

Journal

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Court

LAHORE HIGH COURT

Date

1968-01-10

Appeal No.

GIVIL MISCELLANEOUS NO. 3401 OF 1967

Judge

KARAM ELAHI CHAUHAN

Parties

MST. GAMAN—PETITIONER VERSUS TAJ DIN—RESPONDENT

Lawyers

ABDUL KARIM SAGGU FOR APPELLANT. ABDUL LATIF FOR RESPONDENT.RAJA SAID AKBAR KHAN, A.-G.; RAFIQ AHMAD BANGISH (AMICUS CURIAE) FOR THE STATE.

Statutes

CONSTITUTION OF PAKISTAN 1962 – ARTICLE 102 WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) – SS. 3 AND 14 CONSTITUTION OF PAKISTAN (1962) – ARTICLES 102 AND 242 CONSTITUTION OF PAKISTAN (1962) – ARTICLE 242 WEST PAKISTAN FAMILY COURTS ACT (XXXV OF 1964) – S. 17, READ WITH SS. 24 AND 151 CONSTITUTION OF PAKISTAN (1962) – ARTICLE 102

Judgment

K. E. Chauhan, J.—Mst. Gaman (hereinafter called the petitioner) on the 3rd of April 1967, filed a suit for dissolution of marriage in a Family Court at Vehari (District Multan). About eight days thereafter, her husband Taj Din (hereinafter called the respondent), as a counterblast to the suit of the petitioner, filed a suit in the Family Court of Lahore, for restitution of conjugal rights. The petitioner on the 26th of June 1967, filed an application in this Court under sections 24 and 151, C. P. C., and also under Article 102 of the Constitution of Islamic Republic of Pakistan (hereinafter called the Constitution*, for the transfer of the case filed by her husband in Lahore to the Family Court in Vehari, where her own suit for dissolution of marriage is pending.

Learned counsel who appeared for Taj Din respondent, submitted that he had no objection if the suit, filed by his client, was transferred to Vehari. He, however, argued that this Court had no jurisdiction to transfer a suit pending in one Family Court to another Family Court. The sole question for determination, therefore, is as to whether this Court has such a jurisdiction or not.

2. I will first take up Article 102 of the Constitution which says that, "Each High Court shall superintend and control all other Courts that are subordinate to it." The provision corresponding to this Article in the Government of India Act, 1915 was section 107 which reads as follows :— "107. Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do any of the following things that is to say,— (a) call for returns ; (b) direct the 'transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction ; (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts ; (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts ; and (e) settle tables of fees to be allowed to the sheriff, attorneys and all clerks and officers of Courts: Provided that such rules, forms and tables shall not be inconsistent with the provision of any Act for the time being in force, and shall require the previous approval, in the case of the High Court at Calcutta, of the Governor-General-in-Council, and in other cases of the local Government." A perusal of the above quoted section will show that it bestowed on the High Court the power of superintendence over all Subordinate Courts. Apart from what may have come within the domain of superintendence sub-clauses (a) to (d) gave some illustrations of the acts which might have been performed or the orders which could have been passed by a High Court. The various sub-clauses (a) to (d) were merely illustrative in nature and were not all exhaustive of the meaning of the word "Superintendence." Sub-clause however, clearly illustrated that the High Court could pass an order of transfer of any suit or appeal from one Court to another. This section was re-enacted in the Government of India Act of 1935 in the form of section 224 which read as follows :— "224. (1) Every High Court shall have superintendence over all Courts in India for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say— (a) call for returns; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts; (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts ; and (d) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of Courts: Provided that such rules, forms and tables shall not be inconsistent with the provision of any law for the

time being in force, and shall require the previous approval of the governor.

