

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

F.C.A.No.372 of 2017

Between:

Sobhan Kodali.

.....Appellant

And

Lahari Sakhamuri.

.....Respondent

JUDGMENT PRONOUNCED ON : 08.02.2018

**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI**

1. Whether Reporters of Local newspapers : Yes/No
may be allowed to see the Judgment ?
2. Whether the copies of judgment may be : Yes/No
marked to Law Reporters/Journals ?
3. Whether Their Ladyship/ Lordship wish to : Yes/No
see the fair copy of the judgment ?

SURESH KUMAR KAIT, J

ABHINAND KUMAR SHAVILI, J

HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
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.....Respondent

For Appellant : M/s.Devalaraju Anil Kumar &
P.Sriram, Advocates.

For Respondent : Smt. V.Hima Bindu.

< Gist:

> Head Note:

? CITATIONS:

1. 2017 SCC 694
2. 2015 (8) SCC 38
3. 2013 SCC Online 10641
4. Civil Appeal No.4435/11 (SC)
5. AIR 2004 KAR 32
6. 2017 SCC Online Del 10593
7. 2006 (90) DRJ 77

C/15



**HON'BLE SRI JUSTICE SURESH KUMAR KAIT
AND
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F.C.A.No.372 of 2017

JUDGMENT : (Per Hon'ble Sri Justice Suresh Kumar Kait)

Vide the present appeal, the appellant/husband has challenged the order dated 15.09.2017, passed in I.A.No.591 of 2017 in G.W.O.P.No.433 of 2017, whereby, the learned Additional Family Court, Hyderabad, dismissed the application of the appellant filed under Order 7 Rule 11 of CPC, praying the Court below to reject the main O.P. on the ground that it is hit by Section 9 of the Guardians and Wards Act, 1890.

2. The undisputed facts of the present case are that the respondent/wife went to USA in the year 2004 for her higher studies and completed her Masters in the year 2006 and secured employment in the US in January 2007 and her marriage was performed on 14th March 2008 at Hyderabad with the appellant, who was also residing in US prior to her marriage. Except for the marriage, the appellant and respondent are residing in US and pursuant to marriage also, resided in USA and cohabitated in US and two children, namely, Arthin Kodali and Neysa Sakhamuri Kodali, born in US on 14th March 2012 and 13th October 2014 respectively. Both of them are admitted in school at US much prior to the initiation of proceedings before Additional Family Court at Hyderabad. Both the minor children are US citizens and are holding US passports. The children are ordinary

residents of Pennsylvania and brought to Hyderabad on 23rd March 2017 and petition was filed by the respondent/wife before the Hyderabad Court on 12th April 2017.

3. Learned counsel appearing on behalf of the appellant submitted that the Court below erred in law as well as facts in passing the impugned order dated 15th September 2017 without considering that the said proceedings were barred by Section 9 of the Guardians and Wards Act, 1890 and proceedings were liable to be rejected under Order 7 Rule 11 (a) & (d) of CPC, as there is no cause of action at Hyderabad. The minor children are born at USA and they are citizens of USA by birth and ordinary residents of Pennsylvania. Therefore, merely because the minor children were brought to Hyderabad on 23rd March 2017, would not confer jurisdiction upon the Family Court at Hyderabad to adjudicate the case of custody and guardianship of minor children. The removal of said children from US was on the pretext to observe holy rituals and condolences of the death of the grandmother of respondent. Accordingly, the respondent assured to the appellant that she along with children, will return to US on 24th April, 2017. Believing the said request, the appellant booked 4 tickets for respondent/wife, her mother and for two children to go to Hyderabad and also booked the return tickets for respondent and for two minor children. The matrimonial home in the present case was also in US and until stealthy removal of children from US on 23rd March 2017 to Hyderabad, and as such, it is only the Courts in US,

which are competent to decide the issue of custody and welfare of minor children as they have the most closest concern and intimate contact with the issue of care and custody of the minor children. But the respondent, on the pretext of consoling her mother, ignoring the paramount interest of minor children who are US citizens, by depriving their personal rights granted under US laws, having their custody by virtue of the Ad Interim orders dated 12th April 2017 in I.A.No.292 of 2017 in the proceedings initiated by her in G.W.O.P.No.433 of 2017 on the file of Additional Family Court at Hyderabad and taking undue advantage of said order, she went to the extent of filing false case under Section 498-A of IPC against the appellant and his family members.

