

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.6740 of 2016**

Arising Out of PS. Case No.- Year-1111 Thana- District-

Dr. Dilip Kumar @ Dr. Dilip Kumar Sharma @ Dilip Sharma S/o Late Shiv Pujan Prasad r/o Keshopur Grudwara Road P.S. Jamalpur, District Munger.

... .. Petitioner/s

Versus

1. State of Bihar
2. Swati Omi wife of Dr. Dilip Kumar Sharma @ Dr. Dilip Kumar of Chhoti Kelawari Anand Lane P.S. - Kotwali, District - Munger.

... .. Opposite Party/s

Appearance :

For the Petitioner/s : M/s Rajesh Kumar Singh, Amicus Curiae
Ansul, Amicus Curiae
For the Opposite Party/s : Dr. Ravindra Kumar App

**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

C.A.V. JUDGMENT

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 02-09-2019

1. This petition under Section 482 of the Code of Criminal Procedure has been filed on behalf of the petitioner for quashing of order dated 3.12.2015 passed by Principal Judge, Family Court, Munger in Maintenance Case No. 153 of 2014 directing the petitioner to pay interim compensation to his wife (O.P. No. 2) and his children @ Rs. 15,000/- per month since the date of filing of interim petition dated 3.8.2015 and also directed to pay lump sump of Rs. 10,000/- towards filing of maintenance petition and other petitions and attending the court



till the date and onward Rs. 1000/- on each date towards litigation cost.

2. O.P. No. 2 filed Maintenance Case No. 153 of 2014 under Section 125 of the Code of Criminal Procedure against petitioner for her maintenance as well as for maintenance of her three children.

3. The petitioner appeared in the aforesaid maintenance case and filed his show cause. However, during pendency of the aforesaid maintenance case, O.P. No. 2 under second proviso of Section 125 of the Code of Criminal Procedure filed a petition for grant of interim maintenance and the expenses of the proceeding of her as well as her minor children. The petitioner contested the aforesaid petition but the learned Principal Judge, Family Court, Munger, allowed the interim maintenance petition passing interim order dated 3.12.2015, which has been challenged before this Court by filing petition under Section 482 of the Code of Criminal Procedure.

4. Initially, this petition was listed before learned Single Bench of this Court and learned Single Bench having heard the matter at length *vide* order dated 21.11.2018, doubted the correctness of the view expressed by Division Bench of this



Court in **Md. Akil Ahmad Vs. State of Bihar and Ors.** reported in **2016(4) PLJR 968** and, accordingly, observed that the law laid down by the Division Bench of this Court in **Md. Akil Ahmad case (Supra)** needs reconsideration by the Division Bench as no finding was given over applicability of Section 482 of the Code of Criminal Procedure though impliedly jurisdiction has been derecognised and, directed to place the matter before Division Bench and, accordingly, by order of the Chief Justice, this matter has been placed before us.

5. In **Md. Akil Ahmad case (Supra)**, the issue before the Division Bench for determination was the maintainability of application under Section 482 of the Code of Criminal Procedure against the order of the interim maintenance passed by the Family Court under second proviso of Section 125 of Code of Criminal Procedure during the pendency of the proceeding of maintenance under Chapter IX of the Code of Criminal Procedure. In the above stated case, the learned Division Bench of this Court having considered various aspects as well as decisions cited came to conclusion that the only remedy available to challenge the order of interim maintenance passed under second proviso of Section 125 of the Code of Criminal Procedure was to make an application under



Article 227 of the Constitution of India before this Court.

6. The learned Division Bench in **Md. Akil Ahmad case (Supra)**, further, held that petition under Section 482 of the Code of Criminal Procedure filed against the order of interim maintenance passed by Family Court under second proviso of Criminal Procedure Code is not maintainable.

7. It is pertinent to mention here that at the time of hearing, none appeared on behalf of the petitioner to assist the Court and, accordingly, this Court appointed Sri Rajesh Kumar Singh, advocate as well as Sri Ansul, Advocate, *Amicus Curiae* to assist the Court.

