

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.08.2006

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Tr.C.M.P.Nos.138 and 139 of 2006
and
C.M.P.Nos.6824 and 6825 of 2006

1. Usha @ Ramalakshmi ... Petitioner in both Tr.C.M.Ps
2. Minor Meenakshisundari
(represented by her mother
and guardian 1st Petitioner herein) ... 2nd Petitioner in
Tr.C.M.P.No.138 of 2006

Vs.

P.Shanmugam ... Respondent in both Tr.C.M.Ps.

Prayer : Tr.C.M.P.No.138 of 2006 is filed under section 24 of the CPC to withdraw and transfer the proceedings in M.C.No.3 of 2005 from the file of Family Court, Coimbatore to the file of Judicial Magistrate Court, Tuticorin as per the amendment order by this Court in C.M.P.No.8322 of 2006 on 07.07.2006. Tr.C.M.P.No.139 of 2006 is filed to withdraw and transfer H.M.O.P.No.588 of 2004 from the file of Family Court, Coimbatore and transfer the same to Sub Court, Tuticorin.

For Petitioners : Mr.K.Kalyanasundaram
For Respondent : Mr.P.Valliappan

O R D E R

The petitioner, who is the wife of the respondent and her minor daughter have filed Tr.C.M.P.No.138 of 2006 praying for withdrawal and transfer of the proceedings in M.C.No.3 of 2005 pending on the file of Family Court, Coimbatore to the file of Judicial Magistrate Court, Tuticorin as per the amendment ordered by this Court in C.M.P.No.8322 of 2006 on 07.07.2006. In Tr.C.M.P.No.139 of 2006, the petitioner prays for withdrawal and transfer of H.M.O.P.No.588 of 2004 from the file of Family Court, Coimbatore to the file of Sub Court, Tuticorin.

2. The facts of the case leading to the Transfer Petitions are as follows :

(i) The marriage between the petitioner and the respondent was solemnized on 01.05.2000 at Tirunelveli as per Hindu rites and customs and a daughter, by name, Meenakshisundari was born to them on 20.05.2002. Their marital life was happy only for one year. The parents of the petitioner presented her 25 sovereigns of gold jewels and house hold articles, worth Rs.1,00,000/-. The respondent is a drunkard, addicted to gambling and started demanding dowry from the petitioner's parents. He did not take care of the petitioner and her minor child and even the basic amenities were not provided by him. The petitioner suffered physical and mental cruelty at the hands of the respondent.

(ii) The petitioner's father, a Government servant retired on 31.01.2001 and the respondent with an ulterior motive of extracting the retirement benefits, lured him to come and stay at Coimbatore. The respondent borrowed a sum of Rs.5,00,000/- from the petitioner's father. The respondent sold a house to the petitioner's father for a sum of Rs.1,50,000/- and he promised to pay the balance amount of Rs.3,50,000/- to him with interest. But, the respondent failed to pay the said amount and started harassing the petitioner cruelly and said that the balance amount should be adjusted towards dowry. The petitioner also suffered harassment at the hands of the respondent's parents and his sister. Due to ill-treatment and demand of dowry, the petitioner was constrained to prefer a police complaint before All Women Police Station, Coimbatore.

(iii) The respondent appeared for an enquiry, admitted the atrocities and cruelty caused to the petitioner and promised to settle the matter amicably. The jewels of the petitioner was received by the respondent and pledged in a bank. The petitioner and her minor daughter were living in Coimbatore with the meagre pension received by her father, who retired as a Tahsildar. Since the respondent was totally negligent to the petitioner and her minor daughter and failed to provide even the basic amenities to them, though he was earning more than Rs.25,000/- per month, the petitioner was constrained to file M.C.No.3 of 2005 before the Family Court, Coimbatore, claiming maintenance of Rs.5000/- per month, each. In the maintenance petition, the respondent has entered appearance and had filed the counter affidavit.

As a counter blast to the petitioner's complaint, the respondent filed a petition for divorce in H.M.O.P.No.588 of 2004 before the Family Court, Coimbatore. The petitioner has entered appearance and is contesting the petition.

