

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

MISCELLANEOUS CIVIL APPLICATION NO. 87 OF 2022

RESHMA SHIVRAJ BHOSALE)...APPLICANT

V/s.

SHIVRAJ BAPUSAHEB BHOSLE)...RESPONDENT

Mr.Osman Chishty i/by Mr.Irfan Shaikh, Advocate for the Applicant.

Mr.Rahul B. Khot, Advocate for the Respondent.

CORAM : ABHAY AHUJA, J.

DATE : 22nd DECEMBER 2023

ORAL JUDGMENT :

1. This is an Application under Section 24 of the Code of Civil Procedure, 1908, seeking transfer of Petition for Restitution of Conjugal Rights under Section 9 of the Hindu Marriage Act, 1955, filed by the Respondent, being Petition No.167 of 2021 from the the Family Court, Kolhapur to the Court of Civil Judge, Senior Division, Vasai, Palghar.

2. Mr.Osman Chishty, learned Counsel for the Applicant, submits that the marriage of the Applicant and the Respondent was solemnized on 27th December 2020 at Pune, but after marriage both resided separately at their respective homes - the Respondent at Kolhapur and

the Applicant at Boisar although the Respondent visited the Applicant once in a month or two. That, there is no child out of the wedlock. It is submitted that, the marriage did not last long as it came to the knowledge of the Applicant that the Respondent was having affairs and involved with some other woman. That, the Applicant came to know that even after their marriage, the Respondent was still active on the matrimonial website and was using the site as a dating site. That, there was an First Information Report (FIR) of rape and cheating registered against the Respondent at Gandhi Nagar, Thane. Learned Counsel submits that after marriage the Applicant was subjected to harassment, cruelty (emotional, mental and verbal) and was ill-treated by the Respondent and his family. Therefore, the Applicant lodged FIR No.425 of 2021 against the Respondent at Manikpur Police Station on 6th November 2021 under Sections 498A, 323, 504, 506 of the Indian Penal Code, 1860 (the "IPC"). Learned Counsel submits that the Applicant is not residing with the Respondent since 2021. Learned Counsel submits that the Applicant has also filed Domestic Violence proceedings before Judicial Magistrate First Class, Vasai as well as a Divorce Petition being Petition No.373 of 2022 before the Joint Civil Judge, Senior Division, Vasai on the ground of cheating, extra marital affair and other grounds.

3. Learned Counsel submits that although the Applicant is a doctor but due to the mental and physical trauma is devastated and unable to regularly attend her clinic at Vasai and therefore she is financially drained out and is a constant strain on her father. Learned Counsel submits that the Applicant is suffering from Systemic Lupus Erythymetus – Nephritis which is an autoimmune disease which affects multiple organs of the body and requires immuno suppressive and immune modulative medication to control the disease which includes use of steroids and immuno suppressive drugs which has led to the degeneration of her spine and is undergoing regular treatment at Kokilaben Dhirubhai Ambani Hospital. That, the Orthopedic doctor has advised the Applicant to refrain from long distance travelling as such travelling can aggravate the complexities in the joints of her spinal cord causing severe radiculopathy. Learned Counsel refers to medical certificates/reports at page 9 as well as page 15 of the Affidavit dated 08th October, 2023 of the Applicant. That due to the side effects of the steroids and medication the Applicant's bones have become brittle and fragile. That, because of above ailments the Applicant is required to take analgesic /pain killers so that the Applicant can carry out her daily routine work as the Applicant's clinical practice is the only source of her bread and butter. That, the Applicant is staying at her parental house at

Vasai with her parents. That she cannot travel without escort for long distance. That, the one way distance from Vasai to Kolhapur is around 425 kilometers which takes around 8 hours of travelling. Therefore, for attending a single date of hearing before the Court in Kolhapur, the Applicant would be required to travel more than 850 kilometers a day. That, the Applicant does not have any near relative residing in Kolhapur to help her out. That, the family of Respondent is very powerful and well connected in Kolhapur and can do anything in the jurisdiction of Kolhapur. That, the Applicant has no one to accompany her to Kolhapur as the Applicant got married against the wish of her family. That, it would not be safe and nor feasible for the Applicant to travel such a long distance all by herself. Therefore, the Applicant being a woman, it would not only be inconvenient for her to travel to Kolhapur for attending every hearing before the Family Court at Kolhapur but would also cause undue hardship due to ailments she is suffering from.

