

Dr. Sumit Vs. Shradha

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Court : Mumbai Nagpur

Decided On : Jul-15-2015

Judge : Z.A. HAQ

Appeal No. : Writ Petition No. 3223 of 2015

Appellant : Dr. Sumit

Respondent : Shradha

Judgement :

1. Heard Shri Soumitra Paliwal, Advocate for the petitioner and Shri J.B. Gandhi, Advocate for the respondent.

2. Rule.

Considering the nature of controversy, the learned Advocates for the respective parties are heard for final hearing. Rule is made returnable forthwith.

3. The petitioner and the respondent got married in 2005 in India. At that time, the petitioner-husband was studying Medicine at Michigan, U.S.A. After marriage, the respondent-wife joined the company of the petitioner-husband at Michigan, U.S.A. On 01-09-2006 the couple got a baby girl Shreeya.

In May 2014, the respondent came to India to attend the marriage of her brother. The petitioner also attended the marriage and left for U.S.A. on 02-06-2014, and

as per the plan, the respondent and minor daughter Shreeya were to leave India on 24-06-2014 for which date the tickets were already booked. However, the respondent did not go to Michigan, U.S.A. According to the petitioner, the respondent and her family members gave false excuses for continuing her stay in India. According to the petitioner, considering the conduct of the respondent, he decided to take up legal proceedings at Michigan, U.S.A. and as per the laws there, the proceedings for custody of minor child are required to be taken within six months and therefore, he filed a petition before the Circuit Court for the County of Wayne, Family Division, State of Michigan, U.S.A. on 29-10-2014 praying for the following reliefs :

- (i) for grant of divorce.
- (ii) for legal and physical custody of minor child Shreeya.
- (iii) for order of child support as per the Michigan Child Support Guidelines.
- (iv) for equitable division of the property.
- (v) for equitable division of the debts and
- (vi) for any equitable relief.

The petitioner also sought interim orders and ex parte order for immediate return of minor child Shreeya to Michigan, U.S.A.

The Court at Michigan, U.S.A. passed order on 30-10-2014 directing issuance of notice to the respondent and by an ex-parte order directed return of minor child Shreeya to the jurisdiction of the Court at Wayne, State of Michigan, U.S.A., within seven days of the service of order. The copies of the petition filed by the petitioner before the Court at Wayne and the ex-parte order were served on the respondent on 20-11-2014 and the respondent filed an objection before the Court at Wayne on 30-11-2014 through her counsel. The objection was notarized at Akola on 28-11-2014. On 28-11-2014, the respondent filed Divorce Petition No.10/2014 before the Family Court, Akola praying for the following reliefs :

(i) for appointing the respondent-wife as guardian for having sole custody of minor child Shreeya.

(ii) for declaration that the petitioner-husband is not entitled to claim custody of the minor child Shreeya by approaching any Court in the State of Michigan or any other Court in India.

(iii) for declaration that the proceedings and order passed in Case No.14-11233-DC pending before the 3rd Circuit Court for County of Wayne, Family Division in the State of Michigan is without jurisdiction, null, void and contrary to the welfare of minor child Shreeya.

(iv) for any other suitable orders and for costs of the petition.

On 03-12-2014, the respondent submitted her answer to the complaint before the Court at Wayne through her counsel. The relevant portion of the answer submitted by the respondent-wife before the Court at Wayne is as follows :

(i) That, the Hon'ble Court allow the marriage between the parties be dissolved and a Divorce from the bonds of matrimony be decreed to the Defendant according to the statutes and laws of India in the matter that is pending.

(ii) Award temporary physical and legal custody to Defendant mother SHRADHA FOGLA.

(iii) Award temporary and permanent spousal support to Defendant SHRADHA FOGLA.

(iv) Award temporary child support to Defendant SHRADHA FOGLA pursuant to the Michigan Child Support Guidelines.

(v) Award Defendant SHRADHA FOGLA an interim payment of attorney fees to permit her to bear the cost of representation in this matter.

(vi) Divide the parties marital property in an equitable manner.

(vii) That the Defendant SHRADHA FOGLA may have such other and further relief in the premises as may be agreeable to equity and good conscience.