(iv) The petitioner's mother expired on 15.02.2006 and within a short span of time, her father also expired on 20.02.2006 due to heart-attack. The respondent was residing very close to the house of the petitioner and she was under constant threat by him. After the death of her parents, since she had no relatives at Coimbatore, she came to live in her Uncle's house at Tuticorin and since then, the petitioner and her daughter are under the care and custody of her Uncle. The petitioner has no means of livelihood and is unable to maintain herself and her child, aged about four years and her brother, who has just completed his Diploma in Engineering is still unemployed. Whereas, the respondent is earning more than Rs.25,000/- per month.

3. Explaining her financial constraint, difficulty in attending the Court at Coimbatore without the assistance of a male member, the long distance travel of about 500 kms between the place of boarding and the Court, in which the matrimonial disputes are pending and the constant threat faced by her at the hands of the respondent, the petitioner has preferred the above Transfer Petitions.

4. The respondent has filed a common counter affidavit in both the transfer petitions, contending inter alia and denied all the averments made in the transfer petitions. According to him, the marriage was solemnized at Tirunelveli and a daughter was born to them on 20.05.2002 and the petitioner was always rude and in the habit of harassing him. The respondent, unable to bear the humiliation caused by her was constrained to institute the proceedings in H.M.O.P.No.588 of 2004 before the Family Court, Coimbatore.

5. The respondent has further contended that after the institution of the petition for divorce, as a counter-blast, the petitioner has chosen to initiate maintenance proceedings in M.C.No.3 of 2005, before the Family Court, Coimbatore. In H.M.O.P.No.588 of 2004, counter has been filed, issues have been framed and trial had already commenced. The chief examination of the respondent was over. The respondent has filed proof affidavit on 05.10.2005 and at the instance of the petitioner, the matter has been adjourned for cross-examination and the case was posted for hearing on 03.05.2006. The petitioner has chosen to file Transfer Petitions before this Court on vexatious grounds. The respondent has further contended that because of the conduct of the petitioner, the respondent's father committed suicide on 09.08.2004. The petition for divorce has almost reached the stage of final hearing and only to protract the proceedings, the petitioner has come forward with the above transfer petitions. The respondent has also denied the financial incapacity pleaded by the petitioner and alleged suppression of material facts. The respondent contended

that the averments made in H.M.O.P. 588/2004 may be read as part and parcel of his counter affidavit and prayed for dismissal of both the Transfer C.M.Ps.

6. Learned Counsel for petitioners has submitted the following grounds for transfer of the proceedings :

(i) There is a constant threat by the respondent in Coimbatore, where the proceedings have been instituted, which forced the petitioner to shift her residence from Coimbatore to Tuticorin, where she has taken shelter in her Uncle's residence.

(ii) The distance between Tuticorin and Coimbatore is about 500 kms. Since her daughter is of tender age and there is no male member to accompany her to Coimbatore on every hearing date, it is impossible for her to go to Coimbatore to defend her case and also to prosecute for maintenance.

(iii) She has no means of livelihood for herself and her child and therefore she has filed the maintenance petition before the Family Court, Coimbatore. Her brother is also unemployed.

(iv) She has no relatives at Coimbatore and it would be impossible for her to stay alone with her daughter, who is just four years old. The expenses towards boarding and travelling for attending the Court at Coimbatore on each occasion will be around Rs.1000/-.

For the grounds stated supra, the petitioner has prayed for transfer of both the proceedings to a competent court at Tuticorin.

7. In support of his contentions, learned counsel for the petitioner has placed reliance on the following decisions of the Honourable Supreme Court, reported in (i) 2005 (12) SCC 387 (Neelima Rani @ Neelima Rani Palakonda vs. Srikanth), (ii) 2005 (12) SCC 381 (Smitha Sen vs. Sujit Kumar), (iii) 2005 (12) SCC 237 (Rajani Kishore Pardeshi vs. Kishor Babulal Pardeshi).

