

Dhanappa
I. Koshti

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2 The reliefs sought in Guardianship Petition No. 3 of 2019 are as under -

- (a) That notice u/s 11 of the Guardians and Wards Act, 1890 VIII of 1890 may be dispensed with;
- (b) That the petitioner being mother and natural guardian of the minor Param s/o Hiren Mehta @ Prithvi s/o Hiren Mehta be appointed (without security and without remuneration) as a guardian of the minor;
- (c) That the petitioner may be granted leave to apply to this Hon'ble Court as and when occasion may arise.

Similarly, the reliefs sought in Guardianship Petition No.19 of 2017 are as under -

- (a) Declare the petitioner as the sole guardian of the Minor Daughter in accordance with Section 7 of the Guardian and Wards Act, 1890;
- (b) Direct the Respondent to pay a monthly allowance of Rs.2,00,000/- (Rs. Two Lakhs) to the petitioner for her care and pains in the execution of her duties and in accordance with Section 22 of the Guardians and Wards Act, 1890.
- (c) Direct the Respondent to pay the Petitioner the litigation costs of the present proceedings in accordance with Section 49 of the Guardian and Wards Act, 1890;
- (d) Declare that the Petitioner shall have temporary custody of the Minor Daughter until the final disposal of the present petition pursuant to Section 12 of the Guardian and Wards Act, 1890.

3 In both the aforesaid Guardianship Petitions, a preliminary issue of jurisdiction was raised by the respondents. According to the respondents, in view of the provisions of Section 7 read with Section 8 and Section 20 of the Family Courts Act, 1984, this Court's jurisdiction to entertain the aforesaid two Guardianship Petitions was ousted.

4 To assist this Court on the aforesaid issue, on the last occasion, I had appointed Mr Cyrus Ardeshir and Mr Ziyad Madon as Amicus Curiae. They have given their invaluable assistance for which this Court is deeply grateful.

5 Mr Ardeshir brought to my attention a decision of a Full Bench of this Court in the case of **Romila Jaidev Shroff Vs Jaydev Rajnikant Shroff** [2000 SCC OnLine Bom. 300: 2000(3) Mh.L.J. 468 (FB): 2000(4) Bom.C.R. 122 (FB)]. Mr Ardeshir took me through this entire judgment and brought to my attention that the Full Bench has clearly held that where the High Court in exercise of its Ordinary Original Civil Jurisdiction (within its local limits) is taking up those very matters which are covered by the Family Court, and if it is acting as a District Court, it certainly would lose its jurisdiction. Mr Ardeshir also brought to my attention that for the

purpose of the Family Courts Act, the Full Bench has held that the word 'District Court' used in Section 8 of the Family Courts Act, would include the High Court exercising its Original Civil Jurisdiction under Clause 12 of the Letters Patent. Mr Ardeshir, therefore, submitted that the Full Bench has clearly held that when several High Courts of this country, some of which happen to have Ordinary Original Civil Jurisdiction, and it exercises such jurisdiction, the High Court is a District Court for that limited purpose, and if as a result of this, the High Court on its original side loses its jurisdiction, it does. Mr Ardeshir pointed out that it was clarified by the Full Bench that the loss of jurisdiction will be confined only to that part of the Original Civil Jurisdiction as like in the instant case, is relating to matters to be dealt with under the Family Courts Act, 1984. In this regard, Mr Ardeshir brought to my attention the relevant paragraphs of this Full Bench decision (in the SCC OnLine Report) which read thus -

“4. The plea with regard to the Family Court is raised on the basis of the provisions of section 2(e) along with section 8 of the said Act. Exclusion of jurisdiction of the Civil Court will also have to be considered. Section 2(e) reads as under:

“2(e) all other words and expressions used but not defined in this Act and defined in the Code of Civil Procedure, 1908 (5 of 1908) shall have the meanings respectively assigned to them in that Code.”

Relevant portion of section 8 reads as under:

“8.Exclusion of jurisdiction and pending proceedings—
(a) no District Court or any Subordinate Civil Court referred to in sub-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;”

5. Reference to District Court or any Subordinate Civil Court may in the aforesaid portion of the said section 8 will therefore have to be understood with reference to the Code of Civil Procedure. Section 2(4) of the Code reads as under:

“2(4) district means the local limits of the jurisdiction of a principal Civil Court of Original Jurisdiction (hereinafter called a “District Court”) and includes the local limits of the ordinary original civil jurisdiction of a High Court.”

