



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Order Reserved on :01.09.2016

Order Delivered on:29.11.2016

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THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.M.A(MD) No.885 of 2016

1.Mrs.Ritu Mehta

2.Mr.Vimal Kumar Jain

: Appellants/Respondents

Vs.

Prag N.Mehta

: Respondent/Petitioner

Prayer : Civil Miscellaneous Appeal is filed under Section 47 of Guardians and Wards Act, to set aside the ex-parte order and decree passed by the learned District Judge, Sivagangai, in G.W.O.P.No.24 of 2014, dated 11.06.2015.

For Appellants

: Mr.Yuvraj Sanant
for Mr.K.K.Kannan

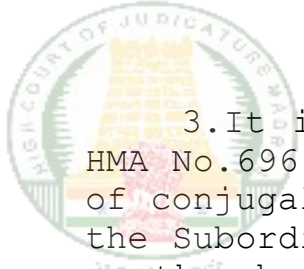
For Respondent

: Mrs.Hema Sampath
Senior counsel
for Mr.K.S.Muthu

JUDGMENT

This appeal is directed against the judgment and decree passed by the District Judge, Sivagangai, in GWOP No.24 of 2015, dated 11.06.2015.

2.The un-controverted facts are that the marriage between the first appellant and the respondent was solemnised on 06.12.2004; out of the lawful wedlock, they were blessed with a male child on 28.10.2007. The respondent herein filed HCP No.488 of 2014 before this court alleging that on 04.08.2013, the first appellant herein took the child to her parents house at Ajmeer. The HCP was closed on 28.08.2014 observing that there was no illegal detention. Thereafter, the respondent filed GWOP No.24 of 2014 before the District Court, Sivagangai, seeking for custody of the child. The appellants received summons and they appeared through an Advocate. The matter was referred to the Lok Adalath to explore the possibility of settlement, but the appellants did not appear before the Lok Adalath. Subsequently, due to non-filing of counter, they were set ex-parte on 30.04.2015 and an exparte decree came to be passed on 11.06.2015.



3.It is also not in dispute that the appellants herein filed HMA No.696 of 2014 before the Family Court, Ajmer, for restitution of conjugal rights, while the respondent herein filed HMOP before the Subordinate Judge, Devakottai, for the very same relief. Based on the decree passed in GWOP No.24 of 2014, the respondent filed an application in I.A.No.84 of 2015 seeking police protection to get custody of the minor child, which was allowed on 23.07.2015. Only then, this appeal is filed challenging the order passed in GWOP.

4.The appellants have challenged the judgment and decree on the sole ground that the District Judge, Sivagangai, has no territorial jurisdiction to entertain the original petition. In other words, the appellants herein have not questioned the competency of the father to have custody of his son. So, the only question arises for consideration in this appeal is as to whether the District Judge, Sivagangai, has jurisdiction to entertain the original petition.

5.Heard Mr.Yuvaraj Sanant, learned counsel appearing for the appellants and Mrs.Hema Sampath, learned Senior counsel appearing for the respondent and perused the materials available on record.

6.Learned counsel for the appellants would submit that the first appellant along with her minor son is residing in Ajmer in the State of Rajasthan for the past few years, so, the ordinary residence of the child should be construed as the place, where the place the child is now residing. Further, HCP filed by the respondent was dismissed on 28.08.2014 by observing that the child is in Ajmer with his mother. Hence, the District Court has no jurisdiction to entertain the petition instituted seeking custody of the minor. Reliance is placed on the following judgments:-

1.The unreported judgment made in CM(M)No.1530 of 2009, dated 26.07.2011 [Arunish Sood vs. Kumar Sood & another].

2.Unreported judgment of this court made in CRP (PD)No.453 of 2010, dated 11.11.2011 [C.Narasaraju vs, S.Ramesh]

3.Unreported judgment of the Rajasthan High court in the case of Sanjay Agarwal vs. Krishna Agarwal.

