
(1998) 10 OHC CK 0003

In the Orissa High Court

Case No : Original Jurisdiction Case No. 9046 of 1996

Mayadhar Mallik

APPELLANT

Vs

Smt. Laxmi Mallik and Others

RESPONDENT

Date of Decision : 23-10-1998

Acts Referred:

Family Courts Act, 1984 — Section 10, 18(2), 18(3), 7, 7(1)

Citation : AIR 2002 Ori 5 : (1999) 1 OLR 37

Hon'ble Judges : P.K. Mohanty, J;P.C. Naik, J

Bench : Division Bench

Advocate : A.R. Dash, L. Udgata and N. Lanka, for the Appellant; K.M. Mishra, S. Choudhury and B.K. Sahu, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanty, J.—The impugned order of the learned Sub-Judge, Jaipur refusing to transfer the proceeding to Family Court, confirmed by the learned Additional District Judge, is under challenge in this writ petition.

2. The short fact of the case is that a suit for maintenance had been instituted by opp. parties 1 to 8, which was registered as T.M.S. No. 49 of 1987 in the Court of learned Subordinate Judge, Jaipur. The suit was decreed against the petitioner on 21-12-1989 directing him to make the payments towards maintenance. The petitioner having failed to make the payments in terms of the decree, the decree-holder (opp. parties 1 to 8) filed Execution Case, registered as Execution Case No. 7 of 1990 before the said Court of Subordinate Judge, Jaipur. The present petitioner-judgment-debtor filed a petition for transfer of the execution case from the Court of Subordinate Judge, Jaipur to the Family Court after establishment of the Family Court, Cuttack. The Subordinate Judge, on consideration held that the Civil Court alone can execute the decree. The petitioner carried a Civil Revision against the said order, which was rejected and the order passed by the Executing Court was confirmed.

3. Sri A R. Dash, learned counsel for the petitioner submitted that on a reading of the languages of Sections 7 and 8, after establishment of the Family Court under the Family Courts Act, 1984, the jurisdiction for execution of an order with regard to maintenance lies with the Family Court and as such, the refusal to transfer the matter to the Family Court cannot be sustained in law. Sri K.M. Mishra, learned counsel for the opposite parties however contends that the proceeding having been initiated before coming into force of the Family Courts Act and the order having been passed by a competent Civil Court and in view of the provisions of Sections 7, 8 and 18 of the Family Courts Act, 1984, only the Civil Court is competent to proceed with the execution case and, therefore, there is no infirmity in the orders of the Courts below in holding so.

4. Having heard the learned counsel for the parties and having gone through the impugned orders, the main controversy that arises for consideration is whether, in view of the provisions of Sub-section (1) of Section 7 read with Sections 8 and 18 of the Family Courts Act, 1984, the Civil Court has the jurisdiction to proceed with the execution case.

5. Section 7 of the Family Courts Act may be quoted hereunder :

"7. Jurisdiction -- (I) 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 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 proceeding referred to in this sub-section are units and proceedings of the following nature, namely;

(a) a suit or proceeding between the parties to a marriage for a decree of a 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 martial 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."

Explanation -- (f) to Sub-section (2) of Section 7 clarifies the import of the words "suits" and "proceedings" contemplated under Clause (a) to Sub-section (1) of Section 7, in terms it, contemplates that subject to the other provisions of the Act suit or proceedings for maintenance shall be dealt with by the Family Court. Section 8 deals with exclusion of jurisdiction of the pending proceedings. It lays down that where a Family Court has been established for any area, 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, which is pending immediately before the establishment of such Family Court before any district Court or subordinate Court referred to in that sub-section, which would have been required to be instituted or taken before or by Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and the Family Court had been established, they shall stand transferred to such Family Court on the date it is established.

Section 8 of the Family Courts Act may be profitably quoted hereunder :

"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 by power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(e) every suit or proceeding of the nature referred to in the Explanation to Sub-section (I) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1972 (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 Court; 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."

