

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.**

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S.B. CIVIL TRANSFER APPLICATION NO. 149 / 2017.



Smt. Payal wife of Ranaram Veera daughter of Shri Girdhari Sain,
by caste Sain, aged 26 years, presently residing at 18/620,
Chopasni Housing Board, Jodhpur.

----Petitioner

Versus

Ranaram Veera son of late Shri Tejaram Veera, by caste Sain,
aged 32 years, resident of Village Pauchhina, District & Tehsil
Jaisalmer (Rajasthan), presently residing at 496, MOF C/o 32
Wing, C/o 56 APO, Air Force Station, Ratanada, Jodhpur (Raj.)
342001.

----Respondent

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For Petitioner(s) : Mr. Shailendra Kala.
Mr. Anuj Kala.

For Respondent(s) : Mr. N.L. Joshi.

JUSTICE DINESH MEHTA**Order****16/01/2018****REPORTABLE****BY THE COURT:**

The present transfer application has been filed by the petitioner – wife, inter alia, seeking transfer of Matrimonial Case No. 2/2017 (26/2012) in the matter of "Ranaram Veera Vs. Smt. Payal" from Family Court, Jaisalmer to Family Court, Jodhpur.

Narrating the facts of the present transfer application, learned counsel Mr. Anuj Kala appearing for the petitioner submitted that the petitioner contracted marriage with the respondent on 14.05.2011 at Jaisalmer; soon whereafter, their nuptial affinity got strained, for which, the petitioner was constrained to return to Jodhpur for living with her parents. Learned counsel for the petitioner informed that there is a series of litigation pending between the parties, out of which, one is a suit for permanent injunction filed by the respondent-husband on 26.01.2017, second being petition for maintenance filed by the petitioner (wife) filed on 24.10.2017 and third being a case for domestic violence filed on 28.07.2017 in the Court of competent jurisdiction at Jodhpur. He submitted that owing to the discord in the matrimony, Petitioner along with her 4 ½ year old daughter has been living at Jodhpur with her parents, for whom taking up journey to Jaisalmer is tiresome and agonizing as it involves not only the cost but time also. She finds herself in a great difficulty travelling as Jaisalmer is about 350 kms. away from Jodhpur. He



also pointed out that presently the Respondent is also posted at Jodhpur, for which he has filed cases at Jodhpur.

Opposing such request for transfer of the case, Mr. N.L. Joshi, learned counsel appearing for the respondent-husband, at the outset invited attention of this Court towards an order dated 19.05.2015, passed in S.B. Civil Transfer Application No. 3/2015

(Smt. Royal Vs. Rana Ram) filed by none other than the petitioner herself, wherein a request identical to the one in the present application was rejected, while observing that the petitioner can avail services of a lawyer and she need not appear in-person. It will not be out of place to reproduce the relevant

part of the order aforesaid, which reads thus:-

"Having considered the matter in its entirety and taking into account the fact that divorce petition is pending before the learned District Judge, Jaisalmer since 2012, I am not inclined to grant indulgence to the petitioner. It may be observed here that before the learned District Judge, Jaisalmer the petitioner is not required to appear in person and she can very well avail services of a lawyer. That apart, by virtue of Section 24 of the Hindu Marriage Act, 1955 (for short, 'Act of 1955') petitioner can also claim maintenance pendente lite and litigation expenses from the respondent-husband including the travelling expenses. Learned counsel for the petitioner has submitted that no endeavour is made by the petitioner to claim maintenance pendente lite and litigation expenses.



Be that as it may it is the volition of the petitioner not to stake claim for maintenance pendente lite and expenses for proceedings, otherwise legal position in this behalf is no more res-integra by virtue of Section 24 of the Act of 1955.

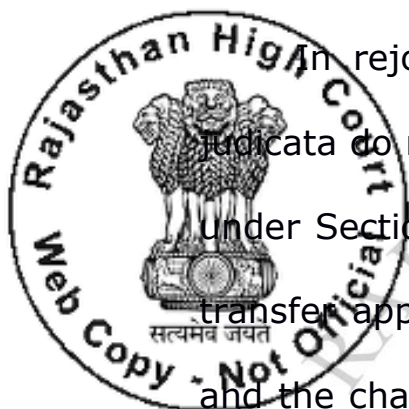


In totality, taking into account the fact that litigation is pending since 2012 and it is not imperative for the petitioner to appear in person before the learned District Judge, Jaisalmer, I am not persuaded to accede to the prayer of the petitioner. Consequently, this transfer petition fails and same is hereby dismissed.