On 03-12-2014, the respondent submitted answer to the application filed by the petitioner before the Court at Wayne for ex-parte order for immediate return of minor child Shreeya to the State of Michigan and for sole legal and physical custody. In this answer, the respondent prayed that the ex-parte order passed by the Court at Wayne be set aside and submitted that the respondent and the minor child Shreeya were entitled to remain in India and that the Court in India will resolve the pending divorce and custody matter. The respondent filed an application before the Court at Wayne praying for an ex-parte order to seal the safety deposit box. The Court at Wayne passed an order on 13-12-2014 on the application directing that the safety deposit box possessed by the petitioner and the respondent be sealed.

On 04-01-2015 the Court at Wayne issued show cause notice to the respondent, asking her explanation as to why the order passed on 30-10-2014 was not complied with. On 13-01-2015 the Court at Wayne passed an order directing that the minor child Shreeya should be returned to Michigan within 28 days i.e. till 10-02-2015. The petitioner had moved the Court at Wayne for orders pointing out that the respondent had violated the ex-parte order passed by the Court at Wayne on 30-10-2014. The Court at Wayne had issued show cause notice to the respondent and then hearing was taken on 17-01-2015. At the time of hearing, the petitioner was represented by his counsel and the respondent participated in the hearing through telephone. After hearing, the Court at Wayne passed an order on 17-02-2015 concluding that the respondent had violated the ex-parte order passed on 30-10-2014 and was liable for an action for contempt of Court for the violation of the Court™s order dated 13-01-2015. The Court directed the respondent to travel to United States embassy in Mumbai, India, with the minor child Shreeya till 23-02-2015, apply for and obtain new passport for minor child Shreeya and ensure that Shreeya is returned to State of Michigan till 25-2-2015. The directions to obtain new passport for minor child Shreeya, perhaps were given by the Court at Wayne in view of the stand taken by the respondent that the passport of minor child Shreeya was kept by the parents of the petitioner. The Court recorded that if the

respondent was unable to travel with Shreeya till 25-02-2015, Shreeya should travel from Mumbai to Detroit, Michigan via an accompanied minor airline travel program till 25-02-2015. The Court passed consequential orders.

The Court at Wayne passed an order on 29-03-2015 recording that the respondent had committed a default by disobeying the orders of the Court and refusing to participate in the hearing on 04-03-2015. The Court reiterated its directions that the respondent should immediately obtain U.S. passport for Shreeya and make arrangements to return Shreeya to Michigan at the petitioner™s costs. The Court requested the learned Judge of Family Court, at Akola to adjourn the hearing of the case without altering the status quo and to allow the Court communication between the learned Judge, Presiding the Court at Wayne and the learned Judge of Family Court, at Akola. It was further requested that the Family Court at Akola should decline to accept the jurisdiction in respect of the Indian Guardianship Case and, instead, that the Family Court should assist in the return of Shreeya to Michigan.

The learned Judge of Court at Wayne had sent an e-mail to the Family Court at Akola, calling upon the Family Court, at Akola to satisfy itself as to whether the Family Court, at Akola has jurisdiction to proceed with the case. On receiving this request, the learned Judge of Family Court, at Akola called upon the parties to make their submissions and has passed the impugned order concluding that he has jurisdiction to entertain the petition. This order is challenged by the petitioner before this Court.

4. The learned Advocates for the respective parties have made exhaustive submissions. The following points arise for consideration:

(i) Whether this petition is maintainable or the petitioner is required to challenge the impugned order under Section 19 of the Family Courts Act, 1984?

(ii) Whether the Family Court at Akola is right in entertaining the petition filed by the respondent?

5. Shri J.B. Gandhi, the learned Advocate for the respondent has taken objection to the maintainability of this petition on the ground that the petitioner has efficacious statutory remedy available under Section 19 of the Family Courts Act, 1984. In support of the submission, the learned Advocate has relied on the following judgments:

(i) Judgment given by the Division Bench of this Court in the case of **Ravindra Harshad Parmar .vs. Dimple Ravindra Parmar** reported in **2015(2) Bom. C.R. 312**.

(ii) Judgment given by the Division Bench of this Court in the case of **Amishi Milan Honawar .vs. Milan Bhavanishankar Honawar** reported in **2005(4) Mh.L.J. 984**.

