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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
MISC. CIVIL APPLICATION NO. 125 OF 2019**

Sia Virendra KamatApplicant
Nee Sarvada Sudheer Parulekar

V/s.

Mr. Virendra Damodar KamatRespondent

**WITH
MISC. CIVIL APPLICATION NO. 130 OF 2020**

Mr. Virendra Damodar KamatApplicant

V/s.

Sia Virendra KamatRespondent

Mr. Pralhad Paranjape a/w Mr. Manish Kelkar for the Applicant in
MCA 125/2019 and for Respondent in MCA 130/2019

Mr. Mayur Khandeparkar a/w Mr. Gandhar Raikar i/b Siddhesh
Borkar for Applicant in MCA 130/2019 and for Respondent in MCA
125/2019

CORAM : NITIN W. SAMBRE, J.

DATE: FEBRUARY 22, 2021.

P.C.:

1] Misc. Civil Application 125 of 2019 is taken out by wife with a
prayer for exercising powers under Section 24 of Code of Civil
Procedure, 1908 [Hereinafter referred to as 'CPC' for the sake of

brevity] seeking transfer of matrimonial proceedings being Marriage Petition No. 42 of 2018 initiated by husband in the Court of 1st Additional Civil Judge Senior Division at Margao to the Family Court at Bandra, Mumbai.

2] Misc. Civil Application No. 130 of 2020 is initiated by husband seeking exercise of powers under Section 24 of the CPC seeking transfer of matrimonial proceedings being No.A-101360 of 2018 pending on the file of Family Court, Bandra to the Court at Panaji-Goa.

3] Facts for deciding both these Applications are as under.

4] Parties to the petition got married on 7th December 2017 at Margao in the state of Goa. Marriage was also solemnized by following Hindu rituals on 12th December 2017 at Sindhudurg, state of Maharashtra. After matrimonial discord, wife started residing at her parents home which is at Mumbai whereas Respondent, a businessman continued to stay in Goa.

5] Wife, citing ground of hardship and non receipt of maintenance, sought transfer of the proceedings initiated by the husband, from Goa to Bandra Family Court whereas husband sought transfer of proceedings initiated by wife in Bandra Family Court to Goa Court.

6] Mr. Paranjape, learned counsel appearing for the Applicant would urge that proceedings pending at Goa at the behest of the husband are required to be transferred to Mumbai as husband has asked her to leave the matrimonial home i.e. Goa. According to him proceedings at Margao are for annulment of marriage under Article 20 of the Law of Divorce whereas marriage Petition is for divorce under section 12 1(a) of the Hindu Marriage Act. Shri Paranjape would urge that Applicant wife is serving in bank at Mumbai. She is residing with her parents who are senior citizens and that being so, it will be difficult for her to travel all the way from Mumbai to Goa on each date of the proceedings. As such he would urge that the issue of hardship can be inferred in her favour, from the aforesaid

background and as such prayed for transfer of the proceedings from the Court at Goa to Court at Bandra, Mumbai.

7] Learned counsel appearing for the Respondent would urge that non-Applicant husband was born in Goa and as such is domiciled of Goa. Section 49 of the Portuguese Civil Code, 1867 as applicable to Goa, provides that a married woman's domicile shall be as that of her husband. Hence according to him, in view of aforesaid provisions, place of domicile of the wife has to be considered as Goa. He would invite attention of this Court to the declaration of marriage signed by wife and the official Registrar of Marriage which was made in the office of Civil Registrar Margaon, Goa, in terms of Article 1079 r/w 1081 of the Portuguese Civil Code. He would urge that neither Hindu Marriage Act, 1955 nor Family Court Act 1984 have been notified in the state of Goa. Only Portuguese Civil Code is applicable to domicile of Goa. According to him, wife voluntarily left the home of the Applicant and did not return back, as she has started residing with her parents in Mumbai. He would urge that annulment of marriage is based on provisions of Portuguese Civil Code, which proceedings are at the stage of recording of evidence. As such according to him Court

