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## **ADVOCATE'S RIGHT TO PRACTISE BEFORE THE FAMILY COURTS**

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Rashika Chaturvedi, M.K.E.S. College of Law, Mumbai

### **ABSTRACT**

Family Courts Act, 1984 was set with an objective towards introspection into problems that have brought the parties to a matrimonial court such as breakdown of marriage, divorce, restitution of conjugal rights, claims for maintenance, alimony and custody of children. An effort must necessarily be made to find out the true cause of the breach and whether corrective steps are still possible. These issues are basically of personal nature and only a person can describe their situation in the best way. People or society doesn't want their personal matter to be discussed with other people and want it to be settled amicably in a speedy manner, therefore with the introduction of Section 13 the roles of representation through advocates was limited, and the right to be represented by an advocate was denied.

But it is a well-known fact that adjudication of complicated or highly contested matrimonial disputes in the light of law and interpretation of provisions over a period of time, would require in given cases a legally trained mind. Inclusion of advocates in Family Courts will contribute to speedy trial, thereby delivering justice to the litigants. Since family matters are complex and require proper legal knowledge, proving the evidence etc., advocates' role becomes a necessity. An advocate develops the special skills of an experienced cross examiner by practicing it over years which can't be expected from a lay litigant to plead. Litigants often have their sentiments take over their formal behaviour which an advocate trained in law and detached from emotions will help navigate the court towards relevant legal provision thereby delivering justice to the litigants. Thereby possibly defeating the purpose of introducing the Section itself.

This research paper tries to answer the question which arises is whether there is an absolute bar for Advocates to practice their profession in Family Courts? Does this restriction somewhere affect the party's rights and freedom? These issues will be discussed in a comprehensive manner in this paper.

## INTRODUCTION

The Family Court acts and rules barred the representation by lawyers without creating any alternative method or simplified way. The courts were already burdened with civil matters due to which there has been a large amount of pending cases related to family matters.

### Need of Family Courts

Family Court matters were not strictly of civil nature and could not be expected to provide instant relief to the harassed victims. These matters involve a blend of criminal procedure code, civil procedure code and even the evidence act. Hence, a great need for establishment of family courts was felt for speedy settlement of family courts matters. Keeping in mind the delicate nature of these disputes where emotion played a key role in resolving family matters, the Family Courts Act, 1984 was enacted by the parliament.

### Evolution of Family Courts in India

The need to establish family courts in India was first emphasized by the Late Smt. Durgabai Deshmukh, a social worker from Maharashtra around 1953, after her tour from China, where she had observed the working of Family Courts. When she returned back she discussed the subject matter with Justice Bhagla and Justice Gajendra Gadkar. After a discussion they made a proposal to set up Family Courts in India to Prime Minister Pt. Jawaharlal Nehru but it didn't go through<sup>1</sup>. The concern over setting up a special court for family disputes was again raised in 1970's and a committee named "Toward Equality" was set up to evaluate the Status of Women in India. This was started by a resolution of the Ministry of Education and Social Welfare with Dr. Phulrenu Guha, then Union Minister for Social Welfare as Chairperson. The report of this committee published in 1974, recommended that all matters concerning the family should be handled by Courts specially set up for this purpose<sup>2</sup>.

The Law Commission of India in its 59th report published in 1974<sup>3</sup>, suggested the changes in

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<sup>1</sup> V.G. Ranganath, *Alternative Dispute Resolution and Family Dispute Resolution*, Legal Service India, (Sept. 19, 2021)

<sup>2</sup> Towards Equality Committee, Report Of The Committee On The Status Of Women In India, 353 (1974).

<sup>3</sup> Law Commission of India, Reforms in the Hindu Marriage Act 1955 and Special Marriage Act 1954: Report No. 59<sup>th</sup>, 6 (March 1974): <https://lawcommissionofindia.nic.in/51-100/Report59.pdf>

the Civil Procedure Code and recommended for setting up for Family Courts. As per these recommendations, the Civil Procedure Code was amended in 1976 and a new section was added, i.e. order 32-A, to provide for setting up for a separate adjudication fora for family matters.

