

Shyni Vs. George and ors.

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Court : Kerala

Decided On : Apr-01-1997

Reported in : AIR1997Ker231; II(1997)DMC676

Judge : P.K. Balasubramanyan, J.

Acts : [Family Courts Act, 1984](#) - Sections 7; Code of Criminal Procedure (CrPC) , 1908 - Order 2, Rule 2

Appeal No. : O.P. No. 3869 of 1996

Appellant : Shyni

Respondent : George and ors.

Advocate for Def. : Mathew John, Adv.

Advocate for Pet/Ap. : K.T. Sankaran,; John S. Ralph,; T.D. Robin,;

Disposition : Petition allowed

Judgement :

ORDER

P.K. Balasubramanyan, J.

1. This Original Petition is filed by a spouse to a subsisting marriage. She is the wife. She filed a suit against the other spouse to the marriage, her husband and

her father-in-law. The suit was for recovery of amounts belonging to her and given into the hands of either the husband or the father-in-law at or about the time of the marriage for being held by them. It could probably be contended that they were to hold them in trust for her. She instituted the suit originally in the Family Court, Trichur. By an order of this Court, the said suit was transferred to the Family Court, Ernakulam for being tried with an application for restitution of conjugal rights filed by the husband in the District Court of Kottayam. This Court transferred that proceeding also to the Family Court, Ernakulam.

2. Before the Family Court, Ernakulam an objection was taken that since one of the parties arrayed as a defendant is not a party to the marriage but is only the father-in-law of the plaintiff and the suit relates to recovery of money entrusted to him also at the time of the engagement, the Family Court does not have jurisdiction to entertain or decide the suit. It was contended on behalf of the wife that the suit was by a spouse to a marriage against the other spouse and the claim for recovery of amounts under three heads was sought to be made jointly against the other spouse, the husband and the father-in-law and that there was nothing in the Family Courts Act which precluded the Court from trying such a suit. The learned Family Court Judge took the view that a suit could be entertained by the Family Court in respect of the property of one of the spouses only against the other spouse and not against the father of the other spouse and consequently it was necessary for the plaintiff wife to delete the second defendant father-in-law from the array of parties and only if she does so, the Family Court can proceed with the suit. The contention raised on behalf of the wife that the claim was for recovery jointly against the husband and the father-in-law and if the suit is not maintainable against the father-in-law, she would be forced to file another suit on the same cause of action against the father-in-law in another Court and to maintain the present suit against the husband in the Family Court simultaneously and such a situation cannot be normally contemplated was brushed aside by the Family Court. The order of the Family Court ordering the plaintiff-wife to amend the plaint suitably by deleting the claim against the father-in-law, second defendant and further holding that if the plaint is not so amended the suit will be proceeded with as if it is only one against the first defendant is challenged in this Original Petition filed by the wife. The prayers in the Original Petition are resisted by the

husband and- the father-in-law arrayed as respondents 1 and 2.

3-4. The Family Court is established by the Family Courts Act, 1984 with the object of establishing 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 Court is established by the issue of a Notification under Section 3 of the Act and a Judge is appointed in terms of Section 4 of the Act. Sub-section

(3) of Section 4 provides that no person shall be qualified to be appointed as a Judge of the Family Court unless he had held for seven years a Judicial Office or office of a member of a Tribunal or any post under the Union or a State requiring special knowledge of law or has for at least seven years been an Advocate of a High Court or possessed such other qualification as the Central Government may with the concurrence of the Chief Justice of India prescribe. In this State, the Judges appointed under Section 4 of the Act are the District Judges in service or retired District Judges who had not attained the age of 62 years.,The jurisdiction is conferred on the Family Court under Section? of the Act. It provides that subject to the other provisions of the Act a Family Court shall 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 to that Section. Clause (b) of Section 7(1) of the Act provides that the Family Court shall be deemed for the purpose of exercising such jurisdiction to be a District Court or a subordinate Civil Court to which its jurisdiction extends. There is a clear emphasis in Section 7(1) of the Act that the Family Court is to be deemed a Civil Court and that it shall have and exercise all the jurisdiction exercisable by the District Court or a subordinate Court. Explanation to Section 7(1) deal with suits, which are within the purview of the Family Court. Sub-section

