

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**TRP(C) No. 235 of 2022**

*Sonalija Jena*

.....

***Petitioner***  
*Mr. B. Parida, Adv.*

Vs.

*Abinash Mohapatra*

.....

***Opposite Party***  
*Mr. R. Prusty, Advocate*

**CORAM:**

**JUSTICE SAVITRI RATHO**

**ORDER**

**19.10.2022**

**Order No.**

03.

(Through hybrid mode)

1. This application under Section 24 of Code of Civil Procedure ( in short “the C.P.C.”) has been filed by the petitioner-wife for transfer of C.P. No. 128 of 2022 , filed by the opp. party-husband under Section 25 of the Guardian & Wards Act 1890, in the Court of learned Judge, Family Court, Rourkela, to the Court of learned Judge, Family Court, Bhubaneswar.

TRP(C) No. 86 of 2022 under Section 24 of the C.P.C. has been filed by the petitioner- wife for transfer of C.P. No.48 of 2021 filed by the opposite party – husband under Section 22 of the Special Marriage Act read with Section 7 of the Family Courts Act, for restitution of conjugal rights in the Court of the learned Family Judge, Rourkela to the Court of the learned Judge, Family Court,

Bhubaneswar, which is listed today along with this TRP(C) and both were heard together and disposed of today.

2. Vide order dated 08.09.2022 , the matter was referred for mediation to the Orissa High Court Mediation Centre .The Mediator has submitted an interim report dated 27.09.2022 informing that the next date of meditation was 12.10.2022. Today, Mr. Parida, learned counsel for the petitioner files the copy of the mediation report dated 12.10.2022 along with a memo. The mediator has inter alia reported that the mediation became unsuccessful. The same be tagged to the record. As mediation has failed, the two TRP(C)s are taken up for final disposal on the consent of the counsels.

3. Mr. B. Parida, learned counsel for the petitioner- wife submits that the parties had fallen in love and married before the Marriage Officer, Rourkela on 01.03.2011 and thereafter the `marriage was solemnized before friends and relatives in the Rourkela Club on 10.02.2012. But soon after her marriage she was tortured at Rourkela the place of her in laws as well as at her husband's workplace in Jharsuguda. They demanded Rs 5 lakhs more as dowry. Their son was born on 23.08.2014. But the opposite

party continued to harass her. They stayed in Bhubaneswar between 2015 to 2016, but the opposite party left her and son and went back to Rourkela. She has lodged FIR against him at the Uditnagar Police Station. She has filed C.P.No. 134 of 2019 against him for divorce, permanent alimony and maintenance of their son, in the Court of the learned Judge , family Court , Bhubaneswar, where he has appeared and filed written statement dated 06.07.2019. Thereafter in order to harass her , he has filed C.P.No, 48 of 2021 in the Court of the learned Judge , Family Court , Rourkela for restitution of conjugal rights. She has filed TRP( C) No. 86 of 2022 before this Court for transfer of C.P. No. 48 of 2021 to Bhubaneswar and during pendency of TRP( C) No. 86 of 2022 , he filed C.P.No. 128 of 2022 in Rourkela for custody of their son. The petitioner and her minor son are residing in Bhubaneswar with her parents and as she has no independent source of income, they are dependent on her parents. As the distance between Rourkela and Bhubaneswar is more than 400 kms., it would be inconvenient for her to go to Rourkela to attend the case. That apart, C.P. No. 134 of 2019 filed by her for divorce is pending in the Court of learned Judge, Family Court, Bhubaneswar in which the opposite party-husband has appeared, so

no inconvenience will be caused to him if C.P. No. 128 of 2022 is also transferred to the Court of learned Judge, Family Court, Bhubaneswar. As their son is residing with her in Bhubaneswar , the proceeding praying for his custody should have been filed in Bhubaneswar . In support of his prayer for transfer, Mr. B. Parida, learned counsel for the petitioner submits that it is the settled position of law that in matrimonial cases, the convenience of the wife is to be given paramount importance and the same principle will apply to this case as it relates to custody of the son who is residing with her . He relies on the following decisions to buttress his submissions :-