8. Per contra, learned counsel for the respondent raised a preliminary objection that the Sub Court at Tuticorin is not competent to hear cases relating to matrimonial disputes, as it lacks territorial jurisdiction. This point has not been raised in the counter affidavit filed by the respondent. He further contended that the petitioner's brother is working in Coimbatore and that the petitioner can stay in Coimbatore and attend the cases, pending on the file of Family Court, Coimbatore. Finally, the respondent offered to bear the expenses, to be incurred by the petitioner towards travelling, boarding, etc. As the proceedings in H.M.O.P.No.588 of 2004 has already reached a final stage, where the

respondent has filed his proof affidavit on 05.10.2005, what remains is only the cross-examination of the respondent and therefore, at this juncture, the prayer for transfer is liable to be rejected.

9. When the matter was posted for clarification on 22.08.2006 at 2.00 p.m., learned counsel for the respondent submitted the following authorities in support of his contention relating to competency of Court:

(i) 1985 Karnataka 149 (M/s. Ritz Hotels Mysore) Ltd., vs. State of Karnataka and others);

(ii) AIR 1964 SC 489 (Lakshmi Narain vs. First Addl. District Judge, Allahabad and others);

(iii) AIR 1992 Karnataka 163 (Syndicate Bank vs. K. Gangadhar and others);

(iv) AIR 1982 SC 3 (Jeewanti Pandey vs. Kishan Chandra Pandey);

(v) AIR 2003 M.P. 189 (Arjun Singhal vs. Pushpa Karwal);

(vi) AIR 1992 Jammu & Kashmir 1 (K. Radha Krishnan Nayyar vs. Radha);

(vii) AIR 2003 Orissa 129 (Dinabandhu Patro vs. State Bank of India and others).

Learned counsel for the respondent submitted that the Sub Court at Tuticorin has no territorial jurisdiction to try the cases relating to matrimonial disputes, in view of the provisions contained under section 19 of the Hindu Marriage Act.

10. Learned counsel for the petitioner brought to the notice of this Court that Hindu Marriage Act, 1955 has been amended by Act 50 of 2003, in and by which, an insertion has been made to Section 19 of the said Act. In case, the wife is the petitioner, application under Section 19 of Hindu Marriage Act can be filed by her in the place where she is residing on the date of filing the petition. The amendment came into effect from 23.12.2003. He also submitted a Full Bench judgment of High court reported in AIR 1973 Madras 2 (P. Madhavan Unni vs. M. Jayapandia Nadar) and contended that the sub court at Tuticorin has got jurisdiction. This case deals with the power of the court to transfer execution proceedings and the Court has held that the words "competent to try" refer only to pecuniary competency and not territorial competency of the transferee court.

11. I have gone through the pleadings made in the Transfer Petitions and the averments contained in H.M.O.P.No.588 of 2004 and M.C.No.3 of 2005. Serious allegations have been made against each other in the proceedings. Though the plea of territorial jurisdiction has not been raised in the common counter affidavit filed by the respondent, since an issue has been raised during the course of hearing, this Court deems fit to decide the preliminary issue of objection relating to territorial jurisdiction.

12. Admittedly, the marriage was solemnized at Tirunelveli in the year 2000 and after two years, the couple had shifted their residence to Coimbatore. During their stay at Coimbatore, there was an allegation of harassment of dowry, physical assault and there were calamities in both the families. Both the proceedings initiated by the parties against each other were within the jurisdiction of the Courts, where the parties last resided together. The question to be decided is as to whether this Court in exercise of its power under Section 24 C.P.C. can transfer the above said proceedings to any competent Court in Tuticorin.

(i) In A.I.R. 1985 Karnataka 149 (M/s.Ritz Hotels (Mysore) Ltd., vs. State of Karnataka and others), where appeals were pending before two Appellate Authorities under Karnataka Public Premises (Eviction of Unauthorised Occupants) Act, 1974 transfer of one appeal to the other Court was ordered. The court held that "while transferring a proceeding from one authority, court or Tribunal either in exercise of the power under Article 227 of the Constitution of India or under Section 24 C.P.C., it has to be seen if the transferee authority, etc., was competent to dispose of the matter transferred to it. "Competence" only means "competence to try or decide" the subject matter involved in a case, suit, proceeding or appeal and it has no reference to the territorial jurisdiction."

