

IN THE HIGH COURT OF BOMBAY AT GOA

TRANSFER APPLICATION NO.3 OF 2018

MRS. MARGARET MASCARENHAS
ALIAS MARGARET FERNANDES
aged 60 years, Retired Teacher,
R/o. H. No.C-19/223, Eugene Vaddo,
Caranzalem, Tiswadi, Goa.

... Applicant

Versus

MR COSTAO FERNANDES
son of Cristovao Fernandes,
aged 65 years, retired,
R/o. H.No.25/1, Assolda,
Quepem, Goa.

... Respondent

Shri Raunaq Rao. Advocate for the applicant.

Shri S.G. Desai, Senior Advocate with Ms. S. Shelke, Advocate for
the respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 25th February, 2019.

Pronounced on: 4th March, 2019.

ORDER:

1. The applicant seeks the transfer of the matrimonial suit No.16/2006 pending before the Court of the Senior Civil Judge, Quepem to the Court at Panaji which has been instituted at the instance of the respondents for various reasons set out by her in her application. The respondent vehemently opposed the application for transfer and filed an exhaustive reply to that effect.

Be that as it may, preliminary objections were raised to the maintainability of the transfer application on the want of jurisdiction and therefore i would be constrained to deal with the preliminary objections before deciding on the merits of the application.

2. Shri S.G. Desai, learned Senior Advocate came to be heard on behalf of the respondent who invited attention to Article 5 of the Law of Divorce and submitted that there was a preference to the plaintiff to file the suit at the place of his residence or domicile. In that context he placed reliance in **Shri Domnic Anthony Fernandes v. Smt. Petorlina Antao Fernandes** [1989 (2) Goa LT (238)]. A reference was also made to Section 4 of the Civil Procedure dealing with the saving clause and to buttress a plea that Section 23 CPC was not attracted. He placed further reliance in **Antonio Filipe Faleiro v/s. Smt. Sandra Faleiro** [First Appeal No.138 of 2001] and submitted that the Court at Quepem alone had the jurisdiction in terms of Article 5 of the Code. Besides the learned Senior Civil Judge had passed an order holding on its jurisdiction and which too was not challenged by the applicant herein. It was further his contention that Section 23 CPC also did not contemplate the transfer of the proceedings from a Special

Court to an ordinary Court. In view thereof, the application for transfer was not maintainable and had to be dismissed.

3. Shri R. Rao, learned Advocate for the original applicant invited attention to the application moved on behalf of the applicant and also addressed himself to the plaint and the order whereby the Trial Court had held that it had jurisdiction. There was no bar to the exercise of jurisdiction under Section 23 CPC and in that context he relied in the transfer Petition in **Vinisha Jitesh Tolani @Manmeet Laghmani v/s. Jitesh Kishore Tolani** [Transfer Petition (Civil) No.1127 of 2008] to substantiate his case. The preliminary objections to the maintainability of the application were not tenable and had to be dismissed. Finally he placed reliance in **Irene Blanch Khera and another v/s. Glenn John Vijay** [MCA No.144 of 2018] and submitted that on a bare perusal and reading of Section 23 (2) CPC, transfer of the proceedings was tenable and hence the preliminary objections had to be dismissed.

4. Admittedly the matrimonial suit came to be filed by the respondent for divorce under Article 4(4) of the Law of Divorce on the grounds enumerated therein whilst praying for the dissolution of the marriage by a Decree of Divorce on the ground of ill-

treatment and cruelty to him and a simultaneous direction to the Civil Registrar to cancel the marriage entry from his registration. Article 5 reads that a suit for divorce shall be instituted either in the Court of domicile or in the Court having jurisdiction over the place where the plaintiff has his residence; but should the plaintiff reside in a foreign country, the respective suit shall be instituted in the Court of the Division of Lisbon. Article 5 of the Law of Divorce which has been substituted by Article 75 provides that the Court of domicile or of the residence of the plaintiff is competent to try the suit for divorce and separation of persons and properties.

