

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

MISC.CIVIL APPLICATION NO.42 OF 2019
(Deepa w/o Piyush Khatri Vs. Piyush s/o Bandulal Khatri)

Mr.B.U.Hosamath and Mr.S.B.Bhosle, Advocate for the applicant.

(CORAM : Ravindra V.Ghugre, J.)

DATE : 04/03/2019

PER COURT :

1. The learned Advocate for the petitioner/wife has put forth the following prayers in this application u/s 23(3), 24 and Section 151 of the Code of Civil Procedure :-

*“1. This Misc.Civil Application may kindly be allowed, and
2. This Hon’ble Court may please be transferred the proceedings of Divorce-petition bearing N o.A-447/2018 pending in the files of the Ld.Family Court at Aurangabad to the Hon’ble Principal Judge of Family Court at Hubballi (Karnataka State)”*

2. The issue, therefore, is as to whether this Court can exercise its jurisdiction u/s 24 to transfer a proceeding from a Court subordinate to this Court, to a Court subordinate to another High Court.

3. The learned Advocate for the applicant has strenuously canvassed that u/s 23 and especially Sub Section 3, this Court has the power and jurisdiction to transfer such a proceeding to another Court which is sub ordinate to the Karnataka High Court. Reliance is placed on the following judgments :-

- “1. Misc.Civil Application No.34/2014 of Bombay High Court, Bench at Aurangabad. Lavanya w/o Rameshwar Nalamwar v/s Rameshwar s/o Dadarao Nalamwar (Coram : Shri T.V.Nalawade, J.)*
- 2. Lakshmi Nagdev v/s Jitendra Kumar Nagadev [(2005) 1-HLR 374 (MP)]*
- 3. Bhakti Sharma v/s Mahendra Kumar Udenia [(1994) 2 DMC 166 (Allahabad)],*
- 4. M.Manjulatha v/s M.L.Narasimham, [(1985) 2 DMC 70 (Karnataka)]*
- 5. Mona Aresh Goel V/s Aresh Satya Goel [AIR 2000 SC 3512 (1)]”*

4. The strenuous submission of the learned Advocate, relying on Lavanya (supra), dated 11/06/2014, is that this Court has transferred a HMP from the Court of the learned Civil Judge, Sr.Dn. Parbhani to the Court of the learned District Judge, Nizamabad which falls under the State of Telangana thereby being subordinate to the Telangana High Court.

5. I find that the judgment delivered by the Hon'ble Apex Court in Durgesh Sharma Vs. Jayshree [(2008)9 SCC 648], was not cited before this Court when the order dated 11/06/2014 was passed at Aurangabad. My learned Brother in the said matter was therefore not properly assisted and the judgment in Durgesh (supra) was not cited for his assistance.

6. Learned Advocate then places reliance upon an order passed by the Hon'ble Apex Court in the matter of Mona Aresh Goel Vs. Aresh Satya Goel [AIR 2000 SC 3512(1)]. I find that the said order which is in 4 paragraphs, reads as under :-

"1. The respondent-husband has been served but does not appear.

2. The transfer petition is filed by the wife to transfer the divorce proceedings taken by the husband in Bombay to Delhi, where she now stays with her parents. The transfer petition avers that the wife has no independent income and that her parents are not in a position to bear the expenses of her travel from Delhi to Bombay to contest the divorce proceedings. She avers that she is twenty two years old and cannot travel to and stay in Bombay alone for, there is no one in Bombay with whom she can stay. We are of the opinion that the transfer petition should, in the circumstances, be allowed.

3. The transfer petition is made absolute in terms of prayer (a), M.J. Petition No. A-636 of 1999 pending before the family Court at Bandra, Bombay is transferred to the Court of the District Judge, Tis Hazari, Delhi, who shall hear it. himself or assign it for hearing to a competent Court.

4. No order as to costs.”

7. It is, therefore, obvious that the Hon'ble Apex Court, on the one hand, noted that the respondent/husband has remained absent and on the other hand, concluded that the transfer petition for transferring the divorce proceedings filed by the husband in Bombay to the Court at Delhi, deserves to be allowed. Nevertheless, the Hon'ble Apex Court has concluded in Durgesh Sharma (supra) that the jurisdiction and power to transfer a proceeding from a subordinate Court under one High Court to a Subordinate Court under another High Court, lies only with the Supreme Court.