4.(1013)25 MLJ 661 [Mrs.Annie Besant vs. G.Narayaniah]

5.Unreported Division Bench judgment of the Rajasthan High court made in OP(FC) No.13 of 2015(R), dated 03.03.2015 [Reegan Jayakumar vs. Shami Shahul];



6.AIR 1978 ANDHRA PRADESH 13[Harihar Pershad Jaiswal vs. Suresh Jaiswal & others]

7.AIR 2011 SUPREME COURT 1952 [Ruchi Majoo vs. Sanjeev Majoo]

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8.AIR 2011 SUPREME COURT 1969 [Allahabad High School Society, Allahabad & another Vs. State of U.P & Others.

7.First, I would like to refer the judgment relied on by the learned counsel appearing for the appellants. In the first decision cited in the case Arunish Sood vs. Kumar Sood & another, the appellant in that case namely Arunish Sood was married to Shivani on 01.11.2004 and out of the wedlock, a male child Shivanish Sood was born on 10.08.2005. Immediately, after the birth of the child, mother passed away. So, the child was residing with her maternal grand-parents at Palampur in Himachal Pradesh. The appellant got remarried. Subsequently, he filed a petition seeking custody of the minor child Shivanash. In the above facts, the Delhi High Court held that the Court in Delhi has no territorial jurisdiction to try the case.

8. In the second cited case [C.Narasaraju vs. Ramesh] also, the mother of the minor namely C.N.Shilpa died during the child birth. Grand father of the minor has been bringing up the child in Mysore since her birth. She was studying in a school in Mysore. The father of the child filed a petition seeking custody of the child in Family Court, Chennai. Considering the above facts, this court directed return of original petition to enable the respondent to file before the appropriate court at Mysore.

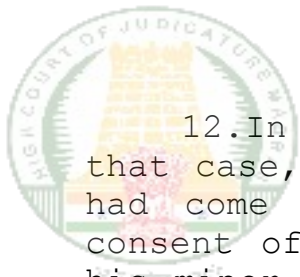
9.In the 3rd case [Sanjay Agarwal vs. Krishna Agarwal], the mother of the minor child namely master Durgesh filed a petition alleging that the minor was forcibly removed from her custody and taken by her father to Merta. When the minor was residing in Jodpur, mother filed a petition seeking custody of the child at Merta. Considering the above facts, the Rajasthan High Court held that the Family Court at Jodhpur shall have jurisdiction not the court in Merta.

10.In the case of Mrs.Annie Besant vs. G.Narayaniah, minors in that case, who were residing at Chengelpat, given custody of Mrs.Annie Besant for the purpose of education. Pursuant thereto, children were getting educated at Oxford University at England. The respondent, in that case, one Mr.Narayanan Iyer filed a petition before the District Court, Chengalpet, seeking custody of the minors. This court, after analysing the entire evidence, held that the minors could not be constructed as minors ordinarily residing at Chengalpet. The dispute was not between the mother and the father of the minors.



11. In the 5th cited case, the father of the minor Rishika aged about 4 years is a permanent residence of Tamil Nadu and his wife was also born and brought up in Tamil Nadu. She was subsequently residing at Ernakulam. During the lawful wedlock, they are blessed with two female children. In the year 2011, on an understanding between the husband and wife, the father along with younger child is residing at Pune, while the mother with her elder daughter was residing at Ernakulam. The mother filed a petition before the Family Court, Ernakulam for custody of the younger daughter. The Division Bench of the Kerala High court has held as follows:-

"14. The battle for custody of the minor was started by the mother after minor Rishia 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 Vs. Narayanaiah (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 facts and dispose of the matter as per law."



