

**Soumya Vs. Johny**

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**Court :** Karnataka

**Decided On :** Apr-15-2015

**Judge :** N.Kumar and B.Sreenivase Gowda

**Appeal No. :** MFA 4222/2014

**Appellant :** Soumya

**Respondent :** Johny

**Judgement :**

R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE15H DAY OF APRIL 2015 PRESENT THE HON'BLE MR.JUSTICE N.KUMAR AND THE HONBLE MR.JUSTICE B. SREENIVASE GOWDA MFA.No.4222 OF 2014 FC) BETWEEN: Soumya D/o Sri Arogyaswamy, Aged about 21 years, No.35, Mesthripalya, Dr. Shivaramakaranth Nagar Post, Bangalore - 560 0077 ...APPELLANT (By Sri S.G. Bhagawan, Adv.) AND: Johny S/o Sri Hrudayaraj, Aged about 28 years, No.27, Mestripalya, Dr. Shivaramakaranth Nagar Post, Bangalore - 560 077 ...RESPONDENT (Respondent served) This MFA is filed under Section 55 of the Divorce Act, against the judgment and decree dated 27.03.2014 passed in M.C.No.4066/2013 on the file of the Principal Judge, Family 2 Court, Bangalore, rejecting the I.A. filed under Section 36 of the Divorce Act. This appeal coming on for admission this day, N.KUMAR. J., delivered the following:

## JUDGMENT

The wife has preferred this appeal under Section 55 of Divorce Act, 1869 challenging the dismissal of application under Section 36 thereof in M.C.No.4066/2013 on the file of Principal Judge, Family Court, Bangalore.

2. The husband Mr.Johny filed a petition under Section 18 of the Divorce Act, 1869 against his wife Mrs.Soumya for a declaration that his marriage be declared null and void on the ground set out therein. After service of notice, even before filing the statement of objections to the main petition, the wife filed an application under Section 36 of the Divorce Act for pendente lite alimony of a sum of Rs.15,000/- per month and Rs.25,000/- towards litigation expenses. The husband did not file any objections to this application. The Family Court, was of view that in the application filed for interim maintenance, the wife has to reveal whether it was her first marriage or second marriage and unless she is lawfully married to the petitioner first time or there was legal termination of the previous marriage, there would be no liability on the part of the petitioner to maintain her and therefore it rejected the application as misconceived. It is against the said order, the present appeal is filed.

3. The question for consideration is, whether an appeal lies against an interlocutory order passed by the Family Court in the proceedings initiated under the provisions of the Indian Divorce Act, 1869?.

4. In order to answer the same, we need to examine the various provisions of the Divorce Act, 1869 and also the Family Courts Act, 1984.

5. Section 3(4) of the Divorce Act defines the Court as under: Court means the High Court or the District Court, as the case may be:

6. Section 3(3) of the Divorce Act defines the District Court as under: District Courts means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, (or of whose jurisdiction under this act the marriage was solemnized or), the husband and wife reside or last resided together. 7. Section 18 of the Divorce Act dealing with petition for

decree of nullity reads as under: Petition for decree of nullity: - Any husband or wife may present a petition to the District Court praying that his or her marriage may be declared null and void. 8. Section 55 of the Divorce Act, 1869 under which this appeal is filed reads as under: Enforcement of, and appeal from, orders and decrees.- All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in 5 the 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 the laws, rules and orders for the time being in force. 9. The Parliament has enacted the Family Courts Act, 1984 providing for the establishment of Family Courts with a view to promoting conciliation in, and securing speedy settlement of, disputes relating to marriage and family affairs and matters connected therewith; and the said Act came into force w.e.f. 14.09.1984. By virtue of Section 20, the provisions of the said Act have an overriding effect and the said provision 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 any instrument having effect by virtue of any law other than this Act. 6 10. On the date the Act came into force, the Hindu Marriage Act, 1956, the Divorce Act, 1869 and the Dissolution of Muslim Marriage Act, 1939 were in force. As the Parliament enacted the special legislation for settlement of disputes relating to marriage and family affairs and the matters connected therewith, by virtue of Section 20 of the Family Courts Act, if there is any inconsistency between the provisions of the Family Courts Act and the above mentioned Acts, the provisions of the Family Court Act would prevail.

11. Under the Family Courts Act, by virtue of Section 3, the Family Courts are established; appointment of Judges are made to the Family Courts under Section 4. Section 7 of the Family Courts Act defines the jurisdiction. Section 8 deals with exclusion of jurisdiction and pending proceedings. It is only where the Family Court is constituted under the Family Courts Act, the jurisdiction of the Court constituted under the aforesaid three enactments is denuded. However, if there is no Family Court in any area to which the aforesaid enactment apply, then the parties have to work out the 7 remedies as provided in terms of those enactments. Therefore, the petition under Section 18 of the Divorce Act, 1869, is filed in Family

Court under the Family Courts Act, in view of Section 7 of the Family Courts Act. It is in that proceeding, the wife filed an interlocutory application for maintenance and it was rejected.

12. Now the question is what is the remedy available to the wife against rejection of her application?. 13. Under Section 55 of the Divorce Act, against all decrees and orders made by the Court including those passed by District Court and the High Court, appeal lies to the High Court. An appeal is provided under Section 19 of the Family Courts Act which 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 of Criminal Procedure, 1973 (2 of 1974) or 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. 14. Therefore, 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. In other words no appeal lies under the Family Court Act against an interlocutory order, whereas an appeal lies against an interlocutory order under Section 55 of the Divorce Act. There is inconsistency in so far as appeal against an interlocutory order. By virtue of Section 20 of the

Family Court Act, which has an overriding effect, no appeal lies against an interlocutory order passed by the Family Court, though the parties are governed by the Divorce Act. Though the appellant in this case i.e. the wife has invoked 10 Section 55 of the Divorce Act for preferring the appeal, since the order is passed by the Family Court under the Act of 1984, an appeal lies to this Court only under Section 19 and not under Section 55 of the Divorce Act. If Section 19 is attracted, no appeal lies against an interlocutory order, as the provisions of Family Courts Act override the provisions of Divorce Act. The impugned order is passed on an application filed by wife for interim maintenance for Rs.15,000/- per month and Rs.25,000/- towards litigation expenses pending disposal of the MC petition on merits. Therefore, it is an interlocutory application and the impugned order passed is an interlocutory order. Therefore, no appeal lies.

15. In the aforesaid circumstances, we pass the following order: a) This appeal is dismissed as not maintainable. b) However, liberty is reserved to the appellant herein to challenge the impugned order before an appropriate forum. If and when such 11 challenge is made, the said forum shall decide the case on merits and in accordance with law. SD/- JUDGE SD/- JUDGE Sk/-

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