

Thomas Vs. Sunnichan

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SooperKanoon Citation : sooperkanoon.com/731603

Court : Kerala

Decided On : Dec-15-2003

Reported in : 2004(2)KLT420

Judge : K.K. Denesan, J.

Acts : [Family Courts Act, 1984](#) - Sections 7 and 7(1); Code of Civil Procedure (CPC) - Sections 9, 19, 20, 24 and 24(1)

Appeal No. : T.R.P. (C) No. 51 of 2003

Appellant : Thomas

Respondent : Sunnichan

Advocate for Def. : Mathew Philip Edappallil, Adv.

Advocate for Pet/Ap. : V. Philip Mathew, Adv.

Judgement :

ORDER

K.K. Denesan, J.

1. This Transfer Petition is filed to transfer O.P. (Divorce) No. 73 of 2003 pending before the Family Court, Kottayam at Ettumanoor to the Family Court, Pathanamthitta at Thiruvalla to be tried along with O.P. No. 944 of 2003.

2. O.P. (Divorce) No. 73 of 2003 was filed before the Family Court, Kottayam by the 1st respondent herein who is the husband of the petitioner's daughter Shiji @ Shija aged 3.1 years. The 2nd respondent herein is the father of the 1st respondent. It is for a declaration that his marriage with the petitioner's daughter is a nullity on the ground that the above named Shiji @ Shija is an idiot.

3. O.P. No. 944 of 2003 was filed by the petitioner herein and his daughter Shiji @ Shija before the Family Court, Pathanamthitta at Thiruvalla praying for return of patrimony and compensation from the respondents. The Family Court, Thiruvalla, has passed an order of attachment before Judgment against the respondents. The respondents have taken a preliminary objection before that Court contending that it has no jurisdiction to entertain the O.P. filed by the petitioner and his daughter.

4. According to the petitioner, the following facts are relevant for a just and proper disposal of this Transfer Petition. Shiji @ Shija has given birth to a child. The said minor child born in the wedlock between herself and the first respondent is only 8 months old. The mother as well as the minor child got infected with jaundice and they are undergoing treatment. Due to ill health, Shiji @ Shija is not able to travel to Ettumanoor in Kottayam District where O.P. (Divorce) No. 73 of 2003 is pending. Family Court at Ettumanoor is 40 kms. away from Mundiypally where the petitioner, his daughter Shiji @ Shija and the small baby reside whereas Family Court, Thiruvalla is just 10 kms. away from Mundiypally. The first respondent is residing at Veroor in Vazhapally Village, Changanacherry Taluk. The distance between the residence of the respondents and the Family Court, Thiruvalla is less than 15 kms. whereas the distance between Family Court, Kottayam at Ettumanoor and the residence of the respondents is more than 30 kms. It is therefore stated that the Family Court, Pathanamthitta at Thiruvalla is the court convenient for both the parties. According to the petitioner Shiji @ Shija and the 1st respondent last resided together in the petitioner's house at Mundiypally. Hence the said court has got jurisdiction to try the case filed by the petitioner and his daughter.

5. Respondents, in the counter-affidavit filed before this court, opposed the prayer for transfer of O.P. (Divorce) No. 73 of 2003 pending before the Family Court,

