



Strengthening Family Courts

An analysis of the confusions & uncertainties thwarting the Family Courts in Bangladesh

ZAHIDUL ISLAM



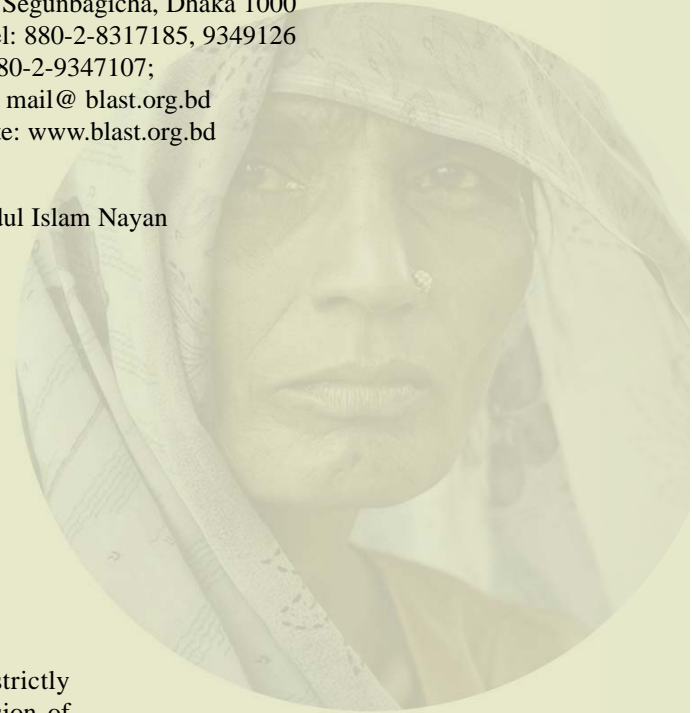
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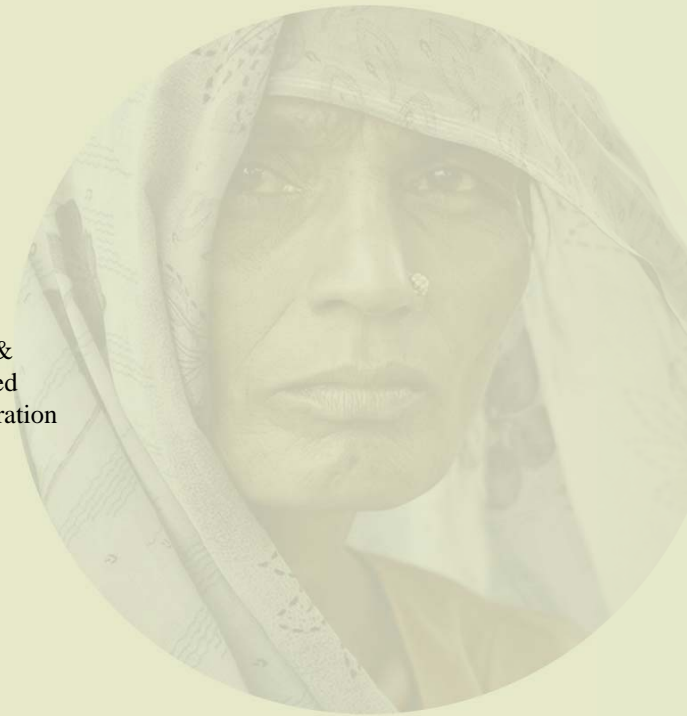
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To

Dr Shahdeen Malik &
Syed Nuruddin Ahmed
Two sources of my inspiration



An analysis of the confusions & uncertainties thwarting the Family Courts in Bangladesh





FOREWORD



Family Courts Ordinance 1985 is meant to be a progressive legislation as it seeks to resolve domestic disputes relating to marriage and related affairs in a congenial atmosphere of mutual understanding while the process remains fast and inexpensive. The legislation breaks new grounds by making provision for mediation as an alternative means for dispute resolution preceding the adversarial process of adjudication. In terms of procedure, this legislation bypasses the Code of Civil Procedure 1908 and sets up a special and simple procedure to avoid complexities and for timely disposal of cases..

Unfortunately after two decades since its commencement, the Family Courts do not appear to have achieved the minimum success, let alone met the objective. Zahidul Islam, a Legal Researcher of BLAST looked into the causes and shared his views with the public through the media. These now are put together as a collection of articles on Family Courts. The articles try to explore the inadequacies of the law, offer various expert opinions on those as well as advocate reforms.

All these articles were earlier published in The Daily Star and The New Age, two national dailies of Bangladesh which we gratefully acknowledge. We hope this compilation will add value to the available literature on Family Courts to help academicians, practitioners, researchers and interested persons equally to understand the law and its application.

Taslimur Rahman,
Executive Director, BLAST





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Introduction

Establishment of Family Courts was on the one hand an expression of our sophisticated legal thought, on the other hand, an acknowledgement that our traditional civil courts had failed to successfully deal with the suits relating to family affairs. Indeed, Family Courts were established by the Family Courts Ordinance 1985¹ to serve the purpose of quick, effective and amicable disposal of some of the family matters. This purpose, though not perceptible from the preamble of the Ordinance, is evident in different places of the body of the Ordinance. The anxiety of the framers of the Ordinance for the said speedy disposal of the family cases is palpable in fixing² only thirty days for the appearance of the defendant, in providing that if, after service of summons, neither party appears when the suit is called on for hearing the court may dismiss the suit.³ The purpose is again manifest in providing a procedure for trial of cases in camera if required for maintaining secrecy, confidentiality and for effective disposal of some complicated and sophisticated matters which may not be possible under normal law of the land. Once more, the Code of Civil Procedure 1908 except sections 10 and 11 and the Evidence Act 1872 have not been made applicable in the proceedings under the Family Courts⁴ which is another sign that indicates the concern of the lawmakers to dispose of the family matters in congenial atmosphere of the Family Court, which was proven to be absent in the lengthy procedure of civil courts. Unfortunately, the noble aim of introducing Family Courts has not been expectantly achieved though already more than two decades have passed after the courts' coming into operation. There are many and diverse type of reasons behind such letdown. Given the socio-economic grounds, the procedural as well as substantive loopholes in the ordinance and related laws are not negligible. Responding to these loopholes a drastic amendment was made to the Ordinance in 1989⁵. Yet, the law is not flawless, resulting in giving rise to some confusions and uncertainties. Besides, there are some

misconceptions. Hence, this author endeavours to examine those confusions, uncertainties and misconceptions in the light of judicial decisions of the country's higher courts.

