NOTES AND COMMENTS

THE FAMILY COURTS

THE FAMILY Courts Act 1984, passed by Parliament, has not yet come into force. It will come into force only when the Central Government issues a notification in the official gazette, and different dates may be specified for its enforcement in different states. This is one of those legislations which depend upon the rules to be framed by the Central Government, the state governments and the High Courts, since several matters connected with the family courts have to be laid down in the rules.[1]

Concept of family court

It is now realized practically all over the world that litigation in regard to any matter concerning family, whether divorce, maintenance and alimony of spouses, or custody, education and financial support for children or trial of juvenile offenders should not be viewed in terms of failure or success of legal actions but as a social therapeutic problem needing solution. It should be viewed as a litigation in which parties and their counsel are engaged in resolving family confiicts where humane considerations overweigh everything else. The resolution of family conflicts requires special procedures—procedures designed to help people in trouble, to reconcile and resolve their differences, and where necesary, to obtain assistance. This means that the traditional adversarial procedure has to be modified and replaced by a less formal (or informal) procedure. In our system today family matters are entrusted to the district judge (unless delegated to a subordinate court) who is well versed in ordinary civil and criminal trials. He tries family matters in the usual manner with the normal adversarial procedure. In other words, the judge who tries claims for breach of contract or tort, claims for motor vehicle accidents, and crimes like rape and murder, also tries all matrimonial matters including custody of children and spousal maintenance. It is now realized that adjudication of family matters is entirely a different matter. It has a different culture; it has a different jurisprudence. The court adjudicating family disputes should function in a manner that it may tend to conserve and not disrupt the family life; it should be helpful and not harmful to individual partners and their children; and it should be preservative rather than punitive to family and marriage. It is,

1. Probably not many people know that the Code of Civil Procedure (Amendment) Act 1976 has already provided for something akin to family courts. See order XXXII-A.

therefore, accepted that adversary system promotes ritualistic and unrealistic response to family problems. The present system offers no legal protection to children. They are not represented by counsel, and the court does not have enough information to determine their best interest. More often than not, children are caught in the inter-spousal conflicts and become pawns, weapons and ultimately victims. The fact of the matter is that adversarial process precludes reconciliation and conciliation of inter-spousal and inter-parental conflicts. Thus, no court which is engaged in finding out what is for the welfare of the family, whether a marriage has broken down or not, which spouse should have the custody of and access to children or which spouse needs support, should rest content with the assertions and contentions of the parties and evidence led by them to prove or disprove their assertions and contentions. The court engaged in this task requires a less formal and more active investigational and inquisitional procedure. In other words it is not a litigation in which parties and their counsel are engaged in winning or defeating a legal action, but an inquisition in which parties, social workers, lawyers, welfare officers, psychiatrists are engaged in finding out a solution to familial problems.

The concept of family court thus implies an integrated broad-based service to families in trouble. It stipulates that the family court structure should be such as to stabilize the marriage, to preserve the family, and where a marriage has broken down irretrievably, to dissolve it with maximum fairness and minimum bitterness, distress and humiliation. The family court system visualizes assistance of specialized agencies and persons.

Status of family court

The Family Courts Act 1984, at the first instance, stipulates for the establishment of family courts for those towns and cities whose population exceeds one million. It also lays down that the state governments may also set up family courts for other areas.[2] Appointment of judges of family courts is to be made by the state governments with the concurrence of their High Courts.[3] A family court may consist of one or more judges.[4] Where there are more than one judge of a family court, each judge is competent to exercise all or any of the powers of the family court.[5] Where a family court has more than one judge, the state government with the concurrence of the High Court will designate one of the judges as the principal judge and any other judge as additional principal judge.[6]

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2. Family Courts Act 1984, s. 3.
3. *Id.*, s. 4(1).
4. *Ibid.*
5. *Id.*, s. 4(2)(*a*).
6. *Id.*, s. 4(2)(*b*).

The retirement age of the judge of the family court, like that of the judge of the High Court, is 62 years.[7] The terms and conditions of service and emoluments of judges are to be determined by the state governments in consulation with the High Courts.[8]

It appears that the Family Courts Act stipulates to confer on the family court a status like that of the income-tax tribunal. It is certainly higher than that of the district judge and lower than that of the High Court, since appeals from its decisions lie to the High Court.

