

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **C.R.P. 55/2009**

% Date of Decision : 21st April, 2009

MUKAND SWARUP Petitioner
Through: Mr. D.K. Garg, Advocate.

Versus

MANISHA JAIN Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

J U D G M E N T

MANMOHAN, J (Oral)

CM No.5128/2009 (for exemption)

Exemption allowed, subject to all just exceptions.

Accordingly application stands disposed of.

C.R.P. 55/2009 & CM No.5127/2009

1. Present civil revision petition has been filed under Section 115 of Code of Civil Procedure challenging order dated 13th March, 2009 whereby the Guardianship Court has held that it has the territorial jurisdiction to entertain and try respondent's petition.
2. Mr. Garg, learned counsel for petitioner contends that Delhi Court has no territorial jurisdiction to entertain and decide the respondent-wife's petition under Sections 7 and 25 of Guardians

and Wards Act, 1890 for custody of the two minor children of petitioner and respondent. He submits that children are presently residing and studying in Chennai and, therefore, Court at Delhi does not have territorial jurisdiction to entertain and try respondent's petition. In this context, he referred to the following judgments:-

A. ***Sanjay Agarwal v. Smt. Krishna Agarwal*** reported in ***MANU/RH/0249/2008*** wherein it has been held as under:

"12. The learned District Judge, Merta while stating the conclusions as reproduced above, has not referred to the relevant of the provisions dealing with the question of jurisdiction but it is apparent that it is the declaration in Clause (a) of Section 6 of the Act of 1956 about the ordinary desirability of custody of a minor who has not completed 5 years of age to be with the mother that has been imported to hold that for such a child below 5 years in age, the application is maintainable before the Court in whose territorial jurisdiction the mother is residing at. The considerations as adopted by the learned District Judge have been supported by the learned Counsel for the non-petitioner-mother with the same argument that for a child of tender age, the custody has to be with the mother and hence the Court having jurisdiction over the place of residence of mother shall have jurisdiction to deal with the guardianship proceedings relating to such minor. To appreciate the submissions, it shall be apposite at this juncture to refer to the decisions cited by the learned Counsel for the non-petitioner."

B. ***Mrs. Annie Besant v. G. Narayaniah & Anr.*** reported in ***AIR 1914 Privy Council 41*** wherein it has been held as under:-

"By the ninth section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the district. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were ordinarily resident in the district of Chingleput. Further a suit inter partes is not the form of procedure prescribed by the Act for proceedings in a District Court touching the

guardianship of infants. It is true that the suit was subsequently transferred to the High Court under Clause 13 of the Letters Patent, 1865, but the powers of the High Court in dealing with suits so transferred would seem to be confined to powers which but for the transfer might have been exercised by the District Court."

C. ***Smt. Jeewanti Pandey v. Kishan Chandra Pandey***

reported in ***(1981) 4 SCC 517*** wherein it has been held as under:-

"12. In order to give jurisdiction on the ground of "residence", something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word "resides" is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense "residence" is more or less of a permanent character. The expression "resides" means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has fixed home or abode. In Webster's Dictionary, "to reside" has been defined as meaning "to dwell permanently or for any length of time", and words like "dwelling place" or "abode" are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g. for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses are houses of others, his actual and physical habitation is the place where he actually or personally resides."

3. I may mention that today in view of trans-national marriages, the international law, as crystallised by the Hague Conventions of 25th October, 1980 and 19th October, 1996, has

stipulated that in cases of child removal/abduction by one parent, the courts of the country where the child has his or her habitual residence are best placed to make long-term decisions concerning the child's future welfare. In fact, Article 3 of the 1980 Convention defines removal or retention of a child to be wrongful where *"(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention....."*

4. Even though India is not a signatory to the aforesaid Hague Conventions, but more or less a similar test has been adopted by Hon'ble Supreme Court in the case of ***Surinder Kaur v. Harbax Singh*** reported in (**1984**) **3 SCC 698** wherein it has been held:

"The modern theory of Conflict of Laws recognizes and in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.... Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the well-being of the spouses and the welfare of the offspring of marriage."