Hopefully, every practising lawyer and acting judge in the Family Courts is aware of these confusions and uncertainties. Again, every lawyer and judge is supposed to know the clear position of law. So, what is the justification of such a study? In fact, before writing this article while I was discussing about the issues with the lawyers, judges and experts, many of them asked me the same question. Here I could not but tell something about this. It is expected that a judge or a lawyer will constantly monitor the judicial pronouncements, which is very much necessary to control and counter check the subversive tendencies in the legal system. But we cannot deny the fact that the actual scenario in our country is different. An observation enshrined in the BLAST research report seems quite pertinent here:

*It appears that a good fraction of lawyers practicing in district level are not conversant with law, procedure or the legal system as a whole. They seem not aware of the change of law or up-to-date position of law. Some lawyers of this type participated in our meetings, commented and recommended on some issues. In some cases those comments and recommendations are outdated, incorrect, hence, irrelevant.*⁶

Hence, this work can help those lawyers who are unaware, or who have little scopes to be aware, of the clear position of the law; and as a consequence of

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

2] section 7(a)

3] Section 9(1)

4] Though there are opposing opinions on this.

5] By Act No. XXX of 1989

6] See note 7.





Introduction

which they are running their family courts dealings with dangerous misconceptions, resulting in even denial of justice in some cases. This book of articles that has brought together almost all the major confusions and uncertainties in the Family Courts Ordinance can also be helpful to the acting judges, who feel these issues in different suits in different occasions

But the prime purpose of this study is to bring these issues to the lawyers' and judges' authorities, like Bangladesh Bar Council or District Bar Associations, Judicial Administrative Training Institute etc., that can make the lawyers and judges conscious, can seek judicial interpretation from the highest judicial authority of the land; and to the legislative authority that can amend the laws to the necessary extent.

At the outset, I have tried to see what and exactly where these confusions, uncertainty and misconceptions lie. For this purpose, I for the most part have relied on an unpublished research report of

Bangladesh Legal Aid and Services Trust (BLAST) that identified a cluster of issues relating to the Family Courts over which, as the report claims, there are either confusions or uncertainties. The report also identified some other socio-legal factors hindering the family courts attaining its purpose.

Among these factors I have⁸ chosen seven topics as to which there are either confusions or misconceptions or uncertainties. In order to get a clear idea about the issues under discussion I primarily relied on the BLAST research report though I had to check the background papers of the research report¹⁰ frequently to get a good understanding of some specific issues. In conducting the legal analysis,¹¹ I have mainly relied on the judicial interpretations¹² enshrined¹³ in published judgments in various law reports of the country. Secondly, I have discussed the issues with my colleagues at my workplace and other practicing lawyers as well as presiding judges.

7] The report entitled "Towards identifying the advocacy issues concerning Family courts and Nari O Shishu Nirjaton Doman Tribunal" was prepared in October 2005 by PIL and Advocacy Cell of Bangladesh Legal Aid and Services Trust (BLAST), which had been working on the issue all a year round. The report in its opening statements claims:

"BLAST is well aware of the fact that there are many constraints, legal or non-legal, substantive or procedural, for which the Family Courts and Nari O Shishu Nirjaton Doman Tribunals are not being able to work efficiently. What exactly are those reasons? And what are the ways to get out of those constraints? To find out the answers of the questions, BLAST, PIL and Advocacy Cell, began working one year ago. As the primary steps, it arranged advocacy issue raising meetings in all of its branches throughout the country. Judges, practicing lawyers, public prosecutors, political leaders, social activists, local govt. representatives, development activists, journalist, victims of different offences, in strait words, people from all walks of life have spoken in those meetings. They have not only spoken and discussed matters from their own experience, but also rendered many invaluable recommendations. The report is based on those common people as well as experts' speech, discussion and recommendations as well."

Hence is the reason that induced me to rely on the report to a large extent.

8] Id.

9] For example, the meeting minutes of the advocacy issue raising meetings arranged by BLAST in 19 District Bar Associations.

10] Especially on Dhaka Law Reports (DLR), Bangladesh Legal Decisions (BLD), Bangladesh Law Chronicles (BLC), Bangladesh Law Times (BLT) and Mainstream Law Reports (MLR). In very limited cases help from other law reports or foreign jurisdiction has been taken.

11] Head office, Bangladesh Legal Aid and Services Trust

12] The lawyers practicing in the Family Courts of different districts as I have met them at the time of my BLAST Unit Offices visits.

13] Who are personally known to me, and who I have met at different meetings, roundtables etc.





Familiarising Family Courts

Family Courts, which have been established in the country more than twenty years ago, need not be made familiar with you. If you are not a lawyer you may not have to learn the procedure of trial in the courts. It may even not necessary for everyone to know the jurisdiction of the Courts. But you must know your rights to be exercised through family courts. Hence, this write-up aims to make you informed about your dealings with a family court.

By the Family Courts Ordinance 1985 the Family Courts get hold of exclusive jurisdiction for expeditious settlement and disposal of disputes in only suits relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. The courts began working all over the country except in the hill districts Rangamati, Bandarban and Khagrachhari. Soon after the court began functioning, questions raised about whether the Family Courts would deal only with the family matters of Muslim community or of all communities. The uncertainty lasted for a long time until in 1998 a special High Court bench of the Supreme Court in a path finding judgment removed all the questions regarding family court's jurisdiction. Every lawyers and judges dealing with Family Courts are supposed to be aware of the judgment. But the common people for whose benefit the courts have been constituted seem still uninformed about the great decision relieving the justice-seekers in the Family Courts of a harming uncertainty.

Section 5 of the Family Court Ordinance, 1985 speaks about the jurisdiction of the Family Courts which reads as: "Subject to the provisions of the Muslim Family Laws Ordinance, 1961 (VII of 1961), a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the following matters, namely:-

- (a) dissolution of marriage;
- (b) restitution of conjugal rights'
- (c) dower;
- (d) maintenance;
- (e) guardianship and custody of children."

Just after coming into force, the Family Court comes

under confusion, as mentioned above, about its jurisdiction that whether a Family Court is a court for Muslim Community only. In *Krishnapada Talukder V Geetasree Talukder* [14 (1994) BLD 415] the question was whether a woman, Hindu by faith, could file a suit in a Family Court for maintenance against her husband. The honourable judge of the High Court Division held that "As per the provisions of the present Ordinance, all the sections of the 27 section statute have been made available for the litigants who are Muslim by faith only."

The said judgment came on 5th June 1994, and just a few days later on 25th July 1994 in *Nirmal Kanti Das Vs Sreemati Biva Rani* [14 (1994) BLD (HCD) 413], the High Court Division expressed diametrically opposite view. The learned judge of the High Court Division referring section 3 of the Ordinance held that he provisions of Family Courts Ordinance shall have effect notwithstanding anything contained in 'any other laws' for the time being in force. From the expression 'other laws', it appears that the Family Court Ordinance controls the Muslim Family Laws Ordinance, 1961, and not vice versa. Thus, any person professing any faith has a right to bring a suit for settlement and disposal of disputes relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. And so, a Hindu wife is entitled to bring a suit for maintenance against her husband in a Family Court.

