THE CONFUSIONS AND UNCERTAINTIES THWARTING THE FAMILY COURTS

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PRELIMINARIES

Establishment of Family Courts was on the one hand an expression of our sophisticated legal thought, on the other hand, an acknowledgement that our traditional civil courts had failed to successfully deal with the suits relating to family affairs. Family Courts were established by the Family Courts Ordinance 1985[1] to serve the purpose of quick, effective and amicable disposal of some of the family matters. This purpose, though not perceptible from the preamble of the Ordinance, is evident in different places of the body of the Ordinance. The anxiety of the framers of the Ordinance for the said speedy disposal of the family cases is palpable in fixing only thirty days for the appearance of the defendant[2], in providing that if, after service of summons, neither party appears when the suit is called on for hearing the court may dismiss the suit.[3] The purpose is again manifest in providing a procedure for trial of cases in camera if required for maintaining secrecy, confidentiality and for effective disposal of some complicated and sophisticated matters which may not be possible under normal law of the land. Once more, the Code of Civil Procedure 1908 except sections 10 and 11 and the Evidence Act 1872 have not been made applicable in the proceedings under the Family Courts[4] which is another sign that indicates the concern of the lawmakers to dispose of the family matters in congenial atmosphere of the Family Court, which was proven to be absent in the lengthy procedure of civil courts.

CONFUSIONS, MISCONCEPTION & UNCERTAINTIES WITH THE FAMILY COURTS

1. Family Courts: Whether courts for Muslim community only

By the Family Courts Ordinance 1985, the Family Courts exercise exclusive jurisdiction for expeditious settlement and disposal of disputes in all

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1 XVII of 1985. The ordinance was made by the President of the Peoples Republic of Bangladesh on 28.3.1985 and was published in the Bangladesh Gazette, Extra on 30.3.1985.

2 Section 7(a)

3 Section 9(1)

4 Though there are contradictory opinions on this; see below note 36.

suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. And the courts began to function all over the country except in the three hill districts of Rangamati, Bandarban and Khagrachhari. Soon after the courts begin functioning, questions arose as to whether the Family Courts would deal only with the family matters of the Muslim community or of all communities?

Before going into the detailed discussion it seem necessary to produce the section verbatim, section 5 of the Ordinance, that reads as follows:

> "5. Jurisdiction of Family Courts – Subject to the provisions of the Muslim Family Laws Ordinance, 1961 (VII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely:-
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> (a) dissolution of marriage;
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> (b) restitution of conjugal rights'
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> (c) dower;
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> (d) maintenance;
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> (e) guardianship and custody of children."

In *Krishnapada Talukder vs. Geetasree Talukder*[5] the question was whether a woman, Hindu by faith, could file a suit for maintenance against her husband under the Family Court Ordinance, 1985. The honourable judge of the High Court Division held that "Family Courts have jurisdiction to entertain, try and dispose of any matter in clauses (a) to (e) of section 5 of the Family Courts Ordinance only between the litigants who are Muslims by faith."[6]

One of the arguments in this case was "in view of the preamble and the territorial extent of the Ordinance as stated in section 1(2) of the Ordinance to the effect that it is expedient to provide for the establishment of Family Courts within the whole of Bangladesh except in the former Chittagong Hill tract..... the reliefs in the matters mentioned in clauses (b) (d) and (e) of section 5 of the Ordinance can be brought by any person irrespective of their religious faith. But ... the reliefs in the matters in clauses (a) and (b) cannot be sought by the persons other than Muslim by faith."[7]

Rejecting the argument, the judgment held that:

According to well-settled rule of constructions, scopes of all the clauses are required to be taken analogously and not separately. In this respect, we

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5 14 (1994) BLD 415;

6 Ibid., 417

7 Ibid., 416

like to quote a paragraph from the book, Maxwell On The Interpretation of Statutes, 12th Edn, at page 289 as follows:

> Where two or more words which are susceptible of analogous meaning are coupled together, ... they are understood to be used in their cognate sense. They take, as it were their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

Therefore, less general matters in clauses (a) and (c) restrict the general clauses in (b) (d) and (e), otherwise the expression "subject to the provisions of the Muslim Family Laws Ordinance", and inclusion of all the matters in one group become meaningless.[8]

However, just a few days later[9] of the above-mentioned judgment, there came another judgment of the High Court Division expressing diametrically opposite opinion. The Honourable judge of the High Court Division in *Nirmal Kanti Das vs. Sreemati Biva Rani*[10] held as following:

Section 3 of the Ordinance reads as follows:

Ordinance to override other Laws: – The provision of this Ordinance shall have effect notwithstanding anything contained in any other laws, for the time being in force.

From the expression 'other laws' used in section 3 of the Ordinance, it appears that the Family Court Ordinance, 1985 controls the Muslim Family Laws Ordinance, 1961, and not vice versa. Any person professing any faith has a right to bring a suit for the purposes mentioned in section 5 of the Family Court Ordinance. A Hindu wife is therefore entitled to bring a suit for maintenance against her husband under the Family Courts Ordinance.[11]

In the like ways, in *Meher Nigar vs. Md Mujibur Rahman*[12] it was held, The Muslim Family Laws Ordinance, 1961 introduced some changes in the orthodox Muslim personal laws relating to polygamy, talaq and inheritance and in order to keep those reformative provisions of the Ordinance of 1961 effective it has been provided in section 5 of the Ordinance of 1985 that the provisions of the earlier Ordinance of 1961 shall not be affected by the provisions of the Ordinance of 1985. But the matters which shall not be affected by the Ordinance of 1985 have been enumerated specifically in sub-sections (2) and (3) of section 23 of the Ordinance of 1985. But this in our opinion does not mean that the provisions of the Family Courts Ordinance,

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8 Id.

