

* HIGH COURT OF DELHI : NEW DELHI

FAO. No.336/2009 & CM Nos.15558-59/2009

% Judgment reserved on: 11th November, 2009

Judgment delivered on: 18th November, 2009

Rajat Bhatia
S/o. Sh. R.K. Bhatia
R/o. BN-1, West, Shalimar Bagh
Delhi-110088

....Petitioner
Through: Mr. Harish Malhotra, Sr. Adv. with
Mr. Siddharth Silwal, Adv.

Versus

Roli Bhatia
W/o. SH. Rajat Bhatia
D/o. Sh. Ramesh Arora
C/o. Mr. & Mrs. Pankaj & Madhavi Narulla
Flat No.203, NVS Apartments
Durga Nagar Colony
Somajiguda
Hyderabad, A.P.

And Also At:

26/4, Nawab Yusuf Road
Behind CTO, Panchsheel Colony,
Civil Lines, Allahabad, UP.

And Also At:

C/o. Arora Cotton House
25/52, M.G. Marg, Civil Lines,
Allahabad, U.P.

....Respondent.

Through: Nemo.

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes

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| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

Appellant has filed present appeal against order dated 9th October, 2009 passed by Guardian Judge, vide which it held that it has no territorial jurisdiction to entertain and try the petition.

2. Appellant filed petition under Section 17 and 25 read with Section 6 of the Guardians and Wards Act, 1890 (for short as 'Act') for grant of custody of minor children. In that petition, respondent filed an application under Order 7 Rule 11 of the Code of Civil Procedure read with Section 9 of the Act, praying for dismissal of the petition for want of territorial jurisdiction.

3. Marriage between appellant and respondent was solemnized according to Hindu Rites in 1996 at Delhi and after marriage, the parties were residing at Delhi. Case of appellant is that on 6th January, 2008, respondent left the matrimonial home discretely along with minor children, in the absence of appellant. She also took away the entire jewellery and a sum of Rs.2.5 lacs from the almirah of appellant's mother.

4. In the written statement it is stated by respondent that she and her minor sons were thrown out of the matrimonial home and were rendered homeless. Thus they were forced by the circumstances to leave Delhi permanently and to shift to Hyderabad on 6th January, 2008 and seek refuge in the house of her parents. Since

children are living in Hyderabad along with respondent and maternal grandparents, Delhi Court had no jurisdiction.

5. It has been contended by learned counsel for appellant that it is well established principle of law that it is not the place of residence of the guardian that gives jurisdiction to the Court under Section 9 of the Act but it is the place of ordinary residence of the minor and for which purpose the legislature has designedly used the words “where the minor ordinarily resides”. The words “ordinarily resides” in Section 9 of the Act” does not mean place of mere temporary residence or residence by compulsion. After coming to the conclusion regarding ordinary residence of the minor, the entire facts and circumstances of the case has to be taken into consideration besides leading of evidence. Jurisdiction is the mixed question of law and fact and thus can only be determined after leading of evidence.

6. It is further contended that the fact that on the date of chamber interaction, the children had come to the Court accompanied by their mother and all other relatives of the mother. Under these circumstances, it is abundantly clear that the minds of the children were tortured and they spoke only what they had been instructed by their mother. This aspect has been completely ignored by the trial court. Since respondent has left the matrimonial home discretely along with minor children without informing the appellant, Delhi Court has got jurisdiction to entertain the petition. In support, learned counsel for appellant cited various judgments namely;

1. *Bhagyalakshmi and Another vs. K.N. Narayana Rao, AIR 1983 Madras 9,*
2. *Paul Mohinder Gahun vs. Selina Gahun, 130 (2006) DLT 524,*
3. *Dr. Vinay Samuel Arawattigi vs. The Principal Judge Family Court and Anr., AIR 2007 ALL 13,*
4. *Amrit Pal Singh vs. Jasmit Kaur, 128 (2006) DLT 523 and,*
5. *Konduparthi Venkateswarlu and Ors. vs. Ramavarapu Viroja Nandan and Ors., AIR 1989 Orissa 151.*

7. Short question which arises for consideration is as to whether Delhi Court has the territorial jurisdiction or not. Section 9 of the Act, deals with Court having jurisdiction to entertain application. It reads as follows:

“Section 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.

(2) If the application is with respect to the guardianship of the property of minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides or to a District Court having jurisdiction in a place where he has property.

(3) If an application with respect to the guardianship of the property of a minor is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if in its opinion the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.”

8. In the present case, it cannot be said that the children have been forcefully removed by the respondent from the matrimonial home, which is apparent from the findings of the trial court. Trial court in the impugned order observed;

“During the chamber interaction with the children, the elder child namely Master Pranav told this Court on 10.09.09 that his father i.e. the petitioner herein used to abuse his mother and also used to hit his mother several times in his presence. He also told the Court that his father had thrown tea upon his mother when they used to reside together. He has also told the Court that his father never tried to meet him as well as his younger brother since the time he has been residing at Hyderabad.”

9. It is quite evident that under such circumstances children felt more safe and secure being with their mother-respondent and there can be no question of forcible removal or a residence by compulsion. Both children are studying in school at Hyderabad and are residing with the respondent their mother, continuously w .e .f 06.01.2008 and had no intention of coming back to the house of appellant.

10. There is no dispute about principles of law laid down in the various judgments cited by learned counsel for appellant with regard to the meaning of “ordinarily residing”.

11. It is well settled that for coming to the conclusion regarding ordinary residence of a minor at the time of the presentation of the application for guardianship under Section 9 of the Act, the entire facts and circumstances of each case have to be taken into consideration.

12. It is also well established under law that where the minor is of tender age, the legal guardian would be the mother and place of her residence, on the date of the presentation of the petition, is the place where it is to be construed as the minor “ordinarily resided”.

13. Above findings arrived by the trial court that respondent along with children have already shifted to Hyderabad with no intention to come back to Delhi and both children have already been admitted to a school at Hyderabad where they are studying, does not suffer from any legal infirmities.

14. Under these circumstances, no ambiguity can be found with the impugned order.

15. Present appeal is thus not maintainable and same is hereby dismissed.

+CM Nos.15558-59/2009

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Dismissed as rendered infructuous.

18th November, 2009
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V.B.GUPTA, J.