- (i) ***Sumita Singh vs. Kumar Sanjay and another*** reported in ***AIR 2002 SC 396.***
- (ii) ***Krishna Veni Nagam vs. Harish Nigam*** reported in ***(2017) 4 SCC 150.***
- (iii) ***Prabhati Pattnaik vs. Aditya Kumar Pattnaik*** reported in ***2020 (III) ILR CUT 796.***

4. Mr. R. Prusty, learned counsel for the opposite party opposes the prayer for transfer stating that learned Judge, Family Court , Rourkela has the jurisdiction to try the case for which the

opposite party has rightly filed the case in Rourkela and this Court should also consider the difficulties which will be faced by him if the case is transferred to Bhubaneswar . He apprehends danger to his life in Bhubaneswar and will face inconvenience if the C.P. is transferred to Bhubaneswar as he will have to cover 800 miles to come to Bhubaneswar to attend to all his cases pending there and return to Rourkela.

**5. CPC 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) retransfer 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 <sup>1</sup>[is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.*

*<sup>2</sup>[(3) For the purposes of this section,-*

*(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;*

*(b) “proceeding” includes a proceeding for the execution of a decree or order.]*

*(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.*

*<sup>3</sup>[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.*

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1. Subs, by Act No. 104 of 1976, sec. 10 for “thereafter tries such suit” (w.e.f. 1-2-1977).

2. Subs, by Act No. 104 of 1976, sec. 10 for sub-section (3) (w.e.f. 1-2-1977).

3. Ins. by Act No. 104 of 1976, sec. 10 (w.e.f. 1-2-1977).

6. In the case of ***Sumita Singh*** (supra), the Supreme Court held that since it is the husband's suit against the wife, the wife's convenience must be looked at and found the circumstances sufficient to allow the wife's prayer for transfer of the case .

However , four years thereafter, in the case of ***Anindita Das vs. Srijit Das*** reported in ***(2006) 9 SCC 197***, the Supreme court has held as follows :

*...“3. Even otherwise, it must be seen that at one stage this Court was showing leniency to ladies. But since then it has been found that a large number of transfer petitions are filed by women taking advantage of the leniency taken by this Court. On an average at least 10 to 15 transfer petitions are on Board of each Court on each admission day. It is, therefore, clear that leniency of this Court is being misused by the women.*

*4. This Court is now required to consider each petition on its merit. In this case the ground taken by the wife is that she has a small child and that there is nobody to keep her child. The child , in this case , is six years old and there are grand parents available to look after the child. The Respondent is willing to pay all expenses for travel and stay for the Petitioner and her companion for every*

*visit when the Petitioner is required to attend the Court at Delhi. Thus, the ground that the Petitioner has no source of income is adequately met.*

5. *Except for stating that her health is not good, no particulars are given. On the ground that she is not able to come to Delhi to attend the Court on a particular date, she can always apply for exemption and her application will undoubtedly be considered on its merit. Hence, no ground for transfer has been made out.*

6. *Accordingly, we dismiss the Transfer Petition. We, however, direct that the Respondent shall pay all travel and stay expenses of the Petitioner and her companion for each and every occasion when she is required to attend the Court at Delhi”....*

In the case of **Krishna Veni Nagam** (supra), the Supreme court had held as follows:

14. *One cannot ignore the problem faced by a husband if proceedings are transferred on account of genuine difficulties faced by the wife. The husband may find it difficult to contest proceedings at a place which is convenient to the wife. Thus, transfer is not always a solution acceptable to both the parties. It may be appropriate that available technology of videoconferencing is used where both the parties have equal difficulty and there is no place which is convenient*

*to both the parties. We understand that in every district in the country videoconferencing is now available. In any case, wherever such facility is available, it ought to be fully utilized and all the High Courts ought to issue appropriate administrative instructions to regulate the use of video conferencing for certain category of cases. Matrimonial cases where one of the parties resides outside court's jurisdiction is one of such categories. Wherever one or both the parties make a request for use of videoconferencing, proceedings may be conducted on video conferencing, obviating the needs of the party to appear in person. In several cases, this Court has directed recording of evidence by videoconferencing. (State of Maharashtra vs Praful B.Desai ; ( 2003) 4 SCC 601 ; Kalyan Chandra Sarkar v Rajesh Ranjan ( 2005) 3 SCC 284 ;Budhadev Karmaskar vs State of W.B;(011) 10 SCC 283 ; Maltesh Gudda vs State (2011) 15 SCC 330).*