9 The former judgment came on 5th June 1994, and the latter on 25th July 1994

10 14 (1994) BLD (HCD)413

11 Ibid., at p. 415

12 14 (1994) BLD (HCD) 467

> 1985 are applicable to the members of the Muslim Community only and not to other communities which constitute the populace of Bangladesh. [13]

Following such dissimilar decisions, the confusion regarding jurisdiction of the Family Court was natural. And such confusion continued until 1997 when a larger bench of the High Court Division of the Supreme Court in its path-finding judgment in *Pochon Rikssi Das vs. Khuku Rani Dasi and others* [14] removed all the confusions. The special bench of the High Court Division comprised of three Judges declaring in a very straightforward way that Family Courts Ordinance applies to all citizens irrespective of religion [15] upheld that:

> The Family Court Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance, [16] which provides that there shall be as many Family Courts as there are Courts of Assistant Judge and the latter courts shall be the Family Courts for the purpose of this Ordinance. [17]

It seems quite pertinent to refer to some of the submissions, which the Court relied on. It was submitted [18] that:

> If the Family Courts Ordinance is intended to apply only to the Muslim community then there was no reason for not providing it accordingly as has been done in case of Muslim Filmily Laws Ordinance, 1961. The Family Courts Ordinance should have been named as Muslim Family Courts Ordinance. .....in the Family Courts Ordinance there was no exclusive exclusion of any community and unless there is specific exclusion the law will have general application that is, it will apply to the citizens of all faiths. ..... if sections 3, 5, and 24 of the Family Courts Ordinance are read together it will be evident that guardianship and custody of children were made exclusively triable in the Family Courts and unless the law is applicable to all how a non-Muslim can get a relief in the said matters. ..... matters enumerated in section 5 of the Family Courts Ordinance are matters of personal laws of the citizens of different faiths who follow different rules in matters enumerated in the section or do not have any rule at all as in the case of Dower and Dissolution of Marriage in case of Hindus. All citizens may

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13 Ibid., at p. 469

14 50 (1998) DLR (AD) 47

15 Ibid., at p. 53

16 Ibid., at p. 52

17 Ibid., at p. 53

18 Submitted by Mr. Khondokar Mahbubuddin Ahmed, Senior Advocate, who appeared before the Court as an amicus curiae.

> not be concerned in all matters but that cannot be a ground to hold that the Ordinance applies only to the Muslims. .....Family Courts Ordinance has not encroached upon the personal laws of the citizen of any faith. This Ordinance provided that Family Courts will have jurisdiction to entertain and decide suits on the matters enumerated in section 5 subject to the provisions of the Muslim Family Laws Ordinance meaning thereby that while disposing of a matter amongst the Muslim the provisions of Muslim Family Laws Ordinance shall have to be kept in mind. .....had there been no exclusive jurisdiction of Family Courts there may be complications in cases filed by husband and wife professing different faiths. ....not all the personal laws of the Muslim have been included in section 5. Some provisions of Muslim personal laws such as Waqf, Gift, parentage etc. have been kept out of the provisions of the Family Courts Ordinance. So it cannot be said that this is only for the Muslims.[19]

It was further submitted:

> .....the provision of our Family Courts Ordinance is exactly same as in West Pakistan Family Courts Ordinance 1964, and .... that the Pakistan Supreme Court in Muhammad Azam Vs Muhammad Iqbal as reported in PLD 1984 (SC) 95 has held that the Pakistan Family Courts Ordinance is applied to non-Muslims. .....if the Family Court Ordinance is not applicable to citizens irrespective of their faith then why the Hill Districts which are also inhabited by the Muslims have been excluded from the purview of the Ordinance.[20]

Accordingly, there should not remain any confusion regarding the jurisdictions of the Family Courts. Henceforth, it seems needless to mention that a Family Court can try suits under *The Hindu Married Women's Right To Separate Residence and Maintenance Act 1946*,[21] the law that has given a right to the Hindu wives to live in separate houses and to get maintenance, but has not provided any forum to go to enforce the right.[22]

Another matter needs to be clarified. The Family Courts Ordinance does not extend to the hill districts of Rangamati, Bandarban and Khagrachhari. The fact is that initially the hill districts used to be governed by Hill Districts Regulation of 1900 and it was repealed in 1983 but as no new law has been introduced for administering the area, as per provisions

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19 Supra note 24, at p. 49-50

20 Ibid., at p. 50

21 Act No. XIX of 1946.

22 So far, the aggrieved party under this Act had to take recourse to time consuming civil court. It is decided the Pochon Rikssi case that Family Courts Ordinance has provided a forum for speedy and effective disposal of issues in the Act.

of the General Clauses Act, the repealed law is still in force and the Hill Districts Regulation is still continuing, resulting in exclusion of Family Courts there. This does not mean that tribal people cannot take recourse to a Family Court. The suits among aboriginal or adivasi or tribal people can be tried by a Family Court if they reside within the local limits[23] i.e. territorial jurisdiction of a Family Court.

2. No provision for amendment of plaint? [24]

As to the scope of amendment of plaint in the Family Courts many lawyers and well as judges seem confused. Without indicating the place in the Ordinance where it has been told, some lawyers allege that the dearth of provision for necessary amendment of plaint has been creating problems. They reason that it is not possible even for good lawyers to prepare a good plaint at a single chance. And it also happens that there arises logical and legal ground after submission of the plaint. This rigid provision obstructs many good causes.