8. He then places reliance upon the judgment delivered by the High Court of Madhya Pradesh in Lakshmi Nagdev Vs. Jitendra Kumar Nagdev decided on 24/09/2004 [Laws (MPH)-2004-9-26], wherein the Madhya Pradesh High Court concluded that Section 23 would empower the High Court to transfer the proceedings from a

Subordinate Court under the said High Court to another Court which is subordinate to another High Court. I do not find that the said view could be accepted considering the observations of the Hon'ble Apex Court in Durgesh Sharma (supra).

9. In Durgesh Sharma (supra), the husband Durgesh Sharma had taken the matter to the Hon'ble Apex Court for challenging the judgment and order dated 25/01/2007 delivered by the High Court of Madhya Pradesh Bench at Indore in MCA No.414/2005 by which the Madhya Pradesh High Court ruled that Section 23 would independently give a right to an applicant to approach the High Court and the High Court can pass an order transferring a proceeding from a Court subordinate to it to another Court subordinate to the Bombay High Court. For clarity, the factual matrix set out in paragraph No.3 needs to be reproduced as under :-

10. The order of the Madhya Pradesh High Court was summarized in paragraph No.13 as under :-

“The High Court vide the impugned order dated 25/1/2007 allowed the application and transferred HMA Petition No.164-A of 2004 pending in the Family Court, Ujjain to a competent Court at Malegaon through the District Judge, Nasik. It is

this order which is challenged in the present appeal. Notice was issued on 14/05/2007 and further proceedings were stayed. Considering the nature of litigation, the matter was ordered to be placed for final hearing and that is how the matter has been placed before us.”

11. The submissions of the learned Advocates were summarized in paragraph Nos.15 to 17 which read as under :-

“15. The learned counsel for the appellant contended that the High Court was wholly wrong in transferring a case pending in a Court subordinate to the said High Court to a Court subordinate to another High Court. A High Court does not possess that power and as such, the High Court of Madhya Pradesh could not have transferred a case to a Court subordinate to the High Court of Bombay. On that ground alone, the order passed by the High Court deserves to be set aside. It was also submitted that even on merits, no ground for transfer of case was made out by the respondent-wife.

16. The learned counsel for the respondent, on the other hand, submitted that the order passed by the High Court is in consonance with law. It was urged that if the High Court is satisfied that a proper case has been made out for transfer of a case from a Court subordinate to the said High Court to a Court subordinate to different High Court, in exercise of power under sub-section (3) of [Section 23](#) of the Code such order can be made.

17. On the facts of the case, it would be very difficult for the

respondent-wife to travel a distance of about 400 kms. all alone and hence discretion was exercised by the High Court. This Court, in the exercise of power under [Article 136](#) of the Constitution may not interfere with the said order. It was, therefore, submitted that the appeal deserves to be dismissed.”

12. The Hon'ble Apex Court has then considered the statutory provisions applicable to such cases in paragraph Nos. 18 to 30 as under :-

“18. Before we deal with rival contentions and case-law on the point, it would be appropriate if we notice the relevant provisions [of the Code](#).

19. [Sections 22](#) to [25](#) enact law as regards transfer and withdrawal of suits, appeals and other proceedings from one Court to another Court. As a general rule, the plaintiff as arbiter litis or dominus litis has a right to choose his/her own forum where there is more than one Court in which such suit may be instituted. Normally, the defendant cannot insist that instead of Court A, the plaintiff should file a suit in Court B. But the right of the plaintiff to choose a forum is not arbitrary, absolute or uncontrolled and in appropriate cases, a superior Court may transfer a case pending in one Court to another Court.

20. [Section 22](#) provides that where a suit may be instituted in one of two or more Courts and is instituted in one of such Courts, a defendant may apply to have the suit transferred to another Court.

