IN THE HIGH COURT OF JHARKHAND AT RANCHI

First Appeal No. 124 of 2018

Baga Tirkey ..... Appellant

Versus

1. Pinki Linda
2. Niraj Karmali ….. … Respondents

CORAM : HON'BLE MR. JUSTICE APARESH KUMAR SINGH
: HON'BLE MRS. JUSTICE ANUBHA RAWAT CHOUDHARY

Through:- Video Conferencing.

For the Appellant : Mr. Ashutosh Anand, Advocate.
For the Respondent No. 1 : M/s K.K. Singh & Sanjay Kumar, Advocates.
For the Respondent No. 2 : Mr. Alok Lal, Advocate.
Amicus Curiae : Mr. Kumar Vaibhav
& Subhashis Rashil Soren, Advocates.

17/ 08.04.2021 Heard learned counsel for the parties and learned Amicus Curiae.

2. Learned Principal Judge, Family Court, Ranchi by the impugned judgment dated 16.3.2018, has dismissed Original Suit No. 583 of 2017, on the ground of maintainability.

3. The suit was instituted under Section 7(1)(a) of the Family Courts Act, 1984 read with Para-5.2 of the 'Customary Laws of Munda and Oraons' as delineated in the book "The Customary Laws of the Munda and the Oraon" by Dr. J. P. Gupta.

4. The parties belonged to Oraon Tribal Community and their marriage was performed on 27th April, 2015 at Ranchi as per the customs of the said community. On the ground of adultery, the appellant wanted divorce.

5. Learned Family Court referred to the book "The Customary Laws of the Munda and the Oraon" and held that there is no substantive codified law, applicable to the parties like the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Divorce Act, 1869. Section 2(2) of Hindu Marriage Act, 1955 makes the Act inapplicable to the members of any Schedule Tribe within the meaning of Article-366 of the Constitution of India, unless notified by the Central Government. Therefore, they were not governed by the Hindu Marriage Act. Learned Family Court was of the view that since the petitioner/appellant is

seeking divorce on the basis of the customs and usage applicable to the parties, which can be exercised only by the Community Panchayat and not by a Court of Law, the petition is not maintainable.

6. During the pendency of this appeal considering the importance of the issues, affecting the rights of the persons, belonging to Tribal Community, Mr. Kumar Vaibhav along with Shubhashis Rasik Soren, learned Advocate were appointed as Amicus Curiae to assist the Court. The Tribal Research Institute, Government of Jharkhand, Ranchi, Director, Judicial Academy, Jharkhand and the Vice-Chancellor, National University of Study and Research in Law (NUSRL) were requested to provide necessary assistance in the matter to this Court.

7. Learned Amicus Curiae has submitted a report after interaction with the Tribal Research Institute (TRI) and elderly persons of Oraon Community, convened by the TRI. Some valuable inputs have also been provided by the National university of Studies and Research in law. The Judicial Academy, Jharkhand also submitted a report, prepared by the Research Scholars containing the statutory framework of the Family Courts' Act, 1984 and decisions rendered by different courts on matter concerning matrimonial dispute between the members of Schedule Tribe. Learned counsel for the parties have also rendered assistance to the Court. Since the suit was dismissed on the ground of maintainability, we are not entering into the merits of the case of the parties except taking note of the foundational facts that they belong to the Oraon Tribal Community and are governed by the Customary Laws.

8. From the inputs provided by learned Amicus Curiae, it is evident that the Oraon community is governed by the Customary Laws, there is a hierarchy of Panchayats in the community such as 'Padha Panchayat', where the parties approach in case of divorce / dissolution of marriage. If the matters remained unresolved, it can also be taken up to the body called 'Bisusendra', a congregation of 'Padha Panchayat'. The parties are summoned by the Panchayat

and after hearing both the sides, decision is taken. Non-adherence to the summons or its verdict leads to social ostracization, which is described as ‘Hucca Pani Bandh’, ‘Kutumb Chilan’ and ‘Chuna tika’. The chances of non-adherence to the summons of the Panchayat are rare.