Unlike the lawyers, some Judges of the Family Courts strongly support the absence of provision for amendment of plaint. Their argument is simple; as the Family Courts are specially established for the speedy disposal of family cases, the provision for amendment of plaint would foil the purpose by destroying the time frame fixed by law.

Let us move to see what is inside the Ordinance. Though there is no specific provision denying amendment of plaint, the place of assumption of such a provision can be marked out in section 6 (9), which reads as:

> A document which ought to be produced in court by the plaintiff where the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit: provided that the Court shall not grant such leave save in exceptional circumstances.

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23 Section 6(1) of the Ordinance provides as follows:

"Every suit under this Ordinance shall be instituted by the presentation of a plaint to the Family Court within the local limits of whose jurisdiction –

(a) the cause of action has wholly or partly arisen; or

(b) the parties reside or last resided together:

Provided that the suits for dissolution of marriage, dower or maintenance, the Court within the local limits of whose jurisdiction the wife ordinarily resides shall also have jurisdiction.

24 The issue was brought by some lawyers from the district Bars of Bogra, Comilla, Jessore, Patuakhali, and Mymensingh; as referred to in the BLAST report, at p. 8.

Now, we can examine what is judicial interpretation of the provision. In *Azad Alam vs. Jainab Khatun and others*[25] the full Bench of Appellate Division of the Supreme Court upheld the view that a plaint cannot be amended under the Family Courts Ordinance. Though the learned Advocate of the case argued that Family Courts Ordinance being silent about amendment of a plaint the Court got power under section 6 of the General Clauses Act to pass any order necessary to give relief, the Court rejected the same in view of the provision under section 20 of the Family Courts Ordinance which provides " Save as otherwise expressly provided by this Ordinance the provisions of the CP Code, except sections 10 and 11, shall not apply to the proceedings before the Family Court."

However, after few months, a High Court Division Bench in *Nazrul Islam Majumdar vs. Tahmina Akhtar alias Nahid*[26] and another expressed the contrary view, though in exceptional circumstances. The Court held that:

> An amendment of the plaint insofar as it does not change the nature and character of the suit would be allowed always in a suit. [27]

And the guiding principle for amendment of plaint, as the Court opined in the judgment, is that it ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings. There lies power of he court and the principle applicable to the amendment of the plaint is also applicable to the amendment of written statement. [28]

The fact of the above mentioned case was that the amendment was sought for by the wife in her own suit bringing to notice certain facts that accrued or happened after the suit was filed and it was to the effect that she divorced her husband as per provisions of law. The Court expressed that:

> ... if the wife has legally divorced her husband the prayer made by the wife in her plaint that she would be allowed maintenance would be deleted as her maintenance would not be allowed after she had divorced and if the wife had legally divorced the husband the suit by the husband for restitution of conjugal life may not also be maintainable on that evidence. this, therefore, is a issue vital for both the parties to be decided by the Court on evidence and

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25 1(1996) BLC (AD) 24; judgment delivered on 23rd October 1993

26 47(1995) DLR (HCD) 235; judgment delivered on 23rd January 1994; however, it could not be learnt whether the HC Bench was aware of the Appellate Division decision *in In Azad Alam vs. Jainab Khatun and others*

27 Ibid., at p. 236

28 Ibid., at p. 237

> that being the positions for ends of justice this amendment needs to be made and it would be incumbent upon the court to do so.[29]

The Court also expressed its opinion in the following words:

> In this sort of case the interest of justice needs be served keeping in mind that the other parties should not be taken by surprise by the amendment of the plaint which would change the nature and character of the suit and if justice demands that the amendment should be done it would be within the discretion of the court to allow such an amendment for ends of justice.[30]

In the case of *Satish vs. Govt of India AIR 1960 (Cal) 278*, the Calcutta High Court reiterated the same principle. It has been again reiterated in the case of *Rajeshawar vs. Padam AIR 1970 (Raj) 77*. And it is the consistent view that the court can take into account subsequent view event necessitating amendment by addition of new relief that may be allowed to do complete justice.[31]

However, as the appellate Division delivered different opinion in *Azad Alam vs. Jainab Khatun and others*[32] it is still a confusing issue.

3. Family Courts proceedings in camera: whether possible? [33]

The necessity of camera trial is undeniable for maintaining secrecy of disputes between the married couples, avoiding publicity in the matter and expediting the disposal of the family court cases in an amicable way. Expectantly, the Family Courts Ordinance under section 11 provides the procedure for trial of cases in camera if requested by the parties to the suits. But this provision exists in theory and is seldom applied in practice; hence the common public as well as the justice seekers in the family courts are unaware of the provision, which makes them averse to take recourse in the Family Courts.

4. Dual option for custody of children, dower and maintenance disputes?

Though the legal position was clarified long ago, a considerable portion of lawyers, still think that there are dual options for claiming custody of children, dower and maintenance of wives, that is, for custody of children

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29 Ibid., at pp. 236 - 237

30 Ibid., at p. 237

31 Kannan vs Chiruda, AIR 1960 Ker. 93; as referred to in 47(1995) DLR (HCD) 235, at p. 237

32 Supra note 35

33 Question regarding camera trial was raised by some lawyers from Jessore, Rajshahi, Chittagong, Pabna Bar, as reffered to in BLAST report, at p.8.

and dower money and maintenance one can bring a suit under section 100 and 488 of CrPC; they also hold that one can also bring a suit in a family court.[34] In fact, such misconception is not an anomaly when earlier we got two diametrically opposed judicial views regarding this.

