

Mrs. K. Vs. Mr. V.

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Court : Mumbai

Decided On : Feb-26-1991

Reported in : (1991)93BOMLR66

Judge : B.N. Srikrishna and ;S.P. Bharucha, JJ.

Appeal No. : (Original Side) Suit No. 199 of 1989

Appellant : Mrs. K.

Respondent : Mr. V.

Judgement :

S.P. Bharucha, J.

1. A difference having arisen between the views of two learned single judges of this Court in respect of the interpretation to be placed upon the Family Courts Act, 1984, (hereinafter called 'the said Act'), the following question has been referred for decision to the Division Bench:

Whether, on the plaint as it stands, it is the Family Court which has the jurisdiction in respect of this suit by virtue of the Family Courts Act and therefore, on the establishment of the Family Court this Court has ceased to have jurisdiction in respect of this suit by virtue of Clause (a) of Section 8 of the Family Courts Act and the suit stands transferred to such Family Court by virtue of Clause (c) of Section 8

of the Family Courts Act.?

2. The plaintiff has filed the suit against the defendant, her husband, and has sought (a) a declaration that she is entitled to an undivided right, title and interest in the matrimonial home and to reside therein; (b) a declaration that she is entitled to maintenance at the rate of Rs. 17,000/- per month for herself and the issue of the marriage, a son, over and above certain other facilities; (c) an injunction restraining the defendant from disposing of the matrimonial home, inducting any third person therein and interfering with her right to the use and occupation thereof and (d) an order and decree for maintenance as aforesaid. The plaint avers that the marriage between the plaintiff and the defendant was performed according to Hindu rites and a son was born, who is a minor. The conduct of the defendant is set out and, upon this basis, the aforementioned reliefs have been prayed for.

3. It was urged on behalf of the defendant before the learned single Judge (Cazi, J.) that this Court had no jurisdiction to entertain and try the suit and that it was only the Family Court established under the said Act which had such jurisdiction. Thereupon the preliminary issue as aforesaid was framed and tried. The learned Judge was inclined to follow the Full Bench judgment of the Madras High Court in *Mary Thomas v. K.E. Thomas* : AIR1990 Mad100 , which held that the High Court's jurisdiction was not taken away by the said Act but he found that another learned single Judge of this Court (Chaudhari, J.) had taken a contrary view, following the Division Bench judgment of the Madras High Court in *Patrick Martin v. Regine Martin* AIR [1989] Mad. 251. He, therefore, ordered that the matter be placed before the Hon'ble the Chief Justice for reference to a Division Bench to decide the preliminary issue.

4. We may at once note that the Division Bench judgment which was followed by Chaudhari, J., namely that in *Patrick Martin's* case, has been over-ruled by the Full Bench judgment of that Court in *Mary Thomas's* case.

5. The relevant provisions of the said Act are these. Its preamble reads thus:- 'An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.' The said Act extends to the

whole of India and comes into force on such date as the Central Government might, by notification in the Official Gazette, appoint, power being given to appoint different dates for different States. Under Section 2(e) all words and expressions used but not defined in the said Act and defined in the Code of Civil Procedure, 1908, have the meaning respectively assigned to them in the Code. For the purposes of exercising the jurisdiction and powers conferred on a Family Court by the said Act, the State Government has power under Section 3 to establish for every area in the State comprising a city or town whose population exceeds one million, a Family Court and it might establish Family Courts for such other areas in the State as it might deem necessary. Sections 7, 8 and 20 need to be reproduced in extenso.

7. Jurisdiction.-(1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

- (d) a suit or proceeding or an order or injunction in circumstances arising out of a marital relationship;
 - (e) a suit or proceeding for a declaration as to the legitimacy of any person;
 - (f) a suit or proceeding for maintenance;
 - (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.
- (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.
8. Exclusion of jurisdiction and pending proceedings.-Where a Family Court has been established for any area,-
- (a) no district court or any subordinate civil court referred to in Sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;
 - (b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);
 - (c) every suit or proceeding of the nature referred to in the Explanation to Sub-section (1) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2) of 1974,-
 - (i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such, suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.

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.

6. In Chapter IV the procedure to be followed by the Family Court is set out. The Family Court is obliged to make efforts (with the assistance of counsellors) to settle every dispute before it. It is empowered to hold proceedings in camera and to take the assistance of medical and welfare experts. Legal representation is not permitted as of right. The Evidence Act is not strictly applicable. A full transcript of oral evidence is not required. Evidence on affidavit is permissible.

7. The argument on behalf of the defendant is that by reason of Section 7 the Family Court alone has jurisdiction to entertain and try the suit and that by reason of Section 8 the jurisdiction of this Court is excluded. When the matter commenced before us this morning there were some discussions. A Chamber Summons was, by consent, allowed whereby the defendant was sued also as the karta of his joint Hindu Family. The character of the suit having been thus altered, it was conceded that the suit would remain in this Court. Consent terms to this effect were filed. Parties also agreed thereunder that the defendant would apply that the Matrimonial Petition before the Family Court should be transferred to this Court and that the plaintiff would consent to such transfer. To enable us to decide the issue which has been referred to us, which is bound to arise in many matters, counsel argued the rival contentions as if the consent terms had not been filed.

8. The principal question that must be answered is: Is the High Court a District Court when it entertains, hears and decides suits and proceedings of the nature referred to in the Explanation to Sub-section (1) of Section 7 of the said Act. The Full Bench of the Madras High Court in Mary Thomas' case posed the same

question in paragraph 10 and answered it in paragraph 20 thus:

On a consideration of the relevant provisions of law and the decisions which have been cited, we are clearly of the opinion that the jurisdiction of the High Court on its Original Side is not ousted by any of the provisions contained in the Act and the High Court shall continue to exercise the jurisdiction vested in it under the Letters Patent and all other laws, notwithstanding the provisions of Section 7, and Section 8 of the Act.