Section 4(3) of the Act lays down the qualifications of judges of the family court. A person who has at least seven years' experience as a judicial officer or as a member of a tribunal or who has held a post for that duration under the Central or a state government requiring special knowledge of law, or who has been an advocate of a High Court (or two or more High Courts in succession) for at least seven years may be appointed as judge of the family court. Other qualifications may also be laid down by the Central Government in consultation with the Chief Justice of India.[9] Women will be given preference for the appointment as judges of the family court.[10] Section 4(4)(*a*) also lays down that "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." This provision certainly conveys that we have accepted the concept of family court, though it will be a very difficult task to find out such a person. In our submission the judges of family court should also have adequate knowledge of psychology, sociology and social work.

It seems that those persons who are engaged in research and teaching of family law in universities and research institutions, and are consequently experts in family law, are not eligible to be appointed as judges of the family court. This seems to be an omission made inadvertently, particularly when the employees of the Central and state governments who are engaged in an employment needing special knowledge of law are eligible. This obviously means that for the appointment of judges of the family court a person need not have any experience either as a judge or as an advocate. And, in our submission, rightly so. But then why omit those who are engaged in research and teaching of family law? Why should they not be eligible for appointment as judges of the family court? One of the two things may be done : either the university employees may be deemed as Central or state government employees or section 4(3)(*a*) may be amended by adding a clause "or those who are engaged in teaching of or research

7. *Id.*, s. 4(5).
8. *Id*, s. 4(6).
9. *Id.*, s. 4(3)(*c*).
10. *Id.*, s. 4(4)(*b*).

in family law for at least seven years".

Jurisdiction of family court

There is some controversy as to what matters should come within the jurisdiction of the family court. It is agreed upon that all matters directly pertaining to the family, such as matrimonial causes, maintenance and alimony of spouses, custody, education and financial support to children, settlement of spousal property, and guardianship and custody of children should come within the jurisdiction of the family court. Some hold the view that the para-family matters, such as dowry, inter-spousal assaults and torts, familial assaults and other criminal matters between the spouses and children, and inter-spousal and inter-familial contracts and torts should also fall within the purview of the family court. Parliament has opted for the former view. Explanation to section 7(1) lists the following matters :

(*a*) a suit or proceeding between the parties to a marriage for a decree of nullity, restitution of conjugal rights, judicial separation and divorce;

(*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 circumstances 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; and

(*g*) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

The family court has also been conferred jurisdiction for passing orders for maintenance of wives, children and parents. Hitherto, this jurisdiction was conferred on a magistrate of the first class under chapter IX, Code of Criminal Procedure 1973 (Cr.P.C.). Under section 125 of the code if any person having sufficient means neglects or refuses to maintain he may be ordered by the magistrate to provide maintenance for (*a*) his wife (including a divorced wife who has not remarried) unable to maintain herself, or (*b*) legitimate and illegitimate minor children unable to maintain themselves (major children are also to be included if they are unable to maintain themselves on account of physical or mental abnormality or injury), and father or mother unable to maintain himself or herself.

Jurisdiction on the family court can also be conferred in any other matter under a statute.

One wishes that para-family matters were also included under the jurisdiction of the family court. At present it has no jurisdiction on any matter pertaining to dowry or juvenile offenders.

Procedure

The concept of family court essentially implies the discarding of adversarial procedure. New, less formal, rules have to be framed. In our submission :

(*i*) The rules should be framed in simple language clearly indicating the whole range of procedures, from the commencement of an action to its conclusion, including the means of enforcing judgments, decrees and orders.

(*ii*) Flexibility of rules should be the hallmark of the new procedure so that diverse, at time complex, problems of familial conflicts are covered.

(*iii*) As far as possible, standard forms should be provided for various types of proceedings and these forms should be framed in such a manner as to be adaptable to the circumstances of each case.

(*iv*) Pleadings should stay away from the traditional fault-oriented approach.

(*v*) Pre-trial processes should be designed in such a manner as to provide dignified means for the parties to reconcile their differences or to arrive at amicable settlements without the need of trial.

(*vi*) Facilities for legal advice should be made available to each litigant so that he or she may become aware of the rights and responsibilities, and, where, children are involved, an early opportunity should be provided to ensure that their rights are adequately protected.