In the early 1990 in *Abdul Khaleque vs. Selina Begum*[35] a High Court Division Bench held that:

> .... the purpose of the family Courts Ordinance is to provide for speedy disposal of family matters by the same forum. There will be anomaly and multiplicity of proceedings, if, in spite of the establishment of family court, the Magistrate constitutes to entertain cases for maintenance. Provisions made in the Family Courts Ordinance have ousted the jurisdiction of the Magistrate to entertain application for maintenance, which is a family court matter.[36]

But just after four years in 1994 in *Meher Nigar vs. Md Mujibur Rahman*[37] a Division Bench expressed a complete opposite view to the effect that the Criminal Courts as usual way entertain a case filed under section 488 of the Code of Criminal Procedure for maintenance. In section 5 of the Family Courts Ordinance it has been mentioned that the Court shall decide the suits filed in respect of the five subjects enumerated in the section. There is difference in between a suit and a case. And Family Courts Ordinance has not created any impediment in the proceeding of the case filed under section 488 of the Code of Criminal Procedure. That is, the gist of the decision is that one may choose any of the two forums.

Following these two judgments, confusion emerged as a natural consequence. But such confusion did not continue for long as the Special High Court Bench comprising three judges resolved the issue finally in *Pochon Rikssi Das vs. Khuku Rani Dasi*[38] in 1997.

To resolved this issue the Court considered (i) section 3 of the Family Courts Ordinance which provides that the provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force, (ii) section 4 which provides that all courts of Assistant Judges shall be the Family Courts for the purpose of this Ordinance, and (ii) section 5 that provides that the Family Courts shall have exclusive jurisdiction to entertain, try and dispose of any suit relating

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34 The issue is raised by some lawyers from Jessore, Tangail and Rajshahi Distrct Bar Association; as referred to in BLAST report at p. 9

35 42 (1990) DLR (HCD) 450

36 Ibid., at p. 452

37 14(1994) BLD (HCD) 467

38 Supra note 24.

to the subjects enumerated in this section that includes maintenance. The Court held that these sections clearly indicate the ouster of the jurisdiction of other courts in dealing with the matters enumerated in section 5 of the Ordinance.[39]

However, the court did not overlook the argument as submitted in *Meher Nigar vs. Md Mujibur Rahman* that the word 'suit' as mentioned in section 5 indicates a civil proceeding and the cases filed under section 488 of the Code of Criminal Procedure is a criminal proceeding; so there is a no ouster of the jurisdiction of the Criminal Courts in the matters relating to maintenance. The Court held that:

> ... it is well settled that a proceeding under section 488 of the Code of Criminal Procedure is quasi criminal and quasi civil in nature and this section has given certain powers to the Magistrates to grant maintenance to wives and children who are unable to maintain themselves. Sub-section (1) of section 488 of the Code of Criminal Procedure is quasi civil in nature as order for maintenance is passed under this part. But sub-section (3) is quasi criminal. So, in a word, section 488 of the Code of Criminal Procedure is both quasi-civil and quasi criminal in nature. On consideration of the provisions of sections 3, 4, 5, and 27 of the Ordinance, we hold that the jurisdiction of the Magistrate is clearly ousted. Before coming into force of this Ordinance maintenance matters used to be decided by the Magistrates under section 488 of the Code of Criminal Procedure. Now section 27 of provides that all suits, appeal and other legal proceedings relating to, or arising out of any matter specified in section 5 pending in any Court immediately before the commencement of this Ordinance shall continue in the same Court and shall be heard and disposed of by that Court as if this Ordinance had not been made. This clearly says that after the coming into force of the Family Courts Ordinance the criminal courts jurisdiction has been ousted in respect of awarding maintenance except in case of pending proceedings.[40]

It can be noted here that the abovementioned view was also taken in Pakistani jurisdiction in *Adnan Afzal vs. Capt. Sher Afzal.*[41] Eventually, the position is that for custody of children, dower and maintenance disputes one has to resort to a Family Court under the Family Courts Ordinance, and not to any other courts.

5. How much of the Code of Civil Procedure is applicable?

While on the one hand, Section 20 (1) of the Ordinance has clearly expressed that the provisions the Code except sections 10 and 11 shall not

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39 Ibid., at p.54

40 Id.

41 PLD 1969 (SC) 187; 21 DLR (SC) 123

apply to the proceedings before the Family Courts, unless expressly provided by or under this Ordinance; on the other hand the Supreme Court in different suits at different times has expressed different opinions as to whether or how much of the Code of Civil Procedure will apply to the proceedings before the Family Courts. The reason behind the confusion or uncertainty over the issue is, therefore, obvious.

Not unsurprisingly, the issue emerged as a great problem in the very first suit[42] of the Family Court of Ramgonj of Lakshmipur in 1985, the very year of the commencement of the Family Courts Ordinance. The fact of the suit was that the plaintiff, the husband, filed the suit against the defendants, his wife and others, for restitution of his conjugal life. In the said suit the plaintiff also filed an application for temporary injunction restraining the marriage of her wife, who claimed that she had divorced her husband, till the disposal of the suit. The prayer for injunction was rejected; then the plaintiff moved the learned District Judge and preferred an appeal, wherein also the prayer was rejected on the ground that the provisions of Code of Civil Procedure granting injunction is not applicable in the proceedings under the Family Courts Ordinance. Consequently, the plaintiff moved the High Court Division[43] which also confirmed the decision of the lower courts holding that the Family Courts Ordinance 1985 is a self contained Ordinance providing the mode and method of trial and disposal of suits, and as section 20 thereof makes all the provisions, except sections 10 and 11, of the Code inapplicable, no other provisions of CPC will be applicable in the proceedings of Family Courts.[44]

