



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.502 OF 2022

Sonika Vishnudas Kadam	...Applicant
<i>Versus</i>	
Vishnudas Haribhau Kadam & Ors.	...Respondents

Mr. Nikhil D. Patil, Advocate for Applicant.
Mr. Mainak Adhikary, Advocate for Respondent Nos.1 to 6.
Ms. S. S. Kaushik, APP for Respondent-State.

CORAM: MADHAV J. JAMDAR, J.
DATED : 5th FEBRUARY 2024

JUDGMENT:-

1. Heard Mr. Patil, learned Counsel appearing for the Applicant, Mr. Adhikary, learned Counsel who has instructions to appear for the Respondent Nos.1 to 6 and Ms. Kaushik, learned APP appearing for the Respondent-State.

2. This is a Criminal Application filed under Section 407 (1)(c) of the *Code of Criminal Procedure, 1973* ("CrPC"). The Applicant is seeking the following substantive prayer:-

"a. This Hon'ble Court be pleased to transfer the Cri M.A. No. 17 of 2017 pending before Jt, Civil Judge Junior Division and Judicial Magistrate First Class, Junnar to Ld. Judicial Magistrate First Class, Thane."

3. It is necessary to set out certain factual aspects before considering the rival submissions :-

i. The marriage between the Applicant and the Respondent No.1 was solemnised on 26th April 2016 at Ghatkopar, Mumbai. The Applicant after marriage resided with the Respondent No.1 and his family members at Room No.4, Shivsagar Rahivasi Sangh Chawl No.13, Barve Nagar, Ghatkopar (W) Mumbai 400 084.

ii. As per the contention of the Applicant-Wife, the Applicant was ousted from her matrimonial house on 18th September 2016. The Applicant filed a Criminal M. A. No.17 of 2017 under Sections 12, 18, 19, 20, 21, 22 of the *Protection of Women from Domestic Violence Act, 2005* ("D.V. Act") in the Court of learned Judicial Magistrate First Class, Junnar. In the said D.V. Proceedings, address of the Applicant is mentioned as C/o. Devanand Narayan Chalak, R./at Dingare, Taluka Junnar, District-Pune. Said Devanand Chalak is uncle of the Applicant. It is specifically mentioned in the Application that as the Applicant was ousted from her matrimonial house by the Respondents on 18th September 2016 and thereafter she was threatened on several occasions by the Respondent No.1,

the Applicant moved to her uncle's residence at Dingare, Taluka-Junnar, District-Pune, and subsequently filed proceedings under the D.V. Act before the learned Judicial Magistrate First Class, Junnar. Perusal of the said D.V. proceedings clearly shows that in fact reference has also been made to the Complaint dated 13th December 2016 lodged in Ghatkopar Police Station, Mumbai by the Applicant.

iii. The present Respondent No.1 filed Marriage Petition No.A-3101 of 2016 under Section 10 of the *Hindu Marriage Act, 1955* in the Family Court at Bandra seeking judicial separation. In the said proceedings, by Order dated 4th July 2019, learned Family Court at Bandra directed the Respondent No.1 to pay Rs.7,000/- per month towards interim maintenance under Section 24 of the *Hindu Marriage Act, 1955* and has further ordered payment of Rs.5,000/- per month towards rent. The Respondent No.1 on 1st April 2022 withdrew the said Marriage Petition No.A-3101 of 2016 without complying with the said order and without making any payment. It is contended by the Applicant that the said Marriage Petition filed before Family Court at Bandra was withdrawn behind the back of the Applicant.

4. In the above facts and circumstances, the present Criminal Application is preferred *inter alia* stating that the Applicant and her mother are residing at Diva (E), Thane 400612. It is stated that the said Criminal M.A. No.17 of 2017 was filed at Junnar as at that time owing to a threat to her life in Mumbai, she was forced to reside at Junnar and as the Applicant was in desperate need of interim orders under the provisions of the D.V. Act she has filed the case at Junnar, Pune. It is stated in the Application that Junnar is about 155 k.m. away from Diva and that the said case be transferred to the Court of learned Judicial Magistrate First Class, Thane. It is also stated that the **Respondent No.1** is residing at Ghatkopar, Mumbai.

