

The Role, duties and procedural functions of Family Courts

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1. Introduction :

The Family Court Act – 1984 was enacted with an avowed object that the Family Court should adopt a radically different approach that what is adopted in ordinary civil proceedings. The Family Court deals with human problems and not property disputes. Therefore, its approach in matrimonial matters is much more constructive, affirmative and productive rather than abstract, theoretical or doctrinaire. Matrimonial matters must be considered with human angle and sensitivity. Delicate issues affecting conjugal relations have to be handled carefully and legal provisions should be construed and interpreted without being oblivious or unmindful of human weaknesses. While so, the role, duties of the Family Courts and Judges of Family Courts assume wider importance. The procedures adopted by the Family Court must be friendly and should achieve the purpose of the enactment.

2. The Role and duties of Family Court:

The preamble of the Family Court Act states that it is an Act for the establishment of Family Court with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and for matter connected therewith. Section 7 of the Act deals about jurisdiction of the Family Court and Section 8 deals about exclusion of jurisdiction in certain cases. Section 9 imposes a duty upon the Family Court to make efforts for settlement. Under section 9(1) of the Act, such an effort shall be taken in the first instance to assist and persuade the parties in arriving at a settlement. Under Section 9(2), when it appears to the Family Court that there is a reasonable possibility of settlement between the parties, at any stage, it may adjourn the proceedings and enable attempts to settle the same. Therefore, Section 9 casts a duty upon the Family Court to make efforts to bring settlement between the parties.

There are scores of Judgments which emphasize the importance of settlement and also reiterate the role and duties of the Family Court to bring settlement. A matrimonial case is not like other cases before a Court. Annulment of marriage, not only affects the parties and their families, but also the society, which feels its reverberations. The number of litigations being on rise, for small and trivial matters, people approach the Courts. The judicial system is overburdened, causing delay in adjudication of the disputes. The Mediation Centers, Arbitration and Conciliation Centers, are opened, by keeping in view S.89 of CPC, to ease the burden of the Courts. Earnest efforts have to be made to resolve the disputes amongst the litigants by having recourse to alternative dispute resolution processes, more particularly the matrimonial dispute(s), by referring them to Mediation Center(s).

The Supreme Court has held that by virtue of Section 9, a duty is cast upon the Family Court to make endeavor to assist and persuade the parties in arriving at settlement. Only if it comes to the conclusion that after the above exercise the settlement is impossible, then case should be posted for future steps such as written statement/counter, issues, trial and so on

A scrutiny of various provisions of Family Court Act would betoken that Family Court Act expects the duty-holders like the Court, Counselors, Welfare experts and any other collaborators to make efforts for reconciliation.

While explaining the role of Mediators and Counselors in bringing settlement, the

1 R. Durga Prasad Vs Union of India AIR 1998 AP 290 .

Supreme Court has held in paras 17 and 18 that in the case of **Santhini vs Vijaya Venkatesh** ² that in the process of mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. The role of a counselor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counselor also assists the parties to resume free communication. In custody matters also the counselor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counselor assists the parents to shed their ego and take a decision in the best interest of the child.

Moreover, The Hon'ble Delhi High Court in **Amina Bharatram Versus Sumant Bharatram and others**³ has held in para 28 that the litigation before the Family Court is a mixture of inquisitorial trial, participatory form of grievance redressal and adversarial trial. As the Family Court is left to devise its own practice, it can have a judicious mixture of all three of them and can as well proceed under any of them exclusively”.

It is also pertinent to note that the appropriate stage for considering a reference to ADR process in a civil suit is on completion of pleadings whereas in matrimonial disputes it is better to refer the parties to ADR on completion of service of notice and before respondent submits his / her pleadings⁴.

The Family Court has to keep it in mind that it is dealing with human problems and not property disputes. Thus, technicalities of rules of evidence are not applicable to proceedings before family court. It has to arrive at just conclusion and adopt an approach to problem not like pure court of law ⁵. Family Court is clearly radical departure from the

² (2018)1 SCC 62

³ I.A.12186/2014 in CS(OS)411/2010) decided on 9.6.2014

⁴ Bhavana Ramaprasad vs Yadunandan Parthasarathy WRIT PETITION NO.40037/2014 (GM-FC), decided on on 31.10.2014 Karnataha HC at para 20.

accepted form of a trial of a Civil Court.⁶

Needless to say, right to fair trial is an integral part of our judicial system. However, in matrimonial case only as a last resort, the Family Court has to decide the case on merits⁷.