(*vii*) Issues between the parties should be determined without any prejudicial delay. This is particularly significant when the court is concerned with the placement of children.

(*viii*) The language, conduct, documentation and legal representation should be simple, shorn of all technicalities.

(*ix*) Pre-trial documentation of the pleadings should be such that issues between the parties are clearly defined. This will help avoid frivolous litigation and encourage pre-trial debate and settlement.

(*x*) One of the objectives of the family court system is to encourage and enable parties to go into a process of reconciliation, failing which the family court judge should have power to pass consent orders, if parties have been able to come to some settlement without any formality of formalhearing or trial of issues.

The Family Courts Act seems to opt for a less formal procedure. Although section 10 of the Act makes the procedure laid down under the Code of Civil Procedure 1908 (C.P.C.) applicable to family court proceedings, it is also laid down that the family court is free to evolve its own rules of procedure, and once the family court lays down its own rules of procedure they will override the rules of procedure laid down in the C.P.C. or the Cr.P.C. (such as under chapter IX of the code). The Act itself contains some provision which indicates the informality of the procedure. Thus,

the family court may receive as evidence any report, statement, document, information or other matter that may assist it effectually in resolving a dispute, irrespective of the fact that the same would be otherwise relevant or admissible under the Indian Evidence Act 1872.[11] It is not obligatory on the part of the family court to record the evidence of witnesses at length. It would be enough if the judge records or causes it to be recorded a memorandum of the substance of what the witnesses have deposed. Such a memorandum is required to be signed by the judge and the witness, and once that is done it will form part of the record of the case.[12] Where the evidence of a person is of formal character it may be given by affidavit and it will constitute part of the evidence in the case.[13] The same informality is maintained about the judgment of the family court. A judgment of the family court should contain a concise statement of the case, the points for determintion, the decision thereon and the reasons for such decision.[14] A decree or order of the family court may be executed by the court itself or any other family court or by an ordinary civil court in accordance with the convenience of the party concerned.[15]

No appeal lies against the interlocutory orders. Similarly, no appeal lies against the decrees or orders passed with the consent of the parties.[16] Otherwise an appeal lies to the High Court both on facts and law.[17] All appeals must be presented within a period of thirty days from the date of judgment, order or decree of the family court.[18] All appeals are to be heard by a bench consisting of two judges.[19] No second appeal is provided.[20] Of course, an appeal with the special leave of the Supreme Court under article 136 will lie to the Supreme Court.

Proceeding in camera and exclusion of lawyers

It is now a part of the concept of family court that confidentiality of the court record should be maintained and if the parties so desire or the court so thinks proper, the proceedings should be in camera. Section 11 of the Family Courts Act makes it obligatory on the part of the court to hold the proceedings in camera if any party so desires. These may also be held in camera if the court so deems fit. However, one should not confuse the confidentiality of the proceedings with secrecy of proceedings. In any democratic system, people are entitled to know the way the justice is administered and, therefore, no court should operate in secrecy

11. *Id.*, s. 14.
12. *Id.*, s. 15.
13. *Id.*, s. 16.
14. *Id.*, s. 17.
15. *Id.*, s. 18(3).
16. *Id.*, s. 19(2).
17. *Id.*, s. 19(1).
18. *Id.*, s. 19(3).
19. *Id.*, s. 19(5).
20. *Id.*, s. 19(4).

Constructive criticism, research and proposals for reform can only come from knowledge of the ways and procedures by which the family court operates.

In some quarters there is a strong opinion for the exclusion of lawyer's service from the family court. The protagonists of the view advocate "do-it-yourself" divorce concept. In our submission, in undefended cases and in cases where parties are in a mood to settle issues amicably, the service of a qualified lawyer will hardly be needed. But in complicated or hotly contested cases dispensation of lawyer's service will undermine the rights of the parties and may harm them. Most people are so upset in crises, particularly in marriage crisis, as not even to be able to file simple documents methodically, or even to think clearly and would gratefully employ a lawyer to relieve themselves of another burden. It is, therefore, submitted that services of specially trained lawyers should be available to parties and their children. It should be realised that when we are thinking of different courts for family matter we are thinking of different types of lawyers also.