5. Mr. Nikhil Patil, learned Counsel appearing for the Applicant pointed out the above facts and submitted that in the facts and circumstances of this case and in the interest of justice, the said D. V. proceedings be transferred from the Court of learned Judicial Magistrate First Class, Junnar to the Court of learned Judicial Magistrate First Class, Thane.

6. On the other hand, it is the contention of Mr. Adhikary, learned Counsel appearing for the Respondent Nos.1 to 6 that although residence of Respondent No.1 is situated in Ghatkopar-Mumbai, the Respondent No.1 is residing in Pune and it is his submission that the Respondent No.1 was unemployed and therefore was residing with his brother ~~i.e. Respondent No.2~~ at Ghatkopar, Mumbai. He relied on the decision of a learned Single Judge in the case of *Sow. Archana W/o. Sachin Deshmukh vs. The State of Maharashtra & Ors.*¹ wherein the decision of the Supreme Court of India in the case of *Rajesh Talwar vs. Central Bureau of Investigation and Ors.*² has been relied upon. Mr. Adhikary, learned Counsel appearing for the Respondent Nos.1 to 6 has more particularly relied on paragraph Nos. 7, 8 and 10 of *Archana Deshmukh* (supra).

7. As far as the first contention of learned Counsel appearing for the Respondent Nos.1 to 6 that the Respondent No.1 is residing in Pune, it is to be noted that no material is pointed out to substantiate the same. In fact, no affidavit-in-reply is filed to the

1 Criminal Application No.2565/2021 (Aurangabad Bench)

2 (2012) 4 SCC 217

present Criminal Application. It is significant to note that the address of the Respondent No.1 in the cause title of this Criminal Application is mentioned as residing at Shivsagar Rahivasi Sangh Chawl No.13, Room No.4, Barve Nagar, Ghatkopar (W), Mumbai 400 084 and he has been served notice of this Criminal Application at the said address. In the D. V. proceedings filed before the learned Judicial Magistrate First Class, Junnar the address of the Respondent No.1 is mentioned as that of Ghatkopar and he has been served at the same address. It is further significant to note that the Respondent No.1 filed the Marriage Petition No. A-3101 of 2016 in the Family Court at Bandra and not in the Family Court at Pune. Thereafter the Respondent No.1 withdrew the Marriage Petition on 1st April 2022 as otherwise the Respondent No.1 was required to comply with the order granting maintenance. Thus, the factual position on record clearly establishes that the Respondent No.1 is residing in Mumbai. There is no material on record in support of the contention that the Respondent No.1 is a resident of Pune. It is further significant to note that the Applicant is residing at Mumbai is specifically mentioned in the Criminal Application and the same is not denied by the Respondent No.1.

8. Mr. Adhikary, learned Counsel appearing for the Respondent Nos.1 to 6 has relied on *Archana Deshmukh* (supra) and more particularly on paragraph Nos.7, 8 and 10 thereof which read as follows:-

*“7. Further, other decisions of the Apex Court are also required to be considered. in **Rajesh Talwar vs. Central Bureau of Investigation and others with companion matter, (2012) 4 SCC 217**, wherein observations have been made that, inconvenience cannot be valid basis for transfer of “criminal proceedings” from one Court to another under Section 406 of the Code of Criminal Procedure. In **Rajesh Talwar** (supra), it is further held that:*

“Jurisdiction of a Court to conduct criminal prosecution is based on the provisions of CrPC. Often either the complainant or the accused have to travel across an entire State to attend to criminal proceedings before a jurisdictional Court. In some cases to reach the venue of the trial Court, a complainant or an accused may have to travel across several States. Likewise, witnesses too may also have to travel long distances, in order to depose before the jurisdictional Court. If the plea of inconvenience for transferring the cases from one Court to another, on the basis of time taken to travel to the Court conducting the criminal trial is accepted, the provisions contained in CrPC earmarking the Courts having jurisdiction to try cases would be rendered meaningless. Convenience or inconvenience are inconsequential so far as the mandate of law is concerned.”