6. It is the admitted position that the Family Court has been established at Cuttack having its jurisdiction for the area is question, but decree was passed and the, execution proceeding was initiated before the establishment of the Family Court. The learned Additional District Judge has held that a proceeding for payment of alimony is a matter arising out of or connected with the marriage dispute and, therefore, a petition u/s 24 of the Hindu Marriage Act and all proceeding connected there or arising there from including proceeding for release of the said alimony amount fall within the purview of Explanation (1) appended to Section 7 of the Act. However, he has held that in view of Section 18 which provides that a decree or an order passed by the Family Court shall have the same effect as that of a Civil Court and Sub-section (3) in a jurisdictional clause for its execution, the execution proceeding does not fall under the purview of Section 7 of the Act and thus the Family Court does not have the jurisdiction to execute a decree of Civil Court passed prior to its establishment.

7. This Court in Mahapratap Rudra Das Vs. Pravabati Das, while interpreting Sections 7 and 8 of the Family Court Act read with Section 125 Cr.P.C. has held that after establishment of a Family Court, powers of the Magistrate u/s 125, Cr.P.C. are to be exercised by the Family Court and, therefore, the order for interim maintenance by Magistrate can be executed by the Family Court, which has got jurisdiction over the area the power. It has been further held that after establishment of the Family Court, the jurisdiction exercisable by the Magistrate First Class under Chapter II is to be exercised by the Family Court and the matter is to stand transferred to the Family Court on the date on which it is established.

8. A reference has been made to a decision reported in Marya Teresa Martin Vs. E. Martin, by a single Judge of the Kerala High Court by the learned counsel for the opposite parties. In the said decision, the learned Judge of the Kerala High Court has held that a plain reading of Section 8 along with Section 7 would show that the intention of the legislature is, after the establishment of the Family Court, with respect to the matters enumerated in the Explanation to Section 7 of the Act, only the Family Court will have jurisdiction. In other words, the said provisions do not envisage concurrent jurisdiction of the Family Court or the District Court. The decision, therefore, does not help the opposite party in any way in sustaining the order.

9. Coming back to the case at hand, the basic question that arise for consideration is as to the meaning to be affected to the word "proceeding" for maintenance occurring in Explanation (1) to Sub-section (1) of Section 7, which speaks about a suit or proceeding for maintenance. An execution proceeding is not a suit but the term "proceeding" is a comprehensive term and means a prescribed course of action for enforcing the legal right. The word has not been

defined and as such, generally speaking, a proceeding will mean a prescribed mode in which judicial business is conducted. The Apex Court in Babu Lal Vs. Hazari Lal Kishori Lal and Others, while interpreting the term "at any stage of the proceeding" occurring in Section 22(2) of the Specific Relief Act, has held that a proceeding u/s 22 includes execution proceeding also and or execution is a stage in the legal proceedings.

10. In that view of the matter, the term "proceeding for maintenance" contemplated under Clause (f) of Explanation to Sub-section (1) of Section 7 of the Act includes on execution proceeding. Clause (c) of Section 8 of the Act contemplates that, where a Family Court has been established for an area, every suit or proceeding of the nature referred to in the Explanation to Subsection (1) of Section 7, 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, or 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 has come into force and such Family Court has been established, the matter shall stand transferred to such Family Court on the date on which it is established. There is no dispute that the execution proceeding is pending before a Civil Court and the Family Court has been established having jurisdiction over that area. In that view of the matter, in terms of Section 8 of the Family Courts Act, the execution proceeding has to be transferred to the Family Court, Cuttack. This is because after establishment of the Family Court, the jurisdiction of the Civil Court is to be exercised by the Family Court. It is also not in dispute that after establishment of the Family Court, the power would have been exercised by the Family Court. The analogy given by the learned Additional District Judge with reference to Section 18 (1) and (3) that in view of the provisions of law, the Family Court is not empowered to execute a decree of a Civil Court in as much as the execution proceeding does not fall under the purview of Section 7 of the Act, is erroneous in law and cannot be sustained. Section 18(3) of the Act authorises the Civil Court to execute a decree for execution and not otherwise. In the case at hand the execution proceeding by operation of law stands transferred to the Family Court and only the Family Court, Cuttack can execute it.

