



GAHC010251762022

Page No.# 1/10



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Mat.App./11/2023

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W/O SUBHANKAR HOJAI, D/O BILALA KEMPRAI, VILL.- UMRANGSO
DONGJEM RAZEE, DIST.- DIMA HASAO, ASSAM.

VERSUS

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S/O LATE AJAY KUMAR HOJAI, VILL.- BOILDURA PART- I, P.O. AND P.S.-
HAFLONG, DIST.- DIMA HASAO, ASSAM. PRESENTLY RESIDING AT CISF
NISA CAMPUS NAGENGI, P.O.- 781026, KAMRUP(METRO), ASSAM.

Advocate for the Petitioner : MR B N SARMA

Advocate for the Respondent : MR. B BARUAH

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the appellant : Mr. BN Sarma, Advocate.

For the Respondent : Mr. B Baruah, Advocate

Date of Hearing : 08.09.2023, 03.01.2024

Date of Order : 15.03.2024

JUDGMENT AND ORDER(CAV)



Heard Mr. BN Sarma, learned counsel for the appellant and Mr. B Baruah, learned counsel for the respondent.

2. The present Matrimonial Appeal has been filed assailing a judgment and order dated 08.07.2022 passed by the learned Subordinate District Council Court, Dima Hasao Autonomous Council, Haflong in TS No. 80/2016.

3. The brief facts leading to the filing of the present application are summarized as follows:

I. The respondent preferred a petition before the Subordinate District Council Court NC Hills Autonomous Council, Haflong seeking divorce from the appellant wife, which was registered as TS No. 80/2016.

II. By an order dated 25.10.2016, the learned Judge while allowing the suit declared the marriage between the appellant and the respondent to be null and void.

III. Being aggrieved, the appellant preferred an appeal before this court, which was registered and numbered as Mat Appeal 33/2016.

IV. Thereafter, this court by judgment and order dated 07.09.2019 set aside the judgment and remanded the case to the Subordinate District Council Court with a liberty for filing amended plaint and to give a chance to file written statement by the appellant.

V. A review petition was preferred by the appellant wife being Review Petition No. 122/2019. The review was sought against the part of the judgment and order dated 17.07.2019 passed in Mat Appeal No. 33/2016, by which a direction was issued to the parties to appear before the learned Subordinate Judge. A question was raised in the review petition that no jurisdiction is vested in the Subordinate District Council Court, North Cachar Hills Autonomous Council to try the matter of divorce in view of separation of judiciary in the North Cachar Hills district. However, such Review Petition was dismissed by holding that the Subordinate District Council Court is having jurisdiction.

VI. Thereafter, the respondent filed amended plaint and the appellant filed written statement.

VII. Thereafter, by impugned judgment dated 08.07.2022, the divorce was granted with an award of permanent alimony of Rs. 4 Lakhs. Being aggrieved the present appeal is preferred.

VIII. In the aforesaid backdrop, a question of maintainability of the present appeal is raised by the learned counsel for the respondents on the ground that the decision of Judge, Subordinate, North Cachar Autonomous Hills is an appealable decision and such appeal lies before District Council Court and not before this court.

IX. As the question of maintainability has been argued by both the parties, now, let this court first consider the issue of the maintainability of the present appeal inasmuch as after determination of the same, this court if necessary shall proceed further to determine the merit of the case, in the event this court holds that High Court is an appellate authority against determination made by the Subordinate District Council Court .

4. The learned counsel for the respondent while raising the issue of maintainability of the present appeal urges the following.

I. The North Cachar Hills (Administration of Justice) Rules, 1955 (for short Rules, 1955) has been framed by the North Cachar Hills Autonomous Council and Rule 21 of the said Rules prescribes for constitution of Subordinate District Council Court having original jurisdiction in all suits and cases in which both the parties are Tribal residing within the areas under the jurisdiction of the Subordinate District Council Court. Therefore, by virtue of such jurisdiction, the petition seeking divorce was adjudicated by the learned Subordinate District Council Court.

