

24.11.2022

List – D/L.

Sl No.14.

Mithun

Ct.No.652.

CO 87 of 2022

Priyanka Ghosh

Vs.

Tushar Kanti Ghosh

Mr. Debasish Kundu, Adv.

Mr. Souma Subhra Ray, Adv.

...for the petitioner.

Mr. Kamal Krishna Pathak, Adv.

Mr. Souvik Maji, Adv..

...for the O.P.

This is an application under Section 24 of the Code of Civil Procedure seeking transfer of Matrimonial Suit No.250 of 2019 pending in the file of the learned Additional District Judge, Kalyani, Nadia to the file of the learned Additional District Judge at Barrackpore, North 24-Parganas.

Petitioner contended that the marriage between the petitioner and the husband/opposite party was solemnized on 17.01.2013 according to the Hindu Rites and Customs. The parties are blessed with a female child who is now school going and resides with the petitioner. Petitioner alleged that the husband/opposite party used to cause immense mental and physical torture and ultimately she was driven from her matrimonial home. Thereafter the opposite party/husband filed present suit for dissolution of marriage by a decree of divorce which is registered as

Matrimonial Suit No.336 of 2015 before the learned District Judge, Nadia

Petitioner submits that her paternal house is at Dum Dum where she is now staying with her daughter and which situates about 250 Kms away from the Court of learned District Judge, Nadia. Considering the same the petitioner earlier filed an application under Section 24 of the Code of Civil Procedure seeking transfer of the present matrimonial suit from the Court of learned District Judge at Nadia being CO No.1761 of 2016. This Court while disposing the said application under Section 24 of the Code of Civil Procedure filed by the present petitioner being CO 1761 of 2016, was pleased to transfer the said matrimonial proceeding from the Court of the learned District Judge, Krishnagar, Nadia to the Court of the learned Additional District Judge at Kalyani and renumbered as Matrimonial Suit No.250 of 2019.

Mr. Debasish Kundu, appearing on behalf of the petitioner submits that the petitioner is eager to contest and defend the said suit but in view of constant threat, it has become impossible for her to attend the said court in order to conduct and defend the case in the Court of Additional District Judge, Kalyani. He further submits that present application of transfer has been made on the basis of fresh cause of action which includes the diarized incident dated 22.1.2021. Moreover, the petitioner is an unemployed

and is not getting any maintenance from her husband. She is now residing with her father at Dum Dum. Petitioner submits that the petitioner has initiated criminal proceeding under Section 498A of the Indian Penal Code and also another proceeding under Section 125 of the Code of Criminal Procedure and both the cases are pending before the learned Magistrate at Barrackpore Court.

Petitioner further submits that opposite party regularly attending the said cases before the Barrackpore Court and he will not face any convenience, if the present Matrimonial suit is retransferred from Kalyani Court to Barrackpore Court. The petitioner being a helpless lady is suffering from trauma due to threat by the husband and his associates. Accordingly she has prayed for the aforesaid transfer.

Mr. Pathak, learned Counsel appearing on behalf of the opposite party vehemently opposed the prayer and submits that a Coordinate Bench of this Court vide order dated 18.04.2019 was pleased to transfer the aforesaid matrimonial proceeding from Krishnanagar Court to Kalyani Court and now petitioner again praying for re-transferring from Kalyani Court to Barrackpore Court which is barred by res-judicata and cannot be entertained. He further submits that he is

also facing threat in conducting cases at Barrackpore Court and as such he will be prejudiced if the case is transferred from Kalyani Court to Barrackpore Court. In this context, he relied upon the principles of res-judicata and he also referred the judgment of the Apex Court reported in **1976(4) SCC 66** and **AIR 2005 SC 626** and contended that it is now well-settled that principles of res-judicata can be invoked not only in separate subsequent proceedings, they also get attracted in different stages of the same suit also and as such the prayer made by the petitioner cannot be allowed.

