

(2016) 08 GUJ CK 0101
In the Gujarat High Court
Case No : First Appeal No. 1856 of 2016

Lt. Col. Iqbalbahadur Teghbahadur Dutt (Retd.)	APPELLANT
Vs	
Ann Saurabh Dutt	RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Family Courts Act, 1984 — Section 7(1)(g)

Citation : (2016) AIR(Gujarat) 189 : (2017) 1 CivCC 712

Hon'ble Judges : Mr. M.R. Shah and Mr. A.S. Suphia, JJ.

Bench : Division Bench

Advocate : Vaibhav Vyas, Advocate, for the Respondent; Mr. Ishan Mihir Patel, Advocate, for the Appellants Nos. 1 and 2

Final Decision : Allowed

Judgement

Mr. M.R. Shah, J. - ADMIT. Mr. Vaibhav Vyas, learned advocate waives service of notice of admission on behalf of the respondent ? original defendant.

2. In the facts and circumstances of the case and with the consent of the learned advocates appearing on behalf of the respective parties, and as the issue involved in the present appeal is in a very narrow compass and it does not require any further evidence and/or record and proceedings, present appeal is taken up for final hearing today.

2.1 Feeling aggrieved and dissatisfied with the impugned order passed by the learned Family Court, Ahmedabad below Ex.1 in Civil Miscellaneous Application No.1 of 2016, by which the learned Family Court, in exercise of the powers under Order 7, Rule 11 of the Code of Civil Procedure, has returned the plaint/application submitted by the appellants herein - grand-father and grand-other of their grand daughter who is minor aged about 4 years, for custody of minor grand daughter Dhairya and for their visitation rights, on the ground that the learned Family Court has no jurisdiction and hence the learned Family Court returned the plaint to present it before the appropriate court/forum.

3. Facts leading to the present First Appeal in nutshell are as under:-

3.1 That the appellants herein ? grand-father and grand-mother of minor Dhairya aged 4 years submitted an application before the learned Family Court, Ahmedabad for grant of custody of minor Dhairya and for visitation rights, under the Guardian and Wards Act, 1890, under sections 8, 10 and 17 of the Hindu Minority and Guardianship Act. 1956.

3.2 That by the impugned order and at preliminary stage itself, by the impugned order the learned trial court has returned the plaint to present it before appropriate court/forum, in exercise of the powers under Order 7, Rule 11 of the Code of Civil Procedure on the ground that the learned Family Court has no jurisdiction, as the case would not fall in any of the provisions of section 7 of the Family Court, 1984.

3.3 Feeling aggrieved and dissatisfied with the impugned order passed by the learned Family Court, Ahmedabad returning the plaint on the ground that the Family Court would not have any jurisdiction to entertains such an application, original petitioners have preferred the present First Appeal.

4. Mr. Ishant Patel, learned advocate appearing on behalf of the appellants has vehemently submitted that while passing the impugned order the learned trial court has not properly appreciated and considered the provisions of section 7 of the Family Courts Act. It is submitted that the learned family Court has not at all considered explanation to subsection (1) of section 7 of the Family Courts Act.

4.1 Mr. Ishant Patel, learned advocate appearing on behalf of the appellants has further submitted that as per explanation (g) to sub-section (1) of section 7, a suit or proceedings in relation to the guardianship of the person or the custody of, or access to any minor would be maintainable before the Family Court and the Family Court would have jurisdiction to entertain the suit and/or any proceedings in relation to the guardianship of the person or the custody of, or access to any minor. It is submitted that clause (g) to the explanation attached to sub-section (1) of section 7 is not restricted to the dispute with respect to the custody or the visitation rights of a minor between the husband and wife (father and mother of the minor). It is submitted that even the Family Court would have jurisdiction to consider the issue in relation to the guardianship of the person or the custody of, or access to any minor, if initiated by any related persons including grand-father and grand-mother. It is submitted that therefore, the learned Family Court has materially erred in returning the plaint preferred by the appellants for custody of the Minor Dhairya and for their visitation rights to meet minor Dhairya.

4.2 Mr. Ishant Patel, learned advocate appearing on behalf of the appellants has further submitted that even thereafter and after the impugned order was passed by the learned Family Court, the appellants as such did approach the District Court for the reliefs sought before the learned Family Court, however, the District Court has also rejected the said application on the ground that for such a relief, present proceedings before the District Court are not maintainable. It is

submitted that, therefore, as such the petitioners are rendered remedyless.

