

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 3RD DAY OF MARCH 2015/12TH PHALGUNA, 1936

OP (FC).No. 13 of 2015 (R)

PETITIONER/RESPONDENT:

REEGAN JAYAKUMAR AGED 33 YEARS
S/O.JAYAKUMAR GANESAN, NO. 8, KAVITHA ILLAM
PALAVAN SATHU KUPPAM, VELLORE - 632 002
NOW RESIDING AT FLAT NO. 10, P3-A, DREAMS NIWERA
SHREE PRAYAGDHAM ROAD, URULIKANCHAN, PUNE - 412 202.

BY ADVS.SRI.BABU PAUL
SRI.NAVEEN THOMAS

RESPONDENT:

SHAMI SHAHUL
D/O.SHAHUL HAMMED, DD SILVER STONE, VADUTHALA P.O.
ERNAKULAM - 682 023.

R1 BY ADV. SMT.R.LEELA

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON
03-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 13 of 2015 (R)

APPENDIX

PETITIONER(S) ' EXHIBITS

EXT.P1: THE TRUE COPY OF ORIGINAL PETITION DATED 21/10/2014 NUMBERED AS O.P.NO. 2007/2014 U/S. 28 OF THE GUARDIAN AND WARDS ACT ON THE FILE OF THE HONOURABLE FAMILY COURT, ERNAKULAM.

EXT.P2: THE TRUE COPY OF INTERIM PETITION DATED 21/10/2014 NUMBERED AS I.A.NO. 3935/2014 IN O.P.NO. 2007/2014 ON THE FILE OF THE HONOUABLE FAMILY COURT, ERNAKULAM.

EXT.P3: THE TRUE COPY OF OBJECTION DATED 19/12/2014 WITH DOCUMENTS IN EXHIBIT P2/I.A.NO. 3935/2014 ON THE FILE OF THE HONOURABLE FAMILY COURT, ERNAKULAM.

EXT.P4: THE TRUE COPY OF JUDGMENT DATED 24/07/2014 IN THE WRIT PETITION NUMBERED AS W.P.(CRIMINAL) NO. 149/2014 OF HONOURABLE HIGH COURT OF KERALA.

RESPONDENT(S) ' EXHIBITS : NIL

//TRUE COPY//

PS TO JUDGE

V.K.MOHANAN & P.D.RAJAN, JJ

.....
O.P(FC) No.13 of 2015
.....

Dated 3rd March, 2015

JUDGMENT

P.D.RAJAN,J

'CR'

This original petition is filed under Article 227 of the Constitution of India by the husband of one Shami Shahul seeking a direction to call for the entire records leading to Exhibit P1 and direct the Family Court, Ernakulam to return Exhibit P1 O.P(Guardian) No.2007/2014 as it has no territorial jurisdiction to entertain the same and grant such other reliefs, which are just and necessary in the interest of justice. The respondent wife filed O.P.No.2007/2014 before Family Court, Ernakulam for permanent custody of the children under Section 28 of the Guardian and Wards Act, 1890.

2. The petitioner here is the father of minor Rishika aged 4 years, who is a permanent resident of Tamil Nadu and now working at Pune, the respondent is his wife who was born and brought up in Chennai and now residing at

Ernakulam from 2012 onwards. Petitioner's marriage with the respondent was registered at Bangalore and thereafter, they resided together there till 2011. In the wedlock, two female children were born to them, but on an understanding between them in the year 2011, the petitioner resided along with the younger daughter, Rishika aged 4 years and respondent resided along with the elder daughter, Reesha, aged 6 years separately. The respondent wife filed O.P.No.2007/2014 before Family Court, Ernakulam for permanent custody of the children under Section 28 of the Guardian and Wards Act, 1890, in which she filed another petition for interim custody of the child. The father of the petitioner, who received notice, appeared before court through counsel and contended that the Family Court, Ernakulam does not have any territorial jurisdiction to entertain Ext.P1 petition. Hence this petition.

3. Section 9 of the Guardians and Wards Act reads as follows:

“ 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 the 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”.

4. According to Section 9 of the Guardian and Wards Act, when an application with respect to guardianship of a minor is concerned, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Therefore the application with respect to the

guardianship must be presented within the jurisdiction of the court where the minor ordinarily resides. It means that Section 9(1) signifies dwelling in a place for some continuous period. "Ordinarily resides" therefore has the meaning to something more than a temporary residence. A close analysis of Section 9(1) explains that the period of such temporary or short residence has some difference with the place where the minor generally resides, which would be residing under special circumstances for a short period than the place where the minor ordinarily resides.

5. Learned counsel appearing for the petitioner contended that the permanent address and residence of the petitioner is at Vellore and the younger child is with him from 26.11.2011. The younger child has never been at Kerala, even according to the respondent, except in the last paragraph mentioned in Ext.P1 for a cause of action, that too, a single line for creating illusory jurisdiction. She is admitted in a school by name, Hakkuna Mathatha at Pune which is a reputed school as stated in Ext.P4 judgment. Hence the Family Court, Ernakulam lacks

jurisdiction to entertain the above petition. He relied on the decision reported in **Prakash V. Padmakumari** (2013(3) KLT SN 18 (case No.16).