at Mumbai will not have any jurisdiction. It is further claimed that Court of Civil Judge Senior Division passed an order answering preliminary issue as to jurisdiction of Goa Court to try the proceedings at the behest of the wife and the same is answered against wife which is not questioned till this day. As such submissions of Shri Khandeparkar are, under provisions of Section 24 of the CPC, proceedings can be transferred from Court having no jurisdiction to Court having jurisdiction and vice versa and that being so, in the light of aforesaid submissions, Court at Mumbai will not have any jurisdiction to entertain the proceedings whereas Court at Goa will have authority to entertain the proceedings. In the aforesaid background the claim is, prayer of the wife for transfer needs to be rejected whereas prayer of the husband needs to be allowed. He would rely on provisions of Article 5 of the Portuguese Civil Code so as to substantiate his aforesaid contentions. Drawing support from the Division Bench Judgement in the matter of ***Monica Variato Vs. Thomas Variato*** in LPA No. 31 of 1998 on 19th June 2000. He would urge that wife has gained domicile of Goa by virtue of marriage. That being so, at her behest, proceedings cannot be entertained under the Hindu Marriage Act or under the Family

Courts Act at Mumbai.

8] As far as prayer of the transfer of the proceedings of the husband is concerned Shri. Paranjape would oppose his claim in the backdrop of aforesaid submissions.

9] Considered rival submissions.

10] It is not in dispute that parties to the proceedings are Hindu by religion. In the aforesaid background, the contention of Shri Khandeparkar are, judgement in the matter of **Monica Variato** [cited supra] expressly provides for jurisdiction with the Court at Goa and not the Court at Bombay. The said issue was dealt with by the Apex Court in the matter of *Vinisha Jitesh Tolani @Manmeet Laghmani Vs. Jitesh Kishore Tolani*¹. The Apex Court in para 13 of the said judgement has held that in view of applicability of Hindu Marriage Act throughout the country, it is not open for the parties to canvas that only Goa Court will have jurisdiction and not the other Courts in India. The aforesaid judgement in the matter of **Monica Variato** [cited

¹ (2010) 5 SCC 748

supra] by Mr. Khandeparkar has been duly considered by the apex Court and has recorded finding in para 13 as under:

“13.....Section 2 of the Hindu Marriage Act extends the operation of the Act to the whole of India except Jammu and Kashmir and also applies to Hindus domiciled in the territories to which the Act extends who are outside the said territories. In other words, the provisions of the Hindu Marriage Act, 1955 would be applicable to the petitioner's case and can be heard by any Court having jurisdiction within the territories to which it applies”.

11] Apart from above, Bombay High Court in the matter of ***Smt. Irene Blanch Khera and another Vs. Shri. Glenn John Vijay [MCA No. 144 of 2018]*** had an occasion to consider similar situation. This Court in the aforesaid judgement has already held that courts at Goa and Mumbai are subordinate to the High Court at Bombay and as such, this Court in law can order transfer of the proceedings from state of Goa to Mumbai. Though Mr. Khandeparkar has relied on the principle of *Sub silentio* so as to claim that judgement of the Apex Court has not specifically dealt with issue raised about ouster of jurisdiction, however it is difficult to infer and apply said principle to the aforesaid case particularly when it is held that Family Court at

Mumbai will also have jurisdiction to try and decide the proceedings which are initiated at Goa.

12] In the present case presumption of valid marriage can be inferred, as both the parties have admitted marriage and cohabitation. Even if the parties to the Application have lived together as husband and wife, however fact remains that the marriage which is solemnized in Goa or in Maharashtra, proceedings for its annulment/divorce either under provisions of Goa law or Hindu Marriage Act can be decided by the Court in Mumbai i.e. Family Court, Bandra. It cannot be said that just because parties are of domicile of Goa and are governed by Portuguese Civil Code, then exclusively Goa Court will have jurisdiction as the Court while dealing with cause brought before it need to adjudicate the claim having regard to the legal provision/enactment by which such relationship is governed.

