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## FAMILY COURT IN INDIA-A CRITICAL ANALYSIS

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### ABSTRACT

Family Courts were set up in major cities of India during late 1980's & 1990's. They have become the trendsetters in matrimonial disputes and family law litigation. The most reported judgments in the family law originate from litigation in family courts,<sup>1</sup> for this reason to look into the working of family courts becomes an important component for research.

This article will dwell into the following topics:

1. Historical background and ideological premise of the Act.
2. Main Provision of Family Court Act along with Objective and Preamble.
3. Role of Judges, lawyers and counselors.
4. Indian Judiciary on Family Courts
5. Loopholes of Family Courts
6. Recommendations and Suggestions
7. Conclusions

**KEYWORDS:** Family Courts, family disputes, Gender Justice, Property (Footnotes)

### HISTORICAL BACKGROUND AND IDEOLOGICAL PREMISE OF THE ACT

The need to establish family courts in India was first emphasized by the Late Smt. Durgabhai Deshmukh, the noted social worker from Maharashtra around 1953, after her tour from China, where she had occasion to study the working of Family Courts, when she returned back she discussed the subject matter with Justice Bhagla and Justice Gajendra Gadkar. After a discussion then made a proposal to setup Family Courts in India to Prime Minister Pt. Jawaharlal Nehru but it didn't go through.

The concern over setting up a special court for family disputes was again raised in 1970's and a committee was setup to evaluate the Status of Women in India. The report of this committee titled "Towards equality" published in 1974, recommended that all matters concerning the family should be handled by Courts specially set up for this purpose.<sup>2</sup>

The Law Commission of India in its 59<sup>th</sup> report published in 1974, suggested the changes in the Civil Procedure Code and recommended for setting up for Family Courts. As per these recommendations, the Civil Procedure Code was amended in 1976 and a new section was added, i.e. order 32-A, to provide for setting up for a separate adjudication fora for family matters.

1. Flavia Agnes (ed. 2011), FAMILY LAW - VOLUME II, MARRIAGE, DIVORCE AND MATRIMONIAL LITIGATION, Oxford University Press.

2. Ibid page 270

The 1980's witnessed the emergence of the new Women's movements in India, where a series of enactments and amendments to existing statutes were enacted by the Parliament like, amendment to rape laws (Sec. 375 & 376 IPC) Sec 498-A, 304 –B. The Family Court Act was part of this trend of legislative reforms concerning women as there was the mounting pressure of women's organization on the Government to render Gender Justice and thus Gender Justice was the underlying compulsion for establishing Family Courts. The FCA, 1984 is a procedural statute which covers a separate and innovative adjudication for family disputes.

In the case of *K.A. Abdul Jaleel v. T.A. Shahida*<sup>3</sup>, V.N. Khare CJ, S.B. Sinha J., and Dr. A.R. Lakshmanan J. stated “ The reason for the enactment of the Family Courts Act was to set up a court that would deal with the disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings”.

The ideology underlying the enactment was to create women friendly adjudication spaces, to ensure that crucial rights of survival of women are not subsumed beneath technicalities and legal jargon. Court should be away from the formal structures of civil and criminal courts. The new litigation should be less formidable in its appearance & more accessible to women from marginalized sections. In order to achieve this, there has to be a conscious shift away from mainstream lawyers and an increased dependence on counselors to aid the parties to the disputes in arriving at mutually amicable solution.<sup>4</sup>

### **MAIN PROVISION OF FAMILY COURT ACT ALONG WITH OBJECTIVES AND PREAMBLE**

The main objective in seeking establishment of family courts was to split matrimonial litigation from general civil and criminal courts, to courts with special expertise in matrimonial law and dispute resolution. These courts were meant to make the litigation process less formal and intimidating, usher in the norm of speedy justice and quick redressed, and facilitate conciliation and settlements.

The Preamble of Family Court Act provides, “An Act to provide for the establishment of family courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith”<sup>5</sup>.

