

Factual Matrix

3. To appreciate the controversy, it is appropriate to set out facts of the case. The appellant herein Durgesh Sharma is the husband of the respondent Smt. Jayshree Sharma. Marriage of the parties was solemnized at Malegaon, District Nasik in the State of Maharashtra on May 16, 1989. It is not in dispute that after the marriage, both the parties lived in Ujjain in the State of Madhya Pradesh.

4. It is the case of the husband that the wife is quarrelsome. She used to raise disputes with the husband and his family members on petty matters. She also threatened the husband that in case she would be kept at Ujjain against her wishes, she would consume poison. It is also the allegation of the appellant- husband that respondent-wife left matrimonial home in 1991. She thereafter stayed with her parents and at parental home, gave birth to twins - son Mayank and daughter Malvika on December 25, 1991. She stayed at parental home from 1991 to 1997. In 1997, the respondent-wife came to Ujjain, but after about 3-4 months, she again left matrimonial home and deserted the husband permanently without proper or sufficient reason, depriving the husband of matrimonial enjoyment. The husband's prestige has been badly affected by the conduct of the wife.

5. The appellant-husband served a notice through his advocate to the respondent-wife on September 22, 2004 to join him to which a reply was sent by the wife through her counsel on October 08, 2004 wherein false allegations have been levelled against the husband which clearly went to show that she was not prepared to stay with the husband.

6. Since the respondent-wife did not return matrimonial home, the appellant-husband instituted a petition under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') on October 27, 2004 in the Family Court at Ujjain which was registered as HMA Petition No. 164A of 2004 for dissolution of marriage on the grounds of (i) desertion; and (ii) cruelty. The appellant husband has stated in the petition that both the parties lastly lived together at Ujjain as husband and wife. Ujjain Court has, therefore, jurisdiction to entertain, try and decide the petition.

7. The respondent-wife filed a written statement controverting facts and denying allegations levelled against her by the appellant-husband. It was stated by her that the appellant-husband had neither provided maintenance to the respondent-wife nor to the children. She denied that her conduct towards her husband and his family members was not proper and that she did not want to stay with the family members of the husband. All such allegations were made only with a view to taking divorce from the respondent-wife. It was denied that the wife deserted the husband without sufficient cause.

8. She also refuted the allegation of having deprived the husband of matrimonial enjoyment and she had subjected him (husband) to physical as well as mental cruelty and torture. She denied that prestige of the husband had been badly affected in the society because of the conduct of the respondent-wife. She stated that her husband took away all the ornaments, jewellery and garments from her. Though sufficient amount of dowry was given to the husband, still he was insisting for additional amount and other articles.

9. She also stated that she was staying at Malegaon, District Nasik in Maharashtra which was at a distance of about 400 kms. from the city of Ujjain. Parents of the respondent- wife were very old. Business of her father was closed. Her brothers had been working separately and were maintaining their own families. She had, therefore, to travel at such a long distance all alone which was very difficult. She also contended that Ujjain Court had no jurisdiction to entertain, try and decide the petition. A prayer was, therefore, made to dismiss HMA with costs.

10. Proceedings were also initiated by the respondent-wife under Section 125 of the Code of Criminal Procedure, 1973 at Malegaon for maintenance as also under Section 24 of the Hindu Marriage Act at Ujjain. We are, however, not concerned with those proceedings in the present case.

11. It may be stated that the respondent- wife also filed an application under Section 9 of the Act for restitution of conjugal rights in the Court of Civil Judge, Senior Division, Malegaon being HMP No. 42 of 2005 on March 23, 2005.

12. Immediately thereafter, the wife preferred an application under Section 23 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') in the High Court of Madhya Pradesh (Indore Bench) for transfer of Ujjain case instituted by the husband being HMA Petition No. 164A of 2004 titled Durgesh Sharma v. Smt. Jayshree Sharma pending in the Family Court at Ujjain to a Court of competent jurisdiction at Malegaon, District Nasik in the State of Maharashtra.

High Court's Order

13. The High Court vide the impugned order dated January 25, 2007 allowed the application and transferred HMA 164A of 2004 pending the Family Court, Ujjain to a competent Court at Malegaon through District Judge, Nasik. It is this order which is challenged in the present appeal.