8. Learned *Amicus Curiae* Sri Rajesh Kumar Singh, Advocate, submitted that the view expressed by Hon'ble Division Bench in **Md. Akil Ahmad's case (Supra)** is not a correct view because, the inherent power vested into the court under Section 482 of the Code of Criminal Procedure cannot be limited. He, further, submitted that in **Madhu Limaye Vs. State of Maharashtra** reported in (1977) 4 SCC 551, it has been held by Apex Court that inherent power vested into the Court under Section 482 of the Code of Criminal Procedure may be invoked for quashing interlocutory orders even though revision is prohibited. Learned *Amicus Curiae* Mr. Singh



submitted that the law laid down in **Madhu Limaye case (Supra)** still holds the field, and, therefore, the view of learned Division Bench rendered in **Md. Akil Ahmad case (Supra)** appears to be *per incurium*. Learned *Amicus Curiae* Mr. Singh, further, submitted that no doubt, in the case of **Amar Nath and Ors. Vs. State of Haryana and Ors.** reported in (1977) 4 SCC 137, the two Hon'ble Judges of the Apex Court held that inherent powers cannot be exercised when there is an express power in a provision of the Code but the correctness of aforesaid view was doubted by Hon'ble three Judges of Supreme court in **Madhu Limaye case (Supra)** and came to conclusion that inherent powers may be invoked for quashing interlocutory order even though revision is prohibited.

9. Learned *Amicus Curiae* Mr. Ansul, Advocate, seconded the submissions advanced by learned *Amicus Curiae* Mr. Singh. However, learned *Amicus Curiae* Mr. Ansul submitted that the order of ad interim maintenance being an intermediate order, the revision against said order is also maintainable. Learned *Amicus Curiae* Mr. Ansul submitted that in the case of **Manish Aggarwal Vs. Seema Aggarwal and others** decided on 13.9.2012 in **FAO No. 388/2012, CM No. 15067/2012 and CM No. 15068/2012**, the Division Bench of



Hon'ble Delhi High Court has answered all the questions which have been raised in the present petition. He, further, submitted that a person aggrieved by the order of ad interim maintenance can either file petition under Section 482 of the Code of Criminal Procedure or under Section 19(4) of Family Courts Act. He referred several decisions in support of his contentions such as follows:

(I) Madhu Limaye vs. State of Maharashtra

[AIR 1978 SC 47]

(ii) Manish Aggarwal Vs. Seema Aggarwal and

others decided on 13.9.2012 in FAO No. 388/2012, CM No. 15067/2012 and CM No. 15068/2012,

(iii) Amar Nath and Ors. Vs. State of Haryana

and Ors. [(1977) 4 SCC 137]

(iv) Shah Babulal Khimji vs. Jayaben D. Kania

& Anr [AIR 1981 SC 1786]

(v) Prabhu Chawla Vs. State of Rajasthan

[2016(16) SCC 30]

10. Learned Additional Public Prosecutor also submitted that the order of interim maintenance passed under second proviso of Section 125 of the Code of Criminal



Procedure is revisable order and hence, revision petition is maintainable under Section 19(4) of the Family Courts Act, 1984.

11. Having heard the above stated contentions, I went through the record as well as decisions cited before this Court.

12. In **Md. Akil Ahmad case (Supra)**, the Division Bench considered the question of maintainability of application filed under Section 482 of the Code of Criminal Procedure against the order of interim maintenance passed by the Family Court under second proviso of Section 125 of the Code of Criminal Procedure during the pendency of the proceeding of maintenance under Chapter IX of the Code of Criminal Procedure. The learned Division Bench in the above stated case after referring to the definition of interlocutory order as provided in **Blacks Law Dictionary (1990) page 814** and having taken into consideration the decision of Single Judge of this Court rendered in **Arvind Kumar Singh Vs. State of Bihar** reported in **2014(4) PLJR 587** came to the conclusion that the order of interim maintenance passed by the Family Court under second proviso of Section 125 of the Code of Criminal Procedure during pendency of proceeding of maintenance under



Chapter IX of the Code of Criminal Procedure is an interlocutory order and in terms of Section 19(4) of Family Courts Act, the revision is barred against the aforesaid order. Furthermore, learned Division Bench in the aforesaid **Md. Akil Ahmad case (Supra)** held that Section 10(2) of the Family Courts Act permits the applicability of provisions of Code of Criminal Procedure, 1973 to the proceeding under Chapter IX of the Code of Criminal Procedure before a Family Court and, therefore, in terms of Sub Section 2 of Section 10 of the Family Courts Act, the provisions of the Code of Criminal Procedure are not applicable before the High Court as to test the propriety and correctness of any order passed under the proceeding of Chapter IX of the Code by the Family Court.

