

BOMBAY HIGH COURT

Priyavari

Vs.

Priyanath

Misc. Civil Appln. No. 93 of 1979

(Waikar, J.)

24.08.1979

ORDER

Waikar, J.

1. A question of some importance involved for consideration in this Miscellaneous Civil Application is whether the powers exercisable by the High Court under Section 23(3) of the Civil Procedure Code (hereinafter called the Code) can be invoked for transfer of a petition under the Hindu Marriage Act, 1955 (hereinafter called the Act) to any Court subordinate to a different High Court.

2. The present petitioner (wife) was married to the non-applicant (husband) on 7th December, 1977 at Mussoorie. The father of the non-applicant is one Bholanath Maharaj, a religious priest having his devotees at several places. After the marriage the spouse along with Bholanath Maharaj went to Delhi and after staying there for a couple of weeks came to Nagpur and were residing here. The applicant resided at Nagpur with her husband and her in-laws only till 19th January, 1979 whereafter she went back to Mussoorie and has been living there with her parents and with her sister.

3. The applicant tiled a matrimonial petition under Section 13 of the Act in the Court of Civil Judge at Mussoorie (Dehradun) being Marriage Petition No. 68 of 1979 on 20th March, 1979 for divorce on the ground of cruelty. The non-applicant appeared in response to the summons and filed his written statement in that suit. The non-applicant (husband) then filed a Marriage Petition under Section 9 of the Act for restitution of conjugal rights on 16th April, 1979 in the District Court at Nagpur, being Hindu Marriage Petition No. 92 of 1979 and the same is now pending in the Court of Civil Judge, Senior Division, Nagpur.

4. The applicant filed the present application under Section 23(3) of the Code for transfer of

Hindu Marriage Petition No. 92 of 1979 pending at Nagpur, which is subsequently instituted petition, to the Court at Mussoorie to be tried and decided along with her Marriage Petition No. 68 of 1979. It is submitted that the non-applicant filed this petition at Nagpur only as a counterblast in order to harass her that she has no sufficient means to come to Nagpur to resist that claim, that common questions of fact and law would arise in both the matters and that a common decision in both the matters by one single Judge would avoid any conflict of judicial decisions.

5. This petition for transfer is resisted by the non-applicant mainly on the ground that this Court has no jurisdiction to order transfer of his case to Court at Mussoorie as prayed for.

6. Shri Choudhary, the learned counsel for the applicant, submitted that in her previously instituted petition by the applicant for dissolution of the marriage, pending at Mussoorie, the non-applicant can under the amended Section 23A of the Act make a counter-claim and seek a relief of restitution of conjugal rights. The points for determination in both the matters, he submitted, would be whether the applicant was cruelly treated, as alleged by the wife, or whether she had voluntarily withdrawn from her marital home without any reasonable excuse, as contended by the husband. He further submitted that a petition under the Act is a suit, that under Section 21 of the Act all proceedings under the Act are to be regulated, as far as may be, by the Code and by virtue of Section 23(3) of the Code, the High Court would be empowered to transfer any suit pending in any subordinate Court to any other Court subordinate to a different High Court.

7. Shri Ghatpande, the learned counsel for the non-applicant, on the other hand, submitted that when the non-applicant has initiated an action for restitution of conjugal rights by filing a petition at Nagpur, he cannot be compelled to lay a counter-claim under Section 23-A of the Act in the petition of the applicant at Mussoorie. In order to succeed in his petition all that he would be required to establish, he submitted, is that the applicant withdrew from his society without any reasonable excuse. The petition under the Act, he submitted, cannot be equated to a suit, as matrimonial jurisdiction is an exclusive jurisdiction and a decree passed in the proceedings becomes a judgment in rem within the meaning of Section 41 of the Indian Evidence Act. Relying upon Section 4(1) of the Code, he submitted that when anything in the Code is in conflict with anything in the special or local law, or any special jurisdiction or power conferred by any other law, the Code will not prevail so as to override any inconsistent provisions. When there is no such conflict the Code no doubt would apply. Lastly he submitted that in view of the special and specific provisions now enacted under Section 21-A of the Act regarding transfer of certain petitions, the provisions of the Code regarding transfer of suits would not apply.