14. Notice was issued on May 14, 2007 and further proceedings were stayed. Considering the nature of litigation, the matter was ordered to be placed for final hearing and that is how the matter has been placed before us. Submissions of counsel

15. We have heard the learned counsel for the parties.

16. The learned counsel for the appellant contended that the High Court was wholly wrong in transferring a case pending in a Court subordinate to the said High Court to a Court subordinate to another High Court. A High Court does not possess that power and as such, the High Court of Madhya Pradesh could not have transferred a case to a Court subordinate to the High Court of Bombay. On that ground alone, the order passed by the High Court deserves to be set aside. It was also submitted that even on merits, no ground for transfer of case was made out by the respondent-wife.

17. The learned counsel for the respondent, on the other hand, submitted that the order passed by the High Court is in consonance with law. It was urged that if the High Court is satisfied that a proper case has been made out for transfer of a case from a Court subordinate to the said High Court

to a Court subordinate to different High Court, in exercise of power under sub-section (3) of Section 23 of the Code such order can be made.

18. On the facts of the case, it would be very difficult for the respondent-wife to travel a distance of about 400 kms. all alone and hence discretion was exercised by the High Court. This Court, in the exercise of power under Article 136 of the Constitution may not interfere with the said order. It was, therefore, submitted that the appeal deserves to be dismissed.

Statutory provisions

19. Before we deal with rival contentions and case-law on the point, it would be appropriate if we notice the relevant provisions of the Code.

20. Sections 22 to 25 enact law as regards transfer and withdrawal of suits, appeals and other proceedings from one Court to another Court.

21. As a general rule, the plaintiff as arbiter litis or dominus litis has a right to choose his/her own forum where there is more than one Court in which such suit may be instituted. Normally, the defendant cannot insist that instead of Court A, the plaintiff should file a suit in Court B. But the right of the plaintiff to choose a forum is not arbitrary, absolute or uncontrolled and in appropriate cases, a superior Court may transfer a case pending in one Court to another Court.

22. Section 22 provides that where a suit may be instituted in one of two or more Courts and is instituted in one of such Courts, a defendant may apply to have the suit transferred to another Court.

23. Section 23 provides the forum where such application may be made. It is material to the controversy in question and may be reproduced;

23. To what Court application lies.

(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

(emphasis supplied)

24. Section 24 contains general power of transfer of any suit, appeal or other proceeding at any stage on the application of a party or by a Court suo motu (of its own motion).

25. Section 24, as originally enacted in the Code of 1908, read as under:

Section 24 - General power of transfer and withdrawal (1) On the application of any of the parties and after notice to the parties 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--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

26. There was a cleavage of opinion on the question whether a case could be transferred from a Court having no jurisdiction to try it. Some High Courts have held that the language of Section 24 was very wide and there was no restriction on the High Court in exercising the power of transfer merely because there was a dispute regarding jurisdiction. Some other High Courts, however, took a contrary view. The Law Commission considered the question and suggested amendment that a suit or proceeding could be transferred under this section from a Court which had no jurisdiction to try it.

27. In the Statement of Objects and Reasons, it was stated;

Clause 10--There is a conflict of decisions with regard to the question whether Section 24 applies in relation to a transfer of a suit from a Court which has no jurisdiction to try it. The High Court of Andhra Pradesh has held that the language of Section 24 is very wide and there are no restrictions or impediments in the way of the High Court exercising the power of transfer merely because there is a dispute regarding jurisdiction. Some other High Courts have taken a contrary view. It is being clarified that a case may be transferred from a Court which has no jurisdiction to try it.

28. Parliament considered the recommendation of the Law Commission and by the Code of Civil Procedure (Amendment) Act, 1976, the section was amended in the present form.¹ Section 24 - General power of transfer and withdrawal--(1) On the application of any of the parties and after notice to the parties 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--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-

section (1), the Court which is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or

29. Sub-section (1) of Section 24 as now stands, enables a High Court (or a District Court) to transfer or withdraw any suit, appeal or other proceeding pending before it or in any Court subordinate to it. Such transfer can be made by the Court at any stage of the proceeding either on an application of a party or suo motu.

30. Sub-section (2) empowers the Court ordering transfer to issue directions for de novo trial or to proceed with the suit, appeal or other proceeding from the point at which it was transferred or withdrawn.

31. Sub-section (3) defines 'proceeding' which includes an 'execution proceeding'.

32. It declares that Courts of Additional and Assistant Judges will be deemed to be withdrawn (3)
For the purposes of this section,-

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order. (4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

subordinate to the District Court. Sub-section (4), likewise, states that the expression "Court of Small Causes" includes courts vested with the powers of a Court of Small Causes.