Before parting, it may be observed that looking to the sensitive nature of dispute, which is a petition for dissolution of marriage and pending since 2012, the learned District Judge, Jaisalmer is expected to proceed with the trial as expeditiously as possible and decide the same at the earliest."

Mr. N.L. Joshi further submitted that the fact that the petitioner is having 4½ years old daughter with her, by itself is not a ground for which, the matter needs to be transferred, while maintaining that these facts were very much existing when this

Court had rejected petitioner's earlier transfer application, vide order dated 19.05.2015. Learned counsel for the Respondent husband on the one hand contended that the present application is hit by the principle of res judicata and on the other argued that the grounds put forth by the applicant do not justify transfer of case and that his client is ready to bear the cost of journey.



In rejoinder, Mr. Kala submitted that the principles of res judicata do not apply to the applications for transfer of a case filed under Section 24 of the Code of Civil Procedure, inasmuch as the transfer application does not determine the rights of the parties; and the change in circumstances gives a separate cause of action

to the applicant to move the Court for transfer of the case all over again. In support of his contention, Mr. Kala placed reliance upon a Full Bench Judgment, reported in AIR 1935 Rangoon 267 and the judgment of the Hon'ble Andhra Pradesh High Court, reported in 2006 (1) ALD 642 (A.P.) in the matter of Yeleti Pedaveerraju Vs. Vanka Jayalakshmi in support of such argument.

In a bid to steer clear the hurdle of res-judicata, learned counsel for the Petitioner submitted that at the time of decision of Petitioner's first transfer application, the matter was being tried by the District and Sessions Judge, Jaisalmer, before whom, lawyers could appear on behalf of the litigants. However, the scenario has since changed, as the Family Court has been established in Jaisalmer and the case is being conducted by such Family Court, where services of lawyers cannot be availed as a matter of right.

To buttress his argument with respect to grounds for transfer, Mr. Kala cited the judgments of the Hon'ble Supreme

Court, reported in 2001(5) Supreme 723 (Supreme Court) in the matter of Amita Shah Vs. Virender Lal Shah; 2013(2) HLR 86 (Supreme Court) in the matter of Arvind Kumar Sharma Vs. Vineeta Sharma & Anr.; 2016(2) HLR 791 (Bom.), in the matter of Sheetal Mahendra Devrukhkar Vs. Mahendra Kashram Devrukhkar; and 2015 (3) HIR 561 (P&H), in the matter of Harpreet Kaur Khalsa Vs. Kawaldeep Singh and submitted that in the facts of the present case, the case pending at Jaisalmer deserves to be transferred to the Family Court, Jodhpur.



Per contra, Mr. N.L. Joshi argued that the case should not be transferred at the request of a wife, merely because she is a woman or she has to raise a young child. In support of such contention, he cited judgments of the Hon'ble Supreme Court, reported in (2005) 11 SCC 535 in the matter of Preeti Sharma Vs. Manjit Sharma; (2004) 13 SCC 694 in the matter of Anuradka Dutta Vs. Subash Chandra Dutta; (2000) 10 SCC 95 in the matter Usha George Vs. Koshy George; in the matter of Pooja Choudhary Vs. Vinay Jaiswal [Transfer Petition (Civil) No. 683/2014, decided on 08.01.2015]; AIR 2017 SC 1345 in the matter of Krishna Veni Nagam V. Harish Nagam; and (2006) 9 SCC 197 in the matter of Anindita Das Vs. Srijit Das; judgments of this Court, reported in 2009(3) DNJ (Raj.) 1472 in the matter of Tilotamma (Smt.) Vs. Anoop Kumar; in the matter of Smt. Parwati Sharma Vs. Pawan Kumar (Transfer Application (CTA No. 87/2015, decided on 03.11.2016), in the matter of Neelam Vs. Dinkar Jangir (Transfer Application No. 139/2016, decided on 21.02.2017); and the decision rendered in the case of Smt.

Mamta Vs. Dharmendra Kumar Chouhan (Transfer Application No. 78/2017, decided on 08.09.2017).

Heard learned counsels for the parties at length and perused the law cited by both the counsels.