the High Court enjoyed, in addition to the powers of revision conferred by the ordinary law, since the Constitution of the High Courts Act, 1861, originally under section 15 of the High Courts Act, 1861 and later under section 107 of the Government of India Act, 1915. It was probably for this reason that the Attorney-General referred to the section 224 of the Government of India Act, 1935, as dealing only with administrative matters. That the scope of Article 224 of the Government of India Act, 1935, was so limited was held in *Sakkal Sardar v. Iswar Das Thirani* (1) and *Ryots of Garabandho and others Zemindar of Parlakitnedi and another (Respondents)* The present Article 102 of the Constitution, however, brings the position back to what it was under the provisions of section 107 of the Government of India Act, 1915, which gave to the High Courts powers to control all subordinate Courts administratively as well as judicially. See *Romlal Hariram Agarwala and another v. Ratanlal Bolchand Agorwale* (3) and *Waryam Singh and another v. Amarnath and another* The corresponding Article in the Constitution of India is Article 227, which bestows similar powers of control and superintendence in the High Courts. It has been held in *Muhammad Baquar Hussain Qureshi v. The State of Hyderabad* (5) and *Aida I Singh and others v. Karam Singh and others* (6) and *Bhagwandas v. Jedu* a case under section 15 of the High Courts Act, 1861, that the power of superintendence and control includes the power to direct transfer of cases. In re: *Gangalakurthi Pattisam and others* (8) it was held that such a jurisdiction includes the power to direct stay of proceedings in subordinate Courts. In view of the above construction of Article 102 of the Constitution I have, therefore, no hesitation in holding that this Court in its supervisory jurisdiction will have the power to transfer cases pending in subordinate Courts.

states that subject to the provisions of the Muslim Family Laws Ordinance, 1961, and the Conciliation Courts Ordinance, 1961, the Family Courts shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in the Schedule. The Schedule contains a list of six matters, namely, (1) Dissolution of Marriage; (2) Dower; (3) Maintenance; (4) Restitution of conjugal rights; (5) Custody of children; and (6) Guardianship. Section 6, specifies the place of sitting of a Family Court and states that subject to any general or special orders of Government in this behalf, a Family Court shall hold its sittings at such place or places within the District or area for which it is established as may be specified by the District Judge.

The proceedings in a Family Court as is laid down in section 7 of the Act, are contemplated to be started by means of a suit by the presentation of a plaint or in such other manner and in such Court as may be prescribed in the Rules made under the Act.

The plaint is to contain all material facts relating to the dispute and is to be accompanied by a Schedule giving the number of witnesses intended to be produced in support thereof together with a brief summary of the facts to which they would depose.

All documents which the plaintiff intends to rely upon in respect of his claim shall be appended to the plaint. Within three days of the presentation of the plaint to a Family Court, the plaintiff shall send to each defendant by registered post, a copy of a complete set of the plaint along with the necessary schedules and documents. The plaintiff is also

required to cause a notice to be inserted in any two newspapers approved by the Family Court of the fact of his having filed the plaint. Thereupon the defendant is required to file his written-statement, which must be accompanied by copies of the entire documentary evidence that he wishes to produce in the case together with a list of the names and addresses of his witnesses and the precise of the evidence that each witness is expected to give. After these formalities are over, the Family Court is required to hold pre-trial proceedings with a purpose of bringing about a compromise or conciliation between the parties, if this be possible. If this object is not achieved, the Court shall frame the issues in the case and fix a date for the hearing of evidence. On the date fixed for the hearing of the evidence, the Family Court shall examine the witnesses who will give their evidence in their own words and no question shall be put to them by any party or any counsel of a party by way of examination-in-Chief, cross-examination or re- examination, provided that the Court may, if it so deems fit, put any question to any witness for the purpose of elucidation of any point which it considers material in the case. After the close of evidence of both sides, the Family Court shall make another effort to effect a compromise or reconciliation between the parties. If such compromise or reconciliation is not possible, the Family Court shall announce its judgment and give a decree. The decree is to be passed in such form and in such manner as may be prescribed by rules and shall enter its particulars in the prescribed register. In Rule 16 of the West Pakistan Family Court Rules, 1965, it is laid down that in every suit, on passing the judgment, a decree shall be drawn up in Form I and shall be signed by the presiding Judge. The decree shall bear the seal of the Court, The Form reads as follows i— "FORM I (See Rule 16) Form of decree In the Family Court i (1) Case No.