(emphasis supplied)

5. In the present case, Section 9 of Guardians and Wards Act,

1890 deals with the issue of jurisdiction of the Court. The relevant portion of said Section 9 is reproduced hereinbelow:

9. Court having jurisdiction to entertain application

(1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

(emphasis supplied)

6. In the present case, admitted facts are that after marriage both petitioner and respondent were residing in Delhi and both the minor children born out of the wedlock were studying in Amity International School at Delhi. It was only after the respondent-wife allegedly left the matrimonial home on 11th October, 2007, that both the minor children were admittedly shifted by petitioner-father to Chennai and have since been residing there with their grandmother and Bua.

7. In my opinion, the expression 'ordinarily resides' conveys a place of habitual residence of minor children. Since in the present case, the children resided and studied in Delhi till October, 2007 and the fact that petitioner and respondent are also resident of Delhi, leaves me in no doubt, that both the minor children are ordinarily residents of Delhi.

8. In fact, trial Court has correctly analysed and appreciated the facts and, therefore, I reproduce the relevant observations of trial Court in this context:

"In the case in hand, both the children were admittedly studying in Amity International School at Delhi till October 2007 and were also residing in Delhi. Although, learned counsel for respondent had

submitted that the respondent shifted to Ponta Sahib H.P. but the perusal of order dated 5.5.2008 shows that Ld. Predecessor of this Court had been pleased to observe that the respondent father had disclosed himself to be a resident of property situated at Saket in divorce petition filed by him and the respondent was also served with the notice of complaint filed under Domestic Violence Act at the said address itself. The respondent was deemed to be duly served with the notice of present petition at the address of Saket mentioned in the memo of parties. Be that as it may, it is irrelevant for the purpose on deciding the issue of territorial jurisdiction as to where the respondent father is presently residing as this Court has to consider the ordinary place of residence of the children and not that of the parties. The children in question were residing and studying in Delhi itself till October 2007. This fact has not been denied by the respondent father in the written statement filed on record. No objection regarding the territorial jurisdiction of this Court to try the present petition, has been taken by the respondent father at the first instance by way of written statement. The children may be presently studying in Chennai but it is an admitted fact that neither petitioner nor respondent is residing at Chennai. Both the children are stated to be residing with their grandmother and/or Bua. Thus, their short period of stay at Chennai and getting them admitted in some school at Chennai by the respondent father cannot take away the jurisdiction of this Court when both the children were residing and studying for considerable time in Delhi itself. At the cost of repetition, it is relevant to note that both the parties to the present petition were also residing at Delhi at least till October 2007. Hence, the ordinary place of residence of both the children, for all intent and purpose, shall be considered to be Delhi. The children were being brought up in Delhi and were studying in Delhi. Due to disputes between the parties, the children have been taken away from Delhi and shifted to Chennai just prior to the filing of the present petition. The present petition has been filed in March, 2008. For these reasons, Court is of the view that the objection taken by respondent regarding territorial jurisdiction of this Court, is without any force."

(emphasis supplied)

9. As far as the case law cited by petitioner is concerned, I am of the view that the argument advanced in Rajasthan High Court judgment was entirely different, inasmuch as in that case it was urged that since mother is entitled to custody of minor children it

would be mother's residence that would determine the jurisdiction of the Court. In the present case, the Court below has not upheld its jurisdiction to decide the custody petition on the basis of residence of respondent-mother. As far as the judgment of Apex Court in ***Smt. Jeewanti Pandey's*** case (supra) and the judgment of Privy Council in ***Mrs. Annie Besant's*** case (supra) are concerned, I am of the view that they support the view the trial court has taken, as they emphasise that the word 'residence' means an abode of permanent character or an established home.

10. Since in the present case, children were residents of Delhi and were studying in Delhi prior to starting of matrimonial disputes, I am of the view that temporary shifting or removal of children by petitioner to Chennai cannot make Chennai the established or permanent home of the children. Consequently, I am of the opinion that Delhi Courts have the territorial jurisdiction to entertain and decide the petition filed by respondent-wife under Sections 7 and 25 of Guardians and Wards Act, 1890. Accordingly, present petition and application being devoid of merits are dismissed, but with no order as to costs.

MANMOHAN, J

April 21, 2009

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