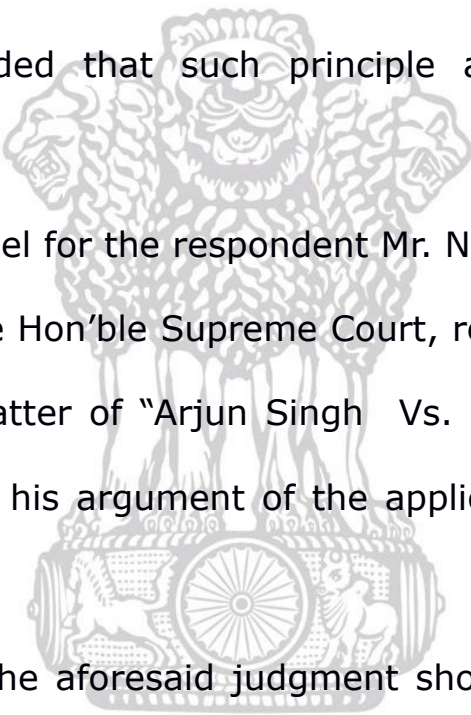
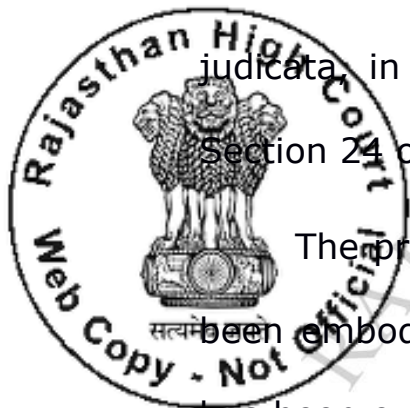
The first and foremost question which has cropped up for consideration is as regards applicability of the principles of res judicata, in the matters relating to transfer of cases filed under Section 24 of the Code of Civil Procedure.

The principles of res judicata, a salutary principle, which has been embodied under Section 11 of the Code of Civil Procedure, has been expanded by the Courts of law and the Hon'ble Supreme Court has expounded that such principle applies to different stages of a suit too.

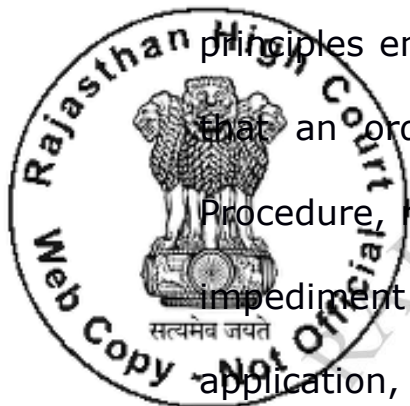
Learned counsel for the respondent Mr. N.L. Joshi relied upon the judgment of the Hon'ble Supreme Court, reported in 1964 AIR (SC) 993 in the matter of "Arjun Singh Vs. Mohindra Kumar & Ors.", in support of his argument of the applicability of principles of res judicata.

A perusal of the aforesaid judgment shows that it does not lend support to the respondent's contention, as it only lays down the basic principles regarding res judicata, propounding that such principle applies to different stages of the proceedings in the same suit also.

In considered opinion of this Court, if the aforesaid judgment of the Hon'ble Supreme Court is understood in its true perspective, the same cannot be held applicable to the application



under Section 24 of the Code of Civil Procedure, as the decision of such application neither decides nor adjudicates the rights of the parties nor does it decide an 'issue' involved in the case. Though an order under Section 24 of the Code of Civil Procedure is a judicial order, yet such adjudication is confined to the facts and grounds existing till such stage. Even, on the basis of the principles enunciated in the judgment aforesaid, it cannot be said that an order passed under Section 24 of the Code of Civil Procedure, rejecting the prayer for transfer of a case would be an impediment or road-block in the way of a party preferring another application, if the fact situation or circumstances changes to his/her detriment.



Learned counsel for the petitioner had cited Full Bench Judgment, reported in AIR 1935 Rangoon 267 in the matter of Dayabhai Jiwandass & Ors. Vs. A.M.M. Murugappa Chettyar, to contend that the principle of res judicata does not apply to the applications under Section 24 of the Code of Civil Procedure, as the same applies to a 'suit' only; whereas, adjudication of the application under Section 24 of the Code does not amount to decision of a 'suit'.

The aforesaid judgment of Full Bench that the adjudication of an application under Section 24 of the Code does not amount to decree for which, principle of res judicata does not apply, does not hold water, in light of the judgment of Hon'ble the Supreme Court, more particularly, 1964 AIR 993 wherein, it has held that the principle of res judicata applies to different stages of the 'suit' and

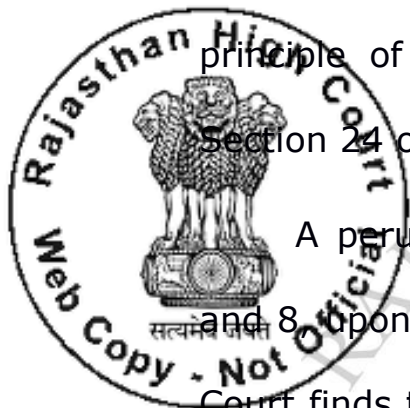
such principle cannot be confined to what has been encapsulated in Section 11 of the Code.

