

**AFR**

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**MATA No.99 of 2022**

*Sanchita Bhattacharjee* .... *Appellant*

*-Versus-*

*Tanoy Bhattacharjee* .... *Respondent*

Advocates appeared in this case:

For Appellant: Mr. G. Mukharjee, Senior Advocate

For Respondent: Mr. S. Dash, Advocate

**CORAM:**

**JUSTICE ARINDAM SINHA  
JUSTICE M.S. SAHOO**

**J U D G M E N T**

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Date of hearing and Judgment : 18<sup>th</sup> January, 2024  
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**ARINDAM SINHA, J.**

1. Mr. Dash, learned advocate appears on behalf of respondent-husband and submits, the appeal is not maintainable in this Court. Impugned judgment dated 16<sup>th</sup> April, 2022 was made by the Senior Civil Judge dissolving the marriage and

directing payment of ₹12,00,000/- as permanent alimony. Appeal lies to the District Judge, Keonjhar. He submits, his client had filed for divorce before the family Court at Bhubaneswar. Appellant-wife had petitioned this Court under section 24 in Code of Civil Procedure, 1908 seeking transfer of the civil proceeding to the Court of Civil Judge (Senior Division), Champua. By order dated 12<sup>th</sup> April, 2018 made by the learned single Judge, the proceeding stood transferred. Text of the order is quoted below.

*“Heard learned counsel for the petitioner and learned counsel for the opposite party.*

***The petitioner wife wants transfer of C.P. No.590 of 2016 from the Court of learned Judge, Family Court, Bhubaneswar to the court of learned Civil Judge (Sr. Division), Champua. Learned counsel for the opposite party husband has no objection to the same.***

*Taking into consideration the submissions at the Bar, C.P. No.590 of 2016 pending in the Court of learned Judge, Family Court, Bhubaneswar is directed to be transferred to the court of learned Civil Judge (Sr. Division), Champua within 15 (fifteen) days from*

*today, and it is further directed that the case be taken up from the stage it was transferred, after noticing all the parties.*

*The TRP(C) is accordingly disposed of.”*

(emphasis supplied)

2. Subsequently appellant-wife filed another transfer petition, rejected by a different learned single Judge on order dated 17<sup>th</sup> March, 2021. Text of the order is reproduced below.

*“Heard Ms. Mitalee Jesthi, learned counsel for the Wife-Petitioner and Mr. Sidharth Das, learned counsel of the Husband-Opposite Party.*

***This Transfer Petition has been filed by the Wife-Petitioner seeking transfer of Mat Case No.9 of 2018 from the court of learned Civil Judge (Senior Division), Champua to the court of learned Judge, Family Court, Keonjhar.***

*Considering the fact that the matter has already been transferred once at the instance of wife itself, this Court declines to transfer the MAT Case No.9 of 2018. However, keeping in view the risk factor involving the wife, as she has already filed complaints against the husband before the*

*S.P., Koenjhar as well as I.I.C., Barbil as appearing at Pages-43 and 44 of the brief and the applications have been filed for police protection, learned S.D.J.M., Champua on appropriate application will provide police protection to the wife. Learned S.D.J.M., Champua is directed to conclude the proceeding in MAT Case No.9 of 2018 within a period of nine months.*

*With the above observation and direction, the prayer made in this Transfer Petition stands rejected.”*

(emphasis supplied)

Subsequent thereto appellant-wife obtained correction of above order and also made interim application, disposed of by order dated 27<sup>th</sup> July, 2021. Relevant part of said order disposing of the application is reproduced below.

*“Heard learned counsel for the parties.*

*2. For the finality of the dispute entering into the final hearing of the parties, this Court finds no scope for entertaining the interlocutory application, which is accordingly rejected.”*

3. Appellant-wife then moved the Supreme Court by two Special Leave Petitions against aforesaid orders dated 17<sup>th</sup> March, 2021 and 27<sup>th</sup> July, 2021, both dismissed on order dated 8<sup>th</sup> November, 2021. The order is reproduced below.

*“We are not inclined to interfere with the impugned order(s) and hence the Special Leave Petitions are dismissed.*

*Learned counsel of the petitioner states that the petitioner wants to settle the matter(s). It will be open to the petitioner to make the said request before the Family Court, which request will be given due consideration.*

*Pending application(s), if any, shall stand disposed of.”*

4. Mr. Dash submits, appellant-wife herself got transferred the civil proceeding to said Court at Champua, resulting in disposal of the civil proceeding on impugned judgment carrying aforesaid directions for dissolution of the marriage and payment of permanent alimony. Right of appeal from impugned judgment, if to be exercised by appellant-wife, must be exercised by filing appeal before the District Judge at Keonjhar.

5. Mr. Mukharjee, learned senior advocate appears on behalf of appellant-wife. According to him the maintainability issue was heard by the earlier Bench and the objection rejected. On query from Court he submits, there is no record thereof in order sheet. Mr. Dash presses his objection.

