SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Jency Vs. Biju Thomas

Jency Vs. Biju Thomas

SooperKanoon Citation : sooperkanoon.com/728792

Court : Kerala

Decided On : Sep-22-2005

Reported in : I(2006)DMC189; 2005(4)KLT766

Judge : K.T. Sankaran, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 22, 23, 23(3), 24, 24(1) and 25; ;Divorce Act, 1869; - Sections 3(3) and 10; ;Family Courts Act, 1984 - Sections 7(1); ;Family Courts Rules

Appeal No. : Tr. P(C) No. 160 of 2004

Appellant : Jency

Respondent : Biju Thomas

Advocate for Def. : P. Gopakumaran Nair and; C.S. Dias, Advs.

Advocate for Pet/Ap. : K.B. Pradeep, Adv.

Judgement :
ORDER

K.T. Sankaran, J.

1. The petitioner, who is the wife of the respondent, prays for a transfer of O.P.No. 754 of 2004 pending before the Family Court, Ernakulam to the Principal Family

Court, Chennai. The Transfer Petition is filed under Section 24 of the Code of Civil Procedure. Though Sections 22 and 23 are mentioned in the Tr.P.C., these sections are seen struck off. The O.P. was filed by the respondent for dissolution of marriage.

2. The material facts are not in dispute, though these facts are not stated either in the Transfer Petition or in the counter filed by the respondent. Counsel appearing for both sides submitted that the marriage between the petitioner and the respondent was solemnized at Ernakulam, within the jurisdiction of the Family Court, Ernakulam. It is also submitted that the petitioner and the respondent were residing together in Dubai for quite sometime. It is averred in the O.P. for dissolution of marriage filed by the respondent that the parties last resided together at Ernakulam. This averment is not denied in the Transfer Petition. The petitioner in the Transfer Petition has not filed any objections in the O.P. pending before the Family Court, Ernakulam. Counsel for the petitioner submitted that the averment in the O.P. that the parties last resided together at Ernakulam is not correct and that they last resided together in Dubai. Since no such averment is available anywhere in the pleadings, it is to be taken for the purpose of this Transfer Petition that the parties last resided together at Ernakulam. This will not preclude the petitioner from raising any objection on that aspect before the Family Court.

3. Section 24 of the C.P.C. does not apply at all to the facts of the case. By exercising power under Section 24, this Court can transfer a suit, appeal or proceedings only to a court subordinate to this Court. A suit or proceedings cannot be transferred to a Court outside the State by exercising jurisdiction under Section 24 of the C.P.C. Under Clause (a) of Sub-section (1) of Section 24 of the C.P.C., this Court can transfer any suit, appeal or other proceeding pending before it to any Court subordinate to it and competent to try and dispose of the same. Under Clause (b) of Sub-section (1) of Section 24, a High Court can withdraw any suit, appeal or other proceedings pending in any subordinate court and either dispose it of or transfer it to any Court subordinate to the High Court or re-transfer the same to the Court from which it was withdrawn. Sub-section (1) of Section 24 does not apply at all in the case of transfer of a suit, appeal or other proceedings from a

Court subordinate to a High Court to another Court within the jurisdiction of another High Court.

4. Counsel for the petitioner contended that the Transfer Petition is maintainable under Section 23(3) of C.P.C. In order to apply Section 23, the ingredients of Section 22 should be satisfied. Sections 22 and 23 read as follows:

'22. Power to transfer suits which may be instituted in more than one Court: -- 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.

'23. To what Court application lies:--

(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under Section 22 shall be made to the Appellate court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(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 Courts in which the suit is brought is situate.'

