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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 15858 OF 2022

Sunanda Kar @ Rath

....

Petitioner

Mr. Maheswar Mohanty, Advocate

-versus-

Sudip Rath

....

Opp. Party

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

30.08.2022

Order No.

4. 1. This matter is taken up through hybrid mode.
2. The Petitioner in this writ petition seeks to assail the order dated 15th December, 2021 (Annexure-7) passed by learned Judge, Family Court, Puri in Execution Case No.16 of 2009, sending back the case record to the Court of learned Civil Judge (Senior Division), Puri to adjudicate the execution proceeding holding that since Family Court at Puri was not in existence on the date of filing of the execution case, the provision of Section 8 (c) of the Family Courts Act, 1984 (for convenience, 'the Act') would not be attracted.
3. Mr. Mohanty, learned counsel submits that the Opposite Party filed MAT Case No.227 of 2002 before learned Civil Judge (Senior Division), Puri for dissolution of marriage by a decree of divorce. The Petitioner filed counter claim for restitution of conjugal rights and consequential relief. The suit for dissolution of marriage was dismissed and counter claim for restitution of conjugal rights was allowed. Since the Opposite

Party did not comply with the said direction, Execution Case No. 16 of 2009 was filed in the Court of learned Civil Judge (Senior Division), Puri. During pendency of the execution proceeding, Family Court, Puri was established on 23rd June, 2010. Accordingly, the J.Dr.-Opposite Party filed an application for transfer of the execution proceeding to Family Court, Puri. On receipt of the application, learned Civil Judge (Senior Division), Puri vide his letter dated 19th May, 2012 sought for administrative approval to transfer the execution proceeding to the Family Court, Puri. After receiving administrative approval, the record in execution case was transferred to the Family Court, Puri on 19th June, 2012. Since then, parties are participating in the execution proceeding before the Family Court, Puri. When the matter stood thus, learned Judge, Family Court, Puri raising doubt about its jurisdiction to entertain the execution proceeding, examined the matter and vide order dated 15th December, 2021 under Annexure-7, directed to send back the case record to the Court of learned Civil Judge (Senior Division), Puri to deal with the execution proceeding holding that the provision under Section 8(c) of the Act is not applicable to the case in hand.

4. Mr. Mohanty, learned counsel for the Petitioner further submits that Section 7 of the Act deals with the jurisdiction of the Family Court and Section 8 deals with exclusion of the jurisdiction and pending proceeding before any other Court over which Family Court established for the area, has jurisdiction. For ready reference, the provisions are reproduced hereunder:

7. Jurisdiction.—(1) 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 a 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 proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

- (a) a suit or proceeding between the parties to a marriage for a decree of 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 circumstance arising out of a marital 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.

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 or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) 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 (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 Code; and

(ii) which would have been required to be instituted or taken before 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, shall stand transferred to such Family Court on the date on which it is established.

5. It is his submission that Section 8(a) clearly stipulates that no District Court or any subordinate civil Court referred to in Section 7 (1) 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. A proceeding includes an execution proceeding also. After establishment of the Family Court, Puri, jurisdiction of learned Civil Judge (Senior Division), Puri to entertain an execution proceeding is ousted. Thus, considering the application filed by the Opposite Party-J.Dr., the execution case was transferred to the learned Family Court, Puri. Parties to the execution proceeding without raising any objection to the jurisdiction of the Family Court participated in the said execution proceeding. The Petitioner had moved this Court in W.P.(C) No. 14220 of 2015, which was

