

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****MISC. CIVIL APPLICATION NO. 255 OF 2015**

Minoti Subhash Anand,)
Age: 68, Indian inhabitant, residing at)
2301-B and 2401-B, Walkeshwar,)
Om Vikas Co-operative Housing Society)
Ltd. 105-107, Walkeshwar Road,)
Mumbai – 400006) **..... Applicant**
(Orig.Applicant)

VERSUS

Subhash Manoharlal Anand,)
Age : 72, Indian inhabitant, residing at)
2301-B and 2401-B, Walkeshwar,)
Om Vikas Co-operative Housing Society)
Ltd. 105-107, Walkeshwar Road,)
Mumbai – 400006) **..... Respondent**
(Orig. Respondent)

Mr.Rohan Cama, i/b. Ms.Sapna Rachure for the Applicant.

Mr.Satyavrat Joshi, i/b. Vidhi Partners for the Respondent.

Applicant and Respondent are present in Court.

CORAM : R.D. DHANUKA, J.

DATED : 10th DECEMBER, 2015

JUDGMENT

By this application, the applicant wife has invoked section 24 of the Code of Civil Procedure, 1908 and has also invoked the general and inherent jurisdiction and also jurisdiction of this court under Article 227 of the Constitution of India and seeks transfer of Case No.155/SS/2009 from the learned Magistrate Court 40th Court, Girgaon to Family Court Bandra and that the same be tried with Petition No.A-1215 of 2011 and Petition No.B-31 of 2011 pending before the Family

Court, Bandra.

2. At the threshold the learned counsel appearing for the respondent raises preliminary objection about maintainability of this petition on the civil side of this court on the ground that section 24 of the Code of Civil Procedure, 1908 cannot be attracted to the facts of this case in view of the fact that the learned Metropolitan Magistrate, 40th Court before whom the applicant has filed proceedings under the provisions of 'Protection of Women from Domestic Violence Act, 2005' (hereinafter referred to as the Domestic Violence Act) is not subordinate to the High Court.

3. Some of the relevant facts for the purpose of deciding this petition are as under :-

4. The applicant got married with the respondent on or about 5th November, 1972. The said marriage was registered under the provisions of the Foreign Marriage Act. The applicant has two sons out of the said wedlock. The dispute arose between the parties. It is case of the applicant that the applicant was staying in her matrimonial home i.e. flat nos.2301-B and 2401-B of the Om Vikas Co-operative Housing Society Ltd., situated at Walkeshwar, Mumbai – 400 006. It is the case of the applicant that the respondent had locked the said premises and had stopped access of the applicant to the said matrimonial home in which she was staying with her husband. The applicant accordingly filed a complaint under the provisions of Domestic Violence Act before the learned Metropolitan Magistrate, Girgaum being Case No. 155/SS/2009.

5. The respondent herein filed two proceedings against the applicant both before Family Court at Bandra, Mumbai i.e. Petition No. B-31 of 2011 under

sections 7(1) (c) and (d) of the Family Courts Act inter alia praying for various reliefs and a separate petition bearing No.A-1215 of 2011 before the Family Court at Bandra inter alia under the Foreign Marriage Act, 1969 read with sections 27(1) (b) and 27(1) (d) of the Special Marriage Act, 1954 read with section 7 of the Family Court Act, 1984 inter alia praying for dissolution of the marriage between the applicant and the respondent.

6. It is the case of the applicant that the evidence in the proceedings filed by the husband before the Family Court has not commenced. It is the case of the respondent that insofar as complaint filed by the applicant before the learned Metropolitan Magistrate is concerned, the cross examination of the applicant has commenced. It is not in dispute that both the parties are senior citizens.

7. In view of the objection about the maintainability of this application raised by the learned counsel for the respondent, the learned counsel for the applicant has addressed this court on the issue of maintainability first and thereafter on the merits of this application.

8. Mr.Cama, learned counsel appearing for the applicant submits that the applicant has filed the present proceedings not only under section 24 of the Code of Civil Procedure, 1908 but has also invoked the general and inherent jurisdiction and also specific jurisdiction of this court under Article 227 of the Constitution of India. Reliance is placed on section 26 of the Domestic Violence Act and it is submitted that the proceedings filed by his client were under sections 18, 19, 20, 21 and 22 of the said Domestic Violence Act before the learned Metropolitan Magistrate. He submits that the reliefs which are claimed by the applicant before the Metropolitan Magistrate under the provisions of the said Domestic Violence

Act can be granted by the Family Court. Learned counsel appearing for the respondent does not dispute this proposition.