(2)Petitioner/Plaintiff versus Defendant/Respondent.

(3) Claim for..... ; This suit coming this day for final disposal before this Family Court, it is hereby ordered that.....

Date Signature of the Judge.

Seat of the Court. Family Court at . . ." Under Rule 17, the Court is required to maintain a register of decrees and orders in the form prescribed for under the Code of Civil Procedure. Section 13 of the Act lays down the manners in which the decrees are to be enforced. The decree shall be executed by the Court passing it or by such other Civil Court as the District Judge may, by special or general order direct.

Section 15 empowers a Family Court to summon witnesses. Section 16 gives to the Court the power to punish its own contempt.

Section 19 says that court-fees to be paid on any plaint for any kind of suit is to be Re. 1.00. Under section 25 of the Act, the Family Court shall be deemed to be a District Court for the purposes of the Guardians and Wards Act, 1890, and notwithstanding anything contained in this Act, shall, in dealing with matters specified in that Act, follow the procedure prescribed in that Act.

presented to a Court not having jurisdiction and it is laid down that it shall be returned to be presented to the proper Court. In rule 6, it is stated that the Court which shall have jurisdiction to try a suit will be that within the local limits of which (a) the cause of action

wholly or in part has arisen, or (b) where the parties reside or last resided together: Provided that in suits for dissolution of marriage or dower, the Court within the local limits of which the wife ordinarily resides shall also have jurisdiction.

In rule 7, it is stated that suits relating to the custody of children and for guardianship shall be instituted in and be heard and tried by the Court of the District Judge, but such Court may transfer any such suit to the Court of the Additional District Judge, the Senior Civil Judge, the Civil Judge First Class or the Civil Judge First Class (Additional) having jurisdiction as provided in rule 6, and thereupon the Court to which such suit is so transferred shall have jurisdiction to hear and try the same, and where in any District there is no such Court, such suits shall be instituted in, and be heard and tried by the Court of the District Judge or the Additional District Judge. Sub-rule (3) of rule gives to the Court of the District Judge powers to transfer cases. Rule 8 gives to the District Judge the powers to stay proceedings of any suit pending in the Court of the Civil Judge of any class. Rules 12 and 13 contemplate the dismissal of a suit in default and its restoration and also passing of ex parte decrees or setting aside of ex parte decrees. Rule 14 says that every judgment or order shall be written by the presiding Judge or from the dictation of such Judge in the language of the Court, or in English and shall be dated and signed by the Judge in open Court at the time of pronouncing it. Judgments and orders which are appealable shall contain the point or points for determination, the decision thereon and the reason in brief for the decision. As already mentioned, in every suit, on passing the judgment, a decree shall be drawn up in Form I (reproduced above) and shall be signed by the presiding Judge. It is also to bear the seal of the Court. In rule 21 it is stated that the records of the Court, including its registers, shall be preserved for such period as is provided under the rules of the High Court applicable to Civil Courts. Rule 23 says that the Court shall, on the application of any party to a dispute, allow inspection of the records of the Court relating to the dispute on payment of a fee of fifty Paisa. Sub-rule (2) of this rule says that on the application of any party to a suit, certified copies of the decree or decision or other proceedings or entry in any register maintained under these rules or of any portion thereof, shall be supplied on payment of a fee calculated at the rate of 25 Paisa for two hundred words or part thereof. Rule 24 says that there shall be kept in the office of every Court a seal of the Court which shall be circular in shape and shall have thereon the inscription "Family Court" and the name of the district. Sub-rule (2) of this rule says that the seal of the Court shall be used on all summonses, order, decrees, copies and other documents issued under the Act or these Rules.

