

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

MISCELLANEOUS CIVIL APPLICATION NO.498 OF 2022

[REDACTED]

[REDACTED]

... Applicant

V/s.

1.

[REDACTED]

2.

3.

4.

5.

... Respondents

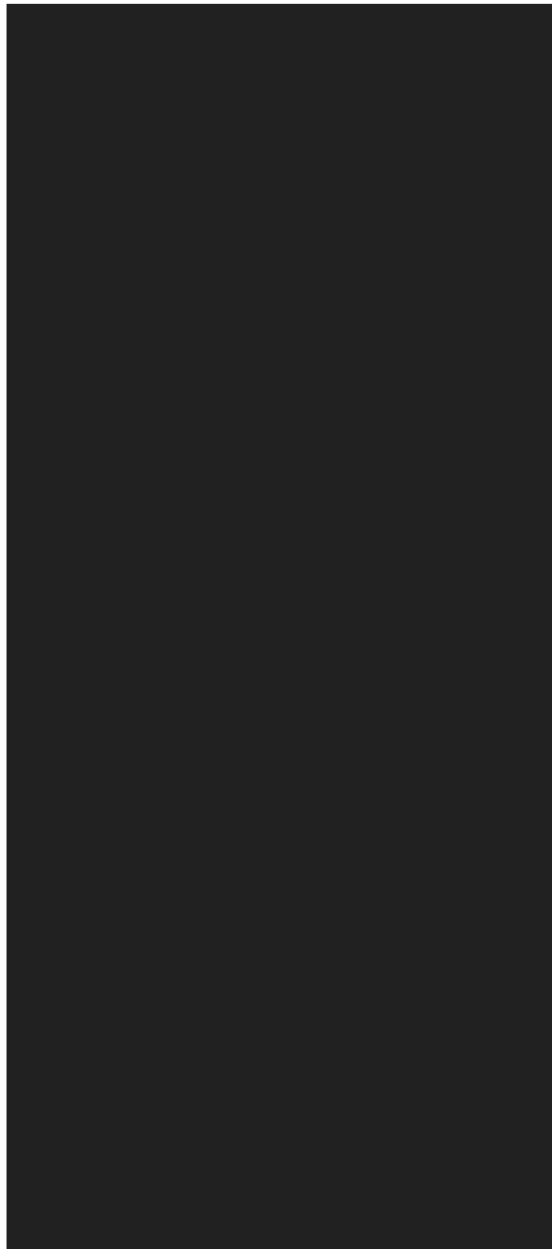
**WITH
MISCELLANEOUS CIVIL APPLICATION NO.500 OF 2022**



... Applicant

V/s.

1.



2.

3.

4.

5.

... Respondents

Mr. Abhijit Sarwate i/by Mr. Ajinkya Udane and Mr. Hardev K. Aidhan for the applicant in both matters.

Dr. Abhinav Chandrachud with Mr. Sumant R. Deshpande for respondent no.1 in both matters.

CORAM : AMIT BORKAR, J.

RESERVED ON : JANUARY 13, 2023

PRONOUNCED ON : FEBRUARY 2, 2023

JUDGMENT:

- 1.** Both these miscellaneous civil applications involve common questions of law and facts and, therefore, are decided by this common judgment.
- 2.** For convenience, facts in Miscellaneous Civil Application No.498 of 2022 are preferred. The applicant-husband seeks transfer of proceedings filed by the wife under the provisions of the Protection of Women from Domestic Violence Act, 2005 (hereafter "DV Act", for short) before the Judicial Magistrate First Class, Cantonment Court, Pune to the Family Court, Pune where the applicant has filed a petition for divorce.
- 3.** The husband has, therefore, filed present application to transfer proceedings under the DV Act to the Family Court, Pune, on the ground that there is the possibility of conflicting verdicts by two different Judges; primary evidence in both cases would be same; if both the proceedings are conducted separately, the efficacy of cross-examination would be undermined; transfer will reduce the burden of two different Courts resulting in saving of judicial time.