II. Rule 30 of the Rules prescribes for an appeal to the District Council Court from the decision of the Subordinate District Council Court in any case of civil or criminal and the period of limitation of 60 days is also prescribed for preferring such appeal. Therefore, the appeal ought to have been preferred before the District Council Court and not before this court inasmuch as the present matrimonial appeal even does not disclose under what provision of law the appeal has been preferred.

5. Per contra, Mr. BN Sarma, learned counsel for the appellant resisting such argument of

maintainability argues the followings:

- I. The earlier matrimonial appeal preferred against the decision of the Subordinate District Council Court was decided by Hon'ble Division Bench of this Court and therefore existence of an appellate authority under the Rules is not a bar for taking the appeal by this court.
 - II. The respondent has not raised such an objection of maintainability in the earlier proceeding filed before this Court, therefore, they are estopped to raise the point of jurisdiction in the present case.
 - III. A notification dated 21.07.2012, in terms of the decision rendered by Division bench in the case of **Registrar General, Gauhati High Court Vs. Union of India reported in (2013) 4 GLT 1109** has already been issued for establishment of civil and criminal courts in the Dima Hasao District and accordingly the civil and criminal courts have already been established and separation of judiciary has been completed. Therefore, against a decree of divorce, a matrimonial appeal shall lie before the High Court.
6. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties.
 7. In the earlier proceeding arising out of the dispute between the petitioner and her husband, this court admittedly entertained a Matrimonial Appeal on a challenge made to the decision of the Subordinate District Council Court and remanded the matter back to the Subordinate District Council Court. The aforesaid decision was rendered on the following counts:
 - I. Rule 47 of the Rules provides that civil cases should be adjudicated according to law, justice equity and good conscience consistent with circumstance of a case and Rule 49 provides that in civil cases such courts shall be guided by spirit of Code of Civil Procedure, 1908 in all matters not covered by recognized customary law or usages of the district.
 - II. The Subordinate District Council Court decided the matter on the basis of suggestion of the Mouzadar and her superior, granted the divorce and therefore, the decision was a

surrender and abdication of judicial power and such a manner cannot receive judicial imprimatur.

III. The procedure undertaken by the learned Judge does not come within the realm of spirit of civil procedure.

IV. The copy of the petition was not enclosed with the notice issued to the other side.

V. The statement submitted by the wife though was not typed as a written statement, the trial judge had taken it to be a written statement. Without the petition, no effective written statement could have been filed and to that extent the wife had been denied a reasonable opportunity of putting forward her case in an effective manner.

8. In the backdrop of the aforesaid finding, the appeal was remanded back to the Subordinate District Council Court for taking a fresh decision in terms of the aforesaid judgment. Accordingly, a written statement was filed by the wife, some witnesses were examined and the judgment was passed.
9. The fact also remains that the aforesaid decision by which the matter was remanded to the Subordinate District Council Court was challenged in the review petition. Such review was dismissed by holding that the Subordinate District Council Court has not been divested of its original jurisdiction in any manner of conducting trial of suit and cases between parties all of whom belong to Scheduled Tribes within its territorial jurisdiction. Therefore, as a corollary the Subordinate District Council Court, North Cachar Autonomous Hills is vested with the jurisdiction to try divorce proceeding between the appellant and the respondent, both of whom belong to the Scheduled Tribe and are residents within the territory of the jurisdiction of the said court.
10. The preliminary issue before this Court is whether the High Court is conferred with the Appellate Jurisdiction against an order passed by Subordinate District Council Court in a Matrimonial suit or it is the District Council Court upon which such jurisdiction is vested under Rule 30 of the Rules, 1955.
11. For the determination of the aforesaid issue, the following background facts of separation of judiciary from executive is necessary.

I. In ***Subhashis Chakraborty vs. State of Meghalaya reported in (2002) 1***

GLT 227, the Full Bench of this Court, while dealing with the separation of judiciary from executive in some of the North Eastern States and areas under 6th Schedule of the Constitution of India, interpreted that Article 50 of the Constitution of India mandates for separation of judiciary from executive.