In the case, the learned Advocates for the plaintiff-petitioner submitted, among others, that though in specific terms the provisions of Order 39, Rule 1 of the Code has not been made applicable in a proceeding under Family Courts Ordinance, to serve the purpose of the legislation the Court may apply Order 39, Rule 1 of the Code of Civil Procedure. Section 141 of the Code provided that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. The proceeding before the Family Courts is a civil proceeding and as such section 141 of the CPC may come into play.[45]

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42 as referred to in 40 (1988) DLR (HCD) 305

43 Civil Revision No. 273 of 1986; *Moqbul Ahmed vs. Sufia Khatun and others*, 40 (1988) DLR (HCD) 305; Judgment delivered on January 11, 1988

44 Ibid., at p. 307

45 Id.

After placing some leading decisions[46] from Indian and Bangladeshi jurisdiction, some other arguments were also advanced and the essence of those submissions were that the strict application of sections of the Ordinance may sometimes frustrate the true intention of the lawmakers. In fact, as it was submitted, it is a sound rule of interpretation that a statue should be so construed as to prevent the mischief and to advance the remedy according to the true intention of the makers of the statute. But none of the arguments was accepted by the learned judge of the High Court Division.

In 1994 a Divisional Bench of the High Court in *Younus Mia vs. Abida Sultana Chhanda*[47] considered light on the issue from a broader outlook. The case was against an order of a Family Court allowing the defendant, a Purdanishin Muslim lady, to examine herself on commission as per provision of Order 26 of the CPC, which on appeal was also affirmed by the learned District Judge.

In this judgment, the learned Court interpreted section 20 of the Ordinance as follows:

> Upon reading this section it appears to us that the meaning of the expression 'proceedings before the Family Courts' as understood by the Ordinance itself is the key to the solution. The word 'proceeding' in a general sense means 'the form and manner of concluding judicial business before a Court of Judicial Officer' (Black's Law Dictionary. p.1368).
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> Keeping this meaning of that term 'proceeding' in mind, we now look into the scheme of the Ordinance so far it is relevant for our purpose by section 4 and 5, after respectively providing for the establishment of Family Courts and the jurisdiction thereof, the Ordinance prescribes procedures applicable to the proceedings before the Family Courts regarding (i) institution of suits and plaints, (ii) issuance of Summons and Notice, (iii) Written Statement, (iv) consequence of non appearance of parties, (v) recording evidence, (vi) writing the judgment and (vii) summoning witnesses respectively in Sections 6, 7, 8, 9, 12, 15 and 18, that is, by these sections the Ordinance substitutes for itself the provisions of Orders 4, 7, 5, 8, 18, 20 and 16 of the Code of Civil Procedure respectively. Therefore, when section 20 of the Ordinance says that the provisions of the Code 'shall not apply to proceedings before the Family Courts' it means that the provisions of the Code shall not apply which

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46 Decisions reported in AIR 1968 (SC) 697; in AIR 1974 (SC)1682; in AIR 1963 (SC) 3007; in AIR 1972 (SC) 1548; in 23 DLR (SC) 81 as referred to in 40 (1988) DLR (HCD) 305

47 47 (1995) DLR (HCD) 331; judgment delivered on 23 February 1994. However, it could not be learnt whether the HC Bench was aware of the Appellate Division decision in In *Azad Alam vs. Jainab Khatun and others.*

> are in the Ordinance as prescribed modes for conducting Judicial business by the Family Courts. [48]

The Court mentioned that it is a canon of interpretation that an attempt should be made to discover the true legislative intent by considering the relevant provision in the context of the whole statute, and subsequently observed that the Code of Civil Procedure itself does not create any Court nor does define the word 'Court'. Its preamble says that it is intended to regulate the procedure of the Courts of Civil Judicature. Basically, the Code of Civil Procedure is a procedural law and, therefore, there is no difficulty in its applications to proceedings of a civil nature suit pending before the courts of any kind. Therefore, the bar in applying the Code to the proceedings before the Family Courts imposed by section 20 of the Ordinance is not and cannot be an absolute bar, but it must be a qualified and limited bar, as already pointed out. Enactment of section 20 was thus only necessary due to certain procedures prescribed in the Ordinance. [49]

The learned Court finally held that:

> ... only those provisions of the Code shall not apply to the Family Courts where alternative provisions have been prescribed for the Family Courts in the Ordinance. [50]

It is quite pertinent to mention that this Court not only pronounced its own judgment but also expressed its findings that the decision of the learned Single Judge in *Moqbul Ahmed vs. Sufia Khatun and others*[51] that section 20 " has not provided that other provisions of the Code will also be applicable in a suit filed under the Family Courts Ordinance" is not a correct decisions. [52]

It is a fact, which may appear surprising to many, that in the judgment of *Saleha Begum vs. Dilruba Begum*[53] pronounced at the end of 2000, the single Judge of a High Court Bench reverted to the early position by holding that:

> Section 20 of the Family Courts Ordinance is a bar to the application of the Civil Procedure Code in Family Court proceedings with the exception of

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48 Ibid., at p. 332

49 Id.

50 Id.

51 Supra note 53

52 Supra note 60; at p. 332

53 53(2001) DLR (HCD) 346

> sections 10 and 11 under the under the Family Courts Ordinance. That being the position the lower appellate court cannot take evidence under Order XLI Rule 27 of Code of Civil Procedure as the provisions of appeal in the Family Courts Ordinance does not provide for taking of evidence. It being a special law must be applied strictly. The appellate Court cannot also remand the case to the trial Court as the Family Courts Ordinance does not provide for any such provision.[54]

Not surprisingly, the judge in the abovementioned case has bypassed the High Court Division decision in *Younus Mia vs Abida Sultana Chhanda*[55] and relied on the Appellate Division decision in *Azad Alam vs. Jainab Khatun and others*[56] as per the Constitutional directive that the law declared by the Appellate Division shall be binding on the High Court Division.[57]

Nevertheless, at the same time, we cannot neglect the High Court Division decision in *Younus Mia vs. Abida Sultana Chhanda*[58] that was founded upon apparently some very cogent and convincing grounds. In fact, we must think the issue again and decide that (a) whether the procedural bar regarding the provisions of the Code of Civil Procedure including the sections 151, 141 and all such essential power as are available to Civil Court embodied in the said Code, as contemplated in the section 20 of the present Ordinance is absolute or a qualified one? And that (b) whether a civil court, and not a tribunal, can be conceived of without these inherent and ancillary powers?

