Courts Act would be maintainable.

Held, that Chapter V of the 1984 Act deals with Appeals and Revisions. This Chapter contains only one section i.e. Section 19. Sub-sections (1), (2), (3) and (6) of Section 19 deal with appeals. Sub-section (4) of Section 19 provides for revisions. Sub-section (5) of Section 19 relates to both appeals and revisions. A reading of Section 19 of the 1984 Act shows that under sub-section (1), save as provided in sub-section (2), an appeal lies from every judgment or order of the Family Court to the High Court, both on facts and on law. This is irrespective of anything contained in the Code of Civil Procedure, 1908, Code of Criminal Procedure (in short, "Cr.PC") or any other law. However, no appeal lies against an interlocutory order. Sub-section (2) of Section 19 specifically prohibits any appeal from a decree or order passed by the Family Court with the consent of the parties or an order passed under Chapter IX of the Cr.P.C. The limitation for filing an appeal against every judgment or order of the Family court is thirty days from the date of the judgment or order as provided under sub-section (3) thereof. Sub-section (4) of Section 19 provides for the revisionary power in respect of an order passed under Chapter IX of the Cr.P.C., which is

not an interlocutory order in nature. Sub-section (5) of Section 19 clearly prohibits any appeal or revision from any judgment, order or decree of the Family Court except as provided under sub-sections (1) to (4) of Section 19 of the said Act. Sub-section (6) of Section 19 lays down that the appeal before the High Court is to be heard by a Bench of two or more Judges from every judgment mentioned in sub-section (1) of Section 19 of the said Act.

(Para 10)

Further held, that Section 19(1) also has a non-obstante clause, which states "... notwithstanding anything contained in the Civil Procedure Code, 1908 (5 of 1908) or in the Criminal Procedure Code, 1973 (2 of 1974), or in any other law...." The non-obstante clause also clarifies that the provision contained in Section 28 of the Act will not be relevant for the present purposes. A bare perusal of Section 19(1) of 1984 Act shows that an appeal is only maintainable in two cases. Firstly, it is maintainable against a judgment. Secondly, it is also maintainable against an order, if that order is not an interlocutory order.

(Para 11)

Further held, that from the above, it would emerge that against an order passed by the Family Court finally deciding the petition and declining to grant divorce under Section 13B of the Act, an appeal under Section 19 of the 1984 Act would be maintainable as the order falls under the provisions of Section 19 of the said Act.

(Para 12)

Vinod S. Bhardwaj, Advocate, *for the appellant.*

AJAY KUMAR MITTAL, J.

(1) This appeal by the husband challenges an order dated 24.7.2012 passed under section 13B of the Hindu Marriage Act, 1955 (in short "the Act") whereby the petition for dissolution of marriage by a decree of divorce by mutual consent, was dismissed.

(2) The case of the appellant-husband as put forth in the instant appeal is that the marriage between the parties was solemnized on 11.6.1989 according to Hindu rites and rituals at Jabalpur (Madhya Pradesh). Out of

the said wedlock, two children, namely, Shruti Gupta aged about 21 years and Samarth Gupta, aged about 15 years were born. Due to their temperamental differences, the parties decided to dissolve the marriage by mutual consent. They entered into a compromise and as per the compromise, the appellant-husband had to pay a sum of Rs. 1.80 crores as full and final settlement towards alimony to the respondent-wife for all her past, present and future maintenance. In view of the compromise arrived at between the parties, a joint petition under Section 13B of the Act was filed for dissolution of the marriage between the parties by mutual consent. Further, the first motion statement of the respondent-wife as required under Section 13B of the Act was recorded. On 16.4.2012, the respondent-wife did not agree for dissolution of marriage by mutual consent and prayed for time to get recorded the second motion statement and the case was adjourned from time to time. Accordingly, the respondent-wife made a statement to the effect that she did not want her marriage with the petitioner to be dissolved by decree of divorce by mutual consent, the petition under Section 13B of the Act filed by the husband was dismissed by the Family Court, Gurgaon vide order dated 24.7.2012. Hence, the present appeal.

(3) A perusal of order dated 12.3.2013 passed by this Court shows that learned counsel for the appellant had taken time to establish that the present appeal was maintainable under the Act.

(4) Learned counsel for the appellant submitted that the parties have compromised the matrimonial dispute and in terms thereof, a sum of Rs. 1.80 crores had been paid to the respondent-wife. It was on that basis that the respondent-wife had made a statement at the first motion under Section 13B of the Act. However, after having received the aforesaid amount, she resiled from her earlier consent and did not agree for divorce by mutual consent under Section 13B of the Act. It was on this premise that the petition was dismissed. Support was gathered from the judgment of the Hon'ble Apex Court in *Anil Kumar Jain* versus *Maya Jain (1)* and the judgment of Rajasthan High Court in *Anil Khatwani* versus *Nistha Khatwani (2)*. Further, learned counsel submitted that the petition was filed before the Family Court and an appeal was maintainable under Section 19 of the Family Court Act, 1984 (for brevity, "1984 Act").

(1) AIR 2010 SC 229

(2) AIR 2012 CC 2125

(5) After hearing the learned counsel for the appellant, we do not find any merit in the appeal. The issue that arises for consideration in this appeal may be bifurcated as under:-

(a) the scope of appeal under Section 28 of the Act;

(b) whether an appeal would be maintainable under Section 19 of the 1984 Act against the judgment or order of the Family Court in respect of dismissal of petition filed under Section 13B of the Act;

(c) whether in the facts and circumstances of the case, the Family Court was in error in rejecting the petition filed by the appellant under Section 13B of the Act.