18. *We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can*

be:

(i) *Availability of videoconferencing facility.*

(ii) *Availability of legal aid service.*

(iii) *Deposit of cost for travel, lodging and boarding in terms of Order 25 CPC.*

(iv) *Email address/ phone number, if any, at which litigant from outstation may communicate.*

The decision of the Supreme Court in ***Krishna Veni*** (supra) had been referred to a larger Bench regarding use of video conferencing in matrimonial cases , In its decision in ***Santhini vs. Vijaya Venketesh*** reported in **2017 (II) CLR (SC) 981**. Chief Justice Mishra speaking for the majority answered the reference as follows :

....“54. *We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The*

*Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest*

*with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.*

*56. In view of the aforesaid analysis, we sum up our conclusion as follows :-*

*(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.*

*(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.*

*(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.*

*(iv) In a transfer petition, video conferencing cannot be directed.*

*(v) Our directions shall apply prospectively.*

*(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent.*

Justice Dr D.Y Chandrachud in his dissenting opinion held

as follows :

9. *The High Courts have allowed for video conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.*

10. *The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the*

*legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.*

*II The reference should in my opinion be answered in the above terms.”....*

This Court in the case of **Prabhati Pattnaik** (supra), relying on the decision in **Krishna Veni**, had observed as follows:

*“it will be open to the transferee court to conduct the proceedings or record evidence of the witnesses who are unable to appear in court, by way of videoconferencing.”*

The Supreme Court in the recent case of **N.C.V. Aishwarya vs. A.S. Saravana Karthik Sha : 2022 SCC Online SC 1199** as follows :

*..... “9. The cardinal principle for exercise of power under Section 24 of the Code of Civil Procedure is that the ends of justice should demand the transfer of the suit, appeal or other proceeding. In matrimonial matters, wherever Courts are called upon to consider the plea of transfer, the Courts*

*have to take into consideration the economic soundness of both the parties, the social strata of the spouses and their behavioural pattern, their standard of life prior to the marriage and subsequent thereto and the circumstances of both the parties in eking out their livelihood and under whose protective umbrella they are seeking their sustenance to life. Given the prevailing socioeconomic paradigm in the Indian society, generally, it is the wife's convenience which must be looked at while considering transfer.*

10. *Further, when two or more proceedings are pending in different Courts between the same parties which raise common question of fact and law, and when the decisions in the cases are interdependent, it is desirable that they should be tried together by the same Judge so as to avoid multiplicity in trial of the same issues and conflict of decisions.”.....*

This Court in the case of **Anuva Choudhury vs. Biswajit Mishra (TRP(C) No. 324 of 2017)** decided on 05.09.2022 alongwith **Biswajit Mishra vs. Anuva Choudhury (TRP (CRL) No. 98 of 2021)**, after referring to a number of decisions of the Supreme Court and this High Court , has held as follows:

*“....8. While deciding an application for transfer of a matrimonial case, it has been the usual practice to*

*consider the inconvenience which is likely to be faced by the wife while turning a deaf ear and blind eye to the difficulties faced by the husband, on account of the accepted position of law that convenience of the wife is of paramount consideration in matrimonial cases. This is because women were considered to belong to the weaker sex and dependent on a male for their survival and security, be it the father, brother, husband or son. But now, after 75 years of independence, the situation has changed and the emancipation of women is clearly visible. Women are being given equal opportunity and representation in all spheres. They have become self dependent and many are no longer dependent on their husband/parents/brothers or sons for their survival and security. They have become the sole breadwinners in some families. They are able to bring up a child on their own. Some are part of the law making and law enforcing agencies. They are able to travel alone in connection with their work and recreation. Unfortunately, there are still many exceptions, as many women are still dependent on their family members for their survival on account of lack of education, lack of support and as some men still have not learnt to respect women for which women are still victims of eve teasing and sexual harassment in educational institutions, public transport and even in their work place. Travelling alone for long distances by road or train for a woman is often fraught with risk. Likewise, due to a variety of reasons, the*