In *Meher Nigar Vs Md Mujibur Rahman* [14 (1994) BLD (HCD) 467] the High Court Division corroborated the abovementioned view by holding that the Muslim Family Laws Ordinance 1961 introduced some changes in the orthodox Muslim personal laws relating to polygamy, talaq and inheritance and in order to keep those reformative provisions of the Ordinance of 1961 effective it has been provided that the provisions of Muslim Family Laws Ordinance of 1961 shall not be affected by the provisions of the Family Courts Ordinance of 1985; and section 23 of the Family Courts has specified the area not to be affected.





Familiarising Family Courts

It otherwise indicates that the provisions of the Family Courts Ordinance are applicable to other communities which constitute the populace of Bangladesh.

Following such dissimilar views and decisions, the confusion regarding jurisdiction of the Family Court was natural. And such confusion continued until 1997 when a larger bench of the High Court Division of the Supreme Court in its path-finding judgment in *Pochon Rikssi Das Vs Khuku Rani Dasi and others* [50 (1998) DLR (HCD) 47] removed all the confusions. The special bench of the High Court Division comprised of three Judges upheld that "the Family Court Ordinance has not taken away any personal right of any litigant of any faith. It has just provided the forum for the enforcement of some of the rights as is evident from section 4 of the Ordinance, which provides that there shall be as many Family Courts as there are Courts of Assistant Judge and the latter courts shall be the Family Courts for the purpose of this Ordinance. Moreover, the court also declared that 'Family Courts Ordinance applies to all citizens irrespective of religion'.

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

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

Ordinance are matters of personal laws of the citizens of different faiths who follow different rules in matters enumerated in the section or do not have any rule at all as in the case of Dower and Dissolution of Marriage in case of Hindus. All citizens may not be concerned in all matters but that cannot be a ground to hold that the Ordinance applies only to the Muslims.Family Courts Ordinance has not encroached upon the personal laws of the citizen of any faith. This Ordinance provided that Family Courts will have jurisdiction to entertain and decide suits on the matters enumerated in section 5 subject to the provisions of the Muslim Family Laws Ordinance meaning thereby that while dispo of the provisions of the Family Courts Ordinance. So it cannot be said that this is only for the Muslim.

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

Another matter needs to be clarified that the Family Courts Ordinance does not extend to the hill districts of Rangamati, Bandarban and Khagrachhari. The fact is that initially the hill districts used to be governed by Hill Districts Regulation of 1900 and it was repealed in 1983 but as no new law has been introduced for administering the area, as per provisions of General Clauses Act the repealed law is still in force and the Hill Districts Regulation is still continuing, resulting in exclusion of Family Courts there. This does not mean that tribal people cannot take recourse of a Family Court. The suits among aboriginal or adivasi or tribal people can be tried by a Family Court if they reside within the local limits, that is, territorial jurisdiction of the Family Court.





Mediation: the prime object of the Family Courts

Family Courts were established in the country in 1985 to deal with the family affairs relating to dissolution of marriage, restitution of conjugal rights, dower, maintenance, guardianship and custody of children. Earlier these issues were dealt with by the civil courts following the Code of Civil Procedure as well as by the Magistrate Courts following Code of Criminal Procedure. But these courts, overburdened with huge case logs, were unable to dispose of the suits timely. This untimely disposal of suit not only entailed an immense sacrifice of time, money and talent, but also perpetuated the family tension. Ultimately, a suit for relief turned to a curse for the family. Thus, delay in disposing the suits was eroding the peoples' trust and confidence in the courts. Hence, the purpose of establishment of Family Courts was to administer quick and effective disposal of disputes in the family affairs and to restore peoples' trust and reliance on courts. Keeping in view the purpose of the Family Courts, the Family Courts Ordinance 1985 prescribes a special procedure, which, among others, fixes only thirty days for the appearance of the defendant, and provides that if after service of summons, neither party appears to contest the suit the court may dismiss the suit. However, the Ordinance has not, in fact, prescribed for establishment of any special type of court to be presided over by any judge with special qualification, skill or experience. As matter of fact, all Courts of Assistant Judge are required to act as Family Courts and all Assistant Judges as the judges of Family Courts. Consequently, it seems that the same judges and same courts are dealing with the same matters but following somewhat upgraded, not wholly different, procedure prescribed by the Family Courts Ordinance 1985. Then what is the dynamism in a Family Court that makes the court different from others? The answer is 'Mediation'. Mediation which itself is a dispute resolution mode finds its place in the formal court system for the first time through the Family Courts.

The emphasis on the mediation in the Family Courts is vivid at least in two places of the Family Courts Ordinance 1985. Section 10 is a place which provides for Pre-trial Proceeding as: (1) when the written statement is filed, the Family Court shall fix a date ordinarily of not more than thirty days for a pre-trial hearing of the suit. (2) On the date fixed for pre-trial hearing, the Court shall examine the plaint, the written statement (if any) and the summary of evidence and documents filed by the parties and shall also, if it so deems fit, hear the parties. At the pre-trial hearing, the Court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties.

Such pre-trial proceeding is nothing but mediation - a sophisticated form of our ancient practice 'Salishi' - which is expected to operate a good negotiation among parties and effect a compromise between the parties. But if such mediation fails to reach a compromise, then the Court shall frame the issues in the suit and fix a date for recording evidence, as is usual in case of any suits in the civil courts. But the door for mediation is not closed herewith. Section 13 of the Ordinance is very clear with its provisions that after the close of evidence of all parties, the Family Court shall make another effort to effect a compromise or reconciliation between the parties. And it is only when this final effort to a compromise or reconciliation becomes ineffective, the Court shall pronounce judgment and, on such judgment, a decree shall follow. If we go back to the time when the Family Courts Ordinance was promulgated we can easily comprehend why such emphasis on mediation was given in the Family Courts. As it has been mentioned earlier that the backlog and delay problem had reached such a proportion that it effectively denied the rights of the citizens to redress their grievances.





Mediation: the prime object of the Family Courts

In other words, litigation being a primary means of resolving disputes our civil justice system had failed to provide justice in a timely manner to a larger, more diverse, faster paced, economically changing society. On the other hand, mediation as a traditional alternative dispute resolution mode turned to another place for exercise of power and domination by the local elite. Rather than considering which was good or bad, the mediator's own opinion became the determining factor in solving conflicts. Even if the opposing parties did not want to accept the solution, they were compelled to do so. And when the disputes were related to family, it was simply like a curse. Family Court Ordinance 1985 not only moderated the procedure of litigation, but also incorporated the traditional mediation process into the Family Courts. Thus it was not just a whimsical remix of customary salish method and modern civil court system, but an outcome of thoughtful response of the legislature to the need of time. As matter of fact, disposing of disputes through mediation was and is the prime object of establishing the Family Courts.