5. In **Domnic Fernandes**(supra), a learned Single Judge of this Court held that Article 75 was to be read within the provisions of the Law of Divorce and was not repealed by the Extension Act of Code of Civil Procedure, 1908. Hence, the place of jurisdiction where the plaintiff resides is competent for a suit of separation. In the brief facts a suit for judicial separation of persons and assets was filed by the respondent against the petitioner who were married in Mumbai though of Goan origin. The plaintiff was residing at Chandor at the time of filing of the suit while the defendant was staying at Cansaulim. The plaintiff also sought the custody of both the minor children who were born to them in

Canada and entitled to the Canadian citizenship. The plaintiff filed the suit in the Court of the Additional Senior Civil Judge, Margao on the ground that the said Court had jurisdiction since she was residing within its jurisdiction. However, in the written statement the defendant/petitioner took a plea that the Margao Court had no jurisdiction as the marriage between the parties had been solemnized at Bombay and was never registered in Goa.

6. In **Domnic Fernandes**(supra), the issue of the jurisdiction of the Court was tried as a preliminary issue and the petitioner insisted on his stand that the Margao Court had no jurisdiction to deal with the matter and the proper Court with jurisdiction would be the Vasco Court within whose jurisdiction Cansaulim lay. It was contended on behalf of the petitioner before the Trial Court that the residence of the defendant was a material consideration in order to ascertain the jurisdiction of the Court under the provisions of Section 20 of CPC and that Article 5 of the Law of Divorce had been repealed by Article 3 of the Portuguese Civil Procedure particularly by its Article 75 which specifically deals with the jurisdiction in respect of the suits filed for judicial separation or divorce. The learned Judge did not find favour with the contention on behalf of the petitioner that Article 5 of the Law of Divorce has

been repealed by Article 75 of the Portuguese Civil Procedure Code.

7. In **Domnic Fernandes**(supra), this Court considered Section 4 of the Goa, Daman and Diu (Extension of the Code of Civil Procedure and Arbitration Act) Act, 1965 dealing with the repeals and savings and observed that the question that fell for determination of this Court was whether there was any provision of Code of Civil Procedure, 1908 corresponding to Article 75 of the Portuguese Civil Procedure Code which replaced Article 5 of the Law of Divorce laying down which Court had jurisdiction to deal with the suits for divorce or judicial separation of spouses. That was a special law and the Portuguese Civil Procedure Code which otherwise had many provisions dealing with jurisdiction had specifically provided for the jurisdiction of the Courts in respect of the divorce and separation of spouses suits in Article 75. This Article therefore for the purposes of divorce or separation of spouses was to be considered as being a part of the Law of Divorce. Moreover the matrimonial jurisdiction of the Civil Courts had been regulated in our country in various Marriage Acts which are special Acts unlike the Code of Civil Procedure therefore derogated by the provisions which occur in the special Acts, in that regard. This being so it is manifest and clear that Section 20 of

the Civil procedure Code was merely a general law which does not affect any special provision which had to be read with a special Act or law.

8. In **Domnic Fernandes**(supra), the learned Single Judge observed that besides, Article 75 should be read within the provisions of the Law of Divorce and therefore it had to be held that the extension Act of the Code of Civil Procedure, 1908 to Goa, Daman and Diu had not repealed it and in that context dismissed the revision application. This judgment clearly substantiates the contention of Shri Desai, learned Senior Counsel that Article 5 / Article 75 of the Portuguese Civil Code would have prevalence over the institution of the suits relating to divorce / separation of the spouses and that the suit as filed on behalf of the respondent in the Court of Quepem would lie within the jurisdiction of that Court. Moreover a reading of Section 4 of the CPC dealing with the savings clause would also substantiate his contention that in the absence of any specific provision to the contrary, nothing in this Code shall deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by law or under any other law for the being in force.

9. In **Antonio Faleiro**(supra), another learned Single Judge of this Court was seized in the appeal with the judgment and order passed by the IInd Additional Civil Judge, Senior Division, Margao rejecting the plaint and dismissing the suit on ground amongst others that the provisions of para 4 of Article 4 of the Law of Divorce were directory and not mandatory as the requirement of examining experts and prior examination under Article 247 or 260 of the Civil Procedure Code, 1910 would be an exercise in futility and Articles 247 and 260 of the Civil Procedure Code, 1910 (Portuguese) were not applicable as the said provisions of the Code of Civil Procedure were repealed. It was contended on behalf of the appellant i.e. the plaintiff before the Trial Court that Articles 247 and 260 of the Portuguese Civil Procedure Code were repealed. However the learned Trial Judge has observed that the Law of Divorce was still in force in this Territory; that there were no provisions in the Code of Civil Procedure, 1908 which were inconsistent with Articles 247 and 260 of the Portuguese Civil Procedure Code and the Code of Civil Procedure, 1908 had not repealed Articles 247 and 260 of the said Portuguese Civil Procedure Code. Quite on the contrary, it was contended on behalf of the respondents that the contention on behalf of the appellant that Articles 247 and 260 of the Portuguese Civil Procedure Code

were repealed was without merit as the said Articles were very much in force and were not repealed by the Code of Civil Procedure, 1908 placing reliance in **Domnic Anthony Fernandes**(supra).

