

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CO No. 3963 of 2018
With
CO No.3964 of 2018

Sanchayita Deb (Guha)

-Versus-

Susanta Deb

For the Petitioner: Mr. Uday Sankar Chattopadhyay,
Mr. Suman Shankar Chatterjee.

Heard on: December 12, 2019.

Judgment on: January 10, 2020.

BIBEK CHAUDHURI, J. :-

1. Both the applications under Section 24 of the Code of Civil Procedure filed by the petitioner being the legally married wife of the opposite party were heard analogously and the applications are disposed of with the following order.

2. C.O 3964 of 2018 was filed by the wife/petitioner praying for transfer of Matrimonial Suit No.34 of 2018 pending before the learned District Judge at Jalpaiguri to the Court of the learned District Judge, Durgapur.

3. It is stated in the application that marriage of the petitioner was solemnized with the opposite party under Special Marriage Act on 14th February, 2004. In the said wedlock between the petitioner and opposite party, she gave birth to a male child on 11th June, 2006 who is now aged about 13 years. The said son of the parties is a student of Bidhan School, Durgapur in the District of Paschim Burdwan. After marriage the petitioner was subjected to physical and mental torture by the opposite party on the standard of dowry given to the petitioner at the time of their marriage from her paternal home. During the subsistence of marriage with the petitioner, it is alleged that the opposite party has performed a second marriage on 17th July, 2012. However the petitioner could not take any legal step against the opposite party/husband as he is a Assistant Sub-Inspector of Police and his elder brother is an influential political leader of the locality. That on 1st February, 2017, the petitioner, her husband and their minor child attended a marriage ceremony at Durgapur. The opposite party left Durgapur on 3rd February, 2017 leaving the petitioner and her child at her paternal home. On 12th December, 2017, the second wife of the opposite party came to the petitioner's matrimonial home wearing some ornaments of the petitioner. When the petitioner demanded her ornaments back, the said second wife of the opposite party took up quarrel with her and physically assaulted her with a wooden bar causing injury on her person. On the same night the opposite party also tried to commit her murder by smothering her with a pillow when he came to learn about the incident. On the very next day the

opposite party drove the petitioner out of his house with their son and since then the petitioner has been residing at her paternal home at Durgapur. Subsequently the petitioner came to learn after receiving the summons that her husband has filed Matrimonial Suit No.34 of 2018 against her for dissolution of marriage by a decree of divorce before the learned District Judge, Jalpaiguri. It is submitted by the petitioner that she is unemployed having no income of her own. She has filed an application under Section 125 of the Code of Criminal Procedure against the opposite party but the opposite party failed and neglected to pay any maintenance for her and their minor child. It is further contended by the petitioner that distance between Durgapur and Jalpaiguri is more than 600 km and it is not financially possible for her to bear such expenses for the journey of the petitioner, from Durgapur to Jalpaiguri to contest the said suit. For this reason, the petitioner has prayed for transfer of the abovementioned matrimonial suit to the court of the learned Additional District Judge at Durgapur.

4. CO 3963 of 2018 is another application under Section 24 of the Code of Civil Procedure filed by the petitioner against the opposite party praying for transfer of Miscellaneous Case No.33 of 2017 pending before the learned District Judge at Jalpaiguri to the Court of learned Additional District Judge at Durgapur.

5. The aforesaid miscellaneous case was filed by the opposite party under Section 12 and 25(1) of the Guardians and Wards Act, 1890 read with Section 13 of the Hindu Minority and Guardianship Act, 1956

praying for custody of the minor child of the petitioner and the opposite party. It is alleged by the petitioner that the minor son of the parties has been residing at Durgapur under the care of the petitioner. He is a student of Bidhan School at Durgapur as he ordinarily resides at Durgapur with his mother, the learned District Judge, Jalpaiguri has prima facie no jurisdiction to try the said miscellaneous case and accordingly, the said case ought to be transferred to the court of the learned Additional District Judge at Durgapur having jurisdiction to try the said case.

6. It will not be out of place to mention at the outset that after admission of both the application for hearing, the petitioner was directed to serve copies of both the applications to the opposite party with a notice to contest the instant proceedings. The opposite party duly received both the notices as is revealed from the postal track report but he has not turned up. Thereafter, a Coordinate Bench of this Court directed the petitioner to serve a notice of the instant proceedings to the learned Advocate for the opposite party who is appearing on behalf of him in the trial court. Affidavit-of-service shows that the said notice was also delivered to the learned Advocate for the opposite party in the court below. However the opposite party did not turn up to contest these proceedings.