6. Mr. Mukharjee submits, his client was wrongly advised to apply for transfer to the Court in Champua. She was and is resident of village Kolloli in district Purulia of West Bengal. The marriage was solemnized there. She was not advised and also did not have the means to petition under section 25 in Code of Civil Procedure, 1908 to the Supreme Court for transfer of the case from family Court, Bhubaneswar to a competent Court situate near her residence in West Bengal, to try it. Be that as it may, right of appeal vested in his client the moment the civil proceeding was filed. It was filed in the family Court and as such under section 19(1) of Family Court's Act, 1984, appeal lies to this Court. He relies on judgment of the Supreme Court in **Garikapatti Veeraya vs. N. Subbiah Choudhury** reported in **AIR 1957 SC 540**, paragraph-28 (Manupatra print), reproduced below.

*“28. From the decisions cited above the following principles clearly emerge:*

*(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*

*(ii) The right of appeal is not a mere matter of procedure but is a substantive right.*

*(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.*

*(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.*

*(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so*

*provides expressly or by necessary intendment and not otherwise.”*

(emphasis supplied)

He lays emphasis on declaration that right of appeal was said to be not mere matter of procedure but a substantive right and institution of suit carrying with it implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. As such on the civil proceeding filed in the family Court, there stood vested by provision in section 19 (1) of Family Courts Act, 1984 right of appeal in event a party was aggrieved by judgment subsequently made in the original proceeding, as to be maintained in this Court. Such right stands preserved till rest of the career of the proceeding. Appeal being continuation of the suit, his client is in appeal before this Court.

7. Without prejudice, Mr. Mukharjee submits, the Family Courts Act, 1984 is a statute enacted after the Code of Civil Procedure, 1908 and Hindu Marriage Act, 1955. In the circumstances, law is well settled that the earlier statutes must yield to provisions in the later statute. Provisions for jurisdiction



provided in the Code, the Act of 1955 and the Act of 1984 are overlapping and therefore the Family Courts Act is to be relied upon for the purpose.

**8. Garikapatti Veeraya** (supra) was judgment of the Supreme Court on petition for Special Leave to Appeal made against judgment of the High Court refusing to grant certificate to prefer appeal to the Supreme Court. Controversy decided by the judgment was regarding whether a right of appeal could be extinguished, on the earlier law replaced by enactment of our Constitution. In the context, the declaration of right of appeal vested in the litigants on commencement of the lis.

**9.** There is no doubt that right of appeal is a statutory right and stands provided by the law in force at the time the lis commences, on institution of the proceeding. There has been no change in the law since the civil proceeding was filed and now. We have section 104 in the Code, which provides for right of appeal and orders XLI to XLIII to give the procedure. The Act of 1955 provides for jurisdiction and definition of district Court and the Act of 1984, for appeal to lie to the High Court from final orders and judgments passed by family Courts. The provisions in

respect of institution of cases giving rise to right of appeal as in the Code, the Act of 1955 and the Act of 1984, by successive operation, do not take away the right of appeal. Section 8 in the Act of 1984 provides for exclusion of jurisdiction and pending proceedings. Clause-(c) under the section mandates transfer of pending proceedings. The transfer effected by operation of the provision does not extinguish the right of appeal had prior to the transfer, of a party to the proceeding. All it does is to provide for the appeal, on transfer, to lie to the High Court. In this case it is the other way round inasmuch as the transfer was from the family Court to the Senior Civil Judge. In the circumstances, we have no instruction from **Garikapatti Veeraya** (supra) to deal with the case at hand.

**10.** The Act of 1984 by section 7 provides for jurisdiction of family Courts. The jurisdiction includes all kinds of suits in relation to, inter alia, marital disputes. The jurisdiction cannot be said to be confined to marital disputes between Hindu couples. Hence, marital disputes of couples governed by other Acts are also maintainable for adjudication by the family Court.

11. Indication on territorial jurisdiction of family Courts can be had from clauses-(a) and (b) under sub-section (1) in section 7 in the Act of 1984. Section 7(1) is reproduced below.

*“7. Jurisdiction.—(1) Subject to the other provisions of this Act, a Family Court shall,—*

*(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and*

*(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.”*

(emphasis supplied)

The civil proceeding was filed by respondent-husband in the family Court at Bhubaneswar. Appellant-wife petitioned for transfer of it to the transferee Court. The right of appeal not standing extinguished by reason of the transfer, we have to keep

in mind provisions in section 24 of the Code regarding general power to transfer directed by the learned single Judge, on consent, by said order dated 12<sup>th</sup> April, 2018.

**12.** The transfer was made from the family Court to the Court of Senior Civil Judge, Champua. It was not a family Court. Hence, we must see whether that Court was competent to try or dispose of the suit. We have ascertained from the parties that they are Hindus and so we looked at section 19 in Hindu Marriage Act, 1955 providing for jurisdiction and procedure. We have not been able to find from the material on record that the marriage was solemnized or appellant-wife at the time of presentation of the petition resided or parties to the marriage last resided or respondent-husband was residing at the time of presentation of the petition, on satisfaction of the contingencies provided in clause-(iv), for the proceeding to have been originally presented or instituted in the Court of Senior Civil Judge, Champua. Said Court therefore does not come within definition of district Court in clause-(b) under definitions section 3.