3. I.(2003) DMC 765 SC

4. Supra note 1 page 271

5. Preamble of the Family Courts Act, 1984

6. Sec 4 of the Family Courts Act, 1984

7. Section 4 (4) b of the Family Courts Act, 1984

The Act seeks to provide for establishment of family Courts in every city or town with a population exceeding one million. The Act exclusively provides within the jurisdiction of the family courts the matter relating to:

- a. Matrimonial relief including nullity of marriage, judicial separation, divorce, restitution of conjugal rights or declaration as to the validity of a marriage or as to the matrimonial status of any person.
- b. The Property of the spouses or either of them.
- c. Declaration as to the legitimacy of any person.
- d. Guardianship of a person or the custody of any minor.
- e. Maintenance, including proceedings under Chapter-IX of the Cr.P.c. 1973. It is obligatory on the part of the family court to effect a reconciliation between the parties to a family disputes. The proceedings are informal and rigid rules of procedure shall not apply. The Act provides for the association of social welfare agencies, counselors, services of medical and welfare experts. No right is given to the parties to the represented by legal practitioner. In the interest of Justice, assistance of a legal expert as amicus curiae can be taken. The Act provides for only one right to appeal, which shall lie to the High Court. The Family Court has been left free to receive any evidence or material that assists it to deal effectually with a dispute and the provision of the Indian Evidence Act would not be applicable.

### **ROLE OF JUDGES, LAWYERS AND CONSOLERS**

In selecting persons for the appointment as Judges Sec 4 (4) a, “every endeavor 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 counseling are selected”<sup>6</sup>; Sec 4(4) b, “preference shall be given to women”<sup>7</sup>.

Family Courts Judges are placed at the same level as district Judge. These judges have the power to adopt and mold procedures in the interest of justice. They are not help by lawyers and they are to be aided

by non-legal support system such as conciliators and experts from other fields. They have to resolve the conflicts by adopting a less legalistic and technical and use humanist approach to dispute resolution. The family court judges should create an atmosphere, which is most conducive to an amicable resolution of the dispute, so that rights of the weaker parties are protected.

Sec 13, “notwithstanding anything contained in any law, no party to a suit or proceeding before a family court shall be entitled, as a right, to be represented by a legal practitioner, provided that if the family court consider it necessary in the interest of justice, it may seek the assistance of legal expert as amicus curiae”<sup>8</sup>. Sec 13 of FCA restrict the role of lawyers in the family courts. This provision was meant to curb the exploitation role of lawyers but after *LeelaMahadeo Joshi V. MahadeoSitaram Joshi*<sup>9</sup>, lawyers were permitted to represent the litigation and presents agreements on their behalf. As according to M.F. Saldauha J. of the Bombay High Court, made the following observations:

“Adjudication of a complicated or highly contested matrimonial dispute in the light of law and interpretation of provisions by different courts over a period of time, would require assistance from advocates. The uneducated and poor litigants are being totally handicapped in the conduct of their cases for want of legal assistance. Even the educated and the rich find it difficult to follow court procedures. In the absence of convincing reasons, permission of representations by lawyers ought not to be refused.”

The state government shall, in consultation with the high court, determine the number and categories of counselors’ required assisting a family court in the discharge of its function and providing the family court with such counselors as it may think fit.

Section 6, family Court Act, is linked to section 9, which stipulates that it is the duty if the family court to make efforts for settlement. This also has a resonance of sec 23 (2) of the Hindu Marriage Act, 1955 which stipulates that it shall be the duty if the court to make every endeavor to bring about a reconciliation between the parties. A similar stipulation regarding settlement can also be found in Article 32-A, rule 3 of the Civil Procedure Code.

Counselors have been awarded a high position within the Act. The mandatory provision of counseling is followed in a cursory manner and their role is confined to the task of ascertaining whether it is possible to reconcile the dispute and save the marriage. Counseling

and conciliation are the two pillars on which the whole structure of Family Courts is built. Counseling, in fact, is the foundation of which the philosophy of conciliated settlement rests. The counselors, their skill and competence have a tremendously important role to play in the whole process. The role of the counselors is not limited to counseling but extends to reconciliation and mutual settlement wherever deemed feasible.

## INDIAN JUDICIARY ON FAMILY COURTS

1. In the case of *Bhuvan Mohan Singh V. Meena*<sup>10</sup> S.C. held that Family Court have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. S.C. further highlighted the role of the Judge in Family Courts.

“The Family Judge is expected to sensitive to the issues, or he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that Family Courts should show undue haste or impatience, but there is a situation. A Family Courts Judge should remember that the procrastination is the greatest assassin of the tis before it. It not only gives rise to more family problems but also gradually builds unthinkable and everestine bitterness. It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the tis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the objects and reasons this and decide the matters as expeditiously as possible keeping in view the objects and reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc.”

2. In the case of *K. Srinivas Rao vs. D.A. Deepa*<sup>11</sup>; SC held that when the disputes is taken up the Family Court for hearing, it must be referred to

8. Sec 13 of the Family Courts Act, 1984

9. AIR 1991 Bom 105

10. AIR 2014 SC 2875,

11. AIR 2013 SC 2176 C

mediation centers. Matrimonial disputes particularly those relating to custody of child, maintenance etc. is preeminently fit for mediation. Sec 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts Family Courts are assisted by Counselors. Even if the Counselors fail in their efforts, the Family Court should direct the parties to mediation centers where trained mediators are appointed to mediate between the parties.