9. We are, however, in the present facts of the case, required to test whether the finding of the learned Family Court that the suit was not maintainable since there is no codified substantive law applicable to the parties, is correct or not. In this regard, it is pertinent to refer to the scheme and object of the Family Courts Act, 1984. The Family Courts Act, 1984[in short FCA] was enacted in public interest for the establishment of the Family Court for speedy settlement of the family dispute. The legislative power exercised by the Parliament can be traced to Article-246(2) of the Constitution of India. The field of legislation is referable to Entry-11-A under List-III of Seventh Schedule was inserted by 42nd Amendment Act, 1976 i.e. “Administration of justice, constitution and organization of all courts, except the Supreme Court and the High Court”.

10. The preamble to the FCA states that it is an Act to provide for the establishment of Family Courts with a view to promote conciliation and to secure speedy settlement of the disputes relating to marriage and family affairs and for matters connected therewith. The FCA is a secular law applying to all religions. Section 7(1)(A) of the FCA confers “all the jurisdiction” hitherto exercised by any District Court or any Subordinate Civil Court in suits or proceedings relating to matters mentioned in Clauses-(a) to (g) of the Explanation. Clause-(a) of the Explanation reads as ‘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’. Use of the words ‘all the jurisdiction’ makes the legislative intent clear that all the enumerate matters in the explanation to section 7 would be the exclusive domain of the Family Courts established under the FCA.

In other words, the FCA created a forum for adjudication of matrimonial matters of the nature enumerated in the explanation to Section 7 of the FCA, which forum can be resorted to by one and all, be it a member of scheduled tribe or a person of any religion.

11. It is useful to refer to the opinion of the Apex Court rendered in the case of ***K.A. Abdul Jaleel Versus T.A. Shahida***, reported in **(2003) 4 SCC 166**, in this regard, Paras-11 and 14 thereof are quoted hereunder:-

> *"11. ……..The wordings 'disputes relating to marriage and family affairs and for matters connected therewith' in the view of this Court must be given a broad construction. The Statement of Objects and Reasons, as referred to hereinbefore, would clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other; irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise.*
> *14. It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, in our opinion, would frustrate the object wherefor the Family Courts were set up."*

12. Further in the case of ***Balram Yadav Versus Fulmaniya Yadav***, reported in **(2016) 13 SCC 308**, the Apex Court has explained the scope of jurisdiction under Section 7(1) Explanation (b) of the FCA as under:-

> *".....Under Section 7(1) Explanation (b), a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws."*

13. The illuminating opinion of the Apex Court leaves no room of doubt on an expansive and liberal interpretation of the jurisdiction of the family courts under the FCA.

14. It is pertinent to make reference to the decision of the Hon'ble Apex Court in the case of ***Samar Kumar Roy Versus Jharna Bera***, reported in **(2017) 9 SCC 591**, wherein the Apex Court was seized with the issue, whether a suit under Sections 34 and 38 of the Specific Relief Act, 1963 would be excluded from the jurisdiction of the family courts in the light of the provision contained in Section 8 of the FCA. The Hon'ble Apex Court held as under:-

> *".....It is obvious that a suit or proceeding between parties to a marriage for a decree of nullity or restitution of conjugal rights or judicial separation or dissolution of marriage, all have reference to suits or petitions that are filed under the Hindu Marriage Act and/or Special Marriage Act for the aforesaid reliefs. There is no reference whatsoever to suits that are filed for declaration of a legal character under Section 34 of the Specific Relief Act.....*
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> *Section 8(a) of the Family Courts Act excludes the Civil Court's jurisdiction in respect of a suit or proceeding which is between the parties and filed under the Hindu Marriage Act or Special Marriage Act, where the suit is to annul or dissolve a marriage, or is for restitution of conjugal rights or judicial separation. It does not purport to bar the jurisdiction of the Civil Court if a suit is filed under Section 34 of the Specific Relief Act for a declaration as to the legal character of an alleged marriage...."*