Kottayam at Ettumanoor to the Family Court, Pathanamthitta at Thiruvalla on the - ground that the Family Court at Thiruvalla lacks territorial jurisdiction to entertain as also try and dispose of cases relating to the matrimonial dispute between the petitioner and the respondents. Respondents have already raised a preliminary objection before the Family Court, Pathanamthitta at Thiruvalla on the question of jurisdiction in O.P. No. 944 of 2003 filed by the petitioner herein and his daughter claiming patrimony and other sums from the respondents. The marriage between the petitioner's daughter and the 1st respondent is admitted in the counter-affidavit. The fact that a child was born in the wedlock is also admitted. However, averments regarding jaundice is-not admitted. According to the respondents, O.P. No. 944 of 2003 has to be treated as a suit for money and since the alleged transactions took place within the territorial limits of the Family Court, Kottayam at Ettumanoor, proceedings before the Family Court at Thiruvalla are hit by Section 20 of the Civil Procedure Code. According to the respondents they are neither residing within the territorial limits of the Family Court at Thiruvalla nor the cause of action either wholly or in part has arisen within the jurisdiction of that court. The above transfer petition has been filed by the petitioner to get over the objection raised by the respondents regarding jurisdiction for the Family Court at Thiruvalla to try and dispose of O.P. No. 944 of 2003. Respondents would further submit that the only court having jurisdiction to proceed with the petition filed seeking a declaration that the marriage is a nullity, is the Family Court, Kottayam at Ettumanoor because the marriage was solemnised in 'St Joseph's Church, Veroor, Changanacherry in Kottayam District.

6. Shri Mathew Philip, learned Counsel for the respondents contended that under Section 7(1)(b) of the [Family Courts Act, 1984](#) a place where a petition has to be filed for a settlement of the matrimonial dispute is the place where a suit could have been filed under Section 20 of the C.P.C. ,

7. Shri V. Philip Mathews, learned Counsel for the petitioner submitted that the contention of the respondents giving over emphasis to the issue of territorial jurisdiction of the two Family Courts must pale into insignificance in a case where one of the parties to the dispute has invoked the jurisdiction of this Court under Section 24 of the C.P.C. Learned Counsel argued that this Court has got ample

power to withdraw any suit, appeal or other proceeding pending in any Court subordinate to it; and (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn. Learned Counsel submitted that having regard to the totality of the facts and circumstances obtaining in the two cases and looking at the overall view of the nature of the disputes between the parties and convenience of the parties it would be just and reasonable to direct transfer of O.P. (Divorce) No. 73 of 2003 from the Family Court at Ettumanoor to the Family Court at Thiruvalla. It was contended that the proceedings pending before the Family Court at Thiruvalla at the instance of the petitioner and his daughter should not be simply treated as a suit for money forgetting or ignoring the fact that a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them is a matter falling within the competence of the Family Court under Clause (c) of Explanation to Sub-clause (1) of Section 7 of the [Family Courts Act, 1984](#).

8. Shri V. Philip Mathews cited several decisions of the Supreme Court to canvas for the proposition that inconvenience and hardships suffered by the female spouse, while prosecuting or defending a proceeding under the Family Courts Act, were given due consideration and cases have been ordered to be transferred to a place nearer to the place of residence of the wife or a place more convenient to her. Decisions of the Apex Court in *Deepa v. Anil Panicker*, (2000) 9 SCC 441, *Theja V. Nagarjuna v. V. Nagarjuna*, (2000) 9 SCC 453, *B.S. Jayashree v. Ashok R. Kamble*, (2000) 10 SCC 172, *Annamma Abraham (Sherly) v. Abraham Jacob*, (2000) 10 SCC 275, *Gana Saraswathi v. H. Raghu Prasad*, (2000) 10 SCC 277, *Geeta Heera v. Harish Chander Heera*, (2000) 10 SCC 304, *Archana Rastogi v. Rakesh Rastogi*, (2000) 10 SCC 350, *Gurmeet Kaur v. B. Balkar Singh*, (2000) 10 SCC 354, *Sumita Singh v. Kumar Sanjay and Anr.*, (2001) 10 SCC 41, *Sumita Singh v. Kumar Sanjay*, AIR 2002 SC 396, *Usha v. Palisetty Mohan Rao*, AIR 2002 SC 400, *Varsha Paresh Shah v. Paresh H. Shah*, (2002) 10 SCC 81, *Leena Mukherjee v. Rabi Shanker Mukherjee*, (2002) 10 SCC 480, *Datla Padmavathi Devi v. Datla Ravindra Rayapuraju Verma*, (2002) 10 SCC 500, and *Reena Mehra v. Rohit Rai Mehra and Anr.*, (2003) 2 SCC 291, were cited. He also cited the decision of this Court in *Pappammal v. Bhagavathy Appan*, 1984 KLT 916.