(6) Taking up first issue, Section 28 of the Act may be scanned. The original unamended Section 28 provided for an appeal against all decrees as well as against orders specifically mentioned in the Act except on the subject of costs only. The unamended Section 28 reads as follows:-

“28. Enforcement of, and appeal from, decrees and orders, -
All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force: Provided that there shall be no appeal on the subject of costs only.”

(7) Section 28 of the Act underwent an amendment by Act 68 of 1976 which was made effective from 27.5.1976. Section 28 of the Act after amendment in 1976 reads thus:-

“28. Appeals from decrees and orders.-(1) 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.

(2) Orders made by the court in any proceeding under this Act under section 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.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of ninety days from the date of the decree or order."

(8) Under sub-section (1) of Section 28 of the Act, an appeal lies from all decrees. Under sub-section (2) of Section 28, an appeal is maintainable against orders passed under Sections 25 and 26 of the Act. However, no appeal on the subject of costs only in view of sub section (3) is competent. Sub section (4) prescribes limitation of ninety days from the date of decree or order for filing an appeal. A fundamental difference brought about by the amendment is that while earlier Section 28 of the Act provided for appeals from decrees and orders, whereas post amendment appeals are provided only from decrees.

(9) Adverting to second point, it would be apposite to reproduce Section 19 of the 1984 Act which reads thus:-

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

(10) Chapter V of the 1984 Act deals with Appeals and Revisions. This Chapter contains only one section i.e. Section 19. Subsections (1), (2), (3) and (6) of Section 19 deal with appeals. Subsection (4) of Section 19 provides for revisions. Sub-section (5) of Section 19 relates to both appeals and revisions. A reading of Section 19 of the 1984 Act shows that under sub-section (1), save as provided in sub-section (2), an appeal lies from every judgment or order of the Family Court to the High Court, both on facts and on law. This is irrespective of anything contained in the Code of Civil Procedure, 1908, Code of Criminal Procedure (in short, "Cr.PC") or any other law. However, no appeal lies against an interlocutory order. Sub-section (2) of Section 19 specifically prohibits any appeal from a decree or order passed by the Family Court with the consent of the parties or an order passed under Chapter IX of the Cr.P.C. The limitation for filing an appeal against every judgment or order of the Family court is thirty days from the date of the judgment or order as provided under sub-section (3) thereof. Sub-section (4) of Section 19 provides for the revisionary power in respect of an order passed under Chapter IX of the Cr.P.C., which is not an interlocutory order in nature. Sub-section (5) of Section 19 clearly prohibits any appeal or revision from any judgment, order or decree of the Family Court except as provided under sub-sections (1) to (4) of Section 19 of the said Act. Sub-section (6) of Section 19 lays down that the appeal before the High Court is to be heard by a Bench of two or more Judges from every judgment mentioned in sub-section (1) of Section 19 of the said Act.

(11) Section 19(1) also has a non-obstante clause, which states “... notwithstanding anything contained in the Civil Procedure Code, 1908 (5 of 1908) or in the Criminal Procedure Code, 1973 (2 of 1974), or in any other law...” The non-obstante clause also clarifies that the provision contained in Section 28 of the Act will not be relevant for the present purposes. A bare perusal of Section 19(1) of 1984 Act shows that an appeal is only maintainable in two cases. Firstly, it is maintainable against a judgment. Secondly, it is also maintainable against an order, if that order is not an interlocutory order.

(12) From the above, it would emerge that against an order passed by the Family Court finally deciding the petition and declining to grant divorce under Section 13B of the Act, an appeal under Section 19 of the 1984 Act would be maintainable as the order falls under the provisions of Section 19 of the said Act.

(13) Examining the last limb of the appeal relating to merits of the controversy, inevitably reference has to be made to Section 13B of the Act. It reads thus:-

“13B. Divorce by mutual consent.-(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, (68 of 1976) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.”

(14) A plain reading of sub-section (1) shows that the parties to the marriage wherever agree by mutual consent that the marriage should be dissolved by a decree of divorce on the ground that they have been living

separately for a period of one year or more, both the parties may present a petition for divorce to the District Court. On presentation of such petition, statement by way of first motion would be recorded. Under sub-section (2), second motion would be required to be made which should be after six months from the date of presentation of the petition referred in sub-section (1) and not later than eighteen months from the date of first motion where the petition has not been withdrawn. The Court, on being satisfied after hearing the parties pass a decree of divorce to be effective from the date of the decree.

(15) In the present case, the wife at the second instance made the following statement:-

“I do not want divorce by way of mutual consent under Section 13B of HMA. The present petition may be dismissed.”

(16) Thus, the second statement is not in consonance and conformity with the requirement of Section 13B of the Act and, therefore, no decree for divorce by mutual consent can be passed. In the absence of the fulfilment of requirement of statement at the second motion of the wife, the Court below was justified in dismissing the petition under section 13B of the Act.

(17) Suffice to notice that the judgment relied upon by the learned counsel for the appellant in **Anil Kumar Jain's case (supra)** was where the Hon'ble Apex Court in exercise of its powers under Article 142 of the Constitution of India had granted the divorce in order to do complete justice between the parties. The judgment of the Rajasthan High Court in **Anil Khatwani's case (supra)** was also based on individual fact situation involved therein. Therefore, these judgments do not help or advance the case of the appellant.

(18) In view of the above, there is not merit in this appeal and the same is hereby dismissed.

(19) The appeal is barred by limitation and an application has been moved for condonation of 187 days' delay in filing the appeal. Since, the appeal has been dismissed on merits, no further orders are required to be passed in the application for condonation of delay and the same is also disposed of as such.