

**Manjari Sen Vs. Nirupam Sen**

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**Court :** Delhi

**Decided On :** Oct-03-1973

**Reported in :** AIR1975Delhi42

**Judge :** S.N. Andley, C.J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Sections 22 and 23(3)

**Appeal No. :** C.M. (M) No. 217 of 1973

**Appellant :** Manjari Sen

**Respondent :** Nirupam Sen

**Advocate for Def. :** S.L. Bhatia, Adv.

**Advocate for Pet/Ap. :** Basudeva Prasad, Sr. Adv. and ; Ashok Grover, Adv

**Judgement :**

ORDER

1. By this Petition under sub-section (3) of Section 23 of the Code of Civil Procedure, the petitioner prays that the petition (Hindu Marriage Act case No. 184 of 1973) filed by the respondent and pending in the Court of the District Judge, Delhi within the jurisdiction of this High Court be transferred to the Court of the District Judge, Patna, within the jurisdiction of the Patna High Court. The respondent is the husband and the petitioner is his wife. The aforesaid petition has

been filed by the respondent under Section 10 of the Hindu Marriage Act, 1955 for a decree of -judicial separation Primarily on the ground of mental cruelty.

2. The Parties were married at Patna on February 4. 1971. After the marriage the Petitioner lived with the respondent at Delhi for about twenty days when she went back to Patna but returned to Delhi in or about May 1971 and stayed here Up to about July 1971. She again went back to Patna in July, 1971 to join her college and she remained there till about March, 1972. Then she came back to Delhi where the parties staved together till about the middle of July, 1972 when they left for Moscow where the respondent was posted. But the petitioner returned to India in or about the middle of November, 1972. It is not disputed by the petitioner that since July 1973, the petitioner is living at Delhi where she is studying in a local college.

3. The respondent filed the aforesaid petition in the Court of the District Judge. Delhi on 29, 1973. Shortly thereafter, on May 16, 1973. the petitioner filed the petition against the respondent in the Court of the District Judge, Patna, under Section 10 of the Hindu Marriage Act. 1955 in her turn alleging mental cruelty against respondent and Praying for a decree for judicial separation.

4. The Petition before me was filed in this Court on August 8, 1973. It may also be stated that the respondent has filed an application under Section 10 of the Code of Civil Procedure in the Court of the District Judge, Patna for stay of proceedings in the petition filed by the Petitioner for judicial separation in that Court. The allegations made by the petitioner in the Petition filed by her at Patna have been raised by her in the additional pleas to the written statement which she has filed in the Court of the District Judge, Delhi in answer to the petition filed by the respondent.

5. The main contention on behalf of the petitioner is that a conflict of decisions by two Courts should be avoided, and, therefore, it is desirable that the matter is decided only in the Court of the District Judge, Patna as the balance of convenience is also in favor of the trial b6ing held at Patna even though the petitioner filed her petition for judicial , after the respondent has filed his Petition for judicial separation. It is also contended that the District Judge, Delhi, is biased

in favor of the respondent.

6. On behalf of the respondent one preliminary objection which has been raised is that the petitioner had challenged the jurisdiction of the District Judge, Delhi to try the respondent's petition which was dismissed but against which the Petitioner has filed a revision which is pending in this Court. It is therefore, contended that the petitioner cannot invoke sub-section (3) of Section 23 of the 'Code which can be invoked only if jurisdiction of the Courts at both the places is admitted. This preliminary objection need not detain me because Mr. Basudeva Prasad, learned counsel for the Petitioner, has stated at the bar before me that the aforesaid revision is not going to be pressed.

7. The other preliminary objection raised by the respondent is that a petition under sub-section (3) of Section 23 of the Code can be filed only after notice of an intended petition under Section 22 of the Code has been given by the defendant to the other Parties to the case. It is stated that no such notice was given and the requirement of notice being mandatory. The petition must fail on this ground as being incompetent and premature. This Preliminary objection has not been taken in the written statement filed by the respondent to the petition filed by the petitioner in this Court but it has been taken in Civil Miscellaneous No. 1189 of 1973 which was filed by the respondent Praying for the dismissal of the Main Petition filed by the petitioner. If the fact of notice not having been given had been disputed by the petitioner it may have become necessary to obtain further affidavits but Mr. Basudeva Prasad has fairly stated that such notice was not given. But he contends that the requirement of notice is not mandatory but only directory.

8. Now, Section 22 of the Code is in these terms:-

'Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant after notice to the other parties, may at the earliest possible opportunity and in all cases where issues are settled at or before such settlement apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.'

