

2004 (1) GLR 893

GUJARAT HIGH COURT

Hon'ble Judges:Kundan Singh, J.

Shobhnaben Versus Devendra Omprakashbhai Oberoi

CIVIL MISCELLANEOUS PETITION No. 12 of 2003 ; \*J.Date :- AUGUST 5, 2003

- [CODE OF CIVIL PROCEDURE, 1908](#) Section - [22](#), [23](#), [24](#)

**Code of Civil Procedure, 1908 - S. 22, 23, 24 - petitioner sought to transfer of Hindu Marriage Petition filed by her husband which is pending before C.J. (S.D.) Baroda to a court having competent jurisdiction at Himmatnagar - both parties have filed separate petitions indifferent courts - held, court cannot ignore inconvenience of parties specially of ladies who requires safety and security in journey - on facts and circumstances of case, petition pending before District Court, Baroda requires to be transferred to Himmatnagar - petition allowed accordingly.**

**Imp.Para:** [ [12](#) ]

**Cases Referred To :**

1. Chand Kanwar V/s. Santosh Kumar Singh, AIR 1997 Raj 190
2. Dr.Rajnath Vs. L. Vidya Ram & Ors., AIR 1953 All 772
3. Maharashtra State Board Of Secondary Education And Higher Secondary Education & Anr. Vs. paritosh Bhupeshkumar Sheth & Ors., 1984 4 SCC 27
4. [Minesh Rajnikant Dalal V/s. Avani Minesh Dalal, 2000 2 GLR 1685 : 2000 \(2\) GLH 634 : 2000 \(2\) GCD 1191 : 1999 GLHEL\\_HC 207728](#)
5. Mrs.Maneka Sanjay Gandhi & Anr. V/s. Miss Rani Jethmalani, 1979 4 SCC 167
6. Shiv Kumari Devendra Ojha V/s. Ramajor Shitla Prasad Ojha & Ors., AIR 1997 SC 1036

**Cases Relied on :**

1. Ms.Shakuntala Modi Vs. Om Prakash Bharuka, AIR 1991 SC 1104
2. Sumita Singh V/s. Kumar Sanjay & Anr., AIR 2002 SC 396

**Equivalent Citation(s):**

2004 (1) GLR 893 : 2004 (1) GCD 529

**JUDGMENT :-**

**KUNDAN SINGH, J.**

**1** Rule.

**2** By means of this petition the petitioner sought for transfer of the Hindu Marriage Petition no. 96/2002 filed by her husband opponent which is pending before the Civil Judge (Senior Division), Baroda to a Court having competent jurisdiction at Himmatnagar.

**3** It is stated that the petitioner is residing with her old widow mother and brother at village Modasa within the jurisdiction of the Court at Modasa, District Himmatnagar after she has been driven out by her husband opposite party from her in-laws house. The marriage of the petitioner with the respondent was solemnized in the month of October, 1998. Both the petitioner as well as the respondent lived together for about three years and gave birth to a female child. Due to demand of illegal dowry, mental and physical torture given to the petitioner by the respondent, the petitioner has filed an application under Sec. 9 of the Hindu Marriage Act for restitution of conjugal rights before the Civil Judge (Senior Division) at Himmatnagar and it is numbered as H.M.P. Case no.3 of 2001. The petitioner also filed an application under Sec. 125 of the Criminal Procedure Code before the Judicial Magistrate, First Class at Modasa being Criminal Misc. Application no. 26 of 2001 and in the said application, maintenance allowance was granted. Her husband - respondent has filed H.M.P. no. 96 of 2002 before the Civil Judge (Senior Division), Baroda for decree of divorce. It is also stated that the issues in the H.M.P. no.3 of 2001 filed for restitution of conjugal rights by the petitioner have already been framed and settled. The petitioner being a lady and having a child of three years and travelling distance from Modasa to Baroda being about 170 Kms., and back 170 Kms., for attending the court on each and every fixed date, is facing great inconvenience. Hence, she has moved this application for transfer of the H.M.P. no.96 of 2002 filed by her husband at Baroda to the competent Court at District Court Himmatnagar.