(ii) Again on the question of competence, the respondent relied on a judgment reported in AIR 1964 SC 489 (Lakshmi Narain vs. First Addl. District Judge, Allahabad and others). In this case, the learned Chief Justice passed orders in chambers under S.24 (1) (a) of the Code of Civil Procedure, on his own motion, without notice to the parties, taking into consideration of the amendments made to the various statutes enabling the District Courts to entertain first appeals upto a valuation of ten thousand rupees. The matters pertain to valuation of suits or Appeals and the competence of the transferee court. The Apex court was pleased to hold that Section 24 C.P.C., postulates that the court to which the Suit or appeal or other proceeding is transferred should be competent to try or dispose of the same. This judgement is not applicable to the facts of the case on hand.

(iii) In AIR 1992 Karnataka 163 (Syndicate Bank vs. K.Gangadhar and others), the issue that came up for consideration was, where a suit for enforcement of mortgage by sale of immovable properties, i.e., suit directly governed by Section 16(c) was filed in the Court in whose territorial jurisdiction the mortgaged properties were situated and that suit was transferred by the High Court to a Court with no territorial jurisdiction over the properties, the plaintiff was entitled to seek on making out a case for retransfer, retransfer of the case to the Court in which the Suit was originally filed.

In this case, in view of the above said provision limiting the institution of suits relating to the mortgaged properties, the court held that the expression "Competent to try or dispose of the same" meant that it should have in addition to pecuniary jurisdiction, territorial jurisdiction over the subject-matter of the property also.

(iv) In AIR 1982 SC 3 (Jeewanti Pandey vs. Kishan Chandra Pandey), while considering the meaning of 'residence', the Supreme Court was pleased to hold that "in order to give jurisdiction on the ground of "residence", something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the Court in which the resident is sued, is his natural forum. The word "reside" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense "residence" is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time, to dwell permanently or for a length of time, to have a settled abode for a time. It is the place where a person has a fixed home or abode. Where there is such fixed home or such abode at the place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g., for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hostels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides."

In this case, the question adjudicated was regarding place of filing the matrimonial proceedings. The power of the Court under Section 24 C.P.C. to transfer the application filed under Section 19 of Hindu Marriage Act has not been considered. The only question considered was regarding the jurisdiction of initiation of the proceedings.

(v) Again in AIR 2003 M.P. 189 (Arjun Singhal vs. Pushpa Karwal), where the marriage between the parties was solemnized and respondent wife was residing within the municipal limit at Jabalpur, husband preferred a transfer petition on the grounds that he was residing outside the municipal limits of Jabalpur. On a reference, in view of the provisions contained in Section 19 of the Hindu marriage Act, relating to the court in which the matrimonial disputes have be instituted, the court held that it was not a case covered under clause (iv) of section 19 of the Hindu marriage Act.

(vi) In AIR 1992 Jammu & Kashmir 1 (K.Radha Krishnan Nayyar vs. Radha), the following issues were considered by the Court :

(a) What is the scope of Section 21 of the Act so far as the persons who were not subject to the State Act at the time of their marriage are concerned ?

(b) Whether the persons whose marriages have been solemnized under the Central Act ?

(c) Whether the persons who were governed by the State Act at the time of their marriage can get a relief in any other court in the country under the provisions of the Central Act?

Dealing with the provisions of the State Act, namely, Hindu Marriage Act, J & K (VIII of 1955) the Court has held as follows :

" The persons who were governed by the State Act at the time of marriage and whose marriage was solemnized within the State of Jammu and Kashmir, can get a relief only in the State and not in any other court in the country under the Central Act unless both the parties have settled and have become domicile of a place to which the State Act is not applicable but the Central Act applies. In that case, the provisions of Sub-S. (iv) of S.21 of the State Act and Sub-S (iv) of S.19 of the Central Act would not apply. For the purpose of attracting the provisions of Sub-S. (iv) and the applicability of the Central and the State Acts, the place of solemnization of the marriage, is important and relevant. In the instant case the marriage of the parties was solemnized at Madras, a place where the State Act is not applicable. Therefore the filing of petition for divorce by husband in State of Jammu and Kashmir would not be proper in view of Section 21 (iv). This judgement has been rendered considering the provisions contained in the special Act, viz. State Act VIII of 1955 and the same is not applicable to the present case.