4. Learned Counsel further submits that the Domestic Violence proceeding as well as Divorce Petition filed by the Applicant are respectively pending before the Judicial Magistrate, First Class, Vasai and Joint Civil Judge, Senior Division, Vasai, which the Respondent is

supposed to attend at Vasai. Also, that the Respondent resides in Panvel along with his sister and works as a driver for his sister. Therefore, if the Restitution proceedings are transferred to Vasai Court, that would save the hardship and inconvenience to the Applicant and also no prejudice would be caused to the Respondent, if the transfer, as prayed for, is allowed. In such circumstances, the learned Counsel requests this Court to allow the Application in the interests of justice.

5. Mr.Chishty for the Applicant has relied upon the following decisions in support of his contentions :

- (a) ***Sumita Singh vs. Kumar Sanjay and Another***¹
- (b) ***Vaishali Shridhar Jagtap vs. Shridhar Vishwanath Jagtap***²
- (c) ***N.C.V. Aishwarya Vs. A.S. Saravana Karthik Sha***³

6. On the other hand, learned Counsel for the Respondent opposes the submissions and submits that the Application for transfer is not maintainable and deserves to be dismissed in view of the provisions of Section 21-A of the Hindu Marriage Act, 1955. Also that, the Court of Civil Judge, Senior Division, Vasai, cannot hear the Petition as it has no jurisdiction to try matrimonial disputes and hence even on the ground

1 (2001) 10 SCC 41
 2 (2016) AIR (SC) 3584
 3 AIR 2022 SC 4318

of jurisdiction, the Application for transfer is untenable and deserves to be dismissed.

7. Without prejudice to the above, learned Counsel for the Respondent further submits that the Respondent is residing with his family at Kolhapur. That, his eldest sister is a Dentist and has her own clinic at Kolhapur and his second sister is a Deputy Collector and at present posted at Panvel. The Respondent is a Mechanical Engineer and is also in land development business.

8. That, after marriage the Applicant came to Kolhapur to stay with the Respondent but as his sister was staying alone at Panvel, for safety reasons the Respondent and the Applicant started staying at Panvel. That, due to minor differences between them, the Applicant left the Respondent at Kolhapur and returned to her parental house at Vasai and started her clinic at Vasai, District Palghar. That, the Applicant is earning handsomely and is staying separately from her father's place. That, the complaint filed by the Applicant in Manikpur Police station, Vasai, is a totally false and concocted complaint. That, the Applicant's maternal uncle is a Sarpanch at native place in Palghar District and has strong political connections and also the Applicant's father, who is a

doctor, is running a clinic at Vasai and has good social and political contacts. That, the Applicant has dragged the Respondent in a false criminal case under Sections 376 and 420 of the IPC registered with Gandhinagar Police Station, Kolhapur and filed a totally false and fabricated complaint under Section 498A of the IPC against the Respondent against which the Respondent has filed Criminal Writ Petition no.5006 of 2021 seeking to quash the said FIR in which the Court has granted interim order directing the Trial Court not to pass any further order including framing of charge until further orders after the charge-sheet is received by the Court. That as the Respondent is worried about the security of the sister, the endeavour is to be always around her as much as possible.

9. The Respondent has denied all the allegations made against him stating that the same are totally false, baseless and concocted and has put the Applicant to strict proof. However, the Respondent has admitted that the Applicant is suffering from Systemic Lupus Erythematosus – Nephritis due to which she cannot bear child. According to the Respondent, the Applicant has been living separately from her family since more than 15 years and has been managing all her affairs independently. That, the Applicant has been travelling to various places

all alone and therefore it is incomprehensible as to why she would feel unsafe or need company to travel. Learned Counsel for the Respondent refers to various photographs at Exhibit C to the Reply in support of his contention. It is submitted that the Applicant has filed the present Application only as a pressure tactics against the Respondent so that he accepts all her demands and gets out of her life. Lastly, it is submitted that the Respondent is the only male member in his family and is required to take care of his bedridden 91 years old mother who is suffering from various age related health diseases including Parkinson's disease. Therefore, considering the difficulty of the Respondent, it is prayed that the Application for transfer be dismissed.