15. There is no precedent which bars members of the Scheduled Tribe to approach the Family Court by filing any suit or proceedings relating to matters mentioned in Clauses-(a) to (g) of the Explanation to Section 7 of the FCA. If at all, such matter is filed, seeking adjudication under the law, applicable to them i.e. Customary Laws, they cannot resort to the provisions of Hindu Marriage Act, 1955, if the parties are not governed by the Hindu Marriage Act, 1955. Reference is made to the decision of this Court in the case of ***Rajendra Kumar Singh Munda Versus Smt. Mamta Devi*** in **F.A. No. 186 of 2008**, vide judgment dated 20th August, 2015. This Court affirmed the order of

the Family Court, dismissing the suit for divorce, filed by a member of Schedule Tribe, under Section 13 of the Hindu Marriage Act, 1955, on the ground that the Hindu Marriage Act does not apply. Customary Laws are applicable in the matters of succession, where parties are governed by Customary Laws.[See ***Bharat Bhushan Versus Tej Ram & Ors.***, reported in **(2016) 15 SCC 655;** ***T. Ravi & Anr. Versus B. Chinna Narasimha & Ors.***, reported in **(2017) 7 SCC 342** as also in the case of ***Narayanan Rajendran Versus Lekshmi Sarojini***, reported in **(2009) 5 SCC 264**.]

16. Learned Amicus Curiae has also reiterated the well settled principle that the conferment of jurisdiction (or in other words- establishment of courts) is essentially a legislative function. He has relied upon the opinion rendered in the case of ***Jagmittar Sain Bhagat & Ors. Versus Director, Health Services, Haryana & Ors.***, reported in **(2013) 10 SCC 136 ,** Para-9 thereofe reads as under:-

> *"9. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply."*

17. Further, it is also a settled legal proposition that ouster of jurisdiction should not be readily inferred and the courts always lean in favour of such an interpretation. This view has been upheld in the case of ***Bhanwar Lal & Anr. Versus Rajasthan Board of Muslim Wakf & Ors.***, reported in **(2014) 16 SCC 51** [Para-26].

18. Learned Amicus Curiae has also submitted that even customs and

usage cannot impede rights of a citizen to approach the court of law, i.e. a family court seeking divorce. Relying upon the observation of Lord Steyn in the case of ***R. Versus Secretary of State for Home Department, ex p Leech*** **1993 (4) All E.R. 539 (CA),** it is submitted that "it is a principle of law that every citizen has a right of unimpeded access to a court…" The Apex Court has also held that access to justice is a facet of Article 21 and 14 of the Constitution of India. [see **(2016) 8 SCC 509** para-31]. Therefore, it is submitted that if at all a custom forbids access to family court and relegates a person seeking divorce to Panchayat/Community court, the same will be violative of right to access to justice and any sanctification of customs, resulting in violation of fundamental rights ought not be resorted to.

19. Learned Amicus Curiae has submitted that patent lack of jurisdiction and latent lack of jurisdiction are different concepts, which ought to have been kept in mind by the learned Family Court while passing the impugned order. Learned Amicus has relied upon a decision in ***Farquharson Versus Morgan***, reported in **(1894) 1 QB 552**. Even as per the observations made in the impugned Judgment, the Family Court has procedural jurisdiction to entertain a suit for dissolution of marriage and there was no patent lack of jurisdiction. It is submitted that the learned Family Court posed unto itself a wrong question and answered it incorrectly, thereby, committing grave error of jurisdiction. 'Adjudicatory Facts' and 'Jurisdictional Facts' are different. The law in this regard is well settled by now. The opinion of the Apex Court in the case of ***Carona Ltd. Versus Parathy Swaminathan & Sons,*** reported in **(2007) 8 SCC 559**, Paras-27,29 and 36 are quoted hereunder:-

> *"27. Stated simply, the fact or facts upon which the jurisdiction of a Court, a Tribunal or an Authority depends can be said to be a 'jurisdictional fact'. If the jurisdictional fact exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It is also well settled that a Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The*

underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not posses.

…….

29. But there is distinction between 'jurisdictional fact' and 'adjudicatory fact' which cannot be ignored. An 'adjudicatory fact' is a 'fact in issue' and can be determined by a Court, Tribunal or Authority on 'merits', on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish 'jurisdictional fact' and 'fact in issue' or 'adjudicatory fact'. Nonetheless the difference between the two cannot be overlooked…….

