Devaki Vs. Chandrika and anr.

Devaki Vs. Chandrika and anr.

SooperKanoon Citation : sooperkanoon.com/728700

Court : Kerala

Decided On : Sep-09-1997

Reported in : AIR1998Ker190; I(1998)DMC110

Judge : T.V. Ramakrishnan and; K. Narayana Kurup, JJ.

Acts : Family Courts Act, 1984 - Sections 7(1)

Appeal No. : C.M.A. No. 184 of 1997

Appellant : Devaki

Respondent : Chandrika and anr.

Advocate for Def. : K.G. Balasubramanian, Adv.

Advocate for Pet/Ap. : C.K. Abdul Rehim, Adv.

Disposition : Appeal allowed

Judgement :

Ramakrishnan, J.

1. The simple reliefprayed for in this appeal is to set aside a non-speaking order of dismissal for default of anapplication, I.A. 1960 of 1996, filed by theappellant for setting aside an ex parte decreepassed against her in O.S. 163 of 1991 on the fileof the Sub Court, Irinjalakuda. However, twoimportant questions; one of

jurisdiction of theCourt and the other of procedure, arise forconsideration in this appeal.

2. Facts required to be stated are thus : The suit O.S. 163 of 1991 is one filed by the respondents against the appellant and her son who is not a party to the appeal. The first respondent is the mother of the second respondent. Respondents have filed the suit claiming that they are the wife and son of Sasi, one of the sons of the appellant who has been impleaded as a defendant along with her in the suit. The prayer in the suit was for a decree for realisation of a total amount of Rs. 33,801/- being past maintenance for 3 years along with the value of gold ornaments weighing 4 1/2 sovereigns and the amount of Rs. 5,001/- alleged to be due to the first plaintiff. Originally the suit was filed as an indigent petition (POP 106/89). On receiving notice, the appellant and her son Sasi have entered appearance and filed their objection through a counsel. Later, the POP was allowed and thepetition was numbered as O.S. 163 of 1991. Thereafter it is the case of the appellant that she never received any information from her Advocate and the suit was decreed ex parte on 13-11-1991. She came to know about the ex parte decree only when she received notice in the E.P. filed for executing the decree against her. Immediately thereafter the appellant filed I.A. 1960 and 1961 of 1996 to set aside the ex parte decree and to condone the delay in filing the application to set aside the ex parte decree. On receiving notice, the respondents have filed counter-affidavit opposing, the prayers in. the applications. The applications were posted to 22-7-1997, for examining the appellant. But thereafter the Court suo motu advanced the case to 27-6-1997 giving notice to the counsel for the appellant. Even though the counsel for the appellant has sent a letter intimating the advancing of the case to 27-6-1997 to the appellant, the same was received by the appellant only on the evening of 27-6-1997. However, when the case was taken up on 27-6-1997, the learned Judge dismissed both the applications for default rejecting the prayer for a short adjournment made by the counsel for the appellant. Aggrieved by the order dismissing I.A. 1960 of 1991 appellant has preferred this appeal.

3. We may first consider the question whether the impugned order is sustainable in law or not. The facts noted above arc not in dispute and as such we are of the

view that the learned Judge was not justified in dismissing the applications, I.A. 1960 and 1961 of 1996 rejecting the prayer for adjournment made by the counsel for the appellant. It is a case where the applications were adjourned for the examination of the parties to 22-7-1997 and the Court has suo motu advanced the case to 27-6-1997 without issuing notice to the parties directly. The notice of advancing the case was given only to the advocate and the letter sent by the advocate was received by the appellant only on the evening of 27-6-1997. As such it is a clear case where the appellant cannot be blamed for her absence in Court on 27-6-1997. In the circumstances we are of the view that it is an order passed without giving the party a sufficient opportunity to prosecute the same and as such liable to be set aside for that reason alone.

4. The learned counsel for the appellant has a further contention that the Sub Court, Irinjalakuda had ho jurisdiction to entertain and dispose of theapplication as such jurisdiction of the Sub Court, Irinjalakuda stood excluded as per Section 8 of the Family Courts Act, 1984 (for short 'the Act') on and after the establishment of the Family Court for the area within which Sub Court, Irinjalakuda is situated. In the circumstances, it was submitted that since the Court had no jurisdiction to entertain and dispose of the matter, the impugned order is liable to be set aside on that ground also.

