

RAJASTHAN HIGH COURT

Sarla Sharma

Vs.

State of Rajasthan

D.B. Civil Writ Petition No. 5936 of 1997

(P.P. Naolekar and K.S. Rathore, JJ.)

24.09.2001

ORDER

P.P Naolekar, J.

1. Petitioner Sarla Sharma has challenged insertion of Rule 22 in Chapter-IV of the Rajasthan (High Court) Family Court (Amendment) Rules, 1994 (hereinafter shall be referred to as 'the Rules of 1994') vide Notification No. Gen/XV/(a)/3/87/709 dated 11.4.1996 on the ground that the Rule 22 framed by the High Court is *ultra vires* being contrary to the scope, object and mandate of Section 13 the Family Courts Act, 1984 (hereinafter shall be referred to as 'the Act of 1984').

2. The Act of 1984 has been framed for setting up the Family Courts for the settlement of family disputes, where emphasis is laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence eliminated. The Law Commission in its 59th report (1974) had stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of trial. The Commission recommended establishment of family courts for speedy settlement of family disputes. The Bill, *inter alia*, seeks to provide for establishment of Family Courts by the State Government in every city or town with a population exceeding one million. Section (sic) of the Act of 1984 exclusively provides within the Family Courts jurisdiction, a suit or proceedings between the parties to a marriage, for a decree of, nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or of restitution of conjugal rights or judicial separation or dissolution of marriage, or declaration as to the validity of a marriage or as to the matrimonial status

of any person, with respect to the property of the parties or of either of them, of injunction in circumstances arising out of a marital relationship; for a declaration as to the legitimacy of any person; for maintenance, in relation to the guardianship of the person or the custody of, or access to, any minor. The Family Court shall also exercise jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Criminal Procedure Code, 1973 and such other jurisdiction as may be conferred on it by any other enactment. By virtue of Section 8 of the Act of 1984 the exclusive jurisdiction to try the matters mentioned herein above has been given to Family Court where a Family Court is being established. Section 9 of the Act of 1984 imposes a duty on a Family Court to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings.

3. Section 15 of the Act of 1984 provides that in a suit or proceeding before a family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall record or cause to be recorded a memorandum of the substance of what the witness deposes. Section (sic) of the Act of 1984 lays down that where the evidence is of a formal character it may be given by affidavit which may, subject to all just exceptions, be read in evidence before the Family Court. The Family Court may, on an application made by the party to the suit or proceedings, summon and examine and such person, as to the facts contained in his affidavit.

Considering the object and the provisions made in the Act of 1984 it is clear that the Family Courts are established to settle the disputes relating to marriage and family affairs and for matters connected therewith by conciliatory process overreaching rigid rules of procedure and to settle the matter expeditiously between the parties and to achieve socially desirable results.

4. Section 13 of the Act of 1984, which is the base for challenge to Rule 22 of the Rules of 1994, reads as under :

"13. *Right to legal representation.* - Notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner :

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as *amicus curiae*."

Section 13 of the Act of 1984 gives overriding effect to Section 13 over all other enactments whereby no party to the suit or proceeding before a Family Court shall be entitled, as of right, to be represented by a legal practitioner. Thus, engagement of a legal practitioner to appear for any of the parties before the Family Court is normally prohibited. But proviso to Section 13 of the Act of 1984 gives a right to the Family Court, if it considers it necessary, in the interest of justice, to seek the assistance of a legal expert as *amicus curiae*. The submission of the counsel for the petitioner is that Section 13 of the Act of 1984 authorises the Family Court to seek assistance of a legal expert as *amicus curiae*. whereas Rule 22 of the Rules of 1994 gives the Family Court an authority to permit a Lawyer/Advocate to appear in the Court which is obviously for a party, whenever the Presiding Officer of the Family Court feels that it is necessary in the interest of justice. Appearance of a Lawyer/Advocate for a party in the Court and appearance of a legal expert as *amicus curiae* is quite different in its authority and power. Under Section 13 of the Act of 1984 the Family Court gets jurisdiction to permit a legal expert to appear as an *amicus curiae*. This power given to Family Court cannot be enlarged by Rule 22 authorising a Lawyer/Advocate to appear before the Court for any of the parties. Rules are framed to give effect to statutory provision, and not for providing something which is not permissible under the statute.