Another judgment cited by Mr. Kala was of Andhra Pradesh High Court, reported in 2006 (1) ALD 642 (A.P.) in the matter of Yeleti Pedaveerraju Vs. Vanka Jayalakshmi; while reading para No. 7 of the judgment aforesaid, learned counsel submitted that principle of res-judicata does not apply to the petitions under Section 24 of the Code of Civil Procedure.

A perusal of the judgment aforesaid, including para Nos. 7 and 8 upon which, great emphasis had been laid by Mr. Kala, this Court finds that this judgment is not at all on the point canvassed by him and the same lends hardly any support to him. A careful analysis of the facts and law enunciated in said case shows that Hon'ble Andhra Pradesh High Court has ruled that a fresh application under Section 24 of the Code is maintainable before the High Court, despite the fact that the District Court in exercise of the powers under Section 24 of the Code has already rejected such application, observing that jurisdiction to transfer a case under Section 24 of the Code is a concurrent jurisdiction.

Having examined the provisions of Section 11 of the Code and the judgment cited by learned counsel for the respondent, and other relevant precedents on the subject, this Court is of the opinion that the principle of res judicata cannot be caged in the confines of Section 11 of CPC. This canon of law is of far more general application and wider generic extension.

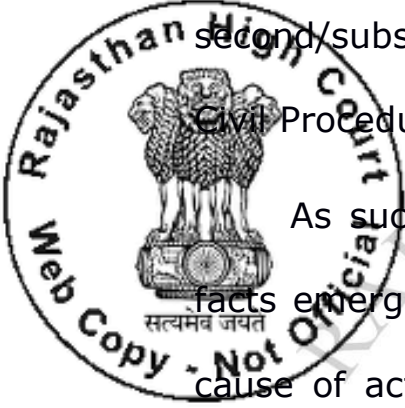
The principle of res judicata applies to a decision of a 'suit' or an 'issue'. However, said decision of an application under Section



24 of the Code cannot be treated to be a decision of an 'issue', as the same is only an adjudication of a request to transfer a case, on the facts pleaded and/or obtaining at the relevant time. The adjudication albeit is a judicial adjudication and not an administrative act simplicitor, yet it does not fall within the precincts of determination of the rights of parties. Hence, a second/subsequent application under Section 24 of the Code of Civil Procedure is not barred.

As such, if subsequent to decision of such application, new facts emerge or circumstances change materially, it gives a fresh cause of action to the parties and the succeeding application, if filed, in light of the changed circumstances, needs to be decided on the facts pleaded therein. If the Court finds that there is a change in circumstance or fact situation, the Court is expected rather obliged to consider such application and decide the same, of course with greater circumspection and caution. This view of the Court is fortified by the judgment of the Hon'ble Supreme Court in the matter of "Arjun Singh Vs. Mohindra Kumar & Ors., reported in AIR 1964 SC 993 wherein, the Hon'ble Supreme Court has held as under:-

"But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the rule of res judicata does not apply it would not follow that on every subsequent day on which the suit stands adjourned for further hearing the petition could be repeated and fresh



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orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of res judicata. Thus, if an application for the adjournment of a suit is rejected, a

subsequent application for the same purpose, even if based on the same facts, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the

distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is application to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the Court would be competent, and would be bound to take those into account and make an order conformably to the facts freshly brought before the Court.”

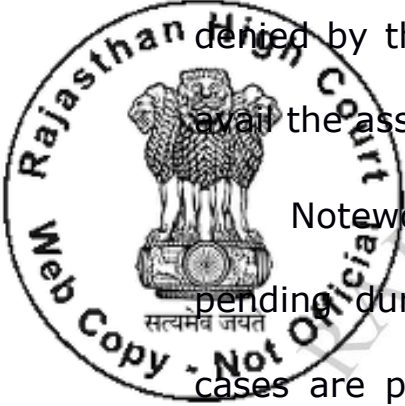
The rival parties have cited various judgments on the merit of the case in support of their contentions that the case at hand be transferred or should not be transferred.