……

36. It is thus clear that for assumption of jurisdiction by a Court or a Tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the Court or Tribunal has power to decide adjudicatory facts or facts in issue……"

20. The above exposition makes the distinction absolutely clear. As per opinion of the Apex Court, extracted hereinabove, the facts or facts upon which the jurisdiction of a Court, a Tribunal or an Authority depends can be said to be 'Jurisdictional Fact'. If the 'Jurisdictional Fact' exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter by erroneously assuming existence of a jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not possess.

21. In the present case, the underlying jurisdictional fact as pleaded before the Family Court, is that both the parties belonged to Oraon Community and their marriage was solemnized as per the Customary Law of Oraon. The Family Court Act, being a secular law, applying to all religions and communities and conferred with the power to adjudicate on matters mentioned in Clauses (a) to (g) of the Explanation to Section 7 of the FCA, could not have held that the suit is not maintainable in the absence of a codified Customary Law of the parties. As per the opinion of the Apex Court extracted hereinabove

the **Corona Ltd. (Supra),** there is a distinction between the 'Jurisdictional Facts' and 'Adjudicatory Facts'. An 'Adjudicatory Fact' is a 'fact in issue' and can be determined by a Court, Tribunal or Authority on merits, on the basis of the evidence, adduced by the parties. It is no doubt that it is very difficult to distinguish 'Jurisdictional Facts' and 'fact in issue' or 'Adjudicatory Fact'. Nonetheless the difference between the two cannot be overlooked**.**

22. It is thus clear that for assumption of jurisdiction by a Court or a Tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the Court or Tribunal has power to decide adjudicatory facts or facts in issue, based upon the pleadings of the parties. The learned Family Court, therefore, fell in error in holding that the suit is not maintainable in absence of codified substantive law as are applicable to the parties, such as Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Divorce Act, 1869, whether the parties are able to plead and prove the custom governing the matters of divorce between them for seeking relief was an issue to be decided on merits after considering the pleadings and evidence on record. Learned Family Court would not have straightaway dismissed the suit as not maintainable holding that there is no codified substantive law, governing the parties. In such a case, where parties claimed to be governed by Customary Law, the learned Family Court ought to have framed an issue to that effect. Once it is found that the parties are governed by the Customary Law, the parties are required to plead and prove the customs, by which, they are governed in matters concerning, marriage and divorce. The judgment of the Apex Court in the case of ***Yamanaji H. Jadhav Versus Nirmala***, reported in **(2002) 2 SCC 637**, para-7 enunciates the course to be followed by the Family Court in a matter of divorce involving customary law. It has been held as under:-

> *".... As per the Hindu Law administered by courts in India divorce was not recognised as a means to put an end to marriage, which was always considered to be a sacrament, with only exception where it is recognised by custom. Public*

> *policy, good morals and the interests of society were considered to require and ensure that, if at all, severance should be allowed only in the manner and for the reason or cause specified in law. Thus such a custom being an exception to the general law of divorce ought to have been specially pleaded and established by the party propounding such custom since said custom of divorce is contrary to the law of the land and which, if not proved, will be a practice opposed to public policy. Therefore, there was an obligation on the trial court to have framed an issue whether there was proper pleadings by the party contending the existence of a customary divorce in the community to which the parties belonged and whether such customary divorce and compliance with the manner or formalities attendant thereto was in fact established in the case on hand to the satisfaction of the court…."*

23. It was further observed in case of ***Subramani Versus M. Chadralekha***, reported in **(2005) 9 SCC 407** in para-10:-

> *"it is well established by long chain of authorities that prevalence of customary divorce in the community to which parties belong, contrary to general law of divorce must be specifically pleaded and established by the person propounding such custom…."*

24. It was thus necessary for the Family Court to call upon the party, seeking divorce under the customary law to plead and establish such custom by leading evidence. In any event, learned Family Court would not have dismissed the suit as not maintainable, since the parties belonged to Tribal Community and are governed by Customary Law, which is not a codified substantive law, like the Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Divorce Act, 1869.