Broadway, J. in *Gulab Chand v. Sher Singh*, Air 1916 Lah 95 and *Tek Chand, J. in Edulji Dinshaw v. Dhanpat Mal Bhagwan Das*, Air 1928 Lah 183 have undoubtedly held that the words, after notice to the other parties' clearly indicate that this notice must be given prior to the making of the application and that a notice of the application issued by the Court to which the application is made is not what was intended. In other words, these learned Judges have expressed the view that the giving of a notice prior to the filing of the application under sub-section (3) of Section 23 of the Code is mandatory. On the other hand, a Division Bench of the Allahabad High Court in *Mt. Basanti Devi v. Mt. Sahgdra.* : AIR1935 All979 has observed, after noticing the judgment of *Tek Chand, J. (supra)*, that although the section contemplates the giving of a notice Prior to the application and such a notice should as a rule be given, yet there is no indication that the failure to give such notice is fatal to the application. The learned Judges have also expressed the view that the failure at an earlier stage to give notice was cured by the issue of a notice on the application itself because the object seems to be that an order for transfer should not be Passed without hearing the other side and that the other side should not in any way be Prejudiced. Now, as has been said repeatedly procedure is a hand-maid of justice. One of the principles of justice is that no order should be made-at the back of the Party who is likely to be affected by the order. If, therefore, an application is made under sub-section (3) of Section 23 of the Code without giving prior notice but notice of the application itself is given by the Court and no order is made by the Court to the prejudice of the other party without notice, justice would have been done. Prior notice does not appear to serve much of a purpose except to say that no order should be made without hearing the parties, who are likely to be affected by it. The requirement of prior notice cannot, therefore, be mandatory because a provision would be mandatory only if non-compliance with it results in a specified consequence. therefore, in my view, the view Liken by the learned Judges of the Allahabad High Court in the cited case is to be preferred to the view of the Lahore High Court. The language of sub-section (3) of Section 23 of the Code may be contrasted with language of Section 80 of the Code which prohibits the institution of a suit against the Government or against a Public officer until the expiration of two months next after notice. Here the language indicates that unless a notice is given under Section 80 and until two

months expire thereafter the suit will be incompetent. This language is in terms mandatory in contrast to the language used in sub-section (3) of Section 23 of the Code. In my view, this Preliminary objection on behalf of the respondent has no force.

9. Then I come to the merits. Neither Section 22 nor Section 23 of the Code lays down the circumstances in which an order of transfer may be made but one of the essential conditions must be the balance of convenience and the desirability of having one adjudication of a particular controversy.

10. Let me first take up the question of balance of convenience and state the facts in relation thereto. It is contended on behalf of the respondent that this question must be decided in the background of the Principle that a plaintiff is the arbiter litis. In my view, this principle is of no application in a situation where two different actions have been filed in two Courts having jurisdiction because each Plaintiff will be the arbiter in relation to his action. It is for this reason that the cases cited by the respondent namely, will have no application because these were all cases where the action was Pending only in one Court. But even in these cases it has been held that the balance of convenience has to be looked at to determine whether a case should be transferred or not.

11. On the question of balance of convenience it has been contended on behalf of the Petitioner that she is a Student in the college and has no means of her own and that she will have to Produce witnesses belonging to Patna at Delhi to meet some of the allegations which have been made by the respondent in his Petition. In the rejoinder to the petition, the petitioner has set out about 12 sets of witnesses who are mostly her relations whereas the respondent has filed a list of 28 witnesses who are alleged to belong to Delhi. To state shortly, the allegations of mental cruelty alleged by the respondent in his petition relate mostly to Delhi and Moscow where the parties resided after the marriage and the only allegation of mental cruelty which took Place at Patna Pertains to two or three dabs of the marriage there. It is true that the petitioner will have to meet these allegations also but the allegations of mental cruelty at the time of marriage are not wholly relevant to the question of judicial separation even though the respondent has deposed

about them in his statement before the District Judge, Delhi, which has been recorded under orders of this Court in view of his Pending departure for Moscow. The preponderance of allegations as to mental cruelty pertain to Delhi and Moscow and it is difficult to lose sight of the fact that the majority of the witnesses belong to Delhi and it will not by any stretch of imagination be convenient to have their statements recorded in Patna. So far as the question of lack of earning capacity of the petitioner and the strain on herself of bringing her witnesses to Delhi is concerned, the relative inconvenience to her can be diminished to a considerable extent either by having the statements of her witnesses recorded on commission at Patna or by the District Judge, Delhi, making adequate Provision for litigation expenses to be given by the respondent to the petitioner on her application. The material facts as to mental cruelty occurred, according to the respondent in Delhi and in my view, the balance of convenience is clearly in favor of the respondent Particularly taking into consideration the fact that the Petitioner is admittedly studying at Delhi.