The Family Court is bound to make efforts for reconciliation and settlement. Sending the case for counseling or mediation is mandatory⁸.

The Delhi High Court⁹ has observed that the Court however is to watch the proceedings during trial and make further attempt for reconciliation at any stage deemed appropriate by the court. The words "*before proceeding to grant any relief*", mean during the course of trial i.e. right from the date when the opposite party is served till the date of giving final decision. If the trial court directs the petitioner to file written statement and not adjourns the case for reconciliation, it will be a illegally in the exercise of its jurisdiction affecting the ultimate decision of the case. Therefore, the people rushing to courts for breaking up of marriage should come as a last resort, and unless it has an inevitable result, courts should try to bring about conciliation. The emphasis should be on saving marriage and not breaking it.

Further, the Family Court Judge should neither be a slave to the concept of speedy settlement nor should he be a serf to the proclivity of hurried disposal abandoning the inherent purity of justice dispensation system. The balanced perception is the warrant and that is how the scheme of the 1984 Act has to be understood and appreciated¹⁰

Even the Family Court can make endeavour to settle pre -litigation cases as well¹¹. The Family court can also fix time limit for completion of mediation process, if it feels that resolution of the disputes may get delayed¹².

⁵ Janaki Vs Sundarm 2001(1) CTC 489 (Mad)

⁶ Smruti Pahariya vs. Sanjay Pahariya , Civil Appeal No. 3465 of 2009 @ Special Leave Petition (Civil) No. 1 7402 of 2008) decided on 11.5.2009

⁷ Bhavana Ramaprasad vs Yadunandan Parthasarathy (Writ Petition NO.40037/2014 (GM-FC) decided on 31 October, 2014

⁸ Bini vs Sundaran AIR 2008 Ker 84 : 2008 (1) KLJ 162, 2008 (1) KLT 331

⁹ Manju Singh Vs Ajay Bir Singh AIR 1986 Delhi 420:1985 (8) DRJ 354:1985 RLR 299,

¹⁰ Santhini Vs Vijaya Venkatesh (2018) 1 SCC 1

¹¹ Laxmikant Jaiswal vs Sudhalata Jaiswal, FAM No. 70 of 2016, decided on on 20 July, 2022, Chattishgarh HC

¹² K.Srinivas Rao Vs D.A.Deepa (2013)2 SCC(Cri)963: 2013(3) MLJ 85(SC)

3. The Role of Family Court Judges :

The Family Court is a creature of statute. It is vested with power to adjudicate and determine the disputes between the parties which fall within the scope and ambit of Explanation to Section 9(1) of the Act. The persons, who are appointed as Judges of the Family Court, perform all duties and functions which are akin to the functions being performed by the Presiding Officer of a Civil or a Criminal Court, though to a very limited extent. The expression 'Judge' under Section 2(a) of the Act means the Principal Judge, Additional Principal Judge or other Judge of a Family Court. The Presiding Judges of the Family Courts perform all the different statutory functions which are spell out in the Family Court Act and decide the cases in accordance with the provisions of the Act. It may be noticed that the primary object and duty of the Family Court Judge is to endeavour and persuade the parties in arriving at a settlement in respect of the suit or proceedings, in which it may follow such procedure, as it may deem fit.

Undoubtedly, it is common knowledge that Family Courts function in a charged atmosphere, with emotions running high. Even casual observations made by Presiding Officers are misconstrued, misinterpreted and perceived as remarks passed against the litigants. So, the Family Court Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility.

A Family Court Judge has to be very sensitive to the cause before it and he/she should be conscious about timely delineation and not procrastinate the matter as delay has the potentiality to breed bitterness that eventually corrodes the emotions¹³. It is also the duty of a Family Court Judge to have the complete control over the proceeding and not to permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river¹⁴.

