

(2009) 07 JH CK 0072
In the Jharkhand High Court

Binod Kumar Singh

APPELLANT

Vs

State of Jharkhand and Another

RESPONDENT

Date of Decision : 23-07-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127, 482, 6
Family Courts Act, 1984 — Section 10, 3, 7, 8
Hindu Marriage Act, 1955 — Section 8

Citation : (2009) 07 JH CK 0072

Hon'ble Judges : R.R. Prasad, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.R. Prasad, J.—The question which has been raised in this application is as to whether the Family Court exercising jurisdiction u/s 7(2)(a) of the Family Courts Act being a criminal court does have power to entertain application for amendment filed in a proceeding u/s 125 of the Code of Criminal Procedure ?

2. The facts giving rise this application are that the respondent No. 2 filed an application u/s 125 of the Code of Criminal Procedure claiming maintenance from the petitioner on the ground that she married to this petitioner on 20.10.2003 before Tollyganj Marriage Officer, Kolkata u/s 8(1) of the Hindu Marriage Act, 1955 but she is being not maintained by him. Upon the said petition, a case was registered as Maintenance Case No. 142 of 2007 which initially proceeded ex-parte but subsequently, after appearance of the respondent No. 2, the order of ex-parte hearing was recalled. Thereafter the petitioner filed his reply denying the applicant as his legally married wife. The matter was taken up for evidence whereby three witnesses were examined, who testified that the marriage was performed before the Tollyganj Marriage Officer, Kolkata. Thereafter an application for amendment was filed on behalf of respondent No. 2 whereby she sought to incorporate the fact that she had married to this petitioner on 16.8.2003 in Kali Temple at Tollyganj, Kolkata and then the marriage was

registered on 20.10.2003 before the Marriage Registrar, Agarpara, Kolkata.

3. Objection was taken on behalf of the petitioner on the petition of the amendment by stating that in terms of Section 10(2) of the Family Courts Act read with Rule 4(c) of the Family Courts (Jharkhand High Court) Rules, 2004, the Family Court dealing with the matter of maintenance acts as criminal court where the provision of Code of Criminal Procedure would apply and therefore, there has been absolutely no scope for the Family Court to entertain the matter relating to amendment of the petition. However, the trial court, vide its order dated 5.1.2009, which is under challenge, allowed the amendment petition sought for on behalf of the petitioner on the ground that the proceeding under Chapter IX of the Code of Criminal Procedure is quasi civil in nature and that the court would be in a better position to do in complete justice by having better particulars of facts incorporated in the amendment petition.

4. Being aggrieved with that order, this writ petition has been filed.

5. Learned Counsel appearing for the petitioner submitted that the Family Court while exercising jurisdiction u/s 7(2)(a) of the Act, acts as criminal court in terms of Section 10(2) of the Family Courts Act read with Rule 4(c) of the Family Courts (Jharkhand High Court) Rules, 2004, wherein provision of the Code of Criminal Procedure would only apply in dealing with the matter u/s 125 or other application under Chapter IX of the Code of Criminal Procedure. In support of the said contention learned counsel referred to a case of Sathyabhama v. Ramachandran 1997 Cri. L.J 4306 decided by Full Bench of Kerala High Court.

6. Thus, it was submitted that the proceeding before the Family Court exercising power u/s 7(2)(a) of the Family Courts Act is a proceeding where only the provision of the Code of Criminal Procedure is applicable and hence, the court committed jurisdictional error by allowing the amendment petition sought by the respondent No. 2 in absence of any such provision either under the Family Courts Act or Code of Criminal Procedure and, therefore, the impugned order is fit to be set aside.

7. As against this, learned Counsel appearing for the respondent No. 2 submitted that there has been no specific prohibition in the Code of Criminal Procedure for allowing the petition for amendment in a proceeding under Chapter IX of the Code of Criminal Procedure and as such, the Family Court cannot be said to have committed any jurisdictional error in allowing the amendment sought on behalf of the respondent No. 2.

8. Learned Counsel in support of his submission has referred to a decision rendered in a case of Sainulabdeen Vs. Beena, .

9. In the context of rival submission the provision of the Family Court first needs to be taken notice of. The Family Court has been defined u/s 2(d) to "mean a Court established u/s 3 of the Act. Section 3 of the Act states that for the purpose of exercising the jurisdiction and powers conferred on a Family Court by

the Act, the State Government after consultation with the High Court and by notification shall establish for every area in the State comprising a city or town whose population exceeds one million a Family Court.

10. Section 7 is the provision which defines or confers the jurisdiction on the Family Court which reads as follows:

7 Jurisdiction - (1) Subject to the other provisions of this Act, a Family Court shall -

(a) have any 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 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."

11. Section 8 excludes the jurisdiction of all other Courts to deal with all such

matters in respect of which jurisdiction has been conferred on the Family Court under the Act. It also provides that every suit or proceeding of the nature referred to in Section 7 will stand transferred to the Family Court wherever a Family Court is established. Section 10 prescribes the procedure to be followed by the Family Courts.

12. It is thus:

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. a 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 that Code before a Family Court.

13. At the same time Rule 4(c) of the Family Court (Jharkhand High Court) Rules needs to be taken notice of which reads as under:

4(c) - In respect of application u/s 125 of the Code of Criminal Procedure or the other application under Chapter IX of the Code of Criminal Procedure is provision of that code will apply.