5. All this literature, which has been mentioned above, clearly points to the direction that the Tribunals constituted under the Act are Courts in every sense. There is no indication or suggestion that it is any persona designata who is to perform the functions mentioned above. The direction in the statute is to establish Courts and then there are laid down the qualifications of the officers, who can man this Court. The functions, which the forum is required to perform, are all judicial. Each matter is to be initiated by means of a suit which is to start by means of a plaint. The plaints in suits before the Family Courts are in no way different from the plaints under the Code of Civil Procedure. After the institution of a suit, by means of a plaint, the process is issued to the defendant who is required to file a written-statement. Thereafter the issues are struck, evidence is recorded and a judgment is pronounced which is to be followed by a decree. The Act does not create any new rights, but it simply specifies the course in which already existing rights of the parties with regard to dissolution of marriage, dower, maintenance, restitution of

conjugal rights, custody of children and guardianship may be enforced. Examined in this way and in the light of the law contained in Khadim Mohy-ud-Din and another v. Ch. Rehmat Ali Nagra and another Ibrahim v. Muhammad Rafique (2), Aziz Begum v. Sh. Nur Muhammad and others (3) and The Corporation of the City of Lahore v. Mst, Fahmida Begum a Family Court is a Court in all respects. It was laid down in these authorities and In re\ Mian Sultan Ali Nanghiana v. Mian Nur Hussain Kiran Chandra Bose v. Kalidas Chatterji (6) and Allen Bros. & Co. v. Bando & Co. that where it is provided that a matter is to be decided by a certain Court then the Presiding Officer of such a Court acts as a Court and not as a persona designata. The provisions of the Family Courts Act make it clear that the* intention of law is to set up Courts and entrust matters to them! in their capacity as Courts and not as a persona designata.

6. The second question to be taken note of is that in Article 242 of the Constitution, the word "Court" has been defined to mean "any Court of law". It is well known that there is a marked distinction between a Court of law and a Tribunal (which renders a final decision between the parties after hearing witnesses on oath, and whose decisions may be subject to an appeal to a Court.

These Tribunals are not necessarily Courts of law though they undoubtedly exert judicial powers. This distinction between a Court of Law and a Tribunal exercising judicial and *gaz«j«-judicial* functions was pointed out by Fry, L. J., in the case of Royal Aquarium, etc., Lid. v. Parkinson Similarly, Lord Sankey, L. C., in the case of Shell Company of (2) 1943 I A 129 (2) P L D 1964 Lah. 644 (4) P L D 1952 Lah. 258 (6) A I R 1943 Cal. 247 (8) (1892) 1 Q B 431 Australia Ltd. v. Federal Commissioner of Taxation observed : "that a tribunal is not necessarily a Court in the strict sense of exercising judicial power, because, it gives final decisions; hears witnesses on oath; two or more contending parties appear before it between whom it has to decide; it gives decisions which affect the rights of subject; there is an appeal to a Court, and because it is a body to which a matter is referred by another body." It was pointed out in that case, that there are Tribunals with many of the "trappings of a Court" which nevertheless are not Courts in the strict sense of exercising judicial power. The views expressed in the Shell case have been referred to in the case of Labour Relations Board of Saskatchewan v. John East Ironworks Ltd. However, a study of the case-law on the subject shows that one of the hallmarks for determining as to whether a forum is a Court of law or not is to see as to whether it applies legal principles and excludes adjudication based on considerations of policy. If the Tribunal is guided by some principles of policy rather than by legal principles or any particular law on the subject, then it will not be a Court of law. Other criteria for seeing whether a Tribunal is a Court of law is to examine as to whether it is required by law to give a public hearing to all the parties of a case subject, of course to the proper exercise of power to exclude the public in proper cases. See Scott v. Scott (3) and Re: Agricultural Industries Ltd. Still another test is that the Presiding Officer of the Court shall not take part in any decision in which he is personally interested. See Co-partnership Farms v. Harvey-Smith The third test is that every litigant has a right to be confronted with the case against him by his opponent in the presence of a Judge and to put his own case before him.