8. In whose favor the balance of convenience tips is of little relevance and I opt not to advert to that aspect of the matter, since the question of jurisdiction of this Court to transfer a petition under the Act, in my view, clinches the issue.

9. Section 22 of the Code deals with the power of transfer of suits which may be instituted in more than one Court and Section 23 indicates the Courts to which an application under Section 22 should be made. Section 22 of the Code enjoins that before applying for transfer of a suit, the defendant has first to serve a notice to the other party at the earliest possible opportunity and before settlement of issues. Sri Ghatpande submitted that the applicant has failed to comply with this requirement as she has merely filed a notice in the Court of the Civil Judge, Senior Division, Nagpur in the Hindu Marriage Petition No. 92 of 1979 without serving any copy thereof on the non-applicant. I find that the particular allegation that a copy was served upon the non-applicant has not been specifically controverted in the return by the non-applicant. This apart, Section 23(3) with which we are concerned here is to be read along with or as supplementary to Section 22 of the Code and it is in these terms :

"23 (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 Court in which the suit is brought is situate."

10. Shri Ghatpande, appearing for the non-applicant, argued that in view of the amended Section 25 of the Code the powers of the High Court under Section 23(3) of the Code stand superseded. I see no merit in this submission. Old Section 25 of the Code empowered the State to transfer civil suits etc. in certain circumstances from the High Court exercising jurisdiction in the State to another High Court. That Section which was narrow in its scope has been substituted by new Section 25 and it now provides for transfer of suits by the Supreme Court which power was earlier exercised by the Government. The Section now confers on the Supreme Court such wide and plenary power of transfer as it has in Criminal cases under, Section 406 of the Cr. P.C. irrespective of the fact whether the Court to which transfer is sought has or has no jurisdiction to try the suit, appeal or other proceedings if it is satisfied that it is expedient in the ends of justice so to do. Section 22 of the Code (which as observed above has to be read along with Section 23) applies where a suit in its entirety is cognizable by either of the two Courts, that is, the Court in which the suit is instituted and the Court to which transfer is sought. It cannot, therefore, be said that Section 23(3) of the Code stands superseded or is rendered negatory in view of the amended Section 25 of the Code as submitted by Shri Ghatpande.

11. Now Section 21 of the Act relied upon by Shri Chaudhary for the purposes of this matter is to this effect :

"21. 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 Civil Procedure Code, 1908." (Underlining is mine) The expression "as far as may be" occurring in this Section only means that all those provisions of the Code shall apply to the proceedings under the Act which are neither inconsistent with any provisions of the Act, nor contrary to its purpose or scheme, as observed in *Smt. Manjit Kaur v.*

*Gurdial Singh*¹ it does not and cannot mean that a particular Rule of procedure contained in the Code may be applied to one case but not to the other, or that in one case it may be applied with full force and in the other not with its full rigour.

12. What is the effect of Section 21-A of the Act, which is relied upon by Shri Ghatpande, is the crux of the matter. In *Smt. Rama Kanta v. Ashok Kumar*² applicability of the new Section 21-A of the Act vis-a-vis Section 24 of the Code came up for consideration. Section 21-A of the Act deals with the power to transfer petitions in certain cases and it may be usefully extracted here :

"21A(1), Where –

¹(AIR 1978 Punj and Hary 150)

² (AIR 1977 Punj and Hary 373)

(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 grounds, whether in the same district court or in a different district court, in the same State or in a different State, the petitions shall be dealt with as specified in Sub-Sec (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 Civil Procedure Code, 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 power to transfer such later petition as if it has been empowered so to do under the said Code."

