

Sudha Vs. Vaidyanathan

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Court : Chennai

Decided On : Sep-20-2000

Reported in : I(2001)DMC156; 2001AIHC1567

Judge : K.P. Sivasubramaniam, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 21A; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Sections 24

Appeal No. : Transfer C.M.P. Nos. 7422, 7423 and 8179 of 2000

Appellant : Sudha

Respondent : Vaidyanathan

Advocate for Def. : Srinath Sridevan, Adv.

Advocate for Pet/Ap. : A. Muthukumar, Adv.

Judgement :

ORDER

K.P. Sivasubramaniam, J.

1. In the above Transfer C.M.P. the petitioner seeks for a transfer of H.M.O.P. No. 4 of 2000 on the file of the Sub-Court, Chidambaram to the Court of Additional District Judge, Karaikal, for trial.

2. According to the petitioner, she was married to the respondent on .11.1997 at Karaikal. She was presented by her father with 22 sovereigns of gold, silver vessels worth about Rs. 12,000/-, stainless steel worth about Rs. 3,000/- among other things. The marriage was also performed on a grand scale by spending about 2.5 lakhs. Thereafter, they were living together at Chidambaram, where the respondent was employed- Ever since the marriage, the respondent was not treating the petitioner properly and she was kept like a slave and even her parents were not allowed to meet her. Her entire salary was taken by the respondent and she was not given anything even for her personal expenses. She had to resign the job at Chidambaram and got herself employed as a staff nurse at Karaikal since her living with the respondent was impossible. She filed M.O.P. No. 3 of 1999 on the file of the Additional District Judge, Pondicherry at Karaikal for judicial separation; A counter was filed by the respondent and on mediation the respondent returned most of the articles given at the time of the marriage and still some more materials were due to be delivered. It was also agreed that as living together has become impossible, a petition for divorce by mutual consent may be filed. As such, she did not press her petition for judicial separation and by order dated 14.12.1999, M.O.P. No. 3 of 1999 was dismissed as not pressed. After securing an order of dismissal as mentioned above, the respondent filed H.M.O.P. No. 4 of 2000 before the Subordinate Judge, Chidambaram, praying for restitution of conjugal rights. The respondent has absolutely no intention of taking her as his wife and the petition has been filed only to harass the petitioner. The respondent also failed to provide maintenance to the minor child and as such the petitioner filed a petition under Section 125, Cr.P.C. for maintenance of the minor child. The petitioner would further submit that her life will be in jeopardy if she was to attend the hearings at Sub-Court, Chidambaram. The respondent has manhandled the petitioner's father and he had been treating the petitioner very badly. Her father was a Post Master with big family and with a marriageable daughter and he cannot accompany her to Chidambaram. The petitioner's father also apprehends danger to his life. She also has a minor child who was only 19 months old. Therefore, there will not be any difficulty for the respondent to attend the Court at Karaikal if the proceedings are transferred to Karaikal.

3. In the counter filed by the respondent in support of the petition to vacate the order of stay, the allegations regarding misunderstandings between the parties were denied. He did not want any amount towards the marriage. As she was working at Chidambaram, the respondent came to Chidambaram and both were living together. It was false to state that the petitioner was treated as a slave. There was also no truth in the contention that the entire salary was taken by him and the petitioner was not given any amount for her personal expenses. It was the petitioner's father who was poisoning the mind of the petitioner and made all arrangements for a job at Karaikal. It is true that M.O.P. No. 3 of 1999 was filed by the petitioner for judicial separation. He had opposed the petition and he requested the petitioner to return to the marriage house and she had informed that she would contemplate reconciliation only if all the goods brought by her from her house were returned to her. Therefore, all the articles were returned to the petitioner. It was agreed that both should live jointly and peacefully. Only under those circumstances, H.M.O.P. No. 3 of 1999 was withdrawn and there was no talk of divorce at all. He was ready and willing to take back his wife. Subsequent proceedings filed by the petitioner for maintenance was only a counter-blast to H.M.O.P. No. 4 of 2000 filed by him. He was, if tending to the criminal case filed against him at Karaikal for even hearing and spending a great deal of money towards travelling and personal expenses Therefore, it will not be possible for him to defend the O.P. at Karaikal, The father of the petitioner was a very, influential person and in fact the responded! had been manhandled on an earlier occasion. Me was only an electrician in Annamalai University. He does not have the resources to fight the litigation.

