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Court : Allahabad

Decided On : Feb-21-1990

Reported in : AIR1991All189; 1991CriLJ1838

Judge : V.K. Khan and ;R.A. Sharma, JJ.

Acts : [Family Courts Act 1984](#) - Sections 7, 7(1), 10 and 11 to 16; Code of Criminal Procedure (CrPC) 1974 - Sections 127 and 407; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 22, 23, 23(3) and 24 - Order 18, Rule 13 - Order 32A, Rules 2, 3, and 4; [Evidence Act, 1872](#) - Sections 3; Muslim Women (Protection of Rights on Divorce) Act, 1981 - Sections 3; [Code of Criminal Procedure \(CrPC\) , 1973](#); [Constitution of India](#) - Sections 7A;

Appeal No. : Criminal Misc. Transfer Applns. Nos. 77, 78 and 43 of 1989

Appellant : Munna Lal and Etc.

Respondent : State of U.P. and Another Etc.

Advocate for Def. : Standing Counsel and ;M.D. Singh, Adv.

Advocate for Pet/Ap. : K.K. Dubey and ;A.R.B. Kher, Adv.

Judgement :

ORDER

R.A. Sharma, J.

1. Hon'ble single Judge was doubtful as to whether Section 24 of the Civil Procedure Code will apply to Family Courts constituted under the Family Courts Act, 1984 (hereinafter referred to as the Act), and as such, the case was referred to a Division Bench for decision, as this question might come often before this Court.

2. Criminal Misc. (Transfer) Application No. 77 of 1989 has been filed under Section 24 of the C.P.C. for transferring the case No. 28 of 1988 under Section 127 of the Cr.P.C. from Family Court, Jhansi to some other Family Court. Civil Misc. (Transfer) Application No. 78 of 1989 has been filed under Section 22 read with Section 23(3), C.P.C. for transferring Original Suit No. 124 of 1988 from Family Court, Jhansi to the corresponding court in Gwalior in the State of Madhya Pradesh. Civil Misc. (Transfer) Application No. 43 of 1989 has been filed under Section 24 of the C.P.C. for transferring the case No. 64 of 1988 from Family Court, Jhansi to some other court competent to dispose of the application under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1981.

3. Common question, which has been argued in these three cases, is as to whether High Court has jurisdiction to transfer the case from one Family Court to another Family Court in exercise of the powers of transfer under C.P.C. and Cr.P.C. Section 7 of the Act, which deals with the jurisdiction of the Family Court is quoted below :

'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.

In connection with the suits and proceedings referred to in the explanation to sub-sec. (1) of Section 7 of the Act a Family Court exercises jurisdiction exercisable by

any district or any subordinate civil court and for the purpose of exercising such jurisdiction be deemed to be a district court or subordinate civil court, as the case may be and in respect of the matter relating to Chapter IX of the Cr.P.C. Family Court exercises the jurisdiction exercisable by a Magistrate 1st Class under Chapter IX of the Code.

4. Section 10 of the Act provides for the procedure and is quoted below :

'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, 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 thereunder, shall apply to the proceedings under Chapter IX of the 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.'

By virtue of Section 10 of the Act, provisions of C.P.C. and of any other law for the time being in force shall apply to suits and proceedings before a Family Court and for the purpose of these provisions of the Code. Family Court shall be deemed to be a civil court and so far as proceedings under Chapter IX of the Cr.P.C. are concerned, the provisions of the Cr.P.C. have been made applicable.

5. Family Court, as such, is a substitute of a civil court in respect of the matters referred to in the explanation to sub-section (1) of Section 7 of the Act and has been declared to be a district court or the subordinate civil court as the case may be. When exercising powers under Chapter IX of the Cr.P.C. Family Court is a

substitute of a Magistrate 1st Class and exercises all the powers, which are exercisable by those Magistrates. By S. 10 of the Act, C.P.C. has been made applicable to matters dealt with in the explanation to sub-section (1) of Section 7 of the Act and Family Court when dealing with these matters, has been declared to be a civil court. Likewise, Code of Criminal Procedure has been made applicable to proceedings under Chapter IX of the Cr.P.C.