disposed of vide order dated 25th August, 2015 directing learned Judge, Family Court, Puri to dispose of the Execution Case by end of 2016. When the matter stood thus, learned Judge, Family Court, Puri raising a doubt with regard to its jurisdiction to entertain the execution proceeding, passed the impugned order under Annexure-7 relying upon the decision in the case of ***Josekutty Joseph –v- Aniamma Thomas***, reported in AIR 2006 Kerala 337. It is his submission that the ratio decided in the said case is not applicable to the case at hand, as in the present case, no issue with regard to the jurisdiction of learned Family Court was ever raised by any of the parties to the proceeding. Further, after establishment of the Family Court at Puri, it is only the said Court, which has jurisdiction to entertain any proceeding mentioned in Explanation to Section 7 (1) of the Act. In view of the above, Court of learned Civil Judge (Senior Division), Puri lacks jurisdiction to entertain said execution proceeding. This material aspect was lost sight by learned Judge, Family Court while adjudicating the matter. In view of the above, he prays for setting aside the impugned order under Annexure-7 and to direct the learned Judge, Family Court, Puri to entertain the Execution Proceeding No.16 of 2009 in accordance with law on its own merit.

6. Although notice was issued to the Opposite Party, he refused to accept the same. As such, service of notice on the Opposite Party is treated to be sufficient.

7. Taking into consideration the contention of Mr. Mohanty, learned counsel for the Petitioner and after close scrutiny of the provisions under Sections 7 and 8 of the Act, it is manifest that no District Court or subordinate civil Court shall in relation to such area in which Family Court is established have any jurisdiction to entertain any proceeding mentioned in explanation to Section 7(1) of the Act. Thus, it is to be examined as to whether '*proceeding*' mentioned in Section 7(1) of the Act excludes an execution proceeding.

7.1. The language and tenor of Section 8 of the Act, clearly stipulates that no District Court or Subordinate Court shall have jurisdiction to decide a suit or proceeding capable of being decided by the Family Court established for the area. The nature of such suits or proceedings have been provided in Explanation to Section 7 (1) of the Act. However, it does not expressly include an execution proceeding.

7.2. Section 18 of the Act confers jurisdiction on the Family Court to entertain and adjudicate an execution proceeding from the suit or proceeding provided under Explanation to Section 7(1) of the Act, which includes a suit for restitution of conjugal rights. Further, Section 8(c) of the Act makes it applicable to the suit or proceeding pending immediately before establishment of the Family Court for the area. Thus, a decree for restitution of conjugal rights can be executed by a Family Court.

7.3. A conspectus of the provisions under Sections 7(1) (inclusive of Explanation), 8 and 18 of the Act makes it

abundantly clear that an '*execution proceeding*' is also included in the explanation of '*suit or proceeding*' under Section 7(1) of the Act. Thus, all execution proceedings, which arise out of the suits or proceedings provided in Explanation to Section 7(1) of the Act and pending before any District Court or Courts subordinate to it on the date of establishment of Family Court for the area should stand transferred to the said Family Court for adjudication. Thus, the explanation to Section 7(1) of the Act is not exclusive in nature, but inclusive one.

7.4. Sub-section (3) to Section 18 of the Act includes a situation, when a competent Court in the facts and circumstances of the said case transfers the decree for execution to an ordinary Civil Court for effective execution of the decree for which area no Family Court is established or for any other reason the Family Court, if established, is not in a position to entertain it, which is certainly not the case in hand. In a case almost akin to the case in hand, a Division Bench of this Court in the case of ***Sri Mayadhar Mallik vs. Smt. Laxmi Mallik and Others***, reported in 1999 (I) OLR 37 held as under:

"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 an 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.”

7.4. In view of the discussions made above, the view taken by Kerala High Court in the case of *Josekutty Joseph* (supra) has no application to this case. It is more so, because the Court neither took the provision under Section 18 of the Act nor that the provision under Section 7 of the Act applies to the pending proceedings immediately before establishment of the Family Court for that area, into consideration and applying Order XXI Rule 10 C.P.C., laid down the ratio therein. Thus, the same is not applicable to the case in hand.

8. In view of the above, Court of learned Civil Judge (Senior Division), Puri lacks jurisdiction to entertain the instant execution proceeding after establishment of Family Court, Puri for the said area.

9. Accordingly, the impugned order under Annexure-7 being not sustainable in law, is set aside. Learned Judge, Family Court, Puri is directed to entertain and adjudicate the Execution Case No.16 of 2009 in accordance with law giving opportunity of hearing to the parties concerned.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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