





Serial No.	Date	Order (s) with Signature (s)
1	2	3
05.	27.08.12 (Kohli, CJ)	<p style="text-align: center;">BEFORE</p> <p style="text-align: center;">HON'BLE THE CHIEF JUSTICE MR. JUSTICE PERMOD KOHLI</p> <p style="text-align: center;">HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE</p> <p>Present : Ms. Gita Bista, Advocate for the appellant. Mr. A. K. Upadhyaya, Mr. J. B. Pradhan, Sr. Advocates and Mr. Karma Thinlay, Advocate as 'Amicus'.</p> <p>Mr. U. P. Sharma, Advocates for the respondent.</p> <p style="text-align: center;">...</p> <p>The impugned Order dated 26.03.2012 passed by the Family Court, South and West Sikkim at Namchi for enhancement of the monthly maintenance allowance under Section 127 of the Code of Criminal Procedure, 1973 (Cr.P.C.) came to be challenged invoking the appellate jurisdiction of this Court under Section 19 of the Family Courts Act, 1984 (hereinafter referred to as 'the Act'). Limitation for filing appeal prescribed under sub-section (3) of Section 19 being only 30 (thirty) days, the appeal was beyond prescribed period of limitation. In absence of any specific provision for condonation of delay under the Act, the parties were asked to address the question of condonation of limitation.</p>


Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>2. In absence of Mr. N. B. Khatiwada, learned Sr. Advocate for the petitioner, a request was made to M/s. A. K. Upadhyaya, J. B. Pradhan, learned Sr. Advocates and Mr. Karma Thinlay Namgyal, learned Advocate to assist the Court as 'Amicus' vide Order dated 21.08.2012.</p> <p>3. The matter came up for hearing today. Learned counsel submitted that the appeal against the impugned order is not maintainable in view of the specific bar contained in sub-section (2) of Section 19. We have examined the provisions of the Act and heard learned counsel for the parties as also <i>amicus curiae</i>.</p> <p>4. Order impugned in the present case has been passed under Section 127 of the Cr. P.C. enhancing the amount of monthly maintenance earlier awarded in favour of the respondent by the Family Court @ Rs. 2,500/- per month. Jurisdiction of the Family Court established under Section 3 has been prescribed under Section 7 of the Act in respect to matters enumerated therein. Section 8 further confers jurisdiction in respect to matters specified therein including the pending proceedings at the</p>


Serial No.	Date	Order (s) with Signature (s)
1	2	3
	<p style="text-align: center;">B 1</p>	<p>commencement of the Act which are required to be transferred to the Family Court. The extracts from above Sections relevant for purposes of the present proceedings are reproduced hereunder: -</p> <p style="text-align: center;">"7. Jurisdiction. - (1)</p> <p style="text-align: center;">(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise -</p> <p style="margin-left: 40px;">(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</p> <p style="margin-left: 40px;">(b) Such other jurisdiction as may be conferred to it by any other enactment.</p> <p style="text-align: center;">8. Exclusion of jurisdiction and pending proceedings. - Where a Family Court has been established for any area, -</p> <p style="margin-left: 40px;">(a)</p> <p style="margin-left: 40px;">(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);</p> <p style="text-align: center;">....."</p> <p>5. Sub-section (2) of Section 7 confers the jurisdiction of the Family Court so established in respect to matters relating to order for maintenance of wife, children and parents falling under Chapter IX of the Cr.P.C. which were hitherto exercised by a Magistrate of First Class. Section 8 further prescribes that a Magistrate shall cease to have</p>


Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>jurisdiction in respect to matter under Chapter IX of the Cr.P.C. in relation to such area where a Family Court has been established.</p> <p>6. Section 10 of the Act applies the procedure to the proceedings undertaken by the Family Court and reads as under: -</p> <p style="padding-left: 40px;">"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 proceedings 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.</p> <p style="padding-left: 40px;">(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.</p> <p style="padding-left: 40px;">(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."</p> <p>7. Sub-section (1) of Section 10 applies the provision of the Code of Civil Procedure, 1908 (C.P.C.) to the suits and proceedings of civil nature before the Family Court except for the specific provision under the Act. Similarly, sub-section (2) of Section 10 applies the provision of Cr.P.C. or the</p>


Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>rules made thereunder to the matters falling under Chapter IX of the Cr.P.C. in respect to proceedings before a Family Court except where provisions to the contrary are contained in the Act. Sub-section (3) of this Section, however, empowers the Family Court to lay down its own procedure to arrive at a settlement in respect to any matter pending before it.</p> <p>8. Section 19 of the Act, which contains the provisions for appeal and revision, is quoted hereunder: -</p> <p>"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.</p> <p>(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):</p> <p>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].</p> <p>(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.</p> <p>[(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</p>


Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.]</p> <p>[(5)] Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.</p> <p>(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges."</p> <p>9. Under sub-section (1) of Section 19, every judgment or order, not being an interlocutory order, passed by a Family Court, is appealable before the High Court both on facts and on law. This appellate jurisdiction is, however, subject to the provision of sub-section (2) of this Section and, over and above, the provisions of the C.P.C. or the Cr.P.C. Sub-section (2) of Section 19 creates a specific bar of appeal in respect to an order passed by Family Court with the consent of the parties or from an order passed under Chapter IX of the Cr.P.C.</p> <p>10. Chapter IX of the Cr.P.C. deals with the maintenance of wives, children and parents. Sections 125 to 128 fall under this Chapter. The impugned order has been passed under this Chapter, i.e. Section 127, whereunder an order of maintenance passed under Section 125 can be</p>


Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>altered under the circumstances contained in the said Section. Thus, appeal is not maintainable before this Court in view of the embargo created under Section (2) of Section 19. Even though an appeal under Section 19 is not maintainable, however, sub-section (4) of Section 19 confers revisional jurisdiction upon this Court to call for and examine the record of the proceedings where Family Court has passed an order under Chapter IX of the Cr. P.C. to satisfy itself as to the correctness, legality or propriety of such an order except an interlocutory order. Sub-section (5) prohibits exercise of revisional jurisdiction as well except as provided under sub-section (4).</p> <p>11. From the conjoint reading of Sections 7, 8, 10 and 19, it emerges that an order passed by the Family Court under Chapter IX of the Cr.P.C. regarding the maintenance of wives, children and parents is only revisable before this Court by virtue of sub-section (4) of Section 19 of the Act.</p> <p>12. In view of the above position in law, the present appeal is not maintainable. At this stage,</p>


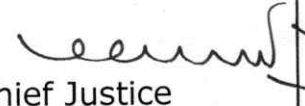
Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>Ms. Gita Bista, learned counsel appearing for the appellant submits that since both the appellate as well as the revisional jurisdictions are vested with this Court, the present appeal may be treated as a revision under sub-section (4) of Section 19 of the Act. We do not find any legal impediment in converting the present appeal to a revision as both the jurisdictions (appellate and revisional) are exercisable by this Court. Acceding the prayer of the learned counsel for the appellant, we treat the present appeal to be a revision under sub-section (4) of Section 19 of the Act.</p> <p>13. It is conceded to by the learned counsel for the respondent that the limitation for criminal revision before this Court being 90 (ninety) days, the revision is within the prescribed period of limitation. Hence, the question of condonation becomes redundant.</p> <p>14. After having treated the appeal as revision, we have heard the learned counsel for the parties on the merits of the impugned order.</p> <p>15. The Family Court vide its order dated 22.04.2001 passed in Family Case No. 43 of 2001</p>

Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>had granted monthly maintenance allowance of Rs.2,500/- per month to the respondent. This order remained in force till the passing of the impugned order. The respondent filed an application on 26.03.2012 before the Family Court, South and West at Namchi being F.C. (Crl. Misc.) Case No. 3 of 2010 titled Smt. Shova Rai vs. Shri Bir Bdr. Gurung, seeking enhancement of monthly maintenance allowance from Rs.2,500/- to Rs.8,000/- per month from the petitioner before us. The petitioner, on being served, objected to the enhancement on variety of grounds. It was, inter alia, pleaded that he is ready and willing to take the entire responsibilities of their minor son and would take care of his education and other necessities. He further pleaded that he is the eldest son in his parental family and has to maintain his aged mother, unemployed brother besides he is living in a rented accommodation at Namchi and has also to repay some amount to a friend secured for his medical treatment of injured shoulder. The Family Court directed the parties to produce the salary certificate of the present petitioner. The respondent produced the salary certificate of the present petitioner which</p>

Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>revealed his gross salary at Rs.22,018/- and after various deductions, the net carry home amount is Rs.12,474/-. It has been recorded that the petitioner herein agreed to pay Rs.5,000/- per month to the respondent and also to pay Rs.30,000/- to her provided she agrees for divorce. The Family Court, however, vide the impugned order enhanced the monthly compensation from Rs.2,500/- to Rs.6,000/- per month and also awarded Rs.30,000/- as arrears of enhanced maintenance on account of revision of the pay of the petitioner out of arrears of salary payable to him.</p> <p>16. While assailing the impugned order, it has been pleaded on behalf of the petitioner that the respondent is running a ration and grocery shop under a fair price shop licence issued in her name and is having sufficient income to maintain herself. It is also pleaded that the minor son is presently living with the petitioner (father), who is taking care of all his requirements and thus the order impugned is not sustainable in law. It is further pleaded that the petitioner being the eldest son in his parental family has obligations to maintain his aged mother,</p>

Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>unemployed brother and he, being residing in a rented house, is unable to shoulder the responsibilities after deduction of Rs.6,000/- per month from his net salary of Rs.12,474/-. It is also stated that the petitioner had relinquished his right not to seek enhancement of maintenance in view of the consent order dated 22.04.2001 passed in Family Case No.43 of 2001 wherein the respondent had specifically agreed not to seek further enhancement till the adjustment of the loan. A copy of the order has also been filed as Annexure A-5.</p> <p>17. We have heard the learned counsel for the parties and considered the impugned order and other material on record. It is admitted case of the parties that the respondent herself is running a ration and grocery shop under a fair price shop licence granted to her by the Government. The Court below while considering the question of enhancement of the maintenance did not enquire into the income of the respondent from the fair price grocery shop to assess the maintenance requirement of the respondent and minor son. The Court below only considered the income of the petitioner and out of the net income of</p>

Serial No.	Date	Order (s) with Signature (s)
1	2	3
		<p>Rs.12,474/-, almost 50% of the amount has been awarded to the respondent. The Court below has also not examined the genuineness of the plea of the petitioner as regard his legal obligation to maintain his aged mother and unemployed brother. There is no finding contrary to the assertion and submissions made by the petitioner. It is also not disputed by the learned counsel for the respondent that the minor son is presently in the care and custody of the petitioner. In that eventuality, the enhancement of the maintenance as directed by the Court below which is primarily on account of the maintenance of the minor son is not justified. Though various other pleas have been raised, however, without going into all such questions, suffice it to say that the Court below has not considered the relevant factors like income of the respondent from the fair price ration and grocery shop and the fact that the minor son is under the care and custody of the petitioner as also authenticity of alleged obligation of the petitioner towards his mother and un-employed brother.</p> <p>18. The impugned order, thus, is not sustainable in law. We set aside the impugned order and remit</p>

Serial No.	Date	Order (s) with Signature (s)
1	2	3
<p>Index : Yes / No Internet : Yes / No pm</p>		<p>back the case to the Family Court, South and West Sikkim at Namchi for <i>de novo</i> enquiry. The Family Court shall pass a fresh order after allowing opportunity to the parties to produce evidence etc. in respect of their respective contentions.</p> <p>No order as to costs.</p> <div style="display: flex; justify-content: space-around; align-items: center;"> <div style="text-align: center;">  Judge 27.08.2012 </div> <div style="text-align: center;">  Chief Justice 27.08.2012 </div> </div>

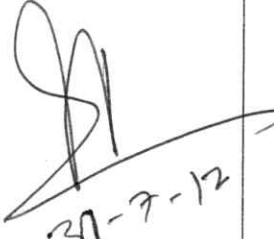
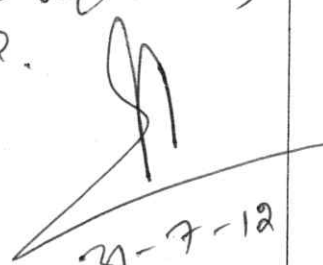
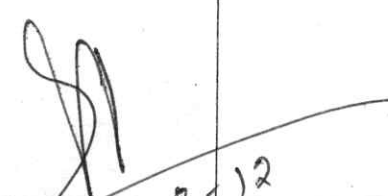
OFFICE NOTE SHEET

Case No. *MAT App No 01/2012*

Sl. No.	Date	Office Note with action taken	Court Order Reference
5	21-8-12	<p>A Copy of order dated 21-8-12 forwarded to Sh. J.B. Madhu, Addl. AG, Sh. A.K. Upadhyaya, Sr. Adv. and Sh. Karan Thirley, Govt. Adv. on 21-8-12</p> <p style="text-align: right;"><i>meas</i> <u>21/8/12</u></p>	21/8/12
6	22-8-12	<p>Order Copies of the order have been served upon the respective counsels on 22-8-12.</p> <p style="text-align: right;"><i>[Signature]</i> 22-8-12</p>	21/8/12
7	30-8-12	<p>A certified copy of order forwarded 27-8-12 forwarded to Ld. Judge, Family Court, STW on 30-8-12 by fax and by Regd. A.D.</p> <p style="text-align: right;"><i>meas</i> <u>30/8/12</u></p>	<p>file recd on 29-8-12 at 4.40 PM.</p> <p style="text-align: right;"><i>meas</i> <u>29/8/12</u></p>

OFFICE NOTE SHEET

Case No. MAT App. 01/2012

Sl. No.	Date	Office Note with action taken	Court Order Reference
3.	30-7-12	<p>Requisites not filed and as such, fresh notice not issued upon the respondent so far. A.D. card pertaining to notice issued on 19-6-12 has also not been received so far.</p> <p style="text-align: right;"> 30-7-12</p>	
4.	30-7-12	<p>A mention memo has been filed by the appellant today with prayer for listing the matter tomorrow, i.e. on 31-7-12.</p> <p style="text-align: right;"> 31-7-12</p>	
5.	14-8-12	<p>(i) A.D. card pertaining to notice issued on 19-6-12 has not been received back so far. (ii) Requisites for issue of notice for re-fixed date have not been filed and as such, fresh notice not issued so far.</p> <p style="text-align: right;"> 14-8-12</p>	<p>29-6-12 (placed in CA App. No. 45 of 2012)</p>