12. In AIR 2011(SC) 1952 [Ruchi Majoo vs. Sanjeev Majoo], in that case, minor and his parents are citizens of America and they had come to India, during their vacation and later by mutual consent of the parties, the wife stayed back in India along with his minor son and he was also admitted in a school at Delhi. The father initiated proceedings against his wife seeking divorce and also the custody of the minor child. The wife filed a petition under Sections 7, 8 and 10(ii) of the Act, before the District Court, Delhi, seeking interim custody of the minor child. The Hon'ble Apex Court on the above said facts observed that the Delhi High Court has jurisdiction to entertain the petition.

13. AIR 1986 PUNJAB AND HARYANA 113 [Smt. Aparana Banerjee vs. Tapan Banerjee]. The mother along with her minor child aged 3 years were residing at Calcutta. The father filed a petition before the Court at Faridabad, seeking custody of the minor. The High Court of Punjab and Haryana following the decision of the Andhara Pradesh reported in AIR 1978 Andh Pra 13 [Harihar Preshad Jaiswal vs. Suresh Jaiswal] has held that:-

3.A similar view was expressed by Harihar Pershad Jaiswal v. Suresh Jaiswal, AIR 1978 Andh Pra 13, while dismissing the application of the father in the following words:--

"If the expression Place of ordinary residence means the residence of his natural guardian, the very purpose of using the word, 'the residence of the minors, in section 9 would be lost. It is not the place of residence of the natural guardian that gives the jurisdiction to the Court under S. 9(1) but it is the place of Ordinary residence of the minor and the Legislature has designedly used the words. 'Where the minor ordinarily resides'. Hence actual residence of the minor, having regard to the circumstances under which the minor place where the minor ordinarily resides.

14. Per contra, Mrs. Hema Sampath, learned Senior counsel appearing for the respondent would submit that the first appellant and the respondent herein had been residing at Karaikudi, since their marriage in the year 2004; the minor child namely Vandan P. Mehta was also residing with his parents at Karaikudi from his birth in the year 2007; he was admitted in a school at Karaikudi. The learned Senior counsel further contended that admittedly, the child was living in Karaikudi for more than five and half years. The first appellant on 08.04.2013 on the false pretext of taking the child to Ajmer for the summer holidays left Karaikudi and thereafter, detained him for the past 3 years. Although, the child is residing with his mother in Ajmer, the minor's ordinary residence would be only the matrimonial residence of the first appellant. So, the District Court, Sivagangai, has jurisdiction to take up the case and not the District Court of Ajmer. In



support of the contention, the learned Senior Counsel has relied upto the following decisions:-

1.Unreported judgment of this court made in CMA (MD)No.1381 of 2013, dated 16.09.2014 [V.Susai David & another Vs. S.Joseph Victor].

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2.AIR 1940 All. 329 [Lalitha Twaif vs. Paramatma Prasad]

3.AIR 1951 Nagpur 179 [Vimala Bai Vs.Baburao Shamrao Kshirsagar]

4.AIR 1983 Madras 9 [Bhgyalakshmi and another vs. K.Narayana Rao]

5.AIR 2008 Rajasthan 49 [Wazid Ali vs. Rubina Bano and others]

6.Unreported judgment of this court made CRP (NPD)No.365 of 2013, dated 06.11.2014 [Venkatesa Chettiar vs. Valli Ammal]

7.1993(2) SCC 185 [Salil Dutta Vs. T.M & M.C, Private Limited]

8.AIR 1914 PC 41 [Mrs.Annie Besant Vs. Narayaniah],

9.2011(6)SCC 479 [Ruchi Majoo Vs.Sanjeev Majoo],

10.2014(5) MLJ 150 [Vadivel vs. Uma Maheswari] and

11.2008(6) MLJ 128 (SC) [Mausami Ganguly Vs. Jayant Ganguly]

15. Similar issue came up for consideration before this court in AIR 1983 Madras 9 [**Bhagyalakshmi & another Vs. K.Narayana Rao**], Mr.Justice Ratnam has held as follows:-