6. Interlocutory Order: whether appealable?

At the commencement of the Ordinance, there was no provision for interim or interlocutory order by the Family Courts. Though the necessity of inclusion of such provision in the Ordinance was felt from the very beginning[59], the Family Courts have run without the same around four

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54 Ibid., at p. 349

55 Supra note 60

56 Supra note 35

57 Article 111 of the Constitution of Bangladesh which reads as:

> Article 111. Binding effect of Supreme Court Judgment.
>
> The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

58 Supra note 60

59 Supra note 52

years. It was only in 1998 when the Supreme Court was to decide for the first time on the issue in *Moqbul Ahmed vs. Sufia Khatun and others*[60].

This above case once more highlighted the necessity of investing the Family Court with the powers to grant interlocutory orders. And just within one year from the pronouncement of the judgment, be it a coincidence or a response to the issue in the judgment, the provision for interlocutory order was inserted in the Ordinance by an amendment Act.[61] And that is Section 16A, which reads as follows:

> Where at any stage of a suit, the Family Court is satisfied by affidavit or otherwise, that immediate action should be taken for preventing any party from frustrating the purpose of the suit, it may make such interim orders as it thinks fit.

From now, there comes another legal aspect that whether an interim order is appealable.[62] In 1994, the High Court Division in *Younus Mia vs. Abida Sultana Chhanda*[63] held that appeal before the Court of the District Judge against an interlocutory order passed by the Family Court was not maintainable.[64] The court reasoned that:

> ... according to Sub-section 1 of section 17, appeal shall lie from 'order' of a Family Court to the District Judge. Subsection 1 of section 2 of the Ordinance does not contain definition of 'Order' but subsection 2 thereof states that the words used in the Ordinance but not defined shall have the meaning assigned to them in the Code. According to section 2 (14) of the Code 'Order' means 'the formal expression of any decision of a Civil Court which is not a decree'. An interlocutory order is, therefore, not such an order finally disposing of any disputes or claim in the suit itself. An interlocutory order is an order passed by way of an aid to proper adjudication of any dispute or claim. The word 'order' used section 17 cannot be read as 'any order'. Had it been the intention of the legislature that 'any order' passed by the Family Courts, shall be appeallable before the Court of District Judge, they could have done so by inserting any order instead of 'order' has been done in sub-section 1 of section 30 of the Special Powers Act as hereunder:

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60 Supra note 53

61 Act No. XXX of 1989

62 "17. Appeal - (1) Subject to the provisions of sub-section (2), an appeal shall lie from a judgment, decree or order of a Family Court to the Court of District Judge."

63 Supra note 60

64 Ibid., at p. 332

> "30(1) an appeal from any order, judgment or sentence of Special Tribunal my be preferred to the High Court Division within thirty days from the date of delivery of passing thereof."[65]

But it seems that the High Court Division afterwards deviated from this position, as in two other judgments in the year 2000 delivered contrary views. In *Atiqur Rahman vs. Ainunnahar*[66] it was held:

> The Order in its widest sense may be said to include any decision rendered by a court on question between the parties of a proceeding before the court and the same can be construed or read either final or interlocutory and both are appeallable.

Similar decision came in *Firojul Islam vs. Zahanar Akhter*[67] also, where it was held that "The order under challenge is an interlocutory order and the same is appeallable."

Following such conflict in decisions of the higher courts, both the judges and practitioners of the Family Courts feel indecisive while dealing with an interlocutory order.

7. Execution of Family Courts' decree for money: still entangled with confusions

The drawback in the Family Court Ordinance 1985 that it does not provide adequate provisions for effective execution of its decree for money has been remedied in 1989 by substitution[68] of subsection (3) of section 16 by which Family Courts have been invested with the powers of a Magistrate of the first class for the enforcement of the decree passed by it, while the earlier provision being that the money decreed by the Family Courts was to be recovered as a public demand at the discretion of the District Judge. Nonetheless, the execution process is still under the shade of confusions and misunderstandings.[69] Some lawyers and judges seem

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65 Ibid.. at p. 333

66 52 (2000) DLR (HCD) 453

67 52 (2000) DLR (HCD) 107

68 By section 9 ( ) of Act XXX of 1989 with effect from 20.06.1989. The original subsection (3) reads as follows: "where a decree relates to the payment of money and the decretal amount is not paid within the time specified by the court, the same shall, if the Court so directs, be recovered as public demand, and on recovery be paid to the decree holder."

69 As the BLAST report reveals at p. 12

confused as to the determination of executing court[70], which indicates that there is procedural non-specification. Again some lawyers and judges think that though the present law keeps provision for sentencing a judgment-debtor to imprisonment for a maximum term of three months for unpaid decretal amount, this provision does not serve the purpose of a decree, as many judgment–debtors prefer to suffer this civil three months imprisonment than to pay decreed money.[71] This means (1) the judgment debtor can choose whether to pay the decretal amount, or to suffer imprisonment; or (2) or to suffer imprisonment for non-payment of the decretal amount.

