
(1991) 08 AHC CK 0014

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 1095 of 1989

Ram Bachan

APPELLANT

Vs

Family Court Judge and Others

RESPONDENT

Date of Decision : 13-08-1991

Acts Referred:

Family Courts Act, 1984 — Section 7, 9
Hindu Marriage Act, 1955 — Section 23(2), 24

Citation : (1991) 2 DMC 554

Hon'ble Judges : S.K. Dhaon, J

Bench : Single Bench

Advocate : Swaraj Prakash, for the Appellant;

Final Decision : Dismissed

Judgement

S.K. Dhaon, J.—This petition, at the instance of the husband, is directed against the order dated 8th November, 1988 passed by the Family Court, Gorakhpur allowing the application u/s 24 of the Hindu Marriage Act 1955 of Smt. Gyani Devi, respondent No. 2 (wife) whereby a sum of Rs. 500/- as litigation expenses and Rs. 200/- per month as maintenance allowance has been awarded to the wife.

2. Sometimes in March, 1987 the petitioner instituted Suit in the Court of Civil Judge, Gorakhpur u/s 9 of the Hindu Marriage Act claiming a decree for restitution of conjugal rights. Upon the constitution of the Family Court, the suit was transferred to that Court. The petitioner contested the application made by his wife u/s 24 of the Hindu Marriage Act by filing a reply to it.

3. The only submission made on behalf of the petitioner is that, as envisaged in Section 9 of the Family Courts Act, 1984 (hereinafter referred to as the Act), it was the duty of the Court to first make effort for bringing about a settlement between the parties before passing the impugned order and it having failed to do so it acted without jurisdiction. The contention is to be rejected, as stated.

4. Section 7 of the Act lays down that subject to the other provisions of the Act the Family Court shall have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Courts under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation. It also provides that the Family Court shall be deemed, for the purposes of exercising such jurisdiction under such law, to be a directed Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends. In the Explanation there is a long list of suits and proceedings beginning from (a) and ending on (g). Explanation (a) includes a suit or proceedings for restitution of conjugal rights. Section 8 of the Act excludes the jurisdiction of district Court or any subordinate civil Court in respect of any suit or proceedings of the nature referred to in the Explanation aforesaid and provides that any such suit or proceeding shall stand transferred to the Family Court.

5. The Act has not abrogated the Hindu Marriage Act on the contrary, Section 7 makes it clear that the Family Court is clothed with all the powers and the jurisdiction which any district Court or any subordinate Court exercises under the Hindu Marriage Act. It is apparent that a suit or proceedings for restitution of conjugal rights, as contemplated in Section 9 of the Hindu Marriage Act, are now cognizable only by the Family Courts. The district Court and Courts subordinate thereto have been divested of that jurisdiction. Putting it differently, the Hindu Marriage Act as a whole will now be administered by the Family Court. It goes without saying that Section 24 of that Act forms part of the Hindu Marriage Act.

6. Sections 23 and 24 of the Hindu Marriage Act have been placed side by side by the legislature sub-Section (2) of Section 23 posits that before proceeding to grant any relief under the Hindu Marriage Act. It shall be the duty of the Court, at the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Section 24 provides that where in any proceeding under the Hindu Marriage Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceedings, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it seems to the Court reasonable.

7. Section 24 is for the benefit of the husband and the wife. The object of the Section is to enable the husband or the wife, as the case may be, who has no independent income, to provide the other so that the proceeding may be conducted, or he or she may be maintained during the pendency of the proceeding. The intent of the legislature appears to be that either of the spouse may not be handicapped during the proceeding. Poverty of either spouse should not be allowed to act to their detriment.

8. The legislative policy appears to be that financial assistance should be provided to the indigent spouse to maintain herself, or himself, as the case may, during the pendency of the proceeding and he or she should also have sufficient funds to defend or carry on proceeding so that the spouse does not unduly suffer in the conduct of the case for want of funds. Thus in Section 24 these are twin objects. The first is that either of the spouse should be able to maintain herself or himself and the second is that either of the spouse should possess sufficient funds to either prosecute the proceedings or to defend himself or herself in the proceedings.

9. In sub-Section (2) of Section 23 the opening words are "before proceeding to grant any relief under this Act." These words are clearly referable to reliefs granted under that provision. The relief which are recognised under the Act, u/s 24 an interlocutory order is passed. No relief recognised under the Act, are enumerated, namely, divorce, judicial separation, restitution of conjugal rights. Therefore, the position is that sub-Section (2) of Section 23 is not attracted when an application u/s 24 by either spouse is considered and disposed of on merits.

10. In *Dilipbhai Chhaganlal Patel Vs. State of Maharashtra and Another*, the argument is that the provisions of sub-Sections (2) and (3) of Section 23 of the Hindu Marriage Act being mandatory, the Court will act without jurisdiction if, without taking recourse to those proceedings, it proceeds u/s 24 and grants reliefs there under. The learned Single Judge while repelling the contention has emphasised that the nature of the proceedings u/s 24 are summary in nature. No appeal is provided for against an order passed u/s 24. The object behind Section 24 is twofold, firstly to prevent vagrancy resulting from the strained relationship between the husband and wife and secondly to ensure that the indigent litigating spouse is not handicapped in defending or prosecuting the case for want of money. That is why Courts have always insisted that whenever an application is made u/s 24 it must be disposed of before any further steps are taken in the main case. In a given case, depending upon the facts and circumstances of the case an attempt to bring about a reconciliation might become difficult, if not impossible, unless some provision is made for maintenance and expenses, such a provision might become necessary even for an active participation in such a proceeding by the concerned spouse. The words used in sub-Section (2) of Section 23 i.e. "before proceeding to grant any relief under this Act" will not cover the summary proceedings u/s 24.