10. Vinisha Jitesh Tolani (supra), filed a petition under Section 25 of the CPC for transfer of the Matrimonial Petition pending before the Senior Civil Judge to United Kingdom where her parents had been given British Nationality. Her marriage with the respondent was performed before the Civil Registrar, Mormugao Taluka, Vasco Da Gama and the same was registered in the presence of three witnesses. It was her contention that due to her troubled marriage she took up residence in London though she was commuting between the UK and India till she physically took up residence in New Delhi. During the same period she was served with certain papers from the Court and she had no option but to engage a lawyer to obtain a copy of the petition filed by the respondent to enable her to protect her rights. It was then that she learnt that the matter had been proceeded with ex-parte, without even serving summons to her, showing her address as Kamat Place, Mangoor Hill, Vasco although, it was within the knowledge of the respondent that she no longer resided in the said flat. She also

discovered that proceedings for declaring her marriage to be a nullity had been commenced while she was in London and much before she returned to India and even while she was in India she was not informed about the pendency of the said proceedings during her stay between April to July, 2008. It was near to impossible to contest the litigation filed in Goa while staying at Delhi and for which she was compelled to file the transfer petition.

11. In **Vinisha Jitesh Tolani**(supra) it was contended on her behalf that keeping in view the judgment of the Apex Court in **Sumita Singh vs. Kumar Sanjay** [(2001) 10 SCC 41] where it was held that in matrimonial proceedings instituted by the husband against the wife, the convenience of the wife is considered in contesting the suit and, accordingly, the matrimonial proceedings ought to be transferred to Delhi. Further it was contended on behalf of the respondent that she was a resident of United Kingdom on the basis of the residential status of an Afghanee refugee granted to her by the UK Government and it did not really matter to her whether the petition under Section 12 of the Hindu Marriage Act was heard either in Delhi or in Goa. Another point was raised that civil proceedings relating to marriage were governed by the Civil Code of 1867 which was in force in Goa and that as a result

the petition for annulment could only be tried in the State of Goa and not in any other State. The family laws of Goa, Daman & Diu applied uniformly to all persons residing within the State of Goa and that by virtue of the provisions of the Goa, Daman & Diu (Administration) Act, 1962, a provision was made for continuance of the existing laws and their adaptation.

12. In **Vinisha Jitesh Tolani**(supra), the Hon'ble Apex Court did not find favour with the contention raised on behalf of the respondent that the annulment proceedings could not be heard outside the State of Goa in view of the existing laws which made the Civil Code and the laws relating to marriage applicable to all persons residing within the State of Goa, found that the claim of the petitioner was justified and there was no difficulty in allowing the prayer of the petitioner. This judgment was in the facts of that case as rightly submitted by Shri Desai, learned Senior Advocate on behalf of the respondent and not at all applicable to the facts of the case. Besides, it had also not considered Article 5/ Article 75 of the Portuguese Civil Code.

13. **Irene Khera**(supra), filed an application under Section 24 of the CPC for transfer of the Matrimonial Petition filed by the

respondent in the Court of the Civil Judge, Senior Division, Mapusa, North Goa to the Family Court, Bandra, Mumbai claiming that she was the legally wedded wife of the respondent, their marriage was registered in Goa after that they got married in the 'Church' at Goa and that she had a child out of the said marriage who was studying in a school in Goa. She was constrained to flee from the house of the respondent as she faced serious threats to her safety and the safety of her daughter. She had made three complaints to that effect against the respondent to the local police station but to no avail, as the respondent being a sitting MLA was an influential person who also threatened to kidnap their minor daughter.

