

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

Tr.C.M.P.No.244 of 2017
and C.M.P.No.4377 of 2017

Saranya .. Petitioner/Respondent

Vs.

A.Sabarison .. Respondent/Petitioner

Prayer :

Transfer Civil Miscellaneous Petition filed under Section 24 of the Code of Civil Procedure praying to withdraw GWOP No.6 of 2017 pending before the Principal District Judge at Tiruchirapalli and transfer the same to the file of the Principal District Judge at Villupuram.

* * *

For Petitioner : Ms.Sasikala
for Mr.K.J.Saravanan
For Respondent : Mr.M.Rajamohan

J U D G E M E N T

The wife in a matrimonial proceedings has preferred the above Transfer Civil Miscellaneous Petition seeking transfer of G.W.O.P.No.6 of 2017 pending on the file of the Principal District Court, Thiruchirapalli, to the Principal District Court, Villupuram.

2. The respondent/husband has filed H.M.O.P.No.385 of 2016 on the file of the Subordinate Court, Thiruchirapalli, which is pending. The petitioner/wife has filed H.M.O.P.No.13 of 2017 for divorce on the file of the Subordinate Court, Villupuram, which is also pending. It is stated in the affidavit filed in support of the petition that the petitioner/wife had to pass through rough weather in the matrimonial life. The marriage was admittedly solemnised in Villupuram. After the marriage, the petitioner husband had lived in Raigarh, Chattisgarh, where he was employed. Later, the respondent had been in Sri Harikota and joined another company in Uttar Pradesh. Later on, he returned

to Thathayangarpettai, Thiruchirapalli.

2.1. It is specifically stated in the affidavit that the respondent had been harassing the petitioner in many ways from the date of the marriage. She had been insulted, abused and was demanded to pay money from her family. Unable to tolerate the insult and ill-treatment, it is stated that the petitioner/wife had returned to her parents house in Villupuram. Even there, the respondent/husband came and assaulted the father of the petitioner and abducted the minor son, which was only four years old. Though a police complaint was given, it was later not pressed. Therefore, it is the specific case of the petitioner that she was forced to live in the parental house to safeguard herself from the physical assault inflicted on her by the respondent/husband.

2.2. In paragraph 11 of the affidavit, it is stated that she is now permanently living in Villupuram with her minor son under the care and custody of her parents. As the GWOP has been filed before the District Court, Thiruchirapalli, the petitioner has expressed her difficulty in travelling about more than 165 kilometers, with minor child, besides apprehending danger in the hands of the respondent/husband. Hence, the transfer has been sought for.

3. The petition was resisted by the respondent/husband by filing a counter affidavit. It is contended that only the Principal District Court at Thiruchirapalli is competent to try the GWOP, as the cause of action arose only within the jurisdiction of the said Court. It is further stated that before removal from Thiruchirapalli, the minor child was ordinarily residing there. Hence, only the District Court Thiruchirapalli, has got jurisdiction. Learned counsel appearing for the respondent/ husband also placed reliance on Sandhiya V. D.Gunasekaran, 2010-5-L.W. 1023. Reliance was also placed on V.N.Sudanandan V. Dr.Chitra, 1999-2-L.W. 370.

4. In Sandhiya V. D.Gunasekaran, 2010-5-L.W. 1023, the judgement of this Court in Bhagyalakshmi V. Narayana Rao, AIR 1983 Madras 9, was relied on, wherein, it is stated that a temporary residence cannot be equated to the place of ordinary residence. The residence of the minor along with the mother at maternal home may be deemed to be a temporary one.

5. In Ruchi Majoo V. Sanjeev Majoo, 2011 (6) SCC 479, it is held as follows :

"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."

6. The above said judgement had placed reliance on *Kuldip Nayar V. Union of India*, (2006) 7 SCC 1.

7. Section 9 of the Guardian and Wards Act, 1890 deals with the Courts having jurisdiction to entertain application. It further states that if the application is with respect to the guardianship of a person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor "ordinarily resides". The expression "ordinarily resides" signifies 'a dwelling place for a considerable time'. Therefore, it could mean something more than the temporary place. If a person lives in a place, where, he had been a permanent residence for sometime, then no intention to go back, the formal place would cease to be the "ordinarily resides". However, in a case of a minor, there is no question of intention arising excepting that the Court has to decide the same, taking into consideration the totality of the circumstances. Though in a normal circumstance, when the husband and wife were united, the minor child would be with the parents and the place would be the place where the child was ordinarily residing. The same can be decided only considering the attendant circumstances.

8. In the given case, the minor child was living with his parents in Thiruchirapalli and was taken by the mother to Villupuram, when she left the matrimonial home. Thereafter, once again the child was removed from the clutches of the mother and brought to Thiruchirapalli and as on the date of the petition also, the child is only with the custody of mother at Villupuram. In paragraph 11 of the affidavit filed in GWOP No.6 of 2017, filed by the husband, it is stated as follows :

"11. The petitioner being the father of the minor child Sivakarthekeyan is the natural guardian for the minor. Hence, no declaration is necessary for Guardianship. On the other hand minor child is with the respondent who is staying at Villuppuram at her parents residence. Hence, the petitioner could not see

the minor child."

