

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

26 APPEAL FROM ORDER NO. 89 OF 2015

KAMESHWARRAO VENUGOPALRAO CHEMBROLU
VERSUS
SRIRAMYA KAMESHWARRAO CHEMBROLU

...

Advocate for Petitioner : Mr. Mahesh R. Sonwane.

Advocate for Respondent : Mr. R. N. Bharaswadkar.

...

CORAM : **V. K. JADHAV, J.**

DATE : 24th April, 2017.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the judgment and order passed by the
Ad-hoc District Judge-3, Jalna dated 1st September, 2015 in Regular
Civil Appeal No.66 of 2015, the original Respondent before the lower
Appellate Court has preferred this appeal.

3 Brief facts giving rise to the present appeal are as follows:

- a) The Appellant / husband has filed petition seeking
dissolution of marriage on the ground of cruelty
and desertion under the provisions of Section
13(1)(i-a) and 13(1)(i-b) of the Hindu Marriage

Act, 1955 before the learned Civil Judge Senior Division, Jalna bearing Hindu Marriage Petition No.76 of 2012.

- b) The Respondent / wife has strongly resisted the said Hindu Marriage Petition and controverted the instances of alleged cruelty and desertion. Respondent / wife has also challenged the jurisdiction of the Jalna Court to entertain the said Hindu Marriage Petition on the ground that the marriage was solemnized at Rajmundry, State of Andhra Pradesh and though she was taken at Jalna after marriage, the Appellant / husband had taken her to Pune to lead marital life. In view of the pleadings of the parties, the Trial Court has framed as much as four issues. The parties to the petition adduced evidence in support of their rival contentions. The learned Civil Judge Senior Division, Jalna vide its judgment and order 15th July, 2014 in Hindu Marriage Petition No.76 of 2012 allowed the petition and dissolved the marriage by a decree of divorce. Being aggrieved

by the same, the Respondent / wife has preferred Regular Civil Appeal No.66 of 2015 and the learned Ad-hoc District Judge-3, Jalna vide its impugned judgment and order dated 1st September, 2015 partly allowed the appeal with costs and thereby set aside the judgment and decree passed by the Civil Judge Senior Division, Jalna in Hindu Marriage Petition No.76 of 2012 and remanded the matter to the Trial Court with a direction to frame issue on the point of jurisdiction and after giving opportunity to both the parties to adduce evidence on the point of jurisdiction only and decide the matter afresh. Being aggrieved by the same, the Appellant / husband has preferred this appeal.

4 The learned counsel for the Appellant / husband submits that the lower Appellate Court has failed to consider that the permanent residence of Appellant / husband is at Jalna and the Appellant / husband and Respondent / wife used to come to Jalna during the festivals and holidays. Even after the marriage, the first

place they came to reside, is Jalna. In between also, on regular intervals, they were coming to Jalna. It, thus, cannot be said that their visits to Jalna were flying visits or their stay at Jalna was casual. The lower Appellate Court has failed to consider the expression “resides” means a place where a person has a fixed home or abode. Even the lower Appellate Court has failed to consider that the Supreme Court has dismissed the transfer petition filed by the Respondent / wife seeking transfer of said Hindu Marriage Petition pending before the Civil Judge Senior Division, Jalna to 1st Additional Senior Civil Judge, Rajahmundry, Andhra Pradesh vide order dated 22nd April, 2013 in Transfer Petition (C) No.224 of 2013.

5 The learned counsel for the Appellant submits that there are three prerequisites for the applicability of the provisions of Section 21 of the Code of Civil Procedure and even if first two conditions are satisfied, the third test, that is, a case of failure of justice on account of the place of suing having been wrongly selected, is required to be satisfied.