33. Newly added sub-section (5) clarifies that a suit or proceeding can be transferred from a Court which has no jurisdiction to try it.

34. Section 25, as originally enacted in the Code of 1908, enabled the Governor-General in Council to transfer, in certain circumstances, a suit, appeal or other proceeding from one High Court to another High Court and read thus:

25. Power of State Government to transfer suits--(1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor-General in Council, who may, by notification in the Official Gazette, transfer such suit, appeal or proceeding to any other High Court;

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

35. The section was amended by the Government of India (Adaptation of Indian Laws) Order, 1937. In sub-section (1), for the words "Governor-General in Council" and "who", the words "State Government" and "which" were substituted.

36. Proviso to sub-section (1) was inserted, which read as under;

Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the State Government of the State in which that High Court has its principal seat.

37. Plain reading of the above provision makes it clear that scope and applicability of Section 25 was very much limited. It enabled the State Government (earlier Governor-General in Council) to exercise power by effecting transfer from one High Court to any other High Court. The Law Commission considered the provision as it originally enacted. It felt that the State Government could not be said to be an appropriate agency for exercising power of transfer of suit, appeal or other proceeding inasmuch as exercise of such power was a 'judicial function'. The Commission also noted that an analogous provision was made in Section 406 of the Code of Criminal Procedure, 1973 which empowered the Supreme Court to transfer cases and appeals from one Court to another Court. It accordingly recommended that such wide powers of transfer should not be retained by the State Government but should be conferred on the Supreme Court.

38. The recommendation was accepted. In the Statement of Objects and Reasons, it was stated:

Clause 12.--Section 25 of the Code empowers the State Government to transfer suits etc. in certain circumstances from the High Court exercising jurisdiction in the State to another High Court. This section is very narrow in scope as it provides only for the transfer of suit, appeal or other proceeding pending in a High Court presided over by a Single Judge. Besides, the State Government, does not seem to be an appropriate agency for exercising the power of transfer. Section 25 is, therefore, being substituted by a new section which provides for the transfer to the Supreme Court the existing power vested with the State Government and to confer on the Supreme Court such wide powers of transfer as it has in criminal cases under Section 406 of the Code of Criminal Procedure, 1973. Further, the new section covers transfer of cases from or to the original side of a High Court to or from any other Civil Court. The new section is thus wider in scope than Section 406 of the Code of Criminal Procedure, 1973.

39. Accordingly, Section 25 was substituted in the present form which reads as under:

25. Power of Supreme Court to transfer suits, etc (1) On the application of a party, and after notice to the parties, and after hearing such of them as desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a High Court or other Civil Court in one State to a High Court or other Civil Court in any other State.

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either retry it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any

person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.

Case law

40. Having considered statutory provisions, this is now the time to refer to few decisions on the point. The issue, in our opinion, can conveniently be discussed in two stages;

(i) position prior to Code of Civil Procedure (Amendment) Act, 1976, and

(ii) position after the Code of Civil Procedure (Amendment) Act, 1976.

(i) Position prior to Amendment Act, 1976

41. The first case on the point appears to be of *Abu Bakar Abdul Rahiman & Co. v. Rambux*, AIR 1916 Nagpur 31 : 40 IC 393. The Court of Judicial Commissioner, Nagpur was called upon to consider the question whether a High Court can transfer a case from a Court subordinate to it to a Court subordinate to another High Court. In that case, plaintiff R was carrying on business at Khamgaon in West Berar. Defendant A was a firm carrying on business in Bombay. R filed a suit against A in the Court of Subordinate Judge, Khamgaon for recovery of Rs.5,000. An application was made by A to the Court of the Judicial Commissioner, Nagpur to transfer the suit to the High Court of Bombay on its original side. The application was purported to have been made under sub-section (3) of Section 23 of the Code. The contention of R was that the Court of Judicial Commissioner, Nagpur could not transfer a case to a Court subordinate to other High Court or to the Original Side of the other High Court.

41. The Court considered the relevant provisions (Sections 22 to 25) of the Code, upheld the contention and ruled that the Court of Judicial Commissioner, Nagpur could not transfer a suit to a Court subordinate to other High Court or to other High Court on its Original Side.