21. [Section 23](#) provides the forum where such application may be made. It is material to the controversy in question and may be reproduced;

23. To what Court application lies.

(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under [section 22](#) shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

(emphasis supplied)

22. [Section 24](#) contains general power of transfer of any suit, appeal or other proceeding at any stage on the application of a party or by a Court suo motu (of its own motion). [Section 24](#), as originally enacted in [the Code](#) of 1908, read as under:

[Section 24](#) - General power of transfer and withdrawal (1)
On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High

Court or the District Court may at any stage--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

23. *There was a cleavage of opinion on the question whether a case could be transferred from a Court having no jurisdiction to try it. Some High Courts have held that the language of [Section 24](#) was very wide*

and there was no restriction on the High Court in exercising the power of transfer merely because there was a dispute regarding jurisdiction. Some other High Courts, however, took a contrary view. The Law Commission considered the question and suggested amendment that a suit or proceeding could be transferred under this section from a Court which had no jurisdiction to try it. In the Statement of Objects and Reasons, it was stated;

“Clause 10--There is a conflict of decisions with regard to the question whether [Section 24](#) applies in relation to a transfer of a suit from a Court which has no jurisdiction to try it. The High Court of Andhra Pradesh has held that the language of [Section 24](#) is very wide and there are no restrictions or impediments in the way of the High Court exercising the power of transfer merely because there is a dispute regarding jurisdiction. Some other High Courts have taken a contrary view. It is being clarified that a case may be transferred from a Court which has no jurisdiction to try it.”

Parliament considered the recommendation of the Law Commission and by [the Code of Civil Procedure \(Amendment\) Act, 1976](#), the section was amended in the present form. Sub Section (1) of Section 24 as now stands ;”

[Section 24](#) - General power of transfer and withdrawal--(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub- section (1), the Court which is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

Sub-section (1) of [Section 24](#) as now stands, enables a High Court (or a District Court) to transfer or withdraw any suit, appeal or other proceeding pending before it or in any Court subordinate to it. Such transfer can be made by the Court at any stage of the proceeding either on an application of a party or suo motu.

24. *Sub-section (2) empowers the Court ordering transfer to issue directions for de novo trial or to proceed with the suit, appeal or other proceeding from the point at which it was transferred or withdrawn.*

25. Sub-section (3) defines 'proceeding' which includes an 'execution proceeding'. It declares that Courts of Additional and Assistant Judges will be deemed to be subordinate to the District Court. Sub-section (4), likewise, states that the expression "Court of Small Causes" includes Courts vested with the powers of a Court of Small Causes.

26. Newly added sub-section (5) clarifies that a suit or proceeding can be transferred from a Court which has no jurisdiction to try it.

27. [Section 25](#), as originally enacted in [the Code](#) of 1908, enabled the Governor-General in Council to transfer, in certain circumstances, a suit, appeal or other proceeding from one High Court to another High Court and read thus:

25. Power of State Government to transfer suits--

(1) Where any party to a suit, appeal or other 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 Governor-General in Council, who may, by notification in the Official Gazette, transfer such suit, appeal or proceeding to any other High Court;

(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.

28. *The section was amended by the Government of India (Adaptation of Indian Laws) Order, 1937. In sub-section (1), for the words "Governor-General in Council" and "who", the words "State Government" and "which" were substituted. Proviso to sub-section (1) was inserted, which read as under :-*

"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."

A Plain reading of the above provision makes it clear that scope and applicability of [Section 25](#) was very much limited. It enabled the State Government (earlier Governor-General in Council) to exercise power by effecting transfer from one High Court to any other High Court.

29. *The Law Commission considered the provision as it originally enacted. It felt that the State Government could not be said to be an appropriate agency for exercising power of transfer of suit, appeal or other proceeding inasmuch as exercise of such power was a 'judicial function'. The Commission also noted that an analogous provision was made in [Section 406](#) of the Code of Criminal Procedure, 1973 which empowered the Supreme Court to transfer cases and appeals from one Court to another Court. It accordingly recommended that such wide powers of transfer should not be retained by the State Government but should be conferred on the Supreme Court. The recommendation was accepted.*

30. *In the Statement of Objects and Reasons, it was stated:*

“Clause 12.--[Section 25](#) of the Code empowers the State Government to transfer suits etc. in certain circumstances from the High Court exercising jurisdiction in the State to another High Court. This section is very narrow in scope as it provides only for the transfer of suit, appeal or other proceeding pending in a High Court presided over by a Single Judge. Besides, the State Government, does not seem to be an appropriate agency for exercising the power of transfer. [Section 25](#) is, therefore, being substituted by a new section which provides for the transfer to the Supreme Court the existing power vested with the State Government and to confer on the Supreme Court such wide powers of transfer as it has in criminal cases under [Section 406](#) of the Code of Criminal Procedure, 1973. Further, the new section covers transfer of cases from or to the original side of a High Court to or from any other Civil Court. The new section is thus wider in scope than [Section 406](#) of the Code of Criminal Procedure, 1973.”