9. Learned counsel for the applicant also placed reliance on Rule 6 of Chapter I of Bombay High Court Appellate Side Rules, 1960 and would submit that under the said provision the applicant can file an application for transfer of suits, appeals, criminal cases or other proceedings pending for trial or disposal in any Civil Court or Criminal Court subordinate to the High Court or over which the High Court has power of superintendence, to another Court subordinate to or under the superintendence of the High Court, or to the High Court itself. He submits that the proceedings filed by the applicant before the learned Metropolitan Magistrate is the proceeding over which the High Court has power of superintendence. He submits that even if there is any conflict between the Code of Civil Procedure, 1908 or Code of Criminal Procedure with the Bombay High Court Appellate Side Rules, 1960, the Bombay High Court Appellate Side Rules will prevail.

10. Learned counsel for the applicant placed reliance on the judgment of Madras High Court in case of ***Selin Raja alias Maria Selin Raj vs. Lawrence alias Lawrence Antonia (2014) 8 MLJ 400*** and would submit that an application filed by the wife under section 24 of the Code of Civil Procedure, 1908 for transfer of the complaint filed under the provisions of Domestic Violence Act to the Family Court was allowed by the Madras High Court in the similar facts in hand before the Madras High Court. The Madras High Court in the said judgment has held that under section 26 of the Protection of Women from Domestic Violence Act, 2005, the Family Court has ample powers to deal with the proceedings initiated by the wife under the Domestic Violence Act.

11. Reliance is also placed on section 7 of the Family Court Act, 1984 and it is submitted that the Family Court can not exercise powers of a Magistrate under the said provisions insofar as reliefs claimed in the Domestic Violence Act is concerned. He submits that the Family Court was enacted in 1984 whereas the Domestic Violence Act was enacted in 2005 and thus section 7(2) of the Family Court Act, 1984 which provides that the Family Court shall have jurisdiction to exercisable by the Magistrate of First Class, the Family Court would not be construed as a Magistrate of the First Class for the purpose of trying the proceeding under Domestic Violence Act. He submits that in any event, in view of section 7(2) of the Family Court Act, Family Court can exercise the powers of a Magistrate of First Class only for the limited events enumerated in the said provision.

12. Insofar as merits of the case is concerned, learned counsel for the applicant invited my attention to the various averments made in the complaint filed before the learned Metropolitan Magistrate relating to the matrimonial home. My attention is also invited to the averments made by the respondent in both the proceedings filed by him before the Family Court and it is submitted that the reliefs claimed in respect of the matrimonial home by the applicant in the complaint filed before the Metropolitan Magistrate and by the husband before the Family Court are virtually the same. The facts in both the proceedings are closely interlinked. He submits that if both the proceedings are heard by two different courts, it may give rise to conflicting decisions. He submits that the applicant cannot be expected to pursue the proceedings before two courts when the issue involved in both cases insofar as matrimonial home is identical at this age.

13. Learned counsel for the respondent on the other hand in support of his plea that this court has no jurisdiction to entertain this application for transfer submits that the present proceedings are not filed by way of a writ petition. He submits that court exercising power under Article 227 of the Constitution of India or the court exercising criminal jurisdiction having control over the court of learned Metropolitan Magistrate only can grant such reliefs of transfer and not in Misc.Civil Application. He submits that the learned Metropolitan Magistrate is not subordinate to the High Court exercising civil jurisdiction. In support of this submission learned counsel for the respondent placed reliance on section 3 of Code of Civil Procedure. He submits that since the learned Metropolitan Magistrate is not subordinate to the High Court exercising civil jurisdiction, application filed under section 24 of the Code of Civil Procedure, 1908 on the civil side is not maintainable. Learned counsel made an attempt to distinguish the judgment of Madras High Court in case of ***Selin Raja alias Maria Selin Raj (supra)***.

14. Insofar as merits of the case is concerned, it is submitted by the learned counsel for the respondent that the reliefs claimed by the respondent in the two proceedings filed before the Family Court are larger reliefs. He submits that the cross examination of the applicant insofar as her application before the Metropolitan Magistrate is concerned has already commenced. Learned counsel for the respondent lastly submits that if this court comes to the conclusion that the present proceedings are maintainable and the proceedings filed by the applicant deserves to be transferred to the Family Court, hearing before the Family Court be expedited.

15. I shall first decide the issue of maintainability raised by the learned counsel

for the respondent in this application.

16. A perusal of the Miscellaneous Civil Application filed by the applicant clearly indicates that the applicant has not only invoked the provisions under section 24 of the Code of Civil Procedure, 1908 but has also invoked general and inherent jurisdiction and jurisdiction under Article 227 of the Constitution of India. It is not in dispute between the parties that the reliefs claimed by the applicant before the learned Metropolitan Magistrate under the provisions of Domestic Violence Act can be granted by the Family Court. Section 24 of the Code of Civil Procedure, 1908 in my view will have to be read with the Bombay High Court Appellate Side Rules, 1960 and in particular Rule 6 of Chapter I. A conjoint reading of section 24 of the Code of Civil Procedure, 1908 and Rule 6 of Chapter I of the Bombay High Court Appellate Side Rules, 1960 clearly indicates that an application for transfer of suits, appeals, criminal cases or other proceedings pending for trial or disposal in any Civil Court or Criminal Court subordinate to the High Court or over which the High Court has power of superintendence, to another Court subordinate to or under the superintendence of the High Court, or to the High Court can be made before the Single Judge. In my view the High Court has power of superintendence over the court of learned Metropolitan Magistrate. Under Rule 6 of Chapter I, the High Court is empowered to transfer any proceedings even pending before a criminal court which is subordinate to the High Court or over which the High Court has power of superintendence to another criminal court which is subordinate to High Court or over which the High Court has power of superintendence and such court shall have jurisdiction to grant such reliefs on such transfer.