Clearly, there is confusion as well as misunderstanding about the process of execution. The discussion below of the relevant provisions of the Ordinance and the case laws will make it clear. Section 16 of the Ordinance provides for the enforcement of decrees. Sub-section 3 of the section states:

> (3) Where the decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court, the decree shall, on the prayer of the decree-holder to be made with in a period of one year from the expiry of the time so specified, be executed-
>
> (a) as a decree for money of a Civil Court under the Code, or
>
> (b) as an order for payment of fine made by a Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1899) and on such execution the decretal amount recovered shall be paid to the decree-holder.

Again subsections (3A) and 3B provide that:

> (3A) For the purpose of execution of a decree under subsection 3(a), the Court shall be deemed to be a Civil Court and shall have all the powers of such Court under the Code.
>
> (3B) For the purpose of execution of a decree under subsection 3(b), the Judge of the Family Court shall be deemed to be a Magistrate of the first class and shall have all the powers of such Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1898), and he may issue a warrant for levying the decretal amount due in the manner provided in that Code for levying fines, and may sentence the judgment debtor, for the whole or any part of the

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70 Specially mentioned by a judge of Family Court of Jessore; also many more lawyers from Chittagnong, Tangail, Rajshahi, Mymensing, Jessore and Rangpur District Bar, as referred to in BLAST report at pp. 12-13

71 A good number of practicing lawyers and presiding judges in the different Family Courts all over the country; as referred to in BLAST report at p. 12-13

> decretal amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to three months or until payment if sooner made.

From subsection 3 of section 16, it is clear that a decree may be executed in two ways, i.e., (a) as a decree for money of a Civil Court under the Code of Civil Procedure, or (b) as an order for payment of fine made by a Magistrate under the Code of Criminal Procedure, 1898. But it is unclear here that who is to decide in which way the decree for money to be executed. Is it the executing court or the decree holder[72] or judgments debtor[73]? Again, as an executing court for execution of the decree for money, which court, civil or criminal, should be prioritised?

The legal provision regarding this is absent in any other place in the Ordinance. And I have not got any satisfactory answer to this through my discussions with the practicing lawyers.[74] Henceforth, I have tried to discuss the issue in the light of judicial interpretations.

Usually Family courts award decree for money in the suits for dower and maintenance. Dower (mahr) is a sum of money or other property, which the wife is entitled to receive from the husband in consideration of the marriage.[75] On the other hand 'maintenance' includes food, clothing, and lodging. After divorce wife is entitled to maintenance up to Iddat period;[76] which may extend to three months.[77] And maintenance of children, the word, maintenance, along with food, clothing and lodging as per definition, includes other necessary expenses for mental and physical well being of a minor, according to his status in society. Educational expenses were included in the definition in *Ahmedullah vs. Mafizuddin Ahmed.*[78] So, a decree for money is in some cases to enforce the rights of a wife or to meet the basic necessity of a child. In fact, the decree for money in the Family Courts is distinguished from fine imposed upon an accused-

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72 *In Maksuda Akhter vs. Serajul Islam* 51 (199) DLR (HCD) 554 the decree holder filed application to the Executing Court for sending the judgment debtor to suffer imprisonment for three months.

73 As some lawyers alleged that as many judgment–debtors prefer to suffer this civil three months imprisonment than to pay decreed money.

74 A number of lawyers practicing in the Family Courts of Dhaka District

75 Baillie Vol. 1, at p. 91

76 *Shah Azmallah vs. Imtiaz Begum,* 11 DLR (WP) 74

77 *Safura Khatun vs. Osman Gani,* 9 DLR 455

78 (73) AIR Gau, 56; as referred to in Handbook on Muslim Family Laws, sixth ed., 2005, DLR, at p. 20.

convict in a criminal proceeding, which is of the nature of a financial punishment. Fine is a charged upon the assets of the convict as a public due.[79] But decretal money of Family Courts is not public dues; rather it is rightful gain of a decree holder.

So, while executing a decree for money, the executing court should keep in mind the purpose of a family court decree for money. Hence, realisation of the decretal money should be the first priority, and imprisonment should be the last option. Only when the assets of the judgment debtor cannot cover the decretal amount, and when there is no way out for realisation of the same, the judgment debtor shall have to undergo imprisonment for the term fixed by the court for default in payment of decretal money. There should not be any option left to the judgment ----- to plead that he will undergo further imprisonment for a fixed term in lieu of payment of the decretal amount of money.[80] If the judgment debtor is allowed to avoid payment of the decretal amount by exercising his option by undergoing imprisonment for default in payment of the same, the very purpose of passing the decree will be frustrated.

For the above reasons, when a decree for money is put before a family Court for execution, the Family Court should proceed firstly as a Civil Court under the Code of Civil Procedure. And if the decree is not satisfied through civil process, only then a Family Court should act as a Magistrate Court under the Code of Criminal Procedure, and sentence the judgment debtor to imprisonment. However, if a Family Court for the purpose of executing a decree for money initially begins working as a Magistrate Court, it must start its proceeding by issuing warrant for levy of fine (as the decretal amount is treated as fine for execution in magistrate court) under the provision section 286 of the Code of Criminal Procedure. And if the

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79 *Md. Ali Hossain & Others vs. The State,* 5 (2000) MLR (HCD) 301, at p. 308

80 The proposition is founded on the decision of the High Court Division in *Md. Ali Hossain & Others vs. State,* 5 (2000) MLR (HCD) 301. the Court held:

> Fine imposed upon an accused in a criminal proceeding is of the nature of a financial punishment as distinguished from physical punishment and it must be paid by him under all normal circumstances. Only when the assets of the accused cannot cover the amount the fine imposed upon him and there is no way out for realization of the fine the accused shall have to undergo imprisonment of either description for a period fixed by the Court for default in payment of fine. There is no option left to the accused to plead that he will undergo further imprisonment for a fixed term in lieu of payment of the fine, fine being a compulsory payment.

decretal amount is not recovered in this way, only then the Magistrate Court may sentence the judgment debtor to imprisonment.