7. The petitioner has sought for transfer of the matrimonial suit mainly on the ground of distance of Jalpaiguri from her paternal home at Durgapur where she is now residing with her child. It is stated by the

petitioner on oath that she has no income of her own. She is fully dependent upon her parents. The opposite party has not paid any maintenance for his wife and the son. Under such circumstances, the petitioner will of course suffer inconvenience to travel Jalpaiguri from Durgapur which is situated at a distance of about 600 km away in one way.

8. It is needless to say that the Hon'ble Supreme Court in plethora of decision was pleased to hold that inconvenience of the wife should be treated as the prime consideration in a proceeding under Section 24 of the Code of Civil Procedure arising out of a matrimonial suit. Decisions of the Hon'ble Supreme Court in the following cases may be relied on in support of my observation:-

- (i) Rajani Kishor Pardeshi vs. Kishore Babulal Pardeshi : (2005) 12 SCC 237**
- (ii) Smita Sharma vs. Vivek Sharma : (2004) 13 SCC 607.**
- (iii) Neelima Rani vs. Srikanth : (2005) 12 SCC 387**
- (iv) Usha Choudhary vs. Dilip Choudhary : (2004) 13 SCC 683**
- (v) Sumita Singh vs. Kumar Sanjay and Anr : AIR 2002 SC 396**

9. With regard to the application under Section 24 of the Code of Civil Procedure praying for transfer of Miscellaneous Case No.33 of 2017 filed by the opposite party before the learned District Judge, Jalpaiguri, I like

to point out at the outset the provision of Section 9 of the Guardians and Wards Act.

9. Court having jurisdiction to entertain application.—

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(2) If the application is with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.

10. Thus, Section 9 confers the territorial jurisdiction to the court in the matter of Guardianship application. Firstly, when the application is in respect of the guardianship of the person of a minor it is to be filed in the court under whose territorial jurisdiction the minor, ordinarily resides. Secondly, if such application relates to the property of the minor there are two fora and the applicant may choose either of the two, namely, a court under whose territorial jurisdiction the minor ordinarily resides, or under whose territorial jurisdiction the minor has property. A Coordinate Bench of this Court in the case of **Ruhi Sahina vs. Syed Masidur Rahman**

reported in **(2018) 5 WBLR (Cal) 299** observed in paragraph 11 of the said judgment as hereunder:-

“Learned Counsel appearing for the petitioner has relied on a judgment in the case of Subhadip Laskar vs. Sanjukta Laskar, reported in 2011 (3) CHN 575. Applying the ratio decided in the said judgment it can be held that it is the place where the minor is presently residing is to be considered for the purpose of determining the jurisdiction where the application under Act VIII is to be lodged. It may be the case that the minor was residing with her parents at the matrimonial home at Diamond Harbour at one point of time but owing to the matrimonial discord and particularly mental and physical cruelty, the wife had to leave her matrimonial home from Diamond Harbour to Paschim Medinipur under compulsion and she had to carry the minor child with her.”

11. Paragraph 13 of the aforesaid judgment is also relevant for our purpose:-

“Apart from all these, the legislative intent, why the words and expression “the child ordinarily resides” has been used, is nothing but to enure the benefit of the child because when the custody matter would be heard the child would be brought to the Court, and, it is not expected that at every hearing day the child would be brought from Paschim Medinipur to Alipore Court travelling 100 Kms. Therefore, this logic is not acceptable that “ordinarily residing” means the matrimonial home where the couple resided last. Looking at the convenience and inconvenience of the minor child I am of the firm opinion that the custody matter should be transferred to a Court where the minor child is residing now with his mother which has been admitted by the opposite party / father in his application.

Therefore, I direct that the Act VIII Case No.18 of 2017 be transferred from the Court of the learned District Judge, Alipore to the Court of learned District Judge, Paschim Medinipur. The learned District Judge, Alipore is directed to transmit records of the Act VIII Case No.18 of 2017 before the learned District Judge, Paschim Medinipur. After such transfer is made the learned District Judge, Paschim Medinipur will issue a notice afresh to both the parties.”

12. In the instant case the minor child of the parties ordinarily resides at Durgapur with his mother. He is a student of Bidhan School, Durgapur. Therefore, the court of the learned Additional District Judge, Durgapur has the jurisdiction under Section 9 of the Guardians and Wards Act, 1890 to try the said miscellaneous case. Moreover for the benefit of the minor child, the said miscellaneous case ought to be transferred to Durgapur for hearing and disposal.

13. In view of the above discussion, both the applications are allowed, however without any cost.

14. Matrimonial Suit No. 34 of 2018 and Miscellaneous Case No.33 of 2017 be transferred to the Court of the learned Additional District Judge, Durgapur for trial and disposal.

15. Let a copy of this order be sent to the learned District Judge, Durgapur for information and compliance.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

(Bibek Chaudhuri, J.)