

(1988) 11 MAD CK 0033

In the Madras High Court

Case No : Petition Diary No. 18070/88 and O.M.S. No. 26 of 1987 Application
No. of 1988

**In Re: Mr. patrick Martin, Mrs. Regina Martin, represent by Power Agent,
Sr. Theresa Thomas
In Re: R. Manivannan and Agnes Mythili
Manivannan**

Date of Decision : 09-11-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2, 2(4), 2(e), 23
Constitution of India, 1950 — Article 225
Copyright Act, 1957 — Section 62, 62(1)
Divorce Act, 1869 — Section 10, 2
Family Courts Act, 1984 — Section 2(e), 20, 3, 7, 8
Guardians and Wards Act, 1890 — Section 7, 7(1), 8

Citation : (1988) 11 MAD CK 0033

Hon'ble Judges : Abdul Hadi, J

Bench : Single Bench

Advocate : G.M. Nathan, M.B. Dominique, S. Rama-Krishna, N.S. Varadachari
and C.P. Pattabhiraman, for the Appellant; V. Sitharandjandoss, V. Chandrasekhar,
M. Khaja Mohideen, Naziruddin and Kanagaraj, for the Respondent

Judgement

Abdul Hadi, J.—These two matters raise a common question regarding jurisdiction of this Court, on and from 3.10.1988, in view of the Notification G.O. Ms. No. 2063, Home Courts VII; dated 21.9.1988, issued by the State Government under S. 3 of the Family Courts Act, 1984 (Central Act No. 16 of 1984), and establishing a "Family Court" under the said Act in the City of Madras, to exercise jurisdiction referred to in S. 7 thereof within the legal limits of Madras City. In the first of these two cases the Original Petition was filed on 4.10.1988 under S. 7 of Guardians and Wards Act, 1890 read with Cl. 17 of the Letters Patent (Madras), for appointment of the petitioners therein (who are foreign nationals) as guardians of the person of the minor Rekha for the purpose of taking the said minor out side India and for ultimate adoption of the said minor in France in accordance with French Law. The papers therein were returned by the office of this Court on the ground that on the above said establishment and functioning of the said Family Court on and from 3.10.1988,

only the said Family Court can try the said O.P., since under S. 7 Explanation (g) of the said Act ""A suit or proceeding in relation to guardian of the person of the minor" is one of the matters to be tried by the Family Court. At the request of the petitioner's counsel whose contention is that this Court's jurisdiction had not been ousted by the said Act, the Original Petition is posted before me to decide the maintainability of the said Original Petition in this Court.

2. In the second of the two cases, the pending O.M.S. 26 of 1987 is under S. 10 of the Indian Divorce Act (Central Act, 1869) and filed by the Christian husband for a decree for divorce of his Christian wife, the first defendant therein. The said Indian Divorce Act applied only to Christians, that is, when the petitioner or the respondent professes Christian religion (Vide S. 2 of the said Act). In the said O.M.S., in which even evidence had already been partially taken, the present Application No. 5607 of 1988 has been tiled on 26.10.1988 by the first defendant wife, for transfer of the said O.M.S. to the above said "Family Court" for being tried therein. The ground on Which the transfer is prayed for is that horn 3.10.1988 this Court's jurisdiction to try the said O.M.S had been ousted, that only the said Family Court can try, in view of S. 7 Explanation (a) thereof which inter alia says that the jurisdiction of the said Family Court relates to suits or proceedings for dissolution of marriage and that in view of S. 8 thereof which says that where a. Family Court has established for any area, no District Court or other subordinate Courts shall in relation to such area have or exercise any jurisdiction in respect of the above said suits or proceedings, and such a suit or proceeding pending in any District Court or Subordinate Court shall be transferred to such Family Courts.

3. It has to be decided whether these two could only be tried by the said Family Court and whether this Court's jurisdiction to try had been ousted on and from 3.10.1988 in view of the establishment of the said Family Court under the said Act in the City of Madras to have operation over the proceedings.