(vii) In AIR 2003 Orissa 189 (Dinabandhu Patro vs. State Bank of India and others), the bank instituted the suit for recovery of loan amount from the borrower. All the transactions relating to the loan took place in whose jurisdiction the suit was instituted. The mortgaged property was also situated within the jurisdiction of the same Court. There was no pleading in the petition for transfer to indicate as to how the interests of petitioner therein would be served best by transfer of the suit to the place where the transfer was sought for. The transfer sought for was declined both on the grounds pecuniary and territorial jurisdiction.

13. The power of the High Court to transfer the proceedings initiated under Hindu Marriage Act in Family Court, to any other Court of competent jurisdiction has come up for consideration before various Court.

(i) In AIR 1973 Madras 247 (M.Gomathi vs. S.Natarajan), this Court in paragraph 4 has held as follows :

"Neither Section 19 nor Section 21 limit the jurisdiction to that which is provided under Section 19. Therefore Section 19 and 21 cannot be construed as excluding the operation of the Civil P.C. I am fortified in this view by the wording of the Code which prohibits the limiting or otherwise affecting the jurisdiction conferred by the special enactment and does not bar conferment of an extended jurisdiction by the application of the Civil P.C. The language of Section 19 or Section 21 of the Hindu Marriage Act does not exclude the application of the Civil P.C. "

(ii) In Hariram Dhalumal vs. Jasoti, AIR 1963 Bombay 176, the marriage was solemnized before the partition of India at Karachi. The parties separated in Karachi. After partition, the parties came to India separately. The husband was employed in Delhi and the wife at Nagpur. The husband applied under Section 19 for divorce in the Nagpur Court. Neither was the marriage solemnized within the jurisdiction of the Court nor did the husband and wife reside or last resided together within the jurisdiction of the Nagpur Court. In the circumstances the Court held as follows :

" ... Where the provision as to jurisdiction specifically contained in Section 19 of the Hindu Marriage Act viz., the place of solemnization of marriage or place of residence of husband and wife, either separately or together within the jurisdiction of the Court is impossible of satisfaction. In my opinion, the provisions

of Section 20 C.P.C. are sufficient to create jurisdiction in the ordinary Civil Court at a place where either the defendant resides or the cause of action is said to arise."

(iii) In AIR 1990 Karnataka 146 (C.S.Shyamala vs. C.S.Srikantaiah), in paragraphs 6 and 7, the Court held as follows :

"Under Section 24 of the C.P.C. power is conferred on this Court on an application of any of the parties and after notice to them 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 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 power that is vested in the High Court under Section 24 of the C.P.C. is comprehensive and discretionary. The very fact that the High Court could on its own motion without notice, could withdraw any suit or appeal or other proceeding pending in any Court subordinate to it and transfer the same, speaks of wide powers which are vested in the High Court under Section 24 of C.P.C. "

In the result, the Suit instituted on the file of Family Court, Tumkur was transferred to the Family Court, Bangalore.

(iv) Dealing with the question, as to whether the proceedings pending on the file of Family Court can be transferred under Section 24 to any competent Civil Court, subordinate to the High Court, this Court in AIR 1990 Madras 330 (K.R.Srinathi vs. H.Ramakrishnan), after considering the provisions of the Code of Civil Procedure and that of the Family Court has held as follows :

"Section 24 of the Code as extracted above specifies the general power of transfer of withdrawal of any suit, appeal or other proceeding of the High Court and the District circumstances contemplated therein. This provision is nothing but the reflection of exhaustive judicial power to transfer suit etc., and no Court to another unless both the Courts are subordinate to it. Before and application under this section can be granted, it is implicit that two conditions should be satisfied, viz., (1) proceedings to be transferred should be subordinate to the High Court or the District Court and competent to try and dispose of the same. The two

phraseologies, viz., (1) any Court subordinate to it, and (2) competent to try or dispose of the same are of signal importance and the meaning to be ascribed to those phraseologies would determine the amplitude and the extent of power of transfer vested in the High Court and the District Court under this section. The Court concerned is 'competent' when it can as regards the nature and subject matter of the case and as regards its pecuniary value, entertain a transferred suit, but it does not include 'Competence' from the point of view of territorial jurisdiction.