6. The learned counsel appearing for the respondent strongly resisted the above contention and contended that petitioner approached this court with unclean hands and without any bonafides. Petitioner has wilfully suppressed the order in I.A.No.3955 of 2014 with ulterior motive to secure an order illegally.

7. Where the parents are living separately and minor is not residing with them, the primary question is which is the place where the minor "ordinarily resides". The words used in Section 9 of the Guardian and Wards Act is "where the minor ordinarily resides". Before answering the above question, we may consider the observation of the privy council with regard to the term, "ordinarily resides". Privy Council had the occasion to discuss the term 'ordinarily resides' in **Mrs. Annie Besant V. Narayaniah** (AIR 1914 PC 41), which was referred in **Ruchi Majoo V. Sanjeev Majoo** case (AIR

2011 SC 1952), paragraph 17 of which reads as follows:

“the infants had been residing in the district of Chingleput in the Madras Presidency. They were given in custody of Mrs. Annie Besant for the purpose of education and were getting their education in England at the University of Oxford. A case was, however, filed in the District Court of Chingleput for the custody where according to the plaintiff the minors had permanently resided. Repeating the plea that the Chingleput Court was competent to entertain the application, their Lordships of the Privy Council observed:

“ The district court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. By the ninth Section of that Act the jurisdiction of the court is confined to infants ordinarily residing in the district.

It is in their Lordship's opinion impossible to hold that the infants who had months previously left India with a view to being educated in England and going to University had acquired their ordinary residence in the district of Chingleput”.

8. A similar position was discussed by the Apex

Court in **Pooja Bahadur V.Uday Bahadur** (AIR 1999 SC 1741), where the children were residing with father at Delhi and mother at Chandigarh. It was held in paragraphs 4 and 5 as follows:

“4. The appeal arises out of an appellate order of the High Court of Punjab and Haryana at Chandigarh, taking the view that custody proceedings by the mother would lie in the Guardian and Wards Court at Delhi and not in a Court at Chandigarh. As the minor children are residing with the father at Delhi no fault can be found with that order.

5. We, therefore, while disposing of this appeal, direct the transfer of custody proceedings from Chandigarh Court to be filed before Guardian and Wards Court, Delhi/District Court, Delhi. The District Court, Delhi shall proceed to deal with this matter at its earliest convenience and may decide the same on its own merits, after hearing the parties in these proceedings”.

9. The word “ordinarily resides” has been discussed by the division Bench of Allahabad High Court in **Jagdish Chandragupta V. Vimla Gupta** (AIR 2003 ALL 317), paragraphs 19 ad 20 read as follows:-

"19. It has been urged that the expression "ordinary resides" as used in Section 9(1) of the Act signifies dwelling in a place for some continuous time. "Ordinarily resides" therefore has to be some thing more than a temporary residence. Even though the period of such temporary residence may be considerable, the place where the minor generally resides and would be expected to reside but for special circumstances must be taken to be the place denoting a place where the minor ordinarily resides. The other aspect which cannot be ignored is that when a person leaves a place where he had been residing as permanent resident for good ie with no intention to come back and goes to some other place to live there, the former place where he used to live ceases to be the ordinary place of residence and the latter place becomes his ordinary place of residence. The question of residence is largely a question of intention. However, in cases of the minor no question of intention can arise. But the court will have to take into consideration all the relevant facts as brought on record to determine the actual place of residence looking the attendant circumstances. The past above for however a long period as may be, can cease to be a place where the minor can be said to be

ordinarily residing depending upon the facts and circumstances of each case and the nature and duration of the residence. The mere fact that a minor is found actually residing at a place at the time of the application is made by itself is not sufficient to determine the jurisdiction.

20. The expression ordinarily resides and residing at the time of the application are not synonymous and stipulate different situations which are not interchanged. The place where the minor ordinarily resides indicates a place where the minor is expected to reside but for the special circumstances. It excludes places to which the minor may be removed at or about the time of the filing of the application for the enforcement of the guardianship and custody of the minor. The place has to be determined by finding out as to whether the minor was ordinarily residing and where such residence would have continued but for the recent removal of the minor to different place”.

10. This court in **Prakash V. Padmakumari** (2013

(3) KLT SN 18 (case No.16) held as follows:-

“in a case of this type where both parents are living separately, the place of residence of the parents can be taken as the place of residence of minors. However, the issue that comes to be decided by

the Family Court is whether the respondent can be said to be an ordinary resident of Vadakara merely for the reason that she left her matrimonial home at Mumbai and is now residing in her paternal house. This question, which should have been decided in the light of the legal principles mentioned in the Pramod Vidyandhar Panicker's case 2013(1) KLT 332), was neither decided nor brought to the attention of the Family Court and instead it has chosen to decide the issue on the assumption that the ordinary residence of the appellant is within Vadakara. As indicated by this Court in this judgment referred to above "mere temporary residence" will not make it "ordinary residence" and something more than that **including** an intention to remain at the place is necessary".

