Ashraya Vs. Nil

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Court : Karnataka

Decided On : Mar-30-1990

Reported in : ILR1990KAR1349

Judge : Venkatachala and ;Hakeem, JJ.

Acts : Family Courts Act, 1984 - Sections 7(1); Guardian and Wards Act, 1890 - Sections 7 and 26

Appeal No. : M.F.A. Nos. 670 and 658 of 1990

Appellant : Ashraya

Respondent : Nil

Advocate for Pet/Ap. : R. Narayanappa and T.A. Ramachandraiah and ;Leslie D' Silva, Adv.

Disposition : Appeal dismissed

Judgement :

Venkatachala, J.

1. These appeals are preferred by petitioners in two Guardians and Wards cases against the common order dated 22-9-1989 made in 26 such clubbed cases by the Court of the XIX Additional City Civil Judge, Bangalore ('Court of City Civil Judge'),

directing return of the petitions filed by them under Sections 7 and 26 of the Guardians and Wards Act, 1890 ('the G & W Act'), as per Rule 10 of Order VII of the Code of Civil Procedure, 1908 ('the Code'), at the same time requiring the petitioners to avail of the provision in Rule 10A of Order VII of the Code.

2. The point, rather of considerable importance, which arises for our decision in these appeals, is whether the proceedings in the petitions filed by the appellants-petitioners in the Court of City Civil Judge (the District Court) under Sections 7 and 26 of the G & W Act, are proceedings of the nature falling under Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Family Courts Act, 1984 ('the Act'), respecting which the Family Court established under the Act shall have and exercise jurisdiction.

3. As the history of the Family Court and the salient aspects of the Act providing for establishment of Family Court could prove to be of considerable advantage in the rendering of our decision on the said point, we shall, briefly refer to them at the out-set.

4. Law Commission of India ('the Law Commission'), in its Fifty-fourth Report on the Code forwarded to Government of India in the year 1973, while recommending introduction of a new Order, Order XXXII-A, into the Code to deal with matters relating to family, gave reasons therefor in Chapter 32A of that Report thus:

32A.2. In the administration of justice in disputes relating to the family, one has to keep in mind the human relationship with which one is dealing. The objective of family counselling, as a method of achieving the ultimate object of preservation of the family, is to be kept in the forefront.

32A.3. Litigation concerning or involving affairs of the family, therefore, requires a special approach, in view of the serious emotional aspects involved. For this sensitive area of personal relationship, our ordinary judicial procedure is not ideally suited. As Sir Garfield Barwick (then Attorney-General of Australia), said in the debates on the Matrimonial Clauses Bill, 1959, the Judge not unnaturally feels reticent about intruding into the human relationship of those who come before him; and the parties themselves so often enter into a conspiracy of silence, where their

innermost secrets are concerned.

32A.4. It is now being increasingly realised that -

(a) as far as possible, an integrated broad based service to families in trouble, should become a part of the Court system;

(b) the existing Court structure should be so organised that one single Court should deal with the problem of preserving the families; and

(c) the conventional procedure dominated by the adversary system may not be appropriate for disputes concerning the family.

32A.5. Many of these matters are outside the scope of this Report; moreover, it will require considerable time and effort to remould the legal system to make it an effective instrument for dealing with them. Nevertheless, it is felt that so far as the Code of Civil Procedure is concerned, it may be desirable to have special provisions on some matters, provisions which highlight the need for adopting a different approach, where matters concerning the family are at issue, including the need for efforts to bring about an amicable settlement .'

5. Then the Law Commission, in its Fifty-ninth Report on Hindu Marriage Act and Special Marriage Act, forwarded to Government of India in the year 1974, expressed its view on the need of establishment of Family Courts to deal with matters concerning the family by adoption of a human approach thus:

'In our Report on the Code of Civil Procedure, we have had occasion to emphasise that in dealing with disputes concerning the family, the Court ought to adopt a human approach -an approach radically different from that adopted in ordinary civil proceedings, and that the Court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, states should think of establishing family Courts, with Presiding Officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such Courts all disputes concerning the family should be referred. What we have said in our Report on the Code of Civil

Procedure should be treated as a part of the present Report also.'