The family court act was a part of legislative reforms concerning women as there was mounting pressure from women's organizations on the government to render gender justice and thus gender justice was underlying compulsion for family courts. The ideology underlying the enactment was to create women friendly adjudication spaces, to ensure that crucial rights of survival of women are not subsumed beneath technicalities and legal jargon. Courts should be away from the formal structures of civil and criminal courts. The new litigation should be less formidable in its appearance & more accessible to women from marginalized sections. In order to achieve this, there has to be a conscious shift away from mainstream lawyers and an increased dependence on counselors to aid the parties to the disputes in arriving at mutually amicable solutions.

Finally the recommendations were accepted and a separate court was introduced by the introduction of Family Courts Act 1984, and there was a provision under Section 13 of Family Courts Act, 1984 which does not allow parties to hire advocates for their disputes.

Section 13 of the family Court reads:

***“Right to legal representation*** – *Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner.*

*Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curiae”*

Although it should be noted that Section 13 of the Act has not prescribed a total bar to the representation by a legal practitioner, which bar itself would be unconstitutional. The intention of the Legislature while framing this section was obviously that problems or grounds for matrimonial background or dispute being essentially of personal nature, it may be advisable to resolve these issues as far as possible by hearing the parties themselves and seeking assistance

from counsellors. This section also makes provision for a situation whereby the court may seek assistance of a legal expert as *amicus curiae*.

## RELEVANT CASE LAWS

The right of an advocate brought on the rolls to practice is conferred on them by Section 14(1)(b) of the Indian Bar Councils Act, 1926 as, if a Tribunal is legally authorized to take evidence then there is right to advocates to practice before the Tribunal. Since Family Courts are authorized to take evidence under Section 7(1) of the Act, the role of an Advocate becomes crucial and indispensable in such cases where evidence has to be adduced. Also Section 30 of the Advocates Act says that Advocates shall be allowed the right to practise in all the courts throughout the territories to which the Act extends. Then also Advocates are denied the right to represent in the Family Court just because of the reason that these matters are of personal nature.

These conflicting views are often complicated to understand and it's not easy to arrive upon a good decision. Based on Advocates rights to practice in family courts, there have been several case laws from different states involving their opinions and method of approach.

### Hon'ble High Court of Allahabad

In the case of *Prabhat Narain Tickoo vs. Smt. Mamta Tickoo and others*<sup>4</sup> in the Allahabad High Court, petitioner is an officer in the Indian navy and he filed a divorce petition which is pending before Additional Principal judge, family court, Kanpur nagar. Learned counsel confined his argument to the third prayer in the petition by stating that the petitioner should be allowed to appear through his counsel in the family court. The question which arises is whether the petitioner will be allowed to appear through a counsel. In this case the interstitial theory was adopted that Section 13 of the Family Courts Act gives discretion to the judges in order to allow the representation through lawyers or not but doesn't tell in which circumstances the permission can be granted. This gap is required to be filled by the law. Thus the judgment allowed both petitioner and respondent to be represented by lawyers. It also stated that divorce cases involve psychological trauma and must be dealt with a speedy process otherwise it may lead to psychological wrecks.

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<sup>4</sup> *Prabhat Narain Tickoo vs. Smt. Mamta Tickoo and others*, 1998 SCC OnLine All 327