(iii) Judgment given by this Court at Principal Seat in the case of **Ravindra Harshad Parmar .vs. Dimple Ravindra Parmar** in Civil Writ Petition **No.8317/2013** on **20-12-2013**.

(iv) Judgment given in the case of **V. Ravi Chandran (Dr.) (2) .vs. Union of India and others** reported in **2010(1) SCC 174**.

The learned Advocate for the respondent has submitted that if it is held that the appeal under Section 19 of the Family Courts Act, 1984 would not lie against the impugned order, then the petitioner has the alternate remedy of revision under Section 115 of the Code of Civil Procedure as the Family Court is a civil Court and its order can be challenged under Section 115 of the Code of Civil Procedure.

6. Shri Soumitra Paliwal, the learned Advocate for the petitioner has submitted that the impugned order is an interlocutory order and therefore, appeal under Section 19 of the Family Courts Act, 1984 would not be available to challenge the impugned order. It is submitted that revision under Section 115 of the Code of Civil Procedure would also not be available in view of the proviso below Section 115 of the Code of Civil Procedure, which lays down that the High Court shall not vary or reverse any order while exercising jurisdiction under Section 115 of the Code of Civil Procedure unless the order, if it had been made in favour of the party

applying for revision, would have finally disposed of the suit or other proceedings. It is submitted that the impugned order has not been passed on the application of any of the parties, specifically on behalf of the petitioner and the impugned order is passed by the Family Court by adverting to the issue of jurisdiction suo motu on the request of the learned Judge of the Court at Wayne, USA.

7. In my view, the petitioner should not be non-suited on the ground of availability of remedy under Section 115 of the Code of Civil Procedure, considering the facts of the case. In the present case, looking to the nature of controversy and the fact that the proceedings are going on before the different Courts at two different places simultaneously, I am not inclined to accept the submission made on behalf of the respondent that the petition should not be entertained and the petitioner be relegated under Section 115 of the Code of Civil Procedure.

In the case of **Ruchi Majoo .vs. Sanjeev Majoo** reported in **(2011) 6 SCC 479**, petition under Article 227 of the Constitution of India was filed by father at the High Court of Delhi challenging the order passed by the Additional District Court, at Delhi in a petition filed under Sections 7, 8, 10 and 11 of the Guardians and Wards Act, 1890, granting interim custody of the minor child to the mother. The High Court of Delhi allowed the petition filed by father, set aside the order passed by the District Court and dismissed the custody case filed by the mother. The Hon'ble Supreme Court considered the legality of the judgment passed by the High Court of Delhi on merits. The question about the maintainability of the petition under Article 227 of the Constitution of India was not raised in that matter.

8. The objection taken by the learned Advocate for the respondent, relying on the provisions of Section 19 of the Family Courts Act, 1984, is also unsustainable. Section 19(1) of the Family Courts Act, 1984 reads as follows:

19(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.?

The remedy of appeal under Section 19(1) of the Family Courts Act, 1984 would be available if the order which is challenged, is not an interlocutory order. Therefore, it has to be examined as to whether the impugned order can be said to be an interlocutory order. The judgment given by the HonTMble Supreme Court in the case of **V.C. Shukla vs. State through C.B.I.** reported in **1980 Supp. SCC 92**, lays down the proposition as to which order can be said to be an interlocutory order?. After considering various judgments, the conclusions are recorded in paragraph 33 of the judgment as follows:

33. The view taken in **Kuppuswami** case was endorsed by this Court in the case of **Mohan Lal Magan Lal Thacker vs. State of Gujarat** where it was held that generally speaking a judgment order which determines the principal matter in question is termed final. The English decisions as also the Federal Court decisions were referred to in this case and after considering the decisions, this Court observed as follows:

The meaning of the two words 'final' and 'interlocutory' has, therefore, to be considered separately in relation to the particular purpose for which it is required. However, generally speaking, a judgment or order which determines the principal matter in question is termed final . An interlocutory order, though not conclusive of the main dispute may be conclusive as to the subordinate matter with which it deals... .