11. In the result, the writ petition is allowed, the impugned orders in Annexures 1 and 2 are quashed and it is directed that the case records be transferred to the Judge, Family Court, Cuttack forthwith. Since this is a matrimonial matter and is pending long since, the Judge, Family Court shall expeditiously deal with the case and dispose of the same preferably within a period of six months from the date of receipt of the records. However, in the facts and circumstances of the case there shall be no order as to costs..

P.C, Naik, J.

While agreeing with the opinion of my learned Brother P,K. Mohanty, J. I would

like to add the following.

12. What is required in this case is to give the meaning to the word "proceeding" occurring in the Explanation to Sub-section (1) of Section 7 of the Family Courts Act, 1984 (in short, "the Act") and Section 8 of the Act. The word "proceeding" has not been defined in the Act and hence the need for this exercise.

13. To begin with, the word "proceeding" is very general one and in common parlance would mean "going forward". When used in connection with any legal matter, it would generally mean, "prescribed mode of action for carrying" into effect a legal right". Thus, to start a proceeding against someone would mean "to start a legal action against him". As explained in *Corpus Juris Secundum*, Volume I, under Chapter "ACTION", the term "proceeding" or "proceedings" has been said to be a technical term, and to have acquired a peculiar and appropriate meaning in law. On the other hand, it has been said that it is not technical, but generally speaking is a very comprehensive term, and may have different meaning, according to the context and the subject to which it relates, such as by its combination with other words and phrases which vary its ordinary meaning. Thus, in its ordinary acceptation, or general sense, except, as qualified by the subject to which it is applied, "proceeding" means the form and manner of conducting judicial business before a court or judicial officer, the form in which actions are to be brought and defended; the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing them.

14. In *Black's Law Dictionary*, in a general sense, "proceeding" is described as the form and manner of conducting juridical business before a Court or judicial officer; regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment, and, in a more particular sense, any application to a Court of justice, however made, for aid in the enforcement of rights. for relief, for redress of injuries, for damages, or for any remedial object. It therefore, follows that the word "proceedings" has different shades of meaning and can be given a narrow or wide import depending upon the nature and scope of the enactment to which it is used and in particular context of the language of the enactment in which it appears. The Apex Court in *Ramchandra Aggarwal and Another Vs. State of Uttar Pradesh and Another*, while considering the meaning of the expression "proceeding" occurring in Section 24(1)(b) of the Civil Procedure Code, 1908, observed at page 1891 (of AIR):

"..... The expression "proceeding" used in this Section not a term of art which has acquired a definite meaning. What its meaning is when it occurs is a particular statute or a provision of a statute will have to be ascertained by looking at the relevant statute"

15. In the case at hand, as earlier observed, a meaning is to be given to the word which occurs in the Explanation to Sub-section (1) of Section 7 of the Act. The words, as occurring in Clause(f), which is relevant for our purpose, are "a

