

SANTHINI

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v.

VIJAYA VENKETESH

(Transfer Petition (Civil) No. 1278 of 2016)

AUGUST 09, 2017

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[KURIAN JOSEPH AND R. BANUMATHI, JJ.]

*Family Law – Transfer petition – Petitioner sought transfer of divorce petition and application for custody of minor child from the Family Court, Kerala to Family Court, Tamil Nadu – Respondent husband relied on decision rendered by coordinate bench in *Krishna Vent Nagam and requested that there was no need to transfer the case and instead parties could be directed to avail the facility of video conferencing as suggested in the said decision – Held: To what an extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered – It is certainly difficult in video conferencing to maintain confidentiality – Footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders are not meant to be part of the record – Rather, physical presence of the parties would make a significant difference – Having regard to the very object behind the establishment of Family Courts Act, 1984 and to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under ss.22, 23 and 26, the directions issued by the Court in Krishna Veni Nagam case need reconsideration on the aspect of video conferencing in matrimonial disputes – Therefore matter referred to larger bench – Reference to larger bench.*

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**Krishna Veni Nagam v. Harish Nagam (2017) 4 SCC 150 – referred to.*

Case Law Reference

(2017) 4 SCC 150

referred to

Para 3

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A CIVIL ORIGINAL JURISDICTION: Transfer Petition (Civil) No. 1278 of 2016.

Under Section 25 of the Code of Civil Procedure.

WITH

B T. P. (C) No. 422 of 2017.

V. K. Sidharthan, S. Sreedharan, Ms. Sridevi V. S., Advs. for the Petitioner.

Rishi Malhotra, Adv. for the Respondent.

C The following Order of the Court was passed:

ORDER

D 1. The petitioner has approached this Court seeking for transfer of O.P.(HMA) No.580 of 2015 filed for dissolution of marriage of the respondent and petitioner and O.P. No.1282 of 2012 filed for custody of minor child, from the Court of Family Court, Alappuzha, Kerala to Family Court, Chennai, Tamil Nadu.

E 2. When the matter came up for consideration before this Court, learned counsel appearing for the respondent brought to our notice a decision rendered by a coordinate Bench of this Court in Krishna Veni Nagam v. Harish Nagam¹ and requested that there is no need to transfer the cases; instead parties can be directed to avail the facility of video conferencing, as suggested by this Court in the case referred to above.

F 3. In Krishna Veni Nagam (supra) a coordinate Bench of this Court went into the issue of preventing the backlog of transfer petitions before the Courts. It appears that the Court also had the assistance of an amicus. Having heard the learned Counsel on both the sides and learned amicus, the Court finally, at paragraph-18, issued the following directions:-

G "18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for

H ¹(2017) 4 SCC 150

ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-

- i) Availability of video conferencing facility.
- ii) Availability of legal aid service.
- iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.
- iv) E-mail address/phone number, if any, at which litigant from out station may communicate.”

4. We are informed that not only this Court but the High Courts and even the District Courts are passing orders in the light of the judgment referred to above, relegating the parties to video conferencing even where such facilities are not available. Thus, it is a situation not only of inter State appeal or intra State appeal but also of intra District appeal.

5. Having due regard to the nature of family disputes sought to be addressed by the Parliament, we are afraid, the Court in Krishna Veni Nagam (supra) has not been furnished with the required information, before passing the order.

6. The Family Courts Act, 1984 was introduced with the following purpose:-

“INTRODUCTION

From time to time, it had been urged by several organisations of women, other organisations and individuals that Family Courts be set-up for the settlement of family disputes. The Law Commission in its 59th Report had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. In 1976 the Code of Civil Procedure was also amended to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family, but not much change in the attitude of the courts was noticed. Therefore, the need was felt to establish Family Courts for speedy settlement of family disputes. Accordingly the Family Courts Bill was introduced in the Parliament.

A STATEMENT OF OBJECTS AND REASONS

B Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes.

C 2. The Bill, *inter alia*, seeks to-

E (a) provide for establishment of Family Courts by the State Government;

(b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;

F (c) enable the State Governments to set up, such courts, in areas other than those specified in (b) above;

(d) exclusively provide within the jurisdiction of the Family Courts the matters relating to-

G (i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of marriage or as to the matrimonial status of any person;

(ii) the property of the spouses or of either of them;

(iii) declaration as to the legitimacy of any person;

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(iv) guardianship of a person or the custody of any minor; A

(v) maintenance, including proceedings under Chapter IX of the Code of Criminal Procedure;

(e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and rigid rules of procedure shall not apply; B

(f) provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the service of medical and welfare experts; C

(g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the court may, in the interest of justice, seek assistance of a legal expert as amicus curiae; D

(h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute;

(i) provide for only one right of appeal which shall lie to the High Court.

3. The Bill seeks to achieve the above objects." E

(Emphasis supplied)

7. Section 9 of the Family Courts Act, 1984 makes it a mandatory duty of the Family Court to make efforts for settlement. The said provision reads as follows:- F

"9. Duty of Family Court to make efforts for settlement. (1) In every suit or proceeding, endeavor shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject-matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit. G

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement H

A between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

B (3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.”

(Emphasis supplied)

C 8. In order to assist the Family Court, the Act has provided for association of social welfare agencies. In Section 6 provision regarding counsellors, officers and other employees of Family Courts is mentioned, which reads as follows:-

D “6. Counsellors, officers and other employees of Family Courts.(1) The State Government shall in consultation with the High Court, determine the number and categories of counsellors, officers and other employees required to assist a Family Court in the discharge of its functions and provide the Family Court with such counsellors, officers and other employees as it may think fit.