Traditionally and institutionally judges in our country occupy the seat of passive listeners of the proceedings before them. The course of civil courts is controlled by lawyers and clients from start to finish. By the Family Courts Ordinance 1985, the Family Court judges are required to occupy the driver's seat and determine the course of the suit in an informal way of mediation.

But it was very unfortunate that in the first one and a half decade since the enactment of the Ordinance, the Family Courts failed to take cognisance or to apply these provisions to mediate disputes in pending suits before them. The reason was just lack of motivation of the concerned judges. Being used to adversarial system the judges presiding over Family Courts were completely ignorant about mediation. And no attempt was made to train the judges in the art of mediation, nor were they directed to use mediation. As a result

these courts had been treating the aforementioned provisions for mediation in the Family Courts Ordinance as superfluous to the Family Courts' proceedings.

However, it was the month June of 2000 when the mediation was for the first time initiated officially in three Family Courts of Dhaka judgeship under a Pilot Project recommended by Bangladesh Legal Study Group. These three courts then faced the actual problems and challenges in practical implementation of mediation in the Family Courts. In absence of previous experience of mediation in court room, these courts found the task immensely difficult. There was another professional concern of the judges in the Family Courts. Every judge of a judgeship is required to dispose of certain number of cases in the average and for each disposal, he is given credit. In case of failure to obtain certain number of credits, the career of a judge is affected. Since there was no credit fixed for mediation, it was a real concern for the judges in the Family Courts. The authority then fixed two credits for every successful mediation and one credit for every failed one. With the passage of time all other problems were successfully and effectively dealt with.

While writing this article, I talked to numbers of Family Courts' judges, who informed me that by this time many of them have had training on mediation, many have learnt personally the art of mediation, and all of them have been instructed to make effort to settle the issues through mediation before going on full trial. As a result, nowadays

almost all the Family Court judges are conscious about this responsibility. However, these judges opined that the major impediment now to perform more and more mediation in the Family Courts is the lack of motivation of the lawyers. Lack of awareness of the parties in the suits about such a suitable dispute resolution option is the second most important factor that contributes in the problem immensely.





Mediation: the prime object of the Family Courts

It is understandable that the fear of loss of cases and financial hardship discourage the lawyers to make effort for mediation. Usually trials take years and in our country usually lawyer's fees are paid part by part throughout the trials till they end. As mediation provides an opportunity to resolve the disputes rapidly, the lawyers feel that this will close their earnings and cause financial hardship. But these are the lawyers on whose advice litigants rely most. So, to make the mediation effort in the Family Courts successful, it is very much necessary first to dispel lawyers' fear of loss of case and financial hardship. They must be convinced that mediation will not adversely affect them financially but will open up new horizons for them. They have to be persuaded that the prospect of receiving lump sum amount by way of fees for being lawyers in mediations is very much possible, as the people in problems do not want to see procedural niceties in the courts and get a delayed remedy, rather they want to see their problems are getting solved speedily, whatsoever may be the way to resolve. And no doubt a successful mediation lawyer will always attract new clients wanting to try mediation who would otherwise have shunned the court.

In the same way, advocacy is needed to make people understand the benefits of mediation in the Family Courts. Bangladesh judiciary having four tiers the final disposal of a suit after going through each tier takes a long time, even years, perpetuating the tensions of the parties in dispute. It is also seen that a suit goes through trial in the lowest tier in most cases goes through the final tier where the losing party is the husband. The husband party's male ego being hurt it takes an uncompromising attitude, determined to take the female party to the highest court knowing well that the female party does neither have the financial means nor has the social support for going to the higher court in the capital Dhaka from their remote villages. Therefore, the trial on appeal continues indefinitely to

the great disadvantage and hardships of the female litigants. Similarly, the mediations in traditional way known as 'Salish' which village elders have been doing from time immemorial, though can bring quick relief, do not have any legal force behind them and as such not binding upon either party. Therefore, a dispute settled through salish remains dormant and can be revived at any time. There is no such problem in mediation in Family Courts. Disputes settled through mediation in Family Courts reach finality with the compromise decree. And unlike a trial or a salish there is no possibility of a dispute, settled through mediation in Family Courts, being revived. Again, most of the family suits involve financial or property settlements for which mediation in Family Courts is proven to be the best solution. These things must be made clear to the common people.

At the same time, it must be noted that with the disposal of the main suit through mediation, countersuits, mainly criminal, arising out of the same family disputes, are also settled. Our experience shows that for each family court suit, there are other cases arising out of the main dispute. For example, against a suit for dower generally criminal cases for theft or unlawful confinement are filed, whereas a case for dowry encourages filing of a suit for defamation or libel. Against a case under the Women And Children Repression Prevention Act, 2000, the other party will invariably file a suit for restoration of conjugal rights. Therefore, mediation encompasses not only the settlement of the main suit but other related suits or cases arising out of the same disputes and with the final disposal of the main

suit all others are also disposed of. Thus, the cumulative effect of mediation is much larger than disputes settled in trial or by private salish. And the object of the Family Courts is to gain this effect.





Mediation: the prime object of the Family Courts

Finally, we must think the fact that mediation is a very serious job that requires a much practical skill and techniques as theoretical knowledge. To understand both parties' perspectives on a conflict situation requires a keen, intuitive sense of human psychology, and to gain the trust of both requires an equal degree of compassion, empathy, humour and sensitivity. Few individuals possess all of these indispensable people skills, and even fewer are able to calmly maintain them in heated conflict situation. These skills relate experience and leanings. So, adequate training should be imparted to all judges of the Family Courts as well as the lawyers dealing with the suits in the same courts. It is also very much necessary to reconsider the appointment of judges in Family Courts. At present, all Assistant Judges do act as the Judges of the Family Courts. There are no other or additional criteria. In India, for being appointed as a Judge of a Family Court a person is required to have at least seven year experience in judicial office or in practicing law; and in selecting persons for appoint of judges every endeavour is 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 counselling are selected. Also, preference is given to women. It may be a guideline for us.



(The author would like to acknowledge the paper on 'Mediation in the Family Courts: Bangladesh Experience' by Hon'ble former Chief Justice of Bangladesh Mr. K. M. Hasan, presented in the First South Asian Regional Judicial Colloquium on Access to Justice in New Delhi on 1 - 3 November 2002, in writing this article.)





Applying CPC in Family Courts

Two decades have already passed since the establishment of Family Courts in the country, but the courts are still entangled with some confusions of law. One of such confusions is as to whether or how much of the Code of Civil Procedure (CPC) will apply to the proceedings before the Family Courts. While on the one hand, Section 20 (1) of the Family Courts Ordinance 1985 has clearly expressed that the provisions the Code except sections 10 and 11 shall not apply to the proceedings before the Family Courts; on the other hand the Supreme Court in different suits at different times has rendered differing opinions over the issue. The reason behind the confusion is, therefore, obvious.

