

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.

SECOND APPEAL NO. 237 OF 2016

Ravindra Sukhdev Ghadge,
Age : 40 years, Occ. Teacher, R/o. Sawarkar Nagar,
Ward No. 1, Chikhali, Tal. Chikhali,
Dist. Buldana.

... Appellant
(Orig. Respondent)

VERSUS

- 1] Swati Ravindra Ghadge @ Swati Bhonde,
Age : 27 years, Occu. Household,
R/o. N-12, CIDCO, Aurangabad,
- 2] Tanmay S/o. Ravindra Ghadge,
Age : 10 years, Occu. Education,
Under Guardianship of Respondent No. 1
- 3] Arav S/o. Ravindra Ghadge,
Age : 3 years, Occu. Nil,
Under Guardianship of Respondent No. 1 ... Respondents
(Orig. Petitioners No. 1 to 3)

.....
Mr Jiwan J. Patil, Advocate for the appellant
Mr M. S. Karad h/f Mr S. V. Jadhavar, Advocate for respondent

.....
CORAM : A. M. DHAVAL, J.
DATE : 2ND NOVEMBER, 2018.

ORAL JUDGMENT:-

1. In this second appeal, Mr. Jiwan Patil, learned counsel for the appellant has raised issue of jurisdiction of the trial Court as well as the appellate Court on the ground that Sections 7 & 8 of the Family Courts Act, 1984, ousts the jurisdiction of the civil court in respect of matrimonial dispute filed.

2. The appellant Ravindra is husband of respondent No. 1 - Swati and father of respondents No. 2 - Tanmay and respondent No. 3 - Arav. The respondents filed Hindu Marriage Petition No. 100 of 2012 in the court of Civil Judge Senior Division, Aurangabad. The appellant is resident of Buldhana and the respondents who are original petitioners, were shown to be residing in N-12, CIDCO, Aurangabad. The marriage was solemnized in Aurangabad. The petition was filed for maintenance under the Hindu Adoption and Maintenance Act, 1956. The learned trial Judge awarded maintenance of Rs.18,750/- per month to all the respondent-original petitioners together, from the date of the petition. In the trial Court, Ravindra - the appellant herein, had not raised any defence of jurisdiction. He filed Reg. Civil Appeal No. 155 of 2014 challenging the order of trial Court. The first Appellate Court modified the order and granted maintenance at the rate of Rs. 5,000/- for each of the petitioners.

3. Heard Mr Jiwan Patil, learned counsel for the appellant and Mr M. S. Karad, learned counsel for the respondent. The substantial question of law framed on 22nd October, 2018 with my finding is as follows:-

"Whether the judgment and decree passed by the Civil Judge Senior Division, Aurangabad, and confirmed by District Judge, Aurangabad is nullity on account of

exclusion of jurisdiction in matrimonial matters by Section 7 of the Family Courts Act?"

..... In the affirmative.

4. There is no factual dispute. The petition was filed in the court of Civil Judge Senior Division as the petitioners were residing in Cidco and the marriage had taken place at Aurangabad. It is not disputed that the residence of the original petitioners as well as place of marriage are within municipal limits of Aurangabad Municipal Corporation and the Family Court is having jurisdiction over the entire area of Aurangabad Municipal Corporation.

5. Sections 7 & 8 of the Family Courts Act read as under:-

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 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.

(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 power 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.

6. The Family Courts Act, 1984 was enacted 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,” as indicated in the preamble of the Act. A separate forum known as Family Court, with facilities for expert advice on matrimonial matters from marriage counsellors, and with emphasis on the conciliatory process more than adjudicatory process, was set up under this Act.

7. As per S. 7 of the Family Courts Act, the Family Court shall have jurisdiction of 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 sub-clause (a) to (g). Clause (f) of S. 7 deals with suit or proceeding for maintenance.

8. It is obvious that, in view of the establishment of the Family Court, the Civil Judge Senior Division, Aurangabad, had no jurisdiction to conduct the petition for grant of maintenance under the Hindu Adoptions and Maintenance Act, 1956.

9. However, the issue is, when no objection was raised to the jurisdiction in the trial Court but was raised in the Ist & IInd appellate Courts, whether it is curable irregularity and whether the judgment & decree would be binding unless prejudice is shown to the parties. If the establishment of Family Court and vesting of exclusive jurisdiction with the Family Court is treated at par with the territorial jurisdiction, then the decision passed by Civil Judge Sr. Divn., will not be a nullity. However, if it is subject-wise exclusion of jurisdiction u/s 8, the decision will be a nullity.

