

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CR No. 6438 of 2014 (O&M)
Date of Decision : 29.05.2015

Kamal Maini

....Petitioner

Versus

Natasha @ Mona and others

...Respondents

CORAM: HON'BLE MR. JUSTICE R.P. NAGRATH

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

Present: Mr. Arun Jain, Senior Advocate
with Mr. K.S. Sidhu, Advocate
for the petitioner.

Mr. Munish Gupta, Advocate
for the respondents.

R.P. Nagrath, J.

The petitioner has applied under Section 25 of the Guardian and Wards Act, 1890 (hereinafter referred to as 'the Act of 1890') to the Guardian Judge, Ludhiana seeking a direction to the respondents to hand over custody of the minor child, namely; Vivan Maini, who was about 6½ years old at the time of filing of the said petition. Respondent no. 1 is the wife of petitioner and respondents no. 2 and 3, the parents and respondent no. 4 is the brother of respondent no. 1.

2. The respondents appeared and applied to the Guardian Judge under Section 9 (1) of the Act of 1890 for return of the petition on the ground of want of territorial jurisdiction. It was stated that petitioner and his family members turned out respondent no. 1 alongwith the minor child on 15.07.2014 by giving her severe beating as she was not able to meet the

demand of ₹ 10 lacs. She had no shelter and thus came to her parents' house at Hoshiarpur with the minor child. The child was admitted in Toddlers Home Study Hall School, Hoshiarpur and presently residing with the mother at Hoshiarpur. Reply (Annexure P-4) to the said application was filed by the petitioner. The learned Guardian Judge vide order dated 08.09.2014 allowed the application of respondents and transferred the petition to District Court, Hoshiarpur where the parties were directed to appear on 30.09.2014 for receiving further orders.

3. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India seeking to set aside the order dated 08.09.2014 passed by the Guardian Judge, Ludhiana.

4. I have heard learned senior counsel for the petitioner, learned counsel for the respondents and perused the paper-book.

5. Learned senior counsel for the petitioner vehemently contended that the minor child can be said to be ordinarily residing at Ludhiana, and simply because the child was illegally removed from the custody of petitioner on 15.07.2014 by the wife in his absence cannot oust the jurisdiction of Guardian Court, Ludhiana to entertain and try the petition. The marriage of petitioner and respondent no. 1 was solemnized on 10.12.2006 at Hoshiarpur. The child was born on 19.01.2008. The child has been residing at Ludhiana and getting education there. After narrating various incidents, it was stated in paragraph no. 6 of the petition (Annexure P-1) filed before the Guardian Judge that

parents of petitioner were at Delhi on 15.07.2014. The petitioner left for his shop at about 06.30 p.m. while respondent no. 1 and the child were at home. At about 07.45 p.m. the petitioner received a telephonic call on his mobile phone that respondent no. 1 is going to Hoshiarpur alongwith respondents no. 2 to 4 and the minor son. She had locked the house and gave the keys to *Chowkidar* of the colony. The petitioner rang up respondent no. 1 many a times but she did not respond and switched off her mobile phone. Father of the petitioner also returned from Delhi at 09.00 p.m. It was learnt that respondents no. 2 to 4 had come from Hoshiarpur to take away respondent no. 1 and forcibly removed the minor child from custody of petitioner without his consent and knowledge. The petition under Section 25 of the Act of 1890 was presented on 24.07.2014.

6. It was stated that the child was studying at Jesus Sacred Heart School, Ludhiana where he studied in the Nursery, LKG and UKG. The child also performed extremely well in extra curricular activities. Due to the outstanding performance, the school authorities published his photograph highlighting the creative work of the child in the school prospectus. The voluminous record of the Jesus Sacred Heart School, Ludhiana was attached with the petition with regard to studies of the child in the school, which issued various certificates of merit. It was asserted in the reply to the application under Section 9(1) of the Act of 1890 that the respondents received summons in the petition from the Guardian Court on 06.08.2014 and the child was admitted in Toddlers Home Study Hall School, Hoshiarpur

thereafter on 09.08.2014, which is affiliated to Punjab School Education Board whereas Jesus Sacred Heart School is affiliated to CBSE.

7. Having given my thoughtful consideration to the contentions raised by learned counsel for the parties, I am of the view that the instant petition does not deserve to be accepted. The respondents had earlier filed an application for transfer of the case from Guardian Court, Ludhiana to Hoshiarpur by moving transfer application TA No. 456 of 2014 in this Court. This Court disposed of the said application on 13.08.2014 with the observations that there is no quarrel with the proposition of law that the proceedings can be instituted at a place where minor ordinarily resides. Therefore, instead of getting the application filed by the husband, the respondents, if so advised, could file application before Ludhiana Court for dismissing the said petition on the ground of lack of jurisdiction. This is how the application under Section 9(1) of the Act of 1890 was filed before the Guardian Court, Ludhiana.