Delay or procrastination is the main impediment in disposal of matrimonial disputes. The Judge of the Family Court must aware of it and see that the cases are dealt with in accordance with Family Court Act. Adjournments should not be granted routine manner¹⁵. Since the family matters are sensitive in character the Judges of the Family Court have to play a greater participatory role. Parties will have to be called to the Chambers at times and this is

¹³ Santhini Vs Vijaya Venkatesh (2018) 1 SCC 1

¹⁴ Shamina Farooqui Vs Shahid Khan 2015(2)RCR (Civil) 628,

¹⁵ K.A. Abdul Jaleel v. T.A. Shahida (2003) 4 SCC 166,

only to achieve the object contemplated by the statute¹⁶. A Family Court Judge is expected to deal with care, caution and with immense sense of worldly experience absolutely being conscious of social sensibility. Needless to emphasize, this commands a sense of trust and maintaining an atmosphere of confidence and also requirement of assurance that the confidentiality is in no way averted or done away with. There can be no denial of this fact. It is sanguinely private.¹⁷

Human approach, social desirability and consistency are the bench mark qualities of a Family Court Judge. Before proceeding to grant any relief under this Act, a shortcut route cannot be adopted by the Courts. In case a party to a proceeding does not remain present, at the most, the court can proceed to decide the case ex parte against him/her¹⁸.

4. Procedural Functions:

(a) Jurisdiction (Sec.7) :

The procedure followed by the Family Court is quite friendly as no long formalities are required. Section 7 of the Family Court Act deals about jurisdiction of the Family Courts. The Explanation of this section tells about the nature of the suits and proceedings, which are as follows:

* A suit or proceeding for the decree of nullity of marriage, or restitution of conjugal rights, or for the dissolution of the marriage between the parties;

A suit or proceeding for determining the validity of a marriage or matrimonial status of a person;

A suit or proceeding in the matter related to the properties between the parties to a marriage;

A suit or proceeding for an injunction or order arising out of a marriage;

A suit or proceeding for declaring the legitimacy of a person;

A suit or proceeding for maintenance;

A suit or proceeding for the guardianship of the person, or custody of any minor.

Under Section 7(2) the family courts have also the power to exercise a jurisdiction which is

¹⁶ Jain Paul Kuriakose Vs Asha Babu [2012 (4) KLJ 651

¹⁷ Santhini Vs Vijaya Venkatesh (2018) 1 SCC 1 in para 46

¹⁸ Laxmikant Jaiswal vs Sudhalata Jaiswal, FAM No. 70 of 2016, decided on on 20 July, 2022, Chattishgarh HC

exercised by a Magistrate of the first class under Chapter IX of the CRPC and such other jurisdiction as provided by any other enactment.

Regarding the question of jurisdiction, in **Kanagshwary Vs. T. Shrikandarah Rubindranathan**¹⁹ in which it was held as under :-

"21. There is no dispute that Section 7 and 8 of the Family Courts Act confer jurisdiction on the Family Court to decide the disputes between the parties to a matter, including property disputes. In case, proceedings for dissolution of marriage or any other proceeding between the parties are pending adjudication before the Family Court, it would be in the best interest of both parties to resolve the property dispute also through the said Court. The Parallel proceedings would cause difficulties to the parties. In case the Matrimonial proceedings are pending before the Family Court and proceeding relating to property, before the Original Side of the High Court, it would be reasonable to make a request before the High Court to transfer the Suit to the Family Court. However, it cannot be said that the High Court has no jurisdiction at all to entertain the Suit between the spouses."

Moreover, in **Manita Khurana Vs Indra Khurana**²⁰ it has been held that the claim of a third party to a marriage cannot be adjudicated before the Family Court. Merely because certain facts concerning third party which are leading to the cause of action referred to the marital relationship of the plaintiff and defendant, that would not make the suit arising out of a marital relation.