10. In rejoinder, to the objection on maintainability Mr.Chishty submits that Section 21-A of the Hindu Marriage Act applies to a Petition for judicial separation under Section 10 or for a decree of divorce under Section 13 and not to a proceeding for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. With respect to the issue of jurisdiction, that the Senior Civil Judge, Vasai does not have the jurisdiction, learned Counsel submits that the same is not tenable as in the absence of constitution of a Family Court, the Civil Court is empowered to exercise jurisdiction in respect of matrimonial

cases, by virtue of the provisions of Section 8 of the Family Courts Act, 1984. Mr. Chishty refers to the decision of the Andhra Pradesh High Court in the case of *V. Sailaja vs. V. Koteswara Rao*⁴ in support.

11. Learned Counsel submits that there should not be a conflict of decisions when two or more proceedings are pending in different Courts between the same parties.

12. I have heard Mr.Chishty, learned Counsel for the Applicant and Mr.Khot, learned counsel for the Respondent at length and with their able assistance have also perused the papers and proceedings and considered the rival contentions.

13. The marriage between the Applicant and the Respondent was solemnized on 27th December 2020 at Pune. That, there is no issue from the wedlock. It appears that since 2021, the Applicant is not residing with the Respondent. There appears to be FIR of rape and cheating registered against the Respondent at Gandhi Nagar, Thane. Also, the Applicant has lodged FIR No.425 of 2021 against the Respondent at Manikpur Police Station on 6th November 2021 under Sections 498A, 323, 504, 506 of the IPC. The Applicant has also filed

⁴ (2003) AIR (AP) 178

Domestic Violence proceedings before the Judicial Magistrate, First Class, Vasai as well as Divorce Petition being Petition No.373 of 2022 before the Joint Civil Judge, Senior Division, Vasai on the ground of cheating, extra marital affair and other grounds.

14. The Applicant resides at Vasai which is 425 kilometers away from Kolhapur.

15. The Applicant, although a doctor having a clinic at Vasai is unable to regularly attend her clinic due to health issues. Admittedly, the Applicant is suffering from Systemic Lupus Erythematosus – Nephritis, an autoimmune disease for which she is under medication reportedly leading to degeneration of bones and has been advised to refrain from long distance travelling. A perusal of the certificate dated 16th December 2022 at page 9 of the Affidavit dated 8th October 2023 by the Applicant suggests that the Applicant is not physically fit to travel long distance beyond 5-10 kilometers. Also a perusal of the report dated 4th January 2023 at page 15 of the said affidavit indicates that the Applicant has been advised surgery, complete bed rest as well as to avoid long distance travelling and exercise. No contrary evidence has been brought to my notice. The photographs at Exhibit C to the Reply nowhere suggest that the Applicant does not suffer from the medical

conditions which do not restrict her travel or that the said medical advice is incorrect.

16. In the reply filed to the application, the Respondent has stated that it was the Applicant who left from matrimonial house at Kolhapur on the pretext of minor differences between them without informing the Respondent. The Respondent requested her to come back to matrimonial house which she refused and after all efforts for settlement were unsuccessful the Respondent filed the petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act against the Petitioner in the Family Court at Kolhapur so that the matter can be amicably settled and they can start their life afresh. It is, therefore, that this matter was referred to Mediation of the Main Mediation Centre of this Court so that the dispute could be resolved amicably but the Mediation has failed and the parties have decided to proceed with the matter.

17. Before proceeding it would be appropriate to consider the objections on behalf of the Respondent with respect to maintainability and jurisdiction.

18. Firstly, the Respondent has submitted that the Application for transfer is not maintainable in view of Section 21-A of the Hindu Marriage Act, 1955. Section 21-A of the Hindu Marriage Act is quoted as under :

Section 21-A. Power to transfer petitions in certain cases. -

(1) Where- (a) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State, the petitions shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,-

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be

heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the Court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908), to transfer any suit or proceeding from the district Court in which the later petition has been presented to the district Court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

19. As can be seen the said section applies to a petition for judicial separation under Section 10 or for a decree for divorce under Section 13 of the Hindu Marriage Act but does not refer to Section 9 pertaining to restitution of conjugal rights and therefore, the provisions of Section 21A or the bar pursuant to the said section is not applicable to petition under Section 9 of the Hindu Marriage Act otherwise the Section would have specifically referred to the said provision.