8. In **Smt. Sunita Jain and others vs. Mittar Sain Jain and another, 2003 (2) RCR (Civil) 176**, the minors alongwith the mother had been residing with the petitioners (grand parents) till September, 1990, when the mother alongwith children left Bhiwani and the children started living at Rohtak with their adoptive father. The petition for custody of the children was instituted in December, 1990. The Additional District Judge, Bhiwani held that the place of ordinary residence of the children would be Bhiwani and not Rohtak as she left Bhiwani

alongwith children in September, 1990. It was held that the territorial jurisdiction is to be determined at the time when the mother left Bhiwani and not the fact that the minor were presently living at Rohtak with their adoptive father. It was held by this Court as under:-

“6. *Having heard the learned counsel for the parties and perusing the impugned order, I am of the considered view that once the petitioner has made it absolutely clear to shift her abode to Rohtak and the custody of the children was with her, it cannot be concluded that the minors were living at Bhiwani at the time of filing of the petition in December, 1990. It has also become clear that the minors have been given in custody to the brother of petitioner No. 1 and to one Jainender Kumar who is stated to be the new husband of petitioner No. 1 to whom she was married after the death of her earlier husband Sandeep Jain. Therefore, for all intents and purposes, the minors were in custody of the petitioner and would be deemed to be residing at Rohtak. **Even otherwise, the paramount consideration for deciding the territorial jurisdiction namely welfare of the children would also lean towards taking the view that instead of minors travelling from Rohtak to Bhiwani, it would be appropriate if these proceedings are initiated in the***

courts at Rohtak. It may not be for the welfare of the minors to travel to Bhiwani because in order to ascertain the intention of the children, the courts have to summon the minors at an appropriate stage to the proceedings. Therefore, the order passed by the Additional District Judge, Bhiwani, is liable to be set aside and it is held the Courts, at Bhiwani would not have any territorial jurisdiction to proceed with the application of the respondent for the custody of the children. (Emphasis supplied)

Therefore, the petition was allowed and the District Judge, Bhiwani was directed to return the petition filed by the respondents so that it could be presented before the court of competent jurisdiction at Rohtak.

9. The judgment of this Court in ***Smt. Sunita Jain's case (supra)*** would squarely apply to the facts of present case and simply because the petition for custody of the child in this case was filed just within 10 days of respondent no. 1 leaving the matrimonial home alongwith minor child, would not in any way effect the principle for deciding the territorial jurisdiction. This Court clearly held in ***Smt. Sunita Jain's case (supra)*** that the paramount consideration for deciding the territorial jurisdiction namely welfare of the children would lean towards taking the view that instead of minors travelling from Rohtak to Bhiwani, it would be appropriate if these proceedings are initiated in the

Courts at Rohtak.

10. Even if at any stretch both the places i.e. Ludhiana and Hoshiarpur are considered to be the places where the child can be said to be ordinarily residing, the appropriate course in the present case would have been to institute the petition at Hoshiarpur and if it was filed at Ludhiana to transfer the same to the Court at Hoshiarpur where the child was presently living with the mother at her parents place. The relevant provision dealing with Section 9 of the Act of 1890 reads as under:-

"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 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."*

11. In **Smt. Anju Bala vs. Vipin Oberoi, 2003 (4) RCR (Civil) 835**, the husband filed a petition for custody of the child in the Court of Guardian Judge at Jagadhri. The mother of the child filed the transfer application in this Court under Section 24 of the Code of Civil Procedure (CPC). It was not in dispute in that case that the minor was presently residing with the mother at Faridabad and in view of the above and the mandatory provisions of Section 9 of the Act of 1890, it was held by this Court that the Courts at Jagadhri do not have jurisdiction to entertain the petition and such a petition was maintainable only in the Court at Faridabad. Therefore, it was directed by this Court that the Guardian Judge, Jagadhri would return the petition filed by the father for presentation to a Court of competent jurisdiction at Faridabad.

12. Hon'ble Supreme Court in **Ruchi Majoo vs. Sanjeev Majoo, 2011 (6) SCC 479** observed as under:-

“24. 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.

25. *The factual aspects relevant to the question of jurisdiction are not admitted in the instant case. There are serious disputes on those aspects to which we shall presently refer.*

26. *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 the foremost rule of interpretation it would be useful to understand the literal meaning of the two words that comprise the expression. The word 'ordinary' has been defined by the Black's Law Dictionary as follows:*

"Ordinary (Adj.) :Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances; belonging to, exercised by, or characteristic of, the normal or average individual."