5. Admittedly, the Family Court, Ernakulam was established by a notification dated 6-6-1992 and the area falling within the jurisdiction of Sub Court, Irinjalakuda came within the jurisdiction of the said Family Court. But a Judge for the Family Court, Ernakulam was appointed only as per a notification dated 7-7-1992. As such at least with effect from 7-7-1992, if not earlier, the jurisdiction of all civil courts within the territorial jurisdiction of the Family Court, to entertain suits of the nature specified in the Explanation to Section 7(1) of the Act stands totally excluded as per Section 8 of the Act. In this case going by the nature of the reliefs prayed for in the suit there cannot be any doubt about the fact that the suit in question was one falling within the purview of the provision in Clauses 'c' and 'f' of the Explanation to Section 7(1) of the Act. As such if the suit was pending on the date when Family Court was established, Sub Court, Irinjalakuda would not have jurisdiction to try and dispose of the suit and the same would have stood statutorily transferred to

the Family Court under Section 8 of the Act. But in this case since the suit was decreed ex parte prior to the establishment of the Family Court, there was no question of statutory transfer of the suit as such to the Family Court. However, the relevant question to be considered is whether the Sub Court, Irinjalakuda was having jurisdiction to entertain and dispose of anapplication filed after the establishment of the Family Court for the purpose of setting aside theex parte decree passed in a suit prior to the establishment of the Family Court or not?

6. Section 8 excludes the jurisdiction of all Civil Courts within the local jurisdiction of Family Court to deal with the categories of suits and proceeding enumerated in the Explanation to Section 7. All pending suits and proceedings of the categories mentioned in the Explanation get statutorily transferred to the Family Court on its establishment. Thus the scheme of the Act is toexclude with reference to the date of establishment of Family Court all the Civil Courts from exercising all the jurisdictions they were having hither to in respect of the categories of suits and proceedings mentioned in the Explanation and to confer all such jurisdictions on the Family Court on its establishment in relation to the particular area for which the Family Court is established. The above legislative scheme will be evident from the provisions in Section 7(1)(a) and (b) of the Act which is as under :

'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 purpose 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.'

It is significant to note that the jurisdiction conferred is the entirety of the jurisdiction exercised by all the civil Courts in respect of the categories of the suits and proceedings mentioned in the Explanation to Section 7 and that while exercising such jurisdiction there is a statutory deeming that Family Court shall be deemed to be civil Courts of different categories for the areas to which the

jurisdiction of such Family Court extends. In the light of the above provision in Section 7, we would hold that all the jurisdiciton which the Sub Court, Irinjalakuda had in respect of the suit and the ex parte decree passed therein have stood vested or conferred statutorily on the Family Court, Ernakulam as per Section 7(1) of the Act and on the establishment of the Family Court, that Court alone has got exclusive right to exercise all such jurisdictions. On the passing of the ex parte decree in the suit, defendants had a statutory right to approach that Court and to file an application to set aside the ex parte decree under Order IX, Rule 13, C.P.C. with a petition to condone the delay under the Limitation Act for condoning the delay, if any, occurred in the matter of filing such an application, Sub Court would have certainly had jurisdiction to entertain and dispose of such application under Order IX, Rule 13 and Section 5 of the Limitation Act as theCourt which had jurisdiction to entertain and dispose of the suit but for the provisions in Sections 7 and 8 of the Act. As such, such jurisdiction to entertain and dispose of applications like those filed by the appellant would in this case stand vested in the Family Court, Ernakulam on its establishment. There is nothing in the Act to show that civil Courts would continue to have power to exercise all jurisdictions they had with reference to the suits and proceedings of the category mentioned in the Explanation which were already disposed of by them prior to the establishment of the Family Court. On the other hand the wording of the provisions in Section 7 of the Act would clearly show that all the jurisdiction exercised by the Civil Courts in respect of the suits and proceedings of the category mentioned in the Explanation to Section 7 whether disposed of, pending or to be filed would vest in the Family Court to the exclusion of all the civil Courts in the area to which the jurisdiction of the Family Court extends. On and after the establishment of the Family Court it cannot also be that parties affected by the ex parte decrees passed in suits prior to the decree be deprived of their valuable right to file application under Order IX, Rule 13 and Section 5 of the Limitation Act if there occurs delay. It is significant to note in this connection that there is no provision in the Act saving of the jurisdiction of the Civil Courts in respect of suits and proceedings covered by the Explanation and disposed of already by the Civil Courts prior to the establishment of the Family Court. In the circumstances, it has to be held generally that the entire jurisdiction exercisable by the Civil Courts in respect of suits and proceedings of the

categories covered by the Explanation and already disposed of by them prior to the establishment of the Family Court would stand statutorily excluded and vested in the Family Court established for the areas within their jurisdiction and only such Family Court would have thereafter jurisdiction to entertain any application or petition in such disposed of matters and to dispose of them in accordance with law.

7. If support is needed for the above view which we have taken in the matter, we find that Madras and Rajasthan High Courts have taken a similar view in more or less similar factual situations in the decisions reported in P. N. Kalathi v. Ellammal. AIR 1964 Mad 463 and Union ofIndia v. Anandi Lal, (1995) 1 Current Civil Cases 559 (Raj).