(2) by Clause (a) provides for the exercise of jurisdiction by the Family Court the jurisdiction exercisable by a Magistrate of the 1st Class under Chapter IX of the Code of Criminal Procedure and Clause (b) provides that such other jurisdiction as may be conferred on it by any other enactment. Section 8 of the Act excludes the

jurisdiction of the ordinary Civil Court by providing that no District Court or any subordinate Civil Court shall in relation to an area where a Family Court has been established have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in Explanation to Section 7(1) of the Act after the constitution of the Family Court. Similarly the jurisdiction of the Magistrate under Chapter IX of the Code of Criminal Procedure is also ousted. Clause (c) provides for transfer of pending business in the Civil Courtsto the Family Courts on its establishment. Section 10 of the Act provides that subject to the other provisions of the Act and the Rules the provisions of the Code of Civil Procedure shall apply. It is also provided that the Code of Criminal Procedure shall also apply. There is a further provision that for the purpose of the provisions of the Code of Civil Procedure a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court. Sub-section

(2) similarly provides for the exercise of jurisdiction under the Code of Criminal Procedure and Sub-section

(3) provides that the Family Court is not prevented from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the dispute. Section 15 provides for the recording of evidence and gives the Judge the discretion to record only a Memorandum of the substance of what the witness deposes. Section 16 provides for acceptance of affidavits in evidence. Section 17 provides for the form of judgment and Section 18 provides for execution of a decree or order passed by the Family Court. Section 18 says that the decree shall have the same force and effect as a decree or order of a Civil Court and shall be executed in the same manner as is prescribed by the Code of Civil Procedure for the execution of decree and orders. Sub-section

(2) provides for execution of orders under Chapter IX of the Code of Criminal Procedure through the procedure prescribed by that Code. Sub-section

(3) enables the Family Court either to execute it by itself or have execution through ordinary Civil Court to which it is send for execution. Section 19 provides for an appeal to the High Court and the power of the High Court to revise any order passed in exercise of jurisdiction under Chapter IX of the Code of Criminal

Procedure. It is also provided that an appeal shall be heard by a bench of two Judges. Section 20 provides that the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. A scrutiny of the above provisions to my mind indicates that the Family Court while dealing with a suit is a Civil Court. In fact it is a substitute for the Civil Court while dealing with matters coming within its purview. It does not supplant the Civil Court. It is the original Court or the Court of first instance.

5. On the scheme of the Act and considering the conferment of jurisdiction on the Family Court, it is clear that a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them comes within the purview of the Family Court. When a wife sues her husband for recovery of her property or which she claim to be her property, obviously the suit could be tried and disposed of only by the Family Court and when in such a suit the wife is, obliged to add a close relative of the husband or even a stranger on the allegation that the husband had made over the property to that close relative or stranger, it will be too much to hold that the jurisdiction of the Family Court is ousted to deal with the claim of the plaintiff in view of the mere presence of the stranger or the close relative of the husband. In such a situation, the close relative of the husband or the stranger could only be the agent of the husband or a confident of the husband holding the property claimed by the wife on behalf of the husband. It is not possible to accept the argument that in such a circumstance also the wife would be obliged to file the suit against the stranger in an ordinary Civil Court even while she is forced to maintain her suit against the husband in the Family Court. Would it make any difference if in a given case, the property of the wife was entrusted not merely to the husband but also to a close relative of the husband, in this case, the father-in-law? I think that it will be the very negation of the scheme of the Family Court Act and the attempt made by that Act to constitute a Special Civil Court for the purpose of dealing with all matrimonial disputes including dispute about property to hold that the wife would not be entitled to maintain a suit for recovery of her property against the father-in-law in the Family Court. If it were merely a suit against the father-in-law it is quite clear that the suit could be instituted only in the ordinary Civil Court. Equally, if it is merely a suit against the husband for recovery of property, the same could only be maintained in the Family