The word 'reside' has been explained similarly as under:

"Reside: live, dwell, abide, sojourn, stay,

remain, lodge. **(Western- Knapp Engineering Co. V. Gillbank, C.C.A. Cal., 129 F2d 135, 136).** To settle oneself or a thing in a place, to be stationed, to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile; specifically, to be in residence, to have an abiding place, to be present as an element, to inhere as quality, to be vested as a right. **(State ex rel. Bowden v. Jensen Mo., 359 S.W.2d 343, 349.)"**

27. In Webster's dictionary also the word 'reside' finds a similar meaning, which may be gainfully extracted:

"1. To dwell for a considerable time; to make one's home; live. 2. To exist as an attribute or quality with in. 3. To be vested: with in"

28. xx xx xx xx xx

29. In **Jagir Kaur and Anr. v. Jaswant Singh AIR 1963 SC 1521**, this Court was dealing with a case under Section 488 Cr.P.C. and the question of jurisdiction of the Court to entertain a petition for maintenance. The Court noticed a near unanimity of opinion as to what is meant by the use of the word "resides" appearing

in the provision and held that "resides" implied something more than a flying visit to, or casual stay at a particular place. The legal position was summed up in the following words:

"8.....Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases there on, we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case....."

30. In **Kuldip Nayar & Ors. v. Union of India & Ors. 2006 (7) SCC 1**, the expression "ordinary residence" as used in the Representation of People Act, 1950 fell for interpretation. This Court observed:

*"243. Lexicon refers to **Cicutti v. Suffolk County Council (1980) 3 All ER 689** to denote that the word "ordinarily" is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is to be found "ordinarily", in the sense of usually or*

habitually and with some degree of continuity, but whether the quality of residence is "ordinary" and general, rather than merely for some special or limited purpose.

244. The words "ordinarily" and "resident" have been used together in other statutory provisions as well and as per Law Lexicon they have been construed as not to require that the person should be one who is always resident or carries on business in the particular place.

245. The expression coined by joining the two words has to be interpreted with reference to the point of time requisite for the purposes of the provision, in the case of Section 20 of the RP Act, 1950 it being the date on which a person seeks to be registered as an elector in a particular constituency.

246. Thus, residence is a concept that may also be transitory. Even when qualified by the word "ordinarily" the word "resident" would not result in a construction having the effect of a requirement of the person using a particular place for dwelling always

or on permanent uninterrupted basis. Thus understood, even the requirement of a person being "ordinarily resident" at a particular place is incapable of ensuring nexus between him and the place in question."

13. It will not be out of place to mention that the question of jurisdiction on such an issue is mixed question of law and facts but in view of the admitted version of the parties that the child has been taken away by the mother and she is residing with her parents at Hoshiarpur where of course after the receipt of summons in the petition by the respondents the child was admitted in the school. The question whether it is in the welfare of the child to stay at Ludhiana with his father or with the mother at Hoshiarpur is to be determined on merits but the aforesaid factual position would be sufficient to determine the territorial jurisdiction of the case to entertain and decide the petition under Section 25 of the Act of 1890. Welfare of the child and other circumstances of course would be depending upon the ultimate merits of the case.

14. Learned senior counsel for the petitioner on the other hand referred to the judgment of this Court in **Prashant Chanana vs. Seema @ Priya, 2010 (1) RCR (Civil) 400.** Residence of the father was at Chandigarh where the petition for custody of the child was filed. The child, however, was staying with sister of the husband at Lucknow where it was studying. In the facts and circumstances of the said case, this Court held as

under:-

“12. Section 9 (1) makes it clear that it is the ordinary place of residence of minor which determines the jurisdiction of a particular Court to entertain an application for guardianship of the minor. Such jurisdiction cannot be taken away by temporary residence elsewhere at the date of presentation of the challan. The term 'residence' is an elastic word of which an exhaustive definition cannot be given. It is differently construed according to the purpose for which enquiry is made into meaning of the term. The sense in which it should be used is controlled by reference to the objector. A reasonable meaning of 'residence' would mean dwelling in a place for some continuous time. The word 'ordinarily resides' in sub Section 1 means mere a temporary residence, even though, it will be of such temporary residence may be considerable. Word ordinarily resides would mean a regular, normal, a settled home or a regular place of abode, which can be distinguishable from a temporary or a forced stay. If a minor child has been removed either by stealth or by compulsion and kept at a different place than the house of a natural born, the same cannot be said to be a place where the child 'ordinarily resides.' The respondent has in her

petition for the custody of the child specifically mentioned and actually admitted that the child has been taken to Lucknow. She also explained the circumstances that the child had been snatched from her when she was residing at Mohali, where the couple had shifted after three years of marriage. In the petition for custody of the child, the address of the petitioner has been shown to be House No.1433, Sector 34-C, Chandigarh i.e., the house of his parents and another address of Sector 38-D. If the averments in the petition are carefully perused, it is apparent that the place where the child at present is staying is not a permanent place of residence of the child. It appears to be temporary and transitory. It is a place where the child has been sent to someone who is not the natural guardian. The child cannot be said to be ordinarily residing at Lucknow, especially when the respondent claims that child has been forcibly and against her wishes sent to a near relation of her husband. Even if it is presumed that the child had been sent with the consent of the respondent to the house of sister of the petitioner at Lucknow, on account of she being issueless lady, the same will not tantamount to a conclusion that the temporary

