



Resolution of Disputes through Judicial process

- Procedure for Conduct of Civil Proceedings
 - Organization of Family Courts

*Lecture -1 – by Sumit Attri, Advocate on Record , Supreme Court of India
Partner – Cyril Amarchand Mangaldas. E-mail : sumit.attri@cyrilshroff.com*

History and Establishment of Family Courts

- Before 1984 all the disputes relating to marriage and family affairs were handled by ordinary civil courts. Due to the fact that the civil courts were already burdened, the resolution of family matters used to take extraordinary long period.
- The Law Commission in its 59th report (1974) recommended for setting-up of special courts where rules of procedure would be simpler. The Law Commission also emphasized that such courts may adopt an approach radical steps distinguished from the existing civil courts and that such courts should make reasonable efforts for settlement before the commencement of the trial. In 1975, the 'Committee on the Status of Women' recommended that all matters concerning the 'family' be dealt with separately.
- As such, on 14th September 1984 the Parliament of India enacted "The Family Courts Act" to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.
- However despite the enactment of the Family Courts Act 1984 the Family Courts could not be established in many states including New Delhi for various administrative reasons or the family courts did not function effectively and the family disputes continued to be handled by the ordinary civil courts. At present all the states have separate family courts for handling the disputes relating to marriage and family affairs.

Few Relevant Acts

- The Hindu Marriage Act 1955 is applicable to the majority of Indian population and regulates the law relating to marriage and other matrimonial issues among Hindu, Buddhist, Jain or Sikh. It does not apply to Muslim, Christian, Parsi or Jew by religion.
- The Hindu Minority and Guardianship Act, 1956 is an act regulating the law relating to minority and guardianship among Hindus and the Hindu Adoptions and Maintenance Act, 1956 is an act regulating the law in relating to adoptions and maintenance among Hindus.
- The Special Marriage Act, 1954 is an act providing special form of marriage in certain cases. This enactment for solemnizing marriage by registration is resorted to by Hindus, non-Hindus and foreigners marrying in India who opt out of the ceremonial marriage under their respective personal laws.
- The Parsi Marriage and Divorce Act, 1936 is an act regulating the law relating to marriage, maintenance and other matrimonial issues among Parsis in India.
- The Indian Christian Marriage Act 1872 and Divorce Act 1869 are the acts regulating the law relating to the marriages, maintenance and other matrimonial issues among Christians in India and
- The Muslim Personal Law (Shariat) Application Act, 1937, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986 and The Muslim Women (Protection of Rights of Marriage) Act 2019 applies to Muslims in India.

Few Relevant Provisions of Family Courts Act 1984

- Section 3 provides for Establishment of Family Courts. The State government after consultation with High Court and after issuing a notification can establish a family court for an area where the population exceeds one million. The State Government may also establish Family Courts for such other areas in the State as it may deem necessary. Also the State Government shall, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may, at any time, increase, reduce or alter such limits.
- Section 4 provides for eligibility for judges who can be appointed as judges for the family courts.
- Sec 4 sub clause (3) provides that a person shall not be qualified for appointment as a Judge unless he:
 - (a) has for at least seven years held a judicial office in India or the office of a Member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or (b) has for at least seven years been an advocate of a High Court or of two or more such Courts in succession; or (c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe
 - Sub clause 4 provides that Preference is given to Female Judges and every endeavour shall be made to ensure that persons committed to the need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counselling are selected.
 - No judge can be appointed or continue as judge of family court after attaining age of 62 years.
- Section 5 & 6 provide that the state can appoint Social Welfare Agencies, Counsellors, officers and other employees of Family Courts to assist the Family Courts for effective execution of their functions.
- Section 7 provides that the Family Court has similar powers as that of a District Judge and civil courts subordinate to district judge. The section also provides the category of cases which shall be decided by family courts. We will deal the types of cases handled by family courts in a different slide.
- Section 8 provides that in an area for which a Family Court has been established no other civil court or magistrate shall deal the cases over which the family court has jurisdiction. All the cases to be handled by family courts shall stand transferred to the family courts after the establishment of family court for such area.
- Section 9 provides that the family court must first try that the parties arrive at a settlement before proceeding further on merits of the dispute.
- Section 11 prescribe that in case the court deem fit or in case the party desire the proceedings of the case before family court can be held in camera.
- Section 12 The Act also provides for assistance of medical and welfare experts where required by court. As per section 13 the parties as a matter of right cannot ask for legal representation but a court in interest of justice can appoint a legal expert an amicus curiae.

