

Subhra Raul Vs. Nathan Raul

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SooperKanoon Citation : sooperkanoon.com/530154

Court : Orissa

Decided On : Apr-17-1998

Reported in : II(1999)DMC294

Judge : A. Pasayat, J.

Acts : [Indian Divorce Act, 1869](#) - Sections 3, 22, 23 and 27

Appeal No. : Original Suit No. 1 of 1996

Appellant : Subhra Raul

Respondent : Nathan Raul

Advocate for Def. : L. Mohapatra, ;D. Mishra, ;B.K. Nayak and ;S.C. Mohapatra, Advs.

Advocate for Pet/Ap. : S.K. Mund, ;D.P. Das and ;J.K. Panda, Advs.

Judgement :

A. Pasayat, J.

1. A question regarding maintainability of the proceeding Original Suit No. 1 of 1996 which has been purportedly filed under Section 22 read with Sections 23 and 27 of the [Indian Divorce Act, 1869](#) (in short, the 'Act') has been raised by the respondent.

2. The essential facts need to be noted for adjudication of the controversy.

Plaintiff Subhra Raul has filed this proceeding praying for a decree of judicial separation to be passed against respondent Nathan Raul. Further prayer is for a decree for payment such gross sum by way of alimony, or annual sum of money as may be quantified. According to respondent, who has raised question of maintain- ability, petition under Section 22 of the Act is required to be filed before the High Court under whose jurisdiction the husband and wife last resided together. According to him, the admitted position being that plaintiff was staying at Mumbai during the period from 1992 to 1995, whereafter she has filed the present suit, this Court has no jurisdiction to entertain or try the suit. According to the plaintiff, she was residing at Cuttack on the date of presentation of petition and respondent has permanent home at Bhubaneswar and therefore, this Court has jurisdiction to entertain the petition.

3. It is highlighted by the respondent, plaintiff had filed Civil Petition No. 305 of 1995 in the Court of learned Judge, Family Court, Cuttack for a decree of judicial separation and for alimony. Respondent entered appearance pursuant to notice and filed a petition to decide the question of maintainability, in view of Sub-section (3) of Section 3 of the Act. By order dated 5.8.1996, learned Judge, Family Court held that unless written statement is filed, question of maintainability cannot be decided. Challenging the said order of learned Judge, Family Court, respondent filed O.J.C. No. 3594 of 1996 before this Court on the ground that finding of the Family Court was not only illegal, but also contrary to the provisions of Section 3(3) of the Act. On 26.8.1996, this Court issued notice and stayed further proceeding before the learned Judge, Family Court. Ultimately, plaintiff appeared in the case and submitted that she would withdraw the case pending before the Family Court. On the self-same ground, according to the respondent, the present suit has been filed and therefore, is misconceived.

4. Admittedly, the parties are Christians and governed by the Protestant School of Indian Christians. It is relevant to take note of Sections 3,22 and 23 of the Act which are relevant, and read as follows :

'3. Interpretation clause-In this Act, unless there be something repugnant in the subject or context-

'High Court'.

(1) 'High Court' means with reference to any area-

(a) in a State, the High Court for that State;

(b) in Delhi, the High Court at Delhi;

(c) in Manipur and Tripura, the High Court of Assam;

(d) in the Andaman and Nicobar Islands, the High Court at Calcutta;

(e) in the (Lakshadweep) the High Court of Kerala;

(ee) in Chandigarh, the High Court of Punjab and Haryana,

and in the case of any petition under this Act, 'High Court' means the High Court for the area where the husband and wife reside or last resided together :

(2) xxx xxx xxx(3) 'District Court' means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together;'

'22. Bar to decree for divorce a mensa et thoro; but judicial separation obtainable by husband or wife-No decree shall hereafter be made for a divorce a mensa et thoro, but the husband or wife may obtain a decree of judicial separation on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a mensa et thoro, under the existing law, and such other legal effect as hereinafter mentioned.'

'23. Application for separation made by petition-Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground

why the application should not be granted, may decree judicial separation accordingly.'

5. A bare reading of the provisions contained in Section 3 makes it clear that for any concerned Court at a place to have jurisdiction, residence of both parties within jurisdiction, is necessary and not merely of either petitioner or opposite party. In order to invoke territorial jurisdiction of the concerned Court to entertain the petition, it must be established that husband and wife still reside, or had last resided together within limits of territorial jurisdiction of the Court.