place of residence would be a place where the child ordinarily resides. The child is said to ordinarily reside at a place where he is expected to be ordinarily found with his natural guardian but when against the wishes of one of the parents, the child has been sent to a person related, it will not tantamount to a presumption that the place where the child 'ordinarily resides' has been shifted. Generally, the matrimonial house or the house of the parents is considered the family residence of a minor unless and until there are extra ordinary reasons to arrive at a conclusion that the place of ordinary residence has been shifted. The circumstances under which a child has been compelled to reside at another place cannot be said to be a regular, normal or settled home. It cannot be laid down as a hard and fast rule that a minor child will be deemed to be permanently residing at a place where there is matrimonial home but depending on the circumstances, under which he has been removed from the matrimonial home will have to be considered to arrive at a conclusion whether the place where he has been shifted can be said to be a place where he ordinarily resides for the purpose of Section 9 of the Guardians and Wards

Act.”

15. The aforesaid case was based on its peculiar facts where child was sent to Lucknow to the sister of husband but in the present case the child is staying with the mother, one of the natural guardian, and the child is living with the mother with the intent of residing there at Hoshiarpur and therefore, the aforesaid judgment cannot provide any help to the petitioner.

16. **Hariom vs. Sunil, 2011 (8) RCR (Civil) 639**, a judgment of Rajasthan High Court, would also not provide any help to the petitioner because it was found that Court at Nohar where the child was taken by the maternal grandmother from the custody of natural guardian has jurisdiction to entertain the application as Nohar was the ordinary place of the child. But in this case the mother is one of the natural guardian.

17. **Mukand Swarup vs. Manisha Jain, 2010 (7) RCR (Civil) 2826**, a judgment of Delhi High Court, would not support the petitioner's case because father of the children had shifted the children to Chennai where they had been residing with their grandmother and *Bua*. Such a temporary shifting of the children would not confer any territorial jurisdiction to the Courts at Chennai to entertain and try the petition. It was admitted in the said case that after the marriage both the 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. In the peculiar facts of that case, it was held that living of the children with the grandmother and *Bua* would not be ordinary residence of the children as both the

parents were residing at Delhi.

18. **Mrs. Elizabeth Dinshaw vs. Arvand M. Dinshaw and another, 1987 (1) SCC 42** was a case where there was an illegal abduction of the child from another country to another. That was a case in which the Court in Michigan (USA) had allowed the petition of the wife for divorce and granted visitation right to the father. Taking advantage of the weekend visitation right the husband came to India without informing the Court at Michigan. In that connection it was held by Hon'ble Supreme Court that child's presence in India is the result of an illegal act of abduction and the father cannot claim any advantage by stating that he has already put the child in some school in Pune. The dispute in that case arose out of a habeas corpus petition filed by the wife in the Hon'ble Supreme Court of India. So that case is absolutely in a different context.

19. So even if both the places i.e. Hoshiarpur and Ludhiana where the parents are separately residing are considered to be the places of ordinary residence of child, it would be in the fitness of things that the case should be tried by the Court of competent jurisdiction where the child is presently residing with the mother. Since the operation of impugned order was stayed by a coordinate Bench of this Court on 22.9.2014, the matter was kept on pending before the Court at Hoshiarpur and interim order was passed by the Guardian Judge at Hoshiarpur on 22.12.2014 granting visitation right to the father in the premises of Toddlers Home Study Hall School, Hoshiarpur.

20. Keeping in view the aforesaid discussion, I find that

the petition under Section 25 of the Act of 1890 should be tried by the Court at Hoshiarpur. If that be the situation, the Guardian Judge at Ludhiana could not have passed the impugned order transferring the case to Hoshiarpur but rather to return the petition to be presented before the Guardian Judge at Hoshiarpur. But that would not make much difference as this Court would rectify the defect, if any, in exercise of its revisional jurisdiction under Article 227 of the Constitution of India . The petition pending before the Guardian Judge at Ludhiana would stand transferred to the Court at Hoshiarpur. The parties are directed to appear before the Civil Judge (Senior Division), Hoshiarpur on 03.7.2015. The Court of Civil Judge (Senior Division)/Guardian Judge where the matter is presently pending is directed to send the file of the case to the transferee Court well before the date fixed.

21. With the aforesaid directions, the instant petition would stand dismissed.

May 29, 2015
jk

(R.P. NAGRATH)
JUDGE