6. Thereafter, in the year 1984, when the Bill was introduced in Parliament for being passed as an Act, Statement of Objects and Reasons accompanying that Bill refers to the futility of the special procedure (Order XXXII-A) required to be adopted by ordinary Courts in dealing with family matters and the need for establishment of Family Courts thus:

'Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.'

7. Salient aspects of the Act, which has been enacted pursuant to the said Bill, are reflected in the following provisions: Section 3, which provides for establishment of Family Courts, requires the State Government concerned to establish Family Courts not merely for areas in its State covered by Cities and Towns, but also for all other areas of the State needing the establishment of such Courts. Section 4, which provides for selection of persons for appointment as Judges of Family Courts, requires that every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the Welfare of the children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and

counselling, are selected and preference shall be given to women. Section 5 contains the provision which enables the Family Court to function with the association of institutions or organisations engaged in social welfare or the persons working in the field of social welfare, with a view to effectively exercise its jurisdiction. Section 6 contains the provision which enables the Family Court to obtain assistance in its functioning from Counsellors, Officers and employees. While Section 7 enumerates the categories of matters respecting which Family Court shall have and exercise jurisdiction, Section 8 not merely excludes the jurisdiction of other Courts respecting matters categorised under Section 7, but also declares that if any such categorised matter was pending before other Court, the same shall stand transferred to Family Court on its establishment in the concerned area. Section 9 imposes a duty on the Family Court to make all efforts in bringing about an amicable settlement of disputes between the parties before it. Sub-section (3) of Section 10, which empowers the Family Court to evolve its own procedure in bringing about settlement of matters before it and finding the truth of the disputed facts in matters before it, frees it from the shackles of rigid Rules of procedure by which ordinary Courts are bound. So also, Section 14, which empowers the Family Court to receive as evidence any report, statement, document, information or matter for effectively deciding the dispute before it, frees it from the shackles of rigorous Rules of evidence as to relevancy or admissibility of evidence under the Indian Evidence Act, 1872, by which ordinary Courts are bound. Besides, while Section 15 relieves the Family Court of the burden of recording evidence of witnesses at length by permitting it to make a Memorandum of the substance of such evidence, Section 16 permits the Family Court to receive evidence of normal character given by affidavit. Section 18 not merely declares that the Judgments and decrees of the Family Court to have the same force and effect as that of Civil Court, but empowers the Family Court to execute its Judgments and decrees or orders as Civil or Magistrate Courts execute them. Section 19 while provides for filing of an appeal against every Judgment or Order of the Family Court before the High Court and such appeal being heard by a Bench consisting of two or more Judges, expressly prohibits the filing of an appeal or revision against any interlocutory order made by the Family Court. Section 20 takes care to declare the over-riding effect of the Act on matters covered by its

provisions notwithstanding anything to the contrary in any other law in force or in any instrument having effect by virtue of any other law.

8. Mindful of the history of the Family Court and the salient aspects of the Act, which provides for its establishment, we shall proceed to examine the afore-stated point whether the proceeding instituted in petitions under Sections 7 and 26 of the G & W Act before the Court of City Civil Judge (District Court) by respective petitioners therein (respective appellants here) is a suit or proceeding of the nature categorised under Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act, as would make the Family Court of the area established under the Act, have and exercise jurisdiction thereof.

9. Unless the nature of the proceeding instituted in the Court of City Civil Judge by the respective petitioners in their petitions under Sections 7 and 26 of the G & W Act is of the nature of proceeding categorised in Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act, question of the Family Court exercising the jurisdiction in the matter will not arise. Our endeavour here, therefore, would be to find the exact nature of proceeding instituted by the concerned petitioners (appellants concerned in appeals) in their petitions before the Court of City Civil Judge. Appellants 1 to 3 in M.F.A. FR.No. 11612/89 were respectively petitioners in petition G & W Case No. 10072/89 of the Court of City Civil Judge. Petitioner-1 is an orphanage which has a destitute child. Petitioner-2 and petitioner-3 are husband and wife, the nationals of Sweden, who are interested in taking in adoption the said destitute child in the orphanage of petitioner-1. For facilitating such adoption of the destitute child, a minor of Indian Nationality, by petitioners 2 and 3 in Sweden according to adoption law prevailing there, the said proceeding is instituted by all the three petitioners in the Court of City Civil Judge, a District Court, by filing a petition under Sections 7 and 26 of the G & W Act invoking the jurisdiction of that Court to obtain orders in the matter of appointment of petitioner 2 as guardian of the person of the minor (destitute child with petitioner-1) and in the matter of grant of permission to remove that destitute child out of its (that Court's) territorial jurisdiction and to Sweden, the foreign Country of petitioners 2 and 3, obviously in consonance with the pronouncement of our Supreme Court in LAXMI KANT v. UNION OF INDIA, : [1984]2SCR795 :

'Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the Country in which the foreign parent resides. But in order to enable such adoption to be made in the Country of the foreign parent, it would be necessary for the foreign parent to take the child to his own Country where the procedure for making the adoption in accordance with the law of that Country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the Court and is permitted by the Court to take the child to his own Country under the provisions of the Guardians and Wards Act, 1890. Today, therefore, as the law stands, the only way in which a foreign parent can take, an Indian child in adoption is by making an application to the Court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own Country for the purpose of adopting it in accordance with the law of his Country.'

Proceeding in G & W Case No. 10062/89 instituted by petitioners (appellants in M.F.A. FR.No. 12574/89) by their petition presented before the Court of City Civil Judge under Sections 7 and 26 of the G & W Act and the order sought to be obtained therein from that Court are similar to those in G & W Case No. 10072/89. Hence, be it the proceeding in G & W Case No. 10062/89 or the proceeding in G & W Case No. 10072/89 instituted in the Court of City Civil Judge, Bangalore, a District Court, seeking appointment of guardian respecting the concerned destitute child (minor) and grant of permission for removing such child out of the territorial jurisdiction of the City Civil Judge, Bangalore, for being taken to a foreign Country, an ancillary matter to the appointment of guardian, is apparently a proceeding relating to guardianship of person of minor and the custody of or access to such minor by guardian categorised in Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act.

10. However, since three grounds were urged by learned Counsel for the appellants in support of their argument that a suit or proceeding under Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act relates to a minor with

a family, but does not relate to a destitute child, a minor with no family concerned in each of the appellants' petitions before the Court of City Civil Judge, a District Court, we propose to examine the sustainability of each of such grounds.

11. The first ground urged was that Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act though in terms refers to a suit or proceeding concerning the guardianship of the person, or the custody of, or access to any minor, the reference to 'any minor' there, must be construed as referring to 'any minor of a family' having regard to the object of the Act as recited in its Preamble, to wit, '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 concerned therewith.' The ground, in other words, was that the object of the establishment of Family Courts under the Act, as found in its Preamble being to deal with disputes or other matters of the family, reference to 'any minor' in Clause (g) above must be regarded as reference to 'any minor in a family.' We find no substance in the ground as the terms of the Preamble to the Act cannot be serviced to qualify or cut down the language of Clause (g) above, the enacting provision of the Act, which gives out the meaning of that clause clearly and unambiguously, as referring to any minor inasmuch as such must be the approach to be made by the Courts when aid of the Preamble to an Act is sought to construe an enacting provision of such Act (See: Y.A. MAMARDE v. AUTHORITY UNDER THE M.W. ACT), : (1972)IILLJ136SC .

12. The second ground urged was that when it is the Family Court which shall have and exercise jurisdiction in a suit or proceeding in relation to the guardianship of the person or the custody of or access to any minor under Clause (g) of the Explanation to sub-section (1) of Section 7 of the Act, the minor concerned in such suit or proceeding has to be regarded as belonging to the 'family' as defined in Rule 6 of Order XXXII-A of the Code, as the words not defined in the Act shall have the meaning given to such words in the Code because of what is said in Clause (e) of Section 2 of the Act. It is true that Clause (e) of Section 2 of the Act states that a word used in the Act, but not defined therein, shall carry the meaning of such word as defined in the Code. But, what has to be seen is whether the meaning of the word 'family', as defined in the Code,