**13.** We requested Registrar (Judicial) to render assistance on our queries. The queries are reproduced below.

- (i) Is there a family Court established in district Keonjhar?
- (ii) If yes, when was it established?
- (iii) What is the extent of its territorial jurisdiction as in 'area' mentioned in section 8, Family Courts Act, 1984?

The Registrar informed us, notification dated 7<sup>th</sup> November, 2013, issued in exercise of power conferred by sub-section (2) in section 3, Family Courts Act, 1984 specifies legal limits of the jurisdiction of existing family Courts in the State. Inter alia, family Court, Keonjhar had territorial limit extending to revenue sub-division of Keonjhar. Further information furnished to us on new Tehasils created by notification issued in year 2008 provided for revenue sub-division of Keonjhar as did not include Champua. Champua was and is a separate revenue sub-division in new district Keonjhar. Here we note that appellant-wife had subsequently applied for transfer of the proceeding to family Court, Keonjhar. The petition stood rejected by aforesaid order dated 27<sup>th</sup> July, 2021. Appellant-wife had sought to prefer appeal on special leave from the Supreme Court, also dismissed by said order dated 8<sup>th</sup> November, 2021. If we are to proceed further,

impugned judgment then becomes one made by a Court not having jurisdiction and therefore, a nullity.

**14.** Appellant-wife had sought the transfer from the family Court to the Court of Senior Civil Judge, Champua. A proceeding for dissolution of marriage under the Act of 1955 could not have been filed by respondent-husband in that Court. He residing in Barbil, of district Keonjhar did not and does not entitle him to present such petition under section 19. So it is that appellant-wife herself caused the transfer, to which respondent-husband did not object. Ordinarily consequence of the transfer would be application of the Code of Civil Procedure subject to provisions of the Act and such rules as the High Court has made. On query from Court, Mr. Mukharjee submits there cannot be estoppel against his client inasmuch as, he reiterates, the Family Courts Act, is the later law and must prevail.

**15.** It appears to us, the transfer by said order dated 12<sup>th</sup> April, 2018 was made simply on basis of consent of the parties. It is well settled that consent cannot confer jurisdiction. The transfer has resulted in a situation where, in event we hold impugned judgment is a nullity as passed by a Court lacking jurisdiction, it

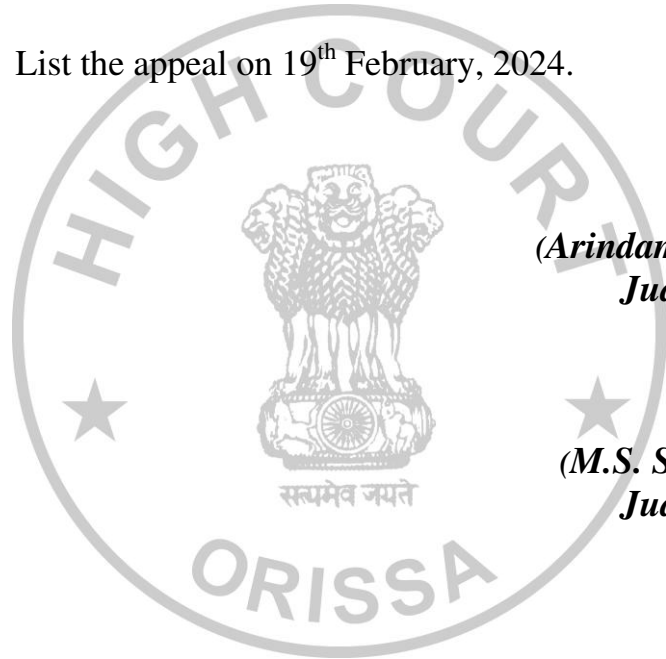
will be a wrong done to respondent-husband by the act of Court at instance of appellant-wife on her convenience, to which he had not objected. It is a legal maxim that the act of the Court shall prejudice no one.

**16.** Going by provisions in section 19 in the Act of 1955 it may well be that the Court of Senior Civil Judge, Champua does not have jurisdiction to receive, try or determine a civil proceeding at instance of respondent-husband. However, by clause-(b) under sub-section (1) in jurisdiction section 7 of the Act of 1984, the family Court, subject to other provisions of said Act shall be deemed for the purposes of exercising such jurisdiction to be, as the case may be, such subordinate Court for the area, to which the jurisdiction of the family Court extends. We say this because, a matrimonial dispute that could be ordinarily instituted before the Senior Civil Judge, Champua under section 19 of the Act of 1955, could also have been ordinarily instituted in the family Court at Keonjhar. We apply this provision as a consequence of the transfer order, to deem impugned order as had been made by the family Court, on the proceeding transferred in exercise of general power of transfer made by this Court through

the learned single Judge on said consent order dated 12<sup>th</sup> April, 2018. In the circumstances, the appeal, in our view, is maintainable in this Court.

17. Considering respondent-husband has contended otherwise, we adjourn hearing of the appeal, to give opportunity for him to test our view, if so advised.

18. List the appeal on 19<sup>th</sup> February, 2024.



*(Arindam Sinha)*  
*Judge*

*(M.S. Sahoo)*  
*Judge*

*Jyostna/Radha*