It was further held in **Subhashis Chakraborty (supra)** that administration of justice be entrusted to judicial officers under the High Court in accordance with provisions of Criminal Procedure Code and Civil Procedure Code. It was also observed that separation of judiciary from executive was necessary to preserve the Rule of Law and protection of liberty of citizens and that Rule of Law and independence of judiciary are the basic features of the Constitution.

II. This court in the case of **Registrar General, Gauhati High Court (supra)** while dealing with the issue of separation of judiciary from the executive in some of the North Eastern States and 6th Scheduled areas, issued certain directions for separation of Judiciary from Executives.

The State of Assam, by the notification dated 21.09.2012 has established a number of courts, indicated therein, including that of the Court of District & Sessions Judge in the Dima Hasao District of Assam for trial of civil and criminal cases within their respective local limits with effect from the date of taking over charge by the Presiding Officers of those courts.

The Assam Administration of Justice in the North Cachar Hills District Act, 2009 (the 2009 Act, for short) was enacted by the State legislature for administration of justice - both Civil and Criminal - in the North Cachar Hills District in the State of Assam to facilitate the trial of suits and cases by regular Civil and Criminal Courts, subject to the provisions of the Sixth Schedule.

The 2009 Act came into force in terms of Section 1(3) of the said Act, 2009 from the date of publication in the Official Gazette on 29.10.2009 Section 3(2)(ii) of the Act, 2009 has provided that suits, cases, applications, proceedings or other business relating to both Civil and Criminal Justice pending before the Court of Deputy Commissioner or the Assistant Deputy Commissioner shall stand transferred to the competent Civil and Criminal Courts of the appropriate jurisdiction to be established



under the Code of Civil Procedure, 1908 and the Code of Criminal Procedure, 1973, as the case may be, with effect from such date as may be notified by the State Government. The Act' 2009 is made subject to the provisions of Paragraph 4 and Paragraph 5 of the Sixth Schedule. Accordingly, a notification dated 14.07.2017 was issued in exercise of the powers conferred by Section 3(2)(ii) of the Act, 2009.

Article 244(2) of the Constitution of India prescribes that provisions of the Sixth Schedule shall apply to the administration of Tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram. As per Paragraph 20(1) of the Sixth Schedule read with Entry I of Part I of the Table thereof, the areas under the North Cachar Hills are tribal areas within the State of Assam.

In exercise of the powers conferred under subparagraph (4) of Paragraph 4, the North Cachar Hills Autonomous Council, with the previous approval of the Governor, has framed a set of Rules, "the North Cachar Hills (Administration of Justice) Rules, 1955" ("the 1955 Rules" and/or "the Rules, 1955", for short).

The Rules, 1955 have provided for constitution of 3 (three) classes of Courts in the areas within the North Cachar Hills Autonomous District, to be constituted by the District Council for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of Paragraph 5 of the Sixth Schedule apply and they are – (1) Village Courts. (2) Subordinate District Council Court. (3) District Council Court.

A Village Court has been vested with the jurisdiction to try suits and cases of the natures prescribed therein in the 1955 Rules in which both the parties belong to Scheduled Tribes and are residents within its jurisdiction.

A Subordinate District Council Court has been vested with the original jurisdiction in respect of all suits and cases in which both the parties do not fall within the local jurisdiction of the same Village Court, but within the areas under the jurisdiction of the Subordinate District Council Court, subject to restrictions provided under Rule 23.

Rule 23 has provided the kinds of suits and cases which the Subordinate District Council Court is not competent to try and Rule 24 states that until such time as the Governor deems fit to invest the Subordinate District Council Courts with such powers



by notification in the Official Gazette, such suits and cases referred to in Rule 23 shall be tried and dealt with by the then existing courts of the Deputy Commissioner and his Assistants.

A District Council Court is a Court of appeal in respect of all suits and cases triable by the Subordinate District Council Court, apart from other powers vested in it by the 1955 Rules. Chapter V of the 1955 Rules has provided for the procedure to be followed by all the three afore-mentioned classes of Courts.