**4** The respondent has filed affidavit-in-reply wherein, it is stated that the applicant has not given any prior notice as is required under Sec. 22 of the Civil Procedure Code. The requirement of giving prior notice is mandatory and in absence of the same, this application is not maintainable and deserves to be rejected in limine. It is also stated that the applicant has suppressed the material fact that in H.M.P. no. 96 of 2002 which is sought to be transferred, the issues have been settled on 28.11.2002 and the matter is now at the stage of evidence. As the issues have already been framed, the present application filed after settlement of issues is not maintainable and is barred by the provisions of Sec. 22 of the Civil Procedure Code. The present applicant had made an application for interim alimony and the same has also been decided by the learned Civil Judge (Senior Division) at Baroda. It is also stated by the learned counsel for the respondent that interim alimony has been granted by the Civil Judge (Senior Division), Baroda and the respondent was directed to pay Rs.1,000=00 p.m. as interim alimony. Now, no application regarding interim alimony or maintenance allowance under Sec. 125 of the Criminal Procedure Code is pending. The allegation regarding physical and mental torture given by the respondent to the petitioner have been denied. It is also stated that

the petitioner has filed a complaint under Section 498-A against the respondent. After investigation, charge-sheet was submitted and it was numbered as C.R.no. 3756 of 2000 and the same is pending in the Court of Judicial Magistrate, First Class at Baroda. The petitioner is regularly attending the proceedings of C.R.no. 3756 of 2000. It is also ascertained that the father and the mother of the respondent are senior citizens of advanced age. The mother of the respondent is suffering from arthritis and at present she is physically bedridden and the respondent being the only son is required to take care of her. The respondent is working as a clerk in HMP Consultancy Services and is earning Rs. 2,500=00 per month, out of which he is paying Rs. 1,000=00 p.m. to the applicant as alimony and the respondent is running his household, getting treatment of his parents from the balance amount of Rs.1,500=00. Hence, this application deserves to be rejected.

5 Heard learned counsel for the parties and perused the relevant papers on record. Learned counsel for the respondent has challenged the jurisdiction of this Court under Sec. 24 of Civil Procedure Code and submitted that since the suits have been filed by both petitioner and respondent at different Courts and are pending at District Courts Baroda as well as Himmatnagar, therefore, the provisions of Sec. 22 of the Civil Procedure Code would apply, but since it is a transfer application under Sec. 24 of the Civil Procedure Code, it would not be applicable and provisions of Sec. 24 will yield to Sec. 22 of the Civil Procedure Code. As the issues have already been framed and the application has been made after five months of the framing of the issues and no prior notice is given as contemplated under Sec. 22 which is mandatory in nature, hence, this application under Section 24 of Civil Procedure Code is not maintainable. He has relied on the propositions of law laid down by the Allahabad High Court in the case of Dr.Rajnath Vs. L. Vidya Ram & Ors. reported in All India Reporter 1953 Allahabad 772, wherein it is held as under :-

"Section 23 merely lays down the forum in which applications under Section 22 are to be made. Although Sec. 22 is mentioned in clause (1) of Sec. 23 only, clauses (2) and (3) of that Section also refer to an application made under Sec. 22 and do not refer to an application under Section made under Sec. 24. Sec. 23 is not an independent section. It is supplemental to Section 22. Section 24 is a general provision empowering the High Court or the District Court to transfer a case on the motion of any other party or on its own motion. The general power conferred by Sec. 24 is not to be applied where the case falls under Section 22. If Sec. 24 were to apply to the classes of cases covered by Sec. 22, it would not have been necessary for the legislature to enact Sec. 22 at all. It is a general principle of interpretation of Statutes that where there is a special provision for a particular matter and there is also a general provision, the special provision should be applied".

5.1. He has also relied on the decision of the Supreme Court in the case of Maharashtra State Board of Secondary Education and Higher Secondary Education & Anr. Vs. Paritosh Bhupeshkumar Sheth & Ors. reported in (1984) 4 S.C.C. 27, wherein it has been held that :-

"Where under a specific section or rule a particular subject has received special treatment, such special treatment will exclude the applicability of any general provision which might otherwise cover the said topic".