The Family Courts Act favours dispensation of the service of the lawyer. Section 13 makes it abundantly clear when it lays down: "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." However, the family court may seek the assistance of a legal expert as amicus curiae whenever it considers that to do so is necessary in the interest of justice.[21]

Support or auxiliary service

Auxiliary service as an essential adjunct of the family court is part of the concept of family court. No family court system can succeed without a well organized support service. It is a logical concomitant of the family court system. The prime objective of the support service is to help parties at reconciliation, conciliation and to lessen adversarial atmosphere. No family court system can succeed unless it is supported by a well organized and well defined auxiliary service. In our submission the auxiliary service should have the following four component services : (*a*) family counselling and reconciliation and conciliation service; (*b*) investigative service; (*c*) legal aid service; and (*d*) enforcement service.

The family counselling, reconciliation and conciliation service should be a three-tier service : (*a*) pre-marital counselling, (*ii*) reconciliation and conciliation counselling, and post-adjudicatory counselling. The pre-marital counselling service should not be part of family court system, but a community service easily accessible to persons in need of it. The reconciliation and conciliation counselling service should be available to the parties before they have gone to the court as well as when they are in the

21. *Id.*, proviso to s. 13.

court. Its main role is to promote reconciliation wherever possible, and, where reconciliation is not possible or undesirable, to secure amicable settlement of all those issues which need solution when a marriage has broken down. Its another role is to get the issues clarified and problems defined and to attempt conciliation of as many issues as possible, regardless of the fact whether the marriage survives or disintegrates. In its third role it provides post-adjudicatory counselling service which helps parties sort out post-divorce disputes and problems.

Since the family court system discards the adversary procedure, an investigational service is an essential adjunct of the family court system. This service is meant to investigate the facts and submit its report which helps the court in arriving at the decision in the main petition as well as collateral matters, such as custody, education and support of children, alimony and maintenance of spouses and settlement of property.

The main role of the legal aid service is to secure the assistance of competent lawyers to parties when they go to trial of their conflicting or competing claims, requiring judicial disposition. Similarly, when parents contest about children, the children should be independenty represented by lawyers. This service will also help in the speedy disposal of undisputed cases.

No less an adjunct of the family court system is the enforcement service. A party who has received a court order in its favour often finds it difficult to enforce it in the present adversarial enforcement procedures. Thus, if a court has passed a maintenance order in favour of a spouse or child, or the custody of the child is committed to a person, how the party is going to get that order enforced. More often than not the enforcement or execution proceedings drag on for months, sometimes for years, and the party is not able to get the relief. The enforcement service will look after the enforcement of all orders.

The Family Courts Act does visualise some support services. Most of these services are to be brought into being under the rules. The Act stipulates for the association with the court proceedings of institutions or organizations engaged in the social welfare, of persons professionally engaged in promoting the welfare of the family, of persons working in the field of social welfare or any other expert in family law matters.[22] It also stipulates for the appointment of counsellors, officers and other employees necessary for the functioning of the family courts system.[23] The family court may also secure the services of a medical expert or such other persons who specialise in promoting the welfare of the family to assist it in the discharge of its functions.[24]

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22. *Id.*, s. 5.
23. *Id.*, s. 6.
24. *Id.*, s. 12.

Training of personnel of the family court system

India has taken the necessary first step in the direction of establishing the family courts. But much more needs to be done before the family court system can be brought to effective functioning. A vast manpower of trained persons to man the family courts and the auxiliary services would be needed. It should be an essential part of the unified family court system that there should be in existence a training and continuing education programme in which the family court judges, the staff of support services and lawyers should be fully involved. The personnel of the family court system should have some training in family law, sociology, psychology and social welfare before being called upon to discharge their functions. The entire personnel of the family court system should, at regular intervals, participate in continuing education programme so that they have better understanding of family conflicts and their appropriate disposition.

Need for continuous training and research in family law matters and allied subjects is imperative for the success of the system. This will require the establishment of some permanent bodies or institutions. We may have family law training centres in each state and an institute of family court system at the national level.

If family court system is to succeed, we should proceed to make adequate arrangements and provide adequate facilities for the same. We should immediately embark on the training of the personnel of the family court system so that by the time the courts come into existence we have no difficulty in manning the same. Otherwise, it will prove to be another experiment that has failed.

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