Accordingly, [Section 25](#) was substituted in the present form which reads as under :-

25. Power of Supreme Court to transfer suits, etc (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 other 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 other proceeding is transferred shall, subject to any special directions 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.”

13. After considering the various judgments cited, the Hon'ble Apex Court over-ruled the judgments cited in Priyavari Mehta Vs.

Priyanath Mehta, [AIR 1980 Bombay 337], Mamta Gupta Vs. Mukund Kumar Gupta [AIR 2000 AP 394] and Lakshmi Nagdev Vs. Jitendra Kumar Nagdev [2004(4) MPLJ 310]. Similarly, the judgment delivered by the Punjab and Haryana High Court in the matter of State Bank of India Vs. Sakow Industries , Faridabad Private Limited [AIR 1976 P & H 321], was over ruled.

14. Finally, the Hon'ble Apex Court concluded in paragraph Nos. 46 to 49 as under :-

“46. Having considered the scheme of the Code as amended from time to time, in our judgment, the law relating to transfer of cases (suits, appeals and other proceedings) is well- settled. It is found in Sections 22 to 25 of the Code and those provisions are exhaustive in nature. Whereas Sections 22, 24 and 25 deal with power of transfer, Section 23 merely provides forum and specifies the Court in which an application for transfer may be made. Section 23 is not a substantive provision vesting power in a particular Court to order transfer.

47. In our considered opinion, where several Courts having jurisdiction are subordinate to one appellate Court, an application for transfer may be made to such appellate Court and the Court may transfer a case from one Court subordinate to it to another Court subordinate to it. Likewise, where such Courts are subordinate to the same High Court, an application

may be made and action may be taken by the High Court transferring a case from one Court subordinate to it to any other Court subordinate to that High Court. But where such Courts are subordinate to different High Courts, it is only the Supreme Court (this Court) which may pass an order of transfer. In other words, if two courts are subordinate to different High Courts, one High Court has no power, jurisdiction or authority to transfer a case pending in any court subordinate to that High Court to a Court subordinate to other High Court. It is only the Supreme Court (this Court) which may order the transfer.

48. [Section 25](#), as originally enacted in [the Code](#) of 1908 and the decisions prior to [Amendment Act](#) of 1976, have no application after substitution of [Section 25](#) as it stands today. To us, [Section 23](#) has no application to such cases and the only provision attracted is [Section 25](#).

49. The language of [Section 25](#) also supports the view which we are inclined to take. Sub-section (1) of [Section 25](#) of the Code enacts that "On the application of a party", this Court may pass an appropriate order of transfer. Thus, [Section 25](#) is 'self-contained Code' and comprises of substantive as well as procedural law on the point. It allows a party to move the Court by making an application as also it empowers the Court to make an order of transfer."

[Emphasis supplied]

15. It was then held that every Court would have its own local or territorial limits beyond which it cannot exercise jurisdiction. In so far as the Supreme Court is concerned, its jurisdiction is not circumscribed by any territorial jurisdiction and it extends over any person or any area within the territory of this Country which is amenable to the jurisdiction of the Supreme Court. In so far as the High Court is concerned, it was held that the High Court exercises jurisdiction limited to the persons and the territories within the State in which it is established and therefore it cannot exercise jurisdiction or pass orders transferring a case pending before a Court subordinate to it, to another Court which is subordinate to a different High court.