Our next focus is on another important matter relating to execution. Some lawyers and judges still think that the maximum term for imprisonment for the failure to satisfy decree for money is three months. Here is no doubt a misunderstanding, which will be removed just now.

Subsection (5) of section 16 provides that:

> The Court may, if it so deems fit, direct that any money to be paid under a decree passed by it be paid in such instalments, as it deems fit.

And subsection 3B provides that:

> For the purpose of execution of a decree under subsection 3(b), the Judge of the Family Court shall be deemed to be Magistrate of the first class.... , and he may issue a warrant for levying the decretal amount due in the manner provided in that Code for levying fines, and may sentence the judgment debtor, for the whole or any part of the decretal amount remaining unpaid [81]after the execution of the warrant, to imprisonment for a term which may extend to three months or until payment if sooner made.

From the underlined part of the above provisions it is clear that the court may sentence the judgment debtor for the whole or any part of the decretal amount. Thus when a judgment debtor has not paid the total of 5,000 taka towards the decretal money, he may be sentenced upto three months' imprisonment, again when the judgment debtor has paid 4,000 taka out 5,000 taka decretal money, the court may award sentence of three months for this 1,000 unpaid decretal amount.

In cases of decretal money to be paid in instalments, the legal position was clarified in the case of *Maksuda Akhter vs Md Serajul Islam.*[82] The fact of the case, if brief, was that Maksuda Akhter was married to Md. Serajul Islam and thereafter they were divorced. Subsequent thereto, Makshuda Akhter filed a suit for realisation of dower money and maintenance. The suit was ultimately decreed and the decree-holder, Maksuda Akhter, put the decree into execution. On the prayer of the judgment debtor 40 instalments were granted by the Court, each instalment being taka 13,875.02 only to be paid by the month. The first instalment was not paid. Consequently the decree holder filed an application for executing the first instalment and sending the judgment debtor to suffer imprisonment for three months. The judgment debtor suffered the imprisonment but did not pay the amount of the first instalment. The judgment debtor did not also

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81 Emphasis supplied.

82 51 (199) DLR (HCD) 554;

pay any instalment which was subsequently due. Then the decree-holder filed another application to direct the judgment debtor to suffer civil imprisonment for further three months for the failure to pay the instalment of August, 1998. The application was rejected as the court understood that as the judgment-debtor once has suffered imprisonment for three months, he shall not have to suffer imprisonment any more and he shall have not to pay the decretal money at all.

Against this judgment and order, the decree-holder filed a petition for revision in the High Court Division. The learned judge of the High Court Division held that:

> A fresh and separate cause of action will arise for failure to pay money of each and every instalment for the purpose of sending the judgment-debtor to imprisonment for his failure to pay the money under each instalment. [83]

Against this High Court Division decision the judgment debtor appealed to the Appellate Division of the Supreme Court, which aslo confirmed the decision. The Appellate Division comprising of four judges, observed that suffering imprisonment of three months was an execution for one instalment only in respect of Taka 13,000.00 and odd whereas the total decree was for Taka three Lac and odd to be paid in 40 instalments. As a matter of fact, the execution was for one instalment, and there is no legal bar to proceeding with the execution under section 16(3) of the Family Courts Ordinance for the unpaid amount. [84]

So, the now the laws is settled that if a judgment-debtor is allowed to pay decretal money in instalments, he will be liable to suffer imprisonment for up to three months for failure to pay each and every instalment.

CONCLUDING REMARKS

As is evident from the above study on the seven topics, there is no confusion regarding jurisdiction of Family Courts, camera trial or regarding filing of suit relating to dower and custody of children and guardianship; what is there is only the misconceptions. But it is clear that there is enough scope for confusion regarding amendment of plaint, interlocutory order and application of CPC in the Family Courts, as there are contradictory opinions on these issues, and apparently there is no decision of the Appellate Division clarifying the actual legal positions of those issues, as was done in *Pochon Rikssi Das vs. Khuku Rani Dasi and others*[85] case which

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83 Ibid., at p. 556

84 *Serajul Islam vs. Maksuda Akhter,* 5 (2000) BLC (AD) 184

85 Supra note 24.

clarified the legal position as to Family Court jurisdiction and dual option for filing suits for dower, guardianship and custody of children. As to execution of the decree, the provisions of the Family Courts Ordinance are not as clear as needed. The issue that when a judgment debtor suffered imprisonment for failure to pay the decretal money, whether he would be exempted from the unpaid decree money for which he suffered imprisonment, or that the decree-money would be recoverable through further execution process, is still unclear. The judges and the lawyers seem grossly divided on the issue.

No doubt, such confusions, uncertainties, misconceptions and difference of opinions are thwarting the Family Courts. And these should not be allowed to run anymore. Logically, there may be differing opinions as to how the misconceptions should be removed, or the confusion resolved, or uncertainties eradicated. But it is expected that there will be none to oppose the necessity of dong so. Therefore, keeping in view the purpose of establishing the family courts, all the concerned authorities should, separately as well as collectively, take necessary steps regarding this immediately.