

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 27TH DAY OF JULY 2015/5TH SRAVANA, 1937

Mat.Appeal.No. 192 of 2015 ()

AGAINST THE ORDER IN IA.NO.1498/13 IN OP.NO.623/13 OF FAMAILY COURT,
THIRUVANANTHAPURAM

APPELLANT/PETITIONER:

SHAIJU.P, AGED 40 YEARS,
S/O.PRABHAKARAN, KOCHUKOLLAARA EDAYAR, THIRUVALLAM
THIRUVANANTHAPURAM, NOW RESIDING AT GURUPUSHPAM
T.C.NO.68/2475 (3), NH BYE-PASS ROAD, THIRUVALLAM
THIRUVANANTHAPURAM.

BY ADVS.SMT.M.A.ZOHRA
SRI.B.SATHIQ

RESPONDENT/COUNTER PETITIONER:

MANJUSHA.M, AGED 33 YEARS
D/O.K.BALAN, ARAVINDAM, POONTHOPE
MANACAUD P.O., THIRUVANANTHAPURAM-695023.

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
27-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Mat.Appeal.No. 192 of 2015 ()

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE-1: TRUE COPY OF OP(G&W)NO.623/13 BEFORE THE FAMILY COURT, .
THIRUVANANTHAPURAM.

ANNEXURE-2: TRUE COPY OF THE I.A.NO.1030/2013 IN OP(G&W)NO.623/2013
BEFORE THE FAMILY COURT, THIRUVANANTHAPURAM.

ANNEXURE-3: COPY OF THE INFORMATION LETTER NO.B32/2014 DATED 4.9.2014.

ANNEXURE-4: COPY OF THE IA.NO.1498/2013 IN OP(G&W)NO.623/13 BEFORE
THE FAMILY COURT, THIRUVANANTHAPURAM

ANNEXURE-5: COPY OF THE JUDGMENT IN OP(FC)NO.317/14 DATED 24.6.14 OF
THIS COURT.

/TRUE COPY/

P.S TO JUDGE

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C.K. ABDUL REHIM & K. RAMAKRISHNAN, JJ.

.....
Mat.A.No.192 of 2015
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Dated this the 27th day of July, 2015.

JUDGMENT

Abdul Rehim,J:

Challenge in the appeal is against the order passed by the Family Court, Thiruvananthapuram in I.A.No.1498/2013 in O.P.No.623/2013, dated 13.8.2014. Parties to the appeal are husband and wife. A minor child namely 'Theertha Shaiju' was born out of the wedlock on 29.6.2009. The marital relationship remain strained. The petitioner herein filed O.P.No.623/2013 before the Family Court seeking custody of the minor child. The respondent entered appearance and filed I.A.No.1498/2013 raising dispute with respect to jurisdiction of that court to entertain the petition and for considering the question of maintainability based on territorial jurisdiction as a preliminary issue. Along with the original petition the appellant filed I.A.No.1030/2013 seeking interim custody of the child. The Family Court ordered arrangement for interim custody of the child with the appellant. The appellant had also approached this court on an earlier occasion by filing O.P(FC)No.317/2014

seeking early disposal of the interim applications. This Court by order dated 24.6.2014 directed the Family Court to dispose of the above applications within a time limit.

2. The Family Court considered I.A.No.1498/2013 and decided the question of territorial jurisdiction, as contemplated under section 9 of the Guardian and Wards Act. It was found that the respondent herein is a native of Uttar Pradesh and the marriage took place at Thiruvananthapuram. After the marriage, she was residing at the matrimonial home at Thiruvananthapuram. But it is found that the respondent had shifted her residence along with the minor child to Rajakumari at Idukki since she got a job there as a teacher, in February, 2009. Consequently her parents also shifted their residence from Uttar Pradesh to Kerala. The Family Court found that the respondent was residing at Idukki from 2009 onwards and the child was also with the respondent. Therefore, the "ordinary place of residence" of the respondent and the child is at Idukki from the day on which she joined service as a teacher in Rajakumari at Idukki. Hence the Family Court found that the 'ordinary place of residence' of the child is at Idukki. Therefore it is found that the Family Court at Idukki alone has jurisdiction

to entertain the original petition. Accordingly it was ordered to return the original petition under Order VII Rule 10(2) of the Code of Civil Procedure for presenting before the proper court.