4. Respondent no.1/wife has filed an affidavit disputing the applicant's contention that there is possibility of conflicting verdict. It is stated that the apprehension of efficacy of cross-examination is misplaced. The DV Act application aims to provide speedy remedy to the wife, and such transfer will take away the right of speedy justice and the statutory right of appeal.

5. Mr. Abhijit Sarwate, learned advocate for the applicant, submitted that it is a consistent view of this Court that the proceedings under DV Act can be transferred to the Family Court.¹

6. According to him, the objection of taking away substantive appeal has been considered by this Court in **Santosh Machindra Mulik** (supra) to hold that no party can be said to be losing his/her right of appeal; what is lost is a further right of revision. He also invited my attention to the Division Bench judgment of this Court in **Sandip Mrinmoy Chakrabarty v. Reshita Sandip Chakrabarty** (Family Court Appeal No.31 of 2020 decided on 26th February 2021) wherein this Court while considering an appeal arising out of judgment deciding proceedings under DV Act and Family Courts Act, 1984 held that right under section 29 of the Family Court Act is not taken away.

7. Per contra, Dr. Abhinav Chandrachud, learned advocate for the respondent, submitted that the learned Single Judge of this Court in **Abhijeet Prabhakar Jail v. Manisha Abhijeet Jail**

1 See Sandip Mrinmoy Chakrabarty v. Reshita Sandip Chakrabarty, 2018 SCC OnLine Bom 2709; Santosh Machindra Mulik v. Mohini Mithu Choudhari, 2019 SCC OnLine Bom 13101; Hitesh Prakashmalji Mehta v. Aashika Hitesh Mehta, Misc. Civil Application (St.) No.788 of 2020 decided on 28th September 2020; Harshereka Ajay Garg & Anr. v. State of Maharashtra & Anr., Criminal Appeal No.1817 of 2022 decided on 26th September 2022; Sanket Sanjeev Khanolkar v. Surabhi Sanket Khanolkar, 2021 SCC Online Bom 5234; and Minoti Subhash Anand v. Subhash Manoharlal Anand, 2015 SCC OnLine Bom 6113.

& Anr., reported in 2018 SCC OnLine Bom 1206 rejected an application to transfer proceedings under the provisions of DV Act holding that such transfer would take away statutory right under section 29 of the DV Act and also takes away right of speedy disposal conferred under the DV Act. Placing reliance on the judgment of the Apex Court in **Lala Shri Bhagwan & Anr. v. Shri Ram Chand & Anr.** reported in AIR 1965 SC 1767, he submitted that the subsequent judgments of this Court referred above are in ignorance of the learned Single Judge of this Court in **Abhijeet Prabhakar Jail** (supra) and, therefore, instead of embarking upon the legality of the view taken by the learned Single Judge, it would be appropriate to place the papers before the Hon'ble the Chief Justice for constitution of Larger Bench to examine the question. In support of his contention that the right of speedy justice is facet under Article 21 of the Constitution of India, 1950, he relied on the Apex Court's judgment in **A.R. Antulay v. R.S. Nayak & Anr.** reported in (1988) 2 SCC 602.

8. In rejoinder, Mr. Sarwate submitted that the judgment in **Abhijeet Prabhakar Jail** (supra) had been considered subsequently by another learned Single Judge of this Court in **Sanket Sanjeev Khanolkar** (supra). The learned Single Judge of this Court held that in **Abhijeet Prabhakar Jail** (supra), this Court failed to consider the provisions of the Family Courts Act, 1984, particularly section 19, which provides for an appeal from the judgment of the Family Court.

9. Dr. Chandrachud, in reply to the said submission, invited my attention to the judgment in **Abhijeet Prabhakar Jail** (Supra)

to submit that the learned Single Judge in the said case had, in fact, referred to appeal under the provisions of the Family Courts Act before the Division Bench of this Court in paragraph 9 and, therefore, it would not be proper to brush aside the judgment of the learned Single Judge of this Court in **Abhijeet Prabhakar Jail**.

10. I have given anxious consideration to the submissions made on behalf of both sides. On consideration of the judgments of this Court, it appears that this Court has consistently held that the proceedings under the provisions of the DV Act can be transferred to the Family Court as the relief sought before the learned Magistrate under DV Act can be effectively tried and granted by the Family Court. It is also consistently held by this Court that such transfer is necessary to avoid conflicting decisions, and the Family Courts are empowered to deal with the reliefs under sections 18 to 22 of the DV Act.