4. Apart from the learned counsel in the above two proceedings, a few other learned counsel at my request also assisted me by their submissions in this regard and I am thankful to them for the same.

5. The preamble of the said Act says that the Act was intended to provide for the establishment of the Family Courts with a view to promote, conciliate in and secure speedy settlement of disputes relating to marriage and Family affairs and for matters connected therewith. S.7 of the said Act demarcates the jurisdiction of the said Family Court; it reads as follows :

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 a subordinate Civil Court for the area to

which the jurisdiction the Family Court extends. Explanations 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 order of injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any persons 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 Chap. 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.

So the list of the subject matters mentioned in the above said Explanation to S. 7(1) includes Guardianship of a person of any-minor, dissolution of marriage and proceeding as to the matrimonial status of any person. These are matters to be dealt with in the above said two cases. Then the initial part of the said S. 7(1) says that the said Family Court shall have and exercise all the jurisdiction exercisable by and 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 above said Explanation. Further S. 8 of the said Act says that where a Family Court has been established for any area, no district Court or any subordinate Courts shall in relation to such area, have or exercise any jurisdiction in respect of the above said suits or proceedings referred to in Explanation to S. 7(1) and such a suit or proceeding pending in any district court or subordinate Court shall stand transferred to such Family Court.

6. Both in Ss.7 and 8, no doubt the expression "District Court is used but not expression High Court". But S. 2(e) of the Act says that all words and expressions used in this Act but not defined in this Act and defined in the Code of

Civil Procedure, shall have the meanings respectfully assigned to them in that Code. So the expression "District Court" used in Ss. 7 and 8 of the said Act shall have the same meaning as it has, in the Code of Civil Procedure. S. 2(4), C.P.C., runs as follows

"District" means the local limits "of the jurisdiction of a Principal Civil Court of Original Jurisdiction (Hereinafter called "District Court") and includes the local limits of ordinary original Civil jurisdiction of a High Court."

7. In dealing with this definition, the Division Bench of this Court in *The Daily Calendar Supplying Bureau v. The United Concern* AIR 1967 Mad. 38 = ILR 1964 2 Mad 666 held as follows :

Cls. 11 and 12 of the Letters Patent confer ordinary original civil jurisdiction "to the High Court over the Presidency Town of Madras, Bombay, etc. Therefore, the area of the Presides v. Town will be a District as defined in S. 2(4) of the C.P.C., 1908 and when the High Court exercise its original civil jurisdiction over the city limits it can be deemed to be a District Court, in these cases where resort to the definition in S. 2(4) C.P.C., is permissible for the purpose of fixing jurisdiction Our attention was drawn to the case of *Calculation High Court in Kedarnath Mandal v. Ganesh Chandra Adak* 1908 Cal WN 446 which arose under the Inventions and Designs Act, 1888. That Act contained the specific clause that a District Court had meaning assignment to that expression by the CPC After considering Cl. 2(4), C.P.C., Fletcher. I came to the conclusion that when a High Court exercises its ordinary original Civil jurisdiction's "corneas within the definition of the District Court as contained in the Civil Procedure Code.

8. Just as in the above Inventions and Designs Act, 1888 in the present Family Courts Act 1984 also, as per S. 2(e) therein the term District Court has the meaning assigned to that expression in the Code of Civil Procedure. So it is clear that in Ss. 7 and 8 of the Family Courts Act, the term "District Court" includes the High Court and so it is clear that the jurisdiction exercised so far by this Court under Cl. 17 and Cl. 35 of the Letters Patent, is ousted and given over to the above said Family Court under the said Act. S. 20 of the Family Courts Act also emphatically says that the provisions of Family Courts 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. So it is clear that S. 20 overrides the above said Cls. 17 and 35 of the Letters Patent.