9. This is a Central Statute. It is a recognised principle that, so far as is possible, the same construction should be placed by a High Court upon a Central statute as has found favour with another High Court. Upon that principle alone we would be obliged to hold as the Full Bench of the Madras High Court has held. Additionally, the point here concerns the jurisdiction of the High Court. It would be awkward if suits and proceedings of the nature referred to in the Explanation to Sub-section (1) of Section 7 were entertained by one High Court and not by another. We have read the Full Bench judgment of the Madras High Court in Mary Thomas' case and are in respectful agreement with what is held therein. We may, however, set out further grounds for taking the same view.

10. The Guardians and Wards Act, 1890 defines a District Court in Section 4(4) thus:

District Court has the meaning assigned to that expression in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction.

11. The Special Marriage Act, 1954, [Section 2(c)] defines the District Court to mean 'in any area for which there is a city Civil Court, that court, and in any other area, the principal civil court of original jurisdiction...' The Hindu Marriage Act, 1955 [Section 3(b)] defines a District Court to mean 'in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction...' The General Clauses Act, 1897, provides the definition of a District Judge [Section 2(17)] and says that it means 'the Judge of a Principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its

ordinary or extraordinary original civil jurisdiction.' What is important to note is that the said Act does not define a District Court in the manner indicated above or at all. The expression 'District Court' does not in itself connote a High Court. Where the expression has to be read as including the High Court, the concerned statute has to so provide.

12. Emphasis was laid on behalf of the defendant upon Section 2(4) of the Code which defines 'District' to mean 'the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called the 'District Court') and includes the local limits of the ordinary original civil jurisdiction of a High Court.' It was submitted that, therefore, when the word 'Court' was appended to the word 'District' as defined in the Code, the High Court stood defined as a District Court and, therefore, fell within the meaning of that expression in the said Act. It is not possible to accept this submission because regard must be had to the terms of Section 3 of the Code which says, 'For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes as subordinate to the High Court and District Court.' It is clear that a distinction is drawn by the Code between a High Court and a District Court and the expressions are used therein in different contexts.

13. The learned Judge was right in placing reliance upon the Bombay Civil Courts Act, 1869. Section 7 thereof states that the District Court shall be the principal court of original civil jurisdiction in the district within the meaning of the Code. This is the Court which is relevant for the purpose of Section 2(4) of the Code. Though the area within which the High Court exercises original jurisdiction is a district, a High Court is not a District Court for it exercises jurisdiction, on its appellate side, not only over that district but over the entire State.

14. We must also have regard to the canons of interpretation of statutes. The established rule is that a 'statute should not be construed as taking away the jurisdiction of the courts in the absence of clear and unambiguous language to that effect.' This is a principle enshrined in the Judgments of Indian and English Courts. The principle applies with even greater vigour when the statute purports to take

away the jurisdiction of a superior court such as the High Court. We do not find in the provisions of the said Act words that clearly or unambiguously indicate the intention of Parliament to oust the jurisdiction of the High Court in regard to the categories of suits and proceedings mentioned in the Explanation to Sub-section (1) of Section 7. The words that are used apply in clear and unambiguous terms only to the jurisdiction of District Courts and subordinate Civil Courts.

15. It was argued on behalf of the plaintiff that even if the jurisdiction of the High Court had been ousted, as contended by the defendant, even so this suit did not stand transferred to the Family Court inasmuch as it was not a suit that fell within the Explanation to Sub-section (1) of Section 7. It was pointed out that the suit as it was now laid involved joint family property and the karta thereof and was, therefore, not a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. This contention must be upheld.

16. It was also submitted that this clause of the Explanation [Clause (c)] should be read down so that it was only property which had been acquired by the parties to a marriage or either of them at or about the time of the celebration thereof that would be covered thereby. To so do would, it was urged, bring Clause (c) in accord with Section 27 of the Hindu Marriage Act, 1955, and Section 42 of the Parsi Marriage and Divorce Act, 1936. Having regard to the frame of Clause (c), it is difficult to accede to the submission, though we must say that we envisage some difficulties when we have regard to the provision in the said Act that evidence is not required to be taken in accordance with the provisions of the Indian Evidence Act, a full transcript thereof is not required to be maintained and legal representation is not ordinarily obtainable.

17. At this point we must note that each of the clauses of the Explanation refers to 'a suit or proceeding'. It is not as if the reliefs that are mentioned there are to be sought in a matrimonial proceeding of the nature indicated in Clauses (a) and (b). Even when such reliefs are independently sought the suit or proceeding would lie in the Family Court.

18. Clause (g) of the Explanation mentions a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

Guardianship, custody and access to a minor are not sought only in matrimonial causes. Such reliefs may also be sought under the provisions of the Guardians and Wards Act, 1890, the Indian Lunacy Act, 1912 and the Hindu Minority and Guardianship Act, 1956. It is far from clear whether Parliament intended that proceedings even under these statutes in relation to guardianship, custody or access to a minor should be filed before the Family Court if instituted by a member of the minor's family.

19. These matters did not directly arise before us; in the course of the arguments. These, as also some other matters, were put to us as indicative of the scope of the said Act. We would be failing in our duty if we did not indicate such of these matters as cause us concern.

20. In the result, we answer the preliminary issue put to us thus: In the negative.

21. The suit shall now be placed before the learned single Judge for disposal in the ordinary course.

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