42. Interpreting Section 23 of the Code, the Court observed;

"Section 23 indicates under three heads the Court to which an application under Section 22 is to be made. (1) Where the several Courts are Subordinate to the same Appellate Court, the application goes before the latter; (2) where the several Courts are subordinate to different Appellate Courts but to the same High Court, the application must go to the High Court; and (3) where the several Courts having jurisdiction over the suit are subordinate to different High Courts, the application must be made to the High Court having authority over the Court in which the suit has been instituted. In the first two of these cases, the Court empowered to decide under

Section 22 also has jurisdiction to transfer under Section 24. But in the third case there is no power of transfer, and the question is whether Section 22, under which the application to be made is one for transfer, can be interpreted to mean that, in a case like the present, the Court to which the application is made, being powerless to transfer, may nevertheless direct that the plaint be returned to the plaintiff for presentation to some Court under another provincial jurisdiction".

(See also *Topan Harji & Co. v. Singhai Dalchadn & Anr.*; AIR 1924 Nag 152 : 75 IC 548).

43. In *Ram Kumar v. Tula Ram Nathu Ram*, AIR 1920 Patna 138 (2) : 56 IC 920, the question was whether the High Court of Patna could transfer a suit from Purulia Court subordinate to the High Court of Patna to a Court subordinate to the High Court of Bombay.

44. Disagreeing with the view in *Abu Bakar*, the Court held that such an order could be passed. "An order of a High Court under Section 22, that the suit shall proceed in a Court subordinate to another High Court, will be final and it will not be open to another High Court to refuse the suit being tried in the Court subordinate to it having jurisdiction to try it".

45. In *Dr. Rajnath v. L. Vidya Ram & Ors.*, AIR 1953 All 772, it was observed that Section 23 of the Code 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. Section 23 merely lays down the forum in which applications under Section 22 are to be made.

46. In *Firm Kanhaiyalal v. Zumerlal*, AIR 1940 Nag 145 : 190 IC 439, the Court held that a High Court can transfer a suit pending in a Court subordinate to that High Court to a Court subordinate to another High Court. The Court held that Section 22 confers power on a Court to transfer a suit pending in a subordinate Court to a Court subordinate to another High Court and Section 23 provides forum to which an application may be made.

47. In that case, a suit was brought in a Court subordinate to the High Court of Nagpur and transfer was sought to a Court subordinate to the High Court of Calcutta by filing an application in the High Court of Nagpur. The Court, overruling *Abu Bakar* held that such a transfer could be effected.

48. In *P. Salayandi Nadar & Ors. v. Venugopala Chetty & Ors.*, AIR 1960 Ker 91 : ILR 1959 Ker 180, the High Court of Kerala held that a High Court has power to transfer a suit pending in a Court subordinate to it to a Court subordinate to another High Court.

49. It may, however, be noted that the Court stated that the competency of the petition was not objected by the opposite party.

50. In *Western U.P. Electric Power Supply Company Ltd. v. Hind Lamps Ltd.*, (1969) 2 SCWR 16 : 1969 UJ (SC) 54, A filed a suit in the Court of Civil Judge at Mainpuri (U.P.) against B for recovery of amount. B also filed a suit against A in the Court of Senior Sub Judge, Delhi for certain amount. B

filed an application in the High Court of Allahabad for transfer of suit filed by A and pending in the Court of Civil Judge at Mainpuri to the Court of Sub-Judge at Delhi. The application was allowed and the suit was transferred. A applied for recalling of the order contending that condition precedent to the application of Sections 22 and 23 of the Code did not exist and the High Court had no jurisdiction to transfer the suit pending in Mainpuri Court to the Court not subordinate thereto. The High Court, however, rejected the prayer. A approached this Court.

51. This Court, in the order, expressly noted that at the hearing before the High Court, the counsel for A conceded that the High Court of Allahabad had jurisdiction to transfer Mainpuri suit to the Court of Special Judge, Delhi. Taking into account the above concession before the High Court, this Court refused to interfere with the order passed by the High Court transferring a suit from a Court subordinate to the High Court of Allahabad to a Court subordinate to a different High Court (High Court of Delhi).