8. In the case of **Rajesh Talwar** (supra) itself, reliance has been placed on the decision in **Jyoti Mishra vs. Dhananjaya Mishra, (2010) 8 SCC 803**, wherein it has been observed in Para No.5 and 6:-

“5. It is true that in cases of dissolution of marriage, restitution of conjugal rights or maintenance, this Court shows much indulgence to the wife and ordinarily transfers the case to a place where it would be more convenient for the wife to prosecute the proceedings. But a criminal case is on a somewhat different footing. The accused may not be able to attend the court proceedings at Indore for many reasons, one of which may be financial constraints, but the consequences of non-appearance of the accused before the Indore Court would be quite drastic.

6. Having regard to the consequences of non-appearance of the accused in a criminal trial, we are loath to entertain the petitioner’s prayer for transfer. In a criminal proceeding, the right of the accused to a fair trial and a proper opportunity to defend himself cannot be ignored for the convenience of the complainant simply because she happens to be the estranged wife.”

*“10. The two cases which the applicant had filed before the Family Court at Jalna have been decided and the appeal filed by respondent No.2 is pending before this Court. The convenience of the wife can be considered in civil cases and not in criminal cases as observed in **Jyoti Mishra** (supra). There is no question of use of constitutional powers of this Court under Article 226 of the Constitution of India or even the inherent powers of this Court under Section 482 of the Code of Criminal Procedure. The ratio laid down*

*in **Siku Industries** (supra) will not be applicable here. It was the case for the offences under paragraph 76(a) of the Employees Provident Funds Scheme, 1952 read with Sections 14(2) and 14-A (1) and/or Section 14-A (2) of the Employees Provident Funds Act, 1952. The Division Bench had then concluded that the cause of action for the prosecution of the petitioners for the alleged contravention of the provisions of the Provident Funds Scheme has wholly arisen at Nagpur and the opponent No.1 was not authorized to initiate the criminal prosecutions against the petitioners before a Magistrate at Bombay and therefore writ of mandamus was issued to opponent No.1 refraining opponent No.1 from proceeding with the criminal prosecutions against the petitioners in Bombay. The liberty was given to opponent No.1 or any other person authorized by the Provident Fund Commissioner to initiate prosecution against the petitioners in a Court at Nagpur. Here in the present case, we are not considering the jurisdiction of the Court. Definitely the Court at Chikhli as well as Court at Jalna [in view of decision in **Rupali Devi** (supra)] will have jurisdictions. But when already the proceedings were launched, investigation was complete and charge-sheet is filed in the year 2017 itself, whether transfer of the said case on the reasons so stated by the applicant is justified, is a question and therefore, the decision of **Jyoti Mishra** (supra) would prevail and therefore the application deserves to be rejected at the threshold."*

(Emphasis added)

9. It is to be noted that the learned Single Judge in *Archana Deshmukh* (supra) has discussed about the factual aspects in the said case in paragraph No.6 which reads as under:-

“6. At the outset, it is to be noted that Regular Criminal Case No.277 of 2017 was filed in the year 2017 and till 2021 there was no problem for the applicant with the said case. She allowed it to be continued with the Court of learned Judicial Magistrate First Class, Chikhli. Now, all of a sudden, applicant says that her parents are old and cannot attend Chikhli Court. It is pertinent to note that respondent No.3 is also 63 years old person. So only old age cannot be the criteria and now the pandemic situation is improved and the Courts are functioning full fledged. The ratio laid down in **Rupali Devi** (supra) cannot be denied, however, it is to be noted that the said decision had considered whether the place where wife takes shelter after she leaves the matrimonial home or driven away by the in-laws, would get jurisdiction or not. Whether to transfer the said case from one Court to another, would definitely be in the discretion of the Courts in view of Section 406 and 407 of the Code of Criminal Procedure.”