*role and responsibilities of men have undergone a sea change. Many men have to single handedly take care of aged and ailing parents and young children, for which there are sometimes constraints on their time and movement. Their job requirements may also be a stumbling block. So in the present situation, an application for transfer of a matrimonial case has to be considered on its own facts without mechanically or blindly allowing the application of the wife. For the same reasons, the earlier decisions have also to be viewed in the same light. A balance has to be struck, so that each party is able to fight/defend his/her case in the trial court. Many Courts have been provided with video conferencing facilities, which can also be utilised by all the parties for their convenience.”.....*

*.....“10. From the aforesaid cases, it is apparent that although the Supreme Court has held that the convenience of the wife is of paramount consideration, but prayers for transfer have been considered taking into account the facts of the particular case. In other words, the convenience of one party only should not be considered. But a balanced view should be adopted, keeping in mind the convenience of both the parties, but giving more weightage to the convenience of the wife.”...*

7. Section – 24 of the C.P.C deals with the power of the High

Court and District Court to transfer cases pending in any court subordinate to it . Where there is more than one Court in which a / proceeding case / suit may be instituted, the plaintiff as *arbiter litis* or *dominus litis* has the right to choose where he / she wants to institute the case . Normally, the defendant for the mere asking cannot ask for transfer of a case to any other Court. But in appropriate cases, a superior Court may transfer a case pending in one Court to another Court. The power of transfer must be therefore be exercised with caution keeping in mind the interest of justice . In matrimonial cases it was the settled position that convenience of the wife is of paramount consideration, for which in majority of transfer applications filed by the wife, the prayer of the wife for transfer of a matrimonial case has been allowed without considering the difficulties which may be faced by the husband . However , in some cases considering the difficulties faced by the husband, the prayer of the wife for transfer have been rejected or while allowing the prayer of the wife for transfer in order to mitigate the difficulties which may be faced by the husband , direction has been issued for hearing all pending cases together on the same date , and not to insist on the personal attendance of the

husband if it is not essential and permitting examination and cross examination of witnesses through video conferencing mode . Certain do and don'ts have however been specified by the Supreme Court regarding recording of evidence through video conferencing.

8. In the present case , apart from the provisions of Section 24 C.P.C., the decisions of the Supreme Court and this Court , the submissions of the learned counsel , the following factors have to be considered in order to decide whether the prayer for transfer should be allowed. They are:-

(a) The son of the petitioner is staying with the petitioner in Bhubaneswar with her parents

(b) The petitioner has no independent source of income and she and her son are dependent on her parents, who stay in Bhubaneswar.

(c) The distance between Bhubaneswar and Rourkela is more than 400 Kms.

(d) C.P.No.134 of 2019 filed by the petitioner -wife for divorce is pending in Bhubaneswar where the opposite party – husband has already appeared and filed his written statement.

9. Taking a holistic view of the matter and the comparative convenience / inconvenience the parties may face if the transfer application is allowed or rejected and in view of the pendency of C.P. No. 134 of 2019 in the Court of learned Judge, Family Court, Bhubaneswar , in which the opposite party-husband has appeared and filed his written statement, the prayer for transfer is allowed.

10. The learned Judge, Family Court, Rourkela is requested to send the record of C.P. No. 128 of 2022 (*Abinash Mohapatra vs. Sonaliya Jena*) to the Court of learned Judge, Family Court, Bhubaneswar by 18.11.2022. Thereafter , the learned Judge, Family Court , Bhubaneswar shall issue notice to both the parties for their appearance.

11. The apprehension of Mr. Prusty regarding danger to the life of opposite party appears to be unfounded as he has already appeared in C.P. No. 134 of 2019 and filed his written statement. However as the opposite party will definitely face inconvenience in having to come to Bhubaneswar from Rourkela to contest the cases there , the learned Family Judge, Bhubaneswar is requested

to post the Civil proceedings involving the parties on the same date if there is no other legal impediment and to dispose of the proceedings expeditiously.

12. The TRP (C) is accordingly allowed.

13. Registry is directed to send a copy of this order to the Courts of the learned Judge, Family Court, Rourkela and Bhubaneswar forthwith by email for compliance.

14. Urgent certified copy of this order be granted as per rules.

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(SAVITRI RATHO)  
JUDGE

*puspa*

