

Guda Vijayalakshmi

Vs

Guda Ramachandra Sekhara Sastry

Transfer Petition (Civil) No. 36 of 1980

(V.D. Tulzapurkar, A.N. Sen JJ)

13.03.1981

JUDGMENT

TULZAPURKAR, J. -

1. On September 26, 1979, the petitioner (wife) filed a suit in forma pauperis seeking maintenance from the respondent (her husband) in the Court of Subordinate Judge, Eluru (Andhra Pradesh) being O. P. No. 72 of 1979. On the receipt of the notice of the suit, the respondent filed a divorce suit (Petition Case 28 of 1980) against the wife under Section 13 of the Hindu Marriage Act, 1955 in the Court of the District Judge, Udaipur (Rajasthan). By the instant transfer petition filed under Section 25, CPC, 1908 the wife is seeking to get the husband's suit transferred to Eluru. On merits we are satisfied that it is expedient for the ends of justice to transfer the husband's suit to the District Court at Eluru (A. P.) where both proceedings, could be tried together and for that purpose the wife is agreeable to have her maintenance suit transferred to the District court at Eluru (A. P.).

2. However, counsel for the respondent (husband) has raised before us a preliminary objection that Section 25 of the CPC under which the transfer petition has been made is not applicable to proceedings under the Hindu Marriage Act, 1955 and as such this Court has no power to transfer the husband's suit from Udaipur district Court to the District Court at Eluru. He urged that Section 25 of CPC gets excluded by reason of the provision of Section 21 and 21-A of the Hindu Marriage Act marked applicable to all the proceedings under the Act only such provisions of CPC as relate to the regulation of proceedings i. e. such provisions which deal with procedural law and since Section 21 of the Hindu Marriage Act makes CPC as relate to the regulation of proceedings i. e. such provisions which deal with procedural matters only, Section 25, CPC is not applicable. He also urged that Section 21-A(3) of the Hindu Marriage Act also makes the above position clear beyond doubt by specifically excluding Section 24 and 25, CPC from being applied to the proceedings under the Hindu Marriage Act. A large number of authorities were referred to by counsel to substantiate his contention on general principles but in particular one decision of the Nagpur Bench of the Bombay High Court in the case of Priyavari Mehta v. Priyanath Mehta was pressed into service as having a direct bearing on the point.

3. In my view, on proper construction of the relevant provision it is not possible to uphold the preliminary objection. In the first place it is difficult to accept the contention that the substantive provision contained in Section 25, CPC is excluded by reason of Section 21 of the Hindu Marriage Act, 1955. Section 21 of the Hindu Marriage Act merely provides : "subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908". In terms Section 21 does not make any distinction between procedural and substantive provisions of CPC

and all that it provides is that the Code as far as may be shall apply to all proceedings under the Act and the phrase "as far as may be" means and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the Act. It is impossible to say that such provisions of the Code as partake of the character of substantive law are excluded by implication as no such implication can be read into Section 21 and a particular provision of the Code irrespective of whether it is procedural or substantive will not apply only if it is inconsistent with any provisions of the Act. For instance, it is difficult to countenance the suggestion that the doctrine of res judicata contained in Section 11 of the Code which partakes of the character of substantive law is not branch or specie of the Rule of Estoppel called Estoppel by Record and though estoppel is often described as a rule of evidence, the whole concept is more correctly viewed as a substantive rule of law. [see Canada an Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.]

4. So far as Section 21-A of the Hindu Marriage Act is concerned the marginal note of that section itself makes it clear that it deals with power to transfer petitions and direct their joint or consolidated trial "in certain cases" and is not exhaustive. Further sub-section (3) of Section 21-a on which strong reliance was placed runs thus :

21-A. (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.