20. Therefore, I agree with the submissions on behalf of the Applicant that since the said Section is with regard to a Petition for judicial separation under Section 10 or for a decree of divorce under

Section 13 of the Act, the argument on behalf of the Respondent is not tenable as the subject Petition is under Section 9.

21. Secondly, it has been submitted on behalf of the Respondent that the Civil Judge, Senior Division, Vasai does not have jurisdiction to try matrimonial disputes. In this regard, it would be pertinent to refer to the following Sections of the Family Courts Act, 1984 :

7. Jurisdiction.-

(1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as

the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

8. Exclusion of jurisdiction and pending proceedings.-Where a Family Court has been established for any area,-

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.

22. It is clear from the above that Section 8 lays down that where a Family Court has been established for any area, no District Court or Subordinate Civil Court will have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the explanation to Sub-section (1) of Section 7. Under Clause (b), the Magistrates in that area will cease to have jurisdiction regarding matters governed by Chapter IX of Code of Criminal Procedure, 1973. The exclusion of jurisdiction is limited to the area for which the Family Court is constituted. The words used are 'such area'. In view of the wording of Section 8, the exclusion of jurisdiction for the Civil and Criminal Court is confined to area for which Family Court is constituted and there are no words indicated that the parties to that proceedings are prohibited from approaching any other Court outside the jurisdiction of the Family Court. Section 20 of the Family Courts Act indicate that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any law for the time being in force or any instrument having effect by virtue of any law other than the said Act. That there is no bar against the parties from approaching other Courts outside the jurisdiction of the Family Court. The exclusion of the jurisdiction of the Courts is confined to the area over which the Family Court exercises jurisdiction. It is therefore reiterated that the

jurisdiction of Civil Court is ousted only in districts where there is a Family Court, but in places where Family Court is not constituted then the exclusion is not applicable to the Civil Court functioning in such places. I therefore see no merit in the contention advanced on behalf of the Respondent.

23. I therefore agree with the reliance placed by the learned Counsel for the Applicant on the decision of the Andhra Pradesh High Court in the case of *V. Sailaja vs. V. Koteswara Rao (supra)*. Paragraphs 13, 14 and 16 of the decision in the case of *V. Sailaja vs. V. Koteswara Rao (supra)* are relevant and are usefully quoted as under :

“13. On a plain reading of the provisions of Sections 7 and 8 of the Family Courts Act, it is clear that in respect of the matters which are enumerated in the Explanation to Section 7, the Family Court shall exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court. The Family Court shall also exercise the jurisdiction of the Magistrate of I Class in respect of a proceeding for maintenance filed under Chapter IX of the Code of Criminal Procedure, 1973. While so, Section 8 of the Act excludes the jurisdiction of Civil Courts/Magistrates of I Class in such of the Districts where Family Courts are constituted under the Family Courts Act.

14. On a careful reading of the language used in Section 8, I am of the opinion that the exclusion contemplated under Section 8 of the Act is only limited to the Districts where a Family Court is already constituted under the Family Courts Act, in which case, the jurisdiction of the Civil Courts in such Districts in respect of the matters which are mentioned in the Explanation to Section 7 of the Family Courts Act gets

ousted. But, in places where Family Court is not constituted, then the said exclusion contemplated under Section 8 is not applicable to the Civil Courts which are functioning in such places. In such cases, the local Civil Courts will continue to exercise the jurisdiction in respect of all matrimonial matters.

16. But, the question in this case is whether this Court can transfer a case from the file of a Family Court to a Civil Court. As already stated, in the absence of constitution of a Family Court, the Civil Court is empowered to exercise jurisdiction in respect of matrimonial cases, by virtue of the provisions of Section 8. Therefore, in places where Family Court is not established, as the local Courts are vested with the jurisdiction to deal with matrimonial cases, such local Courts are competent to try the matrimonial cases of the nature which are mentioned in the Explanation to Section 7 of the Family Courts Act. In such a case, there may not be any bar under Section 8 of the C.P.C. from transferring the cases pending in a Family Court to such Civil Courts. Therefore, this Court in exercise of its jurisdiction under Section 24 of the C.P.C., can transfer cases which are instituted in a Family Court to the Courts within whose local jurisdiction no Family Court is constituted.