12. Then it is contended on behalf of the Petitioner that if both the proceedings proceed simultaneously in both the Courts, there is likelihood of a conflict of decisions which must be avoided and reliance is Placed upon the observations in *Purna Chandra v. Samanta Radhaprasana Das*, : AIR1953 Ori46 to the effect that where there are two suits which raise certain questions of fact and law, having a substantial bearing on decision of each of the cases, it is obviously desirable that they should be tried at the same place and by the same judge in order to avoid multiplicity in the trial of the same issues and conflict of decisions. But even according to this decision, when such a situation arises, the Court has to consider balance of convenience having regard to the circumstances of the two suits. Now, the mental cruelty, which is alleged by the petitioner against the respondent could not have taken place in Patna and must be either in Delhi or Moscow where the Parties resided together. therefore, even if such a question were to arise in so far as the Patna petition is concerned, it will not be possible to save that the balance of convenience is in the trial being held at Patna.

13. It is then urged by the counsel for the petitioner that no petition for transfer of the Patna petition filed by the petitioner has been filed by the respondent there

land, there is likelihood of a conflict of decisions. At the same time the fact remains that respondent has applied under Section 10 of the Code to the District Judge, Patna. for stay of the Patna petition. I am not going into the question whether this Petition for stay is competent or not because this is a matter for decision by the District Judge, Patna and anything I say is likely to embarrass him in the decision thereof. Assuming, however that the petition for stay is dismissed, the respondent might very well apply to the Patna High Court for transfer of the Matrimonial Petition filed by the Petitioner in Patna to the Court of the District Judge, Delhi, under sub-section (3) of Section 23.

14. There is another aspect of this question. Admittedly, the respondent filed his Petition first and I am not at all certain from a Perusal of the notions in the file of the District Judge, Delhi, which is before me, that the petitioner did not file her Petition in Patna after knowing of the petition filed by the respondent at Delhi. In any case the Petitioner's petition was filed later in point of time. Being so the petitioner cannot take advantage of a fact created by herself to say that inasmuch as there is going to be likelihood of a conflict of decisions if the two -petitions are tried separately, it is only her petition that should be tried and the petition filed by the respondent at Delhi should be transferred to Patna. I am thereforee, of the view that the balance of convenience is in favor of a trial at Delhi and in continuance of the petition filed by the respondent at Delhi.

15. So far as the bias of the District Judge, Delhi, is concerned, the allegation is that the District Judge. Delhi, appears to have been influenced by the father of the respondent who is the Director of the Central Bureau of Investigation at New Delhi. I do not think this allegation is justified at all. It is urged that by reason of such influence, the District Judge, Delhi, is pressurising the Petitioner and is trying to expedite the matter which is likely to cause her prejudice. I have gone through the record of the case before the District Judge. Delhi. It appears that after the respondent's petition was filed notices were ordered to be issued to the Petitioner for April 28, 1973. Notice of the petition was sent to the Petitioner under registered cover. The acknowledgement due receipt of this cover does not bear the signatures of the petitioner and. thereforee, when the matter came up before the District Judge. Delhi, on April 28, 1973, he ordered the issue of fresh notices to the

petitioner for May 19, 1973 as he must have been of the opinion that such service was not sufficient. He also ordered the issue a fresh notices to her Dusty in the ordinary manner. It is urged that service upon the Petitioner was not effected in the normal way but as it happened. the petitioner appeared, in the Court of District Judge, Delhi, on May 19, 1973 through her counsel and asked for a cop of the Petition which was given to her and the matter was adjourned to July 12, 1973 for filing of written statement. Before the next date of hearing, the-petitioner filed an application under Section 21 of the Code on June 4, 1973 challenging the territorial jurisdiction of the Court. Notice of this application was ordered to issue to the respondent for July 12, 1973 which was the date already fixed. The petitioner did not file her written statement when the matter came up before the District Judge of Delhi on July 12, 1973 but requested that the question of jurisdiction mad be decided first. The District Judge has recorded the respondent's application that he had come from Moscow for the hearing and the Proceedings in the case be expedited. thereforee, the District Judge adjourned the Petition to July 21, 1973 on which date, he also asked the petitioner to be present to record her statement as to the place where the parties last resided in India as the allegations in this behalf had not been admitted by her in her application. The matter was again adjourned to July 28, 1973 on which date an issue was framed as to the territorial jurisdiction of the Court and the petition was adjourned to August 4, 1973 on which date the question of jurisdiction was decided in favor of the respondent. Then the Petitioner filed, the Present petition in this Court. I have gone through the order-sheet of the District Judge, Delhi, and in my view, the allegation of bias or hurry on his Dart is absolutely unjustified.

16. For these reasons, I dismiss this Petition but in view of the fact that the Parties are married. I do not make any order as to costs. Let the file of the District Judge, Delhi, be sent to him at once.

17. Petition dismissed.