Jurisdiction of Family Court- Category of cases handled by Family Court & Procedure

- Procedure- Section 10 of the Family Courts Act provides that (1) the provisions of the Code of Civil Procedure and of any other law for the time being in force shall apply to the suits and proceedings before a Family Court and it shall be deemed to be a civil court and shall have all the powers of such court. (2) the provisions of the Code of Criminal Procedure or the rules made thereunder, shall apply to the proceedings under Chapter IX of Cr.P.C. (dealing with maintenance of parents, wife and children – Section 125-128 Cr.P.C.) before a Family Court. (3) Family Court can also draw its own procedure with a view to arrive at a settlement in respect of any family matter.
- Section 7 provides the following category of cases over which family courts have jurisdiction.
 - (a) suit or proceeding between the parties to a marriage for declaring the marriage to be null and void or restitution of conjugal rights or judicial separation or dissolution of marriage;
 - (b) suit/proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
 - (c) suit/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 child/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.

Section 7(2) provides that the family courts have also the power to exercise a jurisdiction which is exercised by a Magistrate of the first class under Chapter IX of Cr.P.C. and such other jurisdiction as provided by any other enactment.

Category of Cases handled by Family Courts

- **DISSOLUTION OF MARRIAGE & JUDICIAL SEPERATION**

The family courts have power to grant a decree of judicial separation and dissolution of marriage (normally known as divorce) under various acts like Hindu Marriage Act 1955, The Parsi Marriage & Divorce Act 1936, The Divorce Act 1869 and The Special Marriage Act 1969.

Muslim Wives can apply to civil courts for divorce under Section 2 of the Shariat Act and under Dissolution of Muslim Marriages Act 1939. Muslim law has separate set of regulations for grant of divorce (talaq) by husbands and the same does not come under the jurisdiction of family courts.

- **MAINTENANCE**

The aggrieved wife, children and parents can apply to the family courts under Section 125 of Cr.P.C. Section 24 & 25 of the Hindu Marriage Act also provides that a husband who is unable to maintenance himself can claim maintenance from wife if wife can afford to do so. However under the The Parsi Marriage & Divorce Act 1936 and The Divorce Act 1869 the rights of wife to claim maintenance are recognised.

The Muslim Wife can claim maintenance under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act 1986. However the said suit is not filed before family courts. Sec 5 of the 1986 Act also gives an option to the muslim couple to be governed by section 125-128 of Cr.P.C. which option can be jointly exercised by the couple at the first hearing.

In one of the recent cases titled *Rana Nahid versus Sahisul Haq Chisti* passed on June 18, 2020 in Criminal Appeal No. 192 of 2011 the two judges bench of Supreme Court had difference of opinion on the issue, whether a muslim wife can approach family courts to claim maintenance under the 1986 Act. One of the judges held that Muslim wives can apply for maintenance under the 1986 Act before the family courts. The matter has been referred to larger bench due to difference of opinion and the distinguishing judgements of the Supreme Court bench.

Category of Cases handled by Family Courts

- **CHILD CUSTODY AND VISITATION RIGHTS**

The affected parent can apply to the family court seeking custody of the children or visitation rights to meet children. The applications for custody and visitation rights are filed under Guardian & Wards Act 1890, Hindu Minority & Guardianship Act 1956, The Indian Divorce Act 1869.

- **PROPERTY DISPUTES**

The family courts has jurisdiction over the disputes related to the property of the parties to the marriage. The two conditions which are required for the family court to entertain the suit or proceeding related to the disputes of the property are as follows:

- Such a dispute must have arisen between the parties to the marriage only;
- Such a dispute must have arisen on account of the property of either party to the marriage.

- **DOMESTIC VIOLENCE**

Under the Domestic Violence Act 2005 there is a provision to pass Protection Orders (Section 18), Residence Orders (Section 19), Monetary Relief (Section 20), Custody Orders (Section 21) and Compensation Orders (Section 22) which normally are filed before the concerned judicial magistrate. Though Section 26 of the Domestic Violence Act provides that any relief under sections 18 to 22 of the Domestic Violence Act may be sought in any legal proceedings before civil court, family court or a criminal court, however most of the proceedings are filed before the judicial magistrate handling criminal matters since jurisdiction of family courts is not clearly defined under the DV Act 2005.

CONCLUSION

- The family courts were established for speedy disposal of the disputes relating to marriage and family affairs and for promoting the settlement/conciliation between the parties to the family disputes. There have been administrative delays in setting up and effective functioning of the family courts.
- In practical arena due to (i) increasing number of family disputes (ii) Plethora of legal options available with parties to family disputes to initiate different civil/criminal proceedings (ii) appellate jurisdiction of higher courts (iii) ego clashes between parties to family disputes, the disposal of the matrimonial disputes is still taking considerable time. Judges, advocates and mediators are therefore promoting amicable settlement of the family/matrimonial disputes for an early and final disposal of the pending disputes.