9. Even in the GWOP, the respondent had admitted that the minor child is ordinarily residing with the mother at Villupuram. The word "resides" in Section 9 must mean only the main place of residence and not legal or constructive residence. It certainly does not connote the place of origin. In other words, the word "resides" is flexible one and the act has different meanings. Therefore, it has to be considered according to the context, in which, it appears and could not be read in isolation. Mere fact that the father is a natural guardian cannot be the determining factor for deciding the place of residence, as the statute did not intend in that way. If the minor was residing with the mother in a particular place, such is the place deemed to be the place of ordinary residence of the minor for the purpose of Section 9(1) of the Act.

10. Whether the phrase "where the minor ordinarily resides" connotes the place of residence on the date of filing the petition ? More distinguishably, the intention of the Legislature was not to mean this on the date of filing the application, as it would negate the provisions of the Act. Therefore, the phrase "where the minor ordinarily resides" can be deemed to be the place where, the constructive custody of the minor is.

11. As contended by the learned counsel for the respondent, if only the place where, the father resides is deemed to be the place of ordinary residence, as the child was removed from his custody only from Thiruchirapalli District, Section 9(1) of the Act would have no application, as it is where ordinarily both the "parents" reside. As the Section indicates where the minor ordinarily resides, it should be considered as the place, where, the constructive custody of the minor is.

12. Further, Section 9 defines the jurisdiction to entertain the application. Even presuming for a moment that the place, where the respondent is living, is the place "ordinarily resides", the GWOP has been entertained in the said Court. Now the question is whether the said GWOP can be transferred to the District Court, Villupuram.

13. It is not in dispute that the District Court only has power to decide GWOP. Section 24 of the Code of Civil Procedure prescribes the general power of transfer of any suit or appeal or other proceedings to any Court competent to try or dispose of the same. Though it is argued by the learned counsel for the respondent that the Guardian and Wards Act, 1890, is a special enactment and Section 24 of the CPC has got no application with the same, this Court is unable to persuade itself to accept the

said contention.

14. In fine, the Transfer Civil Miscellaneous Petition is allowed. Consequently, GWOP No.6 of 2017 pending on the file of the Principal District Court, Tiruchirapalli, is transferred to the file of the Principal District Court, Villupuram. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

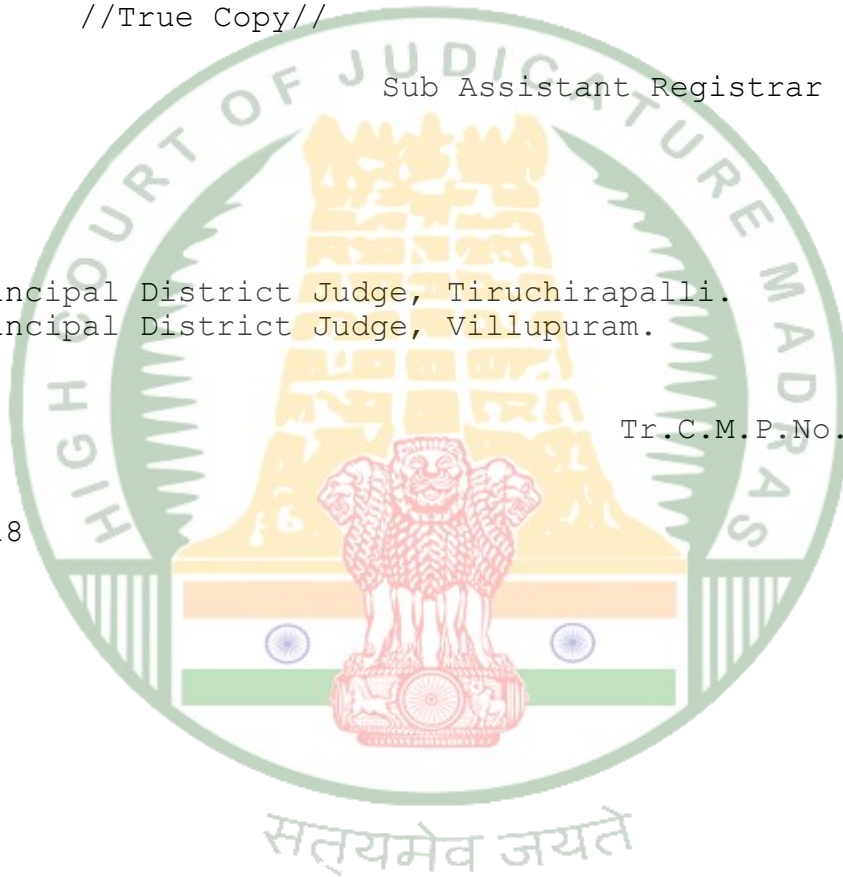
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To

1. The Principal District Judge, Tiruchirapalli.
2. The Principal District Judge, Villupuram.

Tr.C.M.P.No.244 of 2017

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