4. Learned counsel appearing on behalf of appellant further submitted that the Court below ought to have appreciated the fact that the respondent had herself invoked the jurisdiction of the Court in US by filing a divorce-cum-custody petition and equal distribution of the marital property on 21.12.2016, wherein, it was clearly averred by the respondent that both the parties are residing in Pennsylvania, US and primary physical custody of both the children be awarded to the respondent/wife. Further more, the respondent/wife admitted in her divorce petition that for the past 5 years, the minor children are residing with both the appellant and respondent in US and the best interest and permanent welfare of the said minor children would be served by awarding the primary custody to the respondent. Therefore,

it was the respondent who invoked the jurisdiction of the US Court seeking primary physical custody of both the minor children and having done so and having invoked and acquiesced to the jurisdiction of the US Court, the respondent/wife ought not to have been even allowed to file and institute the G & W petition, which on the face of it amounts to abuse of the process of law. Thus, the respondent is guilty of forum shopping and cannot be allowed to invoke the jurisdiction of two Courts when admittedly the minor children have neither been born in India nor are Indian citizens nor are habitual or ordinarily residents in India or Hyderabad. As such, the Family Court, Hyderabad did not have any jurisdiction to adjudicate upon the issue of custody and guardianship of the minor children and the G&W petition ought to have been dismissed for want of jurisdiction under Section 9 of Guardians and Wards Act, 1890, as the minor children are never ordinarily residents of Hyderabad.

5. In the counter affidavit filed by the respondent, the marriage, birth of children and filing of case at Court of Common Pleas of Lehigh County, Pennsylvania, USA, are not disputed, and as such, they are not denied. It is further stated that she has initiated process for divorce and sought for custody of children before the Court mentioned above, however, she never pursued the case and took it forward, as it was still at the threshold and nascent stage i.e. at the stage of counseling on 21.03.2017 and matter was adjourned to 25.05.2017. The respondent herself and the appellant were living

under the same roof in the same house and at that point of time, she came to know about the sudden demise of her maternal grandmother. Therefore, she came to India along with children. The appellant, in fact, has arranged for tickets for them to India on 23rd March 2017 and initially she had no plan to stay back in India. But subsequent developments had forced her to remain in India and seek relief. She herself informed the appellant that she would not be returning to US on 24th April 2017 and requested the appellant to keep the tickets open so as to enable her to travel back to US along with minor children. The Family Court at Hyderabad, while granting interim order, has specifically directed that she should not shift the children from the jurisdiction of the Court without permission of the Court. But the appellant, taking advantage of her absence before the Court at USA, had moved the Court at US for emergency relief and obtained adverse orders by misleading the Court at USA as the respondent has wantonly moved away and taken away the children from the jurisdiction of the Court at USA. When the respondent traveled to India, there were no orders passed either in her favour or in favour of the appellant regarding the custody of children or any other relief sought by her.

6. Learned counsel appearing on behalf of respondent submits that since the respondent has left the US soil, the orders passed by the US Court are not binding upon her, as orders are passed in her absence and when she was not within the jurisdiction of the Court at US. The

settled principle of law that the prime consideration in deciding the custody of minors is the welfare of minor children as held by the Bench of Three Judges of the Apex Court in the case of *Nithya Anand Raghavan v. State & another*¹, wherein, it is held that the welfare of minors should be given more importance than the principle of the liberty of comity of Courts. The said judgment was relied upon by the Court below. The respondent being the natural mother of the children, welfare of the children having regard to their ages, lies with her only. The moment she had decided to stay back in India, it is to be deemed that they became ordinary residents of Hyderabad within the jurisdiction of the Court in India. The children are living wherever the respondent is living and they lived at Hyderabad from June 2016 to December 2016 and have been living at Hyderabad since March 2017. The passport of Master Arthin Kodali was due to expire on 2nd June 2017. When she repeatedly made requests to give consent for the renewal of passport, the appellant denied the same stating that he would give consent for renewal after landing in USA.

7. Learned counsel for respondent further submitted that the respondent had allowed the appellant to have access to minor children through WhattsApp video calls frequently. As the appellant was intimidating her and threatening to take away children from her custody and he has been calling up their common friends stating that the respondent should withdraw the case filed by her in the Court of

¹ 2017 SCC 694

Common Pleas of Lehigh County, Pennsylvania, USA, the respondent was constrained to move the Court on 12th April 2017 and sought for interim direction, and in fact, she had intimated the appellant and also sent a copy of notice and petition to the appellant. In addition to above, the respondent has been taking good care of the children and joined both the minor children in Pioneer World School at Kavuri Hills, Madhapur, Hyderabad and with the help of her parents, she is taking care and attending to their needs.