6. The matter would have been very simple before the learned Single Judge on the basis of the aforesaid statutory material. He could have very easily rested the controversy. However, he was faced with the Division Bench of this Court taking a view that in spite of the aforesaid definition in the Code and the said provisions of section 7 of the Family Courts Act, the jurisdiction of this Court under Clause XII of the Letters Patent is not ousted. This judgment is directly under the Family Courts Act. Had there been only the judgment, the learned Single Judge was bound by it and would have followed the same.

7. However, he was facing a situation where the Supreme Court having interpreted the said definition as contained in the Code and after considering the same held that the High Court exercising its Ordinary Original Civil Jurisdiction will be a District Court. No doubt, this has been held with reference to the provisions of section 105 of the Trade and Merchandise Marks Act, 1958 read with section 2(e) of the said Trade and Merchandise Marks Act, 1958.

8. By virtue of section 2(e) of the Trade and Merchandise Marks Act, 1958, the expression “District Court” was given the same meaning as assigned to it in the Code of Civil Procedure. Thus, the learned Single Judge was faced with a situation that with reference to the aforesaid definition clause of Code while dealing with section 2(e) of the Trade and Merchandise Marks Act, the learned Judges of the Hon'ble Supreme Court had come to a conclusion that expression “District Court” would include a High Court exercising its jurisdiction on original side in respect of the civil matters.

12. Ordinarily the definition of the Code of Civil Procedure contained in section 2(4) having been interpreted by the Hon'ble Supreme Court, the controversy should not continue any further. However, when the judgment of the Division Bench of this Court is under the Family Court itself, while the Supreme Court judgment is not, and when in respect of the said Family

Court which has Courts under an All India Statute, it had the judgment of the Full Bench of Madras High Court and when that judgment was considered by the Division Bench of this Court which has, in our opinion, very correctly expressed the sentiment that the judgment of the High Court of this Country in relation to an All India Statute should ordinarily be respected and followed. We therefore now proceed to consider the question before us whether the expression 'District Court' used in section 8 of the Family Courts Act would include the High Court exercising its Original Civil Jurisdiction under Clause 12 of the Charter.

14. Whether it comes to include the expression 'District Court' or not is the crux of the dispute. If that definition is closely read, it appears that what has been defined is not only the concept of a District but what is the area of operation of the Principal Civil Court of Original Jurisdiction of that District. In parenthesis, there is also an indication to the said Principal Civil Court of the Original Jurisdiction herein called a 'District Court'. Once this explanation in the parenthesis is understood in its proper perspective, the entire area over which the Principal Civil Court of Original Jurisdiction of a District exercises its jurisdiction is the District Court for that District. Understood in that light section 2(4) of the Code of Civil Procedure can well be taken to define concept of a District Court itself. Apart from the jurisdiction in a Court either vested or divested by operation of a Statute, once a jurisdiction given to the Court, it has to be with reference to a territory and most of the time it also has to hold a reference to a pecuniary limits. There may be a Court with unlimited pecuniary jurisdiction but its territorial jurisdiction will always be confined to the clearly demarcated distinct identity which will have to be referred to as a District. Understood in that light, the aforesaid sub-section (4) of section 2 of the Code of Civil Procedure clearly indicates that the Principal Civil Court of Original Jurisdiction is to be confined to the area of operation to District for which it is a Court viz. District Court. If it is not understood in that light, the words appearing in the parenthesis would become redundant.

15. The provisions of Civil Courts Act, 1869 pre-dates the Code of Civil Procedure, 1908. The said Civil Courts Act which had to be enacted provides for different categories of Civil Courts which are made subordinate to each other. A concept well known to the Code of Civil Procedure under section 3 thereof reads as under:

"3. Subordination of Courts.— For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court."

16. The Concept of Small Cause Court is drawn from their respective

Small Cause Courts Act, Presidency and Provincial. But for the local enactment like the Civil Courts Act, for all practical purposes, in any District, as understood under the Code of Civil Procedure, there will be only one Court viz. Principal Civil Court of Original Jurisdiction i.e. a District Court. As per the aforesaid section 3, no doubt, District Court is subordinate to the High Court. This provision of section 3 had prompted the learned Judges of the Division Bench of this Court in Kanak Mehta's case, which is one of the reasons, to hold that the High Court cannot be considered as District Court for the purpose of Family Courts Act. The Family Court does not contemplate the High Court to be considered as such. It refers to the District Court or any subordinate Civil Court, both, in section 7 as well as section 8. Sections 7 and 8 show that the jurisdiction of the District Court as well as subordinate Court is ousted in respect of the matters which can be entertained by the Family Court. If therefore in exercise of its Ordinary Original Civil Jurisdiction within the local limits, this High Court is taking up those very matters which are covered by the Family Court Cases, and if it is acting as a District Court, it certainly would lose the jurisdiction. It is nobody's case that it is a subordinate Court. All that has been urged on behalf of the defendant is that whenever it exercises Ordinary Original Civil Jurisdiction as per clause 12 for the purposes of Code of Civil Procedure, it is a District Court for the District of Mumbai which is the local limits. If that be so, it would lose the jurisdiction.

