

[2022 LiveLaw \(SC\) 1021](#)

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
SURYA KANT; J., J.K. MAHESHWARI; J.
Transfer Petition(Civil) No.964/2021; 8 December, 2022
PRIYANKA versus SANTOSHKUMAR

Hindu Marriage Act, 1955; Section 9, 26 - Orders giving visitation rights or temporary child custody cannot be passed in a proceedings under Section 9 of the Hindu Marriage Act for restitution of conjugal rights - A separate and independent petition under Section 26 has to be filed.

For Petitioner(s) Mr. Shanthakumar Mahale, Adv. Mr. Rajesh Mahale, AOR Mr. A. Sharma, Adv.

For Respondent(s) Mr. T. V. Ratnam, AOR

ORDER

1. The petitioner (wife) has filed this Transfer Petition seeking transfer of M.O.P. No.541 of 2018 titled "Santoshkumar vs Priyanka" filed by the respondent (husband) under Section 9 of the Hindu Marriage, Act, 1955, seeking Restitution of Conjugal Rights, which is pending before the Family Court at Puducherry.
2. The petitioner (wife) seeks transfer of the above-stated case to the Principal Judge, Family Court, Bengaluru (Karnataka).
3. It is an admitted fact that a son named (Eshan), born out of the wedlock on 04-11-2015, is in the custody of the petitioner (wife). It is obviously difficult for her to leave the minor child and defend herself at a distant place at Puducherry. The said Court, without realizing that the petitioner cannot get fair opportunity to defend herself in the said case for the reasons beyond her control, initially proceeded with the petition for restitution of conjugal rights under Section 9 of the Act and surprisingly it then entertained "Interlocutory Application No.121/2019", which was purportedly to be a petition under Section 26 of the Act, for grant of custody of the child.
4. Both the petitions were entertained ex-parte and then decreed. The respondent (husband) has been granted visitation rights, which includes temporary custody of the child.
5. The plea now taken before us is that since Section 9 Petition of the Act, sought to be transferred by the Petitioner (wife) has already been decided, the instant Transfer Petition has become infructuous.
6. We are not impressed by this contention. It appears to us that the petitioner (wife) has been denied a fair trial only because she could not leave the child at Bangalore and visit Puducherry to contest both the petitions.
7. The respondent (husband) should have filed a separate and independent petition under Section 26 of the Hindu Marriage Act, 1955, instead of securing an Order in the proceedings pending under Section 9 of the Act. The Order dated 03-06-2019 giving visitation rights or temporary custody of the child to the respondent (husband) is, thus, patently illegal.
8. We are constrained to invoke our powers under Article 142 of the Constitution of India and set aside the same.

9. It is also not in dispute that the petitioner (wife) has already filed an application to recall the ex-prate decree passed against her under Section 9 of the Hindu Marriage Act, 1955.
10. Taking into consideration the attending circumstances, I.A. No.121/2019 filed by the respondent (husband) as well as application filed by the petitioner (wife) to recall ex-parte decree passed under Section 9 of the Act, are ordered to be transferred to the Family Court at Bengaluru. However, I.A. No.121/2019 filed by the respondent (husband) shall be registered as a separate petition under Section 26 of the Act and shall be decided on its own merits and in accordance with law, by the Family Court, Bengaluru, without being influenced by any observation made by us in this Order.
11. The respondent (husband) shall be at liberty to move an appropriate application in his petition under Section 26 of the Act for grant of interim visitation rights and any such application if filed by the respondent, shall be decided by the Family Court, Bengaluru, after hearing both the parties, as per its own merits and in accordance with law.
12. Before parting with this matter, we make it clear that we have not expressed any opinion on the merits of the case, except to set aside the order dated 03-06-2019, which in our considered view, could not have been passed by the Family Court at Puducherry by entertaining an interim application.
13. The records be forwarded to the transferee Court forthwith.
14. The Transfer Petition is disposed of in the above terms.

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