

Smt. Lakshmi Nagdev Vs. Jitendra Kumar Nagdev

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Court : Madhya Pradesh

Decided On : Sep-24-2004

Reported in : 2005(1)MPHT30; 2004(4)MPLJ310

Judge : Shantanu Kemkar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 23(3); [Hindu Marriage Act, 1955](#) - Sections 21A

Appeal No. : Misc. Civil Case No. 932/2004

Appellant : Smt. Lakshmi Nagdev

Respondent : Jitendra Kumar Nagdev

Advocate for Def. : A.P. Singh, Adv.

Advocate for Pet/Ap. : Alok Aradhe, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Shantanu Kemkar, J.

1. By filing this petition under Section 23(3) of the Code of Civil Procedure (hereinafter referred to as 'CPC') the petitioner wife is seeking transfer of

Matrimonial Suit No. 17-A/04 filed by the respondent husband in the Court of III Additional District Judge, Katni to the Court of competent jurisdiction in District Durg in the State of Chhattisgarh.

2. In short the petitioner's case is that her parents are old and infirm and her brother who is a business man is unable to accompany her to attend the case pending at Katni. Petitioner has a son aged about two years and there is no-one to look after him. The petitioner is residing at Bhilai, District Durg which is more than 465 kms away from Katni. In the aforesaid circumstances it is difficult for her to attend the matrimonial case filed by the respondent at Katni.

3. The respondent opposed the prayer on the grounds that- (i) the petitioner approached this Court after a considerable delay, (ii) the Trial Court vide order dated 28-4-2004 apart from maintenance pendente lite and litigation expenses ordered the respondent to deposit Rs. 10,000/- for travelling expenses of the petitioner which the respondent has deposited, (iii) this Court has no jurisdiction to transfer the case to the Court in the State of Chhattisgarh and (iv) in view of Section 21A of the [Hindu Marriage Act, 1955](#) (hereinafter referred to as 'Act') the application seeking transfer invoking the provisions of the CPC is not maintainable.

4. Shri Alok Aradhe, learned Counsel for the petitioner has contended that the petitioner who is mother of a young son aged about two years is residing with her old and infirm parents and there is nobody to look after her young child. The distance between Durg to Katni is more than 465 kms. In such circumstances, it is very difficult and inconvenient for the petitioner to travel for such a long distance and to attend the case pending at Katni. So far as the maintainability of the petition seeking transfer of case from Katni to Durg, learned Counsel for the petitioner invited my attention to Section 23(3) of the CPC. Section 23(3) of the CPC reads as under :-

'23. (3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.'

The learned Counsel further submitted that deposit of Rs. 10,000/- towards travelling expenses would not solve the inconvenience which would cause to the petitioner. The petitioner is not basing her case for transfer on the ground of non payment of travelling expenses but she is basing her case on the ground that she has a small child and there is nobody to accompany her to attend the case at Katni. As regards the ground of belated approaching this Court he submitted that the petitioner approached to this Court on 3-3-2004 seeking transfer of suit by filing M.C.C. No. 341/2004, after notice to the respondent it was listed on 8-5-2004. However, the same was withdrawn on 8-5-2004 as the petitioner's Counsel was under the bona fide belief that the petition is not maintainable. Thereafter the petitioner preferred an application for recalling of the order. M.C.C. No. 889/2004 preferred for recalling of the order dated 8-5-2004 was disposed of on 25-6-2004 granting liberty to the petitioner to file a fresh petition for transfer of proceedings, accordingly the present petition has been filed. He further submitted that Section 23(3) confers powers on this Court to transfer the case and Section 21A of the 'Act' does not bar entertaining a petition under Section 23(3) of the CPC.

5. Shri A.P. Singh, learned Counsel for the respondent while opposing the petition contended that by now 12 dates of hearing before the Trial Court are over and as such the petition be dismissed being highly belated. He further contended that in view of Section 25 of the CPC this petition seeking transfer of case from one State to other is not entertainable by this Court. He further contended that Section 21A of the 'Act' provides for transfer of case and, therefore, the provisions contained in the CPC for transfer of cases have got no application.

6. In support of their respective contentions the learned Counsel appearing for both the sides have cited various judgments. The same are being considered herein below.

In the case of Jagatguru Shri Shankaracharya Jyotish v. Ramji Tripathi and Ors. (1979 MPLJ 305) in Para 10, this Court has held :-

'10. General Power of transfer and withdrawal of suits are contained in Section 24 of the Code of Civil Procedure. Sections 22 and 23 of the Code apply only to cases where the plaintiff has the option to sue in two or more Courts. Under

Section 22, the defendant, after notice to the other parties and at the earliest possible opportunity and at or before settlement of issues, may apply to have the suit transferred to one of the other Courts where the suit could have been filed. Though the notice to the other parties is to be given, the defect can be cured by notice on the application itself. The Court has to decide the application after hearing the objections, if any, of the other parties in the suit. Section 23 prescribes the forum where the application for transfer has to be made. In case the suit is sought to be transferred to a Court subordinate to another High Court, the application has to be made in the High Court within whose jurisdiction the suit is pending. In the present case, the respondent No. 1 entered appearance in the suit for the first time before the District Judge, Seoni, on 9-9-1974 and the application for transfer was moved in this Court on the very next date on 10-9-1974 to transfer the suit to a Competent Court at Allahabad. The learned Single Judge decided the application after notice and hearing all the parties to the suit. As such, the learned Single Judge has rightly entertained and decided the transfer application. A Division Bench of this Court in *Firm Kanhaiyalal v. Zumerlal* has held that under Sections 22 and 23, High Court can transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court. Same is the view taken by the Supreme Court in *Western U.P. Electric and Power Supply Co. Ltd. v. Hind Lamps Ltd.* Therefore, the learned Single Judge had the jurisdiction to transfer the suit from the Court of District Judge, Seoni, to the Court of District Judge, Allahabad.'