In the case of *Badan Singh vs. Savitri*<sup>5</sup> held in the High Court of Allahabad, the facts shows that a petition for decree of divorce was filed by the appellant-husband in 2018 and the defendant-wife, during the pendency of the suit, filed an application under Section 24 of Hindu Marriage Act claiming Rs.30,000/- for counsel fee and Rs. 1000/- for attending every date of hearing before the family court. The learned counsel of the appellant-husband under Section 13 of the Family Courts Act, 1984 and Rule 27 of Family Court Rules, 2006 said that the court has not granted the permission to the wife to engage a counsel and she has no right to be represented by a legal practitioner in this matter. However, it was observed that in the aforesaid provisions, there is no absolute bar on engaging an Advocate and assistance of a lawyer can always be availed. Rule 27 of the Family Court (Court) Rules, 2006 also empower the Family Court to allow the litigants to be represented by lawyers not only in complicated cases but also in the cases where court feels that the litigant will not be able to conduct their case on their own. Since the husband himself filed the petition for divorce through his counsel therefore the wife cannot be deprived from taking legal assistance from an Advocate. The court hereby allowed the appeal and granted Rs. 15,000/- and Rs. 600/- to respondent-wife in the form of counsel fee and for meeting expenses respectively for attending every date hearings before the Family Court.

### **Hon'ble High Court of Andhra Pradesh**

In the case of *R. Durga Prasad vs. Union of India and another*<sup>6</sup> in Andhra Pradesh High Court, the Petitioner was husband and 2<sup>nd</sup> Respondent was his wife. The facts said that both husband and wife were married according to Hindu rites but shortly their relationship got strained and the respondent-wife filed the petition for divorce in the same year before the Family Court of Visakhapatnam. The wife pleaded that the marriage was not with her free consent and will, rather it was forced and fraud therefore this marriage was void and a nullity. A criminal complaint was also filed. The Petitioner further complained that even though he had filed an Interlocutory application (I.A. No. 345 of 1997) for seeking assistance of an advocate to conduct the case on his behalf, the same was dismissed and C.R.P. No. 2108 of 1997 filed against the same was withdrawn and then the writ petition was filed questioning the constitutional vires of the provision itself. The court held that Section 13 is 'unconstitutional'

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<sup>5</sup> *Badan Singh vs. Savitri*, 2019 SCC OnLine All 3905

<sup>6</sup> *R. Durga Prasad vs. Union of India and another*, 1998 SCC OnLine AP 40

in its nature since it puts a certain bar on the Advocates' unlimited right of representation according to Section 30 of The Advocates Act. Once a Family Court recognizes the necessity of taking the assistance of a legal practitioner, the said provision may get struck down. A reformation is necessary to make this provision constitutional, till then the legislation having no other option has to coexist with each other.

### **Hon'ble High Court of Bombay**

Cases of Divorce being of personal nature require hearing the parties themselves and assistance from a legally trained mind. One case dealing with this issue was *Leela Mahadeo Joshi vs. Dr. Mahadeo Sitaram Joshi*<sup>7</sup> in Bombay High Court. In this case a husband and wife decided to file a petition for divorce by mutual consent after living together for 30 years. They filed the divorce petition under Section 13-B of Hindu Marriage Act since they were married to Hindu Vedic Rites. The learned Trial Judge recorded the evidence of the Appellant-wife and Respondent-husband where they both stated that due to difference of opinions and frequent quarrels there was no way out rather than divorce in order to obtain mental peace. After hearing this the learned Trial Judge concluded that he denied agreeing with the parties as there appeared to be no real difference between husband and wife. It was held by the bench that if the husband and wife are able to prove their case within the confines of the statute, then the Judge had to comply with the law. When all the ingredients of Section 13-B are provided by the party then the Judge cannot refuse the prayer for divorce. Personal predilections should not be allowed to influence the mind of a Judge while dealing with cases where parties claim divorce by mutual consent. If there would have been an Advocate to assist the litigants, the case would have proceeded in a smooth manner by stating the issues completely to the judge by using proper legal knowledge thereby rendering justice to the litigants. It was also observed that Section 13 of the Family Courts Act prohibits the participation of lawyers in the family courts but does not completely exclude third parties to represent or assist the two disputing parties. Therefore, it has been suggested that limited entry of legal practitioners within the family courts could prove beneficial to the clients and their interests might be better represented.