Jurisdiction of High Court is not ousted in child custody and guardianship matters:

The Family Court Act, 1984 is only a procedural legislation, it cannot take away the power of the High Court under clause-17 of the letters patent which is in the nature of plenary power of the High Court, and also that the High Court is not a 'District Court' as the jurisdiction exercised by it under clause-17 of the letters patent extends to the entire state of Tamil Nadu. In a case relating to the issue of concurrent jurisdiction of the High Court over matters of child custody and guardianship with the family Courts, the five-judge bench in a

19 2013 (1) CTC 165

20 2010(167)DLT 58 at 16 and 17

3:2 majority decision, has held that jurisdiction of the High Court on its original side over matters of child custody and guardianship is not ousted in view of the provisions of Explanation (g) to Section 7(1) read with Sections 8 and 20 of the Family Courts Act, 1984 (FCA) . It is further held that the decision in Mary Thomas v. Dr.K.E.Thomas 1989 SCC OnLine Mad 268 continues to be good law²¹.

(b) Procedure generally (Sec. 10) :

The Family Court Act adopts a less formal procedure. In **A.Sreedevi Vs. Vicharappa Ramakrishna Govind**²² the Hon'ble Madras High Court has held that subject to the provisions of Family Court Act, the provisions of CPC shall apply. However, although Section 10 of the Act makes the procedure laid down under the Code of Civil Procedure, 1908 applicable to Family Court proceedings, it also lays down that the Family Court is free to evolve its own rules of procedure. Section 10(3) of the Family Courts Act envisages that the court can lay down its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings. It specifically uses the word 'truth' and casts a duty on the Family Court to lay down procedure to determine the truth of the facts alleged by one party and denied by the other. The Procedure prescribed under Section 10 of the Act is neither discriminatory nor arbitrary. It is neither fanciful nor violative of Article 14 of the Constitution as held in *Lata Pimple Vs Union of India*²³ .

(c) Proceedings to be held in Camera (Sec.11) :

Under Section 11 of the Family Court Act, in every suit or proceedings to which the Act applies , the proceedings may be held in camera either by the Court suo moto or shall be so held at the instance of either one of the party. While using the words ' may be for court to use in camera proceedings, the Act uses the word 'shall be' for the party to the suit. Therefore, when either one of the party requires in camera proceedings, the court has no other option except to held so. It is to be borne in mind that Section 22 of the Hindu Marriage Act permits the court to conduct in camera proceedings. Whereas, other personal laws like Christian , Mohamedan and Parsi have not contained any such provisions. Even if other personal laws like Christian, Parsi or Mohamedan laws do not provide for in camera proceedings, whether

21 *Annapoorani Vs K. Vijaya* A.No.5445 of 2018 in O.A. Nos.539 and 540 of 2021 in G.W.O.P. No.599 of 2018 dated 2.9.22

22 2006(1)MLJ 116

23 AIR 1992 Bom.255 (DB)

there can be ban on publication or not will have to be decided on the basis of Section 11.24. Therefore, once one party makes a prayer for holding the proceedings in camera, it is obligatory on the part of the Family Court to do so.²⁵

(d) Right to Legal Representation (Sec. 13):

The presence of Lawyer makes it more smooth to expedite the trial because of his knowledge of law and procedure and his training. The experience shows that in the matter of reconciliation in matrimonial matters, the Lawyers have played a significant role. It is difficult to conceive a Court without a Lawyer. However, Section 13 of the Family Court Act makes it clear that no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. According to the Section, it is the discretion of the Judge to permit or not to permit representation of lawyer.

The correct interpretation of Section 13 of the Act is that a lawyer has no absolute right to appear on behalf of a party before the Family Court, but it is the discretion of the Family Court to permit the lawyer to appear or not. This interpretation becomes evident when we notice the words "as of right" in Section 13 of the Act. If the intention of the Parliament was to debar the advocates absolutely from appearing in the proceedings of the Family Courts, the words 'as of right' would not have been there. The presence of the aforesaid words indicates that the intention of the Parliament was that it should be left to the discretion of the Family Court to allow lawyers to appear or not.