16. The learned Advocate for the wife in Durgesh (supra), had then canvassed his submissions which are set out in paragraph No.52 as under :-

“52. The counsel for the respondent-wife submitted that provisions of Section 23(3) and 25 of the Code should be harmoniously construed. Referring to Priyavari Mehta, and Lakshmi Nagdev, it was submitted that Section 23(3) of the

Code did not stand deleted or superseded by [Section 25](#) of the Code. If it is held that for transfer of a case, appeal or other proceeding from a Court subordinate to one High Court to a Court subordinate to another High Court, only this Court can be approached, [Section 23\(3\)](#) of the Code will become nugatory, redundant and futile. No Court of law will interpret one provision of law which will make another provision superfluous or ineffective. It was, therefore, submitted that it has been rightly held that the parties must be left "to choose the forum" either under [Section 23\(3\)](#) or [25 of the Code](#)."

17. The Hon'ble Apex Court overruled Priyavari Mehta (supra) and Laxmi Namdeo (supra) and concluded in paragraph Nos. 53 to 56 as under :-

"53. We are unable to uphold the contention. In our considered view, the fallacy in the argument lies in the fact that it presumes and presupposes that [Section 23](#) of the Code is a substantive provision which authorizes a Court mentioned therein to order transfer. It is not so. The said section, as held by us, is merely a procedural one or a machinery provision and provides mode, method or manner in approaching a Court for making an application. It does not empower a Court to effect transfer. Moreover, [Section 25](#) of the Code is a 'complete Code' dealing with substantive as well as procedural law. [Section 23](#), in our opinion, therefore, cannot be interpreted in the manner suggested by the learned counsel

appearing for the wife.

54. *After the commencement of the Constitution and establishment of the Supreme Court (this Court), Parliament thought it proper to amend [Section 25](#) of the Code and accordingly, it was substituted by empowering this Court to order transfer from one High Court to another High Court or to one Civil Court in one State to another Civil Court in any other State.*

55. *It is, no doubt, true that even when [Section 25](#) in the present form was substituted by the [Amendment Act](#) of 1976, sub-section (3) of [Section 23](#) of the Code has neither been deleted nor amended. That, however, is not relevant. Since in our considered view, [Section 23](#) is merely a procedural provision, no order of transfer can be made under the said provision. If the case is covered by [Section 25](#) of the Code, it is only that section which will apply for both the purposes, namely, for the purpose of making application and also for the purpose of effecting transfer. On the contrary, reading of sub-section (3) of [Section 23](#) of the Code in the manner suggested by the learned counsel for the respondent-wife would result in allowing inroad and encroachment on the power of this Court not intended by Parliament. [Section 23](#), therefore, in our considered view, must be read subject to [Section 25](#) of the Code. The decisions taking a contrary view do not lay down correct law. We, therefore, overrule them. Even if such power was with a High Court*

earlier, it stood withdrawn with effect from January 01, 1977 in view of [Section 25](#) of the Code as amended by Code of Civil Procedure (Amendment) Act, 1976.

56. We are unable to agree with the view that in such cases, inherent powers may be exercised under [Section 151](#) of the Code as held by the High Court of Punjab & Haryana in State Bank of India. It is settled law that inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in [the Code](#). The said power cannot be exercised in contravention or in conflict of or ignoring express and specific provision of law. Since the law relating to transfer is contained in [Sections 22 to 25](#) of the Code, and they are exhaustive in nature, [Section 151](#) has no application. Even that contention, therefore, cannot take the case of respondent-wife further.”

[Emphasis supplied]

18. Learned Advocate for the applicant/wife, in the case in hand, submits that she has a six month's old child and cannot travel a distance of about 700 kms. He then submits that he would make an application for adjournment before the Family Court at Aurangabad indicating that the applicant/wife now desires to move the Hon'ble Apex Court for seeking transfer of proceedings from Aurangabad to

Hubballi in the State of Karnataka.

19. Though I am disposing off this application concluding that this Court does not have the jurisdiction to entertain this application for the reasons recorded, I deem it appropriate to entertain the request of the petitioner at least to the extent of seeking an adjournment before the Family Court at Aurangabad.

20. As such, this application is disposed off. If the applicant moves the learned Family Court at Aurangabad in Petition No.A-447/2018 for seeking an adjournment so as to approach the Hon'ble Apex Court, the learned Family Court would consider such application, after hearing the husband and pass an appropriate order in the interest of justice.

(Ravindra V.Ghuge, J.)