

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**CIVIL WRIT PETITION NO. 755 OF 2015
WITH
CIVIL APPLICATION NO. 191 OF 2015**

Karl Raphael Fernandes	...	Petitioner
vs.		
Maurilius Carolyn Fernandes & Anr.	...	Respondents

Mr. Uzair Kazi i/b. Divya Shah & Associates, Advocate for the petitioner.
Mr.S.R.Maurya, for the respondents.

CORAM: SMT.SADHANA S.JADHAV,J.
DATE : 23rd January, 2015.

P.C.

Rule. Rule made returnable forthwith with consent of the parties.

2. The petitioner herein , being aggrieved by the order dated 12.1.2015 passed by the Family Court No. 6, Mumbai, has approached this Court by way of this Writ Petition.

3. The petitioner was married to the respondent at Nashik and they were living as husband and wife at Nashik. It is undisputed that the couple lastly resided at Nashik. The respondent No.1 had withdrawn herself from the society of her husband and is at the present residing at Mulund. The respondent herein has filed a divorce petition and has sought dissolution of marriage under Section

10(1)(ix) and (x) of Divorce Act, 1869 and also under Sections 18, 19, 20, 21 and 22 of the Protection of Woman from Domestic Violence Act, 2005, which is pending before the Family Court at Bandra.

4. It is the contention of the petitioner that the petitioner herein had filed an application before the Family Court challenging the territorial jurisdiction of the Family Court at Mumbai, to decide the divorce petition since the place where they lastly resided together was at Nashik. It is contended that the petitioner had filed an application praying that the Court shall frame an issue under Section 9A of the Code of Civil Procedure, 1908 and decide the issue of territorial jurisdiction. The learned Family Court has formed an opinion that Section 26 of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as “Domestic Violence Act”) specifically provides for any relief available under Sections 18, 19, 20, 21 and 22 of the Domestic Violence Act, which is to be sought in addition to and along with the reliefs sought for in the suit or legal proceeding before a civil or criminal court. That the respondent i.e. the original petitioner before the Family Court had not exclusively filed the petition under the provisions of Domestic Violence Act, but had claimed for ancillary reliefs as under the Domestic Violence Act, the petitioner could have approached any Civil Court or Criminal Court and hence the learned Family Court has reframed the issue under Section 9A of the C.P.C.

5. Section 10 sub-clause (3) of the Family Courts Act, 1984 contemplates as follows :-

“10(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.”

6. The learned counsel for the petitioner submits that the case would be covered by a special statute i.e. the Divorce Act of 1869. According to the learned counsel for the petitioner, Section 45 of the Divorce Act, 1869 contemplates as follows :-

“Subject to the provisions herein contained, all proceedings under the said Act shall be regulated by the Code of Civil Procedure, 1908”

The learned counsel for the petitioner submits that in view of the above stated provisions, it would be incumbent upon the Family Court to initially frame an issue as far as the territorial jurisdiction is concerned and only thereafter the Family Court would continue with the proceedings. However, according to the learned Counsel, unless the issue of jurisdiction is decided, the Family Court cannot grant any relief or proceed with the further stage of the said proceedings.

7. The learned counsel for the respondent submits that in the year 2013, i.e. on 20.3.2013, the respondent herein has filed an application under Section 26

of the Domestic Violence Act and has claimed maintenance during the pendency of the proceedings.

8. The learned counsel for the respondent has filed a Civil Application in the present Writ Petition seeking relief under Section 26 of the Domestic Violence Act. However, the very fact that similar application is filed and subjudice before the Family Court, it would not be necessary for this Court to consider the said application. The learned counsel for the respondent submits that it prima facie appears that the Family Court was of the opinion that unless the petition challenging the territorial jurisdiction is decided, no application seeking interim relief can be decided.

9. Section 9A sub-clause (2) of the Code of Civil Procedure reads as follows :-

“ (2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction.”

It is true that a preliminary issue needs to be framed. However, the hearing of the application seeking relief under Section 26 of the Domestic Violence Act cannot be deferred indefinitely only on the point of determination of territorial jurisdiction.

10. The Writ Petition can be disposed of at this stage with the following directions :-

- (i) The learned Family Court shall frame an issue regarding territorial jurisdiction as a preliminary issue under Section 9A of the Code of Civil Procedure on the next scheduled date i.e. 30.1.2015.
- (ii) The learned Family Court shall also decide the application filed under Section 26 of the Domestic Violence Act on the same day i.e. 30.1.2015 without waiting to determine the issue framed under Section 9A of the C.P.C.
- (iii) The learned Family Court shall frame the issue on 30.1.2015 and decide the said issue finally within eight weeks from 30.1.2015.

Rule is made absolute accordingly. Petition is disposed of.

- 11. Civil Application No.191 of 2015 is heard and disposed of.
- 12. Parties to act on an authenticated copy of this order.

(SMT.SADHANA S.JADHAV, J.)