9. Having heard the submissions made by the learned Counsel on either side and having considered the averments in the Transfer Petition and the counter-affidavit filed by the respondents, I am of the view that the petitioner cannot be refused the relief prayed for in Transfer Petition on the basis of the objection raised regarding the territorial jurisdiction of the Family Court, Pathanamthitta. The fact that the Family Courts constituted under the [Family Courts Act, 1984](#) are competent to try and dispose of suits or proceedings between the parties to a marriage for a Decree of nullity of marriage as also suits or proceedings between them with respect to the property of one of the parties or of either of them cannot be disputed.

10. Section 24 of the C.P.C. confers power on the High Court to withdraw any suit, appeal or other proceeding pending in any court subordinate to it, and transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same. There is no dispute about the fact that both the Family Courts are subordinate to this Court. The dispute is with regard to the competency of the Family Court, Pathanamthitta at Thiruvalla to try the matter on the basis of the territorial limits prescribed. Even assuming that under Section 19 or 20 of the C.P.C. the Family Court at Thiruvalla does not have the territorial jurisdiction to try and dispose of the proceedings, it is within the powers of this Court to authorise the Family Court at Thiruvalla to try and dispose of the said proceedings by an order issued under Section 24 of the C.P.C. because, the said court does not lack competency in any other respects. The expression 'any court competent to try or dispose of in Section 24(1)(b)(ii) should be understood to mean a court which has got the power to try and dispose of suits or proceedings involving disputes of the nature referred to in Section 7 of the Family Courts Act as also Section 9 of the C.P.C. The word 'competent' used in Section 24 of the C.P.C. should be understood in the context in which it is used and the purpose for which the said power is conferred. It should be interpreted and understood in a manner not to nullify the very purpose and object of the said section. Hence it has to be held that the word 'competent' in Section 24 of C.P.C. does not refer to territorial jurisdiction.

11 . In Pappammal v. Bhagavathy Appan, 1984 KLT 916, this Court held that the contention that the transferee court has no jurisdiction at all, would not be a

serious impediment in ordering the transfer and that as a general principle, it was fairly settled that the plea that the transferee court has no jurisdiction to try the suit would not bar the High Court in exercising the power of transfer. In that case, the learned Judge (Sukumaran, J.) took the view that merely because there is a dispute regarding jurisdiction, the High Court is not rendered powerless in effecting a transfer, when the transfer is otherwise justified.

12. In my view when the transfer sought for is justified, relief cannot be refused to the applicant, even if the transferee court has no territorial jurisdiction to try the suit or proceeding. Of course, the consideration will be different, if it is shown that there is a patent or inherent lack of jurisdiction for the transferee court to try the suit or proceeding. Such an interpretation is necessitated, in my view, for effectuating the power conferred under Section 24 of the C.P.C. I think this is the only view this Court can take, following the decision of the Supreme Court in *Usha v. Palisetty Mohan Rao*, AIR 2002 S.C. 400. It was a case where a Transfer Petition was filed before the Supreme Court invoking the power of the apex court under Article 139-A of the Constitution seeking a transfer of the proceedings pending before the Family Court-cum-V Additional District Judge at Visakhapatnam for transfer to the Family Court at Mysore. The apex court in answer to the contention of the Counsel for the respondents in that case that it would not be appropriate to transfer the case to a court which has no jurisdiction under the Hindu Marriage Act held as follows:

'The powers that are exercised by this Court are not under the Hindu Marriage Act but altogether under different provisions of law. If the arguments raised by the learned Counsel is to be accepted then no transfer of any case can be made inasmuch as the matter would have been filed in a Court having jurisdiction to deal with it. That would stultify the process of law and render nugatory the provisions relating to transfer. The argument is therefore plainly untenable and stands rejected'.

