

Guda Vijayalakshmi vs Guda Ramchandra Sekhara Sastry on 13 March, 1981

Equivalent citations: 1981 AIR 1143, 1981 SCR (3) 223, AIR 1981 SUPREME COURT 1143, 1981 SCC(CRI) 574, 1981 ALL WC 346, (1981) 94 MAD LW 66, (1981) MARRILJ 218, (1981) ALL WC 345, 1981 UJ (SC) 695, 1981 BBCJ 143, (1981) 2 SCWR 45, (1981) HINDULR 312, 1981 (2) SCC 646

Author: V.D. Tulzapurkar

Bench: V.D. Tulzapurkar, Amarendra Nath Sen

PETITIONER:

GUDA VIJAYALAKSHMI

Vs.

RESPONDENT:

GUDA RAMCHANDRA SEKHARA SASTRY

DATE OF JUDGMENT 13/03/1981

BENCH:

TULZAPURKAR, V.D.

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TULZAPURKAR, V.D.

SEN, AMARENDRA NATH (J)

CITATION:

1981 AIR 1143

1981 SCR (3) 223

1981 SCC (2) 646

1981 SCALE (1) 794

ACT:

Transfer of proceedings under the Hindu Marriage Act- Power of the Supreme Court to transfer under section 25 of the Civil Procedure Code-Whether section 25 C.P.C. gets excluded by reason of provisions of sections 21 and 21A of the Hindu Marriage Act, 1955.

HEADNOTE:

The petitioner (wife) filed a suit (O.P. 72/79) in forma pauperis seeking maintenance from the respondent (husband) in the court of subordinate Judge, Eluru (Andhra Pradesh). On the receipt of the notice of the suit, the respondent filed a divorce suit (Petition Case No. 28/1980) against the wife under section 13 of the Hindu Marriage Act,

1955 in the court of the District Judge, Udaipur (Rajasthan). By the instant transfer petition filed under section 25 C.P.C., 1908, the wife sought to get the suit at Udaipur transferred to Eluru.

A preliminary objection was raised to the effect that section 25 of the Civil Procedure Code, which gets excluded by reason of the provisions of sections 20 and 21 of the Hindu Marriage Act, 1955, is not applicable to proceedings under the said Act and as such the Supreme Court has no power to transfer the husband's suit from Udaipur District Court, Udaipur (Rajasthan) to Eluru District Court, Eluru (A.P.).

Rejecting the preliminary objection, the Court

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HELD: Per curiam

On merits, it is expedient for the ends of justice to transfer the husband's suit pending in the District Court Udaipur (Rajasthan) to the District Court at Eluru (Andhra Pradesh), where both the proceedings could be tried together and for that purpose, the wife is agreeable to have her maintenance suit transferred to the District Court at Eluru (A.P.). [226 A-B]

Per Tulzapurkar J.

1. It will invariably be expedient to have a joint or consolidated hearing or trial by one and the same Court of a husband's petition for restitution of conjugal rights on the ground that the wife has withdrawn from his society without reasonable excuse under section 9 of the Hindu Marriage Act and the wife's petition for judicial separation against her husband on ground of cruelty under section 10 of the said Act in order to avoid conflicting decisions being rendered by two different Courts. In such a situation resort will have to be had to the

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powers under sections 23 to 25 of the Civil Procedure Code for directing transfer of the petitions for a consolidated hearing. [228 G-H, 227A]

2:1. On a proper construction of the relevant provisions, it cannot be said that the substantive provision contained in section 25 Civil Procedure Code is excluded by reason of section 21 of the Hindu Marriage Act. 1955. [226 F]

2:2. In terms, section 21 C.P.C. does not make any distinction between procedural and substantive provisions of C.P.C. and all that it provides is that the Code, as far as may be, shall apply to all proceedings under the Act and the phrase "as far as may be" means and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the Code. It is impossible to say that such provisions of the Code as partake of the character of substantive law are excluded by implication as no such implication can be read into section 21 of the Act and a particular provision of the Code

irrespective of whether it is procedural or substantive will not apply only if it is inconsistent with any provisions of the Act. [226 G-H, 227 A-B]