11. The sheet anchor of the respondent's submissions is based on the judgment of this Court in **Abhijeet Prabhakar Jail** (supra). It is, therefore, necessary to consider the said judgment in detail. In the facts of the said case, the petitioner/husband filed divorce proceedings before the Family Court, Pune. The respondent/wife filed proceedings under section 12 of the DV Act before the Judicial Magistrate First Class, Pune. The husband, therefore, applied under section 407 of the Criminal Procedure Code, 1973, before this Court. Learned Single Judge, after considering the judgment in the case of **Ujwal Singh Manhas v. Mrs. Jyostna Ujwal Shahi Manhas** in Criminal Application No.561 of 2017,

rejected the transfer request broadly on the following reasons:

- i) such transfer would take away the statutory right of appeal available to the wife;
- (ii) rejection of such an application would not cause any inconvenience to the husband as both proceedings are pending in Courts on the same campus;
- (iii) Because of the transfer of proceedings appeal against the judgment of the Family Court will lie before this Court, which would be inconvenient for the wife as she would have to travel to Mumbai, incurring huge expenses; and
- (iv) transferring such proceedings would take away the right of speedy justice conferred under the provisions of the DV Act.

12. As rightly submitted by Dr. Chandrachud that in case of conflict of the opinion of Single Judges of the High Court, consideration of judicial propriety and decorum require that if Single Judge hearing a matter is inclined to take a view that the earlier Single Judge's decision needs to be reconsidered, he should not embark upon that inquiry sitting as a Single Judge but should refer the matter to the Division Bench or in a proper case, place relevant papers before the Hon'ble Chief Justice to enable him to constitute Larger Bench to examine the question. However, it is equally settled that such a course would be necessary only when there is a conflict of ratio.

13. It is well settled that a judgment of a Court contains three parts : (i) finding of facts, (ii) statement of the principle of law

applicable to the legal issue raised on the facts, based on which the case is decided; and (iii) decision which is based on the finding of fact, applicable principles of law, and in appropriate cases, the need to mould the relief in a particular manner. Out of the three parts, it is only the second part, which is *ratio decidendi* or statement of law applied and acted upon by the Court, that constitutes a binding precedent. Neither the finding on facts nor the ultimate decision in the form of the relief granted nor the manner adopted to dispose of the case is a precedent.

14. At this stage, it would be profitable to refer to the decisions of the Apex Court in the case of **State of Gujarat v. Utility Users' Welfare Association** reported in (2018) 6 SCC 21 wherein the principle of "inversion test" to find out *ratio decidendi* of the judgment has been laid down by the Supreme Court. The concept of "inversion test", succinctly laid down by the Apex Court in paragraphs 112 to 114, would be of significance which is as under:

“112. It is undoubtedly true that the question which the Court was seized of, related to the interpretation of Section 86 of the said Act and certain other matters, which are not connected with the controversy herein. Thus, the issue arises, whether the observations made, albeit to be construed as advisory or suggestive qua the appointment of a Chairman and a Member are to be treated as *ratio decidendi* or *obiter dicta*.

113. In order to determine this aspect, one of the well-established tests is “the Inversion Test” propounded inter alia by Eugene Wambaugh, a Professor at The Harvard Law School, who published a classic text book called *The Study of Cases* [Eugene Wambaugh, *The Study of Cases* (Boston: Little, Brown & Co., 1892)] in the year 1892. This textbook

propounded inter alia what is known as the “Wambaugh Test” or “the Inversion Test” as the means of judicial interpretation. “the Inversion Test” is used to identify the *ratio decidendi* in any judgment. The central idea, in other words of Professor Wambaugh, is as under:

"In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the Court had conceived this new proposition to be good, and had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also" [Eugene Wambaugh, *The Study of Cases* (Boston: Little, Brown & Co., 1892)].