8. Learned counsel for respondent further submitted that in February 2017, as soon as the proceedings were initiated before the Court of Common Pleas of Lehigh County, Pennsylvania, USA, even before passing orders in favour of either of them, the appellant has placed an advertisement in Suleka.com seeking for live-in Indian nanny to take care of two children aged 2 and 4 and help preparing meals for kids and before and after school care with clean driving record for pickup and dropping home which would go to show the kind of treatment that the minor children will be getting with the appellant. Learned counsel submits, the minor children would be adversely affected as the appellant is insensitive to their feelings and never cared for their well-being. The respondent has not violated any order of any Court as sought to be projected by the appellant.

9. Learned counsel for respondent further submitted that as the respondent is born and brought up in India, this country is not an alien country for her. Whether the respondent has an intention to go back

to USA or not, is to be determined by the trial Court, thus, let the trial go on. Explanation (g) to Section 7 of Family Courts Act, 1984 gives right to file suit and proceedings. Thus, there is no bar to file such proceedings before the trial Court. Section 9 of the Guardians and Wards Act, 1890 says, if the minor ordinarily resides, whereas, Section 4 (5)(ii) gives jurisdiction to the District Court where the Ward “for the time being ordinarily resides”. Thus, the respondent has rightly moved the trial Court and the Court at Hyderabad has got jurisdiction. Thus, the appeal filed by the appellant deserves to be dismissed on merits and also on maintainability under Section 7 of the Family Courts Act, 1984, as the present appeal is against an order passed in an interlocutory application.

10. To strengthen her arguments, the learned counsel for respondent has relied upon the cases in (1) **Roxann Sharma v. Arun Sharma**²; (2) **Prakash v. Padma Kumari**³ and (3) **Ruchi Manjoo v. Sanjeev Manjoo**⁴.

11. We have heard learned counsel for the parties in length and perused the material on record.

12. It is not in dispute that the respondent/wife filed divorce petition at Pennsylvania Court on 28th December 2016, stating that the minor children were presently residing with both parents at 2085, Bellflower Lane, Center Valley, Pennsylvania. The best interest of

² 2015 (8) SCC 38

³ 2013 SCC Online 10641

⁴ Civil Appeal No.4435/11 (SC)

minor children requires that plaintiff be awarded primary physical and share legal custody of two minor children. During the past 5 years, the said minor children resided with the appellant and respondent in USA. Moreover, the respondent filed Income-Tax returns in USA on 10.04.2017, thus, the children and the respondent were ordinary residents of USA.

13. However, on 12.04.2017, the respondent filed petition under Sections 7 and 10 of Guardians and Wards Act, 1890 at Hyderabad Court. In said petition, it is admitted that she went to USA in the year 2004 for higher studies and she completed her Masters in 2006 and secured employment with Cytori therapeutics, San Diego, California in January 2007 and her marriage was performed with the respondent on 14.03.2008 at Image Gardens, Madhapur, Hyderabad. At the time of her marriage, the respondent was doing her residency final year, and as such, respondent had to resign her job and move to Pittsburgh in order to join her husband as the appellant was yet to complete his residency. In order to support the family, the respondent took up employment in precision therapeutics, Pittsburgh, Pennsylvania and the respondent did his fellowship in cardiology and moved to Lehigh valley, Pennsylvania in 2011 in order to take up his new job. It is further admitted that due to irretrievable breakdown of marriage, the respondent has filed for divorce on the ground of indignities or irretrievable breakdown of marriage before the Court of Common Pleas of Lehigh County, Pennsylvania Civil Division against the

appellant and sought for custody of children and permanent alimony, counsel fee and costs. It is further admitted that the grandmother of the respondent expired, due to which, on 23rd March 2017, the respondent had to come to India along with the children. Thereafter, she filed the petition before the Court at Hyderabad mentioning therein that the children are presently residing within the jurisdiction of the Court and the Court at Hyderabad has jurisdiction. It is specifically stated that though the children were born in USA and are having a OCI (Overseas Citizen India) and since the parents of the children are also citizens of India, they are governed by the Indian law.