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

In the said case [Moqbul Ahmed vs Sufia Khatun and others, 40 (1988) DLR (HCD) 305, Judgment delivered in 1988], the learned Advocates for the plaintiff-petitioner submitted, among others, that though in specific terms the provisions of Order 39, Rule 1 of the Code has not been made applicable in a proceeding under Family Courts Ordinance, to serve the purpose of the legislation the Court may apply Order 39, Rule 1 of the Code of Civil Procedure. Section 141 of the Code provided that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. The proceeding before the Family Courts is a civil proceedings and as such section 141 of the CPC may come into play.

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

Similarly in 1993 in Azad Alam Vs Jainab Khatun and others [1(1996) BLC (AD) 24; judgment delivered on 23rd October 1993] the full Bench of Appellate Division of the Supreme Court upheld the view that nothing of the CPC, except otherwise expressly provided by the Ordinance, will apply in the Family Courts. Though it was argued that the Court got power under section 6 of the General Clauses Act to pass any order necessary to give relief, the Court rejected the same in view of the provision under section 20 of the Family Courts Ordinance.





Applying CPC in Family Courts

Interestingly, in 1994 just after three months later from the above mentioned Appellate Division decision, a differing opinion came from a Divisional Bench of the High Court in Nazrul Islam Majumdar vs Tahmina Akhter alias Nahid and another [47(1995) DLR (HCD) 235; judgment delivered on 23rd January 1994]. The case was about amendment of plaint about which there is no provisions in the Family Courts Ordinance. The High Court Division in the judgment did not precisely mention whether whole or how much of the Code of Civil Procedure will apply, but clearly expressed that it is discretion of the Court to allow an amendment for ends of justice. And the guiding principle for amendment of plaint is that it ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings. Here are the points 'ends of justice' and 'the purpose of determining the real question in controversy' which were absolutely ignored in earlier two decisions.

It was the same year 1994 when another Divisional Bench of the High Court in Younus Mia vs Abida Sultana Chhanda [47 (1995) DLR (HCD) 331; judgment delivered on 23 February 1994] flashed light on the issue from a broader outlook. The case was against an order of a Family Court allowing the defendant, a Purdanishin Muslim lady, to examine herself on commission as per provision of Order 26 of the CPC, which on appeal was also affirmed by the learned District Judge.

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

Upon reading this section it appears to us that the meaning of the expression 'proceedings before the Family Courts' as understood by the Ordinance itself is the key to the solution. The word 'proceeding' in a general sense means 'the form and manner of concluding judicial business before a Court of Judicial Officer' (Black's Law Dictionary, p.1368).

Keeping this meaning of that term 'proceeding' in

mind, we now look into the scheme of the Ordinance so far it is

relevant for our purpose by section 4 and 5, after respectively providing for the establishment of Family Courts and the jurisdiction thereof, the Ordinance prescribes procedures applicable to the proceedings before the Family Courts regarding (i) institution of suits and plaints, (ii) issuance of Summons and Notice, (iii) Written Statement, (iv) consequence of non appearance of parties, (v) recording evidence, (vi) writing the judgment and (vii) summoning witnesses respectively in Sections 6, 7, 8, 9, 12, 15 and 18, that is, by these sections the Ordinance substitutes for itself the provisions of Orders 4, 7, 5, 8, 18, 20 and 16 of the Code of Civil Procedure respectively. Therefore, when section 20 of the Ordinance says that the provisions of the Code 'shall not apply to proceedings before the Family Courts' it means that provisions of the Code shall not apply which are in the Ordinance as prescribed modes for conducting Judicial business by the Family Courts.

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





Applying CPC in Family Courts

The learned Court finally held that only those provisions of the Code shall not apply to the Family Courts where alternative provisions have been prescribed for the Family Courts in the Ordinance.

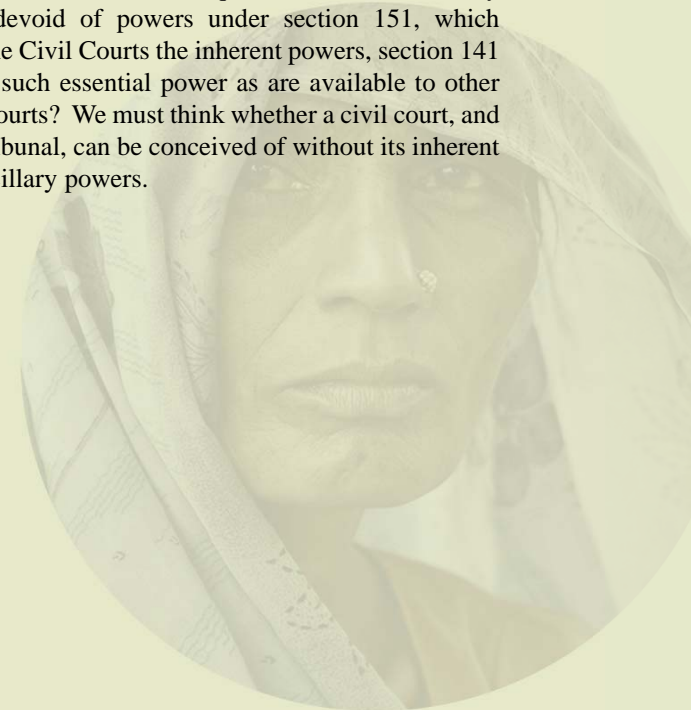
It is quite pertinent to mention that this Court not only pronounced its own judgment but also expressed its findings that the decision of the learned Single Judge in *Moqbul Ahmed vs Sufia Khatun* and other (mentioned above) that section 20 "has not provided that other provisions of the Code will also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

It could not be learnt whether the High Court Division's Benches while giving decisions in the above two cases were informed about the Appellate Division decision in the *Azad Alam Vs Jainab Khatun* and others [1(1996) BLC (AD) 24]. Because we see, the High Court Division in 2000 in *Saleha Begum vs Dilruba Begum* [53(2001) DLR (HCD) 346] reverted to the early position by holding that section 20 of the Family Courts Ordinance is a bar to the application of the Civil Procedure Code in Family Court proceedings; and Family Courts Ordinance being a special law must be applied strictly.

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

In the concluding remarks I want to say even after the Appellate Division judgment on the issue, the problem is not solved. For the successful completion of family courts' suits, the necessity of applying CPC will come

time and again. As a matter of fact, we cannot in any way neglect the High Court Division decision in *Younus Mia vs Abida Sultana Chhanda* that was founded upon apparently some very cogent and convincing grounds. In fact, we must think the issue again and decide whether the procedural bar to the provisions of the Code of Civil Procedure as contemplated in the section 20 of the Family Courts Ordinance is absolute or a qualified one? Is a Family Court devoid of powers under section 151, which gives the Civil Courts the inherent powers, section 141 and all such essential power as are available to other Civil Courts? We must think whether a civil court, and not a tribunal, can be conceived of without its inherent and ancillary powers.