3. Contention of the appellant is that the Family Court went highly erred in finding that the 'ordinary place of residence' of the child is at Idukki. It is contended that since the matrimonial home of the respondent is at Thiruvananthapuram and since the child was born at Thiruvananthapuram and since the parties were residing together at Thiruvananthapuram, the place of 'ordinary residence' of the child need to be considered as Thiruvananthapuram. It is also contended that the respondent became compelled to be stayed at Rajakumari in Idukki only in connection with her employment and such temporary residence cannot be taken as the ordinary place of residence. It is contended that, during pendency of the original petition before the Family Court, the respondent got transfer from Idukki to Thiruvananthapuram and now she is employed as a teacher in GVHS for Girls, Pettah, Thiruvananthapuram, with effect from 27.6.2013. Upon such transfer the respondent and the minor child are now living at Manacaud, Thiruvananthapuram and the child is studying in UKG at Chinmaya, Manacaud, which is

within the territorial jurisdiction of the Family Court, Thiruvananthapuram, is the contention.

4. Despite service of notice from this court, the respondent has not chosen to enter appearance or to contest the case. Admittedly birth of the child was at Thiruvananthapuram. Marriage between the spouses took place at Thiruvananthapuram. The matrimonial home situates at Thiruvananthapuram. Even assuming that the respondent had shifted her residence to her place of employment at Idukki and had taken the child along with her, whether the said place can be considered as the 'ordinary place of residence' of the child for the purpose of determining the question of territorial jurisdiction under the Guardian and Wards Act, is the question mooted for consideration.

5. We notice that, the meaning of the word "ordinary residence" has been interpreted by this court in various decisions. In the Ruling in **Chandy v. Mary Baneena (1988 (1)KLT 611)** Justice K.T. Thomas (as he was then) observed that, the word "reside" is by no means away from ambiguity as the word is capable of having a variety of meanings according to the circumstances to which it is made applicable and the

context in which it is found. "Residence" has connotation in law. It is not meant to take in places of temporary stay, however long the stay may be. Though a casual residence is also residence in a way, such transitory residence is not meant to be included within the purview of 'residence' in law, unless a particular context justified its inclusion. The residence must answer a qualitative as well as quantitative test and the two elements of factum and animus must concur. Facts and circumstances of each case must be looked into to ascertain whether a person can be said to ordinarily reside at a given place. A permanent residence is the place where a person is expected to be ordinarily found. The place where mere physical presence is found may not necessarily be the place where he ordinarily resides. The acceptable attributes of the expression "resides" in contexts like this are, to make an abode for a considerable time; to dwell permanently or for a length of time; or to have a settled abode for a time etc. It is true that the place of residence at the time of filing of the application under the Act is not decisive to ascertain the place of 'ordinary residence', as it would be easy to move the minor children from one place to another and from one jurisdiction to

another. The expression "ordinarily resides" connote a regularly settled home and not a place of study where the children are obliged to dwell by force of circumstances or compulsion of parent's employment, is the findings.

6. The above decision was followed by a learned Judge of this Court in **Suchitra Madhusoodhanan v. Naveen R. Nair (2013(1) KLT 70)**. It is observed that mere fact that the mother or the father of the child was stationed temporarily at various places in connection with their employment is immaterial for deciding the jurisdiction. Only the court having jurisdiction in the place where the minor ordinarily resides can entertain a petition for guardianship under section 9, is the finding.

7. We notice that a Division Bench of this Court had occasion to consider the issue in **Vasu v. Muralidharan** (2009 (1) KLT 480). It is held that mere fact that the minor child has temporarily gone outside, the ordinary residence by itself will determine the place as the place of residence, is the findings. In a recent decision of this court in **Askar Ali Ghan v. Mohammed Ali Haji (2013 (1) KLT 16)** it is held that for deciding the question of jurisdiction, the personal laws of the

parties are irrelevant. Therefore it is held that the place of residence of the natural guardian cannot be taken as the place of jurisdiction.

8. While analysing the issue based on the factual matrix of the case at hand, we notice that both the spouses were living together at Thiruvananthapuram. Even after they started separate residence due to matrimonial disputes, both of them were residing only at Thiruvananthapuram, till she got employment at Idukki. It is true that as on the date of filing of the application she was residing along with the child at Idukki in connection with her employment. But going by principles as enumerated in the decisions cited above, such temporary or transit residence of the mother for the purpose of employment cannot be taken as the ordinary place of residence. Further, we notice that the respondent as well as the child is now residing at Thiruvananthapuram since she was transferred to a school at Thiruvananthapuram.

Under the above mentioned circumstances, we are of the opinion that the impugned order passed by the Family Court is not sustainable. Hence, we allow the appeal and hereby set aside the impugned order in I.A.No.1498/2013 in

O.P.No.623/2013 of the Family Court, Thiruvananthapuram. We find that O.P.No.623/2013 is maintainable before the Family Court, Thiruvananthapuram. Hence we direct the Family Court to entertain the said original petition and to dispose of the same in accordance with law.

Sd/-
C.K. ABDUL REHIM, JUDGE.

Sd/-
K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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