As regards the proviso to Section 13, it only deals with the appointment of amicus curiae, and it was nothing to do with the representation of the parties. The question then arises as to how the Family Court should exercise its discretion in this connection, in other words, when should the Court permit representation by lawyers and when it should not. The correct approach should be that the Family Court should not permit lawyers to appear before it when it is trying to seek reconciliation between the parties under Section 9 of the Family Courts Act. It may be mentioned that it is the first duty of the Court hearing matrimonial cases to try to reconcile the parties as envisaged by Section 9 of the Act. At this stage, lawyers are not at all necessary, and it is for the Court to try to persuade the husband and wife to get reconciled. Lawyers may also not be allowed to appear in cases under Section 13-B of the Hindu Marriage

24 Sridhar vs R. Sukanya And Ors. (2005) 1 MLJ 214

25 Santhini Vs Vijaya Venkatesh (2018) 1 SCC 1 at para 20.

Act (divorce by mutual consent). However, if the reconciliation attempt fails, and the matter has to be adjudicated, in our opinion, the Court should ordinarily allow lawyers to appear on behalf of the parties. This is necessary because Divorce Law and other Family Law has now become a complicated branch of law, and an ordinary layman cannot be expected to know this law and only a trained lawyer can do so.

While interpreting Section 13 of the Act, the Hon'ble Orissa High Court, at Cuttack, in the case of **Samarendra Jena vs Sanghamitra Biswal**²⁶ has observed as follows :

“ 7. the representation by a lawyer is not a matter of right, but permission to be represented by a lawyer should be liberally granted where the facts are complicated. While giving such conclusion, this Court has also relied upon the judgment of this Court in (1997) 12 OCR 196 (Manguli Dalei v. Smt.Malini Dalei)”

It is further to be kept in mind that while main Section 13 deals with appointment of legal practitioners by the parties, proviso deals with the power of the Family Court to appoint a legal practitioner as an amicus curiae. Both should not be mixed up and confused. It only connotes that while the party cannot claim to appoint legal practitioners to plead his/her cause as of right, an exception is carved out in proviso vesting the jurisdiction in the Family Court to seek the assistance of a legal practitioner by appointing any advocate as amicus curiae to assist the Court. But, that does not mean to say that parties are not at all entitled to appoint legal practitioners to plead their causes before the Family Court and that such legal practitioner can appear only when the Family Court appoints as amicus curiae. Section 13 and its proviso do not spell out any such meaning. Truly understood, Section 13 does not create a total embargo on the parties before the Family Court to engage advocates²⁷

It is necessary to clarify that *Section 13* does not prescribe a total bar to representation by a legal practitioner. The Section also makes provision for a situation whereby the Court may seek the assistance of a legal expert as amicus curiae. We must also realise that as far as uneducated and poor persons are concerned that they are being totally handicapped in the conduct of their cases for want of legal assistance. Even as far as persons coming from the educated, and professional strata are concerned, the obvious difficulty that is involved, namely the drafting of applications and pleadings in consonance with Court requirements and the ability to conduct an examination-in-chief or a cross-examination are

²⁶ Writ Petition (Civil) Nos. 863 & 1011 of 2013 on 12 July, 2013

²⁷ R. Durga Prasad vs Union Of India And Anr 1998 (2) ALD 25: 1998 (1) ALT 652: II (1998) DMC 45

skills which one cannot expect of a lay person. Therefore it will be a healthy practice for the Family Court at the scrutiny stage itself, to ascertain as to whether the parties desire to be represented by their lawyers and if such a desire is expressed at this or any subsequent stage of the proceedings, that the permission be granted if the Court is satisfied that the litigant requires such assistance and would be handicapped if the case is not permitted.

(e) Appearance through recognized agent and Application of Order 3 Rule 1 and 2 CPC :

Generally, any appearance , application or act in or to any court may be made or done (i) by a party in person or (ii) by his recognized agent or (iii) by a pleader on his behalf. As stated supra, a party before a Family Court can not claim, as of right, to be represented by a pleader. While so, the next question is whether a party may choose to appear through and be represented by an authorized agent other than a Legal Practitioner?

There is nothing in Act or rules which prohibits a petition being filed by an authorized agent, or requires a petition should be presented by the petitioner in person. Therefore, there is no bar to a petition being presented to the Court by an agent (attorney holder). Even a Legal Practitioner who holds a power of attorney to present the petition, may 'present' a petition, but may not be able to 'represent' the petitioner in the proceedings unless permitted by the Family Court. Similarly, there is nothing in the Act or rules requiring the Family Court to refuse to recognize or accept the appearance of a respondent, through an authorized agent on the date fixed for appearance. A respondent can enter appearance through an authorized agent (who can also be a Legal Practitioner) with an application seeking permission to be represented by a Legal Practitioner.