6. Family Court, when exercising powers and jurisdiction relating to the matters referred to in explanation to sub-section (1) of Section 7 of the Act is a civil court, and as such, High Court has the jurisdiction to transfer the cases from one Family Court to another under Sections 22, 23 and 24 of the C.P.C. Similarly, when Family Court is exercising the powers and jurisdiction under Chapter IX of the Cr.P.C., it is criminal court equivalent, to the Magistrate 1st Class and High Court will have the powers to transfer the case from one Family Court to another under Section 407 of the Cr.P.C.

7. Sri M: D. Singh Shekhar, learned counsel for the opposite parties in Civil Misc. (Transfer) Application No. 78 of 1989 has however, raised an objection that Family Court is not a court and, as such, the High Court has no jurisdiction either under the C.P.C. or Cr.P.C. to transfer a case from one Family Court to another. In support of this argument, it has been urged that the aim and object of the Act is not to decide a dispute but to settle it, in view of Sections 11 to 16 of the Act, proceedings in the Family Court are to be held in camera in the discretion of the court and if any of the parties so desires and no party is entitled to be represented before a Family Court by a legal practitioner and further applicability of the Indian [Evidence Act, 1872](#) has been dispensed with and it is not necessary to a Family Court to record evidence of witnesses at length and only memorandum of the substance of what the witness deposes is sufficient compliance, and as such, it cannot be said that a Family Court is a Court.

8. 'Court' has not been defined in the Family Courts Act, Section 3 of the Evidence Act defines the Court as to include all Judges and Magistrates and all persons except arbitrators legally authorised to take evidence. By virtue of this definition any person, who is legally authorised to take evidence becomes a Court. The

Supreme Court in *Virindar Kumar v. State of Punjab*, AIR 1956 SC 153 has held that (at page 157 of AIR) :

'What distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it.

And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court.'

Judicial power, which a court exercises is a power, which is conferred by statute and is a part of State's inherent judicial functions. The expression 'court' in the context denotes a tribunal constituted by the State as a part of the ordinary hierarchy of courts which are invested with the State's inherent judicial powers. A sovereign State discharges legislative, executive and judicial functions and can legitimately claim corresponding powers which are described as 'legislative, executive and judicial powers' *Associated Cement Companies Ltd. v. P. N. Sharma*, AIR 1965 SC 1595.

9. Privy Council in the case of *Shell Co, of Australia v. Federal Commissioner of Taxation*, (1931) AC 275, has defined 'Judicial power' as follows :

'What is 'judicial power'? Their Lordships are of the opinion that one of the best definitions is that given by Griffith CJ in *Huddart, Parker & Co. v. Moorehead*, (1909) 8 CLR 330 at p. 357 (Aus) where he says : 'I am of opinion that the words Judicial power as used in S. 7 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal

or not) is called upon to take action.'

In relation to the same subject matter, their Lordships of the Privy Council laid down the following negative proposition :--

' 1. A tribunal is not necessarily a court in this strict sense because it gives a final decision;

2. Nor because it hears witnesses on oath;

3. Nor because two or more contending parties appear before it between whom it has to decide;

4. Nor because it gives decisions which affect the rights of subjects;

5. Nor because there is an appeal to a court;

6. Nor because it is a body to which a matter is referred by another body.'

10. The Supreme Court in *Brajnandan Sinha v. Jyoti Narain*, AIR 1956 SC 66, has concluded in paragraph 18 that :

' It is clear, therefore, that in order to constitute a court in the strict sense of the term, an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement.'

11. In order to constitute a court, State's sovereign judicial powers must be conferred on it by a statute for deciding the dispute in a judicial manner so as to decide the rights of the parties in a definitive judgment. To decide a dispute in a judicial manner and declare the rights of the parties in a definitive judgment is essential sine qua non of a court. The decision in a judicial manner contemplates that parties are entitled as a matter of right (i) to be heard in support of their claim; (ii) and to adduce evidence in proof of it; and (iii) to decide the matter on consideration of evidence in accordance with law.