11. It is true, that, in the Act, there is prohibition against the appearance of lawyers in proceedings under it. Nonetheless, legal assistance would be required by either of the spouse. We should not be oblivious of the fact that even now, in the Hindu society, the majority of the womenfolk are illiterate and simpleton. They, therefore, on their own can not either initiate or defend the proceedings. Legal assistance to them is indispensable. They will have therefore, no alternative but to consult some lawyer. For doing so, they will need funds. Even in reconciliation proceeding an attempt by the Court to bring about a settlement

between the parties will have a better chance of success, if the area of the discord or dispute between the spouses is narrowed down or minimised. It will be easier for the Court to pin-point the cause of the matrimonial unhappiness if the parties before it state their respective cases in a logical and clear manner. This may be possible if the pleadings of the parties are skillfully drafted.

12. Section 9 of the Act may now be read :

"In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit."

13. I find no real difference between the objects as contained in sub-Section (2) of Section 23 of the Hindu Marriage Act and Section 9. The Act by itself does not provide for any suit or proceeding. The suit or proceedings, as already explained, are referred to in Explanation to Section 7. Those suits and proceedings are recognised under different statutes, one of them being the Hindu Marriage Act. Therefore, sub-Section (2) of Section 23 has not been abrogated or repealed by Section 9. It follows that Section 9 has brought about no change in the legal position that the provisions as contained in sub-Section (2) of Section 23 of the Hindu Marriage Act do not control the proceedings u/s 24 of that Act. Again, the draftman, in Section 9, has taken care to emphasise that an endeavour to bring about a settlement between the parties should be made where it is possible to do so consistent with the nature and circumstances of the case. It is not intended in Section 9 that even though an indigent spouse can not either maintain himself or herself or prosecute or defend the litigation in which she or he is involved yet the Court should persuade him or her to arrive at a settlement in respect of the subject-matter of the suit or proceedings.

14. We may now consider Section 20 of the Act which provides that the provisions of the 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 the Act. We have already taken the view that Section 9 of the Act is not inconsistent with either sub-Section (2) of Section 23 or Section 24 of the Hindu Marriage Act. Section 9 and sub-Section (2) of Section 23 and Section 24 can co-exist. None of them are repugnant to each other. They have merely to be harmoniously construed and worked. The preamble of the Act emphasises that the Family Courts have been established with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs. It is apparent that there can be no speedy settlement of a dispute between the husband and wife if either of them is indigent. The One who has no paucity of funds is bound to have an edge over the other who is in need of funds. In such a situation, the question of settlement much less a speedy settlement can hardly arise.

15. Learned Counsel for the petitioner has laid considerable emphasis upon the statement of objects and reasons as appended to the Bill giving rise to the Act, we do not find any inkling in the statement of objects, and reasons that the mover of the Bill intended that an application u/s 24 of the Hindu Marriage Act should be kept in the cold storage till a Family Court makes an endeavour to bring about a rapprochement or settlement between the parties. Moreover, it is now well settled that the statement of objects and reasons can not be used as an aid to the construction of the statute. Its limited purpose is of understanding the background and antecedent state of affairs leading to the legislation.

16. Section 9 of the Act will be vulnerable to the attack of being unreasonable and arbitrary and, therefore, hit by Article 14 of the Constitution, if it is interpreted to mean that the Court must first initiate proceedings to bring about a settlement between the two spouses inspite of the precarious financial condition or either of them so that any one of them may not be able to prosecute or defend the proceedings. In a mutual settlement, the element of give and take is implicit. No such settlement can be equitable or just unless and until the parties thereto stand more or less on the same footing. In a contest between two parties in a Court of law or a Tribunal it will not be permissible to a statute to deny a reasonable opportunity to one party to either prosecute or defend the proceedings while the other party has that opportunity. Such a statute on the face of it will be arbitrary and void, if tested on the touchstone of Article 14 of the Constitution. In *Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh*, it was held ".....There is nothing on the record to show, that he has any other source income except pay. As he did not receive subsistence allowance till March 20, 1955 he could not, in our opinion, attend the enquiry. The first payment of subsistence allowance was made to Him on March 20, 1965 after a part of the evidence had already been recorded on February 9,10,11, 1965. The enquiry proceedings during those days are vitiated accordingly. The report of the Enquiry Officer based on that evidence is infected with the same defect. Accordingly, the order of the Government dismissing him from service cannot stand. It was passed in violation of the provisions of Article 311(2) of the Constitution for the appellant did not receive a reasonable opportunity of defending himself in the enquiry proceedings." In Article 311(2) the principles of natural justice have been given a constitutional recognition. The authority, therefore, will be apposite for the purpose of striking down Section 9 of the Act on the ground that it permits violation of principles of natural justice and is, therefore, arbitrary and hit by Article 14 of the Constitution.

17. It is trite law that if two constructions are possible, one leading to its invalidity and the saying it from being declared invalid, the former should be eschewed and the latter accepted.

18. There is no substance in this petition. It is dismissed summarily.