could be adopted as the meaning of the word 'family' in the expression 'Family Court' which shall have and exercise jurisdiction in a suit or proceeding under Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act, as that is what was required to be done by us, by learned Counsel for the appellants, for giving a restricted meaning to the word 'minor' in Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act as 'minor of a family'. Though 'family' as such is not defined in the Act, the expression 'Family Court' has been defined in the Act as meaning 'Family Court established under Section 3 of the Act'. In this situation, splitting of the expression 'Family Court' into 'Family' and 'Court' and understand the 'Family Court' as a Court dealing with matters of persons concerned with the 'family' as defined in the Code is unwarranted not merely because such splitting of an expression as the one on hand and understanding the words of the expression separately is unknown to the statutory interpretation, but also because adoption of such course could bring about a result unintended by the provision. Besides, when Rule 6 of Order XXXII-A of the Code giving the meaning of 'family', by its explanation excludes the concept of family in any personal law or any other law for the time being in force, it is difficult even to comprehend how a minor in Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act cannot be a person other than a member of 'family' referred to in that Rule. Hence, this ground cannot be sustained.

13. The third ground urged was that if regard is given to the enumerated categories of suits .and proceedings found in Clauses (a) to (f) of the Explanation to Sub-section (1) of Section 7, on the application of ejusdem generis rule, the suit or proceeding in Clause (g) of that Explanation must be regarded as one referable to the 'minor of a family'. We find no substance in this ground as well, for the reasons which we shall presently state.

14. Explanation to Sub-section (1) of Section 7 reads thus:

'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 for 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.'

If the clauses in the Explanation are seen, all of them cannot be regarded as those confined to the person of a family, as for instance, a suit or proceeding for maintenance in Clause (f) thereof need not be in relation to a person of a family alone, in that, such suit or proceeding may relate not merely to a person falling outside a family as ordinarily understood, but also to a person ceased to be a person of such family. Moreover, when the suits or proceedings respecting which 'Family Court' shall have and exercise jurisdiction, falling under the category of a clause in the Explanation to Sub-section (1) of Section 7, are explicitly stated by specifying the same, question of applying 'ejusdem generis rule' to limit or restrict the categorised suits or proceedings in one clause, with reference to the categories of suits or proceedings in other clause appears to us to be unwarranted. What needs to be noted is that to attract the application of the ejusdem generis rule, there must be a general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words (See: Paragraph 6 in Chapter 12 of Maxwell on the interpretation of Statutes - 12th Edition). Such situation since does not arise in relation to the understanding of the word 'minor' in

Clause (g) above, no question of application of the ejusdem generis rule can arise. Besides, where the general word 'minor' in Clause (g) above is made to comprehend within its ambit every minor by the use of the word 'any' preceding the word 'minor', to attempt to restrict the meaning of the word 'minor' to the 'minor of a family' would, we cannot help thinking, be an attempt to defeat the object sought to be achieved by Parliament in enacting the clause.

15. The other argument of learned Counsel for the appellants was that the decisions of the Supreme Court in Laxmi Kant v. Union of India and LAXMI KANT PANDEY v. UNION OF INDIA, : AIR 1986 SC272 dealing with inter-Country adoptions, when had brought about judicial legislation to enable the Court deciding the application before it made under the G & W Act for appointment of a foreigner as guardian respecting the person of a minor of Indian Nationality and for minor's removal to the Country of such foreigner, to judge the suitability of such foreigner to become an adoptive parent, the proceeding in such application has to be regarded as a proceeding relating to adoption of the minor and not that relating to guardianship falling under Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act. We find it difficult to accede to this argument.

16. Of course, it cannot be disputed that procedures laid down by the Supreme Court in its aforesaid decisions are intended to guide the Court deciding the guardianship application in finding whether the foreigner, whose appointment as the guardian of the person of the minor is sought, could be, regarded as proper and fit to become the adoptive parent of that minor as the very motivating force for facilitating such adoption is the prospect of bright future of such minor. But, the fact that the Court deciding the application of guardianship has to decide the question whether the foreigner to be appointed as guardian is a proper and f i t person to take the concerned minor in adopt ion, cannot, in our view, make the proceeding instituted in the Court by filing the guardianship application under the G & W Act anytheless the proceeding relating to guardianship of the person of the minor, in that, the Supreme Court, in Lakshmi Kanth's case (supra), as already pointed out, has laid down that there is no way of facilitating adoption of a minor (child) of Indian Nationality by a foreigner except by way of initiating a proceeding for appointment of the concerned foreigner as the guardian of the person of the