6. Ordinary meaning of the word 'reside' is to dwell or live in. One cannot constructively reside in a premises. 'To reside' means to live or to have a dwelling place or abode. It may be said that a person resides in a place, if he, through choice makes it his abode. Whether a person has chosen to take a particular place his abode depends upon the facts of each case. Dictionary meaning of the word 'residence' is 'to dwell' permanently for a considerable time; to have once settled or shall abode, to live in. Mere fact that a person visits a place occasionally or casually would not amount to such residence. The punctuation of the words 'husband and wife resided or last resided together' indicates that expression 'together' must be read 'with last resided' only. 'Residence' connotes two elements i.e. (i) actual or physical habitation, and (ii) intention to remain there for some length or time, not an occasional or casual visit. Temporary stay for temporary purpose without any intention to remain there does not constitute residence. Temporary visits to a place even if accompanied by an intention to settle down there at some future date are not sufficient to constitute evidence for the purpose of the Act. The term 'resides' is an elastic term and the meaning to be given to it must depend upon the circumstances of the case. The word 'residence' may receive a larger or more restricted meaning according to what the Court believes the intention of the Legislature to have been in framing the particular provision in which the word is used. The word 'reside' where there is nothing to show that it is used in a more extensive sense, denotes place where an individual eats, drinks and sleeps and where his family or his servants eat, drink and sleep. The word 'reside' as used in Section 3 of the Act implies a dwelling either of a permanent nature or for some considerable time. It cannot, therefore, apply to the stay of a

person who has permanent abode elsewhere and who merely comes to stay at a particular place for the purpose of filing a suit under the Act, with the intention of returning to its permanent abode on the conclusion of litigation.

7. It is wrong to treat the word 'reside' as equivalent to something in the nature of hearing a domicile in a particular place, or having a place, as one's place of origin, or the place where one's family used to live. 'To reside' means to live or to have a dwelling-place or abode. 'Reside' implies something more than a brief or flying visit. It is by no means free from ambiguity as the word is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. 'Residence' has a connotation in law. Though a casual residence is also residence in a way, such transitory residence is not meant to be included within the purview of residence in law, unless a particular context justifies its inclusion. The residence must answer a qualitative as well as quantitative test and the two elements of factum at animus must concur. (Vide *Smt. Satya v. Teja Singh*, AIR 1975 SC 105). In *Jagir Kaur v. Jaswant Singh*, AIR 1963 SC 1521, it was observed that the term 'resides' does not mean only domicile in the technical sense of that word. The term means more than a flying visit or a casual stay in a particular place. There should be animus manendi or an intention to stay for a period, the length of the period demanding upon facts of each case. A person resides in a place if he through choice makes it his abode permanently or even temporarily. Whether a person has chosen a particular place, his abode depends upon the facts of each case. What is important therefore to see in a given case is whether by choice a particular place is made an abode permanently or even temporarily, the casual stay excluded. If there is an animus revertendi, his temporary stay at another place, however long, will not have the effect of changing one's own permanent residence at the original place. Facts and circumstances of such case must be looked into to ascertain whether a person can be said to ordinarily reside at a given place. A permanent residence is the place where a person is expected to be ordinarily found. The place where mere physical presence is found may not necessarily be the place where he ordinarily resides. The expression acceptable attributes of the expression 'resides' in context like this are to make an abode for a considerable time; to dwell permanently or for a length of time; or to have a settled abode for a time etc. (Vide *Jaswanti v. Kishan*

Chandra, AIR 1982 SC 3). It is further observed in the said decision that residence is the place where a person has fixed a home or abode. In order to give jurisdiction on the ground of residence something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the Court in which the respondent is sued, is his natural Forum. It is true that the place of residence at the time of filing of the application under the Act is not decisive to ascertain the place of ordinary residence, as it would be easy to move the minor children from one place to another and from one jurisdiction to another. The expression 'ordinarily resides' connote a regularly settled home and not a place of stay where the children are obliged to dwell by force of circumstances or compulsion of parent's employment. [See Chandy v. Mary Baneesa, (1988) Ker. LT 611 (613) (Ker.)]. A person resides in a place, if he, through choice, makes it his abode permanently, or temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case. (Lalithamma v. R. Kannan, AIR 1966 Mys. 178]. The word 'residence' to which Act points must be something more than occupation during occasional, casual visits within the local limits of the Court, more specially where there is residence outside these limits marked with a considerable measure of continuance. A mere casual visit to a place with no intention of dwelling there by a husband and a wife who have a fixed place of residence elsewhere will not amount to residence in that place within the meaning of Section 3 of the Act, [See S. Singh v. Smt. Jyotsana Singh, AIR 1982 MP 122 (FB)]. Question of residence is largely a question of intention.