"The words 'ordinarily resides' would in my view connote, a regular, normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth or by compulsion. The place of residence at the time of the filing of the application under the Act does not help to ascertain whether a particular court has jurisdiction to entertain the proceedings or not. It would be easy to stifle proceedings under the provisions of the Act by the mere act of the moving the minors from one place to another and



consequently from one jurisdiction to another. The question whether the minors were ordinarily residing in any particular place has to be primarily decided on the facts of the particular case. The paternal family of the house of the family residence may normally be taken to be the place of ordinary residence of the minors as well. The words 'ordinarily resides' are incapable of any exhaustive definition as those words have to be construed according to the purpose for which the enquiry is made. The intention of not reverting back to the former place of residence would normally be relevant; but in the case of the minors, it is rather difficult to impute any such intention to them. It has also be borne in mind that mere temporary residence or residence by compulsion at a place however long, cannot be equated to or treated as the place of ordinary residence. Bearing in mind these considerations, it is necessary to ascertain from the materials available in this case as to where the minors 'ordinarily resided' for purpose of the Act.

16. In AIR 1940 All. 329 [Lalitha Twaif Vs. Paramatma Prasad], in para 3 and 4 and it has been held as follows:-

"3. The fact that a minor is found actually residing at a place at the time the application is made does not determine the jurisdiction. It must be proved where the minor ordinarily resides, as laid down in Section 9(1). In the present case it has been found that the appellant took away the minors to Shadiabad, where her parents resided, in March 1938, i.e. only three or four months, before the application was made. Before that the minors and their mother had been living for several years in Benares, where Paramatma Prasad lived, within the jurisdiction of the learned District Judge. The learned Judge has observed:

It is in evidence that she has been in Benares for the last six or seven years, though she in this period visited Shadiabad off and on. But so far as, the minors are concerned, I am of opinion that their ordinary place of residence must be held to be Benares. Both of them were born in Benares. For a major part of their lives both of them have lived in Benares. The fact that their mother belongs to Shadiabad would not make their residence also Shadiabad. Their ordinary residence must be held to



be Benares, though at present they might be living with their mother at Shadiabad since March last.

4. These facts have not been controverted by the appellant. It has also been found that the appellant was living with the applicant opposite party during all this period at Benares. This fact further shows that Benares was the place where the minors should be deemed to have their ordinary residence. The mere fact that the minors were taken by their mother to Shadiabad when she went to visit it would not make Shadiabad as the place of ordinary residence of the minors. The learned District Judge of Benares had therefore jurisdiction to try the case.

17. In AIR 1951 Nagpur 179 [Vimala Bai vs. Baburao Shamrao Kshirasagar,] it has been held in para 7 as follows:-

"7. Under the Hindu law, the father is the natural guardian of his children and his children must be deemed to reside where he resides. As observed by Mookerjee A. C.J, where as here, a man has no permanent abode, he must be deemed to reside where he actually resides. It follows therefore that his children must also be deemed to reside at the place where he happens to reside. No doubt, here the father did reside in Nagpur with the applicant and his children including Sudha for a few years and after finding an employment at Amraoti, went there without the applicant and their children. During that period the applicant must be deemed to be in charge of the children on behalf of the father who is their natural guardian, as would follow from the decision in In the matter of Prankrishna Surma, 8 Cal.969: (11 C.L.R.6), and so even though the children continued to stay on in Nagpur, it would not be correct to say that Nagpur was the place of their legal residence, even though they actually resided there".

18. AIR 2008 Rajasthan 49 [Wazid Ali vs. Rubina Bano and others], in para 20, it has been held as follows:-

"20. The ordinary residence of the minor cannot be said to be at Sikar as the child has been shifted as per compulsion and the circumstances created by the mother of the child. The child would have been handed over to the custody of the father, though perhaps, the mother might have thought in her wisdom that the child with her mother may be more convenient and looked after well unmindful of