3. Section 21A of the Hindu Marriage Act, 1955 does not exclude the power of transfer conferred upon the Supreme Court by the present section 25 C.P.C., in relation to proceedings under that Act. The marginal note of section 21A itself makes it clear that it deals with power to transfer petitions and direct their joint or consolidated "trial in certain cases" and is not exhaustive. Section 21A does not deal with the present section 25 C.P.C. which has been substituted by an amendment which has come into force with effect from February 1, 1977 (section 11 of the Amending Act 104, 1976). By the amendment very wide and plenary power has been conferred on the Supreme Court for the first time to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one Civil Court in one State to another Civil Court in any other State throughout the country. Conferral of such wide and plenary power on the Supreme Court could not have been in contemplation of Parliament at the time of enactment of section 21A of the Hindu Marriage Act, 1955. [227 C-D, F-H, 228 A-B]

Smt. Rama Kanta v. Ashok Kumar, AIR 1977 Punjab & Haryana 373 and Priyavari Mehta v. Priyanath Mehta, AIR 1980 Bombay 337, overruled.

Per Amrendra Nath Sen, J.

1. A plain reading of section 25 C.P.C. clearly indicates that very wide jurisdiction and powers have been conferred on the Supreme Court to transfer any suit, appeal or any other proceedings from a High Court or other Civil Court in any State to a High Court or other Civil Court in any other State for the ends of justice. Supreme Court enjoys the power and jurisdiction to entertain the transfer application under section 25 of the Code of Civil Procedure. [230 F, 233 D]

2 : 1. Sections 21 and 21A of the Hindu Marriage Act do not in any way, exclude, effect or curtail the power conferred on the Supreme Court under section 25 of the Code of Civil Procedure. If the jurisdiction clearly conferred 225 on any court has to be ousted, the exclusion of such jurisdiction must be made in clear and unequivocal terms. [232E, 233D]

2 : 2. Section 21 of the Hindu Marriage Act only provides that "all proceedings under the Hindu Marriage Act shall be regulated as far as may be by the Code of Civil Procedure, 1908". Section 21 of the Hindu Marriage Act does not deal with the question of jurisdiction of any court and it cannot be construed to exclude the jurisdiction conferred on the Supreme Court under section 25 C.P.C. [232 E-G]

2 : 3. Section 21A of the Hindu Marriage Act has, indeed, no bearing on the question of jurisdiction conferred on the Supreme Court under section 25 C.P.C. Section 21A has

no application to the case of transfer of any suit or proceeding from one State to another. [233 B-C]

2 : 4. The Supreme Court must necessarily enjoy the power and jurisdiction under the provisions of section 25 C.P.C. of transferring such a suit or proceeding for the ends of justice unless the power and jurisdiction of the Supreme Court are specifically taken away by any statute. [232D-E]

3. Section 25 of the Code of Civil Procedure came into force after section 21 and 21A of the Hindu Marriage Act have been incorporated in the Hindu Marriage Act, 1955 and as such section 25 of the Code overrides sections 21 and 21A of the Hindu Marriage Act. [233 A-E]

JUDGMENT:

ORIGINAL JURISDICTION: Transfer Petition No. 36 of 1980.

Petition under section 25 of the Code of Civil Procedure for transfer of case No. 28 of 1980 Misc. (36) pending in the Court of the Distt. Judge, Udaipur (Rajasthan) to the Court of Subordinate Judge, Eluru (Andhra Pradesh) to be tried alongwith O. P. No. 72 of 1979 pending in that court.

G.S. Rama Rao for the Petitioner.

B.D. Sharma for the Respondent.

The following Judgments were delivered:

TULZAPURKAR, J. On September 26, 1979, the petitioner (wife) filed a suit in forma pauperis seeking maintenance from the respondent (her husband) in the Court of Subordinate Judge, Eluru (Andhra Pradesh) being O. P. No. 72 of 1979. On the receipt of the notice of the suit, the respondent filed a divorce suit (Petition Case No. 28 of 1980) against the wife under s. 13 of the Hindu Marriage Act, 1955 in the Court of the District Judge, Udaipur (Rajasthan). By the instant transfer petition filed under s.