12. Order XXXII-A of the C.P.C. deals with the suits relating to matters concerning the family. Rule 2 of this Order is identical with Section 11 of the Act, Rule 3 is similar to Section 9, Rule 4 is on the same line as that of Section 12 of the Act. Rule 3 of this order, like Section 9 of the Act, provides for settlement in respect of the subject matter of the dispute. Under Order XXXII-A the proceedings relating to matters concerning family are to be held in camera and the court is to make all efforts in arriving at a settlement in respect of the subject matter of the dispute and the court is also entitled in such suits or proceedings to secure the services of any person or woman for the purpose of assisting the court. Before enactment of the Family Courts Act, the suits and proceedings relating to matters concerning the family provided for by Order XXXII-A of the C.P.C. were to be dealt by regular civil court and merely because proceedings are to be held in camera or effort was to arrive at a settlement, it cannot be said that the courts exercising the powers concerning the family are not the court.

13. With the growth of the population the litigation has gone tremendously and some disputes are such that in order to protect the honour and position of the parties to the litigation the proceedings should not be exposed to the public. Matters relating to family are some of those disputes and, as such, provisions have been made to hold the proceedings in camera. When the proceedings are held in camera, possibility of settlement is greater. Many a times the claims are defeated because of the technical rules of the Evidence Act and if the Evidence Act is strictly applied to the proceedings like Family Court, the very purpose may be defeated in many cases. Object of establishment of Family Court is to decide the disputes relating to family at the earliest without going into the technicalities. In order to achieve this object, provisions have been made for excluding the legal practitioner and taking the evidence and material etc. on record even though not admissible under the Evidence Act. With the same object in view, it has further been provided that an oral deposition of the witnesses need not be recorded at length and what is required is memorandum. Even regular civil court many a times are authorised by the Code of Civil Procedure not to take down or record the evidence of a witness at length and recording of the memorandum of the substance of what the witnesses have deposed is sufficient compliance. Reference may be made to Order XVIII, Rule 13, where the courts are required to record memorandum of

evidence in non-appealable cases. If the court proceeds under Order XVIII, Rule 13, it cannot be said that the Court has ceased to be a court.

14. Family Court is a court, which decides the disputes in exercise of the State's judicial power conferred on it by a statute in a judicial manner and declare the rights of the parties. Parties before the Family Court are entitled to be heard in support of their case and they are also entitled to adduce evidence in order to prove their claim, they can cross examine each other and adduce evidence. The Family Court is obliged under law to settle and decide the dispute on the basis of the evidence produced by the parties. Family Court has all the attributes and satisfies all the ingredients of a court. It has been declared by Section 7 of the Act to be a district court or subordinate civil court to which provisions of the C.P.C. and Cr.P.C. have been applied by Section 10 of the Act. It will not cease to be a court merely because some restrictions are imposed by Sections 11 to 16 of the Act.

15. Looked at from every angle Family Court is a court and as such, High Court has powers under Sections 22 to 24 of the C.P.C. to transfer a case relating to the matters dealt with by explanation to sub-section(I) of Section 7 of the Act and likewise has powers under Section 407 of the Cr.P.C. to transfer a case relating to Chapter IX, Cr.P.C.

16. We have dealt with the question referred to us and have not gone into the merits in order to find out whether the case deserves to be transferred or not. Criminal Misc. (Transfer) Application No. 77 of 1989 shall be listed before the Hon'ble Judge dealing with the transfer under Section 407 of the Cr.P.C. for deciding it on merits. Civil Misc. (Transfer) Application No. 78 of 1989 and Civil Misc. (Transfer) Application No. 43 of 1989 shall likewise be listed before the Hon'ble Judge dealing with transfer under the C.P.C.

17. Reference answered accordingly.