Further in this case courts have issued the directions for the Courts, which are dealing with the matrimonial matters as follows:

- a. In terms of Section 9<sup>12</sup> of the Family Courts Act, the Family Courts “shall make all efforts to settle the matrimonial disputes through mediation”. Even if the Counselors submit a failure report, the Family Court shall, with the consent of the parties, refer the matter to the Mediation Centre. In such a case, however, the Family Courts shall set a reasonable time limit for Mediation Centre to complete the process of mediation because otherwise the resolution of the disputes by the Family Court may get delayed. In a given case, if there is good chance to settlement, the Family Court in its discretion, can always extend the time limit.
  - b. The Criminal Courts dealing with the complaint under section 498-A of the Indian Penal Code should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to Mediation Centre if they feel that there exist elements of settlement and both parties are willing. However, they should take care to see that in this exercise, rigor, purport and efficacy of Section 498-A or not to grant bail in not in any way curtailed by this direction. It will be for the concerned court to work out the modalities taking into consideration the facts of each case.
  - c. All Mediation Centres should set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigations stage.
3. In the case of *Jagrika Debata V. Satyanarayan Debata*<sup>13</sup>; the Orissa high Court helps that one of the objectives in enacting Family Courts Act, 1984 was stated to be simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute. It has been pointed out in the impugned judgment, section 14 of the Family Court provides that a Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. Thus consideration of evidence by a Family Court is not restricted by the rules of relevancy or admissibility provided under the Indian Evidence Act.
  4. In case of *K.A. Abdul Jaleel V. T.A. Shahida*<sup>14</sup>— the court has issued whether under section 7 of the Family Courts Act, 1984 had jurisdiction to decide a dispute as regards properties claimed by a divorce wife and it was held the Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected there with. From a perusal of the statement of object and reasons it appears that the said Act, inter alia, seeks to exclusively provide within the jurisdiction of the Family Courts the matter relating to the property of the spouses or either of them. Section 7 of the Act provides for the jurisdiction of the Family Courts in respect of suits and proceedings as referred to in the explanation appended thereto. Explanation © appended to section 7 refers<sup>15</sup> "to a suit or proceeding between the parties to a marriage with respect to the property of the parties or either of them". It was held in this case that now it is well settled principle of law that jurisdiction of a court created especially for resolution of disputes of certain kinds should be construed liberally.

12. Sec 9 of the Family Courts, act, 1984

13. AIR 2010 Ori 58

14. AIR 2003 SC 2525

15. Sec 7 of the Family Courts Act, 1984

5. In case of *Balwinder Kaur V. Hardeep Singh*<sup>16</sup>: The court held that for the purpose of settlement of family disputes emphasis is “laid on conciliation and achieving socially desirable results and eliminating adherence to rigid rules of procedure and evidence. “

### LOOPHOLES OF FAMILY COURTS

1. Difficulties in Proceedings under Ch-IX of Cr.P.C.: It is found that there is more delays in Family Courts than that of Magistrate’s Court in proceeding for maintenance under sec. 125 Cr. P.C. Delay is caused because of an additional procedural requirements that is mandatory counseling in Family Courts. The very purpose of speedy justice is defeated in transferring cases from Magistrate’s Court to the Family Courts.
2. Personal Appearance of Parties: Some time personal appearance of parties causes a great deal of hardship to litigants who may not be able to present themselves as it is mandatory personal appearance is mandatory under Family Courts.
3. Delays and Backlogs: Though the mandate of the family courts was non-adversarial litigation and conciliation resulting in speedy settlements, the matrimonial litigation continues to be extremely contested and there were backlogs in cases.
4. Prof. Lotika Sarkar has raised her voice against the stipulation of preservation of family, which is reflected in the following comments: “one of the major drawbacks of the Family Court Act has been the over emphasis on the preservation and protection of the marriage. In appointing Judges, Sec. 4<sup>17</sup>” of the Act mentions that every endeavor should be made to appoint persons who are committed to preserve and protect the institute of marriage”. It is often forgotten that marriage and family is an area where women are not oppressed, whether it is wife battering, marital rape, or harassment for dowry. Yet it is this marriage that the Judge is asked to preserve and protect. This section read along with the Preamble of the Act conveys the impression that Judges should do their best for a settlement between the parties to preserve the marriage. At times this is stretched to an absurd limit.”<sup>18</sup>

The principle of “gender justice”, which was the primary motivation for the demand for special courts for family matters, was not clearly indicated by the Preamble of the Act. Rather the Act emphasized on “preservation of the family” as its primary aim.