"The above said sub-section is moulded in such an express and explicit way as to indicate in unmistakable terms the territorial exclusion of civil Courts in relation to an area where a Family Court had been constituted in respect of the subject matters arrayed under Clauses (a) to (g) under the Explanation appended to sub-section (1) of Section 7 of the Act. The exclusion contemplated therein is not as if one excluding the total territorial jurisdiction of the Civil Courts situate in other parts of the State so as to make it not possible for the High Court to exercise the general power of transfer as contemplated under Section 24 of the Code. Moreover, the Family Court is a Civil Court subordinate to the High Court. In the absence of any special provisions contained in the Act regarding the transfer of proceedings pending before Family Court prohibiting the exercise of power of transfer by the High Court under Section 24 of the Code, when the other concerned Civil Courts available in other parts of the State where no Family Court had been established, are competent to try the subject matter of disputes to be fought in Family Court, it goes without saying that the powers of transfer as contemplated under Section 24 of the Code can, by no stretch of imagination, be held to have been whittled or taken away by the provisions of Section 8 of the Act. "

(v) In 1991 (Cr1) L.J. 1838 (Munna Lal and etc. vs. State of Uttar Pradesh and another, etc.), a Division Bench of the Allahabad High Court has considered as to whether the case pending on the file of the Family Court can be transferred to another Court, by exercising all the powers under Sections 22 to 24 of C.P.C. and under Section 407 of Cr.P.C. In paragraphs 5 and 6, the Court has held as follows:

"Family Court, as such, is a substitute of a civil court in respect of the matters referred to in the explanation to sub-section (1) of Section 7 of the Act

and has been declared to be a district court or the subordinate civil court, as the case may be. When exercising powers under Chapter IX of the Cr.P.C. Family Court is a substitute of a Magistrate Ist Class and exercises all the powers, which are exercisable by those Magistrates. By Section 10 of the Act, C.P.C. has been made applicable to matters dealt with in the explanation to sub-section (1) of Section 7 of the Act and Family Court when dealing with these matters, has been declared to be a civil court. Likewise, Code of Criminal Procedure has been made applicable to proceedings under Chapter IX of the Cr.P.C.

"Family Court, when exercising powers and jurisdiction relating to the matters referred to in explanation to sub-section (1) of Section 7 of the Act is a civil court, and as such, High Court has the jurisdiction to transfer the cases from one Family Court to another under Sections 22, 23 and 24 of the C.P.C. Similarly, when Family Court is exercising the powers and jurisdiction under Chapter IX of the Cr.P.C., it is a criminal court equivalent to the Magistrate Ist Class and High Court will have the powers to transfer the case from one Family Court to another under Section 407 of the Cr.P.C."

14. The judgments cited by the learned counsel for the respondent have no direct relation to the question to be adjudicated in this case. On the other hand, this Hon'ble Court as well as other courts have considered the scope and extent of the power of the High Court under Section 24 C.P.C. The Courts dealing with the above issue have consistently held that the power of transfer of the High Court cannot be whittled down or taken away as the matrimonial proceedings are initiated only in the Courts subordinate to High Court or in the Family Court, as the case may be. There is no provision in the Hindu Marriage Act or the special enactment, namely, Family Court Act, ousting the jurisdiction of Section 24 C.P.C., when a case is sought to be transferred from one District to another of the same State, the High Court has got ample powers to transfer the same and exercise all its powers under Section 24 of C.P.C. Similarly when a transfer is sought for from one State to another, the Supreme Court exercises its power under Section 25 of C.P.C. The sub court, at Tuticorin is a subordinate court to High court and as such the High Court has got ample powers and jurisdiction to transfer the proceedings from the Family Court to a subordinate court. Therefore the contention of the respondent regarding competency of the Court is liable to be rejected.

If the contention of the respondent has to be accepted, then the power of the High Court under section 24 of Civil Procedure Code will be crippled in so far as the matrimonial jurisdiction is concerned.