17. In my view there is no inconsistency between the provisions of section 24 of the Code of Civil Procedure and Rule 6 of Chapter I of the Bombay High Court

Appellate Side Rules, 1960. Be that as it may, even if there is any inconsistency between section 24 of the Code of Civil Procedure, 1908 and Rule 6 of Chapter I of the Bombay High Court Appellate Side Rules, 1960, in my view the rules of the Bombay High Court Appellate Side Rules, 1960 would prevail over the provisions of Code of Civil Procedure, 1908. There is thus no merit in the submission of the learned counsel for the respondent that this court on civil side cannot pass any order for transfer of the proceedings pending before the learned Metropolitan Magistrate to the Family Court by exercising powers under section 24 of the Code of Civil Procedure which are to be read with Rule 6 of Chapter I of the Bombay High Court Appellate Side Rules, 1960 or that such order can be passed only in a writ petition.

18. The Madras High Court with the similar facts in hand in an application filed under section 24 of the Code of Civil Procedure has transferred the proceedings filed by the wife under the provisions of Domestic Violence Act before the Metropolitan Magistrate in that case to the Family Court in which the proceedings filed by the husband were pending. Madras High Court took a view that under section 26 of Domestic Violence Act ample powers were given to the Family Court to deal with the proceedings initiated by the wife under the Domestic Violence Act. In my view the facts before the Madras High Court are identical to the facts of this case. I am in respectful agreement with the view taken by the Madras High Court in case of ***Selin Raja alias Maria Selin Raj (supra)***.

19. Insofar as the facts in the present matter are concerned, there is no dispute that both the parties are senior citizens. A perusal of the complaint filed by the applicant wife before the learned Metropolitan Magistrate clearly indicates that her principal grievance against the husband is about her access being denied to the

matrimonial home. A perusal of the prayers in the said complaint clearly indicates that the applicant had applied for protection under section 18 of the Domestic Violence Act prohibiting the respondent from interfering with the access of the applicant in the matrimonial home and for injunction dispossessing the applicant in any manner whatsoever from the matrimonial home.

20. A perusal of the proceedings filed by the respondent in the Family Court also clearly indicates that one of the major relief sought by the respondent husband against the applicant is for seeking possession of the matrimonial home and/or injunction against the applicant from entering upon the matrimonial home. On comparison of the complaint filed by the applicant before the learned Metropolitan Magistrate with the proceedings filed by the respondent before the family court, I am of the view that the issues insofar as matrimonial home is concerned are identical. There may be a common evidence insofar as this issue is concerned in both the proceedings. In my view if both the proceedings are allowed to be proceeded before different courts having identical subject matter and issues, there is likelihood of two conflicting opinions which may be rendered by two courts thereon. To obviate such situation, in my view the proceedings filed by the applicant before the Metropolitan Magistrate deserves to be transferred to the Family Court.

21. Insofar as submission of the learned counsel for the respondent that the cross examination of the applicant is already begun before the learned Metropolitan Magistrate is concerned, it is the case of the applicant that the cross examination is just begun and there is hardly any progress. In my view the learned counsel for the applicant is right in his submission that since the evidence on the issue of matrimonial home would be common in both the proceedings, the cross

examination of the applicant can be continued before the family court from the stage as it was before the learned Metropolitan Magistrate and the entire proceedings before the learned Metropolitan Magistrate shall be transferred to the Family Court and be tried along with the proceedings filed by the respondent.

22. I, therefore, pass the following order :-

(a) Misc.Civil Application No.255 of 2015 is made absolute in terms of prayer clause (a). Parties are at liberty to lead common evidence in all the three proceedings.

(b) It would for the Family Court to decide in what sequence the proceedings filed by both the parties shall be heard. Hearing before the Family court is expedited. Both the parties are directed to co-operate with each other and with the Family Court in expeditious disposal of the entire proceeding. It is made clear that the evidence of the applicant which has commenced before the Metropolitan Magistrate in her complaint filed before under the provisions of Domestic Violence Act can be continued from the stage it was before the learned Metropolitan Magistrate.

(c) If the parties apply for leading any further evidence or for further reliefs and/or direction, the same shall be considered by the Family Court on its own merit and in accordance with law.

(d) The Family Court shall make an endeavour to dispose of

all the three proceedings within 18 months from the date of commencement of the cross examination.

23. Miscellaneous civil application is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]