Examined from all these points of views, it will appear that a Family Court is not a Tribunal of such a kind which is to decide matters coming before it on considerations of policy and rather it is to be guided by law. It is not an administrative tribunal but a Court of law. The matters, on which it can adjudicate, have been mentioned in the earlier part

of this judgment and the rule of decision of these matters as laid down in the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, is to be Muslim Personal Law (Shariat) subject of course to any statute law. A Family Court, from these points of views, is, therefore, m Court of law as contemplated in Article 102 of the Constitution! read with Article 242 of the Constitution.

7. The next point to be seen is as to whether a Family Court is subordinate to the High Court within the meaning of Article 102 of the Constitution. The subject of subordination came under discussion in a Full Bench decision of this Court reported in Mian Sultan Ali Nanghiana v. Mia Nur Hussain.

The question that arose for consideration was as to whether Election Petition Commission, constituted under Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936 Part III, in accordance with section 291 of the Government of India Act, 1935, was a Court subordinate to the High Court. Cornelius, J. (as then his Lordship was), who wrote the minority judgment, was of the view that once it is held that an officer, authority or functionary is exercising the functions of a Court in relation to rights, that may be called "civil", that officer, authority, or functionary must be held to be subordinate to the High Court. The majority view, however, which was propounded by Muhammad Munir, A. C. J. (as then he was), was to the contrary and he held at pages 346 and 347 that :— "I cannot accept the broad and unqualified proposition that once it is held that an officer, authority or functionary is exercising the functions of a Court in relation to rights that may be called 'civil' that officer, authority or functionary must be held to be subordinate to the High Court. The result of any such finding would be that all Courts which adjudicate upon the civil rights of subjects whether in cases between the subjects themselves or between the State and the subject will be subordinate to the High Court and this will bring within the sphere of subordination not only the Revenue Courts which admittedly decide civil disputes between the parties but also the income-tax authorities which- determine the subject's liability to the State. One clear indication of subordination has always been held to be that the Court whose subordination is in question is subject to the appellate jurisdiction of the High Court. A Court may also be subordinate to the High Court even qua matters which are not subject to the High Court's appellate power if these matter have been entrusted for adjudication to an admittedly Subordinate Court as a Court and not to the Presiding Officer of such Court as a persona designata....." "The existence of a right of appeal from the decisions of a Court to a Superior Court is a well recognised test of subordination even qua cases in which no appeal lies and a Court may be held to be subordinate to another Court in cases in which there is no right of appeal to that Court." To the same strain are Abdul Rashid Petitioner v. Hanuman Oil and Rice Mill, Arjun Rautara v. Maharaja Krishna Chandra Gajpati Naryan Deo (2) and Makhan Lai and others v. Secretary of State Applying these tests to the the present case, the position that emerges is that according to section 14 of the Family Courts Act, 1964, in such cases where a Family Court is presided over by a District Judge, an appeal shall lie to the High Court and in any other case to the District Court, which, according to section 2(21) of the West Pakistan General Clauses Act VI of 1956, and section 2(4) of the C. P. C. means the principal Civil Court of original Civil Jurisdiction of a district. I have referred to the definition as given by the Civil Procedure Code, because in section 2 (2) of the West Pakistan Family Courts Act, 1964, it is laid down that, "words and expressions used in this Act but not herein defined, shall have the meaning respectively assigned to them in the

Code of Civil Procedure, 1908". A District Court, according to section 3 of the Civil Procedure Code, is subordinate to the High Court and every Civil Court, of a grade inferior to that of a District Court, is subordinate to the High Court and the District Court. A Family Court is thus, from all points of views, a Court subordinate to the High Court within the meaning of Article 102 of the Constitution.