10. Learned counsel Shri. Patil placed reliance on Dr. Jagmittar Sain Bhagat vs. Dir., Health Services, Haryana and Ors. reported in AIR 2013 SC 3060, wherein it is laid down that, if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply.

11. Section 8 is specific. It lays down that, where a family court is established in any area, 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. Similarly, the jurisdiction of the Magistrate court is also ousted by the sub-clause (b).

12. In *Maria Seria Pinto vs. Milton Dias* reported in [2000(4) *Mh.L.J.* 638] the Division Bench of this Court relying on Full Bench judgment in *Romila Jaidev Shroff vs. Jaidev Rajnikant Shroff* reported in 2000(3) *Mh.L.J.* 468 (F.B.) held that, Section 20 of the Family Courts Act has an overriding effect and overrides 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 the said Act. It is further held that, in the view of the Full Bench after coming into force of the Family Courts Act, 1984 and establishment of the Family Court for Mumbai Area, a High Court would completely lose its Jurisdiction by virtue of the provisions of sections 7 and 8 read with section 20 of the Family Courts Act, 1984 and that, by virtue of clause (c) of sub-section (1) of section 8, all the matrimonial matters pending before the High Court on the Original

Side shall stand transferred to the Family Court for hearing and disposal in accordance with the provisions of the said Act.

13. In *Vimalashram Gharkul of Amrapali Utkarsha Sangh, Nagpur vs. Jyto Banson Joseph* reported in [2006(4) Mh.L.J. 692], it was held that, it is, therefore, evident that after the Family Court Act came into force, the proceedings in relation to the guardianship of a person or custody of, or access to, of a minor are required to be instituted in the Family Court in view of section 7 of the said Act since it has a jurisdiction to decide these proceedings and also can exercise jurisdiction exercisable by the District Court and therefore, by necessary implication the application filed by the non-applicant under section 25 of the Guardians and Wards Act, 1890, for custody of minor, is not maintainable.

14. In *Dawalsab vs. Khajasab* reported in *2009(14) SCC 660*, the maintenance petition u/s 125 was filed in the family court at Bijapur. The Judge of the Family Court held that, the respondent was residing at Syndagi where there is a court of Judicial Magistrate and it will have the jurisdiction. The said judgment was confirmed by the High Court. While discussing the provisions of Sections 7 & 8 of the Family Courts Act, the Apex Court held that, in the instant case, it

is the Family Court which has jurisdiction to entertain the petition filed by the appellant since the Family Court at Bijapur had jurisdiction throughout the district and jurisdiction of the Magistrate under Chapter IX of Cr.P.C. has been excluded.

15. The specific ouster of jurisdiction of the courts in respect of area for which the Family court has been established u/s 8 shows that, the subject-wise jurisdiction of Civil Judge Sr. Divn., has been ousted and it is not a simple question of territorial jurisdiction. Therefore, the decisions rendered by the courts having no subject-wise jurisdiction will be a nullity.

16. In fact, the Civil Judge Senior Division should have been more careful and should not have entertained the petition and should have returned it for presentation before the proper court. Whenever in any city there is a family court, all Civil Judges (Sr. Divn.) should see whether the cause of action for the matrimonial petitions filed before them arises within the area for which Family Court has been established or not. If it is established, the Civil Judges (Sr. Divn.) should return the plaint and should avoid unnecessary wastage of time, money and energy of the litigants. As Sec. 8 of the Family Courts Act has taken away the jurisdiction, the decisions rendered by

the Civil Judges (Sr. Divn.) and District Courts are nullity. Therefore, the substantial question of law raised is answered in the affirmative. The appeal is partly allowed. The judgment and decree passed by ld. 2nd Jt. Civil Judge Sr. Divn., Aurangabad dt. 16.06.2014 and District Judge-1, Aurangabad dt. 10.12.2015 are set aside.

17. The trial Court is directed to return the plaint to the respondents for presentation before the Family Court at Aurangabad. If the respondents presents the petition in the Family Court, the Judge of the Family Court shall consider the situation and decide the matter expeditiously. The interim relief granted vide order dt. 22nd October, 2018 stands vacated.

18. Learned advocate for the respondent - Mr M. S. Karad submits that, he will present the plaint in the Family Court at Aurangabad on 01.12.2018. The appellant shall appear before the Family Court on 01.12.2018, without expecting separate service of notice.

[A. M. DHAVAL]
JUDGE

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