5.2. He also relied on the commentary of the Civil Procedure Code by Justice C.K. Thakkar, 2000 edition at page 555 which reads as under :-

"An application for transfer of a suit under Section 22 can be made at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. Sec. 24 can be pressed into service at any stage. Thus, power exercised under Section 24 is more extensive. At the same time, however, the general power conferred by Section cannot be exercised where the case falls under Sec. 22 and hence, where an application of transfer is made under Section 22, Section 24 has no application. If Section 24 were to apply to cases covered by Sec. 22, it was not necessary for Parliament to enact Sec. 22."

6 The next contention of the learned counsel for the respondent is that Sec. 22 of the Civil Procedure Code applies where the issues are framed at or determined or before the settlement of the issue. If the issues have already been determined and the applicant cannot come before the Court for transfer of case, the applicant will have no remedy under the provisions of Civil Procedure Code. Sec. 24 would be applicable only if something happens or occurs. In the present case, no new thing has happened, and also there are no new circumstances for invocation of powers under Sec. 24 of Civil Procedure Code. As per the provisions of Section 22 of the Civil Procedure Code, the petitioner cannot apply for transfer of the suit as the issues have already been settled on 28.11.2002. Mere convenience of the party is not enough for transfer of a case from one Court to another. He relied on the decision of the Supreme Court in the case of Mrs. Maneka Sanjay Gandhi & Anr. V/s. Miss Rani Jethmalani reported in (1979) 4 S.C.C. 167. The relevant portion is extracted as under :-

"2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

7 I have considered the arguments of the learned counsel for the respondent, but I do not find any good reason to accept the same. In case the applicant has not applied for the transfer of the case from one Court to another before the settlement of the issue then the High Court would have no power for the transfer of the case to appropriate Court whatsoever any inconvenience, harassment, injustice is caused to any party, this is not the intention of the legislature. Moreover, Section 22 requires for the application to be moved for transfer of the case from one Court to another where the issues have not been settled and after notice the application for transfer application can be made. Section 22 itself provides that where a suit mainly instituted in any one of two or more Courts and is instituted in one such Courts, any

defendant, after notice to the other parties, may at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other side shall determine in which of the several Courts having jurisdiction the suit shall proceed. No doubt it is also mentioned in Sec. 22 that the application should be moved at the earliest opportunity where the issues are settled at or before such settlement of the issues. As the language of Sec. 22 appears, the application for transfer should be moved at the earliest where the issues have already been settled at or even before such settlement of the issues, the application can be moved. There is no bar that after the settlement of the issues the Court would not have jurisdiction for transfer of the case. While Sec. 24 entrusted power to High Court as well as the District Court to transfer any suit, appeal or other proceedings pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same. The High Court and District Court also have power to withdraw the suit, appeal or other proceeding pending in any Court subordinate to it and to try and dispose of the same or transfer the same for the trial or disposal to any Court subordinate to it competent to try or dispose of the same or retransfer the same for trial or disposal to the Court from which it was withdrawn. Sec. 22 is in regard to the suit only, while Section 24 gives more extensive power. Even the proceeding pending can be transferred. The proceedings also include proceeding for the execution of a decree or order. As such under the provisions of Sec. 24 C.P.C any proceeding including execution proceedings pending before any court can be transferred, though the suit has already been disposed of by some different Court of different place. The learned counsel for the petitioner submitted that suit referred in Section 22 of Civil Procedure Code is meant suit provided under Sec. 16 of Civil Procedure Code prescribing the place of institution of suit either at the Court within which jurisdiction suit property exists or where the defendant resides. It is also pointed out that Sec. 22 is applicable only to the matters mentioned in Sec. 16 wherein the suits for recovery of the immovable property with or without rents or profits, for partition of the immovable property or for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property, or for determination of any other right to or interest in immovable property, for compensation for wrong to immovable property, or for the recovery of movable property actually under distraint or attachment but there is no description of matrimonial cases for inclusion under Sec. 16 Code of Civil Procedure I have considered the rival contentions of the learned counsel for the parties. It is a case in which two petitions have been filed under the provisions of Hindu Marriage Act and both the petitions; one by the petitioner and the other by the respondent are pending in different Court. The object of the proceedings under the Hindu Marriage Act is dispensing with the justice at the earliest to the parties concerned as both the petitions are in respect of the relations between the parties seeking different reliefs. One is seeking relief of decree for divorce while the other is seeking the decree for restitution of conjugal rights. Both are required to be heard and decided by the one and the same Court in order to avoid duplication of evidence and inconsistent findings. There may be common evidence of both the parties in such cases under the provisions of the Act. Though Sec. 21-A of the Hindu Marriage Act has given power to transfer the petitions in certain cases in which one party is claiming the decree for judicial separation under Sec. 10 and the other party seeking decree for divorce and it is also provided that such cases instituted by the