(emphasis supplied)”

24. The arguments of the learned Counsel for the Respondent, therefore are not tenable as in the absence of a Family Court, the Civil Court is empowered to exercise jurisdiction in respect of matrimonial cases by virtue of Sections 7 and 8 of the Family Courts Act. Therefore, if there is no Family Court in the Vasai area, then the Civil Judge, Senior Division, Vasai would have jurisdiction to entertain, try and dispose the said restitution proceedings.

25. Now coming to the issue of transfer of matrimonial proceedings, the Hon'ble Supreme Court in the case of *N.C.V. Aishwarya Vs. A.S. Saravana Karthik Sha (supra)* has laid down the principle that in considering applications under Section 24 of the Code of Civil Procedure, in matrimonial proceedings, it is the convenience of the wife that has to be looked at. In *Rajani Kishor Pardeshi vs. Kishor Babulal Pardeshi*⁵ the Hon'ble Supreme Court has held that between the convenience of the husband and the convenience of the wife, it is the convenience of the wife that has to be preferred.

26. Also, as far as the comparative hardship between the Applicant and Respondent is concerned, learned Counsel has rightly relied on the decisions in the case of *Sumita Singh vs. Kumar Sanjay and Another (supra)* and *Vaishali Shridhar Jagtap vs. Shridhar Vishwanath Jagtap (supra)* where also the above principles have been applied.

27. It is not in dispute that the distance between Kolhapur and Vasai is around 425 kilometers one way. As noted above, the Applicant has been advised not to travel long distance due to her health condition. The travel between Kolhapur and Vasai would certainly aggravate her

5 2005 (12) SCC 237

adverse condition. She would also need someone to accompany her from Vasai to Kolhapur. The FIR, the Domestic Violence proceedings as well as the Divorce proceedings have been filed by the Applicant in Vasai. As such it would not only be inconvenient for the Applicant to travel 425 kilometers one way every time the matter is listed before the Kolhapur Court but would also cause her undue hardship. Although the Respondent-husband has claimed that it would be inconvenient for him also to leave his business at Kolhapur and also the care of his mother who is suffering from various ailments, including Parkinson's disease, however in view of the principles elucidated in the above cited decisions, that in the prevailing structure of socio-economic paradigm in Indian society, that while considering the transfer applications in matrimonial proceedings firstly the wife's convenience must be looked at and secondly it is the convenience of the wife that has to be preferred over the convenience of the husband and therefore, although the husband may face some inconvenience, it is the convenience and hardship of the wife that has to be given preference, I am inclined to allow the Application.

28. In the circumstances, the application is made absolute in terms of prayer clause (b) which reads thus:-

“(b) This Hon’ble Court may be pleased to transfer Restitution of Conjugal Rights Petition U/s. 9 of Hindu Marriage Act, 1955, Petition No.167 of 2021 from the file of Kolhapur Family Court to the file of Court of Civil Judge, Senior Division, Vasai, Palghar.”

29. However, keeping in mind that the husband has a business in Kolhapur and also a 91 year old mother to take care, the Respondent-husband may be permitted to appear before the Court of Civil Judge, Senior Division, Vasai, Palghar through Video Conferencing if such facility is available, upon an application made in that behalf to the said Court on dates where his physical presence is not required.

30. Further, the learned Judge at the Vasai Court, may, in the interests of justice, endeavour to conduct and hear both the Divorce proceedings as well as the Restitution proceedings together, keeping in mind the principle laid down by the Hon'ble Supreme Court in paragraph 10 in the case of *N.C.V. Aishwarya Vs. A.S. Saravana Karthik Sha (supra)*, which is quoted as under :

“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.”

(Emphasis Supplied)

31. The application stands allowed and disposed in the above terms.
Parties to bear their own costs.

32. It is made clear that any observation(s) on the merits of the dispute between the parties is only to consider this application which shall not influence the trial or disposal of the Restitution / Divorce proceedings which are to be tried and decided on their own merits uninfluenced by the said observation(s).

(ABHAY AHUJA, J.)

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