9. Under Art. 225 of the Constitution of India, the pre-existing jurisdiction of any High Court in India is preserved even after the commencement of the Constitution but as per the very words of the said Article itself this preservation is "subject to the provisions of any law of the appropriate Legislature made by virtue of the powers conferred on that Legislature by this Constitution." So even Cls. 17 and 35 of the Letters Patent (Madras) can be altered by the present Parliamentary Legislation, Family Courts Act, 1984.

10. It is to be noted that the above said Division Bench of our High Court approves the above said decision reported in *Kedarnath Mandal v. Ganesh Chandra Adak* (1908) 12 Cal. W.N. 446. In fact it goes one step further. In that Division Bench case, the question was with reference to Copyright Act 14 of 1957 and in the said Act for the purpose of defining a District Court, a specific cross reference to the CPC was not found as in the above said Inventions and Designs Act, 1888 or certain other enactments, like the Guardians and Wards Act, or Indian Patents and Designs Act. Even then, the Division Bench of this Court held in the above said case that even under the above said Act 14 of 1957, the High Court can be deemed to be a District Court since in S. 62, sub-S. (2) of the said Act 14 of 1957 there is a cross reference to the Code of Civil Procedure, which can very well "imply" that the term "District Court" in S. 62(1) of that Act should be given the same meaning as in S. 2(4), C.P.C., (Vide Paragraph 7 of the above said judgment of the Division Bench).

11. It was no doubt pointed out before me that the above said decision in *Kedarnath Mandal v. Ganesh Chandra Adak* AIR 1927 Cal. 290 was not followed in a later Division Bench judgment of the same Calcutta High Court, in *Hyat Mahamed v. Shaikh Mannar*, but I am bound to follow the decision of the Division Bench of our High Court in *The Daily Calendar Supplying Bureau, Sivakasi Vs. The United Concern*, . That apart, I do not find much discussion in the decision in *Hyat Mahamed v. Shaikh Mannur*, as to why actually it disagreed with the decision in *Kedarnath Mandal v. Ganesh Chandra Adak* AIR 1927 Cal. 290. The decision in *Hyat Mahamed v. Shaikh Mannur* 1967 Mad. 381 = I.L.R.1964 2 Mad.666 was under S. 23, C.P.C., and the question before the Court was whether a judge on the Original side of the High Court is a Court "Subordinate" to the High Court and whether a Bench of the High Court can entertain an application for the transfer of a suit from him to another Court. Only in that context it holds that, though the word "District Court" in the CPC includes not merely, the local limits of what is ordinarily called a District Court but includes the local limits of the High Court in its ordinary original civil jurisdiction it does not mean that the words "District Court" wherever it appears in the CPC mean and include a High Court in the exercise of its ordinary original civil jurisdiction. Only in that context the Division Bench observed as follows "If that is what was intended to be laid down by Mr. Fletcher. J., in the case of *Kedarnath Mendal v. Ganesh Chandra Adak* I do not agree with it."

So observing, the Division Bench of the Calcutta High Court held that a Judge on the original side of the High Court was not a Court subordinate to the High Court and a Bench of the High Court could not entertain an application for the transfer of a suit from him to another Court. That is, in the context of S. 23, C.P.C., the Division Bench of the Calcutta High Court held so. In this connection it must also be noted that S. 2, C.P.C., itself begins by saying "In this Act, unless there is anything repugnant in the subject or context..." So it may safely be concluded that only in the subject or the context of S. 23, C.P.C., the Division Bench of the Calcutta High Court observed that the words "District Court" wherever it

appears in the CPC may not mean and include of a High Court in the exercise of ordinary Original civil jurisdiction.