In the ruling cited above, the wife had filed a petition for divorce in the Court of the District Judge at Chandigarh. Thereafter the husband had filed a petition for restitution of conjugal rights in the Court of District Judge, Hoshiarpur. The wife filed an application under Section 24 of the Code for transfer of the petition at Hoshiarpur to Chandigarh A preliminary objection was raised that in view of Section 21-A of the Act no application under Section 24 of the Code is maintainable. This objection was upheld and this is what was observed :

"Section 21-A makes special provision for the transfer of certain proceedings under the Hindu Marriage Act. By virtue of Section 21, it is to be taken that this special provision

excludes the general provisions in the Civil Procedure Code relating to transfer. The learned counsel for the applicant argued that Section 21-A would apply only to the situations mentioned therein and that other situations would continue to be governed by Section 24 of the Civil Procedure Code. To accept the contention of the learned counsel would be to render the provisions of Section 21-A superfluous and practically meaningless since what can be done under Section 21-A of the Hindu Marriage Act could always be done under Section 24, Civil Procedure Code and there would be no point in Section 21-A of the Hindu Marriage Act governing some situation and Section 24, Civil Procedure Code governing other situations."

Obviously a specific provision for transfer of the petitions under certain cases is made by Section 21-A of the Act. The Section specifically relates only to two kinds of petitions, namely, (1) a petition praying for a decree for judicial separation under Section 10 of the Act and (2) an application for a decree for divorce under Section 13 of the Act. A petition for restitution of conjugal rights under Section 9 of the Act is not referred to and not covered by Section 21-A of the Act.

13. In the instant case the petition filed by this applicant at Mussoorie no doubt answers the description of a petition referred to in Section 21-A being one for divorce under Section 13 of the Act, but the petition subsequently instituted by the non-applicant under Section 9 for restitution of conjugal rights at Nagpur is not contemplated by the specific provisions of Section 21-A of the Act.

14. It was submitted by Sri Chandhary that Section 21-A does not deal with transfer of a single petition from one court to the other, but it refers to transfer of one type of petition to be heard with another type of petition pending in a different Court. That really is so. Though title of Section 21-A refers to transfer of certain cases what this provision really deals with is a joint or consolidated hearing of two types of petition specified in the Section by a single Judge and the transfer of such petitions in order to achieve that end. In the present case also what is prayed for is a joint and consolidated hearing of two petitions, namely, one under Section 9 and the other under Section 13 of the Act. A joint or consolidated hearing of such types of petitions, as is prayed for in the instant case, is not contemplated by this Section.

15. Now there is no specific provision in the Code for consolidation of suits and it is only in exercise of inherent powers under Section 151 that suits are consolidated and are heard and tried together. The process sometimes entails transfer of suits if they are pending in different Courts in the same district or different districts or different States. If by virtue of Section 21 of the Act matrimonial petitions of all kinds under the Act could be consolidated by effecting transfers taking recourse to Sections 23 to 25 read with Section 151 of the Code, there was no necessity to enact Section 21-A. Section 21-A of the Act permits consolidation of only two types of petitions under the Act with or without the consent of the parties. Consolidation or joint hearing of other

types of petitions is, therefore, excluded by necessary intendment. The argument of Mr. Chaudhary that powers under Section 23(3) can still be exercised to cover transfer of all types of cases also for the said purpose cannot be accepted as it would render the provisions of Section 21-A redundant and superfluous. The effect of Section 21-A, therefore, in my opinion, is that joint or consolidated hearing or trials of petitions other than those mentioned in 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.

16. Shri Chaudhary, the learned counsel for the applicant, then submitted that when petition under Section 10 of the Act is filed by one party and another petition under Section 13 by another party, then the latter petition must be transferred to be tried with the earlier petition filed under Section 10, as provided for under Section 21-A and it debars a party to take recourse to the provisions of Section 10 of the Code. This, according to him, is the only limited import and the purpose of Section 21-A of the Act. It is not necessary to consider whether the provisions of Section 10 of the Code can or cannot be invoked if no recourse to Section 21-A is taken. We are concerned here with the two petitions one under Section 9 and the other under Section 13 of the Act and the applicant before me, if she so chooses and if so advised may move the appropriate authority under Section in of the Code. A joint hearing or consolidation of such types of petitions, however, is not contemplated by Section 21-A of the Act and consequently powers under Section 23(3) of the Code cannot be exercised for the said purpose.

17. In this view of the matter, the present application filed by the applicant for transfer of petitions of the non-applicant under Section 9 of the Act pending at Nagpur to Mussoorie to be tried along with her petition filed under Section 13 at Mussoorie, cannot be granted, in view of Section 21-A of the Act.

18. In the result, the application is dismissed with costs.
Application dismissed.