Court. In a case where the claims have to be combined or the same has to be made against both the husband and the father-in-law as in the present case, could it be said that the jurisdiction of the Family Court would stand ousted? My answer is an emphatic no. The suit will remain as a suit against the spouse for recovery of the property of the wife. No doubt even at the time of the marriage the property was handed over not only to the husband but also to the father-in-law. But that would not make the suit anything other than for recovery of the property of a party to the marriage from the other party to the marriage and persons connected with him or related to him. It is notorious that in our State, what is called Streedhanam or what is understood as the share of the bride in the properties of her father is normally handed over at the time of the marriage not to the husband but to the father-in-law who receives it on behalf of the husband. It is really a case of the father-in-law acting for and on behalf of the husband while he receives the property of the wife. In the case of the streedhanam paid at the time of the marriage of a Christian woman, this Court has held that the father-in-law would be holding the property as a trustee for the bride. Taking in the sweep of the Family Court Act and the objects sought to be achieved by the Family Courts Act, I am of the view that merely because a stranger is also impleaded in the suit on the ground that the property of the wife or a portion of it also been handed over to him the suit cannot be entertained by the Family Court is not warranted. In any view such a construction of the statute to confine the jurisdiction of the Family Court only to the other spouse and not to anyone else who acts either for that spouse or under that spouse would tend to defeat the very object of the enactment of the Act and the establishment of the Family Courts. One of the important aims of the setting up of the Family Courts Act is to bring about a reconciliation between the spouses if possible and to permit them to separate with dignity only if all attempts at conciliation fail. Can there not be a conciliation even in a case where the wife sues her husband and her father-in-law for recovery of the property which she claims to be hers? The answer can only be in the affirmative. There cannot be any doubt that a special machinery has been constituted by the Family Courts Act for counselling, and for bringing about a conciliation between the spouses. Then, Family Court Judge is charged with the duty to attempt conciliation. Should the spouses be deprived of that machinery specially provided by the Family Courts Act

and not available in that form in the ordinary Civil Court merely, because, one of them is compelled to sue not only the other spouse but also a close relation of that spouse or a confident or assignee of that spouse? The answer can only be 'no' since an answer otherwise would mean that the very scheme of the Act would stand defeated and the spouse who is sued can always take up the stand that he had made over the property to a stranger and when the suing spouse is compelled to implead that person, the suit would be taken out of the purview of the Family Court. I have therefore no hesitation in holding that so long as the suit is by one spouse against the other the suit would be maintainable in the Family Court even if for the purpose of seeking relief in respect of the cause of action put forward in the suit, the suing spouse is forced to implead persons other than the other spouse or including the close relatives of the other spouse.

6. The view taken by the Family Court is that the wife in the present case is obliged to file a suit against her husband in the Family Court and another suit against her father-in-law in the ordinary Civil Court. I do not think that such a situation is warranted by anything contained in the Family Court Act. According to the plaintiff in the present case she has a common cause of action against her husband and her father-in-law. No splitting up of such a cause of action is contemplated even by the Code of Civil Procedure. On the other hand Order 2, Rule 2 of the Code of Civil Procedure insists that all the reliefs arising out of the same cause of action should be asked for in the same suit. Even going by the scheme of the Code, it is not possible to defend the stand adopted by the Family Court that the wife is obliged to sue her husband and her father-in-law separately in the circumstances of the case. The position adopted by the Family Court is therefore not sustainable.

7. In *Krishnan Namboodiri v. Thankamani*, (1994) 1 Ker LT 607 a learned single Judge of this Court had taken the view that it is not enough that the suit is between the parties to the marriage, but the same should be with respect to the property of the parties or either of them and if the subject matter of the suit belongs not only to the parties to the marriage but to the parties to the marriage and also others, the jurisdiction of the Civil Court to entertain that suit is not ousted. That was a case of a suit for partition and what the suing spouse claimed was that she had a share in

the properties of the illom of her husband independent of the share that is due to her husband. Obviously the other members of the illom had also shares in the properties. According to me a suit for partition of that nature in which a party to a marriage claims a share in the property not only along with her husband or as against her husband but also along with various other members of the joint family would be totally different from a case where the wife files a suit for recovery of her exclusive property against her husband and someone else is holding the property on her behalf or who is holding it in trust for her like the father-in-law in the present case. The ratio of the decision in Krishnan Namboodiri's case therefore does not in any manner affect the conclusion reached by me as above.

8. The decision in Raichal John v. Francis Ninan, (1995) 1 Ker LT 687 brought to my notice is of only limited relevance in the present case. Therein, this Court had only indicated that the Court should be slow in taking a dispute away from the Family Court and in transferring it to an ordinary Civil Court. That case related to a claim for transfer of a petition for divorce pending in the Family Court to an ordinary Civil Court., While declining the transfer sought for on the ground of convenience of parties, this Court noticed that the object of the enactment of the Family Courts Act and the establishment of the Family Courts cannot be sacrificed at the alter of the so-called convenience of the litigating parties. At best the said decision only emphasises that the Family Court is the forum in which the dispute between spouses ought to be dealt with. That principle would enable the petitioner in the present case to contend that even if her father-in-law was also involved in the litigation, there was no justification for narrowing the competence of the Family Court in a dispute which relates to her property and which is mainly or at least equally directed against her husband, the other party to the marriage. How the jurisdiction of the ordinary Civil Court is lost on the constitution of the Family Court has been highlighted by my brother Mr. Justice K.A. Abdul Gafoor in the judgment in O.P. 8616 of 1993 brought to my notice by counsel.