* * * *

If the decision on an issue puts an end to the suit, the order is undoubtedly a final one but if the suit is still left alive and has yet to be tried in the ordinary way, no finality could attach to the order . This test was adopted in **S. Kuppuswami Rao vs. King** where the court also held that the words 'judgment' and 'order' have the same meaning whether the proceedings is a civil or a criminal proceeding. In **Mohd. Amin Bros. Ltd. vs. Dominion of India** the Federal Court following its earlier decision adopted against the test, viz., whether the judgment or order finally disposed of the rights of the parties.?

The above said view is expressed by Hon'ble Shri Fazal Ali and Shri A.P. Sen, JJ.

HonTMble Shri D.A. Desai, J. concurring with the above view has expressed his view in paragraph Nos.96, 97 and 98 as follows:

96. Ordinarily speaking, the expression 'interlocutory' in legal parlance is understood in contradistinction to what is styled as final. In the course of a judicial proceeding before a court, for judicially determining the main dispute brought to the court for its resolution, a number of situations arise, where that court goes on disposing of ancillary disputes raised by parties to the proceedings by making orders and unless the order finally disposes of a proceeding in a court, all such orders during the course of a trial would be broadly designated 'interlocutory' orders. Such interlocutory orders are steps, taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding. They regulate the procedure only and do not affect any right or liability of the parties (see *Central Bank of India v. Gokal Chand*). Every such interlocutory order may, for the time being, dispose of a particular point of controversy raised in the proceeding, yet nonetheless the order would be an interlocutory order unless by such an order, the controversy between the parties is finally disposed of. Again, in legal parlance such an order finally disposing of a dispute between the parties would be a judgment in a civil proceeding. In a criminal proceeding when either the accused is acquitted or convicted and sentence is pronounced upon, the order would be a judgment disposing of case before the court trying the accused. Till this situation is reached, a number of orders may have to be made, during the progress of adjudication of main dispute; such orders can appropriately and legally be styled as 'interlocutory orders'.

97. Where some facet or aspect of a controversy in the course of adjudication of the main dispute between the parties is disposed of by an order but the order has not the effect of finally disposing of the dispute which the parties brought to the court, the order would nonetheless be an interlocutory order and it would not cease to be an interlocutory order merely because it disposed of a certain aspect of the controversy between the parties. That is why in some statutes prescribing procedure for trial of cases " civil or criminal, a provision is made that except where an appeal is provided for against an interlocutory order, all such interlocutory orders would be open to question while hearing an appeal against the

final judgment finally disposing of the dispute between the parties. It is in this sense that the expression 'final order' in Section 205(1) of the Government of India Act, 1935 was interpreted by the Federal Court in **S. Kuppaswami Rao v. King**. Approving the observation of Sir George Lowndes in **Abdul Rahman v. D.K. Cassim and Sons**, it was held that the test of finality was whether the order finally disposed of the rights of the parties. The finality must be a finality in relation to the suit. If after the order the suit is still a live suit and the rights of the parties are still to be determined, no appeal lies against it under Section 109(a) Civil Procedure Code. Even if the order decides an important and even a vital issue in the case but it left the suit alive and provided for its trial in the ordinary way, it would still not be a final order. When the question again came up before the Federal Court in **Mohd. Amin Bros. Ltd. v. Dominion of India**, a larger Bench of the Federal Court unanimously approved the aforementioned interpretation of the expression 'final order' in Section 205(1).

The court observed thus:

All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in **S. Kuppaswami Rao v. The King**, and the law on the point, so far as this court is concerned, seems to be well settled. In full agreement with the decisions of the Judicial Committee in **Ram Chand Manjimal v. Goverdhandas Vishindas** and **Abdul Rahman v. D.K. Cassim and Sons** and the authorities of the English courts upon which these pronouncements were based, it has been held by this Court that the test for determining the finality of an order is, whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in **Abdul Rahman v. D.K. Cassim and Sons**, the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it. The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order.