8. Ellammal's case (supra) was a case where a petition was filed by the husband of Ellammal under Section 5 of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 for dissolution of his marriage with her before the Chittoor Sub Court. An ex pane decree was passed in the petition. Subsequent to the passing of the ex parte decree, Sholinghur, the place where the parties were residing and which was within the jurisdiction of the District Court, Chittoor came within the jurisdiction of the North Arcot District. After such territorial adjustment, Ellammal filed an application under Section 150 and Order IX of Rule 13 to set aside the ex parte order of dissolution of marriage before the Vellore Sub Court which was subordinate to the District Court, North Arcot. Maintainability of the application was challenged, Vellore Sub Court upheld the objection and held that the application is not maintainable. On appeal, the decision was reversed. The High Court of Madras upheld the view taken by the appellate Court in the above decision while dismissing the revision petition filed by the husband of Ellammal. While taking the view that Vellore Sub Court alone had jurisdiction to entertain and dispose of the application for setting aside the decree, the High Court has relied upon the provisions in Section 150, C.P.C. regarding transfer of business from one Court to the other and the earlier decisions rendered by the Court in Srinivasa v. Hanumantha, AIR 1922 Mad 10; M. Guruswamy Naicker v. Sheikh Muhammadhu Rowther, AIR 1923 Madras 92 and Narasimha Raju v. Brundavanasahu, AIR 1943 Madras 617. It was held that when a territorial adjustment takes place there will be

a transfer of business from one Court to the other if certain areas are removed from the territorial jurisdiction of one Court and added to the jurisdiction of another Court.

9. Anandi Lal's case (1995 (1) Cur Civ Cas 559) (Raj) (supra) was a case where a decree for recovery of arrears of pay and allowance of a Government employee was passed by the Civil Court prior to the commencement of the Administrative Tribunals Act, 1985 with effect from 1-11-1985. In 1986 the decree holder filed an application for executing the decree before the Civil Court which passed the decree. On behalfof the Union of India it was contended that E.P. filed before the Civil Court was not maintainable in the light of the provisions in Section 37 of the C.P.C. read along with Sections 14 and 28 of the Administrative Tribunals Act, 1985 excluding the jurisdiction of all the Civil Courts and High Courts and conferring jurisdiction on the Tribunal regarding service matters. Rajasthan High Court has held that on and after the commencement of the Administrative Tribunals Act, 1985 the Court which passed the decree ceases to have jurisdiction to entertain the E.P. and the Tribunal alone had exclusive jurisdiction to entertain and dispose of the E.P. The legal effect of Sections 28 and 29 of the Administrative Tribunals Act, 1985 is more or less similar to the legal effect of Sections 7 and 8 of the Act.

10. In view of principles followed by the Courts while deciding the above two cases and the cases referred to therein are applicable to the case on hand also, if not on all four at least analogically. We have already indicated that the provisions contained in Section 7 itself would provide sufficient reasons to take the above view in this case and we need not rely upon any other general principle analogically or otherwise in support of the above view.

11. We would, in the circumstances, hold that entertainment and disposal of the applications, I.As. 1960 and 1961 of 1996 is without jurisdiction and as such liable to be set aside on that ground also.

12. In the light of our finding that the Sub Court, Irinjalakuda had no jurisdiction to entertain and dispose of the applications, the proper procedure which that court ought to have followed was to receive the applications and on receipt of the

applications forward the same to the Family Court concerned even before entertaining them with appropriate endorsement and with notice to the petitioner/petitioners; for entertainment and disposal in accordance with law. We are indicating the above procedure as the proper one because such a procedure would avoid the necessity of returning the applications for presentation to the Family Court, its presentation before the Family Court and the forwarding of the records by the Civil Court to the Family Court in response to the request of the Family Court for records, etc. which would necessarily cause considerably long delay and protraction of the proceedings. Wewould further indicate that as far as suits and proceedings disposed of by the Civil Courts prior to the establishment of the Family Court and coming within the ambit of the Explanation to Section 7 of the Act are concerned, it will be legal and proper for the Family Court to entertain and dispose of such applications/petitions after calling for the records of the disposal of suits or proceedings from the concerned Civil Courts on the request of the parties.

Appeal is thus allowed. There will be a direction to the Court below to forward the application numbered as I.As. 1960 and 1961 of 1996 to the Family Court, Ernakulam with appropriate endorsements for entertainment and disposal afresh in accordance with law by the Family Court, Ernakulam. The entire records in O.S. 163 of 1991 should also be forwarded to the Family Court along with the applications. Parties will bear their respective costs.

Order on C.M.P. No. 4207 of 1997 in C.M.A. No. 184 of 1997 dismissed.