In the case of *Kishorilal Govindram Bihani vs. Dwarkabai Kishorilal Bihani*<sup>8</sup> held at Bombay High Court, the appellant-husband presented an appeal against the judgment and order of the

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<sup>7</sup> *Leela Mahadeo Joshi vs. Dr. Mahadeo Sitaram Joshi*, 1990 SCC OnLine Bom 199

<sup>8</sup> *Kishorilal Govindram Bihani vs. Dwarkabai Kishorilal Bihani*, 1992 SCC OnLine Bom 131

Court dated 20/1/1990. He filed an appeal in 1989 praying for the restitution of conjugal rights as the respondent-wife whom he married on 6/7/1973 left her on 26/1/1965 and went to her parents' home. She came back on 27/2/1984 but again left him on 27/2/1985 which shows that cohabitation was still not resumed. The appellant said that he tried his best efforts but the wife was reluctant to come back and stay with him, therefore the Court should grant him relief so that his conjugal rights can be restored.

But 2 months later, the appellant presented an application for amendment to his prayer and asked for granting alternative relief of divorce from respondent as she has deserted him for a continuous time period of 2 years. To this, Mr. Shah. Learned counsel of respondent-wife said that “prayers are mutually exclusive and if the appellant desires restitution of conjugal rights first and expresses unqualified willingness to live with the respondent, then the question of granting any alternate relief cannot be pleaded in appeal, implying thereby a bar of estoppel”. Mr. Anturkar, learned counsel of appellant-husband said that the husband later realized that since the matter has come to the court therefore there is no other option than divorce left to him according to the attitude of the wife. Learned counsel were asked if any patch-up can be done between the parties as the court observed that desertion was from respondent-wife’s side as in spite of making various phone calls, letters etc. she was not coming back. Therefore, the learned counsel pleaded that Family Court should lay certain norms regarding:

- i) ascertaining at the initial stage itself for engagement of Advocates in a case,
- ii) judge should look towards the status of the parties whether educated or not and thereby considering the necessity of advocates,
- iii) the parties should be comfortable enough for travelling to the court for hearing otherwise advisable to permit representation,
- iv) the complexity of case which will require special skill for its conduct and can’t be expected from lay litigants,
- v) unaware of the correct usage of provisions, therefore presence of advocates is a must,
- vi) Litigants may get hurt as these cases involve emotional sentiments and embarrassing details which would make it difficult for the litigants to handle it alone personally, hence the counsel representation is necessary.

Thus, the court set aside the judgment and order of the Trial Court and the appeal for allowing Advocates in this case was permitted and no order as to costs will be passed.

This case clearly shows that the wrong understanding of provisions by the litigants led to a complex case and it might have caused immense damage to the proceedings and to the litigants just because they didn't seek any legal assistance. Therefore, there is a high need of allowing Advocates in the family court matters to ensure that the litigants are saved from such complexities.

### **Hon'ble High Court of Madhya Pradesh at Jabalpur**

In the case of *Ku. Priyanka Agarwal And Anr. vs Abhay Agarwal*<sup>9</sup> in Madhya Pradesh High Court (Jabalpur), the brief facts were that there was a dispute regarding custody between the maternal grandmother and the father of two minor children aged 4 years and 1 year. The grandmother was not able to appear in the proceedings on a certain date and therefore was proceeded ex parte. There were allegations and counter allegations in the application for appointment of guardianship and its reply and since the consideration is the welfare of minor children under the Guardians and wards Act, therefore representation through Advocates was a must. In such cases involving great complexities, the Family Court should permit the advocates to represent the parties so that no injustice is delivered. It could be a problem for a lay litigant to study the laws and rules and then present themselves with Court procedures and to conduct a trial of their own by citing the relevant case laws. They may not be in a position to visualize future problems and safeguard themselves. From the above observations, the Bombay High Court allowed the appeal and the ex parte order was also set aside. The parties were directed to appear before the Court and the Court fixed the date for evidence of both the parties.