Making above submissions it is requested to allow the present appeal and quash and set aside the impugned order and direct to restore the proceedings before the learned Family Court and direct the learned Family Court to decide and dispose of the application preferred by the appellants herein in accordance with law and on merits.

5. Mr. Vaibhav Vyas, learned advocate has appeared on behalf of the respondent ? original defendant. He has tried to oppose the present appeal and support the impugned order passed by the learned Family Court, however, has failed to satisfy this Court how for the relief sought in the application before the learned Family Court by the grand-father and grand-mother for grant of the custody of the minor, jurisdiction of the Family Court is barred. However, has tried to submit that as per clause (a) to explanation of sub-section (1) of section 7 of the Family Courts Act and considering the nature of the proceedings to be dealt with by the Family Court, dispute between the husband and wife only can be dealt with by the Family Court.

Making above submissions, he has requested to dismiss the present appeal.

6. Heard the learned advocates appearing on behalf of the respective parties at length.

6.1 Short but interesting question of law posed for consideration of this court is with respect to the jurisdiction of the Family Court to deal with proceedings in relation to guardianship of the person or custody of any minor, more particularly in the present case, proceedings initiated by the grand-father and grand-mother of the minor Dhairya for grant of custody and for their visitation rights.

6.2 That by the impugned order the learned Family Court has dismissed the said application preferred by the appellants herein ? grand-father and grand-mother of minor daughter Dhairya aged about 4 years, which was submitted by them for grant of custody and for their visitation rights to their grand-daughter Dhairya, on the ground that for such a relief application preferred by the grand-father and grand-mother, the Family Court would not have any jurisdiction and District Court would have jurisdiction. By passing the impugned order, the learned Family Court has returned the plaint/application of the appellants herein - original petitioners to present it before the appropriate court ? District Court.

6.3 At this stage, section 7 of the Family Courts Act which deals with the jurisdiction of the Family Court is required to be referred, which reads as under :-

"Section 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 proceedings 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."

On fair reading of section 7 of the Family Courts Act, clause (a) to (f) to sub-section (1) of section 7 can be said to be in respect of the disputes between parties to the marriage. However, clause (g) to explanation to sub-section (1) of section 7 provides that the Family Court would have jurisdiction to decide a suit or proceeding in relation to the guardianship of the person or the custody of, or access to any minor. It does not speak about the dispute between the husband and wife (father and mother of the minor). There are no such restriction in clause (g) of explanation to sub-section (1) of section 7. Under the circumstances, considering clause (g) of explanation to sub-section (1) of section 7, Family Court would have jurisdiction to decide a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor, even if the same is initiated by the person other than husband and wife (father and

mother of the minor), more particularly in the present case grand-father and grand-mother for their grand-daughter Dhairya. Under the circumstances, the learned Family Court has materially erred in returning the application to the appellants to present it before the appropriate Court ? District Court on the ground that the application submitted by the grand-father and grand-mother of the minor Dhairya for the custody of the minor, Family Court would not have any jurisdiction. Under the circumstances, the impugned order passed by the learned Family Court cannot be sustained and it is to be held that the Family Court would have jurisdiction to decide the dispute/proceedings in relation to custody or access to minor Dhairya initiated by the grandfather and grand-mother of the minor Dhairya.

6.4 At this stage, it is required to be noted that after the impugned order was passed by the learned Family Court, the appellants did approach the district Court for the very relief which was sought before the learned Family Court and it is reported that the District court has also dismissed the said application on the ground that the District Court would not have any jurisdiction.

6.5 In view of the above and even otherwise when it is found that the Family Court would have jurisdiction to decide the dispute in relation to the guardianship or custody of, or access to any minor, more particularly in the present case, Dhairya, initiated by the grand-father and grand-mother, the impugned order deserves to be quashed and set aside.

7. In view of the above and for the reasons stated above, present appeal succeeds. The impugned order passed by the learned Family Court, Ahmedabad below Ex.1 in Civil Miscellaneous Application No.1 of 2016, is hereby quashed and set aside and the learned Family Court is hereby directed to entertain the application preferred by the appellants herein ? grand-father and grand-mother of minor Dhairya and decide and dispose of the same in accordance with law and on merits.

As the dispute is with respect to custody of the minor and visitation rights of the appellants to the minor aged 4 years, it is expected and hoped that the learned Family Court will decide and dispose of the said application in accordance with law and on merits, at the earliest. All the concerned are directed to cooperate the learned Family Court in early disposal of the proceedings before the learned Family Court. Present appeal is allowed to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.