15. The decisions cited by the learned counsel for the petitioner are considered with reference to the present case. In 2005 (12) SCC 387 (Neelima Rani @ Neelima Rani Palakonda vs. Srikanth), in which the petitioner's wife was unemployed and that she had no source of income and that there was no male member to accompany her to prosecute the case at Chennai. The respondent was contesting the matrimonial case from United Kingdom and he had to come down to Warangal, where the proceedings for divorce was originally initiated. Considering the plight of the petitioner therein, the Honourable Supreme Court has ordered transfer of divorce petition in O.P.No.884 of 2004 from the file of Family Court, Warangal District, Andhra Pradesh to the file of Family Court, Chennai.

In 2005 (12) SCC 381 (Smitha Sen vs. Sujit Kumar), the petitioner's wife had to shift her residence from Patna to Delhi. She was having a small child, aged about 1½ years and that she had no independent source of income to meet out her traveling expenses, lodging, etc. She was living with her father in Patna. Therefore, she filed an application of transfer O.P. from the file of Family Court, Bihar to the file of District Judge, Delhi. The Apex Court has considered that there are justifiable reasons to transfer the petition and accordingly transfer was ordered.

In 2005 (12) SCC 237 (Rajani Kishore Pardeshi vs. Kishor Babulal Pardeshi), the Hon'ble Supreme Court has decided that the convenience of the wife has to be preferred over the convenience of the husband.

Some of the decisions rendered by the Apex Court, in the matter of deciding transfer of matrimonial disputes well certainly give a broad idea of the factors to be taken into consideration.

16. In AIR 2000 SC 3512 (1) (Mona Aresh Goel vs. Aresh Satya Goel), when the wife pleaded that she was unable to bear the traveling expenses and even to travel alone and stay at Bombay, the Supreme Court ordered transfer of proceedings.

In 2000 (10) SCC 304, the Honourable Supreme Court has held that where the petitioner's wife has pleaded lack of money, the same has to be considered.

In 2000 (9) SCC 355, the wife has filed a petition to transfer the proceedings initiated by the husband for divorce, at Bombay.

The place of residence of the wife was at Jaipur, Rajasthan. In that case, the petitioner is having a small child and that she pleaded difficulty in going all the way from Jaipur to Bombay to contest the proceedings from time to time. Considering the distance and the difficulties faced by the wife, the Supreme Court has allowed the transfer petition.

In a decision reported in 2005 (12) SCC 395, the wife has sought for transfer of matrimonial proceedings and a divorce petition has been filed by the respondent's husband at Baikunthpur to be transferred to Allahabad, where the petitioner's wife was residing, on the ground that it would be difficult for her to undertake such long distance journey, particularly in circumstances, in which she finds that the proceedings under Section 125 Cr.P.C. was already pending before the Family Court, Allahabad. Considering the difficulties faced by the wife and also the long distance journey, the Honourable Supreme Court was pleased to order transfer of the proceedings to Allahabad.

17. In 2001 AIHC 1567, this Court while dealing with cases relating to matrimonial disputes, set out certain guidelines which would be useful in dealing with matters regarding transfer of divorce or maintenance petitions. The guidelines are extracted hereunder :

"(a) If the woman has the custody of any child, born out of wedlock, less than five years of age,

(b) If anyone of the spouse suffers due to any physical disability; or any chronic illness as would render him or her difficult to travel which should be duly certified by a Surgeon/physician in Government Service.

(c) Where the respondent in Transfer Petition does not have objection to the transfer or where the respondent in the Transfer Petition also resides in the same place;

(d) Where the joint trial of proceedings pending in two places are sought for, it would be decided on the basis of the date of filing the petition and the petition filed subsequently will be transferred to the place where the earlier petition had been filed;

(e) Last place of residence should be a permanent place or if temporary, for an indefinite period of residence and not a place where the living was only casual or transitory.

(f) Where there is positive evidence such as police complaint, etc. at the husband's place, prima facie establishing that the wife had been subjected to physical torture or dowry harassment.

(g) If none of the aforementioned nor any other justifiable reason is available for transfer, then the person seeking transfer should be ready to pay the incidental expenses, like traveling expenses, for stay during the hearing to the other spouse, either a consolidated amount or fixed amount for each hearing should be paid during the previous hearing itself."