14. On perusal the relevant provisions of the Act would clearly show that Family Court is a court established with jurisdiction of different nature. Jurisdiction exercisable by the District Court and other Subordinate Civil Courts to be exercised in accordance with CPC and jurisdiction exercisable by the Magistrates - a criminal court as per Section 6 of the Code of Criminal Procedure, under Chapter IX of the Code of Criminal Procedure is to be exercised in accordance with the provisions of that Code. A clear distinction has been made through out the provisions of the Act between these two kinds of jurisdiction conferred by the Act on the Family Court separately u/s 7(1) and 7(2)(a) of the Act. Suits or proceedings enumerated in the Explanation are all the civil in nature and are directed to be disposed of in accordance with the provisions of the Code of Civil Procedure. There is a specific deeming provision which states that while exercising the jurisdiction u/s 7(1), the Family Court shall be deemed to be a District Court depending upon the nature of the suits or proceedings before it. There is also a further deeming provision in Section 10(1) which states that while exercising jurisdiction u/s 7(1) Family Court shall be deemed to be a "Civil Court" for the purpose of the provision of the Code and shall have all the powers of such court. The restricted deeming provision would clearly indicate that Family Court can be deemed to be a Civil Court only while exercising the jurisdiction conferred on it u/s 7(1) and disposing of suits or proceedings enumerated in the Explanation to Section 7(1), in accordance with the provision in the Code of Civil

Procedure. Keeping in view the said provision of the Family Courts Act, Hon'ble Kerala High Court in a case of *Sathyabhama v. Ramachandran* (supra) did hold that Family Court exercising jurisdiction conferred u/s 7(2)(a) of the Family Courts Act, acts as a criminal court and not as a civil court only to decide the issue as to whether order passed by the Family Court in case of its challenge would give rise to Civil Revision application or Criminal Revision application. But I do have certain reservation to follow the said proposition for deciding the issue involved in this case.

15. It has been well settled that the order passed in an application u/s 125 of the Code of Criminal Procedure does not finally determine the rights and obligations of the parties and the said section has been enacted with a view to provide a summary remedy for providing maintenance of a wife, children and parents. Any decision of the criminal court that there was valid marriage between the parties will not operate as decisive in any civil proceeding between the parties. The provision u/s 125 of the Code of Criminal Procedure is not to be utilized for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of the social environment.

16. In *Ramesh Chander Kaushal v. Veena Kaushal* (1978) 4 SCC 70 the Hon'ble Justice Krishna Iyer dealing with the interpretation of Section 125 of the Code of Criminal Procedure observed as follows:

9 This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social functions to fulfill. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause of the derelicts.

17. We may take notice of the provision as contained in Section 126 of the Code of Criminal Procedure which deals with procedure to be followed in a proceeding u/s 125 of the Code of Criminal Procedure. Proviso to Sub-section (2) of Section 126 does contemplate about the passing of the ex parte order and even its recall on good cause be shown and at the same time Section 127 of the Code of Criminal Procedure does stipulate about the alteration in allowances. This kind of recourse particularly taking recourse to ex parte proceeding and its recall is available in the CPC whereas the criminal court under the Code of Criminal Procedure does not have power to take that recourse in any other criminal proceeding than the proceeding u/s 125 of the Code of Criminal Procedure. Thus in stricto sensu proceeding u/s 125 of the Code of Criminal Procedure can not be said to be a proceeding purely criminal in nature rather appears to be proceeding

of quashi civil and quashi criminal in nature.

18. At this stage, I may refer to a case of *Sainulabdheen v. Beena and Anr.* (supra) where similar question fell for consideration as to whether the court dealing with the matter relating to Muslim Women (Protection of Rights on Divorce) Act, 1986 does have power to entertain an application for amendment ? The court did hold that reading of the provision of the Muslim Women (Protection of Rights on Divorce) Act, 1987 would show that it is a proceeding in quashi civil and quashi criminal matter even though the Magistrate is made as the adjudicating authority. The court goes on further to say that even assuming that the proceedings are purely criminal proceeding and the Magistrate has no specific power to amend the pleading as in the Code of Civil Procedure, still it never warrants to be interfered with u/s 482 of the Code of Criminal Procedure as there is no specific prohibition in the Code of Criminal Procedure in allowing amendment of a petition filed under Chapter IX of the Code of Criminal Procedure. More or less in a situation like that of present one, Bombay High Court in a case of *Jayprakash Sumantrao Kale v. Smt. Chandrakala Jayprakash Kale and Ors.* 1984 Cri. L.J.1257 did not find it fit to interfere with the order whereby the court in a proceeding u/s 125 of the Code of Criminal Procedure did allow the application for amendment.

19. Thus, keeping in view legislative intent, the court would always be concerned with the advancement of the cause to the destitute women, children and parents and in an attempt of that, if the trial court has entertained the application of the amendment which never goes to decide the right of the parties, the court can never be said to have committed jurisdictional error.

20. Therefore, it would not be justified on my part in exercise of extraordinary power under Article 226 of the Constitution of India to interfere with the discretionary order. Accordingly, this application is dismissed. However, before parting with this order, I may say that the petitioner will have right to rebut the claim as has been put in the amendment petition by filing rejoinder and also by adducing evidence.