25 C.P.C.

1908 the wife is seeking to get the husband's suit transferred to Eluru. On merits we are satisfied that it is expedient for the ends of justice to transfer the husband's suit to the District Court at Eluru (A.P.) where both the proceedings could be tried together and for that purpose the wife is agreeable to have her maintenance suit transferred to the District High Court at Eluru (A.P.) However, counsel for the respondent (husband) has raised before us a preliminary objection that s. 25 of the C.P.C. under which the transfer petition has been made is not applicable to proceedings under the Hindu Marriage Act, 1955 and as such this Court has no power to transfer the husband's suit from Udaipur

District Court to the District Court at Eluru. He urged that s. 25 of C.P.C. gets excluded by reason of the provisions of s. 21 and 21A of the Hindu Marriage Act 1955. According to him s. 25 C.P.C. deals with the substantive law and not procedural law and since s. 21 of the Hindu Marriage Act makes applicable to all the proceedings under the Act only such provisions of C.P.C. as relate to the regulation of proceedings i.e. such provisions which deal with procedural matters only, s. 25 C.P.C. is not applicable. He also urged that s. 21 A (3) of the Hindu Marriage Act also makes the above position clear beyond doubt by specifically excluding ss. 24 and 25 C.P.C. from being applied to the proceedings under the Hindu Marriage Act. A large number of authorities were referred to by counsel to substantiate his contention and general principles but in particular one decision of the Nagpur Bench of the Bombay High Court in the case of Priyavari Mehta v. Priyanath Mehta was pressed into service as having a direct bearing on the point.

In our view, on proper construction of the relevant provisions it is not possible to uphold the preliminary objection. In the first place it is difficult to accept the contention that the substantive provision contained in s. 25 C.P.C. is excluded by reason of s. 21 of the Hindu Marriage Act, 1955. Section 21 of the Hindu Marriage Act merely provides: "Subject to other provisions contained in this Act and to such rules as the High Court may make in that behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908". In terms s. 21 does not make any distinction between procedural and substantive provisions of C.P.C. and all that it provides is that the Code as far as may be shall apply to all proceedings under the Act and the phrase "as far as may be" means and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the Act. It is impossible to say that such provisions of the Code as partake of the character of substantive law are excluded by implication as no such implication can be read into s. 21 and a particular provision of the Code irrespective of whether it is procedural or substantive will not apply only if it is inconsistent with any provision of the Act. For instance, it is difficult to countenance the suggestion that the doctrine of res judicata contained in s. 11 of the Code which partakes of the character of substantive law is not applicable to proceedings under the Act. Res judicata, after all, is a branch or specie of the Rule of Estoppel called Estoppel by Record and though Estoppel is often described as a rule of evidence, the whole concept is more correctly viewed as a substantive rule of law (See: Canada and Dominion Sugar Co. Ltd. v. Canadian National (West Indies) Steamships Ltd.

So far as s. 21A of the Hindu Marriage Act is concerned the marginal note of that section itself makes it clear that it deals with power to transfer petitions and direct their joint or consolidated trial "in certain cases" and is not exhaustive. Further sub-s. (3) of s. 21A on which strong reliance was placed runs thus:

"21A (3). In a case where clause (b) of sub- section (2) applies, the Court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908) to transfer any suit for proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code."

This provision in terms deals with the power of the Government or the Court on whom powers of transfer have been conferred by the C.P.C. as it then stood, that is to say, old s. 24 and 25 of C.P.C. It does not deal with the present s. 25 C.P.C. which has been substituted by an amendment which has come into force with effect from February 1, 1977 (s. 11 of the Amending Act 104 of 1976). By the amendment very wide and plenary power has been conferred on this Court for the first time to transfer any suit, appeal or other proceedings from one High Court to another High Court or from one Civil Court in one State to another Civil Court in any other State throughout the country. Conferral of such wide and plenary power on this Court could not have been in the contemplation of Parliament at the time of enactment of s. 21A of the Hindu Marriage Act, 1955. It is, therefore, difficult to accept the contention that s. 21A of Hindu Marriage Act excludes the power of transfer conferred upon this Court by the present s. 25 of C.P.C. in relation to proceedings under that Act.