98. In the aforementioned two decisions **Salaman v. Varne**, **Bozson vs. Altrincham Urban Distt. Council** and **Isaacs v. Salbstein** were referred to and relied upon but it was urged that a different note was sounded by Lord Halsbury in the Bozson case when he preferred the view expressed in **Shubrook vs. Tufnell** and therefore the aforesaid two decisions particularly approving the ratio in the cases of **Ramchand Manjimal and Abdul Rahman** would not provide a reliable test. It is not necessary to examine all the decisions in details to find out whether there was some conflict in the view taken in the abovementioned decisions and one taken by Lord Halsbury in view of a recent decision in **Salter Rex and Co. vs. Ghosh** wherein Lord Denning after examining the earlier decisions and the apparent conflict as mentioned herein above observed that the view of Lord Alverstone in Bozson case was right in logic but one of Lord Esher in Salaman case was right in experience and Lord Esher's test has always been applied in practice. It is to the effect that the decision whichever way is given, if it finally disposes of the matter in dispute, it is final. While, on the other hand, if the decision if given in one way, will finally dispose of the matter in dispute, but, if given in other will allow the action to go on, it was not final but interlocutory.?

The impugned order does not satisfy the tests of an non-interlocutory order? as laid down above. The important test adopted in the case of **S. Kuppuswami Rao vs. King** reported in **AIR 1949 FC 1** is that the order on an issue which puts an end to the suit, is a final order but if the suit is left alive and has to be tried in the ordinary way, no finality could be attached to the order. The above test for determining as to whether the order is an interlocutory order or not is accepted by the HonTMble Supreme Court in the case of **V.C. Shukla**. Similarly the meaning of the expression final order? as explained by Lord Esher M.R. in the case of **Salaman vs. Warner** reported in **(1891) 1 QB 734**, has also been accepted by the HonTMble Supreme Court in the judgment given in the case of **V.C. Shukla**. In paragraph 23 of the judgment given in the case of **V.C. Shukla**, it is recorded that the words not a final order? necessarily means an interlocutory order or an intermediate order.

In paragraph 30 of the judgment given in the case of **V.C Shukla**, it is recorded as follows:

30. These observations clearly show that the Judicial Committee of the Privy Council accepted the view expressed in the case of **Salman v. Warner** and **Bozson v. Altrincham Urban Distt. Council**. It is, therefore, pertinent to note that the view of Lord Halsbury does not appear to have been accepted either by the Privy Counsel or by the Federal Court either in Hori Ram Singh case or in the case cited above. Similarly, while examining the language of Section 205 of the Government of India Act, the Chief Justice observed as follows:

The words Final order? were used in Section 109 of the Civil Procedure Code. That section prescribes conditions under which an appeal lies to the Judicial Committee of the Privy Council from a decree or final order passed on appeal by a High Court. It was noticed that the words final order? were used in contrast with interlocutory order. The learned Judge took the view that in cases in which the decision of the point in dispute either way did not result in finally disposing of the matter before the Court, the decision did not amount to a final order.?

Applying the ratio laid down by the HonTMble Supreme Court in the judgment given in the case of **V.C. Shukla**, it has to be held that the impugned order has to be considered as an 'interlocutory order'. Therefore, it cannot be said that the impugned order can be challenged in appeal under Section 19(1) of the Family Courts Act, 1984.

9. The judgment given in the case of **Ravindra Harshad Parmar vs. Dimple Ravindra Parmar** reported in **2015(2) Bom.C.R. 312** is not on the point. The reliance placed by the learned Advocate for the respondent on paragraph 42 of the judgment given in the case of **Ravindra Harshad Parmar** is misdirected. It cannot be said that the ratio of the judgment given in the case of **Ravindra Harshad Parmar** is that the order deciding the issue of jurisdiction is a final order and can be challenged in appeal under Section 19 of the Family Courts Act, 1984. It is well settled principle that the ratio decidendi of the judgment is only binding on the Courts and what is the ratio decidendi? is considered by the HonTMble Supreme Court in the following judgments:

(i) Judgment given by the Hon'ble Supreme Court in the case of **Dalbir Singh and others vs. State of Punjab** reported in **(1979) 3 SCC 745**.

(ii) Judgment given by the Hon'ble Supreme Court in the case of **State of Orissa and others vs. Md. Illiyas** reported in **(2006) SCC 275**.