14. It is pertinent to note that the learned Court below, after considering the rival contentions of the parties, framed the issue for determination, as to whether G.W.O.P.No.433 of 2017 is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure. The trial Court opined that after the enactment of Guardians and Wards Act, 1890, the Indian Parliament has enacted the Family Courts Act, 1984. Section 7 of the Family Courts Act deals with the jurisdiction. According to the said Section, the Family Court shall have jurisdiction in respect of a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor, as laid down by explanation (g) to Section 7(1). The words “where the minor ordinarily resides” are absent in Section 7 of the Family Courts Act though they appear in Section 9 of the Guardians and Wards Act,

1890. Section 3 of the Guardians and Wards Act lays down that the provisions of said Act shall be read subject to the enactment subsequently passed. It means, Section 7 of the Family Courts Act prevails over Section 9 of the Guardians and Wards Act, 1890. Thus, it gives jurisdiction to the Family Court in respect of custody and guardianship of minor to meet the requirement of interest and welfare of minor.

15. The object of the Family Courts Act, 1984 is to provide for establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section 7 of the said Act is regarding the jurisdiction. Explanation (g) of the said Section is regarding a suit or proceeding in relation to guardianship of person or the custody of, or access to, any minor. This Section does not determine the jurisdiction of Guardians and Wards Act, 1890. However, the learned trial Court has wrongly applied the Section while rejecting the petition filed by the appellant. Section 4(5)(ii) of the Guardians and Wards Act reads as under :

“in any matter relating to the person of the ward the District Court having jurisdiction in the place where the ward for the time being ordinarily resides.”

16. Whereas, Section 9 of the said Act reads as under :

“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.

(2) *If the application is with respect to 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 a place where he has property.*

(3) *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 or conveniently by any other District Court having jurisdiction.”*

17. In the judgment of Karnataka High Court in **Mr.Abraham G.Karimpanal & others v. Nil**⁵, in Paras 13, 17, 18 & 19, it is held :

“13. *The words 'ordinarily resides' fell for interpretation of the Apex Court and High Courts in large number of cases under various statutes. In SMT. JEEWANTI PANDEY's case (supra), the Supreme Court, dealing with a situation where jurisdiction of a Court was based on 'the ground of residence' has observed in paragraph-12 as under:*

⁵ AIR 2004 KAR 32

"12. In order to give jurisdiction on the ground of 'residence', something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the court in which the respondent is sued, is his natural forum. The word 'reside' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is made applicable and the context in which it is found. It is capable of being understood in its ordinary sense of having one's own dwelling permanently, as well as in its extended sense. In its ordinary sense 'residence' is more or less of a permanent character. The expression 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to dwell permanently or for any length of time', and words like 'dwelling place' or 'abode' are held to be synonymous. Where there is such fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g., for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation is the place where he actually or personally resides."

17. The principles stated above and the case law noticed would not leave us in doubt that while determining the jurisdiction of a Court to entertain the application under Section 7 of the Act on the ground of residence,

what is material is actual residence of the minor at the commencement of the proceedings and not a legal or constructive residence of such minor unless where an artificial residence is created with bad faith. In the instant case, admittedly, the minor Aadya Teresa has been in the foster-care of the appellants 1 and 2 with effect from 11.08.2002 in a place which admittedly conies under the territorial jurisdiction of the Family Court at Bangalore. In an almost similar facts-situation, a learned Single Judge of this Court in the case of GOPALA KRISHNA BENGERI (Supra) held that the Bangalore Court has jurisdiction to entertain the application filed under Section 7 of the Act.

18. *Section 4(5) of the Act defines the word "Court". According to the definition, the word "Court" for the purpose of the Act is the District Court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian of a minor in respect of his person or property. The Family Court Act, 1984, under Section 7, lays down that a family Court shall have and exercise all jurisdiction exercisable by any District Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation which, inter cilia, includes, according to Clause (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Section 8 of the Family Court Act, specifically lays down that where a family Court has been established for any area, no District Court or any subordinate Civil Court referred to shall, in relation to such area, have or exercise any jurisdiction in respect of such suits or proceedings referred to in the Explanation which includes Clause (g). In the matter*

of Ashraya, this Court held that the proceedings for appointment of guardian of a child, even if the petitioner is a foreigner and the child concerned is an orphan or destitute, are proceedings of the nature falling under Section 7(1) Explanation Clause (g) of the Family Courts Act, 1984 and the family Court alone has the jurisdiction in the matter. Therefore, the Family Court though established under the Family Courts Act, 1984, has jurisdiction of the District Court conferred on that Court by the Act. In other words, the Family Court is the District Court for the purposes of the Act.