10. Thus, the factual position in *Archana Deshmukh* (supra) and the discussion in above mentioned paragraphs thereof clearly shows that the relief of transfer was rejected *inter alia* on the ground that investigation was completed, Charge-sheet was filed in the year 2017 and the reasons stated by the Applicant in that case seeking transfer were not justified. Therefore, it cannot be said that as contended by the learned Counsel appearing for the Respondent Nos.1 to 6 that Criminal Case cannot be transferred. In fact, *Jyoti Mishra* (supra) as referred to in *Archana Deshmukh* (supra) also does not lay down the law to the effect that criminal case cannot

be transferred in any circumstances whatsoever. In fact, paragraph Nos.5 and 6 of *Jyoti Mishra* (supra) show that the said decision is in the facts and circumstances of that case.

11. Section 406 of the CrPC is the power of the Supreme Court to transfer cases and appeals from one High Court to another High Court or from a Criminal Court under the jurisdiction of one High Court to another Criminal Court of equal or superior jurisdiction under the jurisdiction of another High Court. Sub-Section 1 of Section 406 of the CrPC is relevant and the same reads as under:-

“406. Power of Supreme Court to transfer cases and appeals.— (1) Whenever it is made to appear to the Supreme Court that **an order under this section is expedient for the ends of justice**, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.”

(Emphasis added)

12. Section 407 of the CrPC is the power of High Court to Transfer cases and appeals. Relevant portion of Sub-Section 1 of

said Section 407 specifying the circumstances in which power thereunder is to be exercised, is set out herein below:-

“407. Power of High Court to transfer cases and appeals.— (1) Whenever it is made to appear to the High Court—

“(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,...”

(Emphasis added)

13. Section 406 of the CrPC contemplates that power of transfer is to be used when the same is expedient for the ends of justice. Section 407 of the CrPC is more elaborate. However, it is clear that the parameters of transfer under Sections 406 and 407 of the CrPC are almost identical. The Supreme Court in case of ***Nahar Singh Yadav v. Union of India***³ has held as follows:-

3 (2011) 1 SCC 307

“29. ... Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:

i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice.”

(Emphasis added)

14. This is a case where the factual position on record, which is also undisputed as there is no affidavit-in-reply filed, clearly shows

that the matrimonial house of the Applicant is at Ghatkopar, Mumbai, the marriage was solemnised at Ghatkopar, Mumbai and due to harassment, the Applicant lodged a complaint with the Ghatkopar Police Station, Mumbai. The Applicant was threatened and therefore she moved to Junnar, Pune to her uncle's place and filed D.V. Proceedings for urgent reliefs. It is further significant to note that the Respondent Nos.1 to 6 are residents of Ghatkopar (West)-Mumbai. Although, it is the oral submission of Mr. Adhikary, learned Counsel appearing for the Respondents that Respondent No.1 is a permanent resident of Pune, no documentary evidence regarding the said contention is produced. In fact, the Respondent No.1 is served notice of the said D.V. Proceedings and of this Criminal Application at his address at Ghatkopar, Mumbai. In any case, it is further significant to note that the Respondent No.1 has filed Marriage Petition No.A-3101 of 2016 under Section 10 of the *Hindu Marriage Act, 1955* in the Family Court at Bandra against the Respondents seeking a decree of judicial separation and the same was withdrawn. It is very significant to note that the Respondent No.1 has not filed the Marriage Petition at Family Court, Pune but at Family Court, Bandra, Mumbai. Assuming that the **Respondent No.1** is residing at Pune, then also considering the

availability of transport facilities even for **Respondent No.1**, it is more convenient to attend the Court at Thane than at Junnar, District-Pune.

15. It is clear that the decision in *Archana Deshmukh* (supra) is in the facts and circumstances of the said case and therefore, the same will have no application to the present case.

16. In the facts and circumstances of this case and in terms of Section 407 (1)(c) of the CrPC, the Applicant is entitled for the relief of transfer. Accordingly, the Criminal Application is allowed in terms of prayer clause (a).

17. The Criminal Application is disposed of in above terms with no order as to costs.

[MADHAV J. JAMDAR, J.]

Note: This Judgment is corrected as per Speaking to the Minutes Order dated 13th February 2024. The corrections are shown in bold in paragraph Nos. 4, 6 & 14.