
(2008) 08 AHC CK 0308
In the Allahabad High Court

Dr. Anil Kumar Lal

APPELLANT

Vs

Additional Principal Judge, Family Court and Another

RESPONDENT

Date of Decision : 29-08-2008

Acts Referred:

Family Courts Act, 1984 — Section 10(3)

Citation : (2009) 1 AWC 988 : (2009) 3 CivCC 684 : (2009) 106 RD 306

Hon'ble Judges : O.P. Srivastava, J

Bench : Single Bench

Final Decision : Allowed

Judgement

O.P. Srivastava, J.—The short question for consideration in the petition is whether oral evidence can be permitted to be given on affidavit in any suit in the family court.

2. The petitioner had filed a suit for decree of divorce against his wife-opposite party No. 2. After recording of the evidence of the petitioner, the opposite party filed oral evidence on affidavit. The petitioner raised objection to the effect that oral evidence on affidavit is not permissible under the Act. The learned court below, however, rejected objection on the ground that u/s 10 (3) of the Family Courts Act, 1984 (hereinafter referred to as the Act) family court can adopt its own procedure and also that in the amended CPC evidence of the witness can be given on affidavit. It is also observed by learned Court that there is no provision in the family court against the amended provision of the Code of Civil Procedure.

3. Aggrieved with the said order, the petitioner has filed the instant writ petition.

4. Learned Counsel for the petitioner submitted that in view of Sections 15 and 16 of the Act, oral evidence on affidavit cannot be permitted to be given on affidavit. On the other hand learned Counsel appearing on other side vehemently argued that under Order XIX of CPC oral evidence has to be given only on affidavit.

5. I have considered the submission of learned Counsel for the parties and gone through the Family Courts Act.

6. Before embarking upon the point involved in this case, it may be mentioned that one of the objects to enact the Act was to simplify the rules of evidence and the procedure so as to enable the family courts to deal effectively with a dispute. In conformity with this object the Act itself provides the manner in which oral and formal evidence can be permitted to be given in a case pending in the family court.

7. On going through the impugned order, I am constrained to observe that learned court below had passed the impugned order without properly examining the relevant provisions contained in Sections 15 and 16 read with Section 20 of the Act.

8. To facilitate the proper appreciation of the controversy involved Section 10 as also Sections 15, 16 and 20 are reproduced hereinbelow:

10. Procedure generally.-(1) Subject to the other provisions of this Act and the rules, the provision 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 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 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.

(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."

15. Record of oral evidence.- In suits or proceedings before a family court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded, a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Evidence of formal character on affidavit.-(1) The evidence of any person where such evidence is of a formal character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceedings before a family court.

(2) The family court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to

the facts contained in his affidavit.

20. Act to have overriding effect.-The provisions of this Act shall have effect notwithstanding 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 this Act.

9. Learned trial court has failed to consider the entire Section 10 and also Sections 15 and 16, as a result whereof, it fell in error in mentioning in the order that Act is silent as regards the manner in which evidence in family court can be permitted to be given. No doubt, as observed by learned trial court, Sub-section (3) of Section 10 provides that 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 one party and denied by the other but it does not mean that the family court can prescribe any procedure ignoring the provisions of the Act altogether. Subsections (1) and (2) start with words "subject to the other provisions of this Act and the rules" which means that in case, there is no provision in the Act in regard to the matter, the Court has to deal with accordingly. Section 20 of the Act also lays down that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

10. Therefore, if there is a provision in any law inconsistent to what is provided in the Act, the provisions of the Act are to be given effect to and not the provision of the other Act.

11. Now advertent to Sections 15 and 16, it is amply clear that the Act provides the manner in which oral evidence as also the evidence of formal character is to be taken. So far as oral evidence is concerned, it is not necessary to record the evidence of witness at length. This provision is clearly in conformity with the object with which the Act was enacted as indicated above. The evidence of oral character is to be recorded in substance in the form of a memorandum. No doubt in view of Section 16 evidence of formal character in such cases can be permitted to be given on affidavit. Therefore, by reading of two sections together, one can conclusively arrive at the conclusion that evidence of only formal character can be permitted to be given on affidavit. Enacting a separate provision for giving of evidence of formal character on affidavit, itself discloses the intention of the Legislature as u/s 15 substance of oral evidence alone has to be recorded. It means that oral evidence cannot be permitted to be given on affidavit. The very purpose of Section 15 will stand frustrated in case any party is permitted to give oral evidence on affidavit for the reason that if oral evidence on affidavit is permitted to be given, the Court will not be able to restrict the party in stating whatever it likes which may be against the spirit of Section 15 which says that it will not be necessary to record the evidence at length.

12. Therefore, in my opinion, Sections 15 and 16 clearly disclose the intention of

the Legislature that the evidence of formal character alone can be permitted to be given on affidavit and not other oral evidence. Separate provision for giving of evidence of formal character on affidavit leads to the conclusion that giving of oral evidence on affidavit is excluded in view of Section 15 of the Act.

The writ petition is allowed. The impugned order dated 16.9.2006 is quashed. The affidavit of opposite party No. 2 is rejected. The evidence shall be permitted to be given in light of provisions of Act as indicated hereinabove.