A party may choose to appear through and be represented by an authorized agent other than a Legal Practitioner, in which event permission under Section 13 is not necessary. A Family Court, having regard to the facts and circumstances, may of course, make a specific order for the personal appearance of a party. Only if such an order is made, the party has to make an application for exemption from personal appearance if he/she is not in a position to appear in the matter. Even if the Family Court refuses permission to the parties to be represented by a Legal Practitioner, the parties may be represented by authorized agents other than a Legal Practitioner. But, if one side has been permitted to be represented by a Legal Practitioner, the Family Court should not refuse permission to the other side to be represented by a Legal Practitioner. To do so would be in violation of principles of natural justice.

The ideal situation under the general scheme of the Family Court Act would be where proceedings are initiated by a husband or wife by presenting a petition in person; notice is issued to the other side; other side appears in person; neither party is represented by any lawyer, unless permitted by the Court; the Family Court at the first instance endeavours to bring about a settlement either by itself or with the assistance of welfare experts/Counselors; When such endeavor fails, the respondent is given an opportunity to file objections and then evidence is recorded and decision is rendered; and the entire process takes only about 3 to 6 months²⁸.”

Moreover, the recognized agent can prosecute or defend or represent until Family Court passes specific order directing the party to appear in person, depending upon the facts and stage of the case²⁹.

Though the party can appear through recognized agent he cannot *seek dispensation once for all, to avoid personal appearance*.³⁰

Even the party can file papers, represents through recognized agent and once the respondent appears, for the purpose of counselling , mediation his presence can be insisted. At the subsequent stages also, the court can compel his appearance.³¹

Thus, it is now well settled legal position that there is no legal impediment under the Family Court Act, for a Power of Attorney to appear on behalf of the Principal and the only legal embargo is that the recognized agent should not be a legal practitioner. Any person, not being a legal practitioner, can be nominated as an agent under Order 3 Rule 2 CPC, to prosecute or defend the parties and until the Family Court passes any specific order, directing appearance of the party, depending upon the facts and circumstances of the case.

However, while seeking appointment of recognized agent, the party must give give declaration in the supporting affidavit stating that his agent is not a legal practitioner³².

The law relating to appointment of power of attorney , his appearance and his participation of trial proceedings are explained in the case of **R.R. Pauvya Vs. C.Kanagavel** **33**as follows:

²⁸ Mrs. Komal S. Padukone vs Principal Judge, Family Court II at paras 10,11,12

²⁹ Pavithra Vs.Rahulraj 2003 (2) LW. 431

³⁰ Dr. K.Malathi Vs Dr. S. Rajasekaran 2003(3)LW. 870 Mad at para 11

³¹ S.M.Syed Amina Beevi Vs Thaika Shahib Alim reported in I (1994) DMC 557 at para 12

³² Terance Alex vs Mary Sowmya Rose C.R.P.(NPD)No.4361 of 2010 16.12.2010 Mad HC

“ 20. Absolutely, the role of the Power of Attorney to assist the principal, who will be not in a position to appear in person to prosecute the proceedings before the Court, acquires significance for consideration. On analyzing the rulings on this issue, we gather and sum up the following regarding the role of the Power of Attorney.

i) Power of Attorney can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appeal as a witness on behalf of the principal in the capacity of the principal;

ii) The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross examined on those facts which are exclusively to the personal knowledge of the principal.

iii) In the family matters, it is not possible for the spouse to engage a power and act on his/her behalf to give evidence before the family Court which she/he alone has personal knowledge.

iv) There is no legal impediment under the Family Courts Act, for a Power of Attorney to appear on behalf of the Principal and the only legal embargo is that the recognized agent should not be a legal practitioner. Any person, not being a legal practitioner, can be nominated as an agent under Order 3 Rule 2 CPC, to prosecute or defend the parties and until the Family Court passes any specific order, directing appearance of the party, depending upon the facts and circumstances of the case. The persons who are exempted from the term "legal practitioner" are the parents, brothers and sisters. Even then for deposing the facts that are within the personal knowledge of the principal, they should refrain themselves, but the principal should appear before the Court and depose.

v) Under Section 13-B of the Act, a petition for dissolution of marriage by a

decree of divorce by mutual consent, shall be presented by the parties to the marriage and not through the Power of Attorney since they should satisfy the Court that as on the date of presentation of the case, they had not been living together as husband and wife for more than one year, that they have not been able to live together and that they have mutually agreed for the dissolution.

vi) Personal appearance, though not initially required, becomes absolutely necessary after the appearance of the respondent to the proceedings. Therefore, the parties should make personal appearance before the Court as and when so stipulated or directed or indicated by the Family Court.