5. To understand argument advanced by the counsel, it is necessary to see who will be called '*amicus curiae*' and what shall be scope and ambit of his authority and power, what duties he shall perform in the court when he is permitted to appear in the family court in the interest of justice, does his authority extends to limits to that of lawyer or advocate appearing for party. The term "Amicus Curiae" is a Latin (phrase) which literally means a friend (of) the Court. An *Amicus Curiae* is an advisor of the Court. Leave to appear as *amicus curiae* differs from intervention in its usual sense in that the intervener becomes a party to the litigation, and is bound by the judgment, while an *amicus curiae* does not become a party to the proceedings. The *amicus curiae* is heard only by leave of the Court and it is within the discretion of the Court. Granting of leave to be heard as an *amicus curiae* is a matter of favour or grace and not a matter of right but of a privilege. Consent of the parties to the proceedings is not ordinarily essential to the participation of an *amicus curiae* as participation is of no personal concern of the parties and no party has a cause to complain if the court grant permission to a stranger a privilege of being heard, since no action of the stranger can

affect the legal right of any of the parties to the proceedings. The court undoubtedly has a right to allow an attorney or other person to appear as a friend of the Court in a case, and it may appoint an attorney or other person to assist it as an *amicus curiae*. The function of an *amicus curiae* is to assist the court in a case or proceedings already pending before it by acting as an advisor or by calling the court's attention to prevailing law or to the facts and circumstances that may have escaped consideration as where such facts deprive the court of jurisdiction. An *amicus curiae* also performs his function by making suggestions as to the matters appearing upon the record or a matter in which the court may proceed upon its own motion but not in the matters which should be presented by pleadings and evidence. He may also make suggestions as matters of practice and may question the sufficiency of service of process to authorise a judgment. *Amicus curiae* is apparently to appear as a friend of the Court and cannot represent the interest of any of individual parties. Office of an *amicus curiae* can not be subverted to the use of a litigant in the case. An *amicus curiae* is not a party to any action and does not legally appear for anyone but is merely a friend of the Court who so function to advise or make suggestions to the Court.

6. *Amicus curiae* is one who gives information to the Court on some matter of law in respect to which the Court is doubtful. He cannot take upon himself the management of the action as counsel. The term "*Amicus Curiae*" includes persons whether attorneys or laymen who interpose in judicial proceedings to assist the court by giving information or otherwise. The function of an *amicus curiae* is to call the court's attention to law or facts or circumstances in a matter pending before the Court that may otherwise escape its consideration and he is not a party and cannot assume the function of a party. An *amicus curiae* is a person, whether attorney or a layman, who stands by, when a Judge is doubtful or mistaken, may, on leave granted in a case pending before the Court, inform the Court as to the facts or situations that may have escaped consideration or remind the court of a legal matter which has escaped its notice and regarding which it appears to be endanger in going wrong. An *amicus curiae* appears before the Court with his permission to enlighten the court by his assistance but is not bound by the decisions. An *amicus curiae* is technically a friend of the court and distinguished from an Advocate, and such position arises only when the court needs assistance, and duty of an *amicus curiae* is to fully advise the court on the law, order, facts and situations so that justice may be attained.

Amicus curiae is not appointed as private counsel by parties to action or to represent them in a partisan manner and for their personal use and benefit and he has not a

function of taking over conduct of a case for parties to litigation. Although, the court may hear the communications of an *amicus curiae*, it is within the discretion of the court whether it will heed the advice given. The *amicus curiae* has no right to complain if the court refuses to accept his suggestions.

7. Section 13 of the Act of 1984 permits a legal practitioner to appear as an *amicus curiae* whereas Rule 22 of the Rules of 1994 authorises the Court to permit a Lawyer/Advocate to appear in the Court whenever the Court feels it necessary in the interest of justice. When the Court permits a Lawyer/Advocate to appear in the Court, it necessarily means the permission, to Lawyer/Advocate to appear in the Court, would be for either of the parties whose cause is being adjudicated by the Court. Appearance of Legal practitioner under Section 13 of the Act of 1984 would be as an *amicus curiae* i.e. the friend of the Court whereas permission to a Lawyer/Advocate to appear in the Court would be for either of the parties and not as a friend of the Court. Legal Practitioner's appearance would be for or on behalf of an interested party, his activities shall be treated as an appearance of party and in that sense he shall be party to the action. He takes upon himself the management of the action as a counsel, i.e. manner in which case is to be pleaded. Selection of evidence to be placed before the Court oral and documentary, grounds to be pressed for consideration of the court in arguments and other matters connected with the trial of the suit or proceedings. There is a basic distinction between a legal practitioner appearing as an *amicus curiae* i.e. friend of the Court and a Lawyer/Advocate appearing for individual party. The Family Courts are established to settle family disputes expeditiously without there being strict rigour of procedural law and Evidence Act keeping an eye on conciliatory approach to achieve socially desirable result. It is, therefore, legislatures have thought it proper to restrict appearance of Lawyers/Advocates in the proceedings, who by nature of their training, do insist upon compliance of the procedural law and application of strict rules of evidence. Having considered the aims and objects and statutory provisions of the Family Court Act and even giving liberal construction, appearance permissible of legal expert as an *amicus curiae* under the proviso to Section 13 of the Act of 1984 cannot be read to include appearance by Lawyer or Advocate. Therefore, apparently, the Rule 22 of the Rules of 1994, permitting Lawyer/Advocate's appearance with the permission of the Court, transgresses the permissible limit provided under Statute, namely, proviso to Section 13 of the Act of 1984.