19. *By a careful reading of the order of the Family Court impugned in this appeal, it appears that the Family Court was also influenced in the decision-making by the fact that the Scrutiny Officer, Karnataka State Council for Child Welfare, has opined that it would have been appropriate for the Scrutinizing Agency in Tamilnadu to undertake the scrutiny of the facts stated by the appellants in their petition and to make recommendation. There is no warrant for the Court to doubt the impartiality or efficacy or integrity of the Scrutiny Officer in Karnataka State in getting the required information and particulars which may have bearing on the decision-making. Be that as it may, the subjective opinion of the Scrutiny Officer, Karnataka State Council for Child Welfare can never be a determinative factor in deciding the jurisdiction of the Family Court to entertain the petition of the appellants filed under Section 7 of the Act. The jurisdiction of the Family Court has to be decided in the premise of the definition of 'the Court' in Section 4(5) of the Act and the provisions of Section 9 of the Act. If a Family Court before which an application is made under Section 7 of the Act finds that the minor whose*

guardianship is sought in the application, ordinarily resides within its territorial jurisdiction, such Family Court is bound to entertain the application and decide that application on merit in accordance with law. The Court cannot refuse to exercise the jurisdiction under Section 7 of the Act on grounds of expediency or convenience or propriety. Jurisdiction of a Court is determined by law and not by considerations of expediency or convenience or choice of the parties who invoke the jurisdiction of such Court.”

18. In **Jasmeet Kaur v. Navtej Singh**⁶, a Division Bench of Delhi High Court held in paragraphs 19 to 23, 32, 33, 36 & 37 as under :

“19. To examine the maintainability of the guardianship application before the competent Court vested with jurisdiction, one must first refer to Section 9 of the G&W Act, which states as follows:-

"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.

(2) If the application is with respect to 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 a place where he has property.

(3) 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

⁶ 2017 SCC Online Del 10593

disposed of more justly or conveniently by any other District Court having jurisdiction." (emphasis added)

20. *Thus, the requirement of Section 9 is that for an application with respect to the guardianship being maintainable before the District Court, it is a prerequisite that the minor must ordinarily reside within the jurisdiction of the said Court.*

21. *The expression "ordinarily resident" used in Section 9 of the G&W Act has a connotation that signifies something more than a temporary residence. The said expression must be given its natural and literal meaning. On this aspect, we need not travel beyond the authoritative decision of the Supreme Court in the case of Ruchi Majoo (supra), where one of the questions that had fallen for determination was the legal validity of the judgment of the High Court impugned therein, dismissing a petition filed by the mother for the custody of the minor child on the ground that the courts at Delhi were not vested with the jurisdiction to entertain the same. In the said context, the Supreme Court had first examined the definition of the words, „ordinarily" and „resides" in Black"s Law Dictionary and Websters Dictionary and based on a conspectus of case law on the interpretation of the expression coined by joining two words, in the cases of Annie Basant vs. Narayaniah (reported as AIR 1914 PC 41), Jagir Kaur and Anr. vs. Jaswant Singh (reported as AIR 1963 SC 1521), Kuldip Nayar and Ors. vs. Union of India and Ors. (reported as 2006 (7) SCC 1), Bhagyalakshmi and Anr. vs. K.N. Narayana Rao (reported as AIR 1983 Mad 9), Aparna Banerjee vs. Tapan Banerjee (reported as AIR 1986 P&H 113), Ram Sarup vs. Chimman Lal and Ors. (reported as AIR 1952 All 79), Vimla Devi vs. Maya*

Devi and Ors. (reported as AIR 1981 Raj. 211) and In Re: Giovanni Marco Muzzu and Ors. (reported as AIR 1983 Bom. 242), had ultimately opined that the question whether one is ordinarily residing at a given place, is dependent on the intention of the parties to make that place ones" ordinary place of abode.

22. *It will be profitable to refer to the following observations made by the Supreme Court in the captioned case, on the aspect of determination of jurisdiction of the court, in cases filed under Section 9 of the G&W Act:-*

*"40. In cases arising out of proceedings under the Guardians and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There is thus a significant difference between the jurisdictional facts relevant to the exercise of powers by a writ court on the one hand and a court under the Guardian and Wards Act on the other. Having said that we **must** make it clear that no matter a court is exercising powers under the Guardian and Wards Act it can choose to hold a summary enquiry into the matter and pass appropriate orders provided it is otherwise competent to entertain a petition for custody of the minor under Section 9(1) of the Act. This is clear from the decision of this Court in *Dhanwanti Joshi v. Madhav Unde* (1998) 1 SCC 112, which arose out of proceedings under the Guardian and Wards Act. The following passage is in this regard apposite:*