5. Absence of Lawyers: Absence of lawyers in the family court makes things even more difficult for the layperson that is completely unaware of the legal jargons. The situation has worsened because in the absence lawyers, litigants left to the mercy of court clerks and peons help them to follow the complicated rules. Women are not even aware of the consequences of the suggestions made by court officials.
6. Counselors: The counselors have important role to play but it was observed that some of the family courts do not have any counselors and in good number of courts the counselors keep on changing frequently. Many of the counselors are just part-time and are not properly trained. As a marriage counselor frequently changes, causes hardship to a woman who has to explain her problems a fresh to the new counselors again.
7. Sustaining Rights Lacking: As the Family Courts are Procedural Law, other problems connected with substantive law persist. Family Courts have been set up to deal with problems that arises on the breakdown of a marriage, divorce, restitution of conjugal rights, claims for alimony and maintenance, custody of children. The setting up a Family Courts does not in any way alter the substantive law relating to marriage. Unless the law changes in radical ways conferring rights on women and creating new rights in their favor, the setting up of Family courts will not help to alter their position. As a result, the Act has ended up being an ineffective instrument to impart justice to women.<sup>19</sup>
8. Inadequate and poor state of Infrastructure: The Family courts generally suffer from unsatisfactory conditions. There is no proper place for the judges to sit and working conditions are normally unhygienic and poor. There is no proper space allotted for the children to meet their separated parents. The Family

16.AIR 1998 SC 764

17. Sec4 of the Family Courts Act, 1984

18.Supra note 1 pg290

19.http://ncw.nic.in/pdfreports/Working of Family courts in India.pdf (visited on 13th March 2016)

Courts lacked essential public conveniences like drinking water, waiting room, toilets etc. and facilities like photocopy, paid public telephone, availability of stamps, stationary etc. In the absence of basic infrastructure the litigants are subjected to endless hardships.

9. Orientation and Attitudes of Family Court Judges: The Judges appointed to the Family Courts do not have any special experience/ expertise in dealing with family matters, nor they have any special expertise in setting disputes through conciliation, which is a requirement prescribed in the Act.<sup>20</sup>
10. The provision that women Judge should be appointed and the Judges should have expertise and experience in setting family disputes, more or less has remained only on paper. In many states the Family Courts do not have a single woman Judge.<sup>21</sup>
11. Lack of uniformity in Rules and Procedures: there is no uniformity relating to rules and procedure. Every High Court lays down its own rules and procedure. Though the Code of Civil Procedure was amended to do away with the rigid rules of procedure, the Family Courts, however, continue to deal with family disputes in the same manner as other civil matters.

## RECOMMENDATIONS AND SUGGESTIONS

1. The State Women's Commissions or the Ministry of Women and Child welfare should conduct a gender specific analysis of the functioning of Family Courts and make appropriate recommendations to the respective State Government and High Courts to improve their functioning and ensure gender justice.
2. The Judges of the Family Court are overburdened with caseload and emotionally drained with dealing with highly charged personal cases and have no time for pursuing academic interest. It is recommended that the higher Judiciary and the state administrator should provide the guiding principles to Family Court Judges and update them on the developments in law, the legal, and Constitutional frameworks on a periodic basis.
3. Prof. (Dr.) N.R. Madhava Menon, former Director of the National Judicial Academy, Bhopal had suggested that the rules relating to Family Court should be appropriately revised. Further

he suggested that an organized program of judicial education on gender justice should be imparted to Judge at all levels through the National and State Judicial Academics.<sup>22</sup>

4. The emerging trends in Family relationship have necessitated a new framework for determining inter family relations and Judges should respond keeping in mind the changes that are taking place within the family. Lahoti J. has laid down the guidelines relating to that what would be the role of a Family Court Judge in ensuring gender Justice. There was no clear mandate of gender justice, as the wordings of the statute do not compel a Family Court to contextualize gender. He urged the Judges must keep in mind the following guideline to ensure basic gender sensitivity:
  - a. be informed of the historical and cultural background in which women have lived over the ages, understand their feelings, and have regard to their needs as a class;
  - b. because women are weaker sections of the society, strike a balance in your approach in dealing with an issue related to gender, or where a woman is victim, in such a way, that the weaker are not only treated as equals but also feel confident that they are equals;
  - c. treat women with dignity and honor and inculcate confidence in them by your conduct, behavior, and ideology whenever they come to you as victims or seekers of justice;
  - d. do not allow them to be harassed and certainly do not do anything which may amount to harassment of a woman; and
  - e. make efforts to render a woman victim quick, speedy, cheaper and effective justice – true to its meaning.<sup>23</sup>
5. Role of counselors should be defined. They should enhance the negotiating power of women. The counselors were to deviate from the preventing framework of "neutrality" and gender justice while working out terms of reconciliation, settlements regarding the quantum of maintenance, issues of custody and access of children, protection against domestic violence or right of residence in the matrimonial home.
6. The tenure of Family Court Judge should increase to 5 yrs. It was felt that two-three years tenure is very short to be able to function effectively because the process involves