17. Section 3 of the Code of Civil Procedure puts the High Court on the top and District Courts and Subordinate Courts under it. It is the Three Tier System. However, section 3 does not deal with Ordinary Original Civil Jurisdiction of the High Court in any manner whatsoever. In fact, the Code itself cannot be said to be dealing with it in any manner except recognizing its Original Civil Jurisdiction in section 120 by declaring that the provisions of sections 16, 17 and 20 shall not apply to the High Court when it exercises its Original Civil Jurisdiction. It is obvious that this very section will apply to the same High Court vested with Original Civil Jurisdiction if it is operating on its Original Side. When Three Tier System is envisaged by section 3 of the Code of Civil Procedure, obviously, reference in that section is to the High Court on its Appellate Side and not its Original Side. Once a reference to the High Court in section 3 of the Code of Civil Procedure is understood in this light, the said impediment felt by the learned Judges of the Division Bench of this Court on account of section 3 of the Code where the District Court is specifically declared to be subordinate to the High Court should not survive.

18. On the contrary, with reference to section 2(4) of the Code of Civil Procedure, for all practical purposes, save and except section

120 of the Code of Civil Procedure, the High Court which exercises its Original Civil Jurisdiction will be in the same position as the District Court in relation to a District viz. Principal Civil Court of Original Jurisdiction.

19. That exactly is the finding given by the Hon'ble Supreme Court in Raja Soap Factory case. This has elaborately been brought out by the said learned Single Judge when he made this reference. However, on behalf of the Original plaintiff, it was urged that the said Raja Soap Factory case will be confined to the provisions of Trade and Merchandise Marks Act, 1958 because it is with reference to the section 2(e) thereof which says that meaning assigned to the expression in the Code of Civil Procedure to the word 'District Court' will be the same for the purposes of Trade and Merchandise Marks Act, 1958. As against that in the Family Courts Act, a reference in section 2(e) says that the words and expressions used but not defined in the Act and defined in the Code of Civil Procedure, 1908 shall have the meanings respectively assigned to them in that Code.

31. When thus interpreted, in our opinion, the conclusion would be inescapable that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Court Act, it would be a District Court as understood therein. It would, therefore, lose its jurisdiction. The reference is answered accordingly."

6 Mr Ardeshir then also brought to my attention a decision of another learned Single Judge (Nishita Mhatre J.) in the case of **Girish J Bobade Vs. Ajay Thakur & Ors (2005 SCC OnLine Bom. 1491 : (2006) 2 Mh. L.J. 702)** wherein the aforesaid Full Bench judgment was followed by the learned Single Judge in a Guardianship Petition filed before this Court. The learned Single Judge *inter alia* held that the Guardianship Petition seek a guardianship of the person of a minor filed by either parents or any relative of a minor would lie

before the Family Court irrespective of whether there is matrimonial dispute pending before that Family Court. Mr Ardeshir also pointed out that a distinction has been drawn in this judgment relating to the guardianship of the person of the minor and guardianship with reference to the property of the minor. Mr Ardeshir pointed out that in this Judgment, in paragraph 11, it has held that the High Court will continue to exercise its Ordinary Original Civil Jurisdiction in respect of petitions relating to guardianship of the property of the minor.

7 When these judgments were cited at bar, and which clearly lay down that a Guardianship Petition for the person of the minor would lie before the Family Court and the jurisdiction of this Court on its Original Side is clearly ousted, the learned advocates appearing for the petitioners in both the aforesaid petitions sought leave to withdraw the Guardianship Petitions with liberty to file the appropriate proceedings in the Family Court seeking appropriate reliefs. In these circumstances, both the Guardianship Petitions are dismissed as withdrawn with liberty as prayed. No order as to costs.

8 It is needless to clarify that I have not examined the merits of the matter in either of the Guardianship Petitions and the Family Court shall decide whatever proceedings filed by the

petitioners herein before it on its own merits and in accordance with law.

9 Hence forth the Registry is directed to examine the Guardianship Petitions filed in this Court in light of this Judgment and only thereafter place them before the appropriate Bench.

(B.P.COLABAWALLA, J.)