In paragraph No.22 of the judgment given in the case of **Dalbir Singh**, Shri A.P. Sen, J. while expressing his dissenting view has expressed as follows:

22. With greatest respect, the majority decision in **Rajendra Prasad** case (supra) does not lay down any legal principle of general applicability. A decision on a question of sentence depending upon the facts and circumstances of a particular case, can never be regarded as a binding precedent, much less 'law declared' within the meaning of Article 141 of the Constitution so as to bind all courts within the territory of India. According to the well-settled theory of precedents every decision contains three basic ingredients:

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts ;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts ; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredients (ii) is the vital element in the decision. This indeed is the ratio decidendi. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of **Qualcast (Wolverhampton) Ltd. vs. Havnes** it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except

directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case.?

Same proposition of law has been reiterated by the Hon'ble Supreme Court in the judgment given in the case of **Mohd. Illiyas**. It cannot be said that the judgment given in the case of **Ravindra Harshad Parmar** decides the point as to whether the appeal under Section 19 of the Family Courts Act, 1984 lies against the order passed by the Family Court deciding the point of jurisdiction or as to whether the order passed by the Family Court deciding the point of jurisdiction is final order or not.

In the case of **Ravindra Harshad Parmar**, the order passed by the Family Court holding that it has territorial jurisdiction to entertain and try the proceedings was challenged before the High Court in Civil Writ Petition No.8317/2013 which was dismissed on 20-12-2013 on the ground that the petition was not maintainable as the order passed by the Family Court has to be challenged in appeal under Section 19 of the Family Courts Act, 1984. The parties accepted the judgment passed in Civil Writ Petition No.8317/2013 and then filed appeal which is decided by the Division Bench by the judgment reported in **2015(2) Bom.C.R. 312**. The Division Bench while delivering the judgment reported in **2015(2) Bom.C.R.312** has not independently adverted to the issue as to whether the order passed by the Family Court holding that it had jurisdiction to entertain and try the proceedings was an interlocutory order or not.

Further, the facts of the case of **Ravindra Harshad Parmar** are distinguishable from the facts of the present case on the following points:

In the case of **Ravindra Harshad Parmar** proceedings in Family Court, Pune were filed on 05-11-2012 and the proceedings in the Court of New Jersey were filed on 21-02-2013. In the present case, the proceedings in the Family Court of Wayne are filed earlier than the proceedings are filed in the Family Court at Akola in India. The learned Single Judge while deciding the Civil Writ Petition No.8317/2013 has not considered the ratio laid down by the HonTMble Supreme

Court in the judgment given in the case of **V.C. Shukla**. The judgment given by the Division Bench of this Court in the case of **Amishi Milan Honawar vs. Milan Bhavanishankar Honawar** reported in **2005(3) Mh.L.J. 984** also does not assist the respondent. On the contrary, this judgment lays down that interlocutory orders cannot be challenged in appeal under Section 19(1) of the Family Courts Act, 1984.

10. In view of the above, it has to be held that the impugned order is an interlocutory order? and cannot be said to be final order? as the proceedings are not terminated because of the impugned order, and therefore, the right of appeal under Section 19(1) of the Family Courts Act, 1984 would not be available to the petitioner to challenge the impugned order. Consequently, this petition has to be entertained on merits.

11. In my view, the point of jurisdiction of the Family Court at Akola in India to deal with the matter, does not arise. The matter is required to be decided mainly by applying the principle of comity of Courts.

It is submitted on behalf of the petitioner that the proceedings before the Court at Wayne were initiated by the petitioner earlier and even interim orders were passed by the Court at Wayne and the respondent submitted to the jurisdiction of the Court at Wayne and therefore, applying the principle of comity of Courts, the Family Court at Akola should restrain itself from exercising the jurisdiction and entertaining the proceedings filed by the respondent. In support of the submission, Shri Paliwal, the learned Advocate has relied on the judgment given by the Hon'ble Supreme Court in the case of **Surya Vadanam vs. State of Tamil Nadu and others** reported in **2015(3) Scale 151**.

12. Per contra, Shri J.B. Gandhi, the learned Advocate has submitted that the Court at Akola, not only is entitled but is duty bound to entertain and decide the proceedings filed by the respondent, as the paramount consideration is the welfare of minor child Shreeya. It is submitted that if the Family Court at Akola is satisfied that the issue about welfare of minor child Shreeya is required to be considered, then the Family Court at Akola can entertain and decide the proceedings filed by the respondent. In support of the submission, the learned Advocate has relied on

the following judgments:

(i) Judgment given by the Hon'ble Supreme Court in the case of **Ruchi Majoo vs. Sanjeev Majoo** reported in **2011(6) SCC 479**.

