

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

MISC. CIVIL APPLICATION NO. 327 OF 2024

Crystal Fernandes

.. Applicant

Versus

Joshua Henry Fernandes

.. Respondent

.....

- Ms. Deepa Punjani for Applicant
- Mr. Abdul Hafeez Yakub Kotwala i/by Mr. Abdul Wahab for Respondent

.....

CORAM : MILIND N. JADHAV, J.

DATE : AUGUST 29, 2024

ORAL JUDGMENT:

1. Heard Ms. Punjani, learned Advocate for Applicant and Mr. Kotwala, learned Advocate for Respondent.

2. By the present Misc. Civil Application (MCA), Applicant seeks transfer of RCS No. 6/2023 and CMAP No. 52/2023 pending in the Civil and Criminal Court at Mapusa, Goa which are filed by the Respondent.

3. RCS No. 6/2023 is filed by Respondent for restitution of conjugal rights whereas CMAP No. 52/2023 has been filed for permanent custody of the child under Articles 137 and 138 of the Goa Portuguese Civil Code, 1867.

4. Ms. Punjani would submit that in view of the decision of the Single Bench of this Court in the case of **Irene Blanch Khera Vs. Glenn**

John Vijay¹, it is held that this Court which is a common High Court for both the State of Maharashtra and Goa, is having jurisdiction to decide the Application under Section 24 of CPC. This is so stated because an objection is raised by Respondent on jurisdiction which I shall deal with later. In so far as CMAP 52/2023 is concerned, it is seen that it seeks permanent custody of the child who is a minor - two and half year old and presently residing with Applicant. Transfer of aforesaid proceedings is sought by Applicant to the Family Court at Bandra, Mumbai. D.V. Act Case No. 288/DV/2022 is filed by Applicant before the JMFC, Andheri, Mumbai. Grounds of hardship are enumerated in paragraph No. 3 of the Application and on reading the same, hardship of the Applicant is clearly evident. Apart from proximity of distance between the two destinations, the fact that Applicant is nurturing her child, it needs to be taken into consideration. Applicant is residing in Mumbai with her parents and she cannot be expected to travel all the way to Goa either along with her child as also in the accompaniment of her parents who are old.

5. *Per contra*, Mr. Kotwala would draw my attention to the affidavit in reply dated 02.08.2024 of Respondent and would contend that the Application seeking transfer of the proceedings from Goa to Mumbai is opposed. He would submit that Applicant has appeared in

1 2018(6) Mh.L.J. 199

the proceedings in Goa and therefore she is well versed with travelling to Goa and therefore this Court should reject the Application. He would submit that the Applicant was given the benefit of the services of legal aid Advocate in the proceedings at Goa. However, if that be the case it would rather be held in favour of the Applicant for seeking the transfer to Mumbai. These submissions made by Mr. Kotwala are insensitive in nature. He would submit that present Application is filed by Applicant only after her Application filed under Section 151 of CPC was rejected by the Civil Court in Goa. This particular ground cannot be countenanced as the exercise of the power under Section 24 of the CPC is to achieve ends of justice which demand transfer of proceedings and nothing would preclude the Applicant from maintaining the present Application under Section 24 despite rejection of her previous Application under Section 151 of CPC.

5.1. Next he would submit that under the High Court Appellate Side Rules namely Rule 3, Petition under Article 226 and Article 227 would have to be filed before the Goa Bench and not before the principal Bench. However, this submission is taken care of by virtue of the decision in the case of **Irene Blanch Khera (1st supra)**. Ms. Punjani would submit that this decision has also been confirmed by the Supreme Court on 28.02.2023. Rule 3 does not apply to the maintainability of a MCA.

5.2. Final ground argued by the learned Advocate for the Respondent is that Respondent's witnesses are all in Goa and he would have to bear the burden of carrying his witnesses from Goa to Mumbai for trial if the transfer is allowed. While submitting this argument, the hardship of the wife and the child is completely ignored by Respondent.

5.3. In support of his submissions, learned Advocate for Respondent has relied on the following decisions:-

- (i) **Sunita Devi Vs. Amril Lal²**;
- (ii) **Dipika Agarwal alias Dipika Khaitan Vs. Rishi Agarwal³**;
- (iii) **Dr. Subramaniam Swamy Vs. Ramakrishna Hegde⁴**;
- (iv) **H.K. Suma Vs. M. Santosh⁵**

5.4. He has placed four citations before the Court. None of the aforesaid citations aid and assist the case of Respondents. While relying on the citations, an Advocate should realize that the facts in said case are required to be considered and whether they are akin and similar to the facts in the present case. Merely relying on an obiter or a ratio of the decision in a judgment and applying *ipso facto* to the facts of the present case cannot be countenanced. This is attempted to be done by the learned Advocate for Respondent while referring to

2 2022(4) HLR 240

3 AIR Online 2019 Cal 327

4 AIR 1990 SC 113

5 2023(2) RCR(Civil) 259

and relying upon the decision in the case of **Dr. Subramaniam Swamy (4th supra)** wherein the facts of that particular case were entirely different. The argument of the Advocate for the Respondent that Respondent will have to carry his witnesses and evidence all the way from Goa to Mumbai is therefore stated to be rejected in limine.

6. The provisions of Section 24 entail that in matrimonial matters wherever Courts are called upon to consider the plea of transfer the Courts will have to take into consideration the economic soundness of both parties, the social strata of the spouses, their standard of life prior to marriage and subsequent thereto, most importantly the circumstances of both the parties in eking out their livelihood and under whose protective umbrella they are seeking their present sustenance to life. The Supreme Court has further held that given the socio-economic paradigm in the Indian society, generally, it is the wife's convenience which is to be looked at while considering the transfer. Applying the aforesaid principles to the facts of the present case, there can be no doubt in the mind that the present Application deserves to be allowed.

7. In view of the above, Application stands allowed in terms of prayer clause 7(i) which reads thus:-

"(i) That case Nos. RCS 6/2023 and CMAP 52/2023 pending in the Mapusa Criminal and Civil Court, and Civil Court, Goa, be transferred to the Family Court in Mumbai."

8. Both the Courts in Goa shall take cognizance of a server copy of this order and act accordingly
9. MCA is allowed and disposed.

Amberkar

[MILIND N. JADHAV, J.]

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by RAVINDRA
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