The Supreme Court then ordered that except the question of jurisdiction all other questions raised by the parties are left open to be considered by the Family Court at Mysore and the Transfer Petition was allowed.

13. Learned Counsel for the petitioner, in answer to the objection raised by the learned Counsel for the respondents regarding the jurisdiction of the Family Court at Thiruvalla to try and dispose of the proceedings seeking a declaration that the marriage between the parties was a nullity, brought to my notice Section 8 of the Divorce Act conferring extraordinary jurisdiction on the High Court to remove, try and determine as a court of original jurisdiction any suit or proceeding instituted under that Act in the Court of any District Judge within the limits of its jurisdiction under the said Act, particularly the provision, conferring power on the High Court not only to withdraw any such suit or proceeding from the court of any District Judge within the limits of its jurisdiction but also to transfer it for trial or disposal to the court to any other such District Judge. In my view there is substance in the above submission made by the learned Counsel for the petitioner. Hence on a consideration of the power conferred on this Court under Section 24 of the C.P.C. and Section 8 of the Divorce Act read with Section 7 of the Family Courts Act, I overrule the objection raised by the respondents regarding the question of jurisdiction for the purpose of disposing the prayer for transfer of the cases and hold that lack of territorial jurisdiction shall not be an impediment in passing appropriate orders under Section 24 of the C.P.C. from one subordinate court to any other subordinate court.

'14. The next question to be considered is whether there are justifiable reasons for the petitioner to seek a transfer of O.P. (Divorce) No. 73 of 2003 from the Family Court, Kottayam at Ettumanoor to the Family Court, Pathanamthitta at Thiruvalla. One of the grounds raised by the respondents in O.P. (Divorce) No. 73 of 2003 for getting declaration that the marriage between the daughter of the petitioner and the 1st respondent herein is a nullity is that the petitioner's daughter Shiji @ Shija at the time of marriage was an idiot and she is unable to look after herself. This allegation is, of course, denied by the petitioner. However, learned Counsel for the petitioner submitted that a husband who raise the allegation that the wife on account of some mental incapacity is unable to take care of herself, cannot stand in the way of the proceedings pending against her being conducted in a court which is nearer to the place of her residence. It is also pointed out that the averments made in the Transfer Petition regarding the distance between the respective places have not been denied by the respondents in the counter-

affidavit. That being so, it is evident that the Family Court at Thiruvalla is a place which is convenient to both the parties, going by the factum of distance. The child born in the wedlock who is only a few months old baby is being taken care of by the wife. According to the petitioner both the mother and the child are suffering from serious ailments necessitating medical care and treatment. According to the respondents hardship and inconvenience are relative factors and in a case where the very question of jurisdiction of the transferee court to try the matter is in dispute, other considerations are irrelevant. I have already found that plea raised on the ground of lack of territorial jurisdiction of the transferee court cannot stand in the way of this Court exercising the power under Section 24 of the C.P.C. unless it is established that there is patent lack of jurisdiction to try the suit or proceedings. When the transferee court is competent to try the suit in all respects except territorial jurisdiction, this Court has to consider the Transfer Petition on its merits.

15. In my view, the totality of circumstances justify the prayer made by the petitioners for a transfer of O.P. (Divorce) No. 73 of 2003 from the Family Court, Kottayam at Ettumanoor to the Family Court, Pathanamthitta at Thiruvalla. Accordingly O.P. (Divorce) No. 73 of 2003 stands transferred from the Family Court, Kottayam at Ettumanoor to the Family Court, Pathanamthitta at Thiruvalla to be tried and disposed of. The Transfer Petition is allowed as above. It will be open to the petitioner to move the Family Court, Pathanamthitta at Thiruvalla for trial and disposal of O.P. (Divorce) No. 73 of 2003 along with O.P. No. 944 of 2003 pending before the said court.