(ii) Judgment given by the Madras High Court in the case of **Bhashyam Ramesh @ Rajagopalan rep. By Power Agent Mr. V.S. Vhasyam vs. R. Saroja @ K.K. Saroja** in **Civil Misc. Appeal No.929 of 2002**

13. In the case of **Bhashyam Ramesh @ Rajagopalan rep. By Power Agent Mr. V.s. Vhasyam vs. R. Saroja @ K.K. Saroja** in **Civil Misc. Appeal No.929 of 2002**, the wife had filed the suit before the Family Court, Chennai, praying for declaration that the decree of divorce passed by the Superior Court of California was void ab initio, inoperative and not binding on the plaintiff. The case was covered by the principles laid down under Section 13 of the Code of Civil Procedure. In that case, there was no issue of imposing self-restraint by the Court as per the principles of comity of Courts. The point is considered by the Hon'ble Supreme Court in the judgment given in the case of **Surya Vadan**. In paragraph 54 of the judgment given in the case of **Surya Vadan**, the Hon'ble Supreme Court has laid down as follows:

54. Second, there is no reason why the principle of comity of courts? should be jettisoned, except for special and compelling reasons. This is more so in a case where only an interim or an interlocutory order has been passed by a foreign court (as in the present case). In McKee which has been referred to in several decisions of this court, the Judicial Committee of the Privy Council was not dealing with an interim or an interlocutory order but a final adjudication. The applicable principles are entirely different in such cases. In this appeal, we are not concerned with a final adjudication by a foreign court “ the principles for dealing with a foreign judgment are laid down in Section 13 of the Code of Civil Procedure. In passing an interim or an interlocutory order, a foreign court is as capable of making a prima facie fair adjudication as any domestic court and there is no reason to undermine its competence or capability. If the principle of comity of courts is accepted, and it has been so accepted by this court, we must give due respect even to such orders passed by a foreign court. The High Court misdirected itself by looking at the issue

as a matter of legal rights of the parties. Actually, the issue is of the legal obligations of the parties, in the contest of the order passed by the foreign court.?

Therefore the reliance on the judgment given in the case of **Bhashyam Ramesh @ Rajagopalan rep. By Power Agent Mr. V.s. Vhasyam vs. R. Saroja @ K.K. Saroja** in **Civil Misc. Appeal No.929 of 2002** is misdirected.

14. Shri J.B. Gandhi, the learned Advocate relying on the judgment given in the case of **Ruchi Majoo** has submitted that in cases under the Guardian and Wards Act, the jurisdiction of the Court is determined by the ordinary residence of the minor and Court exercising jurisdiction over such area will have jurisdiction to entertain and decide the proceedings under the Guardian and Wards Act. It is submitted that the minor child Shreeya had been residing at Akola in India since May 2014 and her name was enrolled in a school at Akola on 15-09-2014, therefore, on the date of filing of the proceedings before the Family Court, at Akola on 28-11-2014, the place of ordinary residence of minor girl Shreeya had been Akola and therefore, the Family Court, Akola has the jurisdiction to entertain and decide the proceedings filed by the respondent for custody of minor girl Shreeya. The submission as made on behalf of the respondent is misconceived. In the facts of the present case, the issue is not as to whether the Family Court at Akola has the jurisdiction to entertain and decide the proceedings or not, but the point which has to be adverted to is whether the Family Court at Akola is required to impose self-restraint.

For considering this point, the relevant facts are;

- (i) The petitioner filed the proceedings before the Court at Wayne on 29-10-2014.
- (ii) On 30-10-2014 the Court at Wayne directed issuance of notice to the respondent and passed an ex-parte order.
- (iii) On 30-11-2014 the respondent filed an objection before the Court at Wayne.
- (iv) On 28-11-2014 the respondent filed the proceedings before the Family Court, at Akola.

(v) On 03-12-2014 the respondent submitted her answer before the Court at Wayne, stating that the marriage between the petitioner and the respondent be dissolved and temporary physical and legal custody of the minor child Shreeya be granted to the respondent and temporary child support be awarded to the respondent as per the Michigan Child Support Guidelines.