parties under Section 10 and 13 of the Hindu Marriage Act, the later case will be transferred to the Court where the petition was presented at earlier point of time. Though in the present case, provision of Sec. 21-A are not directly applicable but the intention of the legislature appears to be of such type, that litigation under Sec. 10 and 13 should be tried by one and the same Court. In the present case, one party has sought for decree of restitution of conjugal rights and the other is seeking decree for divorce. As per the intention of the legislature under Sec. 21-A of the Hindu Marriage Act, it clearly appears that such litigation between husband and wife should be heard and decided by one and the same Court. This Court has taken view in the case of *Minesh Rajnikant Dalal V/s. Avani Minesh Dalal* reported in 2000 (2) Guj.Law Reporter at 1685, wherein it is observed that :-

"The wife is residing with her parents who are staying at Ahmedabad. Being a lady, as and when she has to go to attend the Court at Baroda, somebody has to accompany her and in these days where all are occupied, it may be very difficult for her to arrange every time the company to some other person. The powers which vest in this Court under Sec. 24 of the Civil Procedure Code, are comprehensive and discretionary. The fact that this Court can, on its own motion, even without notice to the other side, withdraw any suit or appeal or other proceedings pending in any Court subordinate to it and transfer the same speaks of wide powers which are vested in it under Section 24 of the Code. Legislature has not limited the power and discretion of this Court under Section 24 of the Code, meaning thereby, the powers are not circumscribed by any considerations. Under Section 24 of the Code, consideration is that if the Court is satisfied that circumstances so warrant such transfer the matters can be ordered to be transferred. Looking to the facts of this case and the meagre amount of cost of expenses awarded to the wife, at least to the extent of overcoming avoidable expenditure some relief would be available to the wife on transfer of this case to Ahmedabad. Further, if two matters are decided by two different Courts, certainly it may result in contrary decisions also. In the same case, there will be duplication of the evidence. Such matters are to be decided by one Court by consolidating the same which will be in the larger interest of the parties also."

**8** It is contended by the learned counsel for the respondent that the petitioner has filed a criminal case in the Court of J.M.F.C Baroda and the same is pending and the petitioner is attending the same regularly. Hence, it can be said that the proceeding of H.M.P. pending before Baroda Court should not be transferred on the basis of the convenience of the parties as petitioner is regularly attending the criminal proceeding pending in the Court of Baroda. In this connection, learned counsel for the respondent pointed out that it is a police challan case and the police has already filed the chargesheet before the Court concerned after completion of the investigation. In the criminal case the petitioner would be required to attend the proceedings. As such on this ground also the H.M.P. pending at Baroda cannot be transferred.

**9** I have considered the argument of the learned counsel for the respondent regarding convenience of the parties, particularly for the criminal case which has been instituted at the instance of the petitioner in the J.M.F.C. Court, Baroda and that the petitioner is attending the proceedings regularly. As it is a police case, the petitioner is not required to attend all the proceeding of the criminal case. It is not a complaint case where the complainant is required

to attend the proceedings before the Court on each and every date and if the complainant does not appear then the case will be decided ex-parte or will be dismissed for default. As such the presence of the petitioner is not necessary in the criminal case pending before the J.M.F.C. Court at Baroda. When her evidence is to be recorded she will be summoned for tendering her evidence before the Court concerned in the criminal case and her presence is not required on any date except the date fixed for the purpose of recording her evidence. As such the contention of the learned advocate for the respondent can not be accepted.