25. As observed at the outset, we have consciously refrained from referring to one or the other custom, said to be operating in the Oraon Community regarding divorce, since it is for the party to plead and prove such customs for seeking relief before the Family Court. The illuminating opinion of the Apex Court rendered in the case of ***Salekh Chand Versus Satya Gupta & ors.***, reported in **(2008) 13 SCC 119**, followed in the recent decision in the case of ***Rathnamma Versus Sujathamma***, reported in **(2019) 19 SCC 714**, para-16

is quoted hereunder:-

> *16. This Court in a judgment reported as Salekh Chand (Dead) by LRs v. Satya Gupta & Ors.4 while dealing with the claim of adoption under the Hindu Adoption and Maintenance Act, 1966, held as under:*
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> *"21. In Mookka Kone v. Ammakutti Ammal [AIR 1928 Mad 299] it was held that where custom is set up to prove that it is at variance with the ordinary law, it has to be proved that it is not opposed to public policy and that it is ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy. It is not disputed that even under the old Hindu Law, 4 (2008) 13 SCC 119 adoption during the lifetime of a male issue was specifically prohibited. In addition, I have observed that such an adoption even if made would be contrary to the concept of adoption and the purpose thereof, and unreasonable. Without entering into the arena of controversy whether there was such a custom, it can be said that even if there was such a custom, the same was not a valid custom.*

26. In the case of ***Dr. Surajmani Stella Kujur Versus Durga Charan Hansdah***, reported in (**2001) 3 SCC 13**, para-10 also it has been held as under:-

> "*For custom to have the colour of a rule or law, it is necessary for the party claiming it to plead and thereafter prove that such custom is ancient, certain and reasonable. Custom being in derogation of the general rule is required to be construed strictly. The party relying upon a custom is obliged to establish it by clear and unambiguous evidence."*

27. Therefore, on a detailed consideration of the submissions of learned counsel for the parties and valuable assistance rendered by the learned Amicus Curiae, we are of the considered opinion that the learned Family Court committed an error of jurisdiction in holding that the suit instituted by the petitioner/appellant herein was not maintainable, as there was no codified substantive law applicable to the parties to marriage, like Hindu Marriage Act, 1955, Special Marriage Act, 1954 and Divorce Act, 1869. It also committed an error in holding that the petitioner is seeking relief of divorce on the basis of customs and usage, applicable to the parties, which can be exercised only by the Community Panchayat and not by Court of Law. The legislature having consciously conferred jurisdiction upon the Family Court to adjudicate on matters, enumerating under Clauses-(a) to (g) of the Explanation to Section 7(1)

including a suit or proceeding between the parties to the marriage for decree of nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage, the learned Family Court could not have held the suit to be not maintainable, as there is absence of a substantive codified law, governing the parties.

28. In view of the aforesaid discussions and for the reasons recorded hereinabove, the impugned judgment cannot be upheld in the eye of law. The matter is remanded to the learned Family Court for adjudication in accordance with law by framing proper issues, as borne out from the pleadings of the parties. We made it clear that the observations made hereinabove should not be treated as comment upon the merits of the case of the parties and are limited to answering the only issue whether the learned Family Court was right in holding the suit as not maintainable in the absence of substantive codified law between the parties.

29. We, accordingly, set aside the judgment dated 16.3.2018, passed in Original Suit No. 583 of 2017 by the Principal Judge, Family Court, Ranchi, and remand the matter to the Family Court to frame an appropriate issue in regard to existence of provision of customary divorce in the community of the parties to these proceedings to get the marriage dissolved. We permit the parties to amend the pleadings, if they so desire and also to lead evidence to prove the existence of a provision of customary divorce in their community. The Family Court will consider the matter afresh without being influenced by the observations made by this Court hereinabove expeditiously.

30. In order to expedite the proceedings the parties themselves or through their counsel should appear before the learned Family Court, Ranchi on 5th of May, 2021. If the proceedings are held in virtual mode, the parties and / or their counsels would join the proceedings online.

31. The appeal is allowed.

32. Let a copy of the judgment be communicated to the court concerned without any delay.

33. Let the Lower Court Records be also sent back to the Court

concerned.

34. Before parting we record the appreciation for the valuable assistance rendered by the learned Amicus Curiae on such a vital legal issue concerning the jurisdiction of the Family Courts.

35. Let a copy of this order be sent to the Judicial Academy, Jharkhand, Ranchi.

(Aparesh Kumar Singh, J.)

(Anubha Rawat Choudhary, J.)

Amitesh/Ranjeet/-