concerned minor (child) and for removal of that child by the foreigner to his own Country, in a Court as provided for in G & W Act. When that is so, a proceeding commenced by filing an application under the G & W Act in Court for appointment of a foreigner as guardian of the person of the minor child of Indian Nationality and for removal of such child from the jurisdiction of the Court to the Country of such foreigner, cannot be regarded as a proceeding relating to adoption of a minor child. Thus, when initiation of a proceeding of the kind for appointment of a guardian of a minor and for removal of such minor to a foreign Country is taken under the G & W Act, the Court which gets jurisdiction to entertain such proceeding after the establishment of the Family Court, would be that Court itself by reason of Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act.

Moreover, the said argument cannot commend our acceptance since its acceptance would result in dismissal in limine of the appellants' applications under the G & W Act and similar other applications which are being made in Courts availing the benefit of the observations of the Supreme Court in Lakshmi Kant's case (supra), as unmaintainable under the G & W Act, inasmuch as the remedy, which becomes available under the G & W Act, is in respect of guardianship matters and not in respect of adoption matters.

17. Yet, another argument urged on behalf of the appellants was that the Family Court established for the area of Bangalore City under the Act being new, it cannot deal with guardianship matters in Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act, as effectively as the Court of City Civil Judge at Bangalore (District Court), which had jurisdiction to deal with such matters under the G & W Act and hence we have to regard the Family Court established under the Act as a Court which has no jurisdiction to deal with such matters of guardianship. We shall examine the sustainability of this argument as well.

18. When, under the Act, Family Court established, as provided for therein, is vested with jurisdiction to deal with certain guardianship matters arising for consideration in the area of its operation, it is neither open to us nor open to any other Court to divest the Family Court of the jurisdiction so vested. Even

otherwise, the view of learned Counsel for the appellants that the Family Court established for the area of Bangalore City under the Act cannot be regarded as a well equipped Court to deal with guardianship matters vested in it, which forms the foundation for their argument under consideration, is unsustainable, in that, it ignores the provisions in the Act as to the nature of persons to be appointed as Presiding Officers of Family Courts and the extraordinary powers conferred under the provisions of the Act upon the Presiding Officers of Family Courts in deciding matters coming up before them. To repeat what we have said of them while referring to the salient aspects of the Act, the Presiding Officers appointed for Family Courts are persons who are committed to the need to protect and preserve the institution of marriage and to the promotion of the welfare of the children. Besides, such persons are those of experience and expertise in counselling and reconciliation of matters which may come up before them. Women are preferred for such appointments obviously taking note of their natural concern and sympathy for persons involved in such matters. Provisions are found in the Act which enable the Family Court to dispense justice in matters coming up before it not merely with least expense and without publicity, but expeditlously, as it is not bound by the technical rules of procedure and evidence by which ordinary Courts are bound. Provisions in the Act are such which enable the Family Court to obtain assistance from experts, Social Organisations or Social Workers for resolving matters coming up before them satisfactorily. There are also provisions in the Act which avoid usual delays which occur in disposal of matters before ordinary Courts. Thus, the Family Court established under the Act, if anything, is the best suited Court for dealing with matters under Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act, respecting which it is conferred with exclusive jurisdiction. Hence, the argument of learned Counsel for the appellants that the Family Court, is not a suitable Court to deal with guardianship matters covered by Clause (g) of the Explanation to Sub-section (1) of Section 7 of the Act, but it is the Court of City Civil Judge, a District Court, lacks merit.

19. Consequently, as we are of the considered view that it is the Family Court of Bangalore City which shall have and exercise jurisdiction to deal with the proceedings of the petitioners (appellants here) initiated by their applications under Sections 7 and 26 of the G & W Act before the Court of City Civil Judge, we affirm

the order of the Court of City Civil Judge under appeal by which the said applications are directed to be returned for presentation before the Family Court.

20. In the result, we dismiss these appeals, however, without costs.

21. If the applications invited from the petitioners or others similarly situated, by the order under appeals, even if are made now before the Court of City Civil Judge, such applications may be entertained and the applications under Sections 7 and 26 of the G & W Act made before it may be returned for presentation before the Family Court.