Coming to the decision rendered by the Nagpur Bench of the Bombay High Court in Priyavari Mehta's case (supra) it needs to be pointed out that the aforesaid aspects of s. 21A of the Hindu Marriage Act and the present s. 25 of the C.P.C. were not considered by the Nagpur Bench at all. Moreover, the Nagpur Bench, following the decision of the Punjab and Haryana High Court in Smt. Rama Kanta v. Ashok Kumar has also taken the view that s. 21A of the Hindu Marriage Act permits transfer and consolidation of only two types of petition under the Act, namely, cross petitions filed by the two spouses against each other under s. 10 or s. 13 of the Act and that consolidation or joint hearing of other types of petitions is excluded by necessary intendment. The Bench has observed:

"The effect of s. 21A, therefore, in my opinion, is that joint or consolidated hearing or trials of petitions other than those mentioned in that section not being permissible, the powers under s. 23 to 25 of the Code cannot be exercised for transfer of petitions for a consolidated hearing of the petitions not contemplated by that section."

Such a view, in our opinion, is not correct. As stated earlier, in the matter of transfer of petitions for a consolidated hearing thereof s. 21A cannot be regarded as exhaustive for the marginal note clearly suggests that the section deals with power to transfer petitions and direct their joint and consolidated trial "in certain cases." Moreover, it will invariably be expedient to have a joint or consolidated hearing or trial by one and the same Court of a husband's petition for restitution of conjugal rights on ground that the wife has withdrawn from his society without reasonable excuse under s. 9 of the Act and the wife's petition for judicial separation against her husband on ground of cruelty under s. 10 of the Act in order to avoid conflicting decisions being rendered by two different Courts. In such a situation resort will have to be had to the powers under ss. 23 to 25 of the Civil Procedure Code for directing transfer of the petitions for a consolidated hearing. Reading s. 21A in the manner done by the Nagpur Bench which leads to anomalous results has to be avoided.

In this view of the matter, the preliminary objection is overruled. Divorce case No. 28 of 1980 pending in the District Court Udaipur (Rajasthan) is transferred to the District Court Eluru (A.P.), to which Court the wife's petition for maintenance shall also stand transferred. No order as to costs.

AMRENDRA NATH SEN, J. I agree with the order proposed by my learned brother. I, however, propose to make certain observations with regard to the preliminary objection raised as to the

jurisdiction of this Court to entertain this application. The preliminary objection raised is that the jurisdiction and power conferred on this Court under S. 25 of the Code of Civil Procedure are excluded by the provisions contained in S. 21 and S. 21A of the Hindu Marriage Act; and as S. 25 of the Civil Procedure Code is not attracted, this Court does not have jurisdiction to entertain this application for transfer. S. 25 of the Code of Civil Procedure reads as follows:-

"(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 re-try 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 the 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."

It may be noticed that the present section 25 was substituted for the former section 25 by the Code of Civil Procedure (Amendment) Act, 1976. In this connection it may be relevant to set out S. 25 of the Code of Civil Procedure, as it stood before its amendment by the substitution of the present section. The earlier section 25 was in the following terms:-

"(1) Where any part 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 State Government, which may, by notification in the Official Gazette, transfer such suit, appeal or proceeding in any other High Court:

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

A plain reading of S. 25 of the Code clearly indicates that very wide jurisdiction and powers have been conferred on this Court to transfer any suit, appeal or any other proceeding from a High Court or other Civil Court in any State to a High Court or other Civil Court in any other State for the ends of justice. I shall now set out the relevant provisions of the Hindu Marriage Act. S. 21 of the Hindu Marriage Act is in the following terms:-

"Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be by the Code of Civil Procedure, 1908."

Section 21A which was introduced in the Act by the Amending Act, (68 of 1976) provided as follows:-

"(1) where-

(a) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under s. 10 or for a decree of divorce under section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13 on any ground, whether in the same district court or in a different district court, in the same State or in a different State;

the petition shall be dealt with as specified in sub-section (2) (2) in a case where sub-section (1) applies;

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that Court:

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented. (3) In a case where clause (b) of sub-section (2) applies, the court or the Government as the case may be, competent under the Code of Civil Procedure, 1908 to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code."