(f) Application of Indian Evidence Act (Sec.14) :

Section 14 of the Family Court Act, 1984 provides that a family court may receive any evidence, report, statement, documents, information or matter which in its opinion will facilitate the effective adjudication of the disputes before it, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872. The aforesaid section therefore makes it pellucid that the issues of relevance and admissibility of evidence which regulate a regular trial do not burden proceedings before the family courts.

Section 20 of the Family Court Act has an overriding effect over all other law for the time being in force. Thus, Section 14 of the Family Court Act provides a discretion to the Family Court to receive evidence irrespective of rigours of Evidence Act.³⁴

The real test is to receive or not to receive the evidence, report, statement, documents, informations etc. placed before the court is that whether it does or does not facilitate an effective adjudication of the disputes before it.

However, mere admissibility does not amount to proof. Whether the document is genuine or contents are true has to be proved by the parties. If the judge is of the opinion that the document produced would assist the court to deal with the matter effectually, then he has no other option but to admit the same and thereafter, to see whether the document is genuine and the contents of the same are true, since it is the bounden duty of the parties to prove the genuineness of the documents as well as its contents.

While deciding discretion, the Family Court can consider the authenticity and genuineness of the evidence. When it is seen that the evidence produced is inappropriate,

³⁴ R.Sridharan vs R. Suganya 2018(4)LW.1 (DB) Mad, in para 48

embarrassing or otherwise sensitive in nature for any of the litigating parties, or for that matter for some other person not directly connected with the litigation, the court may restrict the parties to produce such evidence.

Considering the breadth of the power conferred upon it under Section 14 of the Family Courts Act, some safeguards are required to be considered by the Family Court while exercising its power to receive evidence under that provision. Firstly, even though a given piece of evidence may have been admitted on the record, the Family Court must be extremely circumspect in what evidence it chooses to rely upon in deciding the dispute, particularly the authenticity and genuineness of the evidence, for which stringent standards must be applied. Secondly, if in its opinion the nature of the evidence sought to be adduced is inappropriate, embarrassing or otherwise sensitive in nature for any of the litigating parties, or for that matter for some other person not directly connected with the litigation, the court may restrict the parties who are present in court at the time of considering such evidence ; or may anonymise or redact the evidence ; or may conduct in-camera proceedings so as not to cause distress to any person or party, while at the same time not hesitating to receive evidence that the Family Court considers necessary for effectively deciding the dispute. All proceedings must be conducted strictly within the bounds of decency and propriety; and no opportunity should be given to any party to create a spectacle in the guise of producing evidence. Thirdly, in egregious cases, the Family Court may initiate or direct initiation of legal action against a litigating party or other person, who may appear guilty of procuring evidence by illegal means. Any party aggrieved by the production of such evidence would also be at liberty to initiate appropriate proceedings, whether in civil or criminal law, against concerned parties for procuring evidence illegally, although the initiation or pendency of such proceeding shall not make the evidence so produced inadmissible before the Family Court.³⁵

The next important question that comes to our mind is whether the certificate under section 65-B of Indian Evidence Act is necessary if any electronic evidence is produced . The answer is aptly given in the case of **Pramod EK Vs Ouna VC36** wherein it has been held in para 12 that CD produced before the Family Court is admissible in evidence despite the fact that it was not certified as mandated by Section 65-B of the Evidence Act. It is further made it very clear in para 13 that the Family Courts though not bound by the sophisticated rules of evidence by virtue of Section 14 of the Act, it should be understood to possess unregulated or

35 *Deepti Kapur vs Kunal Julka* (2020 CM(M) 40/2019 and CM APPL.No.1226/2019 dated 30.6.2020, Delhi HC

36 AIR 2019 Ker 85 : 2019 SCC On Line Ker 165

unbridled to power or freedom to receive in evidence indiscriminately all matters that are brought before them. It has been held in more particularly in para 15 that a document merely marked with or without consent of the opposite party in a proceeding before a Family Court is no proof at all unless the contents thereof are either admitted by the adverse party or proved through the person who vouch for the truth of the facts. In the said case, the purported voice of respondent extracted in CD in the opinion of the court has to be proved in the same manner as the tape recorded conversation.