11. Petitioner contended that the respondent in Ext.P1 admitted that she was residing with her parents in a rented flat in D.D.Platinum Planet, Kathrikadavu, Kochi. But in Ext.P4, her present residence is shown as D.D.Silver Storm, Vaduthala. While so, on 11.3.2014, she went to the matrimonial house at Vellore with her elder daughter as directed by the husband. From the above submission, it is clear that now she is residing at

D.D.Silver Storm, Vaduthala which is her present residence. It is her case in Ext.P1 that on 26.7.2011, the younger child was taken from her custody from Kathrikadavu. From the averment, it is found that the petitioner (husband) is a permanent resident of Vellore, Tamil Nadu and the younger child is with him from 26.11.2011 onwards. According to him, the younger child is admitted in a school at Pune. In this situation, when parents are living separately and minor "ordinarily resides" and undergoing her education in another place, we doubt whether the parents residence can be taken as the place of residence of the minors. If the minor child is studying in a school for three years which is far away from the residence of the father and mother, then the question whether fixing a new territorial jurisdiction will cause any hardship to the minor has to be considered by the court.

12. Apex Court in **Ruchi Majoo V. Sanjeev Majoo** (AIR 2011 SC 1952) held as follows:-

"13. Section 9 of the Guardians and Wards Act,

1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a minor. While sub-section (1) of Section 9 identifies the court competent to pass an order for the custody of the persons of the minor, sub-sections (2) & (3) thereof deal with courts that can be approached for guardianship of the property owned by the minor. Section 9(1) alone is, therefore, relevant for our purpose. It says:

“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”.

14. It is evident from a bare reading of the above that the solitary test for determining the jurisdiction of the court under Section 9 of the Act is the 'ordinary residence' of the minor. The expression used is “Where the minor ordinarily resides”. Now whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be a mixed question of law and fact, but unless the jurisdictional facts are admitted it can never be a pure question of law, capable of being answered without an enquiry

into the factual aspects of the controversy. The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes to which we shall presently refer. We may before doing so examine the true purpose of the expression 'ordinarily resident' appearing in Section 9(1) (supra). This expression has been used in different contexts and statutes and has often come up for interpretation. Since liberal interpretation is the first and foremost rule of interpretation, it would be useful to understand the literal meaning of the two words that comprise the expression".

13. It is clear from a bare reading of the above decision that the solitary test for determining the question of jurisdiction of the court under Section 9 of the Act is the ordinary residence of the minor. The expression used under Section 9 of the Act is "whether the minor ordinarily resides". In certain situation when parents are living separately the residence of the parents can be taken as the ordinary residence of the minor. In that situation, which is the place where a minor ordinarily

resides is the primary question of fact. Unless the jurisdictional facts are admitted by a party, it is difficult to answer the question without a proper enquiry into the factual aspect of the controversy. Here, the wife admitted that she was residing with the elder daughter at Katrikadavu, Ernakulam earlier and is presently at Vaduthala, Ernakulam. She admitted that her husband is residing with his minor daughter Rishika and the child is studying in the school, Hakkuna Mathatha at Pune. When the question of jurisdiction is not admitted by the wife, there is a responsibility from the side of the Family court to ascertain the true purpose of the expression "ordinarily resides" as mentioned under Section 9(1) of the Guardian and Wards Act, 1890. Therefore, a liberal interpretation of that point would be useful to understand the meaning of the word "ordinarily resides". Having regard to the object of the above section, a proper enquiry is necessary. A person resides in a place, it may be his permanent or temporary residence. When he chose a particular place as his ordinary residence, then only that can be

considered as the ordinary residence.

14. The battle for custody of the minor was started by the mother after minor Rishika was admitted in a school at Pune, where she ordinarily resides there for her education. There is no allegation of denying access of minor by her mother and censoring communication depriving mother's care, love and affection. While considering custody of the minor, the welfare of the child is the paramount consideration for the court. In the light of the above decisions of the Privy Council in **Mrs. Annie Besant V. Narayaniah** (AIR 1914 PC 41), and apex court in **Pooja Bahadur V.Uday Bahadur** (AIR 1999 SC 1741) & **Ruchi Majoo V. Sanjeev Majoo** (AIR 2011 SC 1952), we are of the view that when parents are residing separately in two different places and the minor is studying in a school at Pune and resides there, the District Court, Pune where the minor ordinarily resides will get the jurisdiction according to the word "ordinarily resides". For ascertaining that jurisdiction, the Family Court can verify the School Certificate, extract of

Admission Register and other relevant documents to decide the disputed question of fact for identifying the place where "ordinarily resides". At the same time, from the statements and pleadings of the parties, if it is not found that the question "ordinarily resides" was not finally settled by the Family Court, the same can be decided by the Family court after verifying the evidence of the parties as mentioned above. For that, parties have to be given opportunity to adduce evidence in support of their respective contention. In the light of the above observation, we direct Family Court, Ernakulam to conduct enquiry with regard to the above fact and dispose of the matter as per law.

The original petition is disposed of as above.

V.K.MOHANAN, JUDGE

P.D.RAJAN, JUDGE

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