**10** The learned counsel for the respondent submitted that the respondent is willing to give travelling allowance to the petitioner for attending the proceeding of the petition pending before the District Court at Baroda, hence this application is not tenable. He also relied on decision of the Supreme Court in the case of Shiv Kumari Devendra Ojha V/s. Ramajor Shitla Prasad Ojha & Ors. reported in AIR 1997 SC 1036, wherein it is observed as under :-

"Shri Upadhyay, learned counsel appearing for the respondents has agreed to bear the expenditure for her travel and stay whenever she attends Court. Under the circumstances, we do not find that there is any justification for transferring the matter to Pratapgarh, U.P. Whenever the petitioner goes to the Court, the respondents would pay Rs. 750=00 on each occasion to the petitioner and the amount would be paid to her in advance. The petitioner would intimate the Civil Judge, Senior Division who would direct the respondents to pay the amount to the petitioner."

10.1. He also relied on the decision of the Rajasthan High Court in the case of Smt. Chand Kanwar V/s. Santosh Kumar Singh reported in AIR 1997 Rajasthan 190, wherein it has been held as under :-

"The learned counsel for the non-petitioner also showed to me an order passed on 17.09.1996 by the Family Court, Udaipur, in the case instituted by the non-petitioner for payment of Rs. 1,000=00 per month as interim maintenance to the petitioner and for payment of transport charges of the petitioner as well as of one male escort from Jaipur to Udaipur and back. In such a situation, I find no case for transfer of the case under Sec. 13 of the Hindu Marriage Act from Udaipur to Jaipur. The transfer petition is, therefore, dismissed."

**11** I have considered the contentions of the learned counsel for the parties. There could be no straight jacket formula in law that the matrimonial petition cannot be transferred if transport charges of the lady and escort are given to lady. Each case is decided on its own facts and circumstances. We cannot ignore inconvenience of the parties specially of ladies who requires safety and security in journey from unwarranted elements, even if we permit transport charges for lady litigant with escort they will have to face many inconvenience and harassment in journey.

11.1 Moreover as pointed out by the learned counsel for the petitioner, that the petitioner has been allowed interim alimony of Rs. 1,000=00 per month though the income of the respondent was shown to be Rs. 2,500=00 only. It would be additional burden on the respondent as out of Rs. 1,500=00 he is incurring substantial amount in the treatment of his ailing mother & father if substantial amount for transport charges are directed to be paid to

the petitioner. If she attends the proceedings of the H.M.P. no. 96 of 2002 pending before Baroda Court, the petitioner being a lady with three years old child without having suitable escort would face much more inconvenience during the journey from Modasa, District Himmatnagar to Baroda which is at a distance of 170 Kms. and back to Himmatnagar even though some travelling allowance is allowed to her and her escort. However, it is mentioned here that the petitioner has already instituted the proceeding for restitution of conjugal rights at an earlier point of time in the month of June, 2001, while the H.M.P sought to be transferred has been instituted by the respondent on 20.11.2002 before Baroda District Court.

11.2. The Supreme Court directed to transfer a petition filed by husband under Sec. 22 of Civil Procedure Code on the ground of hardship to divorced wife to a place where wife has instituted proceedings and nature of both proceedings is such that they should be heard by the same Court, in the case of Ms.Shakuntala Modi vs. Om Prakash Bharuka reported in AIR 1991 S.C 1104. The Supreme Court in the case Sumita Singh V/s. Kumar Sanjay & Anr. reported in AIR 2002 SC 396 has observed as under:-

"It is the husband's suit against the wife. It is the wife's convenience that, therefore, must be looked at. The circumstances indicated above are sufficient to make transfer petition absolute."

**12** Considering the facts and circumstances stated above, particularly in respect of the convenience of the parties and decision of the Supreme Court, the Hindu Marriage Petition pending before District Court, Baroda requires to be transferred to Himmatnagar and accordingly the record and proceedings of H.M.P. No. 96 of 2002 pending in the District Court, Baroda are ordered to be transferred to the District Court having competent jurisdiction at Himmatnagar and both H.M.P. No. 96 of 2002 and H.M.P. No. 3 of 2001 are directed to be consolidated and decided by one and the same judge as expeditiously as possible. The petition is allowed to the aforesaid extent. Rule is made absolute with no order as to costs.