Understood in its primary and ordinary sense, the term 'residence' cannot be used in relation to any person other than a natural person, for 'residence' is essentially a condition applicable to men and the tests for its determination such as living, and sleeping, can have no counterpart in an abstract entity such as an incorporated Company which can neither live nor sleep. [See State of Kerala v. Akhila Kerala Vala Samudaya Samiti, 1979 Ker. LT 1 (FB)].

8. From Section 23 of the Act, it is clear that an application for judicial separation can be made by either husband or wife before either District Court or High Court. So far as High Court is concerned, in terms of Section 3, it is the High Court for the area where husband and wife reside or last resided together. So far as District

Court is concerned, it relates to Court of District Judge within local limits of whose original jurisdiction or of whose jurisdiction under the Act, husband and wife reside or last resided together. As indicated above, the expression 'last resided together' refers to the place where both of them resided together. It can be either of two places i.e. (i) where husband and wife reside, or (ii) where they last resided together. So far as High Court is concerned, by way of illustration, it may be stated that suppose husband and wife reside within the State of Orissa. High Court for the State of Orissa will have jurisdiction to entertain an application. Supposing husband and wife last resided together at a place within the territorial jurisdiction of the Calcutta High Court, said High Court shall also have jurisdiction. So far as District Court is concerned, if husband and wife reside in different districts, or have not resided together in any district, the petition cannot be filed in any District Court. In order to invoke territorial jurisdiction of the District Court to entertain the . petition, it must be established that either the husband and wife still reside or had resided together within the limits of territorial jurisdiction of the said Court.

9. With reference to the pleadings, learned Counsel for petitioner stated that in paragraphs 2, 5 and 32 it has been stated as follows :

'2. That from her said marriage your petitioner lived and cohabited with her said husband at Bhubaneswar (where he has his permanent residence) and at Hyderabad, Delhi and Bombay (where he was posted being in Government service) until the twenty fifth day of October one thousand nine hundred and ninety three, when your petitioner was made to sleep separately by her husband. Your petitioner separated from her husband on the eighth day of January one thousand ninety five, as hereinafter more particularly mentioned. Your petitioner and her said husband have had two issues of their said marriage, the first issue, a daughter was born on the fifth day of November of one thousand nine hundred and eighty eight and the second issue, a son was born on the tenth day of February one thousand nine hundred and ninety one.

xxx xxx xxx xxx xxx xxx5. That just after the marriage, your petitioner and her husband stayed in the matrimonial home at Bhubaneswar where the marriage was consummated. After expiry of his leave, the respondent went to Hyderabad leaving

your petitioner in his home at Bhubaneswar. The respondent, his mother and brothers started misbehaving and harassing her for not bringing dowry to their expectations although her father was an Executive Engineer of the State Government.

xxx xxx xxx xxx xxx xxx³². That this Hon'ble Court has jurisdiction to entertain this petition as the petitioner and the respondent were residing at Bhubaneswar where they had their permanent matrimonial home and during their stay at the places of posting of the respondent, they used to come and stay at Bhubaneswar at least twice every year during the Christmas and summer and as on the date of presentation of this petition, the petitioner is staying at Cuttack and the respondent has his permanent home at Bhubaneswar within the territorial jurisdiction of this Hon'ble Court.'

Case of respondent is that he does not reside within the jurisdiction of this Court. That would need a factual adjudication, as there is dispute on that aspect. It is pointed out by learned Counsel for plaintiff that earlier withdrawal was sought for in the suit as plaintiff and respondent do not reside within the jurisdiction of one District Court. Plaintiff resides at Cuttack and permanent residence of the respondent is at Bhubaneswar.

10. It is significant that position vis-a-vis High Court and District Court is different. Parties may be residing in different districts, but if the High Court is the same, then it would have jurisdiction. It would be different in case of District Courts, as the parties may not be residing in the same district.

11. In view of the analysis of legal position as made above, I feel it would not be proper to throw out the suit on the ground of lack of jurisdiction without factual aspects being brought on record and adjudicated. It goes without saying that question whether this Court has jurisdiction shall be adjudicated on consideration of factual aspects after evidence is led. The matter shall be adjudicated in the suit itself on consideration of materials to be brought on record.

Ordered accordingly. No costs.