13. For better appreciation, I would like to reproduce paragraph 18, 19 and 20 of the **Md. Akil Ahmad case (Supra)** which runs as follows:-

18. For deciding the issue as referred above, we may take notice of Section 10 of the Act, which reads thus:

“Section 10. Procedure generally-(1)
Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings other than the proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), before a Family Court and for the purposes 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.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made there under, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall 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 the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

19. From bare reading of Section 10(2) of the Act, it appears that the provisions of Code of Criminal Procedure 1973 or the rules made there under are made applicable to the proceedings under Chapter IX of the Code, only before a Family Court. Therefore, in terms of sub-section 2 of Section 10 of the Act, the provisions of the Code of Criminal Procedure are not applicable before the High Court as to test the propriety and correctness of any order passed under the proceedings of Chapter IX of the Code, by a Family Court. An appeal against the judgment or order of the Family Court is filed before the High Court in terms of Section 19(1) of the Act, not under the provisions of Code of Criminal Procedure; similarly, a revision application is filed against an order of the Family Court, relating to proceedings of Chapter IX of the Code, under Section 19(4) of the Act not under the provisions of Code of Criminal Procedure. Therefore, the application of provisions of the Code of Criminal Procedure is confined only to the Family Court in the proceedings under Chapter IX of that Code.

20. It is worth to take notice of Section 20 of



the Family Courts Act, which reads thus:

“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 in any instrument having effect by virtue of any law other than this Act.”

14. Furthermore, the learned Division Bench in the case of **Md. Akil Ahmad (Supra)** having relied upon a decision reported in 1990(2) PLJR 693 held that if a person is aggrieved by order of the interim maintenance passed under second proviso of Section 125 of the Code of Criminal Procedure, he may make an application under Article 227 of the Constitution of India. I would like to refer paragraphs 22 and 23 of the decision rendered in **Md. Akil Ahmad case (Supra)**, which runs as follows:

“**22.** Under the similar situation a Full Bench of this Court had occasion to determine the issue: “Whether an appeal would be available under Section 19 (1) of the Family Courts Act, 1984 against an order passed under Section 24 of the Hindu Marriage Act, 1955?” This Court while delivering judgment, reported in AIR 2010 Patna 184, held that an order passed by the Family Court, being interlocutory in nature, would be amenable to the writ jurisdiction under Article 227 of the Constitution of India.

23. We would also like to refer a decision of this Court reported in 1990(2) PLJR 693, rendered by a larger Bench of this Court. In the said decision, Their



Lordships, in paragraph 16, held as under:

“16. Whether the High Court can exercise such power of superintendence only when no appeal or revision has been provided under the Code against orders passed by such criminal courts or even in cases where the persons concerned have availed the remedy provided under the Code for setting aside such orders? It may be urged that in the aforesaid two Full Bench decisions of this Court and in the case of Chandra Shekhar Singh & Another (supra) before the Supreme Court, no internal remedy by way of appeal or revision had been provided, rather there was a bar so far exercise of appellate or revisional power of this Court under the old Code is concerned, in my view whether a bar has been placed or not on exercise of the appellate or revisional power under the Code itself is not of much consequence so far as the power of this Court under Article 227 of the Constitution is concerned. But there may be three situations under which the power under Article 227 may be invoked. Firstly, where no appeal or revision has been provided against the order in question, secondly, where the person aggrieved has already filed a revision application before Sessions Judge and his revision application to this Court against the order passed by the Sessions Judge is barred under Section 397(3) of the Code. The third eventuality may be where although a revision application or an application under Section 482 of the Code is maintainable before this Court, still an application under Article 227 is filed. In my view, there is no question exercise of power under Article 227 in the third category of cases, the remedy being available to petitioner under the provisions of the Code itself. So far the cases falling in the first category i.e., where no appeal or revision has been provided as has been said by the Supreme Court, it will require an exceptional case before power under Article



227 is to be exercised. In respect of the cases coming under second category i.e., the revision application have already been dismissed by the Sessions Judge, and bar under Section 397(3) is applicable for interference under Article 227, very exceptional circumstances must exist in view of the judgment of the Supreme Court in the case of Jagir Singh(Supra)".