6 The learned counsel for the Appellant / husband in order to substantiate his contentions placed his reliance on the following two cases:

- i) **K. P. Ranga Rao Vs. K. V. Venkatesham and others**, reported in, **(2015) 13 Supreme Court Cases 514.**
- ii) **Mrs. Deepali Suvivek Kadam Vs. Suvivek Vasant Kadam**, decided by the Division Bench of this Court (Coram: Smt. V. K. Tahilramani & P. N. Deshmukh, JJ.) dated 6th February, 2014 in Family Court Appeal No.67 of 2013.

7 The learned counsel for the Respondent / wife submits that the lower Appellate Court has correctly interpreted the provisions of Section 19 of the Hindu Marriage Act, 1955. The trial Court ought to have framed the issue as to the jurisdiction to entertain the Hindu Marriage Petition particularly when the Respondent / wife has raised the objection well within time before the trial Court raising the issue of jurisdiction. It is a part of record that the learned Judge of the trial Court has not framed the issue as to the jurisdiction. The lower Appellate Court has therefore, rightly remanded the matter directing the trial Court to frame the issue as to the jurisdiction and decide the matter afresh after giving an opportunity to the parties to adduce evidence on the point of jurisdiction. No interference is required in the impugned judgment and order passed by the lower Appellate Court.

8 The Appellant / husband has specifically pleaded in his Hindu Marriage petition that after solemnization of the marriage, they have cohabited at Jalna for some time and then went to live at Pune where they lived together only for few months and also their respective parents visited them at Pune occasionally. Even in para 8 of the Hindu Marriage Petition, the Appellant / husband has given reference to certain instances at Jalna for performing the auspicious Pooja, which is required to be carried by the newly wedded woman. According to Respondent / wife, the marriage was solemnized according to Hindu rites and customs at Rajmundry (Andhra Pradesh) and the Respondent / wife was taken to Jalna (State of Maharashtra) where the parents of Appellant / husband reside. After staying there for some time, Respondent / wife was taken to Pune to lead marital life with Appellant / husband. It is the contention of Respondent / wife that she lastly resided with Appellant / husband at Pune and not at Jalna and they never stayed at Jalna and therefore, the Court of Jalna does not have the jurisdiction to try and entertain the Hindu Marriage Petition. It is not disputed that the parents of the Appellant / husband have permanent residence at Jalna.

9 In the case of *Mrs. Deepali Suvivek Kadam Vs. Suvivek Vasant Kadam* (supra) relied upon by the learned counsel for

Appellant, in para 8 of the judgment, the Division Bench of this Court has made the following observations:

“8. As stated earlier, the husband has specifically pleaded and stated in his evidence that he and his wife came to Mumbai in May, 2008 and 'Oti Bharani ceremony' took place on 9.5.2008 and she stayed at Mumbai till 20.5.2008. This fact has been admitted by the wife in her evidence. Thus, this clearly shows that both of them last resided together at Chembur, Mumbai. The parents of the respondent-husband have permanent residence at Chembur, Mumbai. The learned counsel for the appellant submitted that mere casual stay in Chembur Mumbai or flying visits to Chembur Mumbai would not confer jurisdiction on the Family Court at Bandra, Mumbai.

In order to support his contention, he has placed reliance on the decision of the Supreme Court in the case of Mst. Jagir Kaur and another Vs. Jaswant Singh, AIR 1963 S.C. 1521, wherein it is observed that the word "resides" does not mean only domicile in the technical sense of that word. It however, means something more than a flying visit to or a casual stay in a particular place. There shall be animus manendi or an intention to stay for a period, the length of the period depending upon the circumstances of each case. A person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person

has chosen to make a particular place his abode depends upon the facts of each case. The Supreme Court in the case of Jagir Kaur (supra), has observed that "the expression 'last resided' means where the person had his last temporary residence also". Moreover, the Supreme Court has further observed that "Generally stated no decision goes so far as to hold that 'resides' in the sub-section means only domicile in the technical sense of that word." In the present case, it is seen that the house at Chembur Mumbai was the permanent house of the parents of the husband. Both the husband and wife used to come to Chembur, Mumbai during the festivals, holidays and every week-end. Even after the marriage, the first place they came to reside, is Chembur, Mumbai. In between also, they were on regular intervals coming to Chembur, Mumbai and lastly also they resided at Chembur, Mumbai. In such case, it cannot be said that they were mere flying visits by the appellant and the respondent at Chembur Mumbai or a casual stay at Chembur Mumbai."