The ingredient to be satisfied under Section 22 of C.P.C. is that the suit may be instituted in any one of two or more Courts. In the case on hand, from the facts stated above, it cannot be said that the Family Court at Chennai has jurisdiction to try the O.P. filed by the respondent. Under Section 23(3), an application for transfer is maintainable before a High Court even where the proposed transferee court is subordinate to another High Court. The contention raised by the respondent is that only Section 25 of the C.P.C. will apply and that the remedy of

the petitioner, if any, is to move the Honourable Supreme Court. I do not agree with this contention at all. If the petition for divorce could be filed either before the Family Court, Chennai or before the Family Court, Ernakulam, definitely this Court, exercising the jurisdiction under Section 23(3) C.P.C., could transfer the case from the Family Court, Ernakulam to the Family Court at Chennai. In the decision, reported in 1958 KLT 1118 - Sadayandi Nadar v. Venugopala Chetty this Court held that the High Court has jurisdiction to transfer a suit pending in a court subordinate to it, to a court subordinate to another High Court. In that decision, this Court followed the decisions reported in AIR 1940 Nagpur 145 and AIR 1920 Patna 138. Earlier, a contrary view was taken by the Nagpur High Court in the decision reported in AIR 1916 Nagpur 31 and it was overruled in the decision in AIR 1940 Nagpur 145. In an unreported case, in C.M.C. 10 of 1996, this Court held that Section 23(3) C.P.C. can be applied to transfer a case pending in a court subordinate to this Court, to a court subordinate to the High Court of Madras. It was held thus:

'But a reading of Section 23 will show that it has no independent existence. An application under Section 23 must therefore, fulfil the conditions mentioned in Section 22 of the C.P.C. Sections 22 and 23 are complimentary to each other. Section 22 confer a person to apply for transfer subject to conditions mentioned in Section 22 and Section 23 specifies the Court to which the application should be made.'

5. The order in C.M.C. 10 of 1996 was confirmed in appeal, M.F.A. 1330/1996.

Therefore, I hold that if ingredients of Section 22 are satisfied, this Court can definitely entertain an application for transfer of the case from the Family Court, Ernakulam to the Family Court, Chennai. But from the facts, as available now, it cannot be said that the Family Court, Chennai has jurisdiction to try the case. Section 3(3) of the Divorce Act, 1869 defines the District Court as follows:

' '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 marriage was solemnized or), the husband and wife, reside or last resided together.'

Going by Section 3(3), a petition before the District Court can be maintained only if any of the following three conditions are satisfied:

a) that the marriage was solemnized within the local limits of ordinary jurisdiction of the District Court or of whose jurisdiction under the Divorce Act the marriage was solemnized; or

b) the husband and wife reside within that jurisdiction; or

c) the husband and wife last resided together within that jurisdiction.

6. As stated earlier, none of these ingredients are made out from the facts available as of now. Section 7(1) of the Family Courts Act, 1984 provides that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any District Court or any Subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation. The parties are governed by the Divorce Act. Therefore a Family Court which could entertain a petition for divorce under Section 10 of the Divorce Act must satisfy the requirements of the jurisdictional aspects provided under Section 3(3) of the Divorce Act. Section 7(1)(b) of the Family Courts Act provides that a Family Court shall be deemed, for the purpose of exercising such jurisdiction under the law mentioned in Clause (a), to be a District Court or, as the case may be, such Subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. Section 10 of the Family Courts Act provides that subject to the other provisions of the Act and the Rules, the provisions of the Code of Civil Procedure shall apply to the suits and proceedings before a Family Court. Therefore, if the ingredients of Section 23(3) read with Section 22 of C.P.C. are satisfied, certainly this Court can transfer a petition pending before any Family Court within the jurisdiction of this Court to any Family Court subordinate to any other High Court having jurisdiction. But the petitioner has not established that any other Family court subordinate to any other High Court has jurisdiction. Therefore, the petitioner cannot be granted the reliefs as provided under Section 23(3) of the C.P.C. The Transfer Petition fails and the prayer for the transfer is rejected.

7. However, taking into account the fact that the petitioner is residing at Chennai with her mother and child aged only three years, it is only just and proper, if the Family Court considers a request for examining her on Commission at Chennai.

The Transfer Petition is disposed of as above.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com