52. In para 6, this Court stated;

"It may be conceded that some other parts of the evidence of the witnesses are inconsistent with the statement made by him. The learned Civil Judge accepted the testimony and made a report to the High Court that Hind Lamps Ltd. had a place of business in Delhi. At the hearing Counsel for the Appellant conceded that the High Court had jurisdiction to transfer the suit. It would be reasonable to infer that the Appellant admitted that because the respondent had a branch office in Delhi the High Court of Allahabad had jurisdiction to transfer the Mainpuri suit in exercise of the power under Section 22 read with Section 23(3) of the Code of Civil procedure. Sitting in appeal with Special Leave, we would not be justified in ignoring the concession made at the bar by Counsel for the Appellant. We are unable to accept the contention that Counsel merely admitted that jurisdiction under Sections 22 and 23(3) was exercisable by the High Court, but denied the existence of the conditions precedent to the exercise of the jurisdiction". (emphasis supplied)

53. In our opinion, the above case does not help the respondent-wife. The case was decided on concession on behalf of the plaintiff that an order of transfer could be passed by a High Court transferring a suit from a Court subordinate to the said Court to a Court subordinate to another High Court. It did not lay down a proposition of law that under the Code, a High Court can transfer a suit, appeal or other proceeding pending in a Court subordinate to that Court to a Court subordinate to another High Court. Moreover, the case had been decided prior to the amendment in Section 25 of the Code by the Amendment Act, 1976.

54. In *State Bank of India v. M/s Sakow Industries Faridabad (Pvt.) Ltd.*, New Delhi, AIR 1976 P&H 321, the State Bank of India filed a suit in the Alipore Court in West Bengal against the defendant-Company for recovery of loan amount of Rs.53 lacs. The defendant Company also filed a suit in the Ballabgarh Court in Punjab & Haryana for permanent injunction restraining the petitioner Bank from interfering with the peaceful possession of its premises and its estates. Before settlement of issues in Ballabgarh suit, the plaintiff Bank filed an application before the High Court

of Punjab & Haryana under Sections 22, 23 (3) read with Section 151 of the Code for transfer of suit from latter (Ballabgarh) Court to former (Alipore) Court.

55. Observing that the same questions of law and fact were involved in both the suits and the parties were also the same, the High Court ordered transfer of suit from Ballabgarh Court to Alipore Court. It was held that such order could be passed in exercise of power under Section 23(3) read with Section 151 of the Code.

56. The Court stated;

"The plain reading of this Section shows that in a situation like the present, High Court can order transfer of the case to some other Court under the different High Court. Moreover, under Section 151 of the Code of Civil Procedure every court has the inherent jurisdiction to pass any order to meet the ends of justice. In *Pragji Soorji and Co. of Bombay v. Kalu Mal Shori Mal and Co. of Amritsar*, AIR 1924 Lah 306, it has been held that the inherent powers under Section 151 of the Code of Civil Procedure can be used for the purpose of preventing or remedying grave abuses. Same view has been taken in *Datt Singh v. Tej-datt Singh*, AIR 1934 All 14. In the peculiar circumstances of the present case, as the facts enumerated reveal, it would meet the ends of justice and prevent the abuse of the process of the Court if the case pending in the Ballabgarh Court is transferred to the Court at Calcutta in which the connected matter is pending between the petitioner-Bank and the said Company".

[see also *Jagatguru Shri Sankaracharya Jyotish Pithadhiswar Shri Swami Swaroopanand v. Ramji Tripathi Lal Bahadur Tripathi*, AIR 1979 MP 50].

(ii) Position after Amendment Act, 1976

57. As already stated, the Code was amended in 1976 with effect from February 1, 1977. Section 25, as originally enacted in the Code of 1908 and amended by the Government of India (Adaptation of Indian Laws) Order, 1937 (which was formal in nature), was substituted by the Amendment Act, 1976. The scope of amended Section 25 is very wide. It empowers the Supreme Court (this Court) to transfer any suit, appeal or other proceeding from one High Court to another High Court or from one Civil Court in a State to any other Civil Court in another State throughout the country. Bare reading of the section clearly reflects the legislative intent. Plenary and extensive powers have been conferred on this Court under Section 25 as it stands now.

58. No case has come up before this Court interpreting the provisions of sub-section (3) of Section 23 in juxtaposition of Section 25 of the Code. There are, however, judicial pronouncements by some High Courts.

59. In *Priyavari Mehta v. Priyanath Mehta*, AIR 1980 Bom 337, A-wife filed a matrimonial petition under Section 13 of the Hindu Marriage Act, 1955 against B-husband in the Court of Civil Judge at Mussoorie (Dehradun) for divorce on the ground of cruelty. B appeared in response to the summons

and filed written statement. B then filed a petition for restitution of conjugal rights under Section 9 of the Act in the District Court, Nagpur. A presented an application under sub-section (3) of Section 23 of the Code in the High Court of Bombay (Nagpur Bench) for transfer of suit instituted by B in Nagpur to Mussoorie. The application was resisted mainly on the ground that the High Court of Bombay (Nagpur Bench) had no jurisdiction to transfer a suit instituted in the Court at Mussoorie which was a Court subordinate to other High Court.