10 In the facts of the instant case, it cannot be said that there were mere flying visits of the parties at Jalna or casual stay at Jalna when the permanent house of the parents of the Appellant / husband is at Jalna and both the husband and wife used to come to Jalna during festivals, holidays etc. Even after the marriage, the first place they

came to reside, is Jalna.

11 In the case of *K. P. Ranga Rao Vs. K. V. Venkatesham and others* (supra) relied upon by the learned counsel for Appellant, the Supreme Court by referring the case of **Pathumma Vs. Kuntalan Kutty**, reported in, **(1981) 3 SCC 589**, in paras 7 and 8 of the judgment, made the following observations:

“7. We find that *Pathumma*⁴ really concludes the matter before us. In paras 5 and 6 of the judgment, it is stated as under: (SCC p. 591)

“5. In order that an objection to the place of suing may be entertained by an appellate or revisional court, the fulfilment of the following three conditions is essential:

(1) The objection was taken in the Court of first instance.

(2) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.

(3) There has been a consequent failure of justice.

6. All these three conditions must coexist. Now in the present case Conditions 1 and 2 are no doubt fully satisfied; but then before the two

4 *Pathumma v. Kuntalan Kutty*, (1981) 3 SCC 589

appellate courts below could allow the objection to be taken, it was *further necessary that a case of failure of justice on account of the place of suing having been wrongly selected was made out*. Not only was no attention paid to this aspect of the matter but no material exists on the record from which such failure of justice may be inferred. We called upon learned counsel for the contesting respondents to point out to us even at this stage any reason why we should hold that a failure of justice had occurred by reason of Manjeri having been chosen as the place of suing but he was unable to put forward any. In this view of the matter we must hold that the provisions of sub-section aboveextracted made it imperative for the District Court and the High Court not to entertain the objection whether or not it was otherwise well founded. We, therefore, refrain from going into the question of the correctness of finding arrived at by the High Court that the Manjeri Court had no territorial jurisdiction to take cognizance of the application praying for final decree.”

(emphasis in original)

8. Obviously Section 21 will apply in the three situations mentioned therein; the first situation refer to the place of suing; the second situation refers to pecuniary limits of the court's jurisdiction; and the third

refers to local limits of the court's jurisdiction. In each of these cases it is stated that an appellate court or revisional court shall not allow an objection to the place of suing (which refers to Section 16 in the present case) unless such objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. What follows is important. An objection as to the place of suing cannot be allowed unless there has been a consequent failure of justice.”

12 In the present case, though the conditions 1 and 2 as referred in the above cited judgment are satisfied, the Respondent / wife has not made out a case of failure of justice on account of the place of suing having been wrongly selected. The learned counsel for Respondent / wife though asked repeatedly, has failed to point out that failure of justice occurred by reason of the place of suing chosen at Jalna. In the above cited case, the Supreme Court has concluded the matter with observations that an objection as to the place suing cannot be allowed unless there has been a consequent failure of justice. Hence, the following order:

ORDER

- I. The appeal, is hereby partly allowed. No costs.

- II. The judgment and order passed by the Ad-hoc District Judge-3, Jalna dated 1st September, 2015 in Regular Civil Appeal No.66 of 2015, is hereby quashed and set aside.
- III. The lower Appellate Court is hereby directed to restore Regular Civil Appeal No.66 of 2015 on its original number and after giving opportunity of being heard to the parties, dispose of the appeal on merits.

[V. K. JADHAV, J.]

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