E (2) The terms and conditions of association of the counsellors and the terms and conditions of service of the officers and other employees, referred to in sub-section (1), shall be such as may be specified by rules made by the State Government.”

9. Section 12 provides for the assistance of medical and welfare experts, which reads as under:-

F “12. Assistance of medical and welfare experts.-In every suit or proceedings, it shall be open to a Family Court to secure the services of a medical expert or such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the court may think fit, for the purposes of assisting the Family Court in discharging the functions imposed by this Act.”

G 10. Section 11 provides that “in every suit or proceedings to which this Act applies, the proceedings may be held *in camera* if the Family Court so desires and shall be so held if either party so desires”.

H 11. Under the Hindu Marriage Act, 1955 also, in respect of the family matters, the Parliament has made several provisions for

reconciliation. Under Section 23(2) “before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties”.

12. Sub-section (3) of Section 23 of the Hindu Marriage Act further provides for methods to facilitate the process, which reads as follows:-

“23 (3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been effected and the court shall in disposing of the proceeding have due regard to the report.”

(Emphasis supplied)

13. Section 22 of the Hindu Marriage Act has given a very important safeguard for protecting the privacy of the proceedings or prohibiting the printing and publishing of any proceedings before the Court, except the printed judgment of the High Court or the Supreme Court. The section also provides for the situation where the proceedings are to be held in camera. Section 22 reads as follows:-

“22 Proceedings to be in camera and may not be printed or published.(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.”

(Emphasis supplied)

14. Section 26 of the Hindu Marriage Act deals with the custody of children, wherein it is mandatory for the Court to ascertain the wish

A of the children as well before taking a decision on the custody. The said section reads as follows:-

B “26 Custody of children.- In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made:

D Provided that the application with respect to the maintenance and education of the minor children, pending the proceeding for obtaining such decree, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the respondent.”

(Emphasis supplied)

E 15. Order XXXIIA of the Code of Civil Procedure was introduced in the year 1976. The same pertains to “suits relating to matters concerning the family”. Rule 3 casts a duty on the Court to make every effort for settlement in family matters, the said provision reads as follows:-

F “3. Duty of court to make efforts for settlement.- (1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

G (2) If, in any such suit or proceeding, at any stage it appears to the court that there is a reasonable possibility of a settlement between the parties, the court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

H (3) The power conferred by sub-rule (2) shall be in addition to,

and not in derogation of, any other power of the court to adjourn the proceedings.” A

16. Rule 2 deals with in camera proceedings. Rule 4 provides for the assistance of a welfare expert and Rule 5 casts a duty on the Court to “inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant”. B

17. Unfortunately, it seems, none of these mandatory procedures as laid down by the Parliament have been brought to the notice of the Court while considering the case of Krishna Veni Nagam (supra). The principal thrust of the law in family matters is to make an attempt for reconciliation before processing the disputes in the legal framework. Reconciliation is not mediation. Neither is it conciliation. No doubt, there is conciliation in reconciliation. But the concepts are totally different. Similarly, there is mediation in conciliation but there is no conciliation in mediation. In mediation, the role of the mediator is only to evolve solutions whereas in reconciliation, the duty-holders have to take a proactive role to assist the parties to reach an amicable solution. In conciliation, the conciliator persuades the parties to arrive at a solution as suggested by him in the course of the discussions. In reconciliation, as already noted above, the duty-holders remind the parties of the essential family values, the need to maintain a cordial relationship, both in the interest of the husband and wife or the children, as the case may be, and also make a persuasive effort to make the parties reconcile to the reality and restore the relationship, if possible. The Family Courts Act expects the duty-holders like the court, counsellors, welfare experts and any other collaborators to make efforts for reconciliation. However, reconciliation is not always the restoration of *status quo ante*; it can as well be a solution as acceptable to both parties. In all these matters, the approaches are different. C
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18. The role of a counsellor in Family Court is basically to find out what is the area of incompatibility between the spouses, whether the parties are under the influence of anybody or for that matter addicted to anything which affects the normal family life, whether they are taking free and independent decisions, whether the incompatibility can be rectified by any psychological or psychiatric assistance etc. The counsellor also assists the parties to resume free communication. In custody matters also the counsellor assists the child, if he/she is of such age, to accept the reality of incompatibility between the parents and yet make the child H

A understand that the child is of both parents and the child has a right to get the love and affection of both the parents and also has a duty to love and respect both the parents etc. Essentially, the counsellor assists the parents to shed their ego and take a decision in the best interest of the child.

B 19. To what extent the confidence and confidentiality will be safeguarded and protected in video conferencing, particularly when efforts are taken by the counsellors, welfare experts, and for that matter, the court itself for reconciliation, restitution of conjugal rights or dissolution of marriage, ascertainment of the wishes of the child in custody matters, etc., is a serious issue to be considered. It is certainly difficult in video conferencing, if not impossible, to maintain confidentiality. It has also to be noted that the footage in video conferencing becomes part of the record whereas the reconciliatory efforts taken by the duty-holders referred to above are not meant to be part of the record. All that apart, in reconciliatory efforts, physical presence of the parties would make a significant difference. Having regard to the very object behind the establishment of Family Courts Act, 1984, to Order XXXIIA of the Code of Civil Procedure and to the special provisions introduced in the Hindu Marriage Act under Sections 22, 23 and 26, we are of the view that the directions issued by this Court in Krishna Veni Nagam (supra) need reconsideration on the aspect of video conferencing in matrimonial disputes.

E 20. Therefore, we are of the view that the matter requires consideration by a larger Bench. The Registry is directed to place the papers before Hon'ble the Chief Justice of India. We request Hon'ble the Chief Justice of India to expeditiously constitute a Bench having regard to the urgency of the matter.