suit or proceeding for maintenance." A reference may be made to Clause (c) of Section 8 in which the words also occur. The said clause provides that 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 shall stand transferred to such a family Court on the date on which it is established. Thus, the intention of the legislature is that once the Family Court is established in any area, any matter pending between the parties falling under the Explanations (a) to (g) to Sub-section (1) of Section 7 of the Act will come within the jurisdiction of the Family Court established over that area. Section 8 of the Act which relates to exclusion of jurisdiction in pending proceedings, lays down that where a Family Court has been established; no Court or magistrate in that area shall have jurisdiction in respect of any suit or proceeding covered by the Explanation to Sub-section (1) of Section 7 and all such suits or proceedings shall stand transferred to the Family Court established in that area. Therefore, the intention of the legislature is that every legal dispute relating to any matter provided in the Explanation to Sub-section (1) of Section 7 shall be within the exclusive jurisdiction of the Family Court and any such matter, pending before a District Court or a subordinate civil Court within the area where the Family Court has been established, shall stand transferred to the Family Court. So, by establishing a Family Court, new forum has been brought into existence to deal with the matters falling within the Explanation and no Court, other than the Family Court, is to take up these matters, which in turn have been excluded from the jurisdiction of the District Court or the subordinate civil Courts. It is in this light that the word "proceeding" occurring in the Explanation to Sub-section (1) of Section 7 and in Section 8 of the Act, is to be construed.

16. At this stage I may refer to a decision of the Apex Court in P.L. Kantha Rao and others Vs. State of Andhra Pradesh and others, wherein while considering the expression "..... either proceeding pending before any Court or other authority immediately before the date of establishment of a Tribunal under this Act, being a by proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after each establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal", it has been observed thus at page 808 (of AIR):

"The word "proceeding" engrafted in Section 29 must be understood in a broader perspective. The word "proceeding" would depend upon the scope of the enactment wherein the expression is used with reference to a particular context where it occurs. It may mean a course of action for enforcing a legal right. In the journey of litigation, there are several stages, one of which is the realisation of the judicial adjudication which attained finality. The word "proceeding" though has not been defined u/s 29, it is a comprehensive term

3. The right to adjudicate the dispute arising from the service conditions of the employees of the state has been expressly taken out from its jurisdiction of the Civil Court and the High Court, except of this Court under Article 136 and has

been conferred upon the Tribunal constituted under the Act. The right to enforce the order of a Tribunal is incidental to the right to claim the relief relating to the service conditions of the employees. Having divested the jurisdiction of the Civil Courts to adjudicate those disputes, the Act did not intend to confer jurisdiction in the Civil Court of the execution of the order of the Tribunal. Therefore, the term "proceeding" in Section 29 is a very wide term to mean a prescribed course of action to enforce the legal right. It indicates the prescribed mode in which the judicial business is conducted. The execution is a step in the judicial process. It seeks to enforce the final order to realise the result of the adjudication. Therefore, it is an integral part of the order passed by the Tribunal which was abolished and that new Tribunal came to be constituted under the Act gets jurisdiction and power to enforce the orders passed by the Tribunal and which attained finality."

17. Now reverting to the point in issue, as admittedly execution is a step in the judicial process as to it is a process to enforce the final order to realise the result of the adjudication, it would, in the facts and circumstances of the case be covered by the expression "proceedings" occurring in the relevant provision. In normal circumstances, the execution of the decree is by the Court, which initially passed it, unless, it is a case of transfer of the decree or abolition of the Court which passed it, where the case would be different. Thus, the Family Court which passes a decree will execute it on which there can be no two opinions. So normally, a decree, passed by the Family Court will be executed by that court or by another Family Court to which it is sent. But, probably keeping in mind that the Family Court is not established at every place, in Sub-section (3) of Section 18 of the Act it has been provided that it may also be sent to an ordinary civil Court for execution.

18. Thus, once a Family Court is established, even as regards execution of the decree, the ordinary civil Court assumes jurisdiction only when a decree is transferred to it for execution by the Family Court. This clearly indicates that even as regards execution, the jurisdiction is limited to case of transfer. In this view of the matter, it cannot be said that if after the establishment of a Family Court in particular area, an execution proceeding relating to any matter covered by Clauses (a) to (g) of Sub-section (1) of Section 7 is pending before an ordinary civil Court, it shall have jurisdiction to proceed with it, though its jurisdiction has been completely ousted by virtue of Section 8 of the Act. In this view of the matter, it follows that the word "proceeding" occurring in the Explanation to Sub-section (1) of Section 7 and in Section 8 of the Act shall include "an execution proceeding."