9. In the order Ext. P5, the Family Court Judge has held that the Family Court's jurisdiction is limited to categories of cases mentioned in Section 7(1) of the Act and the suit filed by the wife against her husband and her father-in-law for recovery of the property that is alleged to belong to her would not come within any

of the categories mentioned in (a)(b)(c)(f) or (g) of the Explanation to Section 7(1) of the Act. He has also said that the suit cannot be said to be one for an order of injunction in circumstances arising out of marital obligation. So the suit will not come under Clause(d) also. The Court would have jurisdiction to entertain the suit only if it comes within the purview of Clause (c) of Explanation to Section 7(1) of the Act. Since Clause (c) refers to suits or proceedings between the parties to a marriage with respect to the property of the parties or either of them and second defendant in the suit, the father-in-law is not a formal party and the entire amount claimed in the suit is claimed both from the husband and the father-in-law, the suit against the father-in-law cannot be entertained by the Family Court. The learned Family Judge has directed the petitioner herein to amend the plaint and confine the claim against the husband in the suit filed in the Family Court and has advised the petitioner to file a separate suit against the father-in-law in the Civil Court. This was because, according to the Court below, the liabilities that are sought to be imposed on the husband and the father-in-law of the petitioner are independent and not joint and several.

10. I have my own doubts whether the learned Judge was right in holding that the liabilities of the husband and the father-in-law are independent of each other. One of the claims in the suit is for recovery of the amount paid as streedhanam at the time of the marriage or just prior to the marriage of the petitioner with the first respondent. The amount was given in connection with the marriage. The other claim made by the wife is for recovery of the value of the ornaments, for recovery of the amount entrusted by the wife to the husband and for her past maintenance. The fact that the ornaments might have been entrusted to the husband by the wife at a point of time different from the time at which Streedhanam amount was paid into the hands of the father-in-law or that further sum belonging to the wife was paid into the hands of the husband at a time different from the point of time at which the Streedhanam was handed over to the father-in-law would not make those claims totally independent of the claim against the father-in-law since all these claims arise out of the matrimonial dispute that has cropped up between the wife and the husband which has led to the filing of an application for restitution of conjugal rights by the husband and the filing of the present suit by the wife and also the filing of M.C. 236 of 1996 claiming maintenance against the husband. This

is therefore a clear dispute relating to a marriage and family affairs between the spouses and hence clearly within the purview of the Family Court. The view adopted by the Family Court is unnecessarily narrow and tends to defeat the very object of the establishment of the Family Courts and also tends to multiply litigation in different fora arising out of a matrimonial dispute between the spouses. I am therefore not in a position to agree with the reasoning adopted by the Family Judge.

11. It may incidentally be noticed that the suit in the Family Court reached that Court by virtue of an order of transfer made by this Court in C.M.C. 31 of 1995. Learned counsel for the petitioner submits that since this Court had made the transfer of the suit which was initially instituted in the Family Court, Trichur to the Family Court at Ernakulam, the Family Court at Ernakulam should not have questioned the maintainability of the suit in that Court. According to counsel the decision transferring the suit to the Family Court, Ernakulam implies an adjudication that that Court has jurisdiction to try the suit. This proposition is controverted by counsel for the respondents. But in my view that the suit is maintainable before the Family Court, I do not think it necessary to finally pronounce on this aspect sought to be put forward on behalf of the petitioner.

12. In passing the order Ext.P5, the Family Court has declined the jurisdiction in a case where it had jurisdiction. Thereby the Family Court has committed an error liable to be corrected by this Court in this proceeding under Article 227 of the Constitution. I am therefore satisfied that the Order Ext. P5 requires to be set aside in this proceeding.

13. therefore allow this Original Petition, set aside the order Ext. P5 passed by the Family Court, Ernakulam and direct that Court to try and dispose of O.S. 52 of 1995 in accordance with law and on the merits. I hold that that Court has jurisdiction to deal with all the claims raised in the suit by the petitioner. In the circumstances of the case, I make no order as to costs.