8. Now I take sections 24 and 151 of the Civil Procedure Code. I have grave doubts about their applicability to the facts and the circumstances of the present case. Firstly, because in section 17 of the Family Courts Act it is inter alia laid down that the provisions of the Code of Civil Procedure, 1908, "shall not apply to proceedings before any Family Court." The obvious effect of transferring a case under section 24, C. P. C., will be to apply the provisions of the C. P. C. to the proceedings before a Family Court. A suggestion was given by the learned counsel for the petitioner that this section prohibited the applicability of Civil Procedure Code in the conduct of the trial of a case before a Family Court and to the procedure to be followed by it and not to the jurisdiction of the High Court to transfer cases from one Family Court to another. There is no justification to give such a restricted meaning to the provisions of section 17 of the Family Courts Act. It aims at a total bar of Civil Procedure Code to the proceedings before a Family Court and an effort should not be made to destroy the effect of this bar. When a case is transferred, it will mean that section 24 will be applied to the proceedings before a Family Court, which, in my opinion, is prohibited by section 17 of the Act Secondly, it is to point out that an amendment was made in section 17 of the Family Courts Act by West Pakistan Family Courts (Amendment) Act, 1967, whereby the words "except sections 10 and II" (of the Civil Procedure Code) were added into section 17, the effect of which was that the Civil Procedure Code was not to apply to the proceedings before a Family Court except its sections 10 and 11 which deal with stay of proceedings and res judicata. The Legislature was aware of the existence of section 24, C. P. C., and if the intention had been to apply the said section, the same could have also been mentioned among the sections later on applied. As this was not done, the intention is clear that the said section is not to be applied.

Thirdly, the very wording of section 24, C. P. C., will show that in its nature, the whole of it cannot be applied to cases before Family Courts. As for example, earlier part of section 24 authorises a High Court to transfer a case from a Subordinate Court to its own file. But in view of section 5 of the Family Courts Act which says that Family Court shall have exclusive jurisdiction to entertain, hear and adjudicate upon matters specified in Schedule, it will not be possible for the High Court to assume that jurisdiction. In this way, there is thus no reason and logic in holding that a part of section 24, C. P. C. applies to suits before Family Courts and the other part does not apply.

Fourthly, rule 7 of the West Pakistan Family Court Rules, 1965, expressly deals with the subject of transfer and reads as follows :— "7. (I) Suits relating to the custody of children and for guardianship shall be instituted in, and be heard and tried by the Court of the District Judge, but such Court may transfer any such suit to the Court of the Additional District Judge, the Senior Civil Judge, the Civil Judge First Class or the Civil Judge First Class (Additional) having jurisdiction as provided in rule 6, and thereupon the Court to which such suit is so transferred shall have jurisdiction to hear and try the same.

(2) Suits triable under the Act, other than those relating to the custody of children and

guardianship, shall be instituted, in, and be heard and tried by, the Court of the Civil Judge having jurisdiction as provided in rule 6, and where in any District there is no such Court, such suits shall be instituted in, and be heard and tried by the Court of the District Judge or the Additional District Judge.

(3) Notwithstanding anything contained in sub-rules (1) and the Court of the District Judge may— (a) recall any suit made over by it for trial under sub-rule (1) to any Court specified in that rule, and either try such suit itself or refer it for trial to any other Court within the District} (b) send for the record and proceedings of any suit pending for trial in any Court in the District and hear and try the suit itself or refer it for trial to any other Court within the District, and thereupon the Court of the District Judge or the Court to which such suit is so transferred, as the case may be, shall have jurisdiction to hear and try the suit." This also points out that the subject of transfer has been dealt with by the Family Courts Act, 1864, through its rules in a particular manner and that the intention was not to apply section 24, C. P. C., because otherwise, there would be no logic in making duplicate provision for the same matter once in Rules and at the same time in section 24, C. P. C.

9. The upshot of the above discussion is that since the applicability of sections 24 and 151 of the C. P. C. is highly doubtful, I would, by invoking my jurisdiction under Article 102 of the Constitution, transfer the suit entitled as "Taj Din v. Mst. Gamart*" pending in the Family Court at Lahore to the Family Court at Vehari, where the suit entitled as "Mst. Gaman v. Taj Din" is already pending, to which transfer learned counsel for the respondent has no objection. The parties shall bear their own costs.

10. Before parting with this case, I must appreciate the assistance rendered to me by the learned Advocate-General and Mr.

Rafiq Ahmad Khan Bangash Advocate, who, at a short notice, gave me a valuable help in determination of the points involved in this case.

Petition allowed.