8. I would have struck down Rule 22 of the Rules of 1994 as being framed beyond the

powers of the Rule making authority. The Rule transgresses and surpasses the provision of proviso to Section 13 of the Act of 1984. But, then, if we read main Section 13 of the Act of 1984 it says that notwithstanding anything contained in any law, no party to a suit or proceeding before a Family Court shall be entitled, as of a right, to be represented by a legal practitioner. Proviso to Section 13 of the Act of 1984 gives power to the Court to seek assistance of a legal expert as *amicus curiae* if the Court considers it necessary in the interest of justice. The main Clause of Section 13 says that no party, as of right, shall be entitled to engage a legal practitioner. Thus, as a matter of right, a party cannot be represented by a legal practitioner but, that implies, that in the exceptional circumstances a Family Court may permit a legal practitioner to appear for a party to represent its cause. Main clause of Section 13 of the Act of 1984 prohibits a party to engage counsel, as of right, but that does not take away powers of the Court to permit a party to take assistance of Lawyer or Advocate in extraordinary circumstances. Normal practice to be followed by the Family Court should be, non-appearance of Lawyer or Advocate representing party before it, while court may permit engagement of counsel by a party in exceptional circumstances. Normally a legal practitioner shall not be permitted to appear for a party as a matter of right as in the matters pending before the other Courts but main Section can be read as giving power to the Family Court to permit engagement of a legal practitioner in exceptional circumstances.

9. The courts strongly leaves against a construction which reduces the statute to a futility. The court shall read the statute so as to make it effective and operative unless the words used in the statute cannot be given any other meaning. Statute is designed to be workable and the interpretation thereof by the courts should be to secure that object unless crucial omission or clear direction makes that end unattainable. This in view, if we read main part of Section 13 to include the family court's authority to permit engagement of a Lawyer/Advocate of party in exceptional circumstances, Rule 22 of the Rules of 1994 shall be in conformity of Section 13 of the Act of 1984. To save the statute from declaring illegal, it is permissible for the Court to reading down the provision. Rule 22 of the Rules of 1994 reads thus :-

"22. Permission for representation by a Lawyer:-

The Presiding Officer of a Family Court, in his discretion may permit a Lawyer/Advocate to appear in the Court, wherever he feels that it is necessary in the interest of justice."

Instead thereof if we read rule like -

"22. *Permission for representation by a Lawyer* :- The Presiding Officer of a Family Court, in his discretion in exceptional circumstances may permit a Lawyer/Advocate to appear in the Court, wherever he feels that it is necessary in the interest of justice."

10. The Rule 22 as above would permit Family Court in its discretion to allow a party to engage Lawyer or Advocate in a suit or proceeding pending before Family Court, in exceptional circumstances if it feels that engagement of Lawyer or Advocate is necessary in the interest of justice. Discretion to be exercised by the Family Court is judicial discretion and therefore it should reflect from the order permitting such engagement. Judicial discretion which shall be exercised by the Family Court shall be guided by reasons. It should not be vague, arbitrary and fanciful but should be exercised reasonably in good faith keeping in view that order will be passed only in exceptional circumstances to meet the ends of justice. While exercising such discretion of permitting Lawyer or Advocate to appear in the Court for a party, the Court must keep in mind that normal rule is no intervention of the Lawyer/Advocate in the proceedings before Family Court. It is only in the exceptional circumstances, which must appear from the order of the Court, a party can be permitted to engage a Lawyer/Advocate to appear on its behalf in the suit or proceedings pending before the Family Court.

11. For the aforesaid, Rule 22 of the Rules of 1994 cannot be said to be beyond the powers of the High Court to frame such Rule. The writ petition is dismissed. There shall be no order as to costs.

Petition dismissed.