In view of this judgment based on earlier Division Bench judgment of this Court passed in case of *Firm Kanhaiyalal Daga v. Zumerlal*, (AIR 1940 Nag. 145), there remains no doubt that the High Court can transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court.

7. In the case of *Guda Vijayalakshmi v. Guda Ramachandra Sekhara Sastry* (AIR 1981 SC 1143), the Supreme Court has held as under :-

'4. So far as Section 21A of the Hindu Marriage Act is concerned the marginal note of that section itself makes it clear that it deals with power to transfer petitions and direct their joint or consolidated trial 'in certain cases' and is not exhaustive..... (omitted)

It is, therefore, difficult to accept the contention that Section 21A of Hindu Marriage Act excludes the power of transfer conferred upon this Court by the present Section 25 of the CPC in relation to proceedings under this Act.'

In *Mamta Gupta v. Mukund Kumar Gupta* (AIR 2000 AP 394) the Andhra Pradesh High Court had occasion to deal with the provisions under Section 23(3) conferring powers on High Court and Section 25 which confer powers on Supreme Court. In the said judgment it has been held that the powers have to be construed harmoniously and Section 25 of the CPC does not overlap Section 23(3). It is for the parties seeking transfer either to choose the forum under Section 23(3) or Section 25.

8. In the light of aforesaid judgments the objection about maintainability of the petition deserves to be rejected. Section 23(3) of the CPC empowers the High Court to transfer a suit pending in a Subordinate Court to a Court subordinate to another High Court, Section 21A of the 'Act' do not in any way exclude, affect or curtail the powers of this Court under Section 23(3) of the CPC. The powers of the High Court under Section 23(3) and the Supreme Court under Section 25 of the CPC are to be construed harmoniously and parties are free to choose the forum either under Section 23(3) or under Section 25 of the CPC.

9. Coming to the next question as to the merits of the petition seeking transfer. In *Amita Shah v. Virender Lal Shah* [(2003) 10 SCC 609] the Supreme Court has held that the convenience of the wife, more particularly, minor child of the marriage must be taken into account. In *Simi Mehrotra v. Anil Mehrotra* [(2002) 10 SCC 70], the Supreme Court allowed the prayer seeking transfer of case from Delhi to Allahabad on the statement of the wife that she is living with her aged parents and there is no one else to accompany her. So it is not possible for her to travel from Allahabad on each date of hearing to attend the Court in Delhi. In *Sumita Singh v. Kumar Sanjay and another* (AIR 2002 SC 396) the Supreme Court transferred the case from Ara Bhojpur to Delhi considering the distance and also by observing that 'it is husband's suit against the wife. It is the wife's convenience that therefore must be looked at'. In *Lalita A. Ranga v. Ajay Champalal Ranga* [(2000) 9 SCC 355] the Supreme Court transferred the suit filed by husband from Family Court at

Bombay to Family Court at Jaipur on the ground that wife is having a small child and, therefore, obviously she will face difficulty to go all the way from Jaipur to Bombay to contest the proceedings from time to time.

10. Relying on the judgment of the Supreme Court passed in the case of Usha George v. Koshy George [(2000) 10 SCC 95], Shri A.P. Singh, learned Counsel for the respondent has contended that 12 dates in the Trial Court are over and, therefore, it would not be proper to transfer the suit.

Shri Alok Aradhe, learned Counsel for the petitioner contended that even though 12 dates are over but still the evidence of the parties has not begun. He submitted that M.C.C. No. 341/2004 was filed on 3-3-2004 when only few dates were over and, therefore, if in the intervening period 12 dates are over the petitioner who approached to this Court promptly be not denied the relief.

11. Considering the judgments relied upon by the learned Counsel for the parties and the provisions of law as referred to above pertaining to transfer of suit, in my opinion, the petitioner has made out a case for transfer of the suit filed by the respondent. Admittedly, the petitioner is having a small child. She is residing with her parents at Bhilai, District Durg, her parents are old and infirm and there is nobody to accompany her at Katni which is more than 465 kms. from Durg. The petitioner had filed a petition seeking transfer firstly, in the month of March, 2004 itself, the delay being caused due to bonafide belief of her Counsel that the petition is not maintainable, for this mistake on the part of her Counsel she should not be made to suffer. The prayer for transfer of suit can not be rejected merely because the respondent has deposited the travelling expenses. It is not the expenses alone which are to be taken into consideration while considering the petition filed on behalf of the wife for transfer of suit filed by the husband, but other factors as stated above also play important role.

12. For the reasons stated above, this petition deserves to be allowed and the same is hereby allowed. The Civil Suit No. 17-A/2004 pending in the Court of III Additional District Judge, Katni is transferred to the Court of District Judge, Durg, Chhattisgarh, who shall proceed with the suit in accordance with law. The parties are directed to appear before the District Judge, Durg on 28th October, 2004.

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