4. The above petition for transfer is one among several similar petitions in matrimonial proceeding which appear to have become more or less a routine and usual venture indulged mostly by the wives, aimed at shifting the jurisdiction to their own place A siereo-typed allegation is made to the effect that since the petitioner is a woman, 'he jurisdiction should be shifted to her door-steps. I am afraid that such a blind approach result only in creating an artificial and unfair exception to the jut jurisdictional issue', throwing aside the law of procedure relating to the jurisdiction, but also result in injustice in individual cases as ! would illustrate below.

5. In *Indian Overseas Bank v. Chemical Construction Company*, : [1979]3SCR920, the Supreme Court held as follows :

'The principle governing the general power of transfer and withdrawal under Section 24 of the Code is that the plaintiff is the dominus litis and, as such entitled to institute his suit in any Forum which the law allows him. The Court should not lightly change that Forum and compel him to go to another Court with consequent increase in inconvenience and expense of prosecuting his suit. A mere balance of convenience in favour of proceeding in another albeit a material consideration, may not always be a sure criterion justifying transfer '

6 At the outset it may be stated that the procedural law, neither under the Code of Civil Procedure nor under the respective personal laws relating to the marriage, makes any distinction between sexes and the jurisdiction is decided on the basis of specific factors such as place when¹ the marriage took place, or when parties resided together or where the respondent resides etc. The choice is given to the petitioner irrespective of the sex of the Petitioner. If the wife is the petitioner, she is given the privilege of choosing the Forum and the husband has to come from wherever he is and vice-versa. As long as a petition is filed correctly in terms of the statutory provisions, it is not expected of the Courts to unnecessarily interfere unless a strong case is made out for transfer of jurisdiction. It cannot be definitely on the basis of sex alone. Convenience of one party cannot be a ground for transfer because it is inherent and it would be positively inconvenient to the other person if the transfer should be against his wish ¹ have not been shown any statutory provision or binding decision which would require that when a woman seeks a transfer of the proceedings it should be automatically granted.

7. On the other hand, orders have been passed only in the light of facts and circumstances of each case. Recently, certain transfer orders had been passed by this Court on a sympathetic consideration of the plight of the women folk especially having the burden of looking-after small children. But the sympathy thus shown appears to be wrongly utilised and had resulted in a spate of transfer petitions on behalf of women folk on an assumption that their petitions for transfer are routine

and should be automatically allowed. With the result, most of the proceedings before the Family Courts are delayed and kept pending till the disposal of the transfer petitions.

8. There cannot be a different yard stick for deciding the question of jurisdiction on the only basis of the sex of the petitioner, If in other civil proceedings such discrimination is not visualised, I fail to understand why it should be different in matrimonial proceedings. Several difficulties have been expressed in many cases on the side of the husbands especially, if they happen to be in Government Service or even under private employment and also facing financial constraints. It is also pointed out that merely for the sake of seeking joint trial, one spouse after receiving notice in a proceeding initiated by other spouse, would file a related proceeding in his or her own convenient place and seek for transfer of the earlier proceedings to be tried along with the later proceedings in the place where the later proceedings had been filed.

9. I have now come across number of such petitions where genuine difficulties are expressed on the side of the husbands which cannot also be ignored. Transfer C.M.P No. 15908 of 1999 is a case where the husband is a coolie in the agricultural fields in Tiruppattur, North Arcot District. He is also looking after three children born out of marriage and is also paying Rs. 300/- as monthly maintenance to the wife who hails from a family of better status. The proceeding was filed at Tiruppattur on the basis of last residence. It would be unjust to expect that his case should be transferred to Coimbatore.