(vi) The respondent filed an application praying for an ex-parte order to seal the safety deposit box, on which an order is passed on 13-12-2014. The legality and the validity of the impugned order has to be examined keeping in view the above mentioned facts.

15. In the judgment given in the case of **Surya Vadan**, the Hon'ble Supreme Court has recorded in paragraph 50 as follows:

50. The principle of the comity of courts is essentially a principle of self-restraint, applicable when a foreign court is seized of the issue of the custody of a child prior to the domestic court. There may be a situation where the foreign court though seized of the issue does not pass any effective or substantial order or direction. In that event, if the domestic court were to pass an effective or substantial order or direction prior in point of time then the foreign court ought to exercise self-restraint and respect the direction or order of the domestic court (or vice versa), unless there are very good reasons not to do so.?

The Hon'ble Supreme Court has summed up its conclusions, in paragraph 60 of the judgment as follows:

60. However, if there is a pre-existing order of a foreign court of competent jurisdiction and the domestic court decides to conduct an elaborate inquiry (as against a summary inquiry), it must have special reasons to do so. An elaborate inquiry should not be ordered as a matter of course. While deciding whether a summary or an elaborate inquiry should be conducted, the domestic court must take into consideration:

(a) The nature and effect of the interim or interlocutory order passed by the foreign court.

(b) The existence of special reasons for repatriating or not repatriating the child to the jurisdiction of the foreign court.

(c) The repatriation of the child does not cause any moral or physical or social or cultural or psychological harm to the child, nor should it cause any legal harm to the parent with whom the child is in India. There are instances where the order of the foreign court may result in the arrest of the parent on his or her return to the foreign country. In such cases, the domestic court is also obliged to ensure the physical safety of the parent.

(d) The alacrity with which the parent moves the concerned foreign court or the concerned domestic court is also relevant. If the time gap is unusually large and is not reasonably explainable and the child has developed firm roots in India, the domestic court may be well advised to conduct an elaborate inquiry.?

While deciding the case of **Surya Vadan**, the judgment given in the case of **Ruchi Majoo** is also considered. The facts as recorded in paragraph 19 of the judgment given in the case of **Ruchi Majoo** show that the wife had initiated the proceedings before the Court at Delhi on or about 28-08-2008 and the protective custody warrant was issued by the Superior Court of California on 09-09-2008. One of the relevant aspect is that till the proceedings were filed before the Court at Delhi, Superior Court of California had not passed any order.

In the case of **Surya Vadan**, though the petition praying for grant of divorce was filed in the Family Court, at Coimbatore on 23-08-2012, the wife had not made any efforts to obtain any interim order in her favour regarding the custody of the children and no order in that regards was passed by the Family Court, Coimbatore prior to 13-11-2012 on which date the High Court of Justice in United Kingdom had passed an order making the children wards of the Court during their minority or until further orders, and directed the wife to return the children to the jurisdiction of the Foreign Court. The facts of the present case are similar to the facts of the case of **Surya Vadan**. The judgment given by the Hon'ble Supreme Court in the case of **V. Ravi Chandran (Dr.)(2) vs. Union of India and others** reported in **(2010)1 SCC 174** also supports the claim made by the petitioner.

16. In my view, in the facts of the present case, the conduct of the respondent is relevant. The respondent conceded to the jurisdiction of the Court at Wayne which is clear from the answers filed by her on 30-10-2014 and 03-12-2014. It is not proper on the part of the respondent to proceed with the petition before the Family Court at Akola, simultaneously after submitting to the jurisdiction of the Court at Wayne, USA.

17. The learned Advocate for the respondent has submitted that it is not possible for the respondent to attend the Court at Wayne in view of the penal action taken against her. The learned Advocate for the petitioner has stated that if the orders passed by the Court at Wayne regarding the custody of minor child are complied with, the petitioner will not press for the penal action and will request the Court at Wayne to drop the penal proceedings.

18. In view of the above, I find that the impugned order should not have been passed by the Family Court, Akola at this stage. The Family Court at Akola ought to have imposed self-restraint in the matter considering the principles of comity of Courts.

19. The impugned order is set aside. Rule is made absolute in the above terms. In the circumstances, the parties to bear their own costs.

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