14. In **Irene Khera**(supra), it was her contention that Mapusa was at a distance of 555 kilometres from Mumbai and therefore she was not in a position to effectively prosecute the said proceeding in Mapusa. Moreover, the respondent was a wealthy businessman and politically influential person, being a sitting MLA unlike the applicant No.1 who was a housewife and had no family support. Besides, she also apprehended serious threats to her life and also the kidnapping of her daughter in case she was required to travel to Goa to contest the proceedings precipitating the application for transfer. The respondent opposed the maintainability of the

application as it had to be filed before the Court of the Principal District Judge at North Goa and the Court in Mumbai did not have jurisdiction. It was further contended on behalf of the respondents that he being of Goan origin and as the marriage was registered under the provisions of the Law of Marriage embodied in the Portuguese Civil Code 1867, only the Court of the Civil Judge, Senior Division at Mapusa, Goa, had the jurisdiction to try and determine the matrimonial petition in terms of law applicable thereto and which could not be transferred out of Goa.

15. In **Irene Khera**(supra), it was contended on her behalf that the application was very much maintainable as the High Court of Bombay being the common High Court for the two States of Maharashtra and Goa just as much as Nagpur Bench can transfer the proceedings lying outside its exclusive judicial districts to the judicial districts in its jurisdiction and vice-versa, then no exception can be made in respect of this High Court's Bench at Panaji, Goa also and this Court can very well avail its jurisdiction and there was no bar at all in that respect. The learned Single Judge of this Court at the Principal seat at Bombay considered Sections 3 and 4 of the High Court at Bombay (Extension of Jurisdiction to Goa, Daman and Diu) Act, 1981, the establishment of the permanent Bench of

the Bombay High Court at Panaji as contained in Section 9, Section 20 providing for a common High Court for Maharashtra, Goa, Dadra and Nagar Haveli and Daman and Diu as provided for under Section 20 after Goa become a State and on coming into force of the Goa, Daman and Diu Reorganization Act 1987 and besides considered Section 26 of the Act which provides that the Principal Seat of the common High Court shall be at the same place at which the Principal Seat of the existing High Court is located immediately before the appointed day.

16. In Irene Khera (supra), the learned Judge on considering the full bench judgment in **Edward Evan Pereira and Anr. V/s. Goncalo Jose Agnelo and Anr** (2011 5 MLJ 550] observed that the judgment made it clear that the High Court of Bombay being the common High Court for the State of Maharashtra and Goa, the same jurisdiction, including the jurisdiction under the Letter Patent is exercisable by the High Court of Bombay sitting at Panaji, Goa, which is exercisable by the High Court of Bombay at its Principal Seat at Bombay and its Benches at Nagpur and Aurangabad and therefore, if the Principal Seat of the High Court at Bombay can transfer the proceedings pending in the judicial Districts in exclusive jurisdiction of its Benches at Aurangabad or Nagpur, then

it follows that the Principal Seat of High Court at Bombay can also transfer the proceedings which are lying within the exclusive jurisdiction of its Seat at Goa, as both the Courts namely the Court in which the proceedings are pending and the Court to which the proceedings are to be transferred are subordinate to the common High Court.

17. In **Irene Khera**(supra), the learned Judge further held that the Court of the Senior Civil Judge, Mapusa, where the proceedings were pending and the Family Court, Bandra, where the proceedings are to be transferred, were both subordinate to the High Court, therefore, this Court which is a common High Court for both the State of Maharashtra and the State of Goa, is having the jurisdiction to decide this Application under Section 24 of the C.P.C. Although a reference was made to the judgment in **Vinisha Tolani** (supra), the question of the proceedings being instituted under Article 4 of the Law of Divorce, the mandate of Article 75 of the Portuguese Code and the law specifically laid down in that regard in **Domnic Fernandes** (supra) did not come up for consideration before the learned Single Judge in **Irene Khera**(supra). Therefore this judgment too is clearly distinguishable. As the proceedings initiated under the Family Laws are peculiar to the State of Goa and

Article 75 clearly provides for the place of domicile or of the residence as the place where the Court would have jurisdiction to deal with the suit, there is force in the contention of Shri S.G. Desai, learned Senior Advocate that it is the Court at Quepem alone which would have the jurisdiction to deal with the matrimonial suit. In view thereof, the preliminary objection to the maintainability of the petition is upheld. It follows as a necessary corollary that the application for transfer as such would not survive and is accordingly dismissed.

NUTAN D. SARDESSAI, J.

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