If the facts pleaded in the present case are juxtaposed with the facts obtaining at the time of decision of earlier transfer application, it transpires that the earlier transfer application was moved only because the petitioner residing at Jodhpur was finding it difficult to participate in the proceedings pending before the District Judge, Jaisalmer; transfer on which ground had been denied by this Court, inter alia, observing that she can very well avail the assistance of a lawyer.

Noteworthy it is, that only one case between the parties was pending during the earlier application, whereas presently three cases are pending at Jodhpur filed by the rival parties, with an additional fact that the respondent-husband himself is posted at Jodhpur. The factum of institution of these three cases was neither available nor considered by this Court, while rejecting the earlier transfer application. As such, the fact situation prevailing presently is entirely or substantially different than the one prevailing in 2015, rather there is a sea change in the fact situation for which, the present application for transfer of case deserves to be entertained. A genuine and bona fide application for transfer of the case cannot be gainsaid as another application filed earlier had been nixed by the Court.

Coming to the merits of the petitioner's contention seeking transfer of the case, this Court believes that it would be expeditious and in the interest of justice and convenient to all concerned that all the matters are heard at one place, viz., Jodhpur. Petitioner's going all the way to Jaisalmer to contest the present case for dissolution of marriage, particularly when the



parties are contesting three cases instituted at Jodhpur panders to nobody's interest, except Respondent's ego.

It is not in dispute that the respondent-husband is presently posted at Jodhpur. This Court fails to understand the adamancy of the respondent-husband, as he not only wants to push the petitioner to Jaisalmer for dissolution of marriage, but he himself also wants to travel all the way to Jaisalmer, despite being posted at Jodhpur. The stand taken by the respondent-husband exemplifies nothing, but his inexplicable inflexibility.

It is needless to observe that a case is required to be decided on the facts obtaining therein. Both the learned counsels have cited plethora of judgments to give strength to their cause, however, if the facts of the present case are considered in its entirety coupled with the judgment of this Court, in the case of Smt.Vinita Vs. Himanshu, reported in AIR 2017 Rajasthan 102, wherein most of the judgments on the issue have been dealt with; reached to a conclusion that the application deserves to be allowed.

It will not be out of context to quote relevant excerpts from the judgment of Smt.Vinita Vs. Himanshu (supra), wherein this Court has held as under:-

"It is, therefore, felt imperative to examine and explore the necessary principles governing transfer applications, filed by families, entangled in forensic fights, while invoking powers conferred upon this Court by Section 24 of the Code of Civil Procedure, 1908.

According to this Court, the provisions of Section 24 of the Code provides a great deal of discretion in the court, however, such discretion is required to be exercised on the basis of sound principles. It is true that the discretionary power, more particularly, the jurisdiction in relation to transfer of cases, can not be imprisoned or bound within a straight jacket or cast-iron formula, uniformly applicable to all situations, yet the courts are required to be mindful of the fact that the power to transfer a case must be exercised with due care, caution and circumspection.



Keeping in mind the provisions and mandate of Sections 24 and 25 of the Code, various judicial pronouncements have laid down broad propositions as to what may constitute a ground for transfer of a case. Generally speaking, they are, balance of convenience or inconvenience to the plaintiff or defendant or witnesses; convenience or inconvenience arising out of a particular place of trial, having regard to the nature of evidence or the points involved in the case; issues raised by the parties; and, reasonable apprehension in the mind of a litigant that he might not get justice in the court, where the proceedings are pending, or reasonable apprehension of failure of justice on the basis of a proven bias. These few factors are some of

the aspects, germane in considering the question of transfer of a suit, appeal or other proceedings.

It may be true that distance alone may not be decisive factor but it has its own role while considering the convenience of the parties, particularly, a wife.

Court should focus on the convenience rather than redressal or mitigating against inconvenience.

Convenience itself is a vital factor, to be reckoned while deciding a Transfer Petition. Suffice it to say,

that in the present case, it is not the distance alone for

which this Court finds that it would be convenient for

the petitioner-wife to defend the case in question at

Bhilwara instead of Chittorgarh. There are other

surrounding circumstances stated above, for which

this Court feels it appropriate to transfer the case to

the court at Bhilwara."

In view of the facts obtaining and discussion foregoing, this Court deems it appropriate, expedient and also in the interest of justice to withdraw Case No. 2/2017 (26/2012) titled as "Ranaram Veera Vs. Smt. Payal" from Family Court, Jaisalmer with a view to transfer it to Family Court-First, Jodhpur.

Ordered accordingly.

A copy of this order be sent to the concerned Courts for facilitating transmission of the record.

(DINESH MEHTA), J.