114. In order to test whether a particular proposition of law is to be treated as the *ratio decidendi* of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the *ratio decidendi* of the case. This test has been followed to imply that the *ratio decidendi* is what is absolutely necessary for the decision of the case. “In order that an opinion may have the weight of a precedent”, according to John Chipman Grey, [Another distinguished jurist who served as a Professor of Law at Harvard Law School.] “it must be an opinion, the formation of which, is necessary for the decision of a particular case”.

15. The sum and substance of inversion test is that when a particular proposition of law can be considered to be *ratio decidendi*, one has to decide the same by considering as to what happens to the final conclusion made in the case after such a proposition of law is inversed or removed from the text of judgment as if it never forms the part of judgment. If the result of

such exercise is that the final conclusion made in the judgment remains unchanged, such proposition of law could not be held to be *ratio decidendi* of the case.

16. In light of the principle of the inversion test, it is necessary to cull out the ratio of the judgment in the case of **Abhijeet Prabhakar Jail** (supra). It appears that the decision of the Single Judge of this Court was based broadly on four reasons i) such transfer would take away the statutory right of appeal available to the wife; (ii) rejection of such application would not cause any inconvenience to the husband as both proceedings are pending in Courts in same campus; (iii) Because of transfer of proceedings, appeal against the judgment of Family Court will lie before this Court which would be inconvenient for the wife as she would have to travel to Mumbai incurring huge expenses; and (iv) transferring such proceedings would take away right of speedy justice conferred under the provisions of the DV Act.

Even if reason (iv) is taken away, the learned Single Judge in the facts of the case could have arrived at the same decision based on factual reasons (ii) and (iii). Rejection of transfer application is based on the cumulative effect of all four factors referred to above. Applying the concept of 'inversion test' to cull out the ratio from the judgment of a single Judge of this Court, in my opinion, reason (iv) would not constitute the ratio of the judgment in the case of **Abhijeet Prabhakar Jail** (supra).

17. In so far as the reason (i) that 'such transfer would take away the statutory right of appeal available to wife' is concerned, the

Division Bench of this Court in **Sandip Mrinmoy Chakrabarty** (supra) has approved the judgment of the learned Single Judge of this Court in **Santosh Sanjeev Mulik** (supra). The learned Single Judge of this Court in **Santosh Sanjeev Mulik**'s case held that transfer of DV proceedings to the Family Court would not take away the wife's right of appeal, but what is lost is a further right of revision, and such reason is no ground to deny transfer of proceedings. The Division Bench, in paragraph 45, repelled submission on behalf of the husband that the order passed by the Family Court after transfer of proceedings under the DV Act would be composite and, therefore, an appeal under section 19 of the Family Courts Act, 1984 would not be maintainable. It is held that the moment both proceedings are clubbed by judicial order of this Court, the jurisdiction of the Family Court becomes abundantly clear over the proceedings under DV Act, and it would be a fallacy and myopic to term part of the order pertaining to the reliefs under DV Act as an order amenable to the writ jurisdiction. The Division Bench, therefore, concluded that the Family Court Appeal challenging the common order arising out of provisions of the DV Act and Family Court Act would be maintainable. Thus, in my view, reason (i) of the learned Single Judge in **Abhijeet Prabhakar Jail** (supra) no longer holds ground in view of the judgment of the Larger Bench of this Court in **Sandip Mrinmoy Chakrabarty** (supra).

18. The consistent view of various Single Judges of this Court that proceedings under the DV Act can be transferred to the Family Court constrains me to hold it is unnecessary to refer the matter to

the Larger Bench because the position of law on the point appears to have been settled by the aforesaid decisions.

19. Reverting back to the facts of the case, considering the pleadings of the parties in both proceedings pending before two different courts, there is the possibility of conflicting verdicts by two courts, and transfer will reduce the burden of one Court resulting in saving of judicial time; and moreover, the transfer of proceedings will not cause inconvenience to the wife as she will not have to travel outside Pune, therefore, for the aforesaid reasons, in my opinion, both miscellaneous civil applications deserve to be allowed.

20. Rule is made absolute in the above terms of prayer clauses (a) and (b) in both the miscellaneous civil applications. No costs.

(AMIT BORKAR, J.)