60. The Court considered the provisions of Sections 22 to 25 as also Section 21A of the Hindu Marriage Act and held that the Court had such power under sub-section (3) of Section 23 of the Code. The Court negated the contention of B that the amended Section 25 of the Code superseded the power of the High Court under sub-section (3) of Section 23 of the Code. According to the Court, in spite of amendment in Section 25 of the Code by Amendment Act, 1976, the Legislature did not think it fit to repeal sub-section (3) of Section 23 of the Code. The Court, therefore, must interpret both the provisions harmoniously.

61. The Court stated;

"Shri Ghatpande, appearing for the non-applicant, argued that in view of the amended Section 25 of the Code the powers of the High Court under Section 23(3) of the Code stand superseded. I see no merit in this submission. Old Section 25 of the Code empowered the State to transfer civil suits etc. in certain circumstances from the High Court exercising jurisdiction in the State to another High Court. That section which was narrow in its scope has been substituted by new Section 25 and it now provides for transfer of suits by the Supreme Court which power was earlier exercised by the Government. The section now confers on the Supreme Court such wide and plenary power of transfer as it has in Criminal cases under Section 406 of the Cr. P. C. irrespective of the fact whether the Court to which transfer is sought has or has no jurisdiction to try the suit, appeal or other proceedings if it is satisfied that it is expedient in the ends of justice so to do. Section 22 of the Code (which as observed above has to be read along with Section 23) applies where a suit in its entirety is cognizable by either of the two Courts, that is, the Court in which the suit is instituted and the Court to which transfer is sought. It cannot, therefore, be said that Section 23(3) of the Code stands superseded or is rendered negatory in view of the amended Section 25 of the Code as submitted by Shri Ghatpande".

(emphasis supplied)

62. In *Mamta Gupta v. Mukund Kumar Gupta*, AIR 2000 AP 394, the wife filed an application in the High Court of Andhra Pradesh to transfer a case pending in the Family Court, City Civil Court, Hyderabad to Family Court, Indore (M.P.). The question before the High Court was whether such a transfer could be effected by the High Court of Andhra Pradesh by transferring a case pending in a Court subordinate to it to a Court subordinate to the High Court of Madhya Pradesh.

63. Considering the provisions of sub- section (3) of Section 23 and power of the High Court to effect transfer as also Section 25 and power of the Supreme Court (this Court), the Court held that both the provisions must be given effect and the power to transfer a case by a High Court under sub-section (3) of Section 23 to a Court subordinate to different High Court must be conceded. If it is not done, Section 23 (3) would become redundant.

64. Referring to case law on the point, the High Court observed;

"Therefore, the contention of the learned Counsel for the respondent that the power of High Court under Section 23(3) is deemed to have been impliedly withdrawn consequent on the introduction of new Section 25 of Code of Civil Procedure cannot be accepted.

Admittedly, as on date Section 23(3) continue to subsist on the statute books along with Section 25. What is held by the Supreme Court in Guda Vijayalakshmi's case (supra), that it had a wider power of transfer, but at the same time it cannot be construed that Section 23(3) became redundant. So long as the provision subsists, it continues to yield power vested in it. Merely because Section 25 confers the powers on the Supreme Court to transfer the case, it cannot be construed that Section 23 gets deleted. The Legislature would have thought fit to do so, when new Section 25 was enforced. Therefore, Section 23 (3) and Section 25 have to be construed in a harmonious way and by doing so, it can only be interpreted that it is for the party seeking transfer either to choose the Forum under Section 23(3) or 25 depending upon his social, economic status.

Option thus vested with the party.

But, to say that the party is
precluded from filing application

under Section 23(3) after 1-2-1977, and that the party has to file an application only before the Supreme Court under Section 25, would amount to emasculating Section 23(3). Both the provisions are independent and option is left to the party approaching the Court for transfer.