15. Now the question for determination is as to whether the petition under Section 482 of the Code of Criminal Procedure can be filed before the High Court against the order of interim maintenance passed by Family Court under second proviso of Section 125 of the Code of Criminal Procedure and the view expressed by the Division Bench in **Md. Akil Ahmad case (Supra)** needs reconsideration.

16. I have noticed that in **Md. Akil Ahmad case (Supra)**, the Division Bench has given specific finding that in terms of Section 10(2) of the Family Courts Act, the provision of Section 482 Code of Criminal Procedure cannot be exercised by the High Court against the order of interim maintenance passed by Family Court under second proviso of Section 125 of the Code of Criminal Procedure as the provisions of Code of Criminal Procedure 1973 or the Rules made thereunder are made applicable to the proceedings under Chapter IX of the Code, only before a Family Court and, therefore, in terms of sub



Section 2 of Section 10 of the Act, the provisions of the Code of Criminal Procedure are not applicable before the High Court as to test the propriety and correctness of any order passed under the proceeding of Chapter IX of the Code of Criminal Procedure and, furthermore, revision application under Section 19(4) of the Family Court is filed against an order of Family Court and not under the provisions of Code of Criminal Procedure. However, I have to see as to whether a petition under Section 482 of the Code of Criminal Procedure can be filed against the order passed by Family Court under second proviso of Section 125 of the Code of Criminal Procedure.

17. Here, I would like to mention that the above stated controversy arose before several other High Courts of this country and the different High Courts answered the question in their own ways.

18. In case of **Manish Aggarwal Vs. Seema Aggarwal and others** decided on 13.9.2012 in **FAO No. 388 of 2012; M No. 15667 of 2012 and CM No. 15668 of 2012**, the Division Bench of Delhi High Court having considered the divergent views of different High Courts of this country came to conclusion that the remedy of criminal revision would be available against both the interim and final order passed under



Sections 125 to 128 of the Code of Criminal Procedure under sub Section (4) of Section 19 of the Family Courts Act. The Division Bench of Delhi High Court in the aforesaid case also held that the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure is not an interlocutory order rather it is an intermediate order against which revision can be filed.

19. The Second proviso of Section 125 of the Code of Criminal Procedure inserted by the amending Act, 1950 of 2001 with effect from 24.9.2001, specifically, empowers the Magistrate to grant interim maintenance pending consideration of application under Section 125 of the Code of Criminal Procedure. For better appreciation of the matter, I would like to refer the provisions of Sections 125 to 128 of the Code of Criminal Procedure, which runs as follows:

“125. Order for maintenance of wives, children and parents.—

(1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class



may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate [***], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.]

Explanation.—For the purposes of this Chapter,-
(a) “minor” means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;
(b) “wife” includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if



so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's 4[allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.— If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an 1 [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.



(5) On proof that any wife in whose favour an order has been made under this section in living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent.

126. Procedure.— (1) Proceedings under section 125 may be taken against any person in any district—

- (a) where he is, or
- (b) where he or his wife resides, or
- (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.

(3) The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

127. Alteration in allowance .— [(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance,



or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.]

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made:

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to 1 [maintenance or interim maintenance, as the case may be,] after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a [monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under section 125, the Civil Court shall take into account the



sum which has been paid to, or recovered by, such person [as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order.

128. Enforcement of order of maintenance.—

A copy of the order of 3 [maintenance or interim maintenance and expenses of proceedings, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to 4 [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the 5 [allowance, or as the case may be, expenses, due].”

20. Furthermore, I would like to refer sub Section (2) of Section 7 of the Family Courts Act, 1984, which runs as follows

7. Jurisdiction

- (1)
- (2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-
 - (a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
 - (b) such other jurisdiction as may be conferred on it by any other enactment.”

21. Furthermore, I would like to refer sub Section (2) of Section 10 of the Family Courts Act, 1984, which runs as



follows:-

“10. Procedure generally

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973, (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.”

22. Section 14 of the Family Courts Act permits the application of Indian Evidence Act, 1872, whereas Sections 15 and 16 of the Family Courts Act speak about the procedure to record oral evidence in suits or proceeding before a Family Court. Section 17 of the Family Courts Act speaks about the contents of judgment pronounced by the Family Court whereas Section 18 of the Act speaks about the execution of decrees and orders passed by the Family Court. Section 19 of the Act prescribes the procedure of appeals and revisions. Here, I would like to refer Section 19 of the Family Courts Act, which runs as follows:-

“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
2[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 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 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.”