Family Court's overriding jurisdiction



As to jurisdiction section 5 of the Family Courts Ordinance 1985 clearly states that a Family Court shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to, or arising out of, all or any of the five matters, namely (a) dissolution of marriage (b) restitution of conjugal rights (c) dower; (d) maintenance; (e) guardianship and custody of children. Once more, section 3 says that notwithstanding anything contained any other law the provisions of this Ordinance shall apply to cases relating to above mention matters. Subsequently, through case laws, the position regarding jurisdiction has been made clearest. Nevertheless, a considerable portion of lawyers, as a BLAST report reveals, still thinks that there are dual options for claiming custody of children, dower and maintenance of wives, that is, for custody of children and dower money and maintenance one can bring suit under section 100 and 488 of CrPC; again for the same, one can bring a suit in a family court. In fact, such misconception is not an anomaly when earlier we got some diametrically opposite judicial views regarding this, and when the habit of vast reading is still absent in our lawyer society as a whole.

In the early 1990 in Abdul Khaleque V Selina Begum (42 (1990) DLR (HCD) 450) a High Court Division Bench held that '.... the purpose of the family Courts Ordinance is to provide for speedy disposal of family matters by the same forum. There will be anomaly and multiplicity of proceedings, if, in spite of the establishment of family court, the Magistrate constitutes to entertain cases for maintenance. Provisions made in the Family Courts Ordinance have ousted the jurisdiction of the Magistrate to entertain application for maintenance which is a family court matter'.

But just after four years in 1994 in Meher Nigar Vs Md Mujibur Rahman (14(1994) BLD (HCD) 467) another Division Bench expressed a complete opposite view to the effect that the Criminal Courts as usual way entertain a case filed under section 488 of the Code of Criminal Procedure for maintenance. In section 5 of

the Family Courts Ordinance it has been mentioned that the Court shall decide the suits filed in respect of the five subjects enumerated in the section. There is difference in between a suit and a case. And Family Courts Ordinance has not created any impediment in the proceeding of the case filed under section 488 of the Code of Criminal Procedure. That is, the gist of the decision is that one may choose any of the two forums.

In the same way, in 1996, there came another judgment in Rezaul Karim vs Rashida Begum 16 (1996) BLD (HCD) 11. The judgment held that '[a] relief provided by an Act cannot be taken away by implication simply because similar relief has been provided in a subsequent Act without repealing the provision for relief in the previous Act. The power of the Magistrate to act under section 488 of CrPC has not been taken away by promulgation of the Family Courts Ordinance.'

Following such contradictory judgments, confusion emerged as a natural consequence. But such confusion did not continue to long as a Special High Court Bench comprising three judges dissolved the issue finally in Pochon Rikssi Das Vs Khuku Rani Dasi (50 (1998) DLR (HCD) 47) in 1997.

To dissolve this issue the said Court considered - (i) section 3 of the Family Courts Ordinance which provides that the provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the

time being in force, (ii) section 4 which provides that all courts of Assistant Judges shall be the Family Courts for the purpose of this Ordinance, and (ii) section 5 that provides that the Family Courts shall have exclusive jurisdiction to entertain, try and dispose of any suit relating to the subjects enumerated in this section that includes maintenance. The Court held that these sections clearly indicate the ouster of the jurisdiction of other courts in dealing with the matters enumerated in section 5 of the Ordinance.





Family Court's overriding jurisdiction

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

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

It can be noted here that the abovementioned view was also taken in Pakistani jurisdiction in *Adnan Afzal vs*

Capt. Sher Afzal (PLD 1969 (SC) 187; 21 DLR (SC) 123) Eventually, the position is that for custody of children, dower and maintenance disputes one has to resort only to a Family Court under the Family Courts Ordinance, and not to any other courts.



Amending plaints in Family Courts

Generally a court of civil jurisdiction follows the procedure prescribed by the Code of Civil Procedure 1908. But Family Courts are exceptions which, though being courts of civil jurisdiction, do not follow the said procedure. The reason is simple. Family Courts are special courts with specific jurisdiction and purpose, created by a special law, that is, Family Courts Ordinance 1985. This Ordinance not only prescribes a specific procedure to follow but also provides that the provisions of the Code of Civil Procedure, except sections 10 and 11, shall not apply to the proceedings before the Family Courts.

In fact, the Ordinance prescribes almost a complete procedure regarding (i) institution of suits and plaints, (ii) issuance of Summons and Notice, (iii) Written Statement, (iv) consequence of non appearance of parties, (v) recording evidence, (vi) writing the judgment and (vii) summoning witnesses etc. But this Ordinance does not provide any provision for amendment of plaint as is available in any other civil court that follows the CPC. Lawyers allege that the dearth of provision for necessary amendment of plaint has been creating problems in dealing with the Family Courts. They reason that it is not possible even for good lawyers to prepare a good plaint at a single chance. Moreover, after presentation of the plaint, other logical and legal grounds may arise, necessitating amendment of plaint. Hence, this rigid provision obstructs many good causes.

But what actually is the matter? Is there no scope for amendment of plaint? As to this the lawyers and judges of the Family Courts seem confused - confused because in the meantime the Supreme Court has given differing opinions.

In *Azad Alam Vs Jainab Khatun and others* [1(1996) BLC (AD) 24; judgment delivered on 23rd October 1993] the full Bench of Appellate Division of the Supreme Court upheld the view that plaint cannot be amended under the Family Courts Ordinance. Though the learned Advocate of the case argued that Family Courts Ordinance being silent about amendment of plaint the Court got power under section 6 of the General Clauses Act to pass any order necessary to give relief, the Court rejected the same in view of the provision under section 20 of the Family Courts Ordinance which provides " Save as otherwise expressly provided by this Ordinance the provisions of the CP Code, except sections 10 and 11, shall not apply to the proceedings before the Family Court."

However, after few months later, the a High Court Division Bench in *Nazrul Islam Majumdar Vs Tahmina Akhtar alias Nahid* (47(1995) DLR (HCD) 235; judgment delivered on 23rd January 1994) expressed opposite view, though it could not be learnt whether the HC Bench was aware of the Appellate Division decision in *Azad Alam Vs Jainab Khatun and others* while expressing the view. The Court held that: An amendment of the plaint insofar as it does not change the nature and character of the suit would be allowed always in a suit.And the guiding principle for amendment of plaint is that it ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings.and the principle applicable to the amendment of the plaint is also applicable to the amendment of written statement.

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





Amending plaints in Family Courts

... if the wife has legally divorced her husband the prayer made by the wife in her plaint that she would be allowed maintenance would be deleted as her maintenance would not be allowed after she had divorced and if the wife had legally divorced the husband the suit by the husband for restitution of conjugal life may not also be maintainable on that evidence. this, therefore, is a issue vital for both the parties to be decided by the Court on evidence and that being the position for ends of justice this amendment needs to be made and it would be incumbent upon the court to do so.