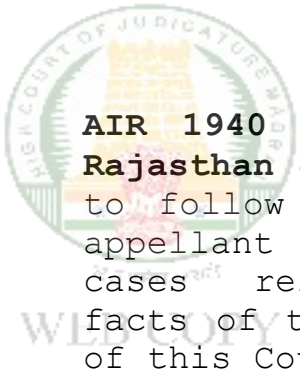


it that the father is the natural guardian of the child. The plea of the learned Counsel for the respondents that the ordinary residence is at Bombay is not made out as per their own pleadings and the record. Smt. Hussain Bano in whose custody the child is, is resident of Sikar. Since the child has been put under custody of the maternal grandmother because of the compelling circumstances, therefore, it also cannot be said to be the ordinary residence of the minor. Therefore, under such circumstances, I feel that the District Court, Jhunjhunu from where the child was taken by the mother from the custody of the natural guardian has the jurisdiction to entertain the application as the Jhunjhunu is the ordinary residence of the child."

19. At this junction, it is useful to refer Section 9 of the Guardians and Wards Act, 1890, which reads as follows:-

"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. If the application is with respect of 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 the place where he has property. 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 on conveniently by any other District Court having jurisdiction.

20. As already observed, this appeal has been preferred only challenging the territorial jurisdiction of the District Court, Sivagangai in ordering custody of the minor. Section 9 of the Act mandates that if the application is with regard to the guardianship of the person, it shall be made in a jurisdictional District Court, where the minor ordinarily resides. In the case of **Bhagyalakshmi (supra)**, this Court observed that the question whether the minor ordinary residing in a particular place has to be decided on the facts of the particular case and the temporary residence or residence by compulsion at a place however long cannot be treated as the place ordinary residence. The view got forfeited by the decision of the Allahabad High Court reported in



AIR 1940 All 329. The High Court of Rajasthan in **AIR 2008 Rajasthan 49** took the same view. With great respect, I am not able to follow the decisions cited by the learned counsel for the appellant for two reasons, firstly, the facts narrated in the cases^{scs} relied on the by the appellants are different from the facts of this case and secondly, I prefer to follow the judgment of this Court reported in **AIR 1983 Mad. 9.**

21. In the case on hand, indisputably, the respondent is a permanent resident of Karaikudi and the first appellant from the date of her marriage in the year 2004 and the child since his birth on 28.10.2007 were residing with the respondent at Karaikudi, till they left the place on 08.04.2013. According to the respondent, on 08.04.2013, the first appellant took the child to the father's place in Ajmer for his summer vacation, but subsequently, he was retained in his maternal grand-father's house without consent of the respondent. It is also not the case of the appellants that the minor child is all along residing at Ajmer since his birth. But, it is the contention of the appellants that the child presently resides in Ajmer, Rajasthan, so it should be construed that the minor ordinarily resides at Ajmer.

22. It is seen from the records that the respondent immediately filed HCP before this court in the year 2014 for production of the minor child. Since, it was disposed of by observing that he was not found illegally detained, the respondent filed GWOP No.24 of 2014 in the District Court, Sivagangai, seeking custody of the child. Further, admittedly the relationship of the 1st appellant and the respondent is not snapped and on the other hand, both of them have instituted proceedings for restitution of conjugal rights. If both the petitions are allowed, the 1st appellant herein, has no other option, except joining with the respondent along with the minor child. In other words, the first appellant might not have any right of insisting the respondent to shift his residence to Ajmer.

23. Considering the peculiar facts and circumstances of the case, I am of the opinion that for the purpose of Section 9 of the Act, Karaikudi shall be considered as ordinary residence of the minor, viz., Vandan P.Mehta and the Court of Sivagangai has jurisdiction to entertain the petition. In such view of the matter, I do not find any merit in the appeal. In the result, this appeal is dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(P&A)

/True copy/



To,

The District Judge,
Sivagangai.

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+1cc to M/s.K.K.Kannan, Advocate Sr.NO.73643

+1cc to M/s.K.S.Muthu, Advocate SR.No.73835

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Judgment made in
CMA (MD) No.885 of 2016
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