23. From bare perusal of Section 19(2) of the Act, it is obvious that no appeal shall lie from an order passed under Chapter IX of Code of Criminal Procedure, 1973 but Section 19(4) of the Act gives power to High Court to 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 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. Therefore, it is obvious from perusal of Section 19(4) of the Family Courts Act that revision petition can be filed against the order of Family Court passed under Chapter IX of the Code of Criminal Procedure, 1973 subject to condition that the order of Family Court should not be an interlocutory order. Now, question arises as to whether order passed by Family Court under second proviso of Section 125 of the Code of Criminal Procedure is an interlocutory order or not.

24. The word ‘interlocutory order’ has not been defined either in Family Courts Act, 1984 or in the Code of Criminal Procedure, 1973 but as per **Black’s Law Dictionary (1990) P. 814**, the word “interim” means “for the time being”, “in the meantime”, “meanwhile”, “temporary”, “provisional”, “not final”, “intervening”. The word “interim” means “intervening” when it is used as a noun and when used as an adjective it means “temporary” or “provisional”. As per **Advanced Law Lexicon (2005) Vol. II**, “interlocutory” means, not that which decides the cause, but that which only settles some intervening matter relating to the cause; a decree or judgment given provisionally during the course of legal action.



The word ‘interlocutory order’ has also been defined in **Halsbury’s Laws of England, Volume 22** of the third edition at page 742 and para 1606 of the same reads as under:

“1606. Final or interlocutory. No definition is given in the Judicature Acts, or the orders and rules thereunder, of the terms “final” or “Interlocutory”, and a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of the two words must therefore be considered separately in relation to the particular purpose for which it is required.”

25. From comparative reading of the above stated definitions, I find that the definition of word ‘interlocutory’, given in **Black’s Law dictionary**, is not explanatory in nature whereas an elaborate explanation has been given in **Halsbury’s Laws of England**. The perusal of definition given in **Halsbury’s Laws of England** goes to show that an order which substantially affects rights of an accused or party or decides certain rights of the parties during pendency, proceeding is not an interlocutory order. Furthermore, the meaning of interlocutory should be considered in relation to the particular purpose for which it is required.

26. Here, I would like to mention that the Full bench of Allahabad High Court in **Smt. Kiran Bala Srivastava**



Vs. Jai Prakash Srivastava [2005(23) LCD 1] discussed the judgment delivered by the Apex Court in **Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.** reported in **AIR 1981 SC 1786** and I think it proper to extract the paragraph 11 of the judgment delivered in **Smt. Kiran Bala Srivastava (supra)** which runs as follows:

11.The Apex Court laid down that there can be three kinds of judgments. Relevant portion of the said judgment to that effect is as follows:

“(1) A final judgment--A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment--This kind of a judgment may take two forms--(a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by



the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect in the suit. Absence of notice under Sec. 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment: Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43, Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43, Rule 1



but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse affect on the party concerned must be direct and immediate rather than indirect or remote.....”

27. Admittedly, an interim order under second proviso of Section 125 of the Code of Criminal Procedure is passed during pendency of petition filed under Section 125(1) of the Code of Criminal Procedure. The second proviso of Section 125 of the Code of Criminal Procedure has been brought on statute book to give instant relief to the applicant but the interim order, admittedly, decides rights and liabilities of the respective parties. No doubt, before passing interim order under Section 125 of the Code of Criminal Procedure, there is no need of formal proof of the claim of the applicant but the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure, *prima facie*, decides rights and liabilities of the parties. Furthermore, the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure can be altered from time to time. Similarly, the order passed under Section 125(1) of the Code of Criminal Procedure can also be altered at



subsequent stage, if the circumstance demands.

28. Furthermore, I find that if a person against whom the order of interim maintenance has been passed fails without sufficient cause to comply with the order of the Court, coercive steps may be taken against him. The order passed under second proviso of Section 125 of the Code of Criminal Procedure appears to be an interlocutory order on its very face but as to whether in true sense the order passed under second proviso of Section 125 of the Code of Criminal Procedure is an interlocutory order or not, it has to be seen.