This case has been decided on a overall view of the petitions filed by either spouses. The guidelines are only illustrative situations aimed at frivolous petitions filed against each parties. This Court while dealing with cases relating to matrimonial disputes proposes to consider the merits of this case.

18. One of the guidelines in the decision reported in 2001 AIHC 1567 is that, (i) if there is a positive evidence, such as police complaint at the husband's place, prima facie establishing that the wife has been subjected to physical torture of dowry harassment, (ii) if the woman has the custody of any child, born out of wedlock, less than five years of age, the said factors have to be borne in mind while considering the case for transfer. In all the decisions rendered by the Hon'ble Supreme Court and High Courts, the physical and financial difficulties faced by the wife have been insisted to be considered while deciding transfer applications.

19. In the instant case, the petitioner has pleaded that there has been dowry harassment at the hands of the respondent and her in-laws, for which she has preferred a complaint at Coimbatore. The parents of the petitioner faced death in a quick succession within a short span of one week and that she has got a minor daughter, aged about four years and that she seems to have no relatives in Coimbatore. Hence, she was constrained to shift her residence to Tuticorin and take shelter in her Uncle's house. The distance between Tuticorin and Coimbatore is about 500 kms and it may not be possible for her to go to Coimbatore for attending the proceedings pending on the file of Family Court, Coimbatore, every time.

The contention of the respondent that he is ready to bear the expenses towards traveling, boarding, and lodging is not accepted by the petitioner, for the grounds stated supra. In this context, it is worthwhile to consider the decision the Supreme Court.

20. In 2000 (3) SCC 744 (Archana Singh vs. Alok Pratap Singh), where there was an offer by the respondent husband to pay travelling expenses to the petitioner wife, the Apex Court held that it is not adequate recompense the difficulties, which the petitioner wife would have to face, more so, when she has a small child to look after and hence ordered transfer of the proceedings.

In view of the amendment to Section 19 of the Hindu Marriage Act, the contention of the respondent that the sub-court at Tuticorin has no jurisdiction is also rejected.

21. Taking into consideration the broad guidelines set out by this Court as well as by the Apex Court, I am of the opinion that the petitioner has made out the case for transfer to a competent Court, subordinate to High Court. Though in Tr.CMP No.138/06 the petitioner has sought for transfer of M.C.No.3 of 2005 pending on the file of Family Court, Coimbatore to learned judicial Magistrate Tuticorin, I am not inclined to grant the relief, as it would be amounting to changing the nature of the proceedings.

22. Since both the proceedings relate to same parties, it is desirable to transfer both the proceedings to one Court, so that the disputes can be once in for all adjudicated, which would also avoid multiplicity of proceedings in two different forums. The pleadings and the materials furnished are considered only for the purpose of deciding the transfer petitions and it should not be construed as a finding. It is open to the parties to let in evidence.

In view of the above, H.M.O.P.No.588 of 2004 and M.C.No.3 of 2005 pending on the file of Family Court, Coimbatore are ordered to be transferred to Sub-Court, Tuticorin. The learned Subordinate Judge is directed to dispose of the proceedings within a period of three months from the date of receipt of a copy of this order. Consequently, connected C.M.P Nos. 6824 and 6825 of 2006 are closed. No costs.

When the order was pronounced, learned counsel for petitioner made a request that time may be fixed for the disposal of the matrimonial proceedings. Learned Subordinate Judge is directed to dispose of the proceedings within a period of three months from the date of receipt of a copy of this order.

abe

Sd/-

Asst. Registrar

//true copy// सत्यमेव जयते

Sub Asst.Registrar

To

- 1.The Subordinate Judge, Tuticorin.
- 2.The Judge, Family Court, Coimbatore.
- 3.The Judicial Magistrate, Tuticorin.

+ one cc to Mr.K.Kalyanasundaram, Advocate Sr.No.39396.

+ two Ccs to Mr.P.Valliappan, Advocate Sr.No.39204.

rsm/6.9.2006

TR.C.M.P.Nos.138 and 139 of 2006
and C.M.P.Nos.6824 and 6825 of 2006