This provision in terms deals with the power of the government or the court on whom powers of transfer have been conferred by the CPC as it then stood, that is to say, old Sections 24 and 25 of CPC. It does not deal with the present Section 25, CPC which has been substituted by an amendment which has come into force with effect from February 1, 1977 (Section 11 of the Amending Act 104 of 1976). By the amendment very wide and plenary power has been conferred on this Court for the first time to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one Civil Court in one State to another Civil Court in any other State throughout the country. Conferral of such wide and plenary power on this Court could not have been in the contemplation of Parliament at the time of enactment of Section 21-A of the Hindu Marriage Act, 1955, It is, therefore, difficult to accept the contention that Section 21-a of Hindu Marriage act excludes the power of transfer conferred upon this Court by the present Section 25 of CPC in relation to proceedings under that Act.

5. Coming to the decision rendered by the Nagpur Bench of the Bombay High Court in Priyavari Mehta case it needs to be pointed out that the aforesaid aspects of Section 21-A of the Hindu Marriage Act and the present Section 25 of the CPC were not considered by the Nagpur Bench at all. Moreover, the Nagpur Bench, following the decision of the Punjab and Haryana High court in Rama Kanta v. Ashok Kumar has also taken the view that Section 21-A of the Hindu Marriage Act permits transfer and consolidation of only two types of petition under the Act, namely, cross petitions filed by the two spouses against each other under Section 10 or Section 13 of the Act that consolidation or joint hearing of other types of petitions is excluded by necessary intendment. The Bench has observed :

The effect of Section 21-a, therefore in my opinion, is that joint or consolidated hearing or trial of petitions other than those mentioned is that section not being

permissible, the powers under Sections 23 to 25 of the Code cannot be exercised for transfer of petitions for a consolidated hearing of the petitions not contemplated by that section.

Such a view, in our opinion, is not correct. As stated earlier, in the matter of transfer of petitions for a consolidated hearing thereof Section 21-A cannot be regarded as exhaustive for the marginal note clearly suggests that the section deals with power transfer petition and direct their joint and consolidated trial "in certain cases". Moreover, it will invariably be expedient to have a joint or consolidated hearing for trial by one and the same court of a husband's petition for restitution of conjugal rights on the ground that the wife has withdrawn from his society without reasonable excuse under Section 9 of the Act and the wife's petition for judicial separation against her husband on ground of cruelty under Section 10 of the Act in order to avoid conflicting decisions being rendered by two different courts. In such a situation resort will have to be had to the powers under Section 23 to 25 of the Civil Procedure Code for directing transfer of the petition for a consolidated hearing. Reading Section 21-A in the manner done by the Nagpur Bench which leads to anomalous results has to be avoided.

6. In this view of the matter, the preliminary objection is overruled, Divorce Case 28 of 1980 pending in the District Court, Udaipur, Rajasthan, is transferred to the District court, Eluru (A. P.), to which court the wife's petition for maintenance shall also stand transferred. No order as to costs.

A. N. Sen, J. (concurring)-I agree with the order proposed by my learned Brother. I, however, propose to make certain observations with regard to the preliminary objection raised as to the jurisdiction of this court to entertain this application. The preliminary objection raised is that the jurisdiction and power conferred on this Court under Section 25 of the Code of Civil Procedure are excluded by the provision contained in Section 21 and Section 21-A of the Hindu Marriage Act; and as Section 25 of the Civil procedure Code is not attracted, this Court does not have jurisdiction to entertain this application for transfer. Section 25 of the Code of Civil Procedure reads as follows :

- (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High court or the civil court in one State to a High Court or other civil court in any other State.
- (2) Every application under this section shall be made by a motion which shall be supported by an affidavit.
- (3) The court to which such suit, appeal or the proceeding is transferred shall, subject to any special direction in the order of transfer, either retry it or proceed from the stage at which it was transferred to it.
- (4) In dismissing any application under this Section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.
- (5) The law applicable to any suit, appeal or other proceeding transferred under this

section shall be the law which the court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.