29. Section 127 of the Code of Criminal Procedure gives power to Court to alter the order passed either under Section 125(1) of the Code of Criminal Procedure or under second proviso of Section 125 of the Code of Criminal Procedure, therefore, according to Section 127 of the Code of Criminal Procedure, even the order passed under Section 125(1) of the Code of Criminal Procedure is not a final order and that order can be altered later on, if the change of circumstance demands. Similar position is in respect of second proviso of Section 125 of the Code of Criminal Procedure as the order of interim maintenance can also be altered at subsequent stage of the proceeding, therefore, it is obvious that nature of



both the orders, either passed under Section 125(1) of the Code of Criminal Procedure or passed under second proviso of Section 125 of the Code of Criminal Procedure, are quite similar in nature as both orders can be altered at subsequent stage. Section 19(4) of the Family Courts Act does not, specifically, bar the revision against the order passed under second proviso of Section 125 of the Code of Criminal Procedure and the only restriction is to avail the provision of Section 19(4) of the Family Courts Act that order in challenge should not be an interlocutory order. Therefore, in the aforesaid circumstance, the nature of order of interim maintenance passed under second proviso of Section 125 of the Code of Criminal Procedure appears is an intermediate order and Section 19(4) of Family Courts Act, 1984 bars the entertainment of revision only against interlocutory order and not against intermediate order.

30. As I have already observed that the second proviso of Section 125 of the Code of Criminal Procedure falls under the category of intermediate order, therefore, the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure can be revised under Section 19(4) Family Courts Act.

31. However, it is pertinent to note here that



learned Division Bench of this Court in **Md. Akil Ahmad case (supra)** did not consider the aforesaid aspect and treating the order passed under second proviso of Section 125 of the Code of Criminal Procedure as interlocutory order came to conclusion that revision under Section 19(4) of the Family Courts Act, 1984, against the interim maintenance order passed under second proviso of Section 125 of Code of Criminal Procedure is not maintainable. Therefore, in my view, the aforesaid observation of learned Division Bench of this Court given in **Md. Akil Ahmad (supra)** case needs reconsideration by a larger Bench.

32. It is true that Sub Section (2) of Section 7 of Family Courts Act, 1984, authorises only Family Court to exercise jurisdiction given to a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure, 1973 and furthermore, sub Section (2) of Section 10 of Family Courts Act, 1984, speaks that the provisions of the Code of Criminal Procedure, 1973, or the Rule made thereunder shall apply to the proceedings under Chapter IX of the Code of Criminal Procedure, 1973, therefore, it is obvious that according to sub Section (2) of Section 10 of the Family Courts Act, 1984, the provisions of Code of Criminal Procedure shall only apply to



the proceeding under Chapter IX of Code of Criminal Procedure, 1973, before a Family Court. Furthermore, Section 19(4) of the Family Courts Act, 1984 gives power to High Court to 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 for the purpose of satisfying itself as to the correctness, legality or propriety of the other order, not being an interlocutory order, and as to the regularity of such proceeding. Therefore, it is obvious that the order passed under Chapter IX of the Code of Criminal Procedure, 1973 by the Family Court can only be challenged by invoking the provision of Section 19(4) of the Family Courts Act, 1984, and not by invoking the provisions of Code of Criminal Procedure. The only rider of challenging the order passed under Chapter IX of the Code of Criminal Procedure, 1973, is that the said order should not be interlocutory order but as I have already discussed that the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure is not an interlocutory order rather it is an intermediate order which can be challenged under Section 19(4) of the Family Courts Act, 1984 and, therefore, it is apparent from the aforesaid



discussions that the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure by the Family Court cannot be challenged under Section 482 of the Code of Criminal Procedure, 1973 because the remedy is available to challenge the said order in Section 19(4) of the Family Courts Act itself.

33. In view of the aforesaid discussions, in my view, the matter requires consideration by a larger Bench of this Court as in the case of **Md. Akil Ahmad (supra)**, Learned Division Bench of this Court has held that the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure, 1973, is an interlocutory order, therefore, I formulate the following questions for determination by a larger Bench:-

(I) Whether interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure, 1973, is an interlocutory order or an intermediate order?

(II) If the interim maintenance order passed under second proviso of Section 125 of the Code of Criminal Procedure, 1973, is an intermediate order, whether revision against the



said order is maintainable under Section 19(4) of the Family Courts Act, or not?

34. Let this order be placed before Hon'ble the Chief Justice for constitution of a larger Bench for giving decision on the above formulated questions.

(Hemant Kumar Srivastava, J)

Partha Sarthy, J: I agree.

Spd/-

(Partha Sarthy, J)

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