20. Namita Singh Jamal (2009) "Have Family Courts lived up to expectations?" *Mainstream*, Vol. XL VII No.12, March 7, 2009

21. *ibid* at pg 2

22. *Supra* note 1, pg 319

23. *Supra* note 1 pg 321

learning newer skills. By the time he/she gets acclimatized to the tasks involved and is able to change procedural rules it is time for a transfer. Judges should resolve the conflict by adopting a less legalistic and technical with more humanistic approach to dispute resolution.

7. Family Courts Judges must adopt a compassionate, humanitarian approach while adjudicating family matters. For this Family Court Judges need special orientation to evolve this framework.
8. The *Committee on Empowerment of Women (2001-02)* had recommended several measures to improve the condition of Family Court, those are as follows:
  - a. Information centers should setup at all Family Courts to explain the procedure and functioning of Family Courts to all potential litigants.
  - b. A standard pro-forma should be worked out and published in all regional language papers, setting out the list of documents require to be filed in court. The pro-forma should be simplified, requiring the parties only to state facts, without substantiating each fact with evidence.
  - c. The atmosphere in the Family Courts should be such as to enable a woman to express herself freely.
9. Recommendations emerged from the workshop by NCW should be incorporated, those are as follows<sup>24</sup>:
  1. Legal prudence has to be simpler. Simplification could be achieved by amendment of laws or judicial interpretation.
  2. Grant of maintenance should include provision for residence for women.
  3. There must be speedy settlement of disputes,
  4. Judges and other court staff must be gender sensitized.
  5. Family Courts can also take help of NGOs in the settlement of disputes.
  6. Counselors should be permanently appointed and should be given training.
  7. Family courts should follow simple procedures, which should not create hurdles to justice.
  8. There should be an informal atmosphere in the Family Courts and these courts should not be like any other civil courts.
  9. Qualified social workers and social activities may also be appointed as Judges of Family Courts.

10. To bring uniformity in the rules of Family Courts all over the country a drafting committee may be set up to draft the rules.
11. Every district should have Family Courts.
12. The office of probation officers must be strengthened and judges should utilize their services.
13. Good practices such as facilities like children's complex etc. as existing in Mumbai should be introduced in all Family Courts. Necessary infrastructure should be provided right at the time of institution of the Family Courts.
14. Model rules should be prepared for the appointment of judges in Family Courts. Judges can also act as a counsel at the second stage of counseling.
15. A woman should be allowed to file a case in the Family Court in the district or state where she resides and not necessarily at the place where the marriage took place or where the husband resides or where they both last resided together.

## CONCLUSION

After examining the functioning of Family Courts we find that the expectation for which Family Courts was established was not yet achieved. The system has given rise to anger, frustration and resentment over its functioning. The system lacks the trust of the majority of Justice seeking population regarding its capability to provide a fair and first forum for handling family disputes. The gender-justice, which was the underlying compulsion for introducing Family Court, is totally missing.

The Family Court needs to be empowered in the true sense of the term and the enforcement mechanism needs to be strengthened. The Family Courts Judges should ensure congenial atmosphere in dealing with the matters relating to marriage, divorce, child custody, adoption etc. and should also mitigate the harness of adversarial court process while dealing with family matters.

The measures like simplification of procedures, speedy settlement of disputes, a permanent cadre of competent counselors who are capable of providing scientific and professional services, informal atmosphere in courts, qualified social workers, and appointment of gender sensitized Judges, uniformity of rules, extension of Family Courts services to all districts of India, strengthening of the system of probation officers, provision/creation of necessary infrastructure, model rules for appointment of Judges. Gender Justice should be a component for recruitment and it should be made

24.[http://ncw.nic.in/pdfreports/Working of Family courts in India.pdf](http://ncw.nic.in/pdfreports/Working%20of%20Family%20courts%20in%20India.pdf) (visited on 13th March 2016)



essential for a Judge to have undergone a gender sensitization course/training before taking the position, as a Judge should be incorporated.

For the effective functioning of Family Courts in India all the recommendations and suggestions should be incorporated and implemented.

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