The principles of res-judicata suggests that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

In the present case it is true that on the earlier occasion on the basis of petitioner's prayer matrimonial suit was transferred from the Krishnanagar Court to the Court at Kalyani. On perusal of the said order passed in CO 1761 of 2016, it

appears that in the said suit learned Counsel appearing on behalf of the petitioner submitted before the Coordinate Bench of this Court for transferring the matrimonial suit before the Barrackpore Court and she contended that for such transfer either petitioner or the opposite party will not suffer because both of them have to travel almost same distance to represent their suit. In the said proceeding learned Counsel appearing on behalf of the opposite party submitted that opposite party seriously apprehends to be humiliated by the petitioner and her family members, if he comes to Barasat and Barrackpore and as such, he suggested for transfer the suit to Kalyani Court and he also submitted that the parties will have to travel almost equal distance if the case is transferred to Kalyani Court.

The Court after considering the suggestion made by the parties was pleased to accept the proposal given by the learned Counsel for the opposite party while disposing of the application after considering the convenience of both the parties.

Learned Counsel appearing on behalf of the petitioner submits by filing copy of a complaint dated 22.11.2021, which is marked as Annexure-C that while the petitioner was returning on that date from the Court, opposite party and his brother had threatened

and asked her not to come again before the Court at Kalyani, so that the opposite party can get divorce from the Court easily and this particular incident gives rise to a separate cause of action to put forth the present application for transfer.

No doubt an order directing a transfer puts an end to the case, so far as the court dealing with it is concerned, still subsequent application of transfer on different cause of action cannot be regarded as barred by res-judicata. Therefore subsequent to earlier decision of such application, if new facts emerge or circumstances change materially it gives a fresh cause of action to the parties and the succeeding application if filed, in view of changed scenario, needs to be decided afresh on the facts pleaded therein. In fact an order under section 24 of the code is a judicial order, yet such adjudication is confined to the facts and grounds existing till such stage. This is also because the decision of such application neither decides nor adjudicates the rights of the parties nor it decides an "issue" involved in the original Matrimonial suit. Said decision passed in C.O. 1761 of 2016 dated 18.04.2019 cannot be treated to be a decision of an "issue", as the same is only an adjudication of a request to transfer a case (as reflected in the order)

on the facts pleaded as was prevailing at the relevant point of time.

A broad proposition that are being laid down in various judicial pronouncements is that balance of convenience and inconvenience to the plaintiff or defendant or witnesses; convenience or inconvenience arising out of a particular place of trial, having regard to the nature of evidence or the points involved in the case; issues raised by the parties; and, reasonable apprehension in the mind of a litigant that he might not get justice in the court, where the proceedings are pending, or reasonable apprehension of failure of justice on the basis of proven bias, transfer of the proceeding can be allowed. However, though distance alone may not be the only decisive factor for order of transfer but the convenience of the wife must be of paramount importance for determining the question of transfer.

In ***Sunita Singh Vs. Kumar Sanjoy & Anr.*** reported in ***AIR 2002 SC 396***, it has been laid down that convenience of wife should get paramount importance with regard to the transfer of the proceeding.

In the present case, the husband is admittedly attending and contesting, one criminal proceeding under section 498A of IPC and other proceeding under

Section 125 of the Code of Criminal Procedure and he would further be required to attend the Court at Barrackpore to defend those two cases. Though he has stated that he is also facing threat but he has not filed any document that he has lodged any complaint to that extent anywhere.

Having considered the aforesaid facts and circumstances of the case and that other two proceedings are pending before the Barrackpore Court where the husband would be required to attend and that the petitioner is an unemployed lady who is also custodian of a minor female school going child and that in such case where the husband has filed a suit of dissolution of marriage, the convenience of the wife is of paramount importance, the prayer made by the petitioner is allowed.

C.O.87 of 2022 is accordingly allowed.

Learned District Judge, Krishnanagar, Nadia is hereby directed to withdraw the Matrimonial Suit No.250 of 2019 pending before the learned Additional District Judge, Kalyani, Nadia and to transmit the same to the Court of the learned District Judge, North 24-Parganas at Barrackpore within a period of 3 weeks from the date of communication of the order, who in turn, will transfer the same to the Court of the learned Additional District Judge at Barrackpore, North 24-

Parganas having jurisdiction within a period of 3 weeks thereafter. The Transferee Court shall serve fresh notice to both the parties intimating the next date of hearing before taking up further proceeding of the suit.

Department is directed to send a copy of this order to the learned District Judge, Nadia at Krishnanagar and to the District Judge, North 24-Parganagar at Barasat immediately.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Ajoy Kumar Mukherjee, J)