*"30. We may here state that this Court in *Elizabeth Dinshaw v. Arvand M. Dinshaw* (1987) 1 SCC 42 while dealing with a child removed by the father from USA*

contrary to the custody orders of the US Court directed that the child be sent back to USA to the mother not only because of the principle of comity but also because, on facts - which were independently considered - it was in the interests of the child to be sent back to the native State. There the removal of the child by the father and the mother's application in India were within six months. In that context, this Court referred to H. (infants), In re (1966) 1 All ER 886 which case, as pointed out by us above has been explained in L (Minors) In re (1974) 1 All ER 913, as a case where the Court thought it fit to exercise its summary jurisdiction in the interests of the child. Be that as it may, the general principles laid down in McKee v. McKee (1951) 1 All ER 942 and J v. C (1969) 1 All ER 788 and the distinction between summary and elaborate inquiries as stated in L. (infants), In re (1974) 1 All ER 913 are today well settled in UK, Canada, Australia and the USA. The same principles apply in our country. Therefore nothing precludes the Indian courts from considering the question on merits, having regard to the delay from 1984 - even assuming that the earlier orders passed in India do not operate as constructive res judicata."

41. *It does not require much persuasion for us to hold that the issue whether the court should hold a summary or a detailed enquiry would arise only if the court finds that it has the jurisdiction to entertain the matter. If the answer to the question touching jurisdiction is in the negative the logical result has to be an order of dismissal of the proceedings or return of the application for presentation before the court competent to entertain the same. A court that has no jurisdiction to entertain a petition for custody cannot*

pass any order or issue any direction for the return of the child to the country from where he has been removed, no matter such removal is found to be in violation of an order issued by a court in that country. The party aggrieved of such removal, may seek any other remedy legally open to it. But no redress to such a party will be permissible before the Court who finds that it has no jurisdiction to entertain the proceedings."(emphasis added)

23. *It clearly emerges from the above discussion that once the answer to the question relating to jurisdiction is not in the affirmative, then, the inevident conclusion is that such a proceeding must terminate forthwith and the guardianship petition has to be returned for being presented before the competent court vested with the jurisdiction to entertain the same.*
32. *We may also advert to the Hague Convention of 25.10.1980, which deals with the "Civil Aspects of International Child Abduction" and the Convention of 19.10.1996, which deals with the "Jurisdiction, Applicable law of recognition, Enforcement and Co-operation in respect of parental responsibility and Measures for the protection of children in International situations". As on 02.08.2017, 98 countries are parties to the 1980 Convention and as on 4.9.2017, 46 countries are parties to the 1996 Convention. India is not yet a signatory to either of the Conventions. The said Conventions have declared that in cases of child removal/abduction by one parent, the courts of the country where the child has his/her habitual residence, are best placed to make long-term decisions relating to the child's future welfare. It would be apposite to refer to Article 3 of the 1980 Convention, which declares removal/retention of a*

child to be wrongful where "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention....."

33. *India may not be a signatory to the aforesaid Hague Conventions, but the underlying salutary principles enunciated therein were adopted by the Supreme Court in the case of Surinder Kaur v. Harbax Singh reported as (1984) 3 SCC 698, wherein it was observed as below:-*

"10.The modern theory of Conflict of Laws recognizes and in any event, prefers the jurisdiction of the State which has the most intimate contact with the issues arising in the case. Jurisdiction is not attracted by the operation or creation of fortuitous circumstances such as the circumstance as to where the child, whose custody is in issue, is brought or for the time being lodged.... Ordinarily, jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the wellbeing of the spouses and the welfare of the offspring of marriage. The spouses in this case had made England their home where this boy was born to them. The father cannot deprive the English Court of its jurisdiction to decide upon his

custody by removing him to India, not in the normal movement of the matrimonial home but, by an act which was gravely detrimental to the peace of that home. The fact that the matrimonial home of the spouses was in England, establishes sufficient contacts or ties with that State in order to make it reasonable and just for the Courts of that state to assume jurisdiction to enforce obligations which were incurred therein by the spouses. [See International Shoe Company v. State of Washington, 90 L. Ed. 95 (1945), which was not a matrimonial case but which is regarded as the fountainhead of the subsequent developments of jurisdictional issues like the one involved in the instant case.] It is our duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily in order to make their living in England, where they gave birth to this unfortunate boy." (emphasis added)

