

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

CIVIL REVISION APPLICATION NO. 485 OF 2017

Khushboo Singhal ... Applicant

Versus

Anmol Deep Kumar ... Respondent

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Mr. Shivam Nagalia i/b Triyama Legal for the applicant.

Mr. Anmol Deep Kumar, respondent in person.

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CORAM: M.S. SANKLECHA, J.

DATE : 22nd September, 2017.

P. C.

1. This application under Section 115 of the Code of Civil Procedure, 1908 (Code) challenges the order dated 15th July 2017 passed by Adhoc District Judge-3, Pune, in the Civil Miscellaneous Application filed in District Court, Pune. The impugned order dated 15th July, 2017 dismissed the petitioner's application for rejection of the petition under Order VII Rule 11(d) of the Code read with Section 9(1) of the Guardians and Wards Act, 1890 (the Act).

2. The respondent herein has filed an application on 6th January, 2017 under Section 7 of the Act read with Section 6 of the Hindu Minority and Guardianship Act, seeking custody of his minor child

from his wife the petitioner herein. In that application, the petitioner filed an application under Order VII Rule 11(d) read with Section 9 of the Act seeking rejection of the petition for want of jurisdiction. This is on the ground that the petition for custody has to be filed where the minor child whose custody is being sought ordinarily resides in terms of Section 9 of the Act. In this case it is contended that the minor resides at Alwar, Rajasthan and not at Pune. Therefore, the Pune Court has no jurisdiction to entertain the respondent's application.

3. The trial Court by its impugned order, notes the fact that admittedly the petitioner herein prior to recently shifting to Alwar along with the minor child, resided in Pune where she has her own flat. Further she continues to have an employment in a company at Pune, although her employer permits her to discharge her duties from home, requiring her to report the office at interval of a few days. In the above facts, the impugned order holds that the ordinary residence of the petitioner would be both at Pune and at Alwar. Further, it places reliance upon the decision of the *Karnataka High Court in the case of K.C. Sashidhar vs. Smt. Roopa* reported in *AIR 1993 Karnataka 120*, wherein in the context of Section 9 of the Act it has been held that ordinary residence of the minor under the Act, for giving jurisdiction to the Court would necessarily go with the person in whose custody the

minor child is. In this case, the child was about 13 months old at the time the application was filed before the trial Court in January, 2017 by the respondent. Thus, the Court held that it would have jurisdiction to entertain the petition after having recorded a finding that both Alwar and Pune can be considered to the places where the respondent ordinarily resides.

4. Mr. Nagalia, learned Counsel appearing for the applicant, submitted that the impugned order fails to appreciate the fact that the applicant has shifted to Alwar prior to the filing of the petition. Consequently, it ought to have held that the Court at Alwar alone would have jurisdiction. He further submitted that there are two other proceedings between the same parties pending in the Alwar Court. Reliance is also placed upon the decisions of the Allahabad High Court in *Navin Singh vs. Smt. Jyoti Parashar and another*, reported in *AIR 2004 Alahabad 441*; the Punjab and Haryana High Court in *Aparna Banerjee vs. Tapan Banerjee*, reported in *AIR 1986 Panjab and Haryana 113* and the Gujarat High Court in *Shah Harichand Ratanchand vs. Virbbal and Ors*, reported in *AIR 1975 Gujarat 150* in support of his contention that the Pune court will not have jurisdiction.

5. The scope of enquiry in an application under Section 115 of the Code is whether the subordinate court has exercised jurisdiction not

vested in it by law or has failed to exercise jurisdiction vested in it by law or has exercised jurisdiction with material irregularly or illegally. It is the petitioner's case before me that the trial court has exercised jurisdiction not vested in it. Thus in view of Section 9 of the Act which requires that the minor whose custody is sought must be ordinarily resident of the place where the court exercising jurisdiction is situated. Further the application made by the applicant under Order VII Rule 11(d) of the Code. The application under Order VII Rule 11 of the Code has to be considered on the basis of the petition/plaint as filed alone.

6. In this case, the trial Court examined the facts before it and on facts came to the conclusion that the ordinary residence of the mother of the minor (petitioner herein) is also at Pune. It relied upon the decision of the Karnataka High court in case of *K.C. Sashidhar* (supra) to come to the view that the ordinary residence of the minor would go with his mother and therefore it has jurisdiction. The fact that the petitioner has filed certain proceedings in Alwar, does not assist the petitioner to determine an application under Order VII Rule 11 of the Code. It is on the averments in the petition before the trial Court that the issue of jurisdiction is to be decided. In fact clause (d) of Order VII Rule 11 of the Code itself states where the suit appears barred by law as stated in the plaint.

7. The three decisions relied upon by Mr. Nagalia learned counsel for the applicant, were all cases where the mother who was having the custody of the child had shifted from the original place of residence (matrimonial home) long before the petition for custody and under the Act was filed. In this case, the minor child was only 13 months old when the application was filed by the respondent. Moreover, it is undisputed that the mother has shifted out of her matrimonial home at Pune to Alwar only a few months prior to filing of the petition before the trial Court by the respondent. Therefore, the decisions in ***Aparna Banerjee*** (supra) and ***Shah Harichand Ratanchand*** (supra) relied upon by Mr. Nagalia are completely distinguishable, as in both the above cases the parent in custody of the child had shifted out of the town in which the application for custody was made long before making of the application. In this case undisputedly even according to the petitioner herein the shifting had taken place just a few months prior to the application. So also the decision in ***Navin Singh*** (supra) is distinguishable as it was only taking a *prima facie* view and the issue of jurisdiction was to be decided later. In the present facts, the trial Court had exercised the issue of jurisdiction raised before it and on appreciation of facts before it concluded that the minor is also ordinarily resident in Pune. Therefore, it has jurisdiction to entertain the petition.

The view taken by the trial Court is a possible view. Therefore, no occasion to exercise the discretionary powers of Revision under Section 115 of the Code arises.

8. Accordingly, the revision application is dismissed.

9. As the dispute involves the well being of a minor child the parents are directed to make an earnest attempt to resolve their differences at the earliest.

(M. S. SANKLECHA, J.)