(emphasis supplied)

65. Recently, in Lakshmi Nagdev v. Jitendra Kumar Nagdev, (2004) 4 MPLJ 310, a petition was filed under Section 23(3) of the Code in the High Court of Madhya Pradesh by the wife seeking transfer of matrimonial suit filed by the husband in the Court of III Additional District Judge, Katni (M.P.) to the Court of competent jurisdiction in District Durg in the State of Chhattisgarh. The prayer was objected on the ground that no such order could be passed which seeks transfer of a suit from a Court subordinate to one High Court to a Court subordinate to other High Court.

66. Referring to Firm Kanhaiyalal, Jagatguru Shri Shankaracharya and Mamta Gupta, the Court held that such a transfer could be effected.

67. The Court said;

"In the light of aforesaid
judgments the objection about
maintainability of the petition

deserves to be rejected. Section 23(3) of the CPC empowers the High Court to transfer a suit pending in a subordinate court to a court subordinate to another High Court, Section 21A of the 'Act' do not in any way exclude, affect or curtail the powers of this Court under Section 23 (3) of the CPC. The powers of the High Court under Section 23(3) and the Supreme Court under Section 25 of the CPC are to be construed harmoniously and parties are free to choose the forum either under Section 23(3) or under Section 25 of the CPC".

(emphasis supplied)

68. Special reference may be made to a decision of this Court in *Guda Vijayalakshmi v. Guda Sekhara Sastry*, (1981) 2 SCC 646. In that case, A (wife) filed a suit for maintenance against B (husband) in a competent Court in Andhra Pradesh. On receipt of notice, B filed a divorce petition under the Hindu Marriage Act, 1955 against A in Rajasthan Court. A filed a transfer petition under Section 25 of the Code in this Court (Supreme Court) for transfer of B's suit from Rajasthan to Andhra Pradesh.

69. This Court considered the provisions of Sections 24 and 25 of the Code prior to and after the Amendment Act of 1976 and also Sections 21 and 21-A of the Hindu Marriage Act, 1955 and held that a transfer petition under Section 25 of the Code would be maintainable irrespective of the provisions of Sections 21 and 21A of the Hindu Marriage Act which did not exclude the jurisdiction of this Court under the Code. The Court also doubted the correctness of the decision of the High Court of Bombay (Nagpur Bench) in *Priyavari Mehta*.

70. Having considered the scheme of the Code as amended from time to time, in our judgment, the law relating to transfer of cases (suits, appeals and other proceedings) is well- settled. It is found in Sections 22 to 25 of the Code and those provisions are exhaustive in nature. Whereas Sections 22, 24 and 25 deal with power of transfer, Section 23 merely provides forum and specifies the Court in which an application for transfer may be made. Section 23 is not a substantive provision vesting power in a particular Court to order transfer.

71. In our considered opinion, where several Courts having jurisdiction are subordinate to one appellate Court, an application for transfer may be made to such appellate Court and the Court may transfer a case from one Court subordinate to it to another Court subordinate to it. Likewise, where such Courts are subordinate to the same High Court, an application may be made and action may be taken by the High Court transferring a case from one Court subordinate to it to any other Court subordinate to that High Court. But where such Courts are subordinate to different High Courts, it is only the Supreme Court (this Court) which may pass an order of transfer. In other words, if two courts are subordinate to different High Courts, one High Court has no power, jurisdiction or authority to transfer a case pending in any court subordinate to that High Court to a Court

subordinate to other High Court. It is only the Supreme Court (this Court) which may order the transfer.

72. Section 25, as originally enacted in the Code of 1908 and the decisions prior to Amendment Act of 1976, have no application after substitution of Section 25 as it stands today. To us, Section 23 has no application to such cases and the only provision attracted is Section 25.

73. The language of Section 25 also supports the view which we are inclined to take. Sub-section (1) of Section 25 of the Code enacts that "On the application of a party", this Court may pass an appropriate order of transfer. Thus, Section 25 is 'self-contained Code' and comprises of substantive as well as procedural law on the point. It allows a party to move the Court by making an application as also it empowers the Court to make an order of transfer.

74. The matter can be examined from another angle also. Every Court has its own local or territorial limits beyond which it cannot exercise the jurisdiction. So far as this Court is concerned, its jurisdiction is not circumscribed by any territorial limitation and it extends over any person or authority within the territory of India. But, it has no jurisdiction outside the country. So far as a High Court is concerned, its jurisdiction is limited to territory within which it exercises jurisdiction and not beyond it. On that analogy also, a High Court cannot pass an order transferring a case pending in a Court subordinate to it to a Court subordinate to another High Court. It would be inconsistent with the limitation as to territorial jurisdiction of the Court.