The Court also expressed its opinion in the following words:

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

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

It seems quite pertinent to mention a judgment of a Divisional Bench of the High Court in *Younus Mia vs Abida Sultana Chhanda 47 (1995) DLR (HCD) 331*. In this judgment, section 20 of the Ordinance was interpreted as follows:

Upon reading this section it appears to us that the meaning of the expression 'proceedings before the Family Courts' as understood by the Ordinance itself is the key to the solution. The word 'proceeding' in a general sense means 'the form and manner of

concluding judicial business before a Court of Judicial Officer' (Black's Law Dictionary. p.1368).

Keeping this meaning of that term 'proceeding' in mind, we now look into the scheme of the Ordinance so far it is relevant for our purpose by section 4 and 5, after respectively providing for the establishment of Family Courts and the jurisdiction thereof, the Ordinance prescribes procedures applicable to the proceedings before the Family Courts regarding (i) institution of suits and plaints, (ii) issuance of Summons and Notice, (iii) Written Statement, (iv) consequence of non appearance of parties, (v) recording evidence, (vi) writing the judgment and (vii) summoning witnesses respectively in Sections 6, 7, 8, 9, 12, 15 and 18, that is, by these sections the Ordinance substitutes for itself the provisions of Orders 4, 7, 5, 8, 18, 20 and 16 of the Code of Civil Procedure respectively. Therefore, when section 20 of the Ordinance says that the provisions of the Code 'shall not apply to proceedings before the Family Courts' it means that provisions of the Code shall not apply which are in the Ordinance as prescribed modes for conducting Judicial business by the Family Courts

The said Court mentioned that it is a canon of interpretation that an attempt should be made to discover the true legislative intent by considering the relevant provision in the context of the whole statute, and subsequently observed that Code of Civil Procedure itself does not create any Court nor does define the word 'Court'. Its preamble says that it is intended to regulate the procedure of the Courts of Civil Judicature. Basically, the Code of Civil Procedure is a procedural law and, therefore, there is no difficulty in its applications to proceedings of a civil nature suit pending before the courts of any kind. Therefore, the bar in applying the Code to the





Amending plaints in Family Courts

section 20 of the Ordinance is not and cannot be an absolute bar, but it must be a qualified and limited bar. Enactment of section 20 was thus only necessary due to certain procedures prescribed in the Ordinance.

The learned Court finally held that only those provisions of the Code shall not apply to the Family Courts where alternative provisions have been prescribed for the Family Courts in the Ordinance.

In the light of the above mentioned judgment we can come to a decision that as there is no alternative provision for the amendment of plaint in the Family Courts Ordinance, the provisions of the CPC as to the same will apply in the Family Courts. However, the fact is that we can not reach such a conclusive decision because of the Appellate Division judgment expressing opposite view, and because of the Constitutional directive that the law declared by the Appellate Division shall be binding on the High Court Division and all other subordinate courts.

Yes, we cannot bypass the Appellate Division judgment. But at the same time we cannot accept the judgment without thinking its impact on the total justice delivery system. A group of lawyers and judges do strongly support the absence of provision for amendment of plaint by presenting the simple argument that as the Family Courts are specially established for the speedy disposal of family cases, the provision for amendment of plaint would oppose the purpose by destroying the time of a case. They stress on the maxim 'justice delayed, justice denied'. On the contrary, the other group argue that speedy disposal of suit may produce injustice. They stress on the maxim 'justice hurried, justice buried'. It is high time the concerned authority resolve the issue.





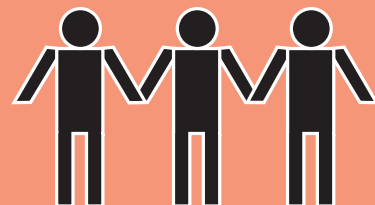
Interlocutory Order in Family Courts: whether appellable?

At the commencement, there was no provision in the Family Court Ordinance 1985 for interim or interlocutory order by the Family Courts. Though the necessity of inclusion of such provision in the Ordinance was felt from the beginning, the Family Courts have run without the same around four years. It was only in 1988 when the Supreme Court was to decide for the first time on the issue in *Moqbul Ahmed vs Sufia Khatun and others* [40 (1988) DLR (HCD) 305]. The fact of the suit was that the plaintiff, the husband, filed the suit against the defendants, his wife, for restitution of his conjugal rights. In the said suit the plaintiff also filed an application for temporary injunction restraining the marriage of her wife elsewhere till the disposal of the suit, as the wife claimed that she had divorced her husband. The prayer for injunction was rejected on the ground that Family Courts Ordinance 1985 is a self contained Ordinance providing the mode and method of trial and disposal of suits, and section 20 thereof makes all the provisions, except sections 10 and 11, of the Code inapplicable, hence a Family Court cannot grant any interlocutory order which is given under the provision of CPC. Then by way of appeal the plaintiff moved the High Court Division. The single judge of the High Court acknowledged the need of interlocutory orders in the cases like this one, but confirmed the decision of the lower courts.

This case once again highlighted the necessity of investing the Family Court with the powers to grant interlocutory orders. And just within one year from the pronouncement of the judgment, be it a coincidence or a response to the issue in the judgment, the provision for interlocutory order was inserted in the Ordinance by section 16A, which reads as "[w]here at any stage of a suit, the Family Court is satisfied by

affidavit or otherwise, that immediate action should be taken for preventing any party from frustrating the purpose of the suit, it may make such interim orders as it thinks fit."

After incorporating this comes another legal aspect that whether an interim order is appellable. In 1994, the High Court Division in judgment of *Younus Mia vs Abida Sultana Chhanda* [47 (1995) DLR (HCD) 331] held that appeal before the Court of the District Judge against an interlocutory order passed by the Family Court was not maintainable. The court reasoned that "...according to Sub-section 1 of section 17, appeal shall lie from 'order' of a Family Court to the District Judge. Subsection 1 of section 2 of the Ordinance does not contain definition of 'Order' but subsection 2 thereof states that the words used in the Ordinance but not defined shall have the meaning assigned to them in the Code. According to section 2 (14) of the Code 'Order' means 'the formal expression of any decision of a Civil Court which is not a decree'. An interlocutory order is, therefore, not such an order finally disposing of any disputes or claim in the suit itself. An interlocutory order is an order passed by way of an aid to proper adjudication of any dispute or claim. The word 'order' used section 17 cannot be read as 'any order'. Had it been the intention of the legislature that 'any order' passed by the Family Courts, shall be appellable before the Court of District Judge, they could have done so by inserting 'any order' instead of 'order' as has been done in sub-section 1 of section 30 of the Special Powers Act." It is mentionable that section 30 of the Special Powers Act reads as "30(1) an appeal from any order, judgment or sentence of Special Tribunal may be preferred to the High Court Division within thirty days from the date of delivery of passing thereof."