12. The decision in *S. B. S. Jayam and Co. Vs. Krishnamoorthi, Proprietor, Gopi Chemical Industries*, . was also cited before me That areas under Trade and Merchandise Marks Act (XLIII of 1958) The said Act in S. 2(1)(e) thereof says that "District Court" has a meaning assigned to it in the CPC 1908, and under S. 105 of the said Trade and Merchandise Marks Act, suit for infringement of a Trade; Mark cannot be instituted in any Court inferior to "District Court". In this context the learned single Judge of this Honorable Court held that the said suit could be filed in the High Court in view of S. 2(4) of the C.P.C, Thus, that was a case of conferment of jurisdiction on the High Court in view of the definition of S. 2(4) of C.P.C. Here it may also be stated that as per the decision in *Raja Soap Factory and Others Vs. S.P. Shantharaj and Others*, even the High Court would not have jurisdiction to try Trade Mark infringement cases, if it did not otherwise possess an ordinary original civil jurisdiction. The Supreme Court came to that conclusion, while interpreting S. 2(4) of the C.P.C. in the light of the above S. 2(1)(e) of the Trade and Merchandise Marks Act and hence held that Mysore High Court could not try (sic) a Trade Mark case as it did not otherwise possess such an original jurisdiction (sic) our present case by using similar (sic) in S. 2 (e) of the Family Courts Act. as in S. 2(1)(e) of the Trade and Merchandise Marks Act, the jurisdiction of the High Court is ousted and given away to the Family Court by the clear words used in the Family Courts Act itself. So the present case is one of ousting of jurisdiction of the High Court by clear words of the statute itself The decision in *Pamela Williams v. (sic)* which was also cited before in: is also no help to support the contention that this Court's jurisdiction is not ousted in respect of the above referred to subject (sic) dealt with under Family Courts Act.

13. It was also argued before us, relying on passages in Maxwell's. The Interpretation of Statutes 12th Edn., pages 153 and 154, CP. Singh's Principles of Statutory Interpretation Third Edn., page 481, (sic) Craies on Statute Law 6th Edn., page 123 and *Bhim Sen Vs. The State of U. P.*, that a statute should not be construed as to take away the jurisdiction of a Court in the absence of clear and unambiguous (sic) words to that effect. But as I stated above the meaning of the term District Court used in Ss. 7 and 8 of the Family Courts Act is quite clear in view of S. 2(e) of the said Act itself, to include even the High Court within its meaning.

14. It was also urged before me that though the above said Original Petition (Diary No. 18070 of 1938) was filed under Guardians and Wards Act, the Guardianship sought for therein was for "inter contra adoption", that the case of adoption was not within the jurisdiction of the Family Court under the above said Act and That hence the said Family Court could not try this Original Petition and that only the High Court could try. This argument has no merit. Whatever the object with which guardianship was sought for, the petition remains a petition "in relation to the Guardianship of the person of any minor" and so it has

necessarily to go before the Family Court under Ss.7 and 8 of the Family Courts Act. No doubt, the Supreme Court, with reference to such inter-country adoption cases, has given certain guidelines, in the decisions reported in *Laxmi Kant Pandey v. Union of India*. Those guidelines have necessarily to be followed by the Family Court when such cases are tried by it.

15. It is also urged that taking into consideration the Preamble and Statements of Objects and Reasons of the Act, the Family Courts Act cannot have application to first of the above said two cases, namely. Diary No. 18070 of 1988. But it is one of the cardinal principles of Construction that where the language of an Act is clear, the Preamble or the Statement of Objects and Reasons of the Act cannot be sought in aid to construe any operative provisions of the Act (Vide AIR 1961 S.C. 954 (956-957) and *The State of Rajasthan v. Mrs. Leela Jain*).

16. So far as the above said O.M.S. under the Indian Divorce Act, I was taken through some of the provisions of the said Act which bring out the superior powers of the High Court in relation to the matters to be decided under the said Act, but the arguments built up on those provisions are of no avail in view of the clear provisions under Ss. 7 and 8 of the Family Courts Act read with S. 2(e) thereof, as explained above in detail. So I hold that the above said Original Petition (Diary No. 18070 of 1988) and O.M.S. 26 of 1987 have necessarily to be transferred to the Family Court established by the above said notification. Application No. 5607 of 1988 is ordered accordingly. No costs.