The learned counsel for the respondent argues that in view of the provisions contained in S. 21, only the provisions contained in the Code of Civil Procedure relating to procedure which will regulate the

proceedings instituted under the Hindu Marriage Act, 1955 will apply; and as S. 25 of the Code of Civil Procedure does not appertain to the domain of procedure and confers substantive right, the said section is not applicable and cannot be attracted. It is argued that this position is further made clear by the provisions contained in S. 21A.

In my opinion, this argument of the learned counsel for the respondent husband is without any substance. I have earlier set out section 25 of the Code of Civil Procedure and I have pointed out that an analysis of the section makes it abundantly clear that for the ends of justice, wide power and jurisdiction have been conferred on this Court in the matter of transfer of any suit, appeal or proceeding from any High Court or other Civil Court in one State to a High Court or other Civil Court in any other State. A suit or a proceeding for divorce under the Hindu Marriage Act in a Civil Court is necessarily a suit or proceeding and must on a plain reading of S. 25(1) of the Code of Civil Procedure be held to come under S. 25(1) of the Code, as the said section speaks of any suit, appeal or other proceeding. This Court must necessarily enjoy the power and jurisdiction under the said provisions of transferring such a suit or proceeding for the ends of justice, unless the power and jurisdiction of this Court are specifically taken away by any statute. If the jurisdiction clearly conferred on any Court has to be ousted, the exclusion of such jurisdiction must be made in clear and unequivocal terms. S.21 of the Hindu Marriage Act does not deal with the question of jurisdiction of any Court. As no procedure with regard to the proceedings under the Hindu Marriage Act has been laid down in the said Act, S. 21 of the Act only provides that 'all proceedings under this Act shall be regulated as far as may be by the Code of Civil Procedure.' S. 21 of the Hindu Marriage Act cannot be construed to exclude the jurisdiction conferred on this Court under S. 25 of the Code of Civil Procedure. It does not become necessary in the instant case to decide whether the provision in relation to jurisdiction of this Court contained in S. 25 of the Code of Civil Procedure is one of substantive law or it belongs to the domain of Procedure. Even I accept the argument of the learned counsel for the respondent that S. 25 does not form any part of the procedural law and is a part of the substantive law, I am of the opinion that jurisdiction conferred on this Courts by S. 25 of the Code of Civil Procedure, is not in any way, affected by S. 21 of the Hindu Marriage Act which, as I have already noted, only provides that 'all proceedings under the Hindu Marriage Act shall be regulated as far as may be by the Code of Civil Procedure, 1908.' S. 21A of the Hindu Marriage Act, in my opinion, has indeed no bearing on the question of jurisdiction conferred on this Court under S. 25 of the Code of Civil Procedure. S. 21A of the Hindu Marriage Act makes provisions for transfer of petitions specified in the said section and for hearing and disposal of such petitions together by the District Court in which the earlier petition has been presented. Such power has been conferred on the Court or the Government. S. 21A has no application to the case of transfer of any suit or proceeding from one State to another. As I have earlier noted, very wide power and jurisdiction have been conferred on this Court in the interest of justice for transferring any appeal, suit or proceeding from one State to another under S. 25 of the Code of Civil Procedure. In the instant case, the petitioner has applied for transfer of the suit pending in the District at Udaipur in the State of Rajasthan to the appropriate Court at Eluru in the State of Andhra Pradesh. I am, therefore, of the opinion that this Court enjoys the power and jurisdiction to entertain this application under S. 25 of the Code of Civil Procedure and S. 21 and S. 21A of the Hindu Marriage Act do not, in any way, exclude, affect or curtail the power conferred on this Court under S. 25 of the Code of Civil Procedure. I may incidentally add that the present section 25 in the Code of Civil Procedure came

into force after S. 21 and 21A have been incorporated in the Hindu Marriage Act, 1955. V.D.K. Preliminary objection rejected.