36. *At the cost of repetition, we may state that the parties in the case at hand are both highly educated professionals, who are well placed in life. They had elected to leave the Indian shores and travel to USA as adolescents, much before their marriage had taken place. They made a life in USA, acquired professional degrees there, met each other and formalized their matrimonial alliance in that country. They elected to set up a joint dental practice and their matrimonial abode in USA and rear their offspring in that environment. Thus, in every which way, the conduct of the appellant and the respondent amply demonstrates that they had abandoned their domicile of origin. Simply because a marital discord took place between*

the appellant and the respondent later on, which made her flee from USA and seek refuge with her parents in India, alongwith her children, cannot be a ground for her to claim permanent custody of the children within the legal system of this country. The expression, "ordinarily resides" clearly conveys a place of permanent abode of the minor children, which in this case, is USA and there is no manner of doubt that they are not ordinarily residing in Delhi, as contemplated in Section 9 of the G&W Act.

37. *In our opinion, the conclusion arrived at in the impugned judgment is amply backed by valid reasoning and is inconsonance with the law on the subject. The learned Family Court has correctly analysed and appreciated the facts of the case and we are in agreement with the view taken that the US law is applicable to the parties for the relief of custody of the children and the courts in India lack the jurisdiction to entertain the case. Accordingly, the impugned judgment is upheld and the present appeal is dismissed as meritless alongwith the pending applications, while leaving the parties to bear their own expenses."*

19. In **Paul Mohinder Gahun v. Selina Gahun**⁷, a learned Single Judge of Delhi High Court held in paras 21 and 32 as under :

- "21. *If applied to the facts of the present case one would find similarity. All the parties involved in the present case including the minor are citizens of Canada. The child had been initially for five years staying in Canada before she was stealthily removed to India on the pretext of only a visit. The Supreme Court thus held that the assumption of jurisdiction by another State would result in encouraging forum shopping. The*

⁷ 2006 (90) DRJ 77

matrimonial home in the present case is also in Canada up to 2003.

32. *The parties in the present case were equally well placed and both employed. It is the normal wear and tear of marriage which has taken a large toll in the present case. The respondent stealthily removed the child to India without disclosing her intention that her short trip would actually be a one way ticket. The child spent five formative years in Canada and the last 21/2 years in Delhi due to the petition filed by the respondent within about a month of her decision to stay back in Delhi. The child at the age of about 8 years is in a boarding school. In my considered view, the child cannot be said to be one who "ordinarily resides" in Delhi when the petition was filed nor are the interests of the child adversely affected if the Guardian Court determine the issue of custody where the child resided for five years before her removal to Delhi."*

20. In the Full Bench judgment of Bombay High Court in FCA.No.161 of 2013, dated 01.12.2016, it is held :

"Learned Senior Counsel further submitted that the Act of 1955 is a special law vis-à-vis the Act of 1984, which is a general law, which provides a forum for the adjudication of matrimonial disputes arising under all the diverse substantive laws. It was submitted that it is well settled principle of interpretation of law that general law does not abrogate earlier special law by mere implication. The Act of 1984 is essentially a procedural law."

"..... Learned Counsel submitted that with a view to secure speedy settlement of disputes relating to marriage and family affairs, separate Family Courts were established pursuant to the Act 66 of 1984. The Act of 1984 is a procedural law

prescribing procedure to be adopted in the Family Courts. Prior to the enactment of the Act of 1984, all the family matters were adjudicated under Order XXXIIA of Civil Procedure Code, 1908 before the concerned District Courts."

*"18. The Apex Court, in para 11, in the case of **R.S.Raghunath vs. State of Karnataka and anr [(1992) 1 SCC 335]**, by referring to earlier judgment in the case of Chandavarkar Sita Ratna Rao v. Ashalata S.Guram [(1986) 4 SCC 447], observed as under :-*

".....In Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, the scope of non-obstante clause is explained in the following words:

"A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment."

On a conspectus of the above authorities it emerges that the non-obstante clause is appended to a provision with a view to give the enacting part of the

provision an overriding effect in case of a conflict. But the non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In Such cases the non- obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules.

In the above case, in para 7, the Apex Court referred to the Maxwell on The Interpretation of Statutes (11th Edition, page 168). The principle of law was stated as under :

A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant, or, in other words, "where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt. with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so." In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act."