As discussed herein above, though the provisions of 2009 Act makes it clear that the suits, cases, appeal, application, proceedings or other business relating to both Civil and Criminal Justice which are pending before the Court of Deputy Commissioner or the Assistant Deputy Commissioner only had been transferred to the competent Civil and Criminal Courts of the appropriate jurisdiction, however, neither the provisions of 2009 Act nor the notification dated 14.07.2017 have provided for the transfer of suits and cases pending before the three classes of Courts constituted under the 1955 Rules made in exercise of powers under Paragraph 4 of the Sixth Schedule

Rule 30 of the Rules, 1955 provides that an appeal shall lie to the District Council Court from the decision of the Sub-ordinate District Council court in any case of civil or criminal. A period of 60 days limitation is also prescribed in the proviso of the said rule.

III. Therefore, it is apparent that the Rules, 1955 is a complete code providing jurisdictional procedure of the court constituted under the Rules, 1955 including the procedure before the appellate court.

IV. It was held in **Registrar General (supra)** that on the courts being set up and being governed by Civil Courts Act, the provision of Civil Court Act 1887 and CPC and Cr.P.C. shall be applicable to the regularly constituted Civil and criminal courts without affecting the function of any other customary court.

V. Thus from the discussions made herein above, it is apparent that two parallel courts are functioning in NC Hills area (now Dima hasao), one set of courts manned by Executives and other village authorities having jurisdiction as provided under the provision of Rules, 1955 and the other courts are General Courts created by virtue of Civil Courts Act, 1887.

The procedure followed for conduct of business and jurisdictions of General Courts are as mandated in the CPC and Cr.P.C and for other Court it is the Rules, 1955.

VI. It is also well settled that if any statute confers jurisdiction upon a court or authority to decide any dispute, such jurisdiction is to be exercised by the said authority and within its limit as conferred by the said statute. In **Arun kumar & Ors Vs Union of India & Ors, reported in (2007) 1 SCC 732**, the Hon'ble Supreme Court held as follows:

"74. A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess."

VII. Thus, in the given fact of the case that in the previous litigation it was held that the subordinate District Court is having Jurisdiction to try the matrimonial dispute between the parties and also the fact that the said Subordinate Court had already made a decision, in the considered opinion of this Court, the District Council Court shall have jurisdiction to adjudicate the appeal under Rule 30 of the Rules 1955 and the High Court has not been conferred with the necessary jurisdiction required to take the appeal in question.

VIII. The appeal memo is also silent as regards the provision under which the matrimonial appeal is preferred. High court is conferred appellate jurisdiction relating to matrimonial dispute under certain statutes, such as under Section 28 of the Hindu Marriage Act and under Section 39 of Special Marriage Act. The present appeal cannot also be treated as an appeal under Section 96 of the Code of Civil Procedure or an appeal under Order 41 CPC or under Rule 30 of the Rules, 1955.



IX. Appellate jurisdiction is conferment of an authority upon the court to adjudicate cases that are already heard and decided by subordinate court to it. It is clear that no special enactment has been made conferring any jurisdiction upon the High Court to exercise power under Rule 30 of the Rules, 1955.

X. Therefore, in absence of any enactment conferring jurisdiction upon this Court to act as an appellate court against decision of the Subordinate Court constituted under the Rules, 1955, the High Court cannot assume jurisdiction of an appellate authority over the decision of such Subordinate court, more particularly when remedy of appeal is provided under Rule 30 of the Rules 1955.

XI. In view of the aforesaid discussions and reasons, this court is of the considered opinion that the High Court shall have no jurisdiction to entertain an appeal against a decision of the Subordinate court. Accordingly, the present appeal is not entertained and the appellant is relegated to the appellate court constituted under Rules, 1955.

12. In view of the above, the present appeal stands dismissed being not maintainable. However, the appellant shall be at liberty to approach appellate authority/ authorities under the North Cachar Hills (Administration of Justice) Rules, 1955. As the appellant has wrongly been litigating in this court and this court has held that the appeal is not maintainable therefore, the period spent before this court till receipt of a certified copy of this order shall be excluded from the period of limitation. The certified copy of the order impugned as annexed to the Appeal Memo be returned back to the appellant.
13. Accordingly, this appeal stands dismissed. Parties to bear their own cost.

JUDGE

Comparing Assistant