



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.10.2016

Coram:

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THE HONOURABLE MR.JUSTICE **S.M.SUBRAMANIAM**

Tr.C.M.P. (MD) .No.136 of 2016
and C.M.P. (MD) No.2333 of 2016

A.Raisa Nasrin

.. Petitioner

Vs.

A.S.Bilal

.. Respondent

PRAYER: Transfer Civil Miscellaneous Petition filed under Section 24 of the Code of Civil Procedure, praying to withdraw the case in G.W.O.P.No.524 of 2016 on the file of the III Additional Family Court, Chennai and transfer the same to the file of the Family Court, Sivagangai.

For Petitioner : Mr.T.Lajapathi Roy
For Respondent : Mr.Ajmal Khan
Senior Counsel
for M/s Ajmal Associates

O R D E R

This Transfer Civil Miscellaneous Petition is filed seeking for transfer of G.W.O.P.No.524 of 2016 from the file of the III Additional Family Court, Chennai to the file of Family Court, Sivagangai.

2. The respective counsels both for the petitioner and the respondent are heard.

3.The petitioner is the wife of the respondent. The marriage between them was solemnized on 27.12.2009 as per the Islamic rituals and customs. Out of the wedlock, a female child was born on 07.10.2010.

4. The contention of the petitioner is that the respondent/ husband is a drunkard and was having a habit of torturing the petitioner and the child both physically and mentally. Further, he used to abuse the petitioner as well as her family members with filthy language. Due to the continuous harassment, the petitioner left the matrimonial home and now she is residing with her parents at Ilayangudi, Sivagangai District. Further, the petitioner states that the petitioner is not employed and she is not having any independent source of income and she is



depending on her parents.

5. The female child, who is six years old, is also studying in ILM Public School at Ilayangudi, Sivagangai District and both the petitioner as well as the child are living with her parents and the respondent filed G.W.O.P.No.524 of 2016 before the learned III Additional District Family Court, Chennai, for custody of the child.

6. Mr.Ajmal Khan, learned Senior Counsel appearing for the respondent vehemently opposed the petition for transfer by stating that Section 9 of Guardians and Wards Act, 1890 enumerates that 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.

7. The Senior Counsel would submit that as per Section 9 of Guardians and Wards Act, 1890, 'ordinary residence of the child' is at Chennai since the petitioner is agreed for re-union and had given a letter stating that she will come back to Chennai for re-union and to resume matrimonial home at Chennai. Now the petitioner is acting differently and she has got the child stealthily and therefore, Section 9 of the said Act is to be applied. The term 'ordinarily resides' is to be interpreted in favour of the respondent and accordingly, ordinary residence of the child is at Chennai and the petition deserves to be dismissed.

8. This apart, the learned Senior Counsel appearing for the respondent contended that there is a life threat to the respondent in the event of transferring the case to Sivagangai District. Because, the petitioner and their parents are influential persons and they are able to attack the petitioner. In support of the arguments, the learned counsel cited the judgment of the Hon'ble Supreme Court in **Ruchi Majoo Vs. Sanjeev Majoo** reported in **2011(6) SCC 479**. In that judgment, paragraph Nos.23 and 24 read as follows:

23. 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 person of the minor, sub-sections (2) and (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.

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".

9. The Hon'ble Supreme Court of India in paragraph No.24 has stated that 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 factum in the present case on hand is very clear that the petitioner and the respondent are living separately and the female child aged about 6 years is in the custody of the petitioner and further she is studying 1st Standard in ILM Public School at Ilayangudi, Sivagangai District.

10. Under these circumstances, this Court is of the opinion that the judgment produced by the learned Senior Counsel for the respondent is not applicable in favour of the respondent and contrarily the facts are in favour of the petitioner in respect of the ordinary residence of the child.

11. The learned counsel for the petitioner filed additional affidavit stating that there is no scope for re-union and the petitioner is not intended to resume to matrimonial home and she would live with her parents at Ilayangudi, Sivagangai District. In view of the specific affidavit filed by the petitioner stating that there is no scope for re-union, this Court is of the view that the ordinary residence of a child decided in favour of the petitioner and accordingly, the ordinary resident of the child is at Ilayangudi, Sivagangai District.

12. The principles regarding transfer petitions, more specifically in the matters of matrimonial cases are well settled through the decisions of the High Court of Madras, in the following cases:-

In TR.CMP.Nos.138 and 139 of 2006, dated 30.08.2006, the High Court of Madras has considered the following judgments:-

'16. In AIR 2000 SC 3512 (1) (Mona Aresh Goel vs. Aresh Satya Goel), when the wife pleaded that she was unable to bear the traveling expenses and even to travel alone and stay at Bombay, the Supreme Court ordered transfer of



proceedings.

In 2000 (10) SCC 304, the Honourable Supreme Court has held that where the petitioner's wife has pleaded lack of money, the same has to be considered.

WEB COPY In 2000 (9) SCC 355, the wife has filed a petition to transfer the proceedings initiated by the husband for divorce, at Bombay. The place of residence of the wife was at Jaipur, Rajasthan. In that case, the petitioner is having a small child and that she pleaded difficulty in going all the way from Jaipur to Bombay to contest the proceedings from time to time. Considering the distance and the difficulties faced by the wife, the Supreme Court has allowed the transfer petition.

In a decision reported in 2005 (12) SCC 395, the wife has sought for transfer of matrimonial proceedings and a divorce petition has been filed by the respondent's husband at Baikunthpur to be transferred to Allahabad, where the petitioner's wife was residing, on the ground that it would be difficult for her to undertake such long distance journey, particularly in circumstances, in which she finds that the proceedings under Section 125 Cr.P.C. was already pending before the Family Court, Allahabad. Considering the difficulties faced by the wife and also the long distance journey, the Honourable Supreme Court was pleased to order transfer of the proceedings to Allahabad.

13. The present Transfer Petition is filed for transferring G.W.O.P.523 of 2016 and the husband is seeking custody of the child. Now the petitioner and the child are residing at Ilayangudi, Sivagangai District along with her parents and it will be difficult for the petitioner and child to travel from Ilayangudi to Chennai to defend the case effectively. The courts are normally considering the plight of women in respect of transfer of matrimonial cases unless the exceptions are proved. In view of the above judgments, the place of the wife is preferable and in the present case, the circumstances narrated by the petitioner deserve consideration.

14. In the result, this Transfer Civil Miscellaneous Petition is allowed with the following directions:

i) The learned Judge, III Additional Family Court, Chennai, is directed to transmit the entire records in G.W.O.P.No.524 of 2016 to the file of the Family Court, Sivagangai District, within a period of two weeks from the date of receipt of copy of this order.

ii) the learned Judge, Family Court, Sivagangai, after obtaining the records on transfer, is directed to



dispose of the matter as expeditiously as possible in accordance with law.

No costs. Consequently, connected C.M.P.(MD) No.2333 of 2016 is closed.

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Sd/-

Assistant Registrar(AS)

/True Copy/

Sub Assistant Registrar

CM

To

- 1.The III Additional Family Court, Chennai
- 2.The Family Court, Sivagangai.

+1cc to Mr.T.Lajapathi, Advocate Sr.No. 64806

+1cc to M/s Ajmal Associates Advocate Sr.No. 64311

JAM/10.11.16/SKS-RR/5p-5c

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