75. This can be compared with exercise of extraordinary jurisdiction by a writ Court under Article 32 or 226 of the Constitution. It is well settled that this Court can exercise power by issuing writs, directions or orders to every authority within the territory of India (as also those functioning outside the country provided such authorities are under the control of Government of India). But the jurisdiction of a High Court has territorial limitations. It can exercise the power "throughout the territories in relation to which it exercises the jurisdiction", that is to say, the writs issued by a High Court cannot run beyond the territory subject to its jurisdiction and the person or authority to whom the High Court is empowered to issue such writs must be within those territories which clearly implies that they must be amenable to its jurisdiction in accordance with law.

76. The counsel for the respondent-wife submitted that provisions of Section 23(3) and 25 of the Code should be harmoniously construed. Referring to Priyavari Mehta, and Lakshmi Nagdev, it was submitted that Section 23(3) of the Code did not stand deleted or superseded by Section 25 of the Code. If it is held that for transfer of a case, appeal or other proceeding from a Court subordinate to one High Court to a Court subordinate to another High Court, only this Court can be approached, Section 23(3) of the Code will become nugatory, redundant and futile. No Court of law will interpret one provision of law which will make another provision superfluous or ineffective. It was, therefore, submitted that it has been rightly held that the parties must be left "to choose the forum"

either under Section 23(3) or 25 of the Code.

77. We are unable to uphold the contention. In our considered view, the fallacy in the argument lies in the fact that it presumes and presupposes that Section 23 of the Code is a substantive provision which authorizes a Court mentioned therein to order transfer. It is not so. The said section, as held by us, is merely a procedural one or a machinery provision and provides mode, method or manner in approaching a Court for making an application. It does not empower a Court to effect transfer. Moreover, Section 25 of the Code is a 'complete Code' dealing with substantive as well as procedural law. Section 23, in our opinion, therefore, cannot be interpreted in the manner suggested by the learned counsel appearing for the wife.

78. After the commencement of the Constitution and establishment of the Supreme Court (this Court), Parliament thought it proper to amend Section 25 of the Code and accordingly, it was substituted by empowering this Court to order transfer from one High Court to another High Court or to one Civil Court in one State to another Civil Court in any other State. It is, no doubt, true that even when Section 25 in the present form was substituted by the Amendment Act of 1976, sub-

section (3) of Section 23 of the Code has neither been deleted nor amended. That, however, is not relevant. Since in our considered view, Section 23 is merely a procedural provision, no order of transfer can be made under the said provision. If the case is covered by Section 25 of the Code, it is only that section which will apply for both the purposes, namely, for the purpose of making application and also for the purpose of effecting transfer. On the contrary, reading of sub-section (3) of Section 23 of the Code in the manner suggested by the learned counsel for the respondent-wife would result in allowing inroad and encroachment on the power of this Court not intended by Parliament. Section 23, therefore, in our considered view, must be read subject to Section 25 of the Code. The decisions taking a contrary view do not lay down correct law. We, therefore, overrule them.

Even if such power was with a High Court earlier, it stood withdrawn with effect from January 01, 1977 in view of Section 25 of the Code as amended by Code of Civil Procedure (Amendment) Act, 1976.

79. We are unable to agree with the view that in such cases, inherent powers may be exercised under Section 151 of the Code as held by the High Court of Punjab & Haryana in *State Bank of India*. It is settled law that inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in the Code. The said power cannot be exercised in contravention or in conflict of or ignoring express and specific provision of law.

Since the law relating to transfer is contained in Sections 22 to 25 of the Code, and they are exhaustive in nature, Section 151 has no application. Even that contention, therefore, cannot take the case of respondent-wife further.

80. For all these reasons, in our opinion, the order passed by the High Court is not sustainable and deserves to be set aside. We hold that a High Court has no power, authority or jurisdiction to transfer a case, appeal or other proceeding pending in a Court subordinate to it to any Court subordinate to another High Court in purported exercise of power under sub-

section (3) of Section 23 of the Code and it is only this Court which can exercise the said authority under Section 25 of the Code. The order passed by the High Court, therefore, deserves to be set aside and is accordingly set aside.

81. On the facts and in the circumstances of the case, however, the parties are directed to bear their own costs.

82. The appeal is disposed of accordingly.

.....J. (C.K. THAKKER) NEW DELHI,
.....J. SEPTEMBER 26, 2008. (D.K. JAIN)