More over, in **Preeti Jain Vs Kunal Jain**³⁷, while dealing with the recorded conversation in a digital device, it has been observed that the privilege in respect of the husband and the wife's communication under Section 122 of the Act of 1872 would also not attract, as Section 14 of the Family Court Act eclipses Section 122 of the Evidence Act in proceedings before the Family Court. Section 14 aforesaid is a special law, so to say, as against the general law, which Section 122 of the Act of 1872 encapsulates vis-a-vis privileged communications between husband and wife.

(g) Recording of evidence (Sec. 15 and 16) :

Sections 15, 16 of the Family Court Act deal about recording of evidence and evidence of formal character on affidavit. In any suit or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length. It is sufficient to record a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witnesses and the judge. The evidence of formal character may be given by affidavit. If any facts contained in the affidavit disputed, witness can be examined to prove the evidence of formal character.

(h) Proceedings through Video conferencing :

Often the issue arises before Family Court regarding the hearing through Video Conferencing. My experience shows that the request for video conferencing comes at 3 important stages. Firstly, upon receiving the notice, instead of appearing in person, respondent files an application for appearance through video conferencing. Secondly, at the time of counselling or mediation, such request comes. Thirdly, during trial proceedings request for examination of witness through VC would arise. That apart, certain specific proceedings namely, in the instances of mutual consent

37 2016 SCC online Raj 2838

proceedings, transfer application, review petition etc., hearing through Video Conferencing is being sought for.

Moreover, the next question also arises, how to apply and what is the procedure for conducting hearing through Video Conferencing.

To understand the position of law, Let us have look at the following decisions regarding the above points:

In **Santhini Vs. Vijaya Venkatesh**³⁸ the Hon'ble Supreme Court has held as follows:

“ 51. The procedure of videoconferencing which is to be adopted when one party gives consent is contrary to Section 11 of the 1984 Act. There is no provision that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings take place which is in the nature of reconciliation, it will be well-nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for some time, is not possible in videoconferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

56. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh, the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of

the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in videoconferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for videoconferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing. "

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

- (i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.*
- (ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.*
- (iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.*
- (iv) In a transfer petition, video conferencing cannot be directed.*
- (v) Our directions shall apply prospectively.*
- (vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent”*

*In Amardeep Singh Vs. Harveen kaur*³⁹, it is held that proceedings for divorce by mutual consent can be conducted through VC.

Regarding the procedure relating to how to apply hearing and record evidence through VC, the Madras High Court VC Rules 2020 assumes importance. The Madras High Court VC Rules elaborately discuss about the procedure relating to application, appointment of Remote site Co-ordinator, Cost for VC, procedure for recording evidence etc., A reading of the above rules will enlighten the conducting of VC hearings.

5. Conclusion :

Before concluding, it would be appropriate to mention the observations of Full Bench of Hon'ble High Court, Madras made in the case of S. Annappoorani Vs K. Vijaya (A.No.5415 of 2018 in O.A. Nos.539 and 540 of 2021 in G.W.O.P. No.599 of 2018 dated 2.9.22) which runs as follows at para 43 :

“ It is a stark reality that many of the Family Courts suffer from procedural delays which completely defeats the purpose of the legislation. These issues have been noticed by Justice V. Parthiban in his order of reference. These concerns were also reiterated and highlighted by practitioners from the Family Court before this Bench. While acknowledging the existence of a problem in the Family Court, there is an urgent need to reform the existing system. There is a grave danger that inefficiency would erode the ability of these Courts to deliver justice to the relevant stake holders who come before it. The High Court cannot throw up its hands and turn a blind eye when there exists a problem that cries out for solution.”
