

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.400 OF 2015
along with
CIVIL APPLICATION NO.606 OF 2015
in
APPEAL FROM ORDER NO.400 OF 2015**

Salim Ibrahim Mhate .. Appellant/Applicant

Vs.

Nazaneen Salim Mhate & Anr. .. Respondents

Mr.Hardik Vyas for Appellant/Applicant.

Mr.Faizal Khan F. Pathan for Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 28th September 2016

P.C.

. By this appeal, the appellant (original applicant in Misc.Application No.408 of 2013) has impugned the order dated 11th December 2014 passed by the learned District Judge, Pune allowing the application filed by the respondent no.1 under Section 9A of the Code of Civil Procedure, 1908 and holding that the trial Court has no territorial jurisdiction to try, entertain and decide the application. By the said order, the learned District Judge, Pune directed the learned trial Judge to return the papers of the application to the applicant for filing of an application before the learned District Judge at Kolhapur.

2. Learned counsel appearing for the appellant submits that the child was staying with the appellant-father since the date of his birth from June 2006 till May 2012. In the month of May 2012, the child was

shifted by his mother to Kolhapur. He submits that the child was all throughout staying with the appellant at Lonavala, Dist. Pune and the trial Court at Pune thus has exclusive jurisdiction to try, entertain and decide the application filed by the appellant for custody of his child under Section 25 of the Guardians and Wards Act, 1890.

3. It is submitted by the learned counsel for the appellant that under Section 9 of the Guardians and Wards Act, 1890, the District Court shall have jurisdiction where the minor ordinarily resides. He submits that the respondent no.1-mother had taken the child to Kolhapur temporarily in the month of May 2012. He submits that a temporary residence at a particular place or residence by compulsion at a place however long, cannot be treated as the place of ordinary residence. In support of this submission, learned counsel for the appellant placed reliance on the judgment of the Orissa High Court in the case of **Konduparthi Venkateswarlu & Ors. Vs. Ramavarapu Viroja Nandan & Ors.**, reported in **AIR 1989 Ori. 151**.

4. Learned counsel for the appellant submits that the application under Section 9A of the Code of Civil Procedure, 1908 has been made belatedly by the respondent no.1 before the District Court at Pune.

5. Learned counsel appearing for the respondents, on the other hand, submits that it is an admitted position that the child was shifted to Kolhapur one year prior to the date of making the application by the appellant. He submits that due to various disputes between the appellant and the respondent no.1, the respondent no.1 had shifted the child to

Kolhapur where the respondent no.1 has been staying with her father. Learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Ruchi Majoo Vs. Sanjeev Majoo*** decided on 13th May 2011 in Civil Appeal No.4435 of 2011. He also invited my attention to the order passed by this Court on 5th May 2016 and would submit that the appellant had submitted to the jurisdiction to the District Court, Kolhapur.

6. It is not in dispute that the child has been staying at Kolhapur since one year prior to the date of making the application by the appellant under Section 25 of the Guardians and Wards Act, 1890. For what reason the child was shifted to Kolhapur by the respondent no.1 can be considered by the District Court, Kolhapur which would hear the application under Section 25 of the Guardians and Wards Act, 1890 made by the appellant on the premise that the child has been staying last more than a year at Kolhapur.

7. A perusal of the order passed by this Court on 5th May 2016 clearly indicates that the the appellant had submitted to the jurisdiction to the District Court, Kolhapur for entertaining the Misc.Application No.408 of 2013 filed by the appellant. By an order dated 5th May 2016, this Court recorded the statement made by the learned counsel for the appellant and had directed the office to forward a copy of the said order to the Family Court at Pune to enable the Court to transfer the papers and proceedings of the Misc.Application No.408 of 2013 to the Court of learned District Judge, Kolhapur. It appears that the direction was issued by this Court wrongly to transfer the papers and proceedings from the Family Court, Pune to District Court, Kolhapur instead of District

Court, Pune to District Court, Kolhapur. In view of the statement made by the learned counsel for the appellant on 5th May 2016, I am not inclined to consider the request made by the learned counsel for the appellant to entertain this appeal from order.

8. Be that as it may, the distance between the Pune and Kolhapur is not much. The child is admittedly staying at Kolhapur for last more than one year. In so far as the judgment of the Orissa High Court in the case of **Konduparthi Venkateswarlu & Ors. (supra)** relied upon by the learned counsel for the appellant and the judgment of the of the Supreme Court in the case of **Ruchi Majoo Vs. Sanjeev Majoo (supra)** relied upon by the learned counsel for the respondents are concerned, both the Courts have held that the issue as to whether the minor ordinarily resides is a mixed question of fact and law. In view of the reasons recorded aforesaid, I am not inclined to interfere with the order passed by the learned District Judge, Pune.

9. I therefore pass the following order:-

- (i) Appeal from order is disposed of in aforesaid terms;
- (ii) Learned District Judge, Pune is directed to return the papers of the Misc. Application No.408 of 2013 to the appellant within one week from the date of communication of this order for presentation before the learned District Court, Kolhapur;
- (iii) Both the parties are directed to appear before the learned District Judge, Kolhapur on 17th October 2016;
- (iv) Both the parties are directed to co-operate with each other and with the learned District Judge, Kolhapur in expeditious disposal of the Misc. Application No.408 of 2013 filed by the appellant;

- (v) Learned District Judge, Kolhapur shall not grant unnecessary adjournment to any of the parties and shall make an endeavour to dispose of the Misc.Application No.408 of 2013 within three months from the date of communication of this order;
- (vi) In view of disposal of the appeal, civil application does not survive and is disposed of.
- (vii) There shall be no order as to costs.

10. Parties as well as the learned District Judge, Pune to act on the authenticated copy of this order.

R.D. DHANUKA, J.