### **Hon'ble High Court of Orissa at Cuttack**

In a seminal case of *Samarendra Jena vs Sanghamitra Biswal*<sup>10</sup> in Orissa High Court, the petitioner-husband filed a civil petition for dissolution of marriage performed under the Special Marriage Act. He filed an application praying to permit him to be represented through a lawyer. The application was rejected by the learned Judge without stating any reason so the petitioner approached the court by filing writ petition which said aside the earlier rejected order and remitted the matter to the court for reconsideration. The opposite party-wife supported the order

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<sup>9</sup> *Ku. Priyanka Agarwal And Anr. vs Abhay Agarwal*, 2004 SCC OnLine MP 210

<sup>10</sup> *Samarendra Jena vs Sanghamitra Biswal*, 2013 SCC OnLine Ori 106



by the learned judge of rejection to permit a lawyer and said that court needs no interference at this stage. The petitioner counsel claimed that family court has not properly considered the contentions raised and has denied the petitioner by rejecting application thereby violating Article 29 of the Constitution. The respondent counsel claims that family court, Bhubaneswar is in consonance with the provisions of law by restricting representation through legal practitioner and even petitioner is himself a practising Advocate of Bhubaneswar bar. The judgement thus stated that there is no illegality observed in order rejecting the prayer of petitioner to be represented through lawyers and hence the writ petition filed by the petitioner stands dismissed with a direction to conclude within a period of 6 months from receiving certified copy of judgment.

### **Hon'ble High Court of Rajasthan at Jaipur**

The case of *Sarla Sharma vs. State of Rajasthan & Ors.*<sup>11</sup> held in High Court of Rajasthan at Jaipur was a case where the Petitioner challenged the insertion of Rule 22 in Chapter-IV of the Rajasthan (High Court) Family Court (Amendment) Rules, 1994 claiming that this rule is in contradiction to the scope, object and mandate of Section 13 of the Family Courts Act, 1984. The rule 22 permits Family Court in its discretion to allow a party to engage Lawyer or Advocate in a suit before the Family Court in exceptional circumstances if it feels that engagement of Lawyer or Advocate is necessary in the interest of justice. The Act of 1984 was framed for setting up Family Courts for settlement of disputes and achieving socially desirable results. The counsel submitted that Section 13 of the Act of 1984 allows the family Court to seek assistance of a legal expert as amicus curiae whereas Rule 22 of the Rules of 1994 gives the Family Court authority to allow a Lawyer/Advocate to appear in the Court whenever the Presiding Officer feels that it is necessary in the interest of justice. It was held that the normal rule of allowing Lawyer/Advocate is in no intervention of them appearing for proceeding before the Family Court. It is only in exceptional circumstances that a party must be permitted to engage a Lawyer/Advocate to appear on its behalf in the suit or proceedings pending before the Family Court. Therefore, the High Court of Rajasthan also allowed legal representation through Advocates claiming Rule 22 to be a valid rule although only in case of exceptional circumstances.

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<sup>11</sup> *Sarla Sharma vs. State of Rajasthan & Ors.*, 2001 SCC OnLine Raj 161

## CONCLUSION

This paper has dealt with a conflicting view as to whether the Advocates should be allowed in the Family Court or not. Based on the above discussions, it can be concluded that there is a necessity of Legal practitioners to assist in the case of complicated family law matters in order to ensure an expeditious decision. The litigants in the Family Court have to wait for an excessive amount of time for their fate to be decided in the court thereby often resulting in psychological breakdown of litigants. Also there is a need to bridge the gap in cases where although Family Courts allows legal practitioners to play their role in cases of exceptional circumstances as per the discretion of judges but doesn't specify the nature of circumstances where legal practitioners can be allowed. Instances are abundant in matrimonial cases where it is observed that implication of consent were not known to the litigants or they wrongly gave up their rights as they were unaware of what could be legally insisted upon. Therefore, family Courts should come with a practical approach in order to help litigants render justice and try to amend the discriminatory provisions of restricting Advocates to practise their profession completely even in the Family Courts.