10. In transfer C.M.P No. 53 of 1999 filed by the wife, the husband had filed O.P. No. 106 of 1999 on the file of the District Court, Erode, praying for judicial separation on the basis of very serious allegations including of the wife leaving to Muscat on her own accord and by abandoning a tender child with him: Thereafter she returned Muscat after 11/2 years. It is further alleged that she took away the child under a false pretext and thus the husband was forced to file I.A. No. 1705 of 1999 for custody of the child. The wife without even caring to file a counter denying such serious allegations in both the opposite parties chose to file the petition for transfer directly praying for transfer of both the petitions to any of the Family

Courts at Chennai. Even in the affidavit filed in support of the transfer petition, she had not chosen to deal with the allegations contained in the O.P. filed by the husband, which would be necessary for this Court to assess the bona fide of both the parties, but had simply asked for a transfer to Chennai on the ground that it would be difficult for her to go to Erode for every hearing and that she apprehends harassment from her husband's people. When the husband positively alleges that the wife had abandoned her child earlier and had taken away the child from him now under false pretext the custody of the child with the wife cannot have relevance to decide the transfer petition.

11. In another petition, the wife after receiving notice in the proceeding initiated by the husband, filed another related proceeding at her own place and files a transfer petition for joint trial at her place on the ground that she is a woman.

12. While I have myself allowed a few petition for transfer at the instance of the wives where either she was having custody of a tender child and in one case where there was positive evidence of dowry harassment and in another case there was a police complaint because of physical assault. All the above allegations were positively substantiated. I have mentioned the above illustrative cases in the previous paragraphs only to show that it would be unjust to close our eyes to the facts and circumstances of each case and to mechanically order the transfer of cases only because the petitioner seeking transfer is a woman. It would be an injustice to adopt a dogmatic approach.

13. There are good wives who are self-effacing sacrificing their life for the sake of errant husband husbands who are jealous, sadistic, immoral and wayward, drunkards, and forced to tolerate cruel in-laws. Likewise there are good and unfortunate husbands who undergo torture at the hands of avaricious and greedy, spend-thrift and termagant wives, and immoral women. There are many mother-in-laws and sister-in-laws who are mainly responsible for dowry harassment. Life and society is a mixture of good and bad men and women and the Courts cannot ignore the down-to-earth realities and indulge in the luxury one-sided populist gimmicks. Transfer petitions have to be decided on the merits of each case and not merely on the basis of the sex of the applicant.

14. Therefore, I feel that in entertaining petitions for transfer, certain basic and broad guidelines have to be formulated to avoid unnecessary spate of petitions before this Court and for the sake of some uniformity and certainty. I am aware that the guidelines cannot be exhaustive and would depend upon the peculiar features of each case.

15. As stated earlier, when once there is no dispute over the correctness of the jurisdiction where a petition had been filed, then transfer can be visualised only for very strong reasons as is normally available under Section 24, C.P.C. such as genuine apprehension of bias of the Judicial Officer, convenience of both parties, availability of majority of witness, ill-health of the party seeking transfer etc. subject to the said grounds being substantiated on proper evidence. A woman having custody of a tender child below the age of five years or if there is any positive evidence of violence and dowry harassment against her, her request for transfer should be allowed. If no such special circumstances are available, the spouse seeking transfer should be agreeable for payment of travelling expenses to the opposite party. Unless the husband is a self-employed person and if he is employed either as a Government Servant or in a private firm, it would be unreasonable to expect him to be available for all the hearing dates at a different place. The same would apply to the female spouse if she is employed in such a capacity. Therefore, the pros and cons of all facts and circumstances have to be considered.

16. Several judgments of other High Courts have been cited before me by both sides in support of their mutual contentions. I feel that it would be sufficient to mention only two judgments of the Supreme Court.