21. In view of the cases cited above, it is established that in order to give jurisdiction on the ground of 'residence', something more than a

temporary stay is required. It must be more or less of a permanent character. In its ordinary sense, 'residence' is more or less of a permanent character. The expression 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. In Webster's Dictionary, 'to reside' has been defined as meaning 'to dwell permanently or for any length of time', and words like 'dwelling place' or 'abode' are held to be synonymous. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same.

22. While determining the jurisdiction of a Court to entertain the application under Section 7 of the Act on the ground of residence, what is material is actual residence of the minor at the commencement of the proceedings and not a legal or constructive residence of such minor unless where an artificial residence is created with bad faith. In the case in hand, the appellant and respondent went to USA for higher studies and they married on 14th March 2008 at Hyderabad. It is admitted fact that prior to their marriage, they were residing in USA. It is also admitted fact that they were blessed with two children, namely, Arthin Kodali and Neysa Sakhamuri Kodali, born in USA on 14th March 2012 and 13th October 2014 respectively. Both of them are admitted in school at US much prior to the initiation of proceedings before Additional Family Court at Hyderabad. Both the children are US citizens and are holding US passports. The

matrimonial home in the present case was also in US until stealthy removal of children from US on 23rd March 2017 to Hyderabad. It is also admitted fact that the respondent had herself invoked the jurisdiction of US Court by filing a divorce-cum-custody petition and equal distribution of the marital property on 21st December 2016, wherein, it was clearly averred by the respondent that both the parties are residing in Pennsylvania, US and primary physical custody of both the children be awarded to the respondent/wife. Further more, the respondent admitted in her divorce petition that for the past 5 years, the minor children are residing with both the appellant and respondent in US and the best interest and permanent welfare of the said minor children would be served by awarding the primary custody to the respondent. Therefore, it was the respondent who invoked the jurisdiction of the US Court seeking primary physical custody of both the minor children.

23. Section 4(5) of the Act defines the word "Court". According to the definition, the word "Court" for the purpose of the Act is the District Court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian of a minor in respect of his person or property. The jurisdiction of the Family Court has to be decided in the premise of the definition of 'the Court' in Section 4(5) of the Act and the provisions of Section 9 of the Act. If a Family Court before which an application is made under Section 7 of the Act finds that the minor whose guardianship is

sought in the application, ordinarily resides within its territorial jurisdiction, such Family Court is bound to entertain the application and decide that application on merit in accordance with law. The Court cannot refuse to exercise the jurisdiction under Section 7 of the Act on grounds of expediency or convenience or propriety. Jurisdiction of a Court is determined by law and not by considerations of expediency or convenience or choice of the parties who invoke the jurisdiction of such Court.

24. The expression “ordinarily resident” used in Section 9 of the G&W Act has a connotation that signifies something more than a temporary residence. The said expression must be given its natural and literal meaning. The question whether one is ordinarily residing at a given place, is dependent on the intention of the parties to make that place ones’ ordinary place of abode.

25. In the case in hand, admittedly, before marriage, the appellant and respondent were staying in US and minor children were born on 14th March 2012 and 13th October 2014. Both of them were admitted in a school at US much prior to initiation of proceedings before Additional Family Court, Hyderabad. Both the minor children are US citizens and are holding US passports. They were shifted to India only on 23rd March 2017, and thereafter, the respondent filed petition before the Court at Hyderabad on 12th April 2017. Thus, practically, the children stayed in India only for around 20 days when the respondent filed the petition before the Court at Hyderabad. In

addition, the respondent came to India on 23.03.2017 with return ticket to U.S. on 24.04.2017. At that time, as admitted by the respondent, she had no plan to stay back in India.

26. It is pertinent to mention here that the respondent, in order to seek orders in her favour, intentionally misled the Family Court at Hyderabad by concealing the facts that minor children are citizens of U.S.A. by birth and are being educated at Datzyk Montessori School, 3300 Broadway, Allentown, Pennsylvania and the appellant and respondent together got enrolled both children in the aforementioned school, for the academic year 2017-18.

27. Keeping in view the above discussion, we have no hesitation to say that the children are not “ordinarily residents” of Hyderabad. Accordingly, we hereby set aside the order dated 15th September 2017 passed by the Additional Family Court, Hyderabad in I.A.No.591 of 2017 in G.W.O.P.No.433 of 2017. Consequently, the proceedings in G.W.O.P.No.433 of 2017 are hereby quashed.

28. Accordingly, F.C.A.No.372 of 2017 is allowed with no order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

SURESH KUMAR KAIT, J

8th February, 2018

ABHINAND KUMAR SHAVILI, J

N.B : L.R.Copy be marked.

(b/o)

ajr