It may be noticed that the present Section 25 was substituted for the former Section 25 by the Code of Civil procedure (amendment) Act, 1976. In this connection it may be relevant to set out Section 25 of the Code of Civil Procedure, as it stood before its amendment by the substitution of the present section. The earlier Section 25 was in the following terms :

(1) Where any party to a suit, appeal or the proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the State Government, which may by notification in the official Gazette, transfer such suit, appeal or proceeding in any the High Court :

Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the State Government of the State in which that High Court has its principal seat.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

A plain reading of Section 25 of the Code clearly indicates that very wide jurisdiction and powers have been conferred on this Court to transfer any suit, appeal or any other proceeding from a High Court or other civil court in one State to a High Court or other civil court in any other State for the ends of justice. I shall now set out the relevant provisions of the Hindu Marriage Act. Section 21 of the Hindu Marriage Act is in the following terms :

Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

Section 21-A which was introduced in the Act by the Amending Act (68 of 1976), provides as follows :

21-A. 91) 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 different district courts, both the petition shall be tried and heard together by that Court;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court 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 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.

The learned counsel for the respondent argues that in view of the provisions contained in Section 21, only the provisions contained in the Code of Civil Procedure relating to procedure which will regulate the proceedings instituted under the Hindu Marriage Act, 1955 will apply; and as Section 25 of the Code of Civil Procedure does not appertain to the domain of procedure and confers substantive right, the said section is not applicable and cannot be attracted. It is argued that this position is further made clear by the provisions contained in Section 21-A.

8. In my opinion, this argument of the learned counsel for the respondent-husband is without any substance. I have earlier set out Section 25 of the Code of Civil Procedure and I have pointed out that an analysis of the section makes it abundantly clear that for the ends of justice, wide power and jurisdiction have been conferred on this Court in the matter of transfer of any suit, appeal or proceeding from any High court or other civil court in one State to a High Court or other civil court in any other State. A suit or a proceeding for divorce under the Hindu Marriage Act in section 25(1) of the Code of Civil Procedure be held to come under Section 25(1) of the Code, as the said section speaks of any suit, appeal or the proceeding. This court must necessarily enjoy the power and jurisdiction under the said provisions of transferring such a suit or proceeding for the ends of justice, unless the power and jurisdiction of this Court are on any court has to be ousted, the exclusion of such jurisdiction must be made in clear and unequivocal terms. Section 21 of the Hindu Marriage Act does not deal with the question of jurisdiction of any court. As no procedure with regard to the proceedings under the Hindu Marriage Act has been laid down in the said Act, Section 21 of the act only provided that "all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure". Section 21 of the Hindu Marriage Act cannot be construed to exclude the jurisdiction conferred on this Court under Section 25 of the Code of Civil Procedure. It does not become necessary in the instant case to decide whether the provision in relation to jurisdiction of this Court contained in section 25 of the Code of Civil Procedure is one of substantive law or it belongs to the domain of procedure. Even if I accept the argument of the learned counsel for the respondent that Section 25 does not form any part of the procedural law and is a part of the substantive law, I am of the opinion that jurisdiction conferred on this Court by Section 25 of the Code of Civil Procedure, is not in any way, affected by Section 21 of the Hindu Marriage Act which, as I have already noted, only provides that "all proceedings under the Hindu Marriage Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908".

9. Section 21-A of the Hindu Marriage Act, in my opinion, has indeed no bearing on the question of jurisdiction conferred on this Court under Section 25 of the Code of Civil Procedure. Section 21-A

of the Hindu Marriage Act makes provision for transfer of petitions together by the district court in which the earlier petition has been presented. Such power has been conferred on the court or the government. Section 21-a has no application to the case of transfer of any suit or proceeding from one State to another. As I have earlier notes, very wide power and jurisdiction have been conferred on this Court in the interest of justice of transferring any appeal, suit or proceeding from one State to another under Section 25 of the Code of Civil Procedure. In the instant case, the petitioner has applied for transfer of the suit pending in the district court at Udaipur in the State of Rajasthan to the appropriate Court at Eluru in the State of Andhra Pradesh. I am, therefore, of the opinion that this Court enjoys the power and jurisdiction to entertain this application under Section 25 of the Code of Civil Procedure and Sections 21 and 21-A of the Hindu Marriage Act do not, in any way, exclude, affect or curtail the power conferred on this Court under Section 25 of the Code of Civil Procedure. I may incidentally add that the present Section 25 in the Code of Civil Procedure came into force after Sections 21 and 21-A had been incorporated in the Hindu Marriage Act, 1955.

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