Interlocutory Order in Family Courts: whether appellable?

But it seems that the High Court Division afterwards deviated from this position, as in two other judgments in the year 2000 it delivered opposing views. In *Atiqur Rahman vs Ainunnahar* [52 (2000) DLR (HCD) 453] it was held that '[t]he Order in its widest sense may be said to include any decision rendered by a court on question between the parties of a proceeding before the court and the same can be construed or read either final or interlocutory and both are appellable.'

Similar decision came in *Firojul Islam vs Zahanar Akhter* [52 (2000) DLR (HCD) 107], where it was held that "[t]he order under challenge is an interlocutory order and the same is appellable."

In the meantime, after the pronouncements of these contradictory decisions from the High Court Division, several years elapsed, but there came no overriding judgment from the Appellate Division of the Supreme Court. (At least this author has not found any path finding judgment from the Appellate Division while writing this article.) Consequence is that till today both the judges and practitioners of the Family Courts feel indecisive while dealing with an interlocutory order. Such indecision or uncertainty, which unquestionably thwarts the decision making process of courts, is very much unbecoming for the Family Courts that have been dealing with the most important family affairs for over two decades. This uncertainty should be removed at once.





Executing Family Court's decree

PART I

The disrepute of the Family Court Ordinance 1985 that it does not provide adequate provisions for effective execution of its decree for money has been wiped up in 1989 by substitution of subsection (3) of section 16 by which Family Courts have been invested with the powers of a Magistrate of the first class for the enforcement of the decree passed by it, while the earlier provision being that the money decreed by the Family Courts was to be recovered as a public demand at the discretions of the District Judge. Nonetheless, the execution process is still under the shade of confusions and misunderstandings. Still today some lawyers and judges seem confused as to the determination of executing court, which indicates that there is procedural non-specification. In the first part of this two part write-up I shall discuss about the confusion regarding determination of executing Court.

Section 16 of the Family Courts Ordinance provides for the enforcement of decrees. Sub-section 3 of the section states:

(3) Where the decree relates to the payment of money and the decretal amount is not paid within the time specified by the Court, the decree shall, on the prayer of the decree-holder to be made with in a period of one year from the expiry of the time so specified, be executed-

(a) as a decree for money of a Civil Court under the Code, or

(b) as an order for payment of fine made by a Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1899)

and on such execution the decretal amount recovered shall be paid to the decree-holder.

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

(3A) For the purpose of execution of a decree under subsection 3(a), the Court shall be deemed to be a

Civil Court and shall have all the powers of such Court under the Code.

(3B) For the purpose of execution of a decree under subsection 3(b), the Judge of the Family Court shall be deemed to be Magistrate of the first class and shall have all the powers of such Magistrate under the Code of Criminal Procedure, 1898 (Act V of 1898), and he may issue a warrant for levying the decretal amount due in the manner provided in that Code for levying fines, and may sentence the judgment debtor, for the whole or any part of the decretal amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to three months or until payment if sooner made.

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

The legal provision regarding this is absent in the Ordinance. And I have not got any satisfactory answer to this through my discussions with the practicing lawyers. Henceforth, I have tried to examine the issue in the light of judicial interpretations. But unfortunately I have failed to get any path finding judgment regarding this. However, the High Court Division judgment in *Md. Ali Hossain & Others Vs State*, 5 (2000) MLR (HCD) 301] has helped me to think the issue from a different angle. In the said case, it was held that:





Executing Family Court's decree

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

Though it was a decision in a criminal proceeding, we can use the essence of the judgment to come to a decision as to determination of court for execution of family court decree for money. Usually Family Courts award decree for money in the suits for dower and maintenance. Dower (mahr) is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. On the other hand 'maintenance' includes food, clothing, and lodging. After divorce wife is entitled to maintenance up to iddat period; which may extent three months. And for maintenance of children, the word of maintenance, along with food, clothing and lodging as per definition, includes other necessary expenses for mental and physical well being of a minor, according to his status in society. Educational expenses may also be included in the definition of maintenance. So, decree for money is in some cases to enforce the rights of a wife or to meet the basic necessity of a child. And it is distinguished from fine imposed upon an accused-convict in a criminal proceeding which is of the nature of a financial punishment. Fine is a charge upon the assets of the convict as a public dues. But decretal money of Family Courts is not public dues; rather it is rightful gain of a

decree holder.

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

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





Executing Family Court's decree

PART II

In the first part of this write-up, the focus was on the confusion as to determination of executing court. It was discussed that for executing the money decree of the Family Courts, the executing court should begin working as a civil court so that the decreed money can be realised; and when the assets of the judgment debtor cannot cover the decretal amount, only then the executing court may sentence the judgment-debtor to imprisonment.

However, our present focus is on another important aspect relating to execution of family courts' money decree. Some lawyers and judges think that though the present law keeps provision for sentencing judgment-debtor to imprisonment for a maximum term of three months for unpaid decretal amount, this provision does not serve the purpose of a decree, as many judgment-debtors prefer to suffer this three months civil imprisonment than to pay decreed money. This in other way expresses that (1) judgment debtor can choose whether to pay the decree-money or to suffer imprisonment; and (2) that the penalty for non-payment of decreed money is civil imprisonment for maximum three months.

No doubt, there is a gross misunderstanding in this respect that will be removed just now. Subsection (5) of section 16 provides that the Court may, if it so deems fit, direct that any money to be paid under a decree passed by it be paid in such instalments as it deems fit. And subsection 3B provides that:

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

extend to three months or until payment if sooner made.

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

For the cases of decretal money to be paid in instalments, the legal position was clarified in the case of *Maksuda Akhter vs Md Serajul Islam* (51 (199) DLR (HCD) 554). The fact of the case, if brief, was that Maksuda Akhter was married to Md Serajul Islam and thereafter they were divorced. Subsequent thereto, Makshuda Akhter filed a suit for realisation of dower money and maintenance. The suit was ultimately decreed and the decree-holder, Maksuda Akhter, put the decree into execution. On the prayer of the judgment debtor 40 instalments were granted by the Court, each instalment being taka 13,875.02 only to be paid by the month. The first instalment was not paid. Consequently the judgment holder filed an application for executing the first instalment and sending the judgment debtor to suffer imprisonment for three months. The judgment debtor suffered the imprisonment but did not pay the amount of the first instalment. The judgment debtor did not also pay any instalment which was subsequently due. Then the decree-holder filed another application to direct the judgment debtor to suffer civil imprisonment for further three months for the failure to pay the instalment of August, 1998. The application was rejected as the court understood that as the judgment-debtor once has suffered imprisonment for three months, he shall not have to suffer imprisonment any more and he shall have not to pay the decretal money at all.





Executing Family Court's decree

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

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

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

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





About the author

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