17. In *Kalpna Deviprakash Thakar v. Dr. Deviprakash Thakar*, : (1996)11SCC96 , the Supreme Court rejected the application by the wife for transfer on the following reasons as contained in paragraph No. 3 of the judgment:

'Insofar as the prayer for transfer is concerned, we have not felt inclined to grant the same for the following reasons :

- (a) The husband-respondent is a medical practitioner and so his absence from Bombay would cause difficulty to his patients also.
- (b) His old and ailing mother lives with him at Bombay who needs frequent medical check-up and constant care.
- (c) The witnesses in the case are principally from Bombay as would appear from the list of witnesses which was produced to us for our perusal.
- (d) Petitioner-wife has some near relations in Bombay. The petitioner, when asked about this fact, did not really deny the same. She however, stated that they are not very close relatives and accommodation with them is insufficient. As, while coming for the trial, she would be required to stay for a day or two only at Bombay, this is not a material objection.
- (e) The husband has undertaken to bear the travelling expenses of the wife as and when she would travel from Palanpur to Bombay to attend Court proceedings. Let him also bear the expenditure of an escort.
- (f) Palanpur is well-connected by train with Bombay, because of which the petitioner would not have to face much difficulty in undertaking the journey.

For the abovesaid reasons, the petition is dismissed.'

18. In *Shakuntala Modi v. Om Prakash Bharuka*, : AIR 1991 SC1104 , the Supreme Court allowed the prayer of the wife/ petitioner that the second proceeding filed by the husband at Delhi Court should be heard alongwith the earlier petition filed by her in Dibrugarh. It was held that both the proceedings have to be tried together and no prejudice could be said to be caused to the husband from the mere fact that he has to undertake a journey.

19. I have referred to the above two judgments only to show that each case has its own peculiar features and reasonings and it will not be just and proper to order transfer in one-sided manner.

20. In *Mayura Awasthi v. A.C. Awasthi*, (1982) 1 DMC 37, a learned Judge of the Madhya Pradesh High Court held that allegation by one spouse that the father of

the other spouse was a rich and influential person, cannot be countenanced as a reason for transfer.

21. The issue of joint trial of proceedings pending in different places requiring joint trial, presents no difficulty at all having regard to the fact that the issue is statutorily covered under Section 21-A of the Hindu Marriage Act which is as follows, which appears to have been inserted with fore-sight about such contingencies.

'21-A. Power to transfer petitions in certain cases-(1) Where,

(a) a petition under this Act has been presented to a District Court having jurisdiction by a party to a marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13; and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13 on any ground, whether in the same District Court or in a different District Court, in the same State or in a different State, the petition shall be dealt with as specified in Sub-section (2).

(2) in a case where Sub-section (1) applies,-

(a) if the petitions are presented to the same District Court, both the petitions shall be tried and heard together by that District Court;

(b) if the petitions are presented to different District Courts, the petition presented later shall be transferred to the District Court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the District Court in which the earlier petition was presented.

(3) In a case where Clause (b) of Sub-section (2) applies, the Court or the Government as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908), to transfer any suit or proceeding from the District Court in which the later petition has been presented to the District Court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code'.

22. The provision empowers the District Courts to transfer the case filed in different District Courts from one Court to the other for joint trial. It is specifically provided that the later petition will be transferred to the place where the earlier petition was filed. It is true that the Supreme Court had interpreted Section 21-A of the Hindu Marriage Act, as not an exhaustive provision and that the power of the Supreme Court to issue appropriate orders of transfer under Section 25, C.P.C. was not in any manner curtailed by Section 21-A of the Hindu Marriage Act, vide *G. Vijayalakshmi v. G. Ramachandra Sekhara Sastry*, : [1981]3SCR223 . It was further held that the power of the Supreme Court under Section 25, C.P.C. was a plenary power and will not be excluded by Section 21-A of the Hindu Marriage Act. On the same reasoning, it has to be held that the power of the High Court under Section 24, C.P.C. cannot also be restricted by Section 21-A of the Hindu Marriage Act in ordering the transfer in the interest of justice. But it has to be borne in mind that Section 21-A being a statutory provision dealing with a particular situation of two proceedings in two different places, it should be normally expected that parties would be governed only under that provision wherever joint trial is sought for. It is true that Section 24, C.P.C. is a provision which enables the party to approach the High Court and in appropriate cases the High Court can order transfer notwithstanding Section 21-A of the Hindu Marriage Act. But even before the High Court, the statutory reasoning should be given its due consideration, except under very exceptional circumstances. The provision under Section 21-A of the Hindu Marriage Act incorporates a just, fair and proper way of dealing with the situation. This would put an end to the unhealthy practice of successive proceedings being filed as a 'counter-blast' by one spouse in a place convenient to herself or himself, and thereafter ask for joint trial where the later proceedings had been filed.

23. It is also settled law that the expression 'last resided together' in Section 19 of the Hindu Marriage Act should receive a strict interpretation. The expression would postulate an intention of a permanent or if temporary, for an indefinite duration. It cannot mean the casual or temporary visit of the place. If the said test is not satisfied then the jurisdiction would be either the place of the marriage or where the respondent resides.

24. I feel that the following guidelines may be helpful in dealing with most of the applications seeking for transfer :

(a) If the woman has the custody of any child, born out of wedlock, less than five years of age.

(b) If any one of the spouse suffers due to any physical disability; or any chronic illness as would render him or her difficult to travel which should be duly certified by a Surgeon/Physician in Government Service.

(c) Where the respondent in transfer petition does not have objection to the transfer or where the respondent in the transfer petition also resides in the same place.

(d) Where the joint trial of proceedings pending in two places are sought for, it would be decided on the basis of the date of filing the petition and the petition filed subsequently will be transferred to the place where the earlier petition had been filed.

(e) Last place of residence should be a permanent place or if temporary, for an indefinite period of residence and not a place where the living was only casual or transitory.

(f) When there is positive evidence such as police complaint etc. at the husband's place, prima facie establishing that the wife had been subjected to physical torture or dowry harassment.

(g) If none of the aforementioned nor any other justifiable reason is available for transfer, then the person seeking transfer should be ready to pay the incidental expenses, like travelling expenses, for stay during the hearing to the other spouse, either a consolidated amount or fixed amount for each hearing should be paid during the previous hearing itself.

25. The above guidelines are only illustrative situations aimed at avoiding frivolous petitions. Each case is likely to involve peculiar features which have to be duly considered even though one of the above conditions may exist.

26. In the present case, the wife/petitioner herein has the custody of a minor child of less than two years of age. In fact, she has already filed a petition at Karaikal for judicial separation in M.O.P. No. 3 of 1999 which according to her, was withdrawn on a false promise by the husband by a petition for divorce by mutual consent. This allegation is of course, denied by the respondent. According to him, he is willing to take her back and there was no talk of divorce at all. Subsequently, he had filed a petition in H.M.O.P. No. 4 of 2000 at Chidambaram, which was followed by the wife by filing a petition for maintenance under Section 125, Cr.P.C. for the minor child, at Karaikal.

27. The respondent's contention that his wife's father is an influential person, cannot be entertained. His further allegation that he had been manhandled, has not been substantiated in any manner.

28. Even though the first petition filed by the wife was withdrawn, the endorsement shows that 'this petition is not pressed at this stage'. Therefore, the withdrawal appears to be conditional and thereafter the husband had filed the present petition. It is also seen that even according to the husband, jewels had been returned to the wife subsequently. It is unlikely that such a situation would have resulted if really there was any idea of the wife coming back to live with the husband. Therefore, considering that the earlier petition filed by the wife had been withdrawn only conditionally and she is also having the custody of the child, less than two years of age, I am inclined to hold that in the interest of justice, the request of the wife for transfer of H.M.O.P. No. 4 of 2000 on the file of the Subordinate Judge, Chidambaram to the Court of Additional District Judge, Karaikal, has to be accepted.

29. In the result, the Transfer C.M.P. is allowed. Consequently, connected CM.Ps. are closed as unnecessary.

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