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

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

DR GEETANJALI AGGARWAL ..... Appellant
Through: Ms. Anu Narula, Advocate.

versus

DR MANOJ AGGARWAL ..... Respondent
Through: Mr. Prabhjit Jauhar, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

O R D E R

% 22.10.2021

C.M. No. 7672/2021 and CM No. 34542/2021

1. This application has been filed by the respondent husband seeking dismissal of the present appeal as not maintainable.

2. The present appeal is directed against the order dated 09.04.2019 passed by the Family Court in G. S. No. 5 of 2018 preferred by the respondent father under The Guardians and Wards Act, 1890. The impugned order has been passed on an application moved by him for seeking permission to admit the minor girl child of the parties in a reputed school and for temporary custody of the child after school hours till evening. The Family Court disposed of the application permitting the child being admitted to Vivekanand School. It was directed that the child be sent on all school days by the respondent mother to the Vivekanand Public School situated in F-Block, Preet Vihar, which was near to her residence. The respondent father was permitted to pick up the child from the house of the

mother half an hour before commencement of the school timings so that the child is taken to school daily by him, and he was also obliged to pick up the child after school hours to bring her back to his home. The father was directed to drop the child to the mother's home by 6 PM every day. All educational expenses were also to be borne by the father, which would be adjusted/ deducted from the maintenance amount of Rs. 25,000/- per month already being paid by him. In case the educational expenses exceeded Rs. 25,000/- per month, the father was obliged to pay the same. The effect of the said order was that the respondent father had daily access to the child, and could interact with the child on daily basis every morning while dropping the child to the school, and thereafter, while picking her up, and till 6 PM. A perusal of the impugned order, in fact, shows that the same is, more or less, in the nature of co-parenting order.

3. The submission of Mr. Jauhar, learned counsel for the respondent father, is that the present appeal is not maintainable under Section 19 of the Family Courts Act. In this regard, he places reliance on the decision of a co-ordinate Bench of this Court in ***Colonel Ramesh Pal Singh vs. Sugandhi Aggarwal***, MAT.APP.(F.C.) 211/2019 decided on 01.10.2019. The Division Bench was dealing with an appeal arising from an order passed by the Family Court on an application under Section 12 of the Guardians and Wards Act, 1890.

4. The Family Court, by the order impugned in that case, granted the custody of the two children to the respondent father after the completion of the school session for the year 2017-18, and it also drew out a vacation arrangement for summer, winter and other holidays i.e. Deepawali and Holi. The Division Bench, after noticing the decision of a Division Bench of this

Court in ***Manish Aggarwal v. Seema Aggarwal***, (2012) 192 DLT 714 (DB) concluded in paragraph 26 that an appeal under Section 19 of the Family Courts Act would not lie against an order passed under Section 12 of the Guardians and Wards Act, on the premise that the same is an interlocutory order.

5. We have heard the submissions of learned counsels on this application.

6. Mr. Jauhar submits that though the impugned order does not specifically refer to any provision of the Guardian and Wards Act, the order has been passed in proceedings launched by the respondent under the said Act. He, therefore, submits that the present appeal is squarely barred in the light of the aforesaid decision in ***Ramesh Pal Singh*** (supra).

7. Mr. Jauhar submits that the impugned order is in the nature of an "interlocutory order", since it is not final. He submits that no order passed by the Family Court on aspects such as maintenance, or guardianship, or visitation in respect of minor child/ children can be considered as final as they are always open to challenge/ modification/ variation. He submits that Section 12 of the Guardians and Wards Act itself uses the expression "*Power to make **interlocutory order** for production of minor and interim protection of person and property*" (emphasis supplied). He further submits that in ***Dhanwanti Joshi Vs. Madhav Unde*** (1998) 1 SCC 112, the Supreme Court had observed that "*order relating to custody of children are by their very nature not final **but are interlocutory in nature** and subject to modification at any future time upon proof of change of circumstances requiring change of custody……"* (emphasis supplied). Similarly, in ***Rosy Jacob Vs. Jacob A. Chakramakkal***, (1973) 1 SCC 840, it was observed that

"*All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. …….*". Again in ***Vikram Vir Vohra Vs. Shalini Bhalla*** (2010) 4 SCC 409, the Supreme Court observed "***that custody orders are always considered interlocutory orders*** *and by the nature of such proceedings custody orders cannot be rigid and final*". (emphasis supplied)

8. Thus, Mr. Jauhar submits that the impugned order is also an "interlocutory order", which is not appealable under Section 19 of the Family Courts Act.

9. On the other hand, the submission of Ms. Narula is that the nomenclature of an order as "*interlocutory order*" is not what matters. It is the nature of the order which has to be seen. The impugned order is in the nature of a final order inasmuch, as, it shall continue to remain in operation till varied. It is an order which is in the nature of a final judgment – having trappings of finality in that, such an order may adversely affect a valuable right of the party. The effect of an order granting/ refusing visitation/ interim custody may have direct and immediate adverse effect on the party against whom it is made, and may have severe, irretrievable, and permanent adverse impact on the minor child – to whom it relates. She further submits that the Division Bench while deciding ***Ramesh Pal Singh*** (supra), in fact, has not correctly appreciated the earlier decision of this Court in ***Manish Aggarwal*** (supra).

10. In this regard, she has specifically drawn our attention to the observations made in paragraph 16 of the decision in ***Ramesh Pal Singh*** (supra) where the Division Bench observed:

"16. We tend to rely on the decision rendered by the Division

bench of this Court in Manish Aggarwal (Supra) case as far as non-applicability of Shah Babulal Khimji (Supra) case is concerned wherein the expression 'judgment' was assigned a wider meaning and has extended the scope of right to appeal where the characteristics and trappings of the finality of the issue is available"

11. She submits that a plain reading of the decision in ***Manish Aggarwal*** (supra) shows that the Division Bench did not, in any way, deviate from the Supreme Court judgment in ***Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.***, AIR 1981 SC 1786.

12. We have heard learned counsels and perused the judgment of the co-ordinate 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 co-coordinate 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.

15. The application stands disposed of.

16. We have heard learned counsels at some length on the aspect of variation of the interim visitation rights presently granted to the respondent. Both the parties are also present during the virtual hearing. Ms. Narula has submitted that the Court may personally interact with both the parties on the day when the Court is sitting physically. We accede to this request of Ms. Narula. Accordingly, let the parties appear before the Court on 25.10.2021 at 03:30 P.M.

VIPIN SANGHI, J

JASMEET SINGH, J

OCTOBER 22, 2021
N.Khanna