13] Considering the object with which Section 24 is incorporated in CPC thereby empowering the High Court to order transfer of the

proceedings within State/its jurisdiction, it cannot be said that this Court cannot exercise the jurisdiction for ordering the transfer of the matter from Court at Goa to Court at Bombay merely because the laws by which the proceedings are regulated has no applicability in Mumbai. It can be noticed that Section 24 carves out an exception to the territorial jurisdiction. The convenience and hardship of wife in the matrimonial proceedings is of importance while considering the prayer for transfer.

14] If we refer to Section 22 of the Code of Civil Procedure, 1908 same empowers the Court to transfer proceedings which may be instituted in more than one Court. While exercising jurisdiction under Section 24, it has to be ensured that the Court to which the proceedings are ordered to be transferred has jurisdiction to try the said suit or proceedings.

15] The territorial, pecuniary and jurisdiction over the subject matter are three independent heads on which jurisdiction of the Court depends. The objection to the Court's jurisdiction, territorial

or pecuniary is technical. However, that by itself will not prompt the Court to infer absence of inherent jurisdiction.

16] In case if Court passes an order in absence of territorial or pecuniary jurisdiction, it cannot be said that the Court is lacking inherent jurisdiction. In support of the aforesaid observations, it will be appropriate to draw support from the judgment of the Apex Court in the matter of ***Official Trustee, West Bengal and Ors. vs. Sachindra Nath Chatterjee and Anr***². The relevant observations read thus :

“This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This Classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to

2 AIR 1969 SC 823

distinguish exercise of jurisdiction from existence of jurisdiction; 'for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.'"

17] Apart from above, observations of the Madhya Pradesh High Court in the matter of ***Vishnoo Kumar Budhan and Ors. vs. Liladhar Hari Ram Agarwal an Ors***³ are worth referring to, which read thus:

"Jurisdiction of the Court depends on 3 circumstances, viz., territorial, pecuniary and jurisdiction over the subject matter. The existence of jurisdiction is different than exercise of jurisdiction. The territorial jurisdiction or pecuniary jurisdiction of the Court can be said, to be exercise of jurisdiction, this is so, because of [Section 21\(1\)](#) and (2) of the Code of Civil Procedure. An objection that court has no jurisdiction to try the suit because of the territorial incompetence of the Court or because of the value of the subject matter of the suit has to be raised in the Court of first instance at the earliest possible opportunity, otherwise no

³ ILR(1993)MP700

*objection is permissible subsequently, unless it is demonstrated that the exercise of the jurisdiction has resulted in failure of justice. The objection to the Court's jurisdiction, territorial or pecuniary, are both technical and does not amount to absence of inherent jurisdiction. There is no inherent lack of jurisdiction in the Court if the order is passed in absence of territorial or pecuniary jurisdiction of the Court. However, in the third category when the Court has no jurisdiction upon the subject matter then there is inherent lack of jurisdiction to decide the matter. The objection of absence of such jurisdiction can be raised at any stage. The competence of the Court to try the proceedings as mentioned under [Section 24](#) therefore has necessarily, reference to "subject matter of dispute". When there is jurisdiction over the subject matter, the decision of all other questions in the case are only exercise of that jurisdiction. Want of territorial jurisdiction is not one of those defects which renders the Court's decision a nullity. But when there is want of inherent jurisdiction, nothing can cure it, neither consent nor waiver nor estoppel. Want of territorial or pecuniary jurisdiction is not fatal defect to a suit or proceeding, it is only an irregularity and is curable. In *Hiralal Patni v. Shri Kali Nath*, AIR 1962 SC 199, in paragraph 4, the Supreme Court has held :*

"It is well settled that the objection as to the local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking it is a case of

inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory-recognition by enactments like Section 21 of Code of Civil Procedure."

18] As such, even if after transfer the Court at Bombay will not have territorial jurisdiction, still it wont lack inherent jurisdiction to try proceedings if order under Section 24 is passed. This Court in the matter of ***Asha @ Deepa Sharma vs. Ramchandra L. Sharma***⁴ in para 10 has held thus :

"10. A close reading of Sections 23 and 24 would make it clear that Section 23 speaks of forum where an application for transfer is to be made and Section 24 provides the exercise of power of transfer by the High Court or for that matter by the District Court. While exercising the power of transfer under Section 24, it is not necessary that the suit or proceeding must be transferred only to the court which has jurisdiction to try that suit or proceeding. Rather, as provided under Sub-section (5) of Section 24, while exercising the power of transfer under Section 24, the High Court or the District Court as the case may be, may transfer the suit or proceedings to a court which has no jurisdiction. I have, therefore, no hesitation in holding that even if the court at Jamnagar

4 1997 BLR Vol. 100 page 55

has no jurisdiction, if the circumstances so warrant, this Court may order for transfer of the aforesaid proceedings to the courts at Jamnagar. However, the question is whether in the light of the contentions raised by the learned Counsel for the parties, a case for transfer of the aforesaid proceedings to the courts at Jamnagar is made out or not. Before I come to the facts of the case, the authorities cited by the learned Counsel for parties may be referred.”

19] Bombay High Court in the matter of ***Mrs. Sweta Milind Hoble Vs. Mr. Milind Anil Hoble***⁵ and ***Mr. Milind Anil Hoble Vs. Mrs. Sweta Milind Hoble***⁶ had an occasion to consider similar issue.

20] Admittedly in the case in hand, parties have married by following Hindu rituals. Respondent has tried to resist the jurisdiction under Section 24 of the CPC only on the plea that parties are domicile of Goa after marriage and as such, it is Portuguese Law which will govern the relationship. Even if for the sake of argument same is accepted, that by itself in my opinion will not put an embargo on the right of a party to claim transfer under Section 24 of the CPC.

⁵ Misc. Civil Application No. 265 of 2018

⁶ Misc. Civil Application (ST) No. 32454 of 2018

The fact remains that High Court of Bombay at Goa is part of the High Court and the Court at Goa from where proceedings were sought to be transferred is subordinate to High Court.

21] Similar arguments were canvassed in the case of Vinisha Tolani as canvassed by the husband in this case. This Court in the said judgement relied on the judgement of apex Court in the matter of **Subramaniam Swami V. Ramkrishna Hegde**⁷. It was inferred that High Court had jurisdiction to transfer the proceedings from Goa to Bombay.

In the aforesaid judgement of the Apex Court, it has been held that in case if more than one Court had jurisdiction to try the proceedings, Plaintiff is a *dominus litis*.

22] As far as the facts of the present case are concerned, to and fro travel of wife would be around 1200 Kms and she will be required to spend minimum 3 days, as two days for travel and one day for attending the Court proceedings.

⁷ (1990) 1 SCC 4

23] Apart from above, it is to be noted that she is serving and earning for herself and is residing with her parents who are senior citizens. Applicant is also not getting any maintenance. That being so, Applicant wife will suffer more hardships than that of non-Applicant husband.

24] As such in my opinion, case for transfer at the behest of Applicant wife is made out. As such Misc. Civil Application No. 125 of 2019 stands allowed in terms of prayer clause 20(a) which reads thus:

“(a) The record and proceedings of the case bearing Marriage Petition No. 42 of 2018 filed by the Respondent in the Court of Ld. First Additional Civil Judge Senior Division, at Margaon be transferred to the Family Court at Bandra”.

25] Whereas Application preferred by husband being Mic. Civil Application No. 130 of 2019 stands rejected